



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 (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. The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and distributing.

OAL also has the authority 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.

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 Administrative Procedure Act (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. OAL has not published any regulatory determinations since April 1992 due to budget constraints.

LEGISLATION

AB 64 (Mountjoy), as introduced December 23, would prohibit any regulation adopted, amended, or repealed by a state agency pursuant to the APA from taking effect unless and until the legislature approves the regulation by statute within 90 days of its adoption,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. [A. CPGE&ED]

LITIGATION

In *Wosley v. State of California*, No. S014557 (Oct. 26, 1992), the California Supreme Court upheld the lower courts' invalidation of the Department of Motor Vehicles' (DMV) policy of charging annual vehicle license fees and use taxes on passenger vehicles originally sold outside California that were higher than the fees and taxes charged on similar vehicles first sold within the state; according to the court, this policy violated the Commerce Clause of the federal Constitution.

In reaching its decision, the court considered a 1976 agreement between the State Board of Equalization (SBE) and the DMV which provided that in all private-party transactions, both in-state and out-of-state, the DMV would require a certificate of cost to establish the actual sale price of the vehicle, with which the use tax would be calculated; plaintiffs contended that because the policy should have been and was not adopted as a regulation pursuant to the APA, use taxes collected pursuant to the agreement should be refunded. On this issue, the Supreme Court reversed the lower courts, finding that "even if the DMV and the SBE erroneously failed to comply with the APA, use taxes collected pursuant to the invalid agreement need not be refunded because such taxes properly were due under state law....The failure of the SBE and the DMV to comply with the requirement of the APA in adopting their agreement regarding collection of use taxes does not exempt taxpayers from the obligation to pay such taxes as are required by state law, and cannot deprive the state of the tax revenues to which it is entitled."

In other litigation, the state Water Resources Control Board's appeal of the final judgment in *State Water Resources Control Board and Regional Quality Control Board, San Francisco Region v. Office of Administrative Law*, No. A054559, is still pending in the First District Court of Appeal. In a judgment favorable to OAL, the trial court held that the wetland rules at issue are regulations within the meaning of the APA; the rules are not exempt from the APA; and since the rules were not adopted pursuant to the APA, they are unenforceable. A decision is expected in early 1993. [12:1 CRLR 29]

OFFICE OF THE AUDITOR GENERAL

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The Office of the Auditor General (OAG) is the nonpartisan auditing and investigating arm of the California legislature. OAG is under the direction of the Joint Legislative Audit Committee (JLAC), which is comprised of fourteen members, seven each from the Assembly and Senate. JLAC has the authority to "determine the policies of the Auditor General, ascertain facts, review reports and take action thereon...and make recommendations to the Legislature...concerning the state audit... revenues and expenditures...." (Government Code section 10501.) OAG may "only conduct audits and investigations approved by" JLAC.

Government Code section 10527 authorizes OAG "to examine any and all books, accounts, reports, vouchers, correspondence files, and other records, bank accounts, and money or other property of any agency of the state...and any public entity, including any city, county, and special district which receives state funds... and the records and property of any public or private entity or person subject to review or regulation by the agency or public entity being audited or investigated to the same extent that employees of that agency or public entity have access."

OAG has three divisions: the Financial Audit Division, which performs the traditional CPA fiscal audit; the Investigative Audit Division, which investigates allegations of fraud, waste and abuse in state government received under the Reporting of Improper Governmental Activities Act (Government Code sections 10540 *et seq.*); and the Performance Audit Division, which reviews programs funded by



the state to determine if they are efficient and cost effective.

MAJOR PROJECTS

Proposition 159 Defeated; Legislature Shuts Down OAG. OAG closed its offices on December 4 as a result of the November 3 defeat of Proposition 159; the measure would have established OAG in the California Constitution with the mandate to conduct independent, non-partisan, professional audits as required by law or requested by the legislature. The initiative would also have exempted OAG from the expenditure limits imposed on the legislature by Proposition 140, and required that not more than 50% of the Joint Legislative Audit Committee be composed of members of the same political party. [12:4 CRLR 35] Although the 1992-93 Budget Act appropriated \$5 million from the general fund to OAG, it provided that this amount could be expended only if Proposition 159 was approved by the voters. Thus, the defeat of Proposition 159 resulted in OAG's continued reliance on the legislature to fund the Office from its own annual operating budget. However, the legislature did not allocate any part of its funds for the operation of OAG during 1992-93, effectively eliminating the Office.

Because of OAG's closing, California will have to contract out audits to private entities in order to continue receiving \$16 million in federal funding; OAG estimated that this will cost the state about twice as much as having OAG perform the audits. OAG also estimated that it had saved taxpayers \$513 million over the last ten years at a cumulative cost of less than \$80 million. Acting Auditor General Kurt Sjoberg opined that OAG returned \$6 to the state for every \$1 that was invested in the Office. While legislation to reopen the Office has been introduced, the fate of those bills is uncertain. (See *infra* LEGISLATION.)

The loss of OAG may also affect the willingness of state employees to step forward and report wrongdoing by government officials. Under the so-called "Whistleblowers' Act," Government Code section 10540 *et seq.*, state employees who report governmental fraud, waste, and abuse to OAG are protected from retaliation for their actions and entitled to confidentiality. The loss of OAG as the forum for such reporting leaves potential whistleblowers unprotected.

During the November election, voters also defeated Proposition 158, which would have amended the California Constitution to create an independent Office of California Analyst to replace another

legislative entity, the Legislative Analyst's Office (LAO). However, unlike OAG, LAO was funded by the legislature until at least June 30.

RECENT AUDITS

OAG has not issued any reports since September. [12:4 CRLR 35]

LEGISLATION

AB 5 (Brown), as introduced December 7, would create the Bureau of State Audits in state government under the direction of the Little Hoover Commission and headed by the State Auditor. The duties of the Bureau would be to examine and report annually upon the financial statements prepared by the executive branch of the state and to perform other related assignments, including performance audits, that are mandated by statute. The State Auditor would be nominated by the Little Hoover Commission and would take office upon confirmation by both houses of the legislature for a four-year term. The State Auditor would also serve as a member of the Commission.

This bill would continue in existence the Office of the Auditor General under the direction of the Joint Legislative Audit Committee; its duties would be limited to the performance of special audits and investigations of public entities, including performance audits, that are requested by the legislature, and the implementation of the Reporting of Improper Governmental Activities Act.

This bill would also abolish the Auditor General Fund and transfer the balance in that fund to the State Audit Fund, which the bill would create as a continuously appropriated fund for the expenses of the State Auditor. The unexpended \$5 million appropriation to OAG contained in the 1992-93 Budget Act (*see supra*) would be transferred to the State Audit Fund. This bill would take effect immediately as an urgency statute. [A. Rls]

AB 24 (Campbell), as introduced December 7, would create the Office of the Auditor General in state government, with specified duties and responsibilities. [A. Rls]

SB 37 (Maddy), as introduced December 8, would create the Office of the Auditor General in state government under the direction of the Little Hoover Commission and would recodify its duties. The Auditor General would be appointed by the Commission, subject to confirmation by the Senate, for a six-year term, and would serve as an *ex officio* member of the Commission. This bill would also transfer the unexpended \$5 million alloca-

tion to OAG contained in the 1992-93 Budget Act to the Auditor General Fund. This bill would take effect immediately as an urgency statute. [S. Rls]

COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY (LITTLE HOOVER COMMISSION)

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The Little Hoover Commission was created by the legislature in 1961 and became operational in the spring of 1962. (Government Code sections 8501 *et seq.*) Although considered to be within the executive branch of state government for budgetary purposes, the law states that "the Commission shall not be subject to the control or direction of any officer or employee of the executive branch except in connection with the appropriation of funds approved by the Legislature." (Government Code section 8502.)

Statute provides that no more than seven of the thirteen members of the Commission may be from the same political party. The Governor appoints five citizen members, and the legislature appoints four citizen members. The balance of the membership is comprised of two Senators and two Assemblymembers.

This unique formulation enables the Commission to be California's only truly independent watchdog agency. However, in spite of its statutory independence, the Commission remains a purely advisory entity only empowered to make recommendations.

The purpose and duties of the Commission are set forth in Government Code section 8521. The Code states: "It is the purpose of the Legislature in creating the Commission, to secure assistance for the Governor and itself in promoting economy, efficiency and improved service in the transaction of the public business in the various departments, agencies, and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies, and instrumentalities and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives..."