DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 814

[Docket No. 98N–0171]

Medical Devices; Humanitarian Use of Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule amending the regulations governing humanitarian use devices (HUD's). These amendments are being made to implement provisions of the Federal Food, Drug, and Cosmetic Act (the act) as amended by the Food and Drug Administration Modernization Act of 1997 (FDAMA).

EFFECTIVE DATE: February 1, 1999.

FOR FURTHER INFORMATION CONTACT: Joanne R. Less, Center for Devices and Radiological Health (HFZ–4dd), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 26, 1996 (61 FR 33232), FDA published a final rule prescribing the procedures for submitting humanitarian device exemption (HDE) applications, amendments, and supplements; procedures for obtaining an extension of the exemption; and the criteria for FDA review and approval of HDE's. This rule amended part 814 (21 CFR part 814) of FDA's premarket approval regulations.

On November 21, 1997, the President signed FDAMA into law (Pub. L. 105–115). Section 2dd of FDAMA made the following changes to section 520(m) of the act (21 U.S.C. 360j(m)):

(1) FDAMA added a new provision to section 520(m) of the act that requires FDA to issue an order approving or denying an HDE within 75 days after receiving the application.

(2) FDAMA provided for an exemption from the requirement that a HUD may not be used without approval from an institutional review board (IRB) for cases in which a physician determines in an emergency situation that approval cannot be obtained in time to prevent serious harm or death to a patient. In such cases, the physician must notify the chairperson of the IRB after using the device. The notification must include the name of the patient, the date on which the device was used, and the reason for the use.

(3) FDAMA eliminated the requirement that the sponsor of an HDE obtain approval for continued use every 18 months. Instead, FDA may require a sponsor to demonstrate continued compliance with the requirements of section 520(m) of the act, if FDA believes that such a demonstration is necessary to protect the public health, or if FDA has reason to believe that the criteria for exemption are no longer met.

(4) FDAMA added a provision to section 520(m) of the act stating that FDA may suspend or withdraw an HDE approval only after providing notice and an opportunity for an informal hearing.

(5) FDAMA eliminated the ''sunset'' provision in section 520(m) of the act, under which new approvals of HDE's would not have been permitted 5 years after the effective date of the rule originally implementing section 520(m) of the act.

Section 2dd of FDAMA became effective on February 19, 1998. In the **Federal Register** of April 17, 1998, FDA published a direct final rule (63 FR 19185) and a companion proposed rule (63 FR 19196) on humanitarian use devices to amend the existing regulations to conform to amendments made by FDAMA to section 520(m) of the act. FDA published the direct final rule because the agency anticipated that it would receive no significant adverse comments, and because the agency believed the rule contained noncontroversial changes. FDA stated that if the agency received any significant adverse comment regarding the direct final rule, FDA would publish a document withdrawing the direct final rule within 30 days after the comment period ended and proceed to respond to all the comments under the companion proposed rule using usual notice-and-comment procedures. Any comments received under the companion proposed rule would be considered as comments regarding the direct final rule.

FDA received significant adverse comment in response to the direct final rule. Therefore, FDA withdrew the direct final rule in the **Federal Register** of July 31, 1998 (63 FR 40825), and is publishing this final rule, which responds to the comments received and modifies the proposal in response to those comments.

II. Highlights of the Final Rule

The following provisions of the proposed rule have not been changed:

Part 814 has been amended in § 814.100 to implement new section 520(m)(5) of the act, which provides that FDA may require an HDE applicant to demonstrate continued compliance with the HDE requirements, if the agency believes that such a demonstration is necessary to protect the public health or if FDA has reason to believe the criteria for exemption are no longer met. This section of the regulation has also been modified to reflect the FDAMA provision that requires FDA to provide notice and an opportunity for an informal hearing before withdrawing or suspending approval of an HDE.

Section 814.104 has been amended to repeal the sunset provision for submitting an original application as provided for in new section 520(m)(5) of the act.

In addition to the changes required by FDAMA, FDA is amending § 814.104(b)(5) to allow a sponsor who is charging more than $250 per HUD, to submit, in lieu of a report by an independent certified accountant (CPA), an attestation by a responsible individual of the organization, verifying that the amount charged does not exceed the device's cost of research, development, fabrication, and distribution. The submission of any report or attestation is unnecessary for HUD's for which an HDE applicant is charging $250 per HUD or less because, in most circumstances, a charge for a HUD that is $250 or less is evidence that the charge is unlikely to exceed the cost of research, development, fabrication, and distribution. This modification to the regulation will decrease the burden associated with submitting an HDE application for some devices by eliminating the time and cost associated with obtaining a report by a CPA or an attestation by a responsible individual in the organization.

Sections 814.106, 814.108, 814.112, and 814.114 have been amended or revised to comply with a new provision of section 520(m) of the act. This new provision states that FDA will issue an order approving or denying an application 75 days after receiving it. Accordingly, FDA has adjusted its extension, review, and response timeframes for applications, amendments, and supplements.

Section 814.116 has also been amended to implement this new provision of section 520(m) of the act. This amendment adjusts the applicable timeframes in cases where panel review is necessary or an applicant has received a not approvable letter.

Section 814.120 has been revised because the 18-month term and 5-year sunset provision were repealed by FDAMA. In accordance with new section 520(m)(6) of the act, § 814.120 has been revised to provide for the

temporary suspension of approval of an HDE or an HDE supplement only after the sponsor has had an opportunity for an informal hearing under 21 CFR part 16.

Section 814.124 has been amended in accordance with section 520(m)(4) of the act, to allow physicians, faced with an emergency situation, to administer a HUD prior to obtaining IRB approval if the physician determines that the wait will cause the patient serious harm or death. The amendment to this section also reflects the requirement that physicians who use a HUD in such emergencies must notify the IRB of such use and establishes a 5-day timeframe for such notification.

Section 814.126 has been amended to incorporate section 520(m)(5) of the act, which provides FDA the authority to require an HDE applicant to demonstrate continued compliance with the HDE requirements, if the agency believes that such a demonstration is necessary to protect the public health or has reason to believe that the criteria for the HDE exemption are no longer met. FDA believes that it cannot fulfill its statutory obligation to protect the public health unless it obtains certain information about these products from the HDE holder. Accordingly, FDA added a reporting requirement that will permit the agency to monitor the HDE holder's continued compliance with the statutory criteria for exemption. The information required in these reports is the same type of information that is required for premarket approval applications (PMA's), but it will also contain additional information because of the unique nature of these device approvals. If these reports or any other information in FDA's possession give the agency reason to believe that a particular device raises public health concerns or that the criteria for exemption are no longer met, FDA may require the HDE holder to submit additional information to demonstrate compliance with the HDE requirements.

III. Summary and Analysis of Comments and FDA's Responses

FDA received significant adverse comment in response to the direct final rule. A summary of the comments and FDA's responses to them are as follows:

1. One comment expressed concern regarding the emergency use of a HUD before IRB review and approval (§ 814.124(a)), without any additional provision for the protection of human subjects. The comment stated that without additional measures, there may be nothing to prevent mistreatment of vulnerable or mentally incompetent subjects. The comment urged the agency to provide protection for patients in the form of required consultation with an institutional ethicist, ombudsman, or other unbiased third party prior to use of the device without IRB approval.

FDA has not changed this provision of the rule. FDAMA specifically provided for the use of a HUD without IRB approval in emergency situations to protect the life or physical well-being of patients. Although FDA encourages the kind of consultation suggested by the comment in situations where time and circumstances permit such consultation, the agency believes imposing a requirement for such prior consultation would be contrary to the intent of this statutory provision. The agency further believes that notification of the IRB chairperson following the emergency use will provide a measure of protection for patients.

2. The same comment also asked for clarification of the statement in § 814.118(e) that FDA will not withdraw approval of an HDE solely because it is subsequently determined that the disease or condition for which the HUD is intended affects or is manifested in more than 4,000 people in the United States per year. The comment urged FDA to set a distribution limit in order to reduce the possibility that manufacturers will abuse the exemption.

FDA agrees that § 814.118(e) of the proposed rule requires clarification. As originally issued in June 1996, that section of the regulation included an additional sentence, which explained that a determination that more than 4,000 people were affected could be a basis for disapproving an extension request for an HDE. When the sentence referencing the extension was eliminated in the proposed rule to conform with FDAMA's removal of the 18-month term for HDE's, the remaining portion of the provision became unclear. Under the statute and FDA's implementing regulations, an HDE may be withdrawn if any of the criteria for the exemption are no longer met. FDA, therefore, is deleting § 814.118(e) from the final rule.

However, because humanitarian use devices are intended for patient populations with limited options, the statute gives the agency discretion in determining whether a HUD should be removed from the market. FDA does agree with the comment that withdrawal would be appropriate when the numbers of devices being sold are so large that they indicate a clear abuse of the law. The agency does not believe, however, that it would be appropriate in every instance to withdraw approval of an HDE solely because the disease or condition has been determined to affect more than 4,000 people in the United States per year. In determining if the approval for an HDE should be withdrawn, FDA will consider all of the statutory criteria as well as the needs of the affected patient population.

3. The second comment objected to the annual reporting requirement and suggested that FDA determine the appropriate reporting period at the time of product approval rather than always requiring reporting on an annual basis.

FDA has modified the rule in response to this comment. Under the June 26, 1996, final rule, an HDE holder was required to obtain approval of an extension request every 18 months in order to continue marketing the HUD. FDAMA eliminated this requirement but provided that FDA may require the holder to demonstrate continued compliance with the HDE requirements if the agency believes that such demonstration is needed to protect the public health or has reason to believe that the criteria for the exemption are no longer met.

FDA included a provision for annual reporting in the proposed rule because the agency believed that annual reporting would be the most appropriate mechanism for the agency to monitor whether there is reason to question the continued exemption of the device from the act's effectiveness requirements. Upon reconsideration, FDA has determined that the reporting frequency necessary to protect the public health may vary depending upon the device, its intended use, the affected patient population, and experience with the device after it is marketed. Therefore, § 812.126(b)(1) has been modified in the final rule to state that the frequency of the reports will be specified in the approval order for the HDE. Ordinarily, FDA does not expect to require periodic reports to be submitted more frequently than annually. FDA does believe, however, that it may be appropriate to require reports on certain HDE's less frequently and that in many cases the frequency of required reports will decrease after the device has been marketed for a period of time.

4. The same comment also objected to the ''requirement'' that an ''HDE holder maintain records in perpetuity * * *'' and suggested that a more appropriate timeframe would be 3 calendar years after the manufacturer ceases distribution of the product in question.

Section 814.126(b)(2) of the HDE regulation specifies the types of records that should be maintained by the HDE holder, but does not specify the timeframe for maintaining such records. FDA agrees that a reasonable timeframe

should be established for maintaining such records and intends to specify such timeframes as part of the approval order. Accordingly, FDA has modified the regulation to state that records shall be maintained in accordance with the approval order for the HDE.

FDA has also made some changes in the final rule to correct typographical errors and citations that were incorrect.

IV. Environmental Impact

The agency has determined under 21 CFR 25.30(h) that this 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.

V. Analysis of Impacts

FDA has examined the impact of this final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612) (as amended by subtitle D of the Small Business Regulatory Fairness Act of 1996 (Pub. L. 104–121)), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs agencies 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). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive Order. In addition, this final rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The rule codifies applicable statutory requirements imposed by FDAMA. Because the rule allows physicians more flexibility without compromising the public health and reduces the requirements imposed on sponsors, it may permit more small competitors to enter the marketplace. The agency certifies, therefore, that this final rule will not have a significant economic impact on a substantial number of small entities. This final rule also does not trigger the requirement for a written statement under section 202(a) of the Unfunded Mandates Reform Act because it does not impose a mandate that results in an expenditure of $100 million or more by State, local, or tribal governments in the aggregate, or by the private sector, in any one year.

VI. Paperwork Reduction Act of 1995

This final rule contains information collection requirements 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 the requirements is given below. The title, description, and respondent description of the information collection provisions are shown below with an estimate of the annual reporting and recordkeeping burden. Included in the estimate is the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information. The description below reflects the changes made in the final rule in response to comments, as discussed in section III of this document.

Title: Amendments to Humanitarian Use Device Requirements.

Description: Section 520(m) of the act was created as an incentive for the development of HUD'S for use in the treatment or diagnosis of diseases or conditions affecting fewer than 4,000 individuals in the United States. FDA is issuing this rule to amend the existing regulations governing HUD's, found in part 814, to conform to the amendments made by FDAMA to section 520(m) of the act.

Section 814.124(a) is amended to allow physicians in emergency situations to administer a HUD prior to obtaining IRB approval. In such situations, the physician is required to provide written notification, including the identification of the patient involved, the date of use, and the reason for use, to the IRB within 5 days after emergency use. FDA anticipates that five physicians will use HUD's in emergency situations before obtaining approval from an IRB. FDA estimates that notifications under this section will take an average of 1 hour per response.

In response to a comment, FDA is amending proposed § 814.126(b)(1) to delete the requirement of an annual report and to include instead a periodic reporting requirement that will be established by the approval order for the HDE. This change continues to permit the agency to obtain sufficient information for it to determine whether there is reason to question the continued exemption of the device from the act's effectiveness requirements. FDA estimates that, due to the nature of some of the devices, initially 15 HDE holders per year will be required to submit annual reports. As the agency and industry gain experience with HDE's, FDA believes the number of HDE holders who will be required to submit annual reports will decrease. FDA believes that much of the information will already be in the HDE holder's possession, and the agency estimates that the reports will take an average of 120 hours per response.

In addition to the changes required by FDAMA, FDA is amending § 814.104(b)(5) to allow a sponsor who is charging more than $250 per HUD to submit, in lieu of a report by an independent CPA, an attestation by a responsible individual of the organization, verifying that the amount charged does not exceed the device's cost of research, development, fabrication, and distribution. In addition, the amendments to § 814.104(b)(5) waive the requirement for submission of any CPA report or attestation for HUD's for which an HDE applicant is charging $250 or less. FDA anticipates, based on past experience, that 7 of the anticipated 15 HDE holders per year will charge less than $250 per HUD, and thus be exempt from the requirement altogether. For the remaining eight HDE holders, FDA anticipates that all will submit attestations in lieu of CPA reports, and estimates that these submissions will require 2 hours to complete.

Proposed § 814.126(b)(2) has been modified, in response to a comment, to require HDE holders to retain records for a time period specified in the approval order, rather than an unlimited time period.

Description of Respondents: Business or other for profit organization.

FDA estimates the burden for this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
814.104(b)(5)	8	1	8	2	16

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
814.124(a)	5	1	5	1	5
814.126(b)(1)	15	1	15	120	1,800
Total					1,821

[1] There are no operating and maintenance costs or capital costs associated with this information collection.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
814.126(b)(2)	15	1	15	2	30

[1] There are no operating and maintenance costs or capital costs associated with this information collection.

The information collection provisions of this final rule have been submitted to OMB for review and approved under OMB control number 0910–dd84. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

List of Subjects in 21 CFR Part 814

Administrative practice and procedure, Confidential business information, Medical devices, Medical research, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 814 is amended as follows:

PART 814—PREMARKET APPROVAL OF MEDICAL DEVICES

1. The authority citation for 21 CFR part 814 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 353, 360, 360c-360j, 371, 372, 373, 374, 375, 379, 379e, 381.

2. Section 814.100 is amended by revising paragraphs (a)(2) and (d) and by adding paragraph (e) to read as follows:

§ 814.100 Purpose and scope.

(a) * * *

(2) Marketing approval for the HUD notwithstanding the absence of reasonable assurance of effectiveness that would otherwise be required under sections 514 and 515 of the act.

* * * * *

(d) A person granted an exemption under section 520(m) of the act shall submit periodic reports as described in § 814.126(b).

(e) FDA may suspend or withdraw approval of an HDE after providing notice and an opportunity for an informal hearing.

3. Section 814.104 is amended by removing paragraph (b), by redesignating paragraphs (c) through (e) as paragraphs (b) through (d), and by revising newly redesignated paragraphs (b)(5) and (d) and the first sentence in redesignated paragraph (c) to read as follows:

§ 814.104 Original applications.

* * * * *

(b) * * *

(5) The amount to be charged for the device and, if the amount is more than $250, a report by an independent certified public accountant, made in accordance with the Statement on Standards for Attestation established by the American Institute of Certified Public Accountants, or in lieu of such a report, an attestation by a responsible individual of the organization, verifying that the amount charged does not exceed the costs of the device's research, development, fabrication, and distribution. If the amount charged is $250 or less, the requirement for a report by an independent certified public accountant or an attestation by a responsible individual of the organization is waived.

(c) *Omission of information.* If the applicant believes that certain information required under paragraph (b) of this section is not applicable to the device that is the subject of the HDE, and omits any such information from its HDE, the applicant shall submit a statement that identifies and justifies the omission. * * *

(d) *Address for submissions and correspondence.* Copies of all original HDE's, amendments and supplements, as well as any correspondence relating to an HDE, shall be sent or delivered to the Document Mail Center (HFZ–401), Office of Device Evaluation, Center for Devices and Radiological Health, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850.

4. Section 814.106 is revised to read as follows:

§ 814.106 HDE amendments and resubmitted HDE's.

An HDE or HDE supplement may be amended or resubmitted upon an applicant's own initiative, or at the request of FDA, for the same reasons and in the same manner as prescribed for PMA's in § 814.37, except that the timeframes set forth in § 814.37(c)(1) and (d) do not apply. If FDA requests an HDE applicant to submit an HDE amendment, and a written response to FDA's request is not received within 75 days of the date of the request, FDA will consider the pending HDE or HDE supplement to be withdrawn voluntarily by the applicant. Furthermore, if the HDE applicant, on its own initiative or at FDA's request, submits a major amendment as described in § 814.37(c)(1), the review period may be extended up to 75 days.

5. Section 814.108 is revised to read as follows:

§ 814.108 Supplemental applications.

After FDA approval of an original HDE, an applicant shall submit supplements in accordance with the requirements for PMA's under § 814.39, except that a request for a new indication for use of a HUD shall comply with requirements set forth in § 814.110. The timeframes for review of, and FDA action on, an HDE supplement are the same as those provided in § 814.114 for an HDE.

6. Section 814.112 is amended by revising paragraph (a) introductory text, paragraph (a)(1), and paragraph (b) to read as follows:

§ 814.112 Filing an HDE.

(a) The filing of an HDE means that FDA has made a threshold determination that the application is sufficiently complete to permit substantive review. Within 30 days from the date an HDE is received by FDA, the agency will notify the applicant whether the application has been filed. FDA may refuse to file an HDE if any of the following applies:

(1) The application is incomplete because it does not on its face contain all the information required under § 814.104(b);

* * * * *

(b) The provisions contained in § 814.42(b), (c), and (d) regarding notification of filing decisions, filing dates, the start of the 75-day review period, and applicant's options in response to FDA refuse to file decisions shall apply to HDE's.

7. Section 814.114 is revised to read as follows:

§ 814.114 Timeframes for reviewing an HDE.

Within 75 days after receipt of an HDE that is accepted for filing and to which the applicant does not submit a major amendment, FDA shall send the applicant an approval order, an approvable letter, a not approvable letter (under § 814.116), or an order denying approval (under § 814.118).

8. Section 814.116 is amended by removing the last sentence in paragraph (a) and by adding two sentences in its place, by revising the last sentence of paragraph (d), and by adding paragraph (e) to read as follows:

§ 814.116 Procedures for review of an HDE.

(a) * * * If the HDE is referred to a panel, the agency shall follow the procedures set forth under § 814.44, with the exception that FDA will complete its review of the HDE and the advisory committee report and recommendations within 75 days from receipt of an HDE that is accepted for filing under § 814.112 or the date of filing as determined under § 814.106, whichever is later. Within the later of these two timeframes, FDA will issue an approval order under paragraph (b) of this section, an approvable letter under paragraph (c) of this section, a not approvable letter under paragraph (d) of this section, or an order denying approval of the application under § 814.118(a).

* * * * *

(d) * * * The applicant may respond to the not approvable letter in the same manner as permitted for not approvable letters for PMA's under § 814.44(f), with the exception that if a major HDE amendment is submitted, the review period may be extended up to 75 days.

(e) FDA will consider an HDE to have been withdrawn voluntarily if:

(1) The applicant fails to respond in writing to a written request for an amendment within 75 days after the date FDA issues such request;

(2) The applicant fails to respond in writing to an approvable or not approvable letter within 75 days after the date FDA issues such letter; or

(3) The applicant submits a written notice to FDA that the HDE has been withdrawn.

9. Section 814.118 is amended by revising paragraph (a)(8) and removing paragraph (e) to read as follows:

§ 814.118 Denial of approval or withdrawal of approval of an HDE.

(a) * * *

(8) The applicant does not permit an authorized FDA employee an opportunity to inspect at a reasonable time and in a reasonable manner the facilities and controls, and to have access to and to copy and verify all records pertinent to the application; or

* * * * *

10. Section 814.120 is revised to read as follows:

§ 814.120 Temporary suspension of approval of an HDE.

An HDE or HDE supplement may be temporarily suspended for the same reasons and in the same manner as prescribed for PMA's in § 814.47.

11. Section 814.124 is amended by adding three sentences at the end of paragraph (a) to read as follows:

§ 814.124 Institutional Review Board requirements.

(a) * * * If, however, a physician in an emergency situation determines that approval from an IRB cannot be obtained in time to prevent serious harm or death to a patient, a HUD may be administered without prior approval by the IRB located at the facility or by a similarly constituted IRB that has agreed to oversee such use. In such an emergency situation, the physician shall, within 5 days after the use of the device, provide written notification to the chairman of the IRB of such use. Such written notification shall include the identification of the patient involved, the date on which the device was used, and the reason for the use.

* * * * *

12. Section 814.126 is amended by revising the first sentence in paragraph (a) and by revising paragraph (b) to read as follows:

§ 814.126 Postapproval requirements and reports.

(a) An HDE approved under this subpart H shall be subject to the postapproval requirements and reports set forth under subpart E of this part, as applicable, with the exception of § 814.82(a)(7). * * *

(b) In addition to the reports identified in paragraph (a) of this section, the holder of an approved HDE shall prepare and submit the following complete, accurate, and timely reports:

(1) *Periodic reports.* An HDE applicant is required to submit reports in accordance with the approval order. Unless FDA specifies otherwise, any periodic report shall include:

(i) An update of the information required under § 814.102(a) in a separately bound volume;

(ii) An update of the information required under § 814.104(b)(2), (b)(3), and (b)(5);

(iii) The number of devices that have been shipped or sold since initial marketing approval under this subpart H and, if the number shipped or sold exceeds 4,000, an explanation and estimate of the number of devices used per patient. If a single device is used on multiple patients, the applicant shall submit an estimate of the number of patients treated or diagnosed using the device together with an explanation of the basis for the estimate;

(iv) Information describing the applicant's clinical experience with the device since the HDE was initially approved. This information shall include safety information that is known or reasonably should be known to the applicant, medical device reports made under part 8dd of this chapter, any data generated from the postmarketing studies, and information (whether published or unpublished) that is known or reasonably expected to be known by the applicant that may affect an evaluation of the safety of the device or that may affect the statement of contraindications, warnings, precautions, and adverse reactions in the device's labeling; and

(v) A summary of any changes made to the device in accordance with supplements submitted under § 814.108. If information provided in the periodic reports, or any other information in the possession of FDA, gives the agency reason to believe that a device raises public health concerns or that the criteria for exemption are no longer met, the agency may require the HDE holder to submit additional information to demonstrate continued compliance with the HDE requirements.

(2) *Other.* An HDE holder shall maintain records of the names and

addresses of the facilities to which the HUD has been shipped, correspondence with reviewing IRB's, as well as any other information requested by a reviewing IRB or FDA. Such records shall be maintained in accordance with the HDE approval order.

Dated: October 28, 1998.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 98–29391 Filed 11–2–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 862, 864, 866, 876, 880, 882, 886, 890, and 892

[Docket No. 98–0015]

Medical Devices; Exemptions From Premarket Notification; Class II Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is codifying the exemption from premarket notification of all 62 class II (special controls) devices listed as exempt in a January 21, 1998, **Federal Register** notice, subject to the limitations on exemptions. FDA has determined that for these exempted devices, manufacturers' submissions of premarket notifications are unnecessary to provide a reasonable assurance of safety and effectiveness. These devices will remain subject to current good manufacturing practice (CGMP) regulations and other general controls. This rulemaking implements new authorities delegated to FDA under the Food and Drug Administration Modernization Act (FDAMA).

EFFECTIVE DATE: November 3, 1998.

FOR FURTHER INFORMATION CONTACT: Heather S. Rosecrans, Center for Devices and Radiological Health (HFZ–404), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1190.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 21, 1998 (63 FR 3142) (hereinafter referred to as the January 21, 1998, notice), FDA issued a notice stating that 62 class II (special controls) devices were exempt from the requirement of premarket notification, with limitations. This notice was issued in accordance with FDAMA (Pub. L. 105–115), which the President signed into law on November 21, 1997. Section 206 of FDAMA, in part, added a new section 510(m) to the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360(m)). Section 510(m)(1) of the act required FDA, within 60 days after enactment of FDAMA, to publish in the **Federal Register** a list of each type of class II device that does not require a report under section 510(k) of the act (generally referred to as a premarket notification or ''510(k)'') to provide reasonable assurance of safety and effectiveness. Section 510(m) of the act further provided that a 510(k) will no longer be required for these devices upon the date of publication of the list in the **Federal Register**. Interested persons were given until April 20, 1998, to comment on the notice.

Section 510(m)(2) of the act also provides that, 1 day after date of publication of the list under section 510(m)(1) FDA may exempt a device on its own initiative or upon petition of an interested person, if FDA determines that a 510(k) is not necessary to provide reasonable assurance of the safety and effectiveness of the device.

An exemption from the requirement of premarket notification does not mean that the device is exempt from any other statutory or regulatory requirements, unless such exemption is explicitly provided by order or regulation. Indeed, FDA's determination that premarket notification was unnecessary to provide a reasonable assurance of safety and effectiveness for devices listed in this document was based, in part, on the assurance of safety and effectiveness that other regulatory controls, such as current good manufacturing practice requirements, provide. Persons with pending 510(k) submissions for devices that are now exempt from premarket notification, subject to the limitations on exemptions, should withdraw their submissions.

FDA is codifying the exemption from premarket notification of all 62 class II devices listed as exempt in the January 21, 1998, notice, subject to the limitations on exemptions. These devices will remain subject to CGMP requirements and other general controls under the statute as well as any special controls.

The Administrative Procedure Act (the APA) (Pub. L. 79–404) and FDA regulations provide that the agency may issue a regulation without notice and comment procedures when the agency for good cause finds (and incorporates the finding and a brief statement of reasons thereof in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(8), § 10.40(e)(1) (21 CFR 10.40).) The Commissioner of Food and Drugs (the Commissioner) finds for good cause that there is reason to dispense with notice and comment rulemaking to amend the codified language in the Code of Federal Regulations (CFR) to reflect that certain class II devices are exempt.

Notice and comment rulemaking to codify the exemptions for these class II devices would be both impracticable and unnecessary. As previously stated, under the authority provided by section 206 of FDAMA, these exemptions have already taken effect by operation of the statute on January 21, 1998. Accordingly, it is both impracticable and unnecessary to provide notice and comment on a regulation that merely codifies that which has already occurred. Furthermore, interested persons were provided an opportunity to comment when the January 21, 1998, notice published.

II. Effective Date

Section 553(d) of the APA requires that the effective date of a substantive rule shall occur not less than 30 days after the publication or service unless, under section 553(d)(1), the rule grants or recognizes an exemption or relieves a restriction, or unless, under section 553(d)(3), the agency finds good cause to make the effective date less than 30 days and publishes the basis with the rule.

The Commissioner finds that because the exemptions are already in effect, providing a delayed effective date for the regulation conforming the CFR to reflect the exemptions is impracticable and unnecessary. Accordingly, there is good cause, under section 553(d)(3) of the APA and § 10.40(c)(4)(ii), to provide an immediate effective date. Additionally, an immediate effective date is authorized under section 553(d)(1) and § 10.40(c)(4)(i) because the codification of the exemptions recognizes an exemption.

III. Comments

FDA received 8 sets of comments from respondents, both supporting and opposing the exemption of the 62 class II devices.

1. Two comments suggested that FDA remove the following in vitro diagnostic, class II devices from the list of exempted devices: 21 CFR 866.3060 *Blastomyces dermatitidis*, 866.3085 *Brucella spp. serological reagents*, 866.3135 *Coccidioides immitis serological reagents*, 866.3320 *Histoplasma capsulatum serological reagents*, 866.3165 *Crytococcus*