STATE & CONSUMER SERVICES AGENCY
(Department of Consumer Affairs)

BOARD OF ACCOUNTANCY
Executive Officer: Carol Sigmann (916) 263-3680

The Board of Accountancy (BOA) licenses, regulates, and disciplines certified public accountants (CPAs). The Board also regulates and disciplines existing members of an additional classification of licensees, public accountants (PAs); the PA license was granted only during a short period after World War II. BOA currently regulates over 60,000 licensees. The Board establishes and maintains standards of qualification and conduct within the accounting profession, primarily through its power to license. The Board's enabling act is found at section 5000 *et seq.* of the Business and Professions Code; the Board's regulations appear in Title 16, Division 1 of the California Code of Regulations (CCR).

The Board consists of twelve members: eight BOA licensees (seven CPAs and one PA), and four public members. Each Board member serves a four-year term and receives no compensation other than expenses incurred for Board activities.

The operations of the Board are conducted through various standing committees and, for specific projects, task forces which are sunsetted at project completion. The Board's major committees include the following:

–The Qualifications Committee, among other things, reviews all applications for licensure, reviews workpapers to determine qualifications if it is unable to do so based on a file review, and considers all policy and/or procedural issues related to licensure.

–The Legislative Committee reviews legislation and recommends a position to the Board; reviews and/or edits proposed statutory language and regulatory language developed by other committees before it is presented to the Board; and serves as an arena for the various trade associations to express their concerns on issues.

–The Committee on Professional Conduct considers all issues related to the professional and ethical conduct of CPAs and PAs.

–The Administrative Committee is responsible for handling disciplinary matters concerning licensees.

The Board's staff administers and processes the nationally standardized CPA examination, currently a four-part exam encompassing the categories of business law and professional responsibility, auditing, accounting and reporting, and financial accounting and reporting. Generally, in order to be licensed, applicants must successfully complete all parts of the exam and three or more years of qualifying accounting experience (including experience in applying a variety of auditing procedures); one year of the experience requirement may be waived with college credit. Under certain circumstances, an applicant may repeat only the failed sections of the exam rather than the entire exam.

The current members of BOA are CPAs Avedick Poladian, Victor Calderon, Eileen Duddy, Ira Landis, Diane Rubin, Robert Shackleton, and Harry Mikkelsen; PA Walter Finch; and public members Robert Badham, Karen Mier, Baxter Rice, and Joseph Tambe.

MAJOR PROJECTS

McCorquodale Bills Require Sunset Review and Restructuring of Board in 1997. Two bills authored by Senator Dan McCorquodale and signed by Governor Wilson will reduce the number of CPAs on the Board and subject the Board to a "sunset" review on July 1, 1997.

The bills follow an October 1993 oversight hearing and an April 1994 report by the Senate Subcommittee on Efficiency and Effectiveness in State Boards and Commissions, which is chaired by Senator McCorquodale. At the oversight hearing, the Center for Public Interest Law (CPIL) expressed serious concerns about the structure and operations of the Board, and questioned its ability and willingness to protect consumers from incompetent CPAs. Specifically, CPIL challenged the supermajority of CPAs which control the Board; BOA's use of a licensing exam with an extremely low pass rate and its failure to properly clarify its other entry standards in statute or regulation; its excessive use of non-Board-member CPAs in licensing and enforcement decisionmaking (through its Qualifications Committee and its Administrative Committee, respectively); and its repeated attempts to stifle lawful competition for the CPA profession from non-CPA accountants. *[14:2&3 CRLR 31–32; 14:1 CRLR 26–27; 13:4 CRLR 5]*

In its April report, the Senate Subcommittee found that "there are...several problems with the current operation of the Board," including the following: BOA does not have an adequate enforcement program, and its expenditure of only 55.9% of its budget on enforcement "is much less than other boards which regulate professions which could cause severe financial harm to the public"; BOA "may be operating to bar qualified professionals from entry into the accounting field" through its use of the national CPA exam and its failure to use the rulemaking process to properly codify its experience requirements; and it "has on occasion attempted to protect existing members from competition" through its adoption, enforcement, and failure to repeal a rule which has now been ruled unconstitutional by the California Supreme Court in *Bonnie Moore v. State Board of Accountancy*. The Subcommittee recommended the removal of two of the Board's CPA members to create "a smaller board [which] may also function more efficiently." By removing some of the CPA members from BOA, the Subcommittee concluded that "the Board may be able to focus more on its enforcement activities and less on protecting the interests of the profession it regulates."

As a first step toward addressing the problems identified in the Subcommittee's report, Senator McCorquodale authored SB 2036 and SB 2038. SB 2036, the "sunset" bill, requires BOA to prepare a complete analysis of its role, functions, and operations by April 1, 1996, and submit to a comprehensive review by a new Joint Legislative Sunset Review Committee on July 1, 1997 (*see* LEGISLATION). As amended May 18, SB 2038 would have—effective January 1, 1995—changed the composition of BOA by removing two of its CPA members, and limited the membership of BOA's Qualifications Committee, Administrative Committee, and Continuing Education Committee to nine people each.

At its May meeting, BOA voted to oppose SB 2038. However, the Board was unable to convince Senator McCorquo-

dale to amend or drop the bill. Consequently, it dispatched Executive Officer Carol Sigmann and Board members Walter Finch and Baxter Rice to San Diego on July 12, to meet with CPIL Director Robert Fellmeth and Supervising Attorney Julie D'Angelo and discuss CPIL's complaints about BOA. As a result of their discussions, the Board representatives agreed to sponsor legislation and conduct rulemaking to clarify its entry requirements, look into the amendment or repeal of the rule found unconstitutional in *Bonnie Moore*, and invite the CPIL representatives to make a presentation about CPIL's concerns at the Board's September 30 meeting. CPIL accepted the invitation, and agreed not to oppose an amendment to SB 2038 which would delay the effective date of the Board and committee composition changes until the Board's sunset date of July 1, 1997, to enable more thoughtful consideration of these and other changes to the Board's structure and operations. As signed by the Governor on September 30, SB 2038 accomplishes just that (*see* LEGISLATION).

Baxter Rice reported these developments to the Board at its July 29–30 meeting, and advised BOA that it would be in the Board's best interests to open a continuing dialogue with CPIL.

Board Undertakes Review of Enforcement Program. At a special meeting on September 14, the Board commenced a comprehensive review of its enforcement program and—in particular—the role of Board staff and the way staff have implemented the enforcement program. The Board's staff enforcement unit was created five years ago, and currently consists of Enforcement Chief Greg Newington and six CPA investigators.

BOA's enforcement program is unlike any other in the Department of Consumer Affairs (DCA) in a number of respects. Contrary to the trend toward the use of professional investigative staff to receive, review, and manage investigations of consumer complaints against licensees, BOA uses a large contingent of non-Board-member licensees called the Administrative Committee (AC) to review enforcement cases. The AC, created by Business and Professions Code section 5020, is a 17-member committee which is allowed to "receive and investigate complaints and to initiate and conduct investigations or hearings, with or without the filing of any complaint, and to obtain information and evidence" relating to any matter involving the conduct of PAs and CPAs or any violation or alleged violation of the Accountancy Act. Under section 5022, the AC must make recommendations and forward its report to the Board for action on any matter on which it is authorized to act. The AC meets approximately six times per year for two days each meeting. The AC is chaired by a non-Board-member CPA, and selects two Vice-Chairs—one for "regular cases" and another for cases designated as "major cases." The Board has also created a Technical Review Panel (TRP) composed of volunteer licensees to serve as consultants to the Board and assist BOA's six staff investigators with investigations of complaints against licensees.

BOA maintains an unusual and extremely complex two-tiered case investigation process. Each involves multiple layers of review and re-review, and each is to a large extent controlled by licensees. Its "regular" process involves receipt of a complaint, assignment to one of the staff CPA investigators or a TRP member for investigation, dismissal of unsubstantiated cases by staff, and referral of the investigative report on "cases with merit" to the AC. Two AC members review the investigative report and, according to BOA documents, "decide on what further action is appropriate." The AC may require the accused licensee to attend an Administrative Committee Investigative Hearing (ACIH) before three or four AC members. Again, "the AC members decide on what further action is appropriate." If violations are confirmed, the AC will either (1) issue a citation and/or fine pursuant to section 95, Title 16 of the CCR; (2) order the licensee to engage in specified continuing education; or (3) ask BOA's Executive Officer to refer serious cases to the Attorney General's Office for preparation and filing of a formal accusation against the licensee. BOA resolves most cases by stipulation, and in fact prepares a stipulated settlement along with most accusations. If no stipulated settlement is reached, the accusation goes to hearing before an administrative law judge (ALJ), who prepares a proposed decision and submits it to the Board. The Board then reviews the proposed decision and determines whether to adopt it or non-adopt it; disciplined licensees may appeal BOA disciplinary decisions in superior court.

Some cases are designated "major cases"—as defined in BOA's Enforcement Policy Manual, major cases "involve complex accounting issues and/or significant consumer harm [which] require special handling and often require additional investigative resources." The Board refers these cases to its three-stage 14-step Major Case Program (MCP), which has traditionally been supervised by a non-Board-member outside contract CPA consultant called the Major Case Coordinator (MCC); this individual coordinates the activities of another entity called the Major Case Advisory Committee (MCAC). The MCAC participants usually include the AC Chair, the AC Vice-Chair for Major Cases, three other members of the AC selected by the Chair and Vice-Chair, the liaison Deputy Attorney General, the Chief of Enforcement, an assigned Board member liaison (*see below*), and the Executive Officer. The three stages of the MCP are as follows:

• ***Stage One***: Once a potential major case is identified, information about the parties involved is obtained and analyzed by staff (sometimes by an AC member, the MCC, or an outside consultant), and a "scoping report" is prepared. BOA's Chief of Enforcement and the AC Vice-Chair for Major Cases review the scoping report and determine whether to close the case, refer it to the "regular" process, or pursue it as a major case. If they decide to pursue it as a major case, they select a Major Case Consultant—another outside contract CPA consultant—to investigate the case; that individual receives direction and a budget for the investigation from the Enforcement Chief and the AC Vice-Chair for Major Cases. As the Consultant's investigation draws to a close, the Board President is contacted and a Board member liaison is selected to participate in the so-called "Stage One MCAC Meeting" if a matter is deemed likely to proceed to Stage Two. At the Stage One meeting, the Consultant presents the results of the investigation and the MCAC makes a recommendation on the matter—both as to its merits and its estimated cost—to the AC. If the AC members do not concur with the recommendation of the MCAC, their concerns are presented to the MCAC members for further consideration. At this stage, "[t]he Executive Officer makes the final decision as to whether to close the case, conduct additional investigation or pursue prosecution."

• ***Stage Two***: If a case reaches Stage Two, the Chief of Enforcement supervises formal investigation of the matter and usually selects outside counsel from a private law firm to develop the case and draft the accusation. The Board's reasons for the use of expensive outside counsel are unclear, but are probably due to the complexity of major cases, the need for accounting/auditing expertise, and understaffing at the Attorney General's Office. At the conclusion of the Stage Two investigation, the MCAC reconvenes to review the findings and recommend closure, additional review, or the filing of the accusation. Again, this recommendation is made to the AC (which may refer the case back to

the MCAC), and the final decision whether to file an accusation rests with the Executive Officer.

• ***Stage Three***: The filing of the accusation (which is frequently served with a draft stipulated settlement) triggers Stage Three. If a settlement is reached, the Board reviews the stipulation and must approve it. If no settlement is reached, an evidentiary hearing is held before an ALJ, who refers a proposed decision to the Board; the Board reviews it and decides whether to adopt it or non-adopt it. In either case, the Board member who served as the Board member liaison on the MCAC for that particular case is precluded from voting on the final decision in the matter.

Although the Board was careful to avoid discussion of particular cases at its September 14 meeting, several factors appear to have prompted it to commence its review of the enforcement program. These factors include criticism by CPIL and the Senate Subcommittee in October 1993 (*see above*) and, more recently, a civil action filed by BOA licensee Arthur Andersen in which Andersen alleged that the Board leaked confidential investigative documents to outside counsel who then filed a class action against Andersen (*see* LITIGATION). Board President Dick Poladian—who is a vice-president at Arthur Andersen and recused himself from Board activity during the pendency of the case—also implied that the AC's review of cases which have been closed by staff played a role in prompting the review. Whatever the reason, Enforcement Program Management Committee (EPMC) Chair Joe Tambe requested the special session to review the roles of the various and numerous participants in the Board's enforcement process.

The Board spent a great deal of time analyzing the roles of the Board, the AC, the Major Case Coordinator, the Major Case Consultant, the MCAC, the Enforcement Chief, and Executive Officer. Board members emphasized the alleged "superior role" of the AC and argued that the AC should report directly to the Board rather than going through staff, while staff reminded the Board that the Executive Officer bears ultimate responsibility for deciding whether to pursue disciplinary action in all cases. For example, while public member Baxter Rice argued that enforcement recommendations should flow from staff to the AC to the Executive Officer, BOA Secretary-Treasurer Jeffery Martin contended that the AC has "independent statutory authority" and does not report to the Executive Officer. After a protracted debate regarding the Enforcement Program's reporting structure and the respective roles of the AC, the EO, and the Chief of Enforcement, the Board adopted the following policy statement: "The Executive Officer takes direction from and reports to the Board. The Administrative Committee takes direction from and reports to the Board. The Executive Officer may delegate enforcement responsibility to the Chief of Enforcement. The Chief of Enforcement receives direction and instruction from the Administrative Committee, through the AC Chair. The role of the staff (the Executive Officer and the Chief of Enforcement) is to provide resources and support to the AC, to enable it to carry out its statutory mandate."

The Board also addressed the role of the MCAC and the purpose of including a Board member liaison on that committee, inasmuch as that Board member is then precluded from voting on the final stipulated settlement or proposed ALJ decision (if the case gets that far). According to the Board, the concept behind creation of the MCAC was to "bring together several minds who are experienced in this type of decision-making to commit serious resources to a serious case." BOA President Poladian stated that the reason for inclusion of a Board member liaison is to "have someone on the Board who will provide support to the Executive Officer, as the EO is at risk once the accusation is filed. As the EO makes that critical decision, a Board liaison should be there supporting and nodding—we don't want the EO to be left holding the bag." Other members opined that the original reason for inclusion of a Board member liaison on the MCAC was to provide the MCAC with some sense of the fiscal situation of the Board and its financial ability to undertake a major case.

While several members expressed support for the MCAC and the presence of a Board member thereon, public member Baxter Rice questioned the need for and purpose of the MCAC, and Board Vice-President Walter Finch stated that "the Board is too involved in the Major Case Program." He argued that the Board member liaison is a powerful force inside the Committee, and can "exert undue influence on the outcome of the case. All the MCAC members rely on the Board liaison for their jobs; if it's a close decision and the Board liaison is in the minority, he can influence the decision even though he's in the minority. The members of the MCAC will listen to the Board member." Finch further stated that if BOA continues to include a Board member liaison on the MCAC, then "we should review the definition of that person's role because Board liaisons are exceeding our definition." Former AC Chair Steve Wolf disagreed, stating that "no Board member can twist an AC member's arm; the potential is there, but it's not always the reality."

Deputy Attorney General Tony Summers pointed out another problem with the Board member liaison concept. While acknowledging that the Board's Enforcement Policy Manual precludes the Board member liaison from voting on the final disposition of that case, Summers noted "a substantial legal question as to whether simply not voting is sufficient to cure the taint of that Board member. To be safe, you need to go beyond telling the liaison not to vote; they should not participate in the decision at all. Thus, you lose a valuable resource (a Board member) if you devote that person to MCAC membership." Deputy Attorney General Mike Granen agreed, noting that he had previously given BOA that exact advice and stating that it would be best if the Board member liaison is not even in the room when the Board considers final disposition of the case.

Following another extensive discussion, the Board bifurcated the issue into (1) support for the existence of the MCAC, and (2) inclusion of a Board member liaison on the MCAC. Except for one abstention, the Board unanimously voted to retain the MCAC. On Walter Finch's motion to drop the Board liaison from the MCAC, the Board split 5–5; thus, the matter was referred to the EPMC for further discussion and a recommendation.

At this point in the discussion, DCA General Counsel Derry Knight made several observations. He first reminded the Board that the primary function of BOA and its enforcement program is to protect consumers. He then opined that the Board "seems to be emphasizing process—there are too many committees, subcommittees, and places for cases to fall out of the system. You have a very elaborate process which is unlike that of any other DCA board. Too much focus on process may be inhibiting this Board from doing its job."

The next item on the Board's agenda was the identification of the individual(s) responsible for negotiating settlements and the point(s) at which the Board may settle cases. Enforcement Chief Newington explained that, after an ACIH, the AC advises the licensee that it will inform him/her of the results within 30–60 days. The next word the licensee receives may be the receipt of the accusation, thus precluding the licensee from engaging in settlement discussions at the AC stage. BOA determined that its general policy with regard to settlement will call for the drafting of an accusation after the ACIH (when sufficient facts are known) and the presentation of the accusation to the licensee at

a prefiling meeting for purposes of settlement discussion. The Board further envisioned that the prefiling meeting would provide an opportunity for review with the licensee to ensure the accuracy of the facts alleged and for settlement discussions. The Board also recognized that, in certain "extreme" cases, the Enforcement Chief, AC Chair, or Executive Officer may decide that there is a need to file an accusation without a prefiling conference.

BOA did not address all of the topics on its agenda for the special meeting. At this writing, the Board is scheduled to resume its review of the enforcement program on November 4, at which time it will discuss policies and safeguards regarding confidentiality, conflicts of interest, cost management, and oversight and direction; and procedures regarding case identification, selection, investigation, and settlement, alternative dispute resolution, cost recovery, filing of accusations, and hearings.

Amendments to Continuing Education Regulation. At its July 29 meeting, BOA heard public testimony on several proposed changes to section 87, Title 16 of the CCR, which sets forth continuing education (CE) requirements for its licensees. Section 87 generally requires BOA licensees to complete 80 hours of qualifying CE during each two-year renewal period.

First, BOA proposed to amend section 87(b) to specify that licensees who are engaged in planning, directing, conducting substantial portions of field work, or reporting on financial or compliance audits of a governmental agency in accordance with government audit standards at any time during the preceding license period are required to have completed 24 of the 80 hours in the areas of governmental accounting, auditing, or related subjects. Under the proposed language, "related subjects" include those which maintain or enhance the licensee's knowledge of governmental operations, laws, regulations, or reports; any special requirements of governmental agencies; and any other topics related to the environment in which governmental agencies operate.

Next, BOA proposed to amend section 87(c) to specify that new licensees receiving their initial CPA license from the Board must, as a condition of the first license renewal, complete during the initial license period 20 hours of CE for each full six-month interval in the initial license period. A licensee engaged in governmental auditing as described in section 87(b) at any time during the initial license period must complete six hours of governmental CE as described above as part of each 20 hours of CE required for license renewal. If the initial license period is less than six full months, no CE is required for license renewal.

Finally, BOA proposed to amend section 87(d), regarding out-of-state licensees, to specify that any person who applies to BOA for a CPA certificate under the provisions of Business and Professions Code section 5087 may obtain BOA's approval to engage in the practice of public accountancy under the provisions of section 5088, subject to the applicant having completed 80 hours of qualifying CE within the preceding two years. If a CPA certificate is granted by BOA, then the licensee must satisfy the provisions of section 87(c) above.

Following the public hearing, the Board adopted the proposed amendments with the exception of the phrase "in accordance with government audit standards" in proposed section 87(b), and agreed to release the modified language for a 15-day comment period. At this writing, the Board is expected to revisit these proposed regulatory changes at its September 30–October 1 meeting.

Amendments to Rules of Professional Conduct. Also on July 29, the Board held a public hearing on its proposed changes to several sections in Article 9, Division 1, Title 16 of the CCR, which prescribes rules of professional conduct for BOA licensees. Specifically, the Board proposed changes to sections 53 (confidential information), 54.1 (prohibition on disclosure of confidential information), 52 (response to Board inquiry), 54.2 (recipients of confidential information), 55 (permission to use name), 56 (commissions), 58 (compliance with standards), 58.1 (accountant's report on the examination of financial statements), 58.2 (accountant's report on unaudited financial information of a public entity), 58.3 (compilation and review of financial statements), 60 (discreditable acts), 63 (advertising), 64 (use of name with estimate of earnings), 65 (independence), 68 (retention of client's records), and 52.1 (failure to appear before BOA or one of its committees).

Many of these proposed changes are technical and involve renumbering existing sections for greater clarity and consistency. One substantive change involves the addition of new section 54 to define confidential information to mean "all information obtained by a licensee, in his or her professional capacity, concerning a client or a prospective client, except that it does not include information obtained from a prospective client who does not subsequently become a client where all of the following conditions are met: (a) the licensee provides reasonable notice to the prospective client or the prospective client's representative that the information will not be treated as confidential information in the event the provider does not become a client and that providing such information will not preclude the licensee from being employed by a party adverse to the potential client in any current or future legal action or proceeding; (b) the licensee, on request, promptly returns the original and all copies of documents provided by the prospective client or his or her representative; and (c) the licensee does not utilize in any manner the information obtained, except that nothing shall prohibit the licensee from utilizing the same information obtained from an independent source such as through litigation discovery." This change was prompted by the California Society of Certified Public Accountants (CSCPA), which complained that existing section 54 works a hardship on CPAs who dedicate their practices to litigation support services and are contacted by attorneys who purport to represent a potential client and who disclose confidential information about the client, thus estopping the CPA from assisting or testifying in support of the opposing party because he/she has been privy to potential client information which must be held confidential pursuant to section 54. *[13:4 CRLR 29; 13:2&3 CRLR 44]*

Another substantive highlight of the rulemaking package includes the repeal of section 56, which prohibits BOA licensees from paying a commission to obtain a client or accepting a commission for a referral to a client of products or services of others. The Board is repealing the regulation because it duplicates section 5061 of the Business and Professions Code.

Following the public hearing, the Board adopted the Article 9 rulemaking package as proposed. At this writing, the changes have not yet been submitted to the Office of Administrative Law (OAL); BOA staff will await the Board's final decision on section 87 and submit all the rule changes in one package.

Other BOA Rulemaking. On September 5, BOA submitted its proposed amendments to section 87.1, Title 16 of the CCR, to OAL. As amended, section 87.1 requires licensees reentering public practice to complete 40 hours of CE in the 24 months prior to reentry; once reentered, the licensee must complete 20 hours of CE for each full six-month period from the date of reentry until the next renewal date, but if the time period between the reentry date and the next renewal date is less than six full months, no additional CE is required for license renewal. Amended section 87.1

also specifies the number of hours of CE in governmental accounting and auditing required between the reentry date and the next renewal date for licensees auditing government agencies. *[14:2&3 CRLR 34]* At this writing, the rulemaking package is pending at OAL.

LEGISLATION

SB 2101 (McCorquodale), as amended July 7, revises the composition of BOA's Administrative Committee. Under the bill, AC must consist of not less than 13 nor more than 17 licensees, at least one of whom is a PA. This bill was signed by the Governor on September 30 (Chapter 1275, Statutes of 1994).

The following is a status update on bills reported in detail in CRLR Vol. 14, Nos. 2 & 3 (Spring/Summer 1994) at pages 34–35:

SB 2038 (McCorquodale), as amended August 18, changes the number of members on BOA to ten by reducing the number of CPAs on the Board from seven to five, effective July 1, 1997 (*see* MAJOR PROJECTS). Thus, the Board will consist of five CPAs, one PA, and four public members. Also effective July 1, 1997, SB 2038 reduces the size of BOA's Qualifications Commission, Administrative Committee, and Continuing Education Committee. Each committee's membership is reduced to six CPAs (two of whom must be Board members), one public member of the Board, and one PA. This bill was signed by the Governor on September 30 (Chapter 1273, Statutes of 1994).

SB 2036 (McCorquodale), as amended August 26, creates a "sunset" review process for occupational licensing boards within DCA, requiring each to be comprehensively reviewed every four years. SB 2036 imposes an initial "sunset" date of July 1, 1997 for BOA; creates a Joint Legislative Sunset Review Committee which will review BOA's performance approximately one year prior to its sunset date; and specifies 11 categories of criteria under which BOA's performance will be evaluated. Following review of the agency and a public hearing, the Committee will make recommendations to the legislature on whether BOA should be abolished, restructured, or redirected in terms of its statutory authority and priorities. The legislature may then either allow the sunset date to pass (in which case BOA would cease to exist and its powers and duties would transfer to DCA) or pass legislation extending the sunset date for another four years. This bill was signed by the Governor on September 26 (Chapter 908, Statutes of 1994).

SB 2079 (Campbell). Existing law authorizes BOA to, among other things, examine all applicants for the CPA certificate. As amended August 9, this bill instead refers to licensure of CPAs and makes related changes. The bill also revises various license requirements, reciprocity provisions, examination provisions, and procedures.

Under existing law, BOA may, by regulation, provide for the forfeiture of the part of the applicant's examination or reexamination fee that is commensurate with the cost of providing examination facilities if the applicant fails to appear for examination after being scheduled and notified, as specified. This bill deletes that provision. This bill was signed by the Governor on September 30 (Chapter 1278, Statutes of 1994).

SB 1111 (Ayala), as amended May 23, requires each accountancy corporation to renew its permit to practice biennially and to pay the renewal fee fixed by BOA, and makes related changes.

Existing law requires each accountancy corporation to file with BOA a report pertaining to qualification and compliance with statutes and regulations, as specified, and to pay a fee for filing this report. This bill deletes the fee requirement for that report. This bill was signed by the Governor on September 28 (Chapter 1077, Statutes of 1994).

AB 1392 (Speier), as amended August 17, is no longer relevant to BOA.

LITIGATION

On May 4, BOA filed an accusation against Arthur Andersen & Company, in which the Board contended that the firm negligently performed audit work in connection with Lincoln Savings & Loan, its parent company, American Continental Corporation (ACC), A&B Loan Company, and Grand Wilshire Chevrolet. Among other things, the accusation alleged that Andersen failed to express a qualified or adverse opinion in its report on the financial statements of Lincoln/ACC, and that these statements failed to disclose certain information about related party transactions, improperly recognized gains, and improperly classified acquisition, development, and construction arrangements. With respect to A&B, BOA alleged that Andersen failed to identify and disclose related party transactions and failed to evaluate the effects of those transactions on the financial statements of A&B. In conjunction with the audit of the financial statements of Grand, the action alleged that Andersen failed to perform adequate confirmation procedures on finance receivables, failed to determine the amount of payments made on finance contracts by a related party, and improperly relied on management's representations concerning the magnitude of these payments.

Andersen responded by filing a lawsuit in Los Angeles County Superior Court against BOA, alleging misconduct by BOA in its investigation and contending that the Board leaked information to private attorneys who then filed a class action against Andersen. Specifically, Andersen alleged that "the State Board leaked certain Andersen documents and records which the State Board had acquired from Andersen in confidence during its investigation... and that this leak was to private plaintiffs' counsel in class action litigation filed against Andersen....The leak was to the advantage of class action plaintiffs. Those class members include business partners or associates of the official State Board member who then served and now serves as the liaison between the State Board and its 'Major Case Advisory Committee....'" *[14:2&3 CRLR 35]*

On August 12, BOA announced that it had reached a settlement with Andersen on the disciplinary matters as well as the civil suit. In settling, Andersen—without admitting any wrongdoing—agreed to the following: (1) to pay $1,700,500 for the costs and attorneys' fees incurred by the Board in investigating and prosecuting the disciplinary matters and in defending Andersen's related civil suit; (2) not to accept any finance company as a new client in its California practice for 60 days; (3) to perform 10,000 hours of public service; (4) to conduct substantial educational programs for partners, managers, and staff in its auditing and accounting department; and (5) to require a minimum of 300 hours of audit experience for certain partners, managers, and staff who are assigned to audit a depository institution. The stipulation further provides that the CPA license of Andersen engagement partner Joseph E. Kresse, Jr. is suspended for six months, and is on probation for three years.

In ***Carberry v. California State Board of Accountancy***, No. AO64735 (First District Court of Appeal), Shaun Carberry appeals the superior court's dismissal of his action against BOA. Carberry is an enrolled agent (EA) admitted to practice before the Internal Revenue Service by the U.S. Treasury Department; additionally, he is admitted to practice before the United States Tax Court by virtue of a status granted by that court to examined non-attorneys. Since 1987, Carberry—who is not a CPA—has operated a business called Citizens Accounting & Tax Service, and uses the business name in conjunction with his own name and professional designation, *i.e.*, "Shaun Carberry, EA."

In this case, Carberry challenges BOA's March 1993 cease and desist letter ordering him to change the name of his business. The Board claims the name violates the California Supreme Court's ruling in *Bonnie Moore, et al. v. State Board of Accountancy*, 2 Cal. 4th 999 (1992), in which the Supreme Court struck down the Board's Rule 2, Title 16 of the CCR, as unconstitutional; the rule prohibits anyone but a CPA from using the words "accountant" or "accounting" in advertising. The court held that BOA must permit non-CPAs to use those words in advertising, so long as their use is accompanied by a disclaimer or explanation that the practitioner is not licensed by the state or the services provided do not require a state license. Carberry and the Board disagree as to whether his use of the acronym "EA" provides a sufficient explanation in compliance with *Moore*. In February 1994, the San Francisco Superior Court sustained BOA's demurrer without explanation. *[14:2&3 CRLR 35; 14:1 CRLR 29]*

On appeal, Carberry contends that his use of the acronym "EA" discloses the fact that he is not a CPA and thus provides the explanation required by *Moore*. Carberry also argues that because BOA has not amended its unconstitutional rule to define ways in which non-CPA accountants may comply with the *Moore* decision, BOA is engaging in "underground rulemaking" by enforcing requirements which have not been adopted in compliance with the Administrative Procedure Act (APA). In its reply, BOA argues that the lower court properly sustained its demurrer because Carberry's complaint fails to state facts sufficient to constitute a cause of action. The basis of this argument is that the *Moore* case has already determined the legal issues Carberry raises in his complaint, thus negating the "actual controversy" requirement. Both parties waived oral arguments as of September 11. At this writing, the First District has not yet issued a decision in the case.

In a related matter, the U.S. Supreme Court decided the case of ***Ibanez v. Florida Dep't of Professional Regulation Board of Accountancy***, 114 S.Ct. 2084 (June 13, 1994), concerning attorney Silvia Ibanez' use of the term "CPA" on her business cards, letterhead, and telephone book listing in describing her tax law firm. Ibanez is a solo practitioner specializing in tax law; she is also a CPA licensed by the Florida Board of Accountancy, and is authorized by the Certified Financial Planner Board of Standards, a private organization, to use the designation "Certified Financial Planner" (CFP). The Florida Board of Accountancy charged Ibanez—who practices law, not public accounting—with engaging in "fraudulent, false, deceptive, or misleading advertising" by appending the "CPA" designation after her name, practicing public accounting in an unlicensed firm, and using a specialty designation (CFP) which has not been approved by the Board. Rejecting a hearing officer's recommendation that all charges against Ibanez be dropped, the Board ruled that Ibanez had engaged in false advertising, because she used the CPA designation without registering her firm with the Board, failed to "forego certain forms of remuneration denied to individuals who are practicing public accountancy," and did not limit the ownership of her firm to other CPAs. *[14:2&3 CRLR 35]*

Writing for the majority, Justice Ruth Bader Ginsburg held that Ibanez' use of the CPA and CFP designations is commercial speech protected by the first amendment. Commercial speech may not be banned by the government unless it is false, deceptive, or misleading; nor may it be restricted unless the state shows that the restriction "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Justice Ginsburg noted that "[t]he State's burden is not slight," and held that—in light of the fact that Ibanez' representations were truthful—Florida's position was unsupported by sufficient evidence of "any harm that is potentially real, not purely hypothetical" caused by them. First, Justice Ginsburg rejected the notion that Ibanez was "practicing" public accounting simply by the use of the CPA designation in her firm's name. As to Ibanez' use of the "CFP" designation, the Court relied on its decision in *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), in which it upheld an attorney's truthful advertisement of a specialty certification issued by a well-known and legitimate private organization, in rejecting the Board's arguments. Accordingly, the Supreme Court reversed the decisions of the state courts and the Board, and remanded the matter for further proceedings consistent with its ruling.

RECENT MEETINGS

At its July 29 meeting the Board discussed its concern about the fact that, over a five-year period, 12,000 licensees did not renew their CPA licenses. AC Chair Alan Swanson reported that the Cite and Fine Subcommittee has been reactivated, and will focus on the license renewal area. The Subcommittee recommended, and the AC concurred, that the Board send a mailing to 2,500 of the 12,000 licensees who had previously renewed with continuing education but did not respond to renewal notices, to determine whether they are engaged in public accountancy. The Subcommittee has also developed a draft questionnaire to address the nonrenewal concern and suggested that the Board publish the names of those who have expired licenses in its *Update* newsletter. Additionally, the Subcommittee recommended that all violations of BOA's continuing education requirements be referred to the AC.

Also at its July 29 meeting, the Board discussed the possibility of adopting regulations to create an inactive license status. At other DCA boards, a licensee who has renewed in inactive status is not allowed to engage in any activities for which a license is required; the primary reason for licensees to renew in inactive status is to maintain their license without completing the requirements for renewal in active status (such as CE). Currently, BOA allows its licensees to renew without completing the CE requirements for reasons specified in Business and Professions Code section 5028; further, licensees not engaged in public practice are exempt from completion of CE as a requirement for license renewal. The Continuing Education Committee (CEC) suggested that the Board replace the current "renewal without CE" status with an inactive license status, for two reasons: (1) doing so would eliminate a substantial amount of confusion which now exists among both licensees and consumers; many licensees consider themselves to be in inactive status when they renew without continuing education; and (2) adoption of an inactive status would enhance the enforcement actions which BOA can take against licensees who practices public accounting without completion of required continuing education. A licensee who engages in public practice while in inactive status would be practicing without a license. The Board voted to adopt CEC's suggestion, and directed CEC to develop appropriate regulatory language for its approval at a future meeting.

FUTURE MEETINGS

September 30–October 1 in San Francisco.
November 4 in Sacramento
(special meeting to discuss Enforcement Program).
November 18–19 in Costa Mesa.
January 20–21, 1995 in San Francisco.