

## ADMINISTRATION PROCEDURE ACT BACKGROUND

The Administrative Procedure Act (APA) was established in the 1940s in part due to California's landmark laws regarding the regulation of clean air, water, and energy efficiency. The Office of Administrative Law (OAL) was established by statute in 1979 to administer the APA. The creation of the oversight agency was in response to an unprecedented growth in the number of administrative regulations and the Legislature's desire to avoid unnecessary burden on Californians. Forming the OAL was viewed as a compromise and alternative to legislative proposals to give the Legislature the ability to review and modify executive branch regulations.

The Legislature expressed its intent to ensure even the most technical regulations were put forth in easily understandable language and that all regulations would not discourage innovation, research, or the improved means of achieving desirable social goals.

A major purpose of the Act was to establish a public process by which those persons or entities affected by a regulation have a voice in its creation as well as notice of the law's new requirements. The Act establishes a specific process for state agencies to follow that includes public notice of the proposed regulation, an opportunity for interested parties to comment, and with some exceptions, review by the Office of Administrative Law.

When reviewing this topic, it is important to remember that regulations are designed to implement state requirements established in statute by the Legislature and Governor to benefit Californians. California is well-known for leading in many important areas including consumer safety, food security, worker protection, energy efficiency, and air and water quality.

To date, debate continues in many arenas as to whether regulations are overly burdensome or do not go far enough to implement the Legislature's desired goals and outcomes.

### **Office of Administrative Law**

The Office of Administrative law was established to provide the orderly review of adopted regulations. In 1979, the Legislature expressed intent that the creation of OAL was designed to reduce the number of administrative regulations and improve the quality of those regulations that were adopted. In 1983, the Legislature further expressed its intent that agencies should actively seek to reduce the unnecessary regulatory burden on individuals and businesses by substituting performance standards for prescriptive standards as long as both were equally effective.

The six main legal standards OAL applies when reviewing proposed regulations are as follows:

- 1) Authority—the underlying law that permits or obligates an agency to engage in a regulatory activity;

- 2) Reference—the statute or court decision the regulation implements;
- 3) Consistency—the regulation does not conflict with existing law;
- 4) Clarity— written in easily understood language;
- 5) Non-duplication—the regulation does not overlap with other regulations;
- 6) Necessity— the regulation is needed to carry out the law.

### **Economic Analysis**

Prior to the enactment of SB 617 (chapter 496, statutes of 2011), the APA required departments to assess the economic impact of proposed regulations. However, the Act did not expressly specify how this should be accomplished in order to accurately reflect the economic impact of a regulation. In 1997, Governor Pete Wilson issued an executive order to require agencies to file a form 399 and submit the form to the Regulatory Review Unit within the California Trade and Commerce Agency. When the Agency was eliminated, the Department of Finance took over the responsibility to make a determination if the approach in the 399 form was reasonable. Whether or not state agencies adequately assess the economic impact of regulations has been a controversial discussion for at least the last decade.

### **The Little Hoover Commission**

In June 2010, the Little Hoover Commission embarked on a study on how California State agencies develop regulations. This study was a follow-up to previous investigations of state-level economic development activities and the Commission's conclusion that California's regulatory environment needed greater clarity and consistency.

In a letter dated July 12, 2010, the Commission received a bipartisan request from Assemblymember Fuentes and Senator Dutton to include in their study specific analysis of how agencies were conducting studies of adverse economic impacts and alternative regulatory approaches. The letter expressed the dual goals of spurring job growth in California while protecting and improving the health and safety of Californians and our environment.

The Commission's study, BETTER REGULATION: Improving California's Rulemaking Process, was released in October 2010. The Commission study included a public process and concluded that California's approach to developing regulations was uneven and lacking in coordination, efficiency and oversight.

The Commission recommended numerous changes to the laws guiding the development of regulations in the following categories: 1) a more thorough cost-benefit analyses; 2) a

rigorous economic analysis for major regulations (those with an impact of at least \$25 million); 3) mandated standards and guidelines for data quality and assessment methodologies; 4) improved regulatory oversight through the formation of an Office on Economic and Regulatory Analysis; 5) the revisiting of existing regulations and built-in review of new regulations to ensure regulations are still needed and are working effectively.

### **SB 617 (Calderon-Pavley)**

In 2011, the law was changed to apply to regulations, modifications, or the repeal of regulations initiated after January 1, 2012.

Under this law, agencies are now required to provide more information during the pre-notice stage of rulemaking and place more emphasis on reasonable alternatives and the selection of the least costly and burdensome alternative that provides equal benefits and fully implements the law. For all regulations, an agency must now prepare an economic impact analysis that considers non-monetary benefits such as the health and welfare of California residents, worker safety, and the environment.

### **Major Regulations**

SB 617 defines major regulations as those with an economic impact on California businesses or individuals of over \$50 million as determined by the department proposing the regulation. Beginning January 1, 2013, state agencies proposing "major" regulations are required to provide the Department of Finance with a standardized regulatory impact analysis. The Department is required to adopt regulations to implement this requirement and publish the regulations in the State Administrative Manual by November 1, 2013. To date, DOF has not issued draft regulations for public review. According to DOF, they are also in the process of issuing a Request for Qualifications (RFQ) for an analytical tool to be used by the Department to verify and validate the departments' standardized regulatory impact analyses.

### **Federal Guidance: Regulatory Impact Analysis**

The Office of Management and Budget (OMB) issued Circular A-4, which provided Federal agencies with guidance on the development of regulatory analysis. The document, which was last updated in 2003, aimed to create consistency in how the benefits and costs of regulations were determined and analyzed. OMB's Office of Information and Regulatory Affairs (OIRA) published a *Regulatory Impact Analysis: A Primer* (primer) to assist agencies in developing regulatory impact analyses in light of the circular and relevant executive orders.

The primer stresses using the best scientific, technical, and economic data to quantify likely benefits and costs in physical as well as monetary units. For example, it stated that benefits of a regulation to reduce air pollution could be quantified in terms of the number of premature deaths avoided, avoided hospital admissions, or prevented lost days of work.

## ***Methods to Determine Value***

Guidance suggests estimating monetary value whenever possible. Some ways to estimate these amounts include willingness to pay (WTP), which is how much an individual would pay for something, and willingness to accept (WTA), which is how much an individual would require to be compensated to accept an impact. Such values could be determined by examining what people actually pay in the marketplace or through studies about their preferences.

While determining the value of costs and benefits can be more straightforward when markets exist, the guidance provides alternatives for when impacts of regulations are not traded in open markets. Specifically, the values of environmental and cultural amenities are often difficult to measure. However, they could be assigned values based on their use and non-use values. A “use value” is determined when an individual derives satisfaction from a use - like living in an area with clean water or visiting a national park. A “non-use” value exists when individuals place values on resources or goods even though they are not and will not use them in the future. For example, an individual might value wildlife thousands of miles from where they live. While use and non-use values are often difficult to estimate, the guidance still encourages that agencies make monetary estimates. Though, it cautions that agencies should explain their methodology and consider uncertainty that could lead to inaccuracies.

The primer recognizes that agencies sometimes design health and safety regulations to reduce the likelihood of fatalities, and therefore it could be appropriate to measure the willingness to pay for reductions in the risk of premature deaths. The guidance describes this concept as the value of statistical life (VSL). It instructs agencies to use a VSL range of \$5 million to \$9 million per statistical life. In essence, this is assigning a monetary value to an individual’s life. Alternatives to this approach involve using the value of statistical life years (VSLY) extended. For example - if the average remaining life expectancy was 20 years, then a risk reduction of a fatality due to a regulation implementation could be measured as 20 life-years extended.

Additionally, federal guidance instructs agencies to consider future benefits and costs since the impacts of regulatory actions might be realized for several years into the future. Agencies are instructed to use benefit and cost projections with both a 3 percent and 7 percent annual discount rate. Doing this analysis calculates the amounts in constant dollars in order to make meaningful comparisons.

While various methods could be used in analyzing impact of regulations, OIRA stresses the importance of estimating costs and benefits by using reasonable and thoughtful methodologies.