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be relisted if the agency has evidence that marketing of the drug has resumed or that the withdrawal is not for safety or effectiveness reasons. A determination that the drug is not withdrawn for safety or effectiveness reasons may be made at any time after its removal from the list, upon the agency's initiative, or upon the submission of a petition under §§ 10.25(a) and 10.30 of this chapter. If the agency determines that the drug is not withdrawn for safety or effectiveness reasons, the agency shall publish a notice of this determination in the FEDERAL REGISTER. The notice will also announce that the drug is relisted, under § 314.162(c). The notice will also serve to reinstate approval of all suspended abbreviated new drug applications that referred to the listed drug.

[57 FR 17995, Apr. 28, 1992]

### § 314.162 Removal of a drug product from the list.

(a) FDA will remove a previously approved new drug product from the list for the period stated when:

(1) The agency withdraws or suspends approval of a new drug application or an abbreviated new drug application under § 314.150(a) or § 314.151 or under the imminent hazard authority of section 505(e) of the act, for the same period as the withdrawal or suspension of the application; or

(2) The agency, in accordance with the procedures in § 314.153(b) or § 314.161, issues a final decision stating that the listed drug was withdrawn from sale for safety or effectiveness reasons, or suspended under § 314.153(b), until the agency determines that the withdrawal from the market has ceased or is not for safety or effectiveness reasons.

(b) FDA will publish in the FEDERAL REGISTER a notice announcing the removal of a drug from the list.

(c) At the end of the period specified in paragraph (a)(1) or (a)(2) of this section, FDA will relist a drug that has been removed from the list. The agency will publish in the FEDERAL REGISTER a notice announcing the relisting of the drug.

[57 FR 17996, Apr. 28, 1992]

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### § 314.170 Adulteration and misbranding of an approved drug.

All drugs, including those the Food and Drug Administration approves under section 505 of the act and this part, are subject to the adulteration and misbranding provisions in sections 501, 502, and 503 of the act. FDA is authorized to regulate approved new drugs by regulations issued through informal rulemaking under sections 501, 502, and 503 of the act.

[50 FR 7493, Feb. 22, 1985. Redesignated at 57 FR 17983, Apr. 28, 1992, and amended at 64 FR 402, Jan. 5, 1999]

### Subpart E—Hearing Procedures for New Drugs

SOURCE: 50 FR 7493, Feb. 22, 1985, unless otherwise noted. Redesignated at 57 FR 17983, Apr. 28, 1992.

### § 314.200 Notice of opportunity for hearing; notice of participation and request for hearing; grant or denial of hearing.

(a) *Notice of opportunity for hearing.* The Director of the Center for Drug Evaluation and Research, Food and Drug Administration, will give the applicant, and all other persons who manufacture or distribute identical, related, or similar drug products as defined in § 310.6 of this chapter, notice and an opportunity for a hearing on the Center's proposal to refuse to approve an application or to withdraw the approval of an application or abbreviated application under section 505(e) of the act. The notice will state the reasons for the action and the proposed grounds for the order.

(1) The notice may be general (that is, simply summarizing in a general way the information resulting in the notice) or specific (that is, either referring to specific requirements in the statute and regulations with which there is a lack of compliance, or providing a detailed description and analysis of the specific facts resulting in the notice).

(2) FDA will publish the notice in the FEDERAL REGISTER and will state that the applicant, and other persons subject to the notice under § 310.6, who wishes to participate in a hearing, has 30 days after the date of publication of

the notice to file a written notice of participation and request for hearing. The applicant, or other persons subject to the notice under §310.6, who fails to file a written notice of participation and request for hearing within 30 days, waives the opportunity for a hearing.

(3) It is the responsibility of every manufacturer and distributor of a drug product to review every notice of opportunity for a hearing published in the FEDERAL REGISTER to determine whether it covers any drug product that person manufactures or distributes. Any person may request an opinion of the applicability of a notice to a specific product that may be identical, related, or similar to a product listed in a notice by writing to the Division of Drug Labeling Compliance (HFD-310), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. A person shall request an opinion within 30 days of the date of publication of the notice to be eligible for an opportunity for a hearing under the notice. If a person requests an opinion, that person's time for filing an appearance and request for a hearing and supporting studies and analyses begins on the date the person receives the opinion from FDA.

(b) FDA will provide the notice of opportunity for a hearing to applicants and to other persons subject to the notice under §310.6, as follows:

(1) To any person who has submitted an application or abbreviated application, by delivering the notice in person or by sending it by registered or certified mail to the last address shown in the application or abbreviated application.

(2) To any person who has not submitted an application or abbreviated application but who is subject to the notice under §310.6 of this chapter, by publication of the notice in the FEDERAL REGISTER.

(c)(1) *Notice of participation and request for a hearing, and submission of studies and comments.* The applicant, or any other person subject to the notice under §310.6, who wishes to participate in a hearing, shall file with the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD

20857, (i) within 30 days after the date of the publication of the notice (or of the date of receipt of an opinion requested under paragraph (a)(3) of this section) a written notice of participation and request for a hearing and (ii) within 60 days after the date of publication of the notice, unless a different period of time is specified in the notice of opportunity for a hearing, the studies on which the person relies to justify a hearing as specified in paragraph (d) of this section. The applicant, or other person, may incorporate by reference the raw data underlying a study if the data were previously submitted to FDA as part of an application, abbreviated application, or other report.

(2) FDA will not consider data or analyses submitted after 60 days in determining whether a hearing is warranted unless they are derived from well-controlled studies begun before the date of the notice of opportunity for hearing and the results of the studies were not available within 60 days after the date of publication of the notice. Nevertheless, FDA may consider other studies on the basis of a showing by the person requesting a hearing of inadvertent omission and hardship. The person requesting a hearing shall list in the request for hearing all studies in progress, the results of which the person intends later to submit in support of the request for a hearing. The person shall submit under paragraph (c)(1)(ii) of this section a copy of the complete protocol, a list of the participating investigators, and a brief status report of the studies.

(3) Any other interested person who is not subject to the notice of opportunity for a hearing may also submit comments on the proposal to withdraw approval of the application or abbreviated application. The comments are requested to be submitted within the time and under the conditions specified in this section.

(d) The person requesting a hearing is required to submit under paragraph (c)(1)(ii) of this section the studies (including all protocols and underlying raw data) on which the person relies to justify a hearing with respect to the drug product. Except, a person who requests a hearing on the refusal to approve an application is not required to

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submit additional studies and analyses if the studies upon which the person relies have been submitted in the application and in the format and containing the summaries required under § 314.50.

(1) If the grounds for FDA's proposed action concern the effectiveness of the drug, each request for hearing is required to be supported only by adequate and well-controlled clinical studies meeting all of the precise requirements of § 314.126 and, for combination drug products, § 300.50, or by other studies not meeting those requirements for which a waiver has been previously granted by FDA under § 314.126. Each person requesting a hearing shall submit all adequate and well-controlled clinical studies on the drug product, including any unfavorable analyses, views, or judgments with respect to the studies. No other data, information, or studies may be submitted.

(2) The submission is required to include a factual analysis of all the studies submitted. If the grounds for FDA's proposed action concern the effectiveness of the drug, the analysis is required to specify how each study accords, on a point-by-point basis, with each criterion required for an adequate well-controlled clinical investigation established under § 314.126 and, if the product is a combination drug product, with each of the requirements for a combination drug established in § 300.50, or the study is required to be accompanied by an appropriate waiver previously granted by FDA. If a study concerns a drug or dosage form or condition of use or mode of administration other than the one in question, that fact is required to be clearly stated. Any study conducted on the final marketed form of the drug product is required to be clearly identified.

(3) Each person requesting a hearing shall submit an analysis of the data upon which the person relies, except that the required information relating either to safety or to effectiveness may be omitted if the notice of opportunity for hearing does not raise any issue with respect to that aspect of the drug; information on compliance with § 300.50 may be omitted if the drug product is not a combination drug product. A financial certification or disclosure

statement or both as required by part 54 of this chapter must accompany all clinical data submitted. FDA can most efficiently consider submissions made in the following format.

- I. Safety data.
  - A. Animal safety data.
    1. Individual active components.
      - a. Controlled studies.
      - b. Partially controlled or uncontrolled studies.
    2. Combinations of the individual active components.
      - a. Controlled studies.
      - b. Partially controlled or uncontrolled studies.
  - B. Human safety data.
    1. Individual active components.
      - a. Controlled studies.
      - b. Partially controlled or uncontrolled studies.
    2. Documented case reports.
    3. Pertinent marketing experiences that may influence a determination about the safety of each individual active component.
      1. Combinations of the individual active components.
        - a. Controlled studies.
        - b. Partially controlled or uncontrolled studies.
      2. Documented case reports.
      3. Pertinent marketing experiences that may influence a determination about the safety of each individual active component.
- II. Effectiveness data.
  - A. Individual active components: Controlled studies, with an analysis showing clearly how each study satisfies, on a point-by-point basis, each of the criteria required by § 314.126.
  - B. Combinations of individual active components.
    1. Controlled studies with an analysis showing clearly how each study satisfies on a point-by-point basis, each of the criteria required by § 314.126.
    2. An analysis showing clearly how each requirement of § 300.50 has been satisfied.
- III. A summary of the data and views setting forth the medical rationale and purpose for the drug and its ingredients and the scientific basis for the conclusion that the drug and its ingredients have been proven safe and/or effective for the intended use. If there is an absence of controlled studies in the material submitted or the requirements of any element of § 300.50 or § 314.126 have not been fully met, that fact is required to be stated clearly and a waiver obtained under § 314.126 is required to be submitted.
- IV. A statement signed by the person responsible for such submission that it includes in full (or incorporates by reference as permitted in § 314.200(c)(2)) all studies and information specified in § 314.200(d).

(WARNING: A willfully false statement is a criminal offense, 18 U.S.C. 1001.)

(e) *Contentions that a drug product is not subject to the new drug requirements.* A notice of opportunity for a hearing encompasses all issues relating to the legal status of each drug product subject to it, including identical, related, and similar drug products as defined in §310.6. A notice of appearance and request for a hearing under paragraph (c)(1)(i) of this section is required to contain any contention that the product is not a new drug because it is generally recognized as safe and effective within the meaning of section 201(p) of the act, or because it is exempt from part or all of the new drug provisions of the act under the exemption for products marketed before June 25, 1938, contained in section 201(p) of the act or under section 107(c) of the Drug Amendments of 1962, or for any other reason. Each contention is required to be supported by a submission under paragraph (c)(1)(ii) of this section and the Commissioner of Food and Drugs will make an administrative determination on each contention. The failure of any person subject to a notice of opportunity for a hearing, including any person who manufactures or distributes an identical, related, or similar drug product as defined in §310.6, to submit a notice of participation and request for hearing or to raise all such contentions constitutes a waiver of any contentions not raised.

(1) A contention that a drug product is generally recognized as safe and effective within the meaning of section 201(p) of the act is required to be supported by submission of the same quantity and quality of scientific evidence that is required to obtain approval of an application for the product, unless FDA has waived a requirement for effectiveness (under §314.126) or safety, or both. The submission should be in the format and with the analyses required under paragraph (d) of this section. A person who fails to submit the required scientific evidence required under paragraph (d) waives the contention. General recognition of safety and effectiveness shall ordinarily be based upon published studies which may be corroborated by unpublished studies and other data and information.

(2) A contention that a drug product is exempt from part or all of the new drug provisions of the act under the exemption for products marketed before June 25, 1938, contained in section 201(p) of the act, or under section 107(c) of the Drug Amendments of 1962, is required to be supported by evidence of past and present quantitative formulas, labeling, and evidence of marketing. A person who makes such a contention should submit the formulas, labeling, and evidence of marketing in the following format.

I. Formulation.

A. A copy of each pertinent document or record to establish the exact quantitative formulation of the drug (both active and inactive ingredients) on the date of initial marketing of the drug.

B. A statement whether such formulation has at any subsequent time been changed in any manner. If any such change has been made, the exact date, nature, and rationale for each change in formulation, including any deletion or change in the concentration of any active ingredient and/or inactive ingredient, should be stated, together with a copy of each pertinent document or record to establish the date and nature of each such change, including, but not limited to, the formula which resulted from each such change. If no such change has been made, a copy of representative documents or records showing the formula at representative points in time should be submitted to support the statement.

II. Labeling.

A. A copy of each pertinent document or record to establish the identity of each item of written, printed, or graphic matter used as labeling on the date the drug was initially marketed.

B. A statement whether such labeling has at any subsequent time been discontinued or changed in any manner. If such discontinuance or change has been made, the exact date, nature, and rationale for each discontinuance or change and a copy of each pertinent document or record to establish each such discontinuance or change should be submitted, including, but not limited to, the labeling which resulted from each such discontinuance or change. If no such discontinuance or change has been made, a copy of representative documents or records showing labeling at representative points in time should be submitted to support the statement.

III. Marketing.

A. A copy of each pertinent document or record to establish the exact date the drug was initially marketed.

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B. A statement whether such marketing has at any subsequent time been discontinued. If such marketing has been discontinued, the exact date of each such discontinuance should be submitted, together with a copy of each pertinent document or record to establish each such date.

### IV. Verification.

A statement signed by the person responsible for such submission, that all appropriate records have been searched and to the best of that person's knowledge and belief it includes a true and accurate presentation of the facts.

(WARNING: A willfully false statement is a criminal offense, 18 U.S.C. 1001.)

(3) The Food and Drug Administration will not find a drug product, including any active ingredient, which is identical, related, or similar, as described in §310.6, to a drug product, including any active ingredient for which an application is or at any time has been effective or deemed approved, or approved under section 505 of the act, to be exempt from part or all of the new drug provisions of the act.

(4) A contention that a drug product is not a new drug for any other reason is required to be supported by submission of the factual records, data, and information that are necessary and appropriate to support the contention.

(5) It is the responsibility of every person who manufactures or distributes a drug product in reliance upon a "grandfather" provision of the act to maintain files that contain the data and information necessary fully to document and support that status.

(f) *Separation of functions.* Separation of functions commences upon receipt of a request for hearing. The Director of the Center for Drug Evaluation and Research, Food and Drug Administration, will prepare an analysis of the request and a proposed order ruling on the matter. The analysis and proposed order, the request for hearing, and any proposed order denying a hearing and response under paragraph (g) (2) or (3) of this section will be submitted to the Office of the Commissioner of Food and Drugs for review and decision. When the Center for Drug Evaluation and Research recommends denial of a hearing on all issues on which a hearing is requested, no representative of the Center will participate or advise in the review and decision by the Commis-

sioner. When the Center for Drug Evaluation and Research recommends that a hearing be granted on one or more issues on which a hearing is requested, separation of functions terminates as to those issues, and representatives of the Center may participate or advise in the review and decision by the Commissioner on those issues. The Commissioner may modify the text of the issues, but may not deny a hearing on those issues. Separation of functions continues with respect to issues on which the Center for Drug Evaluation and Research has recommended denial of a hearing. The Commissioner will neither evaluate nor rule on the Center's recommendation on such issues and such issues will not be included in the notice of hearing. Participants in the hearing may make a motion to the presiding officer for the inclusion of any such issue in the hearing. The ruling on such a motion is subject to review in accordance with §12.35(b). Failure to so move constitutes a waiver of the right to a hearing on such an issue. Separation of functions on all issues resumes upon issuance of a notice of hearing. The Office of the General Counsel, Department of Health and Human Services, will observe the same separation of functions.

(g) *Summary judgment.* A person who requests a hearing may not rely upon allegations or denials but is required to set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing with respect to a particular drug product specified in the request for hearing.

(1) Where a specific notice of opportunity for hearing (as defined in paragraph (a)(1) of this section) is used, the Commissioner will enter summary judgment against a person who requests a hearing, making findings and conclusions, denying a hearing, if it conclusively appears from the face of the data, information, and factual analyses in the request for the hearing that there is no genuine and substantial issue of fact which precludes the refusal to approve the application or abbreviated application or the withdrawal of approval of the application or abbreviated application; for example, no adequate and well-controlled clinical investigations meeting each of the

precise elements of §314.126 and, for a combination drug product, §300.50 of this chapter, showing effectiveness have been identified. Any order entering summary judgment is required to set forth the Commissioner's findings and conclusions in detail and is required to specify why each study submitted fails to meet the requirements of the statute and regulations or why the request for hearing does not raise a genuine and substantial issue of fact.

(2) When following a general notice of opportunity for a hearing (as defined in paragraph (a)(1) of this section) the Director of the Center for Drug Evaluation and Research concludes that summary judgment against a person requesting a hearing should be considered, the Director will serve upon the person requesting a hearing by registered mail a proposed order denying a hearing. This person has 60 days after receipt of the proposed order to respond with sufficient data, information, and analyses to demonstrate that there is a genuine and substantial issue of fact which justifies a hearing.

(3) When following a general or specific notice of opportunity for a hearing a person requesting a hearing submits data or information of a type required by the statute and regulations, and the Director of the Center for Drug Evaluation and Research concludes that summary judgment against the person should be considered, the Director will serve upon the person by registered mail a proposed order denying a hearing. The person has 60 days after receipt of the proposed order to respond with sufficient data, information, and analyses to demonstrate that there is a genuine and substantial issue of fact which justifies a hearing.

(4) If review of the data, information, and analyses submitted show that the grounds cited in the notice are not valid, for example, that substantial evidence of effectiveness exists, the Commissioner will enter summary judgment for the person requesting the hearing, and rescind the notice of opportunity for hearing.

(5) If the Commissioner grants a hearing, it will begin within 90 days after the expiration of the time for requesting the hearing unless the parties otherwise agree in the case of denial of

approval, and as soon as practicable in the case of withdrawal of approval.

(6) The Commissioner will grant a hearing if there exists a genuine and substantial issue of fact or if the Commissioner concludes that a hearing would otherwise be in the public interest.

(7) If the manufacturer or distributor of an identical, related, or similar drug product requests and is granted a hearing, the hearing may consider whether the product is in fact identical, related, or similar to the drug product named in the notice of opportunity for a hearing.

(8) A request for a hearing, and any subsequent grant or denial of a hearing, applies only to the drug products named in such documents.

(h) FDA will issue a notice withdrawing approval and declaring all products unlawful for drug products subject to a notice of opportunity for a hearing, including any identical, related, or similar drug product under §310.6, for which an opportunity for a hearing is waived or for which a hearing is denied. The Commissioner may defer or stay the action pending a ruling on any related request for a hearing or pending any related hearing or other administrative or judicial proceeding.

(Collection of information requirements approved by the Office of Management and Budget under control number 0910-0001)

[50 FR 7493, Feb. 22, 1985; 50 FR 14212, Apr. 11, 1985, as amended at 50 FR 21238, May 23, 1985; 55 FR 11580, Mar. 29, 1990; 57 FR 17996, Apr. 28, 1992; 59 FR 14364, Mar. 28, 1994; 63 FR 5252, Feb. 2, 1998]

#### § 314.201 Procedure for hearings.

Parts 10 through 16 apply to hearings relating to new drugs under section 505 (d) and (e) of the act.

#### § 314.235 Judicial review.

(a) The Commissioner of Food and Drugs will certify the transcript and record. In any case in which the Commissioner enters an order without a hearing under §314.200(g), the record certified by the Commissioner is required to include the requests for hearing together with the data and information submitted and the Commissioner's findings and conclusion.