

(ii) The institution may engage a certified appraiser to complete the appraisal.

\* \* \* \* \*

- 12. Section 323.4 is amended by
- a. Republishing the introductory text;
- b. Redesignating paragraphs (c), (d), and (e) as (d), (e), and (f), respectively; and
- c. Adding a paragraph (c).

The addition reads as set forth below.

#### § 323.4 Minimum appraisal standards.

For federally related transactions, all appraisals shall, at a minimum:

\* \* \*

(c) Be subject to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice;

\* \* \* \* \*

Dated: November 15, 2018

**Joseph M. Otting**

*Comptroller of the Currency*

By order of the Board of Governors of the Federal Reserve System.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

Dated at Washington, DC, on November 20, 2018.

By order of the Board of Directors.  
Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2018-26507 Filed 12-6-18; 8:45 am]

**BILLING CODE 4810-33-6210-01;6714-14-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 860

[Docket No. FDA-2018-N-0236]

RIN 0910-AH53

#### Medical Device De Novo Classification Process

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

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) proposes to establish requirements for the medical device De Novo classification process under the Federal Food, Drug, and Cosmetic Act (FD&C Act). The proposed requirements establish procedures and criteria related to requests for De Novo classification (“De Novo request”). These requirements are intended to ensure the most appropriate classification of devices consistent with

the protection of the public health and the statutory scheme for device regulation, as well as to limit the unnecessary expenditure of FDA and industry resources that may occur if devices for which general controls or general and special controls provide a reasonable assurance of safety and effectiveness are subject to premarket approval. The proposed rule, if finalized, would implement the De Novo classification process under the FD&C Act, as enacted by the Food and Drug Administration Modernization Act of 1997 and modified by the Food and Drug Administration Safety and Innovation Act and the 21st Century Cures Act.

**DATES:** Submit either electronic or written comments on the proposed rule by March 7, 2019. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 by January 7, 2019.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before March 7, 2019. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 7, 2019. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

#### Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a

written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2018-N-0236 for Medical Device De Novo Classification Process. Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit comments on information collection issues to the Office of Management and Budget (OMB) in the following ways:

- Fax to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or email to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). All comments should be identified with the title, “Medical Device De Novo Classification Process.”

**FOR FURTHER INFORMATION CONTACT:**

Sergio de del Castillo, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1538, Silver Spring, MD 20993, 301–796–6419.

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**I. Executive Summary**

*A. Purpose of the Proposed Rule*

This proposed rule implements the medical device De Novo classification process under the FD&C Act (section 513(f)(2) (21 U.S.C. 360c(f)(2)), which provides a pathway for certain new types of devices to obtain marketing authorization as class I or class II devices, rather than remaining automatically designated as a class III device which would require premarket approval under the postamendments device classification section of the FD&C Act (section 513(f)(1) (21 U.S.C. 360c(f)(1)).

The De Novo classification process is intended to provide an efficient pathway to ensure the most appropriate classification of a device consistent with the protection of the public health and the statutory scheme for device regulation.

When FDA classifies a device type as class I or II via the De Novo classification process, other manufacturers do not necessarily have to submit a De Novo request or premarket approval application (PMA) in order to legally market a device of the same type. Instead, manufacturers can use the less burdensome pathway of premarket notification (section 510(k) of the FD&C Act (21 U.S.C. 360(k)), when applicable, to legally market their device, because the device that was the subject of the original De Novo request can serve as a predicate device for a substantial equivalence determination.

*B. Summary of the Major Provisions of the Proposed Rule*

If this rule is finalized as proposed, it will establish procedures and criteria for the submission and withdrawal of a De Novo request. It would also establish procedures and criteria for FDA to accept, review, grant and/or decline a De Novo request. The proposed rule provides that:

- A person may submit a De Novo request after submitting a 510(k) and receiving a not substantially equivalent (NSE) determination.
- A person may also submit a De Novo request without first submitting a 510(k), if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence (SE).
- FDA will classify devices according to the classification criteria in the FD&C Act. FDA classifies devices into class I (general controls) if there is information showing that the general controls of the FD&C Act are sufficient to reasonably assure safety and effectiveness; into class II (special controls), if general

controls, by themselves, are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide such assurance; and into class III (premarket approval), if there is insufficient information to support classifying a device into class I or class II and the device is a life-sustaining or life-supporting device or is for a use which is of substantial importance in preventing impairment of human health or presents a potential unreasonable risk of illness or injury.

- Devices will be classified by FDA by written order.

- A De Novo request includes administrative information, regulatory history, device description, classification summary information, benefits and risks of device use, and performance data to demonstrate reasonable assurance of safety and effectiveness.

- FDA may refuse to accept a De Novo request that is ineligible or is incomplete on its face.

- After a De Novo request is accepted, FDA will begin a substantive review of the De Novo request that may result in either FDA requesting additional information, issuing an order granting the request, or declining the De Novo request.

- FDA may decline a De Novo request if, among other things, the device is ineligible or insufficient information is provided to support De Novo classification.

The proposed rule also describes our practices for the conditions under which the confidentiality of a De Novo request is maintained.

*C. Legal Authority*

FDA is issuing this rule under the De Novo classification section of the FD&C Act, the device classification section of the FD&C Act, and the general rulemaking section of the FD&C Act. (See section 513(f)(2), section 513(a)(1), and section 701(a) of the FD&C Act (21 U.S.C. 371(a).)

*D. Costs and Benefits*

The proposed rule would clarify and make more efficient the De Novo classification process for certain medical devices to obtain marketing authorization as class I or class II devices, rather than remaining automatically designated as class III devices under the FD&C Act. A more transparent De Novo classification process would improve the efficiency of obtaining marketing authorization for certain novel medical devices. Over 10 years, the annualized cost estimates

range from \$0.0 million to \$0.08 million with a 7 percent discount rate, and

range from \$0.0 million to \$0.03 million with a 3 percent discount rate.

**II. Table of Abbreviations/Commonly Used Acronyms in This Document**

TABLE 1—ABBREVIATIONS AND ACRONYMS

Abbreviation or acronym	What it means
510(k)	Premarket Notification.
CFR	Code of Federal Regulations.
EUA	Emergency Use Authorization.
FDA	Food and Drug Administration.
FD&C Act	Federal Food, Drug, and Cosmetic Act.
FR	<b>Federal Register.</b>
GLP	Good Laboratory Practice.
HDE	Humanitarian Device Exemption.
IDE	Investigational Device Exemption.
MDR	Medical Device Reporting.
NSE	Not Substantially Equivalent.
OMB	Office of Management and Budget.
PMA	Premarket Approval Application.
PRA	Paperwork Reduction Act of 1995.
Pub. L.	Public Law.
Ref.	Reference.
RFD	Requests for Designation under § 3.7.
SE	Substantially Equivalent.
U.S.C.	United States Code.

**III. Background**

The De Novo classification process provides a pathway to ensure the most appropriate classification of a device consistent with the protection of the public health and the statutory scheme for device regulation. This pathway is intended to limit unnecessary expenditure of FDA and industry resources that may occur if devices for which general controls or general and special controls provide a reasonable assurance of safety and effectiveness are subject to a PMA due to a lack of a predicate.

When FDA classifies a device type as class I or II via the De Novo classification pathway, other manufacturers do not have to submit a De Novo request or PMA in order to market the same device type, unless the device has a new intended use or technological characteristics that raise different questions of safety or effectiveness. Instead, manufacturers can use the less burdensome 510(k) pathway, when applicable, to market their device, because the device that was the subject of the original De Novo classification can serve as a predicate device.

On October 30, 2017, FDA issued a final guidance (Ref. 1) to provide recommendations on the process for the submission and review of a De Novo request. The guidance provides recommendations for interactions with FDA related to the De Novo classification process, including what information to submit when seeking a path to market via the De Novo classification process. Nevertheless,

some De Novo requests lack crucial data or other information rendering the requests incomplete and requiring additional reviews.

To enhance regulatory clarity and predictability, FDA is also conducting this rulemaking. We believe it will, when finalized, provide a regulatory framework that sets clear standards, expectations and processes for De Novo classification. The statutory language on the content of De Novo requests is vague regarding what specific information is expected from the requester. With codified minimum content requirements, industry will be better able to anticipate what is necessary for successful De Novo classification, and FDA staff will have clear standards for the content and process for De Novo classification. This may also reduce the number of questions raised by FDA during the review of the De Novo request and may reduce the total review time needed to render a final decision. It is important to have enforceable content requirements for De Novo requests as well as additional clarity regarding FDA’s review and ultimate decision on a De Novo request. A regulation will allow FDA to communicate minimum content requirements, which will thereby give FDA the ability to triage inadequate De Novo requests by refusing to accept such De Novo requests.

**IV. Statutory Framework and Authority**

The FD&C Act establishes a comprehensive system for the regulation of medical devices intended for human use. The FD&C Act establishes three

categories (classes) of medical devices based on the extent of the regulatory controls necessary and sufficient to provide reasonable assurance of safety and effectiveness of the device. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

FDA refers to devices that were not in commercial distribution before May 28, 1976, the enactment date of the Medical Device Amendments of 1976, as “postamendments” devices. Postamendments devices are classified into class III “automatically” or “statutorily.” (Section 513(f)(1) of the FD&C Act.) These devices are automatically designated as class III devices and require premarket approval, unless: (1) FDA issues an order classifying the device into class I or II; (2) FDA reclassifies the device into class I or II; or (3) FDA issues an order finding the device to be SE to a predicate device that does not require premarket approval. Under this third option, FDA determines whether a postamendments device is SE to a previously cleared device (predicate device) by means of its 510(k) procedures (section 510(k) of the FD&C Act; 21 CFR part 807). Legally marketed devices that may serve as a predicate device include: A device that has been cleared through the 510(k) process, including a device that is not currently being marketed; a device that was legally marketed prior to May 28, 1976 (“preamendments device”) for which a PMA is not required; a device that has been reclassified from class III into class II or I; or a device that by

regulation is exempted from premarket notification (“510(k)-exempt device”). A device removed from the market at the initiative of the Commissioner of Foods and Drugs or that has been determined by judicial order to be misbranded or adulterated cannot serve as a predicate device (section 513(i)(2) of the FD&C Act and § 807.100(b)(3)).

In 1997, Congress enacted a new De Novo classification pathway. (Section 207 of the Food and Drug Administration Modernization Act of 1997 (Pub. L. 105–115)). Congress included this new pathway to limit unnecessary expenditure of FDA and industry resources that may occur if devices for which general controls or general and special controls would provide a reasonable assurance of safety and effectiveness were, nevertheless, subject to premarket approval by operation of law because a predicate device could not be identified. In 2012, Congress streamlined the De Novo classification process by providing that FDA may classify certain medical devices under the De Novo classification process without first issuing a determination that such devices are NSE to legally marketed devices (Section 607 of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144)). In 2016, the process was further modified so that a De Novo request need not be submitted within 30 days of receiving an NSE determination (Section 3101 of the 21st Century Cures Act (Pub. L. 114–255)).

A De Novo request may recommend to FDA whether the device should be class I or class II. The De Novo request should describe why general controls or general and special controls are adequate to provide reasonable assurance of safety and effectiveness of the device. For any class II recommendation, the De Novo request must also provide an initial draft of proposed special controls along with a description of how the special controls provide reasonable assurance of safety and effectiveness. In response to a De Novo request, FDA will classify the device by written order within 120 days. This classification is the initial classification of the device. After the issuance of an order classifying the device, FDA will publish a notice in the **Federal Register** announcing this classification.<sup>1</sup>

<sup>1</sup> The FD&C Act provides that a class I device is generally exempt from 510(k) requirements (section 510(l) of the FD&C Act (21 U.S.C. 360(l))). FDA also may exempt a class II device from 510(k) requirements if FDA determines that 510(k) is not necessary to provide reasonable assurance of the safety and effectiveness of the device (section

FDA may decline a De Novo request when the device does not meet the statutory criteria for classification into class I or II. For De Novo requests that are not preceded by a 510(k) and an NSE determination, FDA may also decline to undertake the De Novo request if FDA identifies a legally marketed device that could provide a reasonable basis for review of substantial equivalence with the device, or when FDA determines that the device submitted is not of low to moderate risk or that general controls would be inadequate to control the risks and special controls to mitigate the risks cannot be established. A device that remains in class III shall be deemed adulterated and may not be distributed until approved in a PMA or exempted from such approval by an investigational device exemption (IDE).

In addition, the general administrative provisions of the FD&C Act provide authority to issue regulations for the efficient enforcement of the FD&C Act (section 701(a) of the FD&C Act).

#### V. Proposed Rule

FDA is proposing to amend its regulations to establish a new subpart to the medical device classification procedures regulations. The proposed rule, if finalized, would establish requirements for the medical device De Novo classification process.

##### A. Scope (Adding Proposed Subpart D to Part 860 and Modifying § 860.1)

FDA proposes to add a new subpart to the medical device classification procedures regulations, subpart D (21 CFR part 860, subpart D). The new proposed subpart will describe the form and manner for submission of a De Novo request. It would also describe FDA’s process for a review of a De Novo request, and the form and manner in which FDA would grant or decline a De Novo request. Lastly, it would also describe the form and manner for withdrawal of a De Novo request.

The proposed rule would clarify and explain the regulatory framework and process for submitting a De Novo classification request. A De Novo request can be submitted after the submission of a premarket notification (510(k)) and a subsequent order declaring the device NSE to legally marketed devices. Under the proposed rule, a De Novo request may also be

510(m) of the FD&C Act (21 U.S.C. 360(m))). The process to exempt a class II device from 510(k) requirements is separate from FDA’s consideration and granting of a De Novo request. For more information about procedures for class II device exemptions from premarket notification, see FDA’s guidance “Procedures for Class II Device Exemptions from Premarket Notification, Guidance for Industry and CDRH Staff” (Ref. 2).

submitted without first submitting a 510(k) for that device, if the submitter determines that there is no legally marketed device upon which to base a determination of substantial equivalence.

In response to a De Novo request, FDA would classify the device by written order. This classification would be the initial classification of the device (section 513(f)(1) of the FD&C Act). FDA would publish a notice in the **Federal Register** announcing the new classification and codifying it in the CFR.

FDA proposes to amend its regulations to prescribe the content and format of a De Novo request. FDA also proposes to amend its regulations to include processes and criteria for FDA to accept, review, grant, and decline a De Novo request.

The proposed regulation would define the scope of the medical device classification procedures (§ 860.1 (21 CFR 860.1)). It includes the criteria and procedures used by classification panels and the FDA Commissioner in the classification and reclassification of devices (sections 513, 514(b), (21 U.S.C. 360d(b)), 515(b) (21 U.S.C. 360e(b)) and 520(l) (21 U.S.C. 360j(l)) of the FD&C Act). FDA proposes to update the scope to add “advisory committees,” to authorize such committees to provide panel recommendations as to the classification or reclassification of medical devices. (§ 860.1(b).)

##### B. Definitions (Proposed § 860.3)

FDA proposes to add five new definitions to the definitions section of the medical device classification procedures regulations (§ 860.3). FDA also proposes to amend the definitions section to remove the paragraph designations and to list the definitions alphabetically. This proposed amendment would make adding any new definitions to this part easier in the future. Except for removing the paragraph designations, and deleting the definition for “the act” because we are replacing “the act” with “Federal Food, Drug, and Cosmetic Act” throughout part 860, FDA is not proposing in this rulemaking to change any of the definitions currently listed in the definitions section.

FDA proposes to add the term, *classification regulation*, to the definitions section. FDA proposes to define classification regulation to mean a regulation that identifies the generic type of device and its class. The proposed definition explains that FDA’s medical device classification regulations are in parts 862 through 892 of FDA’s regulations (21 CFR parts 862–892).

FDA proposes to add the term, *De Novo request*, to the definitions section. FDA proposes to define *De Novo request* to mean the information that is submitted as part of a request to FDA to issue an order to classify a device under the *De Novo* classification section of the FD&C Act (section 513(f)(2) of the FD&C Act). The proposed definition explains that information submitted as part of a *De Novo* request includes information incorporated into that request by reference.

For convenience, we propose to add a definition of *FDA*. FDA proposes to define *FDA* as the Food and Drug Administration. This addition is intended to remove the need to further define this term in the proposed *De Novo* regulation, as well as in the other subparts of medical device classification procedures regulations (part 860).

FDA proposes to add a definition of *general controls*. This proposed definition harmonizes with the definition in the FD&C Act and the definition of Class I currently listed in the definitions section of the medical device classification procedures regulations (section 513(a)(1)(A) of the FD&C Act and § 860.3). While the meaning of *general controls* has been provided in guidance, adding the definition to this regulation will provide another opportunity to explain which controls are included as general controls.

FDA proposes to add a definition of *special controls*. This proposed definition harmonizes with the definition in section of the FD&C Act and the definition of Class II currently listed in the definitions section of the medical device classification procedures regulations, and is intended to clarify the regulatory significance of special controls as the controls necessary to provide reasonable assurance of safety and effectiveness for a type of device classified as class II (section 513(a)(1)(B) of the FD&C Act and § 860.3). Special controls may include such things as performance standards, performance testing (e.g., biocompatibility testing, sterilization validation, clinical investigations), postmarket surveillance, patient registries, and development and dissemination of guidelines (including guidelines for the submission of clinical data in premarket notification submissions in accordance with premarket notification of the FD&C Act). While explanations of special controls have been provided in guidance, adding the definition to this regulation will provide another opportunity to clarify which controls are special controls.

### *C. Confidentiality of Information and Data Related to a De Novo Request (Proposed § 860.5)*

The proposed additions to confidentiality of information and data section of the medical device classification procedures regulations address the public disclosure of data and information submitted as part of a *De Novo* request (§ 860.5). FDA is proposing that the public disclosure of data and information in a *De Novo* request be governed by the confidentiality sections of the regulations (§ 860.5 and part 20 (21 CFR part 20)).

The proposed *De Novo* request confidentiality section discusses which *De Novo* request information is covered (§ 860.5(g)(1)). FDA proposes that information covered includes all information submitted or incorporated by reference in the *De Novo* request, any *De Novo* supplement, or any other submission relevant to the administrative file (as defined in 21 CFR 10.3(a)).

The proposed *De Novo* request confidentiality section discusses when FDA may disclose the existence of a *De Novo* request (§ 860.5(g)(2)). FDA is proposing that the existence of a *De Novo* request may not be disclosed before it issues an order granting the *De Novo* request. FDA is further proposing that when a *De Novo* requester itself has disclosed the existence of the *De Novo* request publicly, then FDA may also publicly disclose the existence of a *De Novo* request before issuing an order granting the *De Novo* request.

The proposed *De Novo* request confidentiality section discusses when FDA may publicly disclose data or information contained in a *De Novo* request before FDA issues an order granting the *De Novo* request (§ 860.5(g)(3)). The data or information contained in the *De Novo* request will not be disclosed unless the *De Novo* requestor has publicly disclosed or acknowledged the information.

The proposed *De Novo* request confidentiality section proposes that FDA may immediately disclose any safety and effectiveness information and any other information not exempt from release under the trade secret and confidential commercial information section of the regulations after FDA issues the order granting the *De Novo* request (§ 860.5(g)(4) and § 20.61).

### *D. De Novo Classification—General (Proposed § 860.201)*

The proposed section provides the purpose of the new subpart and the devices to which the subpart is

applicable (§ 860.201). In this proposed rule, FDA would add a new subpart to the medical device classification procedures regulations (part 860, subpart D). The new proposed subpart contains the procedures and criteria for the *De Novo* classification process (section 513(f)(2) of the FD&C Act).

The proposed purpose section states that the purpose of the new subpart is to establish an efficient and thorough process to facilitate the classification into class I or II for devices for which there are no legally marketed devices on which to base a review of substantial equivalence and which meet the requirements for class I or class II as described in (§ 860.201(a), and section 513(a)(1) of the FD&C Act and § 860.3).

The proposed purpose section would identify the devices for which a *De Novo* request may be submitted (§ 860.201(b)). Under the proposed purpose section, a *De Novo* request may be submitted after receiving a NSE determination in response to a 510(k) (§ 860.201(b)(1)). We note that devices that have been found to be NSE for lack of a predicate, new intended use, or different technological characteristics that raise different questions of safety and effectiveness will generally be eligible for the *De Novo* classification process. We further note that a *De Novo* request for more than one device type would not be eligible for the *De Novo* classification process as part of the same request.

Under the proposed purpose section, a *De Novo* request may also be submitted if a person, without first submitting a 510(k) and receiving an NSE determination, determines that there is no legally marketed device upon which to base a SE determination (§ 860.201(b)(2)).

The *De Novo* classification process is a pathway to market for devices for which there are no legally marketed devices on which to base a review of SE and which meet the requirements for class I or class II (as described in section 513(a)(1) of the FD&C Act and 21 CFR 860.3). Under the *De Novo* classification section of the FD&C Act, if FDA identifies a legally marketed device that could provide a reasonable basis for review of SE, FDA may decline to undertake a *De Novo* request (section 513(f)(2)(A)(iv) of the FD&C Act). A device that could provide a reasonable basis for review of SE with another device is known as a predicate device. Thus, devices that have been found to be NSE solely due to inadequate performance data to demonstrate SE will generally be ineligible for the *De Novo* classification process because a predicate device that could provide a

reasonable basis for review of SE exists. (The substantial equivalence section of the FD&C Act provides the criteria for FDA to determine SE (section 513(i) of the FD&C Act).)

#### *E. De Novo Request Format (Proposed § 860.223)*

FDA proposes a submission process and format for a De Novo request in this section (§ 860.223). FDA proposes in the format section that De Novo requests for a device be submitted to the FDA Center that has the lead in regulating that device (§ 860.223(a)(1)). FDA proposes that De Novo requests related to devices regulated by the Center for Devices for Radiological Health (CDRH) be submitted to CDRH and that those De Novo requests related to devices regulated by the Center for Biologics Evaluation and Research (CBER) be submitted to CBER. FDA provides the appropriate CBER and CDRH addresses as part of the proposed rule.

FDA also proposes in the format section that the De Novo request be signed by the requester or its authorized representative (§ 860.223(a)(2)).

FDA is proposing further format requirements for the De Novo request (§§ 860.223(a)(3) and (4)). These proposed requirements are intended to assist in the efficiency of FDA's processing and review of the De Novo request. FDA is proposing in the format requirements that a cover page designate the De Novo request as a "De Novo Request" (§ 860.223(a)(3)). FDA is proposing that the entire content of the submission be in English or translated into English (§ 860.223(a)(4)). FDA proposes this requirement because FDA does not have the resources to assure the accurate and timely English translation of documents written in a non-English language to facilitate the document's use in FDA's review. Please note FDA's "eCopy Program for Medical Device Submissions" guidance (Ref. 3), is applicable to De Novo requests.

#### *F. De Novo Request Content (Proposed § 860.234)*

FDA proposes requirements for the content of a De Novo request (§ 860.234). This proposed section would establish the types of information that must be included in each De Novo request. To adequately support a request for De Novo classification, FDA proposes that the De Novo request include the following information, unless the De Novo requester provides a justification for each particular omission.

FDA proposes the De Novo request must include a table of contents that identifies the volume and page number

for each item listed (§ 860.234(a)(1)). A table of contents assists FDA in locating information included in the De Novo request, including during the review of the De Novo request.

To assist FDA in contacting the De Novo requester during review of a De Novo request, FDA is proposing that the De Novo request include the appropriate contact information of the De Novo requester (§ 860.234(a)(2)). During its review of a De Novo request, FDA may need to contact the De Novo requester for various reasons, including to ask questions. Contact information would assist in quick and efficient contact of the appropriate person. FDA is proposing to require that the De Novo request include the name, address, phone, fax, and email address of the De Novo requester.

FDA is also proposing to require that a De Novo request include the establishment registration number of the owner or operator submitting the De Novo request, if applicable (§ 860.234(a)(2)). FDA would use this information should FDA determine an onsite inspection is necessary.

FDA is proposing that a De Novo request include a statement regarding the regulatory history of the device, including if there have been prior submissions to FDA on the device (§ 860.234(a)(3)). If there has been a prior submission, FDA proposes to require that a De Novo request identify on the prior submission, including any 510(k)s and related NSE decisions, IDEs, requests for designation (RFD) under § 3.7 (21 CFR 3.7), Pre-Submission, PMAs, Humanitarian Device Exemptions (HDEs), Emergency Use Authorizations (EUAs), section 513(g) requests for information, and previously withdrawn or declined De Novo requests (§ 860.234(a)(3)). The identification of the prior submission would also be required to identify any feedback or deficiencies communicated to the requester during the Agency's review of the prior submission and how the feedback or deficiencies are addressed in the De Novo request, where applicable. This proposed requirement is useful for FDA in communicating with a firm or when determining whether there is an existing active submission for the same device. This information may also assist FDA in determining if feedback provided during a related submission noted above, including any deficiencies communicated to the requester, was addressed in a previous De Novo request. FDA also uses this regulatory history information when determining whether a potential predicate device exists or whether a more appropriate

pathway to marketing exists for the device.

FDA is proposing that the De Novo request include the name of the device (§ 860.234(a)(4)). The name of the device would include any generic, proprietary, and trade names. These names help FDA identify the device.

FDA is proposing that the De Novo request include the device's indications for use, including whether the device would be prescription or over the counter (§ 860.234(a)(5)). As part of the indications for use, the De Novo request must describe the disease or condition the device would diagnose, treat, prevent, cure or mitigate, or how the device would affect the structure or function of the body, including a description of the patient population for which the device is intended. The indications would include all the labeled patient uses of the device. FDA uses this information to assess whether all of the risks associated with the device are identified, whether the indications for use are consistent with the labeling, and to determine whether the device is of a type that has already been classified. For more information about indications for use, see FDA's guidance "The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)], Guidance for Industry and CDRH Staff" (Ref. 1).

FDA is proposing that the De Novo request include a device description (§ 860.234(a)(6)). Proposed § 860.234(a)(6)(i) requires the submission of a complete description of the device. This may include a narrative description of the device pictorial representations, device specifications, and engineering drawings, where applicable.

FDA is proposing that the device description include a description of each of the functional components or ingredients of the device, if the device consists of more than one physical component or ingredient (§ 860.234(a)(6)(ii)).

FDA is proposing that the device description include a description of the properties of the device relevant to diagnosing, treating, preventing, curing, or mitigating the disease or condition, and/or the effect of the device on the structure or function of the body (§ 860.234(a)(6)(iii)). This description is intended to assist in FDA's assessment of the benefits and risks of the device type.

FDA is proposing that the De Novo request include a complete description of the operational principles of the device (§ 860.234(a)(6)(iv)). This would include the mode of operation through

which a device achieves its intended use. This information would be used during FDA's review of the De Novo request to help determine whether the device is of a type that has been previously classified.

FDA is proposing that the device description include FDA assigned reference numbers (e.g., 510(k) number, classification regulation number) for any legally marketed devices (including accessories) that are intended to be used with the device (§ 860.234(a)(6)(v)).

FDA proposes that the De Novo request include a description of known or reasonably known existing alternative practices or procedures for diagnosing, treating, preventing, curing, or mitigating the disease or condition for which the device is intended, or which similarly affect the structure or function of the body (§ 860.234(a)(6)(v)). This information is intended to capture available alternative biologic, device, or drug practices or procedures during FDA's assessment of the benefits and risks of the device and device type.

FDA proposes a classification summary requirement for a De Novo request for a device that has not previously been the subject of a premarket notification under section 510(k) of the FD&C Act (§ 860.234(a)(8)(i)). This information would be intended to assist FDA to establish that the De Novo classification process is appropriate for the device or if a legally marketed device of the same type exists. For such devices, FDA proposes that the De Novo request include a complete description of the searches used to establish that no legally marketed device of the same type exists (§ 860.234(a)(8)(i)(A)). Further, for such devices, FDA proposes that the De Novo request include a list of potentially similar devices to the subject device, including any classification regulations, PMAs, HDEs, 510(k)s, EUAs, or product codes applicable to the other devices, and a rationale explaining how the subject device is different from these devices (§ 860.234(a)(8)(i)(B) and (C)). FDA intends to use this information in assessing the appropriate classification of the device.

FDA proposes a classification summary requirement for a De Novo request for a device that has been the subject of a premarket notification under section 510(k) of the FD&C Act (§ 860.234(a)(8)(ii)). For such devices, FDA proposes that the submitter include the relevant 510(k) number(s) to assist FDA in locating the previously submitted information. Further, for such devices, FDA proposes that the submitter include a summary of the search performed to confirm that no

legally marketed device of the same type exists since the date FDA issued the NSE determination letter. This requirement would assist FDA in establishing that no legally marketed device of the same type exists.

In accordance with the De Novo classification section in the FD&C Act, FDA proposes that the De Novo request must recommend class I or II classification (section 513(f)(2)(A)(v) of the FD&C Act and § 860.234(a)(9)). FDA proposes that this classification recommendation include a description of why the De Novo requester believes general controls or general and special controls are adequate to provide reasonable assurance of safety and effectiveness. If the submitter recommends that the device be classified as class II, FDA proposes that the recommendation must include a draft proposal for applicable special controls, and a description of how those special controls provide reasonable assurance of safety and effectiveness of the device (§ 860.234(a)(10)).

FDA proposes that the De Novo request include a summary of known or reasonably known probable risks to health associated with the use of the device and any proposed mitigations for each probable risk (§ 860.234(a)(11)). FDA would use this information to assess the different types of harmful events that may potentially result from use of the device and when determining if the harmful events can be mitigated sufficiently. A summary of probable risks to health should be based on the best available information at the time of submission of the De Novo request. A summary of any proposed mitigation should identify whether the mitigation is a general control or a special control and provide details about each control. A summary of any proposed mitigation that involves specific performance testing or labeling must include references to the applicable section or pages in the De Novo request that support the proposed testing or labeling.

FDA proposes that the De Novo request include reference to any published standard relevant to the safety or effectiveness of the device and that are known or should reasonably be known to the requester (§ 860.234(a)(12)). The proposed standards section would require that the De Novo request provide adequate information to demonstrate how the device meets, or justify any deviation from, performance standards (§ 860.234(a)(12)(i)). These published standards include both voluntary consensus standards recognized under the recognition of standards section of the FD&C Act and any voluntary

consensus standard not yet recognized by FDA but cited in the De Novo request (section 514(c) of the FD&C Act (21 U.S.C. 360d(c)). This explanation would specify what applicable voluntary consensus standards or parts of standard(s) the device does not meet and explain any deviations.

FDA proposes that the De Novo request summarize each study used to support the De Novo request (§ 860.234(a)(13)). This proposed requirement is intended to ensure the quality and integrity of data obtained from these studies. This proposed requirement would apply to nonclinical laboratory studies and clinical investigations involving human subjects. For nonclinical laboratory studies and clinical investigations involving human subjects, the summary would be required to include a description of the following: The study objective, the experimental design, any data collection and analysis, and any positive, negative, or inconclusive study results. For nonclinical laboratory studies, FDA proposes to require a summary of each study (§ 860.234(a)(13)(i)). For a clinical investigation involving human subjects, FDA proposes to require that a discussion of subject selection and exclusion criteria, investigation population, investigation period, safety and effectiveness data, adverse reactions and complications, patient discontinuation, patient complaints, device failures (including unexpected software events if applicable) and replacements, results of statistical analyses of the clinical investigation, contraindications and precautions for use of the device, and other information from the clinical investigation as appropriate (any investigation conducted under an IDE must be identified as such) must be included (§ 860.234(a)(13)(ii)). FDA proposes these requirements to assure that a study's data and reported results are credible and accurate and to ensure consistency in FDA clinical data requirements. FDA would use the summary of investigations in assessing safety and effectiveness of the device.

FDA proposes that the De Novo request include a discussion of benefit and risk considerations (§ 860.234(a)(14)). The proposed benefit and risk consideration section would require a discussion demonstrating that the data and information in the De Novo request constitute valid scientific evidence (§ 860.234(a)(14)(i)). Valid scientific evidence is evidence from well-controlled investigations, partially controlled investigations, investigations 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 (§ 860.7(c)(2)). The proposed benefit and risk considerations section would expressly require that, pursuant to the determination of safety and effectiveness section of the regulations, a discussion be included demonstrating that, when subject to general controls or general and special controls, the probable benefit to health from use of the device outweighs any probable injury or illness from such use (*i.e.*, a discussion demonstrating the safety and effectiveness of the device) when the device is used according to its labeling (§ 860.234(a)(14)(ii) and § 860.7). Factors to consider in discussing benefits and risks are discussed in the guidance FDA issued on August 24, 2016, entitled, “Factors to Consider When Making Benefit-Risk Determinations in Medical Device Premarket Approval and De Novo Classifications, Guidance for Industry and CDRH Staff” (Ref. 6).

FDA proposes that a De Novo request must include technical sections that contain data and information in sufficient detail to permit FDA to reach a decision on whether to grant or decline the De Novo request (in § 860.234(a)(15)). This proposed section would require the inclusion of a section containing the nonclinical laboratory studies of the device (§ 860.234(a)(15)(i)). A nonclinical laboratory study is an *in vivo* or *in vitro* experiment in which a test article is studied prospectively in a test system under laboratory conditions to determine its safety (21 CFR 58.3(d)). The nonclinical laboratory studies’ section would include information on microbiology, toxicology, immunology, biocompatibility (see FDA’s guidance “Use of International Standard ISO-10993, “Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process” (Ref. 7)), stress, wear, shelf life, electrical safety, electromagnetic compatibility, and other laboratory or animal tests results,<sup>2</sup> as appropriate (§ 860.234(a)(15)(i)). The information for

the proposed technical sections would be required to include a statement that each study was conducted in compliance with the Good Laboratory Practice (GLP) for nonclinical laboratory studies (§ 860.234(a)(15)(i) and part 58). If the study is not compliant with GLP, the proposed technical section would require that the De Novo requester provide a brief statement explaining the reason for noncompliance with GLP. (§ 860.234(a)(15)(i)). The brief statement would assist FDA in determining whether the non-compliance may relate to potential bias or credibility of the study.

FDA proposes that, for all devices incorporating software, the De Novo request include a section containing all relevant information regarding software information and testing, including, but not limited to, appropriate device hazard analysis, hardware, and system information (§ 860.234(a)(15)(ii)). FDA recommends consulting FDA’s “Guidance for the Content of Premarket Submissions for Software Contained in Medical Devices” (Ref. 8).

FDA proposes that a section be included in a De Novo request that contains the results of any clinical investigation of the device involving human subjects (§ 860.234(a)(15)(iii)). This information is intended to assist FDA in its assessment of the quality and integrity of data obtained from these investigations. The following elements would be included in this section of the request, pursuant to the proposed rule:

- Discussion of clinical protocols in sufficient detail for FDA to assess the strengths and limitations of the investigation, which generally include a discussion of the objectives, design, methodology, and organization of the clinical investigation.
- The number of investigators and the number of subjects per investigator.
- Discussion of any subject selection and exclusion criteria, and the investigation population, to assist FDA in assessing whether the selection of clinical investigation subjects reflects the intended target population for the device. Selection and exclusion criteria typically include standards that investigation participants must meet or characteristics they must have, such as age, gender, type and stage of a disease, previous treatment history, and other medical conditions that may impact selection or exclusion criteria. To the extent a device has disparate safety or effectiveness outcomes or benefits in different demographic groups, differences in the race, ethnicity, age, gender, and sex of a subject population can affect the applicability of the investigation to the intended

population. For more information, see FDA guidance documents “Collection of Race and Ethnicity Data in Clinical Trials” (Ref. 4) and “Evaluation and Reporting of Age-, Race-, and Ethnicity-Specific Data in Medical Device Clinical Studies (Ref. 5).

- An investigation period description to assist FDA in assessing whether the clinical investigation period is applicable to the target population. The investigation period also would assist FDA in evaluating whether the clinical investigation supports the effectiveness of the device as labeled.

- Any safety and effectiveness data to assist FDA in assessing whether the clinical investigation supports that a reasonable assurance of safety and effectiveness exists. FDA would assess reasonable assurance of safety and effectiveness by evaluating the valid scientific evidence submitted to support the De Novo request. FDA would review the data to assess whether the data supports the claims made in the indications for use and demonstrates that the probable benefits of the device outweigh the probable risks. For more information, see FDA’s guidance “Factors to Consider When Making Benefit-Risk Determinations in Medical Device Premarket Approval and De Novo Classifications” (Ref. 6).

- Discussion of data on any adverse reactions to the use of the device (*e.g.*, any unfavorable response that caused or has potential to cause an injury) or complications related to the use of the device. An adverse reaction may occur as part of the effect of the device or may occur unpredictably. Frequency data and severity data are particularly useful in safety and effectiveness determinations. FDA would review the rates of complications in clinical investigations in assessing the safety and effectiveness of the device. The applicability of the adverse event information depends on the existing safety information and whether the population or use presents a new or serious safety issue.

- Discussion of data on any subject discontinuation that occurred in an investigation including the reasons for the discontinuation and the extent of the discontinuation of the subject. FDA would need all discontinuation data in order to determine the safety and effectiveness of the device. Whether the subject decides to discontinue participation in the clinical investigation, or is discontinued by the investigator because the subject no longer qualifies under the protocol, the data collected up to withdrawal of the subject are required for clinical investigation data to be complete.

<sup>2</sup> FDA supports the principles of the “3Rs,” to reduce, refine, and replace animal use in testing. We encourage sponsors to consult with us if they wish to use a non-animal testing method they believe is suitable, adequate, validated, and feasible. We will consider if such an alternative method could be assessed for equivalency to an animal test method.

Without such a control, *i.e.*, if a subject or an investigator were able to decide whether to include a subject's data, depending on whether a subject discontinues participation in the trial, the potential for bias could impact the credibility of the data.

- Discussion of any identified trends after analyzing any subject complaints that occurred. In analyzing trends, factors such as location, user application, as well as repeat component or device events may apply. Trends in complaints may point to possible risks posed by the device. FDA would review such trend analyses in assessing the safety and effectiveness of the device.

- Discussion of any device failures and replacements. In analyzing failures, factors such as location, user application, and repeat component failures may apply. FDA would review such analyses in assessing the safety and effectiveness of the device.

- Discussion of any tabulations of data from all individual subject reporting forms and copies of such forms for each subject who died during a clinical investigation or who did not complete the investigation. Complete information for all subjects who died during the investigation would assist in assessing safety problems as well as to ensure that the investigation evaluation is as unbiased as possible.

- Statistical analysis of the results from each clinical investigation. The statistical analysis should specify and discuss all effects. FDA would review such analyses in assessing the safety and effectiveness of the device.

- Any contraindication, precaution, warning, or other limiting statement relevant to the use of the device (*e.g.*, a statement providing that the device is limited to prescription use only). This includes information regarding any special care to be exercised by a practitioner or patient for the safe and effective use of the device. This section should describe situations in which the device should not be used because the risk of use exceeds the benefit.

- Other appropriate information from the clinical investigation. For example, this section should identify any investigation conducted under an IDE.

For clinical investigations conducted in the United States, FDA proposes that the technical sections of the De Novo request would include a number of statements indicating compliance (or, if the investigation is noncompliant, a brief statement of the reason for the noncompliance) with the following FDA requirements with respect to each investigation conducted (§ 860.234(a)(15)(iii)(A)–(B)):

(1) The institutional review board regulations (21 CFR part 56), or alternatively, a statement that the investigation was not subject to the regulations under § 56.104 or § 56.105; (2) the informed consent regulations (21 CFR part 50); and (3) the applicable IDE regulations concerning sponsors of clinical investigations and clinical investigators (21 CFR part 812). Proposed § 860.234(a)(15)(iii)(A)–(B) would also remind requesters that failure or inability to comply with the requirements does not justify failure to provide information on a relevant clinical investigation.

For clinical investigations conducted outside the United States that are intended to support a De Novo request, the requirements under 21 CFR 812.28 relating to Good Clinical Practice (GCP) would apply when they become effective on February 21, 2019 (83 FR 7366). Consistent with the new provisions for 510(k)s and PMAs that were promulgated as part of the GCP rulemaking (83 FR 7366, 7385 & 7387), FDA proposes to include a provision (§ 860.234(a)(15)(iii)(C)) stating that, for clinical investigations conducted outside the United States that are intended to support a De Novo request, the requirements under § 812.28 would apply. If any such investigation was not conducted in accordance with GCP, FDA proposes that the De Novo request would be required to include either a waiver request in accordance with § 812.28(c) or a brief statement of the reason for not conducting the investigation in accordance with GCP, as well as a description of steps taken to ensure that the data and results are credible and accurate and that the rights, safety, and well-being of subjects have been adequately protected. Proposed § 860.234(a)(15)(iii)(C) would also remind requesters that failure or inability to comply with the requirements does not justify failure to provide information on a relevant clinical investigation.

For clinical investigations conducted in the United States and outside the United States, FDA proposes to require the De Novo request include the following elements (§ 860.234(a)(15)(iii)(D)–(E)):

(1) A statement that each investigation has been completed in accordance with the protocol or a summary of any deviations from the protocol; and (2) a financial certification or disclosure statement (21 CFR part 54). This information would assist FDA in its assessment of the quality and integrity of data obtained from these investigations, as well as to evaluate any uncertainty in the data as part of the benefit-risk assessment.

FDA further proposes that, if a De Novo request relies primarily on data from a single investigator at one investigation site, the De Novo request must include a justification showing why these data and other information are sufficient to demonstrate the safety and effectiveness of the device and to ensure that the results from a site are applicable to the intended population (§ 860.234(a)(15)(iii)(F)). This information would assist FDA in verifying that data from a single investigation site are representative of the safety and effectiveness of the device when used in the intended population.

FDA further proposes to require that a De Novo request include a discussion of the clinical significance of the results, pursuant to the determination of safety and effectiveness (§ 860.234(a)(15)(iii)(G) and § 860.7(e)).

FDA proposes to require that a De Novo request include a bibliography of all published reports not submitted under the technical sections in (§§ 860.234(a)(16)(i) and 860.234(a)(15)). These reports are in addition to, and not the same as, the data and information on any laboratory studies and any clinical investigations conducted by the requester. FDA proposes to require that the De Novo request include any other identification, discussion, and analysis of any other data, information, or report relevant to the safety and effectiveness of the device (§ 860.234(a)(16)(ii)). Under the proposed other information section, such information may be from foreign or domestic sources, and includes information obtained from investigations other than those in the De Novo request and from commercial marketing experience, if applicable (§ 860.234(a)(16)(ii)). FDA proposes that the De Novo request would be required to include copies of such reports or information, if requested by FDA (§ 860.234(a)(16)(iii)). Only those reports or information in the possession of the De Novo requester or reasonably obtainable by the De Novo requester would be required to be provided when requested.

FDA proposes that, if requested by FDA, the De Novo request would be required to include one or more samples of the device and its components, as requested (§ 860.234(a)(17)). If submitting samples of the device is impractical, the De Novo requester would be required to name the location where FDA may examine or test one or more of the devices.

FDA proposes to require that the De Novo request include any proposed labels, labeling, and advertisements for the device (§ 860.234(a)(18)). The

proposed labeling and advertisements would have to be sufficient to describe the device and its intended use, and provide adequate directions for its use. Photographs or engineering drawings would be required, where applicable.

FDA proposes that the De Novo request must include other information that is necessary for FDA to determine whether general controls or general and special controls provide a reasonable assurance of safety and effectiveness of the device (§ 860.234(a)(19)). Examples would include marketing experience outside the United States, medical device reporting (MDR) data (if the device is legally marketed in the United States for a different intended use, and such data may be relevant to an evaluation of safety of the device), and patient preference information (e.g., testimonials from patients who were treated with or used the subject device). Patient preference information that may be used by FDA staff in decision making related to De Novo requests is discussed in the guidance FDA issued on August 24, 2016, entitled, "Patient Preference Information—Voluntary Submission, Review in Premarket Approval Applications, Humanitarian Device Exemption Applications, and De Novo Requests, and Inclusion in Decision Summaries and Device Labeling, Guidance for Industry, Food and Drug Administration Staff, and Other Stakeholders" (Ref. 9).

FDA proposes that pertinent information in FDA files specifically referred to by a De Novo requester may be included in a De Novo request by reference (§ 860.234(b)). This would include information that is specifically referred to and incorporated by reference from any of the De Novo requester's submissions or submissions of someone other than the De Novo requester. The De Novo requester would be required to include the written authorization to reference the information by the person who submitted that information.

FDA proposes to require that the De Novo request include a statement for any omission of any information required by the De Novo content regulation if the requester believes the information is not applicable to the device that is the subject of the De Novo request (in §§ 860.234(c) and 860.234(a)). The statement would have to be in a separate section of the De Novo request and listed in the table of contents. FDA would require the statement for any omission to specify the information omitted, and include a justification for the omission. FDA would notify the De Novo requester if

the justification for the omission is not accepted.

FDA proposes to require the De Novo requester to update its pending De Novo request with new safety and effectiveness information learned about the device from ongoing or completed studies and investigations that may reasonably affect an evaluation of safety or effectiveness of the device as such information becomes available (§ 860.234(d)).

#### *G. Accepting a De Novo Request (Proposed § 860.245)*

The proposed section provides proposed criteria for FDA's acceptance of a De Novo request (§ 860.245). The purpose of the criteria for FDA's acceptance for review of the De Novo request would be to enable FDA to make a threshold determination whether the De Novo request contains the information necessary to permit a substantive review. FDA proposes that, after a De Novo request is received by FDA, FDA would notify the requester whether the submission has been accepted for review (§ 860.245(a)). FDA proposes that, if FDA does not find any reason to refuse to accept the De Novo request, or FDA fails to complete the acceptance review within 15 days, FDA would accept the De Novo request and notify the De Novo requester (§ 860.245(b)). For an accepted De Novo request, FDA proposes that the date of acceptance would be the date FDA received the De Novo request or the date FDA received additional information that results in acceptance of the De Novo request.

FDA proposes that, if a De Novo request contains one or more of the listed deficiencies, FDA would be able to refuse to accept the De Novo request (§ 860.245(c)). The deficiencies are as follows:

- The requester has a pending premarket submission, including a 510(k), HDE, EUA, PMA, or reclassification petition for the same device.
- The De Novo request does not contain either: (1) Each of the items required under the De Novo classification section of the FD&C Act or this part or (2) a justification for any omission of the items (section 513(f)(2) of the FD&C Act).
- The De Novo request is not in the required format set out in proposed § 860.223.
- The De Novo request is for more than one device type. A device type is 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.

- The requester has either not provided a complete response (e.g., for each FDA additional information request, the requester has not provided a supplement or amendment to their De Novo request containing all information requested by FDA) to deficiencies identified by FDA in previous submissions for the same device, including those submissions described in the regulatory history, or the requester has failed to provide a rationale for not responding to those deficiencies as set out in proposed § 860.234(a)(3).

The proposed section on acceptance of a De Novo request provides that FDA would notify the De Novo requester of the reasons for refusal if FDA refuses to accept a De Novo request (§ 860.245(c)(2)). The notice would include the De Novo request reference number and will identify the deficiencies in the De Novo request. FDA proposes that, if FDA refuses to accept a De Novo request, the requester would be permitted to submit the additional information necessary to comply with the requirements of the De Novo classification section of the FD&C Act and applicable regulations, including the provisions of this part (§ 860.245(c)(3) and section 513(f)(2) of the FD&C Act). If FDA subsequently accepts the De Novo request, the acceptance date for the De Novo request would be the date FDA received the additional information.

#### *H. Procedures for Review of a De Novo Request (Proposed § 860.256)*

FDA proposes that FDA would substantively review and grant or decline a De Novo request within 120 days after the De Novo request is received or additional information is received that results in acceptance of the De Novo request (§ 860.256(a)). The 120 days would begin on the day FDA receives the most recent De Novo request or additional information that results in acceptance of the De Novo request (§ 860.245).

FDA proposes that a De Novo requester would be permitted to supplement or amend a pending De Novo request to revise existing information or provide additional information (§ 860.256(b)). Under the proposed rule, FDA may request this information, or a De Novo requester may submit this information on its own initiative. These responses to the FDA requests for additional information regarding a De Novo request under

review are referred to as amendments or supplements. If the requested information is not received within the timeframe specified in FDA's request for information, or the information is incomplete, the De Novo request would be placed on hold until the information is received. If additional information is submitted at the De Novo requester's own initiative, the reason for the additional information and the reference number for the original De Novo request should be included. Additional information may be used by FDA, or an advisory committee if appropriate, during review of the De Novo request.

FDA proposes that FDA would be able to inspect relevant facilities prior to granting or declining a De Novo request (§ 860.256(c)). Such an inspection is intended to assist FDA in determining whether a reasonable assurance of safety and effectiveness can be provided by general or general and special controls. FDA proposes to inspect to help determine that clinical or nonclinical data were collected in a manner that ensures the data accurately represents the risks and benefits of the device, and to help determine that that FDA's Quality System Regulation (QSR), in addition to other general and any special controls, are adequate to ensure that critical and/or novel manufacturing processes that may impact the safety and effectiveness of the device are controlled (21 CFR part 820). Inspection would allow FDA to verify the documentation and implementation of a facility's QSR.

#### *I. Withdrawal of a De Novo Request (Proposed § 860.267)*

The proposed section on withdrawal of a De Novo request specifies when FDA would notify a requester that FDA considers the De Novo request withdrawn (§ 860.267). Once a De Novo request has been withdrawn, the requester would be required to submit a new De Novo request to restart the De Novo review process.

The proposed section on withdrawal of a De Novo request provides when FDA would consider a De Novo request to have been withdrawn (§ 860.267(a)). Under the proposed section, if the De Novo requester fails to provide a complete response to a request for additional information within 180 days, FDA would consider the De Novo request withdrawn (§ 860.267(a)(1)). Under the proposed section, if the De Novo requester fails to provide a complete response to any deficiencies identified by FDA within 180 days of the date FDA notifies the requester of such deficiencies, FDA would also consider the De Novo request

withdrawn (§ 860.267(a)(2)). In addition, under the proposed section, if the De Novo requester does not permit an authorized FDA employee an opportunity to inspect the facilities and to have access to copy and verify records pertinent to the De Novo request, FDA would consider the De Novo request withdrawn (section § 860.267(a)(3)). Finally, under the proposed section, if the De Novo requester submits a written notice to FDA that the De Novo request has been withdrawn, FDA would also consider the De Novo request withdrawn (§ 860.267(a)(4)).

Under the proposed section, if FDA considers a De Novo request withdrawn, FDA would notify the De Novo requester (§ 860.267(b)). The written notice would include the De Novo request reference number and the date FDA considered the De Novo request withdrawn.

#### *J. Granting or Declining a De Novo Request (Proposed § 860.289)*

FDA proposes the processes and criteria for granting and declining a De Novo request (§ 860.289). Pursuant to the De Novo classification section of the FD&C Act, a De Novo request will be granted by administrative order (section 513(f)(2)(B)(i) of the FD&C Act). The order will classify the device into class I or class II, and include any special controls, if applicable. Prior to the issuance of the administrative order, FDA will review the De Novo request under the criteria set forth in the classification section of the FD&C Act, determine the appropriate class of the device, and issue an order to the requester in the form of a letter that classifies the device (section 513(a)(1) of the FD&C Act). The proposed section on granting or declining a De Novo request provides that FDA would grant a De Novo request if none of the reasons listed in the section for denying a De Novo request applies (§§ 860.289(a)(1) and 860.289(b)). Under the proposed section, and as required by the De Novo classification section of the FD&C Act, FDA would subsequently publish a notice in the **Federal Register** announcing the classification order (§ 860.289(a)(2) and section 513(f)(2)(C) of the FD&C Act). This announcement would codify the classification of the device and establish the device type.

FDA proposes that it would decline a De Novo request by issuing a written order to the requester (§ 860.289(b)). If the De Novo request is declined, the device would remain in class III and may not be legally marketed unless and until it has been approved in a PMA,

cleared in a 510(k), or a new De Novo request has been granted.

FDA proposes the following grounds for declining a De Novo request (§ 860.289(b)):

- The device does not meet the criteria under the classification section of the FD&C Act and the definitions section of the medical device classification procedures regulations for classification into class I or II (section 513(a)(1) of the FD&C Act and § 860.3).

- The De Novo request contains a false statement of material fact, or there is a material omission. FDA may rescind a De Novo request containing a false statement of material fact or a material omission.

- The proposed labeling for the device does not meet the requirements in the labeling part and the in vitro diagnostic products for human use part, as applicable (part 801 (21 CFR part 801) and part 809 (21 CFR part 809)).

- The product does not meet the definition of a device at section 201(h) in the FD&C Act (21 U.S.C. 321(h)) and is not a combination product as defined at § 3.2(e) (21 CFR 3.2(e)). FDA generally intends to decline a De Novo request for a combination product that does not have a device primary mode of action (see § 3.2(m)). However, a De Novo request may be appropriate, for example, for the device constituent part of such a combination product if the constituent parts of the combination product are to be distributed separately (see § 3.2(e)(3)–(4)), and the other constituent part (drug or biological product) of the combination product is to be marketed under its own, separate application (*i.e.*, abbreviated new drug application, new drug application, or biologics license application). We welcome comment on this issue.

- The device is of a type which has already been approved in existing applications for PMAs submitted under the premarket approval of medical devices (21 CFR part 814).

- The device type has already been classified into class I, class II, or class III.

- An inspection of a relevant facility under the procedures for review of a De Novo request section results in a determination that general or general and special controls would not provide a reasonable assurance of safety and effectiveness (§ 860.256(c)).

- A nonclinical laboratory study that is described in the De Novo request, and that is essential to show the device there is a reasonable assurance of safety was not conducted in compliance with the GLP requirements and no reason for the noncompliance is provided or, if a reason for noncompliance with the GLP

requirements is provided, the practices used in the study do not support the validity of the study (part 58).

- A clinical investigation described in the De Novo request involving human subjects that is subject to the institutional review board regulations in part 56, the informed consent regulations in part 50, or GCP described in § 812.28(a), was not conducted in compliance with those regulations such that the rights or safety of human subjects were not adequately protected or the supporting data are otherwise unreliable.

- A clinical or nonclinical study necessary to demonstrate that general or general and special controls provide a reasonable assurance of safety and effectiveness has either not been completed according to the study protocol, or deficiencies about such a study identified in a request for additional information under the procedures for review of a De Novo request section have not been adequately addressed (§ 860.256(b)(1)).

- After the De Novo request has been accepted for review under the accepting a De Novo request section, the De Novo requester makes significant changes not solicited by FDA to either the device's indications for use or to the device's technological characteristics (§ 860.245(b)).

FDA proposes that FDA would issue an order declining a De Novo request that would inform the De Novo requester of the grounds for declining the request (§ 860.289(c)).

As noted in the list above, one of the grounds for declining a De Novo request is that the device is of a type which has already been approved in a PMA submitted under the premarket approval of medical devices (21 CFR part 814). With respect to such devices (section 513(f)(1) of the FD&C Act), the postamendments devices reclassification section of the FD&C Act (section 513(f)(3) of the FD&C Act), and not the De Novo classification section of the FD&C Act (section 513(f)(2) of the FD&C Act), is the appropriate pathway for reclassification of such devices. The classification section of the FD&C Act on classification and/or reclassification of postamendments devices (section 513(f)(2) and (3) of the FD&C Act), especially the unique provision (section 513(f)(3) of the FD&C Act) that supports reclassification of a group of devices,

support the view that FD&C Act's provisions on reclassification of postamendments devices (section 513(f)(3) of the FD&C Act), rather than its De Novo classification section (section 513(f)(2) of the FD&C Act), is to be used for reclassification of device types already approved in a PMA.<sup>2</sup>

If a De Novo request is declined because a device was classified into class III under the classification section or the classification change section of the FD&C Act (section 513(d) or (e) of the FD&C Act), and there is evidence to support classification into class I or class II, a person, or FDA on its own initiative, may seek reclassification of the class III device under the classification change section of the FD&C Act (section 513(e) of the FD&C Act).

FDA proposes that FDA would determine the safety and effectiveness of the device using the criteria specified in the determination of safety and effectiveness section of the regulations (§§ 860.289(d) and 860.7). Under the proposed rule, FDA would be permitted to use information other than that submitted by the De Novo requester in making such determinations, *e.g.*, published literature.

#### VI. Proposed Effective Date

FDA proposes that this rule would go into effect 90 days after publication of a final rule.

#### VII. Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us 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). Executive Order 13771 requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset

<sup>3</sup> This interpretation is also consistent with FDA's historical use of the De Novo sections and the legislative history of the FD&C Act provisions on postamendments device reclassification.

by the elimination of existing costs associated with at least two prior regulations.” We believe that this proposed rule is a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because small entities affected by this rule would incur very small one-time costs to read and understand the rule, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to 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 \$150 million, using the most current (2017) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

The proposed rule, if finalized, would clarify and create a more efficient De Novo classification process by specifying: (1) What medical devices are eligible for the De Novo classification process; (2) what information manufacturers must provide in De Novo requests; (3) how to organize these data. By clarifying and making more efficient these requirements, we expect the proposed rule, if finalized, would reduce the time and costs associated with reviewing De Novo requests, and generate net benefits in the form of cost savings. Moreover, the proposed rule, if finalized, would allow us to refuse to accept inappropriate and deficient De Novo requests, and require us to protect the confidentiality of certain data and information submitted with a request until we issue an order granting the request. Table 2 summarizes our estimate of the annualized costs and the annualized benefits of the proposed rule over 10 years.

TABLE 2—SUMMARY OF BENEFITS, COSTS AND DISTRIBUTIONAL EFFECTS OF THE PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (percent)	Period covered (years)	
Benefits:							
Annualized .....				2016	7	10	
Monetized \$millions/year ..				2016	3	10	
Annualized .....				2016	7	10	
Quantified .....				2016	3	10	
Qualitative							
Costs:							
Annualized .....	\$0.04	\$0.0	\$0.08	2016	7	10	
Monetized \$millions/year ..	\$0.02	\$0.0	\$0.03	2016	3	10	
Annualized .....				2016	7	10	
Quantified .....				2016	3	10	
Qualitative							
Transfers:							
Federal .....				2016	7	10	
Annualized .....				2016	3	10	
Monetized \$millions/year ..	From:			To:			
Other .....				2016	7	10	
Annualized .....				2016	3	10	
Monetized \$millions/year ..	From:			To:			
Effects:							
State, Local or Tribal Government: None.							
Small Business: None.							
Wages: None.							
Growth: None.							

In line with Executive Order 13771, in Table 3 we estimate present and annualized values of the costs and cost-savings over an infinite time horizon.

TABLE 3—EXECUTIVE ORDER 13771 SUMMARY TABLE  
[In \$ million 2016 dollars over an infinite time horizon]

	Lower bound (7%)	Primary (7%)	Upper bound (7%)	Lower bound (3%)	Primary (3%)	Upper bound (3%)
Present Value of Costs .....	\$0.0	\$0.6	\$1.1	\$0.0	\$0.6	\$1.1
Present Value of Cost-Savings .....	0.0	0.0	0.0	0.0	0.0	0.0
Present Value of Net Costs <sup>1</sup> .....	0.0	0.6	1.1	0.0	0.6	1.1
Annualized Costs .....	0.0	0.0	0.0	0.0	0.0	0.0
Annualized Cost-Savings .....	0.0	0.0	0.0	0.0	0.0	0.0
Annualized Net Costs <sup>1</sup> .....	0.0	0.0	0.0	0.0	0.0	0.0

<sup>1</sup> We calculate net costs as costs minus cost savings.

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 10) and at <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

**VIII. Analysis of Environmental Impact**

We have determined that, under 21 CFR 25.34(b) and (f), this proposed 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.

**IX. Consultation and Coordination With Indian Tribal Governments**

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal

Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The Agency solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

**X. Paperwork Reduction Act of 1995**

This proposed rule contains information collection provisions that 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). A description of these provisions is given in the

*Description* section of this document with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

*Title:* Medical Device De Novo Classification Process (OMB Control Number 0910–0844)—Revision.

*Description:* This proposed rule implements the medical device De Novo classification process under section 513(f)(2) of the FD&C Act, which provides a pathway for certain new types of devices to obtain marketing authorization as class I or class II devices, rather than remaining automatically designated as a class III device which would require premarket approval under the postamendments device classification section of the FD&C Act (section 513(f)(1)).

On October 30, 2017, FDA issued a final guidance (De Novo Program guidance) (Ref. 1) to provide recommendations on the process for the submission and review of a De Novo request. The information collections associated with the guidance are approved under OMB control number 0910–0844. We provide below a revised burden estimate for the De Novo

classification process as described in this proposed rule.

Proposed 860.201 explains the purpose of the proposed De Novo Classification regulations and provides the applicability of a De Novo request submission. Proposed 860.223 and 860.234 describe the format and content, respectively, of a De Novo request. Proposed 860.245 describes the conditions under which FDA may refuse to accept a De Novo request. Proposed 860.256(b) provides for supplemental, amendatory, or additional information for a pending De Novo request. Proposed 860.267(a)(4) provides that a requester may submit a written notice to FDA that the De Novo request has been withdrawn.

*Description of Respondents:* Respondents to the information collection are medical device manufacturers seeking to market medical device products that have been classified into class III under section 513(f)(2) of the FD&C Act.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

Activity; 21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours	Total operating and maintenance costs
De Novo request—proposed 860.201, 860.223, 860.234, 860.245, 860.256(b)	60	1	60	182	10,920	\$7,278
Written notice of withdrawal—proposed 860.267(a)(4) .....	5	1	5	10	50	5
Total .....	.....	.....	.....	.....	10,970	7,283

Based on our recent experience with the De Novo Program, FDA estimates that the average burden per response for a De Novo request is 182 hours. This includes information collection associated with the proposed provisions described in 860.201, 860.223, 860.234, 860.245, and 860.256(b). Because the provisions under proposed 860.245 are not included in the information collection burden estimates associated with the De Novo Program guidance, we have included an additional 2 hours per response in the average burden per response for manufacturers to review their De Novo request for compliance with the acceptance criteria listed in proposed 860.245. Based on updated program data and trends, we expect to receive approximately 60 De Novo requests per year. This estimate is a 3,640-hour increase from the burden estimate approved for the De Novo Program guidance.

We estimate that the average burden per response for written notice of withdrawal of a De Novo request, as

described in proposed 860.267(a)(4), is 10 minutes. The average burden per response is based on estimates by FDA administrative and technical staff who are familiar with the requirements for submission of a De Novo request (and related materials), have consulted and advised manufacturers on submissions, and have reviewed the documentation submitted. We expect that we will receive approximately five requests for withdrawal per year. There is no change to the currently approved burden estimate for this information collection.

The operating and maintenance cost for a De Novo submission includes the cost of printing, shipping, and the eCopy. We estimate the cost burden for a De Novo submission to be \$121.30 (\$90 printing + \$30 shipping + \$1.30 eCopy). The annual cost estimate for De Novo submissions is \$7,278 (60 submissions × \$121.30). We estimate the cost for a request for withdrawal to be \$1 (rounded) (\$0.09 printing 1 page + \$0.03 shipping + \$1.30 eCopy). The

annual cost estimate for requests for withdrawal is \$5.

To ensure that comments on information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB (see ADDRESSES). All comments should be identified with the title of the information collection.

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3407(d)), the Agency has submitted the information collection provisions of this proposed rule to OMB for review. These requirements will not be effective until FDA obtains OMB approval. FDA will publish a notice concerning OMB approval of these requirements in the **Federal Register**.

This proposed rule also refers to previously approved collections of information. 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 entitled “De Novo Classification Process (Evaluation of Automatic Class III Designation)” have been approved under OMB control number 0910–0844; the collections of information in the guidance document entitled “Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff” have been approved under OMB control number 0910–0756; the collections of information in the guidance documents entitled “Guidance for Industry and Food and Drug Administration Staff—User Fees for 513(g) Requests for Information” and “FDA and Industry Procedures for Section 513(g) Requests for Information under the Federal Food, Drug, and Cosmetic Act—Guidance for Industry and Food and Drug Administration Staff” have been approved under OMB control number 0910–0705; and the collections of information in the guidance document entitled “Emergency Use Authorization of Medical Products and Related Authorities” have been approved under OMB control number 0910–0595. The collections of information in Title 21 of the Code of Federal Regulations (CFR) are approved under the following OMB control numbers: Part 3 under 0910–0523; parts 50 and 56 under 0910–0755; part 54 under 0910–0396; part 58 under 0910–0119; parts 801 and 809 under 0910–0485; part 807, subpart E, under 0910–0120; part 812 under 0910–0078; part 814, subparts A through E under 0910–0231; part 814, subpart H under 0910–0332; part 820 under 0910–0073; part 860, subpart C under 0910–0138.

## XI. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the proposed 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, we conclude 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.

## XII. References

The following references are on display in the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available

electronically at <https://www.regulations.gov>.

FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. FDA’s guidance “De Novo Classification Process (Evaluation of Automatic Class III Designation)” available at <https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-meddev-gen/documents/document/ucm080197.pdf>.
2. FDA’s guidance “Procedures for Class II Device Exemptions from Premarket Notification, Guidance for Industry and CDRH Staff” available at <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM080199.pdf>.
3. FDA’s guidance “eCopy Program for Medical Device Submissions” available at <https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-meddev-gen/documents/document/ucm313794.pdf>.
4. FDA’s guidance “Collection of Race and Ethnicity Data in Clinical Trials,” available at <https://www.fda.gov/downloads/regulatoryinformation/guidances/ucm126396.pdf>.
5. FDA’s guidance “Evaluation and Reporting of Age-, Race-, and Ethnicity-Specific Data in Medical Device Clinical Studies,” available at <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM507278.pdf>.
6. FDA’s guidance “Factors to Consider When Making Benefit-Risk Determinations in Medical Device Premarket Approval and De Novo Classifications, Guidance for Industry and CDRH Staff,” available at (<https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-meddev-gen/documents/document/ucm517504.pdf>).
7. FDA’s guidance “Use of International Standard ISO–10993, “Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process,”) available at <https://www.fda.gov/downloads/medicaldevices/deviceregulationandguidance/guidancedocuments/ucm348890.pdf>.
8. FDA’s guidance “Guidance for the Content of Premarket Submissions for Software Contained in Medical Devices,” available at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm089543.htm>.
9. FDA’s guidance “Patient Preference Information—Voluntary Submission, Review in Premarket Approval Applications, Humanitarian Device Exemption Applications, and De Novo Requests, and Inclusion in Decision Summaries and Device Labeling, Guidance for Industry, Food and Drug Administration Staff, and Other Stakeholders” available at <https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-meddev-gen/documents/document/ucm446680.pdf>.

10. FDA’s full preliminary analysis of economic impacts is available in the Docket No. FDA–2018–N–0236 for this proposed rule and at <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

## List of Subjects in 21 CFR Part 860

Administrative practice and procedure, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, we propose that 21 CFR part 860 be amended as follows:

## PART 860—MEDICAL DEVICE CLASSIFICATION PROCEDURES

- 1. The authority citation for part 860 is revised to read as follows:

**Authority:** 21 U.S.C. 321(h), 360c, 360d, 360e, 360i, 360j, 371, 374.

- 2. Amend § 860.1 by revising paragraph (b) to read as follows:

### § 860.1 Scope.

\* \* \* \* \*

(b) This part prescribes the criteria and procedures to be used by advisory committees, including classification panels, where applicable, in making their recommendations, and by the Commissioner in making the Commissioner’s determinations regarding the class of regulatory control (class I, class II, or class III) appropriate for particular devices. Supplementing the general FDA procedures governing advisory committees (part 14 of this chapter), this part also provides procedures for manufacturers, importers, and other interested persons to participate in proceedings to classify and reclassify devices. This part also describes the kind of data required for determination of the safety and effectiveness of a device, and the circumstances under which information submitted to advisory committees, including classification panels, or to the Commissioner in connection with classification and reclassification proceedings will be available to the public.

- 3. Revise § 860.3 to read as follows:

### § 860.3 Definitions.

For the purposes of this part:

*Class* means one of the three categories of regulatory control for medical devices, defined as follows:

*Class I* means the class of devices that are subject only to the general controls authorized by or under sections 501 (adulteration), 502 (misbranding), 510 (registration), 516 (banned devices), 518 (notification and other remedies), 519

(records and reports), and 520 (general provisions) of the Federal Food, Drug, and Cosmetic Act. A device is in class I if:

(1) General controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device, or

(2) There is insufficient information from which to determine that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device or to establish special controls to provide such assurance, but the device is not life-supporting or life-sustaining, or for a use which is of substantial importance in preventing impairment of human health, and which does not present a potential unreasonable risk of illness or injury.

*Class II* means the class of devices that is or eventually will be subject to special controls. A device is in class II if general controls alone are insufficient to provide reasonable assurance of its safety and effectiveness and there is sufficient information to establish special controls, including promulgation of performance standards, postmarket surveillance, patient registries, development and dissemination of guidance documents (including guidance on the submission of clinical data in premarket notification submissions in accordance with section 510(k) of the Federal Food, Drug, and Cosmetic Act), recommendations, and other appropriate actions, as the Commissioner deems necessary to provide such assurance. For a device that is purported or represented to be for use in supporting or sustaining human life, the Commissioner shall examine and identify the special controls, if any, which are necessary to provide adequate assurance of safety and effectiveness, and describe how such controls provide such assurance.

*Class III* means the class of devices for which premarket approval is or will be required in accordance with section 515 of the Federal Food, Drug, and Cosmetic Act. A device is in class III if insufficient information exists to determine that general controls are sufficient to provide reasonable assurance of its safety and effectiveness, or that application of special controls described in the definition of “*Class II*” in this section in addition to general controls, would provide such assurance, and if, in addition, the device is life-supporting or life-sustaining, or for a use which is of substantial importance in preventing impairment of human health, or if the device presents a potential unreasonable risk of illness or injury.

*Classification panel* means one of the several advisory committees established by the Commissioner under section 513 of the Federal Food, Drug, and Cosmetic Act and part 14 of this chapter for the purpose of making recommendations to the Commissioner on the classification and reclassification of devices and for other purposes prescribed by the Federal Food, Drug, and Cosmetic Act or by the Commissioner.

*Classification questionnaire* means a specific series of questions prepared by the Commissioner for use as guidelines by classification panels preparing recommendations to the Commissioner regarding classification and by petitioners submitting petitions for reclassification. The questions relate to the safety and effectiveness characteristics of a device and the answers are designed to help the Commissioner determine the proper classification of the device.

*Classification regulation* means a section under parts 862 through 892 of this chapter that contains the identification (general description and intended use) and classification (class I, II or III) of a single device type or more than one related device type(s).

*Commissioner* means the Commissioner of Food and Drugs, Food and Drug Administration, United States Department of Health and Human Services, or the Commissioner’s designee.

*De Novo request* means any submission under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act for a medical device, requesting classification into class I or class II, including all information submitted with or incorporated by reference therein.

*FDA* means the Food and Drug Administration.

*General controls* mean the controls authorized by or under sections 501 (adulteration), 502 (misbranding), 510 (registration, listing, and premarket notification), 516 (banned devices), 518 (notification and other remedies), 519 (records, reports and unique device identification) and 520 (general provisions) of the Federal Food, Drug, and Cosmetic Act.

*Generic type of device* means 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.

*Implant* means a device that is placed into a surgically or naturally formed cavity of the human body. A device is

regarded as an implant for the purpose of this part only if it is intended to remain implanted continuously for a period of 30 days or more, unless the Commissioner determines otherwise in order to protect human health.

*Life-supporting or life-sustaining device* means a device that is essential to, or that yields information that is essential to, the restoration or continuation of a bodily function important to the continuation of human life.

*Petition* means a submission seeking reclassification of a device in accordance with § 860.123.

*Special controls* mean the controls necessary to provide reasonable assurance of safety and effectiveness for a generic type of device that is class II. Special controls include performance standards, performance testing, postmarket surveillance, patient registries, development and dissemination of guidelines (including guidelines for the submission of clinical data in premarket notification submissions in accordance with section 510(k) of the Federal Food, Drug, and Cosmetic Act), recommendations, and other appropriate actions, as the Commissioner deems necessary to provide such assurance.

*Supplemental data sheet* means information compiled by a classification panel or submitted in a petition for reclassification, including:

- (1) A summary of the reasons for the recommendation (or petition);
- (2) A summary of the data upon which the recommendation (or petition) is based;
- (3) An identification of the risks to health (if any) presented by the device;
- (4) To the extent practicable in the case of a class II or class III device, a recommendation for the assignment of a priority for the application of the requirements of performance standards or premarket approval;
- (5) In the case of a class I device, a recommendation whether the device should be exempted from any of the requirements of registration, recordkeeping and reporting, or good manufacturing practice requirements of the quality system regulation;
- (6) In the case of an implant or a life-supporting or life-sustaining device for which classification in class III is not recommended, a statement of the reasons for not recommending that the device be classified in class III;
- (7) Identification of any needed restrictions on the use of the device, e.g., whether the device requires special labeling, should be banned, or should be used only upon authorization of a

practitioner licensed by law to administer or use such device; and

(8) Any known existing standards applicable to the device, device components, or device materials.

■ 4. Amend § 860.5 by adding paragraph (g) to read as follows:

**§ 860.5 Confidentiality and use of data and information submitted in connection with classification and reclassification.**

\* \* \* \* \*

(g) Confidentiality of data and information in a De Novo file is as follows:

(1) A “De Novo file” includes all data and information from the requester submitted with or incorporated by reference in the De Novo request, any De Novo supplement, or any other related submission relevant to the administrative file, as defined in § 10.3(a) of this chapter. Any record in the De Novo file will be available for public disclosure in accordance with the provisions of this section and part 20 of this chapter.

(2) The existence of a De Novo request may not be disclosed by FDA before an order granting the De Novo request is issued unless it previously has been publicly disclosed or acknowledged by the De Novo requester.

(3) Before an order granting the De Novo request is issued, data or information contained in the De Novo request is not available for public disclosure, except to the extent the existence of the De Novo request is disclosable under paragraph (2) of this section and such data or information has been publicly disclosed or acknowledged by the De Novo requester.

(4) After FDA issues an order granting a De Novo request, the data and information in the De Novo request that are not exempt from release under § 20.61 of this chapter are immediately available for public disclosure.

■ 5. Add subpart D, consisting of §§ 860.201 through 860.289, to read as follows:

**Subpart D—De Novo Classification**

Sec.	
860.201	Purpose and applicability.
860.223	De Novo request format.
860.234	De Novo request content.
860.245	Accepting a De Novo request.
860.256	Procedures for review of a De Novo request.
860.267	Withdrawal of a De Novo request.
860.289	Granting or declining a De Novo request.

**Subpart D—De Novo Classification**

**§ 860.201 Purpose and applicability.**

(a) The purpose of this part is to establish an efficient, transparent, and

thorough process to facilitate De Novo classification into class I or class II for devices for which there is no legally marketed device on which to base a review of substantial equivalence and which meet the definition of class I or class II as described in section 513(a)(1) of the Federal Food, Drug, and Cosmetic Act and § 860.3.

(b) De Novo requests can be submitted for a single device type:

(1) After receiving a not substantially equivalent determination in response to a premarket notification [510(k)], or

(2) If a person determines there is no legally marketed device upon which to base a determination of substantial equivalence.

**§ 860.223 De Novo request format.**

(a) Each De Novo request or information related to a De Novo request pursuant to this part must be formatted in accordance with this section. Each De Novo request must:

(1)(i) For devices regulated by the Center for Devices and Radiological Health, be sent to the current mailing address displayed on the website <https://www.fda.gov/cdrhsubmissionaddress>.

(ii) For devices regulated by the Center for Biologics Evaluation and Research, be sent to the current mailing address displayed on the website <https://www.fda.gov/BiologicsBloodVaccines/default.htm>.

(2) Be signed by the requester or an authorized representative.

(3) Be designated “De Novo Request” in the cover letter.

(4) Have all content used to support the request written in, or translated into, English.

**§ 860.234 De Novo request content.**

(a) Unless the requester justifies an omission in accordance with paragraph (c) of this section, a De Novo request must include:

(1) *Table of contents.* A table of contents that specifies the volume and page number for each item.

(2) *Administrative information.* The name, address, phone, fax, and email address of the requester and U.S. representative, if applicable. The establishment registration number, if applicable, of the owner or operator submitting the De Novo request.

(3) *Regulatory history.* Identify any prior submissions to FDA for the device, including, but not limited to, any premarket notifications (510(k)s) submitted under part 807 of this chapter, applications for premarket approval (PMAs) submitted under part 814 of this chapter, applications for humanitarian use exemption (HDE)

submitted under part 814 of this chapter, applications for investigational device exemption (IDEs) submitted under part 812 of this chapter, requests for designation (RFD) under § 3.7 of this chapter, applications for emergency use authorization (EUA) under section 564 of the Federal Food, Drug, and Cosmetic Act, pre-submissions, or previously submitted De Novo requests, or state that there have been no prior submissions.

(4) *Device name.* The generic name of the device as well as any proprietary name or trade name.

(5) *Indications for use.* A general description of the disease or condition the device is intended to diagnose, treat, prevent, cure or mitigate, or affect the structure or function of the body, including a description of the patient population for which the device is intended. The indications for use include all the labeled patient uses of the device, including if it is prescription or over-the-counter.

(6) *Device description.* A complete description of:

(i) The device, including, where applicable, pictorial representations, device specifications, and engineering drawings;

(ii) Each of the functional components or ingredients of the device, if the device consists of more than one physical component or ingredient;

(iii) The properties of the device relevant to the diagnosis, treatment, prevention, cure, or mitigation of a disease or condition and/or the effect of the device on the structure or function of the body;

(iv) The principles of operation of the device; and

(v) The relevant FDA assigned reference number(s) for any medical devices (such as accessories or components) that are intended to be used with the device and that are already legally marketed.

(7) *Alternative practices and procedures.* A description of known or reasonably known existing alternative practices or procedures used in diagnosing, treating, preventing, curing, or mitigating the disease or condition for which the device is intended or which similarly affect the structure or function of the body.

(8) *Classification summary.* (i) For devices not the subject of a previous submission under section 510(k) of the Federal Food, Drug, and Cosmetic Act, a complete description of:

(A) The searches used to establish that no legally marketed device of the same type exists.

(B) A list of classification regulations, PMAs, humanitarian use devices

(HUDs), HDEs, premarket notifications (510(k)s), EUAs, and/or product codes regarding devices that are potentially similar to the subject device.

(C) A rationale explaining how the device that is the subject of the De Novo request is different from the devices covered by the classification regulations, PMAs, HUDs, HDEs, 510(k)s, EUAs, and/or product codes identified in paragraph (a)(8)(i)(B) of this section.

(ii) For devices which were the subject of a previous submission under section 510(k) of the Federal Food, Drug, and Cosmetic Act that were determined not substantially equivalent (NSE), the relevant 510(k) number, along with a summary of the search performed to confirm the device has not been classified or reclassified since the date the NSE order was issued by FDA pursuant to § 807.100(a) of this chapter.

(9) *Classification recommendation.* The recommended class (I or II) must be identified and must be supported by a description of why general controls, or general and special controls, are adequate to provide reasonable assurance of safety and effectiveness.

(10) *Proposed special controls.* If the classification recommendation from paragraph (a)(9) of this section is class II, then the summary must include an initial draft proposal for applicable special controls and a description of how those special controls provide reasonable assurance of safety and effectiveness.

(11) *Summary of risks and mitigations.* A summary of known or reasonably known probable risks to health associated with use of the device and the proposed mitigations, including general controls and, if the classification recommendation from paragraph (a)(9) of this section is class II, special controls for each risk. For each mitigation measure that involves specific performance testing or labeling, the De Novo request must provide a reference to the associated section or pages for the supporting information in the De Novo request.

(12) *Standards.* Reference to any published voluntary consensus standards that are relevant to any aspect of the safety or effectiveness of the device and that are known or should reasonably be known to the requester. Such standards include voluntary consensus standards whether recognized or not yet recognized under section 514(c) of the Federal Food, Drug, and Cosmetic Act. Provide adequate information to demonstrate how the device meets, or justify any deviation from, the referenced standard.

(13) *Summary of studies.* An abstract of any information or report described in the De Novo request under paragraph (a)(16)(ii) of this section and a summary of the results of technical data submitted under paragraph (a)(15) of this section. Each such study summary must include a description of the objective of the study, a description of the experimental design of the study, a brief description of how the data were collected and analyzed, and a brief description of the results, whether positive, negative, or inconclusive. This section must also include the following:

(i) A summary of each nonclinical laboratory study submitted in the De Novo request;

(ii) A summary of each clinical investigation involving human subjects submitted in the De Novo request, including a discussion of investigation design, subject selection and exclusion criteria, investigation population, investigation period, safety and effectiveness data, adverse reactions and complications, subject discontinuation, subject complaints, device failures (including unexpected software events, if applicable) and replacements, results of statistical analyses of the clinical investigations, contraindications and precautions for use of the device, and other information from the clinical investigations as appropriate. Any investigation conducted under an investigational device exemption (IDE) under part 812 of this chapter must be identified as such.

(14) *Benefit and risk considerations.* A discussion demonstrating that:

(i) The data and information in the De Novo request constitute valid scientific evidence within the meaning of § 860.7(c) and

(ii) Pursuant to § 860.7, when subject to general controls, or general and special controls, the probable benefit to health from use of the device outweighs any probable injury or illness from such use.

(15) *Technical sections.* The following technical sections, which must contain data and information in sufficient detail to permit FDA to determine whether to grant or decline the De Novo request:

(i) A section containing the results of the nonclinical laboratory studies of the device, including microbiological, toxicological, immunological, biocompatibility, stress, wear, shelf life, electrical safety, electromagnetic compatibility, and other laboratory or animal tests, as appropriate. Information on nonclinical laboratory studies must include a statement that each such study was conducted in compliance with part 58 of this chapter, or, if the study was not conducted in compliance

with such regulations, a brief statement of the reason for the noncompliance.

(ii) For all devices that incorporate software, a section containing all relevant software information and testing, including, but not limited to, appropriate device hazard analysis, hardware, and system information.

(iii) A section containing results of each clinical investigation of the device involving human subjects, including clinical protocols, number of investigators and subjects per investigator, investigation design, subject selection and exclusion criteria, investigation population, investigation period, safety and effectiveness data, adverse reactions and complications, subject discontinuation, subject complaints, device failures (including unexpected software events if applicable) and replacements, tabulations of data from all individual subject report forms and copies of such forms for each subject who died during a clinical investigation or who did not complete the investigation, results of statistical analyses of the results of the clinical investigations, contraindications, warnings, precautions, and other limiting statements relevant to the use of the device type, and any other appropriate information from the clinical investigations. Any investigation conducted under an IDE under part 812 of this chapter must be identified as such. Information on clinical investigations involving human subjects must include the following:

(A) For clinical investigations conducted in the United States, a statement with respect to each investigation that it either was conducted in compliance with the institutional review board regulations in part 56 of this chapter, or was not subject to the regulations under § 56.104 or § 56.105 of this chapter, and that it was conducted in compliance with the informed consent regulations in part 50 of this chapter; or if the investigation was not conducted in compliance with those regulations, a brief statement of the reason for the noncompliance. Failure or inability to comply with these requirements does not justify failure to provide information on a relevant clinical investigation.

(B) For clinical investigations conducted in the United States, a statement that each investigation was conducted in compliance with part 812 of this chapter concerning sponsors of clinical investigations and clinical investigators, or if the investigation was not conducted in compliance with those regulations, a brief statement of the reason for the noncompliance. Failure

or inability to comply with these requirements does not justify failure to provide information on a relevant clinical investigation.

(C) For clinical investigations conducted outside the United States that are intended to support the De Novo request, the requirements under § 812.28 of this chapter apply. If any such investigation was not conducted in accordance with good clinical practice (GCP) as described in § 812.28(a) of this chapter, include either a waiver request in accordance with § 812.28(c) of this chapter or a brief statement of the reason for not conducting the investigation in accordance with GCP and a description of steps taken to ensure that the data and results are credible and accurate and that the rights, safety, and well-being of subjects have been adequately protected. Failure or inability to comply with these requirements does not justify failure to provide information on a relevant clinical investigation.

(D) A statement that each investigation has been completed per the protocol or a summary of any protocol deviations.

(E) A financial certification or disclosure statement or both as required by part 54 of this chapter.

(F) For a De Novo request that relies primarily on data from a single investigator at one investigation site, a justification showing that these data and other information are sufficient to reasonably demonstrate the safety and effectiveness of the device when subject to general controls or general and special controls, and to ensure that the results from a site are applicable to the intended population.

(G) A discussion of how the investigation data represent clinically significant results, pursuant to § 860.7(e).

(16) *Other information.* (i) A bibliography of all published reports not submitted under paragraph (a)(15) of this section, whether adverse or supportive, known to or that should reasonably be known to the requester and that concern the safety or effectiveness of the device.

(ii) An identification, discussion, and analysis of any other data, information, or report relevant to an evaluation of the safety and effectiveness of the device known to or that should reasonably be known to the requester from any source, foreign or domestic, including information derived from investigations other than those in the request and from commercial marketing experience.

(iii) Copies of such published reports or unpublished information in the

possession of or reasonably obtainable by the requester, if requested by FDA.

(17) *Samples.* If requested by FDA, one or more samples of the device and its components. If it is impractical to submit a requested sample of the device, the requester must name the location at which FDA may examine and test one or more of the devices.

(18) *Labeling and advertisements.* Labels, labeling, and advertisements sufficient to describe the device, its intended use, and the directions for its use. Where applicable, photographs or engineering drawings must be supplied.

(19) *Other information.* Such other information as is necessary to determine whether general controls or general and special controls provide reasonable assurance of safety and effectiveness of the device.

(b) Pertinent information in FDA files specifically referred to by a requester may be incorporated into a De Novo request by reference. Information submitted to FDA by a person other than the requester will not be considered part of a De Novo request unless such reference is authorized in writing by the person who submitted the information.

(c) If the requester believes that certain information required under paragraph (a) of this section to be in a De Novo request is not applicable to the device that is the subject of the De Novo request, and omits any such information from the De Novo request, the requester must submit a statement that specifies the omitted information and justifies the omission. The statement must be submitted as a separate section in the De Novo request and listed in the table of contents. If the justification for the omission is not accepted by FDA, FDA will so notify the requester.

(d) The requester must update its pending De Novo request with new safety and effectiveness information learned about the device from ongoing or completed studies and investigations that may reasonably affect an evaluation of the safety or effectiveness of the device as such information becomes available.

#### **§ 860.245 Accepting a De Novo request.**

(a) The acceptance of a De Novo request means that FDA has made a threshold determination that the De Novo request contains the information necessary to permit a substantive review. Within 15 days after a De Novo request is received by FDA, FDA will notify the requester whether the De Novo request has been accepted.

(b) If FDA does not find that any of the reasons in paragraph (c)(1) of this section for refusing to accept the De

Novo request apply or FDA fails to complete the acceptance review within 15 days, FDA will accept the De Novo request for review and will notify the requester. The notice will include the De Novo request reference number and the date FDA accepted the De Novo request. The date of acceptance is the date that an accepted De Novo request was received by FDA.

(c)(1) FDA may refuse to accept a De Novo request if any of the following applies:

(i) The requester has an open or pending premarket submission or reclassification petition for the device;

(ii) The De Novo request is incomplete because it does not on its face contain all the information required under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act or does not contain each of the items required under this part, or a justification for omission of any item;

(iii) The De Novo request is not formatted as required under § 860.223;

(iv) The De Novo request is for multiple devices and those devices are of more than one type; or

(v) The requester has not responded to, or has failed to provide a rationale for not responding to, deficiencies identified by FDA in previous submissions for the same device, including those submissions described in § 860.234(a)(3).

(2) If FDA refuses to accept a De Novo request, FDA will notify the requester of the reasons for the refusal. The notice will identify the deficiencies in the De Novo request that prevent accepting and will include the De Novo request reference number.

(3) If FDA refuses to accept a De Novo request, the requester may submit the additional information necessary to comply with the requirements of section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act and this part. The additional information must include the De Novo request reference number of the original submission. If the De Novo request is subsequently accepted, the date of acceptance is the date FDA receives the additional information.

#### **§ 860.256 Procedures for review of a De Novo request.**

(a) FDA will begin substantive review of a De Novo request after the De Novo request is accepted under § 860.245. Within 120 days after receipt of a De Novo request or receipt of additional information that results in the De Novo request being accepted under § 860.245, FDA will review the De Novo request and send the requester an order granting the De Novo request under § 860.289(a)

or an order declining the De Novo request under 860.289(b).

(b) A requester may supplement or amend a pending De Novo request to revise existing information or provide additional information.

(1) FDA may require additional information regarding the device that is necessary for FDA to complete the review of the De Novo request.

(2) Additional information submitted to FDA must include the reference number assigned to the original De Novo request and, if submitted on the requester's own initiative, the reason for submitting the additional information.

(c) Prior to granting or declining a De Novo request, FDA may inspect relevant facilities to help determine:

(1) That clinical or nonclinical data were collected in a manner that ensures that the data accurately represents the benefits and risks of the device; or

(2) That implementation of Quality System Regulation (part 820 of this chapter) requirements, in addition to other general controls and any specified special controls, provide adequate assurance that critical and/or novel manufacturing processes produce devices that meet specifications necessary to ensure reasonable assurance of safety and effectiveness.

#### **§ 860.267 Withdrawal of a De Novo request.**

(a) FDA will consider a De Novo request to have been withdrawn if:

(1) The requester fails to provide a complete response to a request for additional information pursuant to § 860.256(b)(1) within 180 days after the date FDA issues such request;

(2) The requester fails to provide a complete response to the deficiencies identified by FDA pursuant to § 860.245(c)(2) within 180 days of the date notification was issued by FDA;

(3) The requester does not permit an authorized FDA employee an opportunity to inspect the facilities, pursuant to § 860.256(c), at a reasonable time and in a reasonable manner, and to have access to copy and verify all records pertinent to the De Novo request; or

(4) The requester submits a written notice to FDA that the De Novo request has been withdrawn.

(b) If FDA considers a De Novo request to be withdrawn, the Agency will notify the requester. The notice will include the De Novo request reference number and the date FDA considered the De Novo request withdrawn.

#### **§ 860.289 Granting or declining a De Novo request.**

(a)(1) FDA will issue to the requester an order granting a De Novo request if

none of the reasons in paragraph (b) of this section for declining the De Novo request applies.

(2) If FDA grants a De Novo request, FDA will subsequently publish in the **Federal Register** a notice of the classification order, including any special controls.

(b) FDA may issue written notice to the requester declining a De Novo request if the requester fails to follow the requirements of this part or if, upon the basis of the information submitted in the De Novo request or any other information before FDA, FDA determines:

(1) The device does not meet the criteria under section 513(a)(1) of the Federal Food, Drug, and Cosmetic Act and § 860.3 for classification into class I or II;

(2) The De Novo request contains a false statement of material fact or there is a material omission;

(3) The device's labeling does not comply with the requirements in parts 801 and 809 of this chapter, as applicable;

(4) The product described in the De Novo request does not meet the definition of a device under section 201(h) of the Federal Food, Drug, and Cosmetic Act and is not a combination product as defined at § 3.2(e) of this chapter;

(5) The device is of a type which has already been approved in existing applications for premarket approval (PMAs) submitted under part 814 of this chapter;

(6) The device is of a type that has already been classified into class I, class II, or class III;

(7) An inspection of a relevant facility under § 860.256(c) results in a determination that general or general and special controls would not provide reasonable assurance of safety and effectiveness;

(8) A nonclinical laboratory study that is described in the De Novo request, and that is essential to show there is reasonable assurance of safety was not conducted in compliance with the good laboratory practice regulations in part 58 of this chapter and no reason for the noncompliance is provided or, if a reason is provided, the practices used in conducting the study do not support the validity of the study;

(9) A clinical investigation described in the De Novo request involving human subjects that is subject to the institutional review board regulations in part 56 of this chapter, informed consent regulations in part 50 of this chapter, or GCP described in 812.28(a) of this chapter, was not conducted in compliance with those regulations such

that the rights or safety of human subjects were not adequately protected or the supporting data were determined to be otherwise unreliable;

(10) A clinical or nonclinical study necessary to demonstrate that general controls or general and special controls provide reasonable assurance of safety and effectiveness:

(i) Has not been completed per the study protocol, or

(ii) Deficiencies related to the investigation and identified in any request for additional information under § 860.256(b)(1) have not been adequately addressed; or

(11) After a De Novo request is accepted for review under § 860.245(b), the requester makes significant unsolicited changes to the device's:

(i) Indications for use; or

(ii) Technological characteristics.

(c) An order declining a De Novo request will inform the requester of the deficiencies in the De Novo request, including each applicable ground for declining the De Novo request.

(d) FDA will use the criteria specified in § 860.7 to determine the safety and effectiveness of a device in deciding whether to grant or decline a De Novo request. FDA may use information other than that submitted by the requester in making such determination.

■ 6. In part 860, remove all references to "the act" and add in their place "the Federal Food, Drug, and Cosmetic Act".

Dated: November 27, 2018.

**Scott Gottlieb,**

*Commissioner of Food and Drugs.*

[FR Doc. 2018-26378 Filed 12-4-18; 8:45 am]

**BILLING CODE 4164-01-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 300**

**[EPA-HQ-SFUND-1987-0002; FRL-9987-15-Region 5]**

### **National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Deletion of the Tomah Armory Landfill Superfund Site**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; notification of intent.

**SUMMARY:** The Environmental Protection Agency (EPA) Region 5 is issuing a Notice of Intent to Delete the Tomah Armory Landfill Superfund Site (Tomah Armory Site), located in Tomah, Wisconsin, from the National Priorities