

FEDERAL ADMINISTRATIVE LAW: A BRIEF OVERVIEW

By Richard J. McKinney, Assistant Law Librarian, Federal Reserve Board, May 2010 Presentation to LLSDC Librarians
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Federal administrative law primarily concerns the **powers and procedures of Federal administering agencies** in relation to the public (but usually not in criminal matters). It is Congress that grants general and specific powers to various Federal agencies through **enabling legislation** as well the general laws for their fair and orderly administration. These executive powers are often **quasi-legislative in nature** (via rules and regulations applicable to a class of persons or organizations) or **quasi-judicial in nature** (via orders, adjudications and decisions involving particular persons or organizations). The given powers are also subject to **judicial review** and interpretation. As industry and technology grew over the past 125 years Congress deemed it appropriate to **delegate the details of administering laws** to protect the public or enhance fairness to executive departments or independent regulatory agencies. Unlike the heads of executive departments and agencies the heads of **independent regulatory agencies** generally do not serve at the pleasure of the President or have their rules and legislative recommendations reviewed first by OMB (see [12 USC 250](#), [44 USC 3502\(5\)](#), [E.O. 128663\(b\)](#), and [OMB Circular A-19](#)). The first independent regulatory agency was the Interstate Commerce Commission established in 1887.

Current Major Federal Government Regulatory Agencies (as selected in [Fed. Regulatory Directory](#))

- Consumer Product Safety Commission (<http://www.CPSC.gov>)
(est. 1973; 3 commissioners, 7 yr. term; only 2 from same party)
- Environmental Protection Agency (<http://www.EPA.gov>)
(est. 1970; headed by an administrator who is a cabinet officer)
- Equal Employment Opportunity Commission (<http://www.EEOC.gov>).
(est. 1965; 5 commissioners; 5 yr. terms, only 3 from same party)
- Federal Communications Commission (<http://www.FCC.gov>).
(est. 1934; 5 commissioners; 5 yr. terms, only 3 from same party)
- Federal Deposit Insurance Corporation (<http://www.FDIC.gov>)
(est. 1933; 5 board of directors; 6 yr. terms, only 3 from same party; non-appropriated)
- Federal Energy Regulatory Commission (<http://www.FERC.gov>)
(est. 1977; 5 commissioners; 5 yr. terms)
- Federal Reserve System, Board of Governors of the (<http://www.FederalReserve.gov>)
(est. 1913; 7 governors, 14 yr. terms, non-appropriated)
- Federal Trade Commission (<http://www.FTC.gov>)
(est. 1914; 5 commissioners; 7 yr. terms; only 3 in same party)
- Food and Drug Administration (<http://www.FDA.gov>)
(est. 1906; headed by 1 commissioner; under HHS Dept.)
- National Labor Relations Board (<http://www.NLRB.gov>)
(est. 1935; 1 Gen. Counsel - 4 yr. term & 5 other members - 5 yr. terms)
- Occupational Safety and Health Administration (<http://www.OSHA.gov>)
(est. 1970; 1 Asst. Secretary; under Labor Dept.)
- Securities and Exchange Commission (<http://www.SEC.gov>)
(est. 1934; 5 commissioners; 5 yr. terms; only 3 from same party; non-appropriated)

General Federal Agency Directories

[A-Z Index of U.S. Government Departments and Agencies](#) on USA.gov

[United States Government Manual](#) on FDsys (annual or biennial editions from 1997)

[Federal Regulatory Directory](#) subscription (annual book or online) by CQ Press/Sage Publications

[Federal Yellow Book](#) subscription (quarterly book or online) by Leadership Directories, Inc.

Major Federal Administrative and Rulemaking Laws

Federal Register Act, 1935 ([44 USC § 1501 et seq.](#))

Provides that all agency rules be published in the daily Federal Register; 1937 amdt – CFR

By rule since mid-1970's preambles with explanation & comment summaries are required

Administrative Procedure Act, 1946 ([5 USC § 551 et seq.](#) and [5 USC § 701 et seq.](#), - Judicial Review)

Sets up rulemaking process, admin procedures, adjudication, hearings, etc. (required prop. rules)

Freedom of Information Act, 1966 ([5 USC § 552](#))

Ensures public access, by request, to government records with various exempted info categories

Privacy Act of 1974 ([5 USC § 552a](#))

Establishes fair agency practices for maintaining personally identifiable information

Government in the Sunshine Act, 1976 ([5 USC § 552b](#))

Requires open and announced government agency meetings with some exceptions

Regulatory Flexibility Act, 1980 ([5 USC § 601 et seq.](#)) (see § 601 notes to related laws & Exec. Orders)

Requires reg. analysis of agency prop. rules (impact on small bsns); semi-annual reg. agenda

Paperwork Reduction Act of 1980 / 1995 ([44 USC § 3501 et seq.](#))

Requires agency rules/info collection activities be sent to OMB first & reduce paperwork burden

Congressional Review Act, 1996 ([5 USC § 801 et seq.](#))

Requires agencies to submit agency rules to Congress for 30 day review & possible disapproval

Some Other Federal Administrative Laws

Federal Tort Claims Act, 1946 ([28 USC § 2671 et seq.](#))

Permits private parties to sue U.S. in federal court for tort claims committed by gov. officials

Federal Advisory Committee Act, 1972 ([5 USC app.](#))

Places limits on the governing & establishment of federal advisory committees

Equal Access to Justice Act, 1980 ([5 USC § 504](#)), et. al

Provides payment by U.S. to prevailing parties of fees/costs in agency adjudications / courts

Negotiated Rulemaking Act of 1990 ([5 USC § 561, et seq.](#))

Allows agency heads to establish negotiated rulemaking committees to help formulate a rule

Unfunded Mandates Reform Act of 1995 ([2 USC 1501 et seq.](#))

Limits Federal mandates on state & local governments without providing funding

Alternative Dispute Resolution Act of 1998 ([28 USC 651 et seq.](#))

Authorizes and encourages U.S. district courts to use ADR process and arbitrators

Types of Federal Agency Rules and Notices Published in the Federal Register (FR)

Rules and Regulations – Finalized agency rules – text placed in annual CFR with FR cites

Interim & Interim Final Rules – Temporary rules with request for comment (speed usually needed)

Direct Final Rules – Finalized agency rules with request for comments & possible rule withdrawal

Proposed Rules – Proposed rules published in FR with request for comments (30 – 90 days) (NPRM)

Advanced Notice of Proposed Rulemaking (ANPR) – Notice requesting comments for possible rule

Negotiated Rulemaking Documents – Notices regarding negotiated rulemaking committees

Petition for Rulemaking, Petition Findings – requests, usually from non-governmental bodies

Notices – Section published in FR for certain agency announcements on meetings, applications, grants, decisions, authority delegations, information collection activities, policy statements, etc.

Presidential Documents – Proclamations, Orders, & Memos placed either before Rules or after Notices

Reader Aids and Other Material – Info on publisher, subscriptions, table of contents, CFR parts affected, customer service, electronic research, CFR parts affected during current month, list of new laws

See Federal Register [Document Drafting Handbook](#)

See next day's Federal Register items on its [Public Inspection](#) site (items may increase throughout day)

Federal Rules, Non-Rules and Other Terminology (see CRS reports [RL32240](#), [R43056](#), [R43562](#))
Delegated Authority – Congressionally delegated powers to agencies; agency delegations to staff/others
Legislative Rules – Finalized, binding rules authorized by Congress with notice/comment process
Procedural Rules – Non-substantive rules that need not go through notice/comment process
Retroactive Rules – Finalized or adjudicative rules having retroactive effect permitted by law/courts
Interpretive Rules – Non-binding agency interpretations/opinions of statutes; may persuade courts
Informal Rules – Non-binding, non-enforceable agency guidance, policy statements, letters (FR notice)
Preamble to Rules – Required info with rules – Agency, Action, Summary, Dates, Addresses, Supp. Info
Orders, Decisions – Binding pronouncements by agency officials concerning individuals/companies
Adjudications – Disposition of individual claims by gov. officials after administrative due process
Administrative Law Judge – presides at admin. hearings, takes testimony, makes determinations of fact..
Judicial Review – Court review of agency rules/decisions for authority, due process, standing... [R41546](#)

Researching Federal Regulations (sources - free & commercial)

[Federal Register on FDsys](#) or [GovInfo](#) (1990+ - browse, search, cite navigate (pdf authenticated docs))
[FederalRegister.gov](#) (from 1994 - browse by agency, advance search, links to FDsys docs)
[Federal Register](#) (1936-93) & [CFR](#) (1938-95) via Library of Congress/HeinOnline (browse/print/downl)
[Code of Federal Regulations on FDsys](#) (annual from 1997; browse, search, navigate by cite - pdf)
[eCFR.gov](#) (current CFR - browse only, can also link, no pdf docs, not official or authenticated)
[List of CFR Sections Affected](#) on FDsys (indicates changes to CFR sections by proposed & final rules)
[OpenRegs.com](#) (mobile app for tracking regulations (recent & proposed) created at George Mason Univ.
[RegInfo.gov](#) (tracks pending regulations for OMB review with indepen. agencies exempt; see [Reg Map](#))
[Regulations.gov](#) (central site to comment on all proposed rules & also view submitted comments)
[Regulations on Justia.com](#) (track regulations, browse by agency or date from 2005, has RSS feeds)
[Research Guide to the Federal Register](#) and the Code of Federal Regulations on LLSDC.org
[Federal Register Library](#) on [HeinOnline.org](#) (Fed. Reg. from 1936) (CFR from 1938) (all pdf)
[Federal Register and CFR on LexisAdvance.com](#) (Fed. Reg. from 1936) (CFR from 1981) (text & pdf)
[Federal Register and CFR on Westlaw.com](#) (Fed. Reg. from 1936) (CFR from 1984) (text & pdf)
Other Commercial Services – BloombergLaw, LoisLaw, RegScan, etc.

Researching Federal Agency Orders, Decisions, Interpretations, Letters, etc. on Internet

Federal agency web sites (dig deep) & perhaps create a custom Google search like this [SEC search site](#)
ASU Sandra Day O'Connor College of Law site on Federal [Agency Decisions & Orders](#)
Pace University Law Library site on [Federal Administrative Decisions and Resources](#)
Federal Administrative Decisions & Guidance on [Westlaw.com](#)
Federal Administrative Materials on [LexisAdvance.com](#)
U.S. Federal Agency Documents, Decisions, and Appeals Library on [HeinOnline](#)
Other commercial websites and publications like BloombergLaw, LoisLaw, LRP Publications, etc.

Selected Administrative Law Treatises

[Administrative Law](#) by Stein, Mitchell & Mezines, LexisNexis (six volume loose-leaf)
[Administrative Law and Practice](#), 3d ed. by C. H. Koch, Thomson Reuters, 2010 with poc. part updates
[Administrative Law and Process in a Nutshell](#), 5th ed. by Gellhorn & Levin, Thomson Reuters, 2006
[Administrative Law and Regulatory Policy](#) by Breyer, et. al., 6th ed., 2006
[Administrative Law, Third Series](#) - Bloomberg BNA (multiple volume monthly loose-leaf service)
[Administrative Law Treatise](#) by Richard J. Pierce, Aspen/Wolters Kluwer, 5th ed. (3 vol. loose-leaf)
[Administrative Rulemaking: Structuring, Opposing, and Defending](#), 2016 by O'Reilly, Thomson Reuters
[Federal Administrative Procedure Sourcebook](#), 5th ed. 2016, by Funk & Lubbers, American Bar Assn
[A Guide to Federal Agency Rulemaking](#) by Jeffrey Lubbers, American Univ., 5d ed. 2012

Selected Supreme Court Opinions on Federal Administrative Law

J.W. Hampton Jr. & Co. v. United States [[276 U.S. 394](#)] (1928)]

Held that delegation of legislative power to federal agencies is not unconstitutional so long as the agency in its exercise conforms to an “intelligible principle” of action authorized by Congress

Panama Refining Co. v Ryan [[293 U.S. 388](#)] (1935)]

Invalidated a provision of executive regulation as Congress laid down no intelligible principle for the delegation of that power (order had also been inadvertently repealed and reinstated)

Skidmore v. Swift & Co. [[323 U.S. 134](#)] (1944)]

Held that an agency’s interpretations and rules are to be given deference according to the agency’s thoroughness of investigation, valid reasoning, consistency, and other persuasiveness

Citizens to Preserve Overton Park v. Volpe [[401 U.S. 402](#)] (1971)]

Held that agency discretionary action is subject judicial review to determine if action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. [[467 U.S. 837](#)] (1984)]

Held that if the statute is unclear then deference goes to a permissible construction by the agency

NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co. [[513 U.S. 251](#)] (1995)]

Held that an agency’s interpretation of an ambiguous statute was a permissible construction (variable annuities are not insurance & are incidental to banking)

Christensen et al. v. Harris County et al. [[529 U.S. 576](#)] (2000)]

Held that agency opinion letters, interpretations, guidelines, policy statements, and manuals lack the force of law and do not require deference but are to be respected if persuasive per *Skidmore*

United States v. Mead Corp. [[533 U.S. 218](#)] (2001)]

Held that *Chevron* deference of agency lawmaking does not necessarily apply to agency decisions that have not gone through notice-and-comment rulemaking or formal adjudication

Barnhart v. Walton [[535 U.S. 212](#)] (2002)]

Held that *Chevron* deference may be applicable to a reasonable agency interpretation of an ambiguous statute with interstitial legal questions

Talk America, Inc. v. Michigan Bell [[June 9, 2011](#)]

Held that deference is due agency interpretations of ambiguous agency rules

Perez v. Mortgage Bankers Ass’n - [[Mar. 9, 2015](#)]

Held that agencies may revise interpretations of own regs w/o notice-and-comment procedures

Encino Motorcars v. Navarro [[Jun. 20, 2016](#)].

Held that *Chevron* deference doesn’t apply when a regulation is procedurally defective or lacks adequate explanation for deviation from past agency policy; suggests it is arbitrary & capricious.

Selected Web Sites on Federal Administrative Law

[ABA Administrative Procedure Database Archive](#) at FSU College of Law

[ABA’s Section of Administrative Law and Regulatory Practice](#) at AmericanBar.org

[Administrative Law](#) at HG.org Legal Resources; also has state administrative code links

[Administrative Law](#) site at Loyola University of Chicago – School of Law Library

[Administrative Law Course Outlines](#) at Internet Legal Resource Group (ilrg.com)

[Administrative Law Research](#) site at Harvard Law School Library

[Administrative Law Research Tutorial](#) site at Georgetown Law Library

[Administrative Law Review](#) (back issues from American University Washington College of Law)

[Federal Administrative Law](#) site at Duke University Goodson Law Library

[Federal Administrative Law](#) site at George Mason University School of Law – Library Research Guide

[Federal Administrative Law Judges Conference](#) at FALJC.org

[Guide to Administrative Law](#) site at the Law Library of Congress

[National Association of Administrative Law Judiciary](#) at NAALJ.org