

Bill No: SB 617

SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION
Senator Roderick D. Wright, Chair
2011-2012 Regular Session
Bill Analysis

SB 617 Author: Calderon and Pavley
As Amended: September 8, 2011
Hearing Date: May 10, 2011
Consultant: Paul Donahue

SUBJECT: State government: Administrative regulations and financial accountability

SUMMARY: Requires each state agency adopting a major regulation that is subject to Office of Administrative Law (OAL) review to prepare an economic analysis and requires state agencies to monitor internal auditing and financial controls.

Existing law:

- 1) The Administrative Procedure Act establishes rulemaking procedures and standards for the adoption, amendment, or repeal of regulations by state agencies charged with the enforcement of state laws, and for the review of those regulatory actions by the Office of Administrative Law (OAL). (Govt. Code § 11340 et seq.)
- 2) Requires state agencies to determine if a proposed regulation has the potential for significant, statewide adverse economic impact directly affecting California business enterprises.
- 3) Provides that state agency heads are responsible for the establishment and maintenance of a system or systems of internal accounting and administrative control within their agencies, under the Financial Integrity and State Manager's Accountability Act (FISMA) of 1983

This bill:

- 1) Defines "major regulation" to mean any proposed adoption, amendment, or repeal of a regulation that is subject to review by the OAL which will have an economic impact on California business enterprises and individuals in an amount exceeding \$50 million, *as estimated by the agency.*
- 2) Requires agencies, when submitting to OAL an Initial Statement of Reasons for a proposed regulation to identify the problem the agency intends to address, and enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute.

The benefits may include non-monetary benefits such as the (a) protection of public health and safety; (b) worker safety; (c) the environment; (d) the prevention of discrimination; (e) the promotion of fairness or social equity; and (f) the increase in openness and transparency in business and government, among other things.

3) On and after November 1, 2013, requires the agency to include in its Initial Statement of Reasons for a proposed major regulation a standardized regulation impact assessment that is prepared in a manner prescribed by the Department of Finance (DOF).¹ The assessment shall address:

- a) The creation or elimination of jobs within the state;
- b) The creation of new businesses or the elimination of existing businesses within the state;
- c) The competitive advantages or disadvantages for businesses currently doing business within the state;
- d) The increase or decrease of investment in the state;
- e) The incentives for innovation in products, material, or processes; and,
- f) The benefits of the regulations, including benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency.²

4) Requires DOF to comment on the standardized regulatory impact assessment within 30 days of receipt. State agencies may update their analysis to reflect these comments, as specified.

5) Requires DOF, in consultation with OAL and other state agencies, to adopt regulations for conducting the standardized regulatory impact assessments for major regulations. The DOF regulations for these assessments shall assist agencies in specifying the methodologies for:

- a) Assessing and determining the benefits and costs of the proposed regulation, expressed in monetary terms to the extent feasible and appropriate;
- b) Comparing proposed regulatory alternatives with an established baseline so agencies can make analytical decisions for the adoption, amendment, or repeal of regulations necessary to determine that the proposed action is the most effective, or equally effective and less burdensome, alternative in carrying out the purpose for which the action is proposed, or the most cost-effective alternative to the

¹ The University of California, the Hastings College of Law, and the Fair Political Practices Commission are exempt from the requirements to prepare this assessment.

² The bill authorizes state agencies, for the purpose of completing the assessment, to derive information from existing state, federal or academic publications.

economy and to affected private persons that would be equally effective in implementing the statutory policy or other provision of law;

c) Determining the impact of a regulatory proposal on the state economy, business, and the public welfare, as specified;

d) Assessing the effects of a regulatory proposal on the General Fund and special funds of the state and affected local government agencies attributable to the proposed regulation;

e) Determining the cost of enforcement and compliance to the agency and to affected business enterprises and individuals; and,

f) Making the estimation if a regulation is to be deemed a major regulation.

6) Specifies that reasonable alternatives included in a Statement of Reasons for a regulation include those which are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.

7) Requires an agency proposing to adopt a regulation that is not a major regulation, or that is a major regulation proposed prior to November 1, 2013, to prepare an economic impact analysis, as specified, that includes the benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

8) Specifies that analyses conducted pursuant to this bill are intended to provide agencies and the public with tools to determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of law in the least burdensome manner.

9) Specifies that regulatory impact analyses shall inform the agencies and the public of the economic consequences of regulatory choices, not reassess statutory policy.

10) Provides that the baseline for the regulatory analysis shall be the most cost-effective set of regulatory measures that are equally effective in achieving the purpose of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.

11) Requires state agencies proposing to adopt, amend, or repeal a major regulation on or after January 1, 2013, and that have prepared a standardized regulatory impact assessment, to submit that assessment to DOF upon completion.

12) Requires DOF to convene a public hearing or hearings and take public comment on any draft regulation, affording representatives from state agencies and the public at large the opportunity to review and comment on the draft regulation before it is adopted in final form.

13) Requires state agencies to provide DOF and OAL ready access to their records and full information and reasonable assistance in any matter requested for purposes of developing the regulations required by this bill. This requirement shall not be construed to authorize an agency to provide access to records required by statute to be kept confidential.

14) Requires DOF to submit the adopted regulations to the Senate and Assembly Committees on Governmental Organization and to publish them in the State Administrative Manual by January 1, 2013.

15) Requires the notice of proposed adoption, amendment, or repeal of a regulation submitted by the proposing agency to OAL to also include:

- a) A policy statement overview of the benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things;
- b) An evaluation of whether a proposed regulation is inconsistent or incompatible with existing state regulations;
- c) A statement of the results of the economic impact assessment or the standardized regulatory impact analysis, as specified; and,
- d) A statement that the adopting agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. For a major regulation proposed on or after January 1, 2013, the statement shall be based upon the standardized regulatory impact analysis of the proposed regulation, as specified, as well as upon the benefits of the proposed regulation, as specified.

16) Requires agencies when submitting to OAL a final statement of reasons with the adopted regulation, to also include:

- a) A determination with supporting information that no alternative considered by the agency would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. For a major regulation proposed on or after November 1, 2013, the determination shall be based upon the standardized regulatory impact analysis of the proposed regulation, and upon the statement of benefits, as specified; and,
- b) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses including the standardized regulatory impact analysis for a major regulation, as well as the benefits of the proposed regulation, as specified.

- 17) Requires agencies to include the economic impact assessment or standardized regulatory impact analysis in the file the agency maintains for each rulemaking.
- 18) Defines “noncompliance” to mean that the agency failed to complete the economic impact assessment or standardized regulatory impact analysis, or failed to include the assessment or analysis in the file of the rulemaking proceeding, as specified.
- 19) Requires OAL to return a regulation to the adopting agency if the proposed regulation conflicts with an existing regulation and the agency has not identified the manner in which the conflict may be resolved or the agency has not made the alternatives determination, as specified.
- 20) Provides that, notwithstanding any other law, the return of a regulation to the adopting agency by OAL is the exclusive remedy for a failure to comply with certain requirements, as specified.
- 21) Requires DOF and OAL to review the standardized regulatory impact analyses for adherence to the regulations adopted by DOF, as specified, from time to time.
- 22) Requires DOF to submit to the Senate and Assembly Committees on Governmental Organization a report describing the extent to which submitted standardized regulatory impact analyses for proposed major regulations adhere to the regulations adopted, as specified, by January 1, 2014. Allows DOF to include any recommendations from OAL for actions the Legislature might consider for improving state agency performance.
- 23) Authorizes OAL to notify the Legislature of noncompliance by a state agency with the adopted regulations, in any manner or form, as specified.
- 24) Provides that state agency heads are responsible for the establishment and maintenance of effective, independent, and objective ongoing monitoring of the internal accounting and administrative controls within their agencies.
- 25) Provides that monitoring systems and processes, included with existing elements of a satisfactory system of internal accounting and administrative control, are vital to:
- a) Ensuring that routine application of internal controls do not diminish their efficacy over time;
 - b) Providing timely notice and opportunity for correction of emerging weaknesses with established internal controls;
 - c) Facilitating public resources and other decisions by ensuring availability of accurate and reliable information; and,
 - d) Facilitating production of timely and accurate financial reports.
- 26) Requires state agency heads to implement systems and processes to ensure the independence and objectivity of the monitoring of internal accounting and administrative control as an ongoing activity, as specified.

27) Includes the Controller, the Treasurer, and the Attorney General to the list of recipients of a biennial report regarding the adequacy of each state agency's systems of internal accounting, administrative control, and monetary practices, as specified.

28) Requires the director of DOF, in consultation with the State Auditor and the Controller, to establish, and modify as necessary, a general framework of recommended practices to guide state agencies in conducting active, ongoing monitoring of processes for internal accounting and administrative control.

COMMENTS:

1) Purpose of the bill: According to the author, this bill "will require agencies to review regulations with an estimated cost of more than \$50 million and mandates that the least burdensome, most cost-efficient method of implementation be adopted to lessen the burden on affected businesses." The author states that, as whole, the bill is a straightforward package of process reforms that have the goal of creating a revamped regulatory environment that allows parties affected by regulations new avenues to bring forward concerns about the economic effect of future major regulations.

2) Major regulations: A regulation must have an economic impact on California business to the tune of \$50 million in order to trigger the requirement to prepare a standardized regulatory impact assessment. The adopting agency gets to determine whether or not the economic impact exceeds \$50 million, according to unspecified criteria. It is unclear what standards, if any, would be employed by the state agency in making this determination. For example, an agency could determine the costs on an annual or cumulative, long term basis.

3) Standardized regulatory impact analysis: The bill requires DOF to adopt regulations for use by state agencies in conducting the regulatory impact analysis, which must be prepared whenever a "major" regulation is proposed to be adopted.

The DOF regulations are required to assist state agencies in determining the *monetary costs and benefits*, but also the value of *non-monetary benefits* such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, the increase in the openness and transparency of business and government and other non-monetary benefits consistent with the statutory policy or other provisions of law.

It would seem that the recently added³ requirement that the DOF regulations governing preparation of the regulatory impact analysis by agencies consider these non-monetary benefits of the proposed "major" regulation injects a measure of ambiguity and vagueness into the agency determination of economic impact of these major regulations.

4) Exclusive remedy: This bill would enact a new provision to the Administrative Procedures Act, providing that, notwithstanding any other law, return of a regulation to the adopting agency by OAL is the exclusive remedy for a failure by a state agency to comply with the requirements for a standardized regulatory impact for major regulations,

³ This bill was amended in Assembly on September 8, 2011.

or for non-compliance with what must be provided by the adopting agency in its notice of proposed adoption, amendment, or repeal of a regulation.

5) Senate Rule 29.10 (d): This bill is referred to this Committee for review pursuant to Senate Rule 20.10 (d), which requires that any bill amended in the Assembly in a manner that rewrites the bill shall be referred to policy committee for a hearing.

Upon re-referral of the bill, the Committee may either (1) hold the bill or (2) return the bill to the Senate Floor for consideration of the bill as it was amended in the Assembly. It should be noted that amendments are not permitted under this rule.

SUPPORT:

California Asian Pacific Chamber of Commerce
 California Association of Bed & Breakfast Inns
 California Building Industry Association
 California Business Properties Association
 California Chamber of Commerce
 California Construction and Industrial Materials Association
 California Farm Bureau Federation
 California Grocers Association
 California Hotel & Lodging Association
 California Independent Oil Marketers Association
 California League of Food Processors
 California Manufacturers & Technology Association
 California New Car Dealers Association
 California Professional Association of Specialty Contractors
 California Restaurant Association
 California Retailers Association
 Chemical Industry Council of California
 Consumer Specialty Products Association
 Industrial Environmental Association
 International Fragrance Association - North America
 Los Angeles Chamber of Commerce
 National Federation of Independent Business – California
 Pacific Merchant Shipping Association
 Southern California Edison
 Western States Petroleum Association

OPPOSE:

None on file
