

technical section described in paragraph (a)(9) of this section, a copy of the application form required under paragraph (a)(1) of this section, and a certification that the field copy is a true copy of the technical section described in paragraph (a)(9) of this section contained in the archival and review copies of the ANDA.

[57 FR 17983, Apr. 28, 1992; 57 FR 29353, July 1, 1992, as amended at 58 FR 47352, Sept. 8, 1993; 59 FR 50364, Oct. 3, 1994; 63 FR 5252, Feb. 2, 1998; 63 FR 66399, Dec. 1, 1998; 64 FR 401, Jan. 5, 1999; 65 FR 56479, Sept. 19, 2000; 67 FR 77672, Dec. 19, 2002; 68 FR 69019, Dec. 11, 2003; 69 FR 18766, Apr. 8, 2004; 74 FR 2861, Jan. 16, 2009; 76 FR 13880, Mar. 15, 2011; 81 FR 69649, Oct. 6, 2016]

§ 314.95 Notice of certification of invalidity, unenforceability, or non-infringement of a patent.

(a) *Notice of certification.* For each patent that claims the listed drug or that claims a use for such listed drug for which the applicant is seeking approval and for which the applicant submits a paragraph IV certification, the applicant must send notice of such certification by registered or certified mail, return receipt requested, or by a designated delivery service, as defined in paragraph (g) of this section to each of the following persons:

(1) Each owner of the patent that is the subject of the certification or the representative designated by the owner to receive the notice. The name and address of the patent owner or its representative may be obtained from the U.S. Patent and Trademark Office; and

(2) The holder of the approved NDA under section 505(b) of the Federal Food, Drug, and Cosmetic Act for the listed drug that is claimed by the patent and for which the applicant is seeking approval, or, if the NDA holder does not reside or maintain a place of business within the United States, the NDA holder's attorney, agent, or other authorized official. The name and address of the NDA holder or its attorney, agent, or authorized official may be obtained by sending a written or electronic communication to the Central Document Room, Attn: Orange Book Staff, Center for Drug Evaluation and Research, Food and Drug Administration, 5901-B Ammendale Rd., Beltsville, MD 20705-1266 or to the Orange

Book Staff at the email address listed on the Agency's Web site at <http://www.fda.gov>.

(3) This paragraph (a) does not apply to a method-of-use patent that does not claim a use for which the applicant is seeking approval.

(4) An applicant may send notice by an alternative method only if FDA has agreed in advance that the method will produce an acceptable form of documentation.

(b) *Sending the notice.* (1) Except as provided under paragraph (d) of this section, the applicant must send the notice required by paragraph (a) of this section on or after the date it receives a paragraph IV acknowledgment letter from FDA, but not later than 20 days after the date of the postmark on the paragraph IV acknowledgment letter. The 20-day clock described in this paragraph (b) begins on the day after the date of the postmark on the paragraph IV acknowledgment letter. When the 20th day falls on Saturday, Sunday, or a Federal holiday, the 20th day will be the next day that is not a Saturday, Sunday, or Federal holiday.

(2) Any notice required by paragraph (a) of this section is invalid if it is sent before the applicant's receipt of a paragraph IV acknowledgment letter, or before the first working day after the day the patent is published in the list. The applicant will not have complied with this paragraph (b) until it sends valid notice.

(3) The applicant must submit to FDA an amendment to its ANDA that includes a statement certifying that the notice has been provided to each person identified under paragraph (a) of this section and that the notice met the content requirements under paragraph (c) of this section. A copy of the notice itself need not be submitted to the Agency.

(c) *Contents of a notice.* In the notice, the applicant must cite section 505(j)(2)(B)(iv) of the Federal Food, Drug, and Cosmetic Act and the notice must include, but is not limited to, the following information:

(1) A statement that FDA has received an ANDA submitted by the applicant containing any required bioavailability or bioequivalence data or information.

(2) The ANDA number.

(3) A statement that the applicant has received the paragraph IV acknowledgment letter for the ANDA.

(4) The established name, if any, as defined in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act, of the proposed drug product.

(5) The active ingredient, strength, and dosage form of the proposed drug product.

(6) The patent number and expiration date of each listed patent for the reference listed drug alleged to be invalid, unenforceable, or not infringed.

(7) A detailed statement of the factual and legal basis of the applicant's opinion that the patent is not valid, unenforceable, or will not be infringed. The applicant must include in the detailed statement:

(i) For each claim of a patent alleged not to be infringed, a full and detailed explanation of why the claim is not infringed.

(ii) For each claim of a patent alleged to be invalid or unenforceable, a full and detailed explanation of the grounds supporting the allegation.

(8) If the applicant alleges that the patent will not be infringed and the applicant seeks to preserve the option to later file a civil action for declaratory judgment in accordance with section 505(j)(5)(C) of the Federal Food, Drug, and Cosmetic Act, then the notice must be accompanied by an offer of confidential access to the ANDA for the sole and limited purpose of evaluating possible infringement of the patent that is the subject of the paragraph IV certification.

(9) If the applicant does not reside or have a place of business in the United States, the name and address of an agent in the United States authorized to accept service of process for the applicant.

(d) *Amendment or supplement to an ANDA.* (1) If, after receipt of a paragraph IV acknowledgment letter or acknowledgment letter, an applicant submits an amendment or supplement to its ANDA that includes a paragraph IV certification, the applicant must send the notice required by paragraph (a) of this section at the same time that the amendment or supplement to the ANDA is submitted to FDA, regardless

of whether the applicant has already given notice with respect to another such certification contained in the ANDA or in an amendment or supplement to the ANDA.

(2) If, before receipt of a paragraph IV acknowledgment letter, an applicant submits an amendment to its ANDA that includes a paragraph IV certification, the applicant must send the notice required by paragraph (a) of this section in accordance with the procedures in paragraph (b) of this section. If an ANDA applicant's notice of its paragraph IV certification is timely provided in accordance with paragraph (b) of this section and the applicant has not submitted a previous paragraph IV certification, FDA will base its determination of whether the applicant is a first applicant on the date of submission of the amendment containing the paragraph IV certification.

(3) An applicant that submits an amendment or supplement to seek approval of a different strength must provide notice of any paragraph IV certification in accordance with paragraph (d)(1) or (2) of this section, as applicable.

(e) *Documentation of timely sending and receipt of notice.* The applicant must amend its ANDA to provide documentation of the date of receipt of the notice required under paragraph (a) of this section by each person provided the notice. The amendment must be submitted to FDA within 30 days after the last date on which notice was received by a person described in paragraph (a) of this section. The applicant's amendment also must include documentation that its notice was sent on a date that complies with the timeframe required by paragraph (b) or (d) of this section, as applicable, and a dated printout of the entry for the reference listed drug in FDA's "Approved Drug Products With Therapeutic Equivalence Evaluations" (the list) that includes the patent that is the subject of the paragraph IV certification. FDA will accept, as adequate documentation of the date the notice was sent, a copy of the registered mail receipt, certified mail receipt, or receipt from a designated delivery service as defined in paragraph (g) of this section. FDA will accept as adequate

documentation of the date of receipt a return receipt, signature proof of delivery by a designated delivery service, or a letter acknowledging receipt by the person provided the notice. An applicant may rely on another form of documentation only if FDA has agreed to such documentation in advance. A copy of the notice itself need not be submitted to the Agency.

(f) *Forty-five day period after receipt of notice.* If the requirements of this section are met, FDA will presume the notice to be complete and sufficient, and it will count the day following the date of receipt of the notice by the patent owner or its representative and by the approved NDA holder or its attorney, agent, or other authorized official as the first day of the 45-day period provided for in section 505(j)(5)(B)(iii) of the Federal Food, Drug, and Cosmetic Act. FDA may, if the applicant provides a written statement to FDA that a later date should be used, count from such later date.

(g) *Designated delivery services.* (1) For purposes of this section, the term “designated delivery service” means any delivery service provided by a trade or business that the Agency determines:

(i) Is available to the general public throughout the United States;

(ii) Records electronically to its database, kept in the regular course of its business, or marks on the cover in which any item referred to in this section is to be delivered, the date on which such item was given to such trade or business for delivery; and

(iii) Provides overnight or 2-day delivery service throughout the United States.

(2) FDA may periodically issue guidance regarding designated delivery services.

[81 FR 69651, Oct. 6, 2016, as amended at 84 FR 6673, Feb. 28, 2019]

§ 314.96 Amendments to an unapproved ANDA.

(a) *ANDA.* (1) An applicant may amend an ANDA that is submitted under § 314.94, but not yet approved, to revise existing information or provide additional information. Amendments containing bioequivalence studies must contain reports of all bioequivalence

studies conducted by the applicant on the same drug product formulation, unless the information has previously been submitted to FDA in the ANDA. A complete study report must be submitted for any bioequivalence study upon which the applicant relies for approval. For all other bioequivalence studies conducted on the same drug product formulation as defined in § 314.3 of this chapter, the applicant must submit either a complete or summary report. If a summary report of a bioequivalence study is submitted and FDA determines that there may be bioequivalence issues or concerns with the product, FDA may require that the applicant submit a complete report of the bioequivalence study to FDA.

(2) Submission of an amendment containing significant data or information before the end of the initial review cycle constitutes an agreement between FDA and the applicant to extend the initial review cycle only for the time necessary to review the significant data or information and for no more than 180 days.

(b) *Field copy.* The applicant must submit a field copy of each amendment under § 314.94(a)(9). The applicant, other than a foreign applicant, must include in its submission of each such amendment to FDA a statement certifying that a field copy of the amendment has been sent to the applicant's home FDA district office.

(c) *Different listed drug.* An applicant may not amend an ANDA to seek approval of a drug referring to a listed drug that is different from the reference listed drug identified in the ANDA. This paragraph (c) applies if, at any time before the approval of the ANDA, a different listed drug is approved that is the pharmaceutical equivalent to the product in the ANDA and is designated as a reference listed drug. This paragraph (c) also applies if changes are proposed in an amendment to the ANDA such that the proposed product is a pharmaceutical equivalent to a different listed drug than the reference listed drug identified in the ANDA. A change of the reference listed drug must be submitted in a new ANDA. However, notwithstanding the limitation described in this paragraph (c), an applicant may amend the ANDA