

**§ 807.97**

**21 CFR Ch. I (4–1–12 Edition)**

the public) shall be available for disclosure by the Food and Drug Administration when the intent to market the device is no longer confidential in accordance with this section, unless exempt from public disclosure in accordance with part 20 of this chapter. Upon final classification, data and information relating to safety and effectiveness of a device classified in class I (general controls) or class II (performance standards) shall be available for public disclosure. Data and information relating to safety and effectiveness of a device classified in class III (premarket approval) that have not been released to the public shall be retained as confidential unless such data and information become available for release to the public under § 860.5(d) or other provisions of this chapter.

[42 FR 42526, Aug. 23, 1977, as amended at 53 FR 11252, Apr. 6, 1988; 57 FR 18067, Apr. 28, 1992; 59 FR 64296, Dec. 14, 1994]

**§ 807.97 Misbranding by reference to premarket notification.**

Submission of a premarket notification in accordance with this subpart, and a subsequent determination by the Commissioner that the device intended for introduction into commercial distribution is substantially equivalent to a device in commercial distribution before May 28, 1976, or is substantially equivalent to a device introduced into commercial distribution after May 28, 1976, that has subsequently been reclassified into class I or II, does not in any way denote official approval of the device. Any representation that creates an impression of official approval of a device because of complying with the premarket notification regulations is misleading and constitutes misbranding.

**§ 807.100 FDA action on a premarket notification.**

- (a) After review of a premarket notification, FDA will:
  - (1) Issue an order declaring the device to be substantially equivalent to a legally marketed predicate device;
  - (2) Issue an order declaring the device to be not substantially equivalent to any legally marketed predicate device;
  - (3) Request additional information;
- or

(4) Withhold the decision until a certification or disclosure statement is submitted to FDA under part 54 of this chapter.

(5) Advise the applicant that the premarket notification is not required. Until the applicant receives an order declaring a device substantially equivalent, the applicant may not proceed to market the device.

(b) FDA will determine that a device is substantially equivalent to a predicate device using the following criteria:

(1) The device has the same intended use as the predicate device; and

(2) The device:

(i) Has the same technological characteristics as the predicate device; or

(ii)(A) Has different technological characteristics, such as a significant change in the materials, design, energy source, or other features of the device from those of the predicate device;

(B) The data submitted establishes that the device is substantially equivalent to the predicate device and contains information, including clinical data if deemed necessary by the Commissioner, that demonstrates that the device is as safe and as effective as a legally marketed device; and

(C) Does not raise different questions of safety and effectiveness than the predicate device.

(3) The predicate device has not been removed from the market at the initiative of the Commissioner of Food and Drugs or has not been determined to be misbranded or adulterated by a judicial order.

[57 FR 58403, Dec. 10, 1992, as amended at 63 FR 5253, Feb. 2, 1998]

**PART 808—EXEMPTIONS FROM FEDERAL PREEMPTION OF STATE AND LOCAL MEDICAL DEVICE REQUIREMENTS**

**Subpart A—General Provisions**

- Sec. 808.1 Scope.
- 808.3 Definitions.
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**Subpart B—Exemption Procedures**

- 808.20 Application.