

## REGULATORY AGENCY ACTION



tour in California by providing concert tickets and jackets to cosponsoring radio stations, which would in turn give them to listeners who called in when the stations advertised the concert and the "give-aways". The tickets would identify Miller as a sponsor and the jackets would bear logos of Miller products and the concert.

The Department notified Miller that it would consider the furnishing of the free tickets and jackets a violation of Business and Professions Code section 25600 and Rule 106, which prohibits a licensee from giving any premium, gift, or free goods in connection with the "sale or distribution" of any alcoholic beverage. Miller sought an order preventing ABC from enforcing its interpretation of the rule.

The court held that, although Miller's give-aways would not violate the portion of Rule 106 which prohibits gifts in connection with the "sale" of alcoholic beverages, they would violate the portion of Rule 106 prohibiting gifts in connection with the "distribution" of alcohol, as "distribution" is commonly defined to mean "the process by which commodities get to final consumers, including storing, shipping, and advertising" (emphasis original). The court also found that the legislature intended to authorize the Department to enforce its interpretation of Rule 106 due to the 1983 passage of Assembly Bill 686. AB 686 amended section 25600 to expand the scope of the statutory prohibition to donations made in connection with the distribution as well as the sale of alcoholic beverages.

In a different case, the ABC has decided not to appeal the Third District Court of Appeal's ruling in *California Beer and Wine Wholesalers Association v. ABC*, No. C000498 (May 13, 1988), which invalidated the portion of Rule 106 which authorized beer wholesalers to give retailers up to \$50 in "advertising specialties." (See CRLR Vol. 8, No. 3 (Summer 1988) p. 85 for background information.) The ABC has decided to enforce the court's ruling by prohibiting all wholesalers of alcoholic beverages from giving any promotional items to retailers.

The court's ruling enables California's beer, wine, and distilled spirits wholesalers to save a great deal of money by not having to give retailers, as a means of increasing sales of their products, promotional items such as trays, sponges, and towels.

## 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:

*Competitive Equality Banking Act of 1987.* The federal Competitive Equality Banking Act, enacted as H.R.



## REGULATORY AGENCY ACTION

27 on August 10, 1987, became effective on September 1. Title VI of this complex new set of rules (the Expedited Funds Availability Act) gives bank customers access to their money earlier than under the previous laws. (For a detailed report on Title VI, see CRLR Vol. 8, No. 1 (Winter 1988) pp. 77-78.)

The banking industry had opposed the Expedited Funds Availability Act, primarily citing concerns that expedited access to deposited funds would make it easier for people so inclined to defraud banks. To decrease the likelihood of fraud, the rules limit the amount of money available on an accelerated basis. Additionally, steps are being taken to expedite check processing. To that end, the Competitive Equality Banking Act includes rules specifying the manner in which checks must be endorsed in order to be deposited. All endorsements must be made in an "appropriate color ink" (such as blue or black) within a 1-1/2 inch section along the edge of the back of the check so as not to interfere with the endorsement of the bank at which the check is deposited. The new endorsement rules are expected to cause some temporary confusion while members of the public and businesses adjust.

*Comments Sent to House Banking Committee Members.* On July 18, Superintendent Howard Gould addressed a letter to members of the U.S. House of Representatives' Banking Committee, expressing concern with the treatment of state-chartered banks' insurance and real estate activities in S. 1886 (Proxmire) and Committee Print II (St. Germain).

While the proposed legislation provides that the insurance activities of freestanding, state-chartered banks and state-chartered bank holding companies will continue to be regulated by state laws, state-chartered bank affiliates owned by out-of-state bank holding companies would no longer be governed by the law of the state where the affiliate is located. Superintendent Gould opposes the proposed legislation because he believes it impermissibly preempts state authority over the insurance activities of state-chartered banks within its boundaries owned by out-of-state holding companies.

The Superintendent was in favor of an amendment to the insurance provision presented by Congressman Kleczka, which would have preserved state authority over insurance activities of state-chartered banks, regardless of their holding company affiliation. However, the Committee, which has ap-

proved S. 1886 and Committee Print II, defeated Congressman Kleczka's proposed amendment.

Likewise, Superintendent Gould is concerned with the real estate provisions of the pending legislation which, although providing for individual states' regulation of the real estate activities of state-chartered banks, imposes a moratorium on the future exercise of state-authorized real estate activities by state-chartered subsidiaries of bank holding companies. The bill is currently awaiting hearing in the House as H.R. 5094. (For more information, see CRLR Vol. 8, No. 2 (Spring 1988) p. 82.)

*Superintendent Urges Banks to Adopt Real Estate Investment Policies.* In May, Superintendent Gould addressed a letter to the chief executive officer of each California bank authorized to engage in direct investment in real estate. Recognizing the risk of jeopardizing banks' current authority to engage in real estate activities or of having federal restrictions placed on it if appropriate steps are not taken to assure the authority is exercised properly, the Superintendent urged the board of directors of each bank authorized to engage in real estate activities to adopt policy guidelines addressing each bank's specific methods of operation in the real estate investment area, particularly with regard to the relationship between bank insiders and the bank's real estate activities. The Superintendent's letter discussed situations in which insiders are inappropriately benefiting from their relationship with the bank, by, for example, selling goods, services, or real estate to the bank at higher than prevailing fair market values, or situations where bank executives have a financial or personal interest in the real estate projects of the bank.

The Superintendent's letter states that beginning in July, the Department's examiners will check for the existence of each bank's policies regarding its real estate activities, and will outline their provisions in the examination report, in order to assess the potential exposure which exists in this area. According to Patrick Carroll, Staff Services Analyst in the Department's Research Section, examiners have begun checking whether banks have developed specific policies, and a few banks have forwarded their policies directly to the Department.

*Comments Sent To FDIC.* On May 13, Superintendent Gould commented on the proposal of the Federal Deposit Insurance Corporation (FDIC) to establish a risk-based capital analysis system

relating the amount of a bank's capital to the level of risk contained in its assets. The Superintendent urged FDIC to undertake a comprehensive evaluation of the potential impacts of the proposal on the financial system prior to full implementation of the proposed guidelines.

The Superintendent included with his letter the results of a survey which the Department distributed to California banks for calculation of their risk capital ratio. The survey indicated that the FDIC's proposal would significantly affect banks having assets in excess of \$1 billion, while having no significant effect on the capital positions of banks under \$300 million in size. In addition to recommending modifications to several of the proposal's provisions, the Superintendent recommended that the proposal exempt smaller banks from its provisions, and that other risk factors impacting capital adequacy be addressed, including operational risks and interest rate risks. To date, FDIC has not implemented final guidelines.

*Banks Authorized to Invest in Farmer Mac Stock.* In June, the Department determined that state-chartered banks may invest in federal Agricultural Mortgage Corporation (Farmer Mac) stock. The determination was made pursuant to section 772 of the Financial Code, which provides for investment by banks in the capital stock, obligations, and securities of corporations, subject to such regulations as the Superintendent may prescribe.

*Warnings Issued.* During the past several months, the Department has issued a warning to cease and desist from doing business in California to the following entities, which are not authorized to transact business in the way or manner of a bank: The Interstate Consumer Services Bank (June 10); First International Bank & Trust, Ltd. (San Diego) (July 27); European Industrial Development Bank, Ltd. (Los Angeles) (August 8); and Swiss Trade & Commerce Trust Co., S/A (Anaheim) (August 8).

*Quarterly Report.* At the close of business on March 31, 1988, the 280 state-chartered banks of deposit with 1,724 branches had total assets of \$91.6 billion, an increase of \$2.9 billion, or 3.2% from March 31, 1987. During this period, there was a net increase of 4 banks and a net increase of 25 branches. Fiduciary assets of the trust departments of 41 state-chartered banks, one title insurance company, and 22 non-deposit trust companies totaled \$110.5



billion, a decrease of \$86.1 billion, or 43.7% from March 31, 1987. The assets of 102 agencies and branches of foreign banking corporations (having 117 offices) increased 18.1% to \$70.7 billion.

**Analysis of State Banks' Performance—First Quarter 1988.** For the quarter ending March 31, 1988, total net after-tax revenues for the 280 state-chartered banks was \$183 million; large banks (over \$500 million in size) had net after-tax earnings of \$134 million. The percentage of banks with earnings losses for the quarter was 14.7%.

**Annual Assessment.** Under section 270 of the Financial Code, the Superintendent is required to collect from the banks and trust companies under the Department's supervision an annual pro rata assessment, not to exceed one-hundredth of one percent of the bank or trust company's total resources (deducting secured deposits of public moneys and bills payable). In August, the Department set the assessment base rate at \$0.94 per thousand dollars of total resources, representing 43% of the statutory maximum base rate of \$2.20. The assessment base rate was set after analyzing the status of the Banking Fund, the current year's budget, anticipated revenue from other sources, and the total resources of licensees as of June 30, 1988. According to Patrick Carroll, Staff Services Analyst in the Department's Research Section, the annual assessment is the Department's main source of funding.

**Enforcement.** On July 20, an order enforcing the Superintendent's March 25 cease and desist order against California Capital Fund (see CRLR Vol. 8, No. 3 (Summer 1988) p. 87) was issued by the Alameda County Superior Court (No. 640086-6).

Permanent injunctions were issued by the Orange County Superior Court (No. 53-23-62) on February 5 and May 7, respectively, against Achille Haddad and Sharon Jelovchan, individually and doing business as Central Trust Company, Central Trust Investment Bankers, or Central Pacific Bancorp, ordering them, among other things, to cease and desist from transacting business in the way or manner of a commercial bank or trust company. (For more information, see CRLR Vol. 8, No. 1 (Winter 1988) p. 78.)

## LEGISLATION:

**SB 315 (Montoya)**, which would have required those advertising themselves as financial planners to furnish a specified disclosure statement to their

clients or face civil liability, was defeated in the Assembly Finance and Insurance Committee on August 2. The bill, which was strongly opposed by the banking industry, would have required financial planners to disclose information about their educational and professional qualifications, any past felony conviction, any ties to recommended investments, and the planner's sources of financial information. Senator Montoya has tried unsuccessfully to pass such a measure for four years. (For additional information on this bill, see CRLR Vol. 8, No. 3 (Summer 1988) p. 87 and Vol. 8, No. 2 (Spring 1988) p. 82.)

**Other Bills.** The following bills, previously reported in CRLR Vol. 8, No. 3 (Summer 1988) at page 87, have died in committee: **SB 2583 (Craven)**, regarding payment of interest by banks on bearer bonds where there has been a call of those bonds and the bank has not timely responded; **AB 3114 (Lancaster)**, which would have repealed section 1230 of the Financial Code; and **AB 2030 (Seastrand)**, a companion bill to SB 315 (Montoya).

## DEPARTMENT OF CORPORATIONS

**Commissioner: Christine W. Bender**  
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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:

**Changes in Regulations Under the Knox-Keene Health Care Service Plan Act.** New section 1300.43.15 of the Department's regulations in Title 10 of