

INTERNAL GOVERNMENT REVIEW OF AGENCIES



The Reporter summarizes below the activities of those entities within State government which regularly review, monitor, investigate, intervene or oversee the regulatory boards, commissions and departments of California.

OFFICE OF ADMINISTRATIVE LAW

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The Office of Administrative Law (OAL) was established on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (AB 1111, McCarthy, Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of all existing and proposed regulations against six statutory standards—necessity, authority, consistency, clarity, reference and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted...." OAL has the authority to disapprove or repeal any regulation that, in its determination, does not meet all six standards.

OAL also has the authority to review all emergency regulations and disapprove those which are not necessary for the immediate preservation of the public peace, health and safety or general welfare.

Under Government Code section 11347.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the Administrative Procedure Act (APA) are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. These non-binding OAL opinions are commonly known as "AB 1013 determinations," in reference to the legislation authorizing their issuance.

MAJOR PROJECTS:

AB 1013 Determination. The following determination was issued and published in the *California Regulatory Notice Register* in recent months:

-February 16, 1988, OAL Determination No. 1, Docket No. 87-007. OAL determined that the Board of Prison Terms' Administrative Directive No. 87-4 is a regulation within the meaning of

the APA, thus requiring its adoption in accordance with APA rulemaking requirements. Directive No. 87-4, adopted by the Board in compliance with an opinion by the Attorney General, stated that prisoners serving sentences for 25 years to life, 15 years to life, or life with possibility of parole would no longer be considered eligible for work time credits under Penal Code section 2933.

OAL found that Directive No. 87-4, the implementation of which resulted in the filing of at least twelve *habeas corpus* petitions by affected life prisoners in two superior courts, is a standard of general application intended to implement, interpret, or make more specific section 2933 of the Penal Code. Government Code section 11347.5 requires that such a standard be adopted pursuant to the APA.

Legislative Requests for OAL Review of Regulations. Government Code section 11340.15 provides that OAL shall, at the request of any standing, joint, or select committee of the legislature, initiate a "priority review" of any regulation, group of regulations, or series of regulations. Notice of such a request is published in the *Notice Register* and is sent to interested parties. OAL subsequently takes into consideration the comments of interested parties in determining whether the regulation complies with the six standards of review established under Government Code section 11349.1.

A priority review requested by legislators must be completed within ninety days of OAL's receipt of the request. If OAL determines that the challenged regulation does not satisfy any of the six APA standards, it must issue an order to show cause (OSC) as to why the regulation should not be repealed. If the agency which promulgated the challenged provision does not make the proper showing within the specified time period, OAL must pursue repeal of the regulation as provided by Government Code section 11340.15(c).

In response to a request for priority review initiated by the Assembly Transportation Committee (see CRLR Vol. 8, No. 1 (Winter 1988) p. 35), OAL has issued an OSC as to why section 403.04, Title 13 of the California Code of Regulations, should not be repealed (see *Notice Register* dated February 19, 1988). Administered by the Department of Motor Vehicles, section 403.04 currently requires new car sellers to possess vehicles before advertising them for sale.

Auto brokers, who shop among dealers for the best prices on comparable automobiles and then resell to consumers for a commission, contend that section 403.04 will effectively force them out of business. According to an article appearing in the *Los Angeles Daily Journal* on February 12, auto brokers are not alone in their opposition to the challenged regulation. In a letter to Assemblymember Richard Katz, Chair of the Assembly Transportation Committee, the Federal Trade Commission "expressed concern about any state regulation that bans advertising."

In addition to the substantive issues raised by section 403.04, the underlying procedural implication of OAL's review has also raised questions. In its OSC, OAL cites "an apparent failure to comply with the standards set forth in Government Code section 11349.1." Thus, OAL is effectively reversing its own decision issued in late 1987, at which time the regulation was found to satisfy the six APA standards of review. In explaining its reversal, OAL cites "allegations of inadequate notice to a significant segment of the directly affected public," and "new information concerning the intent of the legislature as to the underlying statutes and of the need for consideration of recently enacted legislation." The public comment period on the proposed repeal ended on March 19.

Rulemaking Video Planned. OAL is currently producing a training video, which is intended to explain APA-mandated rulemaking procedures to state agencies. No estimated date of completion has yet been established for the video, which is part of an ongoing effort by OAL to demystify some of the more technical and complex aspects of the APA-governed regulatory process.

Requests for Governor's Office Review. Infrequently, an administrative body will appeal OAL's disapproval of proposed regulations. Authority for such an appeal is provided in Government Code section 11349.5, which requires that the request for review be filed with the Governor's Legal Affairs Secretary



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and OAL within ten days of receipt of the decision which is being appealed.

Within ten days of its receipt of the request for review, OAL must submit a written response to the Governor's Office and the agency appealing the decision. The Governor's Office then has fifteen days in which to provide a written determination concerning the challenged OAL decision.

On December 3, 1987, OAL disapproved simulcast wagering regulations adopted by the California Horse Racing Board (CHRB). (See *infra* agency report on CHRB; see also CRLR Vol. 7, No. 3 (Summer 1987) pp. 127-28 and Vol. 7, No. 2 (Spring 1987) p. 101 for background information.) In its written decision, OAL noted that in adopting the rejected provisions, which would have been contained in new Article 24, Title 4 of the California Code of Regulations, CHRB failed to satisfy APA notice and clarity requirements; failed to adequately substantiate fiscal impact in its accompanying rulemaking file; and "establishe[d] prescriptive standards without the necessary consideration of performance standards as alternatives."

The focal point of the CHRB's subsequent appeal, as well as OAL's response to that appeal, appeared to be OAL's finding that the CHRB's Notice of Proposed Regulatory Action "was invalidated by a legislative modification of the regulatory authority upon which the proposal was based." Specifically, OAL found that "the Board took public testimony on and adopted the simulcast wagering regulations, but before the regulations could become effective, the Legislature significantly changed the statutory authorization in the Horse Racing Law for simulcast wagering, through the enactment of Chapter 1273 of the statutes of 1987, an urgency statute which became effective September 28, 1987."

In its response to this finding, the CHRB noted, *inter alia*, that "[OAL did] not assert any actual conflict between the adopted regulations and the statutes as amended by Chapter 1273." OAL countered that "failure of the Board to renounce the simulcast wagering regulations after the Legislature changed the statutes upon which the regulations were based deprived interested members of the public of a meaningful opportunity to participate in the rulemaking process for the regulations. An approval of the Board's simulcast wagering regulations under these circumstances would be akin to an approval of a change in the rules of a game after the game is over...."

In addition to appealing OAL's decision to the Governor's Office, which extended the deadline for completion of its review until March 22, the CHRB recently announced in its 1987 Annual Report that it intends to seek an exemption from adherence to the APA rulemaking requirements (including OAL approval) when it is promulgating procedural regulations to establish or revise a form of parimutuel wagering.

LEGISLATION:

SB 1754 (Morgan), OAL-sponsored legislation which was introduced on January 13, would have established a procedure for OAL repeal of existing regulations for which the statutory authority has been repealed or sunsetted. On March 7, an aide to Senator Morgan indicated that the bill will be dropped.

AB 2732 (Felando) represents an alternative approach to addressing problems created by the repeal or sunseting of statutory authority for existing regulations. This bill, which has passed out of policy committee and is pending before the Assembly Ways and Means Committee as of this writing, would provide that "whenever a statute is repealed or, by its own terms, becomes ineffective or inoperative, any regulation adopted to implement, interpret, make specific, or otherwise carry out the provisions of the statute shall also be deemed, by operation of law, repealed, ineffective, or inoperative, as the case may be."

The measure, which may be amended in the Ways and Means Committee to accommodate concerns of the Franchise Tax Board, would also provide for the temporary repeal of any regulation for which the statutory authority has been temporarily repealed or rendered ineffective or inoperative by a provision of law which is effective only for a limited period.

LITIGATION:

A recently-consolidated lawsuit (see CRLR Vol. 8, No. 1 (Winter 1988) p. 36) challenging the validity of an OAL-approved regulation defining the scope of chiropractic practice remains in its pleading stage in Sacramento Superior Court. Rulings on defendant OAL's motions to strike and demurrers were anticipated by the end of March in *California Chapter of the American Physical Therapy Association (APTA) v. California, et al.* (See also CRLR Vol. 7, No. 4 (Fall 1987) at pp. 30 and 100.)

Plaintiffs in the actions, which identify a number of substantive and procedural issues concerning section 302 of

the regulations administered by the Board of Chiropractic Examiners, include APTA, the California Medical Association, the Physical Therapy Examining Committee, and the Board of Medical Quality Assurance.

OFFICE OF THE AUDITOR GENERAL

Auditor General: Thomas W. Hayes (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. P-758 (January 1988) concerns the need for the California Public Utilities Commission (PUC) to more fully report the work statistics it