



The Omnibus Drug Bill will also allocate more money for training and law enforcement programs conducted by the ABC, such as ABC's Drug Enforcement Narcotics Team, which investigates licensees suspected of selling and/or allowing drug sales on their premises.

**License Lottery.** The ABC recently conducted a lottery for new on-sale and off-sale general liquor licenses. A maximum of 25 licenses are issued every year in each county. Winners have ninety days after they win the lottery to file an application designating a location for their establishment.

## LEGISLATION:

Following Governor Deukmejian's veto of AB 2187 (Friedman) (see CRLR Vol. 8, No. 4 (Fall 1988) p. 78 for background information), Assemblymember Terry Friedman is expected to reintroduce his bill during the 1989 legislative session. The bill would have prohibited the ABC from issuing or renewing a liquor license to certain private clubs which discriminate against members or employees on the basis of color, race, religion, ancestry, national origin, sex, or age.

The veto protected approximately 70 private clubs in California from losing their liquor licenses. Members of many of these clubs contributed to the Governor's campaign committee.

In his veto message, the Governor stated that although he is personally opposed to any discrimination which may occur in private clubs, the granting of a liquor license to a club does not signify the state's approval of the club's discriminatory practices. Deukmejian believes that AB 2187 would violate club owners' and members' constitutional right of free and voluntary association. However, the U.S. Supreme Court recently upheld the constitutionality of a similar New York City ordinance against discriminatory clubs.

## BANKING DEPARTMENT

*Superintendent: Howard Gould*  
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The State Banking Department 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 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 seeking 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 examiners following passage of Proposition 13, the superintendent now conducts examinations only when necessary, but at least once every two years. The Department is coordinating its examinations with the FDIC so that every other year each agency examines certain licensees. New and problem banks and trust companies are examined each year by both agencies.

The superintendent administers the Small Business Loan Program, designed to provide long-term capital to rapidly growing small businesses whose growth exceeds their ability to generate internal earnings. Under the traditional standards used by banks, these small businesses cannot provide adequate security to qualify for regular bank loans.

The superintendent licenses Business and Industrial Development Corporations which provide financial and management assistance to business firms in California.

Acting as Administrator of Local Agency Security, the superintendent oversees all deposits of money belonging to a local governmental agency in any state or national bank or savings and loan association. All such deposits must be secured by the depository.

## MAJOR PROJECTS:

*Delayed Funds Availability Regulations.* On October 17, Superintendent Gould adopted emergency amendments to the Department's regulations, which appear in Chapter 1, Title 10 of the California Code of Regulations, concerning the maximum length of time a bank may restrict a customer's access to deposited funds. The Department's existing funds availability regulations were repealed, and the funds availability provisions in the Federal Reserve Board's Regulation CC, 12 C.F.R. Part 229, were made applicable to both transaction and nontransaction accounts (e.g., checking and savings accounts), except that four- to six-day hold periods apply to in-state non-local items. These federal regulations adopted under the federal Expe-



## REGULATORY AGENCY ACTION

ditioned Funds Availability Act preempt any provisions of inconsistent state law, except state laws which require funds to be made available for withdrawal in a shorter time than required by the federal regulations.

In November, the Superintendent proposed to permanently adopt the emergency regulations. A hearing on the proposed permanent regulations was scheduled for January 12 in San Francisco. (For more information on the Expedited Funds Availability Act, see CRLR Vol. 8, No. 4 (Fall 1988) pp. 79-80 and Vol. 8, No. 1 (Winter 1988) pp. 77-78.)

**Proposition 103.** On November 10, the California Supreme Court blocked the immediate implementation of Proposition 103, the insurance reform initiative passed by the voters on November 8 which (among other things) repeals the Insurance Code's prohibition against banks acting as insurance agents or brokers. However, on December 7 the Court lifted its stay as to all but Proposition 103's rate rollback and billing insert provisions (for related discussion, see *infra* report on DEPARTMENT OF INSURANCE), thus presumably clearing the way for banks to be licensed as insurance agents.

**Comments Sent to Congress.** On September 6, Superintendent Gould sent a letter to members of the U.S. House of Representatives' Energy and Commerce Committee expressing his concern over the treatment of state-chartered banks' insurance and real estate activities in H.R. 5094. The then-pending legislation, which expired at the end of last session and has not yet been reintroduced, provided that the insurance activities of state-chartered banks owned by out-of-state holding companies would no longer be governed by the state law concerning insurance activities in the state where the affiliate is located, and that a moratorium would be placed on future exercise of real estate activities by state-chartered subsidiaries of out-of-state affiliates.

Superintendent Gould had previously expressed these concerns to the House Banking Committee in July, arguing that these provisions usurp state control over insurance activities of banks within its borders and place the state-chartered banks owned by out-of-state holding companies at a competitive disadvantage. However, the Banking Committee subsequently approved the proposed legislation and defeated a proposed amendment which would have preserved state authority over insurance activities of state-

chartered banks owned by out-of-state holding companies. (For more information, see CRLR Vol. 8, No. 4 (Fall 1988) p. 80 and Vol. 8, No. 2 (Spring 1988) p. 82.)

**Quarterly Report.** At the close of business on June 30, 1988, the 276 state-chartered banks of deposit with 1,682 branches had total assets of \$93.9 billion, an increase of \$3.5 billion, or 3.9%, over June 30, 1987. During this one-year period, there was a net decrease of five banks and two branches. Fiduciary assets of the trust departments of 41 state-chartered banks, one title insurance company, and 19 non-deposit trust companies totalled \$207.2 billion, an increase of \$34.1 billion, or 19.7%, from June 30, 1987. The assets of 102 agencies and branches of foreign banking corporations (having 119 offices) increased 13.6% to \$72.6 billion.

**Superintendent's Pacific Rim Trip.** In October, Superintendent Gould visited Hong Kong, Taiwan, and Japan to improve working relations with the Department's regulatory counterparts in the three Pacific Rim countries. The California Department of Commerce and the Governor's Trade Representative in Tokyo joined Superintendent Gould in several meetings in an effort to encourage increased trade and investment from California into the three countries. The Superintendent's report on the trip states that 64% of the total banking assets regulated by the Department are foreign-controlled, with a great majority of those assets from Pacific Rim countries. Superintendent Gould reported that last year, California had two-way trade in the Pacific Rim of \$90 billion, an increase of 17% in one year. Japan is California's largest trading partner, with Taiwan third, and Hong Kong sixth. The Department and regulators in Hong Kong, Taiwan, and Japan plan to develop a regular exchange program among their respective staffs.

**Conference of State Bank Supervisors.** The Conference of State Bank Supervisors (CSBS), the nationwide association of banking superintendents, has elected Superintendent Gould as its Vice-Chair. The 84% increase in California bank memberships in CSBS during 1988 contributed to Superintendent Gould's decision to accept the Vice-Chair position. It is expected that Superintendent Gould will become CSBS Chair in 1990. Additionally, four California bankers have accepted appointments as CSBS State Representatives.

**Warning Issued.** On October 24, the Department issued a warning to cease

and desist from doing business in California to Pacific Overseas Bank, Ltd., which is not authorized to transact business in the way or manner of a bank or trust company.

### LEGISLATION:

During the 1989 legislative session, the California Bankers Association (CBA) plans to sponsor a bill to repeal the entire California Banking Law (California Financial Code sections 99-3904), and replace it with 468 new sections of code. The CBA proposal would make major changes in existing law, including the following:

- Change the regulatory process by creating strict time deadlines for the Department of Banking to act on applications by banks and trust companies for approval of new banks, mergers, sales, branch closures, and new activities. Some types of applications would also be subjected to a "deemed approval" standard, so that a bank's application would be automatically approved if the Superintendent of Banking does not act upon it within a specified time period.

- Eliminate the requirements of current law that the Superintendent must find each of a list of factors satisfied before he/she approves a merger or acquisition by a state-chartered bank.

- Eliminate the current provision requiring a finding that a proposed merger or sale of a bank does not harm the availability of funds for home loans.

- Eliminate the Financial Code requirement that an agreement for the sale of assets of a bank must make provision for responsibility for all liabilities of the selling bank.

- Eliminate the right of insured depositors to remove their money without penalty when their deposits are sold to another bank.

- Allow a bank to designate as confidential a wide variety of information it files with the Department of Banking, and then prevent the Department of Banking from giving that information to district attorneys, city attorneys, or the Attorney General for the purpose of enforcing civil consumer protection laws.

- Repeal the section of the Financial Code which makes it grounds for removal of employees of the Department of Banking to be an officer, employee, or director of a bank; to receive compensation or gifts from a bank; or to engage in certain other specified conduct. This specific section of current law would be replaced with a code of ethics to be



drafted in the future by the Superintendent of Banking.

-Prevent the Superintendent of Banking from requiring that a bank make refunds to consumers even when the Superintendent has found that the bank violated a consumer protection law.

-Change the definition of an illegal gratuity to make it harder to prove bribery of a bank official.

## LITIGATION:

In a December 1 Opinion (No. 87-1002, 88 D.A.R. 15253), Attorney General John Van de Kamp concluded that certain practices by banks and other lenders in retaining services of trustees in foreclosure proceedings do not violate Civil Code section 2924(c) or the Cartwright Act, but do violate California's Unfair Business Practices Act.

In his opinion, the Attorney General explained that when a borrower defaults on a loan secured by real estate, the lender often retains the services of a business specializing in foreclosures, known as a "foreclosure trustee," to handle the foreclosure procedures. Foreclosure trustees customarily charge the maximum fees allowed by Civil Code section 2924 for their services. However, because federal regulations limit the amount the federal government will reimburse the lender for foreclosure trustee fees on loans insured by the Federal Housing Administration (FHA) or Veterans Administration (VA), lenders typically insist that a foreclosure trustee limit its fees for handling these loans to the amount of the reimbursement limit—significantly lower than the maximum trustee's fee allowed by state law.

The Attorney General concluded that the practice of lenders to designate as foreclosure trustees on defaulted FHA and VA loans only those who will agree to charge up to the amount the federal government will reimburse is an unfair business practice under Business and Professions Code section 1700 *et seq.*, because it results in third parties paying higher foreclosure fees than the lender for the same trustee services, in contravention of public policy. Additional unfairness results in the inevitable impact the practice has on fees charged for trustee services in foreclosure of loans not secured by the FHA or VA. The pressure to charge higher fees for the rest of the foreclosure trustee's services makes the practice unfair to those who must reimburse the higher fees.

## DEPARTMENT OF CORPORATIONS

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The Department of Corporations is a part of the cabinet-level Business and Transportation Agency. A Commissioner of Corporations, appointed by the Governor, oversees the Department.

The Department administers several major statutes. The most important is the Corporate Securities Act of 1968, which requires the "qualification" of all securities sold in California. "Securities" are defined quite broadly, and may include business opportunities in addition to the traditional stocks and bonds. Many securities may be "qualified" through compliance with the Federal Securities Acts of 1933, 1934, and 1940. If the securities are not under federal qualification, the commissioner must issue a "permit" for their sale in California.

The commissioner may issue a "stop order" regarding sales or revoke or suspend permits if in the "public interest" or if the plan of business underlying the securities is not "fair, just or equitable."

The commissioner may refuse to grant a permit unless the securities are properly and publicly offered under the federal securities statutes. A suspension or stop order gives rise to Administrative Procedure Act notice and hearing rights. The commissioner may require that records be kept by all securities issuers, may inspect those records, and may require that a prospectus or proxy statement be given to each potential buyer unless the seller is proceeding under federal law.

The commissioner also licenses agents, broker-dealers, and investment advisors. Those brokers and advisors without a place of business in the state and operating under federal law are exempt. Deception, fraud, or violation of any regulation of the commissioner is cause for license suspension of up to one year or revocation.

The commissioner also has the authority to suspend trading in any securities by summary proceeding and to require securities distributors or underwriters to file all advertising for sale of securities with the Department before publication. The commissioner has particularly broad civil investigative discovery powers; he/she can compel the deposition of witnesses and require production of documents. Witnesses so compelled may be granted automatic immunity from

criminal prosecution.

The commissioner can also issue "desist and refrain" orders to halt unlicensed activity or the improper sale of securities. A willful violation of the securities law is a felony, as is securities fraud. These criminal violations are referred by the Department to local district attorneys for prosecution.

The commissioner also enforces a group of more specific statutes involving similar kinds of powers: Franchise Investment Statute, Credit Union Statute, Industrial Loan Law, Personal Property Brokers Law, Health Care Service Plan Law, Escrow Law, Check Sellers and Cashiers Law, Securities Depositor Law, California Finance Lenders Law, and Security Owners Protection Law.

A Consumer Lenders Advising Committee advises the commissioner on policy matters affecting regulation of consumer lending companies licensed by the Department of Corporations. The committee is composed of leading executives, attorneys, and accountants in consumer finance.

## MAJOR PROJECTS:

*Proposed Regulatory Changes Under the Franchise Investment Law.* The Department recently announced its intention to amend existing sections 310.002, 310.011, 310.011.1, 310.100, 310.100.1, and 310.125; adopt new section 310.120; and repeal existing section 310.000 of its regulations (Title 10 of the California Code of Regulations (CCR)) adopted under the Franchise Investment Law, Corporations Code section 31000 *et seq.*

Sections 310.011, 310.011.1, 310.100, and 310.100.1 currently set forth certain exemptions for franchisors from the registration requirements of section 31110 of the Corporations Code. The proposed amendments to these sections would exempt franchisors from all of Chapter 2 (commencing with section 31110) of the Franchise Investment Law.

Section 310.125 currently sets forth the application for registration of a material modification of existing franchises. The Commissioner proposes to amend this rule to require that the application be on the Uniform Franchise Registration Application, as amended by the North American Securities Administrators Association, Inc., on November 21, 1986; that a copy of the changed items in the Uniform Franchise Offering Circular complying with section 310.114.1 be attached; that the cover of the offering circular shall indicate that the changes set forth are voluntary and may be rescinded; a description of the pro-