

Memorandum of Understanding  
Between  
The Food and Drug Administration, Public Health Service,  
Department of Health and Human Services  
and  
The Environmental Protection Agency

Notice Regarding Matters of Mutual Responsibility - Regulation of  
Liquid Chemical Germicides Intended for Use on Medical Devices

I. PURPOSE

This Memorandum of Understanding (MOU) between the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) clarifies jurisdiction between the two agencies in the regulation of certain liquid chemical germicides. These liquid chemical germicides are devices under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). This MOU also embodies the agreement of the two agencies to undertake certain rulemakings in order to eliminate duplicative regulation of certain types of liquid chemical germicides. This MOU includes the agencies' interim agreement to simplify and coordinate their regulatory and enforcement activities in shared areas of jurisdiction affecting these types of products pending the conclusion of these rulemakings.

II. STATUTORY AUTHORITIES

A. FDA Authorities

The FD&C Act grants FDA authority to regulate devices as defined in 21 U.S.C. 321(h). Under section 321(h), the term "device" includes an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory that is intended to cure, mitigate, treat, or prevent disease in man, or is intended to affect the structure or any function of the body of man. Liquid chemical germicides intended for use in conjunction with a variety of articles that fit within the statutory definition of "device," such as operating instruments, medical examining tables, hospital scales, and other hospital equipment, also fall within the definition of "device" because they are considered accessories to these devices.

Unless liquid chemical germicides used in conjunction with devices were commercially distributed prior to May 28, 1976,<sup>1</sup> manufacturers of these products, under 21 U.S.C. 360(k) [section 510(k) of the FD&C Act] are required to submit a premarket notification to FDA before they market their products. Before these products can be legally marketed, FDA must grant marketing clearance by (1) issuance of an order in response to a section 510(k) submission which exempts the device from the FD&C Act's

premarket approval requirements, or (2) approval of a premarket approval application. In granting marketing clearance by issuance of a section 510(k) order exempting a liquid chemical germicide from premarket approval, FDA must find that the device is "substantially equivalent," as the term is defined in 21 U.S.C. 360c(i)(1)(A), to a predicate device that does not require premarket approval. Section 513 of the FD&C Act authorizes FDA to exempt products from premarket notification requirements for which there is a reasonable assurance of safety and effectiveness. At present, no chemical germicides that are used with devices have been exempted from premarket notification requirements.

In regulating liquid chemical germicides used with devices, FDA is exercising its responsibilities under the FD&C Act for ensuring that devices are safe and effective for their intended uses. The FD&C Act provides enforcement authority to FDA to pursue regulatory actions, including seizure, injunction, prosecution, and civil penalties.

#### B. EPA Authorities

Liquid chemical germicides, including those regulated as devices, are also under the authority of the EPA under FIFRA. Before a pesticide product may be lawfully sold or distributed in commerce, the product must be registered by EPA pursuant to FIFRA section 3, or otherwise exempted from the requirements of FIFRA. A registration is a license allowing a pesticide product to be sold and distributed for specified uses in accordance with specified use instructions, precautions, and other terms and conditions. Liquid chemical sterilants are included among the various types of antimicrobial products that are currently subject to FIFRA.

1/ Devices marketed prior to May 28, 1976 are grandfathered from the FD&C Act's premarket notification requirements. Neither FDA nor EPA are aware of any currently marketed products that are exempt under this grandfather provision. Should any exist, they are not covered by this Memorandum of Understanding.

A pesticide product may be registered or remain registered only if it meets the statutory standard for registration. Among other things, a pesticide must perform its intended pesticidal function without causing "unreasonable adverse effects on the environment" (FIFRA section 3(c)(5)). "Unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of [the] pesticide" (FIFRA section 2(bb)).

The burden of demonstrating that a pesticide product satisfies the statutory criteria for registration is at all times on the proponents of initial or continued registration. FIFRA section 6 provides EPA with various regulatory tools that the Administrator may use if it appears that the product no longer satisfies the statutory criteria for registration. If appropriate, EPA may require modifications to the terms and conditions of registration, such as deletion of particular uses or revisions to labeling, as an alternative to regulatory outcomes such as cancellation, suspension, or emergency suspension. FIFRA also provides enforcement authority to EPA to pursue actions, including issuance of stop sale, use, or removal orders when there is reason to believe a pesticide is in violation of FIFRA. Additionally, EPA has authority to seek the assessment of civil administrative penalties as well as institute seizure and criminal actions for violations of FIFRA.

FIFRA section 25(b) authorizes the Administrator to exempt pesticides from FIFRA through regulation if the Administrator determines that the pesticide is "adequately regulated by another Federal agency" or is "of a character which it is unnecessary to be subject to this Act in order to carry out the purposes of this Act."

### III. REGULATORY RESPONSIBILITIES AND DEFINITIONS

For the purposes of this agreement, liquid chemical germicides that are used in conjunction with medical devices are divided into two product categories: (1) sterilants and (2) general purpose disinfectants. Sterilants, for purposes of this agreement, means those chemical germicides used to reprocess reusable critical and semicritical devices<sup>2</sup>. Critical devices are devices that are introduced directly into the human body, either into or in contact with the bloodstream or normally sterile areas of the body. These critical devices must be sterile.

<sup>2/</sup> This definition is consistent with the definition of these terms used by the Centers for Disease Control and Prevention (CDC). Block, S.S. 1991. Disinfection, Sterilization, and Preservation. 4th Edition. Philadelphia, Lea & Febiger. Semicritical devices are those which contact intact mucous membranes but which do not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body. For these devices, sterilization is desirable but not mandatory. These devices must be subjected at least to a high level disinfection<sup>3</sup> process using a sterilant, but for a shorter time than that required for sterilization.

The second category of liquid chemical germicides are general purpose disinfectants. General purpose disinfectants, for purposes of this agreement, means those chemical germicides used to reprocess noncritical devices and medical equipment surfaces<sup>4</sup>.

Noncritical devices and medical equipment surfaces must be subjected to intermediate or low level disinfection<sup>5</sup>.

FDA's priority is to confirm the efficacy and safety of sterilants used to reprocess critical and semicritical devices which pose the greatest risk of disease transmission. This includes assuring that they do not adversely affect device performance or pose a hazard to the patient/user. Historically, EPA has assessed the effective performance of all chemical germicides and addressed health and safety issues presented by their use.

The FD&C Act and FIFRA have overlapping regulatory schemes for liquid chemical germicides used on devices. The objective of this MOU is to minimize redundant regulation of these products by FDA and EPA while assuring that the safety and efficacy requirements of both statutes are met. This affects three areas: data requirements for obtaining approval, procedures for obtaining approval, and compliance.

3/ "High level disinfectant" and "high level disinfection" are terms of art used by the public health community. FDA recognizes "high level disinfectant" as a separate or subcategory of sterilants. EPA does not register "high level disinfectants" as separate antimicrobial pesticides, but instead may register uses of germicides that correspond with uses in FDA's "high level disinfection" category.

4/ This definition is consistent with the definition of the term used by CDC.

5/ "Low and intermediate level disinfectants" are terms of art used by the public health community. FDA recognizes "low and intermediate level disinfection" as subcategories of general purpose disinfectants. EPA does not register low level and intermediate level disinfectants, but has corresponding germicide classes.

In determining whether the FD&C Act's and FIFRA's statutory and regulatory requirements are met, EPA and FDA will utilize the data requirements and performance standards referenced in FDA's current Guidance on the Content and Format of Premarket Notification Submission for Liquid Chemical Germicides, FDA premarket notification regulations at 21 CFR Part 807, Subpart E, EPA data requirements regulations at 40 CFR Part 158, and EPA's Subdivision G, Product Performance Guidelines.

Since the EPA registration requirements for general purpose disinfectants parallel the requirements necessary to receive marketing clearance for general purpose disinfectants under section 510(k) of the FD&C Act, fulfillment of EPA's registration requirements fulfills FDA's section 510(k) requirements for those products.

The EPA efficacy data requirements for liquid chemical sterilants, including those with high level disinfectant uses, are fulfilled by FDA's section 510(k) requirements or premarket approval requirements. Therefore, premarket clearance by FDA fulfills certain EPA registration requirements for liquid chemical sterilants, insofar as efficacy and product performance are concerned. FDA premarket clearance does not satisfy EPA's chemistry, toxicology, and ecological effects requirements.

#### IV. AGREEMENT

The Administrator of the Environmental Protection Agency and the Commissioner of the Food and Drug Administration agree that until exemptions referred to in Section V occur, the following division of responsibility will govern the activities of the agencies in the regulation of liquid chemical germicides that are intended for use on devices:

##### A. Regulatory Responsibilities

1. FDA will be primarily responsible for the premarket review of safety and efficacy requirements for liquid chemical germicides that are sterilants<sup>6</sup> intended for use on critical or semicritical devices. Examples of critical devices are laparoscopes, surgical instruments, heart-lung oxygenators, and transfer forceps. Examples of semicritical devices are gastrointestinal endoscopes, endotracheal tubes, cystoscopes, anesthesia breathing circuits, and vaginal specula. FDA will also be primarily responsible for premarket review of contact lens solutions.

6/ If a liquid chemical sterilant product has subordinate claims such as tuberculocidal or virucidal, these claims also will be regulated by FDA.

2. EPA will be primarily responsible for premarket review of liquid chemical germicides that are general purpose disinfectants<sup>7</sup> intended for use on devices other than critical or semicritical devices. Examples of noncritical devices are wheel chairs, medical beds, stands, certain operating room surfaces, medical lamps, dental units, and stethoscopes.

3. FDA marketing clearance through the section 510(k) process or approval through the premarket approval process of sterilants will satisfy certain requirements for registration under FIFRA Section 3. Upon submission to EPA by the applicant of an order issued by FDA granting marketing clearance or approval for a liquid chemical germicide that is a sterilant, EPA will consider the efficacy data requirements for registration to be satisfied, and will promptly determine whether the other requirements for registration are satisfied.

4. EPA registration of liquid chemical germicides that are used as disinfectants for devices, except sterilants, will satisfy the criteria necessary to establish substantial equivalence as defined in 21 U.S.C. 360c(i)(1)(A). For this category of liquid chemical germicides, submission by the manufacturer to FDA of a copy of the EPA correspondence granting registration will satisfy FDA's requirement for a premarket notification under 21 U.S.C. 360(k). Upon receipt of this information from the manufacturer of a liquid chemical germicide in this category, FDA will issue an order finding the product substantially equivalent to a predicate device that does not require premarket approval. This order will allow the device to be legally marketed without an approved FDA premarket approval application.

7/ Procedures described in Paragraph 4 only apply to liquid chemical germicide products that do not contain any sterilant claims. If a liquid chemical germicide product contains both sterilant and general purpose disinfectant claims, registration will proceed according to the procedures described in Paragraph 3. If the registrant of a general purpose disinfectant product registered by EPA subsequently applies for registration of a sterilant claim, registration of that product must proceed under procedures described in Paragraph 3 and the existing EPA registration will become void upon FDA's clearance of the product.

5. As part of the EPA registration process, EPA will require registrants of liquid chemical germicides, other than sterilants that have received FDA premarketing clearance or approval, to put the following statement on their product labels:

"This product is not to be used on any surface or instrument that (1) is introduced directly into the human body, either into or in contact with the bloodstream or normally sterile areas of the body, or (2) contacts intact mucous membranes but which does not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body."

#### B. Compliance Responsibilities

1. FDA will be responsible for all sampling and all efficacy testing of liquid chemical sterilants intended for use on critical and semicritical devices and for instituting appropriate enforcement and/or regulatory action against any products that do not comply with the FD&C Act.

Upon request, EPA will provide FDA with copies of the latest accepted labeling and the name and location of the production site for each product FDA intends to sample.

To the extent allowed under 21 U.S.C. 331j, 21 U.S.C. 360(j)(c), 42 U.S.C. 263g(d), 42 U.S.C. 263i(e), and 21 C.F.R. Part 20, FDA will share all safety and efficacy test results, labeling changes, and upon EPA request, any other information obtained during FDA enforcement/regulatory actions relating to liquid chemical sterilants. EPA may use this information to determine whether the registrant has complied with FIFRA. On the basis of this information, EPA may determine that further regulatory action under FIFRA, including cancellation of the product's registration, is warranted.

2. EPA will be responsible for the sampling and efficacy testing of all general purpose chemical germicides that are intended for use on devices other than critical and semicritical devices, and for instituting appropriate enforcement and/or regulatory action against any such chemical germicide that does not comply with FIFRA. EPA will refer labels and other evidence concerning inefficacious liquid chemical germicides intended for use on medical devices other than critical or semicritical to FDA for complementary action under the FD&C Act.

3. Each agency will provide assistance upon request to support compliance activities and litigation by the other Agency in cases involving liquid chemical germicides that are intended for use on devices. Assistance will be requested in accordance with applicable procedures, statutory and regulatory requirements, including compliance with regulations of 21 CFR Part 20, through the liaison officers listed below. Assistance may include provision of sampling, inspection and audit data, expert witnesses, certified statements, and affidavits.

Each Agency may consult with the other at any time to determine if the initiation of regulatory and/or enforcement action against a liquid chemical germicide in lieu of or concurrently with the other agency's action is appropriate.

This Memorandum of Understanding has no effect on any pending investigations or enforcement or regulatory actions undertaken by EPA pursuant to FIFRA or by FDA pursuant to the FD&C Act.

### C. Coordination of Activities

To ensure the continued coordinated regulatory, compliance, and enforcement activities for liquid chemical germicides intended for use on devices, an EPA/FDA interagency committee is established. The Directors of the EPA's Registration Division and the Compliance Division, Office of Prevention, Pesticides, and Toxic Substances, and of FDA's Center for Devices and Radiological Health, Office of Compliance and Surveillance, will serve as joint chairpersons who will designate their respective

agency members of the committee. The committee will meet at a minimum of twice each fiscal year.

#### V. FUTURE RULEMAKINGS TO ELIMINATE DUPLICATIVE AGENCY REVIEW

EPA will initiate a rulemaking proceeding under section 25(b) of FIFRA to exempt liquid chemical sterilant products from regulation under FIFRA. EPA believes that the efficacy data requirements and product performance standards for liquid chemical sterilants are fulfilled by FDA's section 510(k) requirements or premarket approval requirements. When such exemption becomes effective, FDA and EPA will cease to follow procedures described in Paragraph IV, A.3. and these products will be subject solely to the regulatory and enforcement requirements and procedures of FDA, and EPA will no longer register such products. To the extent EPA receives information regarding such products, it will share such information with FDA.

FDA will initiate a rulemaking proceeding to classify liquid chemical germicides used on devices under section 513 of the FD&C Act. FDA believes that EPA's requirements under FIFRA for liquid chemical germicides that are intended for use on medical devices that are not critical or semicritical devices parallel the FD&C Act's requirements under section 510(k) of the Act. Accordingly, FDA will recommend to its classification advisory panel that liquid chemical germicides intended for use on devices that are not critical or semicritical devices be exempted from premarket notification requirements under section 510(k) of the FD&C Act. When any such exemption becomes effective, FDA and EPA will cease to follow the procedures in paragraph IV, A. 4. To the extent FDA obtains any information regarding such products, it will share the information with EPA.

#### VI. NAME AND ADDRESS OF PARTICIPATING PARTIES

A. Food and Drug Administration  
5600 Fishers Lane  
Rockville, MD 20857

B. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

#### VII. LIAISON OFFICERS

A. For the Food and Drug Administration:

Sterilization and Toxicology Project Officer  
(currently: Dr. Virginia Chamberlain)  
Office of Compliance and Surveillance  
Center for Devices and Radiological Health  
1390 Piccard Drive  
Rockville, MD 20850  
Telephone: (301) 427-1131



B. For the Environmental Protection Agency:

Antimicrobial Program Branch Chief  
(currently: Juanita Wills)  
Registration Division  
Antimicrobial Program Branch (H7505C)  
401 M Street, S.W.  
Washington, DC 20460  
Telephone: (703) 305-6661

#### VIII. PERIOD OF AGREEMENT

This agreement becomes effective upon acceptance by both parties. It may be modified by mutual written consent or terminated by either party upon a thirty (30) day advance written notice to the other party. The parties agree to evaluate the agreement every three (3) years, at which time either party would have the option of renewing, modifying, or canceling the agreement.

APPROVED AND ACCEPTED FOR THE APPROVED AND ACCEPTED FOR THE  
ENVIRONMENTAL PROTECTION AGENCY FOOD AND DRUG ADMINISTRATION

By /Signed/ By /Signed/  
Victor J. Kimm Ronald S. Chessmore

Title Acting Assistant Administrator Title Associate Commissioner for  
Regulatory Affairs

Date June 4, 1993 Date June 4, 1993