

# Regulatory Law History and Process

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## **Historical Overview – Federal and California Regulations:**

The basic concept of regulations – a delegation of legislative power to an agency for enforcement – has probably been around as long as there have been governments. But the expansive regulatory scheme in our current legal environment in the United States at both the Federal and State level is largely a product of sporadic periods of political unrest in the last century.

The oldest still existing Federal Regulatory agency is the Office of the Comptroller of the Currency created in 1863. In the late 1800's and into the first few years of the 1900's there was a widespread sense that large corporations were controlling government for their benefit to the detriment of ordinary citizens. At this time the primary villain in the public mind was the railroads, although banks and large manufacturing concerns were also popular targets of public animosity. The progressive political movement, which crossed political lines at that time, was the anti-big business political response.

Economics was a key driver for the progressive movement. A serious depression from 1893 to 1897, and financial panic in 1907, and continuing retreat in real wages and employment created a critical mass of voters who rejected the hands off approach to business regulation that

characterized the previous decades. The progressives believed government should intercede to control private business.

At the Federal level the Interstate Commerce Commission, created in 1887 is often viewed as the first regulatory agency in the modern sense, followed by the Sherman Antitrust Act in 1890. The Federal Trade Commission and Food and Drug Administration were created as the Progressive influence spread. As the progressive movement expanded, and particularly when progressive sympathizing President's Teddy Roosevelt and Woodrow Wilson came to power, Progressives through the Executive branch and Congress created many of the Federal Regulatory agencies now in existence and gave existing agencies more teeth and ambition.

In California the big break through for progressives came with the election of Hiram Johnson in 1910. The first Johnson administration in 1911 created the Public Utilities Commission, the first workers compensation law and in the next few years many of the other regulatory agencies now in existence in California.

From the beginning agencies created rules to enforce the powers delegated by the jurisdictions legislature. But each individual agency determined the form and extent of publication for their regulations. Often the regulations were called rules, and were numbered, or renumbered in whatever manner the agency choose, and distributed or published in the manner the agency thought appropriate.

This hodge-podge of agencies and agency rules made knowing the law somewhat challenging but it took another period of intense financial instability to trigger the more formal regulatory scheme we know today.

At the Federal level Republicans who advocated free market solutions to all problems controlled both the Presidency and Congress leading up to and after the stock market crash in 1929. They tried to use free market mechanisms to pull the country out of the growing depression, but the market mechanisms they chose did not work. By the time Franklin Roosevelt was elected late in 1932 around 5000 banks had failed and unemployment was nearing 25%. The country was ready for a more activist government and Roosevelt provided it, creating extensive new regulatory authorities, most notably in the financial sector and in labor practices.

As the influence of agencies expanded in the 1930's Congress began to recognize that it was very difficult for people to know what the law was in the system of uncoordinated regulations that had developed. A particularly embarrassing episode involved a suit by the Attorney General against two Texas oil companies which ended up with the assistant AG being grilled by the Supreme Court in December of 1934 over the fact the regulations the oil companies were charged with violating technically did not exist at the time the companies were charged.

Public Law 74-220 signed by President Roosevelt on July 26, 1935 created the Federal Register to require publication of regulations in a central source. The first issue of the Federal Register was published March 14, 1936 (It was 16 pages and was sent out by mail). The Federal Register is has been published every Federal Business Day since its creation.

Even before the first issue of the Federal Register was published the realization mere notice of regulatory adoption was not enough spawned development of a proposed system of codes to organize Federal Regulatory law. Public Law 75-158 signed by President Roosevelt in June 19, 1937 created the Code of Federal Regulations.

In California the waves of new agency responsibilities, most prominently in labor, insurance and mortgage law, coupled with the fact the financially strapped state had little money for individual agencies to advertise or publish their rules, provided fertile ground for following the Federal example. The first statute that created a mechanism for collecting and publishing all regulatory actions by California State agencies was enacted in 1941. After the 1941 statute the first Code of Regulations was finally published as the California Administrative Code beginning in 1945. The official name changed from the California Administrative Code to the California Code of Regulations in the late 1980's.

## **The Federal Regulatory Process**

The adoption of Federal Regulations is subject to detailed process and content controls. The 1935 and 1937 acts addressed only the problem of providing access to the actual text of regulations. No limitations as to process existed. On July 11, 1946 the Administrative Procedure Act was approved to place the rulemaking process in the public domain. Generally the act requires publication of proposed regulations, followed by a period of some months for public hearings and public comments, followed by publication of the adopted regulation.

On November 10, 1947, in Federal Crop Insurance Corp. v. Merrill, (332 U.S.380) the court held that the appearance of rules in the Federal Register was constructive notice of the existence and content of the regulation. On March 22, 1954 the 9<sup>th</sup> Circuit Court of Appeals in Hatch v. the United States held that a regulation that had not been published in the Federal Register could not be enforced against a party even though the party had actual notice of the regulation.

Over the years the publications that agencies submitted for publication became more sophisticated and detailed. Beginning in the mid-1960's a trend for longer preambles to proposed and adopted regulations provided more in depth discussion of the purpose of the regulations. The Freedom of Information Act of 1967 (PL 89-487) increased the number of documents published in the Federal Register, but also reduced the volume of publications to some degree by allowing incorporation by reference for certain documents.

A formal requirement for agencies to summarize the action being taken, state its intended effect and supply the name and contact information of the agency person responsible for responding to questions or comments about proposed regulation was first promulgated 1976, effective April 1, 1977. This change created the modern format of seven headings for the content:

1. Agency,
2. Action,
3. Summary,
4. Dates,
5. Addresses,
6. For Further Information Contact,
7. Supplementary Information.

Beginning in 1977 agencies were required to pay the Government Printing Office to publish in the Federal Register. This led to a trend toward publishing fewer information only documents and create some tension between the agencies desire to minimize the size of their publications and the need to meet the legal sufficiency of the regulations.

The 1974 Privacy Act (5 USC 552a) required that personal information in agency publications be digested rather than publishing the actual records. In 1980 a rule creating standardized indexing terms became applicable to agencies submitting publications to the Federal Register. One of the largest documents ever printed in the Federal Register was a 6,653 page Justice Department Report on the Microsoft Anti-Trust case on May 3, 2002.

### **Federal Regulatory Research Sources and Process:**

The first step in researching the history and purpose of any Section of the Code of Federal Regulations is to go to the Code of Federal Regulations and note the historical annotations that follow the text of the Section. The CFR volumes are widely available in Federal Depository Libraries, but most of us will never see them anymore since a quick trip to your desktop search engine for “Code of Federal Regulations” will bring up a link to the online version of the Code of Federal Regulations provided by GPO access. The Federal Register became available online at the GPO website in 1994 and the Code of Regulations in 1995.

As an example of a CFR annotation assume you are interested in Title 16, Section 1009.9, a regulation relating to the Consumer Product Safety Commission titled “Policy regarding the granting of emergency exemptions from Commission regulations.” This Section contains the following annotation at the end of the Section: **(16 U.S.C. 1191, 1261, 1471, 2051, 2111)**. This part of the annotation cites the statutory authority which authorized the agency to adopt the regulation. The annotation then states: **[44 FR 40639, July 12, 1979]**. This part of the Regulation cites the Federal Register where this regulation was adopted.

The next step is to go to the Federal Register. If this regulation was adopted after 1994 we could go to the GPO access page for the Federal Register to view the adoption publication. But since this predates the digital versions we need to go to a Federal Depository Library to look for the Federal Register for July 12, 1979.

When we pull the Federal Register for that date (Volume 44) and go to page 40639 and we find the Consumer Product Safety Commission adopting publication. Since this adoption is after 1977 we can count on finding significant discussion of the overall purpose of this regulation.

Next we want to find out what else the agency might have said about this regulation, so we check under the “dates” heading, which often will provide us with the dates that the proposed

regulation was first published for comment in the Federal Register, as well as any interim publications between the first proposal and the final adoption. We then pull those Federal Register volumes and review those comments.

We have now done the easy part. There is potentially much more detail available concerning any particular Federal Register adoption, but more detail is in the files of the agency. For very recent adoptions there may be publications available at the agencies website. For older adoptions you must make a public records request to the agency. An applicable statute is 5 USC Section 552, but this section is long, complex and in broadly worded, so agencies seem to have broad discretion in responding to public records requests.

### **The California Regulatory Process**

Although California's version of the Administrative Procedure Act was enacted in 1947 finding substantive discussion about California regulatory adoptions is a much more difficult proposition than research on Federal Regulations. Although California's act created the same general structure for adoption – published notice, consideration and hearing during a public comment period, published final adoption – the California publications were in general simple notice without any substantive explanation, and there was no records retention requirement for documenting an agencies compliance for many decades.

A 1973 enactment created a requirement that the agency providing a brief summary of the purpose of the regulation in the notice.

A 1979 adoption created the current requirement that the agency submit a rulemaking file to the Office of Administrative Law. The rulemaking file must meet rigid process and documentation standards before a regulation could be adopted, and agencies are required to retain the rulemaking file for future public access.

### **Researching the California Code of Regulations**

As a preliminary note, researching California regulations can be incredibly difficult because up until the last decade or two there was no effort to document how sections developed over the years, or to develop indexes for register publications. A basic rule for any California regulatory research is be skeptical about the annotations the Administrative Code, they are more often than not incomplete. Cultivate your knowledge of history since a good rule of thumb is to

ask yourself when the subject matter of your regulation first became a public issue, and be dubious if the regulation source notes say it was enacted decades later.

The first step is to review the source notes for the regulation in question. The office of administrative law provides the CCR online with annotations at <http://www.oal.ca.gov/> (link in the upper left hand corner). If you don't have access to the web page Barclay's publications can be found in most law libraries which provide the text of the sections and some historical annotations, although many sections have long histories that predate the Barclay annotations, which often only cover activity from the early 1990's forward.

They historical annotations will typically cite the California Administrative Register number that adopted or amended the regulation. If there are no source notes following the section go up to the heading for that subchapter, or chapter, or division until you hit the point where the register that enacted the series of sections is identified.

Next you can contact the State Archives to get a copy of the actual regulatory filing. To access the Secretary of State file you need the name of the adopting agency and the date of the adoption. The Secretary of State regulatory filing provides the text in strike out and italicized type to identify what is being deleted and added. More importantly the cover sheet for the regulatory filing will identify the contact within the agency who was the public information source for that particular regulatory adoption, and the face sheet will often provide the date that notice was first published in the Z-Register (Notice register). This will allow you to track down the initial published notice of the regulatory proposal, which (for adoptions since 1974) will provide at least a very terse explanation of the reason for the adoption.

Next, for each regulatory change that is making some pertinent change you can contact the agency to review the rulemaking file. As noted above, the requirement that agencies maintain and retain a rulemaking file was enacted in 1979, but many agencies did not get a retention regime in place for some years, so files from the early 1980's are sometimes not available. Often the most difficult step in getting at a rulemaking file is finding someone in the agency that knows what you are talking about. A call to the agencies legal department may be necessary to get directed to the correct person to process your request.

Agencies vary greatly in their responsiveness to rulemaking file requests. Some may require that you come to their offices (generally in Sacramento, Oakland or San Francisco) and

sit down to review the file in a room with someone watching over you. Others may not want to grant you access to the file, they are only willing to copy the file and send you a copy and the bill. Since rulemaking files are often very voluminous, and mind numbingly duplicative, review by someone who knows the issues you are seeking to resolve can be very cost effective in the long run.

If the regulatory adoption was prior to 1980 there was no requirement the agency keep records of their rulemaking. The further back in time your regulation can be traced the less likely you will find much. But for some topics there can be very significant materials even for regulatory adoptions from the early part of the last century.

Once you have done what you can as to all the annotations under the Section you are interested in, review the materials on the initial regulatory adoption carefully for clues that might suggest the basic language and concepts might have existed in a prior regulation. If you suspect that might be the case look for a note stating substantially the following: “For prior history see Register....” The absence of a comment of this nature doesn’t mean there was no prior history for the language and concepts of the Section, but it is very helpful if that note is present as the cited register will provide a new set of historical annotations taking you further back in time.

The biggest problem with tracking a regulation back in time is that only the most basic research on sections from the California Code of Regulations can be done in most law libraries. Often even the law libraries that retained all the supplements and changes from the 1940’s through the 1980’s just have them all in binders so it is very difficult to figure out what a section read at any point in time. It is worth traveling some distance to find a library that has bound copies of the registers for all the years back to 1945.

Once you have tracked a regulation back into adoptions prior to 1973, beyond contacting the agency about all you can do is look for publications by the agency in the State Archives, the California State Library, or from publication collections at other large libraries around the State, although for many topics it is rare to find much.