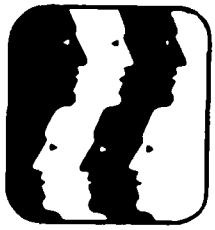

The Reporter summarizes below the activities of those entities within state government which regularly review, monitor, investigate, intervene, or oversee the regulatory boards, commissions, and departments of California.

OFFICE OF ADMINISTRATIVE LAW

Director: John D. Smith
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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 11347.5, 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 authorizing their issuance.

MAJOR PROJECTS

AB 1013 Determinations. On December 14, OAL released 1993 OAL Determination No. 5, Docket No. 90-020, in which OAL considered whether the California State Personnel Board's Hispanic Employment Link Program (HELP), a voluntary affirmative action program involving creation of Hispanic-only civil service classifications, and certain related affirmative action rules of the California Department of Justice (DOJ), are regulations and therefore without legal effect unless adopted in compliance with the APA.

OAL concluded that the provisions of the Board's HELP which constitute regulations include the creation of Hispanic-only classifications; the definition of the term Hispanic; the use of the "1980 labor force parity figure of 17.2%" as threshold criterion in determining whether or not to create Hispanic-only classifications; the use of the "available, qualified labor pool" criterion for determining Hispanic underrepresentation (or "underutilization") in professional classes; the use of the "80% rule" criterion for determining whether Hispanics are "significantly underrepresented" or "underutilized") in nonprofessional classifications; the use of "historical recruitment difficulties" as a criterion for determining if a HELP class would be created; limiting HELP classifications to those that are the "entry-level in a class series"; eleven Hispanic-only classifications; the Legal-Analyst-DOJ-Hispanic classification; and the Quick Placement Program policies. Further, OAL found that certain DOJ affirmative action policies—specifically, Part 6 of the affirmative action form and the definition of the term "underrepresented"—constitute regulations and must be formally adopted pursuant to the APA.

New OAL Rulemaking Action. On December 31, OAL published notice of its intent to adopt new section 4, Title 1 of the CCR, to implement SB 726 (Hill) (Chapter 870, Statutes of 1993). SB 726 requires state agencies, when adopting or amending regulations, to adopt a "plain English" policy statement overview of the regulatory change and to draft the regulations themselves in plain English. *[13:4 CRLR 16]* Among other things, new section 4 would require an agency to prepare and submit to OAL with the notice of proposed action either the express terms of the proposed action written in plain English or, if that is not feasible due to the technical nature of the regulation, a noncontrolling plain English summary of the regulation; section 4 would also require the agency to include in the rulemaking file either a statement that the agency has drafted the regulation in plain English, or a statement confirming that the agency determined that it is not feasible to draft the regulation in plain English and a noncontrolling plain English summary of the regulation.

Further, Government Code section 11346.7, part of the APA, requires every agency, when adopting regulations, to prepare and publish—among other things—an initial statement of reasons that includes information on the public problem addressed by the regulations, the specific purpose of each adoption, studies and reports the agency relied upon in proposing the regulations, and a description of alternatives the agency has identified that would lessen any adverse impact on small business created by adoption of the regulations; Government Code section 11342(e) defines the term "small business" for this purpose. OAL's proposed section 4 would require a state agency, when proposing to adopt, amend, or repeal a regulation, to include in the notice of proposed action a determination as to whether or not the action affects small business; state that an adoption, amendment, or repeal affects small business if a small business within the meaning of Government Code section 11342(e) is or will be required to comply with the resulting regulation(s); and require the agency, if its regulation affects small business, to include prescribed statements, as appropriate, in the notice of proposed action.

At this writing, OAL is scheduled to accept public comments on this proposed action until February 25; no public hearing is scheduled.

OAL Rulemaking Update. OAL's proposed changes to section 100, Title 1 of the CCR, which would provide that the term "changes without regulatory effect" includes—among other things—a change which makes a regulation consistent with a statutory change when the regulation must be consistent with the statute and the adopting agency has no discretion to adopt a provision which differs in substance from the provision chosen, and section 51000, Title 2 of the CCR, which would revise the list of employee positions subject to OAL's conflict of interest code, have not yet been incorporated into the CCR. *[13:4 CRLR 15]* At this writing, OAL is responding to public comments received regarding the proposed changes

to section 100, and is awaiting a response from the Fair Political Practices Commission regarding the proposed changes to section 51000.

LEGISLATION

AB 64 (Mountjoy), as amended March 3, would prohibit any regulation adopted, amended, or repealed by a state agency, as defined, pursuant to the APA from taking effect unless and until the legislature approves the regulation by statute within 90 days of its adoption, amendment, or repeal by the state agency. *[A. CPGE&ED]*

SCA 6 (Leonard), as amended February 16, would authorize the legislature to repeal state agency regulations, in whole or in part, by the adoption of a concurrent resolution. SCA 6, which would not be applicable to specified state agencies, would require the concurrent resolution to specify the regulation to be repealed or specific references to be made, as indicated, and would subject those resolutions to the same procedural rules as those required of bills. The measure would also require every regulation to include a citation to the statute or constitutional provision being interpreted, carried out, or otherwise made more specific by the regulation. *[S. Rls]*

AB 633 (Conroy), as amended April 12, would require the California Environmental Protection Agency to establish a moratorium on the adoption of any new or proposed regulations until January 1, 1995; require that agency to examine the effect on the economy of all regulations adopted since January 1, 1992, if any; and require the agency to identify all regulations that are more stringent than required under federal law, and permit the agency to revise a regulation to make it less stringent than under federal law without the approval of OAL. *[A. CPGE&ED]*

AB 1807 (Bronshvag), as amended September 8, would authorize regulatory agencies within the Department of Consumer Affairs to provide required written notices, including rulemaking notices, orders, or documents served under the APA, by regular mail. *[A. Inactive File]*

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, Government Code section 10540 *et seq.* BSA is also required to conduct audits of state and local government requested by the Joint Legislative Audit Committee (JLAC) to the extent that funding is available. BSA is headed by the State Auditor, appointed by the Governor to a four-year term from a list of three qualified individuals submitted by JLAC.

The Little Hoover Commission reviews reports completed by the Bureau and makes recommendations to the legislature, the Governor, and the public concerning the operations of the state, its departments, subdivisions, agencies, and other public entities; oversees the activities of BSA to ensure its compliance with specified statutes; and reviews the annual audit of the State Audit Fund created by SB 37.

MAJOR PROJECTS

BSA Reviews Implementation of Hazardous Waste Provisions. On December 1, BSA released a report entitled *Review of the California Department of Toxic Substances Control's Implementation of the Hazardous Waste Source Reduction and Management Review Act of 1989.* According to BSA, the Act was structured as an innovative, self-regulatory approach to reduce the generation of hazardous waste in California. Generators which, by site, routinely generate through ongoing process and operations more than 12,000 kilograms (13.2 tons) of hazardous waste during a calendar year, or more than 12 kilograms (26 pounds) of extremely hazardous waste during a calendar year, are subject to the Act, which requires that each generator periodically prepare a Source Reduction Evaluation Review and Plan and accompanying Source Reduction Evaluation Review and Plan Summary, and a Hazardous Waste Management Performance Report and accompanying Hazardous Waste Management Performance Report Summary. The California Department of Toxic Substances Control's primary responsibilities in carrying out the Act include promulgating regulations to carry out the Act; providing technical assistance to generators who are subject to the Act; and reviewing source reduction documents prepared by generators.

BSA's audit indicates that the Act is accomplishing its intended purpose for those who are complying with the Act. However, the Department needs to improve its implementation of the Act in the following areas:

- A high priority should be given by the Department to developing an initial master list of generators potentially subject to the Act. Then the Department should develop an effective program which assures that all identified generators are fully informed of the Act's requirements. According to BSA, this technical assistance program would also encourage generators to fulfill the Act's requirements.
- The Department should streamline the process used for requesting and reviewing generator documents, request source reduction documents from a broader range of generators, significantly increase the number of reviews performed of these documents, and require submittal of revised documents on a timely basis when documents are determined not to be in compliance with the Act's requirements.
- The Department should establish an information system to support the effective and efficient implementation of the Act in these and other areas.

BSA Continues Review of Drug Treatment Authorization Requests. On October 5, BSA released the fifth in a series of semiannual reports concerning how the Department of Health Services (DHS) processes reimbursement requests for certain prescribed drugs under the Medi-Cal program; these reports review DHS' process for counting and compiling data on drug treatment authorization requests (TARs) received and processed from June 1990 through May 1993. *[12:4 CRLR 36; 12:2&3 CRLR 44; 11:4 CRLR 48; 11:2 CRLR 45]*

BSA noted that DHS received approximately 211,400 drug TARs from June 1992 through May 1993, representing an increase of more than 29% since June 1990 through May 1991; according to BSA, the increase in the number of drug TARS received may have occurred partly because of a 39% increase since June 1990 in the number of Medi-Cal beneficiaries eligible to obtain drugs through Medi-Cal. BSA noted that from June 1992 through May 1993, DHS processed approximately 33% more drug TARs than it did during June 1990 through May 1991; DHS' monthly backlog of drug TARs received by mail had increased to approximately 5,000 in May 1993, compared to 2,900 at the end of May 1991; during June 1992 through May 1993, DHS' average time for processing mailed drug TARS exceeded the five working days required by state