



## RESEARCHING FOR ADMINISTRATIVE LAW INTERNSHIPS<sup>1</sup>

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Many students have the opportunity to work in administrative law internships during their law school career. Generally, these internships are either within agencies, private firms that do regulatory work, or nonprofit policy organizations that advocate in issue areas within an agency’s jurisdiction. However, the focus of your 1L year on case law—particularly in a legal research and writing course—may make this exciting opportunity seem daunting. This handout will help ease this transition by explaining how to research sources of administrative law, and briefly outlining the important law and doctrines that govern these documents.

### I. Sources of Administrative Law

#### *The Organic Statute*

The organic statute is your “home base” for administrative law practice. This statute sets out the bounds of the agency’s authority. Among other things, it may allow an agency to promulgate rules, make policy, adjudicate disputes, or issue licenses. All of your authority in arguing as part of an agency or within an agency’s jurisdiction originates from this statute. Thus, it is important to familiarize yourself with it and to understand its basic commands. Further, focusing on the organic statute will keep you tethered to other binding authority. All of the regulations promulgated by the agency are done so through this statute’s authority.

#### Examples of Organic Statutes

Agency/Program	Organic Statute(s)	Codification
U.S. Department of Health and Human Services/Medicare and Medicaid	Social Security Act, Titles XVIII & XIX	42 U.S.C. §§1395-1395ccc; 42 U.S.C. §§1396–1396v.
Environmental Protection Agency	Clean Air Act, Clean Water Act	42 U.S.C. ch. 85, subch. I § 7401 et seq.; 33 U.S.C. §§ 1251–1387

#### *Rulemakings and Regulations*

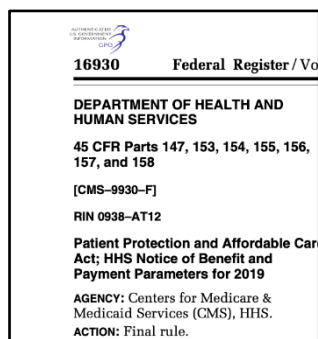
Administrative rulemakings are the process that results in the promulgation of a legally binding regulation. These regulations are published in the Code of Federal Regulations (C.F.R.), the administrative companion to the U.S. Code. These regulations are the main source of

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<sup>1</sup> Prepared by Anthony Albanese in Spring 2019.

administrative policymaking. Generally, regulations are promulgated through a notice and comment process. The agency will issue a notice of a proposed rule in the Federal Register, and it will subsequently collect comments from the public. Then, the agency is required to consider these comments before issuing a final, binding rule. Proposed rules, final rules, and comments can be found on [Regulations.gov](http://Regulations.gov).

The proposed and final rules published in the Federal Register are rich sources for legal writing. A posting for a final rule has three parts, and each part has a different goal. Let's break down a [complex regulation](#) from the Centers for Medicare and Medicaid Services (CMS) and illustrate its usefulness. You can see the first section of a regulation excerpted below.



**Research Tip**

The top left of every regulation indicates, in order:

- The main executive agency (HHS).
- The parts of the C.F.R. where the rule will be codified.
- The title of the rule.
- The sub-agency responsible for the rule (CMS).
- The type of rule (generally proposed or final)

This section is followed by a table of contents, which is subsequently followed by the “preamble.” This section lays out the agency’s rationale for the rule and can be a useful source of persuasive authority for how a rule should be interpreted.<sup>2</sup> The preamble will often have interpretive embellishments that are not present in the text of the codified regulation itself.

**III. Provisions of the Proposed Rule and Analysis of and Responses to Public Comments**

In the November 2, 2017 **Federal Register** (82 FR 51052), we published the “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019” proposed rule (proposed 2019 Payment Notice or proposed rule). We received 416 comments, including 99 comments that were substantially similar to one of four different letters, each regarding the

*Response:* As commenters pointed out, in the language we proposed for § 147.104(b)(1)(i)(C), we tied the coverage effective date to the date a plan selection, rather than a group enrollment, was received. Given that the proposed language we added appears in a section of the rules (§ 147.104) that applies marketwide, and not just in SHOPS, we agree with the commenters that tying the coverage date to a group enrollment, which is a broader term than a plan selection (the latter is a SHOP-specific term), would be more appropriate. We also agree with the

**Research Tip**

Aside the agency’s policy rationale, the preamble includes generalized descriptions of the comments it received and gives equally general responses. These comments indicate areas of public or industry concern with the regulation.

<sup>2</sup> For more on the authority of an agency’s interpretation of its organic statute or own regulations, see Section II on *Chevron* and *Auer* deference, respectively.

The regulation ends with the text of the regulation as it is codified, and it includes the parts of the statute that the agency used as authority to promulgate it.

**PART 156—HEALTH INSURANCE ISSUER STANDARDS UNDER THE AFFORDABLE CARE ACT, INCLUDING STANDARDS RELATED TO EXCHANGES**

■ 39. The authority citation for part 156 continues to read as follows:

**Authority:** Title I of the Affordable Care Act, sections 1301–1304, 1311–1313, 1321–1322, 1324, 1334, 1342–1343, 1401–1402, Pub. L. 111–148, 124 Stat. 119 (42 U.S.C. 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. 36B, and 31 U.S.C. 9701).

**§ 158.350 Subsequent requests for adjustment to the medical loss ratio.**

A State that has made a previous request for an adjustment to the MLR standard must, in addition to the other information required by this subpart, submit information as to what steps the State has taken since its prior requests, if any, to improve the stability of the State’s individual market.

### *Comments on Regulations*

As part of your internship, you may be tasked with reviewing some comments for an agency or composing some comments on behalf of an organizational stakeholder. To find submitted comments, find the relevant regulation through a search on Regulations.gov. Then, click on “Open Docket Folder,” as illustrated below. Scrolling to the bottom of the next page will allow you to see the full docket.

The screenshot shows a regulation entry on Regulations.gov. The title is "Patient Protection and Affordable Care Act; Program Integrity: Exchange, Premium Stabilization Programs, and Market Standards; Amendments to HHS Notice of Benefit and Payment Parameters for 2014". Below the title, it states "This Rule document was issued by the Centers for Medicare Medicaid Services (CMS)". To the right, it says "Comment Period Closed". At the bottom left, there is a link for "Open Docket Folder" with a folder icon. At the bottom right, the ID is "CMS-2013-0130-0104".

As a policy advocate outside of an agency, it may also be useful to seek out comments from other advocacy organizations to see their concerns with a rule. A simple internet search for organizational comments will yield many results. Here are two examples: the Women’s Law Project’s [comments on proposed Title IX regulations](#), and the National Health Law Program’s comments in [response to an RFI](#) concerning nondiscrimination in health insurance.

### *Agency Adjudications*

Agencies with judicial functions authorized by the organic statutes have administrative law judges on staff who hear disputes and issue opinions. Depending on the agency, the review may be done by a single judge, or eventually by appellate panels. Federal courts usually have some manner of review over agency decisions, but it may take many levels of agency appellate review before administrative remedies are fully exhausted.

While in most cases agency adjudications are non-precedential, there is often a “soft precedent” that generally guides agency decisionmaking. Administrative judges will often cite past decisions. You can find these decisions on the agency’s website or Regulations.gov. Depending on the agency, decisions may or may not be available on commercial services such as Lexis or Westlaw. [Here](#) you can find the portal for decisions from HHS’ Departmental Appeals Board.

Like federal courts, agency adjudications are also governed by procedural rules. However, these rules can vary based on the administrative tribunal. As an intern working in administrative adjudications, you should not assume that the same rules of civil procedure or evidence that you have learned in class will necessarily apply. Agency websites should have this information, such as [this set of procedural rules](#) from the Departmental Appeals Board.

### *Guidance and Policy Documents*

In addition to rules and decisions, agencies often promulgate policy documents called “guidance” that clarify how it is implementing its own regulations. As discussed below, these documents generally have persuasive but not binding authority. The formality of guidance can vary by agency and by policy. Examples of guidance documents include the [Medicare Program Integrity Manual](#) and this [HUD Guidance](#) on the discriminatory use of criminal records by landlords.

## **II. Important Law and Doctrines**

Now that you understand the types of documents you will be researching and how to find them, you need to know the law and doctrines that govern their authority. While it only scratches the surface, these are a few of the legal concepts and doctrines that you should be aware of when working with administrative law. These concepts will be fleshed out more fully in your administrative law coursework.

### *The Administrative Procedure Act (APA)*

The APA is the statute that lays out the requirements that federal agencies must follow when crafting rules or adjudicating disputes. In the preceding sections above, this handout set out some very general information about rulemaking and adjudication requirements; the APA provides more specific mandates that have been interpreted by the federal courts over time. The location of these requirements is laid out below.

#### APA Requirements

5 U.S.C § 553 <sup>3</sup>	Informal rulemaking.
5 U.S.C § 555	Informal adjudication.
5 U.S.C. §§ 554, 556-57	Formal adjudications and due process.
5 U.S.C. §§ 701-06	Judicial review.

### *Chevron Deference<sup>4</sup>*

*Chevron* deference is the standard that the Supreme Court has crafted to determine whether a court should defer to an agency’s interpretation of a statute. *Chevron* applies when an

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<sup>3</sup> Today, virtually all rulemaking is done through informal, “notice and comment” procedures described previously in this handout.

<sup>4</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

agency is promulgating a rule or conducting a formal adjudication. The test asks: (1) whether Congress spoke directly—not ambiguously—on the contested issue, and (2) whether the agency’s interpretation is a “permissible construction of the statute.”<sup>5</sup> An interpretation is permissible when it is not “arbitrary, capricious, or manifestly contrary to the statute.”<sup>6</sup>

**Example:** In *Chevron*, the Court upheld a Reagan-era change in how the EPA regulated air pollution for power plants, undoing the stricter interpretation of the Carter administration. The change was a permissible interpretation of the organic statute.

### *Skidmore Deference*<sup>7</sup>

*Skidmore* deference is less deferential than *Chevron*. This deference applies to agencies when they issue policy statements or hold informal adjudications. Under *Skidmore*, the agency has the “power to persuade, if not control” the reviewing court. It requires the decision to be (1) well-reasoned, (2) consistently held, and (3) carefully considered by the expert agency. It is also reviewed under an arbitrary and capricious standard.

**Example:** *Skidmore* dealt with whether an agency bulletin’s determination that a mandated worker “waiting time” could not be considered overtime was binding. The Court held that while there was no clear statutory command, this guidance was merely persuasive.

### *Auer Deference*<sup>8</sup>

*Auer* deference deals with an agency’s interpretation of its own regulations when they are ambiguous. Under *Auer*, the reviewing court should defer to the agency unless its interpretation is “plainly erroneous or inconsistent with the regulation.”<sup>9</sup>

**Example:** *Auer* upheld the Secretary of Labor’s interpretation of ambiguous agency regulations governing whether certain police officers were eligible for overtime benefits. The Secretary’s interpretation of the regulation considered by the Court was entered as an amicus brief, as opposed to guidance before the litigation.

In its October 2018 term, the Supreme Court decided to hear a new challenge to *Auer*.<sup>10</sup> The resolution of this challenge is still pending at the time of this handout’s publication.

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<sup>5</sup> *Id* at 843.

<sup>6</sup> *Id* at 844.

<sup>7</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>8</sup> *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

<sup>9</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, 89 L. Ed. 1700 (1945).

<sup>10</sup> *Kisor v. Wilkie*, No. 18-15, argued on March 27, 2019.