



*New York State CLE - Administrative Law*



**New York State  
Continuing Legal Education  
Administrative Law**





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# Part One

# Introduction



## Part One: Introduction

# Welcome !!!

- We are about to set off together on a grand adventure.
- An Adventure of
  - *Discovery,*
  - *Suspense,*
  - *Mystery,*
  - *and Intellectual Excitement.*





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# The Adventure of the World of Administrative Law





## Where Will This Adventure Bring Us?

On the Road Ahead – We Will:

- *Explore*  
the foundational elements of our free government;
- *Examine*  
the legal ways our government works;
- *Search*  
for the legal balance between effective administration of government policy and the accountability of the state; and
- *Discover*  
the very basis for our modern law and what we truly value as a society.





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**Are you Ready? Are you Excited?**



**Here we Go!**



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**First:**

- **Every Adventure needs a Guide.**



**Robert T. Farley, J.D., L.L.M.**

**Your Humble Instructor and Intellectual Resource**



# What you need to know about me:

## Robert T. Farley, J.D., L.L.M

### ➤ Professional Background

- Attorney – Admitted to Practice Before State and Federal Courts
- Professor – Long Time Law Professor
- Senior Counsel – NYS Senate, Former NYS Deputy Attorney General
- Former Trial Lawyer – McNamee, Lochner, Titus and Williams
- My Biography and Curricular Vitae are on my website.

### ➤ Educational Background

- B.A. – SUNY at Albany (Magna Cum Laude) – 1984
- J.D. – Hofstra University School of Law – 1987
- L.L.M. – Albany Law School (Summa Cum Laude) - 2010

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**Bob  
Farley**



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6.—The Rotunda, State Education Building, Albany, N. Y.



***So Let's Begin Our Grand Adventure***



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# Part Two

# What is Administrative Law



## Part Two: What is Administrative Law?

- **So exactly what is Administrative Law?**
  - **What is the Law Itself?**
  - **What are the chief components of the law?**
  - **What do modern laws include?**
  - **What does the law as Rules mean?**
  - **What is the impact of a representative, federal republic?**
  - **What impact does the fact that our sovereignty rest in the people have?**
  - **What impact does the structure of our government have?**
  - **What impact does checks and balances of the branches have?**
  - **Administrative Law is the Rules under which Agencies Operate**



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# An Adventure in Administrative Law

*To start our Adventure we need to a perspective:*

***What is the “Law”?***

*Administrative Law is a very important subset of modern law*

*To truly understand it, we need to examine it from its overall perspective of the law in general.*

*And so just what is the law?*

- Perhaps the simplest description of the Law is that:  
***“Law is the Rules by which civilization is ordered.”***



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## ***The Chief Elements / Components of the Law are:***

- ***1. Rules***
  - ***2. Pronounced, laid down and/or issued by a controlling authority;***
  - ***3. That are consistent and lasting; and***
  - ***4. That are enforceable and followed by the governed.***
- 
- **Early laws were simply directives from a king or sovereign.**
  - **Modern Laws are Enacted by a Legislature**  
***(In America that is Congress for the Federal Government and State Legislatures for State Governments)***



## Modern Laws Include:

- **Constitutions:** *Both Federal and State*
- **Statutes:** *Enacted by Elected Legislative Bodies  
(Such as Congress or State Legislature)*
- **Case Law:** *Also known as “The Common Law”  
(Case Decisions delivered by Courts)*
- **Regulations:** *Promulgated by government (Executive) agencies  
(Agency pronouncements designed to amplify or clarify their  
authority as provided in statute or constitution)*
- **Executive Orders:** *Issued by Executive (President or Governor)  
(Instructions by the Executive to their agencies directing them  
how to execute a procedure or law)*



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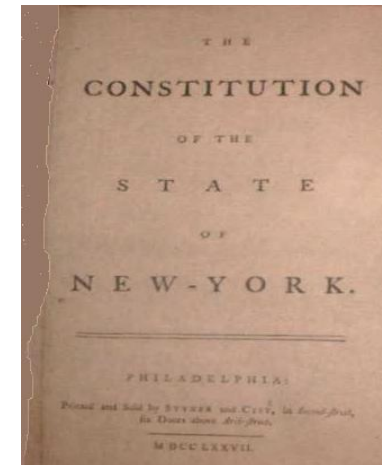
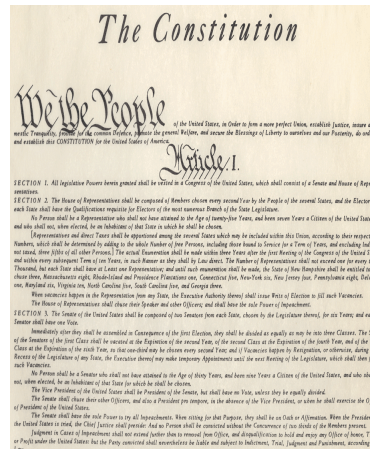
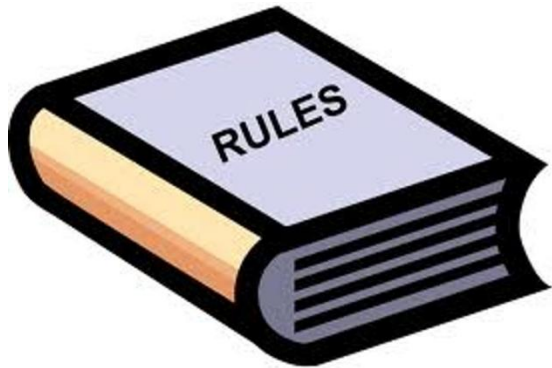
# Laws as Rules:

So when we say that:

*Laws are the rules by which civilization is ordered*

*What do we base their authority on?*

*Where does that the authority for that Rule Book come from?*



**It comes from our Ultimate Rule Books – Our Constitutions**



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Our Founders set up our Nation and State  
as a *Representative, federal, Republic.*

- Both the Government of the United States and the Government of the State of New York were established under this framework.
- Pursuant to our founding documents, our laws come from our government, and the *sovereignty* or power for our government rests in the *people*.

*This system is set up by our*  
**United States and NYS Constitutions**  
*and establishes the Rule Book*  
*for our Government and its Laws.*



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# As a result of this representative, federal, republic:

Laws are made pursuant to the following construct:

## **Federal Government** (For All National Laws – Supreme but Limited Powers)



President (Executive)



Congress (Legislative)



Federal Courts (Judicial)

## **State Government** (For All State Laws – Subserving but Unlimited Powers)



Governor (Executive)



State Legislature (Legislative)



State Courts (Judicial)



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## **Federal Government** (Separation of Powers and Checks and Balances)



**President (Executive)**



**Congress (Legislative)**



**Federal Courts (Judicial)**



**US Senate**



**US House of Representatives**



**Supreme Court**



**US Court of Appeals**



**US District Court**



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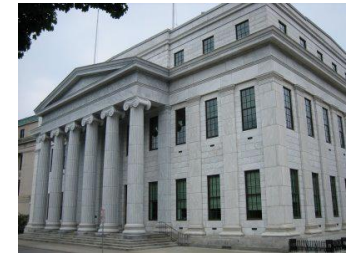
## State Government (Pursuant to State Constitution – Similar Checks and Balances)



Governor (Executive)



State Legislature (Legislative)



State Courts (Judicial)



NYS Senate



NYS Assembly



NYS Court of Appeals



Appellate Division of NYS Supreme Court



NYS Supreme Court



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## **Part Two: What is Administrative Law?**

### **Administrative Law is the Rules under which Agencies Operate**

- While the Law is Rules by which civilization is ordered
- Administrative Law is the Rules under which Government Agencies run
- It is simply the rule book for agencies
  - What they can do;
  - How they can do it; and
  - What oversight they are subject to
- It is a relatively new area of the law (mostly the 20<sup>th</sup> century)
- and it has a big impact on the lives of every citizen



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# **Part Three**

# **Administrative Law within the Context of the Law**



## Part Three: Administrative Law within the Context of the Law

- **So where does Administrative Law fall within this context?**
  - *The Law of Agencies*
  - *A Broad Based and Expanding Area of the Law*
  - *A Controversial Area of the Law*
  - *Has been Designated “ A Fourth Branch of Government”*
  - *Sources for Administrative Law*
  - *Powers of Administrative Law by Agencies*



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## So Where In This Context Does Administrative Law Reside?

- **The Law of Agencies:** *Administrative Law concerns the Law of Agencies.*
- **Broad Based and Expanding:** *It is a broad based, expanding area of the law, that deals with the administration of our laws on both the Federal and State levels of government.*
- **Controversial:** *It is an area of the law frequently subject to political and legal controversy and debate.*
- **Fourth Branch of Government:** *Administrative Law has been described as the law of a “fourth branch of government”*

“The rise of the administration bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts . . . They have become a veritable fourth branch of the government . . . “

U.S. Supreme Court in *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952)



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# So Where In This Context Does Administrative Law Reside Continued?

## ➤ The Law of Agencies:

- *Administrative Law consists of the legal rules that define authority, structure and operations of an agency*

## ➤ Sources for Administrative Law include:

- *Enabling statutes of administrative agencies;*
- *Federal Administrative Procedures Act (APA, 1946);*
- *State Administrative Procedure Act (SAPA, 1975);*
- *Rules, Regulations and Adjudications issued by agencies; and*
- *Court decisions reviewing the validity of agency actions*

## ➤ Administrative Agency Powers include:

- *Legislative (or Rulemaking);*
- *Investigative;*
- *Adjudicatory; and*
- *Enforcement*

• **As a result, part of the powers of all three branches of government can be incorporated into an agency under Administrative Law.**



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# **Part Four**

# **The History of Administrative Law**



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## **Part Four: The History of Administrative Law**

To truly understand where you are going ...

Sometimes its helpful to know where you've been





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## Part Four: The History of Administrative Law Continued

- It all started in a train station in Washington, D.C. on July 2, 1881
- President James A. Garfield is shot by Charles Guiteau, a crazed office seeker, Guiteau who the poster child for reform and increased security
- Upon Garfield's Death, Chester A. Arthur took office
- Vice President, and protégé of Senator Roscoe Conkling, Chester Arthur was a NY Lawyer, Union College Grad, Republican Stalwart, former head of the customs house and the embodiment of a patronage politician.
- But a Letter changed all that, when despite being racked with grief, and being subject to public scorn, Arthur received correspondence from, Julia Sand, a 30 year old New York Socialite, gave Arthur a mission
- Arthur bucked convention and Championed Reform
- After a decade of scandals and failed attempts, Arthur cleaned up government and created civil service, by pushing through the Pendleton Civil Service Reform Act,
- This new federal law embodied an entirely new model – the concept of merit and fitness as qualifiers for appointment.



*"No man ever entered the Presidency so profoundly and widely distrusted as Chester Alan Arthur, and no one ever retired ... more generally respected, alike by political friend and foe",  
Journalist Alexander McClure*

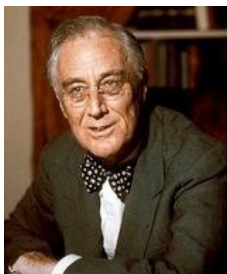


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## **Part Four: The History of Administrative Law Continued**

### **Section Two: Civil Service and the Growth of the Federal Government**

- **The establishment of the Civil Service System made Professional Government Administration possible. No longer would the spoils system deploy political “hacks”, and subject government to the “sweeping winds of change” brought by the electoral process.**



- **As a result, the rise of the “Administrative State” and the law that would develop to run it, would become a product of the 20<sup>th</sup> century.**
- **Woodrow Wilson and Frank Goodnow would jointly promote a new philosophy, that sought to separate politics from the administration of government.**
- **Wilson and Goodnow’s views on a new “political science” of governmental administration, were outlined in a number of their books and articles, and launched during the Wilson presidency.**
- **During the Great Depression, Franklin Roosevelt saw a need, like Lincoln, to grow the federal government in order to preserve it.**
- **Roosevelt’s New Deal legislation significantly expanded the federal government’s role, deploying Wilsonian principles of large agencies, administered by professional bureaucrats.**
- **As a result, the federal government grew to historic proportions.**

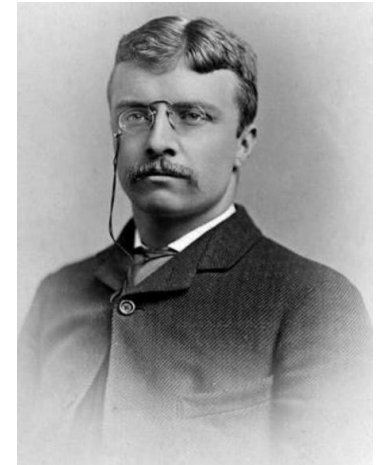


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## **Part Four: The History of Administrative Law Continued**

### **Section Three: Civil Service and the Growth of the State Government**

- From the time of George Clinton, the New York was always the example of the issues involved with the “spoils system”.
- In 1821 the New York State Constitution invested the Governor (in some cases the “advice and consent of the Senate”) with the sole power of appointments.
- Governors such as Martin Van Buren used this system to great effect to build enormous patronage powerbases and control party politics.
- Accordingly, there had long been “commissioners” (whose very name represented the power to make money from their office) who with their fellow employees were able to administer government, by the means of the granting or refusal to grant licenses and approvals.
- In 1883, within months of the federal Pendleton Act, Assemblyman Teddy Roosevelt, and Governor Grover Cleveland, enacted New York’s first Civil Service Law.
- Eleven years later in 1894, these changes were embodied in the State Constitution as Article V, Section 6, and extended to local government as well.





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## **Part Four: The History of Administrative Law Continued**

### **Section Four: The Expansion of Laws: Cases, Statutes and Regulations**

- One need only admire a law library to see the growth of law and government from this historical tipping point.
- The stacks within these treasure troves clearly tell the tale.
- From 1787 to 1900 there is one stack;
- From 1900 to 1940 there are two stacks;
- From 1940 to 1960 there are two stacks; and
- From 1960 to present, there are eight stacks.
- Each stack filled with reporters, representing hundreds of cases.
- The expansion of statutes and regulations have grown by equal measure.





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## **Part Four: The History of Administrative Law Continued**

### **Section Four: The Expansion of Laws: Federal Government Agencies**

- **Today there are hundreds of federal agencies that ply administrative law**
- **Prior to 1862, there were only 6 Departments of the federal government**
- **Federal Departments and the date of their initial creation, include:**
  - **State 1789,**
  - **Treasury 1789,**
  - **Department of War 1789 (Became an executive Military Depart (Army) within Defense in 1947) ,**
  - **Post Office 1792 (Reorganized as quasi-independent agency in 1971),**
  - **Department of the Navy 1798 (Became an executive Military Depart within Defense in 1947),**
  - **Interior 1849,**
  - **Agriculture 1862,**
  - **Justice 1870 (although Attorney General was established in 1789),**
  - **Commerce 1903,**
  - **Labor 1913,**
  - **Defense 1947 (Merging Army (War), Navy, and Air Force)**
  - **Health and Human Services 1953,**
  - **Housing and Urban Development 1965,**
  - **Transportation 1966,**
  - **Energy 1977,**
  - **Education 1980,**
  - **Veterans Affairs 1989, and**
  - **Homeland Security 2002**



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## Part Four: The History of Administrative Law Continued

### Section Four: The Expansion of Laws: Federal Government Agencies

- On the federal level the first federal non departmental agency was created In 1863. It was the Office of the Comptroller of the Currency and was established as a civil war measure to regulate national banks.
- In 1887, just four years after the civil service law, the ICC (Interstate Commerce Commission), would become the first modern federal agency, paving the way for the expanding power of the federal government.
- The early 1900's saw a more rapid creation of new federal agencies, as the Wilsonian principles of "professionally administered government" began to be put into practice. These agencies included:

1906

- Food and Drug Administration,

1913

- Federal Reserve, and

1914

- Federal Trade Commission,

- The Great Depression and the New Deal brought the creation of dozens of new, federal agencies, with sweeping powers, including the:

1933

- Federal Aviation Administration,
- Tennessee Valley Authority,
- Farm Credit Administration,
- Federal Deposit Insurance Corp., and
- National Recovery Administration.

1934

- Federal Housing Administration,
- Federal Communications Commission,
- National Labor Relations Board, and
- Securities and Exchange Commission .

1935

- Farm Security Administration, and • the Social Security Administration.



## **Part Four: The History of Administrative Law Continued**

### **Section Four: The Expansion of Laws: Federal Government Agencies**

- **After the Second World War and with the development of the Great Society programs of the 1960's, the Federal Government began to expand at an even faster rate, creating huge agencies, with unprecedentedly large budgets and sweeping powers.**
- **From Medicare and Medicaid, to Clean Air and Water, to Employee Safety and Non Discrimination, the federal government created dozens of large federal agencies, to regulate, adjudicate, investigate and license all areas of American life, and take a much more active administrative role of public affairs.**
- **Administrative Law (the process of Rule Making, Adjudication, Investigation and Enforcement) has been the means by which federal agencies take this active role. The federal agencies created after World War Two, include:**
  - **Department of Health and Human Services 1953 (67,000 employees),**
  - **Department of Housing and Urban Development 1965 (10,600 employees),**
  - **Department of Transportation 1966 (58,600 employees),**
  - **Department of Energy 1977 (109,000 employees),**
  - **Department of Education 1980 (4,400 employees),**
  - **Department of Veterans Affairs 1989 (235,000 employees),**
  - **Department of Homeland Security 2002 (208,000 employees\*),**
  - **Environmental Protection Agency 1970 (17,300 employees),**
  - **Equal Employment Opportunity Commission 1965 (2,600 employees), and**
  - **Occupational Health and Safety Administration 1971 (2,300 employees).**



## Part Four: The History of Administrative Law Continued

### Section Four: The Expansion of Laws: State Government Agencies

- On the state level, the growth of state agencies over these same periods, has been just as pronounced.
- Although the NYS Constitution provides that there shall be only 20 state “Departments” (Article V, section 2), there is no limit to the number of Divisions, Offices, Commissions, Public Authorities, ect., that may be established by state government.
- Some state agencies include:

Adirondack Park Agency, Office for the Aging, Department of Agriculture and Markets, Division of Alcoholic Beverage Control (State Liquor Authority), Office of Alcoholism and Substance Abuse Services, Council on the Arts, Department of Law, Authority Budget Office, Department of Financial Services, Battery Park City Authority, Bridge Authority, New York State Division of the Budget, Buffalo Fiscal Stability Authority, Central Pine Barrens Joint Planning and Policy Commission, Council on Children and Families, Office of Children and Family Services, City University of New York, Department of Civil Service, Office of Community Renewal, Division of Consumer Protection, Commission on Correction, Department of Corrections and Community Supervision, Office of Counter Terrorism, Office of Court Administration, Division of Criminal Justice Services, Office of Cyber Security, Developmental Disabilities Planning Council, Dormitory Authority, Department of Education, Board of Elections, Office of Emergency Management, Empire State Development Corporation, NYS Employee Assistance Program, Governor's Office of Employee Relations, NYS Employment Relations Board, Energy Research and Development Authority, Department of Environmental Conservation, Environmental Facilities Corporation, Erie County Fiscal Stability Authority, Department of Family Assistance, New York State Financial Control Board, Office of Fire Prevention and Control, Office of General Services, Geographic Information Systems (GIS) Clearinghouse, Governor's Traffic Safety Committee, Department of Health, Higher Education Services Corporation, Division of Homeland Security and Emergency Services, Division of Homes and Community Renewal, Housing Finance Agency/State of NY Mortgage Agency (SONYMA), Hudson River Park Trust, Hudson River Valley Greenway, Division of Human Rights, Office of Information Technology Services, Office of Inspector General, State Insurance Fund, Office of Interoperable and Emergency Communications, Joint Commission on Public Ethics, Commission on Judicial Conduct, Department of Labor, Commission on Local Government Efficiency & Competitiveness, Division of the Lottery, Office of the Medicaid Inspector General, Office of Mental Health, Metropolitan Transportation Authority, Division of Military and Naval Affairs, Department of Motor Vehicles, Nassau County Interim Finance Authority, New York State Law Revision Commission, Office of Victim Services, Olympic Regional Development Authority, Office of Parks, Recreation and Historic Preservation, Division of Parole, Office of People With Developmental Disabilities, Port Authority of New York and New Jersey, Power Authority, Office of Prevention of Domestic Violence, Division of Probation and Correctional Alternatives, Public Employment Relations Board, Department of Public Service, Commission on Quality of Care and Advocacy for Persons with Disabilities, Racing and Wagering Board, Roosevelt Island Operating Corporation of the State of New York, NYS Foundation for Science, Technology and Innovation, South Shore Estuary Council, Department of Audit and Control, Division of the State Police, State University Construction Fund, State University of New York, Department of State, Division of Tax Appeals and Tax Appeals Tribunal, Department of Taxation and Finance, NYS Teachers' Retirement System, Office for Technology, Office of Temporary and Disability Assistance, NYS Thruway Authority, Department of Transportation, Division of Veterans' Affairs, Office of the Welfare Inspector General, Workers Compensation Board

- In order to effectively do the mission with which each such agency is tasked, a body of law has developed, through practice, case law and statute, which is now known as “Administrative Law”. This is the law as to how these agencies of government operate.



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# Part Five

# The Law of Agencies



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## Part Five: Administrative Law - the Law of Agencies

### Section One – Agencies – What is an Agency?

- Administrative law is simply that body of law that defines, describes and commands the behavior of agencies.
- Agencies come in a huge array of sizes and shapes. Some have thousands of employees; others have much smaller numbers. They have names like "Department," "Board", "Division" or "Office."
- Agencies have widely differing missions, goals and organizations. They all share, however, some common features.
  - **First, all are created by legislation. This is known as enabling legislation.**
    - These enabling statutes, are duly passed by the congress or state legislature, and define the agency's mission, organization and jurisdiction.



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## **Part Five: Administrative Law - the Law of Agencies**

### ***Section One – Agencies – What is an Agency Continued:***

- **Agencies have widely differing missions, goals and organizations. They all share, however, some common features.**
  - **Second, all agencies are shaped roughly like a pyramid.**
    - Pursuant to this structure, some person or group of persons are at the top; with his, her or their immediate staff below; and then down through the ranks of their subordinates and other employees of the agency.
  - **Third, agencies share a unified mission.**
    - This mission is defined by the enabling statute (the legislation that creates the agency) and is expressed in the most immediate sense by the person or persons who head the agency.



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## **Part Five: Administrative Law - the Law of Agencies**

### ***Section One – Agencies – What is an Agency Continued:***

#### **➤ Agencies – Defined:**

#### **➤ The Federal Administrative Procedure Act defines an “Agency” as:**

- 5 U.S.C. 551 (1) states that: “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include –
  - the Congress;
  - the courts of the United States;
  - the governments of the territories or possessions of the United States;
  - the government of the District of Columbia;
  - (the President - pursuant to case law) or
  - except as to the requirements of section 552 of this title (the section requiring publication of public information in the federal register):
    - agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
    - courts martial and military commissions;
    - military authority exercised in the field in time of war or in occupied territory; or
    - functions conferred by:
      - sections 1738, 1739, 1743, and 1744 of title 12 (relating to mortgage insurance);
      - chapter 2 of title 41 (relating to procurement contracts); or
      - sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix (relating to war mobilization and reconversion).



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## **Part Five: Administrative Law - the Law of Agencies**

### **Section One – Agencies – What is an Agency Continued:**

#### **➤ Agencies – Defined Continued:**

#### **➤ The State Administrative Procedure Act defines an “Agency” as:**

- 102 (1) states that: “Agency” means any:
  - department, board, bureau, commission, division, office, council, committee
  - or officer of the state,
  - or a public benefit corporation or public authority at least one of whose members is appointed by the governor,authorized by law to make rules or to make final decisions in adjudicatory proceedings,
- but shall not include:
  - the governor,
  - agencies in the legislative and judicial branches,
  - agencies created by interstate compact or international agreement,
  - the division of military and naval affairs to the extent it exercises its responsibility for military and naval affairs,
  - the division of state police,
  - the identification and intelligence unit of the division of criminal justice services,
  - the state insurance fund,
  - the unemployment insurance appeal board,
  - the worker's compensation board, and
  - the state division of parole and the department of correctional services (except with respect to rule making provisions, which are applicable).



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## Part Five: Administrative Law - the Law of Agencies

### Section One – Agencies – What is an Agency Continued:

#### ➤ Agencies – Defined Continued:

##### ➤ The NYS State Executive Law defines a “State Agency” as:

- For purpose of the Executive Department, § 35 (1) states that: “Agency” means any:
  - Any administrative unit of state government, including, but not limited to, any agency, board, bureau, commission, department, division, institution, office, state public authority, state task force, or other body, or parts thereof, however designated, whether or not it receives legislative appropriations, but does not include any entity whose primary function is service to the legislative or judicial branches of state government, the department of law, the department of audit and control or the board of regents;
  - Any office or officer in any agency, except the department of law and department of audit and control; and
  - Any state public authority or public benefit corporation created by or existing under any state law, or parts thereof, however designated, with one or more of its members appointed by the governor or who serve as members by virtue of holding a civil office of the state, other than an interstate or international authority or public benefit corporation, including any subsidiaries of such public authority or public benefit corporation.
  - Provided that "agency" shall not include any department, board, bureau, commission, division, office, council, committee or officer of a municipality or a local industrial development agency or local public authority or local public benefit corporation as that term is defined in section 66 of the general construction law.
- For purpose of the State Register, § 145 (1) states that: “Agency” means any:
  - department, board, bureau, commission, division, office, council, committee
  - or officer of the state,
  - or a public benefit corporation or public authority at least one of whose members is appointed by the governor.



## **Part Five: Administrative Law - the Law of Agencies**

### **Section One – Agencies – What is an Agency Continued:**

#### **➤ Agencies – Defined Continued:**

#### **➤ There are two types of agencies:**

##### **● Executive Agencies:**

- These agencies do not act independently of the Executive (President or Governor)
- The head of an Executive Agency serves at the pleasure of the Executive; and
- The enabling statute of the Agency will determine its Executive status.
- Examples of Executive Agencies on the Federal level include the Department of Agriculture and the Department of Health and Human Services. Examples of Executive Agencies on the State level include the Department of Financial Services and the Department of Environmental Conservation.

##### **● Independent Agencies:**

- These agencies can act independently of the Executive (President or Governor)
- The head of the agency does not serve at the pleasure of the Executive, and can be either appointed by the Executive for a term, appointed by some other branch of government (such as the congress or the legislature), or in the case of the state, be an independently elected official (such as the Attorney General or the Comptroller).
- Examples of Independent Agencies on the Federal level include the Federal Reserve and the National Labor Relations Board. Examples of Independent Agencies on the state level include the Department of Law and the State Board of Regents.

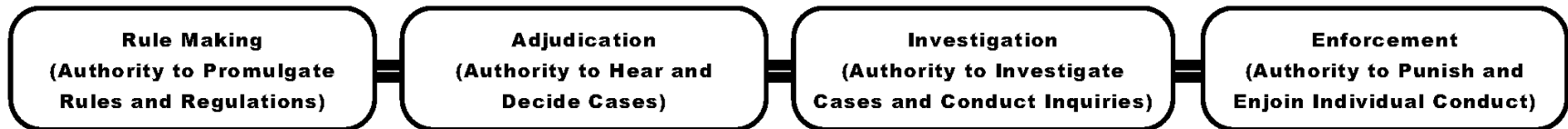


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## Part Five: Administrative Law - the Law of Agencies

### Section Two – Agency Powers:

- Agencies challenge our notions of separated governmental authority.
- In a traditional view of separation of powers, the legislature is charged with making laws, the executive for enforcing them, and courts for interpreting them.
- Agencies, with their powers of Rule Making, Adjudication, Investigation and Enforcement, however, can combine all of these functions (and more) into a single entity.



- This ability to combine all parts of the traditional, separate powers, is one reason why agencies, and the administrative law, under which they operate, have been seen as so controversial.



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## Part Five: Administrative Law - the Law of Agencies

### Section Two – Agency Powers Continued:

#### ● Rule Making

- Many Agencies are vested with the legal authority for the development of legal standards much like legislation.
- These standards, intended to amplify statutes or case law, are known alternatively as rules or regulations.
- Using a formal process that requires publishing notice of the proposed rulemaking in the State or Federal Register, (depending on whether they are a state or federal agency) these agencies must take public comment and follow other legally- proscribed steps, in order to adopt such rules.
- Once adopted, these Rules/Regulations must be published in the State or Federal Register, and eventually assembled in the Official Compilation of Codes, Rules and Regulations of the United States or State of New York.
- These publications are broken down into various volumes, and are often abbreviated as the “CFR” and “NYCRR.” respectively.
- Agencies also make less formal and binding pronouncements in handbooks, memoranda, orders and other guidance documents.





New York State CLE - Administrative Law

## Part Five: Administrative Law - the Law of Agencies

### Section Two – Agency Powers Continued:

#### ● Adjudication

- Many agencies are also vested with the power to conduct administrative adjudications.
- These hearings, presided over by an Administrative Law Judge (ALJ), who is an employee of the agency, are often less formal than a court determination, but often have many of the same qualities.
- Moreover, In terms of the impact upon the lives of the persons involved, administrative adjudication can be every bit as important, critical and profound as court adjudication.
- When a grocer faces the loss of a license to sell beer, a company faces a potential fine for violating an applicable environmental standard, or a disabled person is attempting to obtain vocational services, they each must appear before an agency in an administrative adjudication, and the stakes for each can be personally quite high.
- These determinations made in this adjudication process, like that of rule making, are subject to judicial review, but upon such review, often strong deference is given by the court to the agency, as experts in their field.





New York State CLE - Administrative Law

## Part Five: Administrative Law - the Law of Agencies

### Section Two – Agency Powers Continued:

#### ● Investigations

- Agencies may also be vested with strong powers to investigate potential violations of the law within their jurisdiction.
- Under such powers, they may make use of a full range of investigative tools, including inspections, tests, recordkeeping and reporting requirements, and others.



#### ● Enforcement

- Agencies may also be vested with strong powers of enforcement.
- Pursuant to these enforcement responsibilities, if agency personnel detect violations of the law, they may be able to take legal action in a manner parallel to that of a prosecutor.
- Heavy fines and injunctions can be administratively levied against the violator, but due process standards, although in some cases reduced, still apply.





*New York State CLE - Administrative Law*

# **Part Six**

# **Sources of**

# **Administrative Law**



## **Part Six: Sources of Administrative Law**

### ***Section One – General Sources for Administrative Law:***

- **By way of overview, there are three principal sources of legal restraints on agencies. They are the constitution, their enabling statutes, and the administrative procedure acts.**
- **Constitution**
- **Agencies, like all other parts of the government, must follow and are constrained by the constitution.**
- **Federal agencies are bound by the provisions of the United States Constitution and State agencies are bound by the provisions of both the United States and New York State Constitutions.**
- **The Fourth Amendment to the United States Constitution, for instance, forbids "unreasonable" searches, and this amendment has been held by the United States Supreme Court to apply to agencies. 1**

1. Please see *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).



New York State CLE - Administrative Law

## Part Six: Sources of Administrative Law

### Section One – General Sources for Administrative Law Continued:

#### ● Constitution Continued

- From the standpoint of administrative adjudication, the most important constitutional provisions are those that require "due process of law." 2
- It should be noted, however, that this idea of due process has not, however, been reduced to any exact formula.
- The courts have held that to comply with due process, usually requires that the agency provide reasonable procedures before making a decision that is significantly adverse to a private party and in which the private party has a significant property right or liberty interest.
- Thus, for instance, an agency procedure that caused a party grave harm on the basis of very little proof, or allowed only a minimal opportunity for affected parties to participate, would violate due process. 3

2. Please see U.S. Const. Amend. XIV; N.Y. Const. Art. I, 6.

3. Please see *Goldberg v. Kelly*, 397 U.S. 254 (1970)(AFDC recipient has a due process right to make an oral presentation before termination of benefits); *Miller v. De Buono*, 90 N.Y.2d 783 (1997)(entry of a nurse's aide's name on registry of suspected patient abusers based solely on the existence of "some credible evidence" of abuse violates due process).



## Part Six: Sources of Administrative Law

### Section One – General Sources for Administrative Law Continued:

#### ● Enabling Statutes

- Both Federal and State Agencies are creatures of statute. For the Federal Agencies, these are found in the United States Code. For State Agencies these are found in McKinney's.
- These enabling statutes set forth the mission, jurisdiction, responsibilities and powers of the agency. Through these enabling acts, agencies are delegated the constitutional power to act on behalf of the government.

#### ● Federal Enabling Statutes

- 49 U.S.C. 101, et seq., for example, is the enabling statute for the Federal Department of Transportation. Section 102 of that federal law provides the direct enabling legislation establishing the department, and describes its mission, jurisdiction, responsibilities and powers.

#### ● State Enabling Statutes

- On the state level, Article 2 of the Vehicle and Traffic Law (Sections 200, et seq.) is the enabling statute for the State Department of Motor Vehicles, and Article 2 of the Public Health Law (Sections 200, et seq.) is the enabling statute for the State Department of Health. These state statutes establish these departments in law, designate their functions, powers and duties, and provide for the appointment and qualifications of their commissioners.
- ❖ Enabling statutes provide the legal authority for an agency to act.



*New York State CLE - Administrative Law*

## **Part Six: Sources of Administrative Law**

### **Section One – General Sources for Administrative Law Continued:**

#### **● Administrative Procedures Acts**

- In addition to the constraints and limits placed upon agencies in their enabling act, agencies can also be subject to further restrictions and procedural requirements, pursuant to administrative procedure acts.

#### **● Federal Administrative Procedures Act (APA – 5 U.S.C. 500, et seq.)**

- The Federal Administrative Procedure Act was enacted by Congress in 1946. It took ten years to write and pass, and was in direct response to the growth of agencies within the federal government.
- In part a legislative response to the encroachment of executive power, this statute sought to establish procedural safeguards to agency actions, require public notice and publication of agency actions, and provide uniform procedures amongst agencies and their regulated communities.

#### **● State Administrative Procedures Act (SAPA)**

- Nearly 30 years later, New York State enacted its State Administrative Procedure Act, in 1975. This chapter of laws, sought to bring to state government, the same goals as the Federal APA.
- Loosely modelled on the Federal Administrative Procedure Act and the 1961 Model State Administrative Procedure Act, SAPA, is unique and no other state has an administrative procedure act exactly like it. Its fundamental idea is to provide relative consistency and uniformity in agency processes.

- ❖ **Administrative Procedure Acts represent a check and balance by the legislature on the executive branch.**



## **Part Six: Sources of Administrative Law**

### ***Section One – General Sources for Administrative Law Continued:***

#### **● Publication and Transparency Requirements**

- In addition to their enabling acts and the APA (for federal) and SAPA (for state), agencies are also subject to publication and transparency laws. These laws have an effect of the execution of administrative law and how it works.

#### **● Federal Publication and Transparency Laws**

##### **● The Federal Register**

- In 1935, Congress passed the Federal Register Act. This law, later expanded and incorporated into the Federal Administrative Procedure Act, as 5 U.S.C. § 551, requires agencies to publish information on their activities in the Federal Register. Rules and Regulations, eventually then get published in the Code of Federal Regulation (CFR).
- Documents given classified status for national security are not required to be published. Each daily issue of the Federal Register is organized into four categories:
  - Presidential Documents (executive orders and proclamations)
  - Rules and Regulations (policy statements and interpretations of rules by federal agencies)
  - Proposed Rules (petitions by agencies for assistance in rulemaking and other proposals)
  - Notices (scheduled hearings and meetings open to the public, grant applications, and administrative orders)



## **Part Six: Sources of Administrative Law**

### ***Section One – General Sources for Administrative Law Continued:***

#### **● Federal Publication and Transparency Laws Continued**

##### **● The Federal Register Continued**

- It should be noted that as part of the Federal E-Government eRulemaking Initiative, the web site Regulations.gov was established in 2003. This website enables easy public access to Federal Register publications and was further enhanced in 2005 with the launch of the Federal Docket Management System (FDMS). Through FDMS, the public can use Regulations.gov to access entire rulemaking dockets from participating Federal Departments and Agencies" to include providing on-line comments directly to those responsible for drafting the rulemakings.

##### **● The Federal Freedom of Information Act**

- On July 4, 1966, Congress passed the Federal Freedom of Information Act. This law, incorporated into the Federal Administrative Procedure Act, as 5 U.S.C. § 552, allows for the full or partial disclosure of previously unreleased information and documents controlled by the United States government. The Act defines agency records subject to disclosure, outlines mandatory disclosure procedures and grants nine exemptions to the statute.
- It should be noted that FOIA applies only to executive branch government agencies. These agencies are under several mandates to comply with public solicitation of information. Along with making public and accessible all bureaucratic and technical procedures for applying for documents from that agency, agencies are also subject to penalties for hindering the process of a petition (request) for information.



## Part Six: Sources of Administrative Law

### Section One – General Sources for Administrative Law Continued:

#### ● State Publication and Transparency Laws

##### ● The State Register

- Article 6-A of the Executive Law provides for a State Register. The Department of State (Division of Administrative Rules) is responsible for publishing and maintaining the State Register.
- Like the Federal Register, Article 6-A of the Executive Law also requires state agencies to publish information on their activities in the State Register. Rules and Regulations, eventually then get published in the New York Code of Rules and Regulations (NYCRR).
- Section 146 provides for publication of the State Register, from time to time, as information is received by the Department of State. Such publication includes:
  - Rules, orders, designations, and notices submitted by the chief administrator of the courts;
  - Notices and advertisements required by state statute or federal law, rule or regulation to be published by an agency in a newspaper;
  - Notices required by statute to be published in newspapers in actions against foreign corporations;
  - Notices and job impact statements required by the state administrative procedure act to be published in the state register; and
  - Any other matter required by statute to be published in the state register.

##### Additionally:

- The secretary of state may, at his discretion, publish in the state register any notice or information, where such publication will serve the public interest;
- With regard to rule making notices required to be published in the state register pursuant to article two of the state administrative procedure act, the secretary of state may, at his discretion, publish the complete text of a proposed or adopted rule, which is not otherwise required to be published in the state register, in instances where such publication will serve the public interest; and
- With regard to a notice of adoption published in the state register pursuant to article two of the state administrative procedure act, for which the corresponding notice of proposed rule making published in the state register included the complete text of the rule, the secretary of state may, at his discretion, include only the changes in such text in the notice of adoption.



## Part Six: Sources of Administrative Law

### Section One – General Sources for Administrative Law Continued:

#### ● State Publication and Transparency Laws Continued

##### ● The New York State Freedom of Information Law (FOIL)

- Article 6 of the Public Officers Law established the Freedom of Information Law.
  - A recodification and expansion of a previous statute, the legislature enacted chapter 578 of the laws of 1974 (FOIL), to allow access to the records of the state government and its localities.
  - Section 87 of the Public Officers Law, within FOIL, provides for public access to agency records. Pursuant to such section:
    - Each agency and the governing body of each public corporation must promulgate rules and regulations, to provide for the compliance of such agency and public corporation with FOIL and its purposes;
    - Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that based upon certain specific exceptions, including the fact that such information is specifically exempted from disclosure by state or federal statute; if disclosed would constitute an unwarranted invasion of personal privacy (as determined by the rules of the Committee on Open Government); if disclosed would impair present or imminent contract awards or collective bargaining negotiations; are trade secrets, or similar type of commercially proprietary information; are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings; are inter-agency or intra-agency materials which are not statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations; or external audits.
- Additionally, each agency shall maintain:
- a record of the final vote of each member in every agency proceeding in which the member votes;
  - a record of the name, public office address, title and salary of every officer or employee of the agency; and
  - a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under FOIL.



*New York State CLE - Administrative Law*

# Part Seven

# Agency Actions



## Part Seven: Agency Actions

### Section One – Generally: Actions of Agencies:

#### ● Types of Actions

- Agencies are empowered by their enabling statute to take action, within the scope of their mandate, purposes, powers and mission.
- Section 551 (13) of the Federal Administrative Procedure Act defines “Agency Action” to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”
- The types of actions that agencies generally engage in can be summarized as:
  - **Rulemaking - Promulgation of Rules or Regulations (Legislative);**
  - **Licensing – Issuing licenses for Regulated Conduct (Executive);**
  - **Adjudication – Making Determinations on Regulated Conduct (Judicial);**
  - **Investigation – Conducting Investigations or Studies (Executive);**
  - **Enforcement – Enforcing or Enjoining Regulated Conduct (Executive).**
- As creatures of statute, it should be noted, that agency action outside of the scope of an agency’s enabling law is rarely given deference or upheld.
- Within the scope of their enabling law, however, and especially within the scope of their expertise, the courts have given great deference and nearly always uphold such agency action.



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## Part Seven: Agency Actions

### Section Two – Generally: Rulemaking

#### ● What is Rulemaking

- Regulating Conduct within the scope of an Agency's authority, especially as established under its enabling statute, is a fundamental agency function.

#### ● Federal Rulemaking

- Section 551 (5) of the Federal Administrative Procedure Act defines "Rule Making" to mean the:

- "agency process for formulating, amending, or repealing a rule"

- §551 (4) defines the term "Rule" to mean the:

- 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing"

- The key distinction is that a "rule" is an agency statement of "future effect." In this sense, the rulemaking process resembles the legislative process in that it enacts a new law that is binding only upon future conduct.



New York State CLE - Administrative Law

## Part Seven: Agency Actions

### Section Two – Generally: Rulemaking

#### ● State Rulemaking

➤ Section 102 (2) of the State Administrative Procedure Act defines the term "Rule" to mean:

- the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and
- the amendment, suspension, repeal, approval or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.

#### The term “Rule” does not include:

- Rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public;
- Rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;
- Declaratory Rulings by Agencies or rulings concerning the Right to Judicial Review of Rules;
- Forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory;
- Rules promulgated to implement agreements pursuant to the Taylor Law;
- Rates of interest prescribed by the superintendent of banks; and
- Rules relating to the approval or disapproval of certain excluded rates and fees.



## Part Seven: Agency Actions

### Section Two – Generally: Rulemaking

#### ● General Note: The Price of Rule Making

- The ability to assure a society with clean air and drinking water (EPA), safe airplane flights and landings (FAA) and safe and non contaminated foods and medications (USDA) and (FDA) are all very important to every person in a modern society. But what is the cost?
  - According to the Federal Small Business Administration (SBA) the annual cost of federal regulation alone is \$1.75 trillion. This is sharply up from \$1.1 trillion the SBA reported in 2005. This is a lot of money. And it doesn't even include the enormous cost of state regulation.
  - \$1.75 trillion is far more than Americans pay in income taxes each year, and its about the same as the GDP of the entire economy of many major European Countries. Per household, this regulatory tab works out to nearly \$15,000 (almost as much as the average family spends on housing per year).
  - The SBA study, co-authored by economists Nicole V. Crain and Mark Crain, probably shouldn't come as a surprise. During the past few years, spanning two presidencies, the tide of regulation has risen at an alarming rate. The federal government is currently on pace to issue at least 76,300 pages of new rules and regulations this year, but most economists suspect the actual figure will be much larger.
  - Moreover, this trend appears to be escalating with only more to come. With this year's implementation of the Patient Protection and Affordable Care Act (Obamacare), and the drive to fully implement the Consumer Financial Protection Bureau (Dodd-Frank), 2013 promises to be a record year for imposing new federal rules and regulations.



New York State CLE - Administrative Law

# Part Seven: Agency Actions

## Section Two – Generally: Rulemaking

- General Note: The Price of Rule Making

Number of Pages of Regulations Added to the Federal Register Each Year, 1936-2011





## Part Seven: Agency Actions

### *Section Three – Rulemaking and the Federal Administrative Procedure Act*

- **APA – Recognizes Two Types of Rulemaking: Informal and Formal:**

- Section 553 of the Federal Administrative Procedure Act indicates what procedures an agency must follow when it is engaged in rulemaking.
- These procedures apply unless the rule concerns:
  - (1) military or foreign affairs or
  - (2) matters relating to agency management or personnel or to public property, loans, grants, benefits or contracts. See §553 (a).
- The Federal Administrative Procedure Act further implicitly recognizes two types of rulemaking:
  - (1) Informal Rulemaking and
  - (2) Formal Rulemaking.
- As the names imply, informal rulemaking involves fewer procedures and thus less procedural formality and presumably less time and expense.
- It should be noted that section 553 first defines what procedures an agency must use in informal rulemaking. It then indicates when formal rulemaking is to be used and what procedures it involves.



## Part Seven: Agency Actions

### Section Three – Rulemaking and the Federal Administrative Procedure Act

#### ● Informal Rulemaking:

➤ Section 553 of the Federal Administrative Procedure Act establishes a three step process for informal rulemaking:

(1) An agency is required to publish a notice of the proposed rule in the Federal Register.

● *There are two exceptions to this requirement.*

- Interpretive rules, which are general statements of policy, or rules of agency organization, procedure, and practice; and
- When the agency has "good cause" for bypassing the notice stage of rulemaking.

(2) The agency must give "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."

- Note: that although the agency must give interested persons the opportunity to submit written material, it is the agency's option whether to permit oral presentations. Most agencies do not permit oral presentations. The written comments are kept in a document room at the agency and may be viewed by interested persons who might wish to respond to the submissions.
- Under the Egovernment Act of 2002, agencies are now currently in the process of establishing ways to enable public participation in rulemaking by electronic means through the Internet.

(3) The agency must "incorporate in the rules adopted a concise general statement of their basis and purpose." This statement must appear in the Federal Register along with the final version of the rule.

● It should be noted that many statements of basis and purpose, however, are anything but concise. It is not uncommon for a justification for a controversial rule to be more than 100 pages.



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## **Part Seven: Agency Actions**

### ***Section Three – Rulemaking and the Federal Administrative Procedure Act***

#### **● Formal Rulemaking:**

- Whether a federal agency is required to do formal rulemaking or can do informal rulemaking is specified in its enabling statute. Indeed, section 553(c) of the Federal Administrative Procedure Act establishes this test. Pursuant to this section, an agency must use formal rulemaking when "rules are required by statute to be made on the record after an opportunity for agency hearing." The statute to which §553(c) refers is the agency's enabling statute.
- In "formal rulemaking", an agency follows the procedures specified in §556 and §557 of the APA instead of steps two and three outlined in §553.
- If an agency is required to use formal rulemaking, it must undertake the same type of trial that it would use for a formal adjudication.
- These "trial like procedures" replace the comment period and the statement of basis and purpose.
- If the agency's mandate requires it to adopt a rule "on the record after an opportunity for agency hearing," then it must then use the procedures specified in §556 and §557.
- Since only a few agencies have mandates that require formal rule making, informal rulemaking is used for most rulemaking activity.
- As can be inferred, informal rule making is generally quicker than formal rulemaking because the agency can avoid undertaking a trial-like hearing.



## Part Seven: Agency Actions

### *Section Three – Rulemaking and the Federal Administrative Procedure Act*

#### ● Hybrid Rulemaking:

- Under the APA itself, there are only the two models of rulemaking-formal and informal.
- Congress, however, has created numerous new programs and agencies in the years since the APA was first enacted, and as a result, has often imposed particular rulemaking procedures on those programs or agencies in their enabling statutes.
- These particular procedures are often referred to as "hybrid" rulemaking procedures, because they invariably add some additional procedures to §553's requirements, while not going so far as to mandate the procedures of §556 and §557.
- Some hybrid rulemaking statutory requirement include:
  - (1) The process the Federal Trade Commission (FTC) uses to promulgate trade regulation rules, where among other additional procedures, the FTC must include an informal hearing at which interested parties can make oral presentations and, with some limitations, present and cross-examine witnesses. Please see 15 U.S.C. 557a.
  - (2) The specific procedures the Environmental Protection Agency (EPA) must follow in adopting rules implementing the Clean Air Act, Please see 42 U.S.C. 7607(d); and
  - (3) The rulemaking requirements of the Department of Energy, which require it to supplement the procedures of section 553 with additional requirements, including a public hearing unless the Secretary determines that no substantial issue of law or fact exists with respect to a rule and that the rule is unlikely to have a substantial impact on the Nation's economy or large numbers of businesses or individuals. Please see 42 U.S.C. 7191(c).



## Part Seven: Agency Actions

### Section Three – Rulemaking and the State Administrative Procedure Act

#### ● State Rulemaking:

- Unlike the Federal Administrative Procedure Act, SAPA does not establish a defined, differentiated process for informal or formal rulemaking. Although individual state enabling statutes may provide higher standards, the State Administrative Procedure Act provides for a uniform rulemaking procedure.
- Specifically, article 2 of SAPA governs the procedures by which agencies make administrative rules and regulations. Its provisions are set forth as follows:
  - § 202. Rule making procedure.
  - § 202-a. Regulatory impact.
  - § 202-b. Regulatory flexibility.
  - § 202-c. Regulatory review.
  - § 202-d. Regulatory agenda.
  - § 203. Filing; effective date.
  - § 204. Declaratory rulings by agencies.
  - § 205. Right to judicial review of rules.
  - § 206. Overlapping regulations; compliance determinations.
- Agency rulemaking can be distinguished from agency adjudication because the former involves the creation of standards that apply in the future to a class of persons or entities. (Please see *People v. Cull* 10 N.Y.2d 123 (1961)).
- Agency rules are often described as "quasi-legislative" pronouncements because they resemble statutes, while Agency adjudication is often referred to as "quasi-judicial" because it involves individualized determinations of the legal rights of particular persons or entities.

Note: As a result, an agency's determination that a particular person is disabled and meets the requirements for receiving vocational services is an administrative adjudication because that decision assesses the legal rights of that particular person. Accordingly, the criteria for qualifying as "disabled," might well come from an administrative rule, which is applicable to all persons claiming the right to such vocational services.



New York State CLE - Administrative Law

## Part Seven: Agency Actions

### Section Three – Rulemaking and the State Administrative Procedure Act

#### ● State Rulemaking Continued:

- In broad outline, the process for making administrative rules, pursuant to article 2 of SAPA (and most state enabling statutes) is more public and political than the process for administrative adjudication.

#### ● Notice:

- Notice of proposed administrative rules generally must be published in The State Register.
- As aforementioned, however, there are important exceptions for emergency rules, as well as other kinds of pronouncements that resemble rules, but are merely "general policy" or interpretative statements.
- Pursuant to section 202 of SAPA:
  - Unless a different time is specified by statute, the notice of proposed rule making must appear in the state register at least 45 days prior to either:
    - The addition, amendment or repeal of a rule for which statute does not require that a public hearing be held prior to adoption; or
    - The first public hearing on a proposed rule for which such hearing is so required.
  - This section further requires that the agency must also notify every person who has submitted a written request to be notified of all proposed rules which may affect such person. (These requests shall expire annually on December 31, with renewals for the succeeding year to be accepted on or after December 1.



New York State CLE - Administrative Law

## Part Seven: Agency Actions

### Section Three – Rulemaking and the State Administrative Procedure Act

#### ● State Rulemaking Continued:

- The process for making administrative rules is pursuant to article 2 of the State Administrative Procedure Act and the agency's enabling statute.

#### ● Public Comment:

- Pursuant to section 202 of SAPA, publication of a proposed rule triggers a right of public comment.
- Under this section, and the agency's enabling statute, written comments are always acceptable, and sometimes oral comments, through public hearing are also received.

#### ● Adoption:

- After the comment period closes, agencies can adopt final rules.
- Pursuant to §203 of SAPA, upon the adoption of the final rule, such must be filed with the Secretary of State, then published in the State Register.
- Eventually, the Secretary of State, through its Division of Administrative Rules, will compile the new rule in the NYCRR.
- It should be noted that agencies often must prepare ancillary documents in the course of rulemakings.
- These requirements are in addition to regulatory impact review that must take place pursuant to sections 202-a, 202-b, 202-c, and 202-d of SAPA.
- Because agency's are most often under the control of the Governor, they can and have, from time to time, imposed by executive order, other requirements on the rulemaking process.



## Part Seven: Agency Actions

### *Section Four – Adjudication and the Federal Administrative Procedure Act*

- **APA – Recognizes Two Types of Adjudication: Informal and Formal:**
  - Section 554 of the Federal Administrative Procedure Act indicates what procedures an agency must follow when it is engaged in adjudication.
  - Like rulemaking, there are two types of adjudicatory processes that are implicitly recognized by the APA: formal and informal.
  - If an agency is required to engage in "formal adjudication," the APA requires the agency to use procedures that resemble a trial. In contrast, the APA does not mandate any procedures for "informal" adjudication.
  - Section 554(a) controls whether an agency must use formal adjudication, and states that the procedures listed in this section apply "in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing."
  - The "statute" to which section 554(a) refers is the agency's mandate.
  - If the agency's mandate requires it to reach adjudicatory decisions "on the record after opportunity for agency hearing," then the agency must use the procedures outlined in sections 554, 556 and 557.

**Formal Adjudication:**



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## **Part Seven: Agency Actions**

### ***Section Four – Adjudication and the Federal Administrative Procedure Act***

#### **● Formal Adjudication:**

- **Section 554 provides that cases requiring formal adjudication must use several procedures generally used in trials.**
- **Among the requirements of §554, are that the agency must give notice to the parties of its hearing, and offer an opportunity to reach a settlement.**
- **Additionally, the APA further provides, that the person who presides at the hearing is prohibited from receiving ex parte contacts, or communications from the parties including employees of the agency.**
- **In formal adjudication, the agency must conduct the hearing in accordance with sections 556 and 557.**
- **Section 556 addresses the hearing procedures.**
- **This section authorizes the use of an Administrative Law Judge (ALJ) and specifies the judge's authority.**
- **Section 556 also places the burden of proof on the agency, provides that oral and written evidence can be received, permits cross-examination of witnesses, and mandates that any decision must be based on the entire record.**
- **The entire record is defined by §556, to include the hearing transcript and all documentary evidence.**



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## Part Seven: Agency Actions

### Section Four – Adjudication and the Federal Administrative Procedure Act

#### ● Formal Adjudication Continued:

##### ● Administrative Law Judges:

- Administrative Law Judges (ALJs) who hear the adjudicatory hearings, are technically agency employees who are appointed to serve as judges in agency adjudications and other processes.
- Two features of the appointment process give ALJs independence from the agencies for which they work:
  - The ALJs' pay is determined by a separate agency, the Office of Personnel Management, and
  - The ALJs may not be subjected to removal, suspension, or have their pay reduced, except after a hearing before the Merit Systems Protection Board, another separate agency.
- Appeals:
  - Section 557 of the APA addresses appeal procedures.
    - It provides that the ALJ shall "initially decide the case," although the agency can bypass this.
    - If the ALJ makes an initial decision, either the staff or any party can appeal the decision to the agency administrator, or if the agency is a commission, to the commission members, and the parties have the right to submit briefs.
    - In an appeal, §557 provides that "on appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision." Accordingly, the administrator or commissioners are not required to give deference to the factual conclusions of the ALJ. Moreover, the agency's final decision must be justified in a written opinion on the basis of the entire record.



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## Part Seven: Agency Actions

### Section Four – Adjudication and the Federal Administrative Procedure Act

#### ● Informal Adjudication:

- If an agency is not required by its mandate to conduct adjudication “on the record after opportunity for an agency hearing,” then APA does not prescribe any required procedures for adjudication.
- Nevertheless, two circumstances may require an agency to follow certain hearing procedures.
- First, although the agency's mandate may not require it to use formal adjudication, the statute might still require that the agency use some hearing procedures.
  - An example of this type of requirement is where Congress has authorized the Environmental Protection Agency to impose certain monetary penalties after an informal adjudication, but it requires the EPA to afford an opportunity for a "hearing" that provides a reasonable opportunity to be heard and present evidence." Please see 33 U.S.C. § 1319(g)(2)(A).
- Second, if the due process clause applies to the agency's action, it may be then obligated to follow some type of hearing process. The obligation of due process applies if the agency's action will deprive a person of liberty or "property" as the terms have been defined by the U.S. Supreme Court pursuant to the Constitution.
- The U.S. Supreme Court has also determined what types of procedures must be used when property or liberty is affected. A full trial-like hearing is not generally required to satisfy due process, but instead, what is required, is “some kind of hearing”. An opportunity to be heard is what is important.



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## Part Seven: Agency Actions

### Section Five – Adjudication and the State Administrative Procedure Act

#### ● State Adjudication:

- Article 3 of the State Administrative Procedure Act is the article of the greatest importance for administrative adjudication.
- This article covers all "adjudicatory proceedings" conducted by agencies covered by SAPA, and provides for the following sections:
  - 301. Hearings.
  - 302. Record.
  - 303. Presiding officers.
  - 304. Powers of presiding officers.
  - 305. Disclosure.
  - 306. Evidence.
  - 307. Decisions, determinations and orders.

#### ➤ Section 102 (3) of SAPA defines an "adjudicatory proceeding" as:

“any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges or named parties thereto is required by law to be made only on a record and after an opportunity for hearing.”



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## Part Seven: Agency Actions

### Section Five – Adjudication and the State Administrative Procedure Act

#### ● State Adjudication Continued:

- The definition of adjudicatory proceeding in 102 (3) of SAPA tells us several important things about "adjudicatory proceedings."
- First, several kinds of proceedings are not covered.
  - Rulemakings, which as discussed above are fundamentally different from administrative adjudications, are not subject to the procedures for adjudicatory proceedings.
  - Also excluded are two types of proceedings that might otherwise fit within the definition:
    - employee disciplinary actions and
    - administrative determinations of traffic offenses.
- Second, adjudicatory proceedings must involve a determination of the legal rights and duties of specific persons.
  - This, of course, distinguishes adjudication from rulemaking.
  - Rulemaking does not involve named parties rather, it involves setting norms for entire classes of persons and thus falls outside the scope of administrative adjudication.
- Third, "adjudicatory proceedings" are those administrative adjudications that are "required by law to be made only on a record and after an opportunity for hearing."
  - The idea of agency adjudications being "on a record" is an administrative law term of art.
  - "On a record" proceedings involve the compilation of a record, but they also involve many other procedural formalities.
  - SAPA's provision that the adjudicatory proceedings are those in which an "on a record" hearing is "required by law" means that there must be some provision of law outside SAPA that requires the record hearing.



## Part Seven: Agency Actions

### *Section Five – Adjudication and the State Administrative Procedure Act*

#### ● State Adjudication Continued:

- A voluntary decision by an agency to provide a formal hearing does not mean that the proceeding is converted into an adjudicatory proceeding.
- Accordingly, in order for a proceeding to be an "adjudicatory proceeding" under SAPA, there must be some provision almost always a statute that requires a "hearing on a record" for that particular type of proceeding.
  - As a result, a statute that merely requires an agency to hold a "hearing" or allow an "opportunity to be heard" does not call for an adjudicatory proceeding. It must state "on the record" for the proceeding to be adjudicatory. Please see *Vector East Realty Corp. v. Abrams*, 89 A.D.2d 453 (1st Dep't 1982).
- It should be noted, however, that pursuant to section 401 of SAPA, an exception exists for statutes that call for a "hearing" or an "opportunity to be heard" in connection with the issuance of a license, permit or similar form of government permission. In those statutes, it has been construed, that such is required to be an adjudicatory proceeding.



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## Part Seven: Agency Actions

### Section Five – Adjudication and the State Administrative Procedure Act

#### ● State Adjudication Continued:

- If the proceeding meets SAPA's definition of an adjudicatory proceeding, then the procedures set forth in Article 3 apply. These procedures are as follows:
  - Section 301 requires reasonable notice to the affected parties and sets forth in considerable detail the contents of the notice.
  - Section 302 requires the compilation of a complete record of all adjudicatory proceedings, including the recording of testimony either stenographically or electronically.
  - Section 303 requires that adjudicatory proceedings be conducted either by the head (or one of the heads) of an agency or a properly designated hearing officer, mandates that the proceedings be conducted impartially and describes how the matter is to proceed if the person presiding is disqualified or cannot continue.
  - Section 304 sets forth several significant powers of the person presiding, including the issuance of subpoenas.
  - Section 305 allows agencies to adopt rules that govern pre-hearing disclosure of information.
  - Section 306 sets forth the evidentiary standards to be followed in adjudicatory proceedings.
  - Section 307 requires a written opinion in any adjudicatory proceeding decided adversely to a private party and requires the agency to maintain a publicly- available index of final opinions.
- Article 3 thus requires a fair degree of formality and deliberation in the course of an adjudicatory proceeding.
- It should be further recognized that although adjudicatory proceedings are more streamlined than court adjudication, they do represent the zenith of procedural detail in New York State administrative law.



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## **Part Seven: Agency Actions**

### ***Section Six – Licensing and the Administrative Procedure Acts***

#### **● Licensing:**

- Although the Federal Administrative Procedure Act does not expressly break out the term “licensing”, Article 4 of the State Administrative Procedure Act does.
- Licensing is one of the oldest state activities, dating back to the very founding of the state. Section 102 (5) of SAPA defines licensing as "any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license“, and a "License" in turn is "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.“
- Accordingly, pursuant to SAPA, a license is any form of formal permission issued by a state agency.
- Its designation as a certificate, license, permit or other term is unimportant; all are "licenses" as far as SAPA is concerned.
- Licensing is thereby any state agency activity that significantly affects a license.
- SAPA Section 401 treats licensing matters essentially as adjudicatory proceedings, (which is how the federal government also sees them) provided a statute requires a "hearing" or an "opportunity to be heard" on the matter.



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## Part Seven: Agency Actions

### Section Six – Licensing and the Administrative Procedure Acts

#### ● Licensing Continued:

- Under the section 401, a routine, ministerial issuance of such items as individual fishing licenses would not trigger SAPA section 401's requirements in the ordinary circumstance, but more significant kinds of permissions that are accompanied by hearing requirements that do bring to bear SAPA's procedural requirements.
- Also, as aforementioned, in contrast to ordinary adjudicatory proceedings, licensing statutes need not specifically refer to a hearing "on a record"; a mere reference to a "hearing" or an "opportunity to be heard" is enough to trigger the procedural requirements of an adjudicatory proceeding in this context.
- In addition to the Article 3 provisions that apply to adjudicatory proceedings, Section 401 contains three subdivisions that impose requirements applicable only in licensing matters.
  - First, under subdivision 2, a license holder who makes a timely and sufficient application for a new license is ordinarily entitled to operate under the old license until the agency reaches a decision on the new application and the time for review of the agency's decision has expired.
  - Second, along with this, however, subsection 3 gives the agency the power to summarily suspend a license in emergency circumstances.
  - Third, subdivision 4 gives both the agency and the private party the right to make a demand for each others' documentary evidence intended to be introduced at the hearing on the matter.



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## Part Seven: Agency Actions

### Section Seven – Investigations and the Administrative Procedure Acts

#### ● Investigations:

- Some agencies have neither rulemaking nor adjudicatory powers. Their function is usually to bring enforcement actions in court.
- Additionally, under their enforcement obligations, even agencies with rulemaking or adjudicatory powers may need to go to court to enforce the agency's rules or orders.
- Whether agencies engage in rulemaking, adjudication, or judicial enforcement actions, they will usually need to obtain information from outside the agency in order to support its actions.
- Unless Congress or a state legislature has authorized an agency to compel the production of information in the agency's enabling statute, however, the agency must rely on interested parties to provide the information voluntarily.
- If Congress or a state legislature perceives that such cooperation may not be forthcoming, it can authorize an agency to compel the production of information in several ways. Reporting and subpoena power are common investigatory tools.



## Part Seven: Agency Actions

### *Section Seven – Investigations and the Administrative Procedure Acts*

#### ● Investigations Continued:

- Congress or a state legislature can authorize an agency to compel the production of documents and to compel the testimony of persons with information relevant to an investigation.
- The FTC, for example, can order the production of documentary evidence and the testimony of witnesses. Please see 15 U.S.C. 49. The FTC can use this information to determine whether someone has violated their enabling act which prohibits unfair and deceptive acts and practices or to gather information to support a rule.
- An agency can also compel regulated entities to file periodic or special reports with the agency.
- OSHA, for example, is authorized to require employers to report the death of a worker to the agency, and the State Department of Financial Services is authorized to require certain financial reporting of Banks and Insurance companies.
- This purpose of this information alerts the agency to determine whether the regulated entity violated any agency regulation.



## Part Seven: Agency Actions

### *Section Seven – Investigations and the Administrative Procedure Acts*

#### ● Investigations Continued:

- The power to order reports is different from subpoena power because an agency can require an entity to compile information that otherwise would not exist.
- An agency's subpoena power can only be used to recover existing documents.
- Finally, an agency can also be authorized to inspect the premises of a regulated entity to determine if it is in compliance with regulations promulgated by the agency or a statute enacted by the legislature.
- OSHA, and the State Department of Labor, for example, regularly conduct inspections of workplaces, and if an employer refuses to admit an inspector, the agency will use its inspection power to compel the employer to admit the inspector.
- Likewise, health and safety agencies, such as the FDA, USDA, and State Health Department have the authority to conduct inspections to ensure that a regulated entity is complying with regulations and the statutes they are charged with enforcing.



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## Part Seven: Agency Actions

### Section Seven – Investigations and the Administrative Procedure Acts

#### ● Investigations Continued:

- It should be noted that an agency's power to compel the production of information, witnesses, and records or to conduct inspections is subject to judicial review.
- A court will thus ensure that the agency's action is within its statutory authority and that it complies with applicable constitutional protections such as Fourth Amendment constraints on searches.
- Agency lawyers play a role concerning all of these investigatory tools.
- They draft agency subpoenas and negotiate with regulated entities concerning compliance.
- If an agency has the authority to compel testimony, lawyers question witnesses in a proceeding that is similar to a deposition.
- The lawyers also advise the agency concerning its authority to compel reports and conduct inspections.
- Finally, the lawyers defend the agency when a regulated entity challenges the compulsion of information or an inspection in court.



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## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

#### ● **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**

##### ● **Enforcement**

- **One of any agency's prime responsibilities is enforcement.**
- **Enforcement is an inherent Executive action, whereby the agency seeks to have the regulated entity under its control, comply with statutes, rules and regulations under its purview.**
- **It should be noted that an agency's power to compel the enforcement is contained within its enabling act.**
- **Enforcement can be had pursuant to adjudication within the agency, by means of administrative order or fine, or it can be had by means of external action, by means of the agency bringing a court action against the regulated entity.**
- **Both these actions, internal and external enforcement, are done pursuant to the agency's enabling powers, and both are subject to both jurisdictional requirements and judicial review.**



## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

- **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**
  - **Enforcement Continued – Enforcing Rules:**
    - As aforementioned, the enforcement of Rules involves the gathering of information and investigating violations.
    - Agencies are generally recognized to have broad investigative powers, from their enabling act, by means of monitoring and regulated entity reporting.
    - It should be noted, however that regulated entities, through their officers, often have a 5th Amendment, self incrimination concern.
    - These concerns can be overcome by direct observation by the agency, or when the agency obtains information through subpoena power or reporting.
    - Agencies have array of enforcement tools in civil and criminal penalties, plus the use of injunctions
    - Possible sanctions can include:
      - Prohibitions, requirements, limitations, withholding of relief, penalties, fines, destruction, taking, seizing, withholding of property, assessment of damages, reimbursements, restitution, compensation, costs, charges, fees, requirement, revocation, and suspension of license.
    - Informal procedures include: tests, inspections, permits, negotiations, advice, and settlements, while formal procedures include: adjudicatory hearings and litigation.



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## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

- **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**
  - **Jurisdiction**
    - In order for an agency to accomplish enforcement, it must have jurisdiction.
    - Jurisdiction is conferred to an agency from its enabling act.
  - **Right to Counsel**
    - Article 5 of the State Administrative Procedure Act regards the Right to Counsel, and it is comprised of a single section; section 501.
    - Section 501 gives all persons appearing before agencies "the right to be accompanied, represented and advised by counsel."
    - Of course, this does not ordinarily require the agency to provide counsel for persons who are not represented; it simply allows persons appearing before an agency to select and pay for their own counsel.
    - Section 501 does not preclude agencies from allowing non-lawyer representatives to appear on behalf of parties, and although section 501 literally speaks of any agency proceeding, it has not been construed so broadly. In cases in which representation would be particularly inappropriate, courts have upheld agency decisions not to allow representation. Please see *Mary M. v. Clark*, 100 A.D.2d 41 (3d Dep't 1984) (no right of counsel at informal university disciplinary proceeding).



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## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

- **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**
  - Standing and Judicial Review
  - There are other procedural statutes that affect agency proceedings. Probably the most important of these in New York State is Article 78 of Civil Practice Law and Rules (abbreviated "CPLR").
  - Article 78 is a statute that allows affected parties to challenge agency actions by filing an action in New York State Supreme Court.
  - In general, an affected party may seek judicial review under Article 78 only after the agency proceedings, including any appeals within the agency itself, are completed.
  - Additionally, the party challenging the action must have some significant stake in the agency decision, with the courts finding that a person who finds an agency action annoying, but is no more impacted by it than the general public, may not successfully seek judicial review of it. Please see *Mobil Oil. Co. v. Syracuse Indus. Development Agency*, 76 N.Y.2d 428, 559 N.Y.S.2d 947, 559 N.E.2d 641 (1990).
  - In general, courts uphold agency decisions as long as they are reasonable.
  - This does not necessarily mean that the agency must reach exactly the same result that the reviewing court would have reached had the matter first been presented to the court.



## Part Seven: Agency Actions

### Section Eight – Enforcement, Jurisdiction, and Judicial Review

#### ● Enforcement, Jurisdiction, Right to Counsel and Judicial Review:

##### ● Standing and Judicial Review Continued

- Courts will uphold agency decisions as long as they are factually and legally plausible. Please see Borchers, Patrick J. and David L. Markell, NYS Administrative Procedure and Practice, 8.5 (West 1995).
- As to factual determinations in adjudicatory proceedings, courts uphold agency determinations as long as there is "substantial evidence" to support the decision.
- Thus, for instance, if an agency decision is based on the testimony of a witness, courts will uphold the agency's factual findings even though there might have been a significant amount of contrary evidence and testimony introduced. Please see *Stork Restaurant v. Boland*, 282 N.Y. 256, 26 N.E.2d 247 (1940).
- As to legal determinations, courts usually uphold an agency's interpretation of the law as long as it is reasonable.
- This is particularly so when the agency interprets complex statutes and regulations within the agency's zone of expertise. Please see Borchers, Patrick J. and David L. Markell, NYS Administrative Procedure and Practice, 8.3 (West 1995).
- Other kinds of agency determinations, such as the appropriate penalty to be imposed if there is a violation, are set aside by reviewing courts only if the agency acts arbitrarily or capriciously, or abuses its discretion. In the context of imposing a penalty, courts often say that they will set aside a penalty only if they find it "shocking." Please see *Pell v. Board of Education*, 34 N.Y.2d 222 (1974).



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## **Part Seven: Agency Actions**

### ***Section Eight – Enforcement, Jurisdiction, and Judicial Review***

- **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**
  - **Standing and Judicial Review Continued**
  - **Of course, court deference to the agency judgment brings with it a great responsibility on the part of ALJs and agencies to make the correct determination of matters before them; the agency determination is very likely to be the final word.**
  - **Other statutes affect agency procedures at least tangentially.**
  - **The Freedom of Information Law and the Open Meetings Law impose some duties of openness on agencies, and these are discussed in much more detail in a later chapter. The Executive Law contains some statutes on the rulemaking process that largely duplicate those in SAPA Article 2.**
  - **As a practical matter, however, the general statutes of the most procedural significance for agency adjudication are SAPA and Article 78 of the CPLR.**



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## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

#### ● **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**

##### ● **Standing and Judicial Review Continued**

- **With respect to federal law, both adjudicatory and rulemaking decisions are generally subject to judicial review. As briefly described below, however, the APA has several important rules that may limit if or when judicial review may be obtained.**
- **First, although most agency actions can be appealed, the APA recognizes that not all decisions are subject to judicial review.**
- **Section 701 establishes that a person is not entitled to review if "statutes preclude review" or if "agency action is committed to agency discretion by law."**
- **The first clause refers to the circumstance when Congress has prohibited judicial review in an agency's mandate. Until recently, the Veteran's Administration was the most prominent example of a prohibition on review. Congress originally prohibited review of VA decisions concerning eligibility for veterans' benefits with the intention of preserving an informal system that did not involve lawyers. In 1988, Congress established a new adjudicatory system for veteran's cases and provided for some limited review. 38 U.S.C. § 7251 et seq. (1991).**
- **The second clause refers to circumstances in which the agency's authority is not constrained by legislative standards or restrictions: that is, when Congress has left the decision to the agency's discretion. Please see *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).**



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## Part Seven: Agency Actions

### Section Eight – Enforcement, Jurisdiction, and Judicial Review

#### ● Enforcement, Jurisdiction, Right to Counsel and Judicial Review:

##### ● Standing and Judicial Review Continued

- It should also be noted, that both the AFA and federal common law have imposed limitations as to when a person may seek review of agency action.
- Like in state law, pursuant to § 704 of the APA, one requirement is that the agency action be "final."
- Another requirement of the same section is that the person seeking review must have exhausted any administrative remedies that the agency has provided.
- Finally, the court have imposed a requirement that the agency action be "ripe" for review, meaning in essence that it is appropriate for judicial consideration at the time the law suit is filed.
- The Constitution itself imposes a requirement that the person challenging agency action have "standing." In short, this means that the person has suffered (or is about to suffer) injury as a result of the government action and that a favorable court decision can redress (or prevent) the injury.
- The APA imposes an additional statutory requirement on this general requirement when a person is challenging agency action under the APA. Section 702 of the APA creates a legal right to review for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," Thus, the person suing must either be suffering a "legal wrong" or be adversely affected "within the meaning of a relevant statute."



New York State CLE - Administrative Law

## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

- **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**
  - Standing and Judicial Review Continued
  - If a court undertakes judicial review, it may review the constitutionality of the agency action, and it may review whether the agency action is contrary to statute.
  - Additionally, the court can review the adequacy of the procedures used by the agency.
  - The court may also review the substantive adequacy of the agency's decision.
  - The APA contains three standards of review for such substantive adequacy, ranging from no deference to almost complete deference.
    - The “de novo” standard instructs a court to substitute its judgment for that of the agency. Under this test, the court must agree with the agency decision in order to uphold it.
    - The "substantial evidence" standard instructs a court to uphold a decision if it is "reasonable." Under this test, the court need not agree with the agency's conclusion to affirm it; it only needs to find that the agency's conclusions are reasonable ones.
    - The “arbitrary and capricious” or “abuse of discretion” standards instruct a court to affirm a decision unless the judges can say that the decision is “arbitrary.” The last standard historically has been considered the most deferential, although most courts no longer find any practical difference between the last two standards in light of intervening judicial decisions.



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## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

- **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**
  - **Standing and Judicial Review: the Case of Lujan v. Defenders of Wildlife**
- **Environmental groups argued that the U.S. should stop providing aid to Egypt to build dams on Nile River, because the building of dams endangers the rare Nile crocodile**
- **The groups asserted providing aid should comply with U.S. Endangered Species Act.**
- **The Supreme Court held that Plaintiffs lacked standing and have suffered no “injury in fact”**
- **That a concern about crocodiles in Egypt is too remote, and that a disagreement with agency policy is not equal to an injury.**
- **This is a very important case for standing and judicial review**



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## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

#### ● **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**

- **Deference and the Case of Chevron USA v. National Defense Counsel**
- **This case involved the Clean Air Act’s requirement of “nonattainment” (dirty air) areas to establish a permit program**
- **This Permit Program sought to regulate “new or modified major stationary sources” of air pollution**
- **The Environmental Protection Agency promulgated regulations which stated that a plant with multiple sources of pollution are treated as one source of pollution**
- **This treatment, known as the “Bubble Concept” – placed multiple sources are under one “bubble”, whereby the whole “bubble” is measured (rather than each source)**
- **The National Resources Defense Council (NRDC) challenged EPA’s “Bubble Rule”, claiming that the rule was inconsistent with Clean Air Act.**
- **The Federal Court of Appeals overturned the EPA regulation, and the decision was appealed**



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## Part Seven: Agency Actions

### *Section Eight – Enforcement, Jurisdiction, and Judicial Review*

#### ● **Enforcement, Jurisdiction, Right to Counsel and Judicial Review:**

- Deference and the Case of Chevron USA v. National Defense Counsel Continued
- HELD: The United States Supreme Court Reversed, and upheld the regulation as appropriate.
- In making the decision, the Court stated that two questions must be asked:
  - 1. Has the legislative branch directly spoken to the precise question at issue in the statute concerning the matter?
  - 2. If statute is silent or ambiguous on the issue, was the agency’s answer based on permissible construction of the statute?
- Under the case which has come to be known as creating the rule of “Chevron Deference” the Court held that agencies are allowed to fill gaps left by the legislature (in this case Congress).
- Exceptions to this deference are when agency decisions are “arbitrary, capricious or manifestly contrary” to statute, regulations given controlling weight
- The Court found that the Legislative delegation may be implicit or explicit – often implicit, and that they will usually defer to administrative interpretations
- Accordingly, the Question is not whether the “bubble concept” is inappropriate, it is if Administrator’s view is appropriate and reasonable. According to the Court, such is the agency’s choice to make.



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# ***Thank you for Coming***

- I really enjoyed our time together
- Questions.