



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 (APA) made by 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 is also authorized 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. The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and distributing.

Under Government Code section 11340.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the 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 originally authorizing their issuance.

In April, Governor Wilson reappointed John D. Smith to serve as OAL Director; Smith has served with OAL since 1986 and has served as Director since 1990.

MAJOR PROJECTS

1995 OAL Determinations. On February 22, OAL released 1995 Determina-

tion No. 1, Docket No. 90-023, in which OAL considered whether, in ratifying a cleanup and abatement order pursuant to Water Code section 13304, the California Regional Water Quality Control Board for the Los Angeles Region (Regional Board) adopted a regulation required to be promulgated pursuant to the APA. On April 23, 1990, after two hearings, the Regional Board ratified a cleanup and abatement order issued by Board staff on December 18, 1989, pursuant to Water Code section 13304. The abatement order required HR Textron, a manufacturer located within the Board's jurisdiction, to install a groundwater monitoring well to investigate the extent of pollution caused by a leaking underground storage tank. The California Manufacturers Association alleged that, in ratifying the abatement order, the Regional Board established a general rule of application whereby in any soil contamination case resulting from a release from an underground storage tank of contaminants into soil below grade, groundwater monitoring would automatically be required in a cleanup and abatement order pursuant to Water Code section 13304.

OAL concluded that the record submitted was insufficient to show that the Regional Board established a standard of general application subject to the APA in its action to ratify the abatement order. OAL first determined that the Regional Board is a state board within the meaning of the APA, and that the Board's policies and procedures for the investigation, cleanup, and abatement of discharges under Water Code section 13304 are subject to APA rulemaking requirements. OAL next determined that the APA rulemaking process only applies to the quasi-legislative decisions of the Board. Finally, OAL determined that all of the testimony and discussion on the record concerned this particular abatement order and site, and that the proceeding at issue was quasi-judicial as opposed to quasi-legislative; therefore, OAL found that the record did not show that the Regional Board established a standard of general application subject to the APA rulemaking procedure.

On April 18, OAL released 1995 Determination No. 2, Docket No. 90-024, in which OAL considered whether the Employment Development Department's policy listing requirements that employees in the Employment Program Representative (EPR) and Disability Insurance Program Representative (DIPR) classes must meet in order to be eligible for a time base change from permanent intermittent to full-time work is a regulation and therefore without legal effect unless adopted in compliance with the APA.

OAL found that the Department's quasi-legislative enactments are generally subject to the APA, and that the challenged time base change policy is a regulation as defined in the key provision of Government Code section 11342(g). However, OAL found that the time base change policy falls within the "internal management exception" to the APA rulemaking requirements because the policy at issue does not concern matters of serious consequence involving an important public interest, and therefore does not violate Government Code section 11340.5(a). OAL thus concluded that the policy, although a "regulation," is nonetheless exempt from the APA because it falls within the internal management exception.

On April 26, OAL released 1995 Determination No. 3, Docket No. 90-026, in which OAL considered whether or not a Department of Corrections rule prohibiting inmates from possessing electric typewriters is a regulation and is therefore without legal effect unless adopted in compliance with the APA. On March 19, 1992, after the filing of this Request for Determination, the Department notified OAL that as of January 7, 1992, it had rescinded the rule. Nonetheless, OAL found that the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA; the Department's Operations Manual section 54030.4.3.2, which prohibits inmates from possessing electric typewriters, is a "regulation" as defined in Government Code section 11342(g); no exceptions to the APA rulemaking requirements apply; and, for the time period that section 54030.4.3.2 was in effect, it violated Government Code section 11340.5(a). OAL thus concluded that the rule prohibiting inmates from possessing electric typewriters was without legal effect.

LEGISLATION

AB 250 (Baldwin, Woods), as introduced February 2, would require OAL and the Secretary of the Trade and Commerce Agency, on or before January 1, 1997, to recommend to the legislature the suspen-



sion or repeal of all state regulations determined by OAL and the Secretary to be more stringent than federal regulations on the same subject. The bill would also provide that its provisions shall become inoperative on July 1, 1997 and, as of January 1, 1998, shall be repealed, unless a later enacted statute that becomes effective on or before January 1, 1998 deletes or extends the dates on which it becomes inoperative and is repealed. [A. CPGE&ED]

AB 1135 (Morrissey), as amended April 26, would require, until January 1, 1999, all state agencies within the Trade and Commerce Agency as of July 1, 1995, proposing to adopt or substantively amend any administrative regulation to consider the cumulative impact of all regulations that became effective on and after January 1, 1990 on specific private sector entities that may be affected by the proposed adoption or amendment of the regulation, and to include this information in the notice of proposed action. The bill would also require such an agency to permit public comment on the cumulative impact of regulations that became effective on and after January 1, 1990 and, if the agency determines that the impact of these regulations and the proposed regulation on the same affected private sector entity is significant and adverse, to determine whether an alternative regulation that would be less harmful to that private sector entity and the economy in general should be adopted, and would require the agency to permit public comment on this alternative regulation. [A. Floor]

AB 1179 (Bordonaro). The APA specifies that no administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to business. As amended May 4, this bill would instead specify that no administrative regulation adopted after January 1, 1996, shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses, that the intended benefits of the regulation justify its costs, and the proposed regulation is the most cost-effective of available regulatory options.

The APA requires state agencies to submit specified information to OAL concerning regulations adopted by that agency; OAL is required to review and approve all regulations adopted pursuant to the APA and submitted for publication in the *California Regulatory Code Supplement*,

based on specified standards. OAL is further required to return a regulation to the adopting agency under specified circumstances. Existing law requires the Secretary of the Trade and Commerce Agency to evaluate the findings and determinations required of any state agency that proposes to adopt regulations under the APA, and to submit comments into the rulemaking record in regard to the impact of the regulations on the state's business, industry, economy, or job base. This bill would revise the Secretary's duties in this regard. It would require adopting agencies to submit specified information to OAL that is pertinent to the Secretary's comments, objections, or recommendations. It would also require OAL to return regulations to the adopting agency under certain additional circumstances. [A. Appr]

AB 1160 (Morrissey), as introduced February 23, would require OAL and the Secretary of Trade and Commerce, on or before January 1, 1998, to recommend to the legislature the suspension or repeal of all state regulations determined by OAL and the Secretary to be more stringent than federal regulations on the same subject. This bill would make this provision inoperative on July 1, 1998, and would repeal it on January 1, 1999. [A. CPGE&ED]

SB 452 (Johannessen), as amended May 11, would prohibit enforcement of any regulation filed with the Secretary of State unless the regulation has been made available to the public for thirty days, as specified; require that a regulation be declared invalid by a court if it has not been made available to the public for thirty days or if an agency has failed to mail written copies of new regulations within ten days after receipt of any written or oral request for these copies; and provide that if a regulation is declared invalid because of a failure to comply with the thirty-day availability requirement, the adopting agency would not be required to reinstate adoption, review, and approval procedures for that regulation in accordance with the APA, but instead the regulation would be deemed valid and enforceable upon the agency's compliance with the availability requirement. [A. CPGE&ED]

AB 1857 (Brewer). The APA authorizes departments, boards, and commissions within Cal-EPA, the Resources Agency, and the Office of the State Fire Marshal to adopt regulations that are different from regulations contained in the *Code of Federal Regulations* addressing the same issues upon a finding by the public entity adopting the regulations that certain justifications exist. As introduced February 24, this bill would broaden this authorization to permit all state agencies

to adopt regulations that are different from regulations contained in the *Code of Federal Regulations*. It would also require a state agency, prior to adopting any "major regulation" (as defined) to evaluate alternatives to the requirements of the proposed regulation and consider whether there is a less costly alternative or combination of alternatives that would ensure full compliance with statutory mandates in the same amount of time as the proposed regulatory requirements. [A. CPGE&ED]

AB 1659 (Woods), as amended May 11, would require specified state agencies (including agencies within Cal-EPA and the Resources Agency and the Office of the State Fire Marshal, the Office of Emergency Services, the Division of Drinking Water and Environmental Management, and the State Lands Commission) to determine whether a proposed regulatory change would be a "major regulation" (as defined) prior to publishing notice of the proposed action, and to provide for public comment on that determination. It would require these agencies to provide specified related information and findings in the statement of reasons submitted with the notice of proposed action and with the adopted regulation. The bill would provide that in the event the agency cannot make specified findings required in this regard, it shall notify OAL that it has removed the proposed regulatory change from active consideration. [A. Floor]

SB 329 (Campbell), as introduced February 10, would prohibit a state agency, commencing January 1, 1996, from adopting any regulation in an area over which a federal agency has jurisdiction, unless the state agency notifies each house of the legislature thirty days prior to the effective date of the regulation. The bill would also declare that it is the intent of the legislature that the rules of each house shall ensure that a bill prohibiting the adoption of a particular regulation may be acted upon by both houses within the thirty-day period specified above. [S. GO]

AB 1142 (Baldwin), as introduced February 23, would prohibit all regulations adopted by a state agency that has been determined by OAL to have a substantial adverse job creation impact from remaining in effect for more than four years from the date of its filing with the Secretary of State. [A. CPGE&ED]

SB 690 (Mountjoy), as amended March 30, would exempt the Department of Personnel Administration from the APA and instead provide alternative procedures for the Department to use in the adoption, amendment, or repeal of a regulation. The alternative procedures include, among other things, a public comment period,



preparation of specified information relative to the proposed rule action, public notice, a public hearing, and publication in the *California Code of Regulations*. This bill would require Department policies, guidelines, rules, and documents not subject to these rulemaking procedures to be made reasonably available to state agencies, state employees and their representatives, and other interested parties. This provision, rather than the APA, would also apply to the state Personnel Board for the purposes of adopting, amending, and repealing civil service classifications in accordance with the California Constitution. This bill would continue all Department regulations, policies, guidelines, rules, and documents in effect on the effective date of this article until they are amended or repealed, as specified. [S. GO]

SB 235 (Hughes). Existing law establishes procedures for the enforcement of child support obligations through the courts and through state and local agencies. Under existing law, the state Department of Social Services is the administrator of the state plan for securing child and spousal support and determining paternity. Existing law requires each county to maintain a unit in the office of the district attorney for the same purposes. As introduced February 7, this bill would establish the Division of Child Support Enforcement in OAL, and would provide for the administrative adjudication of child support obligations. The bill would establish procedures for hearings to establish child support and paternity, the enforcement and modification of support obligations so established, and for judicial review of final orders issued by an administrative law judge. [S. Jud]

BUREAU OF STATE AUDITS

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Created by SB 37 (Maddy) (Chapter 12, Statutes of 1993), the Bureau of State Audits (BSA) is an auditing and investigative agency under the direction of the Commission on California State Government Organization and Economy (Little Hoover Commission). SB 37 delegated to BSA most of the duties previously performed by the Office of Auditor General, such as examining and reporting annually upon the financial statements prepared by the executive branch of the state, performing other related assignments (such as performance audits) that are mandated by statute, and administering the Reporting

of Improper Governmental Activities Act, Government Code section 10540 *et seq.* BSA is also required to conduct audits of state and local government requested by the Joint Legislative Audit Committee (JLAC) to the extent that funding is available. BSA is headed by the State Auditor, appointed by the Governor to a four-year term from a list of three qualified individuals submitted by JLAC.

The Little Hoover Commission reviews reports completed by the Bureau and makes recommendations to the legislature, the Governor, and the public concerning the operations of the state, its departments, subdivisions, agencies, and other public entities; oversees the activities of BSA to ensure its compliance with specified statutes; and reviews the annual audit of the State Audit Fund created by SB 37.

MAJOR PROJECTS

The Department of Health Services' Information On Drug Treatment Authorization Requests (February 1995) is the eighth in a series of semiannual reports by BSA concerning the way the Department of Health Services (DHS) processes drug treatment authorization requests (TARs) for certain prescribed drugs under the Medi-Cal program [14:4 CRLR 15; 14:2&3 CRLR 13; 14:1 CRLR 15]; this report focuses on drug TARs processed from June 1994 through November 1994. During this six-month period, DHS processed 214,303 drug TARs, a 177% increase in requests since the first six-month period reviewed; according to BSA, this increase is largely due to changes in the governing code. BSA found that DHS was not able to process the drug TARs in a timely manner and a backlog of 2,344 requests developed by November 1994. Ten pharmacists contacted by BSA reported experiencing processing delays, but also reported that patient care was not affected because the pharmacists filled the patients' prescriptions in advance of receiving the TAR approval. Also, 79 new positions were added in DHS' drug TAR processing units in October 1994 due to the increase of drug TARs received during this period.

Orange County: Treasurer's Investment Strategy Was Excessively Risky and Violated the Public Trust (March 1995) is BSA's audit of the Orange County Treasurer's Office; the County Treasurer-Tax Collector is an elected official, serves a four-year term, and is responsible for receiving, investing, and keeping safe all funds belonging to the County and other monies deposited with the Treasurer. BSA found that during the 1990s, the Treasurer sacrificed his portfolio's safety and liquidity in a futile attempt to maintain yields;

as a result of his failed strategies, the County's investment portfolio ultimately lost \$1.69 billion, the County filed for bankruptcy protection on December 6, 1994, and critical public services are in jeopardy throughout Orange County.

In addition to managing County monies from such sources as property taxes, the Treasurer also manages the monies of approximately 190 public agencies, including cities, special districts, and school districts; the vast majority of these agencies are within Orange County. BSA found that the former Treasurer pursued an investment strategy that placed the funds of the 190 participants in his portfolio at unnecessary risk. For example, the Treasurer excessively utilized short-term reverse repurchase agreements to leverage his portfolio, and purchased highly volatile, long-term structured notes with the proceeds in an attempt to capture higher yields. In a reverse repurchase (or "reverse repo") agreement, the owner of a security, such as the County, "borrows" by selling the security to an investment broker with an agreement to repurchase it a short time later and to pay a stipulated interest rate as the cost of borrowing the money. The security owner can then use the cash received, leveraging the original principal by, in effect, investing the same money twice. If the cost of borrowing is less than the earnings on the investment, then the reverse repo transaction is beneficial to the security owner. To maintain a high rate of earning, and to cover the interest payments, the Treasurer invested in long-range investments with higher interest rates. Interest rates rose in 1994, causing borrowing costs to increase and the value of the investments to decline; the leveraging strategy thus failed.

Among other things, BSA also found that the Treasurer violated the public trust in two ways. First, he altered County accounting records for investment pool interest earnings. As a result, the County's general fund received approximately \$93 million more in interest earnings than it was entitled to receive from the investment portfolio. Second, the Treasurer violated the public trust by shifting nearly \$300 million in losses incurred by specific investments of the County to all portfolio investors.

BSA made the following recommendations to the Orange County Board of Supervisors to assist it in formulating a corrective action plan for the future:

- The Board of Supervisors should direct the Treasurer's Office to prepare a comprehensive investment policy that establishes safe investment guidelines by limiting the use of risky investments and