

granting an exemption have not been met. FDA shall notify the manufacturer if the approval is terminated.

(b) In reviewing an application for an exemption, FDA shall consider the materials submitted by the manufacturer and may consider any other appropriate information, including, but not limited to, any pending or previously approved applications for exemption submitted by the manufacturer.

(c) FDA may grant an application for an exemption if FDA determines that:

(1) It would be economically prohibitive for the manufacturer to incur the costs necessary to submit a supplemental application for a new use, which at a minimum requires:

(i) That existing data characterizing the safety and effectiveness of the drug or device, including data from the study described in the information to be disseminated are not adequate to support the submission of a supplemental application for the new use; and

(ii) That the cost of the study or studies for the new use reasonably exceeds the expected revenue from the new use minus the cost of goods sold and marketing and administrative expenses attributable to the new use of the product, and there are not less expensive ways to obtain the needed information; or

(2) It would be unethical to conduct clinical studies needed to support the submission of a supplemental application for the new use because:

(i) Existing data characterizing the safety and effectiveness of the drug or device, including data from the study described in the information to be disseminated are not adequate to support the submission of a supplemental application for the new use; and

(ii) Although available evidence would not support the submission of a supplemental application for the new use, the data are persuasive to the extent that withholding the drug or device in a controlled study would pose an unreasonable risk of harm to human subjects and no studies in different populations or of modified design can be utilized. In determining whether it would be unethical to conduct clinical studies, the agency shall consider, in addition to the persuasiveness of available evidence of effectiveness, whether

the new use of the drug or device is broadly accepted as current standard medical treatment or therapy.

### Subpart E—Corrective Actions and Cessation of Dissemination

#### § 99.401 Corrective actions and cessation of dissemination of information.

(a) *FDA actions based on post dissemination data.* If FDA receives data after a manufacturer has begun disseminating information on a new use and, based on that data, determines that the new use that is the subject of information disseminated under this part may not be effective or may present a significant risk to public health, FDA shall consult the manufacturer and, after such consultation, take appropriate action to protect the public health. Such action may include ordering the manufacturer to cease disseminating information on the new use and to take appropriate corrective action.

(b) *FDA actions based on information disseminated by a manufacturer.* If FDA determines that a manufacturer is disseminating information that does not comply with the requirements under this part, FDA may:

(1) Provide to the manufacturer an opportunity to bring itself into compliance with the requirements under this part if the manufacturer's noncompliance constitutes a minor violation of these requirements; or

(2) Order the manufacturer to cease dissemination of information and to take corrective action. FDA shall issue such an order only after it has:

(i) Provided notice to the manufacturer regarding FDA's intent to issue an order to cease dissemination; and

(ii) Provided to the manufacturer an opportunity for a meeting. FDA need not provide an opportunity for a meeting if the manufacturer certified that it will submit a supplemental application for the new use within 6 months of the date that dissemination can begin and the noncompliance involves a failure to submit such supplemental application.

(c) *FDA actions based on a manufacturer's supplemental application.* FDA may

order a manufacturer to cease disseminating information under this part and to take corrective action if:

(1) In the case of a manufacturer that has submitted a supplemental application for the new use, FDA determines that the supplemental application does not contain adequate information for approval of the new use;

(2) In the case of a manufacturer that has certified that it will submit a supplemental application for the new use within 6 months, the manufacturer has not, within the 6-month period, submitted a supplemental application for the new use;

(3) In the case of a manufacturer that has certified that it will submit a supplemental application for the new use within 36 months or within such time as FDA has determined to be appropriate under § 99.303(a) or (b), such manufacturer has not submitted the supplemental application within the certified time, or FDA, after an informal hearing, has determined that the manufacturer is not acting with due diligence to initiate or complete the studies necessary to support a supplemental application for the new use; or

(4) In the case of a manufacturer that has certified that it will submit a supplemental application for the new use within 36 months or within such time as FDA has determined to be appropriate under § 99.303(a) or (b), the manufacturer has discontinued or terminated the clinical studies that would be necessary to support a supplemental application for a new use.

(d) *Effective date of orders to cease dissemination.* An order to cease dissemination of information shall be effective upon date of receipt by the manufacturer, unless otherwise stated in such order.

(e) *Cessation of dissemination by a non-complying manufacturer.* A manufacturer that begins to disseminate information in compliance with this part, but subsequently fails to comply with this part, shall immediately cease disseminating information under this part. A manufacturer that discontinues, terminates, or fails to conduct with due diligence clinical studies that it certified it would complete under § 99.201(a)(4)(ii) shall be deemed not in compliance with this part. A manufac-

turer shall notify FDA immediately if it ceases dissemination under this paragraph.

**§ 99.403 Termination of approvals of applications for exemption.**

(a) FDA may, at any time, terminate the approval of an application for an exemption from the requirement to file a supplemental application if:

(1) The application for an exemption had been deemed to be approved because the agency had not acted on the application within 60 days after its receipt by FDA;

(2) The manufacturer is disseminating written information on the new use; and

(3) FDA determines that it would be economically and ethically possible for the manufacturer to conduct the clinical studies needed to submit a supplemental application for the new use.

(b) If FDA terminates a deemed approval of an application for an exemption under paragraph (a) of this section, FDA also may:

(1) Order the manufacturer to cease disseminating information; and

(2) Order the manufacturer to take action to correct the information that has been disseminated if FDA determines that the new use described in the disseminated information would pose a significant risk to public health.

(c) FDA shall notify the manufacturer if it terminates the deemed approval of an application for an exemption under paragraph (a) of this section. If FDA also issues an order to cease dissemination of information, the manufacturer shall comply with the order no later than 60 days after its receipt.

(d) FDA may, at any time, terminate the approval of an application for an exemption from the requirement to file a supplemental application for a new use if, after consulting with the manufacturer that was granted such exemption, FDA determines that the manufacturer no longer meets the requirements for an exemption on the basis that it is economically prohibitive or unethical to conduct the studies needed to submit a supplemental application for the new use.

(e) If FDA terminates an approval of an application for an exemption under