

Food and Drug Administration, HHS

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(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; 69 FR 31705, June 4, 2004]

§ 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

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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 applicable 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) [Reserved]

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

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

(10)–(11) [Reserved]

(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

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economic regulations for food, drugs, devices, and cosmetics.

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

(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; 67 FR 4906, Feb. 1, 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