respect to the aggregate amount of accounts subject to a negotiable order of withdrawal, savings deposits, money market accounts, super now accounts, and other time deposits of a commercial bank, including certificates of deposit. *[S. BC&IT]*

**SB 203 (Deddeh)**. Existing law provides that the failure of a bank or trust company to open a branch office within one year after the Superintendent of Banks approves the application terminates the right to open the office, except that prior to the expiration of the one-year period a one-year extension may be granted by the Superintendent in which to open and operate a branch office upon filing an application with the Superintendent and the payment of a $100 fee. As introduced February 4, this bill would increase that fee to $350. *[S. BC&IT]*

**SB 632 (Deddeh)**. Under existing law, if a draft, such as a check, is unaccepted by the bank and is dishonored, the drawer is obliged to pay the draft according to its terms. As introduced March 2, this bill would, in addition, provide that the drawer is obligated to pay any service charges resulting from dishonor of the draft. *[S. Jud]*

**HR 20 (Burton)**, as amended May 4, states that the Bank of America (BofA) is known as the leading bank in the West; BofA is one of the most profitable financial institutions in America, making a profit of $1.5 billion in 1992; BofA has achieved this success in part through federal subsidies of FDIC guaranteed borrowing and mergers approved by the federal government; BofA's Chief Executive Officer earned a salary of $1.6 million in 1992 and approximately $12 million in stock options between 1987 and 1991; BofA is opening overseas offices in Vietnam while at the same time closing neighborhood banks in California communities; BofA has asked all employees to sign "at will" statements acknowledging that the bank may fire them without cause at the employer's pleasure, work hours may be cut and health care and other benefits taken away, and employees may be transferred anywhere in the bank's system; this personnel action compromises the principle of employer responsibility by implying that the cutting of employee hours, salaries, and benefits is acceptable behavior while the bank continues to earn large profits; the elimination of employee benefits by BofA may place an additional burden on the state budget by increasing the costs of the Medi-Cal system and of state hospitals for uncompensated care; BofA is moving its credit card operations to Arizona and transferring 1,600 jobs out of San Francisco and Glendale in order to escape California consumer protection laws that do not apply if the credit card business is headquartered in a state with weaker regulations; BofA is the dominant bank in the State of California and is the depository bank for the State of California; in the 1991–92 fiscal year, the State of California's total dollar investment in BofA was $3.9 billion; 91% of all deposits from California state agencies are deposited with BofA; and the State of California has $131 million in debt issuance corporate notes from the Pooled Money Account with the BofA.

Accordingly, the measure would state the Assembly's request that the State Treasurer consider withdrawing all deposits from BofA and investing them in other banks within California in accordance with the care, skill, prudence, and diligence that a prudent person would use in conducting or making state financial investments; that the Treasurer discontinue any investment in BofA's corporate notes and invest in other banks within the state of California in accordance with the care, skill, prudence, and diligence that a prudent person would use in conducting or making state financial investments; and that all state agencies consider withdrawing their deposits from BofA and investing them in other banks within California in accordance with the care, skill, prudence, and diligence that a prudent person would use in conducting or making state financial investments. *[A. Inactive File]*

## LITIGATION

***Badie v. Bank of America***, No. 944916, filed in San Francisco Superior Court in August 1992, challenges BofA's new policy which requires that customer disputes over deposit and credit card accounts be sent to binding arbitration. *[13:2&3 CRLR 124]* In July, San Francisco Superior Court Judge Stuart Pollak was assigned to hear the case, which is now expected to go to trial in December. BofA and Wells Fargo are the only banks in California which currently have such a policy; however, if BofA prevails, many of the state's financial institutions are expected to adopt similar policies.

On July 27, Milton Zucker Mende was sentenced to 151 months in federal prison for his role in a multimillion-dollar advance loan fee scam; five other defendants have also been convicted and are awaiting sentencing. Mende was convicted in December 1992 on forty counts of conspiracy, mail fraud, wire fraud, and money laundering; Mende was found to have created sham corporations, including Banco Commercial Arabe, S.A., to take fees ranging from a few thousand to several hundred thousand dollars for loans or loan guarantees which Mende falsely promised to provide. According to SBD, Mende and Banco Commercial Arabe are subject to a permanent injunction prohibiting them from, among other things, transacting banking or trust business in California without a certificate of authority from the Superintendent, and to civil monetary penalties for violations of state banking law.

In ***Leary v. Wells Fargo Bank***, No. 866229 (Aug. 17, 1993), plaintiffs alleged that in 1966 or 1967, defendants Wells Fargo Bank, First Interstate Bank, Crocker National Bank, and Bank of America began a conspiracy to fix the interest rates on bank credit cards, and ultimately charged California customer nearly 5% more interest than they should have. In October 1986, plaintiffs filed a class action against the four banks, charging violations of California antitrust laws. In 1992, Wells Fargo Bank, First Interstate Bank, and Crocker National Bank settled for a total of $55 million; however, Bank of America refused to settle, even though plaintiffs were seeking $672 million in damages, which could be trebled under California antitrust law. Following a ten-week trial, the jury found for Bank of America, finding that plaintiffs failed to prove it conspired to fix prices on credit cards. At this writing, plaintiffs have not decided whether they will appeal the decision.

In ***Youngberg v. Bank of America***, No. 953812, filed on July 30 in San Francisco Superior Court, the plaintiff alleges that Security Pacific Bank, now owned by Bank of America after a 1992 merger, overcharged its trust account customers. Specifically, the case challenges the fee charged by Bank of America for a practice known as "sweeping"—a process in which banks channel otherwise idle trust funds into interest-bearing accounts. The suit seeks unspecified damages for an undetermined number of trust account holders and the beneficiaries of those trusts who may have been affected by excessive sweep fees. Bank of America contends that the fees in question were lawful and appropriate and that proper notification was made to customers.

# DEPARTMENT OF CORPORATIONS

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The Department of Corporations (DOC) is a part of the cabinet-level Business, Transportation and Housing Agency and

is empowered under section 25600 of the California Code of Corporations. The Commissioner of Corporations, appointed by the Governor, oversees and administers the duties and responsibilities of the Department. The rules promulgated by the Department are set forth in Chapter 3, Title 10 of the California Code of Regulations (CCR).

The Department administers several major statutes. The most important is the Corporate Securities Act of 1968, which requires the "qualification" of all securities sold in California. "Securities" are defined quite broadly, and may include business opportunities in addition to the traditional stocks and bonds. Many securities may be "qualified" through compliance with the Federal Securities Acts of 1933, 1934, and 1940. If the securities are not under federal qualification, the commissioner must issue a "permit" for their sale in California.

The commissioner may issue a "stop order" regarding sales or revoke or suspend permits if in the "public interest" or if the plan of business underlying the securities is not "fair, just or equitable."

The commissioner may refuse to grant a permit unless the securities are properly and publicly offered under the federal securities statutes. A suspension or stop order gives rise to Administrative Procedure Act notice and hearing rights. The commissioner may require that records be kept by all securities issuers, may inspect those records, and may require that a prospectus or proxy statement be given to each potential buyer unless the seller is proceeding under federal law.

The commissioner also licenses agents, broker-dealers, and investment advisors. Those brokers and advisors without a place of business in the state and operating under federal law are exempt. Deception, fraud, or violation of any regulation of the commissioner is cause for license suspension of up to one year or revocation.

The commissioner also has the authority to suspend trading in any securities by summary proceeding and to require securities distributors or underwriters to file all advertising for sale of securities with the Department before publication. The commissioner has particularly broad civil investigative discovery powers; he/she can compel the deposition of witnesses and require production of documents. Witnesses so compelled may be granted automatic immunity from criminal prosecution.

The commissioner can also issue "desist and refrain" orders to halt unlicensed activity or the improper sale of securities. A willful violation of the securities law is a felony, as is securities fraud. These criminal violations are referred by the Department to local district attorneys for prosecution.

The commissioner also enforces a group of more specific statutes involving similar kinds of powers: Franchise Investment Statute, Credit Union Statute, Industrial Loan Law, Personal Property Brokers Law, Health Care Service Plan Law, Escrow Law, Check Sellers and Cashers Law, California Commodity Law, Securities Depositor Law, California Finance Lenders Law, and Security Owners Protection Law.

On July 27, Governor Wilson announced his appointment of Gary Mendoza as Commissioner of Corporations. Mendoza, from Sierra Madre, has practiced corporate securities law for more than ten years; he is currently a principal in the law firm of Riordan & McKinzie, the law firm founded by Los Angeles Mayor Richard Riordan. If confirmed by the Senate, Mendoza will receive an annual salary of $95,052. Mendoza succeeds Thomas Sayles, who resigned in February to assume a new post as Secretary of the California Business, Transportation and Housing Agency. *[13:2&3 CRLR 125]*

## MAJOR PROJECTS

**DOC Issues Desist and Refrain Order.** On August 2, Acting Commissioner of Corporations Brian A. Thompson directed Universal Wireless Technologies, Inc. and its owners to desist and refrain from the offer and sale of securities in the form of general partnership interests; two general partnerships also named in the order were Universal Wireless Associates of Lexington, Kentucky, and Universal Wireless Associates of Morehead, Kentucky. According to Thompson, one of the biggest problems in the current investment environment is the illegal offering of high-tech investments; wireless cable investments are particularly prevalent. Thompson noted that because these offerings are very risky and highly speculative, DOC is determined to ensure that any solicitations made comply with the qualification and anti-fraud requirements of the law.

DOC cautioned the investing public to be particularly careful in deciding whether to invest in the numerous wireless cable ventures currently being offered. Thompson warned that "the realities of the situation are that the financial and technical requirements of these kind of offerings make them unsuitable for anyone who is not well-versed or well-advised in these particular companies and technologies." Prospective investors are advised to check with their nearest DOC office to determine whether the investments may be legally offered and sold within California; they should also inquire as to what steps will be taken to ensure that investor funds are used for their intended purpose, and that the license is as valuable as it is represented to be.

**DOC Orders Escrow Company to Discontinue Activities.** On June 4, Acting Commissioner Brian Thompson issued an Order Taking Possession and appointed a conservator over the property, business, and assets of Country Oaks Escrow, Inc. DOC seized four offices of Country Oaks Escrow and issued an order prohibiting the escrow company from further receipt or disbursement of any escrow funds, documents, or other property deposited into escrow; the effect of the order was to freeze all escrow funds and transactions until a complete accounting can be made by the conservator.

Thompson issued the orders when DOC received information indicating that the company had a trust fund shortage of at least $2 million; the actual shortage cannot be ascertained until the conservator and DOC staff have been able to reconcile the company's bank accounts. The conservator will continue examining the books and records of Country Oaks Escrow in order to determine the disposition of the missing trust funds; pending the filing and approval of a claim with Escrow Agents Fidelity Corporation, escrow clients of Country Oaks Escrow will have to provide alternate funding to complete their escrow transactions.

**DOC Issues Investor Bulletin for the Elderly.** On June 10, DOC issued a news release, in cooperation with the North American Securities Administrators Association (NASAA), which describes how older Americans can avoid investment fraud and abuse; the Investor Bulletin was issued in conjunction with hearings by the U.S. Senate's Committee on Aging on the topic of frauds on the elderly. California officials testified on investment frauds targeting the elderly, and suggested ways to stop crimes against the elderly and help the elderly protect themselves.

Some of the suggestions discussed with the Committee are improving cooperation between state and federal authorities; increasing regulatory oversight over the securities industry; raising public awareness; and educating prosecutors and judges to the damage which economic crimes inflict on the elderly.

The Investor Bulletin provides ten "self-defense tips" for the elderly; the tips include not being courteous to tele-marketers and others who are persistently trying to get them to invest in something; checking out strangers offering strange deals; taking personal responsibility for

all of their financial decisions; being suspicious of smooth talkers; avoiding decisions based on greed or fear; seeking the advice of disinterested professionals; and watching for red flags such as the inability to cash out of a deal. Further information can be obtained at any DOC office.

**GMOC to Pay Undisputed Claims.** On July 14, Acting Commissioner Thompson announced that David Ray, the court-appointed receiver of General Money Order Company, Inc. (GMOC), will distribute approximately $11 million to pay 69,384 undisputed claims filed by purchasers of GMOC money orders which were returned unpaid when the Commissioner ordered GMOC to discontinue business and took possession of the company in December 1991. *[12:1 CRLR 114]* The Commissioner took over GMOC after discovering that GMOC had a shortage of at least $3.16 million needed to pay outstanding money orders; the shortage was due in large part to the failure of agents to remit funds for money order sales to GMOC. At the time of the receiver's appointment, GMOC had approximately $5.9 million in its accounts. However, after aggressively pursuing agents owing money to GMOC by filing over 120 lawsuits, the receiver collected approximately $17 million. DOC reports that the receiver will continue these collection efforts against agents in order to make additional disbursements in the future.

**DOC Issues Desist and Refrain Order to Mr. Miniblind.** On September 23, DOC Commissioner Gary Mendoza announced that he had issued a desist and refrain order for the unregistered sale of franchises and an order denying effectiveness to the franchise registration application of Mr. Miniblind, Inc. In making this announcement, Commissioner Mendoza stated that "Mr. Miniblind has been engaged in a pattern of illegal activity, and a number of its franchisees have been victimized." The orders were based upon findings that, among other things, Mr. Miniblind had offered and sold franchises during periods of non-registration; failed to provide its franchisees with an annual accounting of the National Advertising Fund as required by the franchise agreements; commingled funds; used funds for unauthorized purposes; and filed several applications with the Commissioner which contained untrue statements and omissions of material fact.

Commissioner Mendoza urged individuals interested in acquiring a franchise to take precautionary steps such as contacting DOC to ascertain if the franchisor has an effective registration in this state and whether there has been any public enforcement action taken by the Commissioner against the company, its principals, or sales personnel. In addition, a brochure is available from DOC entitled *Should I Buy This Franchise? A Checklist for Prospective Investors.*

**Regulatory Action Under the Credit Union Law.** On June 15, the Office of Administrative Law (OAL) approved DOC's repeal of section 909 and adoption of a new section 909, Title 10 of the CCR; section 909 clarifies when bond or insurance coverage is deemed "commensurate with risks involved." *[13:2&3 CRLR 127]*

On July 9, DOC published notice of its intent to amend section 976(b)(3)(C), Title 10 of the CCR, which deals with promissory notes which contain an option or series of options by the credit union to call a loan due; after a loan has been called due by the credit union, the borrower has sixty days in which to pay the loan in full or arrange for new financing. DOC's proposed amendments would extend the period in which the borrower is required to refinance or repay a loan when the loan is called due by the credit union from sixty days to ninety days. DOC accepted public comments on this proposal until September 17; at this writing, the change awaits review and approval by OAL.

**Regulatory Action Under the Health Care Service Plan Act.** On August 6, OAL approved DOC's amendments to section 1300.67.13(b), Title 10 of the CCR, which conform the regulation to the 1989 and 1990 changes in federal law with respect to Consolidation Omnibus Budget Reconciliation Act of 1987 (COBRA) Continuation Coverage and Medicare Secondary Payor rules, which provide that the order of benefits determination rules are intended to work sequentially, so that one works one's way down to the first rule that applies. *[13:2&3 CRLR 126]*

**Regulatory Action Under the Corporate Securities Law.** On July 7, OAL approved DOC's amendment to section 260.105.11, Title 10 of the CCR; the amended section limits the exemption for non-issuer trading of foreign-country issuer securities to those issuers currently filing with the Securities and Exchange Commission information and reports pursuant to section 15(d) of the Exchange Act; those securities appearing in the most recent Federal Reserve Board list of Foreign Margin Stocks; and those issuers not subject to the reporting requirements of section 13 or 15(d) of the Securities Act of 1934 where the issuer meets certain "worldwide" issuer requirements, as specified. *[13:2&3 CRLR 126]*

On July 1, 1993, OAL approved DOC's amendments to sections 260.110, 260.110.2, and 260.113, and its adoption of section 260.113.1, Title 10 of the CCR. *[13:2&3 CRLR 126]* Among other things, the changes allow a small company application for qualification under Corporations Code section 25113(b)(2); require an application under Corporations Code section 25113(b)(2) to be signed by each member of the small company applicant's board of directors; and specify that the offering shall be made pursuant to a Small Corporate Offering Registration Form (Form U-7), as adopted by the North American Securities Administrative Association.

**DOC Rulemaking Under the Franchise Investment Law.** DOC is still reviewing public comments received in response to its proposed amendments to section 310.100.2, Title 10 of the CCR, regarding the exemption from the registration requirements of Corporations Code section 31110 for the offer and sale of a franchise if certain conditions are met. DOC is also reviewing public comments received in response to its proposed changes to section 310.114.1, Title 10 of the CCR, which would include guidance on how to describe the franchisee and the franchisor(s) in an offering circular. *[13:1 CRLR 81–82]*

**DOC Activity Under the Escrow Law.** In March, DOC began sending notices of all new escrow applications to members of the escrow industry, in response to requests from the industry to be informed of new applications which have been filed with DOC. In July, DOC mailed an optional questionnaire to all escrow mailing list recipients soliciting answers to certain questions that have been raised recently. In response, 116 of the industry's 780 licensees responded to the questionnaire, along with seven non-licensees and nine anonymous participants. Of the 132 responses, 117 indicated that they found the publication that informed them of new applications filed with DOC to be useful; 124 answered they would like to receive information in the monthly notices on administrative actions and company takeovers with which DOC is involved. When asked whether DOC should make available for sale a complete listing of all licensees and their reported gross income and liability for the calendar years 1991 and 1992, the respondents overwhelmingly indicated that they did not favor providing this information to licensees and the public; due to the survey response, DOC will not publish or sell this information in future years. However, this information is part of the Department's public records which are available to any member of the public who desires to review it. This information includes all applications, amendments and exhibits, financial statements,

reports, advertising, licenses, bonds, orders, and all outgoing correspondence.

In its August 17 mailing to all escrow mailing list recipients, DOC noted an alarming increase in the number of trust account shortages occurring in the industry; during 1993, four companies have been placed in conservatorship because of trust account shortages. According to DOC, all of these shortages occurred because the owner of the company used funds for general business operations or personal expenses. Because of concerns generated by these problems, DOC has begun a new mini-audit program; every licensee who does not meet the tangible net worth and liquidity requirement will be visited by one of the Department's examiners immediately. The licensee will have a maximum of thirty days to provide documentation that the requirements have been met. If compliance is not demonstrated within the time deadlines provided, DOC's quick response team will immediately issue an order prohibiting the acceptance of any new escrow business; this order will remain in place until compliance is demonstrated.

DOC's quick response team will also act immediately in the case of poorly maintained books and records. If a DOC examiner finds that a licensee's books and records do not exist or are not maintained currently and properly, it will immediately issue an order prohibiting the acceptance of any new escrow business. If the records are in such a poor state that the safety of trust account funds is in question, it will issue a full freeze order; this order will remain in effect until the licensee can demonstrate that its books and records are maintained properly.

**DOC Proposes Changes to its Conflict of Interest Code.** On September 24, DOC published notice of its intent to amend its conflict of interest code pursuant to Government Code section 87302. DOC's conflict of interest code designates employees who must disclose certain investments, income, interests in real property, and business positions, and who must disqualify themselves from making or participating in the making of governmental decisions affecting those interests. Commissioner Mendoza proposes to make several changes to the Appendix to Rule 250.30 to reflect new position titles and to change the disclosure categories of some employee classifications. DOC accepted public comment on the proposed changes through November 12. At this writing, no public hearing is scheduled.

## LEGISLATION

**AB 110 (Peace)** is one of a package of workers' compensation bills signed by Governor Wilson on July 16 (Chapter 121, Statutes of 1993). Among many other things, AB 110 provides for obtaining health coverage for workers' compensation from a "workers' compensation health care provider organization," provides for the certification of those organizations by the Corporations Commissioner through the enactment of the Workers' Compensation Health Care Provider Organization Act of 1993 (Labor Code section 5150 et seq.), and assigns responsibility for administering and enforcing the Act to the Corporations Commissioner. (See agency report on DEPARTMENT OF INSURANCE for related discussion of AB 110.)

**AB 1100 (W. Brown)**, as amended September 8, enacts the Health Insurance Access and Equity Act to prohibit several discriminatory insurance practices affecting people with AIDS. Among other things, the bill prohibits the Commissioner of Corporations from approving any health care service plan (HCSP) contract which does not conform to specified requirements; requires HCSPs to provide an actuarial basis for underwriting decisions upon the request of the Commissioner; prohibits HCSPs from engaging in specified postclaim underwriting practices; provides that every policy or certificate of disability insurance marketed, issued, or delivered to a resident of this state regardless of the situs of the contract or master group policyholder shall be subject to the provisions of the Insurance Code, except as specified; requires the Insurance Commissioner to develop and adopt standardized language for informed consent disclosure forms for applicants for life or disability income insurance who take an HIV-related test; with respect to standards and provisions in disability insurance policies, requires policy questions relating to medical conditions to be clear and unambiguous, and application questions to be based on medical information that is reasonable and necessary for medical underwriting purposes; shortens the time limits for certain defenses, as specified, and prohibits disability insurers from engaging in postclaims underwriting; expands the recordkeeping requirements of life and disability insurers pertaining to the rescission, termination, or nonrenewal of a policy or contract; and requires all employers to provide employees an outline of coverage, and upon termination, notification of continuation, extension, and conversion rights. This bill, which was supported by Consumers Union and a number of AIDS advocacy organizations, was signed by the Governor on October 11 (Chapter 1210, Statutes of 1993).

**AB 2170 (Bornstein).** Existing law requires certain judgments against specified licensed health care professionals by a court to be reported by the clerk of the court to the appropriate occupational licensing agency. Among other things, this bill would have required arbitration under a HCSP contract for any death or personal injury resulting in an award for an amount in excess of $30,000 to be a judgment for purposes of the above-described provision of law. This bill was vetoed by the Governor on October 11; among other things, Wilson opined that "[w]hile it may be good public policy to publicly disclose a court entered judgment after applying the rigorous standards of the Evidence Code and exhausting all rights of appeal, it may not be sound public policy to publicly disclose all arbitration awards. Because arbitration necessarily involves a truncated litigation process and attempts to settle the dispute, arbitration awards may not accurately reflect a provider's professional competence." Wilson concluded that "the ultimate result of this bill would be to discourage plans and providers from participating in arbitration, which would increase the costs of health care."

The following is a status update on bills reported in detail in CRLR Vol. 13, Nos. 2 & 3 (Spring/Summer 1993) at pages 127–30:

**AB 729 (Speier).** Existing law provides for the licensing of securities broker-dealers and the regulation of agents by the DOC Commissioner. Existing law authorizes the Commissioner to take disciplinary action against a broker-dealer if, among other things, the broker-dealer is subject to any order of the Securities and Exchange Commission, the securities administrator of another state, a securities association, the Commodity Futures Trading Commission, or board of trade taking certain disciplinary action. As amended June 17, this bill provides for discipline if the broker-dealer is or has been subject to any order of those entities. The bill also authorizes discipline for a violation of the California Commodity Law of 1990 or a violation of orders of the Commission or various other entities. The bill authorizes the Commissioner to immediately revoke the certificate of a broker-dealer that fails to comply with any currently effective order of the Commissioner necessary for the protection of any investor, except as specified. This bill also makes similar changes in the provisions applicable to investment advisers.

This bill requires the Commissioner to make available to the public information with respect to the licensure status or disciplinary record of a broker-dealer or agent. Except in specified circumstance, this bill requires a broker-dealer or agent upon re-

quest to deliver a written notice to any client when a new account is opened, stating that the above specified information may be obtained from DOC. This bill requires the Commissioner to provide to the public copies of the above specified information relating to disciplinary records or licensure status of a broker-dealer or agent and provides that no liability or cause of action shall exist against the state, the Department, or specified employees of the Department for the release of false or unauthorized information, unless that release is done with knowledge or malice.

Under existing law, fees collected and fines imposed under the California Commodity Law of 1990 are deposited in the Commodity Merchant Account of the General Fund. This bill provides that those fees and fines are deposited in the Corporations Fund.

Under existing law, operative until January 1, 1994, with respect to any foreign savings associations subject to state or federal supervision, as specified, and any broker-dealer registered, as specified, those entities shall not be considered to be doing business or selling, taking, or soliciting savings accounts in this state by reason of engaging in certain specified activities. This bill deletes the repeal date of that provision, thus extending those provisions indefinitely. It also repeals prior law scheduled to become operative January 1, 1994.

Existing law provides that with certain exceptions, public records, as defined, are open to inspection by the public; existing law exempts from disclosure, records contained in or related to specified applications, reports, communications, or information, filed with, or prepared by, or on behalf of, any state agency responsible for the regulation or supervision of the issuance of securities. Existing law provides that whenever a state or local agency discloses a public record which is otherwise exempt from disclosure, to any member of the public, that disclosure constitutes a waiver of the exemption, unless otherwise specified. This bill provides that the above waiver of exemption provision does not apply to records relating to any person that is subject to DOC's jurisdiction, if the disclosures are made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department.

Existing law provides that with certain exceptions, public records, as defined, are open to inspection by the public. This bill would provide that any information reported to the North American Securities Administrators Association/National Association of Securities Dealers' Central Registration Depository and compiled as disciplinary records which are made available to DOC through a computer system, shall constitute a public record. This bill was signed by the Governor on September 25 (Chapter 469, Statutes of 1993).

**SB 479 (Beverly)**. Under existing law, before any corporation issues shares of any class or series of which the rights, preferences, and restrictions or number of shares or designation of shares are fixed by resolution of the board, an officers' certificate setting forth the resolution and other information shall be executed and filed. As amended May 19, this bill additionally requires, where the rights, preferences, and restrictions contain a supermajority vote provision, that the officers' certificate state that this provision has been approved by the shareholders.

Existing law sets forth various requirements applicable after January 1, 1989, to a corporation with outstanding shares held of record by 100 or more persons for amendment of the articles or a certificate of determination containing a supermajority vote requirement. This bill provides that these provisions shall not apply to a corporation which files an amendment of articles or certificate of determination, on or after January 1, 1994 if, at the time of filing, the corporation has no class of equity securities registered under the Securities Exchange Act of 1934, as specified, outstanding shares of more than one class or series of stock, no supermajority vote provision, as specified, and outstanding securities held of record by fewer than 300 persons. This bill was signed by the Governor on July 19 (Chapter 128, Statutes of 1993).

**SB 128 (Beverly)**. Existing law provides that before the National Association of Securities Dealers, Inc. (NASD) automated quotation system is certified by the Commissioner pursuant to specified provisions of current law, the Commissioner shall determine and conclude that NASD has adopted and obtained Securities and Exchange Commission approval of corporate governance standards, including voting rights, which are substantially similar to the corporate governance standards in effect on the date of application by the association for either the New York or the American Stock Exchange. Existing law also provides that the certification of the interdealer quotation system of NASD shall remain in effect only until January 1, 1994, and shall be subject to applicable decertification proceedings. As introduced January 25, this bill repeals this provision of law and states legislative intent that a national securities exchange or interdealer quotation system seeking certification from the DOC Commissioner adopt corporate governance listing standards or criteria consistent with the standards or criteria adopted by previously certified entities and in addition to specified requirements. This bill also states legislative intent that previously certified entities routinely review the quantitative and the qualitative listing, delisting, and maintenance standards or criteria to enhance investor protection. This bill was signed by the Governor on July 8 (Chapter 79, Statutes of 1993).

**SB 955 (Presley)**. The Corporate Securities Act of 1968 provides that it is unlawful for any person to offer or sell in this state any security in an issuer transaction, as specified, unless the sale is qualified or exempted. As amended August 24, this bill provides that the offer or sale of such a security in a manner that varies or differs from, exceeds the scope of, or fails to conform with either a material term or material condition of qualification of the offering as set forth in the permit or qualification order, or a material representation as to the manner of offering which is set forth in the application for qualification, shall be an unqualified offer or sale.

Existing law provides for certain fines and penalties relative to willful violations of certain provisions of this Act. This bill increases those fines, as specified. This bill was signed by the Governor on October 2 (Chapter 762, Statutes of 1993).

**SB 115 (Beverly)**. Under the Corporate Securities Law of 1968, it is unlawful for any person to offer or sell in this state any security, except as specified, unless the sale has been qualified or unless the security or transaction is exempted. Included among exempted transactions is any offer of a security for which a registration statement under the Federal Securities Act of 1933 has been filed but has not yet become effective, subject to certain conditions. As amended July 1, this bill additionally exempts any offer of a security for which an offering statement under Regulation A of the Securities Act of 1933 has been filed but has not yet been qualified.

Under existing law, certain securities, whether or not eligible for qualification by coordination or notification, as specified, may be qualified by permit. Existing law authorizes an applicant to file a small company application for qualification of the sale of securities by permit if it meets certain conditions. One of these condi-

tions requires that the applicant file an undertaking with the DOC Commissioner that there will be no stock splits, stock dividends, spinoffs, or mergers for a period of two years from the close of the offering. This bill permits the Commissioner, notwithstanding the undertaking, to approve a spinoff or merger pursuant to an application for qualification filed by an applicant.

Existing law authorizes the Commissioner to charge and collect a specified fee for filing a small company application for qualification of securities by permit. Existing law permits the Commissioner to charge an additional fee not to exceed $1,000 if the actual cost of processing the application exceeds the filing fee. This bill makes that provision applicable in cases where the cost, rather than the actual cost, of processing the application fee exceeds the filing fee and permits the Commissioner, in determining the cost, to use the estimated average hourly cost for all persons processing applications for the fiscal year.

Existing law authorizes the Commissioner to charge a fee for any examination, audit, or investigation in connection with specified activities based upon actual compensation and expenses. This bill instead bases this fee upon compensation and expenses, rather than actual compensation and expenses, and authorizes the Commissioner, in determining the costs associated with an examination, audit, or investigation, to use the estimated average hourly cost for all persons performing examinations, audits, or investigations for the fiscal year. This bill was signed by the Governor on July 25 (Chapter 193, Statutes of 1993).

**AB 2025 (Bowen)**. Existing law provides that there is no personal liability to a third party for monetary damages on the part of a volunteer director or volunteer executive officer of a nonprofit public benefit corporation caused by the director's or officer's negligent act or omission in the performance of that person's duties if certain conditions are met, including the condition that the damages are covered pursuant to a liability insurance policy or, if not covered by insurance, that the directors of the corporation and the person made all reasonable efforts in good faith to obtain available liability insurance. As amended August 17, this bill provides that the requirement of a good faith effort to obtain available liability insurance, is satisfied for a corporation that is a charitable corporation, as specified, with an annual budget of less than $25,000 if it makes at least one inquiry per year and the insurance is not available at a specified price. This bill was signed by the Governor on September 30 (Chapter 634, Statutes of 1993).

**SB 687 (Boatwright)**, as amended September 7, authorizes specified foreign professional corporations to qualify as a foreign corporation to transact intrastate business, and provides for the rendering of professional services in this state or for residents of this state by persons who are licensed to render those services in the jurisdiction in which the services are rendered. This bill was signed by the Governor on October 7 (Chapter 910, Statutes of 1993).

**AB 2063 (Weggeland)**. The California Revised Limited Partnership Act permits the merger of limited partnerships with other business entities, such as corporations and general partnerships, including situations in which the surviving entity is a business entity other than a limited partnership. Existing provisions of the California General Corporation Law permit California corporations to merge with other corporations but do not provide for the merger of California corporations with limited partnerships. As amended August 17, this bill enacts provisions to amend the General Corporation Law to permit those mergers. This bill provides that the surviving entity of a merger may be either a corporation or a limited partnership. This bill requires a corporation and a limited partnership that desire to merge to comply with specified requirements, including, among others, approval of an agreement of merger containing specified information, and the filing of specified documents, including the agreement of merger with the Secretary of State. This bill requires the approval, as specified, of the shareholders of a constituent corporation, as defined, of a merger in which the surviving entity is a limited partnership and provides for dissenting shareholder status for those shareholders in specified circumstances. This bill was signed by the Governor on September 26 (Chapter 543, Statutes of 1993).

**SB 545 (Killea)**, as amended August 24, requires the Secretary of State, by January 1, 1995, to develop and maintain a registry of distinguished women and minorities available to serve on boards of directors of corporations. The bill requires the Secretary of State to make information contained in a reasonable number of registrants' transcripts available to corporations. The bill authorizes the Secretary to grant access to a reasonable number of registrants' transcripts to other persons for certain purposes and to businesses providing data base access or search services, as specified. This bill was signed by the Governor on September 26 (Chapter 508, Statutes of 1993).

**AB 733 (Conroy)**. Existing law prohibits any person who has been convicted of specified criminal violations, or has been held liable in a civil action by final judgment, or administrative action by any public agency for certain violations within the past ten years, from serving in any capacity as an officer, director, stockholder, trustee, agent, or employee of an escrow agency, or in any position involving any duties with an escrow agent, in the state. Existing law requires any person who seeks employment by, or an ownership interest in, or other participation in the business of a licensed escrow agent to authorize Fidelity Corporation and the Commissioner of Corporations, or both, to have access to that person's state summary criminal history information. As amended July 2, this bill makes those prohibitions upon holding escrow positions applicable to criminal convictions of, or pleas of nolo contendere to, specified crimes within the past ten years, and to civil and administrative judgments within the past seven years based on specified conduct; exempts from the above provisions any person whose office, employment, ownership interest, or other participation in the business of a licensed escrow agent commenced prior to January 1, 1992; deletes certain criminal charges and provides that an offense does not include a conviction for which the person has obtained a certificate of rehabilitation from a court of competent jurisdiction as allowed by the Penal Code or a similar certificate obtained in a foreign jurisdiction; and provides that these provisions are severable. This bill was signed by the Governor on September 30 (Chapter 625, Statutes of 1993).

**AB 573 (Johnson)**. Existing law authorizes the Commissioner of Corporations to, by rule, order, or regulation, permit loans to be made or entered into at places in California other than designated by an industrial loan company in its certificate of authorization if those loans can be so made consistent with the purposes of the Industrial Loan Law. As amended July 8, this bill deletes the limitation that the loans be made or entered into at places in California and additionally makes that authorization applicable to loans and obligations solicited and acquired at places other than designated by an industrial loan company in its certificate of authorization, subject to those same conditions. It requires, in addition, a written request to the Commissioner for approval to solicit and make loans and acquire obligations at a place of business other than designated in its certificate of authorization, subject to specified conditions and requirements. This bill was signed by the Governor on

September 25 (Chapter 467, Statutes of 1993).

**AB 2079 (Margolin)**. Under the Knox-Keene Health Care Service Plan Act of 1975, HCSPs are regulated by the Commissioner of Corporations. Existing law requires a HCSP whose license has been surrendered or revoked to submit to the Commissioner on or before 105 days after the effective date of the surrender or revocation a closing audit report. As amended August 16, this bill instead requires this HCSP to submit to the Commissioner a closing audit report on or before 105 days after notice of the surrender or revocation. It prohibits the Commissioner from consenting to a surrender and prohibits an order of revocation as being considered final until the closing audit report has been filed and all concerns raised by the Commissioner therefrom have been resolved by the plan. It also authorizes the Commissioner to waive this requirement for good cause.

Existing law authorizes the Commissioner to summarily suspend or revoke the license of a HCSP under prescribed conditions. This bill, in addition, authorizes summary suspension or revocation for failure of a plan to maintain a deposit, insurance, or guaranty arrangement required by the Act and for failure to maintain a deposit required by regulations adopted by DOC.

Under existing law, the Act contains comprehensive provisions regulating HCSP contracts that supplement medicare, including the requirement that the plan use a disclosure form to disclose information about benefits, services, and terms of the plan contract. Existing law exempts a federally qualified health maintenance organization from these provisions. Under existing law, the willful violation of the Act or any rule or order thereunder is a misdemeanor. This bill deletes the exemption for federally qualified health maintenance organizations, and instead exempts from these comprehensive provisions regulating HCSPs (1) a contract or other arrangement of a plan that offers benefits under federal law or under a demonstration project authorized pursuant to federal law and (2) a contract of one or more employers or labor organizations, or of the trustees of a fund, for employees or former employees, or member or former members, of the labor organizations. This bill was signed by the Governor on October 2 (Chapter 735, Statutes of 1993).

**SB 1118 (Rogers)**, like SB 115 (Beverly) above, would exempt any offer of a security for which an offering statement under Regulation A of the Securities Act of 1933 has been filed but has not yet been qualified. *[S. BC&IT]*

**SB 666 (Beverly)**. Existing law permits certain securities to be qualified by permit if the application is a small company application and meets certain requirements. As introduced March 3, this bill would revise those requirements by specifically requiring the Commissioner to adopt rules containing specified requirements. Among other things, the bill would set the minimum stock price at $2 instead of $5, and incorporate by reference Form U-7 of the North American Securities Administrators Association, and associated instructions. *[S. BC&IT]*

**SB 930 (Killea)**, as introduced March 4, and **SB 469 (Beverly)**, as amended September 10, would—among other things—enact the California Limited Liability Company Act, authorizing a limited liability company to engage in any lawful business activity; set forth the duties and obligations of the managers of a limited liability company; and establish requirements and procedures for membership interests in limited liability companies, including voting, meeting, and inspection rights. *[S. Jud; S. Jud]*

**AB 1057 (Conroy)**. Existing law requires applicants for an escrow agent's license to file, and escrow agents to maintain, a bond. Under existing law, an applicant or licensee may obtain an irrevocable letter of credit approved by the Commissioner of Corporations in lieu of the bond. As introduced March 2, this bill would instead permit an applicant or licensee to obtain an irrevocable letter of credit in a form which shall be approved by the Commissioner in lieu of the bond. The bill would also provide that the Commissioner shall be entitled to recover the administrative costs that are specific to processing claims against irrevocable letters of credit. *[S. BC&IT]*

**AB 1031 (Aguiar)**. Existing escrow law provides that any advertising referring to the Fidelity Corporation shall state in type not smaller than the largest size of type used in the body of the advertisement: "Escrow Agents' Fidelity Corporation is a private corporation and is not an agency or other instrumentality of the State of California." As amended April 26, this bill would instead provide for a more comprehensive disclosure statement. It would also require escrow companies to provide certain condensed financial statements, as prescribed by rule or order of the DOC Commissioner. *[S. BC&IT]*

**AB 1125 (Johnson)**, as amended April 12, would require the Commissioner to conduct an inspection and examination of a new escrow agent licensee within six months of licensure. The costs of the inspection and examination would be paid by the licensee to the Commissioner. *[S. BC&IT]*

**AB 1923 (Peace)**. Existing law provides that credit unions must obtain or have insurance pursuant to Title II of the Federal Credit Union Act, or a guaranty of shares provided by the California Credit Union Share Guaranty Corporation, or a form of comparable insurance or guaranty of share acceptable to the Corporations Commissioner for the purpose of insuring or guaranteeing its members' share accounts. As introduced March 5, this bill would provide that credit unions shall obtain insurance as provided for by Title II of the Federal Credit Union Act. This bill would provide that, on or after January 1, 1994, every credit union applying for a certificate to act as a credit union must demonstrate that it has applied for and obtained Title II insurance. By January 1, 1995, every credit union must obtain Title II insurance. Credit unions which have not obtained that insurance by July 1, 1995, or have ceased to maintain it after that date, shall proceed to liquidate or merge with another credit union. *[A. F&I]*

**AB 1533 (Tucker)**. Existing law limits check cashers' charges for cashing a payroll check with identification to 3% and without identification to 3.5%, or $3, whichever is greater. As introduced March 4, this bill would reduce these maximum charges to 1% for cashing a payroll check with identification and 1.5% for cashing a payroll check without identification, or $3, whichever is greater. *[A. F&I]*

**AB 2306 (Margolin)**, as amended May 19, would add to the acts that constitute grounds for HCSP disciplinary action the failure of a plan to correct prescribed deficiencies identified by the Commissioner. *[S. InsCl&Corps]*

**AB 2002 (Woodruff)**, as amended June 28, would be known as the "Filante Health Care Act," authorizing HCSPs, nonprofit hospital service plans, and disability insurers to provide rate incentives for covered individuals or enrollees, as the case may be, to adopt healthful lifestyles, as prescribed, the rate incentives to be based on actuarial considerations related to the differences in lifestyle. The bill would require the Commissioner of Corporations to adopt guidelines by June 30, 1994, and would permit the Commissioner to adopt regulations defining a "healthful lifestyle" for HCSPs. It would also require the Insurance Commissioner to adopt guidelines and would permit the Commissioner to adopt regulations defining a "healthful lifestyle" for disability insurers and nonprofit hospital service plans. The bill would also authorize HCSPs and nonprofit hospital service plans that are certified as meeting those guidelines to indicate that they are certified plans. *[S. InsCl&Corps]*

**SB 719 (Craven)**. Existing law provides that no HCSP, including a specialized HCSP, shall request reimbursement for overpayment or reduce the level of payment to a provider based solely on the allegation that the provider has entered into a contract with any other licensed HCSP for participation in a benefit plan that has been approved by the Commissioner. As amended May 17, this bill would provide instead that no specialized HCSP that provides or arranges for dental services shall request reimbursement for overpayment or reduce the level of payment to a provider based on the that the provider has entered into a contract with any other HCSP for participation in a supplemental dental benefit plan that has been approved by the Commissioner. *[S. InsCl &Corps]*

## ■ LITIGATION

On July 8, former savings and loan boss Charles Keating and his son, Charles Keating III, were sentenced following their January 1993 convictions by a federal jury on charges of racketeering, bank and securities fraud, conspiracy, and the interstate transportation of stolen goods. *[13:1 CRLR 82]* The elder Keating, who is already serving a ten-year state sentence for defrauding 25,000 investors out of $268 million by persuading them to buy worthless junk bonds instead of government-insured certificates, was found guilty on all 73 counts brought against him; his son was found guilty of all 64 counts brought against him. *[13:2&3 CRLR 126]* The elder Keating was sentenced to 12 years and 7 months in federal prison for the racketeering and securities violations; his son was sentenced to eight years and one month.

In ***Mirkin v. Wasserman***, 5 Cal. 4th 1082 (Sept. 9, 1993), the California Supreme Court considered whether plaintiffs, who purchased securities at a price allegedly affected by misrepresentation, can plead a cause of action for deceit under Civil Code sections 1709 and 1710 without alleging that they actually relied on the misrepresentations. Plaintiffs bought shares of the common stock of Maxicare Health Plans, Inc., between October 17, 1985, and February 29, 1988; plaintiffs purported to represent all persons who purchased the common stock or 11.75% senior subordinated notes issued by Maxicare. Plaintiffs alleged that Maxicare, after appearing to experience substantial growth and profits in 1985 and 1986, began to suffer large losses; the value of Maxicare stock gradually dropped from a high of $28.50 per share in 1986 to a low of $1.50 per share in 1988. Plaintiffs also alleged that defendants, beginning in 1985, made numerous misrepresentations about Maxicare's prospects and financial status in prospectuses for the 1985 and 1986 public offerings, in documents filed with the Securities Exchange Commission and in other public communications. According to plaintiffs, these misrepresentations inflated the price of Maxicare securities, thus allowing them to sell for more than their true value.

In their first consolidated amended complaint, plaintiffs purported to state causes of action for deceit and negligent misrepresentation. After conceding that they could not plead that they had actually read or heard the alleged misrepresentations, plaintiffs argued that the so-called "fraud-on-the-market" doctrine obviates the need to plead and prove actual reliance in cases where material misrepresentations are alleged to have affected the market price of stock.

The court initially noted that "[i]t is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation." The court noted that plaintiffs, attempting to justify their failure to plead actual reliance on the alleged misrepresentations, argued that the price of securities traded in an open and developed market, such as a national stock exchange, adjusts in response to material information, whether such information is true or false; in this way, plaintiffs asserted, misrepresentations are reflected in the market price of a security, and someone who relies on the market price as indicating the actual value of a security relies, albeit indirectly, on the misrepresentation. The court commented that plaintiffs' argument amounts, in essence, to a plea to incorporate the fraud-on-the-market doctrine into the common law of deceit.

The court held that California law does not permit plaintiffs to state a cause of action for deceit without pleading actual reliance, finding that no California court has expressly adopted the fraud-on-the-market doctrine and refusing to read an implied adoption into decisions offered in support of plaintiffs' position.

Further, the court rejected plaintiffs' arguments for changing the law by incorporating the fraud-on-the-market doctrine; among other things, the court noted that state and federal law provide other remedies that do not require the pleading or proof of actual reliance. The court concluded that "[t]o incorporate the fraud-on-the-market doctrine into the common law of deceit would only bring about difficulties that the state legislature and the federal courts have apparently attempted to avoid. Nor would the proposed expansion of the common law of deceit offer benefits sufficient to offset the difficulties, since the state and federal securities law already offer remedies that give plaintiffs the benefit of a presumption of reliance. Under these circumstances, there is insufficient justification for upsetting the policy choices that the existing laws reflect."

## DEPARTMENT OF INSURANCE

*Commissioner: John Garamendi*
*(415) 904-5410*
*Toll-Free Complaint Number:*
*1-800-927-4357*

Insurance is the only interstate business wholly regulated by the several states, rather than by the federal government. In California, this responsibility rests with the Department of Insurance (DOI), organized in 1868 and headed by the Insurance Commissioner. Insurance Code sections 12919 through 12931 set forth the Commissioner's powers and duties. Authorization for DOI is found in section 12906 of the 800-page Insurance Code; the Department's regulations are codified in Chapter 5, Title 10 of the California Code of Regulations (CCR).

The Department's designated purpose is to regulate the insurance industry in order to protect policyholders. Such regulation includes the licensing of agents and brokers, and the admission of insurers to sell in the state.

In California, the Insurance Commissioner licenses approximately 1,300 insurance companies which carry premiums of approximately $63 billion annually. Of these, 600 specialize in writing life and/or accident and health policies.

In addition to its licensing function, DOI is the principal agency involved in the collection of annual taxes paid by the insurance industry. The Department also collects more than 170 different fees levied against insurance producers and companies.

The Department also performs the following functions:

(1) regulates insurance companies for solvency by tri-annually auditing all domestic insurance companies and by selectively participating in the auditing of other companies licensed in California but organized in another state or foreign country;

(2) grants or denies security permits and other types of formal authorizations to applying insurance and title companies;

(3) reviews formally and approves or disapproves tens of thousands of insur-