

This is Chris Micheli with the Sacramento Governmental Relations firm of Aprea & Micheli, and an adjunct professor at McGeorge School of Law in its Capital Lawyering Program. Today's podcast is on the six standards of review utilized by the Office of Administrative Law in reviewing proposed regulations.

California's Office of Administrative Law, otherwise known by its acronym, OAL, plays several roles concerning the rulemaking process of the state's 200-plus regulatory agencies, departments, boards, and commissions. In addition to regular rulemaking, there's also emergency rulemaking and even a review of underground regulations.

Most agencies enjoy broad grants of rulemaking authority by statute, although in some instances, the Legislature has provided a limited grant of rulemaking authority. Most of those 200 regulatory entities have adopted regulations, and do so on a frequent basis. OAL reviews over 600 regulations per year.

When OAL reviews regulations, its review is dictated by California's Administrative Procedure Act, the APA, which sets forth six standards by which OAL determines whether a regulation was properly adopted in compliance with the state APA. These six standards of review are defined in California's Government Code and in court decisions interpreting the six standards that provide further guidance to individuals.

These standards are the following:

Authority and reference standards. The authority standard is basically reviewing whether the proposed regulation states the provision of law which authorizes or requires the proposed regulation. The reference standard is basically reviewing whether the proposed regulation cites the law which is being implemented or interpreted.

According to the OAL, complying with the authority and reference standards involves a rulemaking agency in two activities -- picking appropriate authority and reference citations for the note that follows each regulation section that is printed in the California Code of Regulations, the CCR, as well as adopting a regulation that is within the scope of the rulemaking power conferred on the agency itself.

By law, each regulation section that's printed in the CCR must have a citation to the specific statutory authority under which it was enacted, as well as a citation to the specific statute or other provision of law that the regulation is implementing, interpreting, or making specific. If the underlying statute does not expressly or impliedly provide authority for the proposed regulation, then it is void.

Next is the consistency standard. This standard is basically reviewing whether the proposed regulation is in harmony with, and not in conflict, with other laws.

In this regard, the review by OAL focuses on whether the proposed regulation is consistent with the underlying statute. According to the OAL, consistency is viewed as whether the regulation is reasonably designed to aid a statutory objective, that it does not conflict with or contradict any statutory provision.

Next is the clarity standard. This standard is basically reviewing whether the proposed regulation is easily understood by those who are affected by it.

According to the OAL, regulations are frequently unclear and unnecessarily complex, even when the technical nature of the subject matter is taken into account, which is often confusing to persons who must comply with these regulations.

The intent of the clarity standard is to ensure that the rulemaking agency who drafts the regulation text has done so in plain, straightforward language, avoiding technical terms as much as possible, and using coherent and easily readable language.

As such, the OAL attempts to ensure that each regulation can be easily understood by those who are regulated, and avoid instances where a regulation is unclear to the regulated community.

The next standard is the non-duplication standard. This standard is basically reviewing whether a proposed regulation does not serve the same purpose as any other state law or regulation.

In this regard, OAL explains that a regulation cannot simply repeat or rephrase an existing statute. In other words, a regulation cannot serve the same purpose as that of an existing statute or regulation. If it does, then there must be some justification in doing so. Otherwise, it fails the standard.

The last is the necessity standard. This standard is basically reviewing whether the need for the proposed regulation has been demonstrated by substantial evidence.

The rulemaking entity must have a complete rulemaking file when it submits the final work product to the Office of Administrative Law. This rulemaking file must include all materials and background upon which the proposed regulation is based.

Both the initial and final statements of reasons must be thorough in explaining why the provision or provisions are reasonably necessary to accomplish their stated purposes.

The rulemaking file must also identify and include in the rulemaking record any materials relied upon in proposing the provision or provisions, and any other information, statements, reports, or data that the agency is required by law to consider, or that they utilized in preparing the rulemaking product.

OAL is limited in its review of the rulemaking record to the proceedings and the file itself. In addition, a court reviewing the regulations will be limited to the documents contained in that rulemaking record.

As such, it's important for the rulemaking agency to comply with all the requirements of the APA to ensure that their rulemaking is complete under the law.

Thanks for joining us on this podcast looking at OAL's six standards of review.