
Guidance for Industry

180-Day Exclusivity:

Questions and Answers

DRAFT GUIDANCE

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**U.S. Department of Health and Human Services
Food and Drug Administration
Center for Drug Evaluation and Research (CDER)
Center for Biologics Evaluation and Research (CBER)**

**January 2017
Generic Drugs**

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180-Day Exclusivity: Questions and Answers

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Guidance for Industry
180-Day Exclusivity: Questions and Answers¹

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I. INTRODUCTION

This guidance is intended to address questions that have been raised about the provisions of the Federal Food, Drug, and Cosmetic Act (FD&C Act) that relate to generic drug exclusivity, which commonly is known as *180-day exclusivity* for generic drug products. As a general matter, the Food and Drug Administration (FDA or the Agency) has implemented these statutory provisions within the context of application-specific decisions. Some FDA decisions have been made publicly available (e.g., in FDA citizen petition responses and documents released in litigation). In addition, in certain circumstances where a novel issue of interpretation was raised by a particular factual scenario regarding forfeiture of 180-day exclusivity, FDA has opened a public docket or otherwise sought comment from affected parties in advance of taking an action. Also, in certain instances, applicants have submitted correspondence to their abbreviated new drug applications (ANDAs) regarding 180-day exclusivity, which FDA has considered in making decisions. FDA believes that a guidance for industry that provides answers to commonly asked questions about 180-day exclusivity would enhance transparency and facilitate the development, approval, and timely marketing of generic drug products. FDA intends to update this guidance to include additional questions and answers (Q&As) as appropriate.

In general, FDA’s guidance documents do not establish legally enforceable responsibilities. Instead, guidances describe the Agency’s current thinking on a topic and should be viewed only as recommendations, unless specific regulatory or statutory requirements are cited. The use of the word *should* in Agency guidances means that something is suggested or recommended, but not required.

II. BACKGROUND

The *Drug Price Competition and Patent Term Restoration Act of 1984* (the Hatch-Waxman Amendments)² to the FD&C Act established the ANDA approval pathway for generic drugs.³ In

¹ This guidance has been prepared by the Office of Generic Drug Policy in the Center for Drug Evaluation and Research at the Food and Drug Administration.

² Public Law 98-417.

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42 2003, Congress enacted the *Medicare Prescription Drug, Improvement, and Modernization Act*
43 *of 2003* (MMA),⁴ which, among other things, substantially revised certain statutory provisions
44 related to 180-day exclusivity. In this guidance, we will discuss 180-day exclusivity as it
45 pertains to ANDAs subject to the MMA statutory provisions. This guidance does not discuss
46 180-day exclusivity as it pertains to ANDAs subject to the pre-MMA statutory provisions. In
47 Section III.A, we describe how to determine which statutory scheme applies to a particular
48 ANDA.

49

50 A. ANDA Approval Pathway

51

52 The process for obtaining approval to market an innovator drug approved under a new drug
53 application (NDA) differs from that for obtaining approval to market a generic drug under an
54 ANDA. A sponsor of an innovator drug must submit an NDA, which must contain, among other
55 things, a demonstration of the safety and effectiveness of the drug for the conditions of use for
56 which approval is sought.⁵ In its application, an NDA applicant must submit information for
57 each patent that claims the drug or method of using the drug and for which a claim of patent
58 infringement could reasonably be asserted against a person engaged in the unlicensed
59 manufacture, use, or sale of the drug product.⁶ Upon approval of an NDA, FDA publishes this
60 patent information in its publication *Approved Drug Products with Therapeutic Equivalence*
61 *Evaluations*, known as the *Orange Book*.⁷

62

63 To obtain approval of a generic drug, an ANDA applicant is not required to provide independent
64 evidence of the safety and effectiveness of the proposed generic drug. Instead, the applicant
65 relies on FDA's previous finding that the reference listed drug (RLD)⁸ relied upon by the ANDA
66 applicant is safe and effective. The ANDA applicant must identify the RLD on which it seeks to
67 rely and, among other things, demonstrate, with limited exceptions, that the proposed generic
68 drug has the same active ingredient(s), route of administration, dosage form, and strength as the
69 RLD.⁹ A generic drug also must have the same conditions of use and the same labeling as the
70 RLD (except for certain permissible labeling differences),¹⁰ and the applicant must demonstrate
71 that its proposed generic drug is bioequivalent to the RLD.¹¹

³ For the purpose of this guidance, the term *generic drug* refers to a new drug product for which approval is sought or has been obtained in an ANDA submitted under section 505(j) of the FD&C Act.

⁴ Public Law 108-173.

⁵ Section 505(b)(1) of the FD&C Act.

⁶ Id. See also section 505(c)(2) of the FD&C Act.

⁷ The Orange Book is available at <http://www.accessdata.fda.gov/scripts/cder/ob/default.cfm>.

⁸ An RLD is the listed drug identified by FDA as the drug product on which an ANDA applicant relies in seeking approval of its ANDA. 21 CFR 314.3(b).

⁹ A generic drug with the same active ingredient, dosage form, route of administration, and strength as the RLD is considered pharmaceutically equivalent to that product. See also 21 CFR 314.3(b).

¹⁰ See section 505(j)(2)(A)(i), (v) of the FD&C Act. An example of a permissible difference in labeling would be a difference when an ANDA applicant is not seeking approval for a use protected by patent or exclusivity pursuant to section 505(j)(2)(A)(viii) of the FD&C Act and 21 CFR 314.94(a)(8)(iv).

¹¹ See section 505(j)(2)(A)(iv) of the FD&C Act. Therapeutically equivalent products are approved drug products that are pharmaceutical equivalents for which bioequivalence has been demonstrated, and that can be expected to have the same clinical effect and safety profile when administered to patients under the conditions specified in the labeling. 21 CFR 314.3(b).

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B. Patent Certification and 180-day Exclusivity

The timing of ANDA approval depends on, among other things, the patent and exclusivity protections for the RLD. An applicant must provide in its ANDA additional information related to any patents for the RLD. In particular, the ANDA applicant generally must submit to FDA one of four specified certifications regarding the patents for the RLD under section 505(j)(2)(A)(vii) of the FD&C Act.

If the Orange Book does not list a patent for the RLD, the ANDA applicant must certify:

1. That such patent information has not been submitted by the NDA holder for listing in the Orange Book (a paragraph I certification).¹²

With respect to each patent listed in the Orange Book for the RLD, the applicant's patent certification must state one of the following:

2. That such patent has expired (a paragraph II certification)
3. The date on which such patent will expire (a paragraph III certification)
4. That such patent is invalid, unenforceable, or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted (a paragraph IV certification).¹³

If an applicant submits a paragraph I or II certification, the patent in question will not delay ANDA approval. If an applicant submits a paragraph III certification, the applicant agrees to wait until the relevant patent has expired before seeking final approval of its ANDA. If, however, an applicant wishes to seek approval of its ANDA *before* a listed patent has expired by challenging the validity of a patent, claiming that a patent would not be infringed by the product proposed in the ANDA, or claiming a patent is unenforceable, the applicant must submit a paragraph IV certification to FDA.

The FD&C Act describes only one circumstance in which an ANDA applicant need not certify to a listed patent. Specifically, when a patent is listed only for a method of use, an ANDA applicant seeking to omit that approved method of use from the generic drug's labeling can submit a *section viii statement*, acknowledging that a given method-of-use patent has been listed, but stating that the patent at issue does not claim a use for which the applicant seeks approval.¹⁴

An applicant submitting a paragraph IV certification to a listed patent must provide the NDA holder and each patent owner notice of its paragraph IV certification, including a description of the legal and factual basis for the ANDA applicant's assertion that the patent is invalid,

¹² 21 CFR 314.94(a)(12)(i)(A). If in the opinion of the ANDA applicant and to the best of its knowledge there are no patents claiming the drug product, drug substance, or method of use of the drug product, the applicant must submit to its ANDA a certification stating that opinion. 21 CFR 314.94(a)(12)(ii).

¹³ Section 505(j)(2)(A)(vii) of the FD&C Act; see also 21 CFR 314.94(a)(12)(i)(A).

¹⁴ See section 505(j)(2)(A)(viii) of the FD&C Act. See also 21 CFR 314.94(a)(12)(iii).

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112 unenforceable, or will not be infringed.¹⁵ If a patent is listed at the time an ANDA is submitted
113 and, in response to notice of a paragraph IV certification, the NDA holder or patent owner
114 initiates a patent infringement action against the ANDA applicant within 45 days of receiving the
115 required notice, approval of the ANDA generally will be stayed for 30 months from the later of
116 the date of receipt of the notice by any owner of the patent or the NDA holder or such shorter or
117 longer time as the court might order.¹⁶ If a patent is listed in the Orange Book after an ANDA is
118 submitted but before it is approved, the applicant for the pending ANDA generally must amend
119 its application and provide an appropriate patent certification or statement to the newly listed
120 patent; however, no 30-month stay will be available in this circumstance.¹⁷

121
122 The statute provides an incentive and a reward to generic drug applicants that expose themselves
123 to the risk of patent litigation. It does so by granting a 180-day period of exclusivity *vis-à-vis*
124 certain other ANDA applicants to the applicant that is first to file a substantially complete
125 ANDA containing a paragraph IV certification to a listed patent. If only one such ANDA is filed
126 on the first day, there is only one *first applicant*; if two or more such ANDAs are filed on the
127 first day, the ANDA applicants share first-applicant status.¹⁸ If an ANDA contains a paragraph
128 IV certification for a relevant patent and the ANDA is not that of a first applicant, the ANDA
129 applicant is regarded as a *subsequent applicant*.¹⁹

130
131 If an ANDA meets the substantive requirements for approval, but cannot be finally approved due
132 to unexpired patents or exclusivities, FDA will tentatively approve the ANDA. *Tentative*
133 *approval* “means notification to an applicant by [FDA] that an [ANDA] meets the requirements
134 of [section 505(j)(2)(A) of the FD&C Act] but cannot receive effective approval because the
135 application does not meet the requirements of this subparagraph, there is a period of exclusivity
136 for the listed drug under subparagraph (F) or section 505A, or there is a 7-year period of
137 exclusivity for the listed drug under section 527.”²⁰

138
139 The FD&C Act describes a number of conditions under which an ANDA applicant may forfeit
140 eligibility for 180-day exclusivity. These forfeiture events can be generally described as: (1)
141 failure to market; (2) withdrawal of application; (3) amendment of certification; (4) failure to
142 obtain tentative approval; (5) entry into agreement with another applicant, the listed drug

¹⁵ Section 505(j)(2)(B) of the FD&C Act.

¹⁶ Section 505(j)(5)(B)(iii) of the FD&C Act and 21 CFR 314.107(b)(3)(i).

¹⁷ *Id.* See also 21 CFR 314.94(a)(12)(vi).

¹⁸ As described in Question 2, an applicant that submitted a substantially complete ANDA without a paragraph IV certification may become eligible for 180-day exclusivity by amending its application to contain a paragraph IV certification to a listed patent on the first day that an ANDA or amendment containing a paragraph IV certification is submitted for that RLD.

¹⁹ See section 505(j)(5)(B)(iv)(I), (II)(aa) and 505(j)(5)(D)(iii) of the FD&C Act. See also 21 CFR 314.107(c)(1); *Abbreviated New Drug Applications and 505(b)(2) Applications; Final Rule*, 81 FR 69580, 69627-69628 (Oct. 6, 2016).

²⁰ Section 505(j)(5)(B)(iv)(II)(dd)(AA) of the FD&C Act. See also 21 CFR 314.3(b) (defining *tentative approval* to also include, among other things, notification that an ANDA otherwise meets the requirements for approval under the FD&C Act, but cannot be approved because there is a period of exclusivity for the listed drug under section 505E of the FD&C Act, or because a court order pursuant to 35 U.S.C. 271(e)(4)(A) orders that the ANDA may be approved no earlier than the date specified) and 21 CFR 314.105.

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143 application holder, or a patent owner; and (6) expiration of all patents.²¹ Under these provisions,
144 if certain events occur, an applicant eligible for 180-day exclusivity at the time its ANDA was
145 submitted (first applicant) may forfeit eligibility for 180-day exclusivity. If all first applicants
146 forfeit their eligibility for 180-day exclusivity, no applicant will be eligible for 180-day
147 exclusivity, and FDA may approve subsequent applicants' ANDAs, subject to the approval
148 requirements of the FD&C Act.

149
150 FDA has received a number of questions about 180-day exclusivity and has identified the
151 following commonly asked questions for inclusion in this guidance. FDA expects the following
152 information to enhance transparency and facilitate the development, approval, and timely
153 marketing of generic drugs. FDA intends to update this guidance to include additional Q&As as
154 appropriate.

155 156 **III. QUESTIONS AND ANSWERS**

157 158 **A. Applicable Statutory Scheme**

159 160 **Q1. How does FDA determine whether the pre-MMA or MMA provisions of the FD&C** 161 **Act apply to a particular ANDA?**

162
163 Section 1102(b)(1) of the MMA provides that the MMA 180-day exclusivity provisions are
164 effective only with respect to an ANDA filed after the date of enactment (i.e., December 8, 2003)
165 for a listed drug for which no paragraph IV certification was made before that date.²² The
166 following list illustrates how FDA has applied this *effective date* provision in particular
167 situations:

- 168
169 • If all ANDAs referencing a particular RLD are submitted to FDA after December 8, 2003
170 (and thus no paragraph IV certification could have been submitted before December 8,
171 2003), the MMA 180-day exclusivity provisions apply to all of the ANDAs.
- 172
173 • If at least one ANDA with a paragraph IV certification to a listed patent for the RLD was
174 submitted before December 8, 2003, all ANDAs referencing that RLD (including
175 ANDAs submitted after December 8, 2003) are governed by the pre-MMA statutory
provisions.
- 176
177 • If one or more ANDAs referencing a particular RLD were submitted before December 8,
178 2003, but the first paragraph IV certification was submitted after December 8, 2003, the
179 pre-MMA provisions govern for any ANDA referencing that RLD (whether or not that
180 particular ANDA was filed before or after December 8, 2003), because section
181 1102(b)(1) of the MMA is based on the date of submission of the first application, not on
the date of the first paragraph IV certification.

182 FDA has concluded that the effective date provision imposes the same statutory scheme on all
183 ANDAs referencing a specific RLD. An attempt by FDA to apply both pre-MMA and MMA

²¹ Section 505(j)(5)(D) of the FD&C Act.

²² Section 1102(b)(1) of the MMA.

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184 statutory schemes to a single group of applications with a common RLD could result in conflict
185 between the MMA and pre-MMA provisions. The eligibility, triggering, and forfeiture features
186 of the different 180-day exclusivity schemes could render one applicant ineligible for exclusivity
187 while another applicant could retain its eligibility. To avoid these inequitable outcomes, all
188 ANDAs submitted referencing the same RLD will be subject to one statutory scheme.

189

190 B. First Applicants

191

192 **Q2. How does an ANDA applicant qualify as a “first applicant”?**

193

194 *A first applicant* is an ANDA “applicant that, on the first day on which a substantially complete
195 application containing a [paragraph IV] certification ... is submitted for approval of a drug,
196 submits a substantially complete application that contains and lawfully maintains a [paragraph
197 IV] certification ... for the drug.”²³

198

199 An applicant that previously submitted a substantially complete ANDA that did not contain a
200 paragraph IV certification may become eligible for 180-day exclusivity by amending its ANDA
201 to contain a paragraph IV certification to a listed patent for the RLD on the first day that an
202 ANDA or amendment containing a paragraph IV certification is submitted.

203

204 The listed patent or patents to which an ANDA applicant submitted a paragraph IV certification
205 that gives rise to the eligibility for 180-day exclusivity is referred to in this draft guidance as the
206 *qualifying patent(s)*.

207

208 **Q3. What constitutes a substantially complete application?**

209

210 *A substantially complete application* is an ANDA that on its face is sufficiently complete to
211 permit a substantive review. Sufficiently complete means that the ANDA contains all the
212 information required under section 505(j)(2)(A) of the FD&C Act and does not contain a
213 deficiency described in 21 CFR 314.101(d) and (e).²⁴ FDA indicates its determination that an
214 ANDA is substantially complete when the Agency *receives* the ANDA for review under 21 CFR
215 314.101. If FDA determines, after an initial evaluation, that an ANDA was substantially
216 complete as of the date it was submitted to FDA, FDA will consider the ANDA to have been
217 received as of the date of submission.²⁵

218

219 **Q4. Does an ANDA applicant have to be the first to submit a paragraph IV certification
220 to all of the RLD’s listed patents to be a first applicant?**

221

222 No. The statute requires “a” paragraph IV certification;²⁶ it does not require a first applicant to
223 be the first to submit a paragraph IV certification to more than a single patent (or all of the
224 patents), even if multiple patents are listed for the RLD.

²³ Section 505(j)(5)(B)(iv)(II)(bb) of the FD&C Act; see also 21 CFR 314.3(b).

²⁴ 21 CFR 314.3(b); see also section 505(j)(5)(B)(iv)(II)(cc) of the FD&C Act.

²⁵ 21 CFR 314.101(b)(2).

²⁶ Section 505(j)(5)(B)(iv)(II)(bb) of the FD&C Act.

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225
226 There can be multiple patents that could qualify a single ANDA applicant as a first applicant, so
227 long as they are certified to on that same first day that the first paragraph IV certification in an
228 ANDA for that RLD is submitted. As a result, each qualifying patent separately can affect
229 exclusivity. For example, if an ANDA applicant submitted paragraph IV certifications to two
230 separate patents on the same first day and the first patent expires prior to triggering of 180-day
231 exclusivity, the paragraph IV certification to the second patent can remain a basis for first-
232 applicant status and for 180-day exclusivity.

233
234 **Q5. Can an ANDA applicant qualify as a first applicant when it includes both a**
235 **paragraph IV certification and a section viii statement to a single listed patent?**
236

237 Yes. FDA has determined that when both drug product or drug substance claims and method-of-
238 use claims are contained within the same patent, an applicant may file a paragraph IV
239 certification with respect to the drug product or drug substance patent claim(s) and a section viii
240 statement with respect to the method-of-use claim(s) in the patent. This type of certification is
241 commonly referred to as a *split certification*. This approach preserves the NDA holder's
242 statutory right to assert its patent rights regarding the drug substance or drug product claims
243 before ANDA approval while permitting the ANDA applicant to exercise its statutory right to
244 avoid infringing a method-of-use claim by seeking approval for fewer than all of the approved
245 conditions of use for the RLD. Consistent with this principle, the paragraph IV certification in a
246 split certification can qualify an applicant for first applicant eligibility.

247
248 **Q6. Can an ANDA applicant be a first applicant if the applicant includes a paragraph**
249 **III certification to a patent that expires after the patent to which a paragraph IV**
250 **certification was submitted?**
251

252 Yes. The statutory definition of "first applicant" requires "a" paragraph IV certification. The
253 statute does not require that the paragraph IV certification be to the latest expiring patent. For
254 example, a first applicant could have a paragraph IV certification to a patent expiring on January
255 1, 2020 (the only qualifying patent) and a paragraph III certification to a patent expiring on June
256 1, 2030.

257
258 **Q7. Could the timing of sending notice of paragraph IV certification affect first**
259 **applicant status?**
260

261 Yes. For original ANDAs, notice of paragraph IV certification must be provided on or after the
262 date on which the applicant receives a paragraph IV acknowledgment letter from FDA, but not
263 later than 20 days after the date of the postmark on the paragraph IV acknowledgment letter.²⁷
264 The paragraph IV acknowledgment letter is a written, postmarked communication from FDA to
265 an applicant stating that the Agency has determined that an ANDA containing a paragraph IV
266 certification is sufficiently complete to permit a substantive review and has been received for

²⁷ 21 CFR 314.95(b)(1).

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267 review.²⁸ Any notice sent before the ANDA applicant's receipt of a paragraph IV
268 acknowledgment letter is invalid.²⁹

269
270 For amendments containing a paragraph IV certification submitted before the ANDA has been
271 received for review (i.e., before receipt of a paragraph IV acknowledgment letter), the ANDA
272 applicant must send notice according to the timeframe described above for original ANDAs. If
273 an ANDA applicant's notice of its paragraph IV certification is timely provided and the applicant
274 has not submitted a previous paragraph IV certification, FDA will base its determination of
275 whether the ANDA applicant is a first applicant on the date of submission of the amendment
276 containing the paragraph IV certification.³⁰

277
278 For amendments submitted after the ANDA has been received for review (i.e., after receipt of an
279 acknowledgment letter or a paragraph IV acknowledgment letter) and supplements, notice of
280 paragraph IV certification must be provided at the same time that the amendment or supplement
281 is submitted to FDA. If notice is not sent simultaneously with an amendment or supplement,
282 FDA considers the paragraph IV certification not to be effective until notice is provided.³¹ For
283 example, if an ANDA applicant submitted a supplement containing a paragraph IV certification,
284 but notice of the paragraph IV certification was not provided until 30 days after the submission
285 of the supplement, FDA would evaluate whether the applicant was a first applicant based on the
286 date notice was provided, rather than the date of submission of the supplement. Thus, a delay in
287 giving notice of certain amendments or supplements could mean a later date for the paragraph IV
288 certification to become effective which could result in failure to obtain first applicant status (if
289 another applicant submits a certification that becomes effective in the interim).

290
291 Regardless of whether it is an original ANDA, an amendment, or a supplement, a paragraph IV
292 certification must not be submitted earlier than the first working day after the day the patent is
293 published in the Orange Book.³² Any notice sent before the first working day after the day the
294 patent is published in the Orange Book is invalid.³³

295

Q8. What does it mean to “lawfully maintain” a paragraph IV certification?

296

297
298 The definition of first applicant requires that the applicant “lawfully maintain[] a [paragraph IV]
299 certification.”³⁴ This requires an uninterrupted paragraph IV certification to the qualifying patent
300 or patent claim. For example, an applicant has not lawfully maintained its paragraph IV
301 certification if the applicant initially submits a paragraph IV certification to a patent or patent
302 claim, and then later amends its ANDA to include a paragraph III certification or a section viii
303 statement to the qualifying patent or patent claim, and then amends its ANDA again to include a
304 paragraph IV certification to the same patent or patent claim. However, if the applicant initially
305 submits a paragraph IV certification to a qualifying patent or patent claim and subsequently

²⁸ See 21 CFR 314.3(b).

²⁹ 21 CFR 314.95(b)(2).

³⁰ 21 CFR 314.95(d)(2). See also 21 CFR 314.94(a)(12)(viii)(C)(I)(ii).

³¹ Cf. *Purepac Pharmaceutical Co. v. Thompson*, 354 F. 3d 877 (D.C. Cir. 2004).

³² See 21 CFR 314.94(a)(12)(viii)(C)(I)(ii).

³³ See 21 CFR 314.95(b)(2).

³⁴ Section 505(j)(5)(B)(iv)(II)(bb) of the FD&C Act and 21 CFR 314.3(b).

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306 submits an amendment that contains a paragraph IV certification to the same qualifying patent or
307 patent claim (and notice of the paragraph IV certification is sent in accordance with 21 CFR
308 314.95(d)), the first applicant has lawfully maintained the paragraph IV certification to the patent
309 or patent claim upon which eligibility for 180-day exclusivity is based.³⁵

310
311 In addition, if a district court decides that the qualifying patent has been infringed (and the patent
312 is valid), and the judgment of the district court is not appealed or is affirmed, the ANDA
313 applicant's paragraph IV certification that the patent was invalid, unenforceable, or not infringed
314 is no longer accurate. The applicant would be required to amend its ANDA to change its
315 paragraph IV certification to a paragraph III certification, which acknowledges the date the
316 patent expires.³⁶

317

Q9. Can there be more than one first applicant for a single drug product?

318
319

320 Yes. The 180-day exclusivity provisions contemplate that there can be multiple first applicants.³⁷
321 Multiple ANDAs that include paragraph IV certifications to one or more patents listed for an
322 RLD often will be submitted to FDA on the day the first such application (or the first paragraph
323 IV certification) is submitted. If multiple applicants submit paragraph IV certifications on the
324 first day that paragraph IV certifications for that RLD are submitted, all will be considered first
325 applicants. In addition, different ANDA applicants each can qualify as first applicants by
326 certifying to different listed patents on the same first day.

327

Q10. Do multiple first applicants for a single drug product each get their own 180-day exclusivity period?

328
329

330
331 No. There is one 180-day exclusivity period for each drug product. Accordingly, whether
332 multiple first applicants enjoy the full 180-day exclusivity period depends on when those
333 ANDAs are approved in relation to when the 180-day exclusivity period is triggered.³⁸

334

Q11. Can there be different first applicants for different strengths of a drug product?

335
336

337 Yes. Separate 180-day exclusivity periods are available for each strength of the same drug
338 product, because each strength is a distinct drug product. Thus, it is possible for there to be
339 different first applicants for different strengths of the RLD. For example, assume ANDA A
340 applicant submitted the first substantially complete application that contained a paragraph IV
341 certification for a 30 mg strength RLD and lawfully maintained that certification. A few days
342 later, ANDA B applicant submitted its ANDA containing a paragraph IV certification for the 30
343 mg strength RLD. The Agency then approves a 60 mg strength RLD, and lists a patent in the
344 Orange Book submitted by the NDA holder for that strength. ANDA B applicant amends its
345 ANDA to include the 60 mg strength and includes the first paragraph IV certification to the
346 patent listed for the 60 mg strength and lawfully maintains that certification. ANDA A applicant

³⁵ 81 FR 69580, 69617 (Oct. 6, 2016).

³⁶ See 21 CFR 314.94(a)(12)(viii)(A).

³⁷ See, e.g., section 505(j)(5)(D)(iii) of the FD&C Act (refers to "first applicants").

³⁸ See Question 17 below.

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347 similarly amends its ANDA to include the 60 mg strength, but three days later. In these
348 circumstances, ANDA A applicant is the first applicant for the 30 mg strength, and ANDA B
349 applicant is the first applicant for the 60 mg strength.

350

351 C. 180-day Exclusivity and Patents

352

353 **Q12. Does an ANDA applicant need to win its patent litigation to be considered a first**
354 **applicant that retains eligibility for 180-day exclusivity?**

355

356 No. An applicant potentially may retain eligibility for 180-day exclusivity even if it is not sued
357 as a result of its qualifying paragraph IV certification or, if sued, the case is resolved, for
358 example, through settlement that allows the applicant to enter the market before the patent
359 expires.³⁹

360

361 **Q13. Can a patent that an NDA holder requests to remove from the Orange Book still**
362 **give rise to 180-day exclusivity?**

363

364 Yes. An NDA holder can request that FDA remove a patent from the Orange Book in certain
365 circumstances: for example, if a court declared the patent invalid. However, if an NDA holder
366 requests that a patent be removed from the Orange Book and one or more first applicants are
367 already eligible for 180-day exclusivity based on a paragraph IV certification to that patent, FDA
368 will not remove the patent until any 180-day exclusivity stemming from the listed patent has
369 expired, or has been extinguished or relinquished.⁴⁰ Until the patent is removed from the Orange
370 Book—after any associated 180-day exclusivity has expired or has been extinguished or
371 relinquished—ANDA applicants must submit or maintain appropriate certifications to the patent
372 notwithstanding the NDA holder’s request to remove the patent. This practice ensures that NDA
373 holders cannot unilaterally extinguish an ANDA applicant’s eligibility for 180-day exclusivity
374 by requesting removal of the patent from the Orange Book prior to ANDA approval.⁴¹ In such
375 circumstances, FDA will indicate in the Orange Book that the NDA holder has requested
376 removal of the patent.⁴²

377

378 **Q14. Does an ANDA applicant retain 180-day exclusivity after the qualifying patent**
379 **expires?**

380

381 No. In keeping with the statutory language and purpose of 180-day exclusivity, FDA has
382 construed the statute such that 180-day exclusivity attaches based only on paragraph IV
383 certifications to unexpired patents. A paragraph IV certification does not survive the expiry of a
384 listed patent. Upon patent expiry, the statute and FDA’s regulations require ANDA applicants to

³⁹ Cf. *Mova Pharms. Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998).

⁴⁰ See 21 CFR 314.94(a)(12)(viii)(B); see also discussion in sections E and F of this guidance.

⁴¹ See *Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303 (D.C. Cir. 2010); see also 21 CFR 314.53(f)(2)(i).

⁴² See FDA’s website on *Orange Book Data Files*, at

<http://www.fda.gov/drugs/informationondrugs/ucm129689.htm> (describing use of the *patent delist request flag* as indicating that the “[s]ponsor has requested [that the] patent be delisted [but the] patent has remained listed because, under [s]ection 505(j)(5)(D)(i) of the [FD&C] Act, a first applicant may retain eligibility for 180-day exclusivity based on a paragraph IV certification to this patent for a certain period”).

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385 amend their certifications from a paragraph IV certification to a paragraph II certification, which
386 states that the patent has expired.⁴³ If an applicant neglects to amend its certification to a
387 paragraph II certification after a patent expires, FDA will construe the application as including a
388 paragraph II certification.⁴⁴ As noted above, applications with only paragraph II certifications
389 are eligible for immediate effective approval.⁴⁵ Therefore, once the only qualifying patent
390 expires, there are no longer any ANDAs blocked by 180-day exclusivity.

391
392 This interpretation of the statute effectuates the goals of the Hatch-Waxman Amendments. The
393 180-day exclusivity provisions were drafted to give ANDA applicants an incentive to be the first
394 to challenge a listed patent, potentially removing that patent as a barrier to approval. Once a
395 listed patent expires and is no longer a barrier to ANDA approval, there is no longer a need to
396 provide an incentive to challenge it in court. Thus, an expired patent does not serve as the basis
397 for a 180-day exclusivity award, and 180-day exclusivity does not extend beyond the life of the
398 patent.

400 D. 180-day Exclusivity Trigger and Scope of 180-Day Exclusivity

401 **Q15. How is 180-day exclusivity triggered?**

402 The FD&C Act provides that the 180-day exclusivity period is triggered by “first commercial
403 marketing of the drug (including the commercial marketing of the listed drug) by any first
404 applicant.”⁴⁶ FDA has interpreted the statutory phrase “including the commercial marketing of
405 the listed drug” to provide that exclusivity can be triggered by the marketing of an authorized
406 generic⁴⁷ by a first applicant, even if that first applicant’s ANDA has not yet been approved.

407
408
409 Concluding that 180-day exclusivity is triggered upon the first applicant’s commercial marketing
410 of an authorized generic or the RLD prevents potential subversion of the statutory scheme
411 through collusion between NDA holders and first applicants. If 180-day exclusivity were
412 triggered only by commercially marketing the first applicant’s ANDA product, a first applicant
413 that struck a deal with the NDA holder to commercially market the authorized generic or RLD
414

⁴³ Section 505(j)(2)(A)(vii)(II), (IV); 21 CFR 314.94(a)(12)(viii)(C)(I)(i) (“An applicant must amend a submitted certification or statement if, at any time before the date of approval of the ANDA, the applicant learns that the submitted certification or statement is no longer accurate”).

⁴⁴ 81 FR 69580, 69615 (Oct. 6, 2016).

⁴⁵ Section 505(j)(2)(A)(vii)(II); (j)(5)(B)(i) (when an applicant submits only a paragraph II certification, approval of the applicant’s ANDA “may be made effective immediately”); 21 CFR 314.94(a)(12)(viii).

⁴⁶ Section 505(j)(5)(B)(iv)(I) of the FD&C Act; see also 21 CFR 314.3(b) (“*Commercial marketing* is the introduction or delivery for introduction into interstate commerce of a drug product described in an ANDA, outside the control of the ANDA applicant, except that the term does not include transfer of the drug product for investigational use under part 312 of this chapter or transfer of the drug product to parties identified in the ANDA for reasons other than sale. Commercial marketing includes the introduction or delivery for introduction into interstate commerce of the reference listed drug by the ANDA applicant.”).

⁴⁷ Section 505(t)(3) of the FD&C Act defines an authorized generic as “a listed drug (as that term is used in subsection (j)) that: (A) has been approved under subsection (c); and (B) is marketed, sold, or distributed directly or indirectly to retail class of trade under a different labeling, packaging (other than repackaging as the listed drug in blister packs, unit doses, or similar packaging for use in institutions), product code, labeler code, trade name, or trade mark than the listed drug.” See also 21 CFR 314.3(b).

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415 instead of marketing the product described in its ANDA potentially could block approval of
416 subsequent ANDAs until patent expiration.

417

Q16. Once triggered, can 180-day exclusivity be suspended or postponed?

419

420 Once triggered, the 180-day period runs without interruption.

421

Q17. How does the trigger of the 180-day exclusivity period by one first applicant affect other first applicants?

424

425 The effect of one first applicant's trigger of the 180-day exclusivity period on other first
426 applicants flows from the fact that there is only one exclusivity period available for each drug
427 product (see Question 10 above). Any first applicant's trigger of the exclusivity period triggers
428 the 180-day exclusivity period for all first applicants for that drug product and exclusivity for all
429 first applicants ends 180 days after the initial trigger. Other first applicants will benefit from
430 exclusivity only to the extent they commercially market during this exclusivity period. The
431 following examples illustrate how shared 180-day exclusivity might operate. Assume ANDA A,
432 ANDA B, and ANDA C all qualified as first applicants.

433

- 434 • If all three ANDAs are approved on the same day, and if all three first commercially
435 market that same day, triggering the exclusivity period, all three applicants benefit from
436 the full 180-day exclusivity period.
- 437 • If all three ANDAs are approved on the same day, but only ANDA A is commercially
438 marketed on that first day triggering the exclusivity period, it is triggered for all three
439 ANDAs. Thus, if ANDA B is not commercially marketed until day 30, that applicant
440 will benefit from exclusivity only for the remainder of the 180-day period (i.e., 150 days).
441 If ANDA C is not commercially marketed until day 179, it will benefit from only one day
442 of exclusivity.
- 443 • If one or more ANDAs are approved on the same day, but one or more applicants first
444 commercially market the drug product 60 days after approval, the 180-day exclusivity
445 period is triggered upon commercial marketing and runs for 180 days.

446

Q18. Does 180-day exclusivity block approval of all ANDAs that reference the same RLD?

448

449
450 No. 180-day exclusivity blocks only the approval of subsequent ANDAs that also contain a
451 paragraph IV certification.⁴⁸ There are several examples in which 180-day exclusivity does not
452 block approval of another ANDA referencing the same RLD:

453

- 454 • If an ANDA was approved before the NDA holder submitted a patent that provides the
455 basis for first applicant status for a pending ANDA, any related 180-day exclusivity
456 would not affect the previously approved ANDA.

⁴⁸ See section 505(j)(5)(B)(iv)(I) of the FD&C Act.

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- 457
- 458
- 459
- 460
- If an ANDA applicant seeks to omit the approved method(s) of use covered by a listed patent with a section viii statement, another ANDA applicant's paragraph IV certification to that same patent, and any related 180-day exclusivity, would not block approval of the ANDA that contained the section viii statement.
- 461
- If a patent was *late-listed* vis-à-vis a pending ANDA under FDA's regulations, a first applicant's paragraph IV certification to that patent, and any related 180-day exclusivity, would not block approval of the ANDA for which the patent is late-listed and for which as a result no patent certification was required.⁴⁹
- 462
- 463
- 464

465

466 **Q19. Can an authorized generic be marketed during the 180-day exclusivity period?**

467

468 Yes. 180-day exclusivity only blocks approval of subsequent applicants' ANDAs under section
469 505(j) of the FD&C Act and does not affect the approval of or marketing under NDAs, including
470 marketing of authorized generics.

471

472 **Q20. Can pediatric exclusivity affect the timing of approval of subsequent applicants' ANDAs after the 180-day exclusivity period is triggered?**

473

474

475 Yes. Under section 505A(b)(1)(B)(i) of the FD&C Act (addressing pediatric exclusivity), if
476 pediatric exclusivity attaches to a listed patent, the period during which an ANDA may not be
477 approved under section 505(j)(5)(B) of the FD&C Act may be extended by 6 months after the
478 date the patent expires. An ANDA with a paragraph IV certification is required to change its
479 certification to a paragraph II certification when the patent expires (and will be treated as
480 containing a paragraph II certification even if it fails to affirmatively change its certification).
481 Under section 505A(b)(1)(B)(i)(I), an ANDA that was previously blocked by another applicant's
482 eligibility for 180-day exclusivity and that must change to a paragraph II certification (when the
483 patent that formed the basis of the exclusivity expires) will be blocked from approval by
484 pediatric exclusivity after the qualifying patent (and any associated 180-day exclusivity) has
485 expired.

486

487 For example, a first applicant's ANDA contains a paragraph IV certification to a patent that has
488 an associated 6-month period of pediatric exclusivity. The ANDA is approved 178 days before
489 the patent expires, immediately commences commercial marketing, and enjoys 178 days of the
490 180-day exclusivity. The patent expires, all ANDAs that have not yet been approved must
491 change to paragraph II certification to that patent, the 6-month pediatric exclusivity period
492 commences, and FDA generally cannot approve any ANDA with a paragraph II certification
493 during the 6-month pediatric exclusivity period. Because the first applicant was approved prior

⁴⁹ A *late listed* patent is one for which an NDA holder submits the patent for listing later than required by statute or regulations. See, e.g., 21 CFR 314.53(d) and 21 CFR 314.94(a)(12)(vi). An applicant that submitted an ANDA for that RLD that contained an appropriate patent certification or statement before the submission of the patent information is not required to submit a patent certification or statement to address the patent or patent information that is late-listed with respect to the pending ANDA. 21 CFR 314.94(a)(12)(vi). Applicants with pending ANDAs that did not contain an appropriate patent certification or statement before the late listing of a patent or patent information and applicants with ANDAs submitted after the patent or patent information is listed must provide an appropriate patent certification or statement to the newly listed patent or patent information. Id.

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494 to the start of pediatric exclusivity, it does not need to change its certification upon patent expiry
495 and pediatric exclusivity does not affect the approval of the first applicant's ANDA. However,
496 any subsequent applicant's ANDA will need to contain a paragraph II certification and will not
497 be eligible for approval until the pediatric exclusivity expires. Thus, the first applicant may
498 enjoy an additional six months of de facto exclusivity before FDA can approve another ANDA.
499

E. 180-day Exclusivity Relinquishment and Waiver

Q21. Can a first applicant relinquish or waive its 180-day exclusivity?

504 Yes. FDA has consistently interpreted section 505(j)(5)(B)(iv) of the FD&C Act to permit both
505 relinquishment and selective waiver of 180-day exclusivity. *Relinquishment* refers to the
506 voluntary and complete abandonment of eligibility for exclusivity. *Selective waiver* refers to a
507 first applicant's waiver of exclusivity to permit approval during the exclusivity period of a
508 particular subsequent ANDA, or subsequent ANDAs. Relinquishment and selective waiver of
509 180-day exclusivity promote the purpose of the exclusivity—to encourage patent challenges and
510 increase marketplace competition.

512 A first applicant that is eligible for 180-day exclusivity may relinquish its exclusivity at any time.
513 In contrast, selective waiver of 180-day exclusivity may occur only once the exclusivity period
514 has been triggered.

Q22. Will subsequent applicants be notified if 180-day exclusivity is selectively waived or relinquished?

519 As a general matter, when all first applicants have relinquished their claims to 180-day
520 exclusivity, FDA may inform subsequent applicants that are otherwise eligible for approval that
521 their ANDAs may be approved.

523 For selective waivers, FDA's practice is to notify only the subsequent applicant in whose favor
524 the exclusivity has been waived. If a first applicant's exclusivity were triggered and selectively
525 waived in favor of a subsequent applicant with an unapproved ANDA, the fact of the selective
526 waiver to the subsequent applicant could be considered information in the unapproved ANDA.
527 As such, FDA generally would not disclose that the selective waiver had occurred to anyone
528 except the applicant in whose favor exclusivity was waived, at least until the ANDA benefited by
529 the waiver was approved.⁵⁰

F. Forfeiture of 180-day Exclusivity

Q23. How does FDA determine whether a first applicant has forfeited its eligibility for 180-day exclusivity?

536 To ascertain whether a first applicant has forfeited eligibility for 180-day exclusivity, FDA looks
537 at the qualifying patent(s) to determine whether the applicant has lawfully maintained its

⁵⁰ See 21 CFR 314.430(d)(1).

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538 paragraph IV certification(s) and whether the applicant has forfeited exclusivity under any of the
539 forfeiture provisions, as discussed below.

540

541 *1. Failure to Market Forfeiture Provision*

542

543 Section 505(j)(5)(D)(i)(I) states that a forfeiture event occurs:

544 (I) If the first applicant fails to market the drug by the later of-

545 (aa) the earlier of the date that is-

546 (AA) 75 days after the date on which the approval of the application of the
547 first applicant is made effective [...]; or

548 (BB) 30 months after the date of submission of the application of the first
549 applicant; or

550 (bb) with respect to the first applicant or any other applicant (which other
551 applicant has received tentative approval), the date that is 75 days after the date as
552 of which, as to each of the patents with respect to which the first applicant
553 submitted and lawfully maintained a certification qualifying the first applicant for
554 the 180-day exclusivity period [...], at least one of the following has occurred:

555 (AA) In an infringement action brought against that applicant with respect
556 to the patent or in a declaratory judgment action brought by that applicant
557 with respect to the patent, a court enters a final decision from which no
558 appeal (other than a petition to the Supreme Court for a writ of certiorari)
559 has been or can be taken that the patent is invalid or not infringed.

560 (BB) In an infringement action or a declaratory judgment action described
561 in subitem (AA), a court signs a settlement order or consent decree that
562 enters a final judgment that includes a finding that the patent is invalid or
563 not infringed.

564 (CC) The patent information submitted under subsection (b) or (c) is
565 withdrawn by the holder of the application approved under subsection
566 (b).⁵¹

567 **Q24. How does FDA determine whether a first applicant has forfeited exclusivity under**
568 **the “failure to market” provision?**

569

⁵¹ Section 505(j)(5)(D)(i)(I) of the FD&C Act.

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570 Determining whether forfeiture has occurred requires analyzing if and when the events described
571 under the *failure to market* provision occurred. As seen in the statutory provision outlined
572 immediately above, application of this forfeiture provision requires a series of analyses based on
573 the timing of specific events. The statute directs that a forfeiture event occurs when the first
574 applicant fails to market the drug by the later of two dates. One of these dates is calculated under
575 item (aa) by determining the earlier of a date that is either 75 days after the first applicant’s
576 ANDA is approved (subitem (AA)) or 30 months after the date of submission of the first
577 applicant’s ANDA (subitem (BB)). The date determined under item (aa) then is compared to the
578 date as determined under item (bb). Item (bb) states that the occurrence of at least one of the
579 enumerated events with respect to a first applicant or any other applicant (which other applicant
580 has received tentative approval) as to each of the qualifying patents will begin a 75-day period
581 leading to possible forfeiture of exclusivity. These events include, very generally, when a court
582 enters a final decision that the patent is invalid or not infringed, a court signs a settlement order
583 or consent decree entering final judgment that includes a finding that the patent is invalid or not
584 infringed, or the patent information for the listed drug is withdrawn by the NDA holder.⁵² For an
585 event to occur under item (bb) by any other applicant, the same other applicant must receive both
586 tentative approval and a final court decision described in subitem (AA) or (BB). Forfeiture
587 under section 505(j)(5)(D)(i)(I) of the FD&C Act occurs if the first applicant fails to market by
588 the later of the dates under item (aa) or (bb).

589
590 A hypothetical example illustrates how FDA determines whether forfeiture has occurred under
591 the “failure to market” provision. For the purposes of evaluating item (aa), presume that on June
592 1, 2009, the applicant for ANDA A submitted its substantially complete application containing a
593 paragraph IV certification, which it lawfully maintained. FDA approved the ANDA on
594 December 20, 2012, and the 75-day period identified in subitem (AA) of this forfeiture provision
595 ended on March 4, 2013. Thirty months after the date the ANDA is submitted was December 1,
596 2011 (the date identified in subitem (BB)).⁵³ The relevant date for item (aa) of the forfeiture
597 analysis is December 1, 2011, the earlier of these two dates.

598
599 For the second part of the analysis under item (bb), presume that on January 1, 2013, a court
600 entered a final decision (from which no appeal (other than a petition to the Supreme Court for a
601 writ of certiorari) has been or can be taken) that the relevant patent is invalid and not infringed in
602 an infringement action against a subsequent applicant for this RLD whose ANDA received
603 tentative approval at some point before FDA makes the forfeiture determination. The relevant
604 forfeiture date for ANDA A pursuant to subitem (AA) is March 17, 2013, 75 days after the date
605 on which the court issued its decision. Notably, this date applies even though ANDA A in this
606 example was not the subject of the litigation.

607
608 In this scenario, the failure to market forfeiture provision requires the first applicant to market by
609 March 17, 2013, the later of the dates applicable under item (aa) (December 1, 2011) and item

⁵² See Question 26 below.

⁵³ Section 505(j)(5)(D)(i)(I)(aa)(BB) of the FD&C Act states that the 30-month period should be calculated from the date of “submission of the application of the first applicant.” If an ANDA containing a paragraph IV certification is “received” as substantially complete, FDA considers the date an ANDA containing a paragraph IV certification was submitted to be the date the ANDA is “received” pursuant to 21 CFR 314.101(b).

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610 (bb) (March 17, 2013). In this example, if ANDA A applicant did not begin commercial
611 marketing until after March 17, 2013, it would forfeit its exclusivity.

612
613 **Q25. Does an event from both items (aa) and (bb) of the “failure to market” provision**
614 **have to occur to result in forfeiture under this provision?**

615
616 Yes. The “failure to market” provision results in forfeiture when there are two dates (one from
617 item (aa) and one from item (bb)) on the basis of which FDA may identify the “later” event as
618 described in section 505(j)(5)(D)(i)(I) of the FD&C Act. The provision does not effect a
619 forfeiture when an event under item (aa) has occurred, but no event under item (bb) has yet
620 occurred.

621
622 **Q26. Does an NDA holder’s request to remove the qualifying patent from the Orange**
623 **Book qualify as a triggering event under subitem (bb)(CC)?**

624
625 No. An NDA holder’s request that the qualifying patent be removed from the Orange Book does
626 not constitute an event under subitem (CC) because as described in Question 13, FDA will not
627 remove a patent from the Orange Book if the removal would deprive a first applicant of 180-day
628 exclusivity to which it is otherwise entitled. This policy prevents an NDA holder from removing
629 a qualifying patent in order to deprive a first applicant of the period of 180-day exclusivity for
630 which it is otherwise eligible.⁵⁴

631
632 **2. *Withdrawal of Application Forfeiture Provision***

633
634 A forfeiture event occurs under this provision if “[t]he first applicant withdraws the application
635 or [FDA] considers the application to have been withdrawn as a result of [FDA’s] determination
636 . . . that the application does not meet the requirements for approval under [section 505(j)(4) of
637 the FD&C Act].”⁵⁵

638
639 **Q27. How does FDA determine forfeiture under the “withdrawal of application”**
640 **forfeiture provision?**

641
642 The *withdrawal of application* provision provides for forfeiture under two conditions: (1) if the
643 first applicant withdraws the application or (2) if FDA considers the application withdrawn for
644 failure to meet the various general requirements for approval laid out in section 505(j)(4) of the
645 FD&C Act. A first applicant’s affirmative withdrawal of its ANDA would meet the first
646 condition, resulting in a forfeiture under this provision. FDA has not yet considered a forfeiture
647 under the second condition.

648
649 **3. *Amendment of Certification Forfeiture Provision***

650

⁵⁴ See *Teva v. Sebelius*, 595 F.3d at 1318; see also 21 CFR 314.94(a)(12)(viii)(B).

⁵⁵ Section 505(j)(5)(D)(i)(II) of the FD&C Act.

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651 A forfeiture event occurs under this provision if “[t]he first applicant amends or withdraws the
652 certification for all of the patents with respect to which that applicant submitted a certification
653 qualifying the applicant for the 180-day exclusivity period.”⁵⁶

654

Q28. How does FDA determine forfeiture under the “amendment of certification” forfeiture provision?

656

657
658 This subsection provides for forfeiture when a first applicant amends or withdraws the paragraph
659 IV certification for all of the patents or claims of patent(s) for which that applicant submitted a
660 paragraph IV certification qualifying the applicant for the 180-day exclusivity period. For
661 instance, forfeiture under this provision occurs when the ANDA applicant loses related patent
662 litigation and amends its ANDA to include a paragraph III certification to all of the qualifying
663 patents.⁵⁷ As noted above, FDA regulations require ANDA applicants to amend their patent
664 certification “if, at any time before the date of approval of the ANDA, the applicant learns that
665 the submitted certification or statement is no longer accurate.”⁵⁸ FDA recommends that
666 applicants provide this information to the Agency expeditiously to avoid unnecessary
667 expenditure of resources in considering forfeiture on other grounds.

668

669 Notably, this forfeiture provision does not require a first applicant to have amended or
670 withdrawn all paragraph IV certifications contained in its ANDA to forfeit, just those that
671 qualified the applicant as a first applicant. Accordingly, a first applicant may forfeit its
672 eligibility for exclusivity under this provision, but still maintain paragraph IV certifications to
673 non-qualifying patents. For example, an ANDA applicant submits a substantially complete
674 ANDA with a paragraph IV certification to patent 1 (the only patent listed at that time) and later
675 amends its ANDA to contain a paragraph IV certification to patent 2, which was newly issued by
676 the U.S. Patent and Trademark Office and timely submitted for listing in the Orange Book. If the
677 ANDA applicant withdraws its paragraph IV certification to patent 1, it will forfeit its eligibility
678 for 180-day exclusivity even though the applicant maintains its paragraph IV certification to
679 patent 2. If, on the other hand, the ANDA applicant withdraws its paragraph IV certification to
680 patent 2, but maintains its paragraph IV certification to patent 1, eligibility for 180-day
681 exclusivity will not be affected. This is because only patent 1 qualified the ANDA applicant for
682 180-day exclusivity.

683

Q29. Does a first applicant forfeit exclusivity under the “amendment of certification” provision when, because of a change in formulation of the proposed generic drug, a first applicant is required to resubmit paragraph IV certifications to the qualifying patents?

685

686
687
688 No. Resubmission of paragraph IV certifications in connection with an ANDA applicant’s
689 reformulation of its proposed drug product does not constitute an amendment or withdrawal of
690 the paragraph IV certifications under this forfeiture provision. FDA requires submission of an
691 appropriate patent certification or, for a previously submitted paragraph IV certification, a
692 *recertification*, in certain circumstances. For example, an appropriate patent certification or

⁵⁶ Section 505(j)(5)(D)(i)(III) of the FD&C Act.

⁵⁷ See 21 CFR 314.94(a)(12)(viii)(A).

⁵⁸ 21 CFR 314.94(a)(12)(viii)(C)(1)(i).

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693 statement or a recertification is required, among other bases, when an applicant amends its
694 ANDA to make other than minor changes in product formulation.⁵⁹ This practice provides
695 notice of the proposed change in formulation of the ANDA product to the NDA holder and each
696 patent owner so that any patent issues related to the new formulation can be resolved. Under
697 applicable regulations, recertification does not constitute an amendment or withdrawal of the
698 paragraph IV certification resulting in forfeiture of 180-day exclusivity. Rather, an ANDA
699 applicant’s resubmission of paragraph IV certifications in connection with reformulation is
700 understood to fulfill the statutory requirement to continuously maintain previous paragraph IV
701 certifications to those patents.⁶⁰ As explained in the final rule on *Abbreviated New Drug*
702 *Applications and 505(b)(2) Applications*, a “subsequent paragraph IV certification to the
703 qualifying patent or patent claim is not an ‘amendment’ of the previously submitted paragraph
704 IV certification under section 505(j)(5)(D)(i)(III) of the FD&C Act because the type of
705 certification remains the same; rather, it is a reaffirmation of the patent challenge
706 notwithstanding the amendment to the ANDA.”⁶¹

707
708 **Q30. Does a license agreement between the first applicant and the NDA holder or patent**
709 **owner constitute an “amendment of certification” under this provision?**

710
711 No. FDA’s regulations provide that a paragraph IV certification remains appropriate if the basis
712 for non-infringement (of an otherwise valid and infringed patent) is that the ANDA applicant has
713 obtained a license from the patent owner with respect to the patent.⁶²

714
715 Nor does an ANDA applicant’s agreement that the qualifying patent is valid and would be
716 infringed in the course of securing a license require the applicant to change the paragraph IV
717 certification to a paragraph III certification, because requiring such a certification change would
718 render the license null. The effect of a paragraph III certification is that the ANDA cannot be
719 approved until the patent expires. If required to change its paragraph IV certification to a
720 paragraph III certification, the ANDA applicant licensee could not have an approved generic
721 drug product to market during the period in which it needed and obtained a license to do so.

722
723 *4. Failure to Obtain Tentative Approval Forfeiture Provision*

724
725 A forfeiture event occurs under this provision if “[t]he first applicant fails to obtain tentative
726 approval of the application within 30 months after the date on which the application is filed,
727 unless the failure is caused by a change in or a review of the requirements for approval of the
728 application imposed after the date on which the application is filed.”⁶³

729
730 **Q31. How are the dates of the 30-month forfeiture period determined?**

731

⁵⁹ 21 CFR 314.96(d). See 81 FR 69580, 69615 (Oct. 6, 2016).

⁶⁰ See 81 FR 69580, 69617-69618 (Oct. 6, 2016).

⁶¹ Id.

⁶² 21 CFR 314.94(a)(12)(v).

⁶³ Section 505(j)(5)(D)(i)(IV) of the FD&C Act.

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732 The starting date of the 30-month period⁶⁴ in which a first applicant must obtain tentative or final
733 approval or risk forfeiture is one day after the date that a first applicant submits its substantially
734 complete application.⁶⁵ The last day of the 30-month period lands on the 30-month *anniversary*
735 *date* of ANDA submission. For example, for an ANDA filed on February 10, 2005, the 30-
736 month period began on February 11, 2005, and the last day of the 30-month period was August
737 10, 2007.⁶⁶

738
739 We note that the day after the date of a first applicant’s ANDA submission is the date used to
740 determine the start of the 30-month forfeiture period even if the ANDA originally did not contain
741 a paragraph IV certification, but was amended later to contain one that qualified the applicant as
742 a first applicant. Thus, it is possible that FDA could determine that an applicant forfeited its
743 eligibility for exclusivity under this provision based on the 30-month period beginning before
744 submission of a paragraph IV certification.

745
746 The *Food and Drug Administration Safety and Innovation Act*⁶⁷ (FDASIA) created an exception
747 to this general rule regarding the 30-month forfeiture period and paragraph IV certifications
748 submitted in an amendment. The law provides that for applications submitted on or before July
749 9, 2012, and amended to first contain a paragraph IV certification between July 10, 2012, and
750 September 30, 2017, the 30-month forfeiture period begins the day after the date of submission
751 of the paragraph IV amendment, rather than the day after the date of submission of the
752 substantially complete ANDA.⁶⁸

753
754 **Q32. Is the 30-month forfeiture period ever extended or modified?**

755
756 Yes. First, subsection 505(q)(1)(G) of the FD&C Act, enacted as part of the *Food and Drug*
757 *Administration Amendments Act of 2007*,⁶⁹ concerns the submission of citizen petitions that
758 relate to already pending ANDAs and provides that “[i]f the filing of an application resulted in
759 first-applicant status under subsection (j)(5)(D)(i)(IV) and approval of the application was
760 delayed because of a petition, the 30-month period under such subsection is deemed to be
761 extended by a period of time equal to the period beginning on the date on which [FDA] received
762 the petition and ending on the date of final agency action on the petition (inclusive of such
763 beginning and ending dates), without regard to whether [FDA] grants, in whole or in part, or
764 denies, in whole or in part, the petition.” Thus, pursuant to this provision, if approval of a first
765 applicant’s ANDA was delayed because of a petition submitted under section 505(q) of the

⁶⁴ We note that this 30-month period in which a first applicant must obtain tentative or final approval is separate from and calculated differently than the 30-month stay period provided for in section 505(j)(5)(B)(iii) of the FD&C Act.

⁶⁵ Section 505(j)(5)(D)(i)(IV) of the FD&C Act. We interpret “the date on which the application is filed” as used in section 505(j)(5)(D)(i)(IV) of the FD&C Act to refer to the date that a substantially complete ANDA is submitted to FDA.

⁶⁶ For certain ANDAs, the *Food and Drug Administration Safety and Innovation Act* (FDASIA), enacted on July 9, 2012 (Public Law 112-144) directs that this period be extended to 36 or 40 months, as described in Question 32.

⁶⁷ Pub. Law 112-144.

⁶⁸ See Section 1133(b) of FDASIA.

⁶⁹ Pub. Law 110-85.

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766 FD&C Act⁷⁰ such that the time it took FDA to respond to the 505(q) petition prevented approval
767 within 30 months from the date of submission, the 30-month deadline for obtaining a tentative or
768 final approval will be extended by the amount of time the 505(q) petition was under review.

769
770 Second, section 1133(a) of FDASIA extended the 30-month period for certain ANDAs. Under
771 FDA’s interpretation of these provisions, for applications submitted between January 9, 2010,
772 and July 9, 2012, containing a paragraph IV certification (or amended to first contain a paragraph
773 IV certification during that period of time), and approved or tentatively approved during the
774 period of time beginning on July 9, 2012, and ending on September 30, 2015, section 1133(a) of
775 FDASIA extended this period to 40 months. For applications submitted between January 9,
776 2010, and July 9, 2012 (or amended to first contain a paragraph IV certification during that
777 period of time), and approved or tentatively approved during the period of time beginning on
778 October 1, 2015, and ending on September 30, 2016, section 1133(a) of FDASIA extended this
779 period to 36 months. In addition, if an application was submitted between January 9, 2010, and
780 July 9, 2012 containing a paragraph IV certification (or amended to first contain a paragraph IV
781 certification during that period of time), and FDA had not approved or tentatively approved the
782 application but must consider whether the applicant had forfeited exclusivity because a
783 potentially blocked application is ready for approval, FDA applied the 36-month period if it
784 made the forfeiture determination between the period of time beginning on October 1, 2015, and
785 ending on September 30, 2016. For all other applications, the 30-month period set forth in
786 section 505(j)(5)(D)(i)(IV) of the FD&C Act applies.

787
788 **Q33. Does the “failure to obtain tentative approval” forfeiture provision apply to**
789 **circumstances in which the first applicant was not eligible for tentative approval but failed**
790 **to obtain final approval by the 30-month forfeiture date?**

791
792 Yes. Unless the 30-month period is extended for one of the reasons described above,⁷¹ a first
793 applicant that fails to obtain either tentative approval or final approval of its ANDA by the 30-
794 month forfeiture date generally will forfeit eligibility for 180-day exclusivity. Viewed in
795 isolation, the phrase *tentative approval* in section 505(j)(5)(D)(i)(IV) of the FD&C Act might
796 suggest that this section applies only when an ANDA is eligible for a tentative approval due to a
797 patent, 30-month stay, or exclusivity blocking final approval. Such a reading of the statute
798 would result in incongruous circumstances in which first applicants that are eligible for tentative
799 approval can forfeit under this provision, but first applicants that only are eligible for final
800 approval (and arguably closer to marketing) cannot forfeit under this provision. Other references
801 to this forfeiture provision in the statute make clear that the provision has a broader scope. For
802 example, section 505(q)(1)(G) of the FD&C Act expressly states that if “approval” of the first
803 applicant’s application was delayed because of a petition, the 30-month period described in
804 section 505(j)(5)(D)(i)(IV) of the FD&C Act will be extended. In light of this language, FDA
805 has concluded that section 505(j)(5)(D)(i)(IV) establishes a 30-month period within which a first
806 applicant generally must obtain either tentative approval or final approval of its ANDA. This
807 interpretation squares both with the statutory language and with the statutory purpose of

⁷⁰ In general, section 505(q) of the FD&C Act pertains, in relevant part, to petitions that request an action that could delay approval of a pending ANDA or 505(b)(2) application.

⁷¹ See Question 32.

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808 preventing first applicants' ANDAs that do not meet the substantive requirements for approval
809 from delaying approval of subsequent applicants' ANDAs.

810

Q34. How does a first applicant qualify for the exception in the “failure to obtain tentative approval” forfeiture provision?

813

814 To qualify for the exception to this forfeiture provision, the failure to obtain tentative or final
815 approval must be “caused by a change in or a review of the requirements for approval of the
816 application imposed after the date on which the application is filed.”⁷² In other words, two
817 conditions must both be met: (1) FDA changed or reviewed (i.e., considered whether to change)
818 the requirements for approval while the application was under review and (2) this change in, or
819 review of, approval requirements was a cause of the failure to obtain tentative approval or final
820 approval by the 30-month forfeiture date. However, FDA has determined that “but-for”
821 causation is not required to qualify for this exception. In other words, if one of the causes of
822 failure to obtain tentative or final approval by the 30-month forfeiture date was a change in or
823 review of the requirements for approval imposed after the application was filed, an applicant will
824 not forfeit eligibility for exclusivity notwithstanding that there may have been other causes for
825 failure to obtain tentative approval or final approval by the 30-month forfeiture date.

826 Consequently, to qualify for the exception, the record must show that acceptability of at least one
827 aspect of the ANDA (e.g., bioequivalence) was delayed and, irrespective of what other review
828 issues may have been outstanding at the 30-month date, that this delay was caused, at least in
829 part, by a change in, or review of, the requirements for approval. FDA has determined that this
830 interpretation of the statute best effectuates the policy underlying the exception. It does not
831 penalize applicants for FDA's reviews of, or changes in, approval requirements imposed on
832 applicants after their ANDAs are filed that are a cause of the failure to obtain final approval or
833 tentative approval within 30 months. This interpretation also continues to incentivize ANDA
834 applicants to challenge patents by preserving in many instances the opportunity to obtain 180-
835 day exclusivity.

836

Q35. Can a first applicant qualify for the exception if, at the 30-month forfeiture date, FDA is reviewing an ANDA amendment submitted to address a change in the requirements for approval?

840

841 Yes. FDA generally will presume that failure to obtain tentative approval or final approval was
842 caused by a change in, or review of, approval requirements if, at the 30 month date, the evidence
843 demonstrates that there was a change in, or review of, the requirements for approval and that the
844 applicant was actively addressing issues related to the change in, or review of, approval
845 requirements (or FDA was considering such efforts), and these efforts precluded tentative
846 approval or final approval at that time. When the evidence fails to demonstrate that the applicant
847 was actively addressing the change in, or review of, approval requirements, and that these
848 activities precluded tentative approval or final approval at the 30-month date, FDA generally
849 does not presume that the failure was caused by a change in, or review of, approval
850 requirements. If FDA were to hold otherwise, an applicant that receives one or more
851 deficiencies resulting from a change in approval requirements could avoid forfeiture by a delay

⁷² Section 505(j)(5)(D)(i)(IV) of the FD&C Act.

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852 in addressing those deficiencies. When evaluating causation for purposes of determining
853 forfeiture under this provision, FDA will take into account how close the change in or review of
854 the requirement for approval occurred to the 30-month date as well as the amount of effort
855 needed to respond to the change. Further, if the applicant’s response is submitted after the 30-
856 month date, FDA will consider, among other factors, how close the response is submitted to the
857 30-month date.
858

859 **Q36. Does the exception to the “failure to obtain tentative approval” forfeiture provision**
860 **apply if FDA’s review of an ANDA takes longer than 30 months in the absence of a change**
861 **in or review of the approval requirements?**
862

863 No. Under this forfeiture provision, exclusivity is forfeited “unless” there is a review of or
864 change in the approval requirements that has delayed final approval or tentative approval of the
865 ANDA. The statute does not permit FDA to consider an exception based on whether the
866 application could have received tentative approval or final approval before the 30-month
867 forfeiture date had FDA’s review been conducted differently. Section 1133 of FDASIA
868 (referenced in Question 32), which, among other things, extended the 30-month forfeiture period
869 to 40 months for certain ANDAs and to 36 months for certain other ANDAs, reflects Congress’s
870 understanding that, even in the absence of a change in or review of the requirements for
871 approval, FDA’s review of an ANDA might take more than 30 months and might contribute to a
872 first applicant’s failure to obtain tentative approval or final approval by the 30-month forfeiture
873 date and result in forfeiture of exclusivity.
874

875 **Q37. What are examples of changes in the requirements for approval that formed the**
876 **basis of an exception to the “failure to obtain tentative approval” forfeiture provision?**
877

878 The following are examples of changes in the requirements for approval imposed after ANDA
879 submission that FDA has determined were a cause of failure to obtain tentative or final approval
880 in 30 months and therefore formed the basis of an exception to this forfeiture provision:
881

- 882 • FDA’s change in approval requirements related to drug quality that required an applicant
883 to conduct additional testing and include an additional new drug substance specification;
- 884 • FDA’s change in approval requirements for demonstrating bioequivalence for a drug
885 product;
- 886 • Changes in the RLD labeling that required changes in the ANDA applicant’s generic
887 drug labeling;
- 888 • Changes in an RLD’s formulation that required an ANDA applicant to respond (for
889 example, by seeking approval for a change in formulation); and
- 890 • The publication in the *United States Pharmacopeia-National Formulary* of a final
891 monograph for a drug product making it necessary for applicants to demonstrate
892 compliance with the new compendial standards.⁷³

⁷³ This list is intended to be illustrative and not exhaustive.

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Q38. Can FDA’s review of an approval requirement result in an exception to the “failure to obtain tentative approval” forfeiture provision even if the approval requirements ultimately do not change?

Yes. FDA’s review, without change, of approval requirements can be a cause of failure to obtain tentative or final approval within 30 months.

For example, assume FDA originally determines a particular bioequivalence method to be acceptable for a tablet dosage form. Sometime before the 30-month forfeiture date, FDA identifies concerns related to certain dissolution data for one or more tablet products and decides to ask pending ANDAs to develop and propose a different dissolution method, which the applicants provide. After the 30-month forfeiture date, FDA asks a first applicant that had proposed a modified dissolution method to repeat its dissolution testing for all strengths of the company’s drug product using the new method. The first applicant submits an amendment with the dissolution data derived from the modified method. FDA ultimately determines after the forfeiture date that FDA’s originally recommended dissolution method was appropriate. Because FDA’s review of the bioequivalence requirements was a cause of the failure to obtain timely tentative or final approval, the exception to the failure to obtain tentative approval forfeiture provision would still apply even though FDA ultimately did not change the dissolution methods.

Q39. Can FDA’s consideration of issues raised in a citizen petition related to the requirements for ANDA approval provide the basis of an exception to the forfeiture provision if an ANDA is submitted after the petition is submitted and is reviewed while that petition is pending?

Yes, assuming the other criteria for the exception are met. Specifically, if the review of issues raised in a petition submitted before submission of the first applicant’s ANDA continues after ANDA submission and during ANDA review, FDA’s consideration of the issues raised in the petition can constitute a change in or review of requirements for approval.

5. Agreement with Another ANDA Applicant, the Listed Drug Application Holder, or a Patent Owner

A forfeiture event occurs under this provision if “[t]he first applicant enters into an agreement with another applicant [...] for the drug, the holder of the application for the listed drug, or an owner of the patent that is the subject of [a paragraph IV] certification [...], the Federal Trade Commission or the Attorney General files a complaint, and there is a final decision of the Federal Trade Commission or the court with regard to the complaint from which no appeal (other than a petition to the Supreme Court for a writ of certiorari) has been or can be taken that the agreement has violated the antitrust laws [...].”⁷⁴

⁷⁴ Section 505(j)(5)(D)(i)(V) of the FD&C Act.

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936 **Q40. Are there examples of forfeiture under the provision related to agreements with**
937 **another applicant, the NDA holder, or a patent owner?**
938

939 No. As of the date of publication of this draft guidance, FDA has not determined that a first
940 applicant has forfeited its eligibility for exclusivity under this provision, sometimes referred to as
941 the *collusive agreement* forfeiture provision. We note that the collusive agreement forfeiture
942 provision applies to all pending ANDAs, regardless of when the first ANDA referencing the
943 RLD was submitted.⁷⁵ This is not the case for the other forfeiture provisions.⁷⁶ We also note
944 that the collusive agreement forfeiture provision applies to only those settlement agreements
945 described in the statute when, among other things, there is a final decision of the Federal Trade
946 Commission or court that the agreement has violated the antitrust laws, and the decision cannot
947 be or has not been appealed.

948

949 *6. Expiration of All Patents Forfeiture Provision*

950

951 A forfeiture event occurs under this provision if “[a]ll of the patents as to which the applicant
952 submitted a certification qualifying it for the 180-day exclusivity period have expired.”⁷⁷

953

954 **Q41. Does forfeiture under the “expiration of all patents” provision require the**
955 **expiration of all listed patents to which a first applicant submitted a paragraph IV**
956 **certification?**
957

958

959 No. A forfeiture under this provision occurs upon expiration of only all of the qualifying
960 patent(s). Forfeiture can occur under this provision even if the first applicant has paragraph IV
961 certifications to other listed patents that have not expired as long as the certification to these
962 other patents did not provide the basis for eligibility for 180-day exclusivity. For example,
963 suppose an ANDA applicant is the first applicant based on the submission of a substantially
964 complete ANDA containing a paragraph IV certification to U.S. Patent No. 3,456,879 (the ‘879
965 patent). After submission of the ANDA, U.S. Patent No. 6,789,101 (the ‘101 patent) for the
966 RLD is listed and the ANDA applicant amends its application to include a paragraph IV
967 certification to it. The ANDA applicant will forfeit exclusivity upon expiration of the ‘879
968 patent (the only qualifying patent), even if the ‘101 patent remains unexpired.

968

969 *7. Effect of Forfeiture*

970

⁷⁵ Section 1102(b)(2) of the MMA.

⁷⁶ See Question 1. Section 1102(b)(1) of the MMA provides that, except as provided in section 1102(b)(2), the provisions related to 180-day exclusivity “shall be effective only with respect to an application filed under [section 505(j) of the FD&C Act] after the date of the enactment of this Act for a listed drug for which no certification under section 505(j)(2)(A)(vii)(IV) of that Act was made before the date of the enactment of this Act.” Section 1102(b)(2) in turn provides that “[i]f a forfeiture event described in section 505(j)(5)(D)(i)(V) of [the FD&C Act] occurs in the case of an applicant, the applicant shall forfeit the 180-day period under section 505(j)(5)(B)(iv) of [the FD&C Act] without regard to when the first certification under section 505(j)(2)(A)(vii)(IV) of [the FD&C Act] for the listed drug was made.”

⁷⁷ Section 505(j)(5)(D)(i)(VI) of the FD&C Act.

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971 **Q42. Does a first applicant that forfeited its eligibility for exclusivity become a**
972 **“subsequent applicant” blocked from final approval by other first applicants’ eligibility for**
973 **exclusivity?**
974

975 No. The FD&C Act provides that “[t]he 180-day exclusivity period [...] shall be forfeited by a
976 first applicant if a forfeiture event occurs with respect to that first applicant.”⁷⁸ Neither this
977 statutory provision, nor any other, states that in forfeiting exclusivity, a first applicant becomes a
978 subsequent applicant whose ANDA can be approved only after the 180-day exclusivity period
979 has run. Thus, FDA interprets the statute such that a first applicant that has forfeited exclusivity
980 remains a first applicant and need not await expiration of 180-day exclusivity to obtain approval
981 of its ANDA. A first applicant that has forfeited exclusivity is subject to the same timetable for
982 approval that governs the approval of ANDAs for first applicants that remain eligible for 180-
983 day exclusivity.⁷⁹ Section 505(j)(5)(B)(iv) of the FD&C Act, which governs the running of 180-
984 day exclusivity, does not distinguish between first applicants that have forfeited eligibility for
985 180-day exclusivity and those that have not, providing instead only that a *subsequent* applicant’s
986 ANDA may be approved 180 days after the date of first commercial marketing by any first
987 applicant. In addition, once FDA has approved one or more ANDAs, commercial marketing by
988 *any* first applicant will trigger the 180-day exclusivity period for all the first applicant ANDAs,
989 even if the triggering applicant is the first applicant that forfeited its eligibility for exclusivity.
990

991 For example, assume ANDA A and ANDA B are first applicants. ANDA A forfeits its
992 eligibility for 180-day exclusivity for failure to obtain tentative approval within 30 months but
993 ANDA B maintains its eligibility. ANDA A is not blocked from approval by ANDA B’s 180-
994 day exclusivity because ANDA A remains a first applicant. ANDA A also can trigger ANDA
995 B’s 180-day exclusivity. However, ANDA A will not itself block subsequent applicants from
996 approval. Only ANDA B, which retained eligibility for exclusivity, will block subsequent
997 applicants from approval.
998

999 **Q43. If 180-day exclusivity is forfeited by the first applicant(s), does it “roll” to the next-**
1000 **submitted ANDA?**
1001

1002 No. 180-day exclusivity is only available to those ANDA applicants that meet the statutory
1003 definition of first applicant.⁸⁰ Thus, any subsequent applicant that did not submit a substantially
1004 complete ANDA that contained a paragraph IV certification on the first day such an application
1005 was submitted does not qualify for exclusivity. Once 180-day exclusivity is forfeited by all the
1006 first applicants, it no longer blocks approval of any subsequent applicants’ ANDAs but
1007 subsequent applicants do not become first applicants under those circumstances.
1008

1009
1010 G. Procedural Questions Regarding 180-day Exclusivity Determinations
1011

⁷⁸ Section 505(j)(5)(D)(ii) of the FD&C Act.

⁷⁹ Section 505(j)(5)(B)(iii) of the FD&C Act.

⁸⁰ Section 505(j)(5)(B)(iv)(II)(bb) of the FD&C Act.

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1012 **Q44. When does FDA decide whether an ANDA applicant is eligible for 180-day**
1013 **exclusivity?**

1014
1015 It is FDA's practice to make decisions on eligibility for 180-day exclusivity in the context of
1016 specific ANDAs that are otherwise eligible for approval (i.e., when a first applicant's ANDA or a
1017 subsequent applicant's ANDA is ready for approval). Many factors may influence eligibility for
1018 exclusivity up to the time an application is ready for approval (e.g., patent expiration, failure to
1019 obtain a tentative or final approval within 30 months, withdrawal of ANDA) and thus could
1020 render a premature eligibility determination incorrect. When FDA makes an approval decision
1021 with respect to an ANDA, it will inform an applicant affected by exclusivity of its status. For
1022 example, FDA generally will inform an ANDA applicant it is (1) a first applicant entitled to
1023 exclusivity, (2) a first applicant that has forfeited its exclusivity, (3) eligible only for a tentative
1024 approval because one or more first applicants are eligible for 180-day exclusivity, or (4) eligible
1025 for final approval because all first applicants have forfeited exclusivity.

1026
1027 In some circumstances, when a first applicant is ready for final approval, FDA may refrain from
1028 making a formal determination regarding that applicant's eligibility for 180-day exclusivity.
1029 Specifically, if FDA's review of the ANDAs for the drug product indicates that a formal
1030 determination of eligibility for 180-day exclusivity is not necessary (e.g., if there are no
1031 subsequent ANDAs or the subsequent ANDAs are likely more than 180 days away from final
1032 approval), FDA may refrain from making a formal determination regarding eligibility for 180-
1033 day exclusivity.

1034
1035 It also is possible that an ANDA applicant could be informed upon approval that it is a first
1036 applicant eligible for 180-day exclusivity, but later forfeit exclusivity under section 505(j)(5)(D)
1037 of the FD&C Act.

1038
1039 **Q45. How can the public know if a paragraph IV certification has been submitted with**
1040 **respect to a particular RLD?**

1041
1042 FDA maintains on its website a list of drug products for which an ANDA has been received by
1043 the Agency containing a paragraph IV certification. The webpage is titled Paragraph IV Patent
1044 Certifications.⁸¹ This list includes the drug product for which a paragraph IV certification has
1045 been submitted, the dosage form, strength(s), RLD name, and date on which the first
1046 substantially complete ANDA was submitted to FDA or, when applicable, the date of the first
1047 paragraph IV certification. FDA will not disclose the identity of the applicants of those ANDAs,
1048 nor will FDA indicate the number of such ANDAs submitted on that date. The information is
1049 updated twice a month and is as current as the last update. Although FDA makes every effort to
1050 ensure the accuracy of the information provided in this list, this information should be used for
1051 reference only. Any discrepancies, disparities, or other questions about this information should
1052 be discussed with the Office of Generic Drug's Division of Filing Review before making any
1053 decisions based on the information.

⁸¹ This FDA webpage is available at <http://www.fda.gov/drugs/developmentapprovalprocess/howdrugsaredevelopedandapproved/approvalapplications/abbreviatednewdrugapplicationandgenerics/ucm047676.htm>.