the public hearing unless the Commissioner specifies otherwise.

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

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

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

§12.139 Reconsideration and stay of action.

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

Subpart H—Judicial Review

§12.140 Review by the courts.

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

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

§12.159 Copies of petitions for judicial review.

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

PART 13—PUBLIC HEARING BEFORE A PUBLIC BOARD OF INQUIRY

Subpart A—General Provisions

Sec.

Subpart B—Hearing Procedures

Subpart C—Records of a Hearing Before a Board

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

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

Subpart A—General Provisions

§13.1 Scope.

The procedures in this part apply when—

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

(b) Under specific sections of this chapter a matter before FDA is subject to a hearing before a Board; or

(c) Under §12.32, a person who has a right to an opportunity for a formal evidentiary public hearing waives that opportunity and requests that a Board act as an administrative law tribunal concerning the matters involved, and the Commissioner decides to accept this request.

§13.5 Notice of a hearing before a Board.

If the Commissioner determines that a Board should be established to conduct a hearing on any matter, a notice of hearing will be published in the FEDERAL REGISTER setting forth the following information:

(a) If the hearing is under §13.1 (a) or (b), all applicable information described in §12.32(e).

(1) Any written document that is to be the subject matter of the hearing

will be published as a part of the notice, or the notice will refer to it if the document has already been published in the FEDERAL REGISTER or state that the document is available from the Division of Dockets Management or an agency employee designated in the notice.

(2) For purposes of a hearing under §13.1 (a) or (b), all participants who file a notice of participation under §12.32(e)(6)(ii) are deemed to be parties and entitled to participate in selection of the Board under §13.15(b).

(b) If the hearing is in lieu of a formal evidentiary hearing, as provided in §13.1(c), all of the information described in §12.32(e).

[44 FR 22348, Apr. 13, 1979, as amended at 47 FR 26375, June 18, 1982]

§ 13.10 Members of a Board.

(a) All members of a Board are to have medical, technical, scientific, or other qualifications relevant to the issues to be considered, are subject to the conflict of interest rules applicable to special Government employees, and are to be free from bias or prejudice concerning the issues involved. A member of a Board may be a full-time or part-time Federal Government employee or may serve on an FDA advisory committee but, except with the agreement of all parties, may not currently be a full-time or part-time employee of FDA or otherwise act as a special Government employee of FDA.

(b) Within 30 days of publication of the notice of hearing, the director of the center of FDA responsible for a matter before a Board, the other parties to the proceeding, and any person whose petition was granted and is the subject of the hearing, shall each submit to the Division of Dockets Management the names and full curricula vitae of five nominees for members of the Board. Nominations are to state that the nominee is aware of the nomination, is interested in becoming a member of the Board, and appears to have no conflict of interest.

(1) Any two or more persons entitled to nominate members may agree upon a joint list of five qualified nominees.

(2) The lists of nominees must be submitted to the persons entitled to submit a list of nominees under this paragraph but not to all participants. Within 10 days of receipt of the lists of nominees, such persons may submit comments to the Division of Dockets Management on whether the nominees of the other persons meet the criteria established in paragraph (a) of this section. A person submitting comments to the Division of Dockets Management shall submit them to all persons entitled to submit a list of nominees.

(3) The lists of nominees and comments on them are to be held in confidence by the Division of Dockets Management as part of the administrative record of the proceeding and are not to be made available for public disclosure, and all persons who submit or receive them shall similarly hold them in confidence. This portion of the administrative record remains confidential but is available for judicial review in the event that it becomes relevant to any issue before a court.

(c) After reviewing the lists of nominees and any comments, the Commissioner will choose three qualified persons as members of a Board. One member will be from the lists of nominees submitted by the director of the center and by any person whose petition was granted and is the subject of the hearing. The second will be from the lists of nominees submitted by the other parties. The Commissioner may choose the third member from any source. That member is the Chairman of the Board.

(1) If the Commissioner is unable to find a qualified person with no conflict of interest from among a list of nominees or if additional information is needed, the Commissioner will request the submission of the required additional nominees or information.

(2) If a person fails to submit a list of nominees as required by paragraph (b) of this section, the Commissioner may choose a qualified member without further consultation with that person.

(3) The Commissioner will announce the members of a Board by filing a memorandum in the record of the proceeding and sending a copy to all participants.

(d) Instead of using the selection method in paragraphs (b) and (c) of this section, the director of the center, the other parties to the proceeding, and any person whose petition was granted

and is the subject of the hearing, may, with the approval of the Commissioner, agree that a standing advisory committee listed in §14.80 constitutes the Board for a particular proceeding, or that another procedure is to be used for selection of the members of the Board, or that the Board consists of a larger number of members.

(e) The members of a Board serve as consultants to the Commissioner and are special Government employees or Government employees. A Board functions as an administrative law tribunal in the proceeding and is not an advisory committee subject to the requirements of the Federal Advisory Committee Act or part 14.

(f) The Chairman of the Board has the authority of a presiding officer set out in §12.70.

[44 FR 22348, Apr. 13, 1979, as amended at 50 FR 8994, Mar. 6, 1985]

§13.15 Separation of functions; ex parte communications; administrative support.

(a) The proceeding of a Board are subject to the provisions of §10.55 relating to separation of functions and ex parte communications. Representatives of the participants in any proceeding before a Board, including any members of the office of the Chief Counsel of FDA assigned to advise the center responsible for the matter, may have no contact with the members of the Board, except as participants in the proceeding, and may not participate in the deliberations of the Board.

(b) Administrative support for a Board is to be provided only by the office of the Commissioner and the office of the Chief Counsel for FDA.

[44 FR 22348, Apr. 13, 1979, as amended at 54 FR 9035, Mar. 3, 1989]

Subpart B—Hearing Procedures

§13.20 Submissions to a Board.

(a) Submissions are to be filed with the Division of Dockets Management under §10.20.

(b) The person making a submission shall serve copies of it on each participant in the proceeding, except as provided in §§13.10(b)(2) and 13.45. Submissions of documentary data and information need not be sent to each participant, but any accompanying transmittal letter, summary, statement of position, certification under paragraph (d) of this section, or similar document must be.

(c) A submission must be mailed to the address shown in the notice of appearance or personally delivered.

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

(e) No written submission or other portion of the administrative record may be held in confidence, except as provided in §§13.10(b)(2) and 13.45.

(f) A participant who believes that compliance with the requirements of this section constitutes an unreasonable financial burden may submit to the Commissioner a petition to participate in forma pauperis in the form and manner specified in §12.82.

§13.25 Disclosure of data and information by the participants.

(a) Before the notice of hearing is published under §13.5, the director of the center responsible for the matters involved in the hearing must submit to the Division of Dockets Management—

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

(2) A list of all persons whose views will be presented orally or in writing at the hearing;

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

(4) All other documentary information relied on; and

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

(b) Within the time prescribed in the notice of hearing published under § 13.5, each participant shall submit to the Division of Dockets Management all information specified in paragraph (a)(2) through (5) of this section and any objections that the administrative record filed under paragraph (a)(1) of this section is incomplete. With respect to the information specified in paragraph (a)(3) of this section, participants are to exercise reasonable diligence in identifying documents in files comparable to those described in that paragraph.

(c) The submissions required by paragraphs (a) and (b) of this section may be supplemented later in the proceeding, with the approval of the Board, on a showing that the views of the persons or the material contained in the supplement was not known or reasonably available when the initial submission was made or that the relevance of the views of the persons or the material contained in the supplement could not reasonably have been foreseen.

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

(e) The Chairman rules on questions relating to this section. Any participant dissatisfied with a ruling may petition the Commissioner for interlocutory review.

[44 FR 22348, Apr. 13, 1979, as amended at 50 FR 8994, Mar. 6, 1985; 54 FR 9035, Mar. 3, 1989]

§ 13.30 Proceedings of a Board.

(a) The purpose of a Board is to review medical, scientific, and technical issues fairly and expeditiously. The proceedings of a Board are conducted as a scientific inquiry rather than a legal trial.

(b) A Board may not hold its first hearing until after all participants have submitted the information required by § 13.25.

(c) The Chairman calls the first hearing of the Board. Notice of the time and location of the first hearing is to be published at least 15 days in advance and the hearing will be open to the public. All participants will have an opportunity at the first hearing to make an oral presentation of the information and views which in their opinion are pertinent to the resolution of the issues being considered by a Board. A participant's presentation may be made by more than one person. The Chairman determines the order of the presentation. Participants may not interrupt a presentation, but members of the Board may ask questions. At the conclusion of a presentation, each of the other participants may briefly comment on the presentation and may request that the Board conduct further questioning on specified matters. Members of the Board may then ask further questions. Any other participant may be permitted to ask questions if the Chairman determines that it will help resolve the issues.

(d) The hearing is informal and the rules of evidence do not apply. No motions or objections relating to the admissibility of information and views may be made or considered, but other participants may comment upon or rebut all such information and views. No participant may interrupt the presentation of another participant for any reason.

(e) Within the time specified by the Board after its first hearing, participants may submit written rebuttal information and views in accordance with § 13.20. The Chariman will then schedule a second hearing, if requested and justified by a participant. A second hearing, and any subsequent hearing, will be called only if the Chairman concludes that it is needed to fully and fairly present information that cannot otherwise adequately be considered and to properly resolve the issues. Notice of the time and location of any hearing is to be published at least 15 days in advance. The hearing is open to the public.

(f) A Board may consult with any person who it concludes may have information or views relevant to the issues.

(1) The consultation may occur only at an announced hearing of a Board. Participants have the right to suggest or, with the permission of the Chairman, ask questions of the consultant and present rebuttal information and views, as provided in paragraphs (c) and (d) of this section except that written statements may be submitted to the Board with the consent of all participants.

(2) A participant may submit a request that the Board consult with a specific person who may have information or views relevant to the issues. The request will state why the person should be consulted and why the person's views cannot be furnished to the Board by means other than having FDA arrange for the person's appearance. The Board may, in its discretion, grant or deny the request.

(g) All hearings are to be transcribed. All hearings are open to the public, except that a hearing under §10.20(j)(3) is closed to all persons except those persons making and participating in the presentation and Federal Government executive branch employees and special Government employees. At least a majority of Board members are to be present at every hearing. The executive sessions of a Board, during which a Board deliberates on the issues, are to be closed and are not transcribed. All members of the Board shall vote on the report of the Board.

(h) All legal questions are to be referred to the Chief counsel for FDA for resolution. The Chief Counsel's advice on any matter of procedure or legal authority is to be transmitted in writing and made a part of the record or presented in open session and transcribed.

(i) At the conclusion of all public hearings the Board will announce that the record is closed to receiving information. The Board will provide an opportunity for participants to submit written statements of their positions, with proposed findings and conclusions, and may in its discretion, provide an opportunity for participants to summarize their positions orally.

(j) The Board will prepare a decision on all issues. The decision is to include specific findings and references supporting and explaining the Board's conclusions, and a detailed statement of the reasoning on which the conclusions are based. Any member of the Board may file a separate report stating additional or dissenting views.

Subpart C—Records of a Hearing Before a Board

§ 13.40 Administrative record of a Board.

(a) The administrative record of a hearing before a Board consists of the following:

(1) All relevant FEDERAL REGISTER notices.

(2) All written submissions under §13.20.

(3) The transcripts of all hearings of the Board.

(4) The initial decision of the Board.

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

(1) Relevant to receiving information and data, at the time specified in §13.30(i); and

(2) Relevant to pleadings, at the time specified in §13.30(i) for filing a written statement of position with proposed findings and conclusions.

(c) The Board may, in its discretion, reopen the record to receive further evidence at any time before filing an initial decision.

§ 13.45 Examination of administrative record.

(a) The availability for public examination and copying of each document which is a part of the administrative record of the hearing is governed by §10.20(j). Each document available for public examination or copying is placed on public display in the office of the Division of Dockets Management promptly upon receipt in that office.

(b) Lists of nominees and comments submitted on them under §13.10(b)(3) are not subject to disclosure unless they become an issue in a court proceeding.

§ 13.50 Record for administrative decision.

The administrative record of the hearing specified in § 13.40(a) constitutes the exclusive record for decision.

PART 14—PUBLIC HEARING BEFORE A PUBLIC ADVISORY COMMITTEE

Subpart A—General Provisions.

Subpart B—Meeting Procedures

Subpart C—Establishment of Advisory Committees

Subpart D—Records of Meetings and Hearings Before Advisory Committees

Subpart E—Members of Advisory Committees

Subpart F—Standing Advisory Committees

Subpart G—Technical Electronic Products Radiation Safety Standards Committee

Subpart H—Color Additive Advisory Committees

Subpart I—Advisory Committees for Human Prescription Drugs

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SOURCE: 44 FR 22351, Apr. 13, 1979, unless otherwise noted.