

## Food and Drug Administration, HHS

## § 808.25

(4) Identification of which (or both) of the following bases is relied upon for seeking an exemption from preemption:

(i) The requirement is more stringent than a requirement applicable to a device under the Federal Food, Drug, and Cosmetic Act. If the State or political subdivision relies upon this basis for exemption from preemption, the application shall include information, data, or material showing how and why the requirement of the State or political subdivision is more stringent than requirements under the Federal Food, Drug, and Cosmetic Act.

(ii) The requirement is required by compelling local conditions, and compliance with the requirement would not cause the device to be in violation of any applicable requirement under the Federal Food, Drug, and Cosmetic Act. If the State or political subdivision relies upon this basis for exemption from preemption, the application shall include information, data, or material showing why compliance with the requirement of the State or political subdivision would not cause a device to be in violation of any applicable requirement under the Federal Food, Drug, and Cosmetic Act and why the requirement is required by compelling local conditions. The application shall also explain in detail the compelling local conditions that justify the requirement.

(5) The title of the chief administrative or legal officers of that State or local agency that has primary responsibility for administration of the requirement.

(6) When requested by the Food and Drug Administration, any records concerning administration of any requirement which is the subject of an exemption or an application for an exemption from preemption.

(7) Information on how the public health may be benefitted and how interstate commerce may be affected, if an exemption is granted.

(8) Any other pertinent information respecting the requirement voluntarily submitted by the applicant.

(d) If litigation regarding applicability of the requirement is pending, the State or political subdivision may so indicate in its application and re-

quest expedited action on such application.

[43 FR 18665, May 2, 1978; 43 FR 22010, May 23, 1978, as amended at 49 FR 3646, Jan. 30, 1984; 59 FR 14365, Mar. 28, 1994; 87 FR 50761, Aug. 17, 2022]

### § 808.25 Procedures for processing an application.

(a) Upon receipt of an application for an exemption from preemption submitted in accordance with § 808.20, the Commissioner shall notify the State or political subdivision of the date of such receipt.

(b) If the Commissioner finds that an application does not meet the requirements of § 808.20, he shall notify the State or political subdivision of the deficiencies in the application and of the opportunity to correct such deficiencies. A deficient application may be corrected at any time.

(c) After receipt of an application meeting the requirements of § 808.20, the Commissioner shall review such application and determine whether to grant or deny an exemption from preemption for each requirement which is the subject of the application. The Commissioner shall then issue in the FEDERAL REGISTER a proposed regulation either to grant or to deny an exemption from preemption. The Commissioner shall also issue in the FEDERAL REGISTER a notice of opportunity to request an oral hearing before the Commissioner or the Commissioner's designee.

(d) A request for an oral hearing may be made by the State or political subdivision or any other interested person. Such request shall be submitted to the Division of Dockets Management within the period of time prescribed in the notice and shall include an explanation of why an oral hearing, rather than submission of written comments only, is essential to the presentation of views on the application for exemption from preemption and the proposed regulation.

(e) If a timely request for an oral hearing is made, the Commissioner shall review such a request and may grant a legislative-type informal oral hearing pursuant to part 15 of this chapter by publishing in the FEDERAL

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REGISTER a notice of the hearing in accordance with §15.20 of this chapter. The scope of the oral hearing shall be limited to matters relevant to the application for exemption from preemption and the proposed regulation. Oral or written presentations at the oral hearing which are not relevant to the application shall be excluded from the administrative record of the hearing.

(f) If a request for hearing is not timely made or a notice of appearance is not filed pursuant to §15.21 of this chapter, the Commissioner shall consider all written comments submitted and publish a final rule in accordance with paragraph (g) of this section.

(g)(1) The Commissioner shall review all written comments submitted on the proposed rule and the administrative record of the oral hearing, if an oral hearing has been granted, and shall publish in the FEDERAL REGISTER a final rule in subpart C of this part identifying any requirement in the application for which exemption from preemption is granted, or conditionally granted, and any requirement in the application for which exemption from preemption is not granted.

(2) The Commissioner may issue a regulation granting or conditionally granting an application for an exemption from preemption for any requirement if the Commissioner makes either of the following findings:

(i) The requirement is more stringent than a requirement applicable to the device under the Federal Food, Drug, and Cosmetic Act;

(ii) The requirement is required by compelling local conditions, and compliance with the requirement would not cause the device to be in violation of any requirement applicable to the device under the Federal Food, Drug, and Cosmetic Act.

(3) The Commissioner may not grant an application for an exemption from preemption for any requirement with respect to a device if the Commissioner determines that the granting of an exemption would not be in the best interest of public health, taking into account the potential burden on interstate commerce.

(h) An advisory opinion pursuant to §808.5 or a regulation pursuant to para-

graph (g) of this section constitutes final agency action.

[43 FR 18665, May 2, 1978, as amended at 87 FR 50761, Aug. 17, 2022]

### § 808.35 Revocation of an exemption.

(a) An exemption from preemption pursuant to a regulation under this part shall remain effective until the Commissioner revokes such exemption.

(b) The Commissioner may by regulation, in accordance with §808.25, revoke an exemption from preemption for any of the following reasons:

(1) An exemption may be revoked upon the effective date of a newly established requirement under the Federal Food, Drug, and Cosmetic Act which, in the Commissioner's view, addresses the objectives of an exempt requirement and which is described, when issued, as preempting a previously exempt State or local requirement.

(2) An exemption may be revoked upon a finding that there has occurred a change in the bases listed in §808.20(c)(4) upon which the exemption was granted.

(3) An exemption may be revoked if it is determined that a condition placed on the exemption by the regulation under which the exemption was granted has not been met or is no longer being met.

(4) An exemption may be revoked if a State or local jurisdiction fails to submit records as provided in §808.20(c)(6).

(5) An exemption may be revoked if a State or local jurisdiction to whom the exemption was originally granted requests revocation.

(6) An exemption may be revoked if it is determined that it is no longer in the best interests of the public health to continue the exemption.

(c) An exemption that has been revoked may be reinstated, upon request from the State or political subdivision, if the Commissioner, in accordance with the procedures in §808.25, determines that the grounds for revocation are no longer applicable except that the Commissioner may permit abbreviated submissions of the documents and materials normally required for an