

## REPORT ON HUMANITARIAN DEVICE EXEMPTIONS

Pub. L. 101-629, §14(c), Nov. 28, 1990, 104 Stat. 4525, directed Secretary of Health and Human Services, within 4 years after issuance of regulations under 21 U.S.C. 360j(m)(6), to report to Congress on types of devices exempted, an evaluation of effects of such section, and a recommendation on extension of the section.

## REFERENCES IN OTHER LAWS TO GS-16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, §101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.

**§ 360k. State and local requirements respecting devices****(a) General rule**

Except as provided in subsection (b), no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

- (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
- (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

**(b) Exempt requirements**

Upon application of a State or a political subdivision thereof, the Secretary may, by regulation promulgated after notice and opportunity for an oral hearing, exempt from subsection (a), under such conditions as may be prescribed in such regulation, a requirement of such State or political subdivision applicable to a device intended for human use if—

- (1) the requirement is more stringent than a requirement under this chapter which would be applicable to the device if an exemption were not in effect under this subsection; or
- (2) the requirement—
  - (A) is required by compelling local conditions, and
  - (B) compliance with the requirement would not cause the device to be in violation of any applicable requirement under this chapter.

(June 25, 1938, ch. 675, §521, as added Pub. L. 94-295, §2, May 28, 1976, 90 Stat. 574.)

**§ 360I. Postmarket surveillance****(a) Postmarket surveillance****(1) In general****(A) Conduct**

The Secretary may by order, at the time of approval or clearance of a device or at any time thereafter, require a manufacturer to conduct postmarket surveillance for any device of the manufacturer that is a class II or class III device—

- (i) the failure of which would be reasonably likely to have serious adverse health consequences;
- (ii) that is expected to have significant use in pediatric populations; or

(iii) that is intended to be—

- (I) implanted in the human body for more than 1 year; or
- (II) a life-sustaining or life-supporting device used outside a device user facility.

**(B) Condition**

The Secretary may order a postmarket surveillance under subparagraph (A) as a condition to approval or clearance of a device described in subparagraph (A)(ii).

**(2) Rule of construction**

The provisions of paragraph (1) shall have no effect on authorities otherwise provided under the<sup>1</sup> chapter or regulations issued under this chapter.

**(b) Surveillance approval****(1) In general**

Each manufacturer required to conduct a surveillance of a device shall, within 30 days of receiving an order from the Secretary prescribing that the manufacturer is required under this section to conduct such surveillance, submit, for the approval of the Secretary, a plan for the required surveillance. The Secretary, within 60 days of the receipt of such plan, shall determine if the person designated to conduct the surveillance has appropriate qualifications and experience to undertake such surveillance and if the plan will result in the collection of useful data that can reveal unforeseen adverse events or other information necessary to protect the public health. The manufacturer shall commence surveillance under this section not later than 15 months after the day on which the Secretary issues an order under this section. Except as provided in paragraph (2), the Secretary, in consultation with the manufacturer, may by order require a prospective surveillance period of up to 36 months. Except as provided in paragraph (2), any determination by the Secretary that a longer period is necessary shall be made by mutual agreement between the Secretary and the manufacturer or, if no agreement can be reached, after the completion of a dispute resolution process as described in section 360bbb-1 of this title.

**(2) Longer surveillance for pediatric devices**

The Secretary may by order require a prospective surveillance period of more than 36 months with respect to a device that is expected to have significant use in pediatric populations if such period of more than 36 months is necessary in order to assess the impact of the device on growth and development, or the effects of growth, development, activity level, or other factors on the safety or efficacy of the device.

**(c) Dispute resolution**

A manufacturer may request review under section 360bbb-1 of this title of any order or condition requiring postmarket surveillance under this section. During the pendency of such review, the device subject to such a postmarket

<sup>1</sup> So in original. Probably should be “this”.

surveillance order or condition shall not, because of noncompliance with such order or condition, be deemed in violation of section 331(q)(1)(C) of this title, adulterated under section 351(f)(1) of this title, misbranded under section 352(t)(3) of this title, or in violation of, as applicable, section 360(k) of this title or section 360e of this title, unless deemed necessary to protect the public health.

(June 25, 1938, ch. 675, §522, as added Pub. L. 101-629, §10, Nov. 28, 1990, 104 Stat. 4521; amended Pub. L. 102-300, §3(b), June 16, 1992, 106 Stat. 239; Pub. L. 105-115, title II, §212, Nov. 21, 1997, 111 Stat. 2346; Pub. L. 110-85, title III, §307, Sept. 27, 2007, 121 Stat. 865; Pub. L. 112-144, title VI, §616, July 9, 2012, 126 Stat. 1062.)

#### Editorial Notes

##### AMENDMENTS

2012—Subsec. (a)(1)(A). Pub. L. 112-144, §616(1), inserted “, at the time of approval or clearance of a device or at any time thereafter,” after “by order” in introductory provisions.

Subsec. (b)(1). Pub. L. 112-144, §616(2), inserted “The manufacturer shall commence surveillance under this section not later than 15 months after the day on which the Secretary issues an order under this section.” after “the public health.”

2007—Pub. L. 110-85, §307(1), made technical amendment to section catchline.

Subsec. (a). Pub. L. 110-85, §307(2), added subsec. (a) and struck out former subsec. (a). Prior to amendment, text read as follows: “The Secretary may by order require a manufacturer to conduct postmarket surveillance for any device of the manufacturer which is a class II or class III device the failure of which would be reasonably likely to have serious adverse health consequences or which is intended to be—

“(1) implanted in the human body for more than one year, or

“(2) a life sustaining or life supporting device used outside a device user facility.”

Subsec. (b). Pub. L. 110-85, §307(3), designated existing provisions as par. (1), inserted par. heading, substituted “Except as provided in paragraph (2), the Secretary, in consultation” for “The Secretary, in consultation” and “Except as provided in paragraph (2), any determination” for “Any determination”, and added par. (2).

Subsec. (c). Pub. L. 110-85, §307(3)(D), added subsec. (c).

1997—Pub. L. 105-115 amended section generally, substituting present provisions for former provisions which related to required surveillance, discretionary surveillance, and surveillance approval.

1992—Subsec. (b). Pub. L. 102-300 substituted “(a)(1)” for “(a)”, inserted comma after “commerce”, and inserted after first sentence “Each manufacturer required to conduct a surveillance of a device under subsection (a)(2) of this section shall, within 30 days after receiving notice that the manufacturer is required to conduct such surveillance, submit, for the approval of the Secretary, a protocol for the required surveillance.”

#### Statutory Notes and Related Subsidiaries

##### EFFECTIVE DATE OF 1997 AMENDMENT

Pub. L. 105-115, title II, §212, Nov. 21, 1997, 111 Stat. 2346, provided in part that the amendment made by that section is effective 90 days after Nov. 21, 1997.

##### STUDY BY INSTITUTE OF MEDICINE OF POSTMARKET SURVEILLANCE REGARDING PEDIATRIC POPULATIONS

Pub. L. 107-250, title II, §212, Oct. 26, 2002, 116 Stat. 1614, as amended by Pub. L. 108-214, §2(d)(3)(C), Apr. 1,

2004, 118 Stat. 577, provided that the Secretary of Health and Human Services would request the Institute of Medicine to study whether the system under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) for the postmarket surveillance of medical devices provides adequate safeguards regarding the use of devices in pediatric populations, and provided that the Secretary, not later than four years after Oct. 26, 2002, would submit to Congress a report on the study and legislative and administrative recommendations.

#### § 360m. Accredited persons

##### (a) In general

###### (1) Review and classification of devices

Not later than 1 year after November 21, 1997, the Secretary shall, subject to paragraph (3), accredit persons for the purpose of reviewing reports submitted under section 360(k) of this title and making recommendations to the Secretary regarding the initial classification of devices under section 360c(f)(1) of this title.

###### (2) Requirements regarding review

###### (A) In general

In making a recommendation to the Secretary under paragraph (1), an accredited person shall notify the Secretary in writing of the reasons for the recommendation.

###### (B) Time period for review

Not later than 30 days after the date on which the Secretary is notified under subparagraph (A) by an accredited person with respect to a recommendation of an initial classification of a device, the Secretary shall make a determination with respect to the initial classification.

###### (C) Special rule

The Secretary may change the initial classification under section 360c(f)(1) of this title that is recommended under paragraph (1) by an accredited person, and in such case shall provide to such person, and the person who submitted the report under section 360(k) of this title for the device, a statement explaining in detail the reasons for the change.

##### (3) Certain devices

###### (A) In general

An accredited person may not be used to perform a review of—

(i) a class III device;

(ii) a device classified under section 360c(f)(2) of this title or designated under section 360e-3(d)<sup>1</sup> of this title;

(iii) a device that is intended to be permanently implantable, life sustaining, or life supporting, unless otherwise determined by the Secretary in accordance with subparagraph (B)(i)(II) and listed as eligible for review under subparagraph (B)(iii); or

(iv) a device that is of a type, or subset of a type, listed as not eligible for review under subparagraph (B)(iii).

###### (B) Designation for review

The Secretary shall—

(i) issue draft guidance on the factors the Secretary will use in determining whether

<sup>1</sup> See References in Text note below.