

**§ 17.47**

(2) Whether any affirmative defenses are meritorious; and

(3) If the respondent is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors that he or she finds in the case.

(c) The presiding officer shall serve the initial decision or the decision granting summary decision on all parties within 90 days after the time for submission of posthearing briefs and responsive briefs (if permitted) has expired. If the presiding officer believes that he or she cannot meet the 90-day deadline, he or she shall notify the Commissioner of Food and Drugs or other entity designated by the Commissioner to decide the appeal of the reason(s) therefor, and the Commissioner or that entity may then set a new deadline.

(d) Unless the initial decision or the decision granting summary decision of the presiding officer is timely appealed, the initial decision or the decision granting summary decision shall constitute the final decision of FDA and shall be final and binding on the parties 30 days after it is issued by the presiding officer.

**§ 17.47 Appeals.**

(a) Either the Center or any respondent may appeal an initial decision, including a decision not to withdraw a default judgment, or a decision granting summary decision to the Commissioner of Food and Drugs or other entity the Commissioner designates to decide the appeal. The Commissioner has currently designated the Departmental Appeals Board (DAB) to decide appeals under this part. Parties may appeal to the DAB by filing a notice of appeal with the DAB, rm. 637-D, Hubert H. Humphrey Bldg., 200 Independence Ave. SW., Washington, DC 20201, and the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857, in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the presiding officer issues an initial decision or decision granting summary decision.

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(2) The Commissioner or the entity designated by the Commissioner to hear appeals may, within his or her discretion, extend the initial 30-day period for an additional period of time if the Center or any respondent files a request for an extension within the initial 30-day period and shows good cause.

(c) A notice of appeal shall be accompanied by a written brief of no greater length than that allowed for the posthearing brief. The notice must identify specific exceptions to the initial decision, must support each exception with citations to the record, and must explain the basis for each exception.

(d) The opposing party may file a brief of no greater length than that allowed for the posthearing brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief, unless such time period is extended by the Commissioner or the entity designated by the Commissioner to hear appeals on request of the opposing party for good cause shown. Any brief in opposition to exceptions shall be filed with the Dockets Management Branch and the DAB (addresses above).

(e) The appellant may file a reply brief not more than 10 pages in length within 10 days of being served with appellee's brief.

(f) There is no right to appear personally before the Commissioner of Food and Drugs or other entity deciding the appeal (currently the DAB).

(g) The entity deciding the appeal will consider only those issues raised before the presiding officer, except that the appellee may make any argument based on the record in support of the initial decision or decision granting summary decision.

(h) If on appeal the entity deciding the appeal considers issues not adequately briefed by the parties, the entity may ask for additional briefing. However, no such additional briefs will be considered unless so requested.

(i) If any party demonstrates to the satisfaction of the entity deciding the appeal (currently the DAB) that additional evidence not presented at the hearing is relevant and material and that there were reasonable grounds for

the failure to adduce such evidence at the hearing, the entity deciding the appeal may remand the matter to the presiding officer for consideration of the additional evidence.

(j) The Commissioner of Food and Drugs or other entity deciding the appeal (currently the DAB) will issue a decision on the appeal within 60 days, if practicable, of the due date for submission of the appellee's brief. In the decision, the entity deciding the appeal may decline to review the case, affirm the initial decision or decision granting summary decision (with or without an opinion), or reverse the initial decision or decision granting summary decision, or increase, reduce, reverse, or remand any civil money penalty determined by the presiding officer in the initial decision. If the entity deciding the appeal declines to review the case, the initial decision or the decision granting summary decision shall constitute the final decision of FDA and shall be final and binding on the parties 30 days after the declination by the entity deciding the appeal.

(k) The standard of review on a disputed issue of fact is whether the initial decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the initial decision is erroneous.

#### **§ 17.48 Harmless error.**

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in any act done or omitted by the presiding officer or by any of the parties is grounds for vacating, modifying, or otherwise disturbing an otherwise appropriate ruling or order or act, unless refusal to take such action appears to the presiding officer or the Commissioner of Food and Drugs or other entity deciding the appeal (currently the DAB) to be inconsistent with substantial justice. The presiding officer and the entity deciding the appeal at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

#### **§ 17.51 Judicial review.**

(a) The final decision of the Commissioner of Food and Drugs or other entity deciding the appeal (currently the DAB) constitutes final agency action from which a respondent may petition for judicial review under the statutes governing the matter involved. Although the filing of a petition for judicial review does not stay a decision under this part, a respondent may file a petition for stay of such decision under § 10.35 of this chapter.

(b) The Chief Counsel of FDA has been designated by the Secretary of Health and Human Services as the officer on whom copies of petitions for 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 entity deciding the appeal (currently the DAB).

(c) Exhaustion of an appeal to the entity deciding the appeal (currently the DAB) is a jurisdictional prerequisite to judicial review.

#### **§ 17.54 Deposit in the Treasury of the United States.**

All amounts assessed pursuant to this part shall be delivered to the Director, Division of Financial Management (HFA-100), Food and Drug Administration, rm. 11-61, 5600 Fishers Lane, Rockville, MD 20857, and shall be deposited as miscellaneous receipts in the Treasury of the United States.

## **PART 19—STANDARDS OF CONDUCT AND CONFLICTS OF INTEREST**

### **Subpart A—General Provisions**

Sec.

19.1 Scope.

19.5 Reference to Department regulations.

19.6 Code of ethics for government service.

19.10 Food and Drug Administration Conflict of Interest Review Board.

### **Subpart B—Reporting of Violations**

19.21 Duty to report violations.

### **Subpart C—Disqualification Conditions**

19.45 Temporary disqualification of former employees.