

TOPIC 4: ADMINISTRATIVE LAW

Overview

Administrative law concerns the methods by which administrative agencies of the federal and state governments promulgate and enforce regulations. Regulations provide the body of rules surrounding statutory law. This chapter will review the constitutional authority for the creation and functions of administrative agencies. It will explore the nature and organization of agencies, as well as the process by which agencies promulgate and enforce regulations. It will lay out the judiciary's role in reviewing administrative agency action and court decisions. Lastly, it will examine the effects of regulations on business practice.

VIDEO LESSON - INTRODUCTION



VOCABULARY & CONCEPTS

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TOPIC 4: ADMINISTRATIVE LAW - QUESTIONS & ANSWERS

1. What are “Administrative Agencies”?

Federal administrative agencies are bodies impliedly authorized by the US Constitution and created by Congress to enforce statutes and develop regulations in furtherance of those statutes. That is, administrative agencies assist the legislative branch developing and the executive branch in executing laws. Administrative agencies include departments, agencies, commissions, bureaus, boards, government corporations, and committees. Most administrative agencies fall under the control of the executive branch. There are, however, a few administrative agencies that are directly under the control of Congress, such as the Congressional Budget Office and the Library of Congress. The authority of the President over an administrative agency depends upon the genesis of the agency and whether it is an “executive agency” or “independent agency”.

- *Executive Agencies* - The US Constitution establishes the executive branch of the federal government and allows the President to establish employ agencies to carry out the executive function. Executive agencies include all of the departments under the President’s authority. The heads of the executive agencies are cabinet members who report directly to and are closely controlled by the President. The President nominates individuals to these positions and the Senate must approve these nominations by a simple majority vote. The President has complete discretion in removing these individuals from their positions.
 - *Example:* Examples of Executive Agencies include: Department of Defense (DOD); Department of Justice (DOJ); Department of State (DOS); Department of the Treasury (DOT); Department of Homeland Security (DOHS); Department of Health and Human Services (DHHS); Department of Energy (DOE); Internal Revenue Service (IRS).
- *Independent Agencies* - Independent agencies, as the name implies, operate with a degree of independence or autonomy from the executive branch. These agencies are not part of the President’s cabinet; rather, they exist independently pursuant to congressional statute. Congress will pass what is known as an “enabling statute”, that establishes an administrative agency and outlines the extent of the agency’s authority.
 - *Example:* Independent federal agencies include the: Central Intelligence Agency (CIA); Federal Communications Commission (FCC); Federal Energy Regulatory Commission (FERC); Social Security Administration (SSA); Federal Reserve Board of Governors (Federal Reserve); Federal Trade Commission (FTC); General Services Administration (GSA); International Trade Commission (ITC); Environmental Protection Agency (EPA); National Labor Relations Board (NLRB); Securities and Exchange Commission (SEC); Commodities Futures Trading Commission (CFTC); United States Postal Service (USPS); National Aeronautics and Space Administration (NASA); Federal Election Commission (FEC); National Transportation Safety Board (NTSB); National Science Foundation (NSF); Small Business Administration (SBA); Nuclear Regulatory Commission (NRC).

Executive and independent agencies carry on similar functions; however, an independent agency generally has more of a regulatory function, where an executive agency plays more of an enforcement role.

- *Discussion:* How do you feel about the role of agencies in the development and execution of laws? Do you find

surprising the breadth and number of agencies?

- **Practice Question:** Thomas is listening to a heated political discussion at the office water cooler. One colleague is expressing her frustration at the current state of the regulations surrounding an area of business practice. She is blaming the President for not taking steps to ease the regulatory burden. The other colleague is defending the President and arguing that the bureaucracy is a result of Congress' shortcomings. What information would you need to determine which colleague is more accurate (or at least informed) in her statement?
- **Resource Video:** <http://thebusinessprofessor.com/what-are-administrative-agencies/>

2. What are the functions of agencies?

Administrative agencies serve “executive”, “quasi-legislative”, and “quasi-judicial” functions. As part of the regulatory process, Congress passes statutes to establish new law. The statutes, along with direction in the form of an “enabling statute”, are then turned over to administrative agencies to develop rules and regulations that further the objectives of the statutes. As such, while Congress dictates the objectives and substantive laws, the administrative agency assumes the regulatory activity of developing procedural rules for enforcing the law. This is the quasi-legislative, agency function. The statutes themselves are broad in nature, while the rules and regulations developed by administrative agencies are more specific. Disputes between the agency and those subject to regulation often arise when enforcing the substantive statutes and procedural regulations. As such, the agency may develop a tribunal or administrative law body that adjudicates these disputes. This is the quasi-judicial, agency function. Lastly, the agency carries out an executive function by carrying out or enforcing the statutory laws.

- **Resource Video:** <http://thebusinessprofessor.com/function-of-administrative-agencies/>

Quasi-Legislative Functions

A primary charge of administrative agencies is to develop and issue regulations that have the impact of laws. Administrative rules are internal, procedural, interpretative, or legislative. Legislative rules are the most important, as they generally have the force of law and add to the statutory law. Unlike statutory lawmaking, issuing regulations entails several procedural steps. Agencies begin by developing proposed regulations. The proposed regulations are then published to the public with a request for public comment. Some agencies also issue guidelines to supplement the issued regulations. These guidelines provide explanations or interpretations of the statutes and regulations and also explain the agency's responsibility for enforcing the statutes and regulations. They will outline how individuals should proceed to comply with the regulations and will identify conduct that fails to comply with the regulations. Conduct that fails to comply with the statutes and regulations is illegal and may be enforced through agency procedure or civil or criminal law.

- **Discussion:** What do you think about the ability of agencies to create regulations that have the force and effect of law? Is congressional or executive approval of these regulations a sufficient check on the quasi-legislative power of the agencies?
- **Practice Question:** Congress passes a statute that charges the Securities and Exchange Commission (SEC) with enacting regulations that allow for faster and easier private offerings of securities for sale by private companies.

The statute provides the primary objectives but leaves it up to the SEC to develop the procedural rules. What is the process the SEC should undertake in carrying out this charge?

Quasi-Judicial Functions

Administrative agencies often create tribunals (similar to courts) to adjudicate disputes arising under the agency's regulations. Congress, through statute, may direct that certain types of disputes undergo an administrative process ("exhaust all administrative remedies") before a party has standing to bring an action in a state or federal court challenging the agency's action. If Congress fails to specifically address the topic, the Administrative Procedures Act controls the quasi-judicial process. This act generally requires that individuals with disputes concerning federal regulations exhaust all administrative remedies prior to taking judicial action.

An administrative court functions similarly to an Article III court. The court undertakes a fact-finding process and applies those facts to the applicable law. The court may resolve a dispute and hand down fines or sanctions for improper conduct. This process may include issuing cease and desist orders directing individuals to stop carrying on a certain activity and desist from any further activity that runs afoul of the regulations. Administrative courts do not employ juries. All fact finding and decision making are carried out by (an) administrative law judge(s). As such, administrative courts cannot authorize or order detention of individuals. Often agencies will seek to settle disputes with individuals by entering into a consent order providing a resolution of the dispute. This avoid employing the administrative court to resolve the dispute. The administrative court then approves the order to officially resolve the issue. A notable advantage of this process is that consent orders give up the right to judicial review. As such, the parties cannot subsequently file a legal action contesting the administrative decision. Further, there is no admission of guilt in a consent order.

- **Discussion:** How do you feel about agencies creating internal court systems or adjudicative processes? Can you see any Constitutional issues with forcing individuals to adjudicate certain matters before an administrative court (without a jury)?
- **Practice Question:** Dolores has a farm chemical business in Iowa that produces and sells liquid fertilizer to farmers across the country. Her business operations require the mixing and testing of all sorts of chemicals. The Environmental Protection Agency (EPA), which is charged with enforcing federal environmental statutes, inspects Dolores's job site and finds evidence of soil contamination. The EPA undertakes an investigation that includes extensive soil sampling. The EPA determines that Dolores's business is discharging too many chemicals into the soil and seeks to fine Dolores and cause her to cease certain operational activities. Dolores contests the pollution assessment based upon acceptable levels of foreign particulates in soil. The EPA offers a settlement to Dolores that allows her to avoid fines by permanently ceasing certain activities. What are Dolores's options in this situation?

Executive Functions

Administrative agencies perform executive functions by enforcing the regulations they pass. That is, the agency investigates complaints and identifies conduct that it deems in violation of regulations. Enforcement is partially handled through administrative courts that address the dispute and render a decision. In addition to investigating conduct potentially in violation of the regulations, the administrative agency monitors compliance and works to educate and advise lawmakers in the passing and execution of laws. The extent of investigation and advisory activities is as follows:

- *Investigation* - Agencies often investigate activities that are the subject of agency regulations. It will gather and compile information about the company's activity and investigate any areas of concern. The agency may have limited subpoena authority. In the process, they identify practices that may be illegal. It is a crime to make any false or fraudulent statement in any matter within the jurisdiction of a federal agency. As such, companies are required to be forthcoming in reporting activity to the regulatory agency.
- *Advising* - Agencies evaluate common practices and issue public advisory opinions. These opinions explain how the agency views a particular type of conduct. These opinions serve to educate the public and help individuals and companies avoid disputes with the agency. The agencies also develop proposals and make reports to the President or to Congress. These reports keep Congress and the President informed of agency activity and aid them in the development and execution of laws.

- **Discussion:** Do you believe that agencies have sufficient authority in enforcing their regulations and decisions? If no, what enforcement authority should agencies possess?
- **Practice Question:** Dolores has a farm chemical business in Iowa that produces and sells liquid fertilizer to farmers across the country. Her business operations require the mixing and testing of all sorts of chemicals. The Environmental Protection Agency (EPA), which is charged with enforcing federal environmental statutes, inspects Dolores's job site and finds evidence of soil contamination. The EPA undertakes an investigation that includes extensive soil sampling. What are Dolores's obligations with regard to allowing (or facilitating) the EPA investigation?

3. What authority exists for creating and vesting authority in administrative agencies?

The Constitution is silent with regard to the creation of administrative agencies. Congress passes statutes authorizing the creation of administrative agencies. The statutes are known as, "enabling statutes". Congress's authority to create agencies is inferred from its role as legislator. The ability of the executive branch to oversee the operations of administrative agencies is inferred from its responsibility to execute the laws of the United States. The authority to vest quasi-legislative and quasi-judicial authority in the administrative agencies has come under attack at various points in history. The US Supreme Court has reviewed these allocations in a number of situations and generally deemed the allocation of authority valid.

- *Delegation of Legislative Functions* - One of the earliest challenges to the authority of Congress to delegate quasi-legislative responsibilities to administrative agencies came in *Wayman v. Southard*. In this case, the Supreme Court held that administering a statute requires the ability to delegate the responsibility of filling in details to subordinate officials. This based the legislative authority of agencies on the President's authority to execute the statutory law. In 1935, the US Supreme Court reviewed the authority of Congress to delegate authority to the President, which is then delegated to the President's cabinet. The Court recognized that such a delegation is valid if Congress provides sufficient statutory instruction to guide (and limit) the President in the execution of such authority. Since that time, a few attempted delegations of power to the Executive has been overturned as too broad, while many others have been found to be constitutionally valid.
- *Delegation of Judicial Functions* - In 1935, in *Humphrey's Executor v. United States*, the Supreme Court held that administrative agencies may carry out quasi-judicial and quasi-legislative functions in the execution of laws as

agents of the legislative and judicial branches. Congress's grant of authority to administrative agencies to issue sanctions to individuals was pursuant of the agency's regulatory function. In 1909, the Supreme Court in *Oceanic Steam Navigation Co. v. Stranahan*, upheld this practice as constitutional.

Congress maintains the authority to control and limit agency authority. Further, Congress can pass statutes that criminalize activities regulated by agencies. Enforcement of such statutes would necessarily be the role of the executive branch, while determination of challenges to these statutes would be the role of the judicial branch.

- **Discussion:** Are you convinced that the legislative and executive functions of agencies are contemplated within the constitutional authority granted the executive and legislative branches?
- **Practice Question:** Darian owns a payday and title loan agency. He makes loans to individuals secured by a lien on the borrowers paychecks or vehicle title. He recently expanded his operations to include making unsecured student and training loans in exchange for a percentage of future wages post graduation. His operations are generally regulated by the Consumer Financial Protection Bureau (CFPB). The agency investigates Darian's new business practice and seeks to levy on fine on his business for failing to make the required consumer disclosures. What are Darian's options for challenging the authority of the CFPB to regulate his business activity?
- **Resource Video:** <http://thebusinessprofessor.com/authority-for-administrative-agency-functions/>

4. How are administrative agencies organized?

Executive and Quasi-Legislative Staff Members

Administrative agencies are organized differently depending upon whether it is an executive or independent agency.

- **Executive Agencies** - An executive agency falls under the supervision of a member of the President's cabinet. As such, a single individual (director or secretary) sits at the head of the agency. The director will generally act as the senior executive administering the agency. The director will appoint subordinate officers and authorize the hiring of agency staff.
- **Independent Agencies** - Independent agencies generally have a controlling board or commission that governs the agency. The board will generally consist of 5 to 7 members, one of whom is the chair. The chairperson has the power to appoint staff for the agency. The agency board will serve a high-level governance function. It will appoint or elect an executive director for administration as the chief operating official of the agency. The executive director supervises administrative functions, such as personnel matters and budgeting.

Outside of the leadership and governance structure, the operational structure of most agencies is similar. The agency secretary keeps board-meeting minutes and is in charge of all agency publication requirements. The structure of the agency may be centralized or it may have various regional offices. Regulatory administrative agencies generally have regional offices that investigate alleged violations of the law. Agencies may also establish advisory councils. The advisory councils are made up of agency outsiders who are selected because of their expertise. They provide a level of interaction between the regulators and those being regulated.

Quasi-Judicial Staff Members

The quasi-judicial staff within an administrative agency generally consists of numerous administrative law judges and their support personnel.

- *Fact Finders* - Administrative law judges perform the adjudicative, fact-finding functions in disputes between the agency and those regulated. As such, the quasi-judicial staff members have a separate reporting structure from the rest of the agency. This separation serves to ensure that the quasi-judicial function is carried out in an impartial manner. Like Article III judges, administrative judges have immunity from liability for damages based on their decisions.
- *Appeals or Request for Review* - Once the administrative law judge makes a decision in a dispute, a party unhappy with the decision may appeal the decision either to an internal board established to hear appeals, the agency's governing board, or the cabinet-level official. Many state administrative law judges are not organized separately from the administrative agency. The administrative law judge is an employee of the agency. This relationship gives rise to a perception of bias. Other states establish an Office of Administrative Hearings that provides impartial administrative law judges to preside over administrative hearings.

The organization of the judicial staff will vary slightly between administrative agencies, but the primary role of administrative law personnel remains constant.

- **Discussion:** Why do you think the organizational structure varies between executive and legislative agencies? Do you see any reporting issues with housing administrative courts within the agency?
- **Practice Question:** Describe the difference in organization between an executive and independent agency. Also explain how this organization affects the authority of the President to exercise authority over agency operations?
- **Resource Video:** <http://thebusinessprofessor.com/how-are-administrative-agencies-organized/>

5. How are key agency personnel appointed and removed?

In both executive and independent administrative agencies, the President has the authority to nominate the governing personnel (directors, secretaries, boards, commissioners, etc.) for appointment and to remove those individuals.

Appointment of Administrative Agency Officials

Following nomination for appointment by the President, the Senate must vote to confirm the nominee. Congress cannot take part in the appointment process outside of providing advice about the nomination during the confirmation hearing. To keep the key personnel somewhat independent of the President, the individuals generally serve staggered terms that are longer than the President's 4-year term. This prevents the sitting President from appointing all of the leadership of an agency at one time. Further, federal statutes often require that the governing board or commission of independent agencies be bipartisan, with a certain number of individuals coming from outside of the President's political party.

Removal of Administrative Agency Officials

The President generally has the authority to remove key leaders from administrative agencies. While the President's

authority to remove individuals from executive agencies is unlimited, there may be any number of limitations on the ability to remove members of independent agencies. For instance, Congress may pass a statute limiting this authority. These statutes normally require proof of incapacity, neglect of duty, malfeasance, or good cause before the President can remove an official. This is particularly true if the agency primarily serves a regulatory function. Congress may also reserve the ability to vote to remove an independent administrative official. This authority is limited by the function of the agency. If the independent agency exercises any executive powers, such as enforcement or statutes, Congress cannot take part in removing the agent. If Congress wants to remove an agency official acting in an executive capacity (any of the heads of executive agencies), it must initiate impeachment proceedings.

- **Discussion:** What do you think about the requirement for bipartisan representation on administrative boards? Do you agree with the broad authority of the President to remove members of executive agencies? Do you think Congress should have greater authority in this regard? Conversely, do you think statutes limiting the President's removal authority are excessive?
- **Practice Question:** David is an executive member of a federal administrative agency. He was nominated by the President and confirmed by the Senate. What information about the agency and David's position is required to determine the process or procedure for removing David from his position?
- **Resource Video:** <http://thebusinessprofessor.com/appointing-and-removing-agency-personnel/>

6. What is the administrative agency process for creating regulations?

The quasi-legislative process by which administrative agencies create regulations is "formal", "informal" or "hybrid". Formal rulemaking generally proceeds as follows:

- **Public Announcement** - The agency develops a proposed regulation and announces the rule or regulation to the public.
- **Public Comment** - Following the announcement of the new regulations, the administrative agency allows for public comment on the regulation. Individuals may write letters, enter comments on the website, and speak at an open public forum regarding the proposed regulation. At the public hearing, interested parties are allowed to present evidence in support of, or in opposition to, a proposed rule or regulation.
- **Final Rulemaking** - The agency will take public comment and incorporate those comments into a final draft of the regulation. If the proposed regulation garners much public interest, Congress will seek a report or explanation of actions from the agency.

The informal rulemaking process does not require a hearing. The hybrid procedure requires a hearing, but the process is less detailed than the formal process.

- **Discussion:** Do you believe the process of public announcement, comment period, and final rulemaking is effective in notifying the public and gauging public sentiment?
- **Practice Question:** Gene is very upset by a proposed federal regulation passed by the Federal Communications

Commission (FCC) that will impact cable and Internet distribution. What are Gene's options for voicing her opinion about the proposed regulation?

- **Resource Video:** <http://thebusinessprofessor.com/process-for-creating-administrative-regulations/>

7. What is the judiciary's authority to review agency rule making?

Individuals may challenge an administrative action in an Article III court. Generally, a judicial challenge to administrative rulemaking must be a challenge to the procedures followed by the agency. Per administrative procedure, the agency must propose rules within the express grant of authority from the legislature. Exceeding the scope of authority may result in a court finding the proposal void. Once the court decides that a rule of an agency is authorized and constitutional, it will not address the wisdom or effectiveness of the rule. The court will review the constitutionality of the delegation of authority based upon the following:

- *Definiteness* - The delegation of authority to the administrative agency by Congress must be set forth with sufficient clarity so that all concerned, especially reviewing courts, will be able to determine the extent of the agency's authority.
- *Limited* - An executive or legislative delegation of authority must be limited. The delegating authority must provide in the enabling statute or the agency's charge that its power is limited - though it does not have to specifically outline those limitations. These authorities must take steps to implement procedural safeguards to prevent any arbitrary or abusive practices by the agency.

Regardless of the purpose of effect, courts will hold that an agency exceeds its authority if an analysis of legislative intent confirms that the agency has gone beyond that intent.

- **Discussion:** Do you think it is a good idea to limit judicial review of administrative rulemaking to the procedural aspects of the rulemaking process?
- **Practice Question:** Tammy is angry about new regulations from the Federal Trade Commission that limit the importation of products that contain specific technologies. She sells a product that employs the regulated technology and she wants to contest the agency's new rules. During the rulemaking process, she voiced her dissent to the regulations. Now that the regulations are in effect, what can Tammy do to challenge the FTC's rulemaking?
- **Resource Video:** <http://thebusinessprofessor.com/authority-to-review-agency-rulemaking/>

8. What is the judiciary's authority to review administrative court decisions?

The judiciary has power to review agency decisions pursuant to either the procedures written into the delegating statute or pursuant to the Administrative Procedures Act (APA).

- *Note:* The APA is a federal act, but state administrative agencies often follow similar procedures.

- *Review Under the APA* - The Federal Administrative Procedure Act provides for review of administrative court decisions except where statutes preclude judicial review or the agency is vested with sole discretion in a matter. An agency is vested with sole discretion in matters that do not affect a citizen's constitutional rights.
- *Standing* - To establish standing to challenge an administrative court's decision, the plaintiff must have been harmed or suffered a loss pursuant to the administrative court's ruling. Evidence of loss may be economic or limit an individual's established rights.
- *Exhaustion of Remedies* - The judiciary will generally only intervene in an administrative court's decision when the individual seeking review has exhausted all available administrative remedies and procedures available. This means that the individual must first pursue appeal options within the agency. Requiring that all administrative actions be final ensures that the court does not interrupt the administrative process. Courts do, however, retain the authority to intervene before the exhaustion of administrative remedies if seeking such remedies would be useless or the harm is immediate and severe.
- *Issues of Jurisdiction* - In some situations, an injured party will file a court action challenging an administrative action. In such situations, judicial resolution of the claim requires further resolution of issues specifically tasked to the administrative agency under the enabling statute. In such a case, the court will suspend the legal action until the administrative agency resolves these issues.
- *Review of Facts* - When an individual seeks review of the administrative court's decision, the trial court will generally accept any facts in the administrative record that are supported by "substantial evidence". The standard for substantial evidence is that there must be material evidence from which a reasonable person might reach the same conclusion as did the agency. "De novo" review is when the court disregards the agency's findings of fact and takes evidence anew.
- *Standard of Review (arbitrary & capricious)* - The court will review the administrative decision based upon the procedures established by Congress, the record from the administrative hearing, and the reasons and basis for the administrative court's decision. The court will review the agency's decision to determine if it is "arbitrary and capricious". That is, there must be a finding of fact that:
 - 1) there is substantial evidence to support the agency's decision, and
 - 2) the reasoning applied by the agency is based upon applying the facts to the state of the law.

There are limited situations which allow a party to directly challenge an administrative court's decision without first exhausting all administrative procedures. These exceptions may be linked to exigency or when administrative review would be useless.

- **Discussion:** Do you think the requirement that a party exhaust all administrative remedies prior to judicial review is appropriate? Are there any negative consequences to this approach? Do you find any issue with the fact-finding process or the court's acceptance of facts presented to the administrative agency.
- **Practice Question:** John owns a chemical fertilizer business located in Montana. The Environmental Protection

Agency (EPA) inspected John's operations and determined that his product does not meet EPA guidelines for a specific chemical compound content. The EPA issues a cease and desist order from further selling the product and levies a fine on John's business. What are John's options for challenging the EPA's actions?

- **Resource Video:** <http://thebusinessprofessor.com/authority-to-review-administrative-court-decisions/> ; <http://thebusinessprofessor.com/review-under-the-federal-arbitration-act/>

9. What are the advantages of administrative agencies?

Delegating regulatory and executive authority to administrative agencies has numerous advantages:

- **Exactness** - Congress cannot effectively pass statutes that are sufficiently detailed to regulate an entire subject matter. While laws provide a general outline for regulation, the agency rules and regulations make the statutory law more exact. More specifically, the agencies fill any gaps that exist in the statutory law.
- **Expertise** - Administrative agencies generally employ officials who are subject-matter experts in the given areas of regulation. As such, they are often more efficient and effective in developing rules and regulations to govern conduct in the specific area. Their expertise also provides thoroughness and consistency in the development and enforcement of business regulations. Lastly, employing such individuals to make quasi-judicial decisions about disputes avoids relying on individuals who are unfamiliar with the subject.
- **Public Protection** - Agencies often exist to regulate an area of conduct in a manner that protects the public interest. Individuals and businesses do not always act in accord with the public interest.

All of these advantages relate to efficiency, effectiveness, and the public interest. While administrative procedures are often burdensome, agencies allow for the administration of an extremely large and complex system of regulations.

- **Discussion:** Do you believe that the above-cited attributes are truly characteristics of administrative agencies?
- **Resource Video:** <http://thebusinessprofessor.com/advantages-of-administrative-agencies/>

10. What are the disadvantages of administrative agencies and regulations?

While administrative agencies provide the above-stated benefits, there are numerous disadvantages to relying on the agencies in the rule-making and adjudicative process. Foremost among the disadvantages, administrative agencies are famous for adding a degree of bureaucracy to regulated activities. Complying with additional regulations and the procedures raises the cost of doing business. These higher costs are born by the government, businesses, and consumers.

- **Discussion:** Can you think of any examples of private action (business activity) where administrative regulations add considerable burdens to the process.
- **Resource Video:** <http://thebusinessprofessor.com/disadvantages-of-administrative-regulations/>

