4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2021-N-0843]

Genus Medical Technologies LLC Versus Food and Drug Administration; Request for Information and Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for information and comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing that implementation of a decision from the U.S. Court of Appeals for the District of Columbia Circuit in *Genus Med. Techs., LLC* v. *FDA*, 2021 U.S. App. Lexis 10928 (April 16, 2021) is expected to require some approved products to transition from drug status to device status. This notice provides information for stakeholders and solicits public comment to inform the Agency's deliberations about products potentially impacted by the *Genus* decision and the way in which impacted products should be transitioned from drug to device status.

DATES: Submit either electronic or written information and comments by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The https://www.regulations.gov electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to https://www.regulations.gov will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on https://www.regulations.gov.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2021-N-0843 for "Genus Medical Technologies LLC v. Food and Drug Administration; Request for Information and Comments." Received comments, those received in a timely manner (see ADDRESSES), will be placed in the docket and, except for those submitted as "Confidential

Submissions," publicly viewable at https://www.regulations.gov or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- Confidential Submissions--To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on https://www.regulations.gov. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to https://www.regulations.gov and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT: Alexandra Lucas, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301-796-0230, Drug_Device_Transition_Inquiry@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On April 16, 2021, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Genus Med. Techs., LLC* v. *FDA*, 2021 U.S. App. Lexis 10928 (April 16, 2021). The U.S. Government has decided not to appeal this decision.

At issue in the *Genus* litigation was FDA's regulatory classification of certain barium sulfate contrast imaging agents as drugs. Barium sulfate contrast imaging agents are used to improve visualization of the gastrointestinal tract in radiographic diagnostic studies. They meet the definition of *drug* in section 201(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 321(g)) because they are articles intended for use in the diagnosis of disease. In its January 10, 2019, designation letter for Genus's barium sulfate contrast imaging agents, FDA explained that it has regulated barium sulfate contrast imaging agents as drugs even though they also appear to meet the definition of *device* in section 201(h) of the FD&C Act. Although FDA has generally regulated products that meet the *device* definition under the device authorities of the FD&C Act, we have regulated as drugs certain types of products that meet the *drug* definition and may also meet the *device* definition. FDA's classification of all contrast imaging agents, including barium sulfate contrast agents, as drugs allowed us to regulate them consistently under the same authority in the Center for Drug Evaluation and Research (CDER) and was intended to be consistent with a previous court decision, *Bracco Diagnostics, Inc.* v. *Shalala*, 963 F. Supp. 20 (D.D.C. 1997).

In the *Genus* litigation, both the District Court and the Court of Appeals, as a matter of statutory interpretation, disagreed with FDA's view that the Agency had discretion to regulate products meeting the *device* definition as *drugs*. The Court of Appeals determined that FDA cannot classify as a drug any product that meets the definition of *device*, stating "[e]xcepting combination products, . . . devices must be regulated as devices and drugs--if they do not also satisfy the device definition--must be regulated as drugs."

II. Discussion

A. Product Classification Decisions Going Forward

FDA has issued guidance on its approach to classification decisions for drugs and devices. (See FDA's guidance for industry and FDA staff "Classification of Products as Drugs and Devices & Additional Product Classification Issues" (September 2017), available at https://www.fda.gov/media/80384/download.) That guidance reviews the definitions of the terms *drug* and *device* found in section 201(g) and (h) of the FD&C Act, respectively. Both definitions include similar "intended use" clauses, with drugs including "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals…and articles (other than food) intended to affect the structure or any function of the body of man or other animals" and devices including certain articles "intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals…or [articles] intended to affect the structure or any function of the body of man or other animals." A medical product meets the *device* definition if it (1) is an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, and (2) does not achieve its primary intended purposes through chemical action within or on the body, and (3) is not dependent upon being metabolized for the achievement of its primary intended purposes.

Going forward, in accordance with *Genus,* FDA intends to regulate products that meet both the *device* and *drug* definition as devices, except where the statute indicates that Congress intended a different classification, and we further intend to bring previously classified products into line with the *Genus* decision. Accordingly, FDA will examine product classifications, paying particular attention to those products that have been regulated as drugs even though they may satisfy the device definition. We expect the determining factor in many cases to be whether the product achieves its primary intended purposes through chemical action within or on the body or is dependent upon being metabolized for the achievement of its primary intended

purposes. Historically, FDA has not always examined these factors in determining how to regulate certain types of medical products--e.g., imaging agents, which are discussed further below--because the Agency believed it had discretion to regulate such products as drugs even if they met the device definition. In determining product classification in the future, FDA will consider these factors. FDA will also examine whether other statutory provisions--beyond the *drug* and *device* definitions--indicate Congress intended a type of product to be regulated under either the drug or device authorities.

B. Imaging Agents

Some medical imaging techniques can depend solely on an imaging device to produce and display images. These techniques include ultrasound, computerized tomography (CT), magnetic resonance imaging (MRI), and traditional radiology. However, imaging agents are sometimes used in conjunction with these imaging devices to provide image enhancement. For example, with CT and MRI, the addition of an imaging agent may improve the visualization of tissues, organs, and physiologic processes in part by increasing the relative difference of imaging signal intensities in adjacent regions of the body. In other cases, such as radiopharmaceutical imaging, including single photon emission computerized tomography and positron emission computerized tomography, the device alone cannot produce a usable image, and it is necessary to administer an imaging agent to the patient before using the imaging device.

For the past two decades, FDA has generally regulated the imaging agents used in these procedures as drugs without consideration of whether they appear to achieve their primary intended purposes through chemical action within or on the body or whether they are dependent upon metabolization for the achievement of their primary intended purposes. Following the *Genus* decision, we intend to reexamine whether individual imaging agents meet the device definition, including whether they achieve their primary intended purposes through chemical action within or on the body or are dependent upon being metabolized for the achievement of their primary intended purposes. As noted above, we intend to reexamine other product

categories as well, as appropriate.

C. Product Transition Issues

Implementation of the *Genus* decision will require FDA to transition some approved products from drug status to device status. FDA will aim to effect necessary product transitions in a way that does not disrupt the supply of these important medical products or place undue burden on manufacturers or on the healthcare delivery system. Some operational issues raised by product transitions necessitated by *Genus* are discussed briefly below.

1. Categories of Products Implicated by *Genus*

Stakeholders are invited to submit comments regarding categories of products currently regulated as drugs that may be required to transition to device status under *Genus*. Comments are also welcome regarding statutory provisions other than the *drug* and *device* definitions that may indicate Congressional intention regarding the appropriate regulatory pathway (i.e., drug or device) for certain types of products.

2. Transition Process

FDA currently anticipates that it will publish in a future *Federal Register* notice a list of approved drug products that we tentatively determine should transition to device status under *Genus*. Stakeholders would then have an opportunity to comment on those tentative determinations before classification determinations are made.

3. Transition Timing

We recognize that there are differences between the drug regulatory requirements and the device regulatory requirements and that sponsors of transitioning marketed products will need time to transition from compliance with one to the other. For example, sponsors of transitioning products may need to update labeling, bring facilities into compliance with quality system regulations, prepare for device inspections, and come into compliance with other statutory and regulatory provisions that pertain to devices. Therefore, stakeholders are invited to submit comments on timelines necessary for this transition and how FDA can facilitate this transition in

a way that does not disrupt the supply of these important medical products or place undue burden on manufacturers or on the healthcare delivery system.

4. User Fee Transitions

CDER assesses user fees for certain new drug applications (NDAs) and products approved under those NDAs under the Prescription Drug User Fee Amendments (PDUFA). CDER also assesses user fees for certain abbreviated new drug applications (ANDAs) and products approved under those ANDAs under the Generic Drug User Fee Amendments (GDUFA). The PDUFA and GDUFA user fee programs both include specific fees assessed annually for certain marketed approved products.

In the case of PDUFA, with certain exceptions or exemptions, annual prescription drug program fees are assessed for each strength of a prescription drug identified in an approved NDA, as of October 1 of each fiscal year (FY), provided the product is included in the "Prescription Drug Product List" (the "active section") of *Approved Drug Products with Therapeutic Equivalence Evaluations* (commonly known as the "Orange Book").

In the case of GDUFA, annual GDUFA program fees are assessed with respect to approved ANDAs, and fee amounts are tiered based on the number of approved ANDAs owned by an entity (including its affiliates) as of October 1 of each fiscal year. GDUFA also includes an annual facility fee for each facility referenced in an approved ANDA as a producer of an active pharmaceutical ingredient or finished dosage form covered by the ANDA.

FDA does not anticipate that the identification and transitioning of products from drug status to device status pursuant to the *Genus* decision will be completed before October 1, 2021. Persons assessed an annual fee with respect to a product identified in an approved NDA or ANDA as of that date should pay the assessed FY 2022 fees by the due date to avoid being placed on the arrears list and incurring other penalties associated with failure to pay user fees by the due date. Payors of the annual FY 2022 fee with respect to a product that the payor believes should transition to device status under *Genus* are encouraged to request refunds of user fees

attributable to those products. FDA anticipates that, for approved products that transition from drug status to device status under the process described above, refund requests for PDUFA and GDUFA fees that are received on time under section 736(i) or 744B(m) of the FD&C Act (21 U.S.C. 379h(i) or 379j-42(m)), respectively, will be granted. This would include requests for refund of the FY 2022 prescription drug program fees assessed under PDUFA, or FY 2022 generic drug applicant program fees assessed under GDUFA that may result in a lower fee tier for an ANDA holder, as well as any GDUFA facility fees for a facility referenced in one or more ANDAs that will transition, if that facility is not also reported in other ANDAs that will not transition. Under PDUFA, to qualify for consideration for a refund, a written request must be submitted to FDA not later than 180 calendar days after the fee is due (see section 736(i) of the FD&C Act). Under GDUFA, to qualify for a return of a fee, a written request justifying the return must be submitted within 180 calendar days from the date of the fee payment (see section 744B(m) of the FD&C Act).

More information about PDUFA and GDUFA fees and the submission of refund requests is available on FDA's website at https://www.fda.gov/industry/fda-user-fee-programs/prescription-drug-user-fee-amendments (PDUFA) and https://www.fda.gov/industry/fda-user-fee-programs/generic-drug-user-fee-amendments (GDUFA).

5. Determining Drug or Device Status

FDA intends to establish a process for the orderly and efficient determination of which products currently regulated as drugs must be regulated as devices under *Genus*. We encourage sponsors of potentially affected products to comment on this notice, await the publication of our future notice identifying products that we have tentatively determined should transition to device status, and, in the meantime, reach out to FDA with time-sensitive questions.

FDA has established the following contact point for all questions concerning the *Genus* decision and transition activities: Drug_Device_Transition_Inquiry@fda.hhs.gov.

Dated: August 2, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

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