



The Reporter summarizes below the activities of those entities within state government which regularly review, monitor, investigate, intervene, or oversee the regulatory boards, commissions, and departments of California.

OFFICE OF ADMINISTRATIVE LAW

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The Office of Administrative Law (OAL) was established on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (APA) made by AB 1111 (McCarthy) (Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of all existing and proposed regulations against six statutory standards—necessity, authority, consistency, clarity, reference, and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted...." OAL has the authority to disapprove or repeal any regulation that, in its determination, does not meet all six standards. OAL is also authorized to review all emergency regulations and disapprove those which are not necessary for the immediate preservation of the public peace, health and safety or general welfare. The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and distributing.

Under Government Code section 11340.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the APA are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. These non-binding OAL opinions are commonly known as "AB 1013 determinations," in reference to the legislation originally authorizing their issuance.

MAJOR PROJECTS

1995 OAL Determinations. On May 26, OAL issued 1995 Determination No. 4, Docket No. 90-028, in which OAL considered whether a rule enforced by Pelican Bay State Prison requiring visual body cavity searches of inmates is a regulation

required to be adopted pursuant to the APA. OAL concluded that the APA applies generally to the Department of Corrections' quasi-legislative enactments, but that the challenged rule, which requires inmates of Pelican Bay State Prison to submit to an unclothed, visual body cavity search before and after going to the recreation room, does not constitute a regulation within the meaning of Government Code section 11342(g). OAL applied a two-part test which provides that a rule is a regulation if it is a rule or standard of general application, and if the rule has been adopted to implement or interpret the law enforced or administered by the agency or to govern the agency's procedure. OAL concluded that the challenged rule fails the first prong of the test because it is not a rule or standard of general application in that it applies to only one prison rather than the entire male prison population in California. Therefore, OAL determined that the rule is not a regulation and is not required to be adopted pursuant to the APA.

On June 1, OAL released 1995 Determination No. 5, Docket No. 90-029, in which OAL considered whether the Department of Corrections' rule requiring an inmate of the security housing units (SHU) at two state prisons to send non-issuable personal property home at the inmate's expense, or donate or destroy the property, constitutes a regulation required to be adopted pursuant to the APA. The request for a determination was made by an inmate at Pelican Bay State Prison; an inmate at Corcoran State Prison also challenged a similar rule at that facility.

Again, OAL concluded that the challenged rule is not a "regulation" and is not subject to the APA. As noted above, the two-part test applied by OAL provides that a rule is actually a regulation as defined in Government Code section 11342 if the rule is a rule of general application or a modification or supplement to such a rule, and if the challenged rule has been adopted to either implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. For an agency rule to

be "of general application" within the meaning of the APA, it is sufficient if the rule applies to all members of a class, kind, or order. However, OAL noted that some courts have applied a narrower standard to prisoners, by defining a rule of general application as one significantly affecting the male prison population in the custody of the Department. OAL also noted that Penal Code section 5058, as amended on January 1, 1995 by AB 3563 (Aguiar) (Chapter 692, Statutes of 1994), states that a rule issued by the Director of Corrections that applies solely to a particular prison or other correctional facility, provided certain other conditions are met, is not deemed to be a "regulation" within the meaning of the APA. OAL noted that the Requester himself explained in his petition that only SHU inmates are subject to the rule, not the "mainline" inmates at Pelican Bay or Corcoran, and that other prisons with SHU programs, like Folsom and San Quentin, do not have a rule similar to the one in question. OAL concluded that the rule fails the first part of the test because it is not a standard of general application or a standard significantly affecting the male prison population in the custody of the Department in that it applies only to the inmates of security housing units at Pelican Bay and Corcoran state prisons, not all inmates housed in state correctional facilities. As a result, OAL held that the rule is not a regulation within the meaning of the APA.

On November 20, OAL released 1995 Determination No. 6, Docket No. 90-031, in which OAL considered whether the State Personnel Board's (SPB) "non-hearing calendar" procedures constituted regulations, as defined by Government Code section 11342(g), and thus should have been adopted pursuant to the APA. The Requester contended that the Board's bulletin of August 10, 1988 proposed non-hearing calendar procedures for challenging classification issues at SPB meetings, and that the Board's bulletin of October 26, 1988 notified state agencies and employee organizations that SPB had decided to implement the new procedures. This Request for Determination was filed with OAL on July 3, 1990; the SPB adopted the new procedures according to APA requirements on September 30, 1991. Nonetheless, OAL analyzed the request as the facts were when the request was filed and determined that the APA is generally applicable to the quasi-legislative enactments of SPB; the challenged procedures do constitute regulations that must be adopted in accordance with the APA; the challenged rules do not fall within any general exceptions to the APA requirements; and the



rules were invalid until formally adopted pursuant to the APA. In arriving at this conclusion, OAL reasoned that the procedures were rules of general application and modified an existing rule of general application in that they revised existing procedures and applied to all SPB meetings, and to all persons who wished to contest the non-hearing calendar and the actions of the Executive Officer. OAL also found that the challenged rules implement, interpret, or make specific the law enforced or administered by the Board and govern the Board's procedures.

LEGISLATION

SB 452 (Johannessen). The APA provides that a regulation or an order of repeal approved by OAL and filed with the Secretary of State shall become effective on the thirtieth day after the date of filing unless certain conditions exist. As amended September 1, this bill would have prohibited enforcement of any regulation filed with the Secretary of State, notwithstanding the above provision, unless the regulation has been made available to the public for thirty days, as specified.

The APA also provides that a regulation may be declared to be invalid if certain conditions exist. This bill would have required that a regulation be declared invalid if the regulation has not been made available to the public for thirty days or if an agency has failed to mail written copies of new regulations to a person who would be affected by the regulation within ten days after receipt of any written or oral request for these copies. It would have also provided that if a regulation is declared invalid because of a substantive failure to comply with the thirty-day availability requirement, the adopting agency would not be required to reinstate adoption, review, and approval procedures for that regulation in accordance with the APA, but instead the regulation would be deemed valid and enforceable upon the agency's compliance with the availability requirement.

Existing law requires the Legislative Counsel to make specified information available to the public by means of a public computer network. This bill would have required OAL to submit both a paper copy and a computer diskette containing the text of new or amended regulations to the Legislative Counsel when new or amended regulations are filed with the Secretary of State, and would have required the Legislative Counsel to make available, within a reasonable period of time, by means of the public computer network, all new or amended regulations adopted on or after January 1, 1996, re-

ceived from OAL, and by June 1, 1998, all regulations contained in the California Code of Regulations. It would also have required that the diskette be prepared in a specified format by the agency proposing to adopt the new regulations and be submitted by the agency to OAL at the same time the agency submits the adopted regulation, the rulemaking file, or a complete copy of the rulemaking file, to OAL for review.

Existing law permits a court, upon motion, to award attorneys' fees to a successful party against one or more opposing parties in any action that has resulted in the enforcement of an important right affecting the public interest if certain conditions are met. This bill would have specified that, for purposes of these provisions, "an important right affecting the public interest" includes, but is not limited to, the right to public availability of regulations.

On October 14, Governor Wilson vetoed this bill; in his veto message, Wilson stated that "[t]he substance of [SB 452] is addressed in another measure, SB 523, which I have signed on this date. The language in SB 523 achieves the same objective in more carefully crafted language which will achieve fairness for those regulated without the problems and uncertainties created by this bill." However, the only section of SB 523 which contains provisions similar to SB 452 is section 15.9; and section 15.9 of SB 523 was double-joined to SB 452, thus requiring both bills to be signed in order for the language of section 15.9 in SB 523 to take effect. Thus, Wilson's veto of SB 452 effectively cancelled the provision in SB 523 to which he referred in his veto message. (See agency report on DEPARTMENT OF CONSUMER AFFAIRS for a description of SB 523.)

AB 250 (Baldwin, Woods), as introduced February 2, would require OAL and the Secretary of the Trade and Commerce Agency, on or before January 1, 1997, to recommend to the legislature the suspension or repeal of all state regulations determined by OAL and the Secretary to be more stringent than federal regulations on the same subject. The bill would also provide that its provisions shall become inoperative on July 1, 1997 and, as of January 1, 1998, shall be repealed, unless a later enacted statute that becomes effective on or before January 1, 1998 deletes or extends the dates in which it becomes inoperative and is repealed. [A. CPGE&ED]

AB 1135 (Morrissey), as amended August 21, would require the state Air Resources Board (ARB), until January 1, 1999, when proposing to adopt or substantively amend any administrative regula-

tion, to consider the cumulative economic impact of all regulations adopted by ARB that became effective on and after January 1, 1990, on specific private sector entities, as well as state and local governmental agencies, that may be affected by the proposed adoption or amendment of the regulation, and to include this information in the notice of proposed action. The bill would also require ARB to permit public comment on the cumulative economic impact of regulations that became effective on and after January 1, 1990, and, if ARB determines that the impact of these regulations and the proposed regulation on the same affected private sector entity and state and local governmental agencies is significant and adverse, to determine whether the adoption of an alternative regulation that would be less harmful to that private sector entity, the affected state or local governmental agencies, and the economy in general, should be adopted, and would require ARB to permit public comment on this alternative regulation. [S. Floor]

AB 1179 (Bordonaro). The APA specifies that no administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to business. As amended May 4, this bill would instead specify that no administrative regulation adopted after January 1, 1996, shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses, that the intended benefits of the regulation justify its costs, and the proposed regulation is the most cost-effective of available regulatory options.

The APA requires state agencies to submit specified information to OAL concerning regulations adopted by that agency; OAL is required to review and approve all regulations adopted pursuant to the APA and submitted for publication in the *California Regulatory Code Supplement*, based on specified standards. OAL is further required to return a regulation to the adopting agency under specified circumstances. Existing law requires the Secretary of the Trade and Commerce Agency to evaluate the findings and determinations required of any state agency that proposes to adopt regulations under the APA, and to submit comments into the rulemaking record in regard to the impact of the regulations on the state's business, industry, economy, or job base. This bill would revise the Secre-



tary's duties in this regard. It would require adopting agencies to submit specified information to OAL that is pertinent to the Secretary's comments, objections, or recommendations. It would also require OAL to return regulations to the adopting agency under certain additional circumstances. [A. *Appr*]

AB 1160 (Morrissey), as introduced February 23, would require OAL and the Secretary of Trade and Commerce, on or before January 1, 1998, to recommend to the legislature the suspension or repeal of all state regulations determined by OAL and the Secretary to be more stringent than federal regulations on the same subject. This bill would make this provision inoperative on July 1, 1998, and would repeal it on January 1, 1999. [A. *CPGE&ED*]

AB 1857 (Brewer). The APA authorizes departments, boards, and commissions within Cal-EPA, the Resources Agency, and the Office of the State Fire Marshal to adopt regulations that are different from regulations contained in the Code of Federal Regulations addressing the same issues upon a finding by the public entity adopting the regulations that certain justifications exist. As introduced February 24, this bill would broaden this authorization to permit all state agencies to adopt regulations that are different from regulations contained in the Code of Federal Regulations. It would also require a state agency, prior to adopting any "major regulation" (as defined) to evaluate alternatives to the requirements of the proposed regulation and consider whether there is a less costly alternative or combination of alternatives that would ensure full compliance with statutory mandates in the same amount of time as the proposed regulatory requirements. [A. *CPGE&ED*]

AB 1659 (Woods, Goldsmith, Machado), as amended July 17, would require specified state agencies, until January 1, 2001, to determine whether a proposed regulation or amended regulation would be a "major regulation" or a part of a "major rulemaking action," as defined, prior to giving notice of that adoption or amendment, to include that determination in the notice of proposed action, and to provide for public comment on that determination. It would require these agencies to provide specified related information and findings in the statements of reasons submitted with the notice of proposed action and with the adopted regulation. It would provide that in the event an agency cannot make specified findings required in this regard in the final statement of reasons for the adopted regulation, the agency shall report to the legislature and the Governor with respect to the agency's determination

that these findings could not be made and the agency's recommendations of further legislative action.

The APA requires OAL to review regulations adopted by state agencies according to specified criteria. The APA also specifies that a state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to comply with the provisions of the APA requiring a final statement of reasons. This bill would also provide, until January 1, 2001, that a state agency that adopts or amends a regulation mandated by federal law as described in these provisions shall be deemed to have complied with the criteria for review by OAL if a specified statement is included in the notice of proposed adoption or amendment.

The APA also requires OAL to adopt regulations specifying the methods, standards, presumptions, and principles OAL uses, and the limitations it observes, in reviewing regulations, and requires OAL to return any regulation to the adopting agency if certain conditions exist. This bill would require OAL, until January 1, 2001, to return any regulation to the adopting agency if the rulemaking file does not contain substantial evidence, as defined, to support the conclusions of the adopting agency. [S. *GO*]

SB 329 (Campbell), as introduced February 10, would prohibit a state agency, commencing January 1, 1996, from adopting any regulation in an area over which a federal agency has jurisdiction, unless the state agency notifies each house of the legislature thirty days prior to the effective date of the regulation. The bill would also declare that it is the intent of the legislature that the rules of each house shall ensure that a bill prohibiting the adoption of a particular regulation may be acted upon by both houses within the thirty-day period specified above. [S. *GO*]

AB 1142 (Baldwin), as introduced February 23, would prohibit all regulations adopted by a state agency that has been determined by OAL to have a substantial adverse job creation impact from remaining in effect for more than four years from the date of its filing with the Secretary of State. [A. *CPGE&ED*]

SB 690 (Mountjoy), as amended March 30, would exempt the Department of Personnel Administration from the APA and instead provide alternative procedures for the Department to use in the adoption, amendment, or repeal of a regulation. The alternative procedures include, among other things, a public comment period, preparation of specified information relative to

the proposed rule action, public notice, a public hearing, and publication in the California Code of Regulations. This bill would require Department policies, guidelines, rules, and documents not subject to these rulemaking procedures to be made reasonably available to state agencies, state employees and their representatives, and other interested parties. This provision, rather than the APA, would also apply to the State Personnel Board for the purposes of adopting, amending, and repealing civil service classifications in accordance with the California Constitution. This bill would continue all Department regulations, policies, guidelines, rules, and documents in effect on the effective date of this article until they are amended or repealed, as specified. [A. *CPGE&ED*]

SB 235 (Hughes). Existing law establishes procedures for the enforcement of child support obligations through the courts and through state and local agencies. Under existing law, the state Department of Social Services is the administrator of the state plan for securing child and spousal support and determining paternity. Existing law requires each county to maintain a unit in the office of the district attorney for the same purposes. As introduced February 7, this bill would establish the Division of Child Support Enforcement in OAL, and would provide for the administrative adjudication of child support obligations. The bill would establish procedures for hearings to establish child support and paternity, the enforcement and modification of support obligations so established, and for judicial review of final orders issued by an administrative law judge. [S. *GO*]

BUREAU OF STATE AUDITS

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Created by SB 37 (Maddy) (Chapter 12, Statutes of 1993), the Bureau of State Audits (BSA) is an auditing and investigative agency under the direction of the Commission on California State Government Organization and Economy (Little Hoover Commission). SB 37 delegated to BSA most of the duties previously performed by the Office of Auditor General, such as examining and reporting annually upon the financial statements prepared by the executive branch of the state, performing other related assignments (such as performance audits) that are mandated by statute, and administering the Reporting of Improper Governmental Activities Act,