



The Administrative Procedure Act



By Jill Nylander

A Public Policy Perspective

FAST FACTS

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The federal website, Regulations.gov, provides an easy and reliable way for citizens to search, review, and comment on federal regulations.

PRACTITIONERS AND LAY INDIVIDUALS alike should consider the federal Administrative Procedure Act (APA)¹ as one of the most important pieces of legislation ever passed. In reality, the broad-reaching significance of the APA and the profound impact it has had and continues to have on American public policy are largely under-recognized. The APA governs the functioning of the majority of federal agencies and either directly or indirectly impacts the lives of the millions of people influenced by these agencies on a daily basis.

The APA is the law under which numerous United States governmental federal regulatory agencies, like the Social Security Administration, the Environmental Protection Agency, and the Department of Labor, create the rules and regulations required to administer and uphold such significant legislative acts as the Social Security Act, the Clean Air Act, and the Family and Medical Leave Act.

The APA has four basic purposes:

- (1) To require agencies to keep the public informed of their organization, procedures, and rules
- (2) To provide for public participation in the informal rulemaking process
- (3) To prescribe uniform standards for the conduct of formal rulemaking and adjudicative proceedings, i.e., proceedings that are required by statute to be made on the record after an agency hearing
- (4) To restate the law of judicial review²

Consistent with these intended purposes, the APA has evolved since its inception into one of the major democratic mechanisms by which individual due process rights and access to government are ensured. As such, the APA and its state counterparts have substantially influenced public policy over the years by creating an ever-increasing openness to the regulatory aspect of the American governmental process.

This article will provide an overview of the functions of the Administrative Procedure Act, with an emphasis on rulemaking. It will briefly examine the APA's role in regulatory procedure, its history, its Michigan corollary, and its future policy implications. It is intended only as a general overview, as specific agency practices may vary.

The Role of the APA Today

The APA controls the means under which United States administrative agencies promulgate regulations, and delineates the standard for judicial review of agency hearing decisions. Through notice and comment rulemaking and defined administrative due process protections, the components of the APA generate a concrete foundation for agency determinations. Together, the APA and the Freedom of Information Act provide transparency by generating extensive, publicly available records of the factual, analytic, and policy positions of the agency and, in the case of notice and comment rulemaking, of outside parties, as well as the basis for the agency's decision.³

In deference to the fact that agencies can embody aspects of each of the three branches of government, the APA defines the term

“agency” very broadly. The act generally provides that an “agency” is “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.”⁴ The definition does carve out specific exclusions for the U.S. Congress, courts, territories, and the District of Columbia.

The act goes on to define a rule in relevant part as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....⁵

It further states that “‘rulemaking’ means agency process for formulating, amending, or repealing a rule....”⁶ Although the APA refers only to “rules,” the term “regulation” is commonly used interchangeably when referring to rules.

Generally, if an agency seeks to create, amend, or eliminate a rule, it must engage in the rulemaking process prescribed by the APA. Initially, Congress will enact a statute intended to remedy a perceived economic or societal need. The federal regulatory agency charged with administering that law will then be required to develop the corresponding rules necessary to interpret and implement the law. Such laws are frequently referred to as enabling, originating, or underlying statutes, because they authorize the designated agency to embark on the rulemaking process.

This rulemaking process typically requires publication of all proposed new regulations in the *Federal Register* more than 30 days before they will take effect. The *Federal Register* is the official source for rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents. It is updated daily. Agencies must also offer a public opportunity for objection or comment.

While this form of notice and comment, or “informal” rulemaking, is sufficient for many regulations to become effective, others may require prior publication and an opportunity for a public trial-type hearing. An agency's originating legislation dictates when the more formal rulemaking process is required. Normally, an agency will publish a notice of proposed rulemaking in the *Federal Register* with 30, 60, or 90 days for public comment. A customary reply comment period of 30 days often follows. When the department or agency publishes the text of the final rule in the *Federal Register*, it traditionally addresses significant problems and concerns raised by those who submitted comments. It also details any modifications made to the regulation as a result of the comments. Final rules are printed in the *Federal Register* and codified in the Code of Federal Regulations (CFR). In certain instances, emergency rulemaking provisions allow an agency to bypass the traditional rulemaking timeline and process.

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Technological advances in the last few years have streamlined the public's ability to engage in these rulemaking functions under the APA. In addition to the *Federal Register* and CFR, many of the federal agencies will highlight both proposed and newly finalized rules on their respective websites. The eRulemaking Initiative, a multi-agency E-Government collaboration project authorized under the 2002 E-Government Act,⁷ "is transforming the federal rulemaking process by enhancing the public's ability to participate in our government's regulatory decision-making."⁸

The U.S. Environmental Protection Agency oversees the eRulemaking Initiative in conjunction with over 25 federal departments and agency partners. The first milestone of the initiative, Regulations.gov, was officially launched in January 2003. This website provides an easy and reliable way for U.S. citizens to search, review, and comment on federal regulations. As of the writing of this article, 30 federal agencies had the capability to post to their websites notices of proposed rulemaking, proposed rules, or final interim rules for comment, and 524 rulemaking-related postings were available for download and comment.

In the near future, additional federal agencies will post materials on Regulations.gov. Eventually, the eRulemaking Initiative will consolidate into a single electronic federal system encompassing more than 135 federal agencies that previously operated on paper-based rule writing processes. This universally accessible electronic rulemaking technology is quickly bringing the APA to the height of its intended purpose by making it directly possible for average individuals to engage in the regulatory process on a daily basis. The profound public policy implications of such an open, citizen-responsive regulatory process are undeniable.

In addition to unclocking the daily operations of the federal government and increasing engagement of the citizenry, electronic access to rulemaking under the APA will also better inform businesses dealing with or regulated by a federal agency. It will benefit attorneys practicing before regulatory agencies by informing them of potential changes as they are happening and facilitating their advocacy for or against such changes. Electronic rulemaking will similarly benefit advocacy organizations that attend public hearings or meetings, or any institution that applies for grants from a federally regulated agency. Implementation of the electronic rulemaking initiative quite simply lends an easy voice to all citizens, professionals, and institutions concerned with government actions that affect the environment, health care, financial services, exports, education, or other major public policy issues.

The History of the Administrative Procedure Act

The significance of the Administrative Procedure Act today is best placed in full context by considering its past. The APA was initially conceptualized as an oversight tool designed to help increase accountability and to bring order to a rapidly expanding government in the period after the Great Depression. As early as 1933,

President Roosevelt initiated a wave of rapid federal government regulatory expansion through the promulgation of the New Deal legislation. Under the New Deal, the Democratic Congress enacted multiple statutes in an effort to help the country recover from war and overcome many of the socio-economic adversities it had faced in the preceding years.

The historical political climate that gave rise to the APA was fraught with contention. The New Deal legislation pitted proponents of government expansion against those who feared that vesting administrative agencies with regulatory and adjudicatory functions amounted to the establishment of a fourth branch of government without formal accountability to the public. From this turbulence, the APA was eventually to emerge after a protracted period of study and debate.

In 1939, President Roosevelt requested that Attorney General Frank Murphy create a committee to perform a comprehensive investigation into the workings of the country's administrative law foundations, and author recommendations for its improvement. The attorney general's Committee on Administrative Procedure soon began its daunting task and focused its criticism and study on the following three issues:

- (1) Administrative power to adjudicate in individual cases
- (2) The delegated power to legislate by rule and regulation
- (3) The scope of review of administrative action by the courts⁹

The final report of the attorney general's committee made several suggestions for standardizing and improving administrative agency process and procedure. However, due to the onset of World War II, no congressional action was taken at the time.

On June 11, 1946, the APA was approved to encourage placement of the administrative agency rulemaking process in the public domain by requiring proposed rules to be published for comment, with rules finally adopted in the *Federal Register*.¹⁰ The premier issue of the January 1947 *Federal Register* was the first to contain a section on proposed rulemaking. Later that year, the Supreme Court issued a decision holding that publication of rulemaking in the *Federal Register* constituted constructive notice.¹¹ The decision effectively placed rules that were properly published under the APA on par with statutory law.

Twenty years later, on July 4, 1966, President Lyndon Johnson amended the APA by signing into law the Freedom of Information Act (FOIA).¹² FOIA significantly expanded public access to government by allowing citizens access to government records. FOIA carries a presumption of disclosure that places the burden on the government to document why information may not be released. Upon written request, agencies of the United States government are required to disclose those records requested, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA. This right of access is enforceable in federal court.

In light of FOIA's fortieth birthday earlier this summer, numerous news stories detailed President Johnson's reservation in signing the act due to fear that it would provide excessive individual access into the inner workings of government. Documents from the LBJ

Library show that the normally gregarious president, who loved handing out pens at bill signings, refused even to hold a formal ceremony for FOIA, personally removed strong openness language from the press statement, and only agreed to approve the bill after the Justice Department suggested the tactic that has become a favorite of the current administration—a signing statement that seemed to undercut the thrust of the law.¹³

In addition to FOIA, the APA has undergone several other significant amendments over the course of its history. In each instance, citizen access to government processes has been expanded. Under the Sunshine Act of 1976 (Open Meetings), certain bodies or commissions are required to hold public meetings, with exception for those meetings that would deal with matters such as national security.¹⁴ The Privacy Act of 1974 limits release of certain information about individuals.¹⁵

Forms of alternative dispute resolution and rulemaking have also been incorporated into the APA over the years via amendment. The Negotiated Rulemaking Act of 1990 permits agencies to create rules in limited situations by negotiations among a federal agency and representative interest groups.¹⁶ The negotiations are aimed at reaching a consensus on the proposed rule and avoiding litigation over the final rule. The Administrative Dispute Resolution Act of 1991 further encourages agencies to use alternative dispute resolution and related techniques in place of enforcement, traditional rulemaking, or adjudication.¹⁷ Through amendment, the APA has continued to evolve since its inception into the electronic age and has continued to influence public policy by expanding easy and open access to government.

The Michigan Administrative Procedure Act

The Michigan corollary to the federal APA is found in the Michigan Administrative Procedure Act of 1969 (MAPA).¹⁸ To initiate rulemaking, a state department or agency files a request for rulemaking (RFR) with the State Office of Administrative Hearings and Rules (SOAHR). Once an RFR has been approved by SOAHR, the office drafts a proposed rule for presentation to the Legislative Service Bureau (LSB) and SOAHR for informal review. Upon receipt of informal approval of the proposed rule language, the initiating agency is required to file a regulatory impact statement that advises the public of the potential costs and benefits of the proposed rule. The proposed rule is then noticed for public hearing in accord with the MAPA.

Similar to their federal equivalents, each of this state's rulemaking stages can be tracked in the *Michigan Register* and electronically on SOAHR's website.¹⁹ Public hearing dates, times, and locations for comment are also listed on the site. Following an agency hearing report evaluating public comment, the proposed rule is sent for LSB certification. Once certified, rules are sent to SOAHR for legal certification of compliance with the MAPA. Proposed rules are then sent to the Michigan legislature's Joint Committee on Administrative Rules for review. Final agency action to adopt the rule language follows. Proposed rules are then generally effective upon filing with the Michigan Office of the Great Seal. Once effective, new rules are then codified into the Michigan Administrative Code database.²⁰

Conclusion

The federal APA and its 50 state counterparts²¹ have immeasurably increased citizen knowledge of and participation in the American regulatory process. Optimally, outreach and education will continue to improve access to and use of this incredible means for professionals and lay individuals alike to influence public policy. The future of the APA, at both federal and state levels, will likely hold trends for standardization. Both the American Bar Association and National Council of Commissioners on Uniform State Laws have recently implemented projects designed to develop a contemporary model APA. Current literature suggests that the APA and American administrative law will continue to evolve and to serve as models for global administrative law development. ♦



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Footnotes

1. 5 USC 551 et seq.
2. United States Department of Justice Attorney General's Report on the Administrative Procedure Act (1941) <<http://www.law.fsu.edu/library/admin/1941report.html>> (accessed October 13, 2006).
3. Stewart, *U.S. Administrative law: A model for global administrative law?* 68 J Law & Contemp Probs 63, 74 (2005), citing Breyer et al., *Administrative Law And Regulatory Policy* (5th ed), 652–660, 685–699, 872–886.
4. 5 USC 551(1).
5. *Id.*
6. *Id.*
7. 44 USC 36.
8. Regulations.gov home page <<http://www.regulations.gov/fdmspublic/component/main>> (accessed October 13, 2006).
9. U.S. DOJ Attorney General's Manual, *supra*, p 2.
10. Office of the Federal Register, *A Brief History Commemorating the Publication of the 70th Anniversary Publication of the First Issue of the Federal Register*, p 6 (2001), available at <<http://www.archives.gov/federal-register/the-federal-register/history.pdf>> (accessed October 11, 2006).
11. *Federal Crop Ins Corp v Merrill*, 332 US 380, 384–385 (US 1947).
12. 5 USC 552 et seq.
13. The National Security Archive, *Freedom of information at 40*, Electronic Briefing Book No 194 (Thomas Blanton, ed), <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm>> (accessed October 11, 2006).
14. 5 USC 552b.
15. 5 USC 552a.
16. 5 USC 561 et seq.
17. 5 USC 571 et seq.
18. MCL 24.201 et seq.
19. Michigan Department of Labor & Economic Growth, State Office of Administrative Hearings and Rules, Recent and pending rule changes <http://www.michigan.gov/cis/0,1607,7-154-10576_35738_5695---,00.html> (accessed October 11, 2006).
20. A more detailed description of the state rulemaking process and a flowchart can be found on SOAHR's web page <http://www.michigan.gov/cis/0,1607,7-154-10576_35738---,00.html> (accessed October 13, 2006).
21. ABA Administrative Procedure Database—State Resources <<http://www.law.fsu.edu/library/admin/>> (accessed October 13, 2006).