Overview of Administrative Law:

In this part of the tutorial you should learn:
- What administrative law is
- Who makes it
- How it is made, and
- Where it is published

Administrative law is law made by or about the executive branch agencies, departments, the President (at the federal level) or the governor (at the state level). Here are a few examples of federal agencies and departments that make administrative law:
- The Environmental Protection Agency
- The Federal Communications Commission
- The Securities and Exchange Commission
- The Department of Homeland Security

At the federal level, executive branch agencies get their authority to make law when Congress delegates such authority to them in statutes. Statutes that authorize agencies to make law are called authority statutes or enabling statutes.

For example, the statute shown here authorizes the Federal Trade Commission to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.” Once they have statutory authority to do so, most agencies and departments engage in two types of lawmaking activity:
- “quasi-legislative” or rulemaking activity, and
- “quasi-judicial” or decision-making activity

Laws resulting from an agency’s quasi-legislative activities are called regulations, and look a lot like statutes. Laws resulting from an agency’s quasi-judicial activities are called decisions, and look a lot like case law.

Let’s look at regulations first.

This image shows a regulation published in the Code of Federal Regulations, 16 C.F.R. 310.4:
regulation defines and prohibits certain abusive telemarketing practices. Some regulations require activities, such as the payment of taxes. Similarly, statutes often define, prohibit, or require specific activities.

The major difference between statutes and regulations is that statutes are made by the legislature, while regulations are made by agencies and departments of the executive branch acting under statutory authority.

Another difference is that authority statutes tend to be less detailed than regulations. They create a broad legal framework and call upon an agency to fill in the details.

Both regulations and statutes have the force of law.

Because regulations tend to be more specific than the statutes that authorize them, you might think it is sufficient to find and read just the regulations. In reality, it is extremely important to find and read both the relevant statutes and the relevant regulations.

If the agency that made the regulations exceeded the scope of its statutory authority in making them, the regulations will be invalid. You can only judge the validity of regulations by reading them with the statutes that authorized them.

Regulations are published in two official sources:

- The first official source in which federal regulations appear is a daily periodical called the Federal Register. Regulations are published in the Federal Register as they become final, so they are arranged chronologically.
- The second official source of federal regulations is the annual publication called the Code of Federal Regulations (C.F.R.) in which the regulations are arranged by subject.

To understand the difference between the Federal Register and the C.F.R., it helps to understand the rulemaking process.

Agencies begin the rulemaking process by publishing draft or “proposed” regulations in the Federal Register and calling for public comments on those proposed regulations. This image shows a page from the Federal Register in which the
Federal Trade Commission requested public comments on possible revisions to its Telemarketing Sales Rule:

Proposed Rules

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”) directed the Commission to promulgate rules to protect consumers from deceptive telemarketing practices and other abusive telemarketing activities. In response to this directive, the Commission adopted the TSR, which requires telemarketers to make specific disclosures of material information; prohibits misrepresentations; sets limits on the times telemarketers may call consumers; prohibits calls to a consumer who has asked not to be called again; and sets payment restrictions for the sale of certain goods and services.

The Act requires that no later than five years after its effective date of December 31, 1995, the Commission initiate a rule review to evaluate the Rule’s operation and report the results of that review to Congress. Pursuant to this mandatory rule review requirement, the Commission hereby seeks comment on the overall costs and benefits of the TSR, and its overall regulatory and economic impact since its adoption in 1995.

In addition to reviewing the Rule and its effect on deceptive and abusive telemarketing practices, the Commission intends to use this rule review to examine telemarketing generally over the past two decades, and to determine its impact on consumers. This broader review will result in a report addressing issues such as changes in technology, 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 Commission 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 will be accepted until April 27, 2000. A public forum to discuss provisions of the TSR, other than the “do-not-call” provision, will be held on July 27–28, 2000, in Washington, DC, from 8:30 a.m. until 5:30 p.m.

NOTICE: Notification of interest in participating in this forum must be submitted in writing on or before June 16, 2000. The exact dates, location, and information about participation in future FTC forums held in connection with the TSR review will be announced later by Federal Register notice.

ADDRESSES: Six paper copies of each paper and/or written comment should be submitted to the Office of the Secretary, Federal Trade Commission, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Alternatively, the Commission will accept papers and comments submitted to the following email address: tsr@ftc.gov, provided the content of any papers or comments submitted by email is organized in sequentially numbered paragraphs. All submissions should be identified as “Telemarketing Review—Comment. FTC File No. P994414.” Notification of interest in participating in the public forums should be submitted in writing to Camilo I. Danielson, Division of Marketing Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Room 238, Washington, DC 20580.

Papers and written comments will be available for public inspection in accordance with the Freedom of Information Act 5 U.S.C. 552, and Commission regulations, 16 CFR Part 4.9, on normal business days between the hours of 8:30 a.m. and 5:00 p.m. in Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The Commission will make this notice and, to the extent possible, all papers or comments received in response to this notice available to the public through the Internet at the following address: www.ftc.gov.

FOR FURTHER INFORMATION CONTACT:

Catherine Harrington-McBridge (202) 326–2452, email cmbridge@ftc.gov; Karen Leonard (202) 326–3597, email kleonard@ftc.gov; or Camilo Danielson (202) 326–3115, email cdanielson@ftc.gov, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Section A. Background

1. Telemarketing Consumer Fraud and Abuse Act

On August 16, 1994, President Clinton signed into law the Telemarketing Consumer Fraud and Abuse Prevention Act (“Telemarketing Act” or “the Act”). The Telemarketing Act was the culmination of Congressional efforts during the early 1990’s to protect consumers against telemarketing fraud. The purpose of the Act was to combat telemarketing fraud.


2 Other actions enacted by Congress to combat telemarketing fraud during the early 1990’s include the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227, 1991, which restricts the use of automatic dialers, but season the sending of unsolicited commercial facsimile messages; the Federal Communications Commission’s order imposing ways to protect residential telephone subscribers’ privacy rights; and the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. 3225 et seq., which provides for enhanced prison sentences for certain telemarketing-related crimes.
After the proposed regulation or revision is published, interested parties submit written comments like the letter shown here:

May 21, 2010

The Honorable Julius Genachowski, Chair
Federal Communications Commission
c/o Commission’s Secretary
236 Massachusetts Avenue, N.E., Suite 110
Washington, D.C. 20002

Re: Comments – Proposed Rule - Telephone Consumer Protection
CG Docket No. 02-278
FCC 10-18

Dear Chairman Genachowski:

The National School Boards Association (NSBA), representing over 95,000 local school board members through our state school boards associations across the nation is pleased to submit comments on proposed revisions to rules under the Telephone Consumer Protection Act (TCPA) that would harmonize those rules with the Federal Trade Commission’s (FTC’s) recently amended Telemarketing Sales Rule.

NSBA recognizes the Federal Communications Commission’s (FCC) effort and commitment to harmonize rules in order to remove possible duplicative or conflicting requirements with regard to communications to wireless devices. In the process of doing so, NSBA urges the FCC to: 1) retain provisions exempting non-profit entities and non-commercial, informational messages; and 2) clarify that the rules are not applicable to school districts. Our rationale for recommending this clarification is contained in paragraph 3 of the NPRM approved by the FCC on January 20, 2010 (emphasis added):

3. We note that the rule revisions proposed herein would make no changes with respect to categories of prerecorded message calls that are not covered by our TCPA rules. Those categories include calls by or on behalf of tax-exempt non-profit organizations; calls for political purposes, including political polling calls and other calls made by politicians or political campaigns; and calls for other noncommercial purposes, including those that deliver purely “informational” messages – for example, prerecorded calls that notify recipients of a workplace or school closing. In addition, because the TCPA’s restrictions on prerecorded messages do not apply to calls initiated for emergency purposes, the proposed rule revisions would not affect messages sent to consumers to alert them to emergency situations, including, for example, emergency messages permitted by the WARN Act and/or the Commercial Mobile Alert System (CMAS).

The education community is acutely aware of potential impact if the NPRM was in some manner interpreted to apply to school district communications. Delivery restrictions described in section 64.1200 for example, require obtaining written permission for automated calls to wireless devices – including a signature. It would be enormously difficult for school districts to comply with these restrictions when many must reduce instructional and administrative staff due to declining revenues. The growing number of students, parents and other caretakers using wireless devices for either
Sometimes the agency holds hearings at which interested members of the public can testify about how the proposed regulations would affect them. After the initial comment period, the agency may revise the proposed regulation, publish it again, and call for additional comments.

The cycle of notice, when a proposed regulation is published, and comments are solicited, may repeat several times before the agency publishes the final, revised regulation in the Federal Register. No federal regulation can become effective until it is published in its final form in the Federal Register. The “final rule” notice in the Federal Register may specify a later effective date, but not an earlier one:

3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns.

The rules adopted herein establish recordkeeping requirements for a large variety of businesses, including small business entities. First, the seller must secure a written agreement between itself and the consumer showing that the consumer agrees to receive, from the seller, autodialed or prerecorded telemarketing calls to a wireless number and/or prerecorded calls to a residential line. The prior express written consent requirement applies to autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded calls to residential lines only. Limiting the written consent requirement to telemarketing calls significantly reduces the compliance burden for all entities, including small entities.

The Commission allows the seller the flexibility to determine the type of written agreement that it will secure from the consumer. The Commission does not require a particular form or format for this written agreement or its retention. In adopting the written consent requirement for autodialed or prerecorded (telemarketing calls to wireless numbers and prerecorded telemarketing calls to residential lines, the Commission also concluded that consent obtained pursuant to the E-SIGN Act, Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 (2001), will satisfy the requirement of its revised rule, including permission obtained via an email, Web site form, text message, telephone keypress, or voice recording. Accepting consent pursuant to the E-SIGN Act relieves all businesses, including small entities, from the economic impact of generating and retaining a paper document to evidence their compliance. The E-SIGN Act also provides additional flexibility in obtaining electronic consent producing minimal additional recordkeeping efforts. To the extent that the calling parties previously relied on an established business relationship in lieu of express consent, the Commission notes that it stated that such telemarketers had to be prepared to provide clear and convincing evidence of the existence of such a relationship. Hence, a record of written consent will replace the previously required record of an established business relationship. Because of these factors, any additional recording keeping costs should be minimal. Second, telemarketers and sellers, including small business...
The Federal Register is published every business day, and is therefore an excellent tool for keeping up with the latest developments in federal administrative law. However, it is not the best tool for finding current regulations by subject. That’s because the final regulations it contains are published in chronological order, not subject order. Also, the Federal Register contains many documents other than final regulations, including proposed regulations, expired regulations, meeting notices, and announcements.

To ease the task of finding current regulations by subject, federal regulations are ultimately integrated into a subject compilation called the Code of Federal Regulations (CFR). The process of compiling the regulations into a subject arrangement is called codification. Altogether, there are 50 numbered titles in the CFR, each representing one broad topical area of federal regulation. Notice that the cover of the CFR volume shown here is from Title 16, whose subject matter is “Commercial Practices.”

Besides being published in the print Federal Register and CFR (which is also available as an authenticated PDF), regulations are also published unofficially on the e-CFR, in looseleaf services, and in databases.

Now we’ll look at administrative decisions.
In addition to making regulations, most federal agencies also issue decisions. The need to issue decisions arises from agencies’ enforcement duties. For example, many agencies levy fines for violations of their regulations. To do so, they must first determine whether the regulations have actually been violated. This may involve holding a hearing, and usually involves issuing a written decision that interprets the regulations.

Unlike federal regulations, federal administrative decisions are not all published in the same official sources. Most agencies publish their own reporters, and many of these reporters are seriously out of date. Furthermore, few libraries carry reporters from every agency. When you can’t find a reporter for an agency you are researching, other sources you might consult for its opinions include the agency’s web site, looseleaf services, and subscription databases such as Lexis, Westlaw, and Bloomberg.