FEDERAL ADMINISTRATIVE LAW: A BRIEF OVERVIEW

By Richard J. McKinney, Assistant Law Librarian, Federal Reserve Board, May 2010 Presentation to LLSDC Librarians

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)
   (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)
   (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)
   (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 amdts – 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)
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)
Federal Register.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)
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)
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, Third Series - Bloomberg BNA (multiple volume monthly loose-leaf service)
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
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

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

- 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 lawmakering does not necessarily apply to agency decisions that have not gone through notice-and-comment rulemaking or formal adjudication

- 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

- 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 Library of Congress
National Association of Administrative Law Judiciary at NAALJ.org