

HOUSE RESEARCH ORGANIZATION

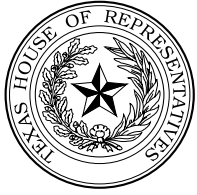
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MAJOR ISSUES OF THE 77th LEGISLATURE REGULAR SESSION

July 2, 2001



Number 77-11



HOUSE RESEARCH ORGANIZATION

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Tom Whatley, Director

July 2, 2001

Number 77-11

MAJOR ISSUES OF THE 77TH LEGISLATURE, REGULAR SESSION

During its 2001 regular session, the 77th Texas Legislature enacted 1,601 bills and adopted 20 joint resolutions after considering over 5,700 measures filed. This report provides an overview of some of the session's highlights, summarizing some proposals that were approved and some that were not. Also included is a brief review of the arguments offered for and against each measure as it was debated during the session.

The measures featured in this report are a sampling and are not intended to be comprehensive. Other reports already published or being prepared by the House Research Organization examine other legislation approved by the 77th Legislature, including SB 1, the general appropriations act for fiscal 2002-03, the bills vetoed by the governor, and the proposed constitutional amendments on the November 6, 2001, ballot.

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77TH LEGISLATURE, REGULAR SESSION

	Introduced	Enacted*	Percent Enacted
House bills	3,701	992	26.8 %
Senate bills	1,843	609	33.0 %
TOTAL bills	5,544	1,601	28.9 %
HJRs	114	13	11.4 %
SJRs	48	7	14.6 %
TOTAL joint resolutions	162	20	12.3 %

*Includes 82 vetoed bills — 60 House bills and 22 Senate bills

COMPARISON OF 1999 AND 2001 REGULAR SESSIONS

	1999	2001	Percent Change
Bills filed	5,766	5,544	- 3.9 %
Bills enacted	1,622	1,601	- 1.3 %
Bills vetoed	31	82	164.5 %
JRs filed	142	162	14.1 %
JRs adopted	17	20	17.6 %
Legislation sent or transferred to Calendars Committee	1,193	1,494	25.2 %
Legislation sent to Local and Consent Calendars Committee	1,292	1,070	- 17.2 %

Source: Texas Legislative Information System (TLIS)

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Allowing wineries to sell and ship wine to ultimate consumers

HB 892 by Swinford, et al.
Effective September 1, 2001

HB 892 establishes the Texas Wine Marketing Assistance Program to help the Texas wine industry promote and market its products and educate the public about the industry. Among other activities, the program will organize a network of package stores to participate in a program under which Texas wineries may ship wine to ultimate consumers. An advisory committee will help the agriculture commissioner implement the program.

HB 892 allows holders of winery permits to ship wine to participating package stores for pickup by the ultimate consumer. The package store may charge a handling fee of up to \$3.50 for each order picked up and may make arrangements to ship the wine directly to the purchaser.

A person who buys wine at a winery may have the wine shipped to his or her residence if the buyer is at least 21 years old, but the buyer must be present when the wine is delivered. Wineries in dry areas may sell up to 25,000 gallons of wine per year to ultimate consumers in Texas in unbroken packages for consumption off premises.

Winery permit holders may hold up to four wine festivals annually at which the permit holder may sell or give free samples of wine on or off premises. Petitions for local-option elections related to the legal sale of wine on winery premises require the signatures of 25 percent of the number of local registered voters who voted in the most recent general election, rather than the signatures of 35 percent of voters, as required for petitions for other local-option elections.

Supporters said HB 892 would benefit rural Texas by helping it to emulate California's billion-dollar wine industry. California produces 400 times the amount of wine that Texas does but consumes only three times as much. Although many Texans drink wine, most of it comes from out of state. Allowing Texas wineries to sell their wine directly to consumers, subject to reasonable limitations, would boost the Texas economy, create jobs, and enable Texans to support their own wine industry.

HB 892 would increase Texas wineries' access to the in-state market by allowing wineries in both wet and dry areas to sell wine to ultimate consumers for off-premise consumption. The biggest barrier for Texas' wine industry is the inability to distribute its products widely. Because Texas is such a large state, tourists who wish to buy a winery's product after they have returned home have no way to obtain the wine without making a lengthy trip to visit the winery again.

Opponents said HB 892 would not contain sufficient enforcement mechanisms to prevent alcohol from getting into the hands of minors. Retailers invest much time and money to prevent this. For example, they hire off-duty police officers to deter minors from attempting to buy alcohol.

The bill would place improper responsibility on package delivery companies. Retail clerks are trained to identify underage drinkers and phony identification cards. Package carriers, on the other hand, are not trained to recognize false identification, nor are they likely to take the extra time to check identification.

Allowing wineries in dry areas to sell wine would defeat the will of the people who elected for the county to be dry. Wineries would be the only entities allowed to sell alcohol in dry areas, except for private clubs that sell only liquor by the drink. If special exceptions were applied to allow direct shipment of wine, beer or liquor could be next.

The **HRO analysis** appeared in the Part Two of the *April 25 Daily Floor Report*.

Notes: The 77th Legislature enacted several other bills related to wine sales by wineries. HB 1948 by Keel contains the same provisions as HB 892 regarding local-option elections on the sale of wine by holders of winery permits. SB 965 by Jackson allows wineries in certain counties to sell wine to ultimate consumers for consumption on or off premises.

Continuing the Texas Parks and Wildlife Department

SB 305 by Harris, et al.
Effective September 1, 2001

SB 305 continues the Texas Parks and Wildlife Department (TPWD) until September 1, 2013, and makes a number of changes to the agency's authority and to the Parks and Wildlife Code, including requiring:

- ! open meetings when a committee of the Parks and Wildlife Commission with at least five members makes a major decision;
- ! use of at least 15 percent of bond funds for park maintenance or improvements that have matching or local money;
- ! a study of the shrimping industry;
- ! use of receipts from hunting and fishing licensing to fund only functions required to manage fish and wildlife resources;
- ! predevelopment archeological surveys of historical sites;
- ! consultation with and advice and resource assistance to local governments in developing aquatic vegetation management plans;
- ! evaluation of the effectiveness and efficiency of TPWD's outreach and education efforts;
- ! consideration of the use of private-sector contractors to manage proposed construction projects or tasks; and
- ! development of an agency-wide business plan to guide its commercial projects.

SB 305 allows the use of bridges, tunnels, and causeways as artificial reefs and authorizes the expenditure of appropriated funds to create them. It protects the confidentiality of information collected for the purpose of providing technical assistance to landowners. It increases oyster leases both in size (from 100 to 300 acres) and in cost (from \$3 to \$6 per acre). It also bans tobacco advertising from all TPWD publications.

The act also directs TPWD to prepare a statewide inventory of land with public access, to create and maintain a database of those land resources, and to develop a conservation and recreation plan and priorities based on that inventory. TPWD must base decisions about resource acquisition and divestiture, grants to local parks, cooperation with private conservation and landowners' groups, and technical guidance to landowners on that plan and must update the inventory and the plan at least every 10 years. The agency may not acquire non-adjacent new parks, historical sites, or wildlife sites until it has completed the inventory and strategic plan, unless the area is of statewide significance.

With commission approval, TPWD may designate an official nonprofit partner dedicated to the agency's goals, including by soliciting and accepting gifts, donations, and grants, as well as other nonprofit partners with which the agency may cooperate to help meet its

goals. The commission must promulgate rules governing fundraising by the nonprofit partner and by agency employees.

The act restricts TPWD's ability to contract for a publication without retaining the right to:

- ! enforce agency rules regarding advertising suitable for youth, including by terminating the contract;
- ! approve the content and advertising in the publication; and
- ! request and receive copies of the publication that contain only advertising appropriate for youth.

If an existing contract does not meet these requirements, TPWD must negotiate a modification to the contract or must modify the contract to incorporate such provisions by March 1, 2002.

Other miscellaneous provisions include:

- ! allowing a mayor to receive requests to control a protected species that is causing damage to land, agriculture, aquiculture, or horticulture;
- ! changing the limitations on employee fundraising to apply only to gifts of more than \$500;
- ! requiring agency rules regarding entities that sell fishing and hunting licenses to specify standards for the licenses issued, including their legibility; and
- ! authorizing the commission to create a program for identifying and classifying sellers of boats and outboard motors (on which sales taxes that benefit TPWD are collected).

Supporters said SB 305 would continue the TPWD under the Sunset process and enact various needed changes. It would guarantee that the public had the opportunity to comment on the commission's proposed decisions, now often made by committees of the whole that can act without public hearings. The bill would sanction TPWD's informal relationship with the Texas Parks and Wildlife Foundation, thus bringing the relationship within the regulation of the law, preventing the appearance of conflicts of interest and the circumvention of rules governing state agency activity, and allowing the foundation to take on tasks for the agency, such as commercial ventures. The bill also would change TPWD's practices regarding oyster bed leases as recommended by the state auditor.

SB 305 would direct TPWD to adopt sound business practices such as evaluating programs for effectiveness, business planning, and strategic planning and base its decision-making on such assessments. The bill's proposed moratorium on most new acquisitions pending completion of strategic planning would balance the need for flexibility with the need to assess current holdings before taking on new ones.

The bill would prohibit TPWD from accepting tobacco advertising or sponsorships, as recommended by the Sunset Advisory Commission. Because many of TPWD's programs and publications target youth, it is counterproductive and wrong for the agency to allow its name and programs to be associated with products that are illegal for youth. It is also wrong for the agency to lend its support to dangerous and addictive habits such as smoking and chewing tobacco, especially when the state has sued the industry over its advertising.

Opponents said the bill's proposed ban on tobacco advertising and sponsorships is wrong. These are legal products. Accepting advertising from these businesses is no more problematic than using taxes from the sale of alcohol and cigarettes to finance law enforcement efforts. The bill could be interpreted to require TPWD to dishonor its agreements with publishers to whom it has assigned the right to produce agency publications if it were not possible to renegotiate the contract terms to comply with the statute.

The bill's requirement for a land inventory and strategic plan demonstrates a misguided focus on preparing to acquire more state-owned land. The agency needs to focus on helping private landowners manage their own land. Also, the proposed "moratorium" on new land acquisitions has too many exceptions.

Other opponents said SB 305 also should ban alcohol advertising in TPWD publications for the same reason that it would ban tobacco advertising. It is hypocritical for the salaries of peace officers charged with enforcing the laws regarding alcohol consumption and with educating boaters and hunters about safe practices to be subsidized by advertising and sponsorships for products that contribute to violations and unsafe practices.

The **HRO analysis** appeared in Part Two of the May 14 *Daily Floor Report*.

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Prohibiting death penalty for the mentally retarded

HB 236 by Hinojosa, et al.

Vetoed

HB 236 would have prohibited sentencing to death any defendant found to be mentally retarded. During the sentencing phase of a capital trial, the defendant could have requested the submission of a special issue regarding whether the defendant was mentally retarded by filing a notice of intent with the court and the state's attorney not later than the 30th day before the trial began.

If the defendant was found guilty and evidence was raised of the defendant's alleged mental retardation, the court would, on the written request of the defense, have had to instruct the jury that if the jury found that the defendant posed a future danger and, in cases where the defendant was a party to the murder, killed the victim or intended to kill the victim or someone else, the jury would have had to determine whether the defendant was mentally retarded. If the jury determined that the defendant was mentally retarded, the court would have had to sentence the defendant to life imprisonment. The jury still could have considered evidence of mental retardation as mitigating evidence in determining whether a life sentence should have been imposed.

If the jury determined that the defendant was *not* mentally retarded and the defendant subsequently was sentenced to death, the defense could have filed a petition for a hearing to determine mental retardation. On receipt of the petition, the court would have had to appoint two disinterested experts in the field of diagnosing mental retardation to examine the defendant. The court would have had to consider these experts' findings and the findings of any other experts offered by the state's attorney. If the court found by a preponderance of the evidence that the defendant was mentally retarded, it would have had to sentence the defendant to life imprisonment. Otherwise, it would have had to sentence the defendant to death.

The defendant and the state could have appealed the court's finding or decision not to make a finding in the mental retardation hearing. The Court of Criminal Appeals would have had to adopt rules governing the appeals process. The appeal would have been a direct appeal and had priority over other cases before the court.

Supporters said justice is not served when the state executes a mentally retarded person. The death penalty should be limited only to the morally most culpable offenders. Mentally retarded people cannot appreciate sufficiently the consequences of their actions and should not be held to the same standards and subjected to the same punishment as other offenders. HB 236 still would allow these offenders to be punished appropriately by a sentence of life in prison. Exempting mentally retarded offenders from the death penalty would bring Texas law into line with public opinion. Fifteen states and the

federal government already outlaw executing these offenders, and many nations around the world prohibit execution of the mentally retarded. Texas does not need to wait for the U.S. Supreme Court to determine whether or not executing the mentally retarded is constitutional, because executing the mentally retarded is morally reprehensible.

“Safeguards” in current law to protect the mentally incompetent from being sentenced to death are insufficient. People with mental retardation have been sentenced to death in Texas, and as many as six have been executed. Mental retardation is determined by a three-pronged test, and it is unlikely that someone could fake mental retardation or that their level of retardation could fluctuate.

HB 236 also would protect the role of juries by establishing specific procedures to decide whether a defendant was mentally retarded. If the jury did not find the defendant to be mentally retarded and sentenced the defendant to death, the bill would permit a second level of review, allowing the court to appoint experienced, qualified experts to determine if the defendant was mentally retarded.

Prohibiting the execution of mentally retarded offenders would not lead to a large number of new appeals, because mental retardation already may be raised in the appeals process. Changing the law would not create equal-protection issues for those who had mental impairments other than mental retardation, because the Court of Criminal Appeals already considers post-developmental organic brain damage in the same manner as mental retardation in cases it reviews.

Opponents said that before enacting legislation, Texas should wait for the U.S. Supreme Court to decide the case of *McCarver v. North Carolina*, in which a man on death row who claims to be mentally retarded argues that executing the mentally retarded is unconstitutional. Executing the mentally retarded is not the same as executing children. While the state does not execute children, it also does not allow children to marry, drive vehicles, sign contracts, raise families, or do any of the other things that adults with mental retardation have the right to do. Whether people understand the wrongfulness of their actions is more important than whether or not they fit the definition of mental retardation. Saying that a 35-year-old person with mental retardation has the “mind” of a 10-year-old is inaccurate. Mental age refers only to an IQ test score, not to the level and nature of the person’s experience and functioning.

HB 236 is unnecessary because Texas already has safeguards to protect defendants who lack the mental capacity to understand the consequences of their crimes. A court can declare someone incompetent to stand trial, or a defendant may be found not guilty by reason of insanity. A jury can consider mental retardation as a mitigating circumstance when imposing a sentence. Each convicted capital defendant is entitled to a thorough and often lengthy appeal through state and federal courts, and execution of incompetent

inmates is prohibited. There is no credible evidence that a person fitting the statutory definition of mental retardation has been executed in Texas or is on death row.

Texans express public opinion when they serve on capital juries, which are drawn from a cross-section of Texans chosen at random. If the majority of Texans are against executing the mentally retarded, it stands to reason that most people on a jury would feel that way and would vote for a life sentence. The decision to sentence a mentally retarded offender to death should continue to be made on a case-by-case basis instead of imposing a blanket prohibition.

The bill improperly would allow judges to second-guess the jury's determination that a defendant was not mentally retarded and should be sentenced to death. It would be unfair to strip juries of their ability to decide appropriate punishment for a capital murderer.

HB 236 would add a new layer of appeals, unnecessarily lengthening the process and extending the suffering of victims' families and friends. Texas' procedures in capital murder cases have been well established through litigation and may not withstand change easily. Changes to the law could be subject to court scrutiny, halting executions while challenges were litigated. Also, a special exception for mentally retarded offenders could raise equal-protection issues. HB 236 would bar the execution of mentally retarded offenders but would not protect offenders with other mental disabilities. Tampering with death-penalty law and creating new categories of exceptions could weaken the death penalty and ultimately lead to its abolition.

Other opponents said the judge in a capital case involving a defendant who may be mentally retarded should be able to appoint experts to make that determination and consider other evidence *before* sending that issue to the jury. If the judge found the defendant to be mentally retarded, then the only sentence available should be life imprisonment. If the judge sent the issue of mental retardation to the jury, then the jury should have the benefit of the experts' determination before considering that issue. Instead, the bill would require that the jury first find that the defendant was not mentally retarded and only after this finding could the defendant ask the judge to appoint experts to make that determination.

The **HRO analysis** appeared in Part Two of the April 19 *Daily Floor Report*.

Requiring background checks on firearm sales at gun shows

HB 367 by Hinojosa, et al.

Died in House Calendars Committee

HB 367 would have created a third-degree felony offense for knowingly selling a firearm at a gun show to a person not licensed to carry a concealed handgun. An exception would have been made for a seller who performed a background check before the sale using the National Instant Check System (NICS), as outlined in federal statutes.

Supporters said HB 367 would bring firearm sales at gun shows into line with those at gun stores. Gun store owners already must perform background checks to ensure that they do not sell guns to minors, convicted felons, or the mentally ill. This bill would protect private sellers from inadvertently selling guns to those who should not have them. Eleven other states already require background checks at gun shows, and implementing these laws has not been a problem.

Gun show operators market to children and others who cannot legally buy weapons by stressing that no background check is required. It takes more identification to cash a check at a bank than to buy a gun at a gun show. Gun shows allow and encourage anonymous sales. According to the federal Bureau of Alcohol, Tobacco and Firearms (ATF), one-quarter to one-half of all people selling guns at these shows are individuals who do not have to perform background checks.

Opponents said HB 367 would create an unnecessary burden on private sellers. Licensed gun dealers already must perform background checks at gun shows. The bill would affect only private sellers, who would have to go through a federally licensed firearms dealer to perform a background check, because only such dealers have access to NICS, and the dealer would need to charge a fee to perform each background check.

HB 367 would be a step toward ending private sales of guns at gun shows. Law enforcement officials patrol gun shows and provide a level of protection against illegal sales that is not found in other private sales. This bill would deter people from selling at gun shows and move gun sales to unregulated areas. A private seller even could go outside of the gun show with a buyer and sell the gun legally without performing a background check. Instead of driving private sellers away from gun shows, the state needs to enforce laws currently on the books.

This bill would infringe upon Americans' Second Amendment right to bear arms. NICS requires buyers to provide social security numbers, in essence creating a national registry of gun owners.

Defense to gambling offense on Indian reservations

HB 514 by Hinojosa, et al.
Died in Senate committee

HB 514 would have provided a defense to prosecution for gambling or other gaming activity allowed under the federal Indian Gaming Regulatory Act (IGRA) of 1988, if the gambling or gaming was conducted by a federally recognized Indian tribe on tribal land recognized by the federal government as of January 1, 1999, and were on premises designated by the tribe for gambling.

Supporters said the bill would not allow expansion of gambling in Texas but would give the Tigua, Kickapoo, and Alabama/Coushatta tribes a narrowly tailored defense to prosecution for casinos they run on tribal property. The bill would not legalize casino gambling, which is barred by the Texas Constitution's prohibition against any but specified types of lotteries, but merely would provide a defense to prosecution, eliminating the need for a constitutional amendment. District attorneys still could take casino operators to court and make them prove that defense. HB 514 would legitimize a source of income that has allowed Texas tribes to become self-sufficient and a casino that makes a large contribution to the economy of the El Paso area. The bill also would allow the Alabama/Coushattas to benefit from self-sufficiency much as the Kickapoos and Tiguas have done. HB 514 would make the same IGRA standard applicable to all three of Texas' federally recognized tribes. Also, the bill clearly would establish Texas' public policy regarding Indian gaming. There would be no need to wait for the federal court's decision in Texas' pending lawsuit regarding the Tiguas' Speaking Rock Casino because the bill, if enacted, would nullify this lawsuit.

Opponents said HB 514 would legitimize current casinos and allow their expansion and set the stage for future legislatures to allow further expansion. The bill would change Texas law unconstitutionally to allow slot machines and other casino-style gambling. Attorney General Dan Morales found in Opinion DM-302 (August 1994) that the Legislature cannot authorize slot machines in the absence of a constitutional amendment. Texans should have the right to express their opinions on legalizing Indian gaming by voting on this issue. The bill would reward the Tiguas for illegal behavior. When the federal Tigua Restoration Act of 1987 was adopted, the tribe's leadership pledged to Congress that it had no interest in conducting high-stakes bingo or other gambling operations on its reservation. The tribe broke its promise by opening a casino in 1993 and continues to operate it in spite of a 5th U.S. Circuit Court of Appeals ruling against the tribe. The Legislature should not preempt federal courts' authority in this matter. A lawsuit brought by the state is pending, and the Legislature should wait for the outcome before enacting any legislation.

The **HRO analysis** appeared in Part Two of the April 24 *Daily Floor Report*.

Enhancing criminal penalties for hate crimes

HB 587 by Thompson, et al.
Effective September 1, 2001

HB 587 enhances criminal penalties for crimes motivated by bias or prejudice toward a person because of the person's race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference. For offenses against the person (Penal Code, Title 5), arson, criminal mischief, or graffiti, the penalty is enhanced if at the punishment stage of the trial, the court determines beyond a reasonable doubt that the defendant was motivated by bias or prejudice against the victim because of the above reasons. District and county court clerks must report attorneys' requests for affirmative findings of bias or prejudice to the Texas Judicial Council.

If requested by a prosecuting attorney, the attorney general must assist in the investigation or prosecution of such crimes. The governor's criminal justice division must provide grants to help counties with fewer than 50,000 residents prosecute such crimes under certain conditions.

HB 587 establishes court-issued protective orders in cases where people are harmed or threatened by hate crimes. The act requires training for prosecuting attorneys in using the new law to prosecute such crimes. The act also requires the attorney general and the Texas Education Agency to develop educational programs about the state's hate-crime laws and to make the programs available to school districts that request them.

Supporters said HB 587 would strengthen Texas's current hate-crime law and ensure that it would pass constitutional muster. Because it does not delineate among the various protected groups, the current law is too vague, making it difficult for prosecutors to use.

Texas needs a strong hate-crime law because crime motivated by hatred is increasing. HB 587 would give law enforcement officers the tools they need to address these crimes. Offenders often commit hate crimes with the intention of victimizing an individual to "make a point" to other members of the group. Hate crimes affect not only the individual victim but the entire community. Swastikas etched on neighborhood walls and burning crosses left in residential front yards create fear in communities and may lead to frictions among community groups.

Hate crimes are a form of terrorism and should be punished severely. Serious offenses could be prevented if defendants knew before committing these crimes that they would receive stiffer sentences and additional jail time for previous crimes motivated by group hatred. Enhanced penalties for less serious hate crimes, such as vandalized property, could prevent escalation to more serious offenses against people by providing strong penalties that would deter future hate-based crime.

Contrary to popular belief, most hate crimes are not committed by members of organized hate groups. Research on hate crimes has shown that hate crimes are not necessarily inevitable. Laws do influence people's behavior, and HB 587 would deter future hate crimes.

It would not be inappropriate to allow harsher punishments based on a defendant's bias or prejudice. Texas laws already recognize that motivation may be considered in determining punishment. For example, the state differentiates categories of manslaughter based on the actor's intent. Premeditation may lead to a more severe penalty, while an act of sudden passion may result in a lighter penalty. Similarly, drug possession with intent to sell is a more serious offense than simple possession.

Opponents said HB 587 is unnecessary because Texas already has an adequate hate-crimes law. The current law is more inclusive than HB 587 would be, because it protects all groups without listing them and defining the characteristics of protected persons.

The criminal justice system should prosecute actions, not thoughts. By allowing enhancement of penalties based on a defendant's bias or prejudice toward certain groups, HB 587 could be misused to punish offenders with unpopular views more severely than other offenders. Stiffer penalties do not necessarily deter crime. If they do, then penalties should be increased for all crimes.

All Texans are protected adequately by laws already on the books. Under HB 587, a defendant who assaulted a person because of the person's race would receive a harsher punishment than a defendant who assaulted a person for unrelated reasons. Assault is wrong no matter what the reason, and the punishment should reflect that. By definition, crime typically harms a group of people, not just an individual. All crimes intimidate people.

To prosecute a hate crime successfully, HB 587 would require an extra element of proof that would be difficult to ascertain. It would be difficult to deduce a suspect's motive for committing a crime and to prove a suspect's mental state. In the case of other crimes that may be motivated by hatred, the state is not required to prove motive, only that a particular person committed the crime. HB 587 would require the defense to prove a negative: that the defendant did not think about the victim's characteristics. Defendants could have their friendships, relationships, and memberships in organizations dissected and analyzed. A hate-crime trial could result in trying the defendant's character, values, and beliefs rather than his actions.

The **HRO analysis** appeared in Part One of the April 18 *Daily Floor Report*.

Revising juvenile justice system procedures

HB 1118 by Goodman, et al.
Effective September 1, 2001

HB 1118 makes various changes affecting the juvenile justice system. It adds provisions relating to automatic restriction of access to certain juvenile records and to destruction of those records for housekeeping purposes. It establishes procedures and guidelines for determining if a juvenile sex offender could be exempt from sex-offender registration. Other provisions relate to juvenile board duties, justice and municipal courts, disposition (sentencing), appointment of attorneys and continuation of representation in indigent juvenile cases, establishment of a local juvenile justice information system, and temporary custody of juveniles for fingerprinting and photographing.

Supporters said HB 1118 would remedy problems with many provisions of current law to reflect the juvenile justice system's changing needs. HB 1118 would require a new approach to the confidentiality of juvenile records. It would not alter current law regarding sealing or destruction of records but would provide a fresh start for some juveniles and could help deter them from further criminal activity. The bill would allow courts to decide on a case-by-case basis if sex-offender registration by juveniles was appropriate and to determine the best interests of the public and the juvenile. Many Texas counties have no across-the-board guidelines for appointing counsel and continuing representation for juveniles from indigent families. Such guidelines would help ensure that indigent youths are appointed counsel in a timely manner and can retain counsel throughout their legal proceedings. Taking a juvenile into temporary custody for the purpose of fingerprinting or photographing would aid investigations without infringing on the child's civil liberties. It would be a brief and constitutional detention for a single purpose and only with probable cause.

Opponents said the current law regarding the sealing of records is sufficient. HB 1118 could endanger the public by exempting certain juvenile sex offenders from registering. Public safety and the integrity of the sex-offender registry depend on establishing a complete list of offenders. HB 1118 would make the appointment of a local citizen advisory council by a juvenile board optional, but input from the community should be mandatory to help citizens remain informed and involved. The proposed time constraints regarding the appointment of attorneys in indigent cases could be burdensome to some counties, especially small or rural ones. Taking a child into custody for fingerprinting or photographing could violate the child's civil rights. Also, parental consent always should be required to fingerprint or photograph children who are not in custody, because they may not fully understand the repercussions of such actions.

The **HRO analysis** appeared in the April 9 *Daily Floor Report*.

Credit for parole time if parole revoked and parole board revisions

HB 1649 by Gallego, et al.
Effective September 1, 2001

HB 1649 allows some offenders who have had their parole revoked to receive credit toward their sentences for the time they spent on parole. Offenders convicted of specific serious or violent crimes listed in Government Code, sec. 508.149, and those who previously have been convicted of one of these offenses must continue to serve the remainder of their sentences if their parole is revoked. Other offenders whose parole is revoked will be divided into two groups. Offenders in one group will continue as under current law, while those in the other group may receive credit for some of their time on parole.

If, on the date of the issuance of an arrest warrant or summons that initiates the parole revocation process, the offender is subject to a sentence for which the remaining portion is *greater* than the time from the parole release date to the date of issuance of the warrant or summons (the time spent on parole), the offender must serve the remaining portion of the sentence *without credit for the time spent on parole*.

If, on the date of issuance of the warrant or summons triggering parole revocation, the offender is subject to a sentence with a remaining portion that is *less* than the time spent on parole, the offender must spend the remaining portion of the sentence for an amount of time *equal to the portion of the sentence remaining on the date that the arrest warrant or citation was issued*.

HB 1649 also requires the presiding officer of the Board of Pardons and Paroles, who is designated by the governor, to report directly to the governor and to serve as the administrative head of the board and the policy board. The policy board must establish the required work hours for board members, and board members must file reports on the hours worked. A member of the parole board may be removed for failing to comply with policies or rules adopted by the policy board.

Supporters said that when parole is revoked and offenders are returned to prison, they currently must serve any time remaining on their sentences that was not served before they were released on parole. This means that a person with a 10-year sentence who served five years in prison and then four years on parole before having his or her parole revoked would be sent back to prison to serve all five years of the sentence without any credit for time spent on parole. This offender could wind up spending 14 years under supervision — 10 in prison and four on parole — for a 10-year sentence.

HB 1649 would give the Board of Pardons and Paroles options to deal with nonviolent offenders only. Serious and violent offenders, such as those who commit crimes against

people or who violate drug laws, and those with previous serious offenses who had their parole revoked, would continue to be sent back to prison for the rest of their terms.

Other offenders whose parole was revoked and whose remaining sentence was *less* than the amount of time spent on parole could have their parole street time count toward their sentences. For example, assume that a person given a 10-year sentence served four years and then was released on parole. That person served five years on parole and then had the parole revoked. The remaining portion of the sentence would be one year. The date from release on parole to the date of the revocation warrant would be five years. That person would receive credit for the time on parole, and the remaining portion of the sentence would be computed as equal to the portion of the sentence remaining on the date the warrant was issued, or one year. Offenders whose remaining sentences were *greater* than their release time would continue to be sent back to prison for the rest of their sentences, as under current law.

It is appropriate to allow certain nonviolent offenders to have their sentences recalculated to ensure that the penalty for violating parole is not too onerous and that some nonviolent offenders do not spend more time under supervision than their original sentence. Giving credit in limited situations for parole street time would allow the state's prisons to be reserved for serious, violent offenders instead of nonviolent parole violators.

HB 1649 also would help impose some accountability on the Board of Pardons and Paroles. Requiring the board's presiding officer to report to the governor simply would codify current practice. The board and its chair would remain independent, and the governor would not be insinuated into parole decisions.

Opponents said parole is a privilege, and offenders who violate it should have to serve the remainder of their sentences. Offenders who cannot follow the rules established by the parole board should not be given special breaks and allowed credit toward their sentences for time spent on parole.

Requiring the presiding officer of the parole board to report directly to the governor could infringe on the board's traditional autonomy. Although appointed by the governor, board members' decisions generally are considered independent of the governor and should remain that way, with no appearance of gubernatorial influence.

The **HRO analysis** appeared in Part Three of the May 4 *Daily Floor Report*.

Requiring corroboration of testimony by certain undercover agents

HB 2351 by Hinojosa, et al.
Effective September 1, 2001

HB 2351 prohibits a defendant from being convicted of an offense under the Texas Controlled Substances Act on the basis of the uncorroborated testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement. Corroboration is not sufficient if it shows only the commission of the offense.

Supporters said this bill would protect defendants from being convicted on the basis of uncorroborated testimony from police informants, who often have motives to lie. For example, in Hearne, a small town near Bryan-College Station, law enforcement officers told a convicted car thief that if he bought a first-degree felony amount of cocaine from 20 people on a list, he would receive probation for his latest crime. Those 20 people were indicted on the basis of the informant's testimony, despite the fact that none of the pre-marked buy money was recovered from any of the defendants.

HB 2351 would not impose an insurmountable standard, nor would it impede enforcement of drug laws. In normal undercover situations, there is some corroboration of an informant's testimony, whether a recording of the transaction or an officer witnessing the buy. If no corroborating evidence were required to bring someone to trial, every Texan would be in danger.

Opponents said this bill would decrease enforcement of drug laws. Corroboration of undercover drug buys is very difficult to obtain. Drug dealers know enough not to sell drugs at prearranged locations where law enforcement could set up video and audio recording equipment. Typically, dealers direct buyers to follow them from place to place and then execute the sale inside a darkened building, rather than in an open lot. Also, undercover informants usually cannot wear recording devices, because drug dealers buy inexpensive, keychain-sized scanning devices that light up when they detect a radio frequency being transmitted. If a dealer knew that an informant was "wired," he either would not make the sale or would kill or harm the informant.

HB 2351 is unnecessary. Most law enforcement agencies already require corroboration of informant testimony.

Other opponents said HB 2351 was gutted in conference committee and no longer serves its original purpose. The bill as filed would have ensured that people could not be convicted solely on the basis of testimony by rogue police officers. Most of the people involved in the infamous 1999 drug bust in Tulia, in which about 12 percent of the African-Americans in that town were arrested and indicted on drug charges, were

arrested and convicted with no evidence other than the testimony of an undercover officer with a shady past. As a result of his testimony, dozens of possibly innocent people are now in prison. Some were not even arrested until 18 months after the alleged drug buys. Most accepted plea bargains after seeing the heavy sentences being handed down by all-white juries. Had HB 2351 as filed been in effect, these defendants could not have been convicted unless the officer had shown evidence that they actually sold drugs.

The **HRO analysis** appeared in Part Three of the May 4 *Daily Floor Report*.

Placing a moratorium on the death penalty

HJR 56 by Dutton, HJR 59 by Naishtat
Died in House Calendars Committee

HJR 56 would have proposed amending the Texas Constitution to prohibit the Texas Department of Criminal Justice (TDCJ) from performing executions until September 1, 2003. **HJR 59** would have proposed amending the Constitution to authorize the governor to issue an order prohibiting TDCJ from performing executions on or after the effective date of the order or until the order were revoked, either by that governor or a subsequent one.

Supporters said placing a moratorium on executions would allow the state to evaluate its practices to ensure that innocent people are not executed. Texas executes more people than any other state — 75 during 1999-2000 — and with more executions comes the increasing chance that an innocent person could be put to death. Since the death penalty was reinstated 25 years ago, 95 death-row inmates around the nation have been exonerated. The death penalty is an irreversible punishment, and if an innocent person is executed, that wrong never can be righted. In 2000, Illinois Gov. George Ryan ordered an execution moratorium pending an extensive review when investigations revealed that several defendants had been condemned unjustly.

Public opinion supports a moratorium. A Scripps Howard poll of 1,000 Texans between May 22 and June 16, 2000, found that 57 percent believed that an innocent person had been executed in Texas. When asked if they thought the state should declare a moratorium on death sentences in cases that might be affected by DNA testing, 75 percent said yes. A Justice Project survey of 802 American voters in August 2000 found that 53 percent favored a nationwide suspension of executions until after completion of a study on the fairness of the death penalty's application.

The death penalty is applied capriciously and should be studied to determine how it can be applied more fairly. Almost 40 percent of Texas' death-row offenders come from Harris County alone. Almost 42 percent of the death-row population is African-American, although African-Americans comprise only 11 percent of the state's population. Most people on death row come from poor backgrounds, and many suffered childhood abuse. Legal assistance for indigent defendants varies widely in quality across the state. Texas needs a moratorium while the state determines why this ultimate and irreversible punishment is being meted out inconsistently.

Taking human life is wrong, whether by murder or through executions by the state. A moratorium would honor the sanctity of human life. Religious leaders in Texas and throughout the world agree that executing people is immoral.

Opponents said an execution moratorium would thwart justice. The death penalty is reserved for the most heinous crimes, and preventing that penalty from being carried out when applied justly would be unfair to surviving victims and to society. A delayed death sentence would be inadequate punishment for the most heinous crimes because it would benefit those who had committed the most cold-blooded murders. The average time spent on death row before execution already is 10.6 years, and a moratorium would prolong that period by at least two years, extending the suffering of victims' families and friends. A moratorium is unnecessary, since no evidence exists that an innocent person ever has been executed in Texas. That people can be released on the basis of DNA or other new evidence shows that the current system works.

These proposed measures would undermine Texas' traditional jury system. When a defendant receives the death penalty, a 12-member jury has heard the case and agreed unanimously that the defendant is guilty, poses a future threat to society, and has no circumstances in his or her background to mitigate against a sentence of death. If a single juror disagrees on any of these issues, the person cannot be sentenced to death. HJR 56 and HJR 59 would undermine a jury's decision to sentence someone to death by preventing that sentence from being carried out.

Public opinion favors the death penalty. The Scripps Howard poll in May-June 2000 showed that 73 percent of Texans favored continuing use of the death penalty. Executing capital offenders reinforces the sanctity of human life by showing that those who dare to murder will pay the ultimate price.

HJR 56 and HJR 59 would lead to increased demand for prison space, rising incarceration costs, and new problems for prison management. With incarceration costs ranging from about \$14,800 to almost \$20,000 per inmate per year, the expense of housing an ever-growing prison population of inmates sentenced to death but whose sentences could not be carried out would drain criminal justice resources from other needs, especially considering that medical expenses incurred by aging inmates are three times those of younger offenders. Furthermore, managing inmates without being able to use parole as an incentive for good behavior is difficult and expensive.

Other opponents said that placing a moratorium on the death penalty would be a wishy-washy way to approach this issue. The death penalty is either right or wrong. If legislators believe the death penalty is wrong, they should outlaw it.

Notes: A similar proposal, SJR 25 by Shapleigh, was reported favorably by the Senate Criminal Justice Committee, but died in the Senate. HB 720 by Dutton would have created the Texas Capital Punishment Commission to study the state's use of the death penalty and would have enacted a moratorium on executions until September 1, 2003. That bill died in the House State Affairs Committee.

Procedures for post-conviction testing of DNA evidence

SB 3 by Duncan, et al.
Effective April 5, 2001

SB 3 allows a person convicted of a crime to ask the convicting court for DNA testing of biological evidence. Testing can be requested only if the biological evidence meets specific criteria, including not having been tested previously, either because DNA testing was not available or because testing was available but technologically could not have provided results that proved something in the case. Testing also can be requested if testing previously was not done through no fault of the offender and if the interests of justice require the testing. The convicted person can request testing of evidence that previously had been tested if the evidence could be subjected to newer testing techniques with a likelihood of results that were more accurate and more capable of proving something in the case than was the previous test.

A convicting court must order a test in certain circumstances and can order tests only under those circumstances. The offender must establish by a preponderance of the evidence that a reasonable probability exists that the offender would not have been prosecuted or convicted if DNA testing had provided exculpatory results. The offender cannot request a test to delay a sentence or the administration of justice unreasonably. An offender who has pled guilty or no contest can request a DNA test, and the court may not find that identity was not an issue in the case solely because of a guilty or no-contest plea.

After examining the test results, the court must hold a hearing and make a finding as to whether the results favored the offender. Results are to be considered favorable if, had they been available before or during the person's trial, it would be reasonably probable that the person would not have been prosecuted or convicted.

SB 3 also establishes requirements and deadlines for preserving and destroying biological evidence.

Supporters said SB 3 was necessary to establish a uniform, fair process for inmates to request post-conviction DNA testing so that Texas inmates, their lawyers, prosecutors, and judges would know how to proceed if they wanted to have a test conducted. The avenues available under current law — *habeas corpus* petitions, requests for new trials, and the clemency process — are inadequate because they do not provide a specific procedure that is impartial and that ensures justice in cases in which DNA evidence could exonerate people convicted of crimes.

SB 3 would give all convicted people initial access to the DNA testing process by allowing any person to ask a convicting court for a test if biological evidence met certain

criteria. The criteria set by SB 3 would be minimal so as not to bar inmates unfairly from receiving tests. By the same token, SB 3 would protect the criminal justice system from requests for testing in cases in which testing would be inappropriate or infeasible. By requiring courts to order tests under specific circumstances, SB 3 would ensure that judges would not refuse arbitrarily or unfairly to order a test.

The bill would set a reasonable standard to require a test: a preponderance of the evidence showing that the defendant probably would not have been prosecuted or convicted. Wrongfully convicted defendants would have no problem meeting this standard. These requirements would ensure that the bill would not be used for frivolous appeals. Also, SB 3 explicitly would prohibit requests made only to delay a sentence.

SB 3 would set a reasonable standard for a court to decide that DNA test results favored an inmate. It would be inappropriate for SB 3 to limit judicial discretion and require a certain type of relief upon a finding that favored an inmate. Also, SB 3 would establish statewide protocols for handling biological evidence, since none exist now.

Opponents said SB 3 was unnecessary because current law provides adequate opportunities for post-conviction testing in appropriate cases. Statutory guidelines about when a test can be requested and when a test must be ordered would exclude some cases that might not meet the standards but still might merit testing.

SB 3 would set too high a standard for courts to order DNA tests. Requiring that defendants show by a “preponderance of the evidence” that a test would demonstrate a “reasonable probability” that they would not have been prosecuted or convicted could oblige defendants almost to prove they had not committed the crime without having the benefit of the test results to make their case. The DNA test might be the only exonerating evidence, and without its results, some defendants might not meet the standard in SB 3. It would be better to allow all convicted people access to this testing without having to meet a litmus test.

The bill should specify that if test results were favorable, defendant would be entitled to receive relief such as a new trial, release from prison, or a hearing before an appellate court. This would be necessary to ensure that courts did not ignore favorable test results, as they have in the past.

The **HRO analysis** appeared in the March 21 *Daily Floor Report*.

Providing attorneys for indigent criminal defendants

SB 7 by Ellis, et al.
Effective January 1, 2002

SB 7 sets deadlines for the appointment of attorneys for indigent criminal defendants. In most counties, a lawyer must be appointed for an indigent defendant who requests an attorney as soon as possible and at least by the third working day after the court receives the defendant's request, if adversarial judicial proceedings have been initiated. In a county with a population of 250,000 or more (currently, the 15 largest counties), an attorney must be appointed by the end of the first working day after the court or the court's designee receives a request. In these counties, if an adversarial judicial proceeding has not been initiated, a court must appoint counsel immediately following the first working day after receiving an indigent defendant's request for a lawyer. In other counties, this deadline is after the third working day.

The judges trying criminal cases in each county must adopt and publish county-wide procedures for appointing attorneys for indigent defendants. Procedures must include standards for determining whether a defendant is indigent. Appointments must be made from a public list of attorneys using a system of rotation, unless the county uses a public defender or an alternative system. If using a rotation system, a judge must establish a list of qualified attorneys and must specify the qualifications to be on the list. The procedures adopted must ensure that appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner. A county's judges may establish county-wide alternative programs for appointing counsel.

Juvenile boards in each county must adopt a plan that specifies qualifications necessary for an attorney to be on an appointment list and must establish procedures for appointing attorneys in juvenile cases. To the extent practicable, the plans must comply with the requirements for appointing attorneys in the adult criminal justice system.

Any county may establish a public defender's office. A commissioners court, with written approval of judicial authorities, can appoint a governmental entity or nonprofit corporation as a public defender.

A judge who disapproves the amount of payment requested by an appointed attorney must state in writing the reasons for approving an amount different from that requested. An attorney whose payment request is not approved can appeal the decision.

SB 7 establishes new guidelines for the standards that previous law required to be adopted for attorneys appointed in death penalty cases. The standards must include at least five years' experience in criminal litigation; trying to a verdict as lead defense

counsel a significant number of felony cases, including homicide trials; and proficiency and commitment to providing quality representation to defendants in death penalty cases.

SB 7 establishes a Task Force on Indigent Defense to develop policies and standards to provide legal representation and other services to indigent defendants. The task force must distribute funds to counties for indigent defense services, help counties improve their indigent defense systems, and monitor counties receiving grants. The task force is a standing committee of the Texas Judicial Council with eight *ex officio* members — the chief justice of the Texas Supreme Court, the presiding judge of the Court of Criminal Appeals, two other judges, and four legislators — and five members appointed by the governor, including judges, a criminal defense attorney, and a public defender.

Counties must report to the state Office of Court Administration (OCA) on a monthly, quarterly, or annual basis regarding the amounts they spend to provide indigent defense services. OCA must forward this information to the Task Force on Indigent Defense.

SB 7 requires that 13.98 percent of the court costs paid when a person is convicted of an offense go to a newly created account, the fair defense account, instead of to general revenue. The account can be appropriated only to the task force to implement SB 7.

Supporters said SB 7 would address many problems with Texas' system of providing legal counsel for indigent defendants, including a lack of uniformity in the appointment process, in the competency of attorneys, and in the compensation of appointed attorneys. Policies can vary widely from county to county and even from court to court, and while some policies result in prompt appointment of competent attorneys, others do not. SB 7 would help address these disparities by setting statewide standards for counties' indigent defense systems and by providing state money to help counties with these systems.

While the current system requires the appointment of counsel for indigent defendants, it sets no statewide limit on the time that an indigent defendant must wait before having an attorney appointed. SB 7 would require the appointment of attorneys within one or three working days of certain deadlines, depending on the county's size.

SB 7 would ensure that the appointment process was fair in every county by requiring judges to adopt county-wide procedures for the timely, fair appointment of attorneys. Counties would retain the autonomy to develop their own procedures as long as they met the bill's broad guidelines.

The public list and rotation appointment system would remove the appearance that appointments could be based on attorneys' relationships with judges and that political donations from lawyers could influence the appointments. SB 7 would not mandate that judges choose a specific lawyer but would give judges the flexibility to choose the best lawyer for each case by allowing appointments. SB 7 would not require counties to use a

public appointment list but would allow counties to develop alternative systems or to use public defenders. The bill would not infringe on judicial discretion, because judges would be the ones setting the qualifications for appointments.

By creating the task force on indigent defense, SB 7 would ensure that a statewide body was responsible for setting uniform minimum standards and policies and for counties' indigent defense systems. It is appropriate for the state to set standards, monitor, and help fund indigent defense services, because under the U.S. Constitution, providing attorneys for indigents is a state responsibility.

Opponents said SB 7 is unnecessary because the current system works well and allows localities to devise systems that work for their unique circumstances. Elected judges are the appropriate authority to run indigent defense systems, without burdensome state requirements or oversight from a statewide task force.

Setting deadlines for appointing attorneys would restrict local discretion in making appointments and is unnecessary, because attorneys in most jurisdictions already are appointed within a few days. The deadlines set by SB 7 could be too onerous in some situations, especially those requiring attorneys to be appointed within one working day in counties with populations of 250,000 or more. There is no need for an arbitrary deadline because courts act as quickly as possible to appoint attorneys so that jails do not become overcrowded with defendants waiting for their cases to be resolved.

Isolated problems in individual counties should not lead the state to scrap the entire system and to infringe on individual courts' authority by requiring county-wide procedures and by setting statewide requirements for appointments. Requiring appointments from a public list of attorneys would remove judicial discretion in making appointments and could result in an attorney with inappropriate experience being appointed for a case.

There is no need to require courts to establish uniform qualifications for appointed attorneys. Judges already monitor attorneys' competence because judges do not want to have cases overturned on appeal.

Establishing a task force to set statewide policies and standards for indigent defense systems would institute an unnecessary layer of state bureaucracy.

The **HRO analysis** appeared in Part One of the May 16 *Daily Floor Report*.

SB 85 would have given juries the option of sentencing defendants found guilty of capital murder to life in prison without the possibility of parole. In a capital case in which the state did not seek the death penalty, if the defendant was found guilty or pleaded guilty or no contest, the court would have had to conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to life imprisonment or to life without parole.

Supporters said that in capital murder cases, juries are limited to choosing between death and a life sentence that carries with it a possibility of parole — not always acceptable alternatives. Even though the current parole rate is low, it has been as high as 79 percent as recently as 10 years ago, and some inmates have had death sentences commuted to life in prison and have been paroled. Allowing a sentence of life without parole would give courts maximum flexibility in deciding punishments and would allow the death penalty to be reserved for the most heinous cases while ensuring that other criminals lived the rest of their lives in prison. Also, it would give victim families and friends the peace of mind of knowing that a murderer sentenced to life in prison would never be eligible for release. Enacting this legislation also would help ensure that an innocent person was not executed and would address concerns about the morality of the state's taking a life and the unequal application of the death penalty to the poor and to minorities. It would bring Texas into line with the federal government and the 33 other states that allow a sentence of life without parole. Life without parole could be legislated in a way to withstand court scrutiny and fit into the state's death penalty punishment scheme. The Texas Department of Criminal Justice (TDCJ) has the expertise and resources to manage a prison population sentenced to life without parole. Resources now spent on pursuing the death penalty and responding to a lengthy appeals process would better be used to manage a prison population sentenced to life without parole.

Opponents said the punishment options already available to Texas juries in capital cases serve to punish offenders adequately and protect the public. Life without parole already exists in effect, since capital murderers given life sentences must serve 40 years before being eligible for parole. The average capital offender enters prison at age 29 and the average prisoner lives to be only 64, so an offender sentenced to life in prison would die, on average, five years before becoming eligible for parole. In addition, eligibility for parole does not guarantee release — two-thirds of the 18-member Board of Pardons and Paroles must vote for release, an unlikely scenario given today's tough parole policies. The procedures used in Texas to determine punishment in capital murder cases have been well-litigated, and modifications to current law would be subjected to court scrutiny, lengthening the appeals process and temporarily halting executions. Managing inmates

without being able to use parole as an incentive for good behavior would be difficult and expensive. Inmate assaults on staff already are on the rise, and TDCJ is experiencing a serious staffing shortage. In the end, life without parole inappropriately could replace the death penalty if juries consistently sentenced capital felons to life without parole, which clearly would be inadequate punishment for the most heinous crimes. Enacting such a statute would open the door to expanding the punishment of life without parole to non-capital crimes, blurring the relationship between offense and punishment that reserves the harshest penalties for the most serious crime, capital murder.

The **HRO analysis** of SB 85 appeared in Part One of the May 14 *Daily Floor Report*. An analysis of the House companion bill, HB 365 by Hinojosa, appeared in Part Three of the May 3 *Daily Floor Report*. Similar bills, HB 30 by McClendon, HB 632 by S. Turner, and HB 869 by Dutton, all died in the House Criminal Jurisprudence Committee.

Prohibiting use of race as a predictor of future criminal behavior

SB 133 by West, et al.

Effective September 1, 2001

SB 133 prohibits the state from offering evidence to establish that a defendant's race or ethnicity would make it likely that the defendant would engage in future criminal conduct.

Supporters said SB 133 would correct a wrong in the Texas criminal justice system. It is fundamentally unfair for the state to present evidence that a defendant's race is a predictor of that person's likelihood to commit new crimes. This pseudoscience should be disallowed in a courtroom along with other unreliable evidence, such as lie detector tests. The bill would protect defense attorneys' right to discuss defendants' race when they believed it was a factor that could mitigate their clients' guilt. It would not prevent prosecutors from presenting evidence of racial bias in hate crimes cases. Prosecutors still could present evidence of a defendant's past actions, organization affiliations, and biases. A good prosecutor would tell a jury that a white supremacist posed a future danger not because he was white, but because of his history of violent actions toward other ethnic groups. This bill would have no effect on the seven capital murder cases in which Dr. Quijano, an expert witness, testified that the defendants' race was a factor to consider in determining their future dangerousness. In two of those cases, the defendants already have been resentenced, and the other five likely will be resentenced, regardless of whether SB 133 were enacted. This bill simply would prevent racial bias from being introduced improperly into future criminal cases.

Opponents said SB 133 could limit the evidence presented in a hate crimes case. For example, if a member of the Ku Klux Klan were being tried for committing racial hate crimes against African-Americans, a prosecutor could be prohibited from telling a jury that the defendant posed a future threat because of his being a white supremacist. This bill could cause the families of murder victims greater distress by requiring new sentencing hearings for defendants in capital murder cases in which racial testimony had been injected. These families already endure months or years of litigation, and granting convicted murderers new sentencing hearings on the basis of a small part of the testimony heard in the original hearings would cause additional pain and suffering.

The **HRO analysis** appeared in Part Two of the May 16 *Daily Floor Report*.

Increasing compensation for wrongful imprisonment

SB 536 by Ellis

Effective September 1, 2001

SB 536 expands eligibility for compensation and increases the maximum compensation available to a person who claims to have been wrongfully imprisoned. A person may make a claim if he or she has spent time in prison for a crime and has received a full pardon for the crime on the basis of innocence or has been granted relief on the basis of actual innocence. The act strikes the requirement that a claimant be not guilty of the crime or have pleaded “not guilty” to the charge that led to imprisonment. The person may not receive compensation for prison time served during which the person also was serving a concurrent sentence for another crime of which the person was not found to be innocent.

A claimant either can apply to the comptroller for administrative compensation or can sue the state. The application or suit must be filed within three years of receiving a pardon or being granted relief on the basis of actual innocence. The comptroller must determine the claimant’s eligibility and the amount of compensation owed within 45 days of receiving an application. If the comptroller denies the claim, the comptroller must state the reason for the denial. The claimant has 10 days after the denial to remedy the problems with the claim. If the comptroller denies the claim again, the claimant can bring action for court-ordered relief. If the comptroller grants the claim, the person must be compensated \$25,000 for every year served in prison up to 20 years, plus a fraction of \$25,000 equal to any fraction of a year served, or \$500,000 if the person served 20 years or more. The claimant also can request one year of counseling to be provided at no cost by the Texas Department of Mental Health and Mental Retardation.

A claimant who chooses to sue the state must follow the procedure outlined in current law. Damages may include expenses incurred in connection with all criminal proceedings, appeals, and obtaining discharge from prison; fines or court costs paid and reasonable attorney’s fees; wages, salary, or other income lost as a direct result of the arrest, prosecution, conviction, or wrongful imprisonment; and medical and counseling expenses incurred. The judge or jury hearing the suit may not deduct from the award any expenses the state or a political subdivision incurred in connection with the arrest, prosecution, conviction, and wrongful imprisonment, including food, clothing, shelter, and medical services. Total damages cannot exceed \$500,000.

Not later than November 1 of each even-numbered year, the comptroller must provide a list of claimants entitled to payment and the amounts due them to the governor, lieutenant governor, and the chair of the appropriate committee of each house of the Legislature so that lawmakers may appropriate the necessary amounts. If sufficient funds are not available on the 30th day after the claim is awarded, the comptroller must pay the

claimant not later than September 1 of the year in which the Legislature makes such an appropriation.

After receiving compensation, a claimant can bring no further action involving the arrest, conviction, or length of confinement against any governmental unit or employee of any governmental unit. Compensation payments will end if the person is convicted of a felony after being awarded compensation or if the person dies.

Supporters said when the state makes a mistake and imprisons someone wrongfully, the state has a responsibility to help that person put his or her life back together. The cap of \$50,000 under current law is insufficient for the falsely imprisoned, who lose years of their working lives and potential income. This bill would allow the wrongfully imprisoned to collect up to \$500,000, an amount that would help them and their families compensate for their lost years.

SB 536 would decrease the burden of proof required of the wrongfully convicted to obtain compensation. For example, some defendants plead guilty to crimes they have not committed to receive a shorter sentence because of a prosecutor's threats of a long prison term if they go to trial. These people are not eligible for compensation under current law. This bill would allow those who were wrongfully imprisoned but who do not meet the stringent standards under current law to be eligible for compensation.

SB 536 would be fairer than current law to innocent defendants who did not receive a pardon from the governor. Since 1990, governors have granted only 10 pardons based on innocence. A pardon is an unreasonable requirement to be eligible for compensation. If a court has granted a defendant relief on the basis of actual innocence, that should be sufficient for the person to qualify for compensation.

Opponents said SB 536 would be too expensive. Although the fiscal note estimates that only four or five lawsuits per legislative session would be filed, this bill would expand eligibility for compensation to a point that many more people could apply.

Other opponents said although SB 536 would serve a good purpose by increasing the compensation for people wrongfully imprisoned, it would transfer authority for determining eligibility and compensation from the attorney general to the comptroller. Constitutionally, the attorney general represents the state in court matters, and the AG should continue to fulfill that duty by determining compensation in these cases.

The **HRO analysis** appeared in Part Two of the May 17 *Daily Floor Report*.

Prohibiting racial profiling, requiring data collection on traffic stops

SB 1074 by West, et al.

Effective September 1, 2001

SB 1074 prohibits peace officers from engaging in racial profiling, defined as law enforcement-initiated actions based on a person's race, ethnicity, or national origin rather than on the person's behavior or on information identifying the person as having engaged in criminal activity. Each law enforcement agency in Texas must adopt a written policy that defines and prohibits racial profiling, establishes a complaint process, requires action against peace officers who violate the policy, and requires collection and reporting of information about traffic stops.

Peace officers who stop motor vehicles for alleged traffic violations or who stop pedestrians for any suspected offense must report to their law enforcement agencies information about the stop, including the gender and the race or ethnicity of the person detained. Law enforcement agencies must compile and analyze this information annually and report it to the governing body of each county or city they serve. The report cannot include identifying information about individual peace officers or people they stop.

Peace officers are exempt from reporting information about stops, and law enforcement agencies are exempt from compiling and analyzing the information, if the agency installs and uses video and audio equipment to record traffic and pedestrian stops or if the agency and the city or county certifies to the Department of Public Safety (DPS) that they need funds for such equipment but do not receive state funds for it. DPS must adopt rules for providing state funds for video and audio equipment to law enforcement agencies. Priorities for distributing the money must include smaller jurisdictions and city and county law enforcement agencies.

State-required education and training programs for police chiefs and peace officers must include information on racial profiling.

Supporters said an explicit ban on racial profiling is needed to clarify the state's policy to law enforcement officers and other Texans. Anecdotal evidence and statistical analysis prove the existence of racial profiling. While a stop by police may be perfectly legal because the officer has seen a violation occur, the issue is whether officers are letting some violators go free and using traffic or other violations as a pretext to stop only minorities to search them for drugs or to harass them. It is not realistic to expect victims of racial profiling to go through the expense and hassle of using the courts to challenge every ticket or police stop.

SB 1074 would require law enforcement agencies to adopt policies prohibiting racial profiling to ensure a uniform statewide policy and because some agencies seem reluctant to implement racial profiling bans.

Reporting information about the race and ethnicity of pedestrians and motorists and the disposition of traffic stops would not be burdensome or expensive and would help identify problem areas. Officers could fill out a checklist at the time of each stop, enter the information directly into computers, or use radio codes to transmit the information. It is important to collect data on pedestrian stops and those in which no citations are issued, because racial profiling can occur at those times.

Cost should not prohibit Texas agencies from collecting these data. Hundreds of law enforcement agencies throughout the nation have been able to fund data-collection efforts similar to what SB 1074 would require. If an agency wanted to be exempt from the reporting requirements, it could install recording equipment and phase in its initial cost or could certify to DPS that it did not have funds for the equipment and could apply for state funds, if available.

Collecting data about racial profiling would not discourage good police work. Officers still would make stops and pursue suspects as long as the officers' actions met the applicable legal tests. SB 1704 would protect officers from individual scrutiny by prohibiting identifying information about peace officers in the reports.

Opponents said specific laws to prohibit racial profiling and to require the collection of data about traffic stops are unnecessary. What some call racial profiling simply may be the appropriate performance of an officer's job. Officers are justified in stopping motorists who break the law, and officers may search motorists or vehicles only if legal standards are met. Other constitutional and statutory protections can be used in courts to challenge improper police actions.

The state should not mandate specific policies for local law enforcement agencies. Collecting data on all police stops would be burdensome and expensive for local agencies. Collecting data on pedestrian stops and stops in which no citation was issued would be especially burdensome, since these encounters often involve officers asking a few questions and then moving on, and the stops often are not recorded.

Installation of video and audio equipment would be too expensive for many agencies, and state funds may not be adequate to fund all agencies that need financial assistance. There would be some ongoing costs even with recording equipment, because it would have to be maintained and replaced periodically.

Compiling statistics on police stops could impede police work. Officers could become hesitant to stop minority drivers who broke the law and could be discouraged from

pursuing suspects. Statistics could lead to unfair criticism of officers who work in minority neighborhoods. It would not be fair to examine traffic stops by officers in an area without knowing the characteristics of motorists in the area.

Notes: SB 1, the general appropriations act, contains a contingency appropriation for this bill. Rider 56 for DPS appropriates \$18.5 million from the proceeds of general-obligation bonds for the purchase of cameras, contingent on the enactment of SB 1074 and HB 3064 and on voter approval of HJR 97 in the November 2001 constitutional amendment election. The rider also appropriates \$50,000 from the State Highway Fund for administration of SB 1074, contingent on the same actions. HB 3064 and HJR 97 would authorize the Texas Public Finance Authority to issue up to \$850 million in bonds for various purposes, including the purchase of needed equipment by or on behalf of DPS.

The **HRO analysis** appeared in Part One of the May 14 *Daily Floor Report*.

Economic Development and Finance

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Creating the Office of Rural Community Affairs

HB 7 by Chisum, et al.
Effective September 1, 2001

HB 7 creates the Office of Rural Community Affairs (ORCA) by transferring the Center for Rural Health Initiatives (CRHI) and the portion of the Texas Department of Housing and Community Affairs (TDHCA) that administers the Community Development Block Grant (CDBG) program.

The act requires ORCA to:

- ! develop a rural policy for Texas in consultation with local leaders, academic and industry experts, and state elected and appointed officials;
- ! work with other state agencies and officials to improve the results and cost-effectiveness of state programs affecting rural communities;
- ! develop programs to improve the leadership capacity of rural community leaders;
- ! monitor developments that affect rural Texas communities and prepare an annual report on the condition of rural communities;
- ! administer the CDBG nonentitlement program and the programs now administered by CRHI; and
- ! perform research to determine the most beneficial and cost-effective ways to improve the welfare of rural communities.

HB 7 establishes a nine-member executive committee to administer ORCA, with three members each appointed by the governor, lieutenant governor, and House speaker. The executive committee must call a meeting at least once a year for the following agency heads to discuss rural issues: the commissioners of agriculture, health, human services, and higher education; executive directors of the TDHCA, Public Utility Commission, Texas Parks and Wildlife Department, and Texas Department of Transportation; director of the Texas Agricultural Extension Service; presiding officer of the Telecommunications Infrastructure Fund Board; executive administrator of the Texas Water Development Board; and the comptroller.

HB 7 abolishes the CRHI and transfers to ORCA existing programs to provide scholarships and forgivable loans to encourage health-care professionals to serve rural communities. The act also continues two programs to help medically underserved communities recruit primary-care physicians by providing start-up money to establish a medical office or a stipend during the completion of residency training. ORCA also is responsible for administering the rural health-facility capital improvement program and for developing rules to designate medical facilities as “rural hospitals” that can qualify for federal funds for rural health programs.

ORCA may enter into an interagency agreement with the Texas Department of Agriculture (TDA) for TDA to conduct economic development activities through the CDBG program. (A related act, HB 819 by Counts, et al., transfers the Office of Rural Affairs, a section devoted to economic development, from the Texas Department of Economic Development to TDA.) HB 7 retains existing statutory restrictions that no more than 20 percent of CDBG funds be used for economic development and adds the restriction that no more than 5 percent of CDBG funds may be used for county economic and management development programs.

Supporters said HB 7 would establish a much-needed rural policy for Texas by creating a new office that would develop a comprehensive strategy to address complex issues that have not been addressed adequately by the current patchwork of state and federal programs. The new office would ensure a continuing focus on rural issues, monitor governmental actions affecting rural Texas, study problems and recommend solutions, and coordinate rural programs among state agencies. ORCA will have about 50 staff members and access to almost \$100 million in funding to address health access needs and community redevelopment in 196 non-metropolitan counties. Rural policy is broader than agriculture alone and is a microcosm of all state policies and issues, from education and economic development to health care and the environment. Rural Texas also has unique concerns about sparse and declining populations, narrow economic bases, and the higher cost of providing basic services such as health care and education. A significant portion of Texans still live in rural areas and small towns. They should not be considered a “disposable” population. Texas’ rural population of about 3.35 million is larger than the 1999 population estimates for 25 individual states.

Opponents said HB 7 would create a new bureaucracy that the state does not need. Existing agencies already are addressing the issues that the proposed rural affairs agency would address. These agencies could coordinate policies on an issue-by-issue basis or through special committees of department heads or their designated representatives. A separate agency for rural affairs would be expensive and unnecessary. Moving staff and other resources from CRHI and TDHCA would disrupt ongoing programs and delay providing assistance to rural areas.

Other opponents said Texas also lacks a comprehensive urban policy, and state programs for urban areas have been equally piecemeal and uncoordinated. The state needs an office of urban affairs to address the unmet needs of urban Texas at least as much as it needs a rural affairs office, since the great majority of Texans now live in urban areas.

The **HRO analysis** appeared in the April 9 *Daily Floor Report*.

Setting benchmark rates for certain lines of insurance

HB 2102 by Eiland, et al.
Effective September 1, 2001

HB 2102 requires the insurance commissioner to set a benchmark rate for personal property and automobile insurance, formerly subject to the flexible rating program, after a notice and hearing. The commissioner may consider operating expenses of all insurers, excluding only expenses that are disallowed under the flexible rating program.

The commissioner must request recommendations regarding changes to the benchmark rates before each annual hearing. Notice of each hearing must be published in the *Texas Register*, after which the commissioner must receive public comment for at least 30 days or at the hearing. The public insurance counsel and any insurer, trade group, or other interested person or entity that has submitted proposed changes or actuarial analyses may ask questions of any person testifying at the hearing. After the hearing, the commissioner must adopt a rule promulgating the benchmark rate. A person aggrieved by the commissioner's action in the benchmark rate process may file a petition for judicial review in district court in Travis County within 30 days after the date on which the commissioner adopts a final order on a benchmark rate.

The commissioner must determine and prescribe appropriate rates to be charged for insurance provided through the Texas Automobile Insurance Plan Association (TAIPA). The act removes the requirement for a hearing before the State Office of Administrative Hearings (SOAH) on rates for insurance provided through TAIPA. The association must file its rates with the Texas Department of Insurance (TDI) for the commissioner's approval. It cannot file more than once in any 12-month period.

Supporters said administrative hearings required by the flexible rating program for automobile and homeowner's insurance are cumbersome and inefficient. HB 2102 would streamline this process by allowing the insurance commissioner to set the benchmark rate on the basis of open hearings. The resulting rates would better reflect the market at the time the rate became effective.

SOAH must handle benchmark rate hearings for personal property and auto insurance, including TAIPA, as contested cases. The average time from the initial notice of hearing until a rate is set often is a year. Since rates are based on data from years before the hearing, the resulting rates may not reflect current market conditions. Allowing the commissioner to exercise rulemaking authority in setting benchmark and TAIPA rates would reduce the number of steps in the benchmark process and would lower costs. This change would not reduce the commissioner's authority in setting benchmark and TAIPA rates, as the commissioner now can revise SOAH's recommendation on the basis of evidence in the record. The bill would preserve judicial review of the rate process.

A rulemaking procedure before the commissioner could increase the public's ability to participate in the rate proceeding. Since the hearing no longer would be a contested case, interested parties might be more inclined to participate, as they would not necessarily have to hire attorneys for representation.

The insurance industry in Texas makes no secret that it would like to deregulate, especially private-passenger auto insurance rates. Problems with the benchmark process form the industry's primary argument for abandoning the current system. Enacting this bill would deflate insurers' most compelling argument for deregulation.

Opponents said HB 2102 would lead to higher auto insurance rates in Texas. Under the current benchmark rate process, insurers may select a rate within the flexibility band, plus or minus 30 percent — a 60 percent differential. Since insurers already can charge up to 30 percent above the benchmark rate without TDI approval, insurers likely would seek permission under this bill to raise rates higher, sooner. Insurers do not want to wait for an administrative hearing, followed by a commissioner's ruling in, for example, October, when they could have a ruling by the previous March under this bill.

Texas' auto insurance market alone is more than \$8 billion. In the past, insurance firms have recommended more than a 10 percent increase in the benchmark rate. On that basis, HB 2102 could cost Texans almost \$1 billion by reducing opportunities to examine evidence or to confront witnesses through administrative hearings.

Under this bill, a party could present analyses either before or at the rate hearing. This could put a party, such as the public insurance counsel, in the difficult position of having to ask questions of an insurer about complicated actuarial data that the counsel had not received in advance of the hearing.

The benchmark rating process was one aspect of major insurance reforms enacted by the 72nd Legislature. Insurers did not like the flexible rate program then, nor do they like it now. HB 2102 would bring them closer to their stated goal of complete deregulation.

The **HRO analysis** appeared in Part One of the May 2 *Daily Floor Report*.

Authorizing higher interest rates on small loans

SB 272 by Carona
Effective September 1, 2001

SB 272 raises the maximum interest rate charged on loans not secured by real property from 18 percent to 30 percent on the part of a loan amount that is \$2,400 or less. The maximum rate for the part of a loan amount over \$2,400 but below \$5,040 is 24 percent. The rate remains at 18 percent for loans between \$5,040 and \$12,000. Loan amounts are indexed to the Consumer Price Index so that the amount borrowed subject to these higher rates rises with inflation. A lender may extend only one of these higher-interest loans to a person or a married couple at any one time, and the term of the loan is limited to 37 to 60 months, depending on the loan amount.

A lender who does not charge more than 10 percent interest on a loan may assess a delinquency charge on any portion of a loan payment that is at least 10 days late. Such a charge may not exceed 5 percent of the payment amount or \$7.50, whichever is greater.

The Finance Commission must direct the consumer credit commissioner to establish a research program to study and evaluate alternatives to the problem of high-cost consumer lending. To pay the commissioner's office for undertaking this research task, the Finance Commission may use \$1, rather than 50 cents, of the administrative fee charged for these loans.

Supporters said that higher interest rates and delinquency charges are necessary for many loans because the risk and expense for lenders have made it unprofitable for them to make loans in Texas. Since federal law has made the lending market a national one, lenders simply may operate from states with higher (or no) maximum interest rates without oversight by Texas regulators. However, SB 272 would balance the need for higher effective interest rates on smaller loans, since expenses tend to be fixed regardless of the principal amount, by setting a lower 24 percent ceiling on interest charged on loans between \$2,400 and \$5,040. Also, the studies required of the consumer credit commissioner would help Texas find solutions to the high costs of borrowing. In a national credit market that the Texas Legislature cannot regulate, imposing artificial price ceilings no longer works. This bill would direct the commissioner to look for other ways to keep prices low.

Opponents said SB 272 would increase consumers' cost of borrowing money at a time when interest rates for these loans already are high. For instance, the current effective interest rate for a \$2,000 loan is almost 27 percent once fees are considered. Under this bill, at a flat 30 percent rate, the consumer would pay about \$75.82 more in interest.

The **HRO analysis** appeared in Part One of the May 14 *Daily Floor Report*.

Continuing the Texas Department of Economic Development

SB 309 by Harris (*Effective September 1, 2001*)

HB 3452 by Gallego, et al. (*Died in conference committee*)

SB 309, making various revisions to expiration dates for agencies under Sunset Advisory Commission review, continues the Texas Department of Economic Development (TDED) until September 1, 2003. It does not alter the expiration date of the Smart Jobs program, administered by TDED, which is scheduled to expire December 31, 2001.

HB 3452, as passed by the House, would have continued TDED for a two-year probationary period. Among other changes, it also would have:

- ! prohibited TDED from awarding a Smart Jobs grant after September 1, 2001, and transferred all Smart Jobs-related funds to the unemployment compensation trust fund;
- ! transferred TDED's foreign offices, international trade functions, border affairs responsibilities, and the rural economic development fund to the secretary of state;
- ! transferred the Texas Business and Community Economic Development Clearinghouse to the comptroller; and
- ! created a Texas Tourism Coordinating Council.

As amended by the Senate, HB 3452 would have continued TDED and the Smart Jobs program for two years with no changes. The bill died when the House-Senate conference committee could not reconcile the differences between the two versions of the bill.

Supporters said the House version of HB 3452 would streamline TDED to enable the agency to focus on its core activities of assisting businesses and communities with economic expansion and promoting tourism. The bill would help correct long-standing problems at TDED identified by sunset review and would ensure proper accountability by requiring TDED to implement effective board leadership and executive management, a strategic plan, and agency-wide contracting standards and operational controls. The bill would ensure compliance with these changes by requiring TDED to undergo sunset review again before the next legislative session.

The bill would freeze the Smart Jobs program at TDED to give the Legislature time to determine the best place and focus for the program, which has changed considerably since it was created. Sweeping all Smart Jobs-related funds into the unemployment compensation trust fund also would help ensure that the trust fund could meet unemployment compensation payments.

Creating the Texas Tourism Coordinating Council would enable the 11 state agencies involved in tourism activities to coordinate their efforts and would ensure a consistent, unified tourism message across the agencies. As the unofficial designee for crossborder relations and border economic development, the Secretary of State's Office is the most appropriate entity in which to house these related programs now at TDED. Moving the Texas Business and Community Economic Development Clearinghouse to the Comptroller's Office, which already keeps extensive data on Texas businesses and on taxes, would provide a single point of contact for economic development information.

Opponents sought many changes to HB 3452, either to retain programs at TDED that the bill would transfer or to transfer programs to other agencies that the bill would not have altered. Separate proposals arose for retaining the Smart Jobs program at TDED and for transferring the program to the Texas Workforce Commission (TWC). Supporters of maintaining Smart Jobs at TDED argued that the agency should have an opportunity to demonstrate the effectiveness of the changes it has made to the program while the Legislature deliberates the program's future. Freezing the program's funding would impair Texas' ability to attract business at a time when the economy is slowing. Supporters of transferring the program to TWC said this would bring the state's job training programs under a single agency and would increase coordination with other workforce development efforts.

International trade functions and foreign offices should remain at TDED, since international trade is an integral part of corporate expansion and recruitment. Moreover, since the duties of the secretary of state often change with the priorities of each new secretary, these functions could receive a lower priority under the next secretary, whereas these functions would remain a priority at TDED, since they are a fundamental part of the agency's mission. The economic development clearinghouse also should remain at TDED. As the first point of contact for businesses seeking to expand, TDED should house the clearinghouse to provide information to these businesses. TDED's tourism functions should be transferred to the Texas Department of Transportation. Having two state agencies charged with promoting tourism in Texas results in inefficiencies and duplication of effort.

Other opponents said TDED should be abolished. The agency never has had a clear purpose and has mismanaged and wasted taxpayer money. Continuing TDED under the House version of HB 3452 would leave little more than a glorified tourism agency, with functions that should be handled by the tourism industry anyway. Economic development is primarily a local activity, and the Governor's Office or the Secretary of State's Office could provide the contact point for businesses and communities interested in economic expansion.

The **HRO analysis** of HB 3452 appeared in Part One of the *May 7 Daily Floor Report*.

Continuing the Office of Consumer Credit Commissioner

SB 317 by Sibley
Effective September 1, 2001

SB 317 continues the Office of Consumer Credit Commissioner (OCCC) until September 1, 2013, and revises the agency's authority extensively, including by providing for regulation of sale-leaseback and deferred presentment transactions as loans; requiring licensing and allowing examination of lenders who finance motor-vehicle sales; and permitting higher interest on some pawn loans and shorter holding periods for pawned property.

Sale-leaseback agreements must allow a seller to terminate the lease portion of the agreement by returning the property to the buyer/lessor without incurring rental charges that occurred before the return of the property. A buyer in a sale-leaseback transaction who requires the seller to provide a check as security for the lease may not threaten criminal prosecution if the check is returned unpaid. Violation of this provision is subject to a fine of up to \$1,000.

Lenders regulated by the OCCC must use contracts written in plain language and printed in easily read type. The Finance Commission must adopt model forms for lenders to use.

Supporters said the increased regulation of motor-vehicle lenders, sale-leaseback agreements, and deferred presentment transactions proposed by SB 317 are necessary to protect consumers. Almost three-quarters of the consumer complaints and questions that OCCC receives relate to motor-vehicle lending. Sale-leasebacks and deferred presentment transactions function as loans but have not been regulated as such, because the companies engaged in these transactions have redefined the interest they charge as "fees" or "rent" to evade regulation. The result is fees and rent that are equivalent to a 650 to 1000 percent interest rate in some cases, especially when the loan is extended or rolled over several times, which a large number of borrowers do.

Contrary to the industry's warnings, treating these transactions as loans would not eliminate them. Many lenders successfully make loans at that rate now, and SB 272 by Carona, which takes effect September 1, 2001, increases the maximum interest rate for many small loans to 24 to 30 percent.

Opponents said that defining sale-leaseback transactions as loans would be inappropriate because, in such transactions, the property actually is purchased and then leased, causing the risk of damage to the property to fall entirely on the owner/lessor. Also, if the seller decides to accept the sales price and turn in the property after making a few lease payments, the seller has that right — no loan has been defaulted on. Regulating sale-leasebacks as loans also would be unwise because the risks involved in these

transactions could make them unprofitable at the current interest-rate ceilings. On the other hand, if the transactions ceased to be offered, consumers with less than sterling credit would lose an important way of obtaining cash. Also, the bill would reduce revenue to the state, because sale-leaseback transactions currently are subject to state sales tax. As loans, they would not be taxable.

The bill's provisions regarding pawn loans also are unfair. Such loans already are very expensive, but the bill would increase interest rates on many of them. At the same time, the bill would reduce the amount of time that a consumer who had pawned an item would have to redeem it by repaying the loaned amount. This provision effectively would increase the cost of borrowing by reducing the term of the loan before the consumer forfeited his or her pawned property for the relatively small cash advance amount.

The **HRO analysis** appeared in Part One of the May 17 *Daily Floor Report*.

Specialty insurance license for residential landlords

SB 431 by Carona
Died in the House

SB 431 would have authorized the insurance commissioner to issue a specialty license to a residential landlord or property manager to act as an agent for any authorized insurer selling renter's insurance. The landlord or manager could act as an agent with respect to insurance that provided coverage to residential renters for loss of or damage to tangible personal property or liability coverage to renters for bodily injury or property damage. Insurance could not have been issued unless written materials containing many specific disclosures were displayed prominently and made readily available to the prospective renter. The required disclosures would have included a statement that purchase of this insurance was not required as a condition of entering into the lease agreement.

Amendments added during House floor debate included prohibiting a license holder (landlord) from coercing a renter to buy an insurance product and from receiving more than a 15 percent commission and creating penalties for violations.

Supporters said SB 431 would allow rental property owners to obtain a specialty license to offer renter's insurance to their residents. Only 15 percent of Texas' residential renters have insurance to cover their belongings. Most renters do not obtain insurance because they do not realize that the landlord's or owner's insurance does not cover their belongings or personal liability. This bill would offer a "one-stop" process to renters when they lease, encouraging them to obtain renter's insurance for their protection and, in turn, to protect their friends and neighbors, as well as the property owner.

Opponents said allowing landlords and property managers to sell renter's insurance would undermine insurance agents and could result in coercion of consumers. The bill's purported consumer-protection measures could be circumvented easily. Unless they read carefully every word of their leases, many people could sign leases without being aware of any possible insurance transaction, much less of any warnings or potential problems. The sale of renter's insurance should occur between parties who are mutually aware of the nature and terms of the transaction. The consumer should be able to ask questions and be advised about rates and forms, particularly as to specific coverage. Assertions that all policies and technical questions would be handled by a fully licensed insurance agent or company would be of little comfort to someone who unwillingly or unknowingly entered into a policy with inadequate or incomplete coverage.

The **HRO analysis** appeared in Part Three of the May 18 *Daily Floor Report*.

Creating a Texas Border Strategic Investment Commission

SB 1837 by Shapleigh, et al.
Died in the House

SB 1837 would have created a seven-member Texas Border Strategic Investment Commission to oversee redevelopment efforts along the Texas-Mexico border. The commission would have included the lieutenant governor, House speaker, comptroller, agriculture commissioner, Senate Finance Committee chair, House Appropriations Committee chair, and secretary of state.

The panel would have considered strategic economic development initiatives in the six metropolitan statistical areas in the border region: San Antonio, Brownsville-Harlingen-San Benito, Corpus Christi, Laredo, McAllen-Edinburg-Mission, and El Paso. The panel also could have studied “persistent poverty counties” classified by the federal government, whether located on the border or elsewhere in the state.

Supporters said SB 1837 would be the first step in creating a Texas Border Marshall Plan on the order of the U.S.-backed reconstruction of Europe after World War II. Despite the prosperity of the 1990s and the promise of the North American Free Trade Agreement, poverty has persisted in the border region. The 43 counties in this region have the highest poverty and unemployment rates and the lowest per-capita income in the United States. Improving economic conditions on both sides of the border requires a coordinated strategy involving all governments, businesses, and citizens. The commission would review economic development projects according to a strict standard and would not create a new set of business subsidies. Emergency economic conditions along the border may not reach the status of the fiscal emergency required to tap into the “rainy day” fund, so it would not be appropriate to designate \$250 million from this fund to finance commission programs. The commission should have adequate resources to help start economic development projects during the upcoming biennium and could make recommendations in time for the next legislative session.

Opponents said that removing the \$250 million rainy day fund appropriation from the Senate version of the bill would reduce the commission to a glorified “think tank” or study group. Rainy day funds to help this distressed region should be used today for real problems, not on some undefined future event that may never arrive.

Other opponents said it is not within Texas’ capacity to reduce poverty in Mexico, even though the Legislature already has appropriated billions of taxpayer dollars to assist the border region. Economic development programs easily could turn into business subsidies. The market should determine the future of the border region.

The **HRO analysis** appeared in Part Three of the May 22 *Daily Floor Report*.

Elections

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HB 2

Gallego

Revising campaign reporting requirements

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Revising campaign reporting requirements

HB 2 by Gallego, et al.

Died in conference committee

HB 2, as passed by the House, would have raised the cap on reportable campaign contributions and expenditures from \$50 to \$200; required general-purpose committees to disclose the occupation of contributors who accounted for the largest proportion of total money accepted; protected donor information from being used for commercial purposes; expanded late-reporting rules by requiring candidates for statewide office and for the State Board of Education and their specific-purpose committees to report large contributions and expenditures accepted during the last nine days of a campaign; and required out-of-state political action committees (PACs) to report expenditures of more than \$200, unless the PAC filed a report with the Federal Elections Commission.

The bill would have restricted the amount candidates and officeholders could reimburse themselves from campaign accounts for personal money spent on their campaigns; prohibited candidates from raising or spending money if they had not filed their reports in a timely manner; and prohibited a campaign treasurer from continuing in that capacity if reporting rules were not followed. It would have established a Class C misdemeanor for coercing or threatening someone to obtain a contribution.

The House version would have defined express advocacy in terms of the “magic words” test and “reasonable person” standard for the purpose of regulating political advertising; required reporting of contributions and expenditures over \$200 by people other than candidates or political parties who spent more than \$2,500 for certain candidate-specific advertising during a preelection period; and required additional disclosure on certain political ads. The Texas Ethics Commission (TEC) would have had to make electronically filed reports available to the public on the Internet no later than the second business day after reports were filed but could have removed the street address (but not the street name) of a contributor.

As passed by the Senate, HB 2 would have defined express advocacy without reference to the “reasonable person” standard. It would have established a third-degree felony for coercing or threatening someone to obtain a contribution. All statewide candidates would have had to report contributions of more than \$1,000 received in the last nine days of a campaign. The bill would have required candidates to report the employer and occupation of contributors giving more than \$500; required out-of-state PACs making expenditures and contributions in Texas to file with the TEC; and required candidates to report cash-on-hand balances. It would have allowed PACs to be established within 30 days before an election as long as the PAC filed its treasurer appointment within 48 hours and would have allowed political contributions by partnerships and limited liability companies. A general-purpose committee that made a direct campaign expenditure of

more than \$5,000 would have had to report the occupation of the person to whom the expenditure was made.

Supporters said HB 2 would close loopholes that prevent the public from identifying the source of campaign funds and would create a reporting system that would allow Texas citizens to be fully informed about the funding of political campaigns. Reporting the occupation or employer of certain contributors would facilitate disclosure of contribution sources and would be similar to existing federal reporting requirements.

Requiring statewide candidates and political committees who make large contributions and expenditures during the last nine days of a campaign to disclose those contributions would go a long way toward informing citizens who was backing whom. The reporting requirement would not be burdensome because it would apply only to contributions of more than \$1,000.

A PAC registered out of state usually is exempt from listing its contributions. This makes it easy to influence Texas elections surreptitiously, as donors can disguise their contributions by sending money to an out-of-state PAC, which then can send money to Texas without reporting it. HB 2 would close this loophole.

The bill would set clear guidelines for regulating express advocacy, including the “reasonable person” standard. In a 1976 decision, *Buckley v. Valeo*, 424 U.S. 1, 26, the U.S. Supreme Court held that advertisements that are not coordinated with a campaign or a candidate and that expressly advocate the election or defeat of a candidate are considered express advocacy and can be regulated.

Current law prohibiting the formation of a PAC within 30 days before an election unconstitutionally infringes on a person’s right to give money to support or oppose candidates and causes. Lifting this prohibition would not allow “fly-by-night” PACs to be formed late in the game and to give large sums of money without disclosure, because under current law, once the PAC collects or spends more than \$500, it must file a treasurer appointment and becomes subject to disclosure requirements. Both general-purpose and specific-purpose committees would have to file supplemental reports during the last nine days of a campaign if they contributed or spent over certain amounts.

Opponents said defining express advocacy with reference to the “reasonable person” standard probably would be unconstitutional. The majority of federal judicial decisions have held that a definition of express advocacy other than one that meets the “magic words” test may not survive constitutional scrutiny. If an advertisement does not use the magic words, it qualifies as “issue advocacy,” which cannot be regulated legally.

The prohibition against accepting contributions or making expenditures for a committee whose campaign treasurer was the treasurer of another committee that did not file timely

would penalize complying candidates unfairly. Also, it is doubtful whether a prohibition against expenditures would be constitutional.

Other opponents said removing the requirement that PACs be established at least 30 days before an election is worrisome. The bill should retain some type of time requirement to prevent the last-minute formation of PACs to transfer funds among shell organizations for the purpose of obscuring the source of contributions.

HB 2 would impose time-consuming and burdensome requirements on candidates and officeholders by requiring additional information on donors. For example, it is not clear what public good would be served by knowing a contributor's employer. Also, the bill would create a loophole for donations given by business partnerships and corporations.

The **HRO analysis** appeared in Part One of the April 17 *Daily Floor Report*.

Environment and Land Management

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Vehicle emissions testing requirements

HB 2134 by Chisum
Effective September 1, 2001

HB 2134 requires the Texas Natural Resource Conservation Commission (TNRCC) to implement a vehicle emissions inspection and maintenance (I&M) program in a county that requests one. TNRCC must review the vehicle emissions inspection fee, authorized under previous law, at least once every two years and can use fee proceeds to provide incentives for additional inspection stations to participate in the testing network. The fee also will fund low-income vehicle repair assistance, retrofit, and accelerated vehicle retirement programs.

The Department of Public Safety (DPS) can waive I&M requirements for a vehicle on which at least \$100 has been spent to bring it into compliance, that has been driven less than 5,000 miles since its last safety inspection, and that is expected to be driven less than 5,000 miles before the next required inspection and for which parts are not readily available. I&M requirements do not apply to vehicles registered, but not primarily operated, in counties with I&M programs. TNRCC can suspend I&M requirements for pre-1996 vehicles in counties where the number of such vehicles subject to I&M requirements is 20 percent or less of the number of those vehicles in the county on September 1, 2001, and where an alternative testing methodology meeting or exceeding U.S. Environmental Protection Agency (EPA) requirements is available.

The low-income and accelerated vehicle retirement programs will provide monetary or other assistance for repairs related to bringing a vehicle into compliance with emissions requirements; a replacement vehicle, if the cost of bringing a vehicle into compliance is uneconomical; and installation of retrofit equipment on a vehicle that fails an emissions test. TNRCC must adopt rules assigning an emissions reduction credit to a private, commercial, or business entity that purchases a qualified vehicle under a low-income or accelerated vehicle retirement program. A vehicle retired under an accelerated vehicle retirement program must be destroyed, recycled, dismantled, and sold as parts, or else repaired and brought into compliance for use as a replacement vehicle. TNRCC, the Texas Department of Transportation, and the Public Safety Commission may establish incentives for counties to implement voluntary I&M programs and low-income and accelerated vehicle retirement programs and to give preference to those counties in any clean-air grant program.

The act establishes a misdemeanor offense punishable by a fine of up to \$350 if a person — except when downshifting to maintain reasonable momentum — knowingly operates a vehicle that emits visible smoke for at least 10 seconds or smoke that lingers for at least 10 seconds before fully dissipating.

An advisory committee will advise DPS on the adoption and content of rules relating to the operation of the I&M program. DPS may impose an administrative penalty on a person who knowingly violates inspection requirements. Individual penalties may not exceed \$1,000, and the aggregate penalty may not exceed \$10,000.

TNRCC must seek a binding commitment from the EPA that any county that voluntarily participates in an I&M program and in a low-income and accelerated vehicle retirement program will receive credit for taking steps to reduce air pollution if the county later is found to exceed federal clean-air standards and that the county will not be penalized for having voluntarily created the programs.

Supporters said CSHB 2134 would help to reduce air pollution and bring Texas into compliance with federal air-quality standards. Several metropolitan areas in Texas have been declared nonattainment areas under federal regulation. TNRCC has promulgated rules for vehicle emissions testing to help bring areas such as Houston-Galveston into compliance with federal standards. This bill would give TNRCC and DPS greater flexibility to administer emissions testing and reduction programs.

The bill would create programs to repair or retrofit vehicles of low-income owners to bring them into compliance with emissions standards or to replace their vehicles. Low-income people often depend on their vehicles for daily transportation to work but cannot afford to make emissions improvements. The program would help to bring these cars into compliance or to accelerate their retirement in order to reduce their contribution to air pollution.

Opponents said CSHB 2134 would burden vehicle inspection stations in counties with I&M requirements by forcing them to increase prices to cover increased labor costs for complying with TNRCC emissions requirements. Higher prices could cause vehicle owners to forgo necessary inspections or use illegal means to obtain inspection stickers. Responsible station owners would have to squeeze their profit margins to compete with lower-priced illicit operations and with stations in nearby counties that did not have I&M requirements.

The **HRO analysis** appeared in Part One of the *May 7 Daily Floor Report*.

Continuing the Texas Natural Resource Conservation Commission

HB 2912 by Bosse, et al.
Effective September 1, 2001

HB 2912 continues the Texas Natural Resource Conservation Commission (TNRCC) until 2013 and makes comprehensive statutory changes. TNRCC will be renamed the Texas Commission on Environmental Quality by January 1, 2004.

Performance-based regulation. TNRCC must develop a tiered regulatory structure and must consider compliance history in taking action on permits, enforcement, and determination of eligibility for announced inspections and innovative regulatory programs. A poor performer cannot receive advance notice of inspections, obtain or renew a flexible permit, or participate in innovative regulatory programs. TNRCC may exempt an applicant from a pollution-control requirement if the applicant proposes a measure that protects the environment better than the existing standard, consistent with federal law. TNRCC cannot consider a preexisting supplemental environmental program as a mitigating factor in an administrative penalty proceeding.

Regulation of air pollution. HB 2912 requires “grandfathered” industrial plants (those exempt from permit requirements under the Texas Clean Air Act) to obtain air-emissions permits by September 1, 2003 (East Texas), or September 1, 2004 (West Texas), and to comply with all permit conditions for emission controls or reductions by March 1, 2007 (East Texas), or March 1, 2008 (West Texas). Grandfathered facilities will be subject to the same modification rules as other facilities. A facility may opt to file a notice of shutdown before the deadline.

TNRCC must regulate “emissions events,” defined as upset, maintenance, startup, or shutdown activities resulting in unauthorized emissions. The commission must develop the capacity for electronic reporting from facilities with continuous emissions monitoring equipment and must record data in a permanent centralized database. TNRCC must collect information on responsive actions and events in each region and must establish criteria for “excessive” emissions. The TNRCC executive director may require a facility to reduce excessive emissions events and to file a publicly available corrective action plan or to apply for a conforming permit.

Administration. In contested case hearings, the TNRCC executive director may be a named party only where the director bears the burden of proof; may provide information only to complete the administrative record; and may not rehabilitate a witness. The public interest counsel (PIC) may recommend legislative and regulatory changes and may use outside technical support. TNRCC may initiate enforcement actions based on credible information from private individuals.

Fees and rates. TNRCC must provide prompt notice of changes in fee payment procedures and may issue a notice of violation to a person who either knowingly violates reporting requirements or undercalculates a fee. TNRCC may collect penalties and interest on delinquent fees, and the director may modify a penalty or interest upon written explanation of good cause. TNRCC may transfer fee revenue dedicated to one activity to other activities, subject to statutory restrictions.

Solid waste regulation. TNRCC must ensure that a facility primarily transferring solid waste is regulated as a solid waste facility and not treated as an unregulated recycling facility. TNRCC may take immediate remedial or removal action to protect human health and the environment from the release of a hazardous substance at a scrap tire site. HB 2912 prohibits the storage, processing, or disposal of hazardous waste in solution-mined salt dome caverns and sulphur mines. The act provides for notice and hearings for reopening closed or inactive landfills, which must comply with current requirements, and requires a permit for land application of certain sludge.

Animal feeding operations. TNRCC may approve construction of a new concentrated animal feeding operation (CAFO) or an increase in the number of animals at an existing CAFO in certain areas only by individual permit. The permit must require that 100 percent of the collectable manure from the additional animals or from all animals be taken outside the watershed, delivered to an approved composting facility, applied to a TNRCC-approved waste application field, or put to an approved use.

Miscellaneous provisions. HB 2912 extends the expiration date of the petroleum storage tank (PST) reimbursement program to September 1, 2006, and reduces the fees on bulk delivery of petroleum products that generate revenue for the PST remediation fund.

TNRCC may not establish vehicle fuel-content standards more stringent than federal standards before January 1, 2004, and may not require use of the Texas low-emission diesel fuel described in revisions to the State Implementation Plan before February 1, 2005.

TNRCC must establish a certification program for installation of water-treatment appliances in certain facilities. An uncertified person may not engage in water treatment. Plumbing licensees and people employed by industrial facilities that install or service water-treatment equipment are exempt from the certification requirement.

The bill restricts the location of concrete crushing facilities and certain landfills. Also, TNRCC may issue emergency orders shutting down unpermitted concrete plants and impose a fine of \$10,000 per day of operation without a required permit.

Supporters said incentives provided by the performance-based regulatory program would encourage more regulated facilities to reduce pollution voluntarily to earn incentives, allowing TNRCC to spend fewer resources regulating these facilities. Some facilities report

a few emissions events but do not report their startup, shutdown, and maintenance events. These pollution-causing events are not covered by permits, making the emissions essentially “free.” HB 2912 would put a stop to this. Also, allowing transfer of fee-generated funds would enable TNRCC to operate more efficiently.

HB 2912 would allow the TNRCC executive director to take a less adversarial role in contested hearings. However, the director’s continued participation in permit hearings is essential to preserve changes made during the permitting process, as a permittee might try to “defend” the permit back to its original application.

The public interest counsel cannot adopt a truly adversarial role because there is no single “public interest,” so the PIC’s role should be limited to ensuring public access to hearings during the application and permitting process. The PIC should not be able to appeal, which would authorize PIC to second-guess commissioners’ decisions.

Opponents said unannounced inspections would have unanticipated consequences. A smaller company might have only one employee responsible for environmental compliance, and that employee might be absent on the day of an unannounced inspection, or the appropriate records might not be kept on the site. Such circumstances would force TNRCC to return to the site to inspect on another day, raising inspection costs. Also, unannounced inspections would result in additional notices of violation for minor paperwork infractions with no environmental impact.

True upsets include failure of pollution-control equipment, leaking apparatus, or faulty parts, but not startup and shutdown operations and scheduled maintenance to maintain equipment. The bill should provide stiffer penalties for failure to report true upsets.

If the executive director’s participation is limited to certain cases, the public would perceive the director’s participation as arbitrary. Also, the PIC should be separate from TNRCC. The counsel cannot fulfill its role as a public advocate in an adversarial proceeding when the adversary is the counsel’s employer. Also, the PIC cannot advocate effectively without the right to appeal.

Because TNRCC is funded by emissions-based fees, decreasing emissions mean decreasing revenue. HB 2912 would exacerbate TNRCC’s funding shortage by requiring more work without additional resources. The bill should remove the 4,000-ton cap on air emissions fees, which amounts to a “volume discount” for large-scale polluters and provides no incentive to reduce emissions. Additional fee revenue could cover the cost of some duties this bill would assign to TNRCC. The fees cover costs associated with specific TNRCC activities. If TNRCC were allowed to transfer those fees among accounts, regulated industries would have to pick up the tab for the cost of TNRCC’s non-regulatory activities.

The **HRO analysis** appeared in Part One of the April 19 *Daily Floor Report*.

Additional \$2 billion bond authorization for water projects

HJR 81 by Counts

Effective pending voter approval on November 6, 2001

HJR 81, if approved by voters, would amend the Texas Constitution to authorize the Texas Water Development Board (TWDB) to issue up to \$2 billion in additional general-obligation bonds for one or more accounts of the Texas Water Development Fund II. Of the additional bond authorization, \$50 million would have to be used for the water infrastructure fund created by the 77th Legislature in SB 2 by Brown.

Supporters said HJR 81, if approved by voters, would authorize TWDB to issue up to \$2 billion in additional general-obligation bonds. These low-interest bonds would be used to back more loans to communities to finance projects for water supply, water quality, and flood control, as well as for the state participation program. Money from the water infrastructure fund will be used to implement water projects recommended in the state and regional water plans.

Although the board has not yet issued all of the water bonds now authorized, it soon will need additional bond authority. The board has about \$490 million remaining in its bond authorization. It has issued almost \$1 billion in bonds since 1992 — nearly two-thirds of that amount in the past five years — largely in response to Texas' rapid population growth. The remaining authorization is projected to be depleted during fiscal 2004-05. Waiting until the next Legislature to seek voter approval for additional authorization would put the board in a precarious situation. If Texas voters, in response to an economic downturn or other factors, did not approve the authorization, the board could not issue additional bonds to finance projects to help meet Texas' future water needs.

Opponents said authorizing TWDB to issue additional bonds would be premature. The board still has \$490 million remaining in its bond authorization, an amount that should be sufficient through the next biennium. Without an urgent need for additional authorization, the board should wait until the 78th Legislature to ask the voters for the authority to issue more bonds. Also, HJR 81 is predicated on the assumption that all projects proposed by local communities and regional planning groups are needed. Many of these projects have not been through a rigorous analysis of their costs and benefits, and many may present potential environmental problems that should be studied further before authorizing additional bonds.

The **HRO analysis** appeared in Part One of the April 19 *Daily Floor Report*.

Developing and managing water resources

SB 2 by Brown
Effective September 1, 2001

SB 2 creates the Texas Water Advisory Council to recommend state water policy initiatives, coordinate intergovernmental efforts along the Texas-Mexico border, coordinate a unified state position on federal and international water issues, and advise the Texas Water Development Board (TWDB) on funding priorities for the state water plan. Unless extended by the 78th Legislature, the council will expire September 1, 2005.

Regional water planning groups must report to TWDB by June 1, 2002, on how political subdivisions in the region plan to pay for water projects identified in the regional plan and what role the state should play in financing projects identified in the plan. TWDB must work with groundwater conservation districts and regional water planning groups to develop groundwater availability models for major and minor aquifers by October 1, 2004. TWDB and the Texas Natural Resource Conservation Commission (TNRCC) must complete the initial designation of groundwater management areas covering all major and minor aquifers by September 1, 2003, and must complete the initial designation of priority groundwater management areas (PGMAs) by September 1, 2005. The act also revises administrative procedures for designating PGMAs and water districts.

SB 2 revises administrative procedures for creating groundwater conservation districts. After January 5, 2002, a groundwater district must develop a water management plan and submit the plan to the appropriate regional planning group. Groundwater districts within the same management area must consider their management plans individually and must compare them to other management plans in the area. A groundwater district may not impose more restrictive conditions on applications for permits to transfer groundwater outside of the district's boundaries than for permit applications for in-district use. However, a district may approve a fee for exporting groundwater out of the district by negotiating with the transporter, by setting the fee below the district's ad valorem water tax rate, or by setting a fee that is a 50-percent export surcharge in a fee-based district.

SB 2 also creates the water infrastructure fund as a special account in general revenue. Money from the fund must be used to implement water projects recommended in the state and regional water plans. The act also creates the rural water assistance fund in the state treasury. Rural political subdivisions eligible for assistance from the fund include a nonprofit water supply or sewer service corporation, a district, or a city that has a service area with a population of 10,000 or less or one that qualifies for federal financing, or a county that does not contain an urban area with a population larger than 50,000.

TWDB must collaborate with other state agencies on an instream flow data collection and evaluation program. SB 2 also creates the legislative Joint Committee on Water

Resources to conduct an interim study and to make recommendations on increasing the efficient use of existing water resources, developing long-term funding strategies, improving water conveyance systems and water marketing, determining the appropriate role of environmental and wildlife concerns in water permitting and development, and protecting the natural condition of the beds and banks of state-owned waterways.

SB 2 sets a \$2 million liability cap on damage claims against a licensed aquatic herbicide applicator working under contract for a river authority. TNRCC must follow specific environmental permitting procedures if any part of a concentrated animal feeding operation proposed in a permit application is located within the protection zone of a sole-source surface drinking water supply. SB 2 also ratifies 13 groundwater conservation districts created by the 76th Legislature's enactment of SB 1911 by Brown.

Supporters said SB 2 is a necessary follow-up to the water planning and development process initiated by the 75th Legislature through SB 1. It would clean up provisions enacted by SB 1, including specifying procedures for designating PGMAs, clarifying administrative procedures for groundwater conservation districts, and facilitating joint planning among districts. It also would implement recommendations of the regional planning groups, including continuing the planning process and identifying funding strategies for regional water plans.

Opponents said SB 2 would not provide funding for needs identified in the regional water plans. The regional groups identified \$17 billion in capital costs needed to meet Texas' water needs for the next 50 years. SB 2 simply would return the funding issue to the regional groups. Also, creation of the Texas Water Policy Advisory Council would add another layer of cumbersome bureaucracy to the water planning process.

Aquatic herbicides pose a significant health risk to public drinking water supplies. The danger and potential impact of chemicals used to kill invasive plants entering a municipal water supply is too great to impose a liability cap on the application of aquatic herbicide.

The **HRO analysis** appeared in Part One of the May 21 *Daily Floor Report*.

Notes: HJR 81 by Counts, if approved by voters in the constitutional amendment election on November 6, 2001, would authorize TWDB to issue \$50 million in general-obligation bonds for the water infrastructure fund created by SB 2.

Creating the Texas Emissions Reduction Plan

SB 5 by Brown, et al.
Effective September 1, 2001

SB 5 creates the Texas Emissions Reduction Plan (TERP), including grant programs aimed at reducing nitrogen oxide (NO_x) emissions; establishes the Texas Council on Environmental Technology (TCET) and a 15-member advisory board for the plan; imposes surcharges to fund the plan; and requires cities and counties to adopt energy-efficient building codes. The Texas Natural Resource Conservation Commission (TNRCC) will administer the plan, which complements the State Implementation Plan (SIP) for compliance with the National Ambient Air Quality Standards (NAAQS). TNRCC must ensure that the U.S. Environmental Protection Agency (EPA) credits all emissions reductions to the appropriate SIP objectives. TNRCC, in conjunction with the advisory board, will review the programs and report to the Legislature on the need for additional appropriations to improve each program's ability to achieve its goals. SB 5 also creates the Texas Emissions Reduction Plan Fund, comprising certain fees and surcharges, to be used only to implement and administer plan programs.

Diesel emissions reduction incentive program. TNRCC must establish a program to offset the incremental cost of projects to reduce NO_x emissions from certain high-emitting diesel sources. Eligible projects must meet cost-effectiveness requirements as determined by TNRCC. Grants may not exceed the incremental project cost.

TNRCC must develop an incentive program to reimburse purchasers or lessees for the incremental costs of new on-road diesel vehicles registered in Texas and operated in the state for at least 75 percent of their annual mileage. The act requires a nearly identical incentive program for light-duty vehicles. TNRCC and the comptroller must inform the public and dealers about the light-duty vehicle incentive program, and the Texas Department of Transportation (TxDOT) must include a notice with each vehicle registration renewal notice. If the balance for the incentive program falls below 15 percent of the total allocation for incentives during a fiscal year, the comptroller must suspend incentives until the balance is adequate to resume incentives or until the next fiscal year, whichever comes first. TxDOT must issue a special insignia for a vehicle that qualifies for the light-duty motor-vehicle purchase/lease incentive. A vehicle displaying the insignia may travel in a preferential carpool or high-occupancy lanes regardless of the number of occupants.

Energy efficiency grant program. The Public Utility Commission (PUC) must develop a grant program for projects that retire, replace, and recycle materials and appliances that contribute to peak energy demand. Utilities will administer grant money allocated by the PUC and will be reimbursed for administrative costs.

New technology research and development program. The 11-member TCET, appointed by the governor from members of the academic and nonprofit communities, will help TNRCC ensure credit for new, innovative, and creative technological advancements. TCET must establish the new technology research and development program, providing grants to support development of emissions-reducing technologies with commercial potential. The council must consider projects that would produce qualifying fuels from Texas resources.

Building energy performance standards. SB 5 adopts the provisions of the International Residential Code as Texas' energy code for single-family residential construction and the International Energy Conservation Code as the official code for all other residential, commercial, and industrial construction. Cities and counties must establish procedures for enforcing the codes and certifying building inspectors. Local amendments may not result in less stringent energy efficiency requirements in nonattainment areas and affected counties.

The Energy Systems Laboratory at the Texas Engineering Experiment Station may recommend a modification of a climate-zone designation for a county or group of counties that differs from the code designation. A building certified by an accredited energy efficiency program or a building inspected by private code-certified inspectors using the adopted codes is considered compliant. A builder without access to either of these methods may certify compliance using a form provided by the laboratory. Political subdivisions in nonattainment areas and affected counties (but not school districts) must establish goals to reduce electricity consumption by 5 percent each year. The laboratory must develop a standardized report format designed to give potential home buyers information on a structure's energy performance and must establish a public information program regarding home energy ratings.

Surcharges and fees. SB 5 imposes fees to support the TERP fund, including a 1 percent surcharge on the retail sale, lease, or rental of new or used off-road, heavy-duty diesel equipment classified as construction equipment, other than implements of animal husbandry, and a 2.5 percent surcharge on retail sale or lease of on-road diesel vehicles that weigh more than 14,000 pounds and are of a model year 1996 or earlier. The act imposes a 10 percent surcharge on the registration of truck-tractors and commercial motor vehicles. It increases to \$225 the fee for inspections of vehicles brought into Texas by people other than manufacturers or importers, except for military personnel and their spouses and dependents. TxDOT also must collect an additional \$10 fee for every commercial vehicle inspection.

Supporters said without additional emissions-reduction programs, Texas will not be able to attain the NAAQS. SB 5 would give TNRCC the statutory authority to implement more effective emissions-reduction programs. The resulting reductions would be sufficient to allow removal of the construction ban proposed in the SIP, which would

prohibit operation of diesel construction equipment before noon in nonattainment areas. Retiring older diesel engines throughout the state would reduce NO_x emissions significantly. Advances in diesel technology reduced emissions by 90 percent between the 1980s and the 1990s. The current SIP would allow operation of retrofitted diesel construction equipment in morning hours, and even more emissions reductions could be obtained if this equipment were replaced with new diesel engines. In reducing NO_x emissions from diesel engines, SB 5 also would reduce emissions of fine particulate matter, another pollutant regulated by the NAAQS. While the current focus is on decreasing NO_x emissions to prevent formation of ground-level ozone pollution, particulate matter is almost certain to be Texas' next problem, particularly as traffic increases.

The proposed building code program would be an innovative way to obtain emissions-reduction credits, as EPA allows states to use building codes for emissions reductions to comply with the NAAQS. Texas would be the first state to use building codes for this purpose. The program also would result in energy savings.

The bill's fee provisions would be fair and reasonable. These broad-based fees would allow many sources of emissions to shoulder the burden of reducing air pollution.

Opponents said new diesel engines that emit fewer air pollutants also use more fuel. With rising fuel costs and anticipated future price increases due to new federal diesel-fuel requirements, it will become even more expensive to replace older diesel engines. The hardest-hit diesel engine-using population would be the independent truck driver who owns a single truck and lacks the clout to negotiate contracts covering increased fuel prices. The proposed diesel engine surcharges would harm the trucking industry and the Texas economy. Diesel trucks sold in Texas already are subject to a significant sales tax, and diesel truck sales have low profit margins. Under this bill, truck owners would be more likely to buy trucks in other states. Many Texas truck owners register their trucks in Oklahoma rather than in Texas because of lower registration fees.

The bill's goals for diesel engine NO_x emissions are unattainable. Engine manufacturers are struggling to meet federal requirements that will take effect in 2004. Emerging diesel technology is not yet widely available for purchase. If Texas imposes requirements that differ from the federal ones, engine manufacturers will conform to federal standards, causing a shortage of Texas-compliant diesel equipment and further increasing prices.

Other opponents said SB 5 should require imposition of the construction ban after a certain period if TERP emissions reductions are not sufficient to replace the reductions lost by eliminating the ban.

The **HRO analysis** appeared in Part One of the May 21 *Daily Floor Report*.

Continuing the Railroad Commission of Texas

SB 310 by Harris
Effective September 1, 2001

SB 310 continues the Railroad Commission (RRC) until September 1, 2013. It imposes or increases fees, including the fee for applying for an exception to a commission rule; the Natural Gas Policy Act application fee; oilfield cleanup fees; drilling permit fees; the fee for reviewing an exception from well spacing or density requirements; the fee for a request to expedite a permit application; the application fee for an extension of time to plug a well; fees based on the number of wells or pipelines operated by certain entities; permit fees for fluid-injection wells; and surface water discharge permit fees. The RRC must adopt guidelines to determine penalties for violations of rules, permits, pipeline certificates, pipeline safety standards, or other provisions.

SB 310 makes the following changes to acceptable forms of financial security for operating wells:

- ! allowing a letter of credit as an acceptable form of financial security;
- ! increasing from \$100 to \$1,000 the annual fee for the option of demonstrating an acceptable record of environmental compliance;
- ! increasing the annual fee from 3 percent to 12.5 percent of the bond that otherwise would be required; and
- ! eliminating the option of a first lien on oil and gas equipment and property.

As of September 1, 2004, for inactive operators or for operators not involved in other activities requiring demonstration of financial security, only an individual bond, blanket bond, letter of credit, or cash deposit will be accepted as financial security.

SB 310 raises the cap on the oilfield cleanup fund from \$10 million to \$20 million. The act adds certain fees and recovered costs to the fund, including an organization report fee; a fee for an application for the voluntary cleanup program; costs recovered under the voluntary cleanup program; and two-thirds of the fee for applying for an exception to a commission rule. An oilfield cleanup fund advisory committee must meet quarterly with the commission, review the commission's recommendations for legislation, and monitor the fund's effectiveness.

SB 310 creates a voluntary cleanup program. Any contaminated site can participate, except for any part already subject to a commission order. A participant must pay all of the RRC's costs for overseeing the cleanup. SB 310 eliminates the liquefied petroleum gas (LPG) division within the commission, the LPG examination fund, and fees set in statute for LPG license categories. The commission must regulate LPG activities and may determine application, license, and renewal fees. Public and private schools must

perform pressure tests for leakage on LPG piping systems at least once every two years to determine whether the piping meets certain fire safety standards. The RRC must require hazardous liquid, carbon dioxide, or gas pipeline operators to conduct liaison activities with fire, police, and other appropriate emergency response officials. The commission has exclusive original jurisdiction over gas utilities inside a city that surrenders its jurisdiction to the commission.

Supporters said SB 310 would continue the RRC until 2013 and would implement Sunset Advisory Commission recommendations. Increasing fees and penalties would improve the RRC's ability to clean up abandoned well sites through the oilfield cleanup fund. More revenue from the fees and raising the fund's cap to \$20 million would help the RRC plug more of Texas' abandoned wells.

Abandoned wells are a serious problem in Texas. Currently, the state must pay to clean up more than 16,000 abandoned wells at a cost of \$4,000 to \$5,000 per well. Requiring operators to file a bond or letter of credit would help to ensure that the state was not left to clean up after unscrupulous operators. Phasing in the bonding, letter of credit, and cash deposit requirements by 2004 would give the industry time to adjust to new requirements.

Texas' population growth has increased interest in developing rural areas. Implementing a voluntary cleanup program would allow the state to tap into that interest to clean up abandoned well sites.

Opponents said the higher fees that SB 310 would impose would put additional financial strain on marginal operators, especially during a slump in the oil and gas industry. Petroleum producers and their profit margins are at the mercy of a worldwide market. Many factors outside of Texas can influence prices and lead to an abrupt turnaround in the industry's health. Increasing fees and penalties would make it harder for energy producers to survive negative swings in the oil market.

Restricting forms of financial assurance to bonds and letters of credit would burden smaller or new operators. These operators may have difficulty obtaining bonds or letters of credit, for instance, if they lack a proven track record. With a possible energy crisis looming, Texas should not discourage exploration of its energy resources.

The **HRO analysis** appeared in Part Two of the May 14 *Daily Floor Report*.

Expanding border counties' land-use authority to prevent colonias

SB 517 by Lucio, et al.

Died in House Calendars Committee

SB 517 would have authorized counties within 50 miles of the Texas-Mexico border to adopt land-use regulations, including zoning and building codes, to prevent the development of colonias — residential subdivisions usually found in unincorporated areas that lack sewers, water, electric and gas services, and paved roads. A border county could have required permits to build, alter, remodel, enlarge, or repair residential structures and could have charged reasonable permit fees. A county could have brought suit for an injunction against a code violation, which would have been a Class C misdemeanor (maximum fine of \$500). The bill would have exempted low-income households from criminal penalties for code violations unless the county made housing rehabilitation assistance available to the owner-occupant.

The Senate engrossed version of SB 517 eliminated references to border counties, which would have made the bill apply to counties statewide. The House Land and Resource Management Committee restored provisions limiting the authority to border counties.

Supporters said border counties need additional land-use authority and building codes to prevent crowding and substandard housing in colonias. Billions of dollars in state and federal tax money have been spent addressing unhealthy conditions endured by the more than 340,000 people who live in Texas' border colonias, and the state needs to stop their proliferation. In the long run, colonias do not provide affordable housing because the property owners and taxpayers must spend even more money to address health and safety problems caused by the lack of infrastructure and shoddy construction. It would be much more cost-efficient to prevent these problems through adequate regulation before the development process begins. Lack of adequate land-use authority for counties reflects an antiquated approach to public policy and ultimately could cost Texas federal grants to remedy colonias problems.

Opponents said SB 517 would create unnecessary regulations and would undermine the state's traditional policy of protecting property rights. Additional regulation would increase the cost of building and decrease the supply of affordable housing. Existing subdivision rules on water and wastewater service address the problems of colonia proliferation and would meet the federal standards regarding the level of regulation needed to qualify for future federal funding.

Other opponents said colonias are no longer just a border concern. Similar subdivisions lacking adequate infrastructure have cropped up near Houston, Austin, and Dallas-Fort Worth. All counties, particularly high-growth counties, need the authority provided by SB 517.

Managing low-level radioactive waste

SB 1541 by Duncan

Died in House Calendars Committee

SB 1541 would have allowed the Texas Natural Resource Conservation Commission (TNRCC) to issue a single license for the disposal or assured isolation of low-level radioactive waste at a single permanent management facility. Assured isolation involves storing waste in above-ground containers with the intent of long-term management or disposal. The license holder could have accepted only waste acquired in accordance with the Texas Low-Level Radioactive Waste Disposal Compact or waste generated by a federal agency. The federal waste could have been disposed of at a separate site next to the facility accepting waste from the compact.

The license holder would have had to convey to the state at no cost all rights, title, and interest to the waste from the compact and the land on which the facility was to be located. Federal waste would have been exempt from this requirement. On or before termination of the license, however, the license holder would have had to convey to the federal government all rights, title, and interest to the federal waste and the land and buildings used for its disposal. The state would not have been liable for damages relating to federal waste disposal or for costs related to removal or remediation. The facility could not have been located in a county with average rainfall above 26 inches, in a 100-year flood plain, within 20 miles upstream of a reservoir, or in a county extending to within 62 miles of the U.S.-Mexico border. TNRCC would have had to adopt criteria for designating other unsuitable sites and to prescribe acceptable methods and procedures for permanent waste management.

Supporters said SB 1541 would enable Texas to honor the terms of its low-level radioactive waste disposal contract with Maine and Vermont, which designates Texas as the host state for a waste disposal facility. The bill also would make it easier to regulate radioactive waste by designating a single disposal site. Acceptance of federal waste would ensure that the facility received enough waste to make it financially viable.

Opponents said SB 1541 would allow private interests to make a profit while leaving the state liable for the waste from the compact and the land on which it was stored. The likely location for the facility in Andrews County could expose the Ogallala Aquifer, the nation's largest aquifer, to contamination from the waste, which could remain hazardous for thousands of years. Acceptance of federal waste would make Texas home to millions of cubic meters of nuclear waste from Cold War research and weapons production.

Families and Children

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Prohibiting minor passengers in open beds of trucks and trailers

SB 399 by Duncan

Effective September 1, 2001

SB 399 makes it a crime to drive open-bed pickup trucks or open flatbed trucks or to pull open flatbed trailers with beds occupied by children younger than 18. It repeals the current exemption allowing children to ride in the beds of such vehicles that are traveling no more than 35 miles per hour. The penalty for a violation remains a misdemeanor punishable by a fine of between \$25 and \$200. In addition to emergencies, defenses to prosecution include operating vehicles in parades, on beaches, or in permitted hayrides, transporting farm workers on certain rural roads, or operating a household's sole vehicle. Compliance or noncompliance is not admissible evidence in a civil trial.

Supporters said Texas children are protected by curfews and laws restricting or prohibiting drugs, guns, and physical abuse, but the National Safe Kids Campaign recently flunked Texas' child vehicle-occupancy laws. It is incongruous that children must wear seat belts when riding in truck cabs but may ride unrestrained in truck and trailer beds. In 1998, almost one-third of those killed in pickup cargo areas in the United States were under 18. Passengers thrown from vehicles are six times more likely to die than are those who remain in vehicles. Along with the incalculable human cost of pickup cargo-area related accidents is the staggering financial cost of treating head injuries due to such accidents. It would be more responsible, both ethically and financially, for truck operators to buy vehicles that seat more passengers than to risk young lives by carrying children where only cargo belongs.

Opponents said SB 399 is a solution in search of a problem. While deplorable, the relatively low incidence of deaths and injuries to children riding in truck or trailer beds, compared to other automobile fatalities and injuries, does not warrant the wholesale restrictions that SB 399 would impose. This bill would penalize low-income, single-vehicle families who could be forced to buy costlier vehicles with more seating capacity to avoid citations and fines. It also would hinder agri-business, especially farm labor, and would interfere with outdoor recreation and rural lifestyles. SB 399 could result in targeting minorities and could encourage racial profiling in enforcement.

Other opponents said the ban on truck and trailer-bed passengers should extend to everyone, regardless of age, and the bill should require restraints for such passengers. Farm workers, beach-goers, and single-vehicle families would remain at risk and should not be exceptions.

Barring recognition of same-sex marriages

SB 488 by Harris, et al.

Died in House Calendars Committee

SB 488 and its companion bill, HB 496 by Chisum, et al., would have prohibited Texas from giving legal effect to any marriage or civil union between two people of the same gender and from recognizing any right or claim based on that marriage or union.

Supporters said that without SB 488, Texas could be forced to give effect under the “full faith and credit” clause of the U.S. Constitution to same-sex marriages or civil unions created in other states where they are legal, such as Vermont. To avoid such an outcome, which would run counter to Texas’ longstanding public policy, the Legislature needs to make Texas’ position clear by enacting this legislation.

The U.S. Constitution, Art. 4, sec. 1 states that “full faith and credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.” Though exacting in regard to recognition of court judgments, the full faith and credit clause has not been interpreted to require a state “to substitute the statutes of other states for its own” on issues about which “it is competent to legislate” (*Baker v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998)). Thus, by clearly indicating Texas’ position regarding same-sex unions, SB 488 would forestall attempts to force Texas to give “credit” to Vermont’s civil union law (of which several dozen Texas couples have availed themselves) by enforcing it here, since Texas would now have its own law on the same subject.

Preventing Texas from being forced to recognize the same-sex marriages or unions entered into in other states is important for several reasons. Such recognition would be contrary to established Texas policy, which refuses to issue marriage licenses to same-sex couples (Family Code, sec. 2.001). Also, it would run counter to the beliefs of most Texans that marriage is and should be defined as the union between one man and one woman. Recognizing same-sex unions also could force the state to provide health and retirement benefits to same-sex partners. Finally, refusing to recognize same-sex unions would not be unconstitutional, because it is tailored narrowly to serve an important governmental purpose of creating stable family units into which children can be born. Since only heterosexual sex can result in pregnancy, the state has an interest in giving the solidity that accompanies legal recognition only to relationships that could result in procreation.

Because some proponents of same-sex marriage or civil unions claim that the federal Defense of Marriage Act is an unconstitutional attempt to constrain the full faith and credit clause, Texas should not rely on the federal law to keep from being forced to recognize same-sex unions.

Opponents said SB 488 was unnecessary and simply would amount to gratuitous gay-bashing. The federal Defense of Marriage Act, enacted in 1996, provides that no state, territory, or possession of the United States or an Indian tribe can be required to give effect either to a marriage between people of the same sex or to claims arising out of such a relationship. Thus, Texas does not need its own law to avoid being forced to recognize same-sex unions entered into in other states.

Even if there were no such federal law, Texas' public policy is clear in not allowing homosexual couples to marry. No reason exists for this legislation other than for legislators to pander to the prejudices of some of their constituents by making a political statement against gays and lesbians. Such a statement not only would be mean-spirited but also would be bad public policy. Americans should not have to surrender their marriages to travel from one state to another.

Other opponents said homosexual couples need the same legal protections that heterosexual couples receive. Marriage is the only vehicle for recognizing the existence of intimate, committed relationships not defined by blood. Among other functions, it identifies those who share our health, life, and pension benefits, those who inherit our property upon our deaths, and those who may make medical decisions on our behalf in a crisis. Homosexual couples should have these rights and responsibilities in relation to each other, just as heterosexual couples do.

SB 488 should be rejected because it is contrary to constitutional principles. The U.S. Supreme Court has held that marriage is a fundamental right protected by the Constitution. Denying that right to same-sex couples violates their right to equal protection. Specifically, it discriminates against them on the basis of their gender by making their ability to marry dependent on gender. Nor can the proposed law withstand constitutional scrutiny as furthering the state's interest in traditional definitions of marriage. Many "traditional," though discriminatory, understandings have failed to withstand constitutional scrutiny, including racist laws against interracial marriage and sexist laws limiting the legal rights of women. This legislation is no different and would be equally suspect constitutionally.

Notes: Although SB 488 died in the House Calendars Committee late in the legislative session, its substantive provisions were attached to other bills enacted by the 77th Legislature: HB 1245 by Goodman, concerning contributions and reimbursement between separate and community property upon dissolution of a marriage; SB 292 by Armbrister, revising the Employees Retirement System of Texas, concerning public retirement systems; and SB 1156 by Zaffirini, Medicaid revisions, concerning state premium reimbursement for persons eligible for group health insurance coverage in lieu of Medicaid. The governor vetoed SB 1156.

Government Affairs

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State-collected information restrictions and privacy task force

HB 1922 by McCall, et al.
Effective September 1, 2001

HB 1922 gives Texas citizens the right to be informed about personal information collected by a state governmental body, unless that information may be withheld statutorily, and the right to correct that information free of charge. The act also creates a state privacy task force to study privacy issues and to recommend legislation to protect personal information collected by state governmental bodies. The task force is to comprise members with a background in consumer issues, business issues, open records, and electronic business, and will expire on September 1, 2003, unless continued by the lieutenant governor and the House speaker.

Supporters said HB 1922 would give Texas citizens the knowledge they need to protect the personal information collected about them by the state government. Citizens should have the right to know what information is collected, so they can make informed decisions as to how much information they are comfortable sharing with the government in exchange for services, and they should have the right to receive, review, and correct this information. The bill also would create a task force to conduct a comprehensive review of privacy issues and recommend further legislation to the Legislature. The potential for privacy legislation to result in unintended consequences, to the detriment of business or open records, makes it imperative for the Legislature to have a thorough understanding of all the issues involved before considering such legislation. The bill would not burden any businesses that rely on information bought from state governmental bodies. The Legislature still would have to consider and approve any change in the law recommended by the task force.

Opponents said the bill would require the task force to recommend legislation requiring a state governmental body to notify a person before selling personally-identifiable information about that person and to give that person an opportunity to prohibit the sale. By creating a presumption that this specific legislation is necessary, the bill would direct the task force toward a particular remedy that could burden businesses that rely on purchased information from the state.

Other opponents said HB 1922 would not go far enough in protecting citizens' personal information. It would not require state governmental bodies to provide notice of which information the government has to collect or how the personal information it collects is used and disseminated. Nor would it allow citizens to prohibit the use of that information for purposes other than those for which it was collected originally.

The **HRO analysis** appeared in the April 10 *Daily Floor Report*.

Revising the workers' compensation insurance system

HB 2600 by Brimer, et al.
Effective September 1, 2001

HB 2600 revises various aspects of Texas' workers' compensation insurance system. Among other provisions, the act:

- ! strengthens the authority of the Texas Workers' Compensation Commission (TWCC) to regulate and sanction doctors (including treating, referral, and insurance carrier doctors), insurance carriers, and utilization review agents;
- ! establishes a medical advisor to TWCC;
- ! authorizes the state to set up regional networks for delivery of workers' comp-related health-care services under the guidance of a network advisory committee;
- ! requires insurers to obtain an examination from designated doctors rather than from doctors of their choice for issues relating to impairment ratings and date of maximum medical improvement;
- ! requires TWCC to set up a pharmaceutical formulary that gives preference to generic drugs and makes it easier for injured workers to get prescriptions filled for the first seven days after injury;
- ! requires TWCC to adopt the reimbursement methodology, model, and values used by the federal Health Care Financing Administration;
- ! simplifies the medical dispute-resolution process;
- ! eliminates the process for obtaining second opinions on spinal surgery;
- ! expands eligibility for lifetime income benefits to include workers with severe third-degree burns;
- ! provides for injured workers to have their attorneys' fees paid if an insurance carrier appeals a dispute to district court and the worker prevails;
- ! promotes return-to-work in the system and requires insurers to provide return-to-work services to employers;
- ! specifies that injured workers with multiple jobs have their income benefits calculated on all their wages, not only wages on the job where injured, and allows insurers to seek reimbursements for these additional benefits from the Subsequent Injury Fund;
- ! prohibits liability waivers for employees who work for employers who do not carry workers' compensation insurance;
- ! requires insurance carriers to submit contact information to a worker and to TWCC's contested case hearing officer and specifies dates for requesting appeals;
- ! sets up a risk-reward program that helps allocate costs for work-related injuries among state agencies;
- ! designates TWCC to complete a study on drug-free workplaces and to report its findings to the 78th Legislature; and
- ! moves up the date for TWCC's sunset review by two years, to September 1, 2005, and authorizes the state auditor to review certain TWCC functions.

Supporters said Texas' workers' compensation medical costs are higher than those of other states and other health-care delivery systems. More costly and intensive medical care, however, has not resulted in greater worker satisfaction or speedier return to work. HB 2600 would address these problems by strengthening TWCC's role and by creating a managed health-care delivery network to ensure higher-quality medical care at lower cost. This omnibus bill is the result of long and difficult negotiations among various stakeholders in the system, including workers, employers, medical professionals, and insurance carriers. It could benefit injured workers who are struggling with the weaknesses of the current system.

HB 2600 would give TWCC the tools it needs to regulate medical care in the workers' compensation system effectively by focusing scrutiny on doctors who drive up medical costs and provide substandard care. It would recognize the need for better monitoring of doctors who regularly participate in the system and would require doctors to register with TWCC if they wished to provide services. All registered doctors would be subject to training and monitoring requirements, whether they treated workers or performed reviews for insurance carriers. The bill also would provide safeguards against insurers who consistently deny necessary care.

The proposed health-care networks would provide an opportunity to improve medical care while saving money. Networks create patient volume. That alone saves money, but the networks also would monitor actively the quality of health care. This would help get injured employees back to work and would save the state money.

HB 2600 would encourage employers to build return-to-work programs by requiring insurance carriers to provide return-to-work coordination services to their policyholders. TWCC could hire experts to train the commission staff on these issues.

The bill would eliminate the costly and time-consuming second-opinion process for spinal surgery and would replace it with the more efficient preauthorization process. It also would set up minimum requirements for preauthorization and concurrent review for certain expensive and controversial medical procedures that the Research and Oversight Council on Workers' Compensation has found to be cost drivers.

Currently, a worker may receive one impairment rating from his or her own doctor, a second rating from the insurance carrier's doctor, and a third rating from TWCC's designated doctor. HB 2600 would reinforce the concept that impairment ratings should be decided by an independent and objective designated doctor who is trained in these issues. Also, the bill would streamline the dispute-resolution process by securing a presumptive decision faster and saving money for carriers, including the state, since they no longer would be paying for unnecessary and duplicative exams.

HB 2600 would require TWCC to set up a pharmaceutical formulary or list of medicines that would give preference to generic drugs and would allow appropriate over-the-counter medications. This would save the system and the state millions of dollars by helping to bring Texas pharmaceutical costs into line with those in other states.

This bill would help to level the playing field by allowing injured workers to have their attorneys' fees paid when insurance carriers appealed disputes to district court and did not prevail. It would expand the definition of lifetime income benefits to a very small but seriously injured group of workers, those with third-degree burns over more than 40 percent of their bodies.

HB 2600 would allow workers with multiple jobs to receive income benefits based on all their reportable wages. The statutory benefit cap, now \$533 a week, would remain on these benefits. TWCC, rather than the employer, would verify any additional wages. This would ensure that workers got adequate benefits without unduly burdening employers.

Opponents said nothing in HB 2600 would penalize insurance carriers for delays in making decisions. Dollars not spent on medical treatment would continue to earn interest for insurers while injured workers would continue to suffer. Rather than ensuring injured employees their rights, the bill would create a bureaucracy of hearings and appeals within TWCC.

Local doctors would not want the hassle of becoming certified by TWCC, the risk of censure, and the possibility of not being paid. This bill could result in regional workers' compensation clinics and hospitals that treat only injured workers because fewer independent physicians would have the resources to risk the inherent delays in payment for services adequately and timely rendered.

Inevitable delays in obtaining treatment would cause delays in rehabilitating workers. Injured workers who cannot return to work in a timely fashion often are forced into bankruptcy. On many occasions, the only other remedy is to seek relief under the Social Security disability laws or through Medicare.

The **HRO analysis** appeared in Part One of the April 24 *Daily Floor Report*.

Revising ERS health and retirement benefits

SB 292 by Armbrister
Effective September 1, 2001

SB 292 makes various changes to the state Employees Retirement System (ERS), which has more than 152,000 active members and about 42,000 retiree members. Its assets have a market value of more than \$19.5 billion.

Among other changes, SB 292 increases the multiplier used to determine retirement benefits from 2.25 percent to 2.3 percent and allows accumulated unused sick leave and annual leave credit to be included in calculating a survivor's death benefit. ERS members will be allowed to buy up to 60 months of equivalent service credit — also known as “air time” — by paying the actuarial present value of each month of additional service credit. Administrative changes include requiring the ERS board to adopt an investment program that includes a code of ethics and requiring records of retirees, beneficiaries, and alternative payees to be kept confidential. It would retain provisions making employees of certain agencies eligible for early retirement due to privatization or other workforce reductions occurring before September 1, 2001.

Supporters said that by raising the multiplier for retirement benefits, SB 292 would make the overall retirement package more attractive for state employees. Maintaining a competitive benefit package is important for keeping experienced employees and reducing turnover.

ERS' conservative investment policy has been successful during the recent stock market expansion, and those decisions have increased the assets available to the system. By requiring an investment policy, including a code of ethics, SB 292 would help ensure the continuing success of the investment program.

Changing the calculation of the survivor's benefit to include unused sick leave and annual leave credit would mirror the current formula for members' retirement benefits and increase the benefit to the survivor on the basis of leave due to an employee who died before retirement. The provisions relating to early-retirement options for employees whose jobs are terminated due to privatization would recognize the loyalty and career aspirations of state employees whose jobs and benefit levels change for reasons beyond their control.

Opponents said all state agency employees should have an early retirement option if their jobs are eliminated by privatization. Under SB 292 and current law, the employees of only four agencies would be eligible.

The **HRO analysis** appeared in Part Two of the May 18 *Daily Floor Report*.

Replacing the General Services Commission

SB 311 by Zaffirini
Effective September 1, 2001

SB 311 abolishes the General Services Commission (GSC) and transfers its functions to the Department of Information Resources (DIR) and to the newly created Texas Building and Procurement Commission (TBPC). The TBPC receives all of GSC's current powers and duties except for those related to telecommunications, which are transferred to DIR, and authority for the electronic procurement system, which the two agencies will share.

Among other changes, the act creates a telecommunications oversight council; authorizes multiple award contract purchasing, reverse auctions, outsourcing of services, and design-build and construction manager-at-risk contracting; requires TBPC to use a best-value approach for leasing space; directs DIR to establish an online travel reservation and ticketing system for state agencies; requires the attorney general to create guidelines for state contracts and creates a contract advisory team to review proposed agency contracts worth \$1 million or more; and requires state agencies to use the electronic procurement system.

Supporters said the GSC has long been one of the state's most poorly managed agencies, with a history of cost overruns and project delays that have cost the state's taxpayers millions of dollars. Despite successive audits by the agency, the State Auditor's Office, and the University of Texas that repeatedly identified weaknesses at GSC, the agency has failed to correct some of these problems. GSC also has been unresponsive to customers who use some of its services. In light of these problems, GSC should be abolished and its functions transferred to other, more accountable, and more responsive agencies. Moving telecommunications to DIR would allow the TBPC to focus on the former GSC's core functions of providing goods, services, and building services to state agencies. Transferring GSC's telecommunications functions to DIR also would ensure that the state has the necessary technical expertise to manage these functions successfully.

Specifying that all state agencies must use the e-procurement system could result in significant savings to the state by eliminating paperwork, allowing the simplification and standardization of solicitations, and enabling the automatic collection of all purchasing information, which can be used to develop additional contracts and to obtain lower prices and better values. The bill would not harm historically underutilized businesses (HUBs) and small businesses, as it specifically would require DIR and the TBPC to ensure that these businesses had maximum access to electronic commerce opportunities. Authorizing multiple award contract purchasing would save the state money by preventing unnecessary duplication. The TBPC could negotiate with the vendors to alter the contracts as necessary to meet all statutory requirements.

Requiring the TBPC to compare the services it offers with those provided in the private sector would ensure that the state receives the best value for its money. Moving state travel services online would increase flexibility, convenience, and savings to the state.

Opponents said SB 311 would fail to address the root of many of the problems that have plagued GSC. Although some of the agency's problems are due to inadequate management, most have been the result of an inability to compete with the private sector in hiring staff, inflexible contracting procedures, and change orders from client agencies that have driven up the prices of its construction services. Abolishing GSC and transferring its functions would solve none of these core problems, while the state would lose all of the investment it has made in reforming the agency. Instead, GSC should be given the tools necessary to carry out the functions assigned to it and to continue the progress it recently has made toward reforming its management.

Requiring state agencies to use an electronic procurement system would hurt businesses that have not yet moved online. In particular, it could reduce business for small businesses and HUBs, the least likely of private companies to be online. GSC previously has testified that as many as 60 percent of HUBs could be affected adversely by moving state procurement online.

By allowing agencies to buy from any state or federal multiple-award contract, the bill would reduce the power of the state's volume buying by allowing agencies to make individual purchases. This provision also could hurt businesses in Texas by allowing agencies to buy goods and services from contracts negotiated in other states, most likely with out-of-state businesses, without giving in-state businesses a chance to bid for those contracts.

Other opponents said that GSC has had too many responsibilities, and its functions should be divided further by separating procurement and building services into two new separate agencies. Creating separate agencies for these functions would ensure that these substantial responsibilities received the attention that they need for effective management.

Some of the travel agencies now under contract with the state to provide travel services are operating those contracts at a loss because the state provides no fees to the agencies. These travel agencies cannot afford to do business with the state much longer, and it is important that GSC receive a directive to continue considering this issue regardless of the ultimate decision on continuing the agency.

The **HRO analysis** appeared in Part One of the *May 22 Daily Floor Report*.

Continuing the Department of Housing and Community Affairs

SB 322 by Lucio, et al.
Effective September 1, 2001

SB 322 continues the Texas Department of Housing and Community Affairs (TDHCA) for a two-year probationary period and makes significant changes to the agency and its programs, including:

- ! creating specific requirements for openness in the low-income housing tax credits program;
- ! placing the manufactured housing regulatory program under a separate governing board;
- ! creating an affordable housing preservation program;
- ! creating a colonia model subdivision program and revolving loan fund;
- ! requiring TDHCA to customize its low-income housing plan by region and to allocate its housing funds based on each region's need;
- ! requiring TDHCA to ensure that applicants are in compliance with all housing laws and regulations before funding their applications;
- ! removing the expiration date for the owner-builder loan program; and
- ! establishing new private-activity bond allocation set-asides.

Supporters said SB 322 would reform the troubled TDHCA to ensure its public accountability and to require that housing funds be allocated to meet the most pressing needs across the state. The bill would ensure compliance with these changes by requiring TDHCA to undergo sunset review again before the next legislative session. It would help ensure greater openness and public participation and would reduce the appearance of impropriety that has surrounded the agency by requiring TDHCA to provide specific public information in advance of board meetings and by setting guidelines for openness in the low-income housing tax credits program.

SB 322 would ensure that TDHCA funds were targeted to the state's neediest regions and citizens by requiring the agency to customize its needs assessment and allocate funds by region; requiring TDHCA to give priority in allocating funds to projects that would provide higher numbers of longer-term, integrated developments that maximized the length of time that the units were affordable; mandating that TDHCA's single-family mortgage revenue bond loan funds go to citizens who could not receive loans without government assistance; and creating several new initiatives to help colonia residents.

The bill would set new allocation percentages for private-activity bond proceeds in order to allocate the increased bond authority recently approved by Congress. By allocating more of this funding for housing, the state could provide thousands of additional housing units that low-income families could afford.

Opponents said SB 322 would micromanage TDHCA and remove the agency's flexibility in administering its programs. Also, the bill would set aside too much of the private-activity bond proceeds for other purposes, including funding for environmental compliance projects. Texas is addressing less than 2 percent of its demand for affordable housing. This money would be better spent providing affordable housing to thousands of Texans each year rather than helping refineries that ought to and can comply with environmental regulations without government assistance.

The scoring criteria that SB 322 would impose for the low-income housing tax credits program are too detailed and would remove too much of the board's discretion in awarding tax credits. Some of the criteria could hinder the ability of nonprofit organizations to compete for tax credits; unwisely lower the maximum amount of tax credits that a developer could receive, rather than allow larger awards to developers who maximize the number of high-quality, affordable housing units; and burden developers by requiring them to amend their applications for minor changes to proposed projects that have received allocations.

Creating an additional quasi-independent housing body to oversee manufactured housing is unnecessary and could create confusion. Requiring an additional board and director would be redundant and could lead to additional expenses. The division should be transferred to the Texas Department of Licensing and Regulation, which performs licensing functions for many industries, including modular housing, and can take advantage of administrative efficiencies.

Requiring TDHCA to allocate at least 40 percent of its single-family loan volume to underserved groups would impose a greater financial burden on the agency and the state. TDHCA would have to target these loans to people who generally do not meet underwriting criteria, which makes the loans less attractive to investors who buy the loans from TDHCA. This would require TDHCA to keep greater reserves on hand as a guarantee to investors that they would recoup their investments if the loans failed, and it would create a need for additional money for down-payment assistance to make the loans feasible.

Other opponents said TDHCA should be abolished. Reports and audits over the past few years have identified many significant shortcomings and weaknesses at TDHCA. An agency this badly mismanaged should be abolished and its functions given to other appropriate agencies. Moving TDHCA's functions to agencies that could manage them better would improve the provision of affordable housing in Texas by ensuring that more of this money ends up going to the purposes for which it was intended.

The **HRO analysis** appeared in Part One of the *May 22 Daily Floor Report*.

Coordinating electronic government initiatives

SB 1458 by Duncan, et al.
Effective June 15, 2001

SB 1458 authorizes various electronic government (e-government) initiatives to coordinate and standardize the state's e-government projects and to provide more government services through the Internet. Major provisions include:

- ! creating the Electronic Government Program Management Office within the Department of Information Resources (DIR) to direct, coordinate, and facilitate e-government projects by governmental entities;
- ! creating a legislative oversight committee to oversee the establishment of e-government projects by state governmental bodies;
- ! creating the TexasOnline Grant Program for two years to provide grants to cities, counties, and school districts to enable these entities to provide electronic government services through TexasOnline;
- ! requiring the comptroller to develop an advanced database system for audits and to equip field auditors and enforcement officers with wireless communication equipment;
- ! authorizing the comptroller to employ or contract for employee services as necessary to enhance productivity; and
- ! authorizing school districts or open-enrollment charter schools to transfer to a student any data processing equipment donated to the school, if that student does not have access to such equipment at home.

Supporters said SB 1458 would help the state reap the benefits of the Internet by providing more government services and information online and by creating a single focal point for the development and coordination of these initiatives. Providing an e-government system would result in greater efficiency and save the state money. In particular, changes in the Comptroller's Office would result in a net revenue gain to the state of more than \$300 million due to efficiency gains and the comptroller's ability to perform more audits and collect more taxes.

The state needs a lead office to establish effective online services and to ensure that state agencies adapt their practices to new technologies. In the past, state agencies traditionally have served their clients individually and developed technological systems independently. This lack of coordination can result in decentralized and harder-to-locate information for citizens, unnecessary duplication of effort, and high implementation costs. By contrast, e-government seeks to provide integrated, one-stop centers for information and services that are focused on customer needs rather than on organizational boundaries. Successfully developing such a system would require a single focal point to provide strategic vision, coordination, leadership, and monitoring. To serve

in this role, the bill would create the E-Government Program Management Office within DIR.

The TexasOnline Grant Program would enable local governments to place their services online. Although several state agencies and counties already offer online services through the TexasOnline portal, many local governments do not have the financial resources to begin this process. The grant program would help these local governments to do so. The program would target the neediest communities by giving preference to economically disadvantaged areas.

The lack of the latest technology, including wireless communications equipment and modern scanners, has hampered the comptroller's work by requiring agency employees to spend large amounts of time on tasks that could be accomplished more quickly and easily with this equipment. SB 1458 would require the comptroller to obtain these technologies for its employees so that more employee time could be spent identifying and collecting taxes owed to the state. By allowing the comptroller to employ or contract for necessary employee services, the bill also would enable the comptroller to obtain the employees necessary to conduct more audits, thereby identifying and collecting more revenue due to the state.

Opponents said SB 1458 could reduce agency autonomy by placing authority over decisions relating to the e-government projects of these agencies with the new Electronic Government Program Management Office. The bill also could result in increased costs to agencies that had projects managed by DIR. These agencies not only would have to pay DIR's management fee but also might have to retain their own management staff, since DIR would be unlikely to have adequate staff to handle all of these new responsibilities.

The **HRO analysis** appeared in Part One of the May 18 *Daily Floor Report*.

Health and Human Services

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Exempting some food stamp recipients from fingerprint imaging

HB 102 by Maxey, et al.
Effective June 14, 2001

HB 102 creates exemptions to the requirement for fingerprint imaging for recipients of food stamps. It exempts elderly or disabled recipients when Texas Department of Human Services (DHS) determines that the requirement would cause undue burden. DHS uses an electronic fingerprint imaging program in connection with its food stamp program. Adult and teen recipients of food stamps have the prints of their index fingers scanned and stored to prevent duplication of services at different locations.

Supporters said that the state should keep the program but drop the requirement for certain people. Elderly and disabled recipients and those who cannot come to the DHS office should be exempt from the fingerprint imaging requirement. It may be difficult for these people to appear physically at a DHS office, and the program never was designed to deter eligible people from receiving food stamps.

The fingerprint imaging program serves a useful purpose and should not be abolished. DHS' assessment of this program found that it saves between \$6 million and \$11 million per year. Even though the number of fraudulent claims detected may be relatively small, the program also may deter people from committing fraud. The fingerprinting step of the food stamp application is not a significant barrier to completing legitimate applications. A minority of the applications left pending are due to this step. When a person applies for food stamps, DHS requires many pieces of information, and omitting any piece of information can leave the application pending.

Fingerprint imaging is not as invasive as other methods of proving identification and discloses no more information than is necessary to verify identity. Other methods, such as picture identification cards, may disclose addresses, telephone numbers, and other personal information. Many Texans routinely provide fingerprint images to the state to obtain driver's licenses.

Opponents said that the fingerprint imaging program should be abolished, as the House-passed version of the bill would require, because the results of the program are not worth the expense. The state has spent \$15.9 million on this program so far but has discovered only nine cases of fraud among the 1.4 million people who have been fingerprinted.

A DHS study found that the two most common types of fraud are misrepresentation of income and overstatement of the number of people living in a household. Fingerprint imaging addresses neither of those types of fraud.

Any cost savings from the program may come from deterring eligible people from applying for food stamps rather than from preventing fraud. DHS' assessment of cost-effectiveness was based on the number of people who go through the application process up to the point of fingerprint imaging, then stop and do not complete the process within 90 days. These people may not be trying to duplicate service but may feel that fingerprint imaging invades their privacy. Also, DHS requires that each member of the recipient's household be fingerprinted, which can be impractical.

The legislation that created the fingerprinting program also created other methods of fraud prevention that are far more cost-effective. The Health and Human Services Commission has implemented data-matching projects to detect and prevent fraud. These include data broker services, a matching system with the Texas Department of Criminal Justice to prevent an incarcerated person from illegally receiving public assistance, and the use of vehicle registration and title information.

Notes: As originally passed by the House, HB 102 would have eliminated fingerprint imaging for food stamp applicants. The final version of the bill reflects the Senate amendments. The Opponents arguments are in support of the original House version.

The **HRO analysis** appeared in the March 7 *Daily Floor Report*.

Creating a state bulk purchasing program for pharmaceuticals

HB 915 by Gray, et al.
Effective September 1, 2001

HB 915 establishes an Interagency Council on Pharmaceuticals Bulk Purchasing, with members representing the Texas Department of Health (TDH), Texas Department of Mental Health and Mental Retardation (MHMR), the Correctional Managed Care Committee, the Employees Retirement System of Texas (ERS), the Teacher Retirement System (TRS), and any other agency that buys pharmaceuticals. The council is charged with investigating all options, including rebate programs, to improve state purchasing power and with making recommendations regarding drug utilization review, prior authorization, restrictive formularies, mail-order programs, and cost sharing.

The council will develop bulk purchasing policies that agencies must follow, although an agency can opt out if doing so would result in the agency's paying a lower price. If an agency opts out, it must report the price it paid and the name of the entity that sold the drugs. The council may buy pharmaceuticals for local government entities by agreement.

HB 915 requires manufacturers, including those in the generic drug industry, to disclose information about drug prices. Manufacturers of drugs sold in Texas must file, at least annually, information about the average manufacturer price for each drug and the prices that wholesalers paid. Upon TDH's request, wholesalers must disclose information about the actual prices they charge retail pharmacies for each drug sold in Texas. The attorney general may investigate a manufacturer or wholesaler to determine the accuracy of the information filed and may take action to enforce the reporting requirements. Information obtained by the council that is specific to the manufacturer or wholesaler or to an individual drug cannot be disclosed.

Supporters said HB 915 would save the state money by enabling agencies to take advantage of bulk purchasing power. Each year, the state pays for millions of prescription pharmaceuticals, primarily through TDH, MHMR, the Texas Department of Criminal Justice, ERS, and TRS. Each agency has its own drug purchasing program and negotiates separately with drug manufacturers and wholesalers for discounted prices. Agencies pay different prices for the same drugs because some agencies receive better pricing than others. If all agencies used a bulk purchasing system, all would receive the lowest price that the state could negotiate. This move would save the state an estimated \$13 million in general revenue-related funds in fiscal 2002-03 alone.

The proposed new council would bring all concerned state agencies together to address this issue. No mechanism exists now for the various agencies that pay for prescription drugs to work together on bulk purchasing programs.

Texas should take advantage of its size. Other, smaller states are considering similar programs, but because Texas is a larger market, the program likely would face proportionate resistance. Texas should not wait while other states save money by taking advantage of bulk purchasing programs.

HB 915 would require wholesalers and manufacturers to provide the information that the state needs to calculate Medicaid rebates and negotiate bulk purchasing. Manufacturers already provide average manufacturer prices as a condition for Medicaid reimbursement, but the attorney general's investigations of several pharmaceutical companies have shown those data to be unreliable. The state needs certified data from both manufacturers and wholesalers, which could be cross-referenced for accuracy and could provide a better picture of Medicaid rebate rates.

Opponents said HB 915 would not provide significant savings through bulk purchasing. Under federal regulation, Medicaid receives rebates from manufacturers. State agencies not involved with Medicaid, accounting for a significant portion of the state's drug expenditures, cannot receive those rebates. Other agencies primarily may buy certain classes of drugs, such as new-generation medications purchased through MHMR, and would experience only incremental savings by joining with other agencies.

Restrictive formularies and other limits on benefits that the council would consider could be inappropriate for some beneficiaries. Prison inmates should not have the same level of drug benefits as teachers, and state employees in different careers might need different types of coverage. A one-size-fits-all approach for the state would not work well.

HB 915 would punish the entire pharmaceutical industry for the actions of a few. The attorney general found that a few manufacturers had inflated the reported prices and has taken appropriate legal action. Because the data are available and the attorney general has the authority to take action against fraudulent behavior, the state has measures in place to determine accurate Medicaid rebate rates. The rest of the industry should not have to disclose proprietary information.

The **HRO analysis** appeared in Part One of the April 26 *Daily Floor Report*.

Creating a state program for needy two-parent families

HB 1005 by Naishtat, et al.
Effective September 1, 2001

HB 1005 establishes a state temporary assistance program for two-parent families and for individuals living in minimum-service counties. The program delivers financial assistance and related support services defined through federal regulation. The bill funds this program by shifting payment for some Temporary Assistance for Needy Families (TANF) services from federal TANF funds to state funds.

In 1995, Texas enacted welfare-reform measures that capped benefits by amount and time and required work or job training, among other requirements. The federal welfare-reform law in 1996 created TANF to replace previous public assistance programs. While the federal reforms were similar to those in Texas, the state received a temporary waiver from the federal regulations. When that waiver expires in January 2002, Texas will have to comply with the federal regulations or develop new regulations of its own.

Texas must spend at least \$235 million of general revenue per year on maintenance of effort (MOE) to receive federal TANF funds. Once funding is in place, TANF programs may be paid for entirely with federal TANF funds, with federal TANF funds and state MOE funds, or with MOE funds alone. Unless the state meets certain work-participation rates — the ratios of different TANF populations engaged in approved work activities — its MOE will go up to about \$250 million per year.

The work-participation requirement for the entire TANF population is 50 percent — half of all recipients must be engaged in an approved work activity. The work requirement for two-parent families is 90 percent. In these families, each parent must work 35 hours per week. When Texas' TANF waiver expires, the state will have to increase the number of working TANF recipients to meet the same work-participation rates.

Under HB 1005, eligibility, work requirements, exemptions, time limits, and the scope of related support services will be determined by an interagency work group representing the Health and Human Services Commission (HHSC), Texas Department of Human Services (DHS), and Texas Workforce Commission (TWC). People in the new program will be eligible for Medicaid in the same manner as are TANF recipients.

As minimum-service counties are reclassified to reflect broader services, people in this program may lose eligibility. HHSC, DHS, and TWC will determine the date when that will occur and will establish such recipients in TANF without disruption of benefits.

Supporters said HB 1005 would create a flexible program to address the needs of Texas' most challenged populations. Most two-parent families on TANF face significant

barriers to complying with TANF work requirements, being concentrated in areas of high unemployment dominated by migrant and seasonal work opportunities and being required to work more hours. Though these families are a small percentage of the overall TANF rolls, local workforce boards must spend a disproportionate amount of time and resources to help them approach compliance. The state is unlikely to meet the required 90 percent work-participation rate for two-parent families when Texas' waiver expires. The separate state program created by this bill would remove two-parent families from federal work-participation requirements and would allow the state to set its own.

Minimum-service areas, often rural areas, offer few workforce support services and job opportunities. TWC continues to build up services in these areas, but they are insufficient to meet the needs of TANF recipients before their time limits for benefits run out. A local workforce board may establish services in an area, but the services may come too late to benefit recipients who have been on the rolls for some time before their lifetime TANF limit runs out. Because these people would receive assistance through the new state program, the "clock" on benefits would stop until the local workforce development board had sufficient services available to meet their needs.

The bill would not prescribe the specifics of this program but would allow local boards to work with the state to develop the program to fit the needs of their service populations. The federal regulations are a one-size-fits-all approach to assistance and getting people to work. Instead of repeating that unsuccessful approach across Texas' diverse counties and regions, this program would give the state flexibility in meeting the needs of people and families on cash assistance.

HB 1005 is pro-family because it would create a system that encourages two-parent families to be fully self-sufficient. Current regulations require that each parent work 35 hours, necessitating the use of child care. The separate state program would allow the state to create rules that could prevent dependence on child care by requiring that one parent work or that both work part-time. In an environment of scarce child-care resources, this pro-family option would be a good solution.

This program would not require additional funding. There would be a small startup cost, but the cash and support benefits for the separate state program would be funded with the state MOE funds, requiring no additional appropriation.

Opponents said HB 1005 would give up on Texas' most challenged populations. Two-parent families and people in minimum-service areas are difficult populations to serve, but the state should not lower its expectations. Texas should strive harder to develop an environment that encourages people to work and become self-sufficient, rather than making them indefinitely dependent on cash assistance.

This bill would remove all incentives for the state to invest in minimum-service areas. The state has had five years since federal welfare reform to build up services across the state but has not done so in all areas. There is no reason to believe that the state would build up services if that population were frozen indefinitely in a separate state program and did not count against the state's work-participation requirements.

Because HB 1005 would make families indefinitely dependent on cash assistance, the bill is not pro-family. Families need parents who work, not parents who receive public assistance. Local boards should do whatever it takes to help these families find work and stay employed.

This bill could cost the state significant general revenue for additional benefits. Participants in the separate state program would be eligible for Medicaid as long as they participated in the program. Because the program would have less stringent time limits, it would prolong eligibility for Medicaid. In an environment of rising costs and usage, the state should not expand Medicaid eligibility.

Other opponents said HB 1005 should prescribe the specifics of the new program, rather than leave important rulemaking to an interagency work group. The Legislature should set work-participation requirements for people in the separate state program to ensure that the bill's intent meets the reality of the program. Also, the bill should specify an expiration date for the program.

Notes: Other bills in the 77th Legislature regarding TANF requirements in anticipation of the expiration of the state's waiver included HB 1004 by Naishtat, which would have defined eligible work activities; HB 1006 by Naishtat, which would have defined work requirements; SB 48 by Zaffirini, which would have created penalties for violations of a recipient's personal responsibility agreement; and SB 49 by Zaffirini, which would have created penalties for certain drug or alcohol-related convictions. The Legislature enacted HB 1004 and HB 1006, but the governor vetoed both bills; SB 48 died in the House Calendars Committee; and the House tabled SB 49.

The **HRO analysis** appeared in Part Three of the May 2 *Daily Floor Report*.

State prescription drug program for Medicare beneficiaries

HB 1094 by Gray, et al.
Effective September 1, 2001

HB 1094 creates a state prescription drug program for Medicare beneficiaries, to be developed and implemented by the Health and Human Services Commission (HHSC) in the same manner as the state's Medicaid vendor drug program. The program will be funded only by state money, unless federal funds are available.

Medicaid is a state-federal program that provides health coverage for poor, disabled, and elderly people. Medicare is a federal program that provides health coverage for people over age 65. Medicaid eligibility generally is based on income, while Medicare eligibility is based on age. Medicare does not offer prescription drug coverage.

The state prescription-drug program established by HB 1094 will provide services to the four categories of Medicare beneficiaries by funding priority, starting with the group receiving the most Medicaid support. HHSC can limit the number of enrollees, require cost sharing by eligible beneficiaries, authorize the use of a formulary to specify which prescription drugs the state program will cover, or implement other cost-containment strategies.

Supporters said HB 1094 would extend the same prescription drug benefits to poor seniors as are provided to eligible people under age 65. Medicaid pays for an unlimited number of prescription drugs for people in Medicaid managed-care programs. When those people turn 65, however, they become ineligible for prescription drug coverage because they can receive Medicare. The state already has determined that these people cannot afford Medicare premiums. Prescription drugs are an integral part of a person's health care and should be included in the state's assistance for health-care coverage.

This program would enable the state to limit drug costs through cost sharing, formularies, prior authorization requirements, drug utilization reviews, and generic substitution. Funding by priority group also would ensure that the populations who need the most help received it, but the state would retain a mechanism for limiting cost. The bill's cost estimate may be inflated because it assumes some level of participation beyond the priority population, which may not occur if funding is unavailable.

Twenty-six other states have implemented some type of pharmaceutical assistance program. The majority of those states use a direct subsidy, but some others use a discount method. This program could be funded with federal money if President Bush's "Offering an Immediate Helping Hand" proposal becomes law. That proposal would provide full prescription drug coverage for Medicare recipients under a certain income level, with subsidies for other people.

Opponents said that HB 1094 would cost the state a projected \$274 million in the first two years alone, money that the state does not have.

The current period of rising caseloads and costs is no time to add beneficiaries. Increases in prescription benefit caseloads due to removing limits on the number of prescription drugs, combined with rising costs, have forced the Medicaid vendor drug program to overspend in the current biennium. If the state cannot pay for the costs of programs it already has in place, it should not add new ones.

Other states have implemented programs that target the same problem but cost the state no money. For example, California has a program that allows Medicare beneficiaries to have their prescriptions filled at the rate the state pays for Medicaid. This results in an average 24 percent discount.

Other opponents said that Texas should wait to determine if federal funds will be available for this program. While the program would provide needed services, funding through general revenue would leave the state at total risk for the cost of prescription drugs. If the program were a joint state-federal effort, the fiscal implications would be less of a concern.

Some states have used tobacco-settlement funds to create a state prescription drug program. Texas could create the prescription drug program as a secondary priority to the Children's Health Insurance Program with funds provided by the tobacco settlement. This would allow the state to fund at least part of the prescription drug program without general revenue.

Notes: A related bill, SB 556 by Duncan, would have permitted all Medicare recipients without prescription drug coverage to purchase drugs through the state's Medicaid vendor drug program. Participants would have been able to purchase prescriptions at the state Medicaid program's rate plus an administrative fee, and the program would not have required state funds. SB 556 died in the House Calendars Committee.

The **HRO analysis** of HB 1094 appeared in Part One of the April 25 *Daily Floor Report*.

Revising regulation of dental services

HB 3507 by Maxey, et al.
Effective September 1, 2001

HB 3507 changes the regulation of dentistry by adding Medicaid reimbursement limitations and considerations, establishing a teledentistry pilot project for school children, creating an alternate training program for dental hygienists, defining delegated duties, establishing a temporary reciprocal licensing program, and expanding the student loan repayment grant program.

The bill defines dental services that can be reimbursed by Medicaid, the state-federal health insurance program for low-income, elderly, and disabled people. Medicaid may provide reimbursement only for services or products that are a dental necessity or considered necessary by a prudent dentist acting in accordance with generally accepted practices. The act directs the Texas Department of Human Services (DHS) to regulate dental services under Medicaid, including prohibiting the use of stainless steel crowns as a preventative measure and implementing anti-fraud measures, including a zero tolerance policy, aggressive investigation and prosecution, and random audits.

A licensed dentist may delegate teledentistry services to a dental hygienist if the hygienist is licensed to perform those services and the dentist remotely supervises under certain conditions. The DHS commissioner must appoint a program administrator to create a teledentistry pilot program to provide dental services to students in a selected public school district. The pilot program may include preventative, screening, and assessment services.

HB 3507 creates an alternative dental hygiene training program, requiring four semesters of education at an approved institution. Dentists and dental hygienists that train students in an alternative program must meet standards of education, number of years in practice, and continuing education. The act establishes a temporary reciprocal licensing program that waives the experience requirement for a reciprocal license for dentists and hygienists licensed in other states and authorizes repayment assistance for dental student loans from schools in any state.

Supporters said HB 3507's changes in reimbursement would help prevent fraud in the Texas Health Steps Dental Services Program, the medical and dental prevention and treatment program for children of low-income families. The House General Investigating Committee has uncovered procedures and billing codes in this program that were prone to fraud, including improper use of stainless steel crowns, unnecessary hospitalization, and bill padding. The bill also would help prevent fraud by directing the Health and Human Services Commission to perform audits. Audits are the only way for the state to reconcile billing with claims in cases where fraud is suspected. Random audits also may prevent

fraud because providers understand that they could be audited and the fraud could be discovered even if it did not appear to be outside normal billing patterns.

The bill would provide dental services to underserved populations, including children and nursing-home residents. By authorizing dental hygienists to perform delegated services, the bill would increase access to health services for elderly people in nursing homes. Because the elderly often have oral health problems, it is particularly important to provide regular services in nursing homes.

HB 3507 would address the state's shortage of dental hygienists by creating an alternative training program. Instead of spending two years in a classroom, students would spend one year in the classroom and a second year in clinical training. The alternative training program would be open only to applicants with two years' experience in a clinical setting in a dentist's office, ensuring that students would have a familiarity with the skills and knowledge presented in the program and making the accelerated classroom learning appropriate.

The bill would encourage more out-of-state dentists and dental hygienists to practice in Texas. The current reciprocal licensing program requires that dental professionals have a certain number of years of experience before they can obtain a reciprocal license in Texas. The student loan repayment grant program currently pays back loans only for graduates of Texas schools. Repayment for out-of-state loans would encourage dental health professionals to come to Texas.

Opponents said preventing fraud is important, but HB 3507's changes would lower or remove some legitimate fees. In some cases, hospitalization is warranted, and reducing the rate may make it difficult for the patient to receive adequate care. Also, the behavior management fee is appropriate in cases where children who do not receive regular dental care are apprehensive about the visit and "act out." Regular and random audits alone would prevent fraud, while ensuring that patients received the care they need.

The alternative training program proposed by this bill would diminish the quality of dental care that hygienists provide. Alternative training would not provide the rigorous classroom practice that current training programs use to prepare students to treat patients. This could result in poorly trained hygienists and dissatisfied or mistreated patients.

The **HRO analysis** appeared in Part Three of the May 2 *Daily Floor Report*.

Protecting the privacy of medical records

SB 11 by Nelson, et al.
Effective September 1, 2001

SB 11 requires certain persons who collect protected health information such as medical records to comply with federal privacy standards under the Health Insurance Portability and Accountability Act (HIPAA). It also requires a person who holds or is required to hold an insurance license or certificate of authority to obtain permission to disclose any nonpublic personal health information. The act establishes requirements for a written or electronic request for such authorization and contains enforcement provisions, including allowing the attorney general to file suit for injunctive relief and civil penalties.

A covered entity must comply with HIPAA standards relating to a person's access to protected health information, uses and disclosures of such information, and notice of privacy practices. To the extent that SB 11 conflicts with another law with respect to the specified information collected by a governmental body or unit, SB 11 controls. A covered entity may not disclose, use, sell, or coerce a person into consenting to the disclosure, use, or sale of protected health information, including prescription patterns, for marketing purposes without the consent or authorization of the person who is the subject of the information.

Except for provisions relating to information used in marketing, the act's requirements regarding privacy of medical records do not apply to a covered entity as defined under HIPAA, to certain entities associated with a covered entity, and to the holder of an insurance license. To the extent that a covered entity engages in the activities of a financial institution or authorizes, processes, clears, settles, bills, transfers, reconciles, or collects payments for a financial institution, SB 11 and any rules adopted under it do not apply. Other exemptions to the medical privacy provisions include worker's compensation insurance, functions, or related entities and an employee benefit plan and related entities.

Supporters said SB 11 would establish requirements for the privacy of medical records and nonpublic health information that now are obtained, analyzed, and distributed by a large number of third parties, including health-care providers, clinical researchers, and insurers. Much of the bill's language would track federal standards under HIPAA and would establish even stronger protections in areas such as marketing.

A downside of the Information Age is the sharing of data considered by many to be private. A person's medical condition and treatment, including drugs prescribed by a physician, should remain confidential, yet companies compile and often distribute such information for marketing and other purposes. Sensitive information of this type could be abused, such as by denying a job to someone who had a specific illness but who might be able to do the work, regardless of a particular medical condition.

SB 11 would protect people from invasions of their privacy related to medical and other private information. A covered entity could not disclose or use a person's protected information, including prescription patterns, for marketing purposes without the person's consent. A patient would have to give the third party permission to obtain such personal information for marketing. The bill would treat violations of these provisions seriously and would allow the attorney general to obtain injunctive relief and civil penalties.

Also, SB 11 would exceed protections offered by HIPAA, which extend only to a health-care provider, health-care plan, or health-care clearinghouse. The bill would define a covered entity to include a business associate, health-care payer, governmental unit, information or computer management entity, school, health researcher, health-care facility, clinic, or person who maintained an Internet site, including an employee, agent, or contractor of all such entities.

Opponents said SB 11 would not go far enough in protecting people's privacy and would fill only a few gaps resulting from HIPAA. For example, the bill would exempt all activities of insurers or "licensees." A licensee could disclose nonpublic personal health information to the extent necessary to perform functions, including underwriting, loss-control services, ratemaking and guaranty fund functions, risk management, utilization review, peer review, and actuarial, scientific, medical, or public policy research. The exception for research alone is too broad and could allow disclosure of nonpublic information that would violate a person's privacy with no recourse.

Although the attorney general could seek injunctive relief and penalties for violations, the bill's proposed remedies are inadequate. Violations of a person's privacy are serious and warrant a private cause of action. The bill should authorize a person to bring suit and seek appropriate relief, such as through the Deceptive Trade Practices Act.

The **HRO analysis** appeared in Part One of the *May 22 Daily Floor Report*.

Simplifying Medicaid enrollment for children

SB 43 by Zaffirini, et al.
Effective January 1, 2002

SB 43 directs the Texas Department of Human Services (DHS) to develop a single form and set of procedures to apply for Medicaid for children under age 19 and to apply for the Children's Health Insurance Program (CHIP), including a mail-in option. DHS must ensure that Medicaid documentation and verification processes, including those used to evaluate assets and resources, are the same as those for CHIP but not more stringent than CHIP processes in place on January 1, 2001. DHS can develop procedures to allow any health and human services agency or other health facility, such as a hospital, to accept an application for medical assistance for a child.

SB 43 allows recertification of a child's eligibility and need for medical assistance by telephone or mail, rather than in person. Between September 1, 2002, and June 1, 2003, DHS must adopt rules to provide continuous eligibility for 12 months (rather than six months, as in current law) or until the child's 19th birthday, whichever comes first.

The Health and Human Services Commission (HHSC), which oversees DHS, must develop procedures to help families who may lose Medicaid coverage either to recertify or to enroll their children in CHIP. Families must attend an orientation session when they first join Medicaid and must follow the regimen of preventative care and early detection in Texas Health Steps. Families in Medicaid managed care may not change managed-care organizations during the period of continuous eligibility.

Supporters said Texas' current application process for Medicaid prevents too many eligible people from receiving coverage. In keeping eligible people off the Medicaid rolls to minimize state expenditures, the state actually increases costs to hospitals and local taxpayers, who end up providing health care. Streamlining the Medicaid application process would help the state achieve its goal of reducing the number of uninsured children. Texas now has about 1.4 million uninsured children, almost half of whom are eligible for Medicaid but not enrolled.

Application process. The Medicaid application process should be similar to the CHIP process in the type of information required. To receive CHIP benefits, a family need only complete a two-page application form and affirm that the information is accurate. However, Medicaid-eligible families must go through another screening process that can require many forms, signatures from neighbors, landlords, and employers, and a face-to-face interview, which can take weeks to complete.

Face-to-face interview. The face-to-face interview is a significant barrier to obtaining medical coverage for children with working parents. DHS does not allow people to

schedule interviews around their work schedule, but rather assigns them a time. Most parents with children on Medicaid are working at low-paying hourly jobs with little flexibility. The interview could be performed adequately over the telephone.

Asset test. The state should encourage families to save some money to become more self-sufficient. The best way for families to move off public assistance, including medical assistance, is by saving enough money to weather emergencies. The \$2,000 asset limit is too low to allow families to graduate to higher levels of self-sufficiency with any degree of security.

Continuous eligibility. One year of continuous eligibility for Medicaid is important to reduce the application hassles encountered by working families and to give patients a “medical home” for preventive care. Six-month recertification requirements often result in families allowing coverage to lapse until a child falls ill or reenrolling as necessary and ending up in another plan with a different provider. Such situations hinder physicians from practicing good primary and preventive care.

Cost. While these changes would cost the state money, the projected cost of \$324.5 million in fiscal 2002-03 failed to take into account the combined effect of all of the proposed changes. The projected number of people who would enroll in Medicaid for the first time double-counts children who would enroll newly because of these changes. Also, the projections do not take into account savings to local governments and hospitals that provide indigent and charity care to eligible patients not enrolled in Medicaid.

Opponents said the Medicaid program is sufficiently different from CHIP to require different application processes and requirements. CHIP essentially is subsidized private insurance, not a state program. Medicaid, however, is funded and administered by the state and includes unlimited health benefits without financial participation. Medicaid should not be made to look like CHIP because it is not like CHIP.

The state should not aspire to enroll as many children as possible in Medicaid, but rather should create policies that allow children to be enrolled in CHIP. Because children who are eligible for Medicaid are, by law, ineligible for CHIP, the current Medicaid rules make more children eligible for CHIP, which is superior to Medicaid in a number of ways, including cost sharing, which allows families to participate in their children’s health care, and inclusion of private organizations, which makes it similar to the health-care coverage that self-sufficient families have. Also, CHIP maximizes the federal funds the state receives for insuring children with a better match rate of three-to-one for federal funds, versus two-to-one for Medicaid.

Application process. It would be a disservice to Texas’ low-income families to make the application form for Medicaid a bare-bones form like that used for CHIP. When families apply for CHIP, the state presumes that they do not need additional assistance because the

income requirements for CHIP usually indicate that the families would not be eligible for other services. That is not the case for Medicaid-eligible families who are likely to be eligible for other forms of public assistance.

Another key function that the application serves is determining outstanding medical bills at the time of application. Because many families wait to apply for assistance until a child is sick and the family is in a dire financial situation because of medical bills, it is important for the application to collect the information DHS needs to determine what outstanding medical bills exist and if they are eligible for payment.

Face-to-face interview. The state should not remove this important antifraud measure. Over the phone, interviewers cannot detect nuances or facial expressions that may be clues to fraud or even verify the interviewee's identity. The potential for Medicaid fraud is great because there is no dollar limit for health-care benefits, and the state must verify that recipients are eligible to receive benefits.

The face-to-face interview only should be waived for people who work, but the interview should be retained for families with no earned income because they are the most likely to need multiple services and should have enough time to come into a DHS office. The office visit may be the only contact those people have with DHS and may be their only opportunity for exposure to information about assistance the state can provide.

Continuous eligibility. The current eligibility requirements ensure that the state spends scarce Medicaid resources on clients only as long as they need care. Longer periods of continuous eligibility would increase state costs by keeping children on the Medicaid rolls longer, even if they did not need or seek medical care, because managed-care organizations receive a set monthly amount per enrollee regardless of care provided.

Cost. The changes proposed by SB 43 would be expensive, perhaps even more so than projected. The cost projections may be too low because they do not take into account a possible increase in fraud as a result of these measures, as well as the less favorable match rate for Medicaid versus CHIP. If these changes were implemented, the state could receive a larger than expected Medicaid bill in two years.

The **HRO analysis** appeared in Part One of the May 18 *Daily Floor Report*.

Requiring appropriate care settings for people with disabilities

SB 367 by Zaffirini, et al.
Effective September 1, 2001

SB 367 establishes a framework for Texas' long-term care placement initiatives and a time line for implementation. It directs health and human services (HHS) agencies to develop a working plan and a task force to provide guidance on community and institutional long-term care. It establishes ways for people who need long-term care services to be assessed for the appropriateness of different settings and to receive help moving from one setting to another, as needed. The act also establishes a pilot program to develop systems of integrated community-based support services.

The Health and Human Services Commission (HHSC) and other agencies must implement a working plan that includes services and supports to foster independence and that allows people with disabilities to live in the most appropriate setting. Appropriateness will be determined by considering the person's needs and personal preferences and availability of state resources. Agencies must facilitate a timely transfer to a community setting if a disabled person wishes to live in the community, the treating professionals agree that this is appropriate, and the state's resources reasonably can accommodate the transfer. Agencies also must develop strategies to prevent unnecessary institutionalization of people living in the community. Each agency must implement the provisions of the working plan subject to the availability of funds.

Eligible people with disabilities cannot be denied access to an institution, nor removed from one if they do not wish to move, unless the move is necessary to protect that person's health or safety. The act also creates an advisory committee to develop a plan by which the Texas Department of Mental Health and Mental Retardation (MHMR) can facilitate the appointment of relatives as guardians for residents to make decisions about appropriate care settings. SB 367 requires HHS agencies to give each client and at least one family member, if possible, information about all options for care, including community-based care, not later than March 1, 2002.

HHSC must coordinate with MHMR, the Texas Department of Human Services (DHS), and the Texas Department of Housing and Community Affairs (TDHCA) to help people move from institutions to community settings. The agencies must establish eligibility criteria, duration of assistance, types of expenses to be covered, and locations where the program would be operated. DHS must administer the program and coordinate with TDHCA in obtaining funding from the U.S. Department of Housing and Urban Development. If funds are available, MHMR and DPRS must establish a pilot program to develop a system of supports and services to enable people with disabilities to live in the community.

Supporters said SB 367 would create the infrastructure for Texas' response to the U.S. Supreme Court's 1999 *Olmstead v. L.C.* decision, under which states must place disabled people in community settings within a reasonable period if community placement is appropriate, the client does not oppose it, and the state's resources reasonably can accommodate it. The Promoting Independence Advisory Board recommended initial steps that the state needed to take to address the issues raised by *Olmstead*. This bill would put into place the recommendations that the state can implement now and would establish ongoing monitoring and advisory roles to continue this work in the future.

The bill would reduce Texas' liability under the *Olmstead* decision. Without appropriate services in the community, the state cannot establish long-term community placement. SB 367 would create a community-first policy, ensuring emphasis on community placement. In the past, people with disabilities were placed in institutions because it was believed that that was the only appropriate care for them. Today, there is widespread recognition that community care can be superior to institutional care for some people. The state's policies should reflect that.

SB 367 would create a time line for implementing the advisory board's recommendations in stages over the coming years, ensuring that the state would make incremental progress in these areas. The agencies would have to implement these programs only if the state provided sufficient funding. Medicaid waiver slots, which allow individuals to "waive out" of institutional care and move to the community while retaining Medicaid funding, are a significant portion of the state's community-based care initiatives and are set by legislative appropriations. Therefore, legislators would have direct control over these initiatives and would consider non-waiver services and programs in light of the state's commitment to fund waiver slots.

SB 367 would require the development of assessment tools to ensure that all people for whom community placement is appropriate would be identified and informed about their options. It is important to determine the whole population for whom community care may be appropriate, rather than waiting for people in institutions to place themselves on waiting lists.

Opponents said SB 367 would duplicate much of what the state already has done in response to the *Olmstead* decision. The state should devote its resources to implementing the recommendations of the Promoting Independence Advisory Board, not to creating another advisory board and pilot project. Texans with disabilities who are placed in institutions inappropriately need ways to move into the community, not more information about the current situation.

Because SB 367 would not direct state agencies to act with reasonable promptness in placing people in the community, it would not protect the state from *Olmstead*-related litigation. This bill would not move people out of institutions more quickly. The only way

to do that is to increase the number of waiver slots, which is an issue of legislative appropriation. Texas already has the tools it needs to place people in the community and should seek funding to do that before it develops ancillary services.

The state already is aware of thousands of people who want to live in the community: those who are on waiting lists. Finding more of these people through new assessment tools would not solve the core issue of too few slots to satisfy the demand. It would be cruel to spend scarce resources on assessing and informing people about community-based alternatives, only to place them on a waiting list for years.

Other opponents said Texas should not have a community-first policy. The transition to community care places a higher burden on institutions, raising their costs per bed per day over time. Because of the many fixed costs in institutional settings, the movement of funds to community-based services would reduce the quality of life in institutions and ultimately could lead to the closure of many facilities. Some family members oppose moving their relatives into the community at any cost, on the grounds that the quality of community care cannot compare favorably to that in an institution.

A program to inform all consumers of community options would be misguided because community living is not appropriate for all people living in institutions, and publicizing an array of options could create confusion for consumers. Institutionalized people who cannot make decisions for themselves should not be coerced and confused by the state or by advocacy groups into using community-based services.

The **HRO analysis** appeared in Part Two of the May 16 *Daily Floor Report*.

Revising regulation of assisted living facilities

SB 527 by Moncrief
Effective September 1, 2001

SB 527 establishes a process by which violations of assisted living facility standards that do not pose an immediate threat to residents can be adjudicated without suspending the facility's license. The Texas Department of Human Services (DHS) can suspend or revoke a license after providing notice and opportunity for a hearing if the facility violates a rule in a substantial or repeated manner or places residents' health and safety in immediate danger. A court, though not DHS, may enjoin a facility's operation.

The act establishes violations for which administrative penalties can be considered, the amount of those penalties, notification requirements, hearings and reviews, and payment and amelioration of penalties. An administrative penalty is capped at \$1,000 except in cases of a repeat offense. The Texas Board of Human Services must establish gradations of penalties based on the seriousness of the violation. In lieu of payment, DHS can allow an assisted living facility to use some or all of a penalty to correct the violation, as long as the violation did not place a resident in immediate harm.

SB 527 also creates an emergency fund for assisted living facilities, separate from the emergency fund for nursing homes. DHS may use emergency funds only to alleviate an immediate threat to residents' health and safety. A court can order DHS to disburse these funds in certain circumstances. The fund is capped at \$500,000, and any excess at the end of each fiscal year must be transferred to general revenue for use in enforcing regulations for assisted living facilities. If the fund falls below the cap, DHS must charge assisted living facilities a fee in addition to the licensing fee to replenish the emergency account. The fee is determined by the number of beds per assisted living facility.

Supporters said SB 527 would enable the state to enforce regulations for assisted living facilities without shutting them down. Under current law, DHS has few options for penalizing assisted living facilities that violate the regulations. Closing these facilities for minor infractions hurts residents rather than improving the quality of care, which is the primary intent of regulation. If residents' health and safety are in jeopardy, the facility should be suspended or closed, but in less serious cases, the state should be able to impose penalties that improve the quality of life in a facility.

Allowing amelioration of penalties and correction of violations is appropriate because these measures give an assisted living facility an incentive and means to improve care. If the state imposes monetary penalties for violations, it takes scarce funds away from care of the residents. It is better for those funds to be used to improve care.

The proposed separate trust fund for assisted living facilities would prevent these facilities from having to subsidize the nursing home industry. Separate statutes govern these two types of facilities, but assisted living facilities still must contribute to the nursing home trust fund. This was not a big problem when the nursing home fund was capped at \$500,000. However, in 1999, after the state had to take over 13 nursing homes, the Legislature raised the cap to \$10 million, placing a huge burden on assisted living facilities. This industry has different concerns, structures, and funding from those of the nursing home industry. Most assisted living facilities are small private businesses funded with private money. They do not receive state money or reimbursement rates. In contrast, nursing homes are larger businesses that do receive state and federal assistance.

Opponents said that the more the state regulates businesses, the higher their costs. The increased regulation proposed by SB 527 would drive up the costs of assisted living facility services. These facilities largely are supported by private paying residents, not by government programs. If their costs become too high and facilities have to close, both consumers and businesses will lose out.

Establishing a separate trust fund for assisted living facilities could drive up the fees charged to nursing homes. If assisted living facilities no longer pay into the nursing home trust fund, multiple fees or higher fees would have to be charged to nursing homes to make up the difference.

Other opponents said that SB 527 would continue the trend toward inappropriately requiring owners of more than one small facility to be licensed and to conform to regulations geared toward larger facilities. Many small assisted living facilities in Texas are being treated like large facilities but may not have the resources to comply with the thousands of regulations that DHS has established for nursing homes. The hearings and dispute-resolution processes that this bill would add often are too expensive for small businesses to participate in, and the fines often are too high. The state should not regulate small assisted living facilities in the same manner as for larger ones.

The bill should limit more narrowly the use of DHS records as evidence in civil actions to prevent overblown reactions to alleged problems. DHS forms on which surveying and inspection information is kept rarely indicate any mitigating circumstances about an alleged problem or any explanation of the problem by the operator, nor do they reflect all of the qualities of the services the facility provides.

The **HRO analysis** appeared in Part Two of the May 21 *Daily Floor Report*.

Continuing the Texas Department on Aging

SB 535 by Carona, et al.
Effective September 1, 2001

SB 535 postpones the merger of the Texas Department on Aging (TDoA) with the Texas Department of Human Services (DHS) until September 1, 2005, and postpones TDoA's abolition until September 1, 2006. In 1999, the 76th Legislature enacted SB 374 by Zaffirini, continuing TDoA until September 1, 2004, at which time it would have ceased operations. The transition time was provided to enable programs from TDoA and the Texas Rehabilitation Commission to be transferred to DHS.

Not later than September 1, 2003, the health and human services commissioner must:

- ! identify the function of each TDoA service and decide whether it relates to long-term care services or to other services for the elderly;
- ! recommend functions involving the direct provision of long-term care services that could be transferred to DHS;
- ! evaluate coordination between TDoA and DHS; and
- ! submit a report to the Legislature, including a list of all TDoA functions and services that could be transferred to DHS, a recommendation of the TDoA's role after the merger, and a description of the coordination between TDoA and DHS.

Supporters said serious concerns that have not been addressed by DHS or the Health and Human Services Commission (HHSC) need to be decided before the proposed merger with TDoA takes place. SB 535 would direct HHSC to study the key elements that have raised concerns about the merger. The 79th Legislature in 2005 would have the final say about whether or how the merger should go forward, with more comprehensive information on which to base its decision. TDoA is a small agency that enjoys the widespread support of elderly Texans and has done an outstanding job with limited staff and resources. Its focus and services would have to compete against other priorities in the new agency. Most likely, the needs of the elderly — especially the healthy elderly — would receive less attention.

Moving programs around would be unnecessary and disruptive and would not necessarily result in greater coordination. With its new powers granted last session, the HHSC can coordinate long-term care services and can make rate setting and provider contracting more consistent without the expense and disruption of forming a new agency. Also, the merger would cause a conflict of interest. The TDoA ombudsman program should not be transferred to DHS, the same agency that regulates nursing homes. A separate ombudsman program would retain its federally required objectivity.

Opponents said that Texas should not undo the good decisions made by the 76th Legislature about the future of health and human services (HHS) agencies. SB 374 moved the state closer to a more comprehensive, less duplicative, and easier-to-access system of providing long-term care services. It was a first step, not the final step, in better organizing and delivering long-term care services. Such an undertaking needs to occur in stages over several years to address effectively the wide-ranging concerns of multiple providers, regulators, and interest groups. SB 535 would be a step backward.

Consolidating long-term care programs into a single state agency is necessary to create an identifiable agency that is responsible for and can coordinate more effectively the complex range of services required by aging and disabled people. This consolidation is especially important because Texas' population is growing in age as well as in number. Fragmentation of services among agencies is a long-standing problem in Texas, and consolidation has been recommended as far back as 1993 by the Task Force on Long-Term Care. This fragmentation is confusing to clients, is administratively expensive, and drains available resources. HHSC has found among HHS agencies 46 long-term care programs with varying eligibility requirements that often provide similar services, such as home-delivered meals, nursing, transportation, physical therapy, adaptive aids, and respite care. Some programs offer choices among an array of services, whereas others offer the clients no choice.

The ombudsman program would not lose its objectivity on nursing home oversight by being placed in the same agency that regulates nursing homes. The program operates with a very small central staff, which would be located in a different division of the agency from nursing home regulation. Other states run their ombudsman programs this way, and there is no reason to think that it would not work for Texas as well.

The **HRO analysis** appeared in Part Two of the May 15 *Daily Floor Report*.

Regulation and reimbursement of telemedicine services

SB 789 by Moncrief, et al.
Effective June 15, 2001

SB 789 creates a standard set of telemedicine definitions to be used in all relevant statutes. It also makes regulatory changes relating to the use of telemedicine services in Medicaid and the Children's Health Insurance Program (CHIP), the state's health-care assistance programs for adults and children below certain income levels. The act grants regulatory authority to the State Board of Medical Examiners (BME) and creates grants for health and human services agencies through the Telecommunications Infrastructure Fund (TIF). It establishes a home health-care services telemedicine pilot program, a jail diversion pilot program, and a teledentistry pilot program.

Medicaid and CHIP. SB 789 authorizes reimbursement for all telemedicine services and removes the limit on reimbursement to rural health facilities, medical schools, and teaching hospitals. By October 1, 2001, the Health and Human Services Commission (HHSC) and the TIF board must adopt standards for a telemedicine communications system for Medicaid, including authentication, security, documentation, and storage of information the system would transmit and store. Medicaid can reimburse only for telemedicine services administered in a facility that uses this system.

SB 789 expands the duties of HHSC's telemedicine advisory committee to include monitoring Medicaid telemedicine programs and coordinating programs among state agencies. HHSC's telemedicine regulations do not affect federally qualified health centers and rural health clinics and the delegation of services by a physician to an advanced practice nurse or physician assistant.

Board of Medical Examiners. HHSC must direct telemedicine facilities and providers to make a good-faith effort to coordinate with other providers to protect existing health-care systems. If a patient consents, the primary-care physician must be informed of the telemedicine services in order to share medical information. HHSC must work with the BME to ensure compliance with coordination and notification requirements. The BME may adopt rules to ensure adequate supervision of health professionals who are not physicians but who provide telemedical services. The board also can set the maximum number of health professionals to whom a physician can delegate telemedical services and can require a physician follow-up visit.

Telecommunications Infrastructure Fund. The TIF board must use TIF funds for an automated system to integrate client services and eligibility requirements for health and human services across agencies. This authorization will expire September 1, 2003. TIF grants can be awarded only to hospitals or clinics that are supported by local tax revenue or are nonprofit, or that see patients in an office visit setting. HHSC also must authorize

TIF grants for other institutions based on the amount they spent on charity care in the previous year and on the number of Medicaid and CHIP patients seen. Institutions that provided no charity care in the previous year will not be eligible for a grant.

Supporters said SB 789 would create a comprehensive plan for telemedicine in Texas. Existing piecemeal legislation has resulted in contradictory or confusing definitions, regulations, and authority over programs. This bill would create a uniform set of definitions and would delegate oversight of specific areas of telemedicine to the appropriate agencies. Texas needs an effective plan for telemedicine, which can save time and travel expenses for providers and patients, allow reductions or substitutions in medical personnel, reduce the number of redundant medical tests, and improve the chances for early diagnosis of disease.

This bill would allow Medicaid to reimburse for telemedicine, a vital cost-containment and quality-of-care component. Telemedicine has proven effective in enabling the Texas prison system to reduce its overall medical costs, and it should be used in the state's health-care assistance programs.

Opponents said SB 789 would go too far in the name of "telemedicine regulation." For example, it would authorize grants from the TIF to health and human services agencies to integrate client services and eligibility requirements across agencies, an issue that far exceeds the boundaries of telemedicine. This issue is funded under HHSC's budget in the general appropriations act. Additional funding for system integration should not be part of a telemedicine bill.

The bill would increase Medicaid services, a move that should be approached with great caution in an environment of rising costs and usage. Medicaid caseloads were higher than expected in fiscal 2000-01, in part because of legislation to keep eligible people in Medicaid. Because of this, the state spent \$600 million more than appropriated for Medicaid. Given that costs are projected to continue to rise in the coming biennium, the state should be cautious about adding services at this time.

The **HRO analysis** of HB 1615, the companion bill to SB 789, appeared in Part Three of the May 3 *Daily Floor Report*.

Revising the state Medicaid program

SB 1156 by Zaffirini, et al.

Vetoed

SB 1156 would have revised the state Medicaid program in the areas of administration, eligibility, and benefits, Medicaid managed care, and demonstration projects. Medicaid, the state-federal health-care program for the poor, elderly, and disabled, is the largest single source of federal funds to the state budget. The bill would have reauthorized the Medicaid managed-care program.

SB 1156 would have authorized the Health and Human Services Commission (HHSC) to transfer any power, duty, function, or other aspect of the Medicaid program from an HHS agency to HHSC as long as the transfer was approved by a new legislative oversight committee that the bill would have established. Effective January 1, 2002, the bill would have transferred acute-care services and the vendor drug program from the Texas Department of Health (TDH) to HHSC, with all associated costs, rules, references, licenses, complaints, or other elements of these programs. It would have directed HHSC to develop strategies to improve management of the cost, quality, and use of Medicaid services and to develop a consolidated Medicaid appropriations request. The bill also would have directed the Texas Department of Human Services (DHS) to contract with other entities, such as hospitals or medical schools, to perform eligibility determination services.

SB 1156 would have authorized TDH to pay premiums for group health coverage instead of Medicaid coverage if private coverage was available and determined to be less expensive. The act would have codified TDH's Medicaid Health Insurance Premium Payment (HIPP) program. TDH could have established sliding-scale cost sharing for prescriptions in Medicaid through its vendor drug program.

Medicaid eligibility would have been extended to legal immigrants who entered Texas after August 22, 1996, lived continuously in the United States for at least five years, and were otherwise eligible for Medicaid. It would have established a Program of All-Inclusive Care for the Elderly (PACE) to provide community-based services to elderly people who were Medicaid recipients and qualified for nursing facility placement.

The bill also would have created a number of projects related to reducing the cost of claim processing, psychotropic medications, HIV/AIDS medications, federal-local medical assistance for adults, women's health services, case management for homeless people, and other projects.

Supporters said SB 1156 represented a comprehensive approach to the state's Medicaid program. As one of the largest programs that the state administers, Medicaid should be

evaluated as a whole. In the past, the Legislature has made piecemeal changes that have resulted in increased caseloads and usage, causing expenditures to exceed projections.

This bill would save the state more than \$100 million in fiscal 2002-03. Combined with other changes that the HHSC commissioner intends to implement, the bill's changes would save \$200 million in Medicaid expenses. These savings would not reflect a "slash and burn" policy, but rather wise fiscal management of the program, including expansion in areas where it is warranted and savings through better program administration.

Opponents said SB 1156 would expand Medicaid eligibility and benefits in ways that may not be sustainable in the future. The bill would save the state even more money if it did not expand eligibility and benefits. Only the administrative changes that move authority for Medicaid to HHSC and that reauthorize Medicaid managed care should be implemented this session. In two years, when the effects of those changes have been realized, the state could look at expanding eligibility for the program. In the past, expanding Medicaid eligibility has resulted in higher-than-expected costs.

The proposed changes in eligibility and benefits would increase Medicaid caseloads, a move that should be approached with great caution in an environment of rising costs and usage. Medicaid caseloads exceeded projections in fiscal 2000-01, requiring the Legislature to spend \$600 million more than it originally appropriated for Medicaid. Given that costs are projected to continue to rise in the coming biennium, the state should be cautious about expanding Medicaid eligibility.

Notes: Some provisions of SB 1156 are contained in other bills that the governor signed and have become law, including the health insurance premium-payment program (HB 3038 by Isett), expanding Medicaid for foster-care adolescents (SB 51 by Zaffirini), the Program of All-Inclusive Care for the Elderly (SB 908 by Shapleigh), and the migrant children's health-care network demonstration project (HB 1537 by Coleman).

The **HRO analysis** of SB 1156 appeared in Part One of the May 21 *Daily Floor Report*.

Long-Term Care Facility Improvement Act

SB 1839 by Moncrief, et al.
Effective June 15, 2001

SB 1839 establishes ways for nursing homes and intermediate care facilities for the mentally retarded (ICF-MRs) to obtain liability insurance coverage and makes liability insurance mandatory for these facilities. It establishes a quality assurance fee for certain facilities to enable them to draw down federal funds. It adds for-profit nursing homes to the medical liability insurance underwriting association and provides for raising funds through a bond offering, then repaying the bonds through a maintenance surcharge assessment on insurance companies' gross premiums for liability insurance.

The act also establishes best practices for risk, surveyor standards, dispute resolution, a quality assurance early warning system, and amelioration of violations. It requires data reporting and notification of exemplary damage awards and allows admission of certain agency documents as evidence in civil actions.

SB 1839 requires a nursing home to carry liability insurance to hold a license after September 1, 2002. Minimum coverage will be set at \$1 million per occurrence and \$3 million in the aggregate, except for institutions owned and operated by the government. For those institutions, the minimum will be set to cover the extent of the governmental unit's liability. The act modifies the operation of the Joint Underwriting Association (JUA) and the participation of for-profit nursing homes in the association. A nursing home not otherwise eligible for coverage by the association will be eligible if it demonstrates that it has attempted to obtain coverage but cannot obtain substantially equivalent coverage and rates. It also directs the Texas Public Finance Authority to issue up to \$75 million in revenue bonds on JUA's behalf to fund the nursing home stabilization fund. Bonds will be payable only from a maintenance tax assessment on liability insurance gross premiums established by SB 1839 or from other sources that the JUA is authorized to collect.

The act establishes a quality assurance fee to be imposed by the Health and Human Services Commission (HHSC) on ICF-MRs and other state facilities for the mentally retarded. The quality assurance fee is an allowable cost for reimbursement under Medicaid. Combined with federal matching funds, the funds can be appropriated to support or maintain an increase in Medicaid reimbursement for institutions or to offset allowable expenses in Medicaid. HHSC must devise a formula by which these funds will raise reimbursement rates, which is expected to provide incentives for institutions to increase direct-care staffing, wages, and benefits.

Supporters said that SB 1839 would keep the doors open and the lights on at Texas' nursing homes. More than one-quarter of Texas' nursing homes are in bankruptcy because

rising liability insurance rates and declining Medicaid reimbursement have forced them to operate at a loss. If the state does not address this problem, its network of long-term care for the elderly will continue to deteriorate. This bill would help keep Texas nursing homes in business.

The bill would not create a tax. The only bed fee that it would contain is for ICF-MRs, nearly all of which are publicly funded. The fee on those beds would be paid by the state Medicaid program, which would draw down additional federal matching funds. Because about 80 of the 1,100 nursing homes in Texas are substantially private-pay, a bed fee on nursing homes, as proposed in an earlier version of the bill, would have been a tax on some private payers.

Including for-profit nursing homes in the JUA would help address affordability problems associated with their liability insurance. The industry has experienced large increases in premiums, while some insurers have left the Texas market. According to the Texas Department of Insurance, the problem is more serious among for-profit facilities.

SB 1839 would not propose to pay for the nursing-home industry's liability insurance. Through the JUA, for-profit nursing homes, like other health-care providers, could buy their own coverage. Revenue from the proposed bonds would create a stabilization fund quickly, and members would service the bond debt through maintenance fees.

Mandatory insurance would be appropriate and beneficial for the nursing-home industry. Health-care professionals deal with peoples' lives and are exposed to high liability. All major providers are required, either by statute or practice, to carry liability insurance or to maintain significant reserves. The nursing-home industry should be no different.

Opponents said that a tax by any other name is still a tax. Even though the bed tax for nursing homes was removed from earlier versions of this bill, an identical tax would be added for ICF-MRs. As with nursing homes, most ICF-MR beds are Medicaid funded, but some are private-pay. It would be unfair to remove the tax for nursing homes but not to protect ICF-MR private-pay beds.

Liability insurance is an administrative cost, not a cost of care. The state should not pay for liability insurance as part of the Medicaid reimbursement rate. Just as physicians balance their caseloads to spread administrative costs across a range of populations, nursing homes should diversify their residents to ensure that their revenue is sufficient to cover administrative costs.

Other opponents said that the nursing-home industry needs additional funding that the state is unwilling or unable to provide. Access to liability insurance is a relatively small part of the problem. Medicaid reimbursement rates are the larger culprit for the industry's financial troubles. Because SB 1839 would permit liability insurance premiums as a

reimbursable cost under Medicaid, the key to solvency for the industry is higher Medicaid reimbursement rates. The bed fee proposed in earlier versions of this bill would have maximized the state's dollars by drawing down additional federal matching funds. The Legislature should not enact a nursing-home bill without finding a way to provide more funding for the nursing homes.

Medicaid is the primary source of funding for the nursing-home industry. Although a few private-pay beds would have had to pay the bed fee, versus the majority where the fee would be covered by Medicaid, the private beds also would have benefitted from the additional federal funds. Compensation for services in nursing homes pays for all of operations of the home. If nursing homes had higher compensation, all beds — Medicaid and private-pay — would benefit.

The JUA is not cheaper insurance, only insurance from the provider of last resort. It can be purchased only if similar insurance at a comparable price is unavailable. Nursing homes cannot afford the “comparably priced” insurance, so there is no reason to believe that they could afford insurance through the JUA.

The **HRO analysis** appeared in Part One of the *May 22 Daily Floor Report*.

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Creating higher education excellence and research funds

HB 1839 by Junell, et al.
Effective September 1, 2001

HB 1839 establishes the Texas Excellence Fund (TEF) and the University Research Fund (URF) with the comptroller to promote increased research capacity and to develop institutional excellence at certain comprehensive research universities and general academic teaching institutions. The funds have different allocation formulas, but each will receive the same amount of money each fiscal year. Both funds will be allocated primarily to institutions with large research and doctoral programs, and smaller amounts will go to other institutions. The bill requires biennial allocations to each fund that will equal the amount of interest earned on the Higher Education Fund (HEF) or \$50 million, whichever is less. For fiscal 2002-03, the appropriation is \$33.8 million for each fund.

The TEF will provide funds to institutions outside the University of Texas (UT) and Texas A&M University (TAMU) systems that are eligible to receive general revenue appropriations through the HEF. Eighty percent of the appropriation from the fund will go to comprehensive research universities, including Texas Tech University, the University of Houston, and the University of North Texas, and the remaining 20 percent to other eligible institutions, allocated according to a formula based on each institution's reported research spending. The URF will provide funds to institutions that participate in the Permanent University Fund (PUF), other than UT-Austin, TAMU, or Prairie View A&M University, which already receive additional funding from the PUF. One million dollars of the fund will be divided among certain general academic teaching institutions, including UT-Arlington, UT-Dallas, UT-El Paso, and UT-San Antonio, with the remainder distributed to doctoral and research universities on the basis of research spending and the number of doctoral and master's degrees awarded. The allocation formulas for both funds will be used for fiscal 2004-05 and are scheduled to expire August 31, 2005.

A joint committee appointed by the lieutenant governor and House speaker must study the feasibility of creating a single research enhancement fund, examine how institutions historically have used "excellence" funds, and consider whether a portion of the PUF should be made available to institutions in the UT System other than UT-Austin. The committee must report its findings and recommendations to the governor, lieutenant governor, and House speaker by December 1, 2002.

Supporters said Texas does not have enough graduate and research universities, especially in major metropolitan areas. Texas has two nationally competitive "flagship" research universities in UT-Austin and TAMU, whereas California, for example, has eight. Increased funding for excellence would help some institutions reach flagship status, enabling them to attract premier faculty and easing enrollment pressures at UT-

Austin and Texas A&M. Evidence shows that graduate and research universities provide significant benefits to the regions where they are located. Their presence lowers the cost of higher education because more students can live at home while attending school.

Graduate and research universities would contribute to Texas' economic development by providing an attractive environment for business, especially for energy, electronics, software, biotechnology, and aerospace companies. These institutions would address the need for a trained workforce, especially in fields such as engineering and computer science, but also in nursing and teaching. Individual institutions serve differing missions and have developed unique areas of expertise. The additional funding that HB 1839 would provide for would help institutions achieve national recognition in their chosen areas.

Most research universities can leverage federal funds at a rate of 10 federal dollars for every one to two state dollars. Federal funds then circulate throughout the state economy. While Texas is second in population, it is sixth in federal research and development obligations to higher education institutions. Also, the expiration dates for the allocation formulas are needed to allow the Legislature to review the plans and funding formulas, which likely would need to be adjusted in the future on the basis of the institutions' performance.

Opponents said HB 1839 would continue the uneven distribution of research universities in Texas. Funding levels would be disproportionate, with the TEF serving 27 institutions with 237,000 students and the URF serving nine institutions with 73,000 students. The bill would not go far enough in recognizing the needs of smaller general academic institutions. Although these institutions may not be near flagship status, they serve critical higher education needs in their communities. Increased excellence funding would enable these institutions to serve their students and communities better and to develop "niches" of excellence consistent with their unique missions.

Other opponents said the bill should not specify expiration dates for the allocation formulas but should require an interim study of the funding formulas once they have been in place. The bill's purpose is to create research opportunities for all the schools, including by enhancing their ability to draw down federal money. A sunset date would hamper the schools' ability to get federal money, because institutions would be certain of receiving additional state funding for only four years.

The **HRO analysis** appeared in Part Two of the *May 2 Daily Floor Report*.

Increasing higher education tuition rates

HB 2531 by Junell, et al.
Effective September 1, 2001

HB 2531 increases the resident tuition rate charged by general academic teaching universities by \$2 per semester credit hour each academic year, from \$40 per hour in 2001-02 to \$50 per hour in 2006-07. These tuition rates will expire January 1, 2008. Universities may charge additional amounts for designated tuition equal to these rates.

Each university system governing board may set a tuition rate for graduate and professional pharmacy programs or law schools at a rate that is at least equal to but no more than three times the prescribed tuition rate. For billing and catalogue purposes, each governing board must accumulate all the tuition that it charges into one tuition charge.

Supporters said HB 2531 is critical for Texas to keep pace with the delivery of high-quality higher education services. Texas is following the national trend of relying less on general revenue and more on tuition to provide these services. To maintain quality and services, a stair-step tuition increase would provide more funding while cushioning the cost increase to students. The extra funding would be used for grants, new laboratory equipment, insurance premiums, the local share of faculty salary increases granted by the Legislature, staff support, computers, and higher utility costs, which have hurt all institutions. Faculty salary increases would enable Texas institutions to remain competitive in recruiting and retaining faculty. Increased tuition also would provide more funds for student financial aid. Part of the money from tuition goes directly to fund aid programs such as the Texas Public Education Grants for low-income students.

Opponents said tuition and fees at Texas' public universities have nearly doubled since 1992, imperiling the goal of increasing the number of poor and minority students. Rising tuition costs put a greater burden on all students and their families and impede the state's efforts to close the gaps in low-income and minority enrollment. As of 2000, the total estimated cost per year to attend a four-year university in Texas, including tuition, fees, transportation, room and board, and books, was \$11,894, compared to the national average of \$10,909. Texas' poorer communities cannot afford higher tuition rates. Texas' growing minority population historically has been underrepresented in higher education, yet increased minority participation is vital to the state's future social and economic strength.

Higher education in Texas must be affordable not only for the poorest Texans but also for middle-class students, who do not qualify for federal grants or for the state's TEXAS Grants. These students and their families can be squeezed out of financial aid with no recourse. The Legislature should appropriate more funds for higher education grants and

scholarships and should broaden eligibility for grants if all Texas students are to have access to higher education.

Other opponents said the Legislature should consider allowing each public institution to set its own tuition, as recommended by the governor's Special Commission on 21st Century Colleges and Universities. Some institutions might choose to offer an expensive education, while others might choose to be more competitive in price. According to the commission, this would give institutions more flexibility to adapt and innovate in response to changing demographics and demand for higher education.

The **HRO analysis** appeared in Part One of the May 1 *Daily Floor Report*.

Creating a state-sponsored higher education savings plan

SB 555 by Ellis, et al.
Effective June 15, 2001

SB 555 creates a state-sponsored higher education savings plan through which a person can establish a trust account to save money to cover all higher education expenses of a beneficiary. The state will not insure the trust accounts and will not guarantee the return of the principal or investment. The person who opens an account is the owner, who may also be the beneficiary. The Prepaid Higher Education Tuition Board will hold money contributed to an account in trust for the owner and beneficiary, who do not have to be Texas residents. The board must contract with one or more financial institutions to serve as plan manager and to invest the money in the trust accounts. To the extent permitted by federal law, the investment options can include mutual funds, fixed and variable annuities, and variable life insurance policies.

An account owner or beneficiary may not direct the investment of any contribution to or earnings on an account. However, if federal law is amended to allow it, an account owner could direct the investment of an account. Contributions to an account can be made with cash or by electronic funds transfer. Public employees can make contributions through payroll deductions. The penalty for a nonqualified withdrawal will be 10 percent of the portion of the withdrawal.

SB 555 also amends current law regarding the Texas Tomorrow Fund (TTF), the prepaid tuition program through which parents may lock in the future cost of a college education for their children at today's prices. The Prepaid Higher Education Tuition Board must administer both the TTF and the college savings plan account. Unless continued by the Legislature, the board, the TTF, and the trust account will expire September 1, 2007.

Supporters said SB 555 would provide tax benefits for Texans who need to save money for college expenses. It would make college more affordable for beneficiaries and their families. Since 1980, the cost of college tuition has risen at twice the rate of inflation. Low- and middle-income families have been hit hardest by this rapid increase. A college savings plan would allow participants to set aside funds to cover room and board, books, and other costs beyond tuition. Money would grow tax-deferred until used for college, after which the gain in value would be taxed at the student's tax rate.

The bill would complement the successful TTF with a college savings plan, but would allow greater flexibility. Depending on how the investment performed, a trust account could earn higher returns than are available through the TTF, because investors in the TTF cannot earn more than the actual cost of tuition, and the maximum contribution would be far in excess of what can be set aside in the TTF plan. The bill would create no

cost to the state because administrative fees and service charges would pay for the program, and the state would not guarantee benefits.

Opponents said providing opportunities to save money for college is more appropriate for private-sector entities, with which this program would compete. Also, participants conceivably could lose money in a market downturn, because the program would not feature a guaranteed return, as in the existing prepaid tuition program.

The **HRO analysis** of the companion bill, HB 1446 by Junell, appeared in Part One of the April 30 *Daily Floor Report*.

Expanding the TEXAS Grants program

SB 1596 by Bivins, et al.
Effective June 11, 2001

SB 1596 establishes the Toward EXcellence, Access, and Success (TEXAS) Grant II program for eligible students who attend public two-year colleges and technical institutes. The Texas Higher Education Coordinating Board will administer the program, giving priority to Texas students with the greatest financial need. Student recipients must enroll in at least one-half of the full course load in college.

To maintain eligibility, students must make satisfactory academic progress by completing at least 75 percent of the semester credit hours they attempt in the most recent academic year and must maintain an overall grade-point average of 2.5 on a four-point scale. An eligible institution may not charge a student receiving a TEXAS II Grant more in tuition and fees than the amount of the grant and may not deny admission or enrollment on the basis of a student's eligibility to receive a TEXAS II Grant. Institutions may use other available sources of financial aid, except for a federal Pell Grant or a loan, to cover any difference in the TEXAS Grant II and the actual amount of tuition and required fees.

Supporters said the greatest obstacle to higher education is cost. SB 1596 would create a much-needed grant program to meet the needs of community and technical college students and to supplement the TEXAS Grant program established in 1999. Texas needs to attract more students into higher education to remain economically competitive, and greater participation by minority populations is especially important. This bill would improve access to higher education for an important population group and would ensure that the neediest students could afford the institutions of their choice. A standard definition of satisfactory academic performance would ensure that every institution had the same requirements statewide and would be consistent with the original TEXAS Grant program.

Texas' community and technical colleges now enroll more than 430,000 students, more than half of the state's total higher education enrollment, yet they received only 14 percent of TEXAS Grant financial aid funds in fiscal 2000. Community and technical colleges have 70 percent of freshmen and sophomore students and 75 percent of the state's minority freshmen and sophomore students.

The amount of a TEXAS II Grant would be based on the average cost of tuition and fees at a public junior college or public technical institute. This would be a fair and equitable basis on which to help students at this type of institution throughout the state.

Opponents said the new grant program would be very expensive, costing more than \$27 million in the first biennium and nearly \$37 million in the second biennium. It would require an undetermined level of state appropriations in future years.

Other opponents said basing the grant amount on the average cost of education at a particular type of institution would limit the number of grants. All grant awards would be the same, but not all students have the same financial need. Instead, the program should offer a maximum amount to the neediest students and smaller amounts to less needy students, thereby helping a greater number of students in need. Also, the individual institutions should be allowed to determine the criteria for satisfactory academic progress.

The **HRO analysis** of the companion bill, HB 3050 by Rangel, appeared in Part Two of the April 30 *Daily Floor Report*.

Judiciary

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SJR 3

Duncan

Revising judicial selection of appellate judges

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Revising judicial selection of appellate judges

SJR 3 by Duncan

Died in House Calendars Committee

SJR 3, as adopted by the Senate, would have proposed a constitutional amendment to allow gubernatorial appointment, followed by nonpartisan retention election, of the members of the Texas Supreme Court, Court of Criminal Appeals, and 14 courts of appeals. After serving an initial term of up to six years, depending on when during the year a judge was appointed, the judge would have stood for a nonpartisan retention election during the regular November elections. Judges retained by the voters would have served additional six-year terms. If voters failed to retain a judge, that seat would have become vacant and subject to being filled by gubernatorial appointment.

As reported by the House Judicial Affairs Committee, SJR 3 would have proposed a constitutional amendment allowing the governor to appoint the members of the Supreme Court and the Court of Criminal Appeals, subject to Senate confirmation, for six-year terms, without retention elections.

Supporters said judicial races too often are decided more by party affiliation than by individual merit or qualifications. Shifting tides of party fortune, not judicial performance, have caused the defeat of significant numbers of qualified, capable judges. Because judges are barred from stating positions on specific issues, factors like party affiliation or campaign advertising have gained undeserved importance in judicial elections. Appointment of appellate judges with retention elections, as in the Senate version, would establish an ideal balance of competing interests: it would minimize the influence of campaign contributions, ensure a roster of qualified candidates, guarantee citizens a voice in judicial selection, and ensure the assessment of candidates on the basis of their records rather than their public relations capabilities.

Opponents said a retention election system, as called for in the Senate version, would put the onus on the voters to mount a campaign to oust bad judges. The effort to collect funds to combat a retention election would be made doubly hard without a clear candidate to oppose the incumbent. Voters could be swayed to reject judges for reasons unrelated to the judge's competence or qualifications. In 1986, a high-dollar campaign unseated three California Supreme Court justices, allowing the new governor of a different party to replace his predecessor's appointees. Regardless of the process for initially selecting judges, all of these systems neglect the need to promote diversity among the judiciary.

Public Education

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Revising regulation of charter schools

HB 6 by Dunnam, et al.
Effective September 1, 2001

HB 6 revises laws regulating open-enrollment charter schools. It authorizes the State Board of Education (SBOE) to grant charters to applicants that meet the education commissioner's financial, governing, and operational standards, but it limits the number of charters to 215, excluding certain charters granted to a public senior college or university.

Governing bodies of a charter holder and of a charter school are subject to open records and public meetings requirements. A charter school is subject to local government requirements for purchasing and contracting, but it may include purchasing and contracting provisions in its charter that override the relevant laws. People with a substantial interest in a charter school's management company and people who have been convicted of certain criminal offenses may not serve as a governing body member, an officer, or employee of a charter holder or school.

Beginning with the 2003-04 school year, a charter holder will receive state funding as a district without a Tier I local share or local revenue and is entitled to grant funds or other discretionary funding available to school districts. Funds received by a charter holder after September 1, 2001, are public funds to be held in trust for the benefit of students and used only for purposes for which a school district may use local school funds. The act adds charter schools to the list of entities required to publish an annual financial statement under the Public Information Act.

The commissioner must adopt a procedure to notify SBOE upon receipt of a charter application. The charter must specify powers and duties that the governing body of a charter holder may delegate to an officer and how the school distributes information to parents about employee qualifications. Charter holders must file articles of incorporation or comparable documents with SBOE and must obtain the commissioner's approval to revise a charter.

The commissioner may modify, place on probation, revoke, deny renewal, temporarily withhold funding, suspend, or take other necessary action against a charter school that fails to protect the health, safety, or welfare of students. After revocation or non-renewal, a charter school may not continue to operate or receive state funds after the end of the school year. The charter school cannot resume operation until conditions pose no threat of material harm to students. The commissioner may audit records related to management and operation of a charter school and may authorize a special accreditation investigation. The Texas Education Agency may investigate a charter school to determine whether it requires students to possess artistic, athletic, or other abilities.

HB 6 prohibits the governing body of a charter school from delegating powers and duties except in the school's charter. At the commissioner's request, the attorney general may sue a governing body member for breach of fiduciary duty, including misapplication of public funds. SBOE must adopt rules for training governing body members and officers of charter schools in basic school law, health and safety issues, and accountability requirements. If a member does not comply, SBOE can revoke or probate a charter and can remove or terminate the person. A management company is liable for damages caused by its failure to comply with contractual or legal obligations, and SBOE can ask the attorney general to bring suit for damages against a company.

Property purchased or leased with state funds received by a charter school after September 1, 2001, is public property. If a charter school ceases to operate, the commissioner must supervise the disposition of such property under state law. This will not affect security interests or liens legally established by the charter holder's creditors.

The Texas Public Finance Authority must establish a nonprofit corporation to issue revenue bonds on behalf of charter schools for acquisition, construction, repair, or renovation of facilities. The comptroller must establish a fund dedicated to credit enhancement of the bonds, which will not be a state debt. Facilities financed through these bonds are exempt from taxation.

All charter school teachers must hold a high school diploma or equivalency certificate. A charter school must obtain criminal history information on employees or volunteers.

Supporters said HB 6 is needed to close loopholes, stop abuses by certain charter schools, and provide additional accountability. The much-publicized closing of some charter schools has generated demands for accountability for expended tax dollars. Some charter schools have commingled funds and have used funds for grossly unnecessary expenses. Charter schools that spend money legally and keep responsible financial records would have no reason to object to this bill's provisions. In fact, successful charter schools support HB 6 because it would help to eliminate irresponsible and abusive charter schools.

Charter schools should be subject to the same laws as other public schools. Decisions on spending public funds should be made in open meetings. Charter schools also should have to maintain student records, and not all have done so. Records are important to students for college admission and transfers to other schools. A lack of records has forced some charter school students to repeat a grade upon closure of certain schools.

While a charter school may need the assistance of a management company, the company should not run or effectively own the school. The law should hold unresponsive management companies accountable for their actions, and sanctions should exist for failure to provide adequate staff and services for students with disabilities. Emergency

suspensions would allow the commissioner to take immediate action to protect students in unsafe facilities and to protect them from weapons, violence, and drugs.

HB 6 would remedy the problem of some charter schools hiring high school dropouts as teachers. Giving schools and regional service centers access to potential employees' criminal history records, similar to background checks required in public schools, would protect students.

Opponents said HB 6 would not address the lack of state direction, oversight, and support that has led to charter school failures. The state has neglected to ensure that charters were granted to applicants with the experience and resources to succeed. Some arbitrary provisions in the bill would burden charter schools with administrative red tape that this program was intended to avoid. If charter school students are succeeding academically, such restrictions are unnecessary. When a charter school is found to be violating a rule, the state should help it adhere to that rule. If the school refuses to comply, it should be shut down.

Charter schools are underfunded. They do not receive facilities funding comparable to the funding that school districts receive, nor do they receive start-up funding for textbooks and supplies. This is why many charter schools seek loans from management companies. Charter schools cannot survive if held to equal rules without equal funding. Most do not have the infrastructure to deal with government competitive-bidding requirements. Charter schools should be free to operate under free-market principles. The bill wrongly would allow the state to claim property that was financed with assurances to the local community that it would belong to the community.

Prohibiting the use of fledgling management companies would discourage existing management companies from entering the charter school market. The state should not intervene if a charter school's contracts with a company are otherwise legal. Any limitations on management companies should be under local control.

Other opponents said the bill should impose a temporary moratorium on new charters to allow the state to study and correct problems with existing charter schools before it spends more public funds on them. HB 6 would not go far enough in imposing responsibility on charter schools.

The bill should require issues regarding the use of management companies to be addressed as part of the application process before a charter is granted. This would provide the state with adequate review and additional leverage to ensure compliance. The commissioner should have authority to prevent companies with poor track records from opening additional charter schools in Texas.

The **HRO analysis** appeared in the April 4 *Daily Floor Report*.

Teacher mentoring, certification, and service bonuses

HB 1143 by Grusendorf, et. al
Died in Senate

HB 1143, as passed by the House, would have required the education commissioner to make grants to school districts for each new teacher. A district would have had to use grant funds to support a new teacher mentor/induction program, provide significant professional development and training, give signing bonuses to new teachers in shortage areas, or pay appropriate college tuition for credits received by a new teacher.

The bill would have allowed the State Board for Educator Certification (SBEC) to issue a certificate to a person with a bachelor's degree in an academic major other than education that was related to at least one subject in the prescribed Texas curriculum, if that person passed the certification exam. Persons with a bachelor's degree related to only one curriculum area would have been limited to certification in that area. SBEC would have been able to issue teaching certificates to out-of-state teachers who had passed a certification exam similar to the Texas exam.

A teacher or principal identified by the commissioner as an experienced, extraordinary educator who agreed to serve at a low-performing campus for three years would have been entitled to a bonus, payable at the beginning of the first year of service. The commissioner would have had to adopt criteria for identifying such educators, including but not limited to: demonstrated ability to improve student performance, subject matter expertise, and, if applicable, performance by the educator's students on assessment tests and in college. An educator who did not serve the entire three-year period would have had to repay the bonus and would have been subject to mandatory SBEC-imposed sanctions. Repayment and sanctions could have been waived for good cause.

Supporters said providing districts with the means to support beginning teachers would keep new teachers in the classroom and help alleviate teacher shortages. Retaining new teachers saves time and money associated with recruiting and interviewing, reduces the need for long-term substitute teachers, and results in a more experienced and qualified teaching staff. The top complaint among teachers who leave the profession is lack of mentoring and support. The Legislature should be encouraging SBEC, SBOE, and school districts to develop best practices for teacher mentoring.

Alternative certification would fill empty classrooms with knowledgeable instructors, would allow retired individuals to pursue a second career in teaching, and give individuals in other fields a way to bring their expertise and knowledge to the classroom. Individuals only would be certified to teach in areas in which they had expertise. This would not cost the state and would be preferable to emergency certification, which provides no guarantee of the qualifications of a teacher certified in such a manner.

Alternative certification also would help alleviate teacher shortages in small towns and rural areas, where Texas teachers tend to move upon retirement.

Reciprocity with other states would ease a significant barrier to entry. Some districts have focused their recruitment efforts on attracting out-of-state teachers, but a teacher licensed in another state must take the Texas teacher certification exam in order to become certified in Texas. Teachers in military families also are affected by Texas' current lack of reciprocity. A teacher who is a military spouse moving to Texas must take the Texas teacher certification exam in order to obtain a Texas teaching certificate, which discourages some teachers from doing so.

Top educators have many employment choices, particularly during a teacher shortage. Low-performing campuses have a hard time recruiting teachers. Bonuses would help attract educators to low-performing schools, improving the quality of education offered at those campuses.

Opponents said allowing people without teacher training to gain “alternative certification” would be an insult to certified teachers. A person with expertise in one subject is not necessarily qualified to teach. Teaching is a profession, like medicine, law, or pharmacy, and should require appropriate training prior to obtaining a license. The bill would allow districts to give up on hiring qualified, certified teachers and allow them to reduce district salary costs, because an alternative certified teacher would be less expensive to hire than a certified teacher with adequate professional development. During Connecticut's teacher shortage, the state took the opposite approach, requiring higher standards, more exams, and participation in a mentoring program, in addition to mandatory training in teaching. The state also raised teacher salaries. Connecticut now has a teacher surplus.

The bill should not permit school districts to use grant money for signing bonuses, as there is no data demonstrating that signing bonuses are effective in recruiting or retaining teachers. Districts could use the money to attract teachers from other districts instead of providing professional development for new teachers. A bonus would not attract top teachers to low-performing campuses. This approach would amount to “combat pay,” which would belittle teachers who had chosen to teach at low-performing campuses for reasons other than financial gain. Also, the bill would not provide standards or guidelines for a mentoring program, nor would it require district to have mentoring programs.

The **HRO analysis** appeared in Part Two of the *May 5 Daily Floor Report*.

Public school accountability and mathematics initiatives

HB 1144 by Grusendorf, et al.
Effective September 1, 2001

HB 1144 revises the public school accountability system in a number of ways, including through the creation of:

- ! coordinated records of student performance from kindergarten through college;
- ! standardized end-of-course assessment instruments that allow for comparison with other states, including a specific assessment for algebra;
- ! academic excellence indicators that include dropout rates and district completion rates for grades 9 through 12;
- ! a requirement of an annual external audit of district dropout records; and
- ! voluntary gold performance ratings for high-performing campuses beginning no later than the 2006-07 school year.

A school district must ensure that a student enrolls in the courses necessary to complete the “recommended” or “advanced” curriculum, not the minimum curriculum, unless the student, parent, and a counselor agree that the student should take the minimum curriculum.

HB 1144 also creates a master mathematics teacher certification, a master math teacher grant program, and a math homework and grading service. A district may provide after-school and summer intensive mathematics instruction programs and may receive state funding for the programs under the commissioner’s guidelines. The commissioner may award grants to institutions with a demonstrated ability to conduct science-based research on effective instructional strategies for math; develop research on acquisition of math skills; monitor the effectiveness of math development institutes; examine the effect of math institutes on the classroom performance of teachers who attend them; and develop research on cognitive development concerning math skills development.

Supporters said development of end-of-course assessments would help to ensure that a diploma from a Texas high school was meaningful. Employers are looking for certain skills in high school graduates, and standardized end-of-course exams would bolster employers’ confidence in the value of a Texas high school diploma. The voluntary gold rating would be the Texas equivalent of the national blue-ribbon designation. A higher standard is necessary to give schools something to strive for.

Requiring students to enroll in the advanced curriculum would boost college participation and retention rates and help more students compete for grants and scholarships. The greatest predictor of college success is the rigor of the high school curriculum. Seventy-two percent of students who qualified for college admission under

the top-ten-percent admission program took the advanced curriculum in high school. Half of all high school students failed one or more sections of the TASP test, and those who took only the minimum curriculum needed more remediation classes in college. The bill would not increase drop-outs because it would preserve the option of the minimum curriculum for those who did not wish to continue with higher education after graduation. Further, the bill would put needed pressure on high schools to offer challenging classes instead of filling up students' schedules with busy work.

The new master mathematics teacher certification and grant program would be modeled after Gov. Bush's popular reading initiative, which created the master reading teacher certification and grant program in 1999 to help all students reach grade level with their reading skills by third grade. This program has increased the reading ability of Texas school children, particularly those attending "high-need" campuses, by encouraging teachers to become certified as master reading teachers and to work with other teachers and with students to improve student reading performance. Focusing on math instruction is the logical next step in encouraging Texas students to improve performance in the basic curriculum. Boosting students' math skills would prepare them for success in Texas' growing high-tech economy.

Opponents said the bill would not go far enough in coordinating records and should require coordination with early childhood data, such as student records from pre-kindergarten programs. Texas should not participate in multistate end-of-course exam development. Texas' end-of-course exams should be based strictly on the Texas Essential Knowledge and Skills curriculum, which other states do not use. Also, the bill would not contain enough guidelines to ensure that the voluntary gold performance program would not overshadow or otherwise weaken the existing campus rating process.

Raising the academic bar by requiring students to take the advanced curriculum would increase high school drop-out rates. Many students are not college-bound, and it would be unfair to subject them to rigorous academic requirements that discourage them from graduating. Requiring extra hours of advanced classes would take away options for electives that create a well-rounded high school experience. Further, many high schools are not prepared to offer the advanced curriculum to all students. The state first should ensure that there are enough qualified educators in the classroom to teach advanced math and science courses before imposing such a requirement.

Notes: SB 385 by Bivins, which also would have required that students enroll in the recommended or advanced curriculum to graduate from high school unless their parents waived the requirement, passed the Senate and was reported favorably, as substituted, by the House Public Education Committee, but died in the House Calendars Committee.

The **HRO analysis** of HB 1144 appeared in Part Two of the May 4 *Daily Floor Report*.

State-funded health insurance for public school employees

HB 3343 by Sadler, et al.
Effective September 1, 2001

HB 3343 creates a uniform group health-insurance plan for teachers and other public school employees, beginning with the 2002-03 school year.

District participation. Participation is mandatory for school districts with 500 or fewer employees and for regional service centers beginning in September 2002. Participation is voluntary for school districts with 501 to 1,000 employees beginning in September 2002. Charter schools whose employees are eligible to participate in the Teacher Retirement System (TRS) may opt in to the state plan, subject to open records and auditing requirements, beginning September 2002. School districts with more than 1,000 employees may opt in beginning with the 2005-06 school year, or earlier, if TRS, as the plan's trustee, determines it cost-effective. School districts that were pooling their resources for health insurance purposes as of January 1, 2001, must elect to be treated as an individual district or as a member of a risk pool by September 1, 2001.

Plan structure. TRS is the trustee of the self-insured plan, providing at least two tiers of health-care coverage, from a basic catastrophic plan to a comprehensive plan equal to state employees' health insurance. Full-time and part-time TRS participants employed by covered entities will be enrolled automatically in the catastrophic plan unless they waive coverage or select another plan. Employees will not be subject to pre-existing condition limitations during the initial eligibility period. Retirees will continue to be covered separately under TRS-Care, the health insurance plan for TRS retirees.

State and school district contributions. The state will contribute \$900 per year to a trust fund established with the comptroller for every eligible school-district employee, regional service center employee, and charter-school employee. Every eligible employee will receive a \$1,000 passthrough from the state that may be used for a medical savings account, dependent coverage, and/or a salary supplement. The state will pay the cost of health coverage for dependents of low-income employees who are disqualified from the Children's Health Insurance Program (CHIP).

All school districts will have to maintain their current effort or contribute at least \$150 per month (\$1,800 per year) per participating employee, whichever is greater. A "hold-harmless" clause will provide graduated assistance to districts that cannot meet their minimum contributions immediately. School districts that now contribute more than \$150 per month per employee will have to use the excess for employee compensation or benefits. School districts may not substitute the \$1,000 employee passthrough for future pay increases.

School finance. Money will be transferred from the Foundation School Program into the trust fund for health insurance for school employees. HB 3343 and a related bill, HB 2849 by Sadler, will maintain equity in the school finance system by:

- ! changing the equalized wealth level from \$295,000 to \$300,000 per student for the first year and to \$305,000 for the second year of fiscal 2002-03;
- ! increasing the guaranteed yield from \$24.99 to \$25.81 per penny of local tax effort the first year and to \$27.14 the second year; and
- ! providing hold-harmless funding for “gap” districts that do not receive state aid under the first two provisions.

Basically, 75 percent of all new money received by school districts under the above provisions must be targeted toward providing health-insurance coverage for employees. If 75 percent of the increases in equalized wealth and the guaranteed yield do not generate enough to cover a school district’s minimum contribution for employee health insurance, the district will receive additional state funding.

Supporters said that from adopting the conservative fiscal approach of a sum-certain contribution to targeting relief to rural districts who need the most help, HB 3343 reflects a responsive and responsible approach to the problem of insuring public-school employees. The bill would begin to address large disparities in the cost and the quality of school districts’ health coverage.

HB 3343 would provide an equal benefit to all school districts and all school employees while maintaining equity in the school finance system. The bill would give a \$1,000 passthrough to all public-school employees, regardless of whether their districts participated in the state plan. Allowing employees to choose whether to use this benefit for additional health-care coverage, salary supplementation, or a combination thereof would be the fairest, most flexible approach to helping school employees. The bill also would give \$900 a year per employee to every school district, whether or not they took part in the state health insurance plan or received other state assistance. As long as all districts received the same state benefit, whatever equity gap now exists among districts would remain unchanged.

This bill would create a substantial benefit for smaller school districts, regional service centers, and charter schools without breaking the state’s budget. Setting a sum-certain contribution would protect the plan’s fiscal integrity while making a good first step toward a long-term commitment to help public-school employees. The Legislature could revisit the amount of that contribution each session and could adjust the amount up or down, depending upon budgetary flexibility.

Because TRS-Care does not have a steady revenue stream, there would be no benefit to shifting retirees into a statewide plan with active employees. Retirees already are covered

by an adequate health-care plan that offers a variety of options, and retirees could be added to the statewide plan in a later session when the budget might be more flexible. Retirees would keep their own benefit program separate and safe until the state could find another way to finance it.

Opponents said all school districts should be allowed to retain local control over the cost and design of their health-benefit packages. Some districts that already provide attractive packages would like to preserve their competitive advantage in hiring and retaining teachers. Also, because a statewide plan would average the cost of health benefits across districts, there is no guarantee that every district would experience lower costs than they now incur. By mandating participation by certain districts while paying only part of the costs, the state would burden local property taxpayers with an unfunded mandate.

This bill would be costly to the state, districts, and employees. According to its fiscal note, HB 3343 would cost the state \$1.9 billion in fiscal 2002-03. Actuaries for TRS estimate a compound growth rate of 13 percent per year in health-plan expenses, which would result in a doubling of program costs in a little less than six years. Even with a sum-certain contribution, the state has no accurate way of gauging the level of future obligation to which it would commit itself.

The state should use its limited resources to take care of issues that clearly fall within the purview of state government. Two billion dollars could go a long way toward solving other pressing problems. Teachers are local employees, and it ultimately is the responsibility of local school districts to provide them with health insurance before it is the state's responsibility. The state should wait and see what decisions come out of the interim school-finance study before making such a large commitment of state dollars. Schools will need an additional \$3 billion in the coming biennium simply to keep up with inflation and the projected growth in student enrollment. In adopting HB 3343, the state would choose to invest \$1.9 billion toward improving school employees' health insurance rather than toward helping school districts meet their basic needs. The end result would be greater pressure on the property tax and on local taxpayers.

Pooling active public-school employees with retirees could help shore up TRS-Care's financial condition by creating a more actuarially sound risk pool. Retirees would not be too expensive to cover, because Medicare absorbs many of their costs. Better retiree benefits would help address the teacher shortage by creating continuous coverage for teachers before and after retirement, simplifying local districts' administrative issues, and eliminating a barrier to full-time employment for retirees who wish to return to the classroom.

The **HRO analysis** appeared in Part One of the April 30 *Daily Floor Report*.

Delaying the end of social promotion

HB 3631 by S. Turner, et al.
Died in Senate committee

HB 3631 would have delayed for one year the implementation of the Student Success Initiative (SSI), which ends “social promotion” of public school students. The prerequisite of passing the Texas Assessment of Academic Skills (TAAS) exam for advancement to the next grade level would have applied to:

- ! third graders, beginning in the 2003-2004, rather than 2002-2003, school year,
- ! fifth graders, beginning in the 2005-2006, rather than 2004-2005, school year, and
- ! eighth graders, beginning with the 2008-2009, rather than 2007-2008, school year.

Supporters said HB 3631 would give students a year to adjust to the new TAAS II exam, which will not have been field-tested for validity as a test instrument when it is first administered. The Texas Education Agency (TEA) will not rate campuses and school districts on the basis of the 2003 TAAS II because the test will be too new, and it would not be fair to use TAAS to hold students accountable but not districts and campuses. This would amount to punishing students for the state’s experiment.

Schools and students would not suffer if SSI implementation were delayed until 2004. In fact, students would benefit from use of a field-tested TAAS II instrument and from teacher familiarity with the test-question format. Starting SSI in 2003 would not allow teachers to prepare students adequately for TAAS II because they will not be familiar with the new test. Students who have mastered material concepts still might not perform well on a new test because of unfamiliarity with new question formatting. When testing is used as a measure of student performance, students must have had a meaningful opportunity to learn the content of the exam. It will take time for the tested material to be integrated into the curriculum.

TEA anticipates significantly higher failure rates on TAAS II and has asked that performance measures be lowered for the test. If student failure rates were high, schools would have to administer TAAS up to three times in each academic year. Presumably, subsequent administrations of the exam would include different exam questions, resulting in additional costs for developing test items. Current law requires school districts to provide students who fail TAAS with accelerated instruction in the failed subject(s), and accelerated instruction groups must have a student-to-teacher ratio no higher than 10 to 1. If a student failed TAAS for the second time during an administration later in the school year, this instruction would have to take place in summer school. Districts would face the cost of hiring additional summer school instructors and providing student transportation. If a student fails a third time, current law will require a grade-placement committee to meet to determine whether the child

should be promoted to the next grade. The grade-placement committee must include “the teacher of the subject of an assessment instrument on which the student failed to perform satisfactorily.” Convening the committee in the summer will cause districts to incur additional costs to include the student’s school-year teacher, as a summer meeting is outside of the teacher’s contractual duties. Also, students who are held back are more likely to drop out of school.

Opponents said SSI should not be delayed, because social promotion does a disservice to students. The sooner a student’s academic deficiencies are identified, the sooner that student will receive the instruction necessary to succeed. Students are not punished by being denied promotion until they are academically prepared for the next grade; they are punished by being passed to the next grade without the necessary skills. As long as schools continue to promote students on that basis, those with academic difficulties will not be identified and helped.

Raising TAAS standards will improve education in reading and math. Students already are well prepared for the TAAS II reading exam, as close to \$460 million in state and federal funds have been spent on reading initiatives, and reading is not now a teacher shortage area. Similar programs, training, and resources for math will be available through the governor’s math initiative by the time SSI would apply to fifth graders under current law (2005). Also, the new TAAS II will be based on the Texas Essential Knowledge and Skills curriculum now used in Texas schools.

The grade-placement committee will serve as a safeguard and, where appropriate, allow a student to advance to the next grade despite failing TAAS II. At the very least, parents will be aware when their children are struggling academically and in need of additional attention. The accountability system for school districts and campuses is not exclusively TAAS-based, but depends on many factors. TEA still will conduct accountability evaluation and reporting activities in 2003, including “school report cards,” despite not issuing accountability ratings.

The **HRO analysis** appeared in Part One of the *May 7 Daily Floor Report*.

Prohibiting mid-August or earlier school start dates

SB 108 by Lucio, et al.
Effective September 1, 2001

SB 108 prohibits a school district from beginning its school year before the week in which August 21 falls, beginning with the 2002-03 school year. A district may apply to the commissioner of education for a waiver if it publishes a notice and holds a public hearing. The application must summarize opinions expressed in the public hearing. A district operating under a year-round system for the 2000-01 school year may modify the start date.

Supporters said earlier start dates result in greater absenteeism. Students whose families are migrant workers may be working in different states in early August because of the economic necessity of helping their families. In rural areas, early start dates force some students to begin school late or leave their families short-handed during a crucial period of the agricultural year. Students who begin school behind their classmates are more likely to drop out.

Earlier start dates increase utility costs due to air-conditioning demands and increase air pollution during the height of the ozone season. Lack of a uniform start date interferes with extracurricular activities such as marching band, which require students to practice outside for long hours. A later start date would reduce the number of days on which students were exposed to extreme heat.

Earlier start dates decrease the income of students and teachers who work summer jobs. Students who are saving for college cannot make up lost earnings during short holidays. Earlier start dates also make it difficult for teachers to complete continuing education classes and for high school students to complete advanced course work at community colleges. Earlier start dates also hurt tourism, the largest industry in many areas of Texas. Many tourist attractions and amenities depend on teenage employees who work during peak summer vacation season.

Quality time for families is disappearing as the school year is extended, especially for divorced families in which children spend part of the summer with each parent. A short summer means that families must give up a significant portion of their time together. Frequent smaller breaks during the year are disruptive to the educational process and are hard on families who need to arrange for daytime child care during school breaks. If districts want to start the school year earlier, they at least should have to justify that decision in a public hearing.

Earlier start dates give some students an unfair advantage on the Texas Assessment of Academic Skills (TAAS) test. Districts are pressured to begin earlier if neighboring districts do, to ensure that students have the same amount of TAAS preparation. It is

possible to have a later start date and administer semester exams before the winter break. No research proves that students are more successful on pre-break exams, and students may perform better on post-break exams, as they have more time to study and are not distracted by an upcoming vacation.

Opponents said local school boards should decide their calendars according to the best interests of the children attending local schools. Many districts do not have a migrant student population, farming families, significant tourism, air-quality problems, or conflicts with summer college courses for teachers and advanced high school students. Decisions regarding the school start date should not be based on the concerns of the tourism industry, extracurricular schedules, or a few parents' desire to keep their children out on vacation past the start date.

Earlier start dates allow a school to complete its first semester exams before the winter break. A later school start date would force many districts to cancel fall break and to postpone exams until after winter break. When exams fall after a break, the first few weeks of classes after break must be devoted to reviewing material. These weeks could be spent better working on new material.

A later start date would force districts to continue classes into June, resulting in the same problems identified by those favoring the bill: migrant student absenteeism, harm to the tourist industry, increased cooling costs, decreased earnings for working students and teachers with second jobs, and so on.

School districts have adopted earlier start dates due to legislative action, state-mandated staff development days, and families' desire for more frequent or longer school breaks. To accommodate these additional days, most districts have opted to begin school earlier, rather than to end school later. Citizens provide input to school board members, who are elected and directly responsible to citizens, concerning school start dates. If citizens disagree with school board decisions, they can choose not to re-elect members.

The **HRO analysis** appeared in Part One of the May 15 *Daily Floor Report*.

Revisions to the Teacher Retirement System

SB 273 by Armbrister, et al.
Effective September 1, 2001

SB 273 requires the Teacher Retirement System (TRS) board of trustees to:

- ! review and certify financial companies offering investment products such as annuities or investments to teachers through a 403(b) program;
- ! increase the multiplier to 2.3 for computing retirement benefits; and
- ! preserve the confidentiality of individual records.

The TRS board must compile and maintain a list of companies eligible to sell annuities and investments to teachers and other school employees as part of a “salary reduction agreement.” Under such an agreement, the school district remits part of the teacher’s salary directly to the company to buy the annuities and investments. TRS must maintain information about the firms on its Internet web site. To pay administrative costs of the program, TRS may collect a fee of up to \$5,000 to certify or recertify an investment company. Companies selling annuities must meet certain investment standards for at least five years and cannot be subject to enforcement action by the Texas Department of Insurance during that period.

With regard to qualified investment products to be offered through a salary reduction agreement, SB 273 establishes a Class A misdemeanor penalty (up to one year in jail and/or a maximum fine of \$4,000) for:

- ! selling or offering for sale an ineligible investment product;
- ! violating a prohibition against selling insurance without a license or unlawfully acting as an agent (under other circumstances, punishable by a \$500 to \$1,000 fine);
or
- ! engaging in unfair and deceptive practices.

SB 273 increases the multiplier to calculate retirement benefits from 2.2 percent to 2.3 percent and increases the monthly benefit payment for beneficiaries by \$50 a month. Another provision adds a 6 percent inflation adjustment for members who retired before August 31, 2000. On top of this inflation adjustment, current retirees will receive an additional 4.5 increase, corresponding to the increase in the multiplier for future retirees. The act also exempts premiums or contributions on insurance policies or contracts from any state tax, regulatory fee, or surcharge.

A teacher or other school district employee with at least seven years of TRS membership may buy three years of additional service credit by paying the actuarial present value of the additional standard annuity benefits.

Supporters said SB 273 would increase retirement benefits to Texas teachers and other public school employees participating in TRS. Enhanced retirement benefits would help improve the state's traditionally low rank in the compensation it provides teachers. The bill also would offer a workable program for certifying the eligibility of 403(b) plans, which would provide additional benefits for teachers.

SB 273 would provide safeguards to minimize the risk of these annuities and investment plans. Companies would have to be certified before selling investment products to teachers through local school districts. TRS already has expertise in evaluating investment plans from having managed the billions of dollars in its own portfolio. The oversight would be supplemented by the Texas Department of Insurance and the State Securities Board. Only companies with proven track records over the past five years would be eligible to participate in the program.

The bill would give teachers and other school personnel a much-deserved increase in the retired service credit multiplier from 2.2 percent to 2.3 percent. The multiplier increase would come from within the system, with no increase in member or state contributions. Thus, teachers would receive greater monthly retirement payments within an actuarially sound retirement system.

Current retirees would receive an overall benefit increase of 10.77 percent. Increasing benefits for older retirees, many of whom worked for very low wages in the 1960s or 1970s, would maintain a rough parity among all retirees. A teacher who retired in 1971 would receive a benefit check only \$50 a month less than one who retired in 2001, despite the wide disparity in their original salaries.

Opponents said TRS should not be in the "blue sky" business of certifying investment products or overseeing insurance companies. This type of authority would dilute TRS' original purpose of managing the funds' assets to benefit retired teachers. The state should leave this kind of oversight to the Texas Department of Insurance or the State Securities Board.

SB 273 would increase the TRS actuarial accrued liability by \$4.6 million. Provisions that would allow members to buy up to 36 months of service also could lead to substantial losses over time. The increase in TRS assets has resulted as much from the bullish stock market over the past several years as from the fund's conservative investment policies. It would not be prudent to increase the fund's unfunded liability during a period of market uncertainty.

The **HRO analysis** appeared in Part Two of the May 18 *Daily Floor Report*.

Management of the Permanent School Fund

SB 512 by Duncan, et al.

Vetoed

SB 512 would have changed the management and investment of the Permanent School Fund (PSF) by the State Board of Education (SBOE). It would have required the SBOE to contract with the State Auditor’s Office (SAO) to investigate written allegations of wrongdoing in PSF investment or management. A new PSF advisory committee would have had to select an independent firm with appropriate experience to evaluate PSF investment management practices and performance as often as the Legislative Audit Committee (LAC) determined necessary or advisable. The comptroller would have had to cooperate with investigations involving consultants, brokers, or dealers doing business with or seeking to do business with the PSF.

SB 512 would have amended PSF ethics and conflict-of-interest policies to apply them explicitly to “interested persons,” anyone who applied for or received anything of value as a direct or indirect result of PSF investments. Reports would have had to be filed for expenditures of more than \$50 on behalf of an SBOE member, a committee member, the commissioner of education, an interested person, or an employee of the agency or of a nonprofit corporation created for PSF investment management. If an interested person entered into certain arrangements involving PSF management or investment and failed to disclose a relationship subject to the conflict-of-interest section, the comptroller or SBOE could have voided the arrangement and declared the person ineligible to contract for business relating to PSF management or investment. Each contract for services to SBOE would have had to require the contractor to comply with applicable statutes and rules and to acknowledge that SBOE could have terminated the contract for failure to comply.

The bill would have amended PSF reporting requirements to allow SBOE to determine the frequency of reports; required SBOE to exercise the constitutionally prescribed standard of care in making investment decisions; and required a commercial bank to execute an agreement fully indemnifying the PSF and ASF against loss due to borrower default or due to the failure of the bank to execute its responsibilities properly.

Supporters said SB 512 would implement recommendations from House General Investigating Committee and SAO investigations of PSF management and investments. These reports cited “evidence suggesting, at a minimum, [that] the appearance of a conflict of interest affects the SBOE’s decisions on consultant and money manager selection, asset allocation, and broker-dealer eligibility requirements,” and identified undisclosed financial relationships between informal advisors and PSF committee members that limited SBOE’s ability to safeguard decisions. The bill would prevent the future receipt of private rewards for public influence with regard to PSF management and would protect PSF investments by establishing an independent advisory committee

of experienced investment managers, setting clear ethical guidelines on conflicts of interest, and setting up investigatory and disciplinary mechanisms.

SBOE members do not have the necessary investment expertise to manage the PSF. Voters do not understand SBOE's role in PSF management and do not query candidates on their financial background. Lack of expertise makes it difficult for SBOE members to manage the PSF prudently in an increasingly complex and volatile market while avoiding conflicts of interest regarding advice from outside investment consultants. The bill would not restrict or dilute SBOE's basic investment authority but would provide investment expertise and oversight.

SBOE members and advisors have eroded public trust, and this bill would help restore that trust. The General Investigating Committee concluded that SBOE members shared confidential information with an informal adviser allowed to participate in interviewing bidders; improperly gave a person with no fiduciary relationship to the PSF apparent authority to speak and act on its behalf; made reckless decisions about the PSF based on unreliable and unsubstantiated information; and ignored ethical breaches by a key hired consultant and an unpaid adviser. While these problems may not have harmed the PSF value, that is not the issue. As trustees of public funds, SBOE members must avoid even the appearance of impropriety.

Opponents said the bill is a solution in search of a problem. No one has alleged wrongdoing by SBOE members. All allegations have concerned the board's informal advisors and their failure to disclose economic interests. No one has alleged that PSF investments were made improperly or that even one dollar was invested improperly. No one has shown that the current management model will not continue to work. PSF investments have performed at or above the market in many aspects and have grown at a respectable rate under SBOE management. Use of TEA staff and outside financial advisors provides SBOE with enough expertise to manage the fund. Personal financial knowledge is not a prerequisite to sound financial management. Many legislators have no financial or investment experience, yet they determine the state budget — a budget far larger than PSF assets. It is doubtful that anyone would argue in favor of reducing legislative budgetary authority in order to empower an advisory committee.

Notes: HJR 74 by Keel, et al., a proposed constitutional amendment that would have transferred management of the PSF from SBOE to a new PSF Investment Board appointed by the governor, lieutenant governor, and House speaker, was placed on the House Constitutional Amendments Calendar, then laid on the table subject to call.

The **HRO analysis** of SB 512 appeared in Part One of the May 22 *Daily Floor Report*. The analysis of HJR 74 appeared in Part One of the May 9 *Daily Floor Report*.

Prohibiting use of seclusion in public schools

SB 1196 by Truan
Effective September 1, 2001

SB 1196 forbids an employee, volunteer, or independent contractor of a school district from placing a student in seclusion and prohibits confinement of a student with a disability in a locked box, closet, or other space for discipline or behavior management. This prohibition does not apply to facilities subject to the federal Children’s Health Act of 2000, Texas Administrative Code (TAC) provisions for Department of Protective and Regulatory Services (DPRS) 24-hour care licensing, or TAC provisions for mental health community services standards, which contain detailed guidelines on use of restraint and seclusion. SB 1196 does not prevent the locked, unattended confinement of a student in an emergency situation while awaiting the arrival of law enforcement personnel, if the student possesses a weapon and confinement is necessary to prevent the student from causing bodily harm to the student or another person.

The education commissioner must adopt rules for the use of restraint and time-out for students receiving special education services consistent with professionally accepted standards. In case of a conflict with rules adopted under the TAC addressing special education, rules adopted under SB 1196 prevail. The commissioner also must identify discipline or behavior-management practices that require training before use.

Supporters said SB 1196 would allow appropriate use of time-out and restraint and would curb inappropriate uses. Current use of seclusion is abusive and often is applied in lieu of treatment or consultation with behavior-management specialists. Some districts lock students in tiny rooms without windows, in supply closets with no water or light, and even in plywood boxes. Secluded students may be handcuffed and not permitted to leave to use the bathroom. No professional standards recommend the use of seclusion, and no data support its use for behavior management.

The bill would define “emergency” so as to authorize the use of seclusion only in a very narrow class of cases. A broader definition would allow schools to circumvent the commissioner’s rules. Dealing with student behavior inappropriately creates emergencies, and teachers without the appropriate knowledge or training should not be allowed to use seclusion. An out-of-control student is likely to be physically aggressive if forced into seclusion, increasing chances that the student or another person could be injured.

Seclusion is inappropriate for disabled students, a disproportionate number of whom are secluded for behavior that has biological causes. Seclusion is particularly inappropriate for autistic children, who tend to be overstimulated easily, need help filtering input, and

may not understand why they are being secluded. Seclusion also is inappropriate for many other children, such as those who have been locked up by abusive parents.

Local control is not working in regard to the use of seclusion. The state has authority over use of seclusion in other situations and should have authority over its use in schools. School districts are not required to notify parents of their seclusion policies, use of seclusion, or the condition of seclusion facilities. Many parents, upon learning of the use of seclusion in their children's schools, have contacted the Texas Education Agency for help in filing a complaint, only to find that TEA cannot help them stop use of seclusion in their schools. A parent who locked his or her child in a closet repeatedly would be accused of child abuse or at least investigated by Child Protective Services.

Opponents said seclusion sometimes is necessary to deal with an out-of-control student who is physically large, violent, or intoxicated or under the influence of a controlled substance. Seclusion protects teachers and other students. SB 1196 would prevent schools from isolating a student who did not have a weapon and yet presented a danger to people on campus. The bill should provide rules for the use of seclusion instead of banning it. Schools often deal with the same behaviors as state mental health facilities and should be allowed to use the same range of non-medical alternatives.

Use of seclusion should remain subject to local control. Some districts have well-appointed, appropriate seclusion rooms and firm policies requiring constant monitoring. These districts should not have to stop using seclusion because of inappropriate use by other districts.

The **HRO analysis** of the House companion bill, HB 692 by Hochberg, appeared in Part Two of the *May 2 Floor Report*.

Redistricting

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HB 150/SB 499
SJR 35/HJR 95

Redistricting the House of Representatives and the Senate
Legislative redistricting in special session

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Redistricting the House of Representatives and the Senate

HB 150 by D. Jones, SB 499 by Wentworth
Died in the Senate

HB 150 and **SB 499** would have drawn new electoral districts for Texas' 150 House members and 31 senators, respectively. HB 150 would have “paired” — or placed two incumbent members in the same district — 18 current House members and would have created nine districts with no incumbents. SB 499, as reported from committee, would not have paired any incumbent senators.

The U.S. Constitution, Art. 1, sec. 2 requires an “actual enumeration” or census every 10 years to apportion each state’s representation in the U.S. House of Representatives. The release of the new census population figures also triggers redrawing of Texas’ legislative, State Board of Education (SBOE), and congressional districts. The Texas Constitution, Art. 3, sec. 28 requires the Legislature to redistrict legislative seats “at its first regular session following publication of a United States decennial census.”

On May 7, the House by 76-71 approved HB 150 on second reading, then passed the bill on third reading by nonrecord vote on May 8. The Senate Redistricting Committee reported HB 150 favorably, without amendment, on May 11. The Senate Redistricting Committee reported SB 499 favorably, as substituted, on May 9. Both bills died without being considered by the Senate.

Because the Legislature failed to adopt legislative redistricting plans, the Legislative Redistricting Board (LRB) was required to complete that task, as required by Texas Constitution, Art. 3, sec. 28. The LRB, comprising the lieutenant governor, House speaker, attorney general, comptroller, and land commissioner, had to meet within 90 days of adjournment of the regular session and adopt a redistricting plan within 60 days after it met. Upon adoption by the board and after being filed with the secretary of state, the plan becomes law and is to be used in the next general election.

Notes: The House Redistricting Committee took no action on HB 721 by D. Jones, which would have drawn new SBOE districts. On May 26, the panel reported favorably, as substituted, HB 722 by D. Jones, a congressional redistricting plan, but the deadline for considering House bills had passed in the House. The Senate Redistricting Committee failed to act on SB 500, a congressional redistricting bill, and on SB 501, an SBOE redistricting proposal, both by Wentworth. Congressional and SBOE redistricting do not fall under the state constitutional deadline or under the LRB’s jurisdiction. Drawing new congressional and SBOE districts can be done in a special legislative session or by a court considering challenges to existing districts.

The **HRO analysis** of HB 150 appeared in Part One of the *May 7 Daily Floor Report*.

Legislative redistricting in special session

SJR 35 by Wentworth, et al./HJR 95 by Deshotel
Died in House committee/Died in House Calendars Committee

SJR 35, as adopted by the Senate, would have proposed amending the Constitution to require the governor to call a special session of up to 45 days for the Legislature to redraw legislative and congressional districts after the publication of the U.S. decennial census. It would have required the Legislature to consider only redistricting in the special session unless the governor included other items in the call and would have prohibited consideration of redistricting during the regular session. Texas Constitution, Art. 3, sec. 28 now requires the Legislature to apportion the state into legislative districts during the first regular session after the publication of the census. If the Legislature fails to complete redistricting or if the legislative redistricting plan is vetoed or otherwise invalidated, the Legislative Redistricting Board (LRB), comprising the lieutenant governor, House speaker, attorney general, comptroller, and general land commissioner, must convene within 90 days and draft a redistricting plan. SJR 35 would have delayed triggering the LRB process until after the Legislature failed to adopt a redistricting plan in the special session. **HJR 95**, as substituted by the House Redistricting Committee, was the same as SJR 35 except that it would have convened the special session automatically on the first Tuesday at least seven days after adjournment of the regular session rather than requiring the governor to call the session.

Supporters said SJR 35 and HJR 95 would set aside a special session for redistricting, allowing the first regular session of a decade to be devoted to adopting the biennial budget and addressing other important state issues. The Legislature is scheduled to meet only five times a decade, and one session should not be lost to the distractions of a redistricting session. The redistricting process is too political to be delegated to a non-legislative redistricting commission, but delaying the matter to a special session would provide a way to insulate the partisan nature of redistricting from other legislative decisions. It would help prevent redistricting from tainting the decision of budgetary and other legislative issues, and those issues, in turn, would not intrude on redistricting. The current constitutional and legislative deadlines and the late release of census data constrict the time available for redistricting decisions. This change would allow adequate time to complete the task.

Opponents said redistricting historically has not prevented the Legislature from adopting a budget and passing other legislation. SJR 35 and HJR 95 would not change the political and personal nature of redistricting and could even exacerbate it by reserving a special session for redistricting to the exclusion of all others. Special sessions are expensive and keep legislators from their regular work and from their families. Deadlocks during regular sessions would not be resolved magically in a new 45-day special session because the membership would remain essentially unchanged.

Taxation and Revenue

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School property tax incentives for new industrial investments

HB 1200 by Brimer, et al.
Effective January 1, 2002

HB 1200 authorizes school districts to cap temporarily the taxable property values of eligible businesses in exchange for new investments. Districts and qualifying corporations or limited-liability companies may negotiate limitations on appraised values of new property used for manufacturing, research and development (R&D), or electricity generation from renewable energy sources. Districts limiting their appraised values through such agreements are held harmless for purposes of state education aid.

An eligible business must make qualified investments during the first two tax years after its application is approved. Qualified investments include property used to manufacture, process, or fabricate semiconductors in a clean-room environment; tangible personal property subject to depreciation and amortization under U.S. Internal Revenue Code, sec. 1245; and buildings housing the property. The minimum investment varies depending on the district's total taxable property value, except in rural and economically disadvantaged districts, where the minimum investment depends on industrial property values.

Qualified property must be located in a reinvestment or enterprise zone but may not be part of an existing school tax-abatement agreement. Districts may designate areas entirely within their boundaries as reinvestment zones. An applicant must plan to create at least 25 new jobs (at least 10 in rural districts and poor areas), at least 80 percent of which must be permanent full-time jobs paying at least 10 percent more than the county's average weekly manufacturing wage; be covered by a group health plan for which the applicant offers to pay at least 80 percent of the premiums; not transferred from another part of the state; and not created to replace previous employees.

Applications for appraised-value limitations must undergo third-party evaluations of economic impact. School boards must set application fees, including costs of the evaluations, and must decide on applications within 120 days of filing, unless both parties agree to extensions. Districts must submit copies of applications to the comptroller, who has 60 days to recommend approval. Both the comptroller and the districts must evaluate applications in writing on the basis of economic and fiscal criteria specified in the law.

For the first eight tax years after the qualifying period (the first two tax years after approval of the application), a participating company's appraised taxable value cannot exceed the lesser of the property's market value or the amount agreed to by the school district. Limitation agreements must specify the investments to be made; protect future district revenues; require companies to maintain viable presences at least three years after the agreements expire; recapture lost revenue for applicants' noncompliance, plus penalties and interest; and specify the tax years covered.

Approved applicants are entitled to credits for taxes paid during the qualifying period on portions of qualified properties' appraised values that exceed the limitation amounts in the agreements. Tax credits cannot exceed half of all school taxes imposed on the property in any one tax year. School districts granting appraised-value limitations may not adopt tax rates exceeding their rollback rates during the first two tax years after application approval. Property subject to a limitation agreement is ineligible for a school tax abatement in the same tax year. Also, cities and counties may assess and collect reasonable impact fees from new developments to pay for the costs of capital improvements or facility expansions necessitated by or attributable to property receiving appraised-value limitations.

HB 1200 extends the Property Redevelopment and Tax Abatement Act until September 1, 2007. Other provisions of the act expire December 31, 2007, but limitation agreements and tax credits approved before that date will continue in effect.

Supporters said Texas is falling behind other states in attracting major new industrial projects. Since 1997, at least 12 projects that would have invested more than \$4.5 billion and created about 5,200 new jobs in Texas went to other states. One of the main reasons is that Texas' property-tax burden penalizes capital-intensive businesses and industries, particularly manufacturing and R&D. Other states are taking advantage of this situation by offering tax incentives to counteract Texas' otherwise optimal business climate.

HB 1200 would give local school officials the tools they need to compete with other states and to attract high-impact business investments, regardless of a district's size or location. Districts could cap taxable property values over eight years for new projects that met stringent criteria. Districts still would collect tax revenue, and recipients of the tax benefits would pay their fair share, both up front and after the incentive expired.

This program would be completely optional, allowing local control and negotiation to fit districts' unique needs and goals. Rural districts could link qualified investments to taxable industrial property value, removing the skewing factors of district size and mineral values. The program also would include districts in strategic investment areas with above-average unemployment and below-average per-capita income. The bill would require outside economic impact studies and would allow districts to recover consulting costs through application fees.

School districts could offer much-needed tax incentives for which the state would hold them harmless at a reasonable cost. The comptroller's "dynamic" revenue estimate projects general revenue-related gains to the state totaling \$171 million through fiscal 2011. The projected revenue loss to school districts, beginning at more than \$100 million in fiscal 2006, is based on the assumption that businesses that would locate in Texas without the bill's incentives would generate that much school tax revenue. Current trends indicate, however, that these businesses likely would not come to Texas without property tax relief. On the other hand, HB 1200's wage and benefit requirements would assure creation of

thousands of well-paying new jobs, with associated growth in sales tax and other tax revenues to cities, counties, and the state.

Opponents said the best way for Texas to compete for new, better-paying jobs is by providing what companies need most in a new location: skilled workers, good transportation, and nearby markets. The state cannot provide these incentives without money to invest in better schools and roads. If companies coming to Texas can avoid their fair share of property taxes, other Texans will have to pay more for these critical needs. Tax burden is only one of many factors that executives weigh before deciding where to locate their companies.

HB 1200 would allow some school districts to waive almost all property taxes for certain new businesses for 10 years, exempting hundreds of millions of dollars worth of new property. The beneficiaries would include businesses that would have moved to Texas anyway. The state would have to reimburse districts up to \$1.7 billion through fiscal 2011, according to the comptroller's projections. Texas public schools cannot afford a revenue giveaway of that magnitude.

The bill's ripple effects are overstated, and the revenue cost per job created is too high. The full impact of tax breaks is unknowable, making such incentives a gamble with future tax revenue. The bill would not penalize school districts in state education aid, but neither would districts stand to gain any additional state revenue, because it would be reduced by the amount of property tax revenue collected from the new investment. HB 1200 would not address the real problem: high property taxes due to inadequate state aid to education.

Tax benefits should not be linked to school district size. This would allow businesses to move into smaller, high-growth counties and pay less in taxes than they would pay in larger counties that would require higher minimum investments. In turn, the districts would have less revenue to pay for program or facility expansions that an influx of workers might cause. Texans would be served better by linking tax breaks to investment in low-income, economically depressed areas.

The program proposed by HB 1200 could pit reluctant districts that need to maintain revenue against chambers of commerce and economic development groups that want to attract more business and industry. Also, school districts could offer incentives inconsistent with city and county programs, creating possible conflicts.

Other opponents said HB 1200 would restrict too narrowly the number of industries eligible to receive incentives. Texas' economy is diverse and increasingly service- and information-oriented. Businesses in those sectors should be eligible as well.

The **HRO analysis** appeared in Part One of the *May 2 Daily Floor Report*.

Raising motor-fuel tax rates and reallocating gasoline tax revenue

HB 3106/HJR 88 and 46 by Alexander/Averitt

Died in House committee

HB 3106 would have raised the state tax rates on gasoline, diesel fuel, and liquefied gas by 5 cents, to 25, 25, and 20 cents a gallon, respectively. The discount rates on gasoline and diesel fuel sold to transit companies also would have risen by 5 cents to 24 and 24.5 cents a gallon, respectively. The bill also would have reallocated two portions of gasoline tax revenue. The Constitution and Tax Code reserve one-fourth of all motor-fuel tax (MFT) revenue for public education. Under HB 3106, additional revenue generated by the increase in MFT rates that otherwise would have been deposited into the available school fund instead would have been earmarked for group health-insurance benefits for school employees. The bill also would have increased by \$17.7 million a year the amount of gasoline tax revenue deposited to the county and road district highway fund. Counties could have spent the money only on state highway and county bridge improvements or to buy materials from the state for road construction or maintenance.

HJR 88 would have proposed amending the Texas Constitution to dedicate one-fourth of the additional net revenue generated by MFT rate increases to the funding of group health-insurance benefits for active school-district employees. **HJR 46** would have proposed a similar amendment relating to increases only in the gasoline tax rate.

Supporters said MFTs, as the closest thing to user fees for motorists, are the fairest source of funding for roads and highways. A 5-cent tax increase, the first since 1991, would raise almost \$500 million a year in new revenue at an average cost of less than \$3 a month for most motorists. This would help reverse the downward trend of state-supported highway contracting and would provide a stable revenue stream. Because almost 75 percent of MFT revenue is dedicated to road building, a tax hike would help reduce the Texas Department of Transportation's (TxDOT) backlog of unfunded projects. HB 3106 would more than triple funds for county bridges and for deteriorating county roads. The bill also would provide more money to public schools in general, plus a subsidy for school-district employees' health insurance.

Opponents said MFTs are more regressive than the sales tax, penalizing low-income drivers and disproportionately taxing ordinary consumers who, unlike businesses, cannot pass the cost on to others. MFT revenue, which fluctuates with fuel price changes, vehicle fuel economy, and driving habits, bears little relation to highway construction costs. In view of current trends, both state and federal MFT revenues are likely to rise without this bill. Even \$500 million more a year would have little impact on TxDOT's massive backlog. Before raising MFT rates, the Legislature should explore other options such as bonding, design-build bidding, and transit alternatives.

Changing the method of taxing smokeless tobacco products

HB 3382/SB 1688 by Y. Davis/Ellis; HB 3650 by Thompson
Died in various committees

HB 3382, as substituted by the House Ways and Means Committee, would have taxed smokeless tobacco on its net weight rather than on the manufacturer’s list price (MLP). Tax rates would have ranged from 23 to 72 cents an ounce on each can or package, compared to the current rate of 35.2 percent of the MLP. The bill would have defined so-called “other” tobacco products, or OTP — moist and dry snuff and chewing, pipe, and roll-your-own tobacco. Records required to be filed with the comptroller by distributors, wholesalers, retailers, export warehouses, and bonded agents would have had to contain the manufacturer’s listed net weight per unit and the aggregate net weight by type of product shown on each invoice. The companion bill, **SB 1688**, proposed lower tax rates than did the committee substitute for HB 3382; otherwise, the two bills were almost identical. HB 3382 died in the House Calendars Committee, and SB 1688 died in the Senate Finance Committee.

HB 3650, which would have raised the tax rate to 40 percent, based it on distributors’ purchase prices, and made receipt or possession the taxing point, died in the Ways and Means Committee.

Supporters of HB 3382 said basing OTP tax rates on weight, as in the federal system, would simplify collection and auditing, end confusion over which sale to tax, and resolve legal disputes about overpayment to the state that otherwise could cost \$9 million or more a year. Most excise taxes are weight-based; price-based OTP rates have given discount brands a relative subsidy. HB 3650 would use sales-tax methods to pinpoint OTP taxpayers and identify the sellers.

Opponents said a weight-based rate would mean a huge tax increase on lower-priced brands. This proposal is part of a nationwide attempt by U.S. Smokeless Tobacco Co. to enlarge its already dominant market share. HB 3382 would raise value-brand prices, penalizing low-income customers, and would reduce the price of premium brands, possibly increasing their accessibility by young people. The weight of tobacco diminishes and is not measured uniformly. HB 3650 would not clarify what price to tax.

Notes: HB 3256 by Y. Davis and its companion bill, SB 1263 by Ellis, contained OTP tax provisions almost identical to those of SB 1688, along with other tax changes ultimately enacted in other legislation. HB 3256 died in the Ways and Means Committee, and SB 1263 died in the Finance Committee.

Exempting personal-use leased vehicles from ad valorem taxation

SB 248 by Carona
Effective January 1, 2002

SB 248 entitles vehicle owners to property-tax exemptions on leased vehicles not held or used primarily to produce income. Vehicles are eligible if at least 50 percent of their annual mileage is for non-income-producing purposes. The comptroller must develop exemption application requirements and procedures to qualify vehicles and must adopt and issue forms for leasing companies to obtain pertinent customer information. Lessors must maintain forms to seek exemptions and must make the forms available to chief appraisers. The comptroller also must develop a lessors' property report form for submission to chief appraisers, detailing information on each leased vehicle the lessor owned on January 1 of the tax year.

The exemption applies only to vehicles leased on or after January 2, 2001. The governing body of a city may adopt an ordinance before January 1, 2002, allowing the city to tax leased vehicles that otherwise would be exempt. Unless continued by the Legislature, this exemption will expire December 31, 2003.

Supporters said Texas is one of the few states that allows property taxes to be imposed on vehicles leased primarily for personal use. SB 248 would implement the property-tax exemption for personal-use leased vehicles that voters authorized by amending the Texas Constitution in 1999 (SJR 21 by Carona).

Auto leasing has become an attractive option for many working people and families. The property tax never was intended to be levied on people who lease vehicles for non-business purposes. Consumers deserve a tax break from what has become an anachronism in today's market. The leased-vehicle tax is based on ownership by either the financing entity or the leasing company earning income from the vehicle. These entities pass the tax on to their customers, which is unfair to people who do not use the vehicles primarily for business purposes. This actually represents double taxation for the consumer, who also pays sales tax on the lease. As a result, Texas has one of the nation's lowest leased-vehicle rates. According to the Legislative Budget Board (LBB), the auto leasing industry estimates that more than 60 percent of vehicles leased in Texas are for personal use, or about 250,000 vehicles.

People who lease vehicles for business purposes receive a federal income-tax deduction that personal-use lessees do not receive. It is unfair to penalize consumers because of how they finance a basic need. This policy hurts people who need transportation and want to lease but cannot afford the taxes. It would be fair to allow primarily personal-use vehicles to be used for some income-producing activities, since business lessees often use their vehicles for personal purposes.

SB 248 would end inconsistencies in tax administration across appraisal districts. Different counties calculate the tax differently — some on the basis of the vehicle's original price, others on its depreciated value. Some leasing firms include taxes in lease payments; some do not collect the tax, so it is not included. Consequently, a lessee's tax liability may accumulate over multiple tax years, unbeknownst to many customers until they receive hefty tax bills.

In fiscal 1999, according to the comptroller, the 6.25 percent motor-vehicle sales tax generated more than \$2.2 billion. If SB 248 were enacted, increased leasing activity would lead to about \$15.5 million in increased sales tax revenue for fiscal 2002-03. Long-term gains would more than offset the relatively small amount of local government revenue lost to the exemption. The bill also would allow cities the option of imposing property taxes on personal-use leased vehicles. This local-option override would be consistent with other personal property-tax exemptions. The bill's sunset provision would allow the 78th Legislature to examine whether the exemption should be continued after 2003.

Opponents said SB 248 would create a special class of personal property exempt from taxes for the benefit of the auto leasing industry. Such decisions are better left to local taxing entities. Until 2000, for example, the city of Dallas taxed all vehicles as personal property. Consumers already can avoid these taxes by means of retail installment contracts developed for the Texas market. These agreements are more convenient for appraisal districts, relieve taxes, and reduce fraud. Most Texans prefer to own their cars, so this exemption alone would not increase leasing significantly. However, if fairness is the problem, state and local officials should take steps to raise public awareness of how the tax works.

Under the school finance system, the state would have to reimburse school districts for revenue lost to the new exemption, beginning with \$20.5 million in fiscal 2004, then almost \$17 million in fiscal 2005, even if the exemption expired. Cities and counties, however, would not be reimbursed for their losses, totaling almost \$31 million in fiscal 2003 and 2004, according to LBB.

The bill would not curb fraud because it would provide no means other than customers' declarations to verify personal use and no enforcement mechanism other than reports to the comptroller. Lessees at least should have to demonstrate to appraisers that they did not claim full business deductions for the vehicles on their federal income-tax returns. Under SB 248, they might be able to "double-dip" by deducting up to 49 percent of a vehicle's use for business purposes in addition to receiving a property-tax exemption.

The **HRO analysis** appeared in Part Two of the May 21 *Daily Floor Report*.

Sliding-scale adjustment of severance tax rates

SB 344 by Bivins

Died in the House Calendars Committee

SB 344 would have applied a sliding scale to the state's severance (production) tax rates for crude oil and natural gas. Instead of the current flat rates, severance tax rates would have been graduated within price ranges and triggered by changes in three-month average prices. As passed by the Senate, the bill would have left the oil tax rate at 4.6 percent of market value as long as the price remained above \$20 per barrel (bbl). The rate would have dropped to 2.3 percent when prices fell to \$20 or lower but not less than \$12, and to 1 percent when prices fell below \$12/bbl. The gas tax rate would have remained at 7.5 percent of market value as long as the price remained above \$3 per million British thermal units (MMBtu). The rate would have dropped to 5 percent when prices fell to \$3 or lower but not less than \$1.25, and to 2 percent if prices fell below \$1.25/MMBtu. Oil produced from new or expanded enhanced-recovery projects would have been taxed at half the applicable rate. The comptroller would have had to certify three-month average prices based on monthly closing costs on the New York Mercantile Exchange. The new rate schedule would have taken effect September 1, 2004, along with provisions for credits for overpayments of taxes during fiscal 2002 and 2003. Rates would have reverted to the existing flat rates in fiscal 2006 without legislative action to continue them.

Supporters said the oil and gas industry is taxed disproportionately. Texas' severance taxes inhibit both oil production, which is increasingly difficult and expensive, and gas production, which is subject to one of the nation's highest tax rates. Incorporating severance-tax relief into the tax structure would assure operators of state aid when needed and would allow them and the state to plan for hard times. Variable rates would bring severance taxes more into line with producers' ability to pay and would provide a cushion to enable many small operators to stay in business.

Opponents said the oil and gas industry is enjoying higher prices, record profits, and, in the case of natural gas, strong demand projections. The industry already benefits from many exemptions and incentives. Operators already are taxed based on their ability to pay because oil and gas are taxed by price, not volume. Consequently, severance taxes are self-adjusting as prices fluctuate. The 1999 moratorium showed that severance-tax relief benefits large companies that need it the least. Permanent relief would deprive the state of precious revenue with little return.

Notes: The House Ways and Means Committee amended the Senate engrossed version by changing the trigger price ranges for oil to more than \$17/bbl, \$17/bbl or less but not less than \$15/bbl, and less than \$15; and for gas to more than \$2.50/MMBtu, \$2.50/MMBtu or less but not less than \$1.80/MMBtu, and less than \$1.80.

Treatment of business loss carryforward for franchise tax purposes

SB 1689 by Ellis

Effective September 1, 2001

SB 1689 provides that, for purposes of determining a corporation's net taxable earned surplus subject to the franchise tax, a business loss may be carried forward only by the corporation that incurred the loss. A loss may not be transferred to or claimed by any other entity, including the survivor of a merger, if the loss was incurred by the merged corporation. The act also specifies that insurance organizations, title insurance firms, and certain other insurance entities authorized to do business in Texas and required to pay an annual premium tax or maintenance tax or fee under the Insurance Code are exempt from the franchise tax.

Supporters said SB 1689 would codify the comptroller's policy of not allowing corporations to carry forward business losses in the event of a merger. Currently, a corporation that incurs a business loss can transfer that loss to offset future franchise tax liability for up to five years. Since the enactment of that statutory provision in 1991, the comptroller has prohibited a corporation from claiming a business loss incurred by another corporation, even in the case of a merger. The comptroller now is involved in litigation as a result of corporations' challenging this policy. SB 1689 would clarify and create consistency in how the comptroller applies the tax law. Without this bill, large corporations with significant franchise-tax liability would have a big tax loophole.

Opponents said SB 1689 is a retroactive bill intended to strengthen the comptroller's legal position in three active lawsuits. The concept of transferring net operating losses in merger transactions is not new or unusual. The federal government and 38 other states allow such transfers.

Transferability of net operating losses has economic benefits. A Texas company with accumulated losses that might be on the verge of insolvency would be more appealing to a potential purchaser if the net operating losses transferred to the survivors. If the losses could not transfer, the company would be less attractive as an acquisition. This scenario would increase the likelihood of a bankruptcy filing and the potential for job losses and make it more probable that Texas creditors would go unpaid.

The **HRO analysis** appeared in Part One of the May 18 *Daily Floor Report*.

Exempting goods in transit from property taxes

SJR 6 by Duncan, et al.

Effective January 1, 2002, pending voter approval

SJR 6 proposes amending the Texas Constitution to authorize the Legislature to exempt from ad valorem taxation property that is stored in the state temporarily. Exempt property would include goods, wares, merchandise, and other tangible personal property (including aircraft and aircraft parts used for repairs by certificated air carriers), and ores other than oil, natural gas, and other petroleum products. The property would have to be acquired in or imported into Texas and stored at a location not owned or controlled by the property owner for not more than 270 days after acquisition or importation. Unlike so-called “freeport goods” that are exempt if exported within 175 days (Texas Constitution, Art. 8, sec. 1-j), these “goods in transit” would not have to be shipped out of state to qualify for the new exemption.

Governing bodies of taxing jurisdictions could choose to tax goods in transit if another law did not exempt the property. A governing body would have to hold a public hearing before acting to do so. Owners of property eligible for the freeport exemption could apply for the new exemption if the Legislature enacted it, subject to the decisions of their local taxing entities. A property owner receiving the goods-in-transit exemption could not claim the freeport exemption for the same property.

Supporters said the existing freeport amendment, which applies only to interstate freight, discriminates against Texas goods bound for Texas destinations. As of 1999, only 219 taxing entities offered the exemption, according to the comptroller. This patchwork tax policy has led to a lack of uniformity in tax appraisal and administration, exacerbated by different tax treatments for various agricultural products.

Although some taxing entities have used the freeport exemption to attract out-of-state business, it actually has served to penalize the Texas warehouse industry. Some developers have persuaded non-urban areas having cheaper operating costs to attract warehouses by offering the exemption. This has forced existing warehouses in developed areas to lower their prices. Surrounding states offer much more favorable inventory tax treatment (e.g., Oklahoma fully exempts all freeport goods with no local taxing option; New Mexico exempts inventories with few exceptions). Recognizing their competitive advantage, they began enacting laws and promoting policies to help their warehouse operators attract new business. Many manufacturers began storing their products outside Texas, costing the state an estimated 27,000 jobs.

SJR 6 would be an important first step in helping Texas regain its share of lucrative warehousing and distribution markets. Voter approval would allow the Legislature to act to stem the loss of customers and jobs to other states.

The predicted losses in state revenue due to increased state reimbursement to school districts due to reduced local revenue from the exemption are exaggerated. Such losses should not exceed \$11 million. In fact, many districts may opt not to grant the exemption. Also, the fiscal note's projections do not take into account the greater sales tax revenue that would accrue from increased warehousing activity.

This amendment should be put to the voters now to signal an important change in state tax policy. If voters approve, the enabling legislation can be considered when the revenue picture improves.

Opponents said any measure that would erode local tax bases further, especially in a tight budget period, would be imprudent. Since 1994, state and local tax revenues have declined as a percentage of personal income. Creating a new exemption would result in substantial costs to the state as well as to local governments. The state should impose a moratorium on new exemptions until the efficiency of existing exemptions is determined.

The looming crisis in school finance makes SJR 6 all the more ill-advised. Many school districts have reached the statutory rate cap of \$1.50 per \$100 of assessed valuation for maintenance and operations taxes, and many more districts are approaching the cap. The Legislative Budget Board (LBB) estimates that if all taxing entities granted the goods-in-transit exemption, the required state reimbursements to school districts for revenue losses in fiscal 2003 would total \$36 million in fiscal 2004. These reimbursements would compensate districts for declines in taxable property values, depending on wording of the enabling legislation. Losses to cities and counties in fiscal 2003 would be \$7.8 million and \$11.2 million, respectively, according to LBB. Losses would continue to escalate through 2006 and beyond.

Texas already has an attractive business climate. This amendment would show favoritism to a single, relatively small industry and would produce little economic "ripple effect." The impact of across-the-border migration of storage facilities is overstated. Realistically, they can serve only markets in Dallas-Fort Worth, El Paso and perhaps Houston efficiently. The state should not be lured into a tax-break war with other states to address regional problems for dubious returns.

SJR 6 would mislead voters. Because no enabling legislation was enacted, the proposed exemption could not take effect for at least two years, even if voters approved it. It would be better to adopt both the amendment and the enabling legislation simultaneously.

Notes: SJR 6's enabling legislation, SB 174 by Duncan, died in the House Calendars Committee.

The **HRO analysis** appeared in Part Two of the May 22 *Daily Floor Report*.

Transportation and Motor Vehicles

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Prohibiting open containers of alcohol in vehicles

HB 5 by Dunnam, et al.
Effective September 1, 2001

HB 5 makes it a Class C misdemeanor, punishable by a fine of up to \$500, for an occupant of a motor vehicle knowingly to possess an open container of alcohol in the passenger area while the vehicle is located on a public highway or right-of-way, regardless of whether the vehicle is being operated or is stopped or parked. "Passenger area" excludes the vehicle's glove compartment and trunk or, if the vehicle does not have a trunk, the area behind the last upright seat. A defendant has an affirmative defense if, at the time of the offense, the defendant was a passenger in the living quarters of a motorized house coach or trailer or in a bus, taxicab, limousine, or other vehicle used primarily to transport people for compensation. The act eliminates the requirement that a person who commits the offense of drinking while driving must be observed in the act by a law enforcement officer.

HB 5 also increases penalties for certain offenses related to operating a vehicle while intoxicated. People who commit certain repeat alcohol-related offenses within a five-year period must have their driver's licenses suspended for at least one year. If a person is convicted of a second or subsequent offense for driving while intoxicated (DWI) within five years of another offense, the court must order the installation of a device on each of the defendant's motor vehicles that uses a deep-lung breath analysis mechanism to make impractical the operation of the motor vehicle if ethyl alcohol is detected in the operator's breath. The device must remain on the defendant's vehicle(s) for one year after the end of the defendant's license suspension.

Supporters said HB 5 would help save lives on Texas roadways by getting tougher with drunk drivers. These measures are necessary because in 1999, Texas led all other states in the number of alcohol-related traffic fatalities with 1,734. Alcohol-related fatalities account for nearly half of all roadway fatalities in the state. Also, HB 5 would prevent Texas from losing federal funds for highway construction that are diverted to safety and education programs if states fail to enact open container laws meeting federal standards.

HB 5 would allow Texas to join about 30 other states and the District of Columbia in banning open containers of alcohol in vehicles. Making it illegal to possess an open container of alcohol in the passenger area of a vehicle on a public highway would help ensure that Texans do not drink and drive. A drinker who has to hide an open container is more aware of the consequences of being caught drunk behind the wheel. Texans would soon become accustomed to the open-container ban as they have become used to the law mandating the use of seat belts.

Current law recognizes an offense only if a law enforcement officer witnesses a driver in the act of drinking. This is difficult to enforce and leaves the false impression that alcohol and driving are acceptable if not observed.

Opponents said Texas already has strict laws that prohibit people from driving while intoxicated and severely punish those who do. Those who do not break these laws — especially the passengers — should not have their freedom restricted. Restricting all open containers would be an unwarranted intrusion of the government into individual behavior, allowing law enforcement officers to ticket or arrest a passenger in a vehicle merely for possessing an open beer can, when the focus should be on whether the driver was impaired. The ban also could be used as a pretext to pull over drivers without reason, which could result in racial profiling abuses.

Texas will not lose federal funding if HB 5 is not enacted. The funds simply would be redirected to highway safety-related programs. These programs are crucial because they help prevent alcohol-related accidents before they happen, rather than after the fact.

Creating harsher penalties for alcohol-related accidents has not reduced deaths. Most drunk drivers already are drunk by the time they get behind the wheel of a car.

HB 5 would create a new class of criminals: passengers and designated drivers. It would discourage the use of designated drivers, since a driver could be punished if a passenger had an open container.

Other opponents said that HB 5 includes only the minimum provisions required to prevent the shift of federal highway construction funds to safety and education programs, emphasizing the fiscal motivation for the bill rather than saving lives. Applying the offense only to persons who possessed an open container “knowingly” would allow a driver to pass a container to a friend in the back seat or stash it under the seat and claim ignorance of its presence, making the offense far more difficult to prove. No other intoxication offense requires a certain mental state to prove the offense. Also, the five-year period for enhancement of penalties for repeat alcohol-related offenses is too short. For most other offenses, the period for enhancing the penalties for repeat offenses is ten years.

The **HRO analysis** appeared in the March 20 *Daily Floor Report*.

Extending license suspension for drunk drivers refusing breath test

HB 63 by Wolens, et al.

Effective September 1, 2001

HB 63 requires a peace officer, before requesting a blood or breath specimen from a suspected drunk driver, to inform the driver orally and in writing that refusal to submit a specimen will result in a 180-day license suspension unless the driver had a prior alcohol- or drug-related offense, in which case suspension will last two years. The bill applies to the driver of a motor vehicle or a watercraft powered by an engine with at least 50 horsepower. Regardless of whether the person refuses to submit a blood or breath specimen, the officer must seize the person's Texas driver's license and issue a temporary driving permit. The temporary license will expire on the 41st day after issuance. If the person were driving a commercial vehicle, the temporary license would not become effective until 24 hours after the time of arrest.

HB 63 extends the period of suspension for failing a blood or breath test from 60 to 90 days if the person had a clear record and from 120 or 180 days to one year if the person had any alcohol- or drug-related contacts with law enforcement in the prior 10 years. For refusal to submit a blood or breath specimen, the suspension period is extended from 90 to 180 days if the person had a clear record, and from 180 days to two years if the person had one or more alcohol- or drug-related law enforcement contacts within the previous 10 years. If a peace officer takes a person's license, DPS must notify the person that a request for a hearing stays the license suspension until an administrative law judge renders a decision. DPS must provide the notice in a manner that will establish to a peace officer that the license is not suspended. If a judge does not find that the person was driving while intoxicated, DPS must return the person's license. Otherwise, the suspension remains in effect. A suspended license cannot be reinstated until the person pays a \$125 fee, an increase of \$25 over the fee required under current law.

Supporters said HB 63 would help Texas crack down on drunk driving. Texas ranks number one in the country for alcohol-related traffic deaths and has the highest percentage of drivers stopped for driving while intoxicated (DWI) who refuse to take a breath or blood test, making conviction difficult. Doubling the penalty for refusing a breath test would encourage more drivers to submit to one. In California, refusal to take the test brings a one-year suspension of a driver's license. As a result, only 5 percent of Californians refused the test in 1999. That year, California had 468 fewer alcohol-related traffic fatalities than Texas, even though it has 13 million more residents than Texas. The bill would not violate due-process rights. Drivers would receive temporary licenses immediately upon seizure of their driver's licenses, and if they requested a hearing, the suspension would be stayed until an administrative law judge made a final decision in the case. Similar laws already are in effect in 39 other states.

HB 63 would help remove dangerous drivers from the road by implementing a swift and sure license suspension. Losing a license immediately for drunk driving would let drivers know that the state means business. Even if some drivers continued to drive with suspended licenses, they would tend to drive less and would drive more carefully, for fear of being caught. This bill would serve as a strong deterrent to drunk driving because drivers would be aware that they would face immediate consequences. The potential embarrassment of having to show a paper administrative license as identification at the grocery store, bank, or airport would make many drivers think twice about getting behind the wheel drunk.

HB 63 would not be too expensive. The fiscal note does not take into account the fees DPS receives for reinstatement of suspended driver's licenses, which generate more than \$6 million annually.

Opponents said HB 63 would take away the due-process rights of drivers arrested for DWI. Before a license can be taken away, drivers must have access to a hearing. It is not adequate to provide a temporary paper license and instructions on how to persuade a police officer that a license is not really suspended while awaiting a hearing. The license should be seized only after proper adjudication. In addition, taking the license away at the time of arrest would create problems for drivers when they needed to show photo identification to write checks, make bank withdrawals, and fly on commercial airliners. Drivers should not be punished for failure to offer evidence that could incriminate them. The U.S. Constitution's Fifth Amendment guarantees that no person shall be compelled to be a witness against himself or herself. It is wrong to provide a greater punishment for failure to submit evidence against oneself than for conviction of the crime for which one failed to give evidence.

HB 63 would suspend driver's licenses for too long, especially in the case of people who refused to submit to a breath test. Improperly calibrated machines can give false readings for people who have just used mouthwash, taken cough syrup, or consumed an amount of alcohol that would put them below the .08 limit. People who protect themselves by not taking this test should not be forced to lose their driver's licenses for six months or more. Also, this bill would be too expensive. According to the fiscal note, DPS would have to hire new employees to administer it and contract for about 2,100 hours of programming to change current systems and create a new database, at a cost to taxpayers of \$3.4 million over the next five years.

The **HRO analysis** appeared in Part One of the *May 7 Daily Floor Report*.

Raising the daytime speed limit to 75 mph on rural highways

HB 299 by Gallego
Effective June 17, 2001

HB 299 allows the Texas Transportation Commission (TTC) to raise the daytime speed limit from 70 to 75 miles per hour on portions of highways in counties with population densities below 10 people per square mile. Based on 2000 census data, that would encompass 86 counties, mostly in South Texas, the Panhandle, and other parts of West Texas. The TTC must determine that the higher limit is safe and reasonable before allowing it. Only passenger vehicles and light trucks (including light trucks pulling trailers) could drive 75 miles per hour, not other trucks, truck tractors, trailers, or semi-trailers. Higher limits also will not apply to vehicles whose speeds are restricted specifically by law, such as school buses and large commercial trucks.

Supporters said motorists who routinely drive several hours per day on long stretches of highway that have little traffic are concerned with saving travel time. Motorists who live and work in rural Texas often are hampered by the state's geography. HB 299 would enable these motorists to shorten considerably the time they spend traveling long distances between cities and towns, thereby reducing driver fatigue, which often contributes to accidents. The TTC should be able to raise speed limits on farm- and ranch-to-market roads for passenger vehicles and light trucks, because those roads often provide key routes for rural residents as well as for travelers.

This bill would not raise the highway speed limit statewide, nor in all rural areas. Speed limits could be raised only in sparsely populated counties and only after completion of "speed studies" by TxDOT. Safety would not be compromised because the TTC would have to consider that criterion before raising a speed limit. This would allow any unique driving conditions peculiar to a specific area or region to be factored into the decision-making process.

Several other western states, including Oklahoma, Arizona, and New Mexico, have adopted the 75-mile-per-hour rural highway speed limit. Their population densities are similar to those in western Texas. Residents in those states strongly support the higher speed limit, and no increase in traffic accidents, injuries, or fatalities has been reported.

Opponents said if HB 299 were approved, Texas will have raised the highway speed limit by 20 miles per hour in only five years. Another increase could lead to more accidents, injuries, and fatalities on Texas highways. In 1996, traffic deaths rose after Texas increased the speed limit to 70 miles per hour. According to the National Highway Traffic Safety Administration (NHTSA), 86 percent of speeding-related fatalities nationwide in 1999 occurred on roads other than interstate highways. Speeding was a factor in 30 percent of all 1999 traffic fatalities, NHTSA reported, and speeding-related

wrecks cost an estimated \$28 billion. Saving some drive time is not worth risking the loss of more lives.

Because the higher speed limits would be based on population, in some areas the bill potentially would blend 70-mile-per-hour counties with 75-mile-per-hour counties. This could cause confusion and frustration for drivers as they passed through varying speed-limit zones from one county to the next. It also could lead to inconsistent enforcement.

Allowing speeds of 75 miles per hour on rural highways could encourage unsafe driving on highways unaffected by the increase. State law allows motorists cited for speeding up to 24 miles per hour above the posted speed limit to clear their records by completing defensive driving courses. Raising speed limits to 75 miles per hour would mean that speeders who were driving up to 99 miles per hour could have their tickets dismissed. This would send the wrong message to motorists, especially young ones.

Given that automobile fuel efficiency decreases at higher speeds, raising the speed limit also could lead to greater fuel consumption at a time when the state should be encouraging motorists to conserve energy.

The **HRO analysis** appeared in Part One of the May 8 *Daily Floor Report*.

Authorizing cities to implement photographic traffic systems

HB 1115 by Driver, et al.
Died in the House

HB 1115 would have allowed a city to implement a traffic-control monitoring system to photograph the license plate of a vehicle that ran a steady red light. Drivers committing red-light offenses recorded by photographic traffic systems would have been subject to civil penalties.

Supporters said HB 1115 would discourage drivers from running red lights. Cities need tools to stop motorists who ignore their responsibilities and endanger others. Disregarding red lights is the leading cause of urban crashes and fatalities. Each year in Texas, more than 17,000 traffic accidents occur in which a person runs a red light. In many cases, police officers cannot chase a driver who has run a red light without also running the light themselves. As a result, red-light violations are difficult to enforce, especially in the most dangerous intersections. In the more than 40 cities around the nation where photographic traffic systems are in use, red-light violations have declined as much as 60 percent.

Citations would be civil penalties like parking tickets. A penalty would not constitute a violation and would not affect a person's insurance premiums or driving record. Being arrested for an offense committed on a public street is not an invasion of privacy. The purpose of these cameras would be to ensure public safety, not intrude on people's private lives or raise revenue for cities.

Opponents said police should not be in the business of arbitrarily monitoring private lives. If cameras are used today to catch people who run red lights, they could be used tomorrow for general surveillance to catch even the pettiest crimes. Most people who run steady red lights do not do so intentionally. Many violations occur because the lights are timed poorly or inconsistently. Furthermore, a motorist caught on camera running a red light would receive a civil penalty, while a motorist caught by an officer for the same offense would be subject to a misdemeanor offense. Since cities likely would place cameras at the most dangerous intersections, drivers who committed the offense where it could cause the most harm would receive lesser penalties than those who committed the offense elsewhere. Also, implementation of these systems could be motivated more by financial concerns than by public safety.

Notes: Amendments adopted on the House floor would have required cities to conduct studies to determine the location of the systems; reduced civil penalties; prohibited cities from installing devices intended to deceive motorists; and required cities to dispose of photographs within a certain period and to establish methods of contesting civil penalties.

The **HRO analysis** appeared in Part Two of the May 4 *Daily Floor Report*.

Creating the Texas Mobility Fund to finance highway projects

SJR 16/SB 4 by Shapiro

Effective if approved by voters on November 6, 2001

SJR 16 proposes to amend the Texas Constitution by creating the Texas Mobility Fund, a revolving bond fund to be administered by the Texas Transportation Commission (TTC) to finance acquisition, construction, maintenance, reconstruction, and expansion of state highways, including design and right-of-way purchases. The fund also could be used to finance public toll roads and other transportation projects. The amendment also would authorize the Texas Department of Transportation (TxDOT) to lend or grant money for turnpikes or toll roads and toll bridges, repealing the constitutional requirement that such expenditures be repaid to the State Highway Fund from tolls or other turnpike revenue.

SB 4 would establish by law the Texas Mobility Fund to be held by the comptroller and managed by TTC through TxDOT. The fund could be used to issue bonds of up to 30 years or credit agreements to finance state highways and other mobility projects with useful lives of at least 10 years, including design expenditures and right-of-way purchases; public toll roads and other public transportation projects; refunding or canceling outstanding obligations; creating debt-service reserves; paying issuance costs; and paying interest for up to two years. The TTC could not obligate the fund until TxDOT had developed a strategic plan outlining spending and benefits.

TTC could create appropriate reserves and sub-funds and issue long- or short-term obligations. The comptroller would have to certify that the fund contained at least 110 percent of the money necessary to pay principal and interest on all obligations issued each year. TTC could seek independent projections and agree to further restrictions on issuing obligations. The attorney general would have to approve the legality of any obligations and credit agreements issued in connection with the fund. TTC could pledge the state's full faith and credit if fund revenue or balances were insufficient to cover obligations and credit agreements. The investment policy would mirror that of the State Highway Fund, subject to TTC discretion. Excess fund money not otherwise obligated could be used for any authorized purpose.

SB 4 would take effect if and when voters approve the constitutional amendment proposed by SJR 16 and if SB 342 by Shapiro becomes law. (See analysis of SB 342.)

Supporters said Texas' traditional "pay-as-you-go" approach to highway financing no longer works. The phenomenal growth in the state's population has led to more vehicle miles traveled, greater traffic congestion, clogged Texas-Mexico border crossings, deficient rural roads, and many unsafe bridges. Demand has far outstripped capacity and spending has lagged. Texas never will catch up if it does not prepare itself to innovate, as allowed by SJR 16.

Highways are the only major capital projects for which the state does not borrow money. That policy no longer is defensible in the face of spiraling needs, lost economic opportunities, and diminished quality of life. Local governments routinely finance road and street projects with bonds. It is past time for the state to use this proven method, subject to appropriate constraints.

The Texas Mobility Fund would supplement existing federal and state highway revenue streams without jeopardizing either. It would provide both flexibility and structure, allowing spending on a variety of transportation projects while keeping the fund secure. Balances would be used primarily to leverage highway bonds, which would enable projects to begin sooner and lessen the impact of construction inflation. The interest earned would allow pursuit of other projects. It would be up to a future legislature to dedicate revenue to the fund, but it is important to establish the fund now as a policy statement until adequate funding can be found. In the meantime, SB 342 could provide some funding from excess toll-road revenue and unexpended or unobligated appropriations to the Texas Turnpike Authority, which that bill would abolish.

Opponents said borrowing money by issuing bonds would make highways more expensive because of debt service, underwriting, and issuance costs. It would drain precious resources away from highway construction and tie up revenue that could be used on other projects. Bonding would generate no new money for highways, merely reallocate it and commit it for the future. Over-commitment could limit Texas' ability to meet unforeseen transportation needs. Currently, the state lacks the resources to make bonding viable soon enough to have a sizeable impact on Texas' transportation crisis. The Legislature either should find sufficient general revenue or raise the gasoline tax, the closest thing to a user fee for motorists.

SB 4 would not address the persistent problem of equity in highway funding. It would provide no formulas, mechanisms or empirical criteria for distributing money. This could lead to continued local and regional disparity in highway expenditures across the state.

Other opponents said it would be pointless to create a fund having no revenue source, not unlike opening a bank account with no deposit. The Legislature should either pay for the plan or postpone it. Texans need more money for roads now, not the equivalent of a promissory note. Borrowing against federal highway funds would mean a quicker, more effective capital infusion. SB 4 would give TTC too little guidance on using the fund to produce creative solutions to transportation problems. Texas needs more integration of transportation modes to produce effective mobility strategies. TxDOT primarily is a road-construction contracting agency whose ability to innovate remains to be seen.

The **HRO analyses** of SJR 16 and SB 4 appeared in Part One of the May 16 *Daily Floor Report*.

Authorizing grant anticipation revenue vehicles (GARVEE bonds)

SJR 10/SB 241 and SJR 7/SB 190, all by Lucio
Died in House and Senate committees

SJR 10, as adopted by the Senate, would have proposed amending the Texas Constitution to allow the Legislature to authorize the Texas Transportation Commission (TTC) to issue bonds payable from federal or state highway funds, or a combination, for highway improvements. Money would have been appropriated annually to cover outstanding obligations, including bond enhancement agreements designed to boost credit ratings and lower interest costs. Bond issuances could not have reduced the 10-year average ratio of non-federal to federal project expenditures. **SB 241**, the enabling legislation, would have set forth project criteria, capped bond maturities at 15 years, limited annual bonding expenditures to 5 percent of yearly federal reimbursement amounts, and required bond approval by the Bond Review Board and the attorney general.

SJR 7 would have proposed a similar constitutional amendment but would have sunsetted the bonding authority on September 1, 2005, unless continued by the Legislature. **SB 190**, the enabling legislation, would have given priority to projects related to the North American Free Trade Agreement (NAFTA) and the Texas trunk system. Annual bonding expenditures would have been capped at 15 percent of yearly federal reimbursement amounts. The TTC would have had to report every even-numbered year on the status of the bond program, including planned projects, bridge and highway improvements along the Texas-Mexico border, leveraging methods for international trade needs, and long-term construction projections.

Supporters said that issuing bonds backed by future federal highway funding would allow Texas to use this money now for its vast highway construction needs. Texas' long-standing "pay-as-you-go" policy for road-building is outdated. Spending has not kept pace with demand for highway improvements fueled by rapid population growth and NAFTA. The results are traffic jams, clogged border crossings, and unsafe bridges. Texas never will catch up without innovative financing. Highways are the only major capital projects for which the state does not borrow money. That policy is indefensible in the face of spiraling needs, lost economic opportunities, and reduced quality of life. Cities and counties routinely finance streets and roads with bonds.

Traffic congestion on the state's international trade routes, especially along the Texas-Mexico border, is a serious impediment to free trade. Bond funding of highway construction would be an effective way to relieve road congestion and thereby promote economic development. Bonding would allow the state to begin large-scale road improvement projects much sooner than under the cash-only payment method.

Issuing grant anticipation notes, more commonly called grant anticipation revenue vehicles (GARVEEs), could accelerate use of \$1 billion or more in federal highway funds for building high-priority road projects. This cash infusion would help Texas close the gap between immediate needs and unfunded projects. The state's interest costs on GARVEEs would be significantly lower than the higher construction costs the state would incur later because of inflation if it waited until sufficient state and federal revenue were available. More capital could attract more contractors, and increased competition could lower bids and save taxpayers' money.

Texas would be protected from overexposure in issuing these highway bonds by safeguards such as minimum project amounts and caps on total bonded indebtedness and maturities. Federal revenue is as certain as state revenue. Congress would not withhold funds for projects so essential and politically sensitive as highways. Several other states are using various forms of GARVEEs successfully.

Opponents said bond funding for highways would be more expensive in the long term than the current pay-as-you-go system. The state would have to pay interest and other costs associated with the bonds along with the costs of road construction itself. Interest rates are locked in, whereas inflation fluctuates with economic conditions.

The state should not obligate itself to finance road construction when the source of repayment is uncertain. There is no guarantee that the federal government will follow through with its highway funding commitments or maintain current funding levels. Federal transportation appropriations are made in six-year increments, well short of most bond maturities. The state is allocated a certain amount of highway spending authority each fiscal year. Federal funds are received as reimbursement grants on a per-expenditure basis, not in lump sums or even block grants. Bonding could reduce the amount of funds available in the future and could stretch contractors' resources, jeopardizing long-range planning.

For an object lesson in the pitfalls of bonding dependent on future federal funding, Texans need look no further than the federal Superconducting Supercollider project, for which the state issued bonds to provide funding for its share of the project, only to have Congress ultimately pull the plug. Even what appears to be the most reliable of funding sources can fall victim to political and economic reversals.

Notes: HB 52 by Oliveira, similar to SB 190, would have made eligible for GARVEE funding only projects costing more than \$50 million. HB 52 also would have given priority to NAFTA-related trade corridors but would have contained fewer TTC reporting requirements.

Authorizing state funding of toll roads

SJR 16/SB 342 by Shapiro, et al.

Effective if approved by voters on November 6, 2001

SJR 16 proposes to amend the Texas Constitution by authorizing the Texas Department of Transportation (TxDOT) to lend or grant money for turnpikes or toll roads and toll bridges. The amendment would repeal the constitutional requirement that the State Highway Fund be repaid for such expenditures from tolls or other turnpike revenue. SJR 16 also would authorize creation of the Texas Mobility Fund in the state treasury. Administered by the Texas Transportation Commission (TTC), the revolving bond fund would finance acquisition, construction, maintenance, reconstruction, and expansion of state highways, including design and right-of-way, as well as public toll roads and other public transportation projects.

SB 342 would allow TxDOT to spend money from any source on public toll road projects without reimbursement. Private toll road operators receiving state money would have to repay TxDOT, reimbursing the fund from which expenditures were made. TxDOT's combined annual toll project grants could not exceed 30 percent of the state's total federal highway funding authorization for the same fiscal year. Contracts for toll projects using grants or loans made from constitutionally dedicated funds would have to be awarded on a competitive low-bid basis. However, the Texas Turnpike Authority (TTA) or its successor would have until March 1, 2004, to enter into exclusive development agreements on up to four toll projects.

SB 342 would abolish the TTA board of directors, transferring to TTC its powers, duties and all assets and unspent or unobligated appropriations. TTC could create regional mobility authorities in those counties that do not have them. Authorities with excess turnpike project revenue would have to spend it on other transportation projects in their regions, deposit it in the Texas Mobility Fund, or reduce tolls. TTC could convert any segment of the free state highway system to a turnpike and transfer it to a regional authority that agreed to maintain and operate it.

SB 342 takes effect if and when the constitutional amendment proposed by SJR 16 takes effect and if SB 4 by Shapiro becomes law creating the Texas Mobility Fund. All appropriations transferred from TTA to TTC would be deposited into the fund.

Supporters said allowing the state to spend money up front on toll roads would hasten much-needed projects by providing crucial financial leverage. Forgoing repayment to TxDOT would alleviate the dual lien problem most toll projects face — one lien to TxDOT, another to investors. Toll projects would become more attractive to investors, accelerating debt retirement and toll revenue production. This would reduce local governments' costs and free more state dollars that would have been spent outright, in lieu

of borrowing. Taxes pay for many roads that some motorists never use. Toll roads make sense as alternate routes available for a nominal user fee.

Current law limits authorization of toll projects to TTA or two existing local authorities. Regional toll authorities would be a more streamlined, flexible approach, making toll roads more viable for local entities. Allowing the TTC to convert roads into tollways would speed up the process and might help pay for much-needed expansion. Regional authority participation would be a prerequisite.

Since 1997, when TTA became a TxDOT division, all TTA actions and decisions have required TTC approval, an unnecessary bureaucratic redundancy. Transferring money from TTA into the proposed Texas Mobility Fund would provide highway bond seed money. Dedicating future excess toll revenue would mean a funding source with strong growth potential. Permitting exclusive development agreements on four proposed Central Texas toll projects would allow design-build contracting to demonstrate its effectiveness *vis-a-vis* competitive bidding.

Opponents said toll roads represent double taxation. Motorists already pay for highways when they fill up their fuel tanks, register their vehicles, and buy auto lubricants; they should not have to pay for highways again when they use them. Allowing TTC to collect tolls on existing roadways, even with local participation, would penalize drivers on high-traffic roads unfairly, a perverse variation on “pay-as-you-go.” Toll rates should not exceed levels needed to cover costs. Transferring excess revenue to a highway bond fund could turn tollways into “cash cows.” Toll road users should not subsidize other roads.

The constitutional prohibition against paying for toll roads with tax dollars remains sound. If tolls are insufficient to initiate and sustain a road, it should not be built as a tollway in the first place. Scarce state highway funds should not be risked on ventures unlikely to return the public’s investments. Also, the TTA board should be retained to give the governor ongoing input into toll road policy. “Grandfathering” TTA’s design-build contracting authority to TxDOT is poor policy-making.

Other opponents said there never will be enough toll revenue to reduce significantly Texas’ highway project backlog. SJR 16 would turn the original toll equity concept on its head — rather than the state subsidizing toll roads, toll roads would be asked to subsidize the state highway program. In fairness, toll revenue at least should be dedicated solely to toll projects. TTC needs clear guidance on formulating toll road policy and should have to integrate other transportation modes into toll projects. Also, TTA’s design-build authority should be transferred to TTC specifically and permanently.

The **HRO analyses** of SJR 16 and SB 342 appeared in Part One of the May 16 *Daily Floor Report*.

Establishing graduated driver's licensing

SB 577 by Bivins, et al.
Effective January 1, 2002

SB 577 prohibits the Department of Public Safety (DPS) from issuing a driver's license to a person under age 18, other than a hardship license, unless the applicant has held a learner's permit or hardship license for at least six months before the application date. During the first six months after being issued a driver's license or a restricted motorcycle or moped license, a minor may not drive between midnight and 5 a.m. unless driving during those hours is necessary for a job (including work on a family farm), school-related activity, or medical emergency. Also during this period, a minor may not drive with more than one passenger who is under 21 unless the passenger is a family member. A peace officer may not stop a vehicle for the sole purpose of determining whether the driver has violated the graduated licensing law.

Supporters said graduated driver's licensing would help curb the high rate of teenage traffic fatalities. According to the National Transportation Safety Board, the crash rate for 16-year-old drivers is by far the highest of any age group. It is 1.5 times that of 17-year-old drivers, three times that of 18- and 19-year-old drivers, and 4.3 times that of 20- to 24-year-old drivers. Forty-three other states have instituted graduated licensing and have seen dramatic decreases in traffic fatalities and injuries among 16-year-olds. A graduated licensing system combines restrictions so that the teenager's initial driving experiences occur in less dangerous circumstances until the driver has gained driving skills. Although parents may think they will be inconvenienced by these provisions and will have to drive their teenagers everywhere, this has not proven to be the case in states with graduated license laws. The restrictions would apply only to the first six months after licensure, and exceptions would be granted for necessary activities.

Opponents said the nighttime curfew is impractical, especially in metropolitan areas, because if a minor gets stuck in traffic or held up by construction, the minor might have to exceed the speed limit to obey the curfew. The decision of when a teenager may drive should be left up to the parents. Also, graduated licensing could create an inconvenience to parents, who would have to drive their teenagers during the six-month restricted period after the license was issued. Requiring parents to supervise driver training for their children would be inconvenient, unenforceable, and unnecessary.

The **HRO analysis** of the companion bill, HB 432 by Driver, appeared in Part One of the April 26 *Daily Floor Report*.

Utilities

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Regulating telemarketing solicitation

HB 472 by Solomons, et al.
Effective January 1, 2002

HB 472, the Texas Telemarketing Disclosure and Privacy Act, requires the Public Utility Commission (PUC) to establish a telemarketer “no-call” list containing phone numbers of residential customers who do not wish to receive unsolicited telemarketing calls. The PUC must provide a request form for customers who want to be on the list, plus a toll-free number and an Internet mail address where customers can obtain a copy of the form. The PUC can contract with a private vendor to maintain the no-call list if the vendor has maintained a national no-call list for more than two years. HB 472 authorizes the PUC, the attorney general, and state licensing agencies to investigate complaints and assess civil penalties and requires the Department of Information Resources to help the PUC administer the no-call list, if asked. It also prohibits a telemarketer from blocking the identity of the telephone number from which a call is made and from interfering with the capability of a caller ID service.

A telemarketing call is not subject to the act’s provisions if it is made by a state licensee under certain circumstances; in connection with an established business relationship or, under certain circumstances, a terminated business relationship; by a consumer as a result of a solicitation or advertisement; between a telemarketer and a business, unless the business had asked not to be called; to collect a debt; or in regard to securities.

Supporters said HB 472 would establish tougher telemarketing regulations that would protect both legitimate businesses and consumers who are harassed and defrauded by unscrupulous telemarketers. Telemarketing is a legitimate business practice, but some use high-pressure, deceptive tactics to defraud Texans. Consumers across the United States lose an estimated \$40 billion a year through telemarketing fraud.

The bill would give consumers some control over who could call them by establishing a statewide no-call list. With one simple step, consumers could request that almost all solicitors in Texas cease contact with them via telemarketing. In the absence of a federally mandated national no-call list, a Texas no-call list would protect all parties and would be workable. Because Congress has authorized states to establish statewide no-call lists, a Texas no-call list would not interfere with a company’s right to market goods or services through interstate commerce.

Telemarketing industry leaders admit that it is inefficient to contact consumers who have no desire to speak to them. Thus, a statewide no-call list would not drive companies out of the state, nor would it deprive telemarketing employees of meaningful employment. It would not hamper a company’s ability to sell its products and services, because people who were receptive to unsolicited telemarketing would not be on the list.

Opponents said Texas law already provides protections against telemarketing abuses. HB 472 would place overly burdensome restrictions on legitimate telemarketers and would affect companies that already comply with federal and state laws. Telemarketers already are prohibited from calling people who ask not to be called. This bill would not prevent fraudulent telemarketing, because the “bad actors” probably would not abide by any new law. If consumers want to screen their calls, caller ID devices and answering machines are a good solution.

A statewide no-call list would inhibit a company’s ability to market to prospective customers by preventing initial contact with customers who might be receptive to receiving information about a product or service. No-call lists should continue to be maintained by each separate business entity, as required by federal law. In-house no-call lists are a much more efficient and inexpensive way to protect customers from being contacted by specific companies.

A better alternative would be to increase efforts to educate Texas consumers about fraudulent telemarketing and their rights under current law and about the national no-call list maintained by the Direct Marketing Association. Consumers may not be aware that they can ask to be placed on a company’s no-call list.

Other opponents said it is not clear whether HB 472 would apply to out-of-state telemarketers calling to Texas. In 1996, the governor of Rhode Island vetoed a telephone solicitation bill on the grounds that the legislation was likely unconstitutional under the First Amendment because it could infringe unreasonably on the rights of companies to communicate their messages by telephone. The governor also stated that the legislation violated the U.S. Constitution by restricting out-of-state telemarketers engaging in interstate commerce.

The **HRO analysis** appeared in Part One of the April 4 *Daily Floor Report*.

Delaying electric deregulation in the Texas Panhandle

HB 1692 by Chisum, et al.
Effective September 1, 2001

HB 1692 requires the Public Utility Commission (PUC) to regulate Southwestern Public Service Co. (SPS) — which controls about 70 percent of the electric power generated in the Texas Panhandle and has limited transmission interconnections outside of its territory — until January 1, 2007, or until the PUC authorizes customer choice, whichever is later. Upon implementation of customer choice, SPS will be subject to the Public Utility Regulatory Act to the same extent as other electric utilities.

If SPS chooses on or after January 1, 2007, to participate in customer choice, the PUC may not authorize customer choice until the applicable region is certified as a qualifying power region.

By May 1, 2002, SPS must submit to the appropriate legislative oversight committee an analysis of the transmission facilities that are necessary to make the utility's transmission capability comparable to areas within the Electric Reliability Council of Texas (ERCOT) power region — an electric grid covering most of Texas but not the Panhandle. On or after September 1, 2003, SPS must file plans to develop transmission interconnections with its own or adjacent power regions. If the PUC approves the plan, it also must approve a rate rider mechanism for recovery of incremental costs for the added facilities after they are completed and in service. To certify that SPS meets the 20 percent market-power rule, the PUC also must find that SPS has sufficient transmission facilities to provide customers with access to power from other suppliers that is comparable to the same access available in the ERCOT region.

SPS is entitled to recover expenditures incurred before September 1, 2001, to comply with electric utility restructuring. Upon application for recovery by the utility, the PUC may approve a retail rate rider mechanism for recovery of transition-to-competition costs. The rider mechanism will expire on or before December 31, 2006.

Supporters said HB 1692 would require regulation of SPS until January 1, 2007, and would delay competition in electricity generation until sufficient transmission facilities could be built to interconnect the SPS territory with its encompassing power region.

SPS is an efficient utility with an abundance of low-cost, coal-fueled power plants. SPS customers traditionally have enjoyed lower-cost electricity service than have customers in other parts of the state or nation. Under SB 7, the electric utility restructuring law enacted in 1999, to qualify as a competitive power region, SPS would have to sell 80 percent of its generating capacity to meet the 20 percent market-power rule. This divestiture would eliminate the economies of scale that enable a large company to provide low-cost

electricity. Also, companies that bought the generating facilities would pass along their increased capital costs in the form of price increases for consumers. HB 1692 would allow Panhandle customers to continue to benefit from low-cost electricity until 2007 or until the PUC determined that competition was sufficient to implement customer choice without a rate shock.

The delay also would give SPS time to increase high-voltage transmission capacity into the region. Increased transmission capacity would facilitate competition by wire. Competitors could use the high-voltage lines to transmit electricity to customers without building or buying new power plants in the region. This could eliminate the need for SPS to divest itself of 80 percent of its generating capacity. The increased competition would help to keep prices low in the Panhandle by reducing costly capital investments for new competitors and by allowing SPS to retain economies of scale.

By delaying electric restructuring in the Panhandle region, HB 1692 would keep the implementation of restructuring synchronous with that of neighboring New Mexico. In March 2001, New Mexico enacted legislation to delay electric restructuring — which was set to begin in January 2002 — by five years. HB 1692 would allow SPS, which needs to reduce its market power in both the Panhandle and New Mexico, to comply with each state's current restructuring laws and avoid having to divest itself of generating capacity in one state and not the other. Such an unwieldy situation would create inefficiencies for the company and could increase prices for consumers.

Opponents said HB 1692 would send conflicting signals to consumers in the Panhandle and across Texas. Since 1999, the state has asked consumers to prepare for the benefits of electric utility restructuring. Delaying implementation of restructuring for some Texas customers because of a fear of its effect on prices — coupled with publicity about California's experience with restructuring — could create significant unease among consumers.

The **HRO analysis** appeared in Part Two of the *April 25 Daily Floor Report*.

Returning “negative stranded costs” to electric ratepayers

HB 2107 by S. Turner, et al.
Died in Senate committee

HB 2107 would have required the Public Utility Commission (PUC) to order certain electric utilities to return to residential customers 50 percent of the amount recovered from those customers to mitigate utilities’ positive “stranded costs” — costs that utilities had incurred for long-term investments in coal and nuclear facilities under regulation, which were expected to be unrecoverable in the competitive electric utility market, scheduled to begin on January 1, 2002. The bill would have applied to utilities that in 1998 were estimated to have potential stranded costs according to the Excess Costs Over Market (ECOM) model and that were located exclusively within the Electric Reliability Council of Texas power region. The returned mitigation would have been applied as a credit to residential customers’ electric utility bills in September 2001.

Supporters said HB 2107 would give consumers relief from rising electricity bills. The increase in natural gas prices since enactment of SB 7, the electric utility restructuring law enacted by the 76th Legislature, has eliminated any potential stranded costs for utilities. In fact, it now appears that utilities have negative stranded costs — that is, their coal and nuclear facilities will be worth more in a competitive market than they are under regulation. However, utilities already have collected almost \$4 billion through mitigation for estimated stranded costs. In essence, they have been “recovering” costs for facilities that actually have increased in value.

Opponents said HB 2107 is unnecessary because current law already provides for a final reconciliation of stranded costs during the “true-up” proceeding in 2004. At that time, stranded costs will be determined on the basis of actual market outcomes. The difference between the market value of any stranded costs and their estimated value in the ECOM model will be reflected in the transmission and distribution rates that will remain under PUC regulation. If utilities had to return stranded costs now based on model estimates and if stranded costs ultimately were found to exist during the true-up, the result could be “rate shock” for consumers as their transmission and distribution rates skyrocketed to make up the difference. HB 2107 could make consumers pay for recovery of stranded costs in the future, rather than allow utilities to minimize stranded costs before the onset of competition.

The **HRO analysis** appeared in Part One of the May 1 *Daily Floor Report*.

Statewide broadband Internet access

SB 1783 by Sibley, et al.
Died in conference committee

SB 1783 would have created a means of providing advanced telecommunications services — including high-speed, or “broadband,” Internet access — to communities that lack such services.

A community could have requested advanced service from a local telecommunications provider. A provider that received a valid request on or after September 1, 2002, would have had to respond within 30 days as to whether the company intended to provide the service itself, to enter into a contract with another company to provide the service, or not to provide the service. If the company intended to provide the service itself, it would have had to do so within 150 days of its response. If no provider offered to provide advanced service, the community could have attempted to obtain funding to provide the service itself or to use the funding to enter into a contract with a company to provide the service. The community could have sought funding from a development corporation, the Telecommunications Infrastructure Fund (TIF), a Texas Agricultural Finance Authority program, a community development block grant, or other business incentives for which the county was eligible.

Certain federal or state designated enterprise communities or economically distressed areas along the Texas-Mexico border, including colonias, could have requested provision of advanced service from a local telecommunications provider for at least 25 residents. If the local provider declined to provide the requested service and no other provider offered the service, a local school district, public library, or certain local nonprofit organizations could have applied for loans or grants from the TIF to contract for advanced service.

SB 1783 would have reduced the annual assessment charged to telecommunications and wireless providers from 1.25 percent to 0.76 percent of the provider’s taxable receipts. It also would have removed the \$1.5 billion cap on the TIF.

A company that committed to provide an advanced service beginning September 1, 2001, in response to a valid request from at least 75 subscribers could have taken advantage of incentives available under current law in certain situations, such as those allowing a company to set its own prices for its nonbasic services.

Supporters said SB 1783 would help ensure that all areas of Texas could receive broadband Internet access. With the support of its telephone subscribers, a community could request the service from a local provider. A company could choose to provide the service itself, make arrangements with another company to provide the service, or decline to provide the service altogether. If the company declined, a community could seek

funding either to provide the service itself or to arrange service from another provider. TIF money could be used to provide advanced services for such communities.

SB 1783 would be “technology-neutral.” It would not favor any specific technology for providing advanced services. It would define advanced services to accommodate the most commonly available platforms for broadband service: cable, DSL, satellite, and fixed wireless.

TIF money would be used to deploy advanced services without regard to urban or rural areas. Any community that had the support of enough subscribers and that was denied service by its local provider could receive funding for deployment of advanced service. Also, the bill ultimately would increase revenues to the TIF by removing the \$1.5 billion cap on the fund.

Deployment of advanced services is expanding rapidly across the nation. However, Federal Communications Commission data suggest that market forces alone will not guarantee all citizens access to such services. Low-income customers and those in sparsely populated areas are among the most likely to be overlooked. SB 1783 would help ensure that segments of the population that otherwise might be bypassed by market forces could receive advanced telecommunications services.

Opponents said SB 1783 would require customers in urban areas to subsidize provision of advanced telecommunications services to rural areas. The TIF is funded by an assessment on telecommunications utilities and mobile telephone service providers. With the proliferation of cellular phones, an increasingly larger portion of the fund’s total assessment comes from cellular customers, the majority of whom live in urban areas. Urban customers could be paying to provide advanced services to rural communities when those services were not available for many urban customers.

SB 1783 is unnecessary. Deployment of advanced telecommunications services already is progressing rapidly across the state and the nation. Market forces and the private sector will ensure that advanced services are deployed across the state without the need for legislation. This bill simply would add another layer of administrative bureaucracy.

The **HRO analysis** appeared in Part One of the May 16 *Daily Floor Report*.

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