4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2015-D-4750]

The "Deemed to be a License" Provision of the BPCI Act: Questions and Answers; Draft Guidance for Industry; Availability; Request for Comments on Preliminary List of Affected Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled "The 'Deemed to be a License' Provision of the BPCI Act: Questions and Answers." This draft guidance is intended to provide answers to common questions about FDA's interpretation of the statutory provision under which an application for a biological product approved under the Federal Food, Drug, and Cosmetic Act (FD&C Act) as of March 23, 2020, will be deemed to be a license for the biological product under the Public Health Service Act (PHS Act) on March 23, 2020. This guidance also describes FDA's compliance policy for the labeling of biological products that will be the subject of deemed biologics license applications (BLAs). This guidance is intended to facilitate planning for the March 23, 2020, transition date and provide further clarity regarding the Agency's interpretation of this statutory provision. FDA also invites comment on the preliminary list of approved new drug applications (NDAs) for biological products under the FD&C Act that will be deemed to be BLAs on the transition date.

DATES: Submit either electronic or written comments on the draft guidance by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]** to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

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-2015-D-4750 for "The 'Deemed to be a License' Provision of the BPCI Act: Questions and Answers; Draft Guidance for Industry." Received comments 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002; or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the SUPPLEMENTARY INFORMATION section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Janice Weiner, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6270, Silver Spring, MD 20993-0002, 301-796-3475, Janice.Weiner@fda.hhs.gov; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New

Hampshire Ave., Bldg. 71, Rm. 7268, Silver Spring, MD 20993-0002, 240-402-7911, Stephen.Ripley@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "The 'Deemed to be a License' Provision of the BPCI Act: Questions and Answers." This draft guidance is intended to provide answers to common questions about FDA's interpretation of the "transition" provision of the Biologics Price Competition and Innovation Act of 2009 (BPCI Act) under which an application for a biological product approved under section 505 of the FD&C Act (21 U.S.C. 355) as of March 23, 2020, will be deemed to be a license for the biological product under section 351 of the PHS Act (42 U.S.C. 262) on March 23, 2020 ("the transition date"). This guidance also describes FDA's compliance policy for the labeling of biological products that will be the subject of deemed BLAs. This guidance is intended to facilitate planning for the transition date and provide further clarity regarding the Agency's interpretation of this statutory provision.

Although the majority of therapeutic biological products have been licensed under section 351 of the PHS Act, some protein products historically have been approved under section 505 of the FD&C Act. On March 23, 2010, the BPCI Act was enacted as part of the Patient Protection and Affordable Care Act (Pub. L. 111-148). The BPCI Act clarified the statutory authority under which certain protein products will be regulated by amending the definition of a "biological product" in section 351(i) of the PHS Act to include a "protein (except any chemically synthesized polypeptide)," and describing procedures for submission of a marketing application for certain "biological products." FDA has previously stated its interpretation of the

statutory terms "protein" and "chemically synthesized polypeptide" in the amended definition of "biological product" (see FDA's draft guidance for industry entitled "New and Revised Draft Q&As on Biosimilar Development and the BPCI Act (Revision 2)," available on FDA's website at https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm. Elsewhere in this issue of the *Federal Register*, FDA also has issued a proposed rule to amend its regulation that defines "biological product" to incorporate changes made by the BPCI Act, and to provide its interpretation of the statutory terms "protein" and "chemically synthesized polypeptide." When final, this regulation will codify FDA's interpretation of these terms.

The BPCI Act requires that a marketing application for a "biological product" (that previously could have been submitted under section 505 of the FD&C Act) must be submitted under section 351 of the PHS Act; this requirement is subject to certain exceptions during a 10-year transition period ending on March 23, 2020 (see section 7002(e)(1) to (3) and (e)(5) of the BPCI Act). On March 23, 2020, an approved application for a biological product under section 505 of the FD&C Act shall be deemed to be a license for the biological product under section 351 of the PHS Act (see section 7002(e)(4) of the BPCI Act).

In the *Federal Register* of March 14, 2016 (81 FR 13373), FDA announced the availability of a draft guidance on "Implementation of the 'Deemed to be a License' Provision of the Biologics Price Competition and Innovation Act of 2009" (Transition Policy Draft Guidance). In the Transition Policy Draft Guidance, FDA explains that because the BPCI Act expressly provides that an application that is approved on March 23, 2020, shall be deemed to be a license, FDA interprets section 7002(e) of the BPCI Act to mean that the Agency will not approve any application under section 505 of the FD&C Act for a biological product subject to

the transition provisions that is pending or tentatively approved after March 23, 2020. Such an application may, for example, be withdrawn and submitted under section 351(a) or 351(k) of the PHS Act, as appropriate. FDA also provides recommendations to minimize the impact on development programs for any proposed protein products intended for submission under section 505 of the FD&C Act that may not be able to receive final approval by March 23, 2020.

FDA received several comments on the Transition Policy Draft Guidance, including comments requesting that FDA provide additional information on administrative procedures and regulatory issues that would facilitate planning for the transition date. For example, commenters requested additional information on FDA expectations with respect to certain requirements for biological products regulated under the PHS Act that differ from requirements for drug products regulated under the FD&C Act. Commenters also requested information on FDA's approach to certain procedural issues, such as: (1) the transition of biological products from FDA's "Approved Drug Products with Therapeutic Equivalence Evaluations" (the Orange Book) to FDA's "Lists of Licensed Biological Products with Reference Product Exclusivity and Biosimilarity or Interchangeability Evaluations" (the Purple Book); (2) whether an approved NDA will be deemed to be a license under section 351(a) or 351(k) of the PHS Act; (3) how BLA numbers will be assigned; and (4) user fee issues. This Q&A draft guidance is intended to address these comments and provide additional information to facilitate planning for the transition date.

We invite comment on the Q&A draft guidance, including additional topics that may be helpful for the Agency to address in connection with the transition date. In particular, we invite comment on the compliance policy for the labeling of biological products that are the subject of deemed BLAs and the length of the compliance period. In addition, we invite comment on the

factors that FDA should consider in determining whether a combination product composed of a biological product constituent part and a drug constituent part will be subject to the transition provision.

We also invite comment on the preliminary list of approved applications for biological products under the FD&C Act that will be affected by the transition provision (available on FDA's website at https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/default.htm). If an application holder or other person believes that an approved NDA should be added to the list or should not be included on the list, the application holder or other person should submit a comment to the public docket established for this Q&A draft guidance and the list.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on "The 'Deemed to be a License' Provision of the BPCI Act: Questions and Answers." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. 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 collection of information in 21 CFR part 314 has been approved under OMB control number 0910-0001; the collection of information in 21 CFR parts 601 and 610 has been approved under OMB control number 0910-0338; the collection of information in 21 CFR

600.80 through 600.90 has been approved under OMB control number 0910-0308; and the collection of information in 21 CFR 201.56, 201.57, and 201.80 has been approved under OMB control number 0910-0572. In addition, the collections of information for applications submitted under section 351(k) of the PHS Act (42 U.S.C. 262(k)) have been approved under OMB control number 0910-0719.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm or https://www.regulations.gov.

Dated: December 6, 2018.

Leslie Kux,

Associate Commissioner for Policy.

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