



regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency." According to CPIL, the Board's new retake policy relates not only to the internal management of the Board, but it also affects people applying for licensure by the Board. Also, the policy implements, interprets, or makes specific the law administered by the Board. Thus, CPIL contends the policy is a regulation as defined by Government Code section 11342(b). Although Business and Professions Code section 4513 authorizes the Board to regulate the times and places of psychiatric technician examinations, it does not authorize the Board to establish rules affecting the eligibility of an applicant to retake an examination without participating in the rulemaking process mandated by the APA.

Rules Implementing AB 3306 Challenged. At its September 21 meeting, the Board adopted five policies as part of its implementation of AB 3306 (Lancaster), which increased the educational requirement for LVNs from tenth to twelfth grade or the equivalent. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 111 for background information.) The first of these policies states that any vocational nursing student with only a tenth grade education or equivalent who was enrolled in an accredited or approved vocational nursing program as of December 31, 1990 will not be required to obtain the twelfth grade education or its equivalent. CPIL has notified the Board of its belief that this policy is a regulation as defined in section 11342(b) of the Government Code, and thus must be adopted pursuant to APA rulemaking procedures.

The APA requires that every rule state its source of authority. CPIL is concerned that the Board lacks statutory authority to permit these students to avoid the new education requirement, as AB 3306 states that all applicants must meet the new education requirement and contains no "grandparent" clause exempting currently-enrolled students.

LEGISLATION:

Anticipated Legislation. At its November 16 meeting, the Board accepted the Education and Practice Committee's suggestions that the Board introduce legislation to authorize LVNs to obtain post-licensure certification in dialysis and in ventilator care. The Committee recommended that requirements of both measures should include a cur-

rent active LVN license and one year of nursing experience in a medical surgical unit in an acute care hospital within the three years prior to certification.

Also at its November 16 meeting, the Board accepted the Education and Practice Committee's suggestion that the Board introduce legislation authorizing psychiatric technicians to obtain post-licensure certification in blood withdrawal.

RECENT MEETINGS:

At the November 16 Board meeting, Doris Zylinski, Dean of Health Occupations at Napa Valley College, presented a "Comparative Study of Licensed Vocational Nurse Curriculum and Employer Requirements." Among other findings, the study noted that: (1) LVN programs should expand or at least maintain current enrollments, as the need for LVNs will increase in the future; (2) the greatest need for LVNs in the future will be in the areas of medical-surgical inpatient services, skilled nursing, rehabilitation units, outpatient services, and home care

settings; (3) schools, colleges, and agencies should work together to ensure that intravenous therapy and blood withdrawal courses are readily available to LVN graduates; (4) the LVN's scope of practice should be directly related to the license, not the type of facility in which the licensee works; and (5) model LVN curricula for the 1990s should, among other things, retain medical-surgical nursing emphasis; increase both theory and clinical education in gerontology; increase clinical experience in skilled nursing, rehabilitation units, and home care settings; increase theory and clinical education in managed care, team leading, leadership, and organizational skills; change pediatric clinical focus from acute inpatient to "sick child" outpatient; and define the role of the LVN in terms of the nursing process.

FUTURE MEETINGS:

May 9-10 in San Francisco.
September 12-13 in San Diego.
November 14-15 in Los Angeles.



BUSINESS, TRANSPORTATION AND HOUSING AGENCY

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

Director: Jay Stroh
(916) 445-6811

The Department of Alcoholic Beverage Control (ABC) is a constitutionally-authorized state department established in 1955 (section 22 of Article XX, California Constitution). The Alcoholic Beverage Control Act, Business and Professions Code sections 23000 *et seq.*, vests the Department with the exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages in California. In addition, the Act vests the Department with authority, subject to certain federal laws, to regulate the importation and exportation of alcoholic beverages across state lines. ABC also has the exclusive authority to issue, deny, suspend, and revoke alcoholic beverage licenses. Approximately 68,000 retail licensees operate under this authority. ABC's regulations are codified in Divisions 1 and 1.1, Title 4 of the California Code of Regulations (CCR). ABC's decisions are appealable to the Alcoholic

Beverage Control Appeals Board. Further, ABC has the power to investigate violations of the Business and Professions Code and other criminal acts which occur on premises where alcohol is sold. Many of the disciplinary actions taken by ABC, along with other information concerning the Department, are printed in liquor industry trade publications such as the *Beverage Bulletin*.

The Director of ABC is appointed by, and serves at the pleasure of, the Governor. ABC divides the state into two divisions (northern and southern) with assistant directors in charge of each division. The state is further subdivided into 21 districts, with two districts maintaining branch offices.

ABC dispenses various types of licenses. "On-sale" refers to a license to sell alcoholic beverages which will be bought and consumed on the same premises. "Off-sale" means that the licensee sells alcoholic beverages which will not be consumed on the premises. Population-based quotas determine the number of general liquor licenses issued each year per county. No such state restrictions apply to beer and wine licenses.



REGULATORY AGENCY ACTION

MAJOR PROJECTS:

Alcohol Tax Measures Defeated. On November 6, California voters rejected Proposition 134, the so-called "nickel-a-drink" tax initiative, along with the competing alcohol industry-sponsored Proposition 126. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 112 and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 130-31 for background information on these measures.) Both ballot proposals would have increased taxes on the sale of alcoholic beverages in California. The alcohol industry, led by a group which called itself Taxpayers for Common Sense, spent over \$32 million in its campaign against Proposition 134.

However, one part of its advertising campaign backfired on the alcohol industry. In mid-October, the alcohol industry began running advertisements promoting Proposition 126 which did not include the disclosure required by Proposition 105. This initiative, passed by the voters in 1988, mandates disclosure of the identity of major financial sponsors of initiative campaigns. As a result, on October 24, the Fair Political Practices Commission (FPPC) ordered the alcohol industry to stop airing advertisements which did not disclose that the alcohol industry and the Beer Institute were paying for them. According to FPPC Chair John Larson, "The voters clearly wanted to know who is behind the political messages that bombard them each election season. Our interpretation of [Proposition 105] is a reasonable one which provides voters with the broadest disclosure possible."

The alcohol industry attempted to argue that it was not required to disclose the industry funding because its ads dealt with both Proposition 126 and Proposition 134. Taxpayers for Common Sense attorney Barry Fadem argued that a loophole in the law allowed nondisclosure, so long as the ads dealt equally with two ballot measures. However, the FPPC rejected this reasoning, finding that this exception applies only to initiatives, and that Proposition 126 was a legislative ballot measure. Accordingly, the law requiring disclosure of the major sources of funding applied to the industry-sponsored ads.

Following the FPPC's ruling, the alcohol industry complained that it had no advance warning of the ruling and stated that the ads in question were "not going to be pulled." However, the Yes-on-134 forces immediately filed a lawsuit to ensure that the ads were not aired; the alcohol industry subsequently complied with the FPPC ruling.

Federal Alcohol Taxes Increased. As part of an effort to reduce the federal deficit, Congress recently enacted legislation which will raise nearly \$10 billion in additional revenues by increasing taxes on alcohol. In addition to a one-time floor tax, Congress passed a federal excise tax increase. Effective January 1, 1991, the federal excise tax increased from 16 to 32 cents per six-pack of beer; from 17 cents to \$1.07 per gallon of table wine; and from \$12.50 to \$13.50 per gallon of distilled spirits. The floor tax, which was assessed as of January 1, 1991, is expected to raise \$300 million nationally, including \$35 million to \$45 million in California alone.

Budget Cuts Affect ABC. Across-the-board cuts in the state budget will reduce ABC's budget by another \$235,000 this year. This 1% budget reduction follows a recent 3% reduction and the expiration of a federal grant which funded ABC's Drug Enforcement Narcotics Team (DENT). (See CRLR Vol. 10, No. 4 (Fall 1990) p. 112 for background information.) With DENT effectively eliminated, the budget reduction further constrains ABC's ability to enforce laws; any additional reductions may trigger considerable delays in ABC's processing of license applications and renewals.

ABC Launches Licensee Education Program. In December, ABC announced the creation of the Licensee Education on Alcohol and Drugs (LEAD) Program, designed to reduce the serious problems associated with driving under the influence of alcohol and other drugs. LEAD is a cooperative effort with the Office of Traffic Safety, the Department of Alcohol and Drug Programs, and the California Highway Patrol. LEAD will provide practical information on recognizing false IDs, preventing sales to those who are underage or intoxicated, and recognizing signs of illicit drug activity in licensed establishments. At this writing, ABC is in the process of notifying licensees of the availability of the LEAD program; experienced ABC investigators will conduct the training at retail establishments.

LEGISLATION:

AB 94 (Friedman), as introduced December 4, would prohibit on and after January 1, 1992, the issuance or renewal of any alcoholic beverage license to a club, as defined, with specified exceptions, which makes any discrimination, distinction, or restriction for the purpose of membership against any person on account of the person's color, race, religion, ancestry, national origin, sex, or age.

This bill would also require ABC to deny an application for the exchange of an alcoholic beverage license if either the applicant or the premises do not qualify for a license and would authorize ABC to deny an application for the exchange or transfer of an alcoholic beverage license if the exchange or transfer would tend to create a law enforcement problem or would create an undue concentration of licenses and the applicant fails to show that the public convenience or necessity would be served by the issuance. This bill is pending in the Assembly Governmental Organization Committee.

SB 21 (Marks) and SB 23 (Kopp), as introduced December 3, would each impose on and after March 1, 1991, a surtax at specified rates on beer, wine, and distilled spirits, and equivalent compensating floor stock tax on beer, wine, and distilled spirits in the possession of licensed persons on March 1, 1991. Both bills would require the following: a \$0.16 per gallon surtax on all beer; a \$0.19 per wine gallon surtax on all still wines containing not more than 14% of absolute alcohol by volume; an \$0.18 per wine gallon surtax on all still wines containing more than 14% of absolute alcohol by volume; an \$0.18 per wine gallon surtax on sparkling hard cider; a \$1.30 per wine gallon surtax on all distilled spirits of proof strength or less; and a \$2.60 per wine gallon surtax on all distilled spirits in excess of proof strength. Both bills would require that the proceeds from these surtaxes be deposited into the general fund. Both bills are pending in the Senate Revenue and Taxation Committee.

Anticipated Legislation. Health care lobbyists have expressed general support for legislation aimed at increasing taxes on alcoholic beverages; however, they may focus their efforts on increasing responsible beverage service programs. A major symposium scheduled for March will focus on building industry and regulatory support for introducing legislation in this area. Representatives from the Department of Alcohol and Drug Programs, the Office of Traffic Safety, and ABC are expected to initiate dialogue on the subject of server training at the symposium. Convenience store liability, conditional use permits, and local control ordinances are other areas of possible legislative action.

At this writing, U.S. Representative Joseph P. Kennedy (D-Massachusetts) is preparing to introduce federal legislation similar to last year's H.R. 4493, which died in committee. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 112 for background information.) The legislation would



require liquor advertisements to include visual and verbal health warnings regarding areas such as alcohol addiction, risks to pregnant women, drunk driving, and underage drinking. The proposed warnings, which are similar to those required in cigarette advertisements, are expected to be opposed by the alcohol industry.

LITIGATION:

In *Outdoor Resorts/Palm Springs Owners' Ass'n v. Alcoholic Beverage Control Appeals Board*, No. E007958 (Oct. 11, 1990), the Fourth District Court of Appeal held that the holder of a club liquor license is not entitled to a duplicate on-sale general license for a separate clubhouse located on the same premises. Outdoor Resorts, a country club and recreational vehicle resort similar to a condominium project, is comprised of numerous lots, the owners of which all belong to an owners' association. The owners' association holds a club liquor license for a bar on its premises. The association applied to ABC for a duplicate license at a second resort clubhouse on the same premises and was rejected. In denying Outdoor Resorts' application, ABC relied on Business and Professions Code sections 23430 and 23355, which proscribe the issuance of more than one club license to any club. On appeal, the administrative law judge (ALJ) issued a proposed decision in favor of Outdoor Resorts' owners' association. Despite the apparent 30-day limitation in Government Code section 11517(b) for ABC review of the decision, ABC rejected the proposed decision of the ALJ seven weeks later. The Alcoholic Beverage Control Appeals Board affirmed the decision of the Department.

On appeal, the Fourth District narrowly interpreted the term "rights and privileges" in Business and Professions Code section 23355, and upheld the Board's denial of the requested duplicate club license. On the procedural issue, Outdoor Resorts asserted that the ALJ's proposed decision became final because ABC did not reject it within 30 days. In denying petitioners' writ, the Fourth District relied on Government Code section 11517(d), which provides that "[t]he proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency..." and found that ABC issued its decision within this 100-day period.

In *Williams v. Saga Enterprises, Inc.*, No. B043922 (Nov. 15, 1990), the Second District Court of Appeal held that a restaurant bartender's voluntary retention of a customer's car keys may have

created a duty to protect third parties from that customer's drunk driving.

Lee Chandler, the drunken customer, frequented the Black Angus restaurant in question and made a practice of giving his car keys to the bartender on the understanding that the keys would be returned to him only if he were able to drive his car safely. Scott Williams sustained serious injuries in an automobile collision with a vehicle driven by Chandler; Chandler was intoxicated, having had several drinks at the restaurant earlier that evening. Williams sued Chandler and the restaurant owner, Saga Enterprises, Inc., claiming that a Saga employee had returned Chandler's car keys to him on the night of the accident even though he was intoxicated. The trial court granted Saga's motion for summary judgment. However, the Second District Court of Appeal reversed and remanded, finding that the bartender voluntarily assumed a duty to protect the public from Chandler's drunk driving, and that action created a triable issue as to whether this "good Samaritan" role exposed the restaurant to liability based on section 324A of the Second Restatement of Torts.

BANKING DEPARTMENT

Superintendent: James E. Gilleran
(415) 557-3232
Toll-Free Complaint Number:
1-800-622-0620

Pursuant to Financial Code section 200 *et seq.*, the State Banking Department (SBD) administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust companies; the establishment, operation, relocation, and discontinuance of various types of offices of these entities; and the establishment, operation, relocation, and discontinuance of various types of offices of foreign banks. The Department is authorized to adopt regulations, which are codified in Chapter 1, Title 10 of the California Code of Regulations (CCR).

The superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor. The superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the superintendent must consider:

(1) the character, reputation, and financial standing of the organizers or incorporators and their motives in seek-

ing to organize the proposed bank or trust company;

(2) the need for banking or trust facilities in the proposed community;

(3) the ability of the community to support the proposed bank or trust company, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; and the stability, diversity, and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered;

(4) the character, financial responsibility, banking or trust experience, and business qualifications of the proposed officers; and

(5) the character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The superintendent may not approve any application unless he/she determines that the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; conditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the proposed name does not so closely resemble as to cause confusion the name of any other bank or trust company transacting or which has previously transacted business in the state; and the applicant has complied with all applicable laws.

If the superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, a certificate of authorization to transact business as a bank or trust company will be issued.

The superintendent must also approve all changes in the location of a head office, the establishment or relocation of branch offices and the establishment or relocation of other places of business. A foreign corporation must obtain a license from the superintendent to engage in the banking or trust business in this state. No one may receive money for transmission to foreign countries or issue travelers checks unless licensed. The superintendent also regulates the safe-deposit business.

The superintendent examines the condition of all licensees. However, as the result of the increasing number of banks and trust companies within the state and the reduced number of