

1992". See Effective and Termination Dates of 1997 Amendment note below.

Subsec. (g)(1). Pub. L. 105-115, §§103(f)(1), 107, temporarily inserted at end "Such sums as may be necessary may be transferred from the Food and Drug Administration salaries and expenses appropriation account without fiscal year limitation to such appropriation account for salaries and expenses with such fiscal year limitation. The sums transferred shall be available solely for the process for the review of human drug applications." See Effective and Termination Dates of 1997 Amendment note below.

Subsec. (g)(2)(A). Pub. L. 105-115, §§103(f)(2)(A), 107, temporarily substituted "Acts, or otherwise made available for obligation." for "Acts". See Effective and Termination Dates of 1997 Amendment note below.

Subsec. (g)(2)(B). Pub. L. 105-115, §§103(f)(2)(B), 107, temporarily substituted "over such costs, excluding costs paid from fees collected under this section, for fiscal year 1997" for "over such costs for fiscal year 1992". See Effective and Termination Dates of 1997 Amendment note below.

Subsec. (g)(3), (4). Pub. L. 105-115, §§103(f)(3), 107, temporarily added pars. (3) and (4) and struck out heading and text of former par. (3). Text read as follows: "There are authorized to be appropriated for fees under this section—

- "(A) \$36,000,000 for fiscal year 1993,
- "(B) \$54,000,000 for fiscal year 1994,
- "(C) \$75,000,000 for fiscal year 1995,
- "(D) \$78,000,000 for fiscal year 1996, and
- "(E) \$84,000,000 for fiscal year 1997,

as adjusted to reflect increases in the total fee revenues made under subsection (c)(1) of this section." See Effective and Termination Dates of 1997 Amendment note below.

Subsecs. (i), (j). Pub. L. 105-115, §§103(g), 107, temporarily added subsec. (i) and redesignated former subsec. (i) as (j). See Effective and Termination Dates of 1997 Amendment note below.

EFFECTIVE AND TERMINATION DATES OF 2007 AMENDMENT

Pub. L. 110-85, title I, §103(h)(2), Sept. 27, 2007, 121 Stat. 832, provided that: "Paragraph (1) [amending this section] shall take effect as if included in section 504 of the Prescription Drug User Fee Amendments of 2002 (Public Law 107-188; 116 Stat. 687) [amending this section]."

Amendment by Pub. L. 110-85 to cease to be effective Oct. 1, 2012, see section 106(a) of Pub. L. 110-85, set out as a note under section 379g of this title.

Amendment by Pub. L. 110-85 effective Oct. 1, 2007, with fees under this subpart to be assessed for all human drug applications received on or after Oct. 1, 2007, see section 107 of Pub. L. 110-85, set out as a note under section 379g of this title.

EFFECTIVE AND TERMINATION DATES OF 2002 AMENDMENT

Amendment by Pub. L. 107-188 effective Oct. 1, 2002, see section 508 of Pub. L. 107-188, set out as an Effective Date of 2002 Amendment note under section 356b of this title.

Amendment by Pub. L. 107-188 to cease to be effective Oct. 1, 2007, see section 509 of Pub. L. 107-188, set out as a note under section 379g of this title.

EFFECTIVE AND TERMINATION DATES OF 1997 AMENDMENT

Amendment by Pub. L. 105-115 effective Oct. 1, 1997, and ceases to be effective Oct. 1, 2002, see sections 106 and 107 of Pub. L. 105-115, set out as notes under section 379g of this title.

TERMINATION DATE

Section not in effect after Oct. 1, 1997, see section 105 of Pub. L. 102-571, set out as a note under section 379g of this title.

SPECIAL RULE FOR WAIVERS AND REFUNDS

Section 103(h) of Pub. L. 105-115 provided that: "Any requests for waivers or refunds for fees assessed under section 736 of the Federal Food, Drug, and Cosmetic Act (42 U.S.C. 379h) prior to the date of enactment of this Act [Nov. 21, 1997] shall be submitted in writing to the Secretary of Health and Human Services within 1 year after the date of enactment of this Act. Any requests for waivers or refunds pertaining to a fee for a human drug application or supplement accepted for filing prior to October 1, 1997 or to a product or establishment fee required by such Act for a fiscal year prior to fiscal year 1998, shall be evaluated according to the terms of the Prescription Drug User Fee Act of 1992 [see section 101(a) of Pub. L. 102-571, set out as a Short Title of 1992 Amendment note under section 301 of this title] (as in effect on September 30, 1997) and part 2 of subchapter C of chapter VII of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 379g et seq.] (as in effect on September 30, 1997). The term "person" in such Acts shall continue to include an affiliate thereof."

§ 379h-1. Fees relating to advisory review of prescription-drug television advertising

(a) Types of direct-to-consumer television advertisement review fees

Beginning in fiscal year 2008, the Secretary shall assess and collect fees in accordance with this section as follows:

(1) Advisory review fee

(A) In general

With respect to a proposed direct-to-consumer television advertisement (referred to in this section as a "DTC advertisement"), each person that on or after October 1, 2007, submits such an advertisement for advisory review by the Secretary prior to its initial public dissemination shall, except as provided in subparagraph (B), be subject to a fee established under subsection (c)(3).

(B) Exception for required submissions

A DTC advertisement that is required to be submitted to the Secretary prior to initial public dissemination is not subject to a fee under subparagraph (A) unless the sponsor designates the submission as a submission for advisory review.

(C) Notice to Secretary of number of advertisements

Not later than June 1 of each fiscal year, the Secretary shall publish a notice in the Federal Register requesting any person to notify the Secretary within 30 days of the number of DTC advertisements the person intends to submit for advisory review in the next fiscal year. Notwithstanding the preceding sentence, for fiscal year 2008, the Secretary shall publish such a notice in the Federal Register not later than 30 days after September 27, 2007.

(D) Payment

(i) In general

The fee required by subparagraph (A) (referred to in this section as "an advisory review fee") shall be due not later than October 1 of the fiscal year in which the DTC advertisement involved is intended to be submitted for advisory review, subject to subparagraph (F)(i). Notwithstanding the

preceding sentence, the advisory review fee for any DTC advertisement that is intended to be submitted for advisory review during fiscal year 2008 shall be due not later than 120 days after September 27, 2007, or an earlier date as specified by the Secretary.

(ii) Effect of submission

Notification of the Secretary under subparagraph (C) of the number of DTC advertisements a person intends to submit for advisory review is a legally binding commitment by that person to pay the annual advisory review fee for that number of submissions on or before October 1 of the fiscal year in which the advertisement is intended to be submitted. Notwithstanding the preceding sentence, the commitment shall be a legally binding commitment by that person to pay the annual advisory review fee for that number of submissions for fiscal year 2008 by the date specified in clause (i).

(iii) Notice regarding carryover submissions

In making a notification under subparagraph (C), the person involved shall in addition notify the Secretary if under subparagraph (F)(i) the person intends to submit a DTC advertisement for which the advisory review fee has already been paid. If the person does not so notify the Secretary, each DTC advertisement submitted by the person for advisory review in the fiscal year involved shall be subject to the advisory review fee.

(E) Modification of advisory review fee

(i) Late payment

If a person has submitted a notification under subparagraph (C) with respect to a fiscal year and has not paid all advisory review fees due under subparagraph (D) not later than November 1 of such fiscal year (or, in the case of such a notification submitted with respect to fiscal year 2008, not later than 150 days after September 27, 2007, or an earlier date specified by the Secretary), the fees shall be regarded as late and an increase in the amount of fees applies in accordance with this clause, notwithstanding any other provision of this section. For such person, all advisory review fees for such fiscal year shall be due and payable 20 days before any direct-to-consumer advertisement is submitted to the Secretary for advisory review, and each such fee shall be equal to 150 percent of the fee that otherwise would have applied pursuant to subsection (c)(3).

(ii) Exceeding identified number of submissions

If a person submits a number of DTC advertisements for advisory review in a fiscal year that exceeds the number identified by the person under subparagraph (C), an increase in the amount of fees applies under this clause for each submission in excess of such number, notwithstanding

any other provision of this section. For each such DTC advertisement, the advisory review fee shall be due and payable 20 days before the advertisement is submitted to the Secretary, and the fee shall be equal to 150 percent of the fee that otherwise would have applied pursuant to subsection (c)(3).

(F) Limits

(i) Submissions

For each advisory review fee paid by a person for a fiscal year, the person is entitled to acceptance for advisory review by the Secretary of one DTC advertisement and acceptance of one resubmission for advisory review of the same advertisement. The advertisement shall be submitted for review in the fiscal year for which the fee was assessed, except that a person may carry over not more than one paid advisory review submission to the next fiscal year. Resubmissions may be submitted without regard to the fiscal year of the initial advisory review submission.

(ii) No refunds

Except as provided by subsections (d)(4) and (f), fees paid under this section shall not be refunded.

(iii) No waivers, exemptions, or reductions

The Secretary shall not grant a waiver, exemption, or reduction of any fees due or payable under this section.

(iv) Right to advisory review not transferable

The right to an advisory review under this paragraph is not transferable, except to a successor in interest.

(2) Operating reserve fee

(A) In general

Each person that on or after October 1, 2007, is assessed an advisory review fee under paragraph (1) shall be subject to fee¹ established under subsection (d)(2) (referred to in this section as an "operating reserve fee") for the first fiscal year in which an advisory review fee is assessed to such person. The person is not subject to an operating reserve fee for any other fiscal year.

(B) Payment

Except as provided in subparagraph (C), the operating reserve fee shall be due no later than—

- (i) October 1 of the first fiscal year in which the person is required to pay an advisory review fee under paragraph (1); or
- (ii) for fiscal year 2008, 120 days after September 27, 2007, or an earlier date specified by the Secretary.

(C) Late notice of submission

If, in the first fiscal year of a person's participation in the program under this section, that person submits any DTC advertisements for advisory review that are in excess of the number identified by that person in

¹ So in original. Probably should be "the fee".

response to the Federal Register notice described in subsection (a)(1)(C), that person shall pay an operating reserve fee for each of those advisory reviews equal to the advisory review fee for each submission established under paragraph (1)(E)(ii). Fees required by this subparagraph shall be in addition to any fees required by subparagraph (A). Fees under this subparagraph shall be due 20 days before any DTC advertisement is submitted by such person to the Secretary for advisory review.

(D) Late payment

(i) In general

Notwithstanding subparagraph (B), and subject to clause (ii), an operating reserve fee shall be regarded as late if the person required to pay the fee has not paid the complete operating reserve fee by—

(I) for fiscal year 2008, 150 days after September 27, 2007, or an earlier date specified by the Secretary; or

(II) in any subsequent year, November 1.

(ii) Complete payment

The complete operating reserve fee shall be due and payable 20 days before any DTC advertisement is submitted by such person to the Secretary for advisory review.

(iii) Amount

Notwithstanding any other provision of this section, an operating reserve fee that is regarded as late under this subparagraph shall be equal to 150 percent of the operating reserve fee that otherwise would have applied pursuant to subsection (d).

(b) Advisory review fee revenue amounts

Fees under subsection (a)(1) shall be established to generate revenue amounts of \$6,250,000 for each of fiscal years 2008 through 2012, as adjusted pursuant to subsections (c) and (g)(4).

(c) Adjustments

(1) Inflation adjustment

Beginning with fiscal year 2009, the revenues established in subsection (b) shall be adjusted by the Secretary by notice, published in the Federal Register, for a fiscal year to reflect the greater of—

(A) the total percentage change that occurred in the Consumer Price Index for all urban consumers (all items; U.S. city average), for the 12-month period ending June 30 preceding the fiscal year for which fees are being established;

(B) the total percentage change for the previous fiscal year in basic pay under the General Schedule in accordance with section 5332 of title 5, as adjusted by any locality-based comparability payment pursuant to section 5304 of such title for Federal employees stationed in the District of Columbia; or

(C) the average annual change in the cost, per full-time equivalent position of the Food and Drug Administration, of all personnel compensation and benefits paid with respect to such positions for the first 5 fiscal years of the previous 6 fiscal years.

The adjustment made each fiscal year by this subsection shall be added on a compounded basis to the sum of all adjustments made each fiscal year after fiscal year 2008 under this subsection.

(2) Workload adjustment

Beginning with fiscal year 2009, after the fee revenues established in subsection (b) are adjusted for a fiscal year for inflation in accordance with paragraph (1), the fee revenues shall be adjusted further for such fiscal year to reflect changes in the workload of the Secretary with respect to the submission of DTC advertisements for advisory review prior to initial dissemination. With respect to such adjustment:

(A) The adjustment shall be determined by the Secretary based upon the number of DTC advertisements identified pursuant to subsection (a)(1)(C) for the upcoming fiscal year, excluding allowable previously paid carry over submissions. The adjustment shall be determined by multiplying the number of such advertisements projected for that fiscal year that exceeds 150 by \$27,600 (adjusted each year beginning with fiscal year 2009 for inflation in accordance with paragraph (1)). The Secretary shall publish in the Federal Register the fee revenues and fees resulting from the adjustment and the supporting methodologies.

(B) Under no circumstances shall the adjustment result in fee revenues for a fiscal year that are less than the fee revenues established for the prior fiscal year.

(3) Annual fee setting for advisory review

(A) In general

Not later than August 1 of each fiscal year (or, with respect to fiscal year 2008, not later than 90 days after September 27, 2007), the Secretary shall establish for the next fiscal year the DTC advertisement advisory review fee under subsection (a)(1), based on the revenue amounts established under subsection (b), the adjustments provided under paragraphs (1) and (2), and the number of DTC advertisements identified pursuant to subsection (a)(1)(C), excluding allowable previously-paid carry over submissions. The annual advisory review fee shall be established by dividing the fee revenue for a fiscal year (as adjusted pursuant to this subsection) by the number of DTC advertisements so identified, excluding allowable previously-paid carry over submissions under subsection (a)(1)(F)(i).

(B) Fiscal year 2008 fee limit

Notwithstanding subsection (b) and the adjustments pursuant to this subsection, the fee established under subparagraph (A) for fiscal year 2008 may not be more than \$83,000 per submission for advisory review.

(C) Annual fee limit

Notwithstanding subsection (b) and the adjustments pursuant to this subsection, the fee established under subparagraph (A) for a fiscal year after fiscal year 2008 may not be more than 50 percent more than the fee established for the prior fiscal year.

(D) Limit

The total amount of fees obligated for a fiscal year may not exceed the total costs for such fiscal year for the resources allocated for the process for the advisory review of prescription drug advertising.

(d) Operating reserves**(1) In general**

The Secretary shall establish in the Food and Drug Administration salaries and expenses appropriation account without fiscal year limitation a Direct-to-Consumer Advisory Review Operating Reserve, of at least \$6,250,000 in fiscal year 2008, to continue the program under this section in the event the fees collected in any subsequent fiscal year pursuant to subsection (a)(1) do not generate the fee revenue amount established for that fiscal year.

(2) Fee setting

The Secretary shall establish the operating reserve fee under subsection (a)(2)(A) for each person required to pay the fee by multiplying the number of DTC advertisements identified by that person pursuant to subsection (a)(1)(C) by the advisory review fee established pursuant to subsection (c)(3) for that fiscal year, except that in no case shall the operating reserve fee assessed be less than the operating reserve fee assessed if the person had first participated in the program under this section in fiscal year 2008.

(3) Use of operating reserve

The Secretary may use funds from the reserves only to the extent necessary in any fiscal year to make up the difference between the fee revenue amount established for that fiscal year under subsections (b) and (c) and the amount of fees actually collected for that fiscal year pursuant to subsection (a)(1), or to pay costs of ending the program under this section if it is terminated pursuant to subsection (f) or not reauthorized beyond fiscal year 2012.

(4) Refund of operating reserves

Within 120 days after the end of fiscal year 2012, or if the program under this section ends early pursuant to subsection (f), the Secretary, after setting aside sufficient operating reserve amounts to terminate the program under this section, shall refund all amounts remaining in the operating reserve on a pro rata basis to each person that paid an operating reserve fee assessment. In no event shall the refund to any person exceed the total amount of operating reserve fees paid by such person pursuant to subsection (a)(2).

(e) Effect of failure to pay fees

Notwithstanding any other requirement, a submission for advisory review of a DTC advertisement submitted by a person subject to fees under subsection (a) shall be considered incomplete and shall not be accepted for review by the Secretary until all fees owed by such person under this section have been paid.

(f) Effect of inadequate funding of program**(1) Initial funding**

If on November 1, 2007, or 120 days after September 27, 2007, whichever is later, the Secretary has not received at least \$11,250,000 in advisory review fees and operating reserve fees combined, the program under this section shall not commence and all collected fees shall be refunded.

(2) Later fiscal years

Beginning in fiscal year 2009, if, on November 1 of the fiscal year, the combination of the operating reserves, annual fee revenues from that fiscal year, and unobligated fee revenues from prior fiscal years falls below \$9,000,000, adjusted for inflation (as described in subsection (c)(1)), the program under this section shall terminate, and the Secretary shall notify all participants, retain any money from the unused advisory review fees and the operating reserves needed to terminate the program, and refund the remainder of the unused fees and operating reserves. To the extent required to terminate the program, the Secretary shall first use unobligated advisory review fee revenues from prior fiscal years, then the operating reserves, and finally, unused advisory review fees from the relevant fiscal year.

(g) Crediting and availability of fees**(1) In general**

Fees authorized under subsection (a) shall be collected and available for obligation only to the extent and in the amount provided in advance in appropriations Acts. Such fees are authorized to remain available until expended. Such sums as may be necessary may be transferred from the Food and Drug Administration salaries and expenses appropriation account without fiscal year limitation to such appropriation account for salaries and expenses with such fiscal year limitation. The sums transferred shall be available solely for the process for the advisory review of prescription drug advertising.

(2) Collections and appropriation acts**(A) In general**

The fees authorized by this section—

(i) shall be retained in each fiscal year in an amount not to exceed the amount specified in appropriation Acts, or otherwise made available for obligation for such fiscal year; and

(ii) shall be available for obligation only if the amounts appropriated as budget authority for such fiscal year are sufficient to support a number of full-time equivalent review employees that is not fewer than the number of such employees supported in fiscal year 2007.

(B) Review employees

For purposes of subparagraph (A)(ii), the term “full-time equivalent review employees” means the total combined number of full-time equivalent employees in—

(i) the Center for Drug Evaluation and Research, Division of Drug Marketing, Advertising, and Communications, Food and Drug Administration; and

(ii) the Center for Biologics Evaluation and Research, Advertising and Promotional Labeling Branch, Food and Drug Administration.

(3) Authorization of appropriations

For each of the fiscal years 2008 through 2012, there is authorized to be appropriated for fees under this section an amount equal to the total revenue amount determined under subsection (b) for the fiscal year, as adjusted pursuant to subsection (c) and paragraph (4) of this subsection, plus amounts collected for the reserve fund under subsection (d).

(4) Offset

Any amount of fees collected for a fiscal year under this section that exceeds the amount of fees specified in appropriation Acts for such fiscal year shall be credited to the appropriation account of the Food and Drug Administration as provided in paragraph (1), and shall be subtracted from the amount of fees that would otherwise be collected under this section pursuant to appropriation Acts for a subsequent fiscal year.

(h) Definitions

For purposes of this section:

(1) The term “advisory review” means reviewing and providing advisory comments on DTC advertisements regarding compliance of a proposed advertisement with the requirements of this chapter prior to its initial public dissemination.

(2) The term “advisory review fee” has the meaning indicated for such term in subsection (a)(1)(D).

(3) The term “carry over submission” means a submission for an advisory review for which a fee was paid in one fiscal year that is submitted for review in the following fiscal year.

(4) The term “direct-to-consumer television advertisement” means an advertisement for a prescription drug product (as defined in section 379g(3) of this title) intended to be displayed on any television channel for less than 3 minutes.

(5) The term “DTC advertisement” has the meaning indicated for such term in subsection (a)(1)(A).

(6) The term “operating reserve fee” has the meaning indicated for such term in subsection (a)(2)(A).

(7) The term “person” includes an individual, partnership, corporation, and association, and any affiliate thereof or successor in interest.

(8) The term “process for the advisory review of prescription drug advertising” means the activities necessary to review and provide advisory comments on DTC advertisements prior to public dissemination and, to the extent the Secretary has additional staff resources available under the program under this section that are not necessary for the advisory review of DTC advertisements, the activities necessary to review and provide advisory comments on other proposed advertisements and promotional material prior to public dissemination.

(9) The term “resources allocated for the process for the advisory review of prescription

drug advertising” means the expenses incurred in connection with the process for the advisory review of prescription drug advertising for—

(A) officers and employees of the Food and Drug Administration, contractors of the Food and Drug Administration, advisory committees, and costs related to such officers, employees, and committees, and to contracts with such contractors;

(B) management of information, and the acquisition, maintenance, and repair of computer resources;

(C) leasing, maintenance, renovation, and repair of facilities and acquisition, maintenance, and repair of fixtures, furniture, scientific equipment, and other necessary materials and supplies;

(D) collection of fees under this section and accounting for resources allocated for the advisory review of prescription drug advertising; and

(E) terminating the program under this section pursuant to subsection (f)(2) if that becomes necessary.

(10) The term “resubmission” means a subsequent submission for advisory review of a direct-to-consumer television advertisement that has been revised in response to the Secretary’s comments on an original submission. A resubmission may not introduce significant new concepts or creative themes into the television advertisement.

(11) The term “submission for advisory review” means an original submission of a direct-to-consumer television advertisement for which the sponsor voluntarily requests advisory comments before the advertisement is publicly disseminated.

(June 25, 1938, ch. 675, §736A, as added Pub. L. 110-85, title I, §104, Sept. 27, 2007, 121 Stat. 832.)

TERMINATION OF SECTION

For termination of section 106(a) of Pub. L. 110-85, see Effective and Termination Dates note below.

EFFECTIVE AND TERMINATION DATES

Section effective Oct. 1, 2007, with fees under this subpart to be assessed for all human drug applications received on or after Oct. 1, 2007, and ceases to be effective Oct. 1, 2012, see sections 106(a) and 107 of Pub. L. 110-85, set out as Effective and Termination Dates of 2007 Amendment notes under section 379g of this title.

§ 379h-2. Reauthorization; reporting requirements

(a) Performance report

Beginning with fiscal year 2008, not later than 120 days after the end of each fiscal year for which fees are collected under this subpart, the Secretary shall prepare and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report concerning the progress of the Food and Drug Administration in achieving the goals identified in the letters described in section 101(c) of the Food and Drug Administration Amendments Act of 2007 during such fiscal year