

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

*Director: Linda Stockdale Brewer
(916) 323-6221*

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 Determinations. The following determinations have been issued and published in the *California Administrative Notice Register* in recent months:

-October 26, 1987, OAL Determination No. 14, Docket No. 87-003. This determination concerns several Department of Motor Vehicle (DMV) publica-

tions, including Chapter 12 of DMV's *Driver Safety Manual* (entitled "Implied Consent Hearings"), and another publication entitled *Peace Officer's Guide to the Implied Consent Law*.

OAL found certain provisions of the former publication to be regulations within the meaning of the APA, because they establish rules and procedures interpreting and supplementing California's implied consent statute. Additionally, two parts of the *Peace Officer's Guide* were determined to be regulatory in nature and therefore subject to APA rulemaking requirements. The balance of both publications' text was found to be either non-regulatory or simply consisting of "restatements of existing statutes, regulations, or case law."

-November 19, 1987, OAL Determination No. 15, Docket No. 87-004. OAL determined that portions of the California Department of Corrections' *Departmental Administrative Manual* were regulations. OAL found that the Department had "unlawfully established rules and procedures that interpret or supplement statutory, regulatory, or case law" in its promulgation of provisions governing prison law libraries. The majority of the material reviewed by OAL was found to be either non-regulatory in nature or a restatement of existing law.

-December 4, 1987, OAL Determination No. 16, Docket No. 87-005. OAL determined that the Board of Behavioral Science Examiners had failed to comply with the APA in establishing rules concerning required training in child abuse assessment and reporting. However, it was also noted that most of the challenged rules were later adopted in accordance with APA rulemaking requirements.

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. A notice of such a request

is published in the *Notice Register* and is sent to interested parties, with OAL subsequently taking 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 one or more of the six APA standards, it must issue an order to show cause why the regulation should not be repealed. If the agency which promulgated the challenged provision does not make such a showing within the specified period of time, OAL must pursue repeal of the regulation as provided by Government Code section 11340.15(c).

In recent months, OAL has received several requests for priority review from the legislature. The first, initiated by the Senate Committee on Industrial Relations, asked whether section 16200, Title 8, California Administrative Code, relating to the payment of prevailing wages on public works projects, is inconsistent with section 1773 of the Labor Code. On December 24, OAL issued an order to show cause (OSC) why section 16200 should not be repealed. OAL specified in the OSC that the challenged provision does not appear to comply with the consistency and necessity standards.

Under Government Code sections 11349(a) and 11349.1, the need for a regulation must be demonstrated by substantial evidence, as demonstrated in the rulemaking record pertaining to that specific rule. Government Code 11349(d) defines "consistency" as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

The second recent request for priority review was initiated by the Assembly Transportation Committee. Specifically, legislators asked OAL to determine whether section 403.04, Title 13, California Administrative Code, relating to the availability of vehicles advertised for sale by automobile dealers, meets the six APA standards of review. The public comment period relevant to this request was to end on January 18.

LEGISLATION:

AB 1442 (Wright), which became effective January 1 (Chapter 551, Statutes of 1987), represents an attempt by OAL to reduce what may be a costly impact



of regulation on small businesses. The measure will exempt small businesses from filing reports required by state agency regulations unless such reporting is necessary for the public's health, safety, or welfare.

The bill, which only affects reporting requirements in regulations adopted on or after January 1, augments Government Code section 11346.53, which contains other requirements pertaining to the potentially adverse economic impact of regulation on small business.

"Small business" is variously defined under section 11342(e) of the Government Code as including those businesses independently owned and operated; businesses not dominant in their fields of operations; those agricultural, trade, service provider, construction, and transportation and warehousing operations not exceeding specified revenue ceilings; manufacturing enterprises not exceeding 250 employees; health care facilities not exceeding specified bed or revenue limits; and those businesses generating no more than 4.5 million kilowatt hours of electrical power annually.

LITIGATION:

Two lawsuits challenging the validity of an OAL-approved regulation defining the scope of chiropractic practice, including one suit in which OAL is named as a defendant, have been consolidated in Sacramento Superior Court. *California Chapter of the American Physical Therapy Association (APTA) v. California, et al.* (discussed in CRLR Vol. 7, No. 4 (Fall 1987) at pp. 30 and 100) has been combined with a similar suit filed by the California Medical Association (CMA) (discussed in CRLR Vol. 7, No. 4 at p. 100). Together, the two suits identify a number of substantive and procedural issues concerning recently-approved section 302 of the regulations administered by the Board of Chiropractic Examiners, which is also named as a defendant.

In addition to APTA and the CMA, plaintiffs in the newly-consolidated lawsuit now include the Physical Therapy Examining Committee and Board of Medical Quality Assurance. A case conference was scheduled for January.

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-756 (September 1987) concerns staff turnover in the four departments which regulate much of California's financial industry, including the State Banking Department, the Department of Savings and Loan, the Department of Corporations, and the Department of Real Estate. Specifically, the report analyzes attrition rates among examiners, auditors, and appraisers in the four departments.

OAG's study found that during fiscal years 1985-86 and 1986-87, attrition among examiners of the State Banking

Department was higher than attrition among all state employees in similar positions. Analysis of the other three departments for the same time period showed that attrition slowed to a rate less than attrition among all state employees in similar jobs.

The OAG report also discusses findings of the Legislative Analyst concerning employee attrition. In the analysis of the Governor's Budget for fiscal year 1987-88, the Legislative Analyst noted a high level of employee turnover in the State Banking Department, the Department of Savings and Loan, and the Department of Corporations. High attrition was attributed to several factors, including better salary and benefits offers by private and other public employers, as well as the promotional and salary limitations within the state civil service system.

The Legislative Analyst made three recommendations to those departments and to the Department of Personnel Administration (DPA), including the following: (1) DPA should expand the job classification of examiner at the three departments to provide greater promotional opportunities; (2) DPA should conduct a salary and benefits survey of all state examiners, auditors, and appraisers, and compare them with the salary and benefits offered to similar employees in other states and the federal government; and (3) more authority should be delegated to the three departments for filling and reclassifying vacant examiner positions.

The OAG revealed that the first two recommendations have been implemented. The three departments already have authority to fill and reclassify vacant examiner and auditor positions at the entry, intermediate, and journey levels without review by DPA. The third recommendation pertains to vacant supervisory and specialist positions, referred to as "Examiner IVs." The DPA believes that because its review of the Examiner IV classification is complex, it should retain that authority.

Additionally, DPA implemented two other changes on its own initiative. DPA authorized a salary increase for entry-level auditors at the Department of Savings and Loan and the Department of Corporations, and for entry-level examiners at the State Banking Department. This step is designed to improve the ability of the three departments to fill vacant positions. During fiscal years 1985-86 and 1986-87, DPA authorized an increase in the number of Examiner IV positions at the Depart-