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Primary Framework

The Administrative Procedure Act

Congress laid out the basic framework under which rulemaking is conducted when it enacted the Administrative Procedure Act (APA) in 1946. It remains the basic legislative standard even though its processes have been affected by more recent statutes.

The rapid growth of federal agencies and programs during the New Deal era was accompanied by the increasing use of regulations. Regulations allow agencies to set wide-ranging policies. They are not limited to individual cases, as are adjudications, which in earlier years had been the primary vehicle for agency decisions.

The soon exploding use of regulations led to a concern in Congress and in the Executive Branch about a lack of uniformity among the agencies in formulating policies. An Attorney General's Committee on Administrative Proceedings was created in 1939 and issued a report and recommendations to Congress in 1941.

The Administrative Procedure Act (5 USC 551-559, 701-706), enacted in 1946, implemented many of the recommendations of the Attorney General's Committee. Passage of the act was followed in 1947 by the issuance of The Attorney General's Manual on the Administrative Procedure Act, which clarified some of the terms and procedures in the APA.

The Administrative Procedure Act defined "rule" as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .

The Attorney General's Manual took the definition one step further to contrast rulemaking from adjudication. The definition are important because agencies face different procedural requirements under APA, depending on how an agency action is classified.

The Attorney General's Manual said that rulemaking is:

[A]gency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but because it is primarily concerned with policy considerations.

Adjudication, on the other hand, is the quasi-judicial "determination of past and present rights and liabilities."

The APA describes two kinds of rulemaking — formal and informal. "Formal rulemaking" calls for a trial-like, on-the-record proceeding. Most federal agencies, however, develop rules through "informal rulemaking." The main requirements for informal rulemaking are:

- Publication of a "Notice of Proposed Rulemaking" (NPRM) in the Federal Register;
- Opportunity for public participation by submission of written comments;
- Consideration by the agency of the public comments and other relevant material; and
- Publication of a final rule not less than 30 days before its effective date, with a statement explaining the purpose of the rule.

While the APA does not require all agencies to follow one single model for rulemaking, it does impose minimum procedural conditions that all agencies are expected to follow. This is to ensure that the public has the opportunity to participate in the formulation and revision of government regulations, and that there be minimum standards for judicial review.

The requirements are quite minimal, yet as basic rules they provide the foundation for the development of further procedures. For example, although the APA does not require a public file or record of the rulemaking process, agencies usually compile one to prove their process is fair and reasonable.

Also, an agency is free to publish an Advance Notice of Proposed Rulemaking (ANPRM) when the agency wants to test out a proposal or solicit ideas before it drafts its Notice of Proposed Rulemaking. On the other hand, if an agency need to respond quickly to an emergency it can implement a final regulation while still accepting and considering public comments.

Rules that are exempt from the "notice-and-comment" requirements of the APA are those dealing with military or foreign affairs functions and those "relating to agency management or personnel or to public property, loans, grants, benefits or contracts."

Agencies often voluntarily waive an exemption, although when they do so, they still retain the power to omit notice-and-comment when for "good cause" the procedures would be "impracticable, unnecessary, or contrary to the public interest." Congress may, of course, require an agency to follow a specific public participation procedure.

There are other exemptions from notice-and-comment procedures:

- Rule of "agency organization, procedure or practice;"
- "Interpretative rules" that add little substantive interpretation of the law; or
- "General statements of policy."

- Agencies may run into difficulties in the courts trying to invoke these exemptions, however, if the proposed action has a major impact on the public.

While the APA governs the rulemaking process, as a practical matter its influence on rulemaking has been diminished by the Reagan executive orders, and Clinton's subsequent E.O. 12866, that placed OMB in a position to shape agency decision-making at its earliest stages.

Executive Order 12866

Executive Order 12866, issued by President Clinton on September 30, 1993, amended and consolidated long-standing executive orders put in place during the Reagan Administration.

Its objectives, the President stated, are "to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public."

All executive branch agencies, except for the independent regulatory agencies, are subject to E.O. 12866. Before a regulation can go on the books, they must:

- Assess the general economic costs and benefits of all regulatory proposals;
- For every "major" rule, complete a Regulatory Impact Analysis (RIA) that describes the costs and benefits of the proposed rule and alternative approaches, and justifies the chosen approach;
- Submit all "major" proposed and final rules to OMB for review;
- Wait until OMB completes its review and grants approval before publishing proposed and final rules;
- Submit an annual plan to OMB in order to establish regulatory priorities and improve coordination of the Administration's regulatory program. This requirement also applies to the independent agencies; and
- Periodically review existing rules.

E.O. 12866 was amended January 2007 by President George W. Bush through another executive order, E.O. 13422. The Bush order changed significantly some portions of E.O. 12866. More on E.O. 12866.

Secondary Controls

The Paperwork Reduction Act

Building on the 1942 Federal Reports Act, the Paperwork Reduction Act of 1980 (44 USC 3501) establishes the guiding policies for the collection and dissemination of government information. Since its inception, the Paperwork Reduction Act (PRA) has

had a major impact on both agency rulemaking and on the principles of the Administrative Procedure Act.

The PRA created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) and gave the agency broad authority over information management activities, including meeting annual paperwork reduction goals, reviewing each agency's information management activities, and improving federal information policy.

The Paperwork Clearance Process

The central component of the law is the paperwork clearance process, a provision resurrected from the 1942 Federal Reports Act. Under the PRA, every time a federal agency proposes collecting information from ten or more people, the information collection must first be approved by OIRA. Everything from tax forms to health research questions is reviewed by OIRA. Information collections that fall under the purview of OIRA reviews also include application forms, questionnaires, surveys, and reporting or recordkeeping requirements.

To accommodate this broad standard to the APA rulemaking process, Congress distinguished between regulatory and nonregulatory paperwork. The latter is referred to as "information collection requests" and involves gathering data independent of a rule, such as when an agency wants to research an issue for some future agency action. Reporting or recordkeeping requirements contained in or associated with a regulation, on the other hand, are known as "information collection requirements."

When an agency proposes to collect information from ten or more people, it must first send OIRA its information collection proposal and supporting documentation. At the same time, the agency sends a public notice to the Federal Register regarding the request that has been forwarded to OMB.

The results of OMB's review are referred to as "public comments." While the law uses the term "public comments," in deference to the notice-and-comment principles of the APA, the OMB action is actually a clearance decision. The agency knows that if OMB does not approve, the agency will not be able to keep that information collection provision in its regulation.

When the final rule is published in the Federal Register, the agency must explain how it has responded to OMB's comments. However, OMB still has the last word; after the final rule is issued, OMB can disapprove the paperwork requirement if the agency:

- Missed any of the required procedural steps;
- Substantially changed the paperwork requirement without giving OMB sufficient opportunity to review it; or
- Gave an "unreasonable" response to the OMB comments.

This provision of the PRA effectively means that if the paperwork requirement is intrinsic to the regulation, then OMB disapproval of that paperwork requirement could potentially derail the entire regulation. An OMB disapproval will likely force the agency to reenter rulemaking to address the information collection provisions. It also means that public comments, which may have shaped the regulation, will be moot. Because agencies collect information in order to determine when and how to regulate, an OMB disapproval can impact an agency's rulemaking ability even if the information collections are not embedded in the regulations. Finally, there can be no judicial review of OMB's paperwork review decisions.

There is one exception to OMB's tight control on information collection; independent regulatory agencies can override an OMB disapproval.

The Paperwork Reduction Act was also amended in 1995.

Read the OMB Watch factsheet, "The Paperwork Reduction Act: What it is and How it Works"

The Congressional Review Act

The Congressional Review Act(1) set up a process in which Congress has 60 session days to review and possibly reject agency rules.

First, agencies must submit all new rules to the parliamentarians and leadership in both the House and Senate, in addition to the Government Accountability Office (GAO). GAO then must provide a report to the agency's authorizing committee on each major rule within 15 days of the rule's publication in the Federal Register or its receipt by Congress, whichever is later.

If a Congress member finds a rule objectionable, he/she can introduce a "resolution of disapproval." The resolution is then referred to committees of jurisdiction. In the Senate, if the committee has not reported within 20 calendar days, the resolution can be discharged upon a petition supported by 30 members, and it "shall be placed on the calendar." In the House, there is no such petition provision, and the resolution would be treated like any bill.

The Act prescribes special expedited procedures, which limit debate in the House and ban a Senate filibuster, for consideration of the resolution. Barring congressional action, a major rule(2) goes into effect 60 days after it has been submitted to Congress; a non-major rule goes into effect immediately, though like a major rule, Congress still has 60 session days to repeal it.

If the motion to disapprove passes in both the House and Senate, and is then signed by the president(3), the rule essentially disappears. Even if it has already taken effect, the agency that issued it can no longer enforce the regulation or defend it in court.

Furthermore, the agency is banned from pushing a similar version of the rule at a later date.

Notes

1. The Congressional Review Act was enacted as a provision within the Small Business Regulatory Enforcement Fairness Act, but it should be thought of as a separate act since its purpose and focus are, for the most part, unrelated to SBREFA's other provisions.

2. "Major" is defined as a rule that is estimated to have an annual effect on the economy of more than $100 million.

3. Like a bill, the president can veto the resolution in which case only a congressional override could defeat the rule.

The Federal Advisory Committee Act

When making decisions, agencies often seek advice from advisory committees composed of individuals from outside the federal government. To keep such committees from representing only limited interests, Congress enacted The Federal Advisory Committee Act in 1972 (5 USC App. 1). The Act requires agencies to follow specific procedures when creating advisory committees. The law also provides guideline for the conduct of advisory committee activities. For example, advisory committees must provide advance public notice of their meetings and hold open meetings.

When creating an advisory committee, an agency must issue a charter, approved by the General Services Administration, and must select committee members in such a way as to assure that diverse views will be considered on the issues under review. An advisory committee expires automatically after two years unless it is rechartered.

Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA) (5 USC 552), enacted in 1966, allows public access to government information. Individuals are assured the right to a judicial hearing to enforce its provisions.

The Act was amended in 1974, 1976, and 1986 to narrow the scope of FOIA exemptions and the ability of agencies to withhold information. Amendments in 1996 extended FOIA's provisions to electronic records, and requires agencies to package information electronically — via computer diskette, CD-ROM or the Internet, for example — for any requester.

FOIA requires federal agencies, including independent regulatory agencies, to publish certain items in the Federal Register, which include:

- Rules of procedure;

- Statements of general agency policy that have been adopted;
- Descriptions of agency organization;
- Changes in or repeal of existing rules and policies; and
- Descriptions of internal guidelines for carrying out agency functions.

But the heart of FOIA is the requirement that agencies make records available when they receive requests that reasonably describe the records and follow agency published procedures. Agencies may charge for locating and duplicating records, but they must publish the fee schedule. Also, the fees may be waived if the request is in the public interest.

Controversy often develops over FOIA requests when agencies try to deny requests on the grounds that the information sought is exempt from mandatory disclosure. The major exemptions are:

- National defense or foreign policy material classified as secret;
- Agency personnel rules and records;
- Records exempted from disclosure by statute;
- Trade secrets;
- Law enforcement investigations records; and
- Inter- or intra-agency memoranda or letters.

If an agency denies a FOIA request, the person making the request can sue to compel disclosure if the records exist. If an agency fails to produce the records within statutory time limits, that also can be grounds for a suit.

Note: The FOIA is complemented by the Privacy Act of 1974 (5 USC 552), which restricts what the government can do with records that contain information about individuals.

Individuals may copy any or all of an agency record that contains information on them, seek correction of the record, and find out from the agency what it plans to do with the information in the record. Agencies must also publish in the Federal Register their plans for managing such records.

The Government Performance and Results Act

The Government Performance and Results Act (GPRA), which was passed in 1993 and fully implemented on Oct. 1, 1997, set out to establish a system for measuring each agency's performance — both as a whole and for specific programs — that can be tied to the congressional appropriations process.

More specifically, GPRA requires:

- Each federal agency to develop a 5-year strategic plan that is to be updated every three years. These strategic plans are to include general agency goals and

objectives, including outcome-related measures and how these relate to specific program performance goals.

In creating the plans the agencies must consult with Congress and actively solicit the views of other affected or interested entities. OMB oversees the development of these plans and has provided guidelines for the preparation and submission of them (Part 2 of OMB Circular A-11). The first strategic plans were submitted to Congress and OMB in September 1997; they must be resubmitted every three years but may be resubmitted sooner.(1) Circular A-11 "strongly" encourages agencies to submit an agency-wide plan although many sub-agencies have created individual plans as well.

- Each federal agency to develop an annual performance plan that provides objective, quantifiable criteria by which to measure the success of each program activity. These performance plans must contain quantifiable measures and indicators for every program activity operated by the agency. The performance plans were submitted to Congress -- as required by the law -- with the FY 1999 U.S. Budget in February 1998.

The performance goals must be described in detail including the organizational cost and validity of the measures. If the agency and OMB agree that the outcomes of a particular program cannot be quantified, a descriptive statement can be written which must include the infeasibility or impracticality of quantifying the program's goals. Thus, there is a heavy emphasis on quantifiable measures. Agencies can aggregate, disaggregate, or consolidate program areas to comply but may not minimize the significance of any single program in doing so.

- Starting in 2000, each federal agency must submit program performance reports to Congress. The program performance reports must review and evaluate the success of achieving the performance goals from the previous fiscal year. On March 31, 2000, the first annual reports must be submitted to Congress. The agency assessment is to reach back three years, starting in 2003, and must compare performance for the current fiscal year with that of the previous year. The reports must also assess the effectiveness of any waivers granted under GPRA (see next item).

- OMB may grant agency waivers in limited areas to help agencies achieve performance goals. In exchange for "accountability to achieve a performance goal," OMB may approve agency waivers dealing with: administrative procedures and controls; staffing levels; limitations on compensation; prohibitions or restrictions on funding transfers in specific areas.(2) These managerial waivers were designed to allow agencies the administrative flexibility that other countries found necessary to maximize performance measurement activities. Agencies may submit waiver requests to OMB starting with their first performance plan, and must describe and quantify the anticipated effects on agency performance. Since GPRA's passage other laws have given agencies many of these same waiver authorities.

- Creation of performance budgeting pilots. OMB is to designate five agencies to present budgets which would outline performance differences in program areas at different levels of funding. These pilots will be tested in fiscal years 1998 and 1999. A report on the outcomes of the pilot is required no later than March 31, 2001

Notes

1. Circular A-11 requires agencies to submit plans 45 days before the deadline.

2. Waivers are limited to the following services: travel and transportation; rent, communications and travel; advisory; and supplies and maintenance.

Analytical Requirements

The Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act — which was enacted on March 15, 1995, following intense pressure from the National Governors Association and others — sets up procedural mechanisms that aim to prevent Congress from imposing costs on states without providing federal funds.

Specifically, the measure requires the Congressional Budget Office (CBO) to do an analysis of all bills that are expected to cost state, local and tribal governments $50 million or more, or the private sector $100 million or more. House and Senate committees reporting out bills containing such mandates are required to show that CBO did the necessary analyses of cost. And for mandates on state, local and tribal governments of over $100 million, committees must also show where the necessary authorizations of appropriations will come from (whether or not the programs are in that committee's jurisdiction) in order to offset the costs to the public sector. If a committee does not provide this information, the bill is subject to a point of order on the House or Senate floors, preventing its consideration. A majority vote can override the point of order.

In addition, the Act requires federal agencies to consult with state, local and tribal governments — prior to the public notice and comment period — about any rulemaking that contains an unfunded mandate, and then conduct assessments of such mandates for final and proposed regulations. Regulations where these analyses are not performed are subject to judicial review.

The Regulatory Flexibility Act

Complaints from small business that they were drowning in federal forms and going broke because of federal regulations led to the passage of the Regulatory Flexibility Act in 1980 (5 USC 601). Agencies proposing rules that would have a "significant" economic

impact on small business, small not-for-profit organizations, or small governmental entities must prepare a Regulatory Flexibility Analysis (RFA) and try to find simpler, less burdensome ways for such small organizations to comply with federal requirements.

The Act applies to independent regulatory agencies and executive agencies. The Small Business Administration (SBA) oversees the Act's enforcement.

The Act does not require an agency to abandon a proposed regulation because it might have a "significant" impact on small entities, only to consider less burdensome alternatives and to explain why it has rejected those alternatives.

If a proposed regulation comes under the Act, an agency must prepare an Initial Regulatory Flexibility Analysis, which it publishes along with the proposed rule and sends to SBA. SBA has no OMB-like review power. It simply monitors agency compliance with the Act.

After the comment period, the agency must prepare a Final Regulatory Flexibility Analysis, which should respond to any issues raised in the public comments and which is published with the final rule or made available to the public. (The Regulatory Flexibility Analyses are often combined with the Regulatory Impact Analyses required by E.O. 12291.)

The Regulatory Flexibility Act also requires agencies to publish and implement a plan for reviewing existing rules on a 10-year cycle to minimize any significant economic impact these rules might have on small entities.

The Small Business Regulatory Enforcement Fairness Act

Complaints from small business that the Regulatory Flexibility Act had not adequately addressed regulatory burden led to the enactment of the Small Business Regulatory Enforcement Fairness Act (P.L. 104-121) on March 29, 1996. The law is far-reaching and provides small business with an array of new ways to air their concerns about agency regulations and enforcement activity.

Perhaps most significant, the two agencies that have received the brunt of the criticism from the small business community — the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) — must make a special effort to answer small business concerns during rulemakings.

Specifically, these agencies have to convene a "Small Business Advocacy Review Panel" to shape each rule that is expected to have a major economic impact on small business to better fit the needs of small business owners. Before issuing a proposed rule, the panel — composed of representatives from the involved agency (EPA or OSHA), OMB's Office of Information and Regulatory Affairs (OIRA), and the Small Business Administration's (SBA's) Office of Advocacy — must solicit and review recommendations from a second

panel consisting of small entity representatives (which, in addition to small business, can include small not-for-profit organizations and small governmental jurisdictions).

The Act's other main component deals with agency enforcement of regulations once they are on the books — requiring SBA to establish and oversee a "Regulatory Enforcement Ombudsman" and 10 regulatory fairness boards located in 10 regional cites. Under the authority of the Ombudsman, the boards — each comprised of five small business owners — advise agencies on small business concerns and submit an annual report to Congress based on information that is gathered at fairness-board meetings.

Besides taking their concerns to fairness-board meetings, the Act provides several other outlets to small business owners who wish to challenge agency enforcement actions — through both petitions and the courts.

Excluding violations that are either criminal or blatantly "pose serious health, safety, or environmental threats," a small business owner can petition agencies to reduce or waive penalties on the basis of their economic impact to the business. Similarly, small business owners can file a grievance in court against agencies if they feel they have been "adversely affected or aggrieved" by a ruling. In accordance with this, the Act grants courts the authority to suspend regulations and force revisions that are more conducive to small business interests, or further, to establish that the regulation cannot be enforced against any small entity(1). Should a court find that an agency has been "excessive" in its enforcement of a regulation, the Act also allows small businesses to recover attorney's fees, and other costs associated with going to trial, from the federal government.

In deciding whether an agency has overreached, courts are to examine the agency's analysis of record-keeping requirements mandated by the Act. The analysis, which is also to be used in congressional reviews, must state the need for the rule, a summary of public concerns, a description of what is expected from small businesses, and a list of any steps taken by the agency to reduce economic burdens brought on by the rule. In addition, the agency must explain why it did not promote less burdensome rulings.

Notes

1.Currently the definition for "small entity" applies to about 93 percent of the nation's businesses.

National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) (1970) (42 U.S.C. §§ 4321-4347) requires agencies to include an environmental impact statement in any major action "significantly affecting the quality of the environment." Agencies must consult with and obtain the comment of any federal agency jurisdiction or expertise in the environmental area. Those comments accompany the proposal through the agency review process. The Council on Environmental Quality (CEQ) has issued regulations to implement the procedural provisions of NEPA (40 CFR parts 1500-1508). Regulatory agencies have

also promulgated supplementary regulations that establish procedures for determining the need for an environmental impact statement as well as for preparing and obtaining comments on such statements.

Source: The Regulatory Group, Inc., available at reg-group.com/glossary.shtml.

Executive Order 13132

Executive Order 13132 concerns the federalism implications of agency actions. E.O. 13132 is the latest executive order in a long line of decrees intending to preserve the rights of the states in regulating themselves. The E.O. also concerns implementation of the Unfunded Mandates Reform Act — which Congress passed with the aim of reducing regulatory compliance costs to states — to some extent. President Bill Clinton signed E.O. 13132 on August 4, 1999.

The E.O. instructs agencies to avoid submitting to Congress legislation which may preempt state law or allow regulation unduly influencing state activities. The E.O. also instructs agencies to appoint a federalism officer within the agency. This official is responsible for consulting with state governments on regulatory actions the agency believes may have federalism implications.

One of the more well-known provisions of E.O. 13132 requires agencies to determine the federalism implications of a proposed rule. If the rule has federalism implications and either imposes significant direct compliance costs on states or preempts state law, the agency must prepare a "federalism summary impact statement," including a summary of state and local officials' concerns about the proposed rule and the agency's position supporting the need for the regulation and a statement of the extent to which state and local concerns have been met. This assessment is generally included when an agency publishes a notice of proposed rulemaking.

For more on federalism in the rulemaking process, click here.

Executive Order 13175 - Indian Tribal Governments

Executive Order 13045 - Children's Health

Executive Order 12630 - Property Rights

Executive Order 13211 - Energy Impacts

Executive Order 12898 - Environmental Justice