Assessing User Fees Under the Biosimilar User Fee Amendments of 2022

Guidance for Industry

FINAL GUIDANCE

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)

July 2023
User Fees

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This guidance represents the current thinking of the Food and Drug Administration (FDA or Agency) on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. To discuss an alternative approach, contact the FDA staff responsible for this guidance as listed on the title page.

I. INTRODUCTION

This guidance provides information to stakeholders regarding FDA's implementation of the Biosimilar User Fee Amendments of 2022 (BsUFA III) under Title IV of the FDA User Fee Reauthorization Act of 2022.

This guidance describes the types of user fees authorized by BsUFA III, how FDA determines which products are subject to a fee, and FDA's policies regarding exceptions and waivers. This guidance also describes the process for submitting payments to FDA and the consequences for failing to pay BsUFA fees, and the process for requesting reconsideration if FDA denies a request for a waiver or return of user fees. This guidance does not address FDA's implementation of other user fee programs (e.g., Prescription Drug User Fee Amendments, Generic Drug User Fee Amendments). Throughout this guidance, references to *user fees* or the *user-fee program* are specific to the biosimilar biological product user fee program under section 744H of the Federal Food, Drug, and Cosmetic Act (FD&C Act).

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

[1] This guidance has been prepared by the Division of User Fee Management, Office of Management, in the Center for Drug Evaluation and Research in cooperation with the Center for Biologics Evaluation and Research at the Food and Drug Administration. Submit comments to Docket No. FDA-2017-D-6821 (available at https://www.regulations.gov/docket?D=FDA-2017-D-6821). See the instructions in that docket for submitting comments on this and other Level 2 guidances.

The Biosimilar User Fee Act of 2012 (BsUFA I) added sections 744G and 744H to the FD&C Act, authorizing FDA to collect user fees for a 5-year period from persons that develop biosimilar biological products. Since 2012, Congress has revised and extended BsUFA two times, each time for a 5-year period. Fees authorized by this legislation help fund the process for the review of biosimilar biological product applications and have played an important role in expediting the review and approval process. The most recent reauthorization (known as BsUFA III) is under Title IV of the FDA User Fee Reauthorization Act of 2022, enacted on September 30, 2022.

BsUFA III extends FDA's authority to collect user fees from Fiscal Year (FY) 2023 through FY 2027.[2] Discussions about the next reauthorization of BsUFA are expected to begin before FY 2027, the final fiscal year of BsUFA III.

III. DEFINITIONS

For purposes of this guidance:

- The term ***affiliate*** means a business entity that has a relationship with a second business entity if, directly or indirectly, (A) one business entity controls, or has the power to control, the other business entity, or (B) a third-party controls, or has the power to control, both of the business entities.[3]

- The term ***biosimilar biological product*** means a specific strength of a biological product in final dosage form for which a biosimilar biological product application has been approved.[4]

- Except as provided by section 744G(4)(B), the term ***biosimilar biological product application*** means an application for licensure of a biological product under section 351(k) of the Public Health Service Act (PHS Act).[5]

- The term ***final dosage form*** means, with respect to a biosimilar biological product, a finished dosage form which is approved for administration to a patient without substantial further manufacturing (such as lyophilized products before reconstitution).[6]

- The term ***financial hold*** means an order issued by the Secretary to prohibit the sponsor of a clinical investigation from continuing the investigation if the Secretary determines that the investigation is intended to support a biosimilar biological product application and the sponsor has failed to pay any of the biosimilar biological product development program fees for the product.[7]

[2] FDA's fiscal year begins on October 1 and ends on September 30.
[3] Section 744G(2) of the FD&C Act.
[4] Section 744G(3) of the FD&C Act.
[5] Section 744G(4)(A) of the FD&C Act.
[6] Section 744G(10) of the FD&C Act.
[7] Section 744G(11) of the FD&C Act.

- The term ***person*** includes an affiliate of such person.[8] The term ***person*** includes an individual, partnership, corporation, or association.[9] This document will also use the term ***person*** when referring to a sponsor or applicant.

- The term ***supplement*** means a request to the Secretary to approve a change in a biosimilar biological product application which has been approved, including a supplement requesting that the Secretary determine that the biosimilar biological product meets the standards for interchangeability described in section 351(k)(4) of the PHS Act.[10]

IV. STRUCTURE OF THE BSUFA USER FEE PROGRAM

BsUFA III authorizes the collection of three types of fees: (1) biosimilar biological product development program fees (BPD fees), (2) biosimilar biological product application fees (application fees), and (3) biosimilar biological product program fees (program fees).

The Agency will establish initial and annual BPD fees and reactivation fees, biosimilar biological product application fees, and biosimilar biological product program fees for each fiscal year following a process set forth in the statute and will publish the fees and fee revenue amounts for a fiscal year in the Federal Register not later than 60 days before the start of that year.[11]

V. BIOSIMILAR BIOLOGICAL PRODUCT DEVELOPMENT FEES

BsUFA III BPD fees are assessed for products in FDA's BPD program. BPD fees include the initial BPD fee, the annual BPD fee, and the reactivation fee.

A. Initial BPD Fee

Under section 744H(a)(1)(A) of the FD&C Act, an ***initial BPD fee*** is a one-time fee that is assessed to a sponsor to enter the BPD program. To enter the BPD program for a product, a sponsor can:

- Request a BPD meeting for a product; or

- Submit a clinical protocol for an investigational new drug application (IND) describing an investigation that FDA determines is intended to support a biosimilar biological product application for the product.

[8] Section 744G(12) of the FD&C Act.
[9] Section 201(e) of the FD&C Act, 21 U.S.C. 321(e).
[10] Section 744G(14) of the FD&C Act.
[11] Section 744H(c)(5) of the FD&C Act.

There is no fee for a biosimilar initial advisory meeting.

The initial BPD fee is due within 7 calendar days after FDA grants the first BPD meeting for the product or upon submission of an IND for the product that FDA determines is intended to support a biosimilar biological product application, whichever occurs first.[12] Refer to section VIII of this guidance for consequences of failing to pay the required fees.

B. Annual BPD Fee

Beginning in the next fiscal year after a sponsor has paid the initial BPD fee, the sponsor must pay an ***annual BPD fee***[13] for the product in each fiscal year.[14] The annual BPD fee for a product is due on the first business day on or after October 1 of each fiscal year[15] or the first business day after the enactment of an appropriations Act providing for the collection and obligation of such fees for the year, whichever is later, unless:

- The sponsor has submitted a marketing application for the product that was accepted for filing;[16]
- The sponsor has discontinued participation in the BPD program for the product;[17] or
- The sponsor has been administratively removed from the BPD program for the product.[18]

C. Request for Refund of Annual BPD Fee

If a person submits a biosimilar biological product application before October 1 of the fiscal year and the application is subsequently accepted for filing, the person may request a refund of the annual BPD fee paid by the person for such fiscal year.[19] To qualify for consideration for such a refund, the person must submit to FDA a written request for the refund not later than 180 calendar days after the application is accepted for filing.[20]

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[12] Section 744H(a)(1)(A)(iv) of the FD&C Act.
[13] Section 744H(a)(1)(B) of the FD&C Act.
[14] In the case that such product (including, where applicable, ownership of the relevant IND) is transferred to a licensee, assignee, or successor of the person that paid the initial BPD fee for the product, and written notice of such transfer is provided to FDA, such licensee, assignee, or successor must pay the annual BPD fee. Section 744H(a)(1)(B)(i) of the FD&C Act.
[15] Section 744H(a)(1)(B)(ii) of the FD&C Act.
[16] Section 744H(a)(1)(B)(iii)(I) of the FD&C Act.
[17] Section 744H(a)(1)(B)(iii)(II) of the FD&C Act.
[18] Section 744H(a)(1)(B)(iii)(III) of the FD&C Act.
[19] Section 744H(a)(1)(B)(iv) of the FD&C Act.
[20] *Id*.

For example, if a person is in the BPD program and receives an invoice for the annual BPD fee for FY 2023,[21] the person may request a refund of the annual BPD fee paid for FY 2023 if a biosimilar biological product application for the product was submitted in FY 2022 and accepted for filing. To qualify for consideration for a refund of the annual BPD fee paid for the product for FY 2023, the person must submit to FDA a written request for the refund not later than 180 calendar days from the date the application was accepted for filing. The person should submit Form FDA 3913 (User Fee Payment Refund Request)[22] to CDERCollections@fda.hhs.gov to request such refund.

D. Discontinuation of Annual BPD Fee Obligation

A sponsor may discontinue participation in the BPD program for a product, effective October 1 of a fiscal year, by notifying FDA ***on or before August 1 of the preceding fiscal year*** as follows:[23]

- If the sponsor has not yet submitted an IND – By submitting a written declaration to FDA that the sponsor has no present intention of further developing the product as a biosimilar biological product.[24] The sponsor should send a courtesy copy to CDERCollections@fda.hhs.gov and include the following information in the letter:

    - Sponsor's contact information including name, address, email, and telephone number
    - Identification of the request at the top of the cover letter as "Request to Discontinue Participation in the BPD Program"
    - Name of product
    - Pre-IND number

- If the sponsor has already submitted an IND and wishes to discontinue participation in the BPD program – By withdrawing the IND for the product in accordance with Part 312 of Title 21 of the Code of Federal Regulations (CFR) or any successor regulations.[25]

  In addition to withdrawing the IND, the sponsor should submit to FDA a written request to discontinue participation in the BPD program, as described above, with a courtesy copy to CDERCollections@fda.hhs.gov.

Requests to discontinue participation in the BPD program can be submitted to the FDA Electronic Submissions Gateway[26] or mailed to:

Food and Drug Administration

[21] In this example, the fee for FY 2023 would be due on the first business day on or after October 1, 2022 (unless one of the exceptions applies; see section V.B of this guidance).
[22] FDA Form 3913, available at https://www.fda.gov/ForIndustry/UserFees/.
[23] Section 744H(a)(1)(C) of the FD&C Act.
[24] Section 744H(a)(1)(C)(i) of the FD&C Act.
[25] Section 744H(a)(1)(C)(ii) of the FD&C Act.
[26] https://www.fda.gov/industry/electronic-submissions-gateway.

Center for Drug Evaluation and Research
Central Document Room
5901-B Ammendale Road
Beltsville, MD 20705-1266

FDA must receive the request by August 1 of the preceding fiscal year to avoid assessment of the annual BPD fee.[27] If FDA receives a request to discontinue participation in the BPD program after August 1 of the fiscal year, the sponsor will receive an annual BPD fee invoice for the upcoming fiscal year and must pay the invoice amount by the due date.[28] Under section 744H(a)(1)(F)(i) of the FD&C Act, FDA shall not refund any BPD fee (initial, annual, or reactivation), except as provided in section 744H(a)(1)(B)(iv) of the FD&C Act (see section V.C. of this guidance).

E. Reactivation Fee

A sponsor that has discontinued participation in the BPD program for a product or has been administratively removed from the BPD program for a product and wants to resume participation in the BPD program for the product must pay all annual BPD fees previously assessed for such product and still owed and a ***reactivation fee***.[29] To resume participation in the BPD program for a product, a sponsor can:

- Request a BPD meeting for the product; or
- Submit a clinical protocol for an IND describing an investigation that FDA determines is intended to support a biosimilar biological product application for the product.

The ***reactivation fee*** is due within 7 calendar days after FDA grants a BPD meeting for the product or upon submission of an IND describing an investigation that FDA determines is intended to support a biosimilar biological product application for the product, whichever occurs first.[30] The reactivation fee for a fiscal year will be equal to twice the amount of the annual BPD fee established for that fiscal year.[31] Refer to section VIII of this guidance for consequences of failing to pay the required fees.

Beginning in the next fiscal year after a sponsor has paid the reactivation fee for a product, the sponsor must pay an annual BPD fee for such product.[32]

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[27] Section 744H(a)(1)(C) of the FD&C Act.
[28] Sections 744H(a)(1)(B) and 744H(a)(1)(C) of the FD&C Act.
[29] Section 744H(a)(1)(D) of the FD&C Act.
[30] Section 744H(a)(1)(D)(i) of the FD&C Act.
[31] Section 744H(b)(2)(C) of the FD&C Act.
[32] In the case that such product (including, where applicable, ownership of the relevant IND) is transferred to a licensee, assignee, or successor of the person that paid the reactivation fee for the product, and written notice of such transfer is provided to FDA, such licensee, assignee, or successor must pay the annual BPD fee. Section 744H(a)(1)(D)(ii) of the FD&C Act.

VI. BIOSIMILAR BIOLOGICAL PRODUCT APPLICATION FEES

FDA assesses a user fee for each biosimilar biological product application. Each person that submits a biosimilar biological product application is assessed an application fee as follows:

- A biosimilar biological product application for which clinical data (other than comparative bioavailability studies) with respect to safety or effectiveness are required for approval is assessed a full application fee.[33]

- A biosimilar biological product application for which clinical data (other than comparative bioavailability studies) with respect to safety or effectiveness are not required for approval is assessed one-half of a full application fee.[34]

Application fees are due when the application is submitted.[35]

A. Exception to the Application Fee

If a biosimilar biological product application:

- was submitted by a person that paid the fee for the application;

- was accepted for filing; and

- was not approved or was withdrawn prior to approval (without a waiver),

the submission of a biosimilar biological product application for the same product by the same person (or the person's licensee, assignee, or successor) does not require an application fee.[36]

B. Applications Refused for Filing or Withdrawn

If an application is refused for filing by the FDA or is withdrawn by the applicant without a waiver before filing, FDA will refund 75 percent of the paid application fee.[37] A written refund request is not required.

An application that was withdrawn before filing or refused for filing shall be subject to the full application fee when resubmitted or filed over protest unless a waiver applies.[38]

[33] Section 744H(a)(2)(A)(i) of the FD&C Act.
[34] Section 744H(a)(2)(A)(ii) of the FD&C Act.
[35] Section 744H(a)(2)(C) of the FD&C Act.
[36] Section 744H(a)(2)(D) of the FD&C Act.
[37] Section 744H(a)(2)(E) of the FD&C Act.
[38] Section 744H(a)(2)(F) of the FD&C Act.

C. Waiver of the Application Fee

Under section 744H(d)(1) of the FD&C Act, an applicant is eligible for a waiver of the ***application fee*** if the applicant is a small business submitting its first biosimilar biological product application to the Agency for review and does not have another product that has been approved under a human drug application[39] or a biosimilar biological product application and introduced or delivered for introduction into interstate commerce.

To qualify for a small business waiver of the application fee, an applicant must meet all of the following criteria:

- The applicant employs fewer than 500 employees, including employees of affiliates;
- The applicant does not have a drug product that has been approved under a human drug application or a biosimilar biological product application and introduced or delivered for introduction into interstate commerce; and
- The applicant, including its affiliates, is submitting its first biosimilar biological product application.

1. Small Business Waiver and Return Request

To qualify for a small business waiver of the biosimilar biological product application fee,[40] an applicant should submit to the Agency Form FDA 3971[41] at least four months prior to the submission of the application. If an applicant submitted an application with payment and would like to request a small business waiver and return of the fee paid, the applicant should complete and submit Form FDA 3971 to request the return. Such a request must be made not later than 180 calendar days of when the application fee was due.[42] The completed form should be submitted via email to CDERCollections@fda.hhs.gov.

Upon receipt of Form FDA 3971, FDA may contact the applicant to request additional information and to clarify information provided in Form FDA 3971. Examples of information that may be requested include, but are not limited to, the following:

- An application for size determination;
- A copy of the applicant's Articles of Incorporation and Bylaws;
- The applicant's most recent annual financial statement to shareholders; and

[39] Section 735(1) of the FD&C Act; 21 U.S.C. 379(g)(1).
[40] Section 744H(d)(1) of the FD&C Act.
[41] FDA Form 3971, available at https://www.fda.gov/media/108984/download.
[42] Section 744H(h) of the FD&C Act.

- A breakdown of the number of persons employed full time, part time, temporarily, or otherwise by the applicant and affiliates during each of the pay periods for the 12 months preceding the applicant's certification.

Occasionally, FDA finds entities affiliated with the applicant that were not identified by the applicant. In such cases, FDA may request additional information and documents regarding the nature of the relationship between the applicant and such other entities. If the requested information is not submitted, FDA may deny the small business waiver request because there is insufficient evidence that the applicant meets the criteria described in section 744H(d)(1) of the FD&C Act.

FDA recognizes that some information provided by companies may be confidential. FDA will treat confidential commercial or financial information consistent with applicable federal laws and regulations.

After FDA assesses an applicant's eligibility for a small business waiver, FDA notifies the applicant whether the waiver is granted.

2. Expiration Date of the Small Business Waiver

If a small business waiver is granted, the applicant should submit its biosimilar biological product application within 1 year after the date of the small business determination since circumstances supporting a small business waiver may have changed. For example, an applicant may have merged with a larger company and therefore no longer be considered a small business. Similarly, an applicant could purchase a new drug application (NDA) or biologics license application (BLA) from an unaffiliated company and, therefore, have a drug product that has been approved under a human drug application or a biosimilar biological product application and introduced into or delivered for introduction into interstate commerce.

If an applicant is granted a small business waiver and is unable to submit the application within 1 year of the determination, the applicant should request a new small business waiver. The Agency will examine its records, including any new information submitted, to confirm that the applicant still meets the criteria for a small business waiver. If the criteria are no longer met, the small business waiver request will be denied. If the criteria are still met, the Agency will renew the small business waiver for another year.

3. Small Business Waivers of Application Fees for Future Biosimilar Biological Product Applications

After an applicant or its affiliate(s) is granted a small business waiver and submits its first biosimilar biological product application, the applicant cannot receive another small business waiver.[43] That means the applicant or its affiliate(s) is not eligible to receive a small business waiver for any subsequent biosimilar biological product application. In addition, the applicant or affiliate(s) is ineligible for another small business waiver even if the application is withdrawn or

[43] Section 744H(d)(1) of the FD&C Act.

refused for filing. If an applicant does not submit the application for which it was granted a small business waiver, the applicant may qualify again for a small business waiver.

VII. BIOSIMILAR BIOLOGICAL PRODUCT PROGRAM FEES

The biosimilar biological product program fee (program fee) is assessed annually for each eligible biosimilar biological product. Program fees are assessed for a fiscal year to each person who is named as the applicant in a biosimilar biological product application for each biosimilar biological product that is identified in a biosimilar biological product application approved as of October 1 of such fiscal year,[44] that may be dispensed only under prescription pursuant to section 503(b) of the FD&C Act,[45] and that does not appear on a list of discontinued biosimilar biological products (as of October 1 of such fiscal year).[46,47] For example, if the approval of a biosimilar biological product application occurs on or before October 1, 2022, and the products identified in the approved application are prescription products that do not appear on the discontinued list as of October 1, 2022, then program fees will be assessed for the products for FY 2023. However, if approval of a biosimilar biological product application occurs after October 1, 2022, then program fees are not assessed for the products identified in the application for FY 2023.

The program fees are generally due on the first business day on or after October 1 of each fiscal year or the first business day after the enactment of an appropriations Act providing for the collection and obligation of such fees for the year, whichever is later.[48]

Applicants may not be assessed more than five program fees for biosimilar biological products identified in each approved application for each fiscal year.[49] For example, if seven biosimilar biological products are approved under the same BLA, the applicant would be assessed five program fees for the fiscal year.

A. Program Fees for Liquid Parenteral Biosimilar Biological Products[50]

For the purposes of assessing program fees for liquid parenteral biosimilar biological products, FDA intends to take into consideration both the total quantity of drug substance in mass or units of activity in a product and the concentration of the drug substance in mass or units of activity per unit volume of product. For example, two biosimilar biological products in final dosage form with the same concentration but with different fill volumes would be considered two

[44] Section 744H(a)(3)(A)(i) of the FD&C Act.
[45] Section 744H(a)(3)(A)(ii) of the FD&C Act.
[46] Section 744H(a)(3)(A)(iii) of the FD&C Act.
[47] An approved biosimilar biological product that appears on the list of discontinued biosimilar biological products as of October 1 of a fiscal year would also be assessed the program fee if it is removed from the discontinued list during the fiscal year and the other statutory criteria for fee assessment are satisfied (see section 744H(a)(3)(E)(iii) of the FD&C Act). Such fee is due on the last business day of such fiscal year and must be paid only once for each such product for each fiscal year. *Id*.
[48] Section 744H(a)(3)(B) of the FD&C Act.
[49] Section 744H(a)(3)(D) of the FD&C Act.
[50] Section 744G(3) of the FD&C Act.

separate biosimilar biological products for the purpose of assessing program fees. The applicant would be assessed two program fees for these products. If the applicant has more than five concentrations or fill volumes approved in the BLA, it will not be assessed more than five program fees for each fiscal year for products identified in such application.

An auto-injector that has the same strength or potency in final dosage form as a prefilled syringe or vial will generally be assessed a separate program fee. This is intended to align the Agency's assessment of fees for biological products approved under section 351(k) of the PHS Act with its assessment of fees for products approved under section 351(a) of the PHS Act or section 505 of the FD&C Act.[51, 52]

VIII. FAILURE TO PAY FEES

Under section 744H(a)(1)(E) of the FD&C Act, if a sponsor has failed to pay any BPD fee (initial, annual, or reactivation) for a product as required:

- FDA shall not provide a BPD meeting relating to the product for which fees are owed.[53]

- Except in extraordinary circumstances, FDA shall not consider an IND submitted for the product to have been received under section 505(i)(2) of the FD&C Act if FDA determines that the investigation is intended to support a biosimilar biological product application.[54]

- Except in extraordinary circumstances, FDA shall prohibit the sponsor of a clinical investigation from continuing the investigation (this is referred to as a "financial hold") if FDA determines that the investigation is intended to support a biosimilar biological product application.[55]

If a sponsor has failed to pay the annual BPD fee as required for a product for a period of two consecutive fiscal years, FDA may administratively remove the sponsor from the BPD Program for the product. FDA will provide written notice to the sponsor of the intended administrative removal at least 30 days prior to administratively removing the sponsor from the biosimilar biological product development program for the product.[56]

A biosimilar biological product application or supplement submitted by an applicant subject to BsUFA fees shall be considered incomplete and shall not be accepted for filing until all BsUFA fees owed by such person have been paid.[57]

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[51] See guidance for industry *Assessing User Fees Under the Prescription Drug User Fee Amendments of 2022* (https://www.fda.gov/media/167877/download).
[52] The distinction in this guidance between (1) auto-injectors and (2) prefilled syringes or vials is for the purposes of assessing the biosimilar biological product program fee only and not for any other purpose.
[53] Section 744H(a)(1)(E)(i) of the FD&C Act.
[54] Section 744H(a)(1)(E)(ii) of the FD&C Act.
[55] Section 744H(a)(1)(E)(iii) of the FD&C Act.
[56] Section 744H(a)(1)(E)(v) of the FD&C Act.
[57] Sections 744H(a)(1)(E)(iv) and 744H(e) of the FD&C Act.

IX. PAYMENT INFORMATION AND PROCEDURES

This section briefly describes the procedures for payment of fees and assessing and issuing invoices for the annual BPD fee and the biosimilar biological product program fees under BsUFA III. More detailed instructions will be provided in FDA's direct notice to affected persons by issuing a "Notification of Annual BsUFA Fees" correspondence.

A. Initial BPD Fees, Reactivation Fees, and Application Fees

Persons should complete a Biosimilar User Fee Cover Sheet (Form FDA 3792) online and pay by electronic check, wire transfer, money order, or bank draft. Instruction on accessing and completing the Biosimilar User Fee Cover Sheet is located on the BsUFA website (https://www.fda.gov/bsufa).

B. Annual Billing Cycle

1. BsUFA Annual Survey

FDA intends to send persons an annual survey to gather pertinent information to assist with fee setting for the next fiscal year. FDA anticipates sending the survey in the second quarter of each fiscal year.

2. Notification of Annual BsUFA Fees Correspondence

FDA intends to issue a "Notification of Annual BsUFA Fees" correspondence to affected persons by July of each year regarding their active BPD programs and approved biosimilar biological products. Persons should review the correspondence and notify FDA of any changes in contact information, changes in the status of Pre-IND/INDs in the BPD program, changes in biosimilar biological product marketing status, and any other information pertinent for the Agency to issue an accurate invoice to the proper person.

3. Annual Invoicing

FDA intends to issue annual invoices for the upcoming fiscal year by the preceding September, based on information available to the Agency at the time the invoices are prepared. Because persons are invoiced for annual BPD fees and program fees in advance of the first business day of the upcoming fiscal year, the invoices may not reflect the actual data available as of October 1. FDA intends to issue additional invoices at a later date, as needed, to capture any new biosimilar biological products in the BPD program and program fee-eligible biosimilar biological products that were not previously invoiced. For example:

- If a sponsor pays the FY 2022 initial BPD fee between the date the annual BPD invoices for FY 2023 are prepared and October 1, 2022, the sponsor can expect to receive the FY 2023 annual BPD fee invoice in December 2022.

- An applicant with a program fee-eligible biosimilar biological product approved between the date that FY 2023 annual invoices are prepared and October 1, 2022, can expect to receive the FY 2023 program fee invoice in December 2023.

- If an approved biosimilar biological product is removed from the list of discontinued biosimilar biological products between the date that FY 2023 annual invoices are prepared and the end of FY 2023, an applicant can expect to receive the FY 2023 program fee invoice in December 2023.[58]

Invoices may also be issued after the close of the fiscal year for other reasons. Payment instructions are included on the invoice.

4. Moving a Product to the Discontinued Section of the Biosimilar Biological Product List

FDA maintains a list of approved biosimilar biological products that are user fee-eligible and products that are not marketed (discontinued). This list, "Therapeutic Biosimilar Biological Products", is available on the BsUFA website (https://www.fda.gov/bsufa). Applicants who have decided to withdraw a product from sale or have decided to delay launch of a product after its approval date should request to have the product moved to the discontinued section of this list (i.e., the list of discontinued biosimilar biological products).

Requests to move an approved biosimilar biological product to the discontinued section of the biosimilar biological product list should be submitted to CDERCollections@fda.hhs.gov no **later than September 30 of the preceding fiscal year.** The request should clearly identify the product to be moved and the date that it is or will be withdrawn from sale and, if applicable, the date the applicant intends to resume commercial marketing. If the applicant submits a written request to place a product on the list of discontinued biosimilar biological products, and the request identifies the date the product is, or will be, withdrawn from sale, then for purposes of assessing the program fee, FDA will consider the product to have been moved to such discontinued list on the date that the request was received or, if the product will be withdrawn from sale on a future date, such future date when the product is withdrawn from sale, whichever is later.[59] A product is considered withdrawn from sale once the applicant has ceased its own distribution of the product, whether or not the applicant has ordered recall of all previously distributed lots of the product, except that a routine, temporary interruption in supply will not render a product withdrawn from sale.[60]

When requesting to move an approved biosimilar biological product to the list of discontinued biosimilar biological products, applicants should not rely on communications with a review division or other FDA components other than the CDER or CBER User Fee staff, as appropriate.

[58] Please note the applicant may also be responsible for paying FY 2022 program fees for this biosimilar biological product. See FN 47.
[59] Section 744H(a)(3)(E)(i) of the FD&C Act.
[60] Section 744H(a)(3)(E)(ii) of the FD&C Act.

X. APPEALS PROCESS

A. Reconsideration Request

If FDA denies a request for a waiver or return of user fees, the applicant may request reconsideration of that decision. A request for reconsideration should be made within 30 calendar days of the issuance of FDA's decision to deny a request for a waiver or return of user fees.

FDA recommends that requests for reconsideration state the applicant's reasons for believing that FDA's decision is in error and include any additional information, including updated financial information that is relevant to the applicant's position. The Agency will issue a response upon reconsideration, setting forth the basis for the decision.

All requests for reconsideration (regardless of whether the product is regulated by CDER or CBER) should be submitted via email to CDERCollections@fda.hhs.gov and should be addressed to the following:

Division of User Fee Management
Attention: Division Director
Center for Drug Evaluation and Research

Alternatively, an applicant can mail the request to FDA[61] via the carrier of its choice. For the most updated mailing address, visit the following FDA website: https://www.fda.gov/bsufa.

B. Appeal Request

If a request is denied upon reconsideration, the applicant may choose to appeal the denial. A request for an appeal should be made within 30 calendar days of the issuance of FDA's decision to affirm its denial of a request for a waiver or return of user fees. The following information should be included in the appeal:

- The original request;
- The denial of the original request;
- The reconsideration request;
- The denial of the reconsideration request; and
- A statement of the applicant's reasons for believing that the prior conclusions were in error.

No new information or new analyses should be presented in the appeal request. If new information or analyses are presented in the appeal request the appeal will not be accepted and the matter will be referred back to the original deciding authority to consider the new information or analyses.

[61] Electronic mail is the Biosimilar User Fee staff's preferred method of receiving communication over postal mail.

All requests for appeals for either CDER or CBER products should be submitted to the Director of CDER's Office of Management via CDERCollections@fda.hhs.gov and a copy should be submitted to the CDER Formal Dispute Resolution Project Manager. The contact information can be found on the CDER Formal Dispute Resolution Web page.[62] Alternatively, an applicant can mail the request to FDA via carrier of its choice. For the most updated mailing address, visit the following FDA website: https://www.fda.gov/bsufa.

After FDA reviews the information submitted in the appeal request, for CDER regulated products the Director of CDER's Office of Management will issue a written decision on the applicant's request; for CBER regulated products, the Director of CBER will issue a written decision on the applicant's request.

CDER Products

If the applicant's appeal is denied at one management level, the applicant can appeal the same matter to the next higher management level in the Center chain of command. A new request should be submitted for each appeal to the next management level and should follow the process provided in this guidance. If the applicant has exhausted the Center's management levels and remains unsatisfied with the decision, the applicant may request review of the matter by the Commissioner of Food and Drugs (Commissioner) under 21 CFR 10.75(c). Requests for review by the Commissioner should be submitted to FDA's Ombudsman, with a copy provided to the Center. Review of such matters by the Commissioner is discretionary.[63]

CBER Products

If the applicant's appeal is denied by the Director of CBER, the applicant may request review of the matter by the Commissioner under 21 CFR 10.75(c). Requests for review by the Commissioner should be submitted to the FDA's Ombudsman, with copies provided to the center that denied the appeal. Review of such matters by the Commissioner is discretionary.

XI. OTHER RESOURCES

The following guidance documents may be helpful:

- Guidance for Industry - Submitting Separate Marketing Applications and Clinical Data for Purposes of Assessing User Fees[64]

The following manuals of policies and procedures (MAPP) may be helpful:

[62] See https://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ContactCDER/ucm444092.htm.
[63] See 40 FR 40682, 40693 (September 3, 1975).
[64] See https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM079320.pdf.

- MAPP 6050.2 Effect of Failure to Pay BsUFA Fees[65]

Additional information is also available on the FDA User Fee Programs web page. For any questions, please email the BsUFA User Fee Team at CDERCollections@fda.hhs.gov or call 301-796-7900.

XII. PAPERWORK REDUCTION ACT OF 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information regarding BSUFA have been approved under OMB control number 0910-0718. The collection of information in this guidance including Forms FDA 3397 and 3971 have been approved under OMB control number 0910-0297. The collection of information regarding this guidance including Form FDA 3913 has been approved under OMB control number 0910-0805. The collections of information associated with new drug applications under 21 CFR 314 or biologics license applications under 21 CFR 601 have been approved under OMB control numbers 0910-0001 and 0910-0338, respectively.

> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this information collection is 0910-0718 (expires 1/31/2025).

[65] See https://www.fda.gov/media/154612/download