Waivers, Exceptions, and Exemptions from the Requirements of Section 582 of the Federal Food, Drug, and Cosmetic Act

Guidance for Industry

DRAFT GUIDANCE

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For questions regarding this draft document contact CDER Office of Compliance at 301-796-3100 or drugtrackandtrace@fda.hhs.gov.

U.S. Department of Health and Human Services
Food and Drug Administration
Center for Drug Evaluation and Research (CDER)
Center for Biologics Evaluation and Research (CBER)

May 2018
Procedural

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U.S. Department of Health and Human Services
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Contains Nonbinding Recommendations

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Waivers, Exceptions, and Exemptions from the Requirements of Section 582 of the Federal Food, Drug, and Cosmetic Act Guidance for Industry[1]

This draft guidance, when finalized, will represent the current thinking of the Food and Drug Administration (FDA or Agency) on this topic. 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. To discuss an alternative approach, contact the FDA staff responsible for this guidance as listed on the title page.

I. INTRODUCTION

Under section 582 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360eee-1), trading partners[2] in the pharmaceutical distribution supply chain must perform specific tasks and comply with requirements to enable the traceability and security of certain prescription drugs as they are distributed in the United States. Section 582(a)(3) gives FDA the authority to grant waivers, exceptions, and exemptions from these requirements in certain situations. This guidance describes recommendations for how trading partners and stakeholders should request a waiver, exception, or exemption from the requirements of section 582 of the FD&C Act, and describes how FDA intends to review and decide such requests and determine FDA-initiated exceptions and exemptions. Additionally, this guidance describes how FDA intends to biennially review and renew waivers, exceptions, and exemptions.

In general, FDA's guidance documents do not establish legally enforceable responsibilities. Instead, guidances describe the Agency's current thinking on a topic and should be viewed only as recommendations, unless specific regulatory or statutory requirements are cited. The use of the word *should* in Agency guidances means that something is suggested or recommended, but not required.

[1] This guidance has been prepared by the Office of Compliance in the Center for Drug Evaluation and Research (CDER) in cooperation with the Center for Biologics Evaluation and Research (CBER) at the Food and Drug Administration.

[2] *Trading partner* is defined in section 581(23) of the FD&C Act and includes manufacturers, repackagers, wholesale distributors, dispensers, and third-party logistics providers. However, third-party logistics providers are not subject to the requirements of section 582 of the FD&C Act. For the purpose of this guidance, "trading partner" refers to manufacturers, repackagers, wholesale distributors, and dispensers.

II. BACKGROUND

The Drug Supply Chain Security Act (DSCSA) (Title II of Public Law 113-54) was signed into law on November 27, 2013. The DSCSA outlines critical steps to build an electronic, interoperable system by 2023 that is able to identify and trace products[3] as they are distributed in the United States. Section 202 of the DSCSA added section 582 to the FD&C Act, which sets forth trading partner requirements, including those related to product tracing, product identifiers, authorized trading partners, and verification.

Section 582(a)(3)(A) of the FD&C Act requires FDA to issue a guidance that:

> (i) establish[es] a process by which an authorized manufacturer, repackager, wholesale distributor, or dispenser may request a waiver from any of the requirements set forth in this section, which the Secretary may grant if the Secretary determines that such requirements would result in an undue economic hardship or for emergency medical reasons,[4] including a public health emergency declaration pursuant to section 319 of the Public Health Service Act;
>
> (ii) establish[es] a process by which the Secretary determines exceptions, and a process through which a manufacturer or repackager may request such an exception, to the requirements relating to product identifiers if a product is packaged in a container too small or otherwise unable to accommodate a label with sufficient space to bear the information required for compliance with this section; and
>
> (iii) establish[es] a process by which the Secretary may determine other products or transactions that shall be exempt from the requirements of this section.

Accordingly, this guidance describes the processes required by the law. Additionally, as required by section 582(a)(3)(B), this guidance also includes a process for the biennial review and renewal of waivers, exceptions, and exemptions.

[3] *Product* is defined in section 581(13) of the FD&C Act.

[4] The emergency medical reason waiver described in section 582(a)(3)(A)(i) is distinct from the emergency medical reason statutory exclusions in sections 581(24)(B)(iii) and 503(e)(4)(C), and can extend to section 582 requirements not within the purview of those statutory exclusions. For purposes of the statutory exclusions in sections 581(24)(B)(iii) and 503(e)(4)(C), a public health emergency declared under section 319 of the Public Health Service Act is automatically considered an "emergency medical reason." Upon declaration of a public health emergency, product distribution for such emergency medical reasons is excluded from the DSCSA definitions of "transaction" and "wholesale distribution." Therefore, the DSCSA requirements related to product tracing and wholesale distribution do not apply to trading partner activities that address the public health emergency declaration for the duration of the declaration. For more information, please visit https://www.fda.gov/Drugs/DrugSafety/DrugIntegrityandSupplyChainSecurity/DrugSupplyChainSecurityAct/ucm580386.htm.

III. PROCESS FOR REQUESTING A WAIVER, EXCEPTION, OR EXEMPTION

A. Submitting a Request to FDA

A trading partner or stakeholder seeking a waiver, exception, or exemption from requirements of section 582 of the FD&C Act should submit a written request to FDA.

Submissions to FDA for CBER-regulated Products

Waiver, exception, and exemption requests for products reviewed by CBER should be submitted as product correspondence to the biologics license application (BLA), new drug application (NDA), abbreviated new drug application (ANDA), or investigational new drug application (IND) in the electronic common technical document (eCTD) format.[5] For submissions related exclusively to CBER-regulated products but not associated with a specific application(s), requests should be sent to DSCSA-CBER-WEER@fda.hhs.gov. Paper submissions should be submitted to the following address:

Food and Drug Administration
Center for Biologics Evaluation and Research
Document Control Center
10903 New Hampshire Ave.
Bldg. 71, Rm. G112
Silver Spring, MD 20993-0002

Submissions to FDA for all other Requests

All other waiver, exception, and exemption requests, including those for CDER-regulated products, those that are not related to specific products, or where the lead center is uncertain or unknown, should be submitted by email to DSCSA-WEER@fda.hhs.gov or by mail or delivery service to the following address:

Office of Drug Security, Integrity, and Response
Center for Drug Evaluation and Research
Food and Drug Administration
10903 New Hampshire Ave.
Bldg. 51, Rm. 4203
Silver Spring, MD 20993-0002
Attn: DSCSA WEER team

A table summarizing where requests should be sent is provided in the Appendix.

Only an authorized manufacturer, repackager, wholesale distributor, or dispenser may request a waiver under section 582(a)(3)(A)(i), and only a manufacturer or repackager may request an

[5] See Final Guidance for Industry: *Providing Regulatory Submissions in Electronic Format – eCTD Specifications* at https://www.fda.gov/ectd.

exception under section 582(a)(3)(A)(ii).[6] Any interested stakeholder may request an exemption under section 582(a)(3)(A)(iii).

Each request should include the following information:

- The name, telephone number, and email address of an individual who FDA can contact about matters relating to the proposed waiver, exception, or exemption[7]
- The identity of the trading partner(s) that would be covered by the proposed waiver, exception, or exemption
- A description of the activities and/or products (including the national drug code number) for which the proposed waiver, exception, or exemption is being sought
- The requested effective period of the waiver, exception, or exemption
- The requirements of section 582 of the FD&C Act to which the proposed waiver, exception, or exemption would apply
- A detailed statement of the reasons why FDA should grant the proposed waiver, exception, or exemption, including pertinent supporting documentation

In addition, please include the following affirmation in your request: "I affirm that the information in this statement is correct, and I understand that under 18 U.S.C. 1001 it is illegal to make a materially false, fictitious, or fraudulent statement or representation in this matter within FDA's jurisdiction."

Upon receipt of a request, FDA intends to issue an acknowledgement to the trading partner or stakeholder that submitted the request.

B. FDA Review of Requests

FDA intends to evaluate a request to ensure that it contains sufficient information to permit a substantive review by the Agency. If FDA determines that a request lacks sufficient information to permit a substantive review, the Agency may deny the request. FDA may also contact a requesting trading partner or stakeholder to clarify an aspect of the request (e.g., the products covered by the request) or to ask for additional information related to the subject of the request.

During the review, FDA intends to consult with subject matter experts within the Agency as appropriate and assess, as applicable, whether:

- A waiver of the section 582 requirement(s) identified in the request is (1) warranted because complying with the requirement(s) would result in undue economic hardship or (2) appropriate for emergency medical reasons
- An exception to the section 582 requirements relating to product identifiers is warranted because the product identified in the request is packaged in a container that is too small or

[6] Authorized representatives of a trading partner, such as legal counsel and consultants, may submit a waiver or exception request on behalf of the trading partner.

[7] It is the responsibility of the requesting trading partner or stakeholder to inform FDA of changes in contact information.

otherwise unable to accommodate a label with sufficient space to bear the information required for compliance with these requirements

- Exempting the product(s) and/or transaction(s) identified in the request from the section 582 requirement(s) identified in the request is appropriate to maintain public health or is otherwise appropriate

FDA intends to also consider the potential risks that a proposed waiver, exception, or exemption poses to the security of the drug supply chain when reviewing requests. Additionally, if the submission seeks a waiver, exception, or exemption that will cover a broad segment(s) of industry and/or multiple trading partners, FDA may deny or defer the request if it determines that an FDA-initiated exception, exemption, or other regulatory action would be more appropriate. To minimize the potential risks to the drug supply chain, FDA expects to limit the duration of the waivers, exceptions, or exemptions that it grants. However, FDA may grant a waiver, exception, or exemption that is valid until further notice from the Agency to address situations that involve extraordinary circumstances.

C. FDA Determinations on Requests

FDA intends to notify the requesting trading partner or stakeholder of a waiver, exception, or exemption request in writing of the Agency's determination to grant, deny, or take other appropriate action on the request, and explain the basis of the determination. The Agency may, in its discretion, post information regarding a determination to its website if it concludes that doing so is in the best interest of, or is necessary to protect, public health. Such information would be posted in a manner that is consistent with the laws and regulations regarding the disclosure of confidential information.

D. Notifying FDA of Material Changes

A recipient of a waiver, exception, or exemption should notify the FDA Center that originally issued the waiver, exception or exemption whenever there is a material change in the circumstances that were the basis for granting the initial request for relief. Furthermore, recipients should notify FDA within a reasonable amount of time of the change; this is true regardless of the duration of the waiver, exception, or exemption. The following example is provided to help trading partners and stakeholders understand when they should notify FDA of a material change:

> A manufacturer receives an exception from FDA for a product packaged in a container that is too small to accommodate a label with space to bear a product identifier. The exception has an effective period of 3 years. A year after receiving the exception, the manufacturer begins packaging the product in a larger container that is able to accommodate a label with space for a product identifier. The manufacturer should notify FDA of this change when it begins production with the new container instead of waiting until the biennial review of the exception.

IV. PROCESS FOR FDA-INITIATED EXCEPTIONS AND EXEMPTIONS

Sections 582(a)(3)(A)(ii) and (iii) of the FD&C Act give FDA the authority to establish exceptions or exemptions from the requirements of section 582 on its own initiative. FDA intends to use this authority when necessary to address an issue that affects a broad segment(s) of industry and/or multiple trading partners, impacts many activities, or involves numerous products. Consistent with the approach described in Section III, FDA intends to only establish exceptions under section 582(a)(3)(A)(ii) on its own initiative where it is assessed that the excepted product(s) is packaged in a container that is too small or otherwise unable to accommodate a label with sufficient space to bear the information required for compliance with the section 582 requirements relating to product identifiers. Similarly, FDA intends to only establish exemptions under section 582(a)(3)(A)(iii) on its own initiative where it determines that the exemption is appropriate to maintain public health or is otherwise appropriate. As with exceptions and exemptions that are granted pursuant to a request, before establishing exceptions or exemptions, FDA intends to consider how an exception or exemption might affect the security of the drug supply chain prior to establishing the exception or exemption on its own initiative.

If FDA establishes an exception or exemption to address a particular issue, it intends to communicate the information in writing using a method appropriate for the circumstances (e.g., a letter to the affected trading partners or - if an exception or exemption applied to a broad segment of industry - a posting on its website). An exception or exemption that is established by FDA may be limited in duration or valid until further notice from FDA.

V. REVIEW AND RENEWAL OF WAIVERS, EXCEPTIONS, AND EXEMPTIONS

A. Biennial Review of Waivers, Exceptions, and Exemptions

Once every 2 years, FDA intends to review waivers, exceptions, and exemptions that are valid until further notice from the Agency or longer than 2 years in duration (i.e., the expiration date is more than 2 years after the effective date) and renew such waivers, exceptions, and exemptions, as applicable. During this review, the Agency intends to assess whether there has been a material change in circumstances such that the waiver, exception, or exemption is no longer appropriate. If the waiver, exception, or exemption under review is one that the Agency granted in response to a written request, FDA may seek the recipient's assistance in determining whether there has been a material change in circumstances. For example, a trading partner that received an "undue economic hardship" waiver may be asked to submit updated financial information demonstrating that the circumstances supporting the original waiver decision still exist.

In the event FDA determines that a waiver, exception, or exemption is no longer appropriate following a biennial review, it intends to terminate the waiver, exception, or exemption. For waivers, exceptions, and exemptions that were granted in response to a written request, FDA intends to provide written notice of its determination to the recipient of the waiver, exception, or exemption. For FDA-initiated exceptions and exemptions, the Agency intends to announce the termination using a written method appropriate for the circumstances. The Agency intends to

issue these written notices and announcements within a reasonable amount of time before the stated termination date.

B. Renewal of Expiring Waivers, Exceptions, and Exemptions

A trading partner or stakeholder may submit a renewal request for any waiver, exception, or exemption it received that is of limited duration. A renewal request should be submitted to the FDA Center that originally issued the waiver, exception or exemption as soon as the trading partner or stakeholder determines that renewal is necessary. The request should include a detailed statement justifying the continuance of the waiver, exception, or exemption, and the desired length of the extension. In addition, the request should contain the affirmation set forth in Section III.A. FDA intends to review and respond to renewal requests in the same manner that it reviews and responds to initial requests for waivers, exceptions, and exemptions.[8]

FDA does not intend to accept a renewal request for an FDA-initiated exception or exemption. If a trading partner believes that it will need to renew an expiring FDA-initiated exception or exemption after the expiration date, that trading partner or stakeholder should submit a written request for an exception or exemption in accordance with the process set forth in Section III of this guidance.

[8] See Sections III.B and III.C of this guidance.

APPENDIX

Where to Submit Waiver, Exception, and Exemption Requests

	Electronic Submissions to FDA	**Paper Submissions to FDA (if electronic submissions are not possible)**
Requests related exclusively to CBER-regulated products that are associated with a BLA, NDA, ANDA, or IND	Send in eCTD format to FDA Electronic Submission Gateway as product correspondence	N/A
Requests related exclusively to CBER-regulated products that are *not* associated with a specific application(s)	Send email to: DSCSA-CBER-WEER@fda.hhs.gov	Food and Drug Administration Center for Biologics Evaluation and Research Document Control Center 10903 New Hampshire Ave. Bldg. 71, Rm. G112 Silver Spring, MD 20993-0002 Attn: CBER OCBQ
All other requests, including those for CDER-regulated products, those that are not related to specific products, or when the lead center is uncertain or unknown	Send email to: DSCSA-WEER@fda.hhs.gov	Office of Drug Security, Integrity, and Response Center for Drug Evaluation and Research Food and Drug Administration 10903 New Hampshire Ave. Bldg. 51, Rm. 4203 Silver Spring, MD 20993-0002 Attn: DSCSA WEER team