

with §20.82 of this chapter, the authorized discretion to disclose records related to a section 305 presentation before the consideration of criminal prosecution is closed.

(2) After consideration of criminal prosecution is closed, the records are available for public disclosure in response to a request under the Freedom of Information Act, except to the extent that the exemptions from disclosure in subpart D of part 20 of this chapter are applicable. No statements obtained through promises of confidentiality shall be available for public disclosure.

(b) Consideration of criminal prosecution based on a particular section 305 notice of opportunity for presentation of views shall be deemed to be closed within the meaning of this section and §7.85 when a final decision has been made not to recommend criminal prosecution to a United States attorney based on charges set forth in the notice and considered at the presentation, or when such a recommendation has been finally refused by the United States attorney, or when criminal prosecution has been instituted and the matter and all related appeals have been concluded, or when the statute of limitations has run.

(c) Before disclosure of any record specifically reflecting consideration of a possible recommendation for criminal prosecution of any individual, all names and other information that would identify an individual whose prosecution was considered but not recommended, or who was not prosecuted, shall be deleted, unless the Commissioner concludes that there is a compelling public interest in the disclosure of the names.

(d) Names and other information that would identify a Food and Drug Administration employee shall be deleted from records related to a section 305 presentation of views before public disclosure only under §20.32 of this chapter.

[44 FR 12168, Mar. 6, 1979]

PART 10—ADMINISTRATIVE PRACTICES AND PROCEDURES

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10.206 Procedures for electronic media coverage of agency public administrative proceedings.

AUTHORITY: 5 U.S.C. 551–558, 701–706; 15 U.S.C. 1451–1461; 21 U.S.C. 141–149, 321–397, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201, 262, 263b, 264.

SOURCE: 44 FR 22323, Apr. 13, 1979, unless otherwise noted.

Subpart A—General Provisions

§ 10.1 Scope.

(a) Part 10 governs practices and procedures for petitions, hearings, and other administrative proceedings and activities conducted by the Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and other laws that the Commissioner of Food and Drugs administers under § 5.10.

(b) If a requirement in another part of title 21 differs from a requirement in this part, the requirements of this part apply to the extent that they do not conflict with the other requirements.

(c) References in this part and parts 12, 13, 14, 15, and 16 to regulatory sections of the Code of Federal Regulations are to chapter I of title 21 unless otherwise noted.

(d) References in this part and parts 12, 13, 14, 15, and 16 to *publication*, or to the day or date of publication, or use of the phrase *to publish*, refer to publication in the FEDERAL REGISTER unless otherwise noted.

[44 FR 22323, Apr. 13, 1979, as amended at 54 FR 9034, Mar. 3, 1989]

§ 10.3 Definitions.

(a) The following definitions apply in this part and parts 12, 13, 14, 15, 16, and 19:

Act means the Federal Food, Drug, and Cosmetic Act unless otherwise indicated.

Administrative action includes every act, including the refusal or failure to act, involved in the administration of any law by the Commissioner, except that it does not include the referral of apparent violations to U.S. attorneys for the institution of civil or criminal proceedings or an act in preparation of a referral.

Administrative file means the file or files containing all documents per-

taining to a particular administrative action, including internal working memoranda, and recommendations.

Administrative record means the documents in the administrative file of a particular administrative action on which the Commissioner relies to support the action.

Agency means the Food and Drug Administration.

Chief Counsel means the Chief Counsel of the Food and Drug Administration.

Commissioner means the Commissioner of Food and Drugs, Food and Drug Administration, U.S. Department of Health and Human Services, or the Commissioner's designee.

Department means the U.S. Department of Health and Human Services.

Dockets Management Branch means the Dockets Management Branch, Office of Management and Operations of the Food and Drug Administration, U.S. Department of Health and Human Services, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

Ex parte communication means an oral or written communication not on the public record for which reasonable prior notice to all parties is not given, but does not include requests for status reports on a matter.

FDA means the Food and Drug Administration.

Food and Drug Administration employee or *Food and Drug Administration representative* includes members of the Food and Drug Division of the office of the General Counsel of the Department of Health and Human Services.

Formal evidentiary public hearing means a hearing conducted under part 12.

Interested person or *any person who will be adversely affected* means a person who submits a petition or comment or objection or otherwise asks to participate in an informal or formal administrative proceeding or court action.

Meeting means any oral discussion, whether by telephone or in person.

Office of the Commissioner includes the offices of the Associate Commissioners but not the centers or the regional or district offices.

Order means the final agency disposition, other than the issuance of a regulation, in a proceeding concerning any

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matter and includes action on a new drug application, new animal drug application, or biological license.

Participant means any person participating in any proceeding, including each party and any other interested person.

Party means the center of the Food and Drug Administration responsible for a matter involved and every person who either has exercised a right to request or has been granted the right by the Commissioner to have a hearing under part 12 or part 16 or who has waived the right to a hearing to obtain the establishment of a Public Board of Inquiry under part 13 and as a result of whose action a hearing or a Public Board of Inquiry has been established.

Person includes an individual, partnership, corporation, association, or other legal entity.

Petition means a petition, application, or other document requesting the Commissioner to establish, amend, or revoke a regulation or order, or to take or not to take any other form of administrative action, under the laws administered by the Food and Drug Administration.

Presiding officer means the Commissioner or the Commissioner's designee or an administrative law judge appointed as provided in 5 U.S.C. 3105.

Proceeding and *administrative proceeding* means any undertaking to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action.

Public advisory committee or *advisory committee* means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup of an advisory committee, that is not composed wholly of full-time employees of the Federal Government and is established or utilized by the Food and Drug Administration to obtain advice or recommendations.

Public Board of Inquiry or *Board* means an administrative law tribunal constituted under part 13.

Public hearing before a public advisory committee means a hearing conducted under part 14.

Public hearing before a Public Board of Inquiry means a hearing conducted under part 13.

Public hearing before the Commissioner means a hearing conducted under part 15.

Regulations means an agency rule of general or particular applicability and future effect issued under a law administered by the Commissioner or relating to administrative practices and procedures. In accordance with §10.90(a), each agency regulation will be published in the FEDERAL REGISTER and codified in the Code of Federal Regulations.

Regulatory hearing before the Food and Drug Administration means a hearing conducted under part 16.

Secretary means the Secretary of Health and Human Services.

The laws administered by the Commissioner or *the laws administered by the Food and Drug Administration* means all the laws that the Commissioner is authorized to administer under §5.10.

(b) A term that is defined in section 201 of the Federal Food, Drug, and Cosmetic Act or part 1 has the same definition in this part.

(c) Words in the singular form include the plural, words in the masculine form include the feminine, and vice versa.

(d) Whenever a reference is made in this part to a person in FDA, e.g., the director of a center, the reference includes all persons to whom that person has delegated the specific function involved.

[44 FR 22323, Apr. 13, 1979, as amended at 46 FR 8455, Jan. 27, 1981; 50 FR 8994, Mar. 6, 1985; 54 FR 6886, Feb. 15, 1989; 54 FR 9034, Mar. 3, 1989; 59 FR 14363, Mar. 28, 1994]

§10.10 Summaries of administrative practices and procedures.

To encourage public participation in all agency activities, the Commissioner will prepare for public distribution summaries of FDA administrative practices and procedures in readily understandable terms.

§10.19 Waiver, suspension, or modification of procedural requirements.

The Commissioner or a presiding officer may, either voluntarily or at the

request of a participant, waive, suspend, or modify any provision in parts 12 through 16 applicable to the conduct of a public hearing by announcement at the hearing or by notice in advance of the hearing if no participant will be prejudiced, the ends of justice will thereby be served, and the action is in accordance with law.

Subpart B—General Administrative Procedures

§ 10.20 Submission of documents to Dockets Management Branch; computation of time; availability for public disclosure.

(a) A submission to the Dockets Management Branch of a petition, comment, objection, notice, compilation of information, or any other document is to be filed in four copies except as otherwise specifically provided in a relevant FEDERAL REGISTER notice or in another section of this chapter. The Dockets Management Branch is the agency custodian of these documents.

(b) A submission is to be signed by the person making it, or by an attorney or other authorized representative of that person. Submissions by trade associations are also subject to the requirements of § 10.105(b).

(c) Information referred to or relied upon in a submission is to be included in full and may not be incorporated by reference, unless previously submitted in the same proceeding.

(1) A copy of an article or other reference or source cited must be included, except where the reference or source is:

- (i) A reported Federal court case;
- (ii) A Federal law or regulation;
- (iii) An FDA document that is routinely publicly available; or
- (iv) A recognized medical or scientific textbook that is readily available to the agency.

(2) If a part of the material submitted is in a foreign language, it must be accompanied by an English translation verified to be complete and accurate, together with the name, address, and a brief statement of the qualifications of the person making the translation. A translation of literature or other material in a foreign language is to be ac-

companied by copies of the original publication.

(3) Where relevant information is contained in a document also containing irrelevant information, the irrelevant information is to be deleted and only the relevant information is to be submitted.

(4) Under § 20.63 (a) and (b), the names and other information that would identify patients or research subjects are to be deleted from any record before it is submitted to the Dockets Management Branch in order to preclude a clearly unwarranted invasion of personal privacy.

(5) Defamatory, scurrilous, or intemperate matter is to be deleted from a record before it is submitted to the Dockets Management Branch.

(6) The failure to comply with the requirements of this part or with § 12.80 or § 13.20 will result in rejection of the submission for filing or, if it is filed, in exclusion from consideration of any portion that fails to comply. If a submission fails to meet any requirement of this section and the deficiency becomes known to the Dockets Management Branch, the Dockets Management Branch shall not file the submission but return it with a copy of the applicable regulations indicating those provisions not complied with. A deficient submission may be corrected or supplemented and subsequently filed. The office of the Dockets Management Branch does not make decisions regarding the confidentiality of submitted documents. Persons wishing to voluntarily submit information considered confidential shall follow the pre-submission review requirements of § 20.44.

(d) The filing of a submission means only that the Dockets Management Branch has identified no technical deficiencies in the submission. The filing of a petition does not mean or imply that it meets all applicable requirements or that it contains reasonable grounds for the action requested or that the action requested is in accordance with law.

(e) All submissions to the Dockets Management Branch will be considered as submitted on the date they are post-marked or, if delivered in person during regular business hours, on the date

they are delivered, unless a provision in this part, an applicable FEDERAL REGISTER notice, or an order issued by an administrative law judge specifically states that the documents must be received by a specified date, e.g., §10.33(g) relating to a petition for reconsideration, in which case they will be considered submitted on the date received.

(f) All submissions are to be mailed or delivered in person to the Dockets Management Branch, Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

(g) FDA ordinarily will not acknowledge or give receipt for documents, except:

(1) Documents delivered in person or by certified or registered mail with a return receipt requested; and

(2) Petitions for which acknowledgment of receipt of filing is provided by regulation or by customary practice, e.g., §10.30(c) relating to a citizen petition.

(h) Saturdays, Sundays, and Federal legal holidays are included in computing the time allowed for the submission of documents, except that when the time for submission expires on a Saturday, Sunday, or Federal legal holiday, the period will be extended to include the next business day.

(i) All submissions to the Dockets Management Branch are representations that, to the best of the knowledge, information, and belief of the person making the submission, the statements made in the submission are true and accurate. All submissions are subject to the False Reports to the Government Act (18 U.S.C. 1001) under which a willfully false statement is a criminal offense.

(j) The availability for public examination and copying of submissions to the Dockets Management Branch is governed by the following rules:

(1) Except to the extent provided in paragraphs (j)(2) and (3) of this section, the following submissions, including all supporting material, will be on public display and will be available for public examination between 9 a.m. and 4 p.m., Monday through Friday. Requests for copies of submissions will be filed and handled in accordance with subpart C of part 20:

(i) Petitions.

(ii) Comments on petitions, on documents published in the FEDERAL REGISTER, and on similar public documents.

(iii) Objections and requests for hearings filed under part 12.

(iv) Material submitted at a hearing under §12.32(a)(2) and parts 12, 13, and 15.

(v) Material placed on public display under the regulations in this chapter, e.g., agency guidance documents developed under §10.115.

(2)(i) Material prohibited from public disclosure under §20.63 (clearly unwarranted invasion of personal privacy) and, except as provided in paragraph (j)(3) of this section, material submitted with objections and requests for hearing filed under part 12, or at a hearing under part 12 or part 13, or an alternative form of public hearing before a public advisory committee or a hearing under §12.32(a) (2) or (3), of the following types will not be on public display, will not be available for public examination, and will not be available for copying or any other form of verbatim transcription unless it is otherwise available for public disclosure under part 20:

(a) Safety and effectiveness information, which includes all studies and tests of an ingredient or product on animals and humans and all studies and tests on the ingredient or product for identity, stability, purity, potency, bioavailability, performance, and usefulness.

(b) A protocol for a test or study.

(c) Manufacturing methods or processes, including quality control procedures.

(d) Production, sales distribution, and similar information, except any compilation of information aggregated and prepared in a way that does not reveal confidential information.

(e) Quantitative or semiquantitative formulas.

(f) Information on product design or construction.

(ii) Material submitted under paragraph (j)(2) of this section is to be segregated from all other submitted material and clearly so marked. A person who does not agree that a submission is properly subject to paragraph (j)(2)

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may request a ruling from the Associate Commissioner for Public Affairs whose decision is final, subject to judicial review under § 20.46.

(3) Material listed in paragraph (j)(2)(i) (a) and (b) of this section may be disclosed under a protective order issued by the administrative law judge or other presiding officer at a hearing referenced in paragraph (j)(2)(i). The administrative law judge or presiding officer shall permit disclosure of the data only in camera and only to the extent necessary for the proper conduct of the hearing. The administrative law judge or presiding officer shall direct to whom the information is to be made available (e.g., to parties or participants, or only to counsel for parties or participants), and persons not specifically permitted access to the data will be excluded from the in camera part of the proceeding. The administrative law judge or other presiding officer may impose other conditions or safeguards. The limited availability of material under this paragraph does not constitute prior disclosure to the public as defined in § 20.81, and no information subject to a particular order is to be submitted to or received or considered by FDA in support of a petition or other request from any other person.

[44 FR 22323, Apr. 13, 1979, as amended at 46 FR 8455, Jan. 27, 1981; 49 FR 7363, Feb. 29, 1984; 54 FR 9034, Mar. 3, 1989; 59 FR 14363, Mar. 28, 1994; 64 FR 69190, Dec. 10, 1999; 65 FR 56477, Sept. 19, 2000; 66 FR 56035, Nov. 6, 2001; 66 FR 66742, Dec. 27, 2001]

§ 10.25 Initiation of administrative proceedings.

An administrative proceeding may be initiated in the following three ways:

(a) An interested person may petition the Commissioner to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action. A petition must be either: (1) In the form specified in other applicable FDA regulations, e.g., the form for a color additive petition in § 71.1, for a food additive petition in § 171.1, for a new drug application in § 314.50, for a new animal drug application in § 514.1, or (2) in the form for a citizen petition in § 10.30.

(b) The Commissioner may initiate a proceeding to issue, amend, or revoke a

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regulation or order or take or refrain from taking any other form of administrative action. FDA has primary jurisdiction to make the initial determination on issues within its statutory mandate, and will request a court to dismiss, or to hold in abeyance its determination of or refer to the agency for administrative determination, any issue which has not previously been determined by the agency or which, if it has previously been determined, the agency concluded should be reconsidered and subject to a new administrative determination. The Commissioner may utilize any of the procedures established in this part in reviewing and making a determination on any matter initiated under this paragraph.

(c) The Commissioner will institute a proceeding to determine whether to issue, amend, or revoke a regulation or order, or take or refrain from taking any other form of administrative action whenever any court, on its own initiative, holds in abeyance or refers any matter to the agency for an administrative determination and the Commissioner concludes that an administrative determination is feasible within agency priorities and resources.

[44 FR 22323, Apr. 13, 1979, as amended at 54 FR 9034, Mar. 3, 1989]

§ 10.30 Citizen petition.

(a) This section applies to any petition submitted by a person (including a person who is not a citizen of the United States) except to the extent that other sections of this chapter apply different requirements to a particular matter.

(b) A petition (including any attachments) must be submitted in accordance with § 10.20 and in the following form:

(Date) _____

Dockets Management Branch, Food and Drug Administration, Department of Health and Human Services, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

CITIZEN PETITION

The undersigned submits this petition under _____ (relevant statutory sections, if known) of the _____ (Federal Food, Drug, and Cosmetic Act or the Public Health Service Act or any other statutory provision for which authority has been delegated to the

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Commissioner of Food and Drugs under 21 CFR 5.10) to request the Commissioner of Food and Drugs to _____ (issue, amend, or revoke a regulation or order or take or refrain from taking any other form of administrative action).

A. Action requested

(1) If the petition requests the Commissioner to issue, amend, or revoke a regulation, the exact wording of the existing regulation (if any) and the proposed regulation or amendment requested.)

(2) If the petition requests the Commissioner to issue, amend, or revoke an order, a copy of the exact wording of the citation to the existing order (if any) and the exact wording requested for the proposed order.)

(3) If the petition requests the Commissioner to take or refrain from taking any other form of administrative action, the specific action or relief requested.)

B. Statement of grounds

(A full statement, in a well organized format, of the factual and legal grounds on which the petitioner relies, including all relevant information and views on which the petitioner relies, as well as representative information known to the petitioner which is unfavorable to the petitioner's position.)

C. Environmental impact

(A) Claim for categorical exclusion under §§ 25.30, 25.31, 25.32, 25.33, or § 25.34 of this chapter or an environmental assessment under § 25.40 of this chapter.)

D. Economic impact

(The following information is to be submitted only when requested by the Commissioner following review of the petition: A statement of the effect of requested action on: (1) Cost (and price) increases to industry, government, and consumers; (2) productivity of wage earners, businesses, or government; (3) competition; (4) supplies of important materials, products, or services; (5) employment; and (6) energy supply or demand.)

E. Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition.

(Signature) _____
(Name of petitioner) _____
(Mailing address) _____
(Telephone number) _____

(c) A petition which appears to meet the requirements of paragraph (b) of this section and §10.20 will be filed by

the Dockets Management Branch, stamped with the date of filing, and assigned a docket number. The docket number identifies the file established by the Dockets Management Branch for all submissions relating to the petition, as provided in this part. Subsequent submissions relating to the matter must refer to the docket number and will be filed in the docket file. Related petitions may be filed together and given the same docket number. The Dockets Management Branch will promptly notify the petitioner in writing of the filing and docket number of a petition.

(d) An interested person may submit written comments to the Dockets Management Branch on a filed petition, which comments become part of the docket file. The comments are to specify the docket number of the petition and may support or oppose the petition in whole or in part. A request for alternative or different administrative action must be submitted as a separate petition.

(e)(1) The Commissioner shall, in accordance with paragraph (e)(2), rule upon each petition filed under paragraph (c) of this section, taking into consideration (i) available agency resources for the category of subject matter, (ii) the priority assigned to the petition considering both the category of subject matter involved and the overall work of the agency, and (iii) time requirements established by statute.

(2) Except as provided in paragraph (e)(4) of this section, the Commissioner shall furnish a response to each petitioner within 180 days of receipt of the petition. The response will either:

(i) Approve the petition, in which case the Commissioner shall concurrently take appropriate action (e.g., publication of a FEDERAL REGISTER notice) implementing the approval;

(ii) Deny the petition; or

(iii) Provide a tentative response, indicating why the agency has been unable to reach a decision on the petition, e.g., because of the existence of other agency priorities, or a need for additional information. The tentative response may also indicate the likely ultimate agency response, and may

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specify when a final response may be furnished.

(3) The Commissioner may grant or deny such a petition, in whole or in part, and may grant such other relief or take other action as the petition warrants. The petitioner is to be notified in writing of the Commissioner's decision. The decision will be placed in the public docket file in the office of the Dockets Management Branch and may also be in the form of a notice published in the FEDERAL REGISTER.

(4) The Commissioner shall furnish a response to each petitioner within 90 days of receipt of a petition filed under section 505(j)(2)(C) of the act. The response will either approve or disapprove the petition. Agency action on a petition shall be governed by §314.93 of this chapter.

(f) If a petition filed under paragraph (c) of this section requests the Commissioner to issue, amend, or revoke a regulation, §10.40 or §10.50 also apply.

(g) A petitioner may supplement, amend, or withdraw a petition in writing without agency approval and without prejudice to resubmission at any time until the Commissioner rules on the petition, unless the petition has been referred for a hearing under parts 12, 13, 14, or 15. After a ruling or referral, a petition may be supplemented, amended, or withdrawn only with the approval of the Commissioner. The Commissioner may approve withdrawal, with or without prejudice against resubmission of the petition.

(h) In reviewing a petition the Commissioner may use the following procedures:

(1) Conferences, meetings, discussions, and correspondence under §10.65.

(2) A hearing under parts 12, 13, 14, 15, or 16.

(3) A FEDERAL REGISTER notice requesting information and views.

(4) A proposal to issue, amend, or revoke a regulation, in accordance with §10.40 or §12.20.

(5) Any other specific public procedure established in this chapter and expressly applicable to the matter.

(i) The record of the administrative proceeding consists of the following:

(1) The petition, including all information on which it relies, filed by the Dockets Management Branch.

(2) All comments received on the petition, including all information submitted as a part of the comments.

(3) If the petition resulted in a proposal to issue, amend, or revoke a regulation, all of the documents specified in §10.40(g).

(4) The record, consisting of any transcripts, minutes of meetings, reports, FEDERAL REGISTER notices, and other documents resulting from the optional procedures specified in paragraph (h) of this section, except a transcript of a closed portion of a public advisory committee meeting.

(5) The Commissioner's decision on the petition, including all information identified or filed by the Commissioner with the Dockets Management Branch as part of the record supporting the decision.

(6) All documents filed with the Dockets Management Branch under §10.65(h).

(7) If a petition for reconsideration or for a stay of action is filed under paragraph (j) of this section, the administrative record specified in §10.33(k) or §10.35(h).

(j) The administrative record specified in paragraph (i) of this section is the exclusive record for the Commissioner's decision. The record of the administrative proceeding closes on the date of the Commissioner's decision unless some other date is specified. Thereafter any interested person 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 new petition to modify the decision in accordance with this section.

(k) This section does not apply to the referral of a matter to a United States attorney for the initiation of court enforcement action and related correspondence, or to requests, suggestions, and recommendations made informally in routine correspondence received by FDA. Routine correspondence does not constitute a petition

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within the meaning of this section unless it purports to meet the requirements of this section. Action on routine correspondence does not constitute final administrative action subject to judicial review under §10.45.

(1) The Dockets Management Branch will maintain a chronological list of each petition filed under this section and §10.85, but not of petitions submitted elsewhere in the agency under §10.25(a)(1), showing:

- (1) The docket number;
- (2) The date the petition was filed by the Dockets Management Branch;
- (3) The name of the petitioner;
- (4) The subject matter involved; and
- (5) The disposition of the petition.

[44 FR 22323, Apr. 13, 1979, as amended at 46 FR 8455, Jan. 27, 1981; 50 16656, Apr. 26, 1985; 54 FR 9034, Mar. 3, 1989; 57 FR 17980, Apr. 28, 1992; 59 FR 14364, Mar. 28, 1994; 62 FR 40592, July 29, 1997; 66 FR 6467, Jan. 22, 2001; 66 FR 12848, Mar. 1, 2001]

§ 10.33 Administrative reconsideration of action.

(a) The Commissioner may at any time reconsider a matter, on the Commissioner's own initiative or on the petition of an interested person.

(b) An interested person may request reconsideration of part or all of a decision of the Commissioner on a petition submitted under §10.25. Each request for reconsideration must be submitted in accordance with §10.20 and in the following form no later than 30 days after the date of the decision involved. The Commissioner may, for good cause, permit a petition to be filed after 30 days. In the case of a decision published in the FEDERAL REGISTER, the day of publication is the day of decision.

(Date) _____

Dockets Management Branch, Food and Drug Administration, Department of Health and Human Services, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

PETITION FOR RECONSIDERATION

[Docket No.]

The undersigned submits this petition for reconsideration of the decision of the Commissioner of Food and Drugs in Docket No. _____.

A. Decision involved

(A concise statement of the decision of the Commissioner which the petitioner wishes to have reconsidered.)

B. Action requested

(The decision which the petitioner requests the Commissioner to make upon reconsideration of the matter.)

C. Statement of grounds

(A full statement, in a well-organized format, of the factual and legal grounds upon which the petitioner relies. The grounds must demonstrate that relevant information and views contained in the administrative record were not previously or not adequately considered by the Commissioner.

(No new information or views may be included in a petition for reconsideration.)

(Signature) _____
(Name of petitioner) _____
(Mailing address) _____
(Telephone number) _____

(c) A petition for reconsideration relating to a petition submitted under §10.25(a)(2) is subject to the requirements of §10.30 (c) and (d), except that it is filed in the same docket file as the petition to which it relates.

(d) The Commissioner shall promptly review a petition for reconsideration. The Commissioner may grant the petition when the Commissioner determines it is in the public interest and in the interest of justice. The Commissioner shall grant a petition for reconsideration in any proceeding if the Commissioner determines all of the following apply:

(1) The petition demonstrates that relevant information or views contained in the administrative record were not previously or not adequately considered.

(2) The petitioner's position is not frivolous and is being pursued in good faith.

(3) The petitioner has demonstrated sound public policy grounds supporting reconsideration.

(4) Reconsideration is not outweighed by public health or other public interests.

(e) A petition for reconsideration may not be based on information and views not contained in the administrative record on which the decision was made. An interested person who wishes

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to rely on information or views not included in the administrative record shall submit them with a new petition to modify the decision under § 10.25(a).

(f) The decision on a petition for reconsideration is to be in writing and placed on public display as part of the docket file on the matter in the office of the Dockets Management Branch. A determination to grant reconsideration will be published in the FEDERAL REGISTER if the Commissioner's original decision was so published. Any other determination to grant or deny reconsideration may also be published in the FEDERAL REGISTER.

(g) The Commissioner may consider a petition for reconsideration only before the petitioner brings legal action in the courts to review the action, except that a petition may also be considered if the Commissioner has denied a petition for stay of action and the petitioner has petitioned for judicial review of the Commissioner's action and requested the reviewing court to grant a stay pending consideration of review. A petition for reconsideration submitted later than 30 days after the date of the decision involved will be denied as untimely unless the Commissioner permits the petition to be filed after 30 days. A petition for reconsideration will be considered as submitted on the day it is received by the Dockets Management Branch.

(h) The Commissioner may initiate the reconsideration of all or part of a matter at any time after it has been decided or action has been taken. If review of the matter is pending in the courts, the Commissioner may request that the court refer the matter back to the agency or hold its review in abeyance pending administrative reconsideration. The administrative record of the proceeding is to include all additional documents relating to such reconsideration.

(i) After determining to reconsider a matter, the Commissioner shall review and rule on the merits of the matter under § 10.30(e). The Commissioner may reaffirm, modify, or overrule the prior decision, in whole or in part, and may grant such other relief or take such other action as is warranted.

(j) The Commissioner's reconsideration of a matter relating to a petition

submitted under § 10.25(a)(2) is subject to § 10.30 (f) through (h), (j), and (k).

(k) The record of the administrative proceeding consists of the following:

(1) The record of the original petition specified in § 10.30(i).

(2) The petition for reconsideration, including all information on which it relies, filed by the Dockets Management Branch.

(3) All comments received on the petition, including all information submitted as a part of the comments.

(4) The Commissioner's decision on the petition under paragraph (f) of this section, including all information identified or filed by the Commissioner with the Dockets Management Branch as part of the record supporting the decision.

(5) Any FEDERAL REGISTER notices or other documents resulting from the petition.

(6) All documents filed with the Dockets Management Branch under § 10.65(h).

(7) If the Commissioner reconsiders the matter, the administrative record relating to reconsideration specified in § 10.30(i).

[44 FR 22323, Apr. 13, 1979, as amended at 46 FR 8455, Jan. 27, 1981; 59 FR 14364, Mar. 28, 1994; 66 FR 6467, Jan. 22, 2001; 66 FR 12848, Mar. 1, 2001]

§ 10.35 Administrative stay of action.

(a) The Commissioner may at any time stay or extend the effective date of an action pending or following a decision on any matter.

(b) An interested person may request the Commissioner to stay the effective date of any administrative action. A stay may be requested for a specific time period or for an indefinite time period. A request for stay must be submitted in accordance with § 10.20 and in the following form no later than 30 days after the date of the decision involved. The Commissioner may, for good cause, permit a petition to be filed after 30 days. In the case of a decision published in the FEDERAL REGISTER, the day of publication is the date of decision.

(Date) _____

Dockets Management Branch, Food and Drug Administration, Department of Health

Food and Drug Administration, HHS

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and Human Services, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

PETITION FOR STAY OF ACTION

The undersigned submits this petition requesting that the Commissioner of Food and Drugs stay the effective date of the following matter.

A. Decision involved

(The specific administrative action being taken by the Commissioner for which a stay is requested, including the docket number or other citation to the action involved.)

B. Action requested

(The length of time for which the stay is requested, which may be for a specific or indefinite time period.)

C. Statement of grounds

(A full statement, in a well-organized format, of the factual and legal grounds upon which the petitioner relies for the stay.)

(Signature) _____
(Name of petitioner) _____
(Mailing address) _____
(Telephone number) _____

(c) A petition for stay of action relating to a petition submitted under §10.25(a)(2) is subject to the requirements of §10.30 (c) and (d), except that it will be filed in the same docket file as the petition to which it relates.

(d) Neither the filing of a petition for a stay of action nor action taken by an interested person in accordance with any other administrative procedure in this part or in any other section of this chapter, e.g., the filing of a citizen petition under §10.30 or a petition for reconsideration under §10.33 or a request for an advisory opinion under §10.85, will stay or otherwise delay any administrative action by the Commissioner, including enforcement action of any kind, unless one of the following applies:

(1) The Commissioner determines that a stay or delay is in the public interest and stays the action.

(2) A statute requires that the matter be stayed.

(3) A court orders that the matter be stayed.

(e) The Commissioner shall promptly review a petition for stay of action. The Commissioner may grant or deny a petition, in whole or in part; and may grant such other relief or take such other action as is warranted by the pe-

tion. The Commissioner may grant a stay in any proceeding if it is in the public interest and in the interest of justice. The Commissioner shall grant a stay in any proceeding if all of the following apply:

(1) The petitioner will otherwise suffer irreparable injury.

(2) The petitioner's case is not frivolous and is being pursued in good faith.

(3) The petitioner has demonstrated sound public policy grounds supporting the stay.

(4) The delay resulting from the stay is not outweighed by public health or other public interests.

(f) The Commissioner's decision on a petition for stay of action is to be in writing and placed on public display as part of the file on the matter in the office of the Dockets Management Branch. A determination to grant a stay will be published in the FEDERAL REGISTER if the Commissioner's original decision was so published. Any other determination to grant or to deny a stay may also be published in the FEDERAL REGISTER.

(g) A petition for a stay of action submitted later than 30 days after the date of the decision involved will be denied as untimely unless the Commissioner permits the petition to be filed after 30 days. A petition for a stay of action is considered submitted on the day it is received by the Dockets Management Branch.

(h) The record of the administrative proceeding consists of the following:

(1) The record of the proceeding to which the petition for stay of action is directed.

(2) The petition for stay of action, including all information on which it relies, filed by the Dockets Management Branch.

(3) All comments received on the petition, including all information submitted as a part of the comments.

(4) The Commissioner's decision on the petition under paragraph (e) of this section, including all information identified or filed by the Commissioner with the Dockets Management Branch as part of the record supporting the decision.

(5) Any FEDERAL REGISTER notices or other documents resulting from the petition.

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(6) All documents filed with the Dockets Management Branch under §10.65(h).

[44 FR 22323, Apr. 13, 1979, as amended at 46 FR 8455, Jan. 27, 1981; 54 FR 9034, Mar. 3, 1989; 59 FR 14364, Mar. 28, 1994; 66 FR 6468, Jan. 22, 2001; 66 FR 12848, Mar. 1, 2001]

§ 10.40 Promulgation of regulations for the efficient enforcement of the law.

(a) The Commissioner may propose and promulgate regulations for the efficient enforcement of the laws administered by FDA whenever it is necessary or appropriate to do so. The issuance, amendment, or revocation of a regulation may be initiated in any of the ways specified in §10.25.

(1) This section applies to any regulation: (i) Not subject to §10.50 and part 12, or (ii) if it is subject to §10.50 and part 12, to the extent that those provisions make this section applicable.

(2) A regulation proposed by an interested person in a petition submitted under §10.25(a) will be published in the FEDERAL REGISTER as a proposal if:

(i) The petition contains facts demonstrating reasonable grounds for the proposal; and

(ii) The petition substantially shows that the proposal is in the public interest and will promote the objectives of the act and the agency.

(3) Two or more alternative proposed regulations may be published on the same subject to obtain comment on the different alternatives.

(4) A regulation proposed by an interested person in a petition submitted under §10.25(a) may be published together with the Commissioner's preliminary views on the proposal and any alternative proposal.

(b) Except as provided in paragraph (e) of this section, each regulation must be the subject of a notice of proposed rulemaking published in the FEDERAL REGISTER. (1) The notice will contain:

(i) The name of the agency;

(ii) The nature of the action, e.g., proposed rule, or notice;

(iii) A summary in the first paragraph describing the substance of the document in easily understandable terms;

(iv) Relevant dates, e.g., comment closing date, and proposed effective date(s);

(v) The name, business address, and phone number of an agency contact person who can provide further information to the public about the notice;

(vi) An address for submitting written comments;

(vii) Supplementary information about the notice in the form of a preamble that summarizes the proposal and the facts and policy underlying it, includes references to all information on which the Commissioner relies for the proposal (copies or a full list of which are a part of the docket file on the matter in the office of the Dockets Management Branch), and cites the authority under which the regulation is proposed;

(viii) Either the terms or substance of the proposed regulation or a description of the subjects and issues involved;

(ix) A reference to the existence or lack of need for an environmental impact statement under §25.52 of this chapter; and

(x) The docket number of the matter, which identifies the docket file established by the Dockets Management Branch for all relevant submissions.

(2) The proposal will provide 60 days for comment, although the Commissioner may shorten or lengthen this time period for good cause. In no event is the time for comment to be less than 10 days.

(3) After publication of the proposed rule, any interested person may request the Commissioner to extend the comment period for an additional specified period by submitting a written request to the Dockets Management Branch stating the grounds for the request. The request is submitted under §10.35 but should be headed "REQUEST FOR EXTENSION OF COMMENT PERIOD."

(i) A request must discuss the reason comments could not feasibly be submitted within the time permitted, or that important new information will shortly be available, or that sound public policy otherwise supports an extension of the time for comment. The Commissioner may grant or deny the request or may grant an extension for

a time period different from that requested. An extension may be limited to specific persons who have made and justified the request, but will ordinarily apply to all interested persons.

(ii) A comment time extension of 30 days or longer will be published in the FEDERAL REGISTER and will be applicable to all interested persons. A comment time extension of less than 30 days will be the subject either of a letter or memorandum filed with the Dockets Management Branch or of a notice published in the FEDERAL REGISTER.

(4) A notice of proposed rulemaking will request that four copies of all comments be submitted to the Dockets Management Branch, except that individuals may submit single copies. Comments will be stamped with the date of receipt and will be numbered chronologically.

(5) Persons submitting comments critical of a proposed regulation are encouraged to include their preferred alternative wording.

(c) After the time for comment on a proposed regulation has expired, the Commissioner will review the entire administrative record on the matter, including all comments and, in a notice published in the FEDERAL REGISTER, will terminate the proceeding, issue a new proposal, or promulgate a final regulation.

(1) The quality and persuasiveness of the comments will be the basis for the Commissioner's decision. The number or length of comments will not ordinarily be a significant factor in the decision unless the number of comments is material where the degree of public interest is a legitimate factor for consideration.

(2) The decision of the Commissioner on the matter will be based solely upon the administrative record.

(3) A final regulation published in the FEDERAL REGISTER will have a preamble stating: (i) The name of the agency, (ii) the nature of the action e.g., final rule, notice, (iii) a summary first paragraph describing the substance of the document in easily understandable terms, (iv) relevant dates, e.g., the rule's effective date and comment closing date, if an opportunity for comment is provided, (v) the name,

business address, and phone number of an agency contact person who can provide further information to the public about the notice, (vi) an address for the submission of written comments when they are permitted, (vii) supplementary information about the regulation in the body of the preamble that contains references to prior notices relating to the same matter and a summary of each type of comment submitted on the proposal and the Commissioner's conclusions with respect to each. The preamble is to contain a thorough and comprehensible explanation of the reasons for the Commissioner's decision on each issue.

(4) The effective date of a final regulation may not be less than 30 days after the date of publication in the FEDERAL REGISTER, except for:

(i) A regulation that grants an exemption or relieves a restriction; or

(ii) A regulation for which the Commissioner finds, and states in the notice good cause for an earlier effective date.

(d) The provisions for notice and comment in paragraphs (b) and (c) of this section apply only to the extent required by the Administrative Procedure Act (5 U.S.C. 551, 552, and 553). As a matter of discretion, however, the Commissioner may voluntarily follow those provisions in circumstances in which they are not required by the Administrative Procedure Act.

(e) The requirements of notice and public procedure in paragraph (b) of this section do not apply in the following situations:

(1) When the Commissioner determines for good cause that they are impracticable, unnecessary, or contrary to the public interest. In these cases, the notice promulgating the regulation will state the reasons for the determination, and provide an opportunity for comment to determine whether the regulation should subsequently be modified or revoked. A subsequent notice based on those comments may, but need not, provide additional opportunity for public comment.

(2) Food additive and color additive petitions, which are subject to the provisions of § 12.20(b)(2).

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(3) New animal drug regulations, which are promulgated under section 512(i) of the act.

(f) In addition to the notice and public procedure required under paragraph (b) of this section, the Commissioner may also subject a proposed or final regulation, before or after publication in the FEDERAL REGISTER, to the following additional procedures:

(1) Conferences, meetings, discussions, and correspondence under §10.65.

(2) A hearing under parts 12, 13, 14, or 15.

(3) A notice published in the FEDERAL REGISTER requesting information and views before the Commissioner determines whether to propose a regulation.

(4) A draft of a proposed regulation placed on public display in the office of the Dockets Management Branch. If this procedure is used, the Commissioner shall publish an appropriate notice in the FEDERAL REGISTER stating that the document is available and specifying the time within which comments on the draft proposal may be submitted orally or in writing.

(5) A revised proposal published in the FEDERAL REGISTER, which proposal is subject to all the provisions in this section relating to proposed regulations.

(6) A tentative final regulation or tentative revised final regulation placed on public display in the office of the Dockets Management Branch and, if deemed desirable by the Commissioner, published in the FEDERAL REGISTER. If the tentative regulation is placed on display only, the Commissioner shall publish an appropriate notice in the FEDERAL REGISTER stating that the document is available and specifying the time within which comments may be submitted orally or in writing on the tentative final regulation. The Commissioner shall mail a copy of the tentative final regulation and the FEDERAL REGISTER notice to each person who submitted comments on the proposed regulation if one has been published.

(7) A final regulation published in the FEDERAL REGISTER that provides an opportunity for the submission of further comments, in accordance with paragraph (e)(1) of this section.

(8) Any other public procedure established in this chapter and expressly applicable to the matter.

(g) The record of the administrative proceeding consists of all of the following:

(1) If the regulation was initiated by a petition, the administrative record specified in §10.30(i).

(2) If a petition for reconsideration or for a stay of action is filed, the administrative record specified in §§10.33(k) and 10.35(h).

(3) The proposed rule published in the FEDERAL REGISTER, including all information identified or filed by the Commissioner with the Dockets Management Branch on the proposal.

(4) All comments received on the proposal, including all information submitted as a part of the comments.

(5) The notice promulgating the final regulation, including all information identified or filed by the Commissioner with the Dockets Management Branch as part of the administrative record of the final regulation.

(6) The transcripts, minutes of meetings, reports, FEDERAL REGISTER notices, and other documents resulting from the procedures specified in paragraph (f) of this section, but not the transcript of a closed portion of a public advisory committee meeting.

(7) All documents submitted to the Dockets Management Branch under §10.65(h).

(h) The record of the administrative proceeding closes on the date of publication of the final regulation in the FEDERAL REGISTER unless some other date is specified. Thereafter, any interested person 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 it to the Commissioner with a new petition to modify the final regulation.

(i) The Dockets Management Branch shall maintain a chronological list of all regulations proposed and promulgated under this section and §10.50 (which list will not include regulations resulting from petitions filed and assigned a docket number under §10.30) showing—

(1) The docket number (for a petition submitted directly to a center, the list also includes the number or other designation assigned by the center, e.g., the number assigned to a food additive petition);

(2) The name of the petitioner, if any;

(3) The subject matter involved; and

(4) The disposition of the petition.

[44 FR 22323, Apr. 13, 1979, as amended at 52 FR 36401, Sept. 29, 1987; 54 FR 9034, Mar. 3, 1989; 56 FR 13758, Apr. 4, 1991; 62 FR 40592, July 29, 1997; 66 FR 6468, Jan. 22, 2001; 66 FR 12848, Mar. 1, 2001]

§ 10.45 Court review of final administrative action; exhaustion of administrative remedies.

(a) This section applies to court review of final administrative action taken by the Commissioner, including action taken under §§10.25 through 10.40 and §16.1(b), except action subject to §10.50 and part 12.

(b) A request that the Commissioner take or refrain from taking any form of administrative action must first be the subject of a final administrative decision based on a petition submitted under §10.25(a) or, where applicable, a hearing under §16.1(b) before any legal action is filed in a court complaining of the action or failure to act. If a court action is filed complaining of the action or failure to act before the submission of the decision on a petition under §10.25(a) or, where applicable, a hearing under §16.1(b), the Commissioner shall request dismissal of the court action or referral to the agency for an initial administrative determination on the grounds of a failure to exhaust administrative remedies, the lack of final agency action as required by 5 U.S.C. 701 *et seq.*, and the lack of an actual controversy as required by 28 U.S.C. 2201.

(c) A request that administrative action be stayed must first be the subject of an administrative decision based upon a petition for stay of action submitted under §10.35 before a request is made that a court stay the action. If a court action is filed requesting a stay of administrative action before the Commissioner's decision on a petition submitted in a timely manner pursuant to §10.35, the Commissioner shall request dismissal of the court action or

referral to the agency for an initial determination on the grounds of a failure to exhaust administrative remedies, the lack of final agency action as required by 5 U.S.C. 701 *et seq.*, and the lack of an actual controversy as required by 28 U.S.C. 2201. If a court action is filed requesting a stay of administrative action after a petition for a stay of action is denied because it was submitted after expiration of the time period provided under §10.35, or after the time for submitting such a petition has expired, the Commissioner will request dismissal of the court action on the ground of a failure to exhaust administrative remedies.

(d) The Commissioner's final decision constitutes final agency action (reviewable in the courts under 5 U.S.C. 701 *et seq.* and, where appropriate, 28 U.S.C. 2201) on a petition submitted under §10.25(a), on a petition for reconsideration submitted under §10.33, on a petition for stay of action submitted under §10.35, on an advisory opinion issued under §10.85, on a matter involving administrative action which is the subject of an opportunity for a hearing under §16.1(b) of this chapter, or on the issuance of a final regulation published in accordance with §10.40, except that the agency's response to a petition filed under section 505(j)(2)(C) of the act and §314.93 of this chapter will not constitute final agency action until any petition for reconsideration submitted by the petitioner is acted on by the Commissioner.

(1) It is the position of FDA except as otherwise provided in paragraph (d)(2) of this section, that:

(i) Final agency action exhausts all administrative remedies and is ripe for preenforcement judicial review as of the date of the final decision, unless applicable law explicitly requires that the petitioner take further action before judicial review is available;

(ii) An interested person is affected by, and thus has standing to obtain judicial review of final agency action; and

(iii) It is not appropriate to move to dismiss a suit for preenforcement judicial review of final agency action on the ground that indispensable parties are not joined or that it is an unconsented suit against the United

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States if the defect could be cured by amending the complaint.

(2) The Commissioner shall object to judicial review of a matter if:

(i) The matter is committed by law to the discretion of the Commissioner, e.g., a decision to recommend or not to recommend civil or criminal enforcement action under sections 302, 303, and 304 of the act; or

(ii) Review is not sought in a proper court.

(e) An interested person may request judicial review of a final decision of the Commissioner in the courts without first petitioning the Commissioner for reconsideration or for a stay of action, except that in accordance with paragraph (c) of this section, the person shall request a stay by the Commissioner under §10.35 before requesting a stay by the court.

(f) The Commissioner shall take the position in an action for judicial review under 5 U.S.C. 701 *et seq.*, whether or not it includes a request for a declaratory judgment under 28 U.S.C. 2201, or in any other case in which the validity of administrative action is properly challenged, that the validity of the action must be determined solely on the basis of the administrative record specified in §§10.30(i), 10.33(k), 10.35(h), 10.40(g), and 16.80(a) or the administrative record applicable to any decision or action under the regulations referenced in §16.1(b), and that additional information or views may not be considered. An interested person who wishes to rely upon information or views not included in the administrative record shall submit them to the Commissioner with a new petition to modify the action under §10.25(a).

(g) The Commissioner requests that all petitions for judicial review of a particular matter be filed in a single U.S. District court. If petitions are filed in more than one jurisdiction, the Commissioner will take appropriate action to prevent a multiplicity of suits in various jurisdictions, such as:

(1) A request for transfer of one or more suits to consolidate separate actions, under 28 U.S.C. 1404(a) or 28 U.S.C. 2112(a);

(2) A request that actions in all but one jurisdiction be stayed pending the conclusion of one proceeding;

(3) A request that all but one action be dismissed pending the conclusion of one proceeding, with the suggestion that the other plaintiffs intervene in that one suit; or

(4) A request that one of the suits be maintained as a class action in behalf of all affected persons.

(h)(1) For the purpose of 28 U.S.C. 2112(a), a copy of any petition filed in any U.S. Court of Appeals challenging a final action of the Commissioner shall be sent by certified mail, return receipt requested, or by personal delivery to the Chief Counsel of FDA. The petition copy shall be time-stamped by the clerk of the court when the original is filed with the court. The petition copy should be addressed to: Office of the Chief Counsel (GCF-1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. The Chief Counsel requests that the purpose of all petitions mailed or delivered to the Office of Chief Counsel to satisfy 28 U.S.C. 2112(a) be clearly identified in a cover letter.

(2) If the Chief Counsel receives two or more petitions filed in two or more U.S. Courts of Appeals for review of any agency action within 10 days of the effective date of that action for the purpose of judicial review, the Chief Counsel will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10-day period, in accordance with the applicable rule of the panel.

(3) For the purpose of determining whether a petition for review has been received within the 10-day period under paragraph (h)(2) of this section, the petition shall be considered to be received on the date of delivery, if personally delivered. If the delivery is accomplished by mail, the date of receipt shall be the date noted on the return receipt card.

(i) Upon judicial review of administrative action under this section:

(1) If a court determines that the administrative record is inadequate to support the action, the Commissioner shall determine whether to proceed with such action. (i) If the Commissioner decides to proceed with the action, the court will be requested to remand the matter to the agency to reopen the administrative proceeding

and record, or on the Commissioner's own initiative the administrative proceeding and record may be reopened upon receipt of the court determination. A reopened administrative proceeding will be conducted under the provisions of this part and in accordance with any directions of the court.

(ii) If the Commissioner concludes that the public interest requires that the action remain in effect pending further administrative proceedings, the court will be requested not to stay the matter in the interim and the Commissioner shall expedite the further administrative proceedings.

(2) If a court determines that the administrative record is adequate, but the rationale for the action must be further explained:

(i) The Commissioner shall request either that further explanation be provided in writing directly to the court without further administrative proceedings, or that the administrative proceeding be reopened in accordance with paragraph (i)(1)(i) of this section; and

(ii) If the Commissioner concludes that the public interest requires that the action remain in effect pending further court or administrative proceedings, the court will be requested not to stay the matter in the interim and the Commissioner shall expedite the further proceedings.

[44 FR 22323, Apr. 13, 1979, as amended at 54 FR 6886, Feb. 15, 1989; 54 FR 9034, Mar. 3, 1989; 57 FR 17980, Apr. 28, 1992; 65 FR 56477, Sept. 19, 2000]

§ 10.50 Promulgation of regulations and orders after an opportunity for a formal evidentiary public hearing.

(a) The Commissioner shall promulgate regulations and orders after an opportunity for a formal evidentiary public hearing under part 12 whenever all of the following apply:

(1) The subject matter of the regulation or order is subject by statute to an opportunity for a formal evidentiary public hearing.

(2) The person requesting the hearing has a right to an opportunity for a hearing and submits adequate justification for the hearing as required by §§ 12.20 through 12.22 and other applica-

ble provisions in this chapter, e.g., §§ 314.200, 514.200, and 601.7(a).

(b) The Commissioner may order a formal evidentiary public hearing on any matter whenever it would be in the public interest to do so.

(c) The provisions of the act, and other laws, that afford a person who would be adversely affected by administrative action an opportunity for a formal evidentiary public hearing as listed below. The list imparts no right to a hearing where the statutory section provides no opportunity for a hearing.

(1) Section 401 on any action for the amendment or repeal of any definition and standard of identity for any dairy product (including products regulated under parts 131, 133, and 135 of this chapter) or maple sirup (regulated under § 168.140 of this chapter).

(2) Section 403(j) on regulations for labeling of foods for special dietary uses.

(3) Section 404(a) on regulations for emergency permit control.

(4) Section 406 on tolerances for poisonous substances in food.

(5) Section 409 (c), (d), and (h) on food additive regulations.

(6) Section 501(b) on tests or methods of assay for drugs described in official compendia.

(7) Section 502(d) on regulations designating habit forming drugs.

(8) Section 502(h) on regulations designating requirements for drugs liable to deterioration.

(9) Section 502(n) on prescription drug advertising regulations.

(10) [Reserved]

(11) Section 507(f) on regulations for antibiotic drug certification.

(12) Section 512(n)(5) on regulations for animal antibiotic drugs and certification requirements.

(13) Section 721 (b) and (c) on regulations for color additive listing and certification.

(14) Section 4(a) of the Fair Packaging and Labeling Act on food, drug, device, and cosmetic labeling.

(15) Section 5(c) of the Fair Packaging and Labeling Act on additional economic regulations for food, drugs, devices, and cosmetics.

(16) Section 505 (d) and (e) on new drug applications.

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(17) Section 512 (d), (e) and (m) (3) and (4) on new animal drug applications.

(18) Section 515(g) on device pre-market approval applications and product development protocols.

(19) Section 351(a) of the Public Health Service Act on a biologics license for a biological product.

(20) Section 306 on debarment, debarment period and considerations, termination of debarment under section 306(d)(3), suspension, and termination of suspension.

[44 FR 22323, Apr. 13, 1979, as amended at 54 FR 9034, Mar. 3, 1989; 58 FR 49190, Sept. 22, 1993; 60 FR 38626, July 27, 1995; 63 FR 26697, May 13, 1998; 64 FR 398, Jan. 5, 1999; 64 FR 56448, Oct. 20, 1999]

EFFECTIVE DATE NOTE: At 67 FR 4906, Feb. 1, 2002, §10.50 was amended by removing and reserving paragraph (c)(7), effective Apr. 2, 2002.

§ 10.55 Separation of functions; ex parte communications.

(a) This section applies to any matter subject by statute to an opportunity for a formal evidentiary public hearing, as listed in §10.50(c), and any matter subject to a hearing before a Public Board of Inquiry under part 13.

(b) In the case of a matter listed in §10.50(c) (1) through (10) and (12) through (15):

(1) An interested person may meet or correspond with any FDA representative concerning a matter prior to publication of a notice announcing a formal evidentiary public hearing or a hearing before a Public Board of Inquiry on the matter; the provisions of §10.65 apply to the meetings and correspondence; and

(2) Upon publication of a notice announcing a formal evidentiary public hearing or a hearing before a Public Board of Inquiry, the following separation of functions apply:

(i) The center responsible for the matter is, as a party to the hearing, responsible for all investigative functions and for presentation of the position of the center at the hearing and in any pleading or oral argument before the Commissioner. Representatives of the center may not participate or advise in any decision except as witness or counsel in public proceedings. There is to be no other communication be-

tween representatives of the center and representatives of the office of the Commissioner concerning the matter before the decision of the Commissioner. The Commissioner may, however, designate representatives of a center to advise the office of the Commissioner, or designate members of that office to advise a center. The designation will be in writing and filed with the Dockets Management Branch no later than the time specified in paragraph (b)(2) of this section for the application of separation of functions. All members of FDA other than representatives of the involved center (except those specifically designated otherwise) shall be available to advise and participate with the office of the Commissioner in its functions relating to the hearing and the final decision.

(ii) The Chief Counsel for FDA shall designate members of the office of General Counsel to advise and participate with the center in its functions in the hearing and members who are to advise the office of the Commissioner in its functions related to the hearing and the final decision. The members of the office of General Counsel designated to advise the center may not participate or advise in any decision of the Commissioner except as counsel in public proceedings. The designation is to be in the form of a memorandum filed with the Dockets Management Branch and made a part of the administrative record in the proceeding. There may be no other communication between those members of the office of General Counsel designated to advise the office of the Commissioner and any other persons in the office of General Counsel or in the involved center with respect to the matter prior to the decision of the Commissioner. The Chief Counsel may assign new attorneys to advise either the center or the office of the Commissioner at any stage of the proceedings. The Chief Counsel will ordinarily advise and participate with the office of the Commissioner in its functions relating to the hearing and the final decision.

(iii) The office of the Commissioner is responsible for the agency review and final decision of the matter, with the advice and participation of anyone in FDA other than representatives of

the involved center and those members of the office of General Counsel designated to assist in the center's functions in the hearing.

(c) In a matter listed in §10.50(c) (11) and (16) through (19), the provisions relating to separation of functions set forth in §§314.200(f), 514.200, and 601.7(a) are applicable before publication of a notice announcing a formal evidentiary public hearing or a hearing before a Public Board of Inquiry. Following publication of the notice of hearing, the rules in paragraph (b)(2) of this section apply.

(d) Except as provided in paragraph (e) of this section, between the date that separation of functions applies under paragraph (b) or (c) of this section and the date of the Commissioner's decision on the matter, communication concerning the matter involved in the hearing will be restricted as follows:

(1) No person outside the agency may have an ex parte communication with the presiding officer or any person representing the office of the Commissioner concerning the matter in the hearing. Neither the presiding officer nor any person representing the office of the Commissioner may have any ex parte communication with a person outside the agency concerning the matter in the hearing. All communications are to be public communications, as witness or counsel, under the applicable provisions of this part.

(2) A participant in the hearing may submit a written communication to the office of the Commissioner with respect to a proposal for settlement. These communications are to be in the form of pleadings, served on all other participants, and filed with the Dockets Management Branch like any other pleading.

(3) A written communication contrary to this section must be immediately served on all other participants and filed with the Dockets Management Branch by the presiding officer at the hearing, or by the Commissioner, depending on who received the communication. An oral communication contrary to this section must be immediately recorded in a written memorandum and similarly served on all other participants and filed with the

Dockets Management Branch. A person, including a representative of a participant in the hearing, who is involved in an oral communication contrary to this section, must, if possible, be made available for cross-examination during the hearing with respect to the substance of that conversation. Rebuttal testimony pertinent to a written or oral communication contrary to this section will be permitted. Cross-examination and rebuttal testimony will be transcribed and filed with the Dockets Management Branch.

(e) The prohibitions specified in paragraph (d) of this section apply to a person who knows of a notice of hearing in advance of its publication from the time the knowledge is acquired.

(f) The making of a communication contrary to this section may, consistent with the interests of justice and the policy of the underlying statute, result in a decision adverse to the person knowingly making or causing the making of such a communication.

[44 FR 22323, Apr. 13, 1979, as amended at 50 FR 8994, Mar. 6, 1985; 54 FR 9035, Mar. 3, 1989; 64 FR 398, Jan. 5, 1999]

§ 10.60 Referral by court.

(a) This section applies when a Federal, State, or local court holds in abeyance, or refers to the Commissioner, any matter for an initial administrative determination under §10.25(c) or §10.45(b).

(b) The Commissioner shall promptly agree or decline to accept a court referral. Whenever feasible in light of agency priorities and resources, the Commissioner shall agree to accept a referral and shall proceed to determine the matter referred.

(c) In reviewing the matter, the Commissioner may use the following procedures:

(1) Conferences, meetings, discussions, and correspondence under §10.65.

(2) A hearing under parts 12, 13, 14, 15, or 16.

(3) A notice published in the FEDERAL REGISTER requesting information and views.

(4) Any other public procedure established in other sections of this chapter and expressly applicable to the matter under those provisions.

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(d) If the Commissioner's review of the matter results in a proposed rule, the provisions of §10.40 or §10.50 also apply.

§ 10.65 Meetings and correspondence.

(a) In addition to public hearings and proceedings established under this part and other sections of this chapter, meetings may be held and correspondence may be exchanged between representatives of FDA and an interested person outside FDA on a matter within the jurisdiction of the laws administered by the Commissioner. Action on meetings and correspondence does not constitute final administrative action subject to judicial review under §10.45.

(b) The Commissioner may conclude that it would be in the public interest to hold an open public meeting to discuss a matter (or class of matters) pending before FDA, in which any interested person may participate.

(1) The Commissioner shall inform the public of the time and place of the meeting and of the matters to be discussed.

(2) The meeting will be informal, i.e., any interested person may attend and participate in the discussion without prior notice to the agency unless the notice of the meeting specifies otherwise.

(c) Every person outside the Federal Government may request a private meeting with a representative of FDA in agency offices to discuss a matter. FDA will make reasonable efforts to accommodate such requests.

(1) The person requesting a meeting may be accompanied by a reasonable number of employees, consultants, or other persons with whom there is a commercial arrangement within the meaning of §20.81(a) of this chapter. Neither FDA nor any other person may require the attendance of a person who is not an employee of the executive branch of the Federal Government without the agreement of the person requesting the meeting. Any person may attend by mutual consent of the person requesting the meeting and FDA.

(2) FDA will determine which representatives of the agency will attend the meeting. The person requesting the meeting may request, but not require

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or preclude, the attendance of a specific FDA employee.

(3) A person who wishes to attend a private meeting, but who is not invited to attend either by the person requesting the meeting or by FDA, or who otherwise cannot attend the meeting, may request a separate meeting with FDA to discuss the same matter or an additional matter.

(d) FDA employees have a responsibility to meet with all segments of the public to promote the objectives of the laws administered by the agency. In pursuing this responsibility, the following general policy applies where agency employees are invited by persons outside the Federal Government to attend or participate in meetings outside agency offices as representatives of the agency.

(1) A person outside the executive branch may invite an agency representative to attend or participate in a meeting outside agency offices. The agency representative is not obligated to attend or participate, but may do so where it is in the public interest and will promote the objectives of the act.

(2) The agency representative may request that the meeting be open if that would be in the public interest. The agency representative may decline to participate in a meeting held as a private meeting if that will best serve the public interest.

(3) An agency representative may not knowingly participate in a meeting that is closed on the basis of gender, race, or religion.

(e) An official transcript, recording, or memorandum summarizing the substance of any meeting described in this section will be prepared by a representative of FDA when the agency determines that such documentation will be useful.

(f) FDA promptly will file in the appropriate administrative file memoranda of meetings prepared by FDA representatives and all correspondence, including any written summary of a meeting from a participant, that relate to a matter pending before the agency.

(g) Representatives of FDA may initiate a meeting or correspondence on any matter concerning the laws administered by the Commissioner. Unless otherwise required by law, meetings

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may be public or private at FDA's discretion.

(h) A meeting of an advisory committee is subject to the requirements of part 14 of this chapter.

[66 FR 6468, Jan. 22, 2001]

§ 10.70 Documentation of significant decisions in administrative file.

(a) This section applies to every significant FDA decision on any matter under the laws administered by the Commissioner, whether it is raised formally, for example, by a petition or informally, for example, by correspondence.

(b) FDA employees responsible for handling a matter are responsible for insuring the completeness of the administrative file relating to it. The file must contain:

(1) Appropriate documentation of the basis for the decision, including relevant evaluations, reviews, memoranda, letters, opinions of consultants, minutes of meetings, and other pertinent written documents; and

(2) The recommendations and decisions of individual employees, including supervisory personnel, responsible for handling the matter.

(i) The recommendations and decisions are to reveal significant controversies or differences of opinion and their resolution.

(ii) An agency employee working on a matter and, consistent with the prompt completion of other assignments, an agency employee who has worked on a matter may record individual views on that matter in a written memorandum, which is to be placed in the file.

(c) A written document placed in an administrative file must:

(1) Relate to the factual, scientific, legal or related issues under consideration;

(2) Be dated and signed by the author;

(3) Be directed to the file, to appropriate supervisory personnel, and to other appropriate employees, and show all persons to whom copies were sent;

(4) Avoid defamatory language, intemperate remarks, undocumented charges, or irrelevant matters (e.g., personnel complaints);

(5) If it records the views, analyses, recommendations, or decisions of an agency employee in addition to the author, be given to the other employees; and

(6) Once completed (i.e., typed in final form, dated, and signed) not be altered or removed. Later additions to or revisions of the document must be made in a new document.

(d) Memoranda or other documents that are prepared by agency employees and are not in the administrative file have no status or effect.

(e) FDA employees working on a matter have access to the administrative file on that matter, as appropriate for the conduct of their work. FDA employees who have worked on a matter have access to the administrative file on that matter so long as attention to their assignments is not impeded. Reasonable restrictions may be placed upon access to assure proper cataloging and storage of documents, the availability of the file to others, and the completeness of the file for review.

§ 10.75 Internal agency review of decisions.

(a) A decision of an FDA employee, other than the Commissioner, on a matter, is subject to review by the employee's supervisor under the following circumstances:

(1) At the request of the employee.

(2) On the initiative of the supervisor.

(3) At the request of an interested person outside the agency.

(4) As required by delegations of authority.

(b)(1) The review will be made by consultation between the employee and the supervisor or by review of the administrative file on the matter, or both. The review will ordinarily follow the established agency channels of supervision or review for that matter.

(2) A sponsor, applicant, or manufacturer of a drug or device regulated under the act or the Public Health Service Act (42 U.S.C. 262), may request review of a scientific controversy by an appropriate scientific advisory panel as described in section 505(n) of the act, or an advisory committee as described in section 515(g)(2)(B) of the act. The reason(s) for any denial of a request for

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such review shall be briefly set forth in writing to the requester. Persons who receive a Center denial of their request under this section may submit a request for review of the denial. The request should be sent to the Chief Mediator and Ombudsman.

(c) An interested person outside the agency may request internal agency review of a decision through the established agency channels of supervision or review. Personal review of these matters by center directors or the office of the Commissioner will occur for any of the following purposes:

(1) To resolve an issue that cannot be resolved at lower levels within the agency (e.g., between two parts of a center or other component of the agency, between two centers or other components of the agency, or between the agency and an interested person outside the agency).

(2) To review policy matters requiring the attention of center or agency management.

(3) In unusual situations requiring an immediate review in the public interest.

(4) As required by delegations of authority.

(d) Internal agency review of a decision must be based on the information in the administrative file. If an interested person presents new information not in the file, the matter will be returned to the appropriate lower level in the agency for reevaluation based on the new information.

[44 FR 22323, Apr. 13, 1979, as amended at 50 FR 8994, Mar. 6, 1985; 63 FR 63982, Nov. 18, 1998]

§ 10.80 Dissemination of draft Federal Register notices and regulations.

(a) A representative of FDA may discuss orally or in writing with an interested person ideas and recommendations for notices or regulations. FDA welcomes assistance in developing ideas for, and in gathering the information to support, notices and regulations.

(b) *Notices and proposed regulations.* (1) Once it is determined that a notice or proposed regulation will be prepared, the general concepts may be discussed by a representative of FDA with an interested person. Details of a draft of a

notice or proposed regulation may be discussed with a person outside the executive branch only with the specific permission of the Commissioner. The permission must be in writing and filed with the Dockets Management Branch.

(2) A draft of a notice or proposed regulation or its preamble, or a portion of either, may be furnished to an interested person outside the executive branch only if it is made available to all interested persons by a notice published in the FEDERAL REGISTER. A draft of a notice or proposed regulation made available in this manner may, without the prior permission of the Commissioner, be discussed with an interested person to clarify and resolve questions raised and concerns expressed about the draft.

(c) After publication of a notice or proposed regulation in the FEDERAL REGISTER, and before preparation of a draft of the final notice or regulation, a representative of FDA may discuss the proposal with an interested person as provided in paragraph (b)(2) of this section.

(d) *Final notices and regulations.* (1) Details of a draft of a final notice or regulation may be discussed with an interested person outside the executive branch only with the specific permission of the Commissioner. The permission must be in writing and filed with the Dockets Management Branch.

(2) A draft of a final notice or regulation or its preamble, or any portion of either, may be furnished to an interested person outside the executive branch only if it is made available to all interested persons by a notice published in the FEDERAL REGISTER, except as otherwise provided in paragraphs (g) and (j) of this section. A draft of a final notice or regulation made available to an interested person in this manner may, without the prior permission of the Commissioner, be discussed as provided in paragraph (b)(2) of this section.

(i) The final notice or regulation and its preamble will be prepared solely on the basis of the administrative record.

(ii) If additional technical information from a person outside the executive branch is necessary to draft the final notice or regulation or its preamble, it will be requested by FDA in

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general terms and furnished directly to the Dockets Management Branch to be included as part of the administrative record.

(iii) If direct discussion by FDA of a draft of a final notice or regulation or its preamble is required with a person outside the executive branch, appropriate protective procedures will be undertaken to make certain that a full and impartial administrative record is established. Such procedures may include either:

(a) The scheduling of an open public meeting under §10.65(b) at which interested persons may participate in review of and comment on the draft document; or

(b) The preparation of a tentative final regulation or tentative revised final regulation under §10.40(f)(6), on which interested persons will be given an additional period of time for oral and written comment.

(e) After a final regulation is published, an FDA representative may discuss any aspect of it with an interested person.

(f) In addition to the requirements of this section, the provisions of §10.55 apply to the promulgation of a regulation subject to §10.50 and part 12.

(g) A draft of a final food additive color additive, or new animal drug regulation may be furnished to the petitioner for comment on the technical accuracy of the regulation. Every meeting with a petitioner relating to the draft will be recorded in a written memorandum, and all memoranda and correspondence will be filed with the Dockets Management Branch as part of the administrative record of the regulation under the provisions of §10.65.

(h) In accordance with 42 U.S.C 263f, the Commissioner shall consult with interested persons and with the Technical Electronic Product Radiation Safety Standards Committee (TEPRSSC) before prescribing any performance standard for an electronic product. Accordingly, the Commissioner shall publish in the FEDERAL REGISTER an announcement when a proposed or final performance standard, including any amendment, is being considered for an electronic product, and any draft of any proposed or final standard will be furnished to an inter-

ested person upon request and may be discussed in detail.

(i) The provisions of §10.65 apply to meetings and correspondence relating to draft notices and regulations.

(j) The provisions of this section restricting discussion and disclosure of draft notices and regulations do not apply to situations covered by §§20.83 through 20.89.

[44 FR 22323, Apr. 13, 1979, as amended at 54 FR 9035, Mar. 3, 1989; 64 FR 398, Jan. 5, 1999]

§ 10.85 Advisory opinions.

(a) An interested person may request an advisory opinion from the Commissioner on a matter of general applicability.

(1) The request will be granted whenever feasible.

(2) The request may be denied if:

(i) The request contains incomplete information on which to base an informed advisory opinion;

(ii) The Commissioner concludes that an advisory opinion cannot reasonably be given on the matter involved;

(iii) The matter is adequately covered by a prior advisory opinion or a regulation;

(iv) The request covers a particular product or ingredient or label and does not raise a policy issue of broad applicability; or

(v) The Commissioner otherwise concludes that an advisory opinion would not be in the public interest.

(b) A request for an advisory opinion is to be submitted in accordance with §10.20, is subject to the provisions of §10.30 (c) through (1), and must be in the following form:

(Date) _____

Dockets Management Branch, Food and Drug Administration, Department of Health and Human Services, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

REQUEST FOR ADVISORY OPINION

The undersigned submits this request for an advisory opinion of the Commissioner of Food and Drugs with respect to _____ (the general nature of the matter involved).

A. *Issues involved.*

(A concise statement of the issues and questions on which an opinion is requested.)

B. *Statement of facts and law.*

(A full statement of all facts and legal points relevant to the request.)

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The undersigned certifies that, to the best of his/her knowledge and belief, this request includes all data, information, and views relevant to the matter, whether favorable or unfavorable to the position of the undersigned, which is the subject of the request.

(Signature) _____
(Person making request) _____
(Mailing address) _____
(Telephone number) _____

(c) The Commissioner may respond to an oral or written request to the agency as a request for an advisory opinion, in which case the request will be filed with the Dockets Management Branch and be subject to this section.

(d) A statement of policy or interpretation made in the following documents, unless subsequently repudiated by the agency or overruled by a court, will constitute an advisory opinion:

(1) Any portion of a FEDERAL REGISTER notice other than the text of a proposed or final regulation, e.g., a notice to manufacturers or a preamble to a proposed or final regulation.

(2) Trade Correspondence (T.C. Nos. 1-431 and 1A-8A) issued by FDA between 1938 and 1946.

(3) Compliance policy guides issued by FDA beginning in 1968 and codified in the Compliance Policy Guides manual.

(4) Other documents specifically identified as advisory opinions, e.g., advisory opinions on the performance standard for diagnostic X-ray systems, issued before July 1, 1975, and filed in a permanent public file for prior advisory opinions maintained by the Freedom of Information Staff (HFI-35).

(e) An advisory opinion represents the formal position of FDA on a matter and except as provided in paragraph (f) of this section, obligates the agency to follow it until it is amended or revoked. The Commissioner may not recommend legal action against a person or product with respect to an action taken in conformity with an advisory opinion which has not been amended or revoked.

(f) In unusual situations involving an immediate and significant danger to health, the Commissioner may take appropriate civil enforcement action contrary to an advisory opinion before amending or revoking the opinion. This action may be taken only with the approval of the Commissioner, who may

not delegate this function. Appropriate amendment or revocation of the advisory opinion involved will be expedited.

(g) An advisory opinion may be amended or revoked at any time after it has been issued. Notice of amendment or revocation will be given in the same manner as notice of the advisory opinion was originally given or in the FEDERAL REGISTER, and will be placed on public display as part of the file on the matter in the office of the Dockets Management Branch. The Dockets Management Branch shall maintain a separate chronological index of all advisory opinions filed. The index will specify the date of the request for the advisory opinion, the date of the opinion, and identification of the appropriate file.

(h) Action undertaken or completed in conformity with an advisory opinion which has subsequently been amended or revoked is acceptable to FDA unless the Commissioner determines that substantial public interest considerations preclude continued acceptance. Whenever possible, an amended or revoked advisory opinion will state when action previously undertaken or completed does not remain acceptable, and any transition period that may be applicable.

(i) An interested person may submit written comments on an advisory opinion or modified advisory opinion. Four copies of any comments are to be sent to the Dockets Management Branch for inclusion in the public file on the advisory opinion. Individuals may submit only one copy. Comments will be considered in determining whether further modification of an advisory opinion is warranted.

(j) An advisory opinion may be used in administrative or court proceedings to illustrate acceptable and unacceptable procedures or standards, but not as a legal requirement.

(k) A statement made or advice provided by an FDA employee constitutes an advisory opinion only if it is issued in writing under this section. A statement or advice given by an FDA employee orally, or given in writing but not under this section or §10.90, is an

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informal communication that represents the best judgment of that employee at that time but does not constitute an advisory opinion, does not necessarily represent the formal position of FDA, and does not bind or otherwise obligate or commit the agency to the views expressed.

[44 FR 22323, Apr. 13, 1979, as amended at 46 FR 8455, Jan. 27, 1981; 59 FR 14364, Mar. 28, 1994; 65 FR 56477, Sept. 19, 2000]

§ 10.90 Food and Drug Administration regulations, recommendations, and agreements.

(a) *Regulations.* FDA regulations are promulgated in the FEDERAL REGISTER under §10.40 or §10.50 and codified in the Code of Federal Regulations. Regulations may contain provisions that will be enforced as legal requirements, or which are intended only as guidelines and recommendations, or both. The dissemination of draft notices and regulations is subject to §10.80.

(b) [Reserved]

(c) *Recommendations.* In addition to the guidelines subject to paragraph (b) of this section, FDA often formulates and disseminates recommendations about matters which are authorized by, but do not involve direct regulatory action under, the laws administered by the Commissioner, e.g., model State and local ordinances, or personnel practices for reducing radiation exposure, issued under 42 U.S.C. 243 and 263d(b). These recommendations may, in the discretion of the Commissioner, be handled under the procedures established in paragraph (b) of this section, except that the recommendations will be included in a separate public file of recommendations established by the Dockets Management Branch and will be separated from the guidelines in the notice of availability published in the FEDERAL REGISTER, or be published in the FEDERAL REGISTER as regulations under paragraph (a) of this section.

(d) *Agreements.* Formal agreements, memoranda of understanding, or other similar written documents executed by FDA and another person will be included in the public file on agreements established by the Freedom of Information Staff (HFI-35) under §20.108. A document not included in the public file is

deemed to be rescinded and has no force or effect whatever.

[44 FR 22323, Apr. 13, 1979, as amended at 54 FR 9035, Mar. 3, 1989; 65 FR 56477, Sept. 19, 2000]

§ 10.95 Participation in outside standard-setting activities.

(a) *General.* This section applies to participation by FDA employees in standard-setting activities outside the agency. Standard-setting activities include matters such as the development of performance characteristics, testing methodology, manufacturing practices, product standards, scientific protocols, compliance criteria, ingredient specifications, labeling, or other technical or policy criteria. FDA encourages employee participation in outside standard-setting activities that are in the public interest.

(b) *Standard-setting activities by other Federal Government agencies.* (1) An FDA employee may participate in these activities after approval of the activity under procedures specified in the current agency Staff Manual Guide.

(2) Approval forms and all pertinent background information describing the activity will be included in the public file on standard-setting activities established by the Freedom of Information Staff.

(3) If a member of the public is invited by FDA to present views to, or to accompany, the FDA employee at a meeting, the invitations will be extended to a representative sampling of the public, including consumer groups, industry associations, professional societies, and academic institutions.

(4) An FDA employee appointed as the liaison representative to an activity shall refer all requests for information about or participation in the activity to the group or organization responsible for the activity.

(c) *Standard-setting activities by State and local government agencies and by United Nations organizations and other international organizations and foreign governments pursuant to treaty.* (1) An FDA employee may participate in these activities after approval of the activity under procedures specified in the current agency Staff Manual Guide.

(2) Approval forms and all pertinent background information describing the activity will be included in the public file on standard-setting activities established by the Freedom of Information Staff (HFI-35).

(3) The availability for public disclosure of records relating to the activity will be governed by part 20.

(4) If a member of the public is invited by FDA to present views to, or to accompany, the FDA employee at a meeting, the invitation will be extended to a representative sampling of the public, including consumer groups, industry associations, professional societies, and academic institutions.

(5) An FDA employee appointed as the liaison representative to an activity shall refer all requests for information about or participation in the activity to the group or organization responsible for the activity.

(d) *Standard-setting activities by private groups and organizations.* (1) An FDA employee may engage in these activities after approval of the activity under procedures specified in the current agency Staff Manual Guide. A request for official participation must be made by the group or organization in writing, must describe the scope of the activity, and must demonstrate that the minimum standards set out in paragraph (d)(5) of this section are met. Except as provided in paragraph (d)(7) of this section, a request that is granted will be the subject of a letter from the Commissioner or the center director to the organization stating—

(i) Whether participation by the individual will be as a voting or nonvoting liaison representative;

(ii) That participation by the individual does not connote FDA agreement with, or endorsement of, any decisions reached; and

(iii) That participation by the individual precludes service as the deciding official on the standard involved if it should later come before FDA. The deciding official is the person who signs a document ruling upon the standard.

(2) The letter requesting official FDA participation, the approval form, and the Commissioner's or center director's letter, together with all pertinent background information describing the activities involved, will be included in

the public file on standard-setting activities established by the Freedom of Information Staff (HFI-35).

(3) The availability for public disclosure of records relating to the activities will be governed by part 20.

(4) An FDA employee appointed as the liaison representative to an activity shall refer all requests for information about or participation in the activity to the group or organization responsible for the activity.

(5) The following minimum standards apply to an outside private standard-setting activity in which FDA employees participate:

(i) The activity will be based upon consideration of sound scientific and technological information, will permit revision on the basis of new information, and will be designed to protect the public against unsafe, ineffective, or deceptive products or practices.

(ii) The activity and resulting standards will not be designed for the economic benefit of any company, group, or organization, will not be used for such antitrust violations as fixing prices or hindering competition, and will not involve establishment of certification or specific approval of individual products or services.

(iii) The group or organization responsible for the standard-setting activity must have a procedure by which an interested person will have an opportunity to provide information and views on the activity and standards involved, without the payment of fees, and the information and views will be considered. How this is accomplished, including whether the presentation will be in person or in writing, will be decided by the group or organization responsible for the activity.

(6) Membership of an FDA employee in an organization that also conducts a standard-setting activity does not invoke the provisions of this section unless the employee participates in the standard-setting activity. Participation in a standard-setting activity is subject to this section.

(7) The Commissioner may determine in writing that, because direct involvement by FDA in a particular standard-setting activity is in the public interest and will promote the objectives of

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the act and the agency, the participation is exempt from the requirements of paragraph (d)(1) (ii) and/or (iii) of this section. This determination will be included in the public file on standard-setting activities established by the Freedom of Information Staff and in any relevant administrative file. The activity may include the establishment and validation of analytical methods for regulatory use, drafting uniform laws and regulations, and the development of recommendations concerning public health and preventive medicine practices by national and international organizations.

(8) Because of the close daily cooperation between FDA and the associations of State and local government officials listed below in this paragraph, and the large number of agency employees who are members of or work with these associations, participation in the activities of these associations is exempt from paragraphs (d)(1) through (7) of this section, except that a list of the committees and other groups of these associations will be included in the public file on standard-setting activities established by the Freedom of Information Staff (HFI-35):

- (i) American Association of Food Hygiene Veterinarians (AAFHV).
- (ii) American Public Health Association (APHA).
- (iii) Association of American Feed Control Officials, Inc. (AAFCO).
- (iv) Association of Food and Drug Officials (AFDO).
- (v) Association of Official Analytical Chemists (AOAC).
- (vi) Association of State and Territorial Health Officials (ASTHO).
- (vii) Conference for Food Protection (CFP).
- (viii) Conference of State Health and Environmental Managers (COSHEM).
- (ix) Conference of Radiation Control Program Directors (CRCPD).
- (x) International Association of Milk, Food, and Environmental Sanitation, Inc. (IAMFES).
- (xi) Interstate Shellfish Sanitation Conference (ISSC).
- (xii) National Association of Boards of Pharmacy (NABP).
- (xiii) National Association of Departments of Agriculture (NADA).

(xiv) National Conference on Interstate Milk Shipments (NCIMS).

(xv) National Conference of Local Environmental Health Administrators (NCLEHA).

(xvi) National Conference on Weights and Measures (NCWW).

(xvii) National Environmental Health Association (NEHA).

(xviii) National Society of Professional Sanitarians (NSPS).

[44 FR 22323, Apr. 13, 1979, as amended at 46 FR 8455, Jan. 27, 1981; 52 FR 35064, Sept. 17, 1987; 54 FR 9035, Mar. 3, 1989]

§ 10.100 Public calendar.

(a) *Public calendar.* A public calendar will be prepared and made publicly available by FDA each week showing, to the extent feasible, significant events of the previous week, including significant meetings with persons outside the executive branch, that involve the representatives of FDA designated under paragraph (c) of this section.

(1) Public calendar entries will include:

(i) Significant meetings with members of the judiciary, representatives of Congress, or staffs of congressional committees when the meeting relates to a pending court case, administrative hearing, or other regulatory action or decision;

(ii) Significant meetings, conferences, seminars, and speeches; and

(iii) Social events sponsored by the regulated industry.

(2) The public calendar will not include reports of meetings that would prejudice law enforcement activities (e.g., a meeting with an informant) or invade privacy (e.g., a meeting with a candidate for possible employment at FDA), meetings with members of the press, or meetings with onsite contractors.

(b) *Calendar entries.* The calendar will specify for each entry the date, person(s), and subject matter involved. If a large number of persons are in attendance, the name of each individual need not be specified. When more than one FDA representative is in attendance, the most senior agency official will report the meeting on the public calendar.

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(c) *Affected persons.* The following FDA representatives are subject to the requirements of this section:

- (1) Commissioner of Food and Drugs.
- (2) Senior Associate Commissioners.
- (3) Deputy Commissioners.
- (4) Associate Commissioner for Regulatory Affairs.
- (5) Center Directors.
- (6) Chief Counsel for the Food and Drug Administration.

(d) *Public display.* The public calendar will be placed on public display at the following locations:

- (1) Dockets Management Branch.
- (2) Office of the Associate Commissioner for Public Affairs.
- (3) The FDA home page, to the extent feasible.

[66 FR 6468, Jan. 22, 2001]

§ 10.105 Representation by an organization.

(a) An organization may represent its members by filing petitions, comments, and objections, and otherwise participating in an administrative proceeding subject to this part.

(b) A petition, comment, objection, or other representation by an organization will not abridge the right of a member to take individual action of a similar type, in the member's own name.

(c) It is requested that each organization participating in FDA administrative proceedings file annually with the Dockets Management Branch a current list of all of the members of the organization.

(d) The filing by an organization of an objection or request for hearing under §§ 12.20 through 12.22 does not provide a member a legal right with respect to the objection or request for hearing that the member may individually exercise. A member of an organization wishing to file an objection or request for hearing must do so individually.

(e) In a court proceeding in which an organization participates, the Commissioner will take appropriate legal measures to have the case brought or considered as a class action or otherwise as binding upon all members of the organization except those specifically excluded by name. Regardless of whether the case is brought or consid-

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ered as a class action or as otherwise binding upon all members of the organization except those specifically excluded by name, the Commissioner will take the position in any subsequent suit involving the same issues and a member of the organization that the issues are precluded from further litigation by the member under the doctrines of collateral estoppel or res judicata.

§ 10.110 Settlement proposals.

At any time in the course of a proceeding subject to this part, a person may propose settlement of the issues involved. A participant in a proceeding will have an opportunity to consider a proposed settlement. Unaccepted proposals of settlement and related matters, e.g., proposed stipulations not agreed to, will not be admissible in evidence in an FDA administrative proceeding. FDA will oppose the admission in evidence of settlement information in a court proceeding or in another administrative proceeding.

§ 10.115 Good guidance practices.

(a) *What are good guidance practices?* Good guidance practices (GGP's) are FDA's policies and procedures for developing, issuing, and using guidance documents.

(b) *What is a guidance document?*

(1) Guidance documents are documents prepared for FDA staff, applicants/sponsors, and the public that describe the agency's interpretation of or policy on a regulatory issue.

(2) Guidance documents include, but are not limited to, documents that relate to: The design, production, labeling, promotion, manufacturing, and testing of regulated products; the processing, content, and evaluation or approval of submissions; and inspection and enforcement policies.

(3) Guidance documents do not include: Documents relating to internal FDA procedures, agency reports, general information documents provided to consumers or health professionals, speeches, journal articles and editorials, media interviews, press materials, warning letters, memoranda of understanding, or other communications directed to individual persons or firms.

(c) *What other terms have a special meaning?*

(1) “Level 1 guidance documents” include guidance documents that:

- (i) Set forth initial interpretations of statutory or regulatory requirements;
- (ii) Set forth changes in interpretation or policy that are of more than a minor nature;
- (iii) Include complex scientific issues; or
- (iv) Cover highly controversial issues.

(2) “Level 2 guidance documents” are guidance documents that set forth existing practices or minor changes in interpretation or policy. Level 2 guidance documents include all guidance documents that are not classified as Level 1.

(3) “You” refers to all affected parties outside of FDA.

(d) *Are you or FDA required to follow a guidance document?*

(1) No. Guidance documents do not establish legally enforceable rights or responsibilities. They do not legally bind the public or FDA.

(2) You may choose to use an approach other than the one set forth in a guidance document. However, your alternative approach must comply with the relevant statutes and regulations. FDA is willing to discuss an alternative approach with you to ensure that it complies with the relevant statutes and regulations.

(3) Although guidance documents do not legally bind FDA, they represent the agency’s current thinking. Therefore, FDA employees may depart from guidance documents only with appropriate justification and supervisory concurrence.

(e) *Can FDA use means other than a guidance document to communicate new agency policy or a new regulatory approach to a broad public audience?* The agency may not use documents or other means of communication that are excluded from the definition of guidance document to informally communicate new or different regulatory expectations to a broad public audience for the first time. These GGP’s must be followed whenever regulatory expectations that are not readily apparent from the statute or regulations are

first communicated to a broad public audience.

(f) *How can you participate in the development and issuance of guidance documents?*

(1) You can provide input on guidance documents that FDA is developing under the procedures described in paragraph (g) of this section.

(2) You can suggest areas for guidance document development. Your suggestions should address why a guidance document is necessary.

(3) You can submit drafts of proposed guidance documents for FDA to consider. When you do so, you should mark the document “Guidance Document Submission” and submit it to Dockets Management Branch (HFA-305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

(4) You can, at any time, suggest that FDA revise or withdraw an already existing guidance document. Your suggestion should address why the guidance document should be revised or withdrawn and, if applicable, how it should be revised.

(5) Once a year, FDA will publish, both in the FEDERAL REGISTER and on the Internet, a list of possible topics for future guidance document development or revision during the next year. You can comment on this list (e.g., by suggesting alternatives or making recommendations on the topics that FDA is considering).

(6) To participate in the development and issuance of guidance documents through one of the mechanisms described in paragraphs (f)(1), (f)(2), or (f)(4) of this section, you should contact the center or office that is responsible for the regulatory activity covered by the guidance document.

(7) If FDA agrees to draft or revise a guidance document, under a suggestion made under paragraphs (f)(1), (f)(2), (f)(3) or (f)(4) of this section, you can participate in the development of that guidance document under the procedures described in paragraph (g) of this section.

(g) *What are FDA’s procedures for developing and issuing guidance documents?*

(1) FDA’s procedures for the development and issuance of Level 1 guidance documents are as follows:

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(i) Before FDA prepares a draft of a Level 1 guidance document, FDA can seek or accept early input from individuals or groups outside the agency. For example, FDA can do this by participating in or holding public meetings and workshops.

(ii) After FDA prepares a draft of a Level 1 guidance document, FDA will:

(A) Publish a notice in the FEDERAL REGISTER announcing that the draft guidance document is available;

(B) Post the draft guidance document on the Internet and make it available in hard copy; and

(C) Invite your comment on the draft guidance document. Paragraph (h) of this section tells you how to submit your comments.

(iii) After FDA prepares a draft of a Level 1 guidance document, FDA also can:

(A) Hold public meetings or workshops; or

(B) Present the draft guidance document to an advisory committee for review.

(iv) After providing an opportunity for public comment on a Level 1 guidance document, FDA will:

(A) Review any comments received and prepare the final version of the guidance document that incorporates suggested changes, when appropriate;

(B) Publish a notice in the FEDERAL REGISTER announcing that the guidance document is available;

(C) Post the guidance document on the Internet and make it available in hard copy; and

(D) Implement the guidance document.

(v) After providing an opportunity for comment, FDA may decide that it should issue another draft of the guidance document. In this case, FDA will follow the steps in paragraphs (g)(1)(ii), (g)(1)(iii), and (g)(1)(iv) of this section.

(2) FDA will not seek your comment before it implements a Level 1 guidance document if the agency determines that prior public participation is not feasible or appropriate.

(3) FDA will use the following procedures for developing and issuing Level 1 guidance documents under the circumstances described in paragraph (g)(2) of this section:

(i) After FDA prepares a guidance document, FDA will:

(A) Publish a notice in the FEDERAL REGISTER announcing that the guidance document is available;

(B) Post the guidance document on the Internet and make it available in hard copy;

(C) Immediately implement the guidance document; and

(D) Invite your comment when it issues or publishes the guidance document. Paragraph (h) of this section tells you how to submit your comments.

(ii) If FDA receives comments on the guidance document, FDA will review those comments and revise the guidance document when appropriate.

(4) FDA will use the following procedures for developing and issuing Level 2 guidance documents:

(i) After it prepares a guidance document, FDA will:

(A) Post the guidance document on the Internet and make it available in hard copy;

(B) Immediately implement the guidance document, unless FDA indicates otherwise when the document is made available; and

(C) Invite your comment on the Level 2 guidance document. Paragraph (h) of this section tells you how to submit your comments.

(ii) If FDA receives comments on the guidance document, FDA will review those comments and revise the document when appropriate. If a version is revised, the new version will be placed on the Internet.

(5) You can comment on any guidance document at any time. Paragraph (h) of this section tells you how to submit your comments. FDA will revise guidance documents in response to your comments when appropriate.

(h) *How should you submit comments on a guidance document?*

(1) If you choose to submit comments on any guidance document under paragraph (g) of this section, you must send them to the Dockets Management Branch (HFA-305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

(2) Comments should identify the docket number on the guidance document, if such a docket number exists.

For documents without a docket number, the title of the guidance document should be included.

(3) Comments will be available to the public in accordance with FDA's regulations on submission of documents to the Dockets Management Branch specified in §10.20(j).

(i) *What standard elements must FDA include in a guidance document?*

(1) A guidance document must:

(i) Include the term "guidance,"

(ii) Identify the center(s) or office(s) issuing the document,

(iii) Identify the activity to which and the people to whom the document applies,

(iv) Prominently display a statement of the document's nonbinding effect,

(v) Include the date of issuance,

(vi) Note if it is a revision to a previously issued guidance and identify the document that it replaces, and

(vii) Contain the word "draft" if the document is a draft guidance.

(2) Guidance documents must not include mandatory language such as "shall," "must," "required," or "requirement," unless FDA is using these words to describe a statutory or regulatory requirement.

(3) When issuing draft guidance documents that are the product of international negotiations (e.g., guidances resulting from the International Conference on Harmonisation), FDA need not apply paragraphs (i)(1) and (i)(2) of this section. However, any final guidance document issued according to this provision must contain the elements in paragraphs (i)(1) and (i)(2) of this section.

(j) *Who, within FDA, can approve issuance of guidance documents?* Each center and office must have written procedures for the approval of guidance documents. Those procedures must ensure that issuance of all documents is approved by appropriate senior FDA officials.

(k) *How will FDA review and revise existing guidance documents?*

(1) The agency will periodically review existing guidance documents to determine whether they need to be changed or withdrawn.

(2) When significant changes are made to the statute or regulations, the agency will review and, if appropriate,

revise guidance documents relating to that changed statute or regulation.

(3) As discussed in paragraph (f)(3) of this section, you may at any time suggest that FDA revise a guidance document.

(1) *How will FDA ensure that FDA staff are following GGP's?*

(1) All current and new FDA employees involved in the development, issuance, or application of guidance documents will be trained regarding the agency's GGP's.

(2) FDA centers and offices will monitor the development and issuance of guidance documents to ensure that GGP's are being followed.

(m) *How can you get copies of FDA's guidance documents?* FDA will make copies available in hard copy and, as feasible, through the Internet.

(n) *How will FDA keep you informed of the guidance documents that are available?*

(1) FDA will maintain on the Internet a current list of all guidance documents. New documents will be added to this list within 30 days of issuance.

(2) Once a year, FDA will publish in the FEDERAL REGISTER its comprehensive list of guidance documents. The comprehensive list will identify documents that have been added to the list or withdrawn from the list since the previous comprehensive list.

(3) FDA's guidance document lists will include the name of the guidance document, issuance and revision dates, and information on how to obtain copies of the document.

(o) What can you do if you believe that someone at FDA is not following these GGP's? If you believe that someone at FDA did not follow the procedures in this section or that someone at FDA treated a guidance document as a binding requirement, you should contact that person's supervisor in the center or office that issued the guidance document. If the issue cannot be resolved, you should contact the next highest supervisor. You can also contact the center or office ombudsman for assistance in resolving the issue. If you are unable to resolve the issue at the center or office level or if you feel that you are not making progress by going through the chain of command, you may ask the Office of the Chief

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Mediator and Ombudsman to become involved.

[65 FR 56477, Sept. 19, 2000]

Subpart C—Electronic Media Coverage of Public Administrative Proceedings; Guideline on Policy and Procedures

SOURCE: 49 FR 14726, Apr. 13, 1984, unless otherwise noted.

§ 10.200 Scope.

This guideline describes FDA's policy and procedures applicable to electronic media coverage of agency public administrative proceedings. It is a guideline intended to clarify and explain FDA's policy on the presence and operation of electronic recording equipment at such proceedings and to assure uniform and consistent application of practices and procedures throughout the agency.

§ 10.203 Definitions.

(a) *Public administrative proceeding* as used in this guideline means any FDA proceeding which the public has a right to attend. This includes a formal evidentiary public hearing as set forth in part 12, a public hearing before a Public Board of Inquiry as set forth in part 13, a public hearing before a Public Advisory Committee as set forth in part 14, a public hearing before the Commissioner as set forth in part 15, a regulatory hearing before FDA as set forth in part 16, consumer exchange meetings, and Commissioner's public meetings with health professionals.

(b) *Advance notice* as used in this guideline means written or telephone notification to FDA's Office of Public Affairs (Press Relations Staff) of intent to electronically record an agency public administrative proceeding.

(c) *Electronic recording* as used in this guideline means any visual or audio recording made by videotape recording equipment or moving film camera, and/or other electronic recording equipment.

[49 FR 14726, Apr. 13, 1984, as amended at 54 FR 9035, Mar. 3, 1989]

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§ 10.204 General.

(a) FDA has for many years willingly committed itself to a policy of openness. In many instances FDA has sought to make the open portions of agency public administrative proceedings more accessible to public participation. Similarly, FDA has sought, wherever possible, to allow full written media access to its proceedings, so that members of the press would have the opportunity to provide first-hand reports. However, because electronic media coverage presents certain difficulties that are easier to resolve with advance notice to the agency and all participants, FDA believes that codification of its policy will facilitate and further increase media access to its public administrative proceedings. The agency intends to refer to this guideline when notices of hearing, or individual advisory committee meetings, are published in the FEDERAL REGISTER. Thus, all parties to a proceeding will be on notice that the proceeding may be recorded electronically and any person interested in videotaping or otherwise recording the proceeding will be notified that there are established procedures to be followed.

(b) The designated presiding officer of a public administrative proceeding retains the existing discretionary authority set forth in specific regulations pertaining to each type of administrative proceeding to regulate the conduct of the proceeding over which he or she presides. The responsibilities of the presiding officer, established elsewhere in parts 10 through 16, include an obligation to be concerned with the timely conduct of a hearing, the limited availability of certain witnesses, and reducing disruptions to the proceeding which may occur. Each proceeding varies, and the presiding officer cannot anticipate all that might occur. Discretionary authority to regulate conduct at a proceeding has traditionally been granted to presiding officers to enable them to fulfill their responsibility to maintain a fair and orderly hearing conducted in an expeditious manner.

(c) This guideline provides the presiding officer with a degree of flexibility in that it sets forth the agency's policy as well as the procedures that

presiding officers should ordinarily follow, but from which they may depart in particular situations if necessary, subject to the presumption of openness of public proceedings to electronic media coverage. The presiding officer's discretion to establish additional procedures or to limit electronic coverage is to be exercised only in the unusual circumstances defined in this guideline. Even though a presiding officer may establish additional procedures or limits as may be required in a particular situation, he or she will be guided by the policy expressed in this guideline in establishing these conditions. The presiding officer may also be less restrictive, taking into account such factors as the duration of a hearing and the design of the room.

(d) If a portion or all of a proceeding is closed to the public because material is to be discussed that is not disclosable to the public under applicable laws, the proceeding also will be closed to electronic media coverage.

(e) The agency requests advance notice of intent to record a proceeding electronically to facilitate the orderly conduct of the proceeding. Knowledge of anticipated media coverage will allow the presiding officer to make any special arrangements required by the circumstances of the proceeding. The agency believes that this guideline establishes sufficiently specific criteria to promote uniformity.

(f) The agency would like to allow all interested media representatives to videotape a proceeding in which they have an interest. However, should space limitations preclude a multitude of cameras, the presiding officer may require pool sharing. In such a case, pool sharing arrangements of the resulting videotape should be made between those allowed to film and those who were excluded. Arrangements for who is designated to present the pool and a method of distributing the resulting film or tape may be determined by the established networks' pooling system. However, the agency has a strong commitment to ensuring that media representatives other than the major networks also be able to obtain a copy of the tape at cost. FDA is concerned that if the network pool representative wishes to record only a

short portion of a proceeding, but an excluded party wishes to record the entire proceeding, confusion will result. The agency expects the interested media representatives to negotiate a suitable agreement among themselves before commencement of the proceeding. For example, the network pool representatives might agree to record a portion of the proceeding up to a break in the proceeding, at which time, while the network representative is disassembling equipment, another media representative might set up to continue recording. If an agreement cannot be reached before the proceeding, the agency will use the time of receipt of any advance notice to determine the representation for each category of media, e.g., one network reporter, one independent reporter. The agency recommends that parties intending to videotape provide as much advance notice as possible, so that the agency may best respond to the needs of the electronic media.

(g) To ensure the timely conduct of agency hearings and to prevent disruptions, equipment is to be stationary during a proceeding and should be set up and taken down when the proceeding is not in progress. As noted previously, the presiding officer may, at his or her discretion, be less restrictive if appropriate.

(h) The agency recognizes that electronic media representatives may desire only short footage of a proceeding, a facsimile of the proceeding, and/or interview opportunities and may be unnecessarily restricted by requirements for setting up before a proceeding and then waiting until a break in the proceeding before being permitted to take down their equipment. To accommodate this possibility, FDA's Press Relations Staff will attempt to make arrangements to respond to such needs by, for example, requesting that the presiding officer provide a break shortly after commencement of the proceeding to permit take down of equipment.

(i) The agency is making a full commitment to allowing, whenever possible, electronic coverage of its public administrative proceedings subject to the limited restrictions established in this guideline.

§ 10.205 Electronic media coverage of public administrative proceedings.

(a) A person may record electronically any open public administrative proceeding, subject to the procedures specified in this guideline. The procedures include a presumption that agency public proceedings are open to the electronic media. Whenever possible, FDA will permit all interested persons access to record agency public administrative proceedings. Restrictions other than those listed in § 10.206 will be imposed only under exceptional circumstances.

(b) A videotape recording of an FDA public administrative proceeding is not an official record of the proceeding. The only official record is the written transcript of the proceeding, which is taken by the official reporter.

§ 10.206 Procedures for electronic media coverage of agency public administrative proceedings.

(a) To facilitate the agency's response to media needs, a person intending to videotape an FDA public administrative proceeding should, whenever possible, provide advance notice to the Press Relations Staff (HFI-20), Office of Public Affairs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, in writing or by telephone (telephone 301-443-4177), at least 48 hours in advance of the proceeding. The Press Relations Staff will inform the presiding officer that the proceeding will be attended by representatives of the electronic media, and ascertain whether any special provisions in addition to those set forth in this subpart are required by the presiding officer. If so, the Press Relations Staff will function as a liaison between the presiding officer and the person intending to record the proceeding in facilitating any procedures in addition to those outlined in this subpart. The presiding officer will not deny access for failure to provide a 48-hour advance notice. Any advance notice may describe the intended length of recording if known, the amount and type of equipment to be used, and any special needs such as interviews.

(b) Cameras should be completely set up before a proceeding is scheduled to begin or during a break in the pro-

ceeding and should remain standing in the area designated for electronic media equipment. Cameras may be taken down only during breaks or after the hearing is over. Roving cameras will not be permitted during the proceeding. Any artificial lighting should be unobtrusive. Microphones, like cameras, should be in place before the start of a proceeding and may be taken down as indicated in this paragraph.

(c) When space in the hearing room is limited, the presiding officer may restrict the number of cameras or the equipment present. Should such a restriction become necessary, the pool arrangements are the responsibility of the participating media. The agency encourages the network pool to make copies of the tape, film, or other product available at cost to nonpool participants. However, if this is not possible, the agency may need to use the time of receipt of any advance notice to determine the representation for each category, e.g., one network reporter, one independent reporter, etc.

(d) *Off the record* portions of a proceeding may not be videotaped.

(e) Before or during the proceeding, the presiding officer may establish other conditions specific to the proceeding for which the request is being made. These conditions may be more or less restrictive than those stated in this guideline, except that the presiding officer shall observe the agency's presumption of openness of its public proceedings to the electronic media. Only a substantial and clear threat to the agency's interests in order, fairness, and timeliness authorizes the presiding officer to impose additional restrictions. This threat must outweigh the public interest in electronic media coverage of agency proceedings. Additional restrictions shall be narrowly drawn to the particular circumstances. The following factors are listed to assist presiding officers in determining whether the agency's interest is sufficiently compelling to call for the unusual step of imposing additional restrictions. Generally this step is justified when one of the following factors is met:

(1) Electronic recording would result in a substantial likelihood of disruption that clearly cannot be contained

by the procedures established in paragraphs (a) through (d) of this section.

(2) Electronic recording would result in a substantial likelihood of prejudicial impact on the fairness of the proceeding or the substantive discussion in a proceeding.

(3) There is a substantial likelihood that a witness' ability to testify may be impaired due to unique personal circumstances such as the age or psychological state of the witness or the particularly personal or private nature of the witness' testimony, if the witness' testimony were electronically recorded.

(f) Before the proceeding, the Press Relations Staff will, upon request, provide written copies of any additional conditions imposed by the presiding officer (as described in paragraph (e) of this section) to requesting members of the media. Any appeals should be made in accordance with paragraph (h) of this section.

(g) The presiding officer retains authority to restrict or discontinue videotaping or other recording of a proceeding, or parts of a proceeding, should such a decision become necessary. The presiding officer's responsibility to conduct the hearing includes the right and duty to remove a source of substantial disruption. In exercising his or her authority, the presiding officer shall observe the presumption that agency public proceedings are open to the electronic media. The presiding officer shall exercise his or her discretion to restrict or discontinue electronic coverage of a public proceeding, or portions of a public proceeding, only if he or she determines that the agency's interest in the fair and orderly administrative process is substantially threatened. A clear and substantial threat to the integrity of agency proceedings must clearly outweigh the public interest in electronic media coverage of the proceedings before additional restrictions are imposed on the electronic media during the course of the proceedings. The factors noted in paragraph (e) of this section indicate the kind of substantial threat to the agency interests that may require imposing additional restrictions during the course of the proceedings. If additional requirements are established during

the hearing, the presiding officer shall notify immediately the Deputy Commissioner of Food and Drugs of that fact by telephone and submit a written explanation of the circumstances that necessitated such an action within 24 hours or sooner if requested by the Deputy Commissioner. In the absence or unavailability of the Deputy Commissioner, the presiding officer shall notify the Associate Commissioner for Regulatory Affairs.

(h) A decision by a presiding officer, made either before the proceeding or during the course of a proceeding, to establish requirements in addition to the minimum standards set forth in this guideline may be appealed by any adversely affected person who intends to record the proceeding electronically. Appeals may be made in writing or by phone to the Deputy Commissioner or, in his or her absence, to the Associate Commissioner for Regulatory Affairs. The filing of an appeal, whether before or during a proceeding, does not require the presiding officer to interrupt the proceeding. However, the Deputy Commissioner or, in his or her absence, the Associate Commissioner for Regulatory Affairs will resolve an appeal as expeditiously as possible so as to preserve, to the extent possible, the reporters' opportunity to record the proceedings.

[49 FR 14726, Apr. 13, 1984, as amended at 54 FR 9035, Mar. 3, 1989]

PART 11—ELECTRONIC RECORDS; ELECTRONIC SIGNATURES

Subpart A—General Provisions

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Subpart B—Electronic Records

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