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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98E-0796]

Determination of Regulatory Review Period for Purposes of Patent Extension; LumenHance®

AGENCY : Food and Drug Administration, HHS.

ACTION : Notice.

SUMMARY : The Food and Drug Administration (FDA) has determined the regulatory review period for LumenHance® and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Brian J. Malkin,
Office of Health Affairs (HFY-20),
Food and Drug Administration,
5600 Fishers Lane,
Rockville, MD 20857,
301-827-6620.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), **FDA's** determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 **U.S.C.** 156(g) (1) (B) .

FDA recently approved for marketing the human drug product LumenHance® (manganese chloride USP) . LumenHance® is indicated for use as a magnetic resonance imaging (MRI) contrast media, to enhance the delineation of the upper gastrointestinal tract to distinguish it from organs and tissues that are adjacent to the upper regions of the gastrointestinal tract. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for LumenHance® (U.S. Patent No. 5,368,840) from Bracco Diagnostics Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated December 14, 1998, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of LumenHance® represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for LumenHance® is 1,796 days. Of this time, 1,067 days occurred during the testing phase of the regulatory review period, while 729 days occurred during the approval phase. These periods of time were derived from the following dates:

1. The date an exemption under section 505 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355) became effective: The applicant claims January 18, 1993, as the date

the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was January 20, 1993, which was 30 days after FDA receipt of the IND.

2. The date the application was initially submitted with respect to the human drug product under section 505 of the act: December 22, 1995. The applicant claims December 20, 1995, as the date the new drug application (NDA) for LumenHance® (NDA 20-686) was initially submitted. However, FDA records indicate that NDA 20-686 was submitted on December 22, 1995.

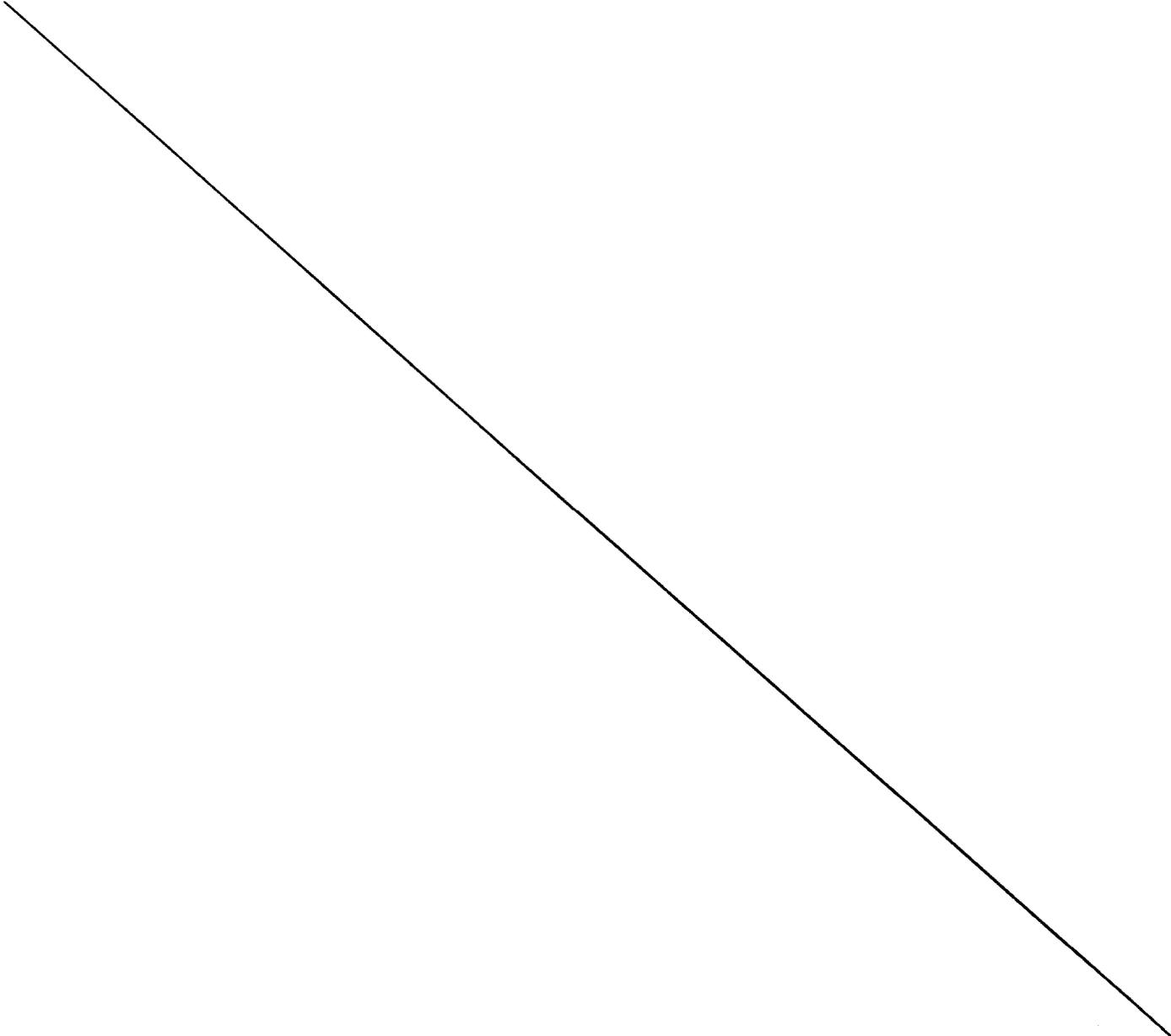
3. The date the application was approved: December 19, 1997. FDA has verified the applicant's claim that NDA 20-686 was approved on December 19, 1997.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 20 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before (insert date 60 days after date of publication in the FEDERAL REGISTER), submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before (insert date 180 days after date of publication in the FEDERAL REGISTER), for a determination regarding whether

the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the



docket number found in brackets in the heading of this document.
Comments and petitions may be seen in the Dockets Management
Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: 2/16/99
February 16, 1999

Thomas J. McGinnis

Thomas J. McGinnis,
Deputy Associate Commissioner
for Health Affairs

CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a final flourish.