

review by Federal courts, to determine whether a State or local requirement is equal to, or substantially identical to, requirements imposed by or under the act, or is different from, or in addition to, such requirements, in accordance with the procedures provided by this part. However, it is the responsibility of States and political subdivisions to determine initially whether to seek exemptions from preemption. Any State or political subdivision whose requirements relating to devices are preempted by section 521(a) may petition the Commissioner of Food and Drugs for exemption from preemption, in accordance with the procedures provided by this part.

(f) The Federal requirement with respect to a device applies whether or not a corresponding State or local requirement is preempted or exempted from preemption. As a result, if a State or local requirement that the Food and Drug Administration has exempted from preemption is not as broad in its application as the Federal requirement, the Federal requirement applies to all circumstances not covered by the State or local requirement.

[43 FR 18665, May 2, 1978, as amended at 45 FR 67336, Oct. 10, 1980; 61 FR 52654, Oct. 7, 1996]

### § 808.3 Definitions.

(a) *Act* means the Federal Food, Drug, and Cosmetic Act.

(b) *Compelling local conditions* includes any factors, considerations, or circumstances prevailing in, or characteristic of, the geographic area or population of the State or political subdivision that justify exemption from preemption.

(c) *More stringent* refers to a requirement of greater restrictiveness or one that is expected to afford to those who may be exposed to a risk of injury from a device a higher degree of protection than is afforded by a requirement applicable to the device under the act.

(d) *Political subdivision* or *locality* means any lawfully established local governmental unit within a State which unit has the authority to establish or continue in effect any requirement having the force and effect of law with respect to a device intended for human use.

(e) *State* means a State, American Samoa, the Canal Zone, the Commonwealth of Puerto Rico, the District of Columbia, Guam, Johnston Island, Kingman Reef, Midway Island, the Trust Territory of the Pacific Islands, the Virgin Islands, and Wake Island.

(f) *Substantially identical to* refers to the fact that a State or local requirement does not significantly differ in effect from a Federal requirement.

### § 808.5 Advisory opinions.

(a) Any State, political subdivision, or other interested person may request an advisory opinion from the Commissioner with respect to any general matter concerning preemption of State or local device requirements or with respect to whether the Food and Drug Administration regards particular State or local requirements, or proposed requirements, as preempted.

(1) Such an advisory opinion may be requested and may be granted in accordance with § 10.85 of this chapter.

(2) The Food and Drug Administration, in its discretion and after consultation with the State or political subdivision, may treat a request by a State or political subdivision for an advisory opinion as an application for exemption from preemption under § 808.20.

(b) The Commissioner may issue an advisory opinion relating to a State or local requirement on his own initiative when he makes one of the following determinations:

(1) A requirement with respect to a device for which an application for exemption from preemption has been submitted under § 808.20 is not preempted by section 521(a) of the act because it is: (i) Equal to or substantially identical to a requirement under the act applicable to the device, or (ii) is not a requirement within the meaning of section 521 of the act and therefore is not preempted;

(2) A proposed State or local requirement with respect to a device is not eligible for exemption from preemption because the State or local requirement has not been issued in final form. In such a case, the advisory opinion may indicate whether the proposed requirement would be preempted and, if it would be preempted, whether the Food

and Drug Administration would propose to grant an exemption from preemption;

(3) Issuance of such an advisory opinion is in the public interest.

### Subpart B—Exemption Procedures

#### § 808.20 Application.

(a) Any State or political subdivision may apply to the Food and Drug Administration for an exemption from preemption for any requirement that it has enacted and that is preempted. An exemption may only be granted for a requirement that has been enacted, promulgated, or issued in final form by the authorized body or official of the State or political subdivision so as to have the force and effect of law. However, an application for exemption may be submitted before the effective date of the requirement.

(b) An application for exemption shall be in the form of a letter to the Commissioner of Food and Drugs and shall be signed by an individual who is authorized to request the exemption on behalf of the State or political subdivision. An original and two copies of the letter and any accompanying material, as well as any subsequent reports or correspondence concerning an application, shall be submitted to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. The outside wrapper of any application, report, or correspondence should indicate that it concerns an application for exemption from preemption of device requirements.

(c) For each requirement for which an exemption is sought, the application shall include the following information to the fullest extent possible, or an explanation of why such information has not been included:

(1) Identification and a current copy of any statute, rule, regulation, or ordinance of the State or political subdivision considered by the State or political subdivision to be a requirement which is preempted, with a reference to the date of enactment, promulgation, or issuance in final form. The application shall also include, where available, copies of any legislative history or background materials pertinent to

enactment, promulgation, or issuance of the requirement, including hearing reports or studies concerning development or consideration of the requirement. If the requirement has been subject to any judicial or administrative interpretations, the State or political subdivision shall furnish copies of such judicial or administrative interpretations.

(2) A comparison of the requirement of the State or political subdivision and any applicable Federal requirements to show similarities and differences.

(3) Information on the nature of the problem addressed by the requirement of the State or political subdivision.

(4) Identification of which (or both) of the following bases is relied upon for seeking an exemption from preemption:

(i) The requirement is more stringent than a requirement applicable to a device under the act. If the State or political subdivision relies upon this basis for exemption from preemption, the application shall include information, data, or material showing how and why the requirement of the State or political subdivision is more stringent than requirements under the act.

(ii) The requirement is required by compelling local conditions, and compliance with the requirement would not cause the device to be in violation of any applicable requirement under the act. If the State or political subdivision relies upon this basis for exemption from preemption, the application shall include information, data, or material showing why compliance with the requirement of the State or political subdivision would not cause a device to be in violation of any applicable requirement under the act and why the requirement is required by compelling local conditions. The application shall also explain in detail the compelling local conditions that justify the requirement.

(5) The title of the chief administrative or legal officers of that State or local agency that has primary responsibility for administration of the requirement.