

the detention order is deemed terminated.

(b) If you appeal the detention order, but do not request an informal hearing, the presiding officer must issue a decision on the appeal confirming or revoking the detention within 5 calendar days after the date the appeal is filed. If the presiding officer fails to confirm or terminate the detention order during such 5-calendar day period, the detention order is deemed terminated.

(c) If you appeal the detention order and request an informal hearing and your hearing request is denied, the presiding officer must issue a decision on the appeal confirming or revoking the detention within 5 calendar days after the date the appeal is filed. If the presiding officer fails to confirm or terminate the detention order during such 5-calendar day period, the detention order is deemed terminated.

(d) If the presiding officer confirms a detention order, the article of food continues to be detained until we terminate the detention under §1.384 or the detention period expires under §1.379, whichever occurs first.

(e) If the presiding officer terminates a detention order, or the detention period expires, FDA must terminate the detention order as specified under §1.384.

(f) Confirmation of a detention order by the presiding officer is considered a final agency action for purposes of 5 U.S.C. 702.

§ 1.406 How will FDA handle classified information in an informal hearing?

Where the credible evidence or information supporting the detention order is classified under the applicable Executive order as requiring protection from unauthorized disclosure in the interest of national security (“classified information”), FDA will not provide you with this information. The presiding officer will give you notice of the general nature of the information and an opportunity to offer opposing evidence or information, if he or she may do so consistently with safeguarding the information and its source. If classified information was used to support the detention, then any confirmation of such detention will

state whether it is based in whole or in part on that classified information.

PART 2—GENERAL ADMINISTRATIVE RULINGS AND DECISIONS

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AUTHORITY: 15 U.S.C. 402, 409; 21 U.S.C. 321, 331, 335, 342, 343, 346a, 348, 351, 352, 355, 360b, 361, 362, 371, 372, 374; 42 U.S.C. 7671 *et seq.*

SOURCE: 42 FR 15559, Mar. 22, 1977, unless otherwise noted.

Subpart A—General Provisions

§ 2.5 Imminent hazard to the public health.

(a) Within the meaning of the Federal Food, Drug, and Cosmetic Act an imminent hazard to the public health is considered to exist when the evidence is sufficient to show that a product or practice, posing a significant threat of danger to health, creates a public health situation (1) that should be corrected immediately to prevent injury and (2) that should not be permitted to continue while a hearing or other formal proceeding is being held. The *imminent hazard* may be declared at any point in the chain of events which may ultimately result in harm to the public health. The occurrence of

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the final anticipated injury is not essential to establish that an *imminent hazard* of such occurrence exists.

(b) In exercising his judgment on whether an *imminent hazard* exists, the Commissioner will consider the number of injuries anticipated and the nature, severity, and duration of the anticipated injury.

§ 2.10 Examination and investigation samples.

(a)(1) When any officer or employee of the Department collects a sample of a food, drug, or cosmetic for analysis under the act, the sample shall be designated as an official sample if records or other evidence is obtained by him or any other officer or employee of the Department indicating that the shipment or other lot of the article from which such sample was collected was introduced or delivered for introduction into interstate commerce, or was in or was received in interstate commerce, or was manufactured within a Territory. Only samples so designated by an officer or employee of the Department shall be considered to be official samples.

(2) For the purpose of determining whether or not a sample is collected for analysis, the term *analysis* includes examinations and tests.

(3) The owner of a food, drug, or cosmetic of which an official sample is collected is the person who owns the shipment or other lot of the article from which the sample is collected.

(b) When an officer or employee of the Department collects an official sample of a food, drug, or cosmetic for analysis under the act, he shall collect at least twice the quantity estimated by him to be sufficient for analysis, unless:

(1) The amount of the article available and reasonably accessible for sampling is less than twice the quantity so estimated, in which case he shall collect as much as is available and reasonably accessible.

(2) The cost of twice the quantity so estimated exceeds \$150.

(3) The sample cannot by diligent use of practicable preservation techniques available to the Food and Drug Administration be kept in a state in which it could be readily and meaningfully ana-

lyzed in the same manner and for the same purposes as the Food and Drug Administration's analysis.

(4) The sample is collected from a shipment or other lot which is being imported or offered for import into the United States.

(5) The sample is collected from a person named on the label of the article or his agent, and such person is also the owner of the article.

(6) The sample is collected from the owner of the article, or his agent, and such article bears no label or, if it bears a label, no person is named thereon.

In addition to the quantity of sample set forth in this paragraph, the officer or employee shall, if practicable, collect such further amount as he estimates will be sufficient for use as trial exhibits.

(c) After the Food and Drug Administration has completed such analysis of an official sample of a food, drug, or cosmetic as it determines, in the course of analysis and interpretation of analytical results, to be adequate to establish the respects, if any, in which the article is adulterated or misbranded within the meaning of the act, or otherwise subject to the prohibitions of the act, and has reserved an amount of the article it estimates to be adequate for use as exhibits in the trial of any case that may arise under the act based on the sample, a part of the sample, if any remains available, shall be provided for analysis, upon written request, by any person named on the label of the article, or the owner thereof, or the attorney or agent of such person or owner, except when:

(1) After collection, the sample or remaining part thereof has become decomposed or otherwise unfit for analysis, or

(2) The request is not made within a reasonable time before the trial of any case under the act, based on the sample to which such person or owner is a party. The person, owner, attorney, or agent who requests the part of sample shall specify the amount desired. A request from an owner shall be accompanied by a showing of ownership, and a request from an attorney or agent by a showing of authority from such person or owner to receive the part of

sample. When two or more requests for parts of the same sample are received the requests shall be complied with in the order in which they were received so long as any part of the sample remains available therefor.

(d) When an official sample of food, drug, or cosmetic is the basis of a notice given under section 305 of the act, or of a case under the act, and the person to whom the notice was given, or any person who is a party to the case, has no right under paragraph (c) of this section to a part of the sample, such person or his attorney or agent may obtain a part of the sample upon request accompanied by a written waiver of right under such paragraph (c) from each person named on the label of the article and owner thereof, who has not exercised his right under such paragraph (c). The operation of this paragraph shall be subject to the exceptions, terms, and conditions prescribed in paragraph (c) of this section.

(e) The Food and Drug Administration is authorized to destroy:

(1) Any official sample when it determines that no analysis of such sample will be made;

(2) Any official sample or part thereof when it determines that no notice under section 305 of the act, and no case under the act, is or will be based on such sample;

(3) Any official sample or part thereof when the sample was the basis of a notice under section 305 of the act, and when, after opportunity for presentation of views following such notice, it determines that no other such notice, and no case under the act, is or will be based on such sample;

(4) Any official sample or part thereof when the sample was the basis of a case under the act which has gone to final judgment, and when it determines that no other such case is or will be based on such sample;

(5) Any official sample or part thereof if the article is perishable;

(6) Any official sample or part thereof when, after collection, such sample or part has become decomposed or otherwise unfit for analysis;

(7) That part of any official sample which is in excess of three times the

quantity it estimates to be sufficient for analysis.

[42 FR 15559, Mar. 22, 1977, as amended at 63 FR 51299, Sept. 25, 1998]

§ 2.19 Methods of analysis.

Where the method of analysis is not prescribed in a regulation, it is the policy of the Food and Drug Administration in its enforcement programs to utilize the methods of analysis of the Association of Official Analytical Chemists (AOAC) as published in the latest edition (13th Ed., 1980) of their publication "Official Methods of Analysis of the Association of Official Analytical Chemists," and the supplements thereto ("Changes in Methods" as published in the March issues of the "Journal of the Association of Official Analytical Chemists"), which are incorporated by reference, when available and applicable. Copies are available from the Association of Official Analytical Chemists, 2200 Wilson Blvd., Suite 400, Arlington, VA 22201-3301, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to:

http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. In the absence of an

AOAC method, the Commissioner will furnish a copy of the particular method, or a reference to the published method, that the Food and Drug Administration will use in its enforcement program. Other methods may be used for quality control, specifications, contracts, surveys, and similar non-regulatory functions, but it is expected that they will be calibrated in terms of the method which the Food and Drug Administration uses in its enforcement program. Use of an AOAC method does not relieve the practitioner of the responsibility to demonstrate that he can perform the method properly through the use of positive and negative controls and recovery and reproducibility studies.

[42 FR 15559, Mar. 22, 1977, as amended at 47 FR 946, Jan. 8, 1982; 54 FR 9034, Mar. 3, 1989]