

Subpart F—Administrative Record

§ 12.100 Administrative record of a hearing.

(a) The record of a hearing consists of—

- (1) The order or regulation or notice of opportunity for hearing that gave rise to the hearing;
- (2) All objections and requests for hearing filed by the Dockets Management Branch under §§12.20 through 12.22;
- (3) The notice of hearing published under §12.35;
- (4) All notices of participation filed under §12.45;
- (5) All FEDERAL REGISTER notices pertinent to the proceeding;
- (6) All submissions filed under §12.82, e.g., the submissions required by §12.85, all other documentary evidence and written testimony, pleadings, statements of position, briefs, and other similar documents;
- (7) The transcript, written order, and all other documents relating to the prehearing conference, prepared under §12.92;
- (8) All documents relating to any motion for summary decision under §12.93;
- (9) All documents of which official notice is taken under §12.95;
- (10) All pleadings filed under §12.96;
- (11) All documents relating to any interlocutory appeal under §12.97;
- (12) All transcripts prepared under §12.98; and
- (13) Any other document relating to the hearing and filed with the Dockets Management Branch by the presiding officer or any participant;

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

- (1) With respect to the taking of evidence, when specified by the presiding officer; and
 - (2) With respect to pleadings, at the time specified in §12.96(a) for the filing of briefs.
- (c) The presiding officer may reopen the record to receive further evidence at any time before the filing of the initial decision.

§ 12.105 Examination of record.

Documents in the record will be publicly available in accordance with §10.20(j). Documents available for ex-

amination or copying will be placed on public display in the office of the Dockets Management Branch promptly upon receipt in that office.

Subpart G—Initial and Final Decisions

§ 12.120 Initial decision.

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

(b) The initial decision must contain—

- (1) Findings of fact based issued upon relevant, material, and reliable evidence of record;
- (2) Conclusions of law;
- (3) A discussion of the reasons for the findings and conclusions, including a discussion of the significant contentions made by any participant;
- (4) Citations to the record supporting the findings and conclusions;
- (5) An appropriate regulation or order supported by substantial evidence of record and based upon the findings of fact and conclusions of law; and
- (6) An effective date for the regulation or order.

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

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

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

(f) Notice that an initial decision has become the decision of the Commissioner without appeal to or review by the Commissioner will be published in

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the FEDERAL REGISTER, or the Commissioner may publish the decision when it is of widespread interest.

§ 12.125 Appeal from or review of initial decision.

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

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

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

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

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

(f) Within 10 days following the expiration of the time for filing exceptions (including any extensions), the Commissioner may file with the Dockets Management Branch, and serve on the participants, a notice of the Commissioner's determination to review the initial decision. The Commissioner may invite the participants to file briefs or present oral argument on the matter. The time for filing briefs or

presenting oral argument will be specified in that or a later notice.

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

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

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

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

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

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

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

§ 12.139 Reconsideration and stay of action.

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

Subpart H—Judicial Review

§ 12.140 Review by the courts.

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

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