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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1316

[Docket No. DEA-493]

Interlocutory Appeals in Administrative Hearings

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: The Drug Enforcement Administration is amending its hearing regulations to provide that, when the presiding officer of an administrative hearing denies an interlocutory appeal, he shall transmit his determination to the Drug Enforcement Administration Administrator for discretionary review.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Lynnette Wingert, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, VA 22152, Telephone: (202) 598-6812.

SUPPLEMENTARY INFORMATION: The Drug Enforcement Administration (DEA) is amending its administrative hearing regulation governing interlocutory appeals of rulings of the presiding officer.¹

¹ 21 CFR 1316.62.

Under the current regulations, the parties are not entitled to appeal a ruling of the presiding officer² to the DEA Administrator (Administrator), prior to the conclusion of the hearing, except with the consent of the presiding officer based upon his certification that the allowance of the appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party or substantial detriment to the public interest. If the presiding officer denies a party the right to file an interlocutory appeal, the party has no right to challenge the presiding officer's denial of the appeal. Thus, under the current regulation, the presiding officer has the ability to preclude interlocutory appeal, and therefore foreclose the Administrator's ability to timely correct an erroneous ruling by the presiding officer, even where the effects of that error may be significant.

Under the newly revised regulation, when the presiding officer denies the motion of any party for interlocutory review of a ruling by him, the presiding officer must transmit his determination and the parties' filings related to the interlocutory appeal to the Administrator for the Administrator's discretionary review. The Administrator may, notwithstanding the presiding officer's ruling, decide that interlocutory review of the issue(s) raised is warranted to prevent exceptional delay, expense, or prejudice to any party or substantial detriment to the public interest. In this way, this rule leaves the current standard for granting an interlocutory appeal unchanged but merely allows the Administrator, in the exercise of his discretion, to determine that the standard is met in a particular case.

The DEA has determined that this rule is necessary for the efficient execution of the administrative hearing process. The new regulation does not, however, grant either party

² DEA regulations define "presiding officer" as "an administrative law judge qualified and appointed as provided in the Administrative Procedure Act (5 U.S.C. 556)." 21 CFR 1316.42(f).

the right to file any additional briefing as to why the interlocutory appeal should either be allowed or denied. Rather, it simply preserves the Administrator's authority to be the final decision-maker as to important legal questions, and ensures that the Administrator will have the opportunity to weigh in on matters of considerable importance. The rule also requires that the presiding officer grant or deny a party's request for consent to take an interlocutory appeal within ten (10) business days of receipt of the request. It also requires that, in the event the presiding officer denies the request to take the appeal, the presiding officer must transmit his determination and the parties' filings related to the request to the Administrator for his review within three (3) business days.

Regulatory Analyses

Notice and Comment Rulemaking Is Not Required Because This Rule Is a Rule of Agency Procedure or Practice

Pursuant to 5 U.S.C. 553(b)(A), rules of agency procedure or practice are not subject to the requirements of notice and comment rulemaking. As the U.S. Court of Appeals for the District of Columbia Circuit has explained, "the 'critical feature' of the procedural exception 'is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'"³

This rule does not create any substantive right in a party beyond those already existing under 21 CFR 1316.62 or alter a party's existing right to seek interlocutory review of a ruling of a presiding officer. Rather, the rule merely preserves the Administrator's authority to address important legal questions on an interlocutory basis

³ *JEM Broadcasting Co., Inc., v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)).

when he concludes that review is clearly necessary to prevent exceptional delay, expense, or prejudice to any party or substantial detriment to the public interest, the same standard that has long applied to interlocutory appeals in DEA administrative proceedings.

Accordingly, the DEA has determined that this rule is a rule of agency procedure or practice which is not subject to the notice and comment rulemaking procedures under 5 U.S.C. 553(b). For the same reasons, the DEA has determined that this rule is effective immediately.⁴

Executive Orders 12866, 13563, and 13771 (Regulatory Planning and Review, Improving Regulation and Regulatory Review, and Reducing Regulation and Controlling Regulatory Costs)

This rule was developed in accordance with the principles of Executive Orders 12866, 13563, and 13771. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866.

This rule will not have an annual effect on the economy of \$100 million or more in at least one year and therefore is not an economically significant regulatory action. As described above, this rule only affects review procedures for DEA administrative hearings—specifically, when the Administrator may engage in interlocutory review of

⁴ 5 U.S.C. 553(d).

rulings in DEA administrative hearings. Because this rule does not create any new regulatory burdens, the DEA concludes its economic impact, if any, will be extremely limited.

This rule merely modifies an existing procedural rule for the conduct of administrative hearings. Accordingly, it does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Accordingly, the DEA has determined that this rule is not a "significant regulatory action" under Executive Order 12866, and it has not been reviewed by the Office of Management and Budget.

Because the DEA has determined that this rule is not a significant regulatory action under Executive Order 12866, this rule is not subject to the requirements of Executive Order 13771.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with

Executive Order 13132, the DEA has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This rule does not have tribal implications warranting the application of Executive Order 13175. It does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Paperwork Reduction Act

This rule does not impose new information collection requirements under the Paperwork Reduction Act of 1995.⁵ It is a rule of agency procedure or practice, and does not impose new reporting or recordkeeping requirements on State or local governments, individuals, businesses, or organizations.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)⁶ requires an agency to conduct a regulatory flexibility analysis assessing a rule's impact on small entities when the agency promulgates a rule that is subject to notice and comment under 5 U.S.C. 553(b).⁷ As explained above, this final rule is a rule of agency procedure or practice and thus not subject to section 553(b)'s notice and comment requirement. Consequently, this RFA requirement does not apply to this rule.

⁵ 44 U.S.C. 3501-3521.

⁶ 5 U.S.C. 601-612.

⁷ 5 U.S.C. 603(a), 604(a).

Unfunded Mandates Reform Act of 1995

The requirements of the Unfunded Mandates Reform Act of 1995 (UMRA)⁸ apply to rules subject to the notice and comment rulemaking procedures of 5 U.S.C. 553(b).⁹ As discussed above, this is not such a rule. Moreover, DEA has determined that this action would not result in any Federal mandate that may result “in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted for inflation) in any one year.”¹⁰ Therefore, neither a Small Government Agency Plan nor any other action is required under the UMRA.

Congressional Review Act

This action is not a major rule as defined by section 804 of the Congressional Review Act (CRA).¹¹ It is a rule of “agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties,” and accordingly is not subject to the reporting requirement under the CRA.¹²

List of Subjects in 21 CFR Part 1316

Administrative practice and procedure, Authority delegations (Government agencies), Drug traffic control, Research, Seizures and forfeitures.

For the reasons set out above, DEA amends 21 CFR part 1316 as follows:

PART 1316—ADMINISTRATIVE FUNCTIONS, PRACTICES, AND PROCEDURES

Subpart D—Administrative Hearings

⁸ 2 U.S.C. 1501 *et seq.*

⁹ 2 U.S.C. 1532(a).

¹⁰ *Id.*

¹¹ 5 U.S.C. 801-808.

¹² *See* 5 U.S.C. 804(3)(C).

1. The authority citation for part 1316, subpart D, continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 875, 958(d), 965.

2. Revise § 1316.62 to read as follows:

§ 1316.62 Interlocutory appeals from rulings of the presiding officer.

Rulings of the presiding officer may not be appealed to the Administrator prior to his consideration of the entire hearing without first requesting the consent of the presiding officer. Within ten (10) business days of receipt of a party's request for such consent, the presiding officer shall certify on the record or in writing his determination of whether the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense or prejudice to any party, or substantial detriment to the public interest. If the presiding officer denies an interlocutory appeal, he shall, within three (3) business days, transmit his determination and the parties' filings related to the interlocutory appeal to the Administrator for the Administrator's discretionary review. If an interlocutory appeal is allowed by the presiding officer or if the Administrator determines that an appeal is warranted under this section, any party to the hearing may file a brief in quintuplicate with the Administrator within such period that the Administrator directs. No oral argument will be heard unless the Administrator directs otherwise.

Dated: April 23, 2019.

Uttam Dhillon,
Acting Administrator.

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