(b) The Food and Drug Administration may refuse to consider any particular nonclinical laboratory study in support of an application for a research or marketing permit, if it finds that the study was not conducted in accordance with the good laboratory practice regulations set forth in this part, without disqualifying the testing facility that conducted the study or undertaking other regulatory action.

§ 58.217 Suspension or termination of a testing facility by a sponsor.

Termination of a testing facility by a sponsor is independent of, and neither in lieu of nor a precondition to, proceedings or actions authorized by this subpart. If a sponsor terminates or suspends a testing facility from further participation in a nonclinical laboratory study that is being conducted as part of any application for a research or marketing permit that has been submitted to any Center of the Food and Drug Administration (whether approved or not), it shall notify that Center in writing within 15 working days of the action; the notice shall include a statement of the reasons for such action. Suspension or termination of a testing facility by a sponsor does not relieve it of any obligation under any other applicable regulation to submit the results of the study to the Food and Drug Administration.

[43 FR 60013, Dec. 22, 1978, as amended at 50 FR 8995, Mar. 6, 1985]

§ 58.219 Reinstatement of a disqualified testing facility.

A testing facility that has been disqualified may be reinstated as an acceptable source of nonclinical laboratory studies to be submitted to the Food and Drug Administration if the Commissioner determines, upon an evaluation of the submission of the testing facility, that the facility can adequately assure that it will conduct future nonclinical laboratory studies in compliance with the good laboratory practice regulations set forth in this part and, if any studies are currently being conducted, that the quality and integrity of such studies have not been seriously compromised. A disqualified testing facility that wishes to be so reinstated shall present in writing to the Commissioner reasons why it believes it should be reinstated and a detailed description of the corrective actions it has taken or intends to take to assure that the acts or omissions which led to its disqualification will not recur. The Commissioner may condition reinstatement upon the testing facility being found in compliance with the good laboratory practice regulations upon an inspection. If a testing facility is reinstated, the Commissioner shall so notify the testing facility and all organizations and persons who were notified, under § 58.213 of the disqualification of the testing facility. A determination that a testing facility has been reinstated is disclosable to the public under part 20 of this chapter.

PART 60—PATENT TERM RESTORATION

Subpart A—General Provisions

Sec.

Subpart B—Eligibility Assistance

Subpart C—Regulatory Review Period Determinations

Subpart D—Due Diligence Petitions

Subpart E—Due Diligence Hearings

AUTHORITY: 21 U.S.C. 348, 355, 360e, 360j, 371, 379e; 35 U.S.C. 156; 42 U.S.C. 262.

SOURCE: 53 FR 7305, Mar. 7, 1988, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 60 appear at 68 FR 24879, May 9, 2003.

Subpart A—General Provisions

§ 60.1 Scope.

(a) This part sets forth procedures and requirements for the Food and Drug Administration's review of applications for the extension of the term of certain patents under 35 U.S.C. 156. Patent term restoration is available for certain patents related to drug products (as defined in 35 U.S.C. 156(f)(2)), and to medical devices, food additives, or color additives subject to regulation under the Federal Food, Drug, and Cosmetic Act or the Public Health Service Act. Food and Drug Administration actions in this area include:

(1) Assisting the United States Patent and Trademark Office in determining eligibility for patent term restoration;

(2) Determining the length of a product's regulatory review period;

(3) If petitioned, reviewing and ruling on due diligence challenges to the Food and Drug Administration's regulatory review period determinations; and

(4) Conducting hearings to review initial Food and Drug Administration findings on due diligence challenges.

(b) References in this part to the Code of Federal Regulations are to chapter I of title 21, unless otherwise noted.

[53 FR 7305, Mar. 7, 1988, as amended at 57 FR 56261, Nov. 27, 1992]

§ 60.2 Purpose.

(a) The purpose of this part is to establish a thorough yet efficient process for the Food and Drug Administration review of patent term restoration applications. To achieve this purpose, the regulations are intended to:

(1) Facilitate determinations of patent term restoration eligibility and regulatory review period length, and

(2) Ensure that parties interested in due diligence challenges will have an opportunity to participate in that process, including informal hearings.

(b) The regulations are intended to complement those promulgated by the United States Patent and Trademark Office to implement those parts of the law which are under that agency's jurisdiction. These regulations shall be construed in light of these objectives.

§ 60.3 Definitions.

(a) The definitions contained in 35 U.S.C. 156 apply to those terms when used in this part.

(b) The following definitions of terms apply to this part:

(1) The term *Act* means the Federal Food, Drug, and Cosmetic Act (secs. 201–901, 52 Stat. 1040 *et seq.* as amended (21 U.S.C. 301–392)).

(2) *Active ingredient* means any component that is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure or any function of the body of man or of animals. The term includes those components that may undergo chemical change in the manufacture of the drug product and be present in the drug product in a modified form intended to furnish the specified activity or effect.

(3) *Applicant* means any person who submits an application or an amendment or supplement to an application under 35 U.S.C. 156 seeking patent term restoration.

(4) *Application* means an application for patent term restoration submitted under 35 U.S.C. 156.

(5) *Clinical investigation or study* means any experiment that involves a test article and one or more subjects and that is either subject to requirements for prior submission to the Food and Drug Administration under section 505(i), 512(j), or 520(g) of the Federal Food, Drug, and Cosmetic Act, or is not subject to the requirements for prior submission to FDA under those sections of the Federal Food, Drug, and Cosmetic Act, but the results of which are intended to be submitted later to, or held for inspection by, FDA as part of an application for a research or marketing permit. The term does not include experiments that are subject to the provisions of part 58 regarding nonclinical laboratory studies.

(6) *Color additive* means any substance that meets the definition in section 201(t) of the Act and which is subject to premarketing approval under section 721 of the Act.

(7) *Due diligence petition* means a petition submitted under § 60.30(a).

(8) *FDA* means the Food and Drug Administration.

(9) *Food additive* means any substance that meets the definition in section 201(s) of the Act and which is subject to premarketing approval under section 409 of the Act.

(10) *Human drug product* means the active ingredient of a new drug or human biologic product (as those terms are used in the Act and the Public Health Service Act), including any salt or ester of the active ingredient, as a single entity or in combination with another active ingredient.

(11) *Marketing applicant* means any person who submits an application for premarketing approval by FDA under:

(i) Section 505(b) of the Act or section 351 of the Public Health Service Act (human drug products);

(ii) Section 515 of the Act (medical devices);

(iii) Section 409 or 721 of the Act (food and color additives); or

(iv) Section 512 of the Act (animal drug products).

(12) *Marketing application* means an application for:

(i) Human drug products submitted under section 505(b) of the Act or section 351 of the Public Health Service Act;

(ii) Medical devices submitted under section 515 of the Act;

(iii) Food and color additives submitted under section 409 or 721 of the Act; or

(iv) Animal drug products submitted under section 512 of the Act.

(13) *Medical device* means any article that meets the definition in section 201(h) of the Act and which is subject to premarketing approval under section 515 of the Act.

(14) *Product* means a human drug product, animal drug product, medical device, food additive, or color additive, as those terms are defined in this section.

(15) *PTO* means the United States Patent and Trademark Office.

(16) *Animal drug product* means the active ingredient of a new animal drug (as that term is used in the Act) that is not primarily manufactured using recombinant deoxyribonucleic acid (DNA), recombinant ribonucleic acid (RNA), hybridoma technology, or other processes involving site-specific genetic manipulation techniques, including any salt or ester of the active ingredient, as a single entity or in combination with another active ingredient.

[53 FR 7305, Mar. 7, 1988, as amended at 57 FR 56261, Nov. 27, 1992; 64 FR 399, Jan. 5, 1999]

Subpart B—Eligibility Assistance

§ 60.10 FDA assistance on eligibility.

(a) Upon written request from the U.S. Patent and Trademark Office, FDA will assist the U.S. Patent and Trademark Office in determining whether a patent related to a product is eligible for patent term restoration as follows:

(1) Verifying whether the product was subject to a regulatory review period before its commercial marketing or use;

(2) For human drug products, food additives, color additives, and medical devices, determining whether the permission for commercial marketing or use of the product after the regulatory review period is the first permitted commercial marketing or use of the product either:

(i) Under the provision of law under which the regulatory review period occurred; or

(ii) Under the process claimed in the patent when the patent claims a method of manufacturing the product that primarily uses recombinant deoxyribonucleic acid (DNA) technology in the manufacture of the product;

(3) For animal drug products, determining whether the permission for commercial marketing or use of the product after the regulatory review period:

(i) Is the first permitted commercial marketing or use of the product; or

(ii) Is the first permitted commercial marketing or use of the product for administration to a food-producing animal, whichever is applicable, under the

provision of law under which the regulatory review period occurred;

(4) Informing the U.S. Patent and Trademark Office whether the patent term restoration application was submitted within 60 days after the product was approved for marketing or use, or, if the product is an animal drug approved for use in a food-producing animal, verifying whether the application was filed within 60 days of the first approval for marketing or use in a food-producing animal; and

(5) Providing the U.S. Patent and Trademark Office with any other information relevant to the U.S. Patent and Trademark Office's determination of whether a patent related to a product is eligible for patent term restoration.

(b) FDA will notify the U.S. Patent and Trademark Office of its findings in writing, send a copy of this notification to the applicant, and file a copy of the notification in the docket established for the application in FDA's Division of Dockets Management (HFA–305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

[57 FR 56261, Nov. 27, 1992]

Subpart C—Regulatory Review Period Determinations

§ 60.20 FDA action on regulatory review period determinations.

(a) FDA will consult its records and experts to verify the dates contained in the application and to determine the length of the product's regulatory review period under § 60.22. The application shall contain information relevant to the determination of the regulatory review period as stated in the ''Guidelines for Extension of Patent Term Under 35 U.S.C. 156'' published on October 9, 1984, in PTO's *Official Gazette* and as required by 37 CFR chapter I.

(b) After determining the length of the regulatory review period, FDA will notify PTO in writing of its determination, send a copy of this determination to the applicant, and file a copy of the determination in the docket established for the application in FDA's Division of Dockets Management (HFA–305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

(c) FDA will also publish the regulatory review period determination in the FEDERAL REGISTER. The notice will include the following:

(1) The name of the applicant;

(2) The trade name and generic name (if applicable) of the product;

(3) The number of the patent for which an extension of the term is sought;

(4) The approved indications or uses for the product;

(5) An explanation of any discrepancies between the dates in the application and FDA records;

(6) Where appropriate, an explanation that FDA has no record in which to review the date(s) contained in the application; and

(7) The regulatory review period determination, including a statement of the length of the testing and approval phases and the dates used in calculating each phase.

[53 FR 7305, Mar. 7, 1988, as amended at 59 FR 14364, Mar. 28, 1994]

§ 60.22 Regulatory review period determinations.

In determining a product's regulatory review period, which consists of the sum of the lengths of a testing phase and an approval phase, FDA will review the information in each application using the following definitions of the testing phase and the approval phase for that class of products.

(a) For human drugs:

(1) The testing phase begins on the date an exemption under section 505(i) of the Act becomes effective (or the date an exemption under former section 507(d) of the Act became effective) for the approved human drug product and ends on the date a marketing application under section 351 of the Public Health Service Act or section 505 of the act is initially submitted to FDA (or was initially submitted to FDA under former section 507 of the Act), and

(2) The approval phase begins on the date a marketing application under section 351 of the Public Health Service Act or section 505(b) of the Act is initially submitted to FDA (or was initially submitted under former section 507 of the Act) and ends on the date the application is approved.

(b) For food and color additives:

(1) The testing phase begins on the date a major health or environmental effects test is begun and ends on the date a petition relying on the test and requesting the issuance of a regulation for use of the additive under section 409 or 721 of the Act is initially submitted to FDA.

(2) The approval phase begins on the date a petition requesting the issuance of a regulation for use of the additive under section 409 or 721 of the Act is initially submitted to FDA and ends upon whichever of the following occurs last:

(i) The regulation for the additive becomes effective; or

(ii) Objections filed against the regulation that result in a stay of effectiveness are resolved and commercial marketing is permitted; or

(iii) Proceedings resulting from objections to the regulation, after commercial marketing has been permitted and later stayed pending resolution of the proceedings, are finally resolved and commercial marketing is permitted.

(c) For medical devices:

(1) The testing phase begins on the date a clinical investigation on humans is begun and ends on the date an application for premarket approval of the device or a notice of completion of a product development protocol is initially submitted under section 515 of the Act. For purposes of this part, a clinical investigation is considered to begin on whichever of the following dates applies:

(i) If an investigational device exemption (IDE) under section 520(g) of the Act is required, the effective date of the exemption.

(ii) If an IDE is not required, but institutional review board (IRB) approval under section 520(g)(3) of the Act is required, the IRB approval date.

(iii) If neither an IDE nor IRB approval is required, the date on which the device is first used with human subjects as part of a clinical investigation to be filed with FDA to secure premarket approval of the device.

(2) The approval phase either:

(i) Begins on the date an application for premarket approval of the device is initially submitted under section 515 of the Act and ends on the date the application is approved; or

(ii) Begins on the date a notice of completion of a product development protocol is initially submitted under section 515 of the Act and ends on the date the protocol is declared to be completed.

(d) For animal drugs:

(1) The testing phase begins on the date a major health or environmental effects test is begun or the date on which the agency acknowledges the filing of a notice of claimed investigational exemption for a new animal drug, whichever is earlier, and ends on the date a marketing application under section 512 of the Act is initially submitted to FDA.

(2) The approval phase begins on the date a marketing application under section 512 of the Act is initially submitted to FDA and ends on the date the application is approved.

(e) For purposes of this section, a ''major health or environmental effects test'' may be any test which:

(1) Is reasonably related to the evaluation of the product's health or environmental effects, or both:

(2) Produces data necessary for marketing approval; and

(3) Is conducted over a period of no less than 6 months duration, excluding time required to analyze or evaluate test results.

(f) For purposes of determining the regulatory review period for any product, a marketing application, a notice of completion of a product development protocol, or a petition is *initially submitted* on the date it contains sufficient information to allow FDA to commence review of the application. A marketing application, a notice of completion of a product development protocol, or a petition is *approved* on the date FDA sends the applicant a letter informing it of the approval or, by order declares a product development protocol to be completed, or, in the case of food and color additives, on the effective date of the final rule listing the additive for use as published in the FEDERAL REGISTER or, in the case of a new animal drug in a Category II Type A medicated article, on the date of publication in the FEDERAL REGISTER of the notice of approval pursuant to

section 512(i) of the Act. For purposes of this section, the regulatory review period for an animal drug shall mean either the regulatory review period relating the drug's approval for use in nonfood-producing animals or the regulatory review period relating to the drug's approval for use in food-producing animals, whichever is applicable.

[53 FR 7305, Mar. 7, 1988, as amended at 57 FR 56262, Nov. 27, 1992; 64 FR 400, Jan. 5, 1999]

§ 60.24 Revision of regulatory review period determinations.

(a) Any person may request a revision of the regulatory review period determination within 60 days after its initial publication in the FEDERAL REGISTER. The request shall be sent to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. The request shall specify the following:

(1) The type of action requested;

(2) The identity of the product;

(3) The identity of the applicant;

(4) The FDA docket number; and

(5) The basis for the request for revision, including any documentary evidence.

(b) Unless the applicant is the person requesting the revision, the applicant shall respond to the request within 15 days. In responding to the request, the applicant may submit information which is relevant to the events during the regulatory review period but which was not included in the original patent term restoration application. A request for a revision is not equivalent to a due diligence petition under § 60.30 or a request for a hearing under § 60.40. If no response is submitted, FDA will decide the matter on the basis of the information in the patent term restoration application, request for revision, and FDA records.

(c) FDA shall apply the provisions of § 60.22 in considering the request for a revision of the regulatory review period determination. lf FDA revises its prior determination, FDA will notify PTO of the revision, send a copy of this notification to the applicant, and publish the revision in the FEDERAL REGISTER, including a statement giving the reasons for the revision.

[53 FR 7305, Mar. 7, 1988, as amended at 59 FR 14364, Mar. 28, 1994; 67 FR 9585, Mar. 4, 2002]

§ 60.26 Final action on regulatory review period determinations.

(a) FDA will consider a regulatory review period determination to be final upon expiration of the 180-day period for filing a due diligence petition under § 60.30 unless FDA receives:

(1) New information from PTO records, FDA records, or FDA centers that affects the regulatory review period determination;

(2) A request under § 60.24 for revision of the regulatory review period determination;

(3) A due diligence petition filed under § 60.30; or

(4) A request for a hearing filed under § 60.40.

(b) FDA will notify PTO that the regulatory review period determination is final upon:

(1) The expiration of the 180-day period for filing a due diligence petition; or

(2) If FDA has received a request for a revision, a due diligence petition, or a request for a hearing, upon resolution of the request for a revision, the petition, or the hearing, whichever is later. FDA will send a copy of the notification to the applicant and file a copy of the notification in the docket established for the application in FDA's Division of Dockets Management (HFA–305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

[53 FR 7305, Mar. 7, 1988, as amended at 59 FR 14364, Mar. 28, 1994]

§ 60.28 Time frame for determining regulatory review periods.

(a) FDA will determine the regulatory review period for a product within 30 days of the receipt of a written request from PTO for such a determination and a copy of the patent term restoration application.

(b) FDA may extend the 30-day period if:

(1) A related FDA action that may affect the regulatory review period determination is pending; or

(2) PTO requests that FDA temporarily suspend the determination process; or

(3) PTO or FDA receives new information about the product that warrants an extension of the time required for the determination of the regulatory review period.

(c) This section does not apply to applications withdrawn by the applicant or applications that PTO determines are ineligible for patent term restoration.

Subpart D—Due Diligence Petitions

§ 60.30 Filing, format, and content of petitions.

(a) Any person may file a petition with FDA, no later than 180 days after the publication of a regulatory review period determination under § 60.20, that challenges FDA's determination by alleging that the applicant for patent term restoration did not act with due diligence in seeking FDA approval of the product during the regulatory review period.

(b) The petition shall be filed in accordance with § 10.20, under the docket number of the FEDERAL REGISTER notice of the agency's regulatory review period determination, and shall be in the format specified in § 10.30. The petition shall contain the information specified in § 10.30 and any additional information required by this subpart. If any provision of § 10.20 or § 10.30 is inconsistent with any provision of this part, FDA will consider the petition in accordance with this part.

(c) The petition shall claim that the applicant did not act with due diligence during some part of the regulatory review period and shall set forth sufficient facts, including dates if possible, to merit an investigation by FDA of whether the applicant acted with due diligence.

(d) The petition shall contain a certification that the petitioner has served a true and complete copy of the petition upon the applicant by certified or registered mail (return receipt requested) or by personal delivery.

[53 FR 7305, Mar. 7, 1988, as amended at 67 FR 9585, Mar. 4, 2002]

§ 60.32 Applicant response to petition.

(a) The applicant shall file with FDA a written response to the petition no later than 30 days after the applicant's receipt of a copy of the petition.

(b) The applicant's response may present additional facts and circumstances to address the assertions in the petition, but shall be limited to the issue of whether the applicant acted with due diligence during the regulatory review period. The applicant's response may include documents that were not in the original patent extension application.

(c) If the applicant does not respond to the petition, FDA will decide the matter on the basis of the information submitted in the patent term restoration application, due diligence petition, and FDA records.

§ 60.34 FDA action on petitions.

(a) Within 90 days after FDA receives a petition filed under § 60.30(a), the agency will either deny the petition under paragraph (b) or (c) of this section or investigate and determine under § 60.36 whether the applicant acted with due diligence during the regulatory review period. FDA will publish its due diligence determination in the FEDERAL REGISTER, notify PTO of the due diligence determination in writing, and send copies of the notice to PTO, the applicant, and the petitioner.

(b) FDA may deny a due diligence petition without considering the merits of the petition if:

(1) The petition is not filed in accordance with § 60.30;

(2) The petition is not filed in accordance with § 10.20;

(3) The petition does not contain the information required by § 10.30;

(4) The petition fails to contain information or allegations upon which it may reasonably be determined that the applicant did not act with due diligence during the applicable regulatory review period; or

(5) The petition fails to allege a sufficient total amount of time during which the applicant did not exercise due diligence such that, even if the petition were granted, the petition would

not affect the maximum patent extension the applicant sought in the application.

§ 60.36 Standard of due diligence.

(a) In determining the due diligence of an applicant, FDA will examine the facts and circumstances of the applicant's actions during the regulatory review period to determine whether the applicant exhibited that degree of attention, continuous directed effort, and timeliness as may reasonably be expected from, and are ordinarily exercised by, a person during a regulatory review period. FDA will take into consideration all relevant factors, such as the amount of time between the approval of an investigational exemption or research permit and the commencement of a clinical investigation and the amount of time required to conduct a clinical investigation.

(b) For purposes of this part, the actions of the marketing applicant shall be imputed to the applicant for patent term restoration. The actions of an agent, attorney, contractor, employee, licensee, or predecessor in interest of the marketing applicant or applicant for patent term restoration shall be imputed to the applicant for patent term restoration.

Subpart E—Due Diligence Hearings

§ 60.40 Request for hearing.

(a) Any person may request, not later than 60 days after the publication under § 60.34(a) of FDA's due diligence determination, that FDA conduct an informal hearing on the due diligence determination.

(b) The request for a hearing under this section shall:

(1) Be sent by mail, personal delivery, or any other mode of written communication to the Division of Dockets Management and filed under the relevant product file;

(2) Specify the facts and the action that are the subject of the hearing;

(3) Provide the name and address of the person requesting the hearing; and

(4) Certify that the requesting party has served a true and complete copy of the request upon the petitioner and the applicant by certified or registered mail (return receipt requested) or by personal delivery.

(c) The request shall state whether the requesting party seeks a hearing within 30 days or 60 days of FDA's receipt of the request.

[53 FR 7305, Mar. 7, 1988, as amended at 67 FR 9585, Mar. 4, 2002]

§ 60.42 Notice of hearing.

Ten days before the hearing, FDA will notify the requesting party, the applicant, and the petitioner, orally or in writing, of the date, time, and location of the hearing. The agency will provide the requesting party, the applicant, and the petitioner with an opportunity to participate as a party in the hearing.

§ 60.44 Hearing procedures.

The due diligence hearing shall be conducted in accordance with this part, supplemented by the nonconflicting procedures in part 16. During the due diligence hearing, the applicant and the petitioner shall enjoy all the rights and privileges accorded a person requesting a hearing under part 16. The standard of due diligence set forth in § 60.36 will apply in the due diligence hearing. The party requesting the due diligence hearing shall have the burden of proof at the hearing.

§ 60.46 Administrative decision.

Within 30 days after the completion of the due diligence hearing, the Commissioner will affirm or revise the determination made under § 60.34(a) and will publish the due diligence redetermination in the FEDERAL REGISTER, notify PTO of the redetermination, and send copies of the notice to PTO and to the requesting party, the applicant, and the petitioner.

PART 70—COLOR ADDITIVES

Subpart A—General Provisions

Sec.