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(c) Following loss management procedures to electronically deauthorize lost, stolen, missing, or otherwise potentially compromised tokens, cards, and other devices that bear or generate identification code or password information, and to issue temporary or permanent replacements using suitable, rigorous controls.

(d) Use of transaction safeguards to prevent unauthorized use of passwords and/or identification codes, and to detect and report in an immediate and urgent manner any attempts at their unauthorized use to the system security unit, and, as appropriate, to organizational management.

(e) Initial and periodic testing of devices, such as tokens or cards, that bear or generate identification code or password information to ensure that they function properly and have not been altered in an unauthorized manner.

# PART 12—FORMAL EVIDENTIARY PUBLIC HEARING

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AUTHORITY: 21 U.S.C. 141–149, 321–393, 467f, 679, 821, 1034; 42 U.S.C. 201, 262, 263b–263n, 264; 15 U.S.C. 1451–1461; 5 U.S.C. 551–558, 701–721; 28 U.S.C. 2112.

SOURCE: 44 FR 22339, Apr. 13, 1979, unless otherwise noted.

## Subpart A—General Provisions

### § 12.1 Scope.

The procedures in this part apply when—



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(a) A person has a right to an opportunity for a hearing under the laws specified in § 10.50; or

(b) The Commissioner concludes that it is in the public interest to hold a formal evidentiary public hearing on any matter before FDA.

## Subpart B—Initiation of Proceedings

### § 12.20 Initiation of a hearing involving the issuance, amendment, or revocation of a regulation.

(a) A proceeding under section 409(f), 502(n), 512(n)(5), 701(e), or 721(d) of the act or section 4 or 5 of the Fair Packaging and Labeling Act may be initiated—

(1) By the Commissioner on the Commissioner's own initiative, e.g., as provided in § 170.15 for food additives; or

(2) By a petition—

(i) In the form specified elsewhere in this chapter, e.g., the form for a color additive petition in § 71.1; or

(ii) If no form is specified, by a petition under § 10.30.

(b) If the Commissioner receives a petition under paragraph (a)(2) of this section, the Commissioner will—

(1) If it involves any matter subject to section 701(e) of the act or section 4 or 5 of the Fair Packaging and Labeling Act, and meets the requirements for filing, follow the provisions of § 10.40 (b) through (f);

(2) If it involves a color additive or food additive, and meets the requirements for filing in §§ 71.1 and 71.2, or in §§ 171.1, 171.6, 171.7, and 171.100, publish a notice of filing of the petition within 30 days after the petition is filed instead of a notice of proposed rulemaking.

(c) [Reserved]

(d) The notice promulgating the regulation will describe how to submit objections and requests for hearing.

(e) On or before the 30th day after the date of publication of a final regulation, or of a notice withdrawing a proposal initiated by a petition under § 10.25(a), a person may submit to the Commissioner written objections and a request for a hearing. The 30-day period may not be extended except that additional information supporting an objection may be received after 30 days upon a showing of inadvertent omission and hardship, and if review of the objection and request for hearing will not thereby be impeded. If, after a final color additive regulation is published, a petition or proposal relating to the regulation is referred to an advisory committee in accordance with section 721(b)(5)(C) of the act, objections and requests for a hearing may be submitted on or before the 30th day after the date on which the order confirming or modifying the Commissioner's previous order is published.

[44 FR 22339, Apr. 13, 1979, as amended at 64 FR 399, Jan. 5, 1999]

### § 12.21 Initiation of a hearing involving the issuance, amendment, or revocation of an order.

(a) A proceeding under section 505 (d) or (e), 512 (d), (e), (m) (3) or (4), of section 515(g)(1) of the act, or section 351(a) of the Public Health Service Act, may be initiated—

(1) By the Commissioner on the Commissioner's own initiative;

(2) By a petition in the form specified elsewhere in this chapter, e.g., § 314.50 for new drug applications, § 514.1 for new animal drug applications, or § 601.3 for licenses for biologic products; or

(3) By a petition under § 10.30.

(b) A notice of opportunity for hearing on a proposal to deny or revoke approval of all or part of an order will be published together with an explanation of the grounds for the proposed action. The notice will describe how to submit requests for hearing. A person subject to the notice has 30 days after its issuance to request a hearing. The 30-day period may not be extended.

(c) The Commissioner may use an optional procedure specified in § 10.30(h) to consider issuing, amending, or revoking an order.

(d) In a proceeding under sections 505(e), 512(e) or (m), or 515(e) of the act in which a party wishes to apply for reimbursement of certain expenses under the Equal Access to Justice Act (5 U.S.C. 504 and 504 note), FDA will follow the Department of Health and Human Services' regulations in 45 CFR part 13.

[44 FR 22339, Apr. 13, 1979, as amended at 47 FR 25734, June 15, 1982; 54 FR 9035, Mar. 3, 1989; 85 FR 72906, Nov. 16, 2020]



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### § 12.22 Filing objections and requests for a hearing on a regulation or order.

(a) Objections and requests for a hearing under § 12.20(d) must be submitted to the Division of Dockets Management and will be accepted for filing if they meet the following conditions:

(1) They are submitted within the time specified in § 12.20(e).

(2) Each objection is separately numbered.

(3) Each objection specifies with particularity the provision of the regulation or proposed order objected to.

(4) Each objection on which a hearing is requested specifically so states. Failure to request a hearing on an objection constitutes a waiver of the right to a hearing on that objection.

(5) Each objection for which a hearing is requested includes a detailed description and analysis of the factual information to be presented in support of the objection. Failure to include a description and analysis for an objection constitutes a waiver of the right to a hearing on that objection. The description and analysis may be used only for the purpose of determining whether a hearing has been justified under § 12.24, and do not limit the evidence that may be presented if a hearing is granted.

(i) A copy of any report, article, survey, or other written document relied upon must be submitted, except if the document is—

(*a*) An FDA document that is routinely publicly available; or

(*b*) A recognized medical or scientific textbook that is readily available to the agency.

(ii) A summary of the nondocumentary testimony to be presented by any witnesses relied upon must be submitted.

(b) Requests for hearing submitted under § 12.21 will be submitted to the Division of Dockets Management and will be accepted for filing if they meet the following conditions:

(1) They are submitted on or before the 30th day after the date of publication of the notice of opportunity for hearing.

(2) They comply with §§ 314.200, 514.200, or 601.7(a).

(c) If an objection or request for a public hearing fails to meet the requirements of this section and the deficiency becomes known to the Division of Dockets Management, the Division of Dockets Management shall return it with a copy of the applicable regulations, indicating those provisions not complied with. A deficient objection or request for a hearing may be supplemented and subsequently filed if submitted within the 30-day time period specified in § 12.20(e) or § 12.21(b).

(d) If another person objects to a regulation issued in response to a petition submitted under § 12.20(a)(2), the petitioner may submit a written reply to the Division of Dockets Management.

[44 FR 22339, Apr. 13, 1979, as amended at 54 FR 9035, Mar. 3, 1989; 64 FR 69190, Dec. 10, 1999]

### § 12.23 Notice of filing of objections.

As soon as practicable after the expiration of the time for filing objections to and requests for hearing on agency action involving the issuance, amendment, or revocation of a regulation under sections 502(n), 701(e), or 721(d) of the act or sections 4 or 5 of the Fair Packaging and Labeling Act, the Commissioner shall publish a notice in the FEDERAL REGISTER specifying those parts of the regulation that have been stayed by the filing of proper objections and, if no objections have been filed, stating that fact. The notice does not constitute a determination that a hearing is justified on any objections or requests for hearing that have been filed. When to do so will cause no undue delay, the notice required by this section may be combined with the notices described in §§ 12.28 and 12.35.

### § 12.24 Ruling on objections and requests for hearing.

(a) As soon as possible the Commissioner will review all objections and requests for hearing filed under § 12.22 and determine—

(1) Whether the regulation should be modified or revoked under § 12.26;

(2) Whether a hearing has been justified; and

(3) Whether, if requested, a hearing before a Public Board of Inquiry under part 13 or before a public advisory committee under part 14 or before the Commissioner under part 15 has been justified.



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(b) A request for a hearing will be granted if the material submitted shows the following:

(1) There is a genuine and substantial issue of fact for resolution at a hearing. A hearing will not be granted on issues of policy or law.

(2) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions.

(3) The data and information submitted, if established at a hearing, would be adequate to justify resolution of the factual issue in the way sought by the person. A hearing will be denied if the Commissioner concludes that the data and information submitted are insufficient to justify the factual determination urged, even if accurate.

(4) Resolution of the factual issue in the way sought by the person is adequate to justify the action requested. A hearing will not be granted on factual issues that are not determinative with respect to the action requested, e.g., if the Commissioner concludes that the action would be the same even if the factual issue were resolved in the way sought, or if a request is made that a final regulation include a provision not reasonably encompassed by the proposal. A hearing will be granted upon proper objection and request when a food standard or other regulation is shown to have the effect of excluding or otherwise affecting a product or ingredient.

(5) The action requested is not inconsistent with any provision in the act or any regulation in this chapter particularizing statutory standards. The proper procedure in those circumstances is for the person requesting the hearing to petition for an amendment or waiver of the regulation involved.

(6) The requirements in other applicable regulations, e.g., §§ 10.20, 12.21, 12.22, 314.200, 514.200, and 601.7(a), and in the notice promulgating the final regulation or the notice of opportunity for hearing are met.

(c) In making the determination in paragraph (a) of this section, the Commissioner may use any of the optional procedures specified in § 10.30(h) or in other applicable regulations, e.g., §§ 314.200, 514.200, and 601.7(a).

(d) If it is uncertain whether a hearing has been justified under the principles in paragraph (b) of this section, and the Commissioner concludes that summary decision against the person requesting a hearing should be considered, the Commissioner may serve upon the person by registered mail a proposed order denying a hearing. The person has 30 days after receipt of the proposed order to demonstrate that the submission justifies a hearing.

[44 FR 22339, Apr. 13, 1979, as amended at 54 FR 9035, Mar. 3, 1989; 64 FR 399, Jan. 5, 1999]

### § 12.26 Modification or revocation of regulation or order.

If the Commissioner determines upon review of an objection or request for hearing that the regulation or order should be modified or revoked, the Commissioner will promptly take such action by notice in the FEDERAL REGISTER. Further objections to or requests for hearing on the modification or revocation may be submitted under §§ 12.20 through 12.22 but no further issue may be taken with other provisions in the regulation or order. Objections and requests for hearing that are not affected by the modification or revocation will remain on file and be acted upon in due course.

### § 12.28 Denial of hearing in whole or in part.

If the Commissioner determines upon review of the objections or requests for hearing that a hearing is not justified, in whole or in part, a notice of the determination will be published.

(a) The notice will state whether the hearing is denied in whole or in part. If the hearing is denied in part, the notice will be combined with the notice of hearing required by § 12.35, and will specify the objections and requests for hearing that have been granted and denied.

(1) Any denial will be explained. A denial based on an analysis of the information submitted to justify a hearing will explain the inadequacy of the information.

(2) The notice will confirm or modify or stay the effective date of the regulation or order involved.



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(b) The record of the administrative proceeding relating to denial of a public hearing in whole or in part on an objection or request for hearing consists of the following:

(1) If the proceeding involves a regulation—

(i) The documents specified in §10.40(g);

(ii) The objections and requests for hearing filed by the Division of Dockets Management;

(iii) If the proceeding involves a color additive regulation referred to an advisory committee in accordance with section 721(b)(5)(C) of the act, the committee's report and the record of the committee's proceeding; and

(iv) The notice denying a formal evidentiary public hearing.

(2) If the proceeding involves an order—

(i) The notice of opportunity for hearing;

(ii) The requests for hearing filed by the Division of Dockets Management;

(iii) The transcripts, minutes of meetings, reports, FEDERAL REGISTER notices, and other documents constituting the record of any of the optional procedures specified in §12.24(c) used by the Commissioner, but not the transcript of a closed portion of a public advisory committee meeting; and

(iv) The notice denying the hearing.

(c) The record specified in paragraph (b) of this section is the exclusive record for the Commissioner's decision on the complete or partial denial of a hearing. The record of the proceeding will be closed as of the date of the Commissioner's decision unless another date is specified. A person who requested and was denied a hearing may submit a petition for reconsideration under §10.33 or a petition for stay of action under §10.35. A person who wishes to rely upon information or views not included in the administrative record shall submit them to the Commissioner with a petition under §10.25(a) to modify the final regulation or order.

(d) Denial of a request for a hearing in whole or in part is final agency action reviewable in the courts, under the statutory provisions governing the matter involved, as of the date of publication of the denial in the FEDERAL REGISTER.

(1) Before requesting a court for a stay of action pending review, a person shall first submit a petition for a stay of action under §10.35.

(2) Under 28 U.S.C. 2112(a), FDA will request consolidation of all petitions on a particular matter.

(3) The time for filing a petition for judicial review of a denial of a hearing on an objection or issue begins on the date the denial is published in the FEDERAL REGISTER, (i) When an objection or issues relates to a regulation, if a hearing is denied on all objections and issues concerning a part of the proposal the effectiveness of which has not been deferred pending a hearing on other parts of the proposal; or (ii) when an issue relates to an order, if a hearing is denied on all issues relating to a particular new drug application, new animal drug application, device premarket approval application or product development protocol, or biologics license. The failure to file a petition for judicial review within the period established in the statutory provision governing the matter involved constitutes a waiver of the right to judicial review of the objection or issue, regardless whether a hearing has been granted on other objections and issues.

### § 12.30 Judicial review after waiver of hearing on a regulation.

(a) A person with a right to submit objections and a request for hearing under §12.20(d) may submit objections and waive the right to a hearing. The waiver may be either an explicit statement, or a failure to request a hearing, as provided in 12.22(a)(4).

(b) If a person waives the right to a hearing, the Commissioner will rule upon the person's objections under §§12.24 through 12.28. As a matter of discretion, the Commissioner may also order a hearing on the matter under any of the provisions of this part.

(c) If the Commissioner rules adversely on a person's objection, the person may petition for judicial review in a U.S. Court of Appeals under the act.

(1) The record for judicial review is the record designated in §12.28(b)(1).



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(2) The time for filing a petition for judicial review begins as of the date of publication of the Commissioner's ruling on the objections.

### § 12.32 Request for alternative form of hearing.

(a) A person with a right to request a hearing may waive that right and request one of the following alternatives:

(1) A hearing before a Public Board of Inquiry under part 13.

(2) A hearing before a public advisory committee under part 14.

(3) A hearing before the Commissioner under part 15.

(b) The request—

(1) May be on the person's own initiative or at the suggestion of the Commissioner.

(2) Must be submitted in the form of a citizen petition under §10.30 before publication of a notice of hearing under §12.35 or a denial of hearing under §12.28; and

(3) Must be—

(i) In lieu of a request for a hearing under this part; or

(ii) If submitted after or with a request for hearing, in the form of a waiver of the right to request a hearing conditioned on an alternative form of hearing. Upon acceptance by the Commissioner, the waiver becomes binding and may be withdrawn only by waiving any right to any form of hearing unless the Commissioner determines otherwise.

(c) When more than one person requests and justifies a hearing under this part, an alternative form of hearing may by used only if all the persons concur and waive their right to request a hearing under this part.

(d) The Commissioner will determine whether an alternative form of hearing should be used, and if so, which alternative is acceptable, after considering the requests submitted and the appropriateness of the alternatives for the issues raised in the objections. The Commissioner's acceptance is binding unless, for good cause, the Commissioner determines otherwise.

(e) The Commissioner will publish a notice of an alternative form of hearing setting forth the following information:

(1) The regulation or order that is the subject of the hearing.

(2) A statement specifying any part of the regulation or order that has been stayed by operation of law or in the Commissioner's discretion.

(3) The time, date, and place of the hearing, or a statment that such information will be contained in a later notice.

(4) The parties to the hearing.

(5) The issues at the hearing. The statement of issues determines the scope of the hearing.

(6) If the hearing will be conducted by a Public Board of Inquiry, the time within which—

(i) The parties should submit nominees for the Board under §13.10(b);

(ii) A notice of participation under §12.45 should be filed; and

(iii) Participants should submit written information under §13.25. The notice will list the contents of the portions of the administrative record relevant to the issues at the hearing before the Board. The portions listed will be placed on public display in the office of the Division of Dockets Management before the notice is published. Additional copies of material already submitted under §13.25 need not be included with any later submissions.

(f)(1) The decision of a hearing before a Public Board of Inquiry or a public advisory committee under this section has legal status of and will be handled as an initial decision under §12.120.

(2) The decision of a public hearing before the Commissioner under this section will be issued as a final order. The final order will have the same content as an initial decision, as specified in §12.120 (b) and (c).

(3) Thereafter, the participants in the proceeding may pursue the administrative and court remedies specified in §§12.120 through 12.159.

(g) If a hearing before a public advisory committee or a hearing before the Commissioner is used as an alternative form of hearing, all submissions will be made to the Division of Dockets Management, and §10.20(j) governs their availability for public examination and copying.

(h) This section does not affect the right to an opportunity for a hearing before a public advisory committee



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under section 515(g)(2) of the act regarding device premarket approval applications and product development protocols. Advisory committee hearing procedures are found in part 14.

### § 12.35 Notice of hearing; stay of action.

(a) If the Commissioner determines upon review of the objections and requests for hearing that a hearing is justified on any issue, the Commissioner will publish a notice setting forth the following:

(1) The regulation or order that is the subject of the hearing.

(2) A statement specifying any part of the regulation or order that has been stayed by operation of law or in the Commissioner's discretion.

(3) The parties to the hearing.

(4) The issues of fact on which a hearing has been justified.

(5) A statement of any objections or requests for hearing for which a hearing has not been justified, which are subject to § 12.28.

(6) The presiding officer, or a statement that the presiding officer will be designated in a later notice.

(7) The time within which notices of participation should be filed under § 12.45.

(8) The date, time, and place of the prehearing conference, or a statement that the date, time, and place will be announced in a later notice. The prehearing conference may not commence until after the time expires for filing the notice of participation required by § 12.45(a).

(9) The time within which participants should submit written information and views under § 12.85. The notice will list the contents of the portions of the administrative record relevant to the issues at the hearing. The portions listed will be placed on public display in the office of the Division of Dockets Management before the notice is published. Additional copies of material already submitted under § 12.85 need not be included with any later submissions.

(b) The statement of the issues determines the scope of the hearing and the matters on which evidence may be introduced. The issues may be revised by the presiding officer. A participant may obtain interlocutory review by the Commissioner of a decision by the presiding officer to revise the issues to include an issue on which the Commissioner has not granted a hearing or to eliminate an issue on which a hearing has been granted.

(c) A hearing is deemed to begin on the date of publication of the notice of hearing.

[44 FR 22339, Apr. 13, 1979, as amended at 47 FR 26375, June 18, 1982]

### § 12.37 Effective date of a regulation.

(a) If no objections are filed and no hearing is requested on a regulation under § 12.20(e), the regulation is effective on the date specified in the regulation as promulgated.

(b) The Commissioner shall publish a confirmation of the effective date of the regulation. The FEDERAL REGISTER document confirming the effective date of the regulation may extend the time for compliance with the regulation.

### § 12.38 Effective date of an order.

(a) If a person who is subject to a notice of opportunity for hearing under § 12.21(b) does not request a hearing, the Commissioner will—

(1) Publish a final order denying or withdrawing approval of an NDA, NADA, device premarket approval application, or biologics license, in whole or in part, or revoking a device product development protocol or notice of completion, or declaring that such a protocol has not been completed, and stating the effective date of the order; and

(2) If the order involves withdrawal of approval of an NADA, forthwith revoke, in whole or in part, the applicable regulation, under section 512(i) of the act.

(b) If a person who is subject to a notice of opportunity for hearing under § 12.21(b) requests a hearing and others do not, the Commissioner may issue a final order covering all the drug or device products at once or may issue more than one final order covering different drug or device products at different times.



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## Subpart C—Appearance and Participation

### § 12.40 Appearance.

(a) A person who has filed a notice of participation under § 12.45 may appear in person or by counsel or other representative in any hearing and, subject to § 12.89, may be heard concerning all relevant issues.

(b) The presiding officer may strike a person's appearance for violation of the rules of conduct in § 12.90.

### § 12.45 Notice of participation.

(a) Within 30 days after publication of the notice of hearing under § 12.35, a person desiring to participate in a hearing is to file with the Division of Dockets Management under § 10.20 a notice of participation in the following form:

(Date)

Division of Dockets Management, Food and Drug Administration, Department of Health and Human Services, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

NOTICE OF PARTICIPATION

Docket No. ____

Under 21 CFR part 12, please enter the participation of:

(Name) _____
(Street address) _____
(City and State) _____
(Telephone number) _____

Service on the above will be accepted by:

(Name) _____
(Street address) _____
(City and State) _____
(Telephone number) _____

The following statements are made as part of this notice of participation:

A. *Specific interests.* (A statement of the specific interest of the person in the proceeding, including the specific issues of fact concerning which the person desires to be heard. This part need not be completed by a party to the proceeding.)

B. *Commitment to participate.* (A statement that the person will present documentary evidence or testimony at the hearing and will comply with the requirements of 21 CFR 12.85, or, in the case of a hearing before a Public Board of Inquiry, with the requirements of 21 CFR 13.25.)

(Signed) _____

(b) An amendment to a notice of participation should be filed with the Division of Dockets Management and served on all participants.

(c) No person may participate in a hearing who has not filed a written notice of participation or whose participation has been stricken under paragraph (e) of this section.

(d) The presiding officer may permit the late filing of a notice of participation upon a showing of good cause.

(e) The presiding officer may strike the participation of a person for nonparticipation in the hearing or failure to comply with any requirement of this subpart, e.g., disclosure of information as required by § 12.85 or the prehearing order issued under § 12.92. Any person whose participation is stricken may petition the Commissioner for interlocutory review.

[44 FR 22339, Apr. 13, 1979, as amended at 46 FR 8456, Jan. 27, 1981; 59 FR 14364, Mar. 28, 1994; 68 FR 24879, May 9, 2003]

### § 12.50 Advice on public participation in hearings.

(a) *Designated agency contact.* All inquiries from the public about scheduling, location, and general procedures should be addressed to the Deputy Commissioner for Policy (HF–22), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, or telephone 301–443–3480. The staff of the Associate Commissioner for Regulatory Affairs will attempt to respond promptly to all inquiries from members of the public, as well as to simple requests for information from participants in hearings.

(b) *Hearing schedule changes.* Requests by hearing participants for changes in the schedule of a hearing or for filing documents, briefs, or other pleadings should be made in writing directly to the Administrative Law Judge (HF–3), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

(c) *Legal advice to individuals.* FDA does not have the resources to provide legal advice to members of the public concerning participation in hearings. Furthermore, to do so would compromise the independence of the Commissioner's office and invite charges of improper interference in the hearing process. Accordingly, the Deputy Commissioner for Policy (HF–22) will not



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answer questions about the strengths or weaknesses of a party's position at a hearing, litigation strategy, or similar matters.

(d) *Role of the office of the Chief Counsel.* Under no circumstances will the office of the Chief Counsel of FDA directly provide advice about a hearing to any person who is participating or may participate in the hearing. In every hearing, certain attorneys in the office are designated to represent the center or centers whose action is the subject of the hearing. Other members of the office, including ordinarily the Chief Counsel, are designated to advise the Commissioner on a final decision in the matter. It is not compatible with these functions, nor would it be professionally responsible, for the attorneys in the office of the Chief Counsel also to advise other participants in a hearing, or for any attorney who may be called on to advise the Commissioner to respond to inquiries from other participants in the hearing, for such participants may be urging views contrary to those of the center involved or to what may ultimately be the final conclusions of the Commissioner. Accordingly, members of the office of the Chief Counsel, other than the attorneys responsible for representing the center whose action is the subject of the hearing, will not answer questions about the hearing from any participant or potential participant.

(e) *Communication between participants and attorneys.* Participants in a hearing may communicate with the attorneys responsible for representing the center whose action is the subject of the hearing, in the same way that they may communicate with counsel for any other party in interest about the presentation of matters at the hearing. It would be inappropriate to bar discussion of such matters as stipulations of fact, joint presentation of witnesses, or possible settlement of hearing issues. Members of the public, including participants at hearings, are advised, however, that all such communications, including those by telephone, will be recorded in memoranda that can be filed with the Division of Dockets Management.

[44 FR 22329, Apr. 13, 1979, as amended at 50 FR 8994, Mar. 6, 1985; 54 FR 9035, Mar. 3, 1989; 58 FR 17096, Apr. 1, 1993]

## Subpart D—Presiding Officer

### § 12.60 Presiding officer.

The presiding officer in a hearing will be the Commissioner, a member of the Commissioner's office to whom the responsibility for the matter involved has been delegated, or an administrative law judge qualified under 5 U.S.C. 3105.

### § 12.62 Commencement of functions.

The functions of the presiding officer begin upon designation and end upon the filing of the initial decision.

### § 12.70 Authority of presiding officer.

The presiding officer has all powers necessary to conduct a fair, expeditious, and orderly hearing, including the power to—

(a) Specify and change the date, time, and place of oral hearings and conferences;

(b) Establish the procedures for use in developing evidentiary facts, including the procedures in §12.92(b) and to rule on the need for oral testimony and cross-examination under §12.87(b);

(c) Prepare statements of the areas of factual disagreement among the participants;

(d) Hold conferences to settle, simplify, or determine the issues in a hearing or to consider other matters that may expedite the hearing;

(e) Administer oaths and affirmations;

(f) Control the course of the hearing and the conduct of the participants;

(g) Examine witnesses and strike their testimony if they fail to respond fully to proper questions;

(h) Rule on, admit, exclude, or limit evidence;

(i) Set the time for filing pleadings;

(j) Rule on motions and other procedural matters;

(k) Rule on motions for summary decision under §12.93;

(l) Conduct the hearing in stages if the number of parties is large or the issues are numerous and complex;



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(m) Waive, suspend, or modify any rule in this subpart under §10.19 if the presiding officer determines that no party will be prejudiced, the ends of justice will be served, and the action is in accordance with law;

(n) Strike the participation of any person under §12.45(e) or exclude any person from the hearing under §12.90, or take other reasonable disciplinary action; and

(o) Take any action for the fair, expeditious, and orderly conduct of the hearing.

### § 12.75 Disqualification of presiding officer.

(a) A participant may request the presiding officer to disqualify himself/herself and withdraw from the proceeding. The ruling on any such request may be appealed in accordance with §12.97(b).

(b) A presiding officer who is aware of grounds for disqualification shall withdraw from the proceeding.

### § 12.78 Unavailability of presiding officer.

(a) If the presiding officer is unable to act for any reason, the Commissioner will assign the powers and duties to another presiding officer. The substitution will not affect the hearing, except as the new presiding officer may order.

(b) Any motion based on the substitution must be made within 10 days.

## Subpart E—Hearing Procedures

### § 12.80 Filing and service of submissions.

(a) Submissions, including pleadings in a hearing, are to be filed with the Division of Dockets Management under §10.20 except that only two copies need be filed. To determine compliance with filing deadlines in a hearing, a submission is considered submitted on the date it is actually received by the Division of Dockets Management. When this part allows a response to a submission and prescribes a period of time for the filing of the response, an additional 3 days are allowed for the filing of the response if the submission is served by mail.

(b) The person making a submission shall serve copies of it on the other participants. Submissions of documentary data and information are not required to be served on each participant, but any accompanying transmittal letter, pleading, summary, statement of position, certification under paragraph (d) of this section, or similar document must be served on each participant.

(c) Service is accomplished by mailing a submission to the address shown in the notice of participation or by personal delivery.

(d) All submissions are to be accompanied by a certificate of service, or a statement that service is not required.

(e) No written submission or other portion of the administrative record may be held in confidence, except as provided in §12.105.

### § 12.82 Petition to participate in forma pauperis.

(a) A participant who believes that compliance with the filing and service requirements of this section constitutes an unreasonable financial burden may submit to the Commissioner a petition to participate in forma pauperis.

(b) The petition will be in the form specified in §10.30 except that the heading will be ''Request to Participate in Forma Pauperis, Docket No. ____.'' Filing and service requirements for the petition are described in paragraph (c) of this section, whether or not the petition is granted. The petition must demonstrate that either: (1) The person is indigent and a strong public interest justifies participation, or (2) the person's participation is in the public interest because it can be considered of primary benefit to the general public.

(c) The Commissioner may grant or deny the petition. If the petition is granted, the participant need file only one copy of each submission with the Division of Dockets Management. The Division of Dockets Management will make sufficient additional copies for the administrative record, and serve a copy on each other participant.

### § 12.83 Advisory opinions.

Before or during a hearing, a person may, under §10.85, request the Commissioner for an advisory opinion on



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whether any regulation or order under consideration in the proceeding applies to a specific situation.

### § 12.85 Disclosure of data and information by the participants.

(a) Before the notice of hearing is published under § 12.35, the director of the center responsible for the matters involved in the hearing shall submit the following to the Division of Dockets Management:

(1) The relevant portions of the administrative record of the proceeding. Portions of the administrative record not relevant to the issues in the hearing are not part of the administrative record.

(2) All documents in the director's files containing factual information, whether favorable or unfavorable to the director's position, which relate to the issues involved in the hearing. *Files* means the principal files in the center in which documents relating to the issues in the hearing are ordinarily kept, e.g., the food additive master file and the food additive petition in the case of issues concerning a food additive, or the new drug application in the case of issues concerning a new drug. Internal memoranda reflecting the deliberative process, and attorney work product and material prepared specifically for use in connection with the hearing, are not required to be submitted.

(3) All other documentary data and information relied upon.

(4) A narrative position statement on the factual issues in the notice of hearing and the type of supporting evidence the director intends to introduce.

(5) A signed statement that, to the director's best knowledge and belief, the submission complies with this section.

(b) Within 60 days of the publication of the notice of hearing or, if no participant will be prejudiced, within another period of time set by the presiding officer, each participant shall submit to the Division of Dockets Management all data and information specified in paragraph (a)(2) through (5) of this section, and any objections that the administrative record filed under paragraph (a)(1) of this section is incomplete. With respect to the data and information specified in paragraph (a)(2) of this section, participants shall exercise reasonable diligence in identifying documents in files comparable to those described in that paragraph.

(c) Submissions required by paragraphs (a) and (b) of this section may be supplemented later in the proceeding, with the approval of the presiding officer, upon a showing that the material contained in the supplement was not reasonably known or available when the submission was made or that the relevance of the material contained in the supplement could not reasonably have been forseen.

(d) A participant's failure to comply substantially and in good faith with this section constitutes a waiver of the right to participate further in the hearing; failure of a party to comply constitutes a waiver of the right to a hearing.

(e) Participants may reference each other's submissions. To reduce duplicative submissions, participants are encouraged to exchange and consolidate lists of documentary evidence. If a particular document is bulky or in limited supply and cannot reasonably be reproduced, and it constitutes relevant evidence, the presiding officer may authorize submission of a reduced number of copies.

(f) The presiding officer will rule on questions relating to this section.

[44 FR 22339, Apr. 13, 1979, as amended at 54 FR 9035, Mar. 3, 1989]

### § 12.87 Purpose; oral and written testimony; burden of proof.

(a) The objective of a formal evidentiary hearing is the fair determination of relevant facts consistent with the right of all interested persons to participate and the public interest in promptly settling controversial matters affecting the public health and welfare.

(b) Accordingly, the evidence at a hearing is to be developed to the maximum extent through written submissions, including written direct testimony, which may be in narrative or in question-and-answer form.

(1) In a hearing, the issues may have general applicability and depend on general facts that do not concern particular action of a specific party, e.g.,



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the safety or effectiveness of a class of drug products, the safety of a food or color additive, or a definition and standard of identity for a food; or the issues may have specific applicability to past action and depend upon particular facts concerning only that party, e.g., the applicability of a grandfather clause to a particular brand of a drug or the failure of a particular manufacturer to meet required manufacturing and processing specifications or other general standards.

(i) If the proceeding involves general issues, direct testimony will be submitted in writing, except on a showing that written direct testimony is insufficient for a full and true disclosure of relevant facts and that the participant will be prejudiced if unable to present oral direct testimony. If the proceeding involves particular issues, each party may determine whether, and the extent to which, each wishes to present direct testimony orally or in writing.

(ii) Oral cross-examination of witnesses will be permitted if it appears that alternative means of developing the evidence are insufficient for a full and true disclosure of the facts and that the party requesting oral cross-examination will be prejudiced by denial of the request or that oral cross-examination is the most effective and efficient means to clarify the matters at issue.

(2) Witnesses shall give testimony under oath.

(c) Except as provided in paragraph (d) of this section, in a hearing involving issuing, amending, or revoking a regulation or order, the originator of the proposal or petition or of any significant modification will be, within the meaning of 5 U.S.C. 556(d), the proponent of the regulation or order, and will have the burden of proof. A participant who proposes to substitute a new provision for a provision objected to has the burden of proof in relation to the new provision.

(d) At a hearing involving issuing, amending, or revoking a regulation or order relating to the safety or effectiveness of a drug, device, food additive, or color additive, the participant who is contending that the product is safe or effective or both and who is requesting approval or contesting withdrawal of approval has the burden of proof in establishing safety or effectiveness or both and thus the right to approval. The burden of proof remains on that participant in an amendment or revocation proceeding.

[44 FR 22339, Apr. 13, 1979, as amended at 64 FR 399, Jan. 5, 1999]

### § 12.89 Participation of nonparties.

(a) A nonparty participant may—

(1) Attend all conferences (including the prehearing conference), oral proceedings, and arguments;

(2) Submit written testimony and documentary evidence for inclusion in the record;

(3) File written objections, briefs, and other pleadings; and

(4) Present oral argument.

(b) A nonparty participant may not—

(1) Submit written interrogatories; and

(2) Conduct cross-examination.

(c) A person whose petition is the subject of the hearing has the same right as a party.

(d) A nonparty participant will be permitted additional rights if the presiding officer concludes that the participant's interests would not be adequately protected otherwise or that broader participation is required for a full and true disclosure of the facts, but the rights of a nonparty participant may not exceed the rights of a party.

[44 FR 22339, Apr. 13, 1979, as amended at 48 FR 51770, Nov. 14, 1983]

### § 12.90 Conduct at oral hearings or conferences.

All participants in a hearing will conduct themselves with dignity and observe judicial standards of practice and ethics. They may not indulge in personal attacks, unseemly wrangling, or intemperate accusations or characterizations. Representatives of parties shall, to the extent possible, restrain clients from improprieties in connection with any proceeding. Disrespectful, disorderly, or contumacious language or conduct, refusal to comply with directions, use of dilatory tactics, or refusal to adhere to reasonable standards of orderly and ethical conduct during any hearing, constitute



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grounds for immediate exclusion from the proceeding by the presiding officer.

### § 12.91 Time and place of prehearing conference.

A prehearing conference will commence at the date, time, and place announced in the notice of hearing, or in a later notice, or as specified by the presiding officer in a notice modifying a prior notice. At that conference the presiding officer will establish the methods and procedures to be used in developing the evidence, determine reasonable time periods for the conduct of the hearing, and designate the times and places for the production of witnesses for direct and cross-examination if leave to conduct oral examination is granted on any issue, as far as practicable at that time.

### § 12.92 Prehearing conference procedure.

(a) Participants in a hearing are to appear at the prehearing conference prepared to discuss and resolve all matters specified in paragraph (b) of this section.

(1) To expedite the hearing, participants are encouraged to prepare in advance for the prehearing conference. Participants should cooperate with each other, and request information and begin preparation of testimony at the earliest possible time. Failure of a participant to appear at the prehearing conference or to raise matters that could reasonably be anticipated and resolved at that time will not delay the progress of the hearing, and constitutes a waiver of the rights of the participant regarding such matters as objections to the agreements reached, actions taken, or rulings issued by the presiding officer and may be grounds for striking the participation under § 12.45.

(2) Participants shall bring to the prehearing conference the following specific information, which will be filed with the Division of Dockets Management under § 12.80:

(i) Any additional information to supplement the submission filed under § 12.85, which may be filed if approved under § 12.85(c).

(ii) A list of all witnesses whose testimony will be offered, orally or in writing, at the hearing, with a full curriculum vitae for each. Additional witnesses may later be identified, with the approval of the presiding officer, on a showing that the witness was not reasonably available at the time of the prehearing conference or the relevance of the witness' views could not reasonably have been foreseen at that time.

(iii) All prior written statements including articles and any written statement signed or adopted, or a recording or transcription of an oral statement made, by persons identified as witnesses if—

(*a*) The statement is available without making request of the witness or any other person;

(*b*) The statement relates to the subject matter of the witness' testimony; and

(*c*) The statement either was made before the time the person agreed to become a witness or has been made publicly available by the person.

(b) The presiding officer will conduct a prehearing conference for the following purposes:

(1) To determine the areas of factual disagreement to be considered at the hearing. The presiding officer may hold conferences off the record in an effort to reach agreement on disputed factual questions.

(2) To identify the most appropriate techniques for developing evidence on issues in controversy and the manner and sequence in which they will be used, including, where oral examination is to be conducted, the sequence in which witnesses will be produced for, and the time and place of, oral examination. The presiding officer may consider—

(i) Submission of narrative statements of position on factual issues in controversy;

(ii) Submission of evidence or identification of previously submitted evidence to support such statements, such as affidavits, verified statements of fact, data, studies, and reports;

(iii) Exchange of written interrogatories directed to particular witnesses;

(iv) Written requests for the production of additional documentation, data, or other relevant information;



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(v) Submission of written questions to be asked by the presiding officer of a specific witness; and

(vi) Identification of facts for which oral examination and/or cross-examination is appropriate.

(3) To group participants with substantially like interests for presenting evidence, making motions and objections, including motions for summary decision, filing briefs, and presenting oral argument.

(4) To hear and rule on objections to admitting into evidence information submitted under § 12.85.

(5) To obtain stipulations and admissions of facts.

(6) To take other action that may expedite the hearing.

(c) The presiding officer shall issue, orally or in writing, a prehearing order reciting the actions taken at the prehearing conference and setting forth the schedule for the hearing. The order will control the subsequent course of the hearing unless modified by the presiding officer for good cause.

### § 12.93 Summary decisions.

(a) After the hearing commences, a participant may move, with or without supporting affidavits, for a summary decision on any issue in the hearing. Any other participant may, within 10 days after service of the motion, which time may be extended for an additional 10 days for good cause, serve opposing affidavits or countermove for summary decision. The presiding officer may set the matter for argument and call for the submission of briefs.

(b) The presiding officer will grant the motion if the objections, requests for hearing, other pleadings, affidavits, and other material filed in connection with the hearing, or matters officially noticed, show that there is no genuine issue as to any material fact and that a participant is entitled to summary decision.

(c) Affidavits should set forth facts that would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated. When a properly supported motion for summary decision is made, a participant opposing the motion may not rest upon mere allegations or denials or general descriptions of positions and contentions; affidavits or other responses must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(d) Should it appear from the affidavits of a participant opposing the motion that for sound reasons stated, facts essential to justify the opposition cannot be presented by affidavit, the presiding officer may deny the motion for summary decision, order a continuance to permit affidavits or additional evidence to be obtained, or issue other just order.

(e) If on motion under this section a summary decision is not rendered upon the whole case or for all the relief asked. and evidentiary facts need to be developed, the presiding officer will issue an order specifying the facts that appear without substantial controversy and directing further evidentiary proceedings. The facts so specified will be deemed established.

(f) A participant may obtain interlocutory review by the Commissioner of a summary decision of the presiding officer.

### § 12.94 Receipt of evidence.

(a) A hearing consists of the development of evidence and the resolution of factual issues as set forth in this subpart and in the prehearing order.

(b) All orders, transcripts, written statements of position, written direct testimony, written interrogatories and responses, and any other written material submitted in the proceeding is a part of the administrative record of the hearing, and will be promptly placed on public display in the office of the Division of Dockets Management, except as provided in § 12.105.

(c) Written evidence, identified as such, is admissible unless a participant objects and the presiding officer excludes it on objection of a participant or on the presiding officer's own initiative.

(1) The presiding officer may exclude written evidence as inadmissible only if—

(i) The evidence is irrelevant, immaterial, unreliable, or repetitive;

(ii) Exclusion of part or all of the written evidence of a participant is necessary to enforce the requirements of this subpart; or



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(iii) The evidence was not submitted as required by §12.85.

(2) Items of written evidence are to be submitted as separate documents, sequentially numbered, except that a voluminous document may be submitted in the form of a cross-reference to the documents filed under §12.85.

(3) Written evidence excluded by the presiding officer as inadmissible remains a part of the administrative record, as an offer of proof, for judicial review.

(d) Testimony, whether on direct or on cross-examination, is admissible as evidence unless a participant objects and the presiding officer excludes it.

(1) The presiding officer may exclude oral evidence as inadmissible only if—

(i) The evidence is irrelevant, immaterial, unreliable, or repetitive; or

(ii) Exclusion of part or all of the evidence is necessary to enforce the requirements of this part.

(2) If oral evidence is excluded as inadmissible, the participant may take written exception to the ruling in a brief to the Commissioner, without taking oral exception at the hearing. Upon review, the Commissioner may reopen the hearing to permit the evidence to be admitted if the Commissioner determines that its exclusion was erroneous and prejudicial.

(e) The presiding officer may schedule conferences as needed to monitor the program of the hearing, narrow and simplify the issues, and consider and rule on motions, requests, and other matters concerning the development of the evidence.

(f) The presiding officer will conduct such proceedings as are necessary for the taking of oral testimony, for the oral examination of witnesses by the presiding officer on the basis of written questions previously submitted by the parties, and for the conduct of cross-examination of witnesses by the parties. The presiding officer shall exclude irrelevant or repetitious written questions and limit oral cross-examination to prevent irrelevant or repetitious examination.

(g) The presiding officer shall order the proceedings closed for the taking of oral testimony relating to matters specified in §10.20(j)(2)(i) (*a*) and (*b*). Such closed proceedings will be conducted in accordance with §10.20(j)(3). Participation in closed proceedings will be limited to the witness, the witness' counsel, and Federal Government executive branch employees and special government employees. Closed proceedings will be permitted only for, and will be limited to, oral testimony directly relating to matters specified in §10.20(j)(3).

### §12.95 Official notice.

(a) Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter peculiarly within the general knowledge of FDA as an expert agency.

(b) If official notice is taken of a material fact not appearing in the evidence of record, a participant, on timely request, will be afforded an opportunity to show the contrary.

### §12.96 Briefs and arguments.

(a) Promptly after the taking of evidence is completed, the presiding officer will announce a schedule for the filing of briefs. Briefs are to be filed ordinarily within 45 days of the close of the hearing. Briefs must include a statement of position on each issue, with specific and complete citations to the evidence and points of law relied on. Briefs must contain proposed findings of fact and conclusions of law.

(b) The presiding officer may, as a matter of discretion, permit oral argument after the briefs are filed.

(c) Briefs and oral argument are to refrain from disclosing specific details of written and oral testimony and documents relating to matters specified in §10.20(j)(2)(i)(*a*) and (*b*), except as specifically authorized in a protective order issued under §10.20(j)(3).

### §12.97 Interlocutory appeal from ruling of presiding officer.

(a) Except as provided in paragraph (b) of this section and in §§12.35(b), 12.45(e), 12.93(f), and 12.99(d), when an interlocutory appeal is specifically authorized by this subpart, rulings of the presiding officer may not be appealed to the Commissioner before the Commissioner's consideration of the entire record of the hearing.



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(b) A ruling of the presiding officer is subject to interlocutory appeal to the Commissioner if the presiding officer certifies on the record or in writing that immediate review is necessary to prevent exceptional delay, expense, or prejudice to any participant, or substantial harm to the public interest.

(c) When an interlocutory appeal is made to the Commissioner, a participant may file a brief with the Commissioner only if specifically authorized by the presiding officer or the Commissioner, and if such authorization is granted, within the period the Commissioner directs. If a participant is authorized to file a brief, any other participant may file a brief in opposition, within the period the Commissioner directs. If no briefs are authorized, the appeal will be presented as an oral argument to the Commissioner. The oral argument will be transcribed. If briefs are authorized, oral argument will be heard only at the discretion of the Commissioner.

### § 12.98 Official transcript.

(a) The presiding officer will arrange for a verbatim stenographic transcript of oral testimony and for necessary copies of the transcript.

(b) One copy of the transcript will be placed on public display in the office of the Division of Dockets Management upon receipt.

(c) Except as provided in § 12.105, copies of the transcript may be obtained by application to the official reporter and payment of costs thereof or under part 20.

(d) Witnesses, participants, and counsel have 30 days from the time the transcript becomes available to propose corrections in the transcript of oral testimony. Corrections are permitted only for transcription errors. The presiding officer shall promptly order justified corrections.

### § 12.99 Motions.

(a) A motion on any matter relating to the proceeding is to be filed under § 12.80, and must include a draft order, except one made in the course of an oral hearing before the presiding officer.

(b) A response may be filed within 10 days of service of a motion. The time may be shortened or extended by the presiding officer for good cause shown.

(c) The moving party has no right to reply, except as permitted by the presiding officer.

(d) The presiding officer shall rule upon the motion and may certify that ruling to the Commissioner for interlocutory review.

## Subpart F—Administrative Record

### § 12.100 Administrative record of a hearing.

(a) The record of a hearing consists of—

(1) The order or regulation or notice of opportunity for hearing that gave rise to the hearing;

(2) All objections and requests for hearing filed by the Division of Dockets Management under §§ 12.20 through 12.22;

(3) The notice of hearing published under § 12.35;

(4) All notices of participation filed under § 12.45;

(5) All FEDERAL REGISTER notices pertinent to the proceeding;

(6) All submissions filed under § 12.82, e.g., the submissions required by § 12.85, all other documentary evidence and written testimony, pleadings, statements of position, briefs, and other similar documents;

(7) The transcript, written order, and all other documents relating to the prehearing conference, prepared under § 12.92;

(8) All documents relating to any motion for summary decision under § 12.93;

(9) All documents of which official notice is taken under § 12.95;

(10) All pleadings filed under § 12.96;

(11) All documents relating to any interlocutory appeal under § 12.97;

(12) All transcripts prepared under § 12.98; and

(13) Any other document relating to the hearing and filed with the Division of Dockets Management by the presiding officer or any participant;

(b) The record of the administrative proceeding is closed—

(1) With respect to the taking of evidence, when specified by the presiding officer; and



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(2) With respect to pleadings, at the time specified in §12.96(a) for the filing of briefs.

(c) The presiding officer may reopen the record to receive further evidence at any time before the filing of the initial decision.

### §12.105 Examination of record.

Documents in the record will be publicly available in accordance with §10.20(j). Documents available for examination or copying will be placed on public display in the office of the Division of Dockets Management promptly upon receipt in that office.

## Subpart G—Initial and Final Decisions

### §12.120 Initial decision.

(a) The presiding officer shall prepare and file an initial decision as soon as possible after the filing of briefs and oral argument.

(b) The initial decision must contain—

(1) Findings of fact based issued upon relevant, material, and reliable evidence of record;

(2) Conclusions of law;

(3) A discussion of the reasons for the findings and conclusions, including a discussion of the significant contentions made by any participant;

(4) Citations to the record supporting the findings and conclusions;

(5) An appropriate regulation or order supported by substantial evidence of record and based upon the findings of fact and conclusions of law; and

(6) An effective date for the regulation or order.

(c) The initial decision must refrain from disclosing specific details of matters specified in §10.20(j)(2)(i) (*a*) and (*b*), except as specifically authorized in a protective order issued pursuant to §10.20(j)(3).

(d) The initial decision is to be filed with the Division of Dockets Management and served upon all participants. Once the initial decision is filed with the Division of Dockets Management, the presiding officer has no further jurisdiction over the matter, and any motions or requests filed with the Division of Dockets Management will be decided by the Commissioner.

(e) The initial decision becomes the final decision of the Commissioner by operation of law unless a participant files exceptions with the Division of Dockets Management under §12.125(a) or the Commissioner files a notice of review under §12.125(f).

(f) Notice that an initial decision has become the decision of the Commissioner without appeal to or review by the Commissioner will be published in the FEDERAL REGISTER, or the Commissioner may publish the decision when it is of widespread interest.

### §12.125 Appeal from or review of initial decision.

(a) A participant may appeal an initial decision to the Commissioner by filing exceptions with the Division of Dockets Management, and serving them on the other participants, within 60 days of the date of the initial decision.

(b) Exceptions must specifically identify alleged errors in the findings of fact or conclusions of law in the initial decision, and provide supporting citations to the record. Oral argument before the Commissioner may be requested in the exceptions.

(c) Any reply to the exceptions is to be filed and served within 60 days of the end of the period for filing exceptions.

(d) The Commissioner may extend the time for filing exceptions under paragraph (a) of this section or replies to exceptions under paragraph (c) of this section only upon a showing by a participant of extraordinary circumstances. Such an extension shall be requested by filing a written request with the Commissioner's Executive Secretariat (HF–40) and serving copies of the request on the Division of Dockets Management (HFA–305), the Chief Counsel (GCF–1), and all hearing participants.

(e) If the Commissioner decides to hear oral argument, the participants will be informed of the date, time, and place, the amount of time allotted to each participant, and the issues to be addressed.

(f) Within 10 days following the expiration of the time for filing exceptions



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(including any extensions), the Commissioner may file with the Division of Dockets Management, and serve on the participants, a notice of the Commissioner's determination to review the initial decision. The Commissioner may invite the participants to file briefs or present oral argument on the matter. The time for filing briefs or presenting oral argument will be specified in that or a later notice.

[44 FR 22339, Apr. 13, 1979, as amended at 53 FR 29453, Aug. 5, 1988]

### § 12.130 Decision by Commissioner on appeal or review of initial decision.

(a) On appeal from or review of the initial decision, the Commissioner has all the powers given to make the initial decision. On the Commissioner's own initiative or on motion, the Commissioner may remand the matter to the presiding officer for any further action necessary for a proper decision.

(b) The scope of the issues on appeal is the same as the scope of the issues at the public hearing unless the Commissioner specifies otherwise.

(c) As soon as possible after the filing of briefs and any oral argument, the Commissioner will issue a final decision in the proceeding, which meets the requirements established in §12.120 (b) and (c).

(d) The Commissioner may adopt the initial decision as the final decision.

(e) Notice of the Commissioner's decision will be published in the FEDERAL REGISTER, or the Commissioner may publish the decision when it is of widespread interest.

### § 12.139 Reconsideration and stay of action.

Following notice or publication of the final decisions, a participant may petition the Commissioner for reconsideration of any part or all of the decision under §10.33 or may petition for a stay of the decision under §10.35.

## Subpart H—Judicial Review

### § 12.140 Review by the courts.

(a) The Commissioner's final decision constitutes final agency action from which a participant may petition for judicial review under the statutes governing the matter involved. Before requesting an order from a court for a stay of action pending review, a participant shall first submit a petition for a stay of action under §10.35.

(b) Under 28 U.S.C. 2112(a), FDA will request consolidation of all petitions related to a particular matter.

### § 12.159 Copies of petitions for judicial review.

The Chief Counsel for FDA has been designated by the Secretary as the officer on whom copies of petitions of judicial review are to be served. This officer is responsible for filing the record on which the final decision is based. The record of the proceeding is certified by the Commissioner.

# PART 13—PUBLIC HEARING BEFORE A PUBLIC BOARD OF INQUIRY

### Subpart A—General Provisions

Sec.
13.1 Scope.
13.5 Notice of a hearing before a Board.
13.10 Members of a Board.
13.15 Separation of functions; ex parte communications; administrative support.

### Subpart B—Hearing Procedures

13.20 Submissions to a Board.
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13.30 Proceedings of a Board.

### Subpart C—Records of a Hearing Before a Board

13.40 Administrative record of a Board.
13.45 Examination of administrative record.
13.50 Record for administrative decision.

AUTHORITY: 5 U.S.C. 551–558, 701–721; 15 U.S.C. 1451–1461; 21 U.S.C. 141–149, 321–393, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201, 262, 263b–263n, 264.

SOURCE: 44 FR 22348, Apr. 13, 1979, unless otherwise noted.

## Subpart A—General Provisions

### § 13.1 Scope.

The procedures in this part apply when—

(a) The Commissioner concludes, as a matter of discretion, that it is in the public interest to hold a public hearing before a Public Board of Inquiry



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