

501(f)(2)(B) of the act. Accordingly, unless an effective date of the requirement for premarket approval is shown in the regulation for a device classified into class III in this part, the device may be commercially distributed without FDA's issuance of an order approving a PMA or declaring completed a PDP for the device. If FDA promulgates a regulation under section 515(b) of the act requiring premarket approval for a device, section 501(f)(1)(A) of the act applies to the device.

(b) Any new, not substantially equivalent, device introduced into commercial distribution on or after May 28, 1976, including a device formerly marketed that has been substantially altered, is classified by statute (section 513(f) of the act) into class III without any grace period and FDA must have issued an order approving a PMA or declaring completed a PDP for the device before the device is commercially distributed unless it is reclassified. If FDA knows that a device being commercially distributed may be a "new" device as defined in this section because of any new intended use or other reasons, FDA may codify the statutory classification of the device into class III for such new use. Accordingly, the regulation for such a class III device states that as of the enactment date of the amendments, May 28, 1976, the device must have an approval under section 515 of the act before commercial distribution.

(c) A device identified in a regulation in this part that is classified into class III and that is subject to the transitional provisions of section 520(l) of the act is automatically classified by statute into class III and must have an approval under section 515 of the act before being commercially distributed. Accordingly, the regulation for such a class III transitional device states that as of the enactment date of the amendments, May 28, 1976, the device must have an approval under section 515 of the act before commercial distribution.

[52 FR 17733, May 11, 1987; 52 FR 22577, June 12, 1987]

**§ 866.9 Limitations of exemptions from section 510(k) of the Federal Food, Drug, and Cosmetic Act (the act).**

The exemption from the requirement of premarket notification (section 510(k) of the act) for a generic type of class I or II device is only to the extent that the device has existing or reasonably foreseeable characteristics of commercially distributed devices within that generic type or, in the case of in vitro diagnostic devices, only to the extent that misdiagnosis as a result of using the device would not be associated with high morbidity or mortality. Accordingly, manufacturers of any commercially distributed class I or II device for which FDA has granted an exemption from the requirement of premarket notification must still submit a premarket notification to FDA before introducing or delivering for introduction into interstate commerce for commercial distribution the device when:

(a) The device is intended for a use different from the intended use of a legally marketed device in that generic type of device; e.g., the device is intended for a different medical purpose, or the device is intended for lay use where the former intended use was by health care professionals only;

(b) The modified device operates using a different fundamental scientific technology than a legally marketed device in that generic type of device; e.g., a surgical instrument cuts tissue with a laser beam rather than with a sharpened metal blade, or an in vitro diagnostic device detects or identifies infectious agents by using deoxyribonucleic acid (DNA) probe or nucleic acid hybridization technology rather than culture or immunoassay technology; or

(c) The device is an in vitro device that is intended:

(1) For use in the diagnosis, monitoring, or screening of neoplastic diseases with the exception of immunohistochemical devices;

(2) For use in screening or diagnosis of familial or acquired genetic disorders, including inborn errors of metabolism;

(3) For measuring an analyte that serves as a surrogate marker for screening, diagnosis, or monitoring

life-threatening diseases such as acquired immune deficiency syndrome (AIDS), chronic or active hepatitis, tuberculosis, or myocardial infarction or to monitor therapy;

(4) For assessing the risk of cardiovascular diseases;

(5) For use in diabetes management;

(6) For identifying or inferring the identity of a microorganism directly from clinical material;

(7) For detection of antibodies to microorganisms other than immunoglobulin G (IgG) or IgG assays when the results are not qualitative, or are used to determine immunity, or the assay is intended for use in matrices other than serum or plasma;

(8) For noninvasive testing as defined in § 812.3(k) of this chapter; and

(9) For near patient testing (point of care).

[65 FR 2311, Jan. 14, 2000]

### Subpart B—Diagnostic Devices

#### § 866.1620 Antimicrobial susceptibility test disc.

(a) *Identification.* An antimicrobial susceptibility test disc is a device that consists of antimicrobial-impregnated paper discs used to measure by a disc-agar diffusion technique or a disc-broth elution technique the in vitro susceptibility of most clinically important bacterial pathogens to antimicrobial agents. In the disc-agar diffusion technique, bacterial susceptibility is ascertained by directly measuring the magnitude of a zone of bacterial inhibition around the disc on an agar surface. The disc-broth elution technique is associated with an automated rapid susceptibility test system and employs a fluid medium in which susceptibility is ascertained by photometrically measuring changes in bacterial growth resulting when antimicrobial material is eluted from the disc into the fluid medium. Test results are used to determine the antimicrobial agent of choice in the treatment of bacterial diseases.

(b) *Classification.* Class II (performance standards).

#### § 866.1640 Antimicrobial susceptibility test powder.

(a) *Identification.* An antimicrobial susceptibility test powder is a device

that consists of an antimicrobial drug powder packaged in vials in specified amounts and intended for use in clinical laboratories for determining in vitro susceptibility of bacterial pathogens to these therapeutic agents. Test results are used to determine the antimicrobial agent of choice in the treatment of bacterial diseases.

(b) *Classification.* Class II (performance standards).

#### § 866.1645 Fully automated short-term incubation cycle antimicrobial susceptibility system.

(a) *Identification.* A fully automated short-term incubation cycle antimicrobial susceptibility system is a device that incorporates concentrations of antimicrobial agents into a system for the purpose of determining in vitro susceptibility of bacterial pathogens isolated from clinical specimens. Test results obtained from short-term (less than 16 hours) incubation are used to determine the antimicrobial agent of choice to treat bacterial diseases.

(b) *Classification.* Class II (special controls). The special control for this device is FDA's guidance document entitled "Class II Special Controls Guidance Document: Antimicrobial Susceptibility Test (AST) Systems; Guidance for Industry and FDA."

[68 FR 5827, Feb. 5, 2003]

#### § 866.1700 Culture medium for antimicrobial susceptibility tests.

(a) *Identification.* A culture medium for antimicrobial susceptibility tests is a device intended for medical purposes that consists of any medium capable of supporting the growth of many of the bacterial pathogens that are subject to antimicrobial susceptibility tests. The medium should be free of components known to be antagonistic to the common agents for which susceptibility tests are performed in the treatment of disease.

(b) *Classification.* Class II (performance standards).