

Office of Administrative Law

2017 SLAA Report

December 28, 2017

Marybel Batjer, Secretary
California Government Operations Agency
915 Capitol Mall, Suite 200
Sacramento, CA 95814

Dear Ms. Marybel Batjer,

In accordance with the State Leadership Accountability Act (SLAA), the Office of Administrative Law submits this report on the review of our internal control and monitoring systems for the biennial period ending December 31, 2017.

Should you have any questions please contact Debra Cornez, Director, at (916) 323-6831, Debra.Cornez@oal.ca.gov

BACKGROUND

The Office of Administrative Law, created in 1980, is a small agency with 21 employees. OAL's core function is to review, and approve or disapprove, administrative regulations proposed by over 200 state agencies to assess whether they comply with the legal standards and procedural requirements established by the Administrative Procedure Act (APA; Gov. Code, sec. 11340 et seq.). OAL transmits approved regulations to the Secretary of State, and issues written decisions for disapproved regulations. OAL is responsible for compiling and publishing the California Code of Regulations (CCR). OAL is also responsible for publishing the California Regulatory Notice Register (Notice Register), a weekly publication that contains notices of proposed regulatory action by state agencies, as well as other notices of general public interest. Pursuant to Government Code sections 11344 and 11344.1, OAL makes the CCR and Notice Register available on the Internet, free of charge.

In response to petitions submitted to OAL by interested persons, OAL also evaluates whether state agency rules, policies or procedures that have not been adopted pursuant to the requirements of the APA constitute "underground regulations." OAL may issue a formal legal analysis and opinion reflecting those evaluations.

Additionally, OAL assists state regulatory agencies through a formal 3-day training program, as well as through less formal methods, to understand and comply with the APA. Through its Reference Attorney service, OAL provides direct legal advice to state agencies and members of the public regarding California rulemaking law.

ONGOING MONITORING

As the head of Office of Administrative Law, Debra Cornez, Director, is responsible for the overall establishment and maintenance of the internal control and monitoring systems.

EXECUTIVE MONITORING SPONSORS(S)

The executive monitoring sponsor responsibilities include facilitating and verifying that the Office of Administrative Law internal control monitoring practices are implemented and functioning as intended. The responsibilities as the executive monitoring sponsor(s) have been given to:

Debra Cornez, Director, and Beverly Johnson, Deputy Director.

MONITORING ACTIVITIES

Frequency of Monitoring Activities

The monitoring of OAL's responsibility of meeting statutory and regulatory deadlines continues on a daily basis. The monitoring of nonpayment of invoices to various state agencies for state agency staff who have attended OAL's 3-day training program, but have not yet paid, continues on a daily basis. The monitoring of the staffing level at OAL is ongoing, and increases as vacancies become imminent. The Director meets with other management staff on a weekly basis, and more often, as the need arises. Staff Services Manager and AGPA meet quarterly with DGS/CFS to discuss new processes and/or procedures in Accounting regarding Fi\$CAL, and to discuss issues that may be at hand and any other concerns we may have with CFS.

Reporting and Documenting Monitoring Activities

The Director, Deputy Director and Assistant Chief Counsel (OAL does not have a chief counsel position) determine whether statutory and regulatory deadlines have been met by monitoring through e-mail notifications, database auto-notifications, and confidential file review memos written by legal staff to the executive file review committee. The executive file review committee consists of the Director, Deputy Director, Assistant Chief Counsel, and one Senior Attorney. The Director monitors the office workload of the legal staff on a weekly basis, or on a daily basis if needed, using a report compiled by support staff. The Staff Services Manager meets with the Director on a weekly basis, or more often as needed, and reports on the current progress of nonpayments of state agency invoices, and the ongoing working relationship with Finance, DGS, and Fi\$Cal. The Director meets with management staff on a weekly basis, or more often if the circumstances require, such as, when the office is in the process of filling a vacant position.

Procedure for Addressing Identified Internal Control Deficiencies

Being a small office of 21 people, with a flat management/hands on style, OAL is able to act quickly in response to any deficiencies that appear during any monitoring activity or otherwise.

ADDRESSING VULNERABILITIES

Because OAL is a small agency with a collegial staff of attorneys, legal analysts, and support staff, OAL's executive team uses a hands-on, direct communication approach toward management of the office. We do not have an internal auditor. If a vulnerability is identified, we engage in a series of informal, but comprehensive discussions of risks that could potentially affect our ability to perform our core mission. After conducting the assessment, we identify the issues and resolve the vulnerability to reduce the risk to an acceptable level or resolve the problem entirely.

COMMUNICATION

OAL communicates internally with its staff through regular management meetings and monthly legal division meetings, written policies and procedures for both the legal staff and support staff, checklists for legal review, and confidential legal memorandums.

ONGOING MONITORING COMPLIANCE

The Office of Administrative Law is in the process of implementing and documenting the ongoing monitoring processes as outlined in the monitoring requirements of California Government Code sections 13400-13407. These processes include reviews, evaluations, and improvements to the Office of Administrative Law systems of controls and monitoring.

RISK ASSESSMENT PROCESS

The following personnel were involved in the Office of Administrative Law risk assessment process: Executive Management.

RISK IDENTIFICATION

Because OAL is a small agency with a collegial staff of attorneys, legal analysts, and support staff, OAL's executive team uses a hands-on, direct communication approach toward management of the office. We do not have an internal auditor. Our risk assessment was performed by engaging in a series of informal, but comprehensive discussions of risks that could potentially affect our ability to perform our core mission. After conducting the assessment, we identified the issues described herein as representing the significant risks facing our agency. Our assessment of each risk and our plans for addressing each risk are also discussed within this report.

RISK RANKING

OAL prioritizes any potential risks so that significant internal control deficiencies are remedied on a timely basis with the focus being on OAL meeting the statutory and regulatory deadlines and obligations of OAL's core mission.

RISK AND CONTROLS

RISK: OPERATIONS-EXTERNAL-STAFF—RECRUITMENT, RETENTION, STAFFING LEVELS

Inadequate staffing levels would prevent OAL from meeting its statutory and regulatory deadlines and obligations.

OAL has seen a steady increase in recent years in the number of proposed regulatory actions, the number of regulations affected per action, and in the complexity in the regulations submitted for review (2013 - 669 files, 2014 - 687 files, 2015 - 708 files, and 2016 - 719 files; about an 8% increase in files since 2013). Accordingly, the number of workload hours has increased. Examples of statutes that have had a significant impact on OAL's workload: AB 32, the California Global Warming Solutions Act of 2006, a comprehensive program of regulatory and market mechanisms to achieve reductions of greenhouse gases; SB 617 that requires state agencies to complete an economic impact analysis for all proposed regulatory actions and determine whether the action is a major regulation (economic impact exceeds \$50 million); Proposition 57 "The Public Safety and Rehabilitation Act of 2016" that deals with the awarding of credits earned for good behavior and approved rehabilitative or educational achievements; Proposition 66 "Death Penalty Reform and Savings Act" that contains various provisions intended to facilitate the enforcement of judgements and achieve cost savings in capital cases; and regulations from various state agencies implementing the Medicinal and Adult-Use Cannabis Regulation and Safety Act. Regulations implementing the above laws must be reviewed by OAL for compliance with the APA and regulations adopted by the Department of Finance that implement SB 617.

Increase in workload impacts the ability for OAL to meet statutory and regulatory deadlines. OAL manages this risk through individual training and cross-training, and monitoring of individual's ability to meet deadlines.

CONTROL A

Maintaining adequate staffing levels to sustain our core mission, especially during lean years, is one of our most significant challenges. To minimize this risk, last year we were successful in getting OAL's budget augmented to sustain the current program level and authorized staffing to ensure that we will be able to meet our statutory obligations and provide for more training classes. We are able to continue to meet our statutory and regulatory deadlines; however, it becomes a challenge as the number of files, and the complexity of files, submitted to OAL increase each year.

RISK: OPERATIONS-EXTERNAL-STAFF—RECRUITMENT, RETENTION, STAFFING LEVELS

Requests from state agencies for OAL's 3-day training class on the rulemaking process have increased. OAL recently transferred over 200 state employees from the class waiting list to classes scheduled for 2016; however, the waiting list has over 200 state employees on the list and the number grows weekly. The burden of staffing the training class falls on the current legal staff and its already full workload.

OAL receives petitions challenging purportedly illegal rules (“underground regulations”) issued by state agencies. Due to budget cuts, OAL lost one of the two legislative approved attorney positions to deal with the petition workload. The review of an “underground regulation” petition requires a comprehensive legal analysis of all applicable statutes, regulations and case law, and all documents relevant to the challenged rule. With only one attorney now assigned to the underground regulations unit, OAL management must carefully assess whether to accept or decline any petition submitted for review.

OAL believes the increase in requests for the training is a result of the high number of people retiring from state service at this time; therefore, new people are filling vacancies that need training on the regulatory process. Additionally, new bodies of law, such as the Medicinal and Adult-Use Cannabis Regulation and Safety Act, require training in the rulemaking process for staff at the many state agencies who are responsible for implementing this new Act.

Increase the number of training classes each year, which is possible due to new authorized attorney position in 2016, and increase the size of the class by expanding the training room. This will allow OAL to address the training backlog.

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However, despite increasing the number of classes per year, the number of people signed up for the class remains high. We have begun the process to expand the training room so that it will hold approximately 50% more students. This will allow OAL to provide training to more students, but not increase the burden on the trainers/attorneys time and workload by increasing the number of classes each month.

RISK: OPERATIONS-EXTERNAL-STAFF—RECRUITMENT, RETENTION, STAFFLING LEVELS

Staff Recruitment and Retention - Over the years, experienced and knowledgeable attorneys in the APA rulemaking process is what has enabled OAL to make it through really lean times and regular periods of heavy workload. OAL management is concerned with retaining experienced and knowledgeable attorneys as well as its support staff. This can be a challenge given that out of the 11 attorney positions, OAL does not have any Attorney IV positions available, and therefore, no real upward mobility that many state agencies have, including those agencies with a smaller legal staff. Thus, openings in other state agencies may be attractive to our attorneys or support staff (particularly promotional opportunities with other agencies). For instance, in 2015, an OAL Attorney III accepted an Attorney IV position with another agency. It should be noted that it is common for an attorney to work for OAL for 20-plus years; however, promoting to an Attorney IV is becoming more of the norm statewide for those attorneys who are eligible and qualified.

Additionally, during interviews of applicants for vacant attorney positions, OAL is frequently asked if it has Attorney IV positions available. OAL cannot compete equally for talented attorneys with other state agencies who have Attorney IV positions on their legal staff.

OAL operates with a lean budget with every position filled. It does not have much wiggle room to afford an increase in salaries for its current legal staff.

OAL is committed to its staff and will continue to evaluate all resources to determine the viability of its budget to obtain an Attorney IV position.

CONTROL A

We are taking all feasible steps available to us to retain our existing staff by providing an outstanding working environment. Nevertheless, we remain concerned about the costs associated with obtaining Attorney IV positions. To minimize the costs of filling vacancies, in general, we have registered to use the HRModernization program implemented by the Department of Human Resources (CalHR) as an economical means of conducting examinations for attorney positions. We are also reviewing and evaluating our budget to determine if OAL can include the salary of an Attorney IV in its budget.

RISK: OPERATIONS-INTERNAL-STAFF—KEY PERSON DEPENDENCE, WORKFORCE PLANNING

Key person dependence - OAL is a small agency of 21 employees with one staff services manager who wears many hats: assistant to the Director, Deputy Director and Assistant Chief Counsel; fiscal officer; human resources and supervisor. As a result of these conditions, some degree of key person dependency is unavoidable.

Succession planning - One of OAL's most experienced attorneys will retire in 12-16 months, and we anticipate that this trend will continue as OAL has one additional attorney with over 30 years of state service with OAL, plus other attorney not too far behind these two attorneys. Because OAL has a small legal staff of 11 attorneys, each departure of an experienced attorney has a significant impact on the legal experience and historical knowledge held by OAL.

The smaller the agency the greater chance of having key person dependence due to reliance on the key person's expert knowledge without any backup to assist in his/her absence.

Limited positions in a small agency create challenges to cross-train backups and to find others in the staff with skills needed to accomplish the mission.

CONTROL A

Key person dependence - In addition to establishing written procedures for the staff services manager's key business functions, additional staff have been trained. We have cross trained the office's AGPA on many fiscal functions, including now being the primary person responsible for the procurement of office supplies, and another person primarily responsible for keeping track of OAL's property.

Succession planning - We engage our staff in discussions about retirement in an effort to get advance notice for planning purposes. We have also begun identifying what internal staffing changes can and will need to be made. OAL has an informal, but well-established process for sharing historical and subject matter knowledge within the office. In order to preserve historical and subject matter knowledge and enhance consistency in our review of proposed regulations and underground regulation petitions, we developed a binder of resource materials for OAL attorneys and a guide for OAL's front office staff.

CONCLUSION

The Office of Administrative Law strives to reduce the risks inherent in our work and accepts the responsibility to continuously improve by addressing newly recognized risks and revising controls to prevent those risks from happening. I certify our internal control and monitoring systems are adequate to identify and address current and potential risks facing the organization.

Debra Cornez, Director

CC: California Legislature [Senate (2), Assembly (1)]
California State Auditor
California State Library
California State Controller
Director of California Department of Finance
Secretary of California Government Operations Agency