Regulations Amending the Food and Drug Regulations (Public Release of Clinical Information): SOR/2019-62

Canada Gazette, Part II, Volume 153, Number 6

Registration

SOR/2019-62 March 4, 2019

FOOD AND DRUGS ACT

P.C. 2019-133 February 28, 2019

Her Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to section 30 [a] of the *Food and Drugs Act* [b], makes the annexed *Regulations Amending the Food and Drug Regulations (Public Release of Clinical Information)*.

Regulations Amending the Food and Drug Regulations (Public Release of Clinical Information)

Amendments

1 (1) Paragraph C.08.004(1)(b) of the *Food and Drug Regulations* [1] is replaced by the following:

> **(b)** if that submission or supplement does not comply with section C.08.002, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1, issue a notice to the manufacturer to that effect.

(2) Subsection C.08.004(2) of the Regulations is replaced by the following:

(2) If a new drug submission or an abbreviated new drug submission or a supplement to either submission does not comply with section C.08.002, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1, the manufacturer who filed the submission or supplement may amend the submission or supplement by filing additional information or material within 90 days after the day on which the Minister issues a notice to the manufacturer under paragraph C.08.004(1)(b) or within any longer period specified by the Minister.

(3) Paragraph C.08.004(3)(b) of the Regulations is replaced by the following:

> **(b)** if that submission or supplement does not comply with section C.08.002, C.08.002.1 or

C.08.003, as the case may be, or section C.08.005.1, issue a notice to the manufacturer to that effect.

2 (1) Paragraph C.08.004.01(1)(b) of the Regulations is replaced by the following:

(b) if that submission or supplement does not comply with section C.08.002.01, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1, issue a notice to the manufacturer to that effect.

(2) Subsection C.08.004.01(2) of the Regulations is replaced by the following:

(2) If an extraordinary use new drug submission or an abbreviated extraordinary use new drug submission or a supplement to either submission does not comply with section C.08.002.01, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1, the manufacturer who filed the submission or supplement may amend the submission or supplement by filing additional information or material within 90 days after the day on which the Minister issues a notice to the manufacturer under paragraph C.08.004.01(1)(b) or within any longer period specified by the Minister.

(3) Paragraph C.08.004.01(3)(b) of the Regulations is replaced by the following:

(b) if that submission or supplement does not comply with section C.08.002.01, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1, issue a notice to the manufacturer to that effect.

3 The Regulations are amended by adding the following after section C.08.009:

Disclosure of Information in Respect of Clinical Trials

C.08.009.1 (1) In sections C.08.009.2 and C.08.009.3, ***information in respect of a clinical trial*** means information in respect of a *clinical trial*, within the meaning of section C.05.001, that is contained in a new drug submission, an extraordinary use new drug submission, an abbreviated new drug submission or an abbreviated extraordinary use new drug submission for a new drug for human use filed under section C.08.002, C.08.002.01 or C.08.002.1 or in a supplement to any of those submissions filed under section C.08.003.

(2) For greater certainty, the definition *information in respect of a clinical trial* includes information that is contained in a submission or supplement referred to in that definition and that is in respect of clinical testing involving human subjects in regards to which an application was filed under this Division before September 1, 2001.

C.08.009.2 (1) Information in respect of a clinical trial that is confidential business information ceases to be confidential business information when one of the following circumstances occurs with respect to the submission or supplement:

(a) the Minister issues a notice of compliance under section C.08.004 or C.08.004.01;

(b) in the case where the Minister issues a notice to the manufacturer under paragraph C.08.004(1)(b) or C.08.004.01(1)(b) and the manufacturer does not amend the submission or supplement under subsection C.08.004(2) or C.08.004.01(2), the applicable period referred to in the relevant subsection expires;

(c) the Minister issues a notice to the manufacturer under paragraph C.08.004(3)(b) or C.08.004.01(3)(b).

(2) Subsection (1) does not apply to information in respect of a clinical trial that

(a) was not used by the manufacturer in the submission or supplement to support the proposed

conditions of use for the new drug or the purpose for which the new drug is recommended; or

(b) describes tests, methods or assays that are used exclusively by the manufacturer.

C.08.009.3 The Minister may disclose, without notifying the person to whose business or affairs the information relates or obtaining their consent, any information in respect of a clinical trial that has ceased to be confidential business information.

Transitional Provisions

4 In sections 5 and 6, *information in respect of a clinical trial* has the same meaning as in section C.08.009.1 of the *Food and Drug Regulations*.

5 Despite subsection C.08.009.2(1) of the *Food and Drug Regulations*, information in respect of a clinical trial that is confidential business information and that is contained in a submission or supplement with respect to which one of the following circumstances occurred before the day on which these Regulations come into force ceases to be confidential business information on the day on which these Regulations come into force:

(a) the Minister issued a notice of compliance under section C.08.004 or C.08.004.01 of the *Food and Drug Regulations*;

(b) the Minister, after having notified the manufacturer under paragraph C.08.004(1)(b) or C.08.004.01(1)(b) of the *Food and Drug Regulations* that the submission or supplement did not comply with section C.08.002, C.08.002.01, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1 of those Regulations, issued a notice to the manufacturer, in view of the omission by the manufacturer to amend the submission or supplement, that indicated that the submission or supplement was considered to have been withdrawn;

(c) the Minister notified the manufacturer under paragraph C.08.004(3)(b) or C.08.004.01(3)(b) of the *Food and Drug Regulations* that the submission or supplement did not comply with section C.08.002, C.08.002.01, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1 of those Regulations.

6 (1) This section applies to information in respect of a clinical trial that is confidential business information and that is contained in a submission or supplement

(a) that was filed within 90 days before the day on which these Regulations come into force; and

(b) with respect to which the Minister notified the manufacturer under paragraph C.08.004(1)(b) or C.08.004.01(b) of the *Food and Drug Regulations* before the day on which these Regulations come into force that the submission or supplement did not comply with section C.08.002, C.08.002.01, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1 of the *Food and Drug Regulations*.

(2) Despite subsection C.08.009.2(1) of the *Food and Drug Regulations*, information in respect of a clinical trial that is contained in a submission or supplement ceases to be confidential business information upon the expiry of whichever of the following periods applies if the manufacturer does not amend the submission or supplement within that period:

(a) 90 days after the day on which these Regulations come into force; or

(b) any longer period specified by the Minister.

7 Sections 5 and 6 do not apply to information referred to in subsection C.08.009.2(2) of the

***Food and Drug Regulations*.**

Coming into Force

8 These Regulations come into force on the day on which they are registered.

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the regulations*.)

Issues

Health Canada does not have a formal policy or guidance on the identification of confidential business information (CBI) in drug submissions and medical device applications. However, as a matter of practice, the Department generally does not publicly release detailed clinical data in drug submissions and medical device applications, except where the information has entered the public domain or consent has been granted by the sponsor with respect to the release of CBI.

Without access to more clinical data, health professionals and researchers are unable to perform independent analyses of the evidence underlying published research findings and Health Canada's regulatory reviews. This approach limits transparency and misses opportunities to promote greater confidence in the oversight of drugs and medical devices. It is also out of step with Health Canada's key regulatory partners, including the European Medicines Agency (EMA) and the U.S. Food and Drug Administration, which have increased clinical data transparency over the past 10 years.

Background

Health Canada has the authority to regulate the safety, efficacy and quality of drugs and the safety, effectiveness and quality of medical devices. Health Canada's authority is derived from the *Food and Drugs Act* (FDA), the *Food and Drug Regulations* (FDR) and the *Medical Devices Regulations* (MDR), respectively. In 2014, the *Protecting Canadians from Unsafe Drugs Act (Vanessa's Law)* amended the FDA to improve the safety of therapeutic products [2] by introducing measures to, among other things,

(a) strengthen safety oversight of therapeutic products throughout their life cycle;

(b) improve reporting by certain health care institutions of serious adverse drug reactions and medical device incidents that involve therapeutic products; and

(c) promote greater confidence in the oversight of therapeutic products by increasing transparency.

Information submitted to Health Canada in drug submissions and medical device applications is used to assess the safety and efficacy of a drug in humans and the safety and effectiveness of medical devices.

Vanessa's Law provided new transparency powers to the Minister of Health, including a new discretionary authority for the Minister to disclose CBI to eligible persons for the purpose of protecting or promoting human health or the safety of the public under the FDA. The Minister also has the authority under the FDA to disclose CBI for the purpose of identifying or responding to a serious risk of injury to the health of Canadians. A definition of CBI was also added to the FDA.

In addition, the FDA permits the Governor in Council (GIC) to make regulations that specify the business information obtained under the Act that is not CBI, or the circumstances in which it ceases to be CBI. It also permits a regulation to be made authorizing the disclosure of this information. These provisions are the basis for these regulations.

Objectives

The objective of these regulations is to provide public access to specific clinical information submitted to Health Canada in drug submissions for human use and medical device applications following a final regulatory decision. Health Canada is establishing a process to anonymize personal information prior to release of any information.

Upon the completion of Health Canada's review of a drug submission or medical device application, Health Canada aims to publicly release clinical information regarding the safety and efficacy of drugs in humans and the safety and effectiveness of medical devices. Clinical information could include clinical summaries; clinical overviews and clinical study reports, including protocol and protocol amendments; sample case report forms; and statistical analysis plans. Medical device clinical information could include the summaries, reports and supporting evidence of safety and effectiveness.

Description

Amendments to the *Food and Drug Regulations*

The following types of drug submissions are within the scope of these Regulations: New Drug Submissions (NDS), Extraordinary Use New Drug Submissions (EUNDS), Supplemental New Drug Submissions (SNDS), Supplemental Extraordinary Use New Drug Submissions (SEUNDS), Abbreviated New Drug Submissions (ANDS), Supplemental Abbreviated New Drug Submissions (SANDS), Abbreviated Extraordinary Use New Drug Submissions (AEUNDS), and Supplemental Abbreviated Extraordinary Use New Drug Submissions (SEUANDS).

Amendments made to the *Food and Drug Regulations* specify the kind of clinical information in the aforementioned drug submissions that will cease to be CBI following a final regulatory decision. More specifically, clinical information in a drug submission will not be released until a final decision has been made to issue a Notice of Compliance (NOC), a Notice of Non-Compliance – withdrawn (NON-W) or a Notice of Deficiency – withdrawn (NOD-W). Furthermore, disclosure will only occur after the time to file additional information (in accordance with subsection C.08.004(2) [3]) has passed and any applicable reconsideration processes have been completed.

Clinical information provided in drug submissions will continue to be treated as confidential during the regulatory review process.

The following clinical information will cease to be treated as confidential following a final regulatory decision and will be released to the public: clinical summaries, reports and supporting data of clinical trials submitted in support of a drug submission, except

(a) information that the manufacturer did not use in the drug submission to support the proposed conditions of use or purpose for the drug; or

(b) information that describes tests, methods or assays that are used exclusively by the manufacturer.

Health Canada has established a process in guidance that allows a manufacturer to propose

redactions on any information within the submission that falls under the type of information described in (a) or (b) if it meets the definition of CBI in the FDA. The manufacturer will also be asked to anonymize any personal information which will be assessed by Health Canada to ensure compliance with the *Privacy Act* and the *Canadian Charter of Rights and Freedoms* (the Charter). Health Canada will then also assess the proposed CBI redactions and intends to publicly release the information that has ceased to be CBI, based on a phased-in implementation approach on disclosure. [4]

As per the regulation-making authority under the FDA, the amendments also authorize the Minister to release information that has ceased to be CBI to the public without notifying the originator or receiving their consent.

The amendments only apply to drugs for human use, and apply to clinical information in drug submissions filed with Health Canada before and after the coming into force of the Regulations.

Additional amendments to Division 8 of the *Food and Drug Regulations* specify that in a situation where the Minister issues a Notice of Non-Compliance (NON) or a Notice of Deficiency (NOD), the manufacturer may amend or supplement the submission by filing additional information or material within 90 days after the Minister issues the notice or by any later date, as specified in the notice.

Amendments to the *Medical Devices Regulations*

Amendments made to the *Medical Devices Regulations* specify the kind of clinical information in applications for Class III and Class IV medical devices that will cease to be CBI following a final regulatory decision. Final regulatory decisions include the issuance of a Medical Device Licence or a Refusal Letter of a medical device application after completion of the reconsideration process, if any, or after the time to request reconsideration has passed.

Clinical information provided in medical device applications will continue to be treated as confidential during the regulatory review process.

The following clinical information will cease to be treated as confidential following a final regulatory decision and will be released to the public: clinical summaries, reports and supporting data of clinical trials or investigational testing in humans submitted in support of any Class III or Class IV medical device application, except

> (a) information that the manufacturer did not use to support the conditions, purposes and uses for which the device is manufactured, sold or represented as submitted in the medical device application; or
>
> (b) information that describes tests, methods or assays that are used exclusively by the manufacturer.

Health Canada has established a process in guidance that allows a manufacturer to propose redactions on any information within the submission that falls under the type of information described in (a) or (b) if it meets the definition of CBI in the FDA. The manufacturer will also be asked to anonymize any personal information. Health Canada will then validate the proposed redactions and intends to publicly release the information that has ceased to be CBI, based on a phased-in implementation approach on disclosure. [5]

As per the regulation-making authority under the FDA, the amendments also authorize the Minister to release the information that has ceased to be CBI to the public without notifying the originator or receiving their consent.

The amendments apply to clinical information in applications for Class III and Class IV medical devices filed with Health Canada before and after the coming into force of the Regulations.

“One-for-One” Rule

The “One-for-One” Rule does not apply to these regulations, as their amendment is not expected to increase the administrative burden on businesses.

Small business lens

The small business lens does not apply to these regulations, as there are no costs to small business (or costs are insignificant).

Consultation

On March 10, 2017, Health Canada published a white paper entitled *Public release of clinical information in drug submissions and medical device applications* for a 75-day consultation. On April 10, 2017, an article entitled “Health Canada to increase transparency” was published in the *Canadian Medical Association Journal* to promote awareness of the consultation document. In total, 45 submissions were received from a range of groups, including pharmaceutical and biotechnology industries (16), medical device industries (3), academia (13), health care professionals (5), and patients and the public (8).

Pharmaceutical and biotechnology industries: Several respondents asked that Health Canada’s public release of clinical information be very closely aligned with the EMA’s clinical trial disclosure initiative (*European Medicines Agency Policy on publication of clinical data for medicinal products for human use* — Policy 0070). In their view, international harmonization will allow for the transparency objectives to be achieved efficiently from both Health Canada’s and industry’s perspectives. Several respondents asked that the proposal apply only to information submitted following the coming-into-force date and that adequate time and consideration be given for the complexities associated with disclosing individual patient data. Several respondents also raised concerns about the burden on industry and Health Canada resources and recommended that new non-prescription drug submissions be excluded from this initiative.

Health Canada response: Health Canada closely aligned the regulations with the EMA’s initiative on the publication of clinical data for medicinal products, in order to gain efficiencies for stakeholders and harmonize its policy with that of its international counterparts. In order to achieve these objectives, Health Canada established an external, multidisciplinary stakeholder group and sought input on the implementation details. Health Canada does not intend to disclose clinical case report forms (e.g. ICH E3 16.3) or individual patient listings as part of this regulatory initiative.

Medical device industry: Several respondents noted that the global approach in major jurisdictions (i.e. the United States and the European Union) to medical device clinical data transparency varies and is at different stages of development. Some industry stakeholders suggested that the implementation of medical device clinical data disclosure be delayed and aligned with recently published European Union medical device regulations (Regulation (EU) 2017/745, and in vitro device Regulation (EU) 2017/746). Several respondents noted that while drug companies can leverage their EMA Policy 0070 transparency submissions, there is no similar opportunity for international alignment for medical devices.

Health Canada response: Health Canada held consultations with the external stakeholder group and sought input and recommendations to address issues that are unique to the medical device industry, which included input on options to phase in the implementation for medical device applications. Health Canada plans to phase in the proactive publication of clinical information in medical device applications beginning in the third year of operation, which is clarified in the guidance document;

however, the regulations do not include a delay in the coming into force and therefore clinical information in medical device applications will be published upon request.

Academia: Researchers reacted favourably to the proposal, noting that it will expand public access to information that will help Canadians and their health care providers make more informed health decisions. They agreed that the release should apply both to future and past submission information and that all clinical data used to support market authorization should be released. Several respondents noted that the exceptions from the release of information should be removed or limited in order to not circumvent the policy objective. Concerns were also raised with respect to risks of delay in implementation and proper resourcing of this initiative.

Health Canada response: The regulations will apply to drug submissions and medical device applications filed with Health Canada before and after the coming into force of the regulations. Based on the feedback provided, the exceptions as outlined in the regulations have been drafted to (a) capture information that may be part of an ongoing clinical program; and (b) ensure that the exception for methods or assays that are used exclusively by a manufacturer (e.g. in-house procedure or modification of analytical assays) is limited to the description of the methods or assays and not the clinical information produced through their use.

Patient groups and health professionals: Reactions by patients and health professionals were favourable, with concerns focused on evidence that Health Canada is committed to early implementation and a process that avoids the delays experienced through the access to information process.

Health Canada response: The regulatory amendments have been developed in ways that would avoid the delays that are currently being experienced by users through the access to information process. Under the regulations, only a small amount of information contained in the clinical information would have to be redacted for CBI prior to release. Health Canada consulted the external stakeholder group on reasonable processing timelines for redactions.

Stakeholder engagement on implementation of proposed regulations (October 2017–April 2018)

From October 2017 to April 2018 Health Canada consulted an external stakeholder group on technical and process issues related to the public release of clinical information. Members of the group were recruited through an open nomination process, and selected to provide a balanced representation of industry and non-industry groups. This group provided advice on a range of issues, including options for phasing in implementation, an approach to the de-identification of individual patient data, and processes for applying the proposed regulations to specify clinical information eligible for public release. This advice informed the draft guidance document prepared by Health Canada and published for public consultation on April 10, 2018. These consultations were in addition to, and complement, public consultations on the proposed regulatory amendments. Details of the meetings are available on line at https://www.canada.ca/en/health-canada/programs/consultation-public-release-clinical-information-drug-submissions-medical-device-applications/meeting-table.html (https://www.canada.ca/en/health-canada/programs/consultation-public-release-clinical-information-drug-submissions-medical-device-applications/meeting-table.html).

Prepublication in the *Canada Gazette*, Part I (December 2017)

The *Regulations Amending the Food and Drug Regulations (Public Release of Clinical Information)* and the *Regulations Amending the Medical Devices Regulations (Public Release of Clinical Information)* were prepublished in the *Canada Gazette*, Part I, on December 9, 2017. The regulations

were open for comment for a 75-day period. Over the course of the consultation period, the Department received 21 submissions on the proposed regulations from 5 stakeholder groups. Respondents included the National Association of Pharmacy Regulatory Authorities (NAPRA) [1], governments (1), health care professionals and academic groups (2), pharmaceutical and biotechnology industries (14), and medical devices industries (3).

In general, respondents from the NAPRA, health care professionals and academia groups were supportive of the proposal. Some stakeholders from the pharmaceutical industry were supportive of the proposal as long as the process remains harmonized globally, continues to foster innovation, protects intellectual property and establishes safeguards for patient privacy.

NAPRA, health care professionals and academic groups urged Health Canada to more fully enable the unrestricted independent reanalysis of clinical data by removing the proposed exceptions to what will cease to be CBI.

Medical device respondents asked Health Canada to delay the implementation of the proposal for medical devices until the European Union implements its medical device transparency initiative. They also encouraged Health Canada to work with the European Commission to align its initiatives with those of the Commission.

Respondents provided the following specific feedback on the proposed amendments to the regulations:

Non-prescription drug submissions: Several pharma ceutical industry respondents requested that all non-prescription drug submissions be excluded from the proposal, and be consulted on separately under Health Canada’s Self-Care Framework. In contrast, NAPRA respondents requested that all non-prescription drug submissions continue to be included in the proposal.

Health Canada response: All drug submissions submitted under Division 8 of the *Food and Drug Regulations*, including non-prescription drugs, are in scope of the public release of clinical information regulations because of the potential impact of this clinical data on protecting public health. Drugs regulated under Division 1 (i.e. well-established drugs that have been on the Canadian market for a sufficient time to establish their safety and effectiveness) have not been included, as there is no regulatory requirement to submit clinical data for Division 1 drug applications.

Negative decisions: Several pharmaceutical, biotechnology and medical devices respondents requested that clinical information contained in submissions or applications that have received a final negative decision should continue to be treated as CBI.

Health Canada response: The regulatory amendment to release clinical information from submissions that have received a final negative decision is aligned with the EMA’s Policy 0070. Unlike screening rejections and manufacturer-cancelled submissions, these submissions have undergone Health Canada review and are in scope of the proposal.

The disclosure of clinical information in these submissions provides public transparency regarding Health Canada’s review process, and compliments Health Canada’s other transparency initiatives such as the publishing of Summary Basis of Decision Documents and Regulatory Decision Summaries.

Reanalysis of data: Several stakeholders suggested that independent reanalysis of clinical data by third parties might lead to inaccurate and incomplete conclusions, and those parties may in turn promote the use of a drug that is not supported by the indications described in the product monograph.

Health Canada response: Reanalyses of clinical data are subject to the same professional standards

as are other scientific analyses. Peer review journals should apply the same requirements for publication of the findings of reanalyses as for other research findings. Published findings are open for review and criticism by researchers knowledgeable in the field. Making more information available for independent reanalysis will likely help to support more informed health decisions by clinicians.

Proposed exceptions: Respondents from all stakeholder groups provided feedback on proposed paragraphs C.08.009.2(2)(a) and (b) of the *Food and Drug Regulations* or paragraphs 43.12(2)(a) and (b) of the *Medical Devices Regulations* that set out which information will not cease to be CBI following Health Canada's final regulatory decision.

Some health care professional and academic respondents argued that the exceptions described in the proposal are unnecessary, and they should be deleted because released information will remain subject to the data exclusivity provisions already contained in the *Food and Drug Regulations*, which, combined with the proposed requirement to establish terms of use agreements with end users, is sufficient to protect against unfair commercial use of the publicly released data.

Other health care and academic respondents were concerned that the proposed exceptions are too broad and could constrain independent researchers from conducting their analysis. They suggested removing the exceptions relating to information that was not used to support the drug or device application in proposed paragraphs C.08.009.2(2)(a) and 43.12(2)(a), as this exception is not aligned with the EMA's Policy 0070.

They also suggested removing the exceptions for information that describes proprietary tests, methods, or assays contained in proposed paragraphs C.08.009.2(2)(b) and 43.12(2)(b), as withholding this information from public release could hamper independent reanalysis in some circumstances. Respondents from NAPRA also emphasized this last point.

Pharmaceutical industry respondents requested that the exceptions in proposed paragraphs C.08.009.2(2)(a) and (b) of the *Food and Drug Regulations* (information not used to support the submissions or descriptions of tests, methods or assays that are used exclusively by the manufacturer), be modified to ensure that information on chemistry and manufacturing, preclinical testing and advice from other regulatory authorities remain out of scope of the proposal, regardless of the location of this information in the submission. Similarly, medical device respondents requested that a third exception be added to ensure that intellectual property that is not directly related to the clinical data, global regulatory filing status, and advice from other regulatory authorities continue to be treated as CBI.

Health Canada response: The intent of the regulations is to specify that clinical trial information related to safety and efficacy ceases to be CBI following Health Canada's final regulatory decision. The categories of information that are eligible for redaction will not cease to be CBI and if they meet the definition of CBI in the FDA, they will be treated as such. The redactions for tests and methods are limited to the descriptions of specific and unique methodological details developed exclusively for or by the manufacturer, not the clinical data resulting from these tests and methods. The process for justifying the redaction of clinical information falling within the two prescribed exceptions is provided in the accompanying Health Canada guidance document. This approach is internationally aligned and consistent with the approaches taken by the EMA and the United States Food and Drug Administration, which has a Freedom of Information process, a Clinical Data Summary Pilot Program, and which published redacted clinical study reports on the Drugs@FDA website. Based on the recently published EMA report, these redactions amount to 0.01% of the published information and allow proper secondary analysis of the clinical data. This report is available online at http://www.ema.europa.eu/docs/en_GB/document_library/Report/2018/07/WC500252071.pdf (http://www.ema.europa.eu/docs/en_GB/document_library/Report/2018/07/WC500252071.pdf).

Eligible persons may request unredacted CBI, subject to eligibility requirements, from Health Canada under paragraph 21.1(3)(c) of the FDA, or directly from the manufacturers' clinical information disclosure portals.

Chemistry and manufacturing for drugs, manufacturing and design features for medical devices, non-clinical (preclinical testing) information, and sales information are outside the scope of these regulations. Consequently, where information that falls within these categories meets the definition of CBI in the FDA, they will be treated as such. If this type of information is found within clinical documents in scope of these regulations, the manufacturer can propose its redaction. All information provided in confidence by foreign regulatory authorities is out of scope of this proposal and will not be publicly released in this context. Health Canada's guidance document provides further details on the types of information that will not be released, and submission sections out of scope for release.

Past submissions: Several pharmaceutical industry respondents were concerned with the application of the regulatory proposal to information in past submissions. Respondents stated that the release of information that was submitted prior to the regulations coming into force is not internationally aligned with the United States or the European Union, which, they stated, do not broadly disclose clinical information from past submissions. One pharmaceutical industry respondent suggested that application of the proposed regulations to past submissions is contrary to the patient consent requirements within certain provincial health privacy laws.

Medical device respondents shared similar concerns over the application of the regulations to past medical devices applications. Respondents stated that the forthcoming European Union medical device transparency proposal will only apply to future application information, and therefore any publication of past medical device applications in Canada would be a unique global requirement for devices.

Health Canada response: Public access to clinical information from past submissions is consistent with the public policy objective, which is to enable independent analyses of clinical data, leading to a more comprehensive understanding of the drug or medical device. Without access to past submissions, the regulations would not offer Canadians access to clinical data on the vast majority of drugs and medical devices which they may currently use. As described in the guidance document, Health Canada only intends to disclose clinical information from past submissions upon request. This is aligned with both the European Union and United States who currently release information in past submissions under the EMA's Policy 0043, and under the United States' *Freedom of Information Act*. The provincial health privacy law cited in the pharmaceutical industry respondent's comment applies to health information custodians such as health care practitioners, long-term care homes and hospitals. Health Canada protects all personal information under its control in accordance with Canada's *Privacy Act* and the Charter. The anonymization approach outlined in the accompanying guidance document is set out to ensure that personal information is protected from disclosure.

Disclosure of clinical information: Several pharmaceutical and medical device industry respondents requested a modification to proposed section C.08.009.3 of the FDR and section 43.13 of the MDR, which states that the Minister may disclose information that has ceased to be CBI without notifying or obtaining consent from the manufacturer. They requested that proposed section C.08.009.3 of the FDR and section 43.13 of the MDR be modified so that manufacturers are notified when the information is released. One respondent also requested the regulations be modified to specify that public disclosure is for non-commercial purposes, and to include an opportunity for manufacturers to be heard before clinical data is publicly disclosed.

Health Canada response: The regulation-making authority under paragraph 30(1.2)(d.2) of the FDA allows the GIC to make regulations to authorize the Minister to disclose information that ceases to be

CBI without notifying the person to whose business or affairs the information relates, or obtaining their consent. A disclosure authority without notification is therefore aligned with Parliament's intent. However, as detailed in the accompanying guidance document, Health Canada intends to consult the manufacturers and provide them with an opportunity to propose redactions to clinical information. The guidance document also addresses the issue of non-commercial use of the publicly released data, with proposed terms of use for end users. The terms of use require that end users agree not to use the publicly released data for commercial purposes or attempt to identify clinical trial subjects or individuals.

"One-for-One" Rule: Several industry respondents enquired about why the proposed regulations did not fall under the "One-for-One" Rule.

Health Canada response: The regulation-making authority, under paragraphs 30(1.2)(d.1) and (d.2) of the FDA, allows the GIC to make regulations that specify the business information that is not CBI or the circumstances in which business information ceases to be CBI, and to allow the Minister to disclose that information without notifying the person to whose business the information relates to. The aforementioned authority does not impose a new administrative burden on industry since manufacturers are not required to propose or review the redactions made by Health Canada prior to that information being released, so the "One-for-One" Rule does not apply to this proposal. Several manufacturers have requested that Health Canada develop a redaction process that is similar to EMA's Policy 0070 whereby the manufacturer is provided an opportunity to propose redactions in relation to CBI and anonymize any personal information in their documents; however, that is completely voluntary and it is not required by the regulations.

Draft guidance document: Several industry respondents stated that the lack of accompanying draft guidance document impeded their ability to make comments on issues such as scope of technical documentation being released and acceptable anonymization approaches of personal information.

Health Canada Response: In order to focus on technical aspects related to implementation, Health Canada established an external stakeholder reference group, which consisted of balanced industry and non-industry stakeholders with expertise in the areas of clinical trial reporting, regulatory affairs, health data and data protection/privacy law. Health Canada met with this group from October 2017 to April 2018 and relied on their advice to prepare the draft guidance document published for public consultation on April 10, 2018. Information on these meetings was regularly published on Health Canada's website and is available at https://www.canada.ca/en/health-canada/programs/consultation-public-release-clinical-information-drug-submissions-medical-device-applications/meeting-table.html (https://www.canada.ca/en/health-canada/programs/consultation-public-release-clinical-information-drug-submissions-medical-device-applications/meeting-table.html).

Comments not related to regulatory text: Many of the stakeholders' comments focused on issues related to the implementation of the regulations. Some pharmaceutical industry stakeholders were not supportive of the regulations, and they expressed concerns that the process to redact CBI and personal information is complex. This would place an administrative burden on both industry and Health Canada. Several stakeholders questioned whether the public health benefits of the regulations can be measured, and whether these benefits warranted the effort required to operationalize this initiative.

Health Canada response: Since the intent of the original legislative amendments was to increase confidence in the drug review process by increasing transparency, Health Canada's costs attributed to the process of redacting CBI was contemplated during the legislative approval process. Because industry's participation in the redaction process is voluntary, costs to industry are not attributed to the regulations.

Alignment with the EMA process: Comments were received relating to leveraging clinical information packages already processed by the EMA; preventing disclosure of ongoing interim study data; ensuring the disclosure of patient data, particularly individual patient data; adequately protect patient privacy; and encouraging a phased-in approach to implementation.

Health Canada response: These comments were considered in the preparation of the draft guidance document entitled “Public Release of Clinical Information,” published from April 10 to June 25, 2018, for a 75-day comment and consultation period, and are reflected in the final accompanying guidance document. A list of submissions to the draft guidance document is available at https://www.canada.ca/en/health-canada/programs/consultation-public-release-clinical-information-drug-submissions-medical-device-applications.html (https://www.canada.ca/en/health-canada/programs/consultation-public-release-clinical-information-drug-submissions-medical-device-applications.html).

Summary of the changes made to the proposed regulation

No changes were made to the draft versions of the *Regulations Amending the Food and Drug Regulations (Public Release of Clinical Information)* and the *Regulations Amending the Medical Devices Regulations (Public Release of Clinical Information)* following their prepublication in the *Canada Gazette*, Part I, on December 9, 2017.

Rationale

The amendments to the *Food and Drug Regulations* and the *Medical Devices Regulations* are necessary to specify what and when business information ceases to be CBI and to provide an authority for the Minister to publicly disclose that information.

Providing public access to clinical information will enable independent analysis of the information by researchers, which may contribute to a broader understanding of the benefits, harms and uncertainties of drugs and medical devices. Health care providers can use this information to better inform health decisions and promote the appropriate use of drugs and medical devices for Canadian patients.

A small amount of information contained in the clinical information will not cease to be CBI and, if it meets the definition of CBI in the FDA, will be redacted prior to its release. The following two categories of information will not cease to be CBI:

- Clinical data related to the efficacy of the drug or effectiveness of the device that the manufacturer did not use to support (1) the proposed conditions of use and purpose for the drug as submitted in the drug submission; or (2) the conditions, purposes and uses for which the device is manufactured, sold or represented as submitted in the medical device application. This data may be a component of an ongoing development program. For example, the drug manufacturer may be using the data to support future trials to gain approval for additional indications. This information could provide competitors with clues on the drug’s future uses and should therefore not cease to be CBI.
- Information that describes tests, methods or assays that are used exclusively by the manufacturer. Disclosure of the information pertaining to the exclusive features may prejudice the competitive position of the submission sponsor and therefore will not cease to be CBI.

The amendments to Division 8 of the *Food and Drug Regulations* aim to align the Regulations with what Health Canada has been doing operationally, as per the *Management of Drug Submissions Guidance*, in issuing a Notice of Non-Compliance – Withdrawal (NON-W) or a Notice of Deficiency – Withdrawal (NOD-W) in situations where the manufacturer does not respond to an NON

or an NOD within the prescribed time period, respectively. These amendments are necessary to clarify the policy intent that the reconsideration decision of a Notice of Non-Compliance – withdrawn (NON-W) or a Notice of deficiency – withdrawn (NOD-W) [or, in the event that no reconsideration is sought in the time permitted, the NON-W or NOD-W itself] are considered final regulatory decisions and, as a result, the clinical information would cease to be CBI.

Costs

There are no anticipated costs to industry attributable to the amendments because industry's decision to propose redactions to clinical data is a voluntary one and not required by the regulations. The process for industry to propose redactions to clinical data is set out in a guidance document: "Public Release of Clinical Information" which is available on Health Canada's website. The redaction process was developed in consultation with representatives from academia and industry as well as health care professionals and is based on the EMA model. Health Canada has a portal and workflow tracker that will help manage the review process for the proposed redactions. There may be minimal costs to the Government of Canada; however, these costs are not expected to be significant. The resources required for the additional staff needed to administer the review process will be absorbed within existing departmental resources.

Implementation, enforcement and service standards

Consultation with manufacturers on redactions of information that would not cease to be CBI

After Health Canada's issuance of a final regulatory decision, the manufacturer would be requested to provide a redacted version of the clinical information with supporting justification. Health Canada would review the manufacturer's proposed redactions to CBI on the basis of the exceptions outlined in the regulations. Health Canada will also assess the proposed anonymized approach to personal information to ensure compliance with the *Privacy Act* and the Charter prior to releasing the information. To mitigate and protect from an inadvertent privacy breach, sections containing individual patient data have been defined as out of scope and will not be published on the online Health Canada portal. Only aggregated information, or information for which personal information has been protected will be included in documents found on the online Health Canada portal. Health Canada would provide the results of its review to the manufacturer and provide an opportunity for the manufacturer to respond to Health Canada's findings. The final decision rests with Health Canada for redactions in publicly released information. Clinical information would be made available on an Internet-based portal. In the event that a manufacturer does not respond to Health Canada's request to redact information, Health Canada would undertake a review based on the information available to it and would redact information in compliance with the regulations.

A privacy impact assessment (PIA) and a privacy protocol have been conducted for information relating to requesters of clinical information. The only personal information collected will be email addresses and names of individuals requesting the clinical information for the purpose of notifying them of the status of their requests or used to clarify, when required, the details of their requests. The email addresses and names of requesters will be stored on a protected server. Health Canada personnel handling this information have taken the appropriate training courses in order to avoid any negative effects on privacy that might result from this activity. To offset additional work, Health Canada has recruited and trained additional staff with appropriate scientific background to undertake this new activity. To gain additional efficiencies, Health Canada has also developed IT solutions that allow the public to search, browse, and submit requests for clinical information, and that allow Health

Canada to manage the workflow and interact and review redactions with the sponsors.

Consultation with an external stakeholder group on the proposed implementation plan

Health Canada consulted with an external stakeholder group on aspects of the implementation including the processes for redacting CBI, options for phasing in the implementation approach for drug submissions and medical device applications. In addition, the external stakeholder group provided input on methods for the de-identification of patient data, terms of use conditions, considerations for the end user, and measurements for health system impacts. As a result of the consultation process, while the regulations come into force immediately, the proactive disclosure of drug submissions and medical device applications will be phased in with the proposed schedule included in the related guidance document.

The external stakeholder group's recommendations contributed to the development of a draft guidance document that was published on Health Canada's website for consultation on April 10, 2018. The final guidance document will be available on Health Canada's website on the day the regulations are registered.

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Footnotes

a S.C. 2016, c. 9, s. 8

b R.S., c. F-27

1 C.R.C., c. 870

2 Under *Vanessa's Law*, therapeutic products include prescription and over-the-counter drugs, vaccines, gene therapies, cells, tissues and organs, and medical devices. They do not include natural health products.

3 Subsection C.08.004(2) allows manufacturers who have filed NDS, ANDS, SNDS or SANDS which are not in compliance with section C.08.002, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1, to file additional information or material within 90 days of receiving the notice that the submission is deficient.

4 Health Canada established an external stakeholder group, which consisted of industry and non-industry stakeholders, including clinical data transparency advocates, patient groups and health professionals, to seek input on the implementation aspects of this approach. More details on the work of this external stakeholder group are discussed in the “Implementation, enforcement and service standards” section of this document.

5 Health Canada established an external stakeholder group, which consisted of a balanced representation from industry and non-industry stakeholders, including clinical data transparency advocates, patient groups and health professionals, to seek input on the implementation aspects of this approach. More details on the work of this external stakeholder group are discussed in the “Implementation, enforcement and service standards” section of this document.

(https://www.budget.gc.ca/2018/docs/themes/progress-progres-en.html?utm_source=CanCa&utm_medium=Activities_e&utm_content=Progress&utm_campaign=CAbdgt18)
Supporting Canada's researchers to build a more innovative economy

Regulations Amending the Medical Devices Regulations (Public Release of Clinical Information): SOR/2019-63

Canada Gazette, Part II, Volume 153, Number 6

Registration

SOR/2019-63 March 4, 2019

FOOD AND DRUGS ACT

P.C. 2019-134 February 28, 2019

Her Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to section 30 [a] of the *Food and Drugs Act* [b], makes the annexed *Regulations Amending the Medical Devices Regulations (Public Release of Clinical Information)*.

Regulations Amending the Medical Devices Regulations (Public Release of Clinical Information)

Amendment

1 The *Medical Devices Regulations* [1] are amended by adding the following after section 43.1:

Disclosure of Information in Respect of Clinical Studies or Investigational Testing

43.11 In sections 43.12 and 43.13, ***information in respect of a clinical study or investigational testing*** means information in respect of a clinical study, or investigational testing, involving human subjects that is contained in an application for a Class III or IV medical device licence made under section 32 or in an application to amend such a licence made under section 34.

43.12 (1) Information in respect of a clinical study or investigational testing that is confidential business information ceases to be confidential business information when one of the following circumstances occurs with respect to the application:

(a) the Minister issues a licence under paragraph 36(1)(a);

(b) the Minister amends a licence under paragraph 36(1)(b);

(c) the Minister refuses to issue a licence or amend a licence under section 38.

(2) Subsection (1) does not apply to information in respect of a clinical study or investigational testing

that

(a) was not used by the manufacturer in the application to support the information referred to in paragraph 32(3)(b) or paragraph 32(4)(b); or

(b) describes tests, methods or assays that are used exclusively by the manufacturer.

43.13 The Minister may disclose, without notifying the person to whose business or affairs the information relates or obtaining their consent, any information in respect of a clinical study or investigational testing that has ceased to be confidential business information.

Transitional Provisions

2 (1) Despite subsection 43.12(1) of the *Medical Devices Regulations*, *information in respect of a clinical study or investigational testing*, as defined in section 43.11 of those Regulations, that is confidential business information and that is contained in an application with respect to which one of the following circumstances occurred before the day on which these Regulations come into force ceases to be confidential business information on the day on which these Regulations come into force:

(a) the Minister issued a licence under paragraph 36(1)(a) of the *Medical Devices Regulations*;

(b) the Minister amended a licence under paragraph 36(1)(b) of the *Medical Devices Regulations*;

(c) the Minister refused to issue or amend a licence under section 38 of the *Medical Devices Regulations*.

(2) Subsection (1) does not apply to information referred to in subsection 43.12(2) of the *Medical Devices Regulations*.

Coming into Force

3 These Regulations come into force on the day on which they are registered.

N.B. The Regulatory Impact Analysis Statement for these Regulations appears following SOR/2019-62, Regulations Amending the Food and Drug Regulations (Public Release of Clinical Information) (sor-dors62-eng.html).

Footnotes

a S.C. 2016, c. 9, s. 8

b R.S., c. F-27

1 SOR/98-282

Government of Canada activities and initiatives

#YourBudget2018 – Advancement

(https://www.budget.gc.ca/2018/docs/themes/advancement-advancement-en.html?utm_source=CanCa&utm_medium=Activities_e&utm_content=Advancement&utm_campaign=CAbdgt18)
Advancing our shared values

#YourBudget2018 – Reconciliation

(https://www.budget.gc.ca/2018/docs/themes/reconciliation-reconciliation-en.html?utm_source=CanCa&utm_medium=%20Activities_e&utm_content=Reconciliation&utm_campaign=CAbdgt18)
Advancing reconciliation with Indigenous Peoples

#YourBudget2018 – Progress

(https://www.budget.gc.ca/2018/docs/themes/progress-progres-en.html?utm_source=CanCa&utm_medium=Activities_e&utm_content=Progress&utm_campaign=CAbdgt18)
Supporting Canada's researchers to build a more innovative economy