

Hi, this is Chris Micheli with the Sacramento governmental relations firm of Aprea & Micheli and an Adjunct Professor at McGeorge School of Law. Thanks for joining today's podcast to provide a brief overview of the California rulemaking process.

California is the home to over 200 state agencies, departments, boards, and commissions that can make public policy through their authority to adopt regulations. There's a list of state agencies that have adopted regulations on the website of California's Office of Administrative Law, OAL. OAL's website, found at oal.ca.gov, also provides direct access to the California Code of Regulations, the CCR, which is organized under various subject matter titles of which there are 28 of them.

California's APA, or Administrative Procedure Act, is patterned after the Federal APA. The APA contains required procedures for rulemaking authority as well as administrative hearings that are conducted by all of these agencies, departments, boards, and commissions.

California's APA is found at Chapter 3.5, Chapter 4, and Chapter 5, commencing with Section 11340 which is part one of Division 3 of Title II of California's Government Code. In addition, note that there are numerous regulations governing the APA. These are found at the California Code of Regulations, or the CCR, in Title I, Sections 1 through 120. Note that the OAL's website includes checklists that are used by OAL to review regulations as well as some fabulous publications including the *California Rulemaking Under the Administrative Procedure Act*.

Now, generally speaking, the authority of state agencies and departments to adopt public policy, that is their rulemaking process, is defined and restricted by the authorizing statute, which can be general or specific. Statutes usually prescribe each agency's authority to adopt policy and it's an established principle of administrative law that an agency cannot exceed as legally prescribed authority to regulate.

On the other hand, many statutes confer broad powers to some state agencies regarding matters that directly affect the general public. There are opportunities for interested parties to be informed, to observe and to participate in rulemaking activities of these state agencies and departments. In particular, interested parties have significant access to the rulemaking activities of these state entities by virtue of the APA. For example, every state entity is required to annually adopt its rulemaking calendar, which is published on their website. This is pursuant to state statute. Moreover, agencies establish interested parties' mailing lists for notices of rulemaking activities by that particular agency or department.

California law also requires every state agency to satisfy the basic minimum procedural requirements that are established by the APA for the adoption, the amendment, or the repeal of a regulation unless that agency is expressly exempted by statute from doing so. According to the OAL, California courts have long recognized that under the state's Constitution, the Legislature made by statute delegate these quasi-legislative powers to a state agency and the executive branch so long as adequate standards are provided to guide the agency.

The agency developed four required documents during the preliminary activity stage which are needed to initiate the formal rulemaking process in the state. The express terms of the proposed regulation, that is the proposed text, the initial statement of

reasons sometimes referred to as the ISOR, I-S-O-R, the fiscal impact statement and then the notice of proposed rulemaking. These documents are filed with the Office of Administrative Law and then published by the relevant agency.

Next begins the 45-day opportunity to submit written, faxed or email comments on all or any part of a proposed rulemaking when the notice of proposed rulemaking is published in the California Regulatory Notice Register. The notice of proposed rulemaking is also mailed to interested parties and it's posted on the rulemaking agency's website.

According to the OAL, a regulation must be easily understandable. It must have a rationale and it must be the least burdensome and effective alternative. A regulation cannot alter, amend, enlarge or restrict this statute or be inconsistent with or in conflict with a statute.

Under the California APA, similar to the federal, an agency has an option as to whether it wishes to hold a public hearing on a proposed rulemaking. However, if an agency does not schedule a public hearing, and an interested person submits a written request for a public hearing within 15 days prior to the close of the written comments period, then the agency must hold that public hearing because of this requirement and agency usually scheduled a public hearing at the outset of the rulemaking process.

The APA also requires a rulemaking agency to consider all relevant information presented to it during the comment period before adopting, amending or repealing the regulation. After the initial public comment period, the agency will often decide to change its initial proposal, either in response to public comments or even on its own.

Before a rulemaking agency adopts regulatory changes, it must mail a notice of opportunity to comment to those proposed changes along with a copy of the text of the proposed changes to each person who has submitted written comments on the original proposal, or who has testified at the public hearing, or asked to receive a notice of proposed modification. In addition, the agency must post the notice on its website.

Next, a rulemaking agency must summarize and respond on the record to timely filed comments. This summary in response to the comments demonstrate that the agency has in fact considered all relevant material presented to it before adopting, amending or repealing a regulation. An agency must respond to a comment in one of two ways according to the OAL. The agency must either, one, explain how it has amended the proposal to accommodate the comment, or two, it must explain the reasons for making no change to the proposal. An agency's summary and response to comments are included as part of the final statement of reasons.

Now, thereafter, the agency must transmit its rulemaking file to the Office of Administrative Law for review within one calendar year from the date that the notice of proposed rulemaking action was published in the notice register. OAL then has 30 working days in which to review the rulemaking record to determine whether it demonstrates that the rulemaking agency satisfy the procedural requirements of the APA. Specifically, the Office of Administrative Law reviews the rulemaking file for compliance with the six standards of review which are set forth in the Government Code: authority, reference, consistency, clarity, non-duplication, and necessity.

Note that OAL may not substitute its judgment for the other rulemaking agency with regard to the substantive content of the regulations. California's rulemaking process is set forth in the APA and the accompanying regulations promulgated by the OAL. There are numerous instances along the way that interested parties can participate in the rulemaking process, including pre and post-formal activities. For example, parties can meet with state agency staff prior to a regulatory project being commenced in order to provide valuable input before the agency staff actually begins drafting any regulatory changes.

Many agencies and departments utilize a so-called Interested Parties Process in order to review draft rule making projects prior to the commencement of the formal OAL process. Even after the agency or department has completed the rulemaking process, there are opportunities to be involved, such as with the OAL review, appeal to the Governor's office, or even challenging the rulemaking in court. As such, the rulemaking process is relatively transparent in California, and it affords consideration of the comments of interested parties.

Thanks for joining this brief overview of the rulemaking process in California. I hope you found it useful. Thanks for joining.