Administrative
Procedure
Act

Citations:


The Administrative Procedure Act (APA), as originally enacted, was repealed by Pub. L. No. 89-554, 80 Stat. 381 (September 6, 1966), as part of the general revision of title 5 of the United States Code. Its provisions were incorporated into the sections of title 5 listed above. Although the original section numbers are used sometimes, it is actually an error to use the original section numbers unless one is referring to the APA prior to its codification in 1966. In this volume all references to the Act are to sections of title 5.

Section 552 has been revised significantly since 1946 and is commonly known as the Freedom of Information Act. Section 552a (the Privacy Act) was added to the APA in 1974 and has been amended several times since. Section 552b (the Government in the Sunshine Act) was added in 1976 and amended once. These sections and sections 701–706 pertaining to judicial review are discussed and set forth separately in this book. Two significant laws relating to rulemaking and adjudication were enacted in 1990—the Administrative Dispute Resolution Act (5 U.S.C. §§ 571-584) and the Negotiated Rulemaking Act (5 U.S.C. §§ 561–570), which are discussed separately below, as well as in separate chapters in this book.

Overview:

Attempts to regularize federal administrative procedures go back at least to the 1930s. Early in 1939, at the suggestion of the attorney general, President Roosevelt asked the attorney general to appoint a distinguished commit-
committee to study existing administrative procedures and to formulate recommendations. The Attorney General’s Committee on Administrative Procedure, chaired by Dean Acheson, produced a series of monographs on agency functions and submitted its Final Report to the President and the Congress in 1941. These materials, plus extensive hearings held before a subcommittee of the Senate Committee on the Judiciary in 1941, are primary historical sources for the Administrative Procedure Act.

The Administrative Procedure Act was signed into law by President Truman on June 11, 1946. In the months that followed, the Department of Justice compiled a manual of advice and interpretation of its various provisions. The *Attorney General’s Manual on the Administrative Procedure Act*, published in 1947 (and reprinted in the Appendix), remains the principal guide to the structure and intent of the APA. The *Manual* (page 9) states the purposes of the Act as follows:

1. To require agencies to keep the public currently informed of their organization, procedures, and rules.
2. To provide for public participation in the rulemaking process.
3. To prescribe uniform standards for the conduct of formal rulemaking and adjudicatory proceedings (i.e., proceedings required by statute to be made on the record after opportunity for an agency hearing).
4. To restate the law of judicial review.

The Act imposes upon agencies certain procedural requirements for two modes of agency decision making: rulemaking and adjudication. In general, the term “agency” refers to any authority of the government of the United States, whether or not it is within or subject to review by another agency—but excluding the Congress, the courts, and the governments of territories, possessions, or the District of Columbia.\(^1\) Definitions of other terms may be found in section 551.

**Structure of the Administrative Procedure Act.** The Administrative Procedure Act has two major subdivisions: sections 551 through 559, dealing in general with agency procedures; and sections 701 through 706, dealing in general with judicial review. In addition, several sections dealing with administrative law judges (§§ 1305, 3105, 3344, 5372, and 7521) are scattered through title 5 of the United States Code. The sections pertaining to judicial review are discussed in Chapter 2 of this volume. As noted, sections 552, 552a, and 552b are also discussed in separate chapters, as are

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1. See 5 U.S.C. §§ 551(1), 701(b)(1) for other specific exemptions.
the new sections added by the Administrative Dispute Resolution and Negotiated Rulemaking Acts.

The structure of the APA is shaped around the distinction between rulemaking and adjudication, with different sets of procedural requirements prescribed for each. Rulemaking is agency action that regulates the future conduct of persons through formulation and issuance of an agency statement designed to implement, interpret, or prescribe law or policy. It is essentially legislative in nature because of its future general applicability and its concern for policy considerations. By contrast, adjudication is concerned with determination of past and present rights and liabilities. The result of an adjudicative proceeding is the issuance of an “order.” (Licensing decisions are considered to be adjudication.)

The line separating these two modes of agency action is not always clear, because agencies engage in a great variety of actions. Most agencies use rulemaking to formulate future policy, though there is no bar to announcing policy statements in adjudicatory orders. Agencies normally use a combination of rulemaking and adjudication to effectuate their programs. The APA definition of a “rule,” somewhat confusingly, speaks of an “agency statement of general or particular applicability and future effect . . . .” The words “or particular” were apparently included in the definition to encompass such actions as the setting of rates or the approval of corporate reorganizations, to be carried out under the relatively flexible procedures governing rulemaking.2

Beyond the distinction between rulemaking and adjudication, the APA subdivides each of these categories of agency action into formal and informal proceedings. Whether a particular rulemaking or adjudication proceeding is considered to be “formal” depends on whether the proceeding is required by statute to be “on the record after opportunity for an agency hearing” (5 U.S.C. §§ 553(c), 554(a)). The Act prescribes elaborate procedures for both formal rulemaking and formal adjudication, and relatively minimal procedures for informal rulemaking. Virtually no procedures are prescribed by the APA for the remaining category of informal adjudication, which is by far the most prevalent form of governmental action.3

**Rulemaking.** Section 553 sets forth the basic requirements for rulemaking: notice of proposed rulemaking in the Federal Register, followed by an opportunity for some level of participation by interested persons, and

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2 For discussion of the inclusion of “or particular” in the definition, see KENNETH C. DAVIS & RICHARD PIERCE, 1 ADMINISTRATIVE LAW TREATISE §§ 6.1 (3d ed. 1994).