the public via privately-run computer services such as Legitech and LEXIS.

LEGISLATION:

AB 1736 (Campbell). Existing law requires OAL to provide for the official compilation, printing, and publication of the CCR and updates thereto. As introduced March 8, this bill would specify that any action taken by OAL to have the CCR or its updates compiled, printed, or published by anyone other than a state agency shall be in compliance with the State Contract Act. This bill is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development.

AB 2060 (Polanco), as introduced March 8, would require every state and local agency that is authorized to adopt rules, regulations, or ordinances to adopt rules and regulations to grant variances and to adopt a variance process, whereby an individual or private entity may apply for full or partial relief from regulations adopted by that governmental agency. This bill would also require every such agency to adopt a procedure for an appeal of any decision that leads to orders, sanctions, or fines being given to private individuals or entities, including the denial of a variance. This bill is pending in the Assembly Consumer Protection Committee.

AB 2061 (Polanco). Existing law requires every state agency to transmit to OAL, for filing with the Secretary of State, a certified copy of each regulation adopted or amended, with specified exceptions. As introduced March 8, this bill would include regional agencies that are not created by local government and that do not have an elected board of governors as agencies whose regulations are subject to OAL approval.

This bill would also require state and regional agencies proposing to adopt or amend any regulation to actively consider the potential for adverse economic impact on California small business enterprises and individuals. This bill is pending in the Assembly Consumer Protection Committee.

LITIGATION:

In *Fair Political Practices Commission (FPPC) v. Office of Administrative Law, et al.,* No. 512795, a tentative decision in favor of the FPPC handed down by the Sacramento County Superior Court on January 23 was implemented into a final and binding judgment issued on March 5. The court held that FPPC regulatory actions are subject to review under the APA only as it existed at the time of the electorate's 1974 approval of the Political Reform Act (PRA), which, *inter alia,* created the FPPC. OAL, its authority to review agency regulations, and the six criteria upon which its review is based were not created until 1980. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 38; Vol. 10, No. 4 (Fall 1990) p. 39; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47 for background information.)

In particular, the court held that Government Code section 83112, which specifies that FPPC regulations "shall be adopted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 *et seq.*)," is a "specific reference statute" as opposed to a "general reference statute." "When a reference is specific, the referencing statute takes the law as it existed at the time that the reference was made." Thus, the court ruled that the APA as it existed in 1974 is applicable to the FPPC, and enjoined OAL from applying to the FPPC any provisions of the APA that are inconsistent with the version of that law existing in 1974. According to FPPC staff counsel Jonathan Rothman, the court's rationale is that the FPPC was intended to be somewhat independent, and subjecting it to external standards and modifications would intrude on that independence.

Another issue in the matter focuses on a 1983 FPPC regulation which OAL originally approved and then disapproved two years later. Section 18312 of the FPPC's regulations in Title 2 of the CCR, implementing Government Code section 83112, instructs OAL to inspect only procedural and not substantive aspects of FPPC rulemaking. In its March 5 order, the court held that section 18312 is overbroad, and ordered FPPC to redraft the regulation.

According to OAL Director John D. Smith, the decision forces OAL to review the FPPC's regulations according to 1974 APA standards which predate the creation of OAL, and may encourage other agencies with unique enabling statutes to attempt to gain exemption from OAL review contained in the current APA based on this precedent. At this writing, OAL is considering an appeal of the decision.

OAL prevailed in a December 4, 1990 decision in *State Water Resources Control Board (WRCB) and the Regional Quality Control Board, San Francisco Region v. Office of Administrative Law,* No. 906452 (San Francisco County Superior Court). The court upheld OAL's invalidation of certain WRCB amendments to the San Francisco Bay Plan which defined the term "wetlands" and set forth certain criteria for permit discharges to wetlands, upon its finding that the amendments constituted regulations which must be adopted in compliance with the APA. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 39; Vol. 10, No. 4 (Fall 1990) p. 164; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 196-97 for background information.)

The outcome of this case may be significant, because it bears upon the administrative rulemaking procedures and powers of several state boards and agencies which conduct activities and enforcement procedures via local arms or local enforcement agencies and regional policy boards. For example, in *Simpson Paper Co. v. State Water Resources Control Board,* No. 364-016 (Sacramento County Superior Court), the central issue is similar to the matter addressed in *WRCB v. OAL.* Here, plaintiffs challenge the validity of certain provisions of the California Ocean Plan which were implemented by WRCB but not adopted pursuant to the APA.

Further settlements were recently reached in *California Chapter of the American Physical Therapy Ass'n et al. v. California State Board of Chiropractic Examiners, et al.,* Nos. 35-44-85 and 35-24-14 (Sacramento County Superior Court). The parties are litigating the validity of the Board of Chiropractic Examiners' (BCE) adoption and OAL's approval of section 302 of BCE's regulations, which defines the scope of chiropractic practice. A significant step towards final settlement occurred recently when the California Medical Association reached a settlement with BCE and other parties by agreeing to language of a proposed regulation on the scope of practice designed to replace the challenged section. This new scope of practice regulation was submitted by BCE to OAL as an emergency regulation, and is currently pending OAL approval. (*See infra* agency report on BCE; *see also* CRLR Vol. 11, No. 1 (Winter 1991) pp. 38-39; Vol. 10, No. 4 (Fall 1990) p. 39; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47 for background information.)

OFFICE OF THE AUDITOR GENERAL

Acting Auditor General: Kurt Sjoberg (916) 445-0255

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.

RECENT AUDITS:

Report No. F-001 (January 1991) reviews the state's financial status for the fiscal year ending June 30, 1990, and includes a financial section with the state's general purpose financial statements and a statistical section with labor, income, and population statistics. The financial statements indicate that the state's General Fund spent approximately $970 million more than it generated in revenues for fiscal year 1989-90, and ended the fiscal year with a fund deficit of $866 million.

Report No. P-013 (January 1991) concerns the Department of General Services' Office of Local Assistance (OLA) and its responsibilities for the administration of school construction and improvement programs. OLA provides administrative support for the State Allocation Board (SAB); in this capacity, OLA disburses funding according SAB policies to local public school districts to build or improve their school facilities. The majority of funding for such programs is derived from general obligation bonds issued by the state.

OAG's review indicates that OLA should closely monitor its programs to maximize the limited funds available for school projects. OAG noted several examples of OLA's poor use of funds, including its failure to take advantage of discounts offered by portable classroom manufacturers; its inadequate review of school districts' sales of surplus property; its failure to audit completed school construction projects; its funding of asbestos abatement projects prior to receiving SAB's required approval; its payment of excessive management fees and disbursal of funds without required documentation; and its failure to transfer some $18 million in rent income to the state's General Fund.

OAG's recommendations for improving OLA's administration of funding include developing procedures to ensure that school districts are reimbursed for costs incurred or commitments made before the SAB's approval of any project only when specifically allowed by law; obtaining and reviewing documentation from school districts where funds have been disbursed without the required documentation; determining whether the funds were used in accordance with the SAB's policies and state law, and recovering any funds improperly used; and promptly conducting close-out audits for all completed construction projects.

Report No. P-044 (January 1991) is the first in a series of semiannual reports regarding the way the Department of Health Services (DHS) processes requests to seek reimbursement for certain prescribed drugs under the Medi-Cal program. Under Medi-Cal, beneficiaries may receive prescription drugs from a list established by DHS; this list is known as the Medi-Cal list of contract drugs. When a doctor prescribes a drug that is not on the list of contract drugs, the provider (generally a pharmacist) must receive authorization to seek reimbursement for the cost of the drug; this is known as a treatment authorization request (TAR).

Chapter 457, Statutes of 1990 requires OAG to prepare a summary and analysis of DHS' data on the drug TAR process. Further, this legislation mandates that OAG submit a report on this data to the legislature beginning February 1, 1991, and every six months thereafter until August 1, 1992.

OAG's report analyzes statistical information concerning the numbers of drug TARs received and processed by DHS from June 1990 through November 1990, and reviews DHS' processes for approving, denying, modifying, and returning the request. During the six-month period reviewed, DHS processed 78,498 drug TARs, averaging 13,083 each month. Processing time ranged from 24 hours to 21 days.

The report found that DHS' ability to receive and process drug TARs is limited by the number of medical transcribers available to answer the toll-free long distance and local telephone lines. However, OAG noted that DHS is establishing a third field office to expand its capability for processing TARs. In addition, DHS is implementing a method for collecting complaints about its processing of drug TARs, as well as collecting data on the number of denied TARs which have been appealed to the Department of Social Services. This data should be available by the next reporting period in August 1991.

Report No. P-919 (February 1991) reviews Los Angeles County's implementation of the Greater Avenues for Independence (GAIN) program. State law requires that employment and training opportunities be provided to all applicants for and recipients of Aid to Families With Dependent Children (AFDC) who are not otherwise exempt through the GAIN program. A portion of Los Angeles County's GAIN program, case management services, is administered by a private contractor, MAXIMUS, Inc. (MAXIMUS). Following its review, OAG concluded that Los Angeles County complied with state and county requirements in awarding a contract to MAXIMUS for the performance of GAIN case management services; and that MAXIMUS is performing these services within the standards established by the county and does not exercise discretionary authority in the performance of its services.

However, OAG discovered that a state budget restriction combined with a county policy of not spending county funds on programs required by the state limited the county's ability to provide the level of GAIN services that more funding would otherwise have provided. Out of a total funding level of $45.4 million available through the Department of Social Services (DSS) for the provision of all GAIN services for fiscal year 1989-90, the state budget limited the county to spending no more than $7.9 million for GAIN case management services. Further, county policy prevented the county from augmenting the $7.9 million in state funding with county funds to expand case management services. Due to these policies, the county could refer only 10,600 (53%) people to the GAIN program out of approximately 20,000 people whom it estimates it could have served during 1989-90. However, the report notes that the state's budget

restrictions were removed from the 1990-91 budget, and the county will be able to spend the full allocation offered by DSS for GAIN services.

Report No. P-966 (February 1991) concerns the Department of Conservation's (Department) administration of the California Beverage Container Recycling and Litter Reduction Act (Act). The legislature intended the Act to encourage recycling through convenient, economical, and efficient opportunities for returning beverage containers for the refund established by the Act. The Act sets a recycling goal of 80% for beverage containers sold in the state and specifies that all beverage containers redeemed should be recycled. Beverage distributors are required to file reports of beverage container sales and to deposit a minimum redemption payment with the Department for each beverage container sold.

OAG found that the Department does not comply with the Act in four areas: (1) it does not always identify distributors who make late payments and thus are not able to assess the late penalties authorized under the Act; (2) operators of some certified recycling centers pay for beverage containers that do not have refund value; (3) the Department allocated more money for some of its recycling programs than it was authorized to spend; and (4) the Department has not obtained the required approval from the Department of General Services (DGS) for various contracts for services relating to the program.

Among other things, OAG recommended that the Department implement a policy for the rate at which it will assess penalties on late payments; issue inspection regulations for certified recycling centers; and obtain approval from DGS for all contracts over $12,500 for services except consulting, promotional, and advisory services necessary to implement the Act.

Report No. P-945 (March 1991) reviews the California Horse Racing Board's (CHRB) contracting for equine drug testing and aspects of its personnel practices. It also follows up on recommendations made by OAG in Report No. P-730 (February 1988). (See CRLR Vol. 8, No. 3 (Summer 1988) pp. 36-37 for background information on OAG's previous audit.)

CHRB regulates all horse race meetings in the state where parimutuel wagering occurs. The principal activities of the Board include licensing all participants in horse racing, allocating racing days to racing associations, contracting with stewards to officiate at the races, enforcing racing regulations and laws, and collecting the state's share of horse racing revenues. Also, CHRB contracts with various laboratories to test horses and humans for legal and illegal drugs administered within 24 hours before a race.

OAG found that CHRB deviated from its original budget assumptions by verbally instructing one such contractor, Truesdail Laboratories, Inc., to conduct more drug testing than budgeted for in the contract. Truesdail subsequently increased its testing, which contributed to cost overruns of $190,565 in fiscal year 1988-89 and $165,921 in fiscal year 1989-90. OAG noted that the Board's actions placed the state at risk of being sued by the contractor if the Department of General Services had not approved contract amendments for funding the additional work. The report also stated that, contrary to state law, CHRB authorized the state Controller's office to pay the contractor $52,988 in higher rates for certain tests before the Department of General Services approved the higher rates. According to the report, CHRB staff did not adequately analyze the cost impact of the increased testing; did not monitor its contract expenditures to determine whether the expenditures were meeting the constraints of the contract budget; and did not verify contractors' invoices against documents received from race tracks.

OAG recommended that CHRB accurately analyze the cost of changes to the terms of its contracts, including verbal changes, to stay within budgetary limits; refrain from significantly deviating from the terms of a contract without formally amending the contract; obtain approval from the Department of General Services before authorizing any work or payment outside the scope of its contracts or contract amendments; and verify the test sample numbers on contractors' invoices against the sample numbers on Board-generated documents to ensure that CHRB requested the testing for which it is being billed.

OAG next reviewed CHRB's personnel practices, stating that as of March 1, 1990, the Board's staffing had reached 51 full-time employees. Despite a State Personnel Board (SPB) requirement that each agency or department with 50 or more full-time employees establish an effective affirmative action program to achieve full representation for minorities and women, as of November 28, 1990, the Board had not yet developed such a program. However, on December 28, 1990, CHRB submitted an affirmative action plan to SPB; the plan was approved by SPB on February 20. OAG noted that CHRB has eleven positions classified as supervisory or managerial; of those positions, three are held by women and two are held by ethnic minorities (both Asians). OAG noted that the establishment of an affirmative action plan should allow CHRB to formalize methods for maintaining and increasing the number of women and minority employees working for the Board.

Finally, OAG reviewed the status of recommendations it made in February 1988 to improve CHRB's control over its regulatory activities. OAG stated that CHRB had implemented five of OAG's eight previous recommendations and plans to implement some or all of the remaining three recommendations.

Report No. F-050 (March 1991) reviews some of the administrative functions of the California State University (CSU), the largest system of senior higher education in the country. Managed by 24 trustees who appoint a chancellor, CSU has 20 campuses and a systemwide office consisting of six entities, including Office of the Chancellor. In the fall of 1989, CSU had approximately 360,000 students and 20,500 faculty members.

The report found that CSU has adequate supporting documentation for the administrative budgets reviewed. Further, OAG found no evidence that CSU has inappropriately transferred nonadministrative funds to provide funding for administrative purposes at the systemwide office, including the Chancellor's Office. OAG found that the expenditures of CSU and the Chancellor's Office generally complied with relevant CSU policies and procedures.

The report also noted that CSU's Board of Trustees has not always held its closed meetings in accordance with the Bagley-Keene Open Meeting Act, which governs meetings held by certain government agencies. The purpose of the Act is to ensure that state agencies conduct their actions and deliberations openly, with closed sessions allowed only for limited exceptions. Although the Board has used closed meetings to discuss issues not allowed by the Act, the report states that it has taken steps to improve its compliance with the Act.

Other Reports. In recent months, OAG also released *A Review of the Factors That Contributed to the Closure of the First Independent Trust Company* (Report No. P-041, January 1991), and *The Department of General Services Needs to Improve its Management of the Design and Construction of State Buildings* (Report No. P-017, February 1991).

LEGISLATION:

SB 1132 (Maddy). Existing law requires the Auditor General to complete his/her audits in accordance with the "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions" issued by the Comptroller General of the United States. As introduced March 8, this bill would require the Auditor General to complete the audits in accordance with the "Government Auditing Standards" issued by the Comptroller of the United States. This bill is pending in the Senate Rules Committee.

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

Executive Director: Jeannine L. English
Chairperson: Nathan Shapell
(916) 445-2125

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...."

The Commission seeks to achieve these ends by conducting studies and making recommendations as to the adoption of methods and procedures to reduce government expenditures, the elimination of functional and service duplication, the abolition of unnecessary services, programs and functions, the definition or redefinition of public officials' duties and responsibilities, and the reorganization and or restructuring of state entities and programs. The Commission holds hearings about once a month on topics that come to its attention from citizens, legislators, and other sources.

MAJOR PROJECTS:

The Snail's Pace of Reforming Residential Care Facilities for the Elderly (February 1991). This letter report is part of the Commission's long-term investigation into the quality of facilities that provide care for California's elderly. The Commission's related reports on facilities for the elderly include: *Community Residential Care in California: Community Care as a Long-Term Service* (December 1983); an untitled letter review in February 1985; and *Report on Community Residential Care for the Elderly* (January 1989). This letter report is designed to assess the changes that have been made in response to previous Commission reports and recommend a future course of action.

Residential care facilities (RCFs), also known as board and care facilities, provide a safe residence for the elderly and some assistance with meals and grooming. The California Department of Social Services (DSS) currently licenses 4,073 RCFs with a capacity to care for 93,601 elderly residents.

Since its 1983 report, the Commission has sponsored thirty bills to improve the licensing and monitoring of RCFs (all of which are detailed in the letter report). Some of these bills prohibit the operation of unlicensed facilities and require placement agencies to use only licensed facilities. Fines and other enforcement mechanisms were strengthened under several of the laws; others provide for better education and training of the people who operate residential care facilities. Still other laws require disclosure of more information to consumers regarding their right of access to RCF records and available protections for residents.

The Commission based its February 1991 report on public hearings and interviews with advocates for the elderly, DSS staff, and other experts. The report found that, in most cases, the current laws regulating RCFs are adequate, but significant problems exist in two areas. First, DSS has not designed or implemented regulations to permit enforcement of the RCF statutes. The report cited cases where DSS adoption of implementing regulations has taken more than five years after a bill was signed into law. In two instances, new laws were passed before older laws on the same issue were ever implemented. The report recommends that DSS place top priority on completing regulations to implement all RCF laws and report to the Governor and legislature on January 1, 1992 on the status of these regulations.

The second significant problem cited in the report is the failure of DSS to eliminate unsafe, substandard, and unlicensed RCFs. The report referred to the Commission's 1983 and 1989 reports which cited the same problem of unlicensed facilities. Calling the DSS response "painfully slow," the 1991 report found little evidence of DSS commitment to resolving the problem of unsafe, unlicensed facilities. The report recommended that DSS track its current efforts against unlicensed facilities and report the results to the Governor and the legislature by January 1, 1992.

Recent Hearing. On January 23, the Commission held a hearing on the status of women in state-regulated apprenticeship training programs. Specifically, the Commission considered the efforts of the Department of Industrial Relations' Division of Apprenticeship Standards toward fulfilling its mandate to bring women into nontraditional jobs. Commission staff estimates that the report on this hearing will be completed in May 1991.

Education Report. The Commission plans to complete a report focusing on educational dropouts in May 1991. This report will be based partially on a public hearing held before the Commission on this subject on November 15, 1990.

Future Hearings. The Commission had scheduled two public hearings on affordable housing—one on April 25 and one on June 27. Funds for studying this topic had been provided by AB 2895 (Roberti) (Chapter 1423, Statutes of 1988). However, Governor Wilson has