

ADMINISTRATIVE LAW

CLASS 10

TODAY'S TOPICS

- **What is Administrative Law?**
- **Agency Types**
- **Goals of Administrative Law**
- **Agency Activities:**
 - Administration (Executive)
 - Rulemaking (Quasi-Legislative)
 - Adjudications (Quasi-Judicial)

WHAT IS ADMINISTRATIVE LAW?

Law made by or about the executive branch agencies, departments, the President (at the federal level), or the governor (at the state level).

THE SOURCE OF AGENCY POWER

**“Authority statutes”
delegate authority to
agencies.**

**Authority statutes create a
broad legal framework.
Agency regulations fill in the
details.**

**E.g., Federal Trade
Commission’s authority to
make rules**

§ 6102. Telemarketing rules

(a) In general

(1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

16 CFR Ch. I (1–1–06 Edition)

§ 310.4 Abusive telemarketing acts or practices.

...

(b) *Pattern of calls.* (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

...

LIMITS OF AGENCY POWER

The agency's power is limited by the scope of the authority statute.

Rules or adjudications not authorized by statute are invalid.

AGENCY TYPES

Function: Regulatory v. Social Welfare

Structure: Executive v. Independent

REGULATORY V. SOCIAL WELFARE

Regulatory: regulate public and private interests by promulgating regulations, monitoring compliance, and prosecuting violators. E.g., state health department licenses doctors, motor vehicles department licenses drivers.

Social Welfare: administer and provide assistance. E.g., disability, retirement, and worker's compensation benefits.

EXECUTIVE V. INDEPENDENT

Executive: Defining feature is that by statute the head (“Secretary”) serves at the President’s pleasure, i.e. can be removed at will.

- Secretaries are members of the Cabinet.

Independent: Defining feature is that by statute the heads may be removed only for cause.

- Often headed by 1 or 5-7 Commissioners
- Terms exceed 4 years and/or staggered so President doesn’t appoint them all.
- Statute may require bipartisan commission (e.g., no more than 3 of 5 Commissioners from any party)

Agricultural Department

Commerce Department

Defense Department

Education Department

Energy Department

Health and Human
Services Department

Homeland Security Department

Housing and Urban
Development Department

Interior Department

Justice Department

State Department

Transportation Department

Treasury Department

Veterans Affairs
Department

African Development Foundation
Appalachian Regional Commission
Board for International Broadcasting
Central Intelligence Agency
Commission on Civil Rights
Commodity Futures Trading Commission
Consumer Product Safety Commission
Corporation for Public Broadcasting
Corporation for National and Community Service
Election Assistance Commission
Environmental Protection Agency
Equal Employment Opportunity Commission
Export-Import Bank of the United States
Farm Credit Administration
Federal Communications Commission
Federal Deposit Insurance Corporation
Federal Election Commission
Federal Housing Finance Board
Federal Labor Relations Authority
Federal Maritime Commission
Federal Mediation and Conciliation Service
Federal Mine Safety and Health Review Commission
Federal Reserve System, Board of Governors
Federal Retirement Thrift Investment Board
Federal Trade Commission
General Services Administration
Institute of Museum and Library Sciences
Inter-American Foundation
International Broadcasting Bureau
Legal Services Corporation
Merit Systems Protection Board
National Aeronautics and Space Administration

National Archives and Records Administration
National Capital Planning Commission
National Credit Union Administration
National Endowment for the Arts
National Labor Relations Board
National Mediation Board
National Railroad Passenger Corporation (AMTRAK)
National Science Foundation
National Transportation Safety Board
Nuclear Regulatory Commission
Occupational Safety and Health Review Commission
Office of Government Ethics
Office of Personnel Management
Office of Special Counsel
Panama Canal Commission
Peace Corps
Pension Benefit Guaranty Corporation
Postal Rate Commission
Railroad Retirement Board
Securities and Exchange Commission
Selective Service System
Small Business Administration
Social Security Administration
Tennessee Valley Authority
Trade and Development Office
U.S. Agency for International Development
U.S. Information Agency
U.S. International Trade Commission
U.S. Postal Service

INTERSTATE COMMERCE COMMISSION

Type: independent; regulatory



Authority Statute: Interstate Commerce Act (1887)

Structure: 7 commissioners, staggered terms.

Purposes: The ICC's original purpose was to regulate railroads (and later trucking) to ensure fair rates, to eliminate rate discrimination, and to regulate other aspects of common carriers.

FEDERAL COMMUNICATIONS COMMISSION



Type: independent; regulatory

Authority Statute: Communications Act of 1934

Structure: 5 commissioners; 5-year terms; max 3 from same party; no financial interest in FCC-related business.

Purposes: Regulate interstate communications by radio, TV, satellite, cable.

FOOD AND DRUG ADMINISTRATION



Type: executive; regulatory

Authority Statute: Food, Drug, and Cosmetic Act of 1938

Structure: 1 commissioner; reports to Secretary of Health and Human Services

Purposes: Assure the safety of drugs and medical devices; ensure the security of the food supply; regulate marketing of tobacco.

SOCIAL SECURITY ADMINISTRATION



Type: independent; social welfare

Authority Statute: Social Security Act of 1935

Structure: 1 commissioner; 6-year term

Purposes: Administers Social Security, a social insurance program consisting of retirement, disability, and survivors' benefits. To qualify for these benefits, most American workers pay Social Security taxes on their earnings.

DEPARTMENT OF VETERANS AFFAIRS

Type: executive; social welfare



Authority Statute: Department of Veterans Affairs Act of 1989

Structure: 1 Secretary

Purposes: Disability compensation, pension, home loans, medical benefits, etc. for veterans

GOALS OF ADMINISTRATIVE LAW

Efficiency

Expertise

Fairness

Independence: Immune from political pressure (e.g., reelection requires popularity).

Democracy: Accountability to public (e.g., notice and comment procedures for rulemaking)

ADMINISTRATION

Advising

Conducting research

Issuing permits

Managing property

Administering contracts & grants

RULEMAKING

**New federal regulations
published each day in the
*Federal Register***

Sample Citation:

**Federal Acquisition
Regulations for National
Aeronautics and Space
Administration, 55 Fed.
Reg. 58,782 (Dec. 21, 1990)**



**Regulations are codified in
*Code of Federal
Regulations***

Sample citation:

7 C.F.R. § 319.76 (1999)



RULEMAKING PROCESS

Step 1: Proposed regulations with call for public comments

10428

Proposed Rules

Federal Register

Vol. 65, No. 39

Monday, February 28, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Rule review, request for public comments, and announcement of public forums.

SUMMARY: The Federal Trade Commission ("the Commission" or "FTC") is requesting public comment on the Commission's Telemarketing Sales Rule ("TSR" or "the Rule"). The Telemarketing and Consumer Fraud and Abuse Prevention Act ("the Telemarketing Act" or "the Act")

composition of the industry, telemarketers' efforts at self-regulation, the effectiveness of law enforcement and legislation, trends in telemarketing, and current consumer issues related to telemarketing. In order to initiate discussion of these and other issues, the Request for Comment invites written responses to the series of questions in Sections F and G, *infra*, which set forth with more specificity the type of information the Commission particularly desires related to the Rule and about telemarketing generally.

In addition, this document contains an invitation to participate in a series of public forums to be held in the future to afford the Commission staff and interested parties an opportunity to explore and discuss the issues underlying the list of questions and any other topics that emerge from the comments we receive in response to this notice.

DATES: Papers and written comments responding to the Request for Comment

Administrative Procedures Act (8 USC § 553)

To give the public a meaningful opportunity to comment, the proposed rule must:

- (a) refer to the authority statute; &
- (b) explain the "terms or substance" of the proposed rule; or a describe the "subjects and issues involved."

Step 2: Written comments submitted by public.

Public hearings possible.

Agency may then publish a revised proposed regulation (back to Step 1).

RE: Telemarketing Rulemaking-Comment
FTC File No. R41001

Dear FTC Commission

I am writing to express my opposition to the changes proposed to the telemarketing Sales Rule. I work for a telemarketing company that employs over 11,000 people across the country. Telemarketing means

Step 3. Final rule effective not fewer than 30 days after publication

4580 **Federal Register / Vol. 68**

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Final Amended Rule.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues its Statement of Basis and Purpose ("SBP") and final amended Telemarketing Sales Rule ("amended Rule"). The amended Rule sets forth the FTC's amendments to the Telemarketing Sales Rule ("original Rule" or "TSR"). The amended Rule is issued pursuant to the Commission's

EFFECTIVE DATES: The amended Rule will become effective March 31, 2003. Full compliance with § 310.4(a)(7), the caller identification transmission provision, is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" provision will be required approximately seven months from the date a contract is awarded to create the national registry.

Final rule invalid if agency failed to consider public comments.

EXEMPTIONS FROM APA RULEMAKING REQUIREMENTS

Interpretive Rules

- **Distinguish from “legislative rules”, which create rights and obligations.**
 - Authority statute: The agency shall revoke the license of any securities broker who makes misrepresentations to customers.
 - Legislative: “A securities broker must reply to any notice of intent to revoke a license within 10 days.”
 - Interpretive: “The term ‘misrepresentation’ means an intentional false statement....”
 - Ambiguity possible

Emergency Rules

- Agency can publish “interim” rule that becomes effective immediately, with consideration of public comments later, if there is “good cause”

Military or foreign affairs functions

Agency management or personnel rules

Public property, loans, grants, benefits, or contracts

ADJUDICATIONS

In the Matter of)	
)	
DYNASTY MORTGAGE, L.L.C.)	File No. EB-03-TC-100
)	
)	NAL/Aect. No. 200432170005
Apparent Liability for Forfeiture)	FRN: 0012612156
)	
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 28, 2005

Released: March 1, 2005

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Dynasty Mortgage, L.L.C.¹ ("Dynasty") apparently willfully or repeatedly violated section 64.1200(c)(2) of the Commission's rules² by making telephone calls for the purpose of delivering telephone solicitations to residential telephone consumers who had registered their telephone numbers on the National Do-Not-Call Registry. This NAL addresses 70 such calls made to 50 residential telephone consumers in Arizona and

APA PROCEDURAL REQUIREMENTS

1. **Administrative Law Judge: Independent from investigator. No ex parte contact.**
2. **On the record**
3. **Written decision with findings of fact & conclusions of law**
4. **Burden of proof is preponderance of the evidence**
5. **Evidentiary rules**
 - FRE inapplicable. Any evidence may be submitted if it's not irrelevant, immaterial, or unduly repetitious.
 - No absolute right to oral hearing
 - Right to cross examination only if it's required for a "full and fair disclosure of the facts." (e.g., is credibility in question?)

CONSTITUTIONAL DUE PROCESS

5th/14th Amendments: No person may be “deprived of ... liberty or property” by government “without due process of law.”

Analysis:

1. Does a person have any liberty or property interest?
2. Is government depriving person of that interest?
3. What process is “due”?

Liberty

- Classic case: Confining a person
- Right to Travel (Burnham p.28):
 - *Crandall v. Nevada* (U.S. 1867)
 - Facts: Nevada law imposed tax on persons leaving the state by means of public transportation.
 - Held: Unconstitutional
 - Reasoning: Unrestricted right of interstate travel is implicit in the federal system.
 - *Shapiro v. Thompson* (U.S. 1969)
 - Facts: No state welfare benefits until have resided in the state for 6 months. Justification was to prevent migration to state for purposes of getting benefits.
 - Held: Unconstitutional
 - Reasoning: Right to interstate travel previously recognized. This classification (long-term v. short-term residents) burdens that right with no compelling justification.

Property

Classic case: taking away ownership-type property interest

Also:

- Welfare recipient's "right" to continue to receive public benefits. *Goldberg v. Kelly* (U.S. 1970).
- Termination of a tenured professor at a state university.
- Suspension of a driver's license. *Bell v. Burson* (U.S. 1971) (right to drive is important because, e.g., needed to get to work).

But not:

- Extension of a one-year government employment contract. *Roth v. Board of Regents* (U.S. 1972).
- Termination of emergency temporary housing benefits as scheduled after one week.

What is this new conception of property?

What Process Is Due?

- *Mathews v. Eldridge* (1976) cost effectiveness test, balancing these factors:
 1. Seriousness of the deprivation
 2. Risk of erroneous deprivations and the likely effectiveness of the proposed additional procedural protection
 3. Government's interest in avoiding the cost and burden of the additional procedure