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Major Issues

of the 78th Legislature, Regular Session

During its 2003 regular session, the 78th Texas Legislature enacted 1,383 bills and adopted 21 joint resolutions after considering more than 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 78th Legislature, including HB 1, the general appropriations act for fiscal 2004-05, bills vetoed by the governor, and the proposed constitutional amendments on the September 13, 2003, ballot. The Legislature may revise or revive several of the bills covered in this report during a subsequent special session.

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SYNOPSIS OF LEGISLATION
78th Legislature, Regular Session

	Introduced	Enacted*	Percent enacted
House bills	3,636	824	22.7%
Senate bills	1,956	559	28.6%
TOTAL bills	5,592	1,383	24.7%
HJR s	100	15	15.0%
SJR s	61	6	9.8%
TOTAL joint resolutions	161	21	13.0%

*Includes 48 vetoed bills — 31 House bills and 17 Senate bills

	2001	2003	Percent change
Bills filed	5,544	5,596	0.9%
Bills enacted	1,601	1,383	-13.6%
Bills vetoed	82	48	-41.5%
Joint resolutions filed	162	161	-0.6%
Joint resolutions adopted	20	21	5.0%
Legislation sent or transferred to Calendars Committee	1,494	1,255	-16.0%
Legislation sent to Local and Consent Calendars Committee	1,070	1,096	2.4%

Source: Texas Legislative Information System.



Civil Liability

* HB 4	Nixon	Revising medical malpractice and tort liability laws	8
* HJR 3	Nixon	Capping noneconomic damages in medical and other liability cases	16
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Revising medical malpractice and tort liability laws

HB 4 by Nixon, et al.
Generally effective September 1, 2003

HB 4 amends Texas' medical liability statute in regard to limits on liability in malpractice cases; cases involving emergency or charity care; litigation matters such as expert reports, the structure of attorney fees, and filing deadlines; and recovery of medical expenses. It also makes many changes in Texas' tort liability laws in regard to class actions, settlement offers, product liability, civil litigation procedures, limitations on damages, liability of certain public employees, and other matters.

Medical malpractice liability

HB 4 repeals the Medical Liability and Insurance Improvement Act (V.T.C.S., art. 4590i) and replaces it with a new set of statutes governing cases of medical malpractice liability.

Limits on liability. The bill sets a cap on noneconomic damages of \$250,000 per claimant per case and a total cap of \$500,000 for all institutions in a single case. This cap is not indexed, and health-care providers need not carry liability insurance to obtain protection under the cap. If the \$250,000 limit on liability is found unconstitutional, providers would have to carry liability insurance to obtain protection. The levels of liability coverage would increase in three tiers over time. Initially, the required level for health-care providers would be \$200,000 per claim and \$600,000 aggregate, increasing to \$300,000 and \$900,000 in 2005 and to \$500,000 and \$1,000,000 in 2007. The bill maintains the general \$500,000 indexed cap on liability in cases involving wrongful death or survival action. This cap includes punitive damages under the limit and applies on a per-occurrence basis, regardless of the number of claimants and defendants. Hospitals that provide charity care have their liability limited to \$500,000 in exchange for providing uncompensated health-care services, as long as the patient or the person responsible for the patient signs a statement to that effect.

The bill maintains the statute of limitations of two years from the occurrence of the breach or tort, except that minors under age 12 have until their 14th birthday to file. It adds a statute of repose, limiting the filing of a claim to 10 years after the act.

Informed consent. HB 4 creates a nine-member Texas Medical Disclosure Panel attached to the Texas Department of Health. The panel of three lawyers and six doctors must determine which risks related to medical care must be disclosed and which procedures may be performed only after disclosing the risks. It must establish a general disclosure form and must develop written materials for disclosure of risks associated with hysterectomies. Compliance or failure to comply with the required disclosure is admissible into evidence and creates a rebuttable presumption of either informed consent or lack thereof. Failure to disclose may not be found negligent if doing so would have been medically infeasible, such as in an emergency.

Arbitration. An arbitration agreement between a claimant and a physician or health-care provider must include a disclosure statement informing the claimant that the agreement waives the claimant's right to a jury and is invalid unless signed by the patient's attorney.

Emergency care. HB 4 repeals the immunity from liability for emergency procedures performed by “good Samaritans” and replaces that immunity with a definition of standard of proof in such cases. A claimant must prove that the treatment or lack of treatment deviated, with wilful or wanton negligence, from the degree of care and skill that could be expected from an ordinarily prudent physician in similar circumstances. This provision does not apply to cases involving treatment after the patient is stabilized or to remedy an emergency caused by a provider.

Pretrial matters. A claimant must provide written notice of a claim at least 60 days before filing a suit and must authorize in writing the disclosure of medical records. All parties have access to the patient’s medical records and standard discovery interrogatories within 45 days of a request. Filers of claims must submit only an expert report and no longer must submit a cost bond. If a claimant fails to serve each party an expert report and the expert’s curriculum vitae within 180 days after filing the claim, the court must dismiss the claim with prejudice and must order the claimant to pay the defendant’s attorney fees and court costs. The required expert report may not be introduced into evidence or referred to by either party in the course of the action, but any other expert report may be introduced by either party. The bill also establishes qualifications for expert witnesses testifying in a claim.

Recovery matters. A court must order periodic payments, rather than a lump-sum payment, at the request of either the defendant or the plaintiff in cases when the award is at least \$100,000. To be allowed to make periodic payments, the defendant must show financial responsibility in the form of an insurance policy, bond, or other proof of ability to make full payment. If a recipient of periodic payments dies, all payments except loss of earnings must cease and any remaining security be returned to the defendant.

Nursing home insurance. HB 4 delays from September 1, 2003, until September 1, 2005, the requirement that nursing homes carry a certain level of liability insurance.

Supporters said Texas has a medical malpractice crisis, and the changes in HB 4 would be the best way to help ensure patients’ access to care. Large jury awards have driven up the cost of malpractice insurance in recent years, forcing physicians in some areas of the state to limit their practices, retire early, or leave Texas. Many obstetrician/gynecologists no longer deliver babies, and more and more neurologists no longer perform surgery. HB 4 would strike an appropriate balance between common-sense reforms to the medical liability system and protecting the right of those who are harmed to recover compensation. Other states have enacted similar reforms to address similar problems. In 1975, California enacted its Medical Injury Compensation Reform Act (MICRA), considered the nation’s most comprehensive set of medical malpractice reforms. MICRA has had a significant impact on premium rates in California, where rates have risen at about one-quarter the pace of the rest of the nation.

Limits on liability. Caps on noneconomic damages are a cornerstone of efforts to reduce medical malpractice rates, because high verdicts in malpractice cases make it more expensive for insurers to write policies. Since economic damages would remain uncapped, a limit on noneconomic damages would ensure that plaintiffs received the compensation they deserved, rather than winning a “lottery.” Based on California’s experience, a \$250,000 cap on noneconomic damages in Texas would reduce liability premiums substantially over time. Such a cap would not limit a patient’s right to redress, nor would it limit the amount a patient could be compensated for actual losses and damages, past or future health-care expenses, past loss of earnings or future loss of earning

capacity, and other economic damages. Noneconomic damages do not make a patient whole but only weigh down the medical system.

An alternate to the first limit on liability in the bill would ensure that the state's reform efforts would stand even if the first limit were held unconstitutional. The *quid pro quo* offered by the alternate cap would satisfy the constitutionality test, as it has in the Charitable Immunity and Liability Act of 1987, upon which it is modeled. The caps-for-coverage trade would promote higher recovery for patients, as it would ensure that physicians and hospitals carried sufficient liability insurance to cover an award.

Opponents said the tort system is not a significant cause of the medical malpractice liability crisis. Texas should focus first on insurance rate regulation, which would lower malpractice premium rates directly. Insurers' intense competition for market share during the 1990s sank premium rates to artificial depths. Thin margins, coupled with stock market woes and low interest rates, have forced insurers to pass higher costs on to policyholders. California's premium rates grew along with the rest of the nation through the 1980s, even after the enactment of the damage award caps in MICRA, and fell only after state voters approved a 1988 initiative that mandated lower rates and regulated insurance companies.

Limits on liability. A cap on noneconomic damages would limit unfairly a patient's right to redress. Economic damages account only for medical bills and wages, not for intangible losses such as becoming homebound, being unable to care for one's children, suffering caused by major disfigurement, and other results of medical malpractice.

The bill's alternate limit on liability would be insufficient to withstand a constitutional challenge, and the caps-for-coverage trade represents no trade at all. Physicians already must carry certain levels of liability insurance to obtain hospital privileges. HB 4 would require the public to surrender access to courts in exchange for protection it already enjoys. Also, indigent patients should not have to waive their right to recovery in exchange for health services. This bill would allow emergency rooms to treat indigent patients with a lower standard of care without fear of liability, because patients would have to sign away their rights at the door.

Other opponents said the Legislature should require a guarantee from insurers that the changes in HB 4 will result in lower premiums. In 1995, the 74th Legislature enacted HB 1988 by Duncan, establishing flexible rating for certain lines of insurance. That law contained a provision introduced by then-Rep. Mark Stiles requiring insurers to estimate the amount of money saved through the civil liability revisions also enacted that session and to apply that amount to a temporary rate reduction. HB 4 similarly should require that reductions in tort costs be applied directly to reducing premium rates.

Any limit on liability should be indexed, as should the minimums for insurance policies under an alternate cap. Limits set in today's dollars would be worth little or nothing in 25 years, and doctors would have to carry only minimal levels of insurance by future standards. Caps and insurance minimums set in statute could be increased over time, but it would make more sense and save future legislatures time and effort to index them in HB 4.

Tort liability

Class actions. HB 4 extends jurisdiction to the Texas Supreme Court to hear an appeal from a trial court's order regarding a class certification and stays all proceedings in the trial court pending that appeal. Supreme Court rules must require trial courts to calculate class attorneys' fees by the Lodestar method, which requires a reasonable fee based on hours actually worked, and to ensure that if a class receives a portion of its settlement in noncash compensation, the class attorneys receive the same proportion of cash to noncash compensation.

Settlement offers. If a party to a civil suit makes a settlement offer to another party that is not accepted and the rejecting party prevails at trial, the offering party may receive its litigation costs incurred after the rejected offer, if the rejecting party's recovery is 20 percent or more less favorable than the settlement offer. If litigation costs are shifted against the plaintiff, the plaintiff recovers at least half of his or her economic damages, plus the amount of any statutory liens against the plaintiff's recovery. These provisions apply to actions filed on or after January 1, 2004.

Product liability. HB 4 establishes a 15-year "statute of repose" for product liability actions, requiring a plaintiff to initiate an action within 15 years from the date of sale of the product, unless the symptoms of a claimant's disease caused by a product did not manifest themselves until many years after use of the product. It also creates an "innocent retailer" defense under which a seller that did not manufacture a product is not liable for harm caused to a plaintiff by that product unless the seller had some responsibility for the defect or unless the manufacturer is insolvent or not subject to the court's jurisdiction.

Actions alleging an injury caused by a failure to provide adequate warnings or information about a pharmaceutical product are subject to a rebuttable presumption that the defendant is not liable for failing to provide an adequate warning if the defendant supplied a warning that complied with federal guidelines. A claimant may rebut this presumption in several ways, including by showing that the defendant misrepresented or withheld relevant information from the U.S. Food and Drug Administration. The bill also establishes a rebuttable presumption that a product's manufacturer or seller is not liable for an injury caused by some aspect of the formulation, labeling, or design of the product if those features complied with mandatory federal safety standards. These changes apply to product liability cases filed on or after July 1, 2003.

Forum non conveniens and multidistrict litigation. HB 4 requires a court to dismiss a case that has no connection to Texas and that should have been brought in another state or country if the court determines that dismissal is in the best interest of justice and for the parties' convenience. The chief justice of the Supreme Court must appoint a five-member judicial panel that may transfer civil actions involving one or more common questions of fact pending in the same or different courts to any district court for consolidated or coordinated pretrial proceedings.

Proportionate responsibility. A defendant in a civil action may seek to designate a person as a responsible third party, and a plaintiff may seek to join a responsible third party as a party in the case. The trier of fact may consider the potential fault of a responsible third party when allocating responsibility. Defendants who are jointly and severally liable for damages to a claimant are liable only for the percentage of damages found by the trier of fact equal to their percentage of responsibility. These changes apply to cases filed on or after July 1, 2003.

Interest. HB 4 prohibits assessment or recovery of prejudgment interest on an award of future damages. The postjudgment interest rate is based on the weekly average one-year treasury yield as published by the Federal Reserve System, with a minimum rate of 5 percent and a maximum rate of 15 percent, rather than 10 and 20 percent, as in current law.

Appeal bonds. The bill adds several circumstances in which a court may grant a stay of execution of judgment. It also reduces the amount of security required to obtain an appeal bond in certain cases. It caps security at 50 percent of the judgment debtor's net worth or \$25 million, whichever is lower. If the debtor shows that it is likely to suffer substantial economic harm if required to post security in the required amount, the trial court must lower the bond amount. An appellate court may review the bond amount but may not increase the amount above the cap.

Claims against public health-care workers. HB 4 extends the limit on personal liability for governmental employees to include health-care personnel of a public hospital and limits the liability of a nonprofit organization that manages a hospital for a city or hospital district.

Damages. A jury may award exemplary (punitive) damages only if the claimant proves by clear and convincing evidence that the harm resulted from fraud, malice, or gross negligence and if the jury votes unanimously to award exemplary damages. The bill limits the recovery of medical or health-care expenses to the amount actually paid or incurred by or on behalf of the claimant.

School employees. A person must exhaust all administrative remedies before filing suit against a professional employee of a school district. An employee may recover attorney's fees and court costs from the plaintiff if the employee is found to be immune from liability. The bill expands the immunity granted to school employees under federal law to a person who provides services for a private school.

Admissibility of evidence in civil action. Evidence that a convalescent or nursing home has been found by the Texas Department of Health to have violated a standard for participating in the Medicaid program or that the institution has had a monetary penalty assessed against it is not admissible in court, except when the state or local agency seeking an enforcement action is a party to the case or when the violation relates to the particular incident and individual whose personal injury is the basis of the claim brought in the case. Evidence as to the use or nonuse of a seatbelt is admissible in a civil case filed on or after July 1, 2003.

Successor liability for asbestos-related litigation. The bill limits a successor corporation's asbestos-related liabilities to the fair market value of the acquired company's total gross assets at the time of a merger or consolidation, if the acquisition that generated the asbestos-related liability took place before May 13, 1968.

Liability of certain service providers. HB 4 immunizes all volunteers of a charitable organization from civil liability for any act or omission within the volunteer's scope of duty. A volunteer fire department or firefighter is liable for damages only to the extent that a county or county employee providing the same or similar emergency response services would be liable. In an action alleging professional negligence against a registered architect or licensed professional engineer, the plaintiff must file an affidavit of a third-party design professional setting forth a specific negligent act of the defendant.

Supporters said HB 4 would make comprehensive reforms in Texas’ system of tort liability law, creating a system that offers balance and fairness for all parties. The current lawsuit environment breeds litigiousness, which diminishes the peace of a civil society. Juries often appear to render “jackpot” verdicts without first considering how much they will increase the costs of products and services to the average consumer.

Class actions. HB 4 would enable class members to recover fully for their injuries. Under the current system, class attorneys often receive more recovery than the class members themselves receive. Requiring courts to apply the Lodestar method of calculating attorneys’ fees would ensure that attorneys do not receive a windfall for a minimal amount of work but that they are paid properly for services rendered. The bill would end the proliferation of “coupon settlements” that entitle class members to a discount off their next purchase while the class attorneys reap millions of dollars.

Settlement offers. HB 4 would give parties an incentive to settle cases early, helping to unclog the courts by reducing the number of cases that go to trial. Rejecting parties would risk losing their attorney’s fees and costs from the time of the offer to the end of trial if they did not accept a reasonable offer. Offering parties would be encouraged to make reasonable settlement offers early, because they could receive reimbursement for their fees and costs from the rejecting parties if the offer was more favorable than the judgment for the plaintiffs.

Product liability. HB 4 would protect innocent retailers from liability for products manufactured by someone else. Retailers often are small businesses that are in no better position to pay for an injury than is the plaintiff. Establishing a 15-year statute of repose for product liability claims would allow manufacturers to plan for expansion or improvement of their business without worrying about stale claims.

Forum non conveniens and multidistrict litigation. Texas courts are clogged with cases that do not belong here. In some cases, Texas has no meaningful relation to the case or the parties, other than that the plaintiffs believe they can recover more money in a Texas court than elsewhere. Also, making venue and forum non conveniens more consistent with federal standards would give Texas courts a more substantial basis to send cases back where they belong. Consolidating cases that share fact issues for the purposes of pretrial matters would allow multiplaintiff cases to be heard in a more efficient manner that would ensure justice for all parties.

Proportionate responsibility. HB 4 would ensure that all potentially responsible parties were submitted to the fact finder. The current system confuses jurors because they are told about all of the possibly responsible people but may assess liability only to those who are parties in the case. This encourages plaintiffs to seek to maximize their recovery by suing defendants with the “deepest pockets” rather than those who are most liable.

Appeal bonds. Many defendants find it difficult to pursue appeals because they cannot afford the high cost of an appeal bond. In many cases, the cost of the bond ends the suit at the time of judgment rather than after a rightfully brought appeal. HB 4 would limit the bonding requirement and cap the total amount of the bond to level the playing field for defendants.

Damages. Exemplary damages should be designed to prevent a defendant from repeating a harmful act, not to prevent a business from operating at all. Because juries often do not understand the complexities of corporate finance, they find it difficult to ascertain the proper amount of damages to

assess against a corporate wrongdoer. Giving judges a simple formula with which to determine damages would assist them with this determination.

Successor liability for asbestos-related litigation. Corporations who bought other companies years ago unknowing of potential asbestos-related litigation are going bankrupt because of lawsuits relating to actions that occurred before their purchase occurred. Putting these companies out of business prevents rightful claimants from receiving the compensation they deserve. A reasonable limit on the amount of potential liability would ensure that injured people were compensated and that the companies could remain in business.

Opponents said HB 4 would destroy benefits that the legal system has developed for ordinary people over hundreds of years of common law and would endanger the rights of millions of Texans. The bill effectively would slam the courthouse doors in the faces of plaintiffs with valid claims and would encourage defendants to continue wrongful business practices by removing the threat of suit.

Class actions. By making it more difficult to maintain class actions, HB 4 would prevent thousands of people from being able to obtain the justice they deserve. The Lodestar method of determining fees would do more to reduce the defendant's payout than to increase recovery by an injured class.

Settlement offers. HB 4 would create a greater "litigation lottery" than now exists by forcing parties to guess the value of their cases early in the process at the risk of losing litigation costs. The penalty assessed against a rejecting party that did not receive a high enough judgment would preclude many injured claimants from receiving the amount of recovery they deserved.

Product liability. Protecting manufacturers that complied with governmental regulations would allow manufacturers to evade responsibility for injuries they cause. Governmental regulations are set as minimum standards, not according to what is or is not safe for the average consumer, and are not designed for setting liability limits.

Forum non conveniens and multidistrict litigation. Current venue rules give judges enough authority to remove cases that do not belong in Texas. Plaintiffs already must plead and prove sufficient facts to show that venue is proper. Denying a plaintiff the right to choose a forum that is both convenient and necessary to the parties would tip the balance in the favor of the defense. Combining multiplaintiff cases is not in the interest of justice. Making the parties join together for purposes of pretrial procedure ignores the uniqueness of each plaintiff's injuries. A single judge reviewing a block of hundreds of cases cannot give each case the individual attention it needs and deserves.

Proportionate responsibility. Plaintiffs have the right to sue any and all parties that they believe are liable for their injuries, and they risk being barred forever from claims against necessary parties that they fail to sue. Requiring the designation of all potential defendants would be unfair to plaintiffs. A defendant could bring a string of possible defendants into the case in name only and encourage juries to assess damages to the imaginary defendants.

Appeal bonds. The purpose of an appeal bond is to ensure a plaintiff's recovery in the event that the defendant tries to skip out on the judgment. Capping the amount of the bond would limit a party's ability to recover the full amount of damages if the defendant defaulted on the bond, because the cap often is lower than the judgment amount.

Damages. Exemplary damages are intended to punish wrongdoers for egregious harm so that they will not repeat harmful acts. Limiting exemplary damages would undermine a jury's ability to send the proper message to a wrongdoer. Jurors decide murder cases and other cases, and they can be trusted to determine the amount of exemplary damages to assess.

Successor liability for asbestos-related litigation. Absolving companies of liability for asbestos-related claims would prevent thousands of injured Texans from receiving compensation to which they are entitled. These companies bought their predecessors understanding the potential for future lawsuits, and they should not be allowed to shirk their responsibility.

The **HRO analysis** appeared in the March 19 *Daily Floor Report*.

Capping noneconomic damages in medical and other liability cases

HJR 3 by Nixon, et al.
On September 13, 2003, ballot

HJR 3 proposes amending the Texas Constitution to authorize the Legislature to set limits on noneconomic damages in medical and other liability cases. This authority would apply to laws relating to medical liability enacted during the regular session of the 78th Legislature or in later regular or special sessions. After January 1, 2005, this authority would apply to limiting noneconomic damages in all other types of liability cases, subject to approval by a three-fifths vote of all members elected to each house.

The amendment would define “economic damages” as compensatory damages for any pecuniary loss or damage. Such damages would not include any loss or damage, however characterized, for past, present, and future physical pain and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment.

The Legislature’s authority to limit noneconomic damages would apply regardless of whether the claim or cause of action arose or was derived from common law, a statute, or other law, including tort, contract, or any other liability theory or combination of theories. The claim or cause of action would include a medical or health-care liability claim, as defined by the Legislature, based on a medical or health-care provider’s treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety that caused or contributed to a person’s actual or claimed disease, injury, or death.

If Texas voters rejected the proposed amendment, a court could not consider any aspect of the vote for any purpose, in any manner, or to any extent.

Supporters said Texans should be allowed to decide whether limiting noneconomic damages is an appropriate action for the Legislature to take. Texas faces a crisis in medical malpractice insurance caused by increases in the size of damage awards. Physicians in some areas, burdened by large increases in the cost of their liability insurance, have limited their practices, retired early, or left the state, jeopardizing Texans’ access to health care. A key solution to this crisis would be to impose a \$250,000 cap on noneconomic damages, as enacted in HB 4 by Nixon. The state faced a similar crisis when the 65th Legislature enacted a cap on noneconomic damages in 1977, but the Texas Supreme Court ruled the cap unconstitutional except in cases of wrongful death. Texas voters, not the courts, should decide whether their elected lawmakers can enact reasonable and necessary solutions to persistent problems with the liability system. Voters should be able to decide this issue quickly so that caps on noneconomic damages could take effect without delay. The proposed amendment would ensure that future courts could not overturn the Legislature’s attempts to resolve the medical malpractice crisis.

The amendment could fail for reasons unrelated to its merits, such as national or international events, bad weather, other issues or candidates on the ballot, or voter confusion over the ballot language. If damage caps faced a legal challenge, the courts should not be able to consider the outcome of the vote on the amendment in deciding the constitutionality of damage caps.

Opponents said Texans should not be asked to give the Legislature free rein to restrict their constitutionally protected access to relief in court when they suffer losses and seek to establish liability for damages. No one can predict what other types of caps a future legislature might enact under the broad, open-ended authority in this amendment. Some caps might be acceptable, while others might not, but the courts are the appropriate forum to decide these issues.

The damage caps authorized by the proposed amendment would not lower medical malpractice premiums, nor would they improve patient access to care. Increases in malpractice insurance rates are due to other factors, including premiums driven artificially low in the 1990s by competition, recent stock market performance, very low interest rates, and increases in claims and defense costs. A cap on damages would address none of these factors, nor would it affect whether doctors could remain in practice, yet people harmed by health-care providers would lose an important legal right to redress.

Even if damage caps were justified in medical malpractice cases, no similar justification exists to give the Legislature broad authority to limit damage awards in all other types of cases. HJR 3, like HB 4, represents an attempt to “piggyback” onto medical malpractice limitations broader, less justifiable liability restrictions in other types of cases. Also, requiring a vote by three-fifths of each house to enact future caps for nonmedical liability cases would protect Texans’ interests no better than the current system. Even though the Legislature already has the authority to enact caps with a majority vote, the courts oversee the use of that authority, and the Constitution protects the right of access to the courts.

The **HRO analysis** appeared in the March 26 *Daily Floor Report*.

Creating an inactive docket for certain asbestos-related claims

SB 496 by Janek
Died in the Senate

SB 496, as reported by the Senate State Affairs Committee, would have required cases involving asbestos-related injuries, but not incapacities, to be placed on an inactive docket established by the Texas Supreme Court. Cases involving asbestos-related incapacities would have been placed on an accelerated active docket. An incapacity requires proof of inability to perform certain functions, a higher standard than that of an injury. A case placed on the inactive docket could have been moved to the active docket by showing through objective medical criteria that the claimant had an asbestos-related incapacity. Cases placed on the inactive docket would not have been subject to discovery or other court orders. Claimants with an asbestos-related injury but not an incapacity could have filed their cases on the inactive docket to preserve their ability to sue. Filing fees for the inactive docket would have gone into a dedicated account in general revenue.

Supporters said Texas has almost half of the nation's 200,000 pending asbestos cases, and creating an inactive docket for some cases would increase efficiency and fairness in dealing with asbestos-related claims. Courts in other states have created similar types of dockets. Many cases brought by plaintiffs who have had been exposed to asbestos but are not incapacitated are clogging active dockets, making it impossible for many seriously injured plaintiffs to obtain relief. SB 496 would ensure that incapacitated plaintiffs could obtain the relief they needed, while preserving the rights of recovery of those who have been injured by asbestos.

The bill would assure plaintiffs of their ability to recover, because they could place their cases on the inactive docket and later remove them to the active docket if the plaintiffs became incapacitated. It would ensure that the most seriously injured plaintiffs received compensation by accelerating their cases ahead of less urgent cases. Businesses bearing the burden of expensive asbestos claims would have to pay damages only to claimants who were incapacitated and not to those who might become injured in the future.

Opponents said the courts, not the Legislature, should resolve any problem with asbestos cases to preserve the separation of powers. Requiring the creation of an inactive docket would prevent many people from recovering compensation for their injuries, because the bill would set too high a hurdle for a case to be removed to the active docket. By preventing many valid claims from being adjudicated, SB 496 would enable companies that have caused great harm to thousands of Texans to avoid paying compensation. Many plaintiffs cannot afford an attorney except on the basis of a contingency fee taken from any recovery received, and because the inactive docket would prevent any recovery until a case was removed to the active docket, many plaintiffs could not obtain the legal help they would need simply to preserve their claims. The state should allow the court system to continue to hold these companies liable for the harm they have caused.

Notes: The companion bill, HB 1240 by Nixon, died in the House Calendars Committee.



Criminal Justice

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Prohibiting death sentence for person found mentally retarded

HB 614 by Keel, et al.

Died in the Senate

HB 614 would have prohibited a death sentence for a person found by a jury to be mentally retarded and would have established procedures for presenting evidence of mental retardation to the jury. The jury's decision would have been made during the sentencing phase of a capital trial. A defendant who wanted the jury to consider the issue of mental retardation would have had to file with the court and the prosecutor a written notice of intent to raise the issue, accompanied by objective evidence of the defendant's potential mental retardation. The bill would have required courts to order the examination of defendants by qualified experts upon receiving objective evidence of mental retardation from any source. Upon request by the defense, a jury would have had to answer a specific question about whether the defendant was mentally retarded. Courts would have had to tell juries that if they decided a defendant was mentally retarded, the defendant would be sentenced to life in prison.

Supporters said HB 614 would establish clear, fair procedures to implement the U.S. Supreme Court's ban in *Atkins v. Virginia*, 536 U.S. ___ (2002), on the execution of the mentally retarded. HB 614 would protect the role of juries by allowing them to determine whether a defendant was mentally retarded and would mirror current law, which requires juries to decide about whether a defendant is a future danger and whether any mitigating circumstances would preclude a death sentence. It is appropriate to ask the jury that hears evidence and facts about a murder to decide whether the defendant has mental retardation. Details about how a defendant planned, carried out, or covered up a murder can shed light on whether the person is mentally retarded and can reflect the person's adaptive, functioning, social, and interpersonal skills.

HB 614 simply would create one more special issue to be decided by a jury during a trial's punishment phase. It would weave the issue of mental retardation into Texas' already established and court-approved death penalty procedures.

The bill would require the determination of mental retardation to be made during the punishment phase of a trial because deciding whether someone will receive a death sentence or life imprisonment is a punishment decision. No other fact relating to punishment is decided before a trial. Requiring the decision before trial would lead to unnecessary delays in capital trials, with most or even all defendants claiming mental retardation.

The bill would not include a specific IQ score for determining whether a person could be presumed to be mentally retarded. Such a finding should not be decided by any hard and fast rule, but by considering all the evidence.

Opponents said the procedure established by HB 614 would not be fair or cost effective. It would be better to decide the question of mental retardation before a trial began, not during the sentencing phase. This would be in line with current procedures that allow questions about a defendant's competency to stand trial to be decided beforehand.

HB 614 inappropriately and unfairly would ask jurors, who had heard the often horrible and gruesome details of a capital murder and decided that the defendant was guilty of the murder, to decide impartially the question of mental retardation. Whether a defendant has mental retardation should be an objective, clinical determination that is not colored by the emotion of a murder trial. The facts and circumstances of a crime are irrelevant as to whether someone has mental retardation. HB 614 could lead to court challenges with defendants arguing that they did not receive due process and were harmed because the jury was prejudiced.

Deciding the issue of mental retardation after a trial would be more costly than deciding the issue beforehand. If a defendant was found to be mentally retarded before trial, the cost of a capital trial — which averages \$2 million by some estimates — could be avoided. These defendants still could be tried for the crimes and given life sentences, but without the costly special procedures that are part of all capital trials.

Allowing the issue of mental retardation to be decided before trial would not cause unnecessary delays or lead to all defendants claiming mental retardation. Baseless claims of mental retardation could be avoided by requiring claims of mental retardation to be supported by evidence.

Other opponents said that a judge, not a jury, should decide whether a defendant had mental retardation. Judges have the experience and training necessary to weigh complicated evidence and to make objective decisions.

HB 614 is unnecessary. Texas' criminal justice system already has many safeguards to prevent execution of the mentally retarded, including allowing the issue of mental retardation to be raised when examining a defendant's competency to stand trial and allowing the issue to be considered as a factor that could mitigate against imposing the death penalty.

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

Requiring probation for possession of certain controlled substances

HB 2668 by Allen, et al.
Effective September 1, 2003

HB 2668 requires a judge to place a defendant on community supervision (probation) upon conviction of a state-jail felony offense of possession of certain controlled substances. If the defendant previously was convicted of a felony, the judge can place the defendant on community supervision or sentence him or her to a term of incarceration in a state jail. Unless the judge makes an affirmative finding that the defendant does not require treatment to complete the period of community supervision successfully, the judge must require the defendant to undergo substance-abuse treatment. The bill also requires the Drug Demand Reduction Advisory Committee to inform courts and prosecutors about grants and other sources of revenue to assist in providing the treatment.

Supporters said HB 2668 would divert defendants convicted of minor drug crimes from state jail to probation, saving the state an average \$40 per inmate per day and making more prison beds available for violent offenders. The bill would help alleviate the severe overcrowding of prison space projected by the Criminal Justice Policy Council. It also would help reduce crowded court dockets, because offenders, ensured the fair option of probation, would have less incentive to take cases to trial. Probation is a more appropriate and effective punishment for minor drug crimes than is jail time. As drug courts have proven, treatment for offenders who commit drug-related crimes is effective in reducing recidivism rates.

Opponents said mandating probation for drug offenders would be inappropriate. Judges should have the discretion to decide when to grant probation, based on the facts of the case and the defendant's characteristics. The bill would remove prosecutors' bargaining power, because a defendant, ensured of probation, would have nothing to lose by going to trial and, therefore, no incentive to reach a plea bargain. As a result, the bill could clog courts' trial dockets with minor drug-possession cases. HB 2668 inappropriately would reduce punishment for possession of serious drugs, including cocaine and heroin. It would send the message that personal use is acceptable, even though these drugs pose very dangerous health risks.

Other opponents said the bill would not go far enough because it would not allow a defendant to clear his or her record after successfully completing a term of probation. Ex-felons face many handicaps, such as the loss of the right to vote and serve on juries. That classification should be reserved for the most serious offenders.

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

Making evidence tested by unaccredited crime laboratory inadmissible

HB 2703 by Bailey, et. al.
Effective June 20, 2003

HB 2703 makes inadmissible in court physical evidence and testimony regarding the evidence if, at the time of forensic analysis or the time the evidence is submitted to the court, the crime laboratory or other entity conducting the analysis is not accredited by the Department of Public Safety (DPS). The bill does not apply to latent print examinations, breath tests, and examinations exempted by rule by the DPS director. Until September 1, 2005, physical evidence is admissible regardless of the accreditation status of the crime laboratory if the laboratory preserves one or more separate samples of the physical evidence and agrees to do so until all appeals in the case are final. The DPS director must establish an accreditation process for crime laboratories and other entities, including DNA laboratories, and must regulate DNA testing. The director can exempt certain crime laboratories from the accreditation process if independent accreditation is unavailable or inappropriate, the type of examination is admissible under a well-established rule of evidence, and the type of test performed is conducted routinely outside of a crime laboratory.

Supporters said HB 2703 would establish minimum standards that would help bring all laboratories in Texas up to national standards and would prevent the kind of shoddy forensic analyses that threaten to taint the state's criminal justice system. A DPS audit in December 2002 found widespread problems in the unaccredited Houston Police Department (HPD) crime lab. The audit team found that lab personnel lacked necessary training and experience; that a leaking roof might have contaminated evidence; that the lab had failed to calibrate properly equipment and instruments used in DNA testing; and that trial testimony of lab analysts had been based on questionable lab results. HB 2703 would prevent these kinds of abuses in the future. Requiring accreditation would ensure that laboratories received the funding, and employees received the training, necessary to function properly. Laboratories would undergo internal and external audits on a routine basis, ensuring that any problems would be detected early and that laboratories would have to keep up with changes in technology regarding DNA testing. Prosecutors, courts, and juries give great weight to forensic evidence, and it is essential that such analyses be reliable. HPD and the Harris County District Attorney's Office are reviewing cases as far back as 1992 involving DNA evidence that was tested at the HPD crime lab and that inculpated the defendant, to determine whether the evidence should be retested.

Opponents said HB 2703 would do nothing to address cases that already have been decided on the basis of unreliable forensic analyses from unaccredited labs.

Other opponents said HB 2703 would not go far enough. To protect the rights of criminal defendants fully, the bill should allow them to obtain through discovery the error rate for the laboratory where the evidence was tested and should make the error rate admissible at trial. That would enable the jury to consider the laboratory's record in deciding whether to trust the forensic analysis.

The **HRO analysis** appeared in Part Two of the April 29 *Daily Floor Report*.

Creating criminal and civil penalties for death of an unborn child

SB 319 by Armbrister, et al.
Effective September 1, 2003

SB 319 allows criminal and civil penalties to be imposed for the death or injury of an unborn child. It amends the statutes dealing with wrongful death to include in the definition of an “individual” an unborn child at every state of gestation from fertilization until birth. In the criminal statute, the bill defines “death,” for an individual who is an unborn child, as including the failure to be born alive. Penal Code provisions regarding criminal homicide and assault do not apply to the death or injury of an unborn child if the conduct charged is:

- committed by the mother of the unborn child;
- a lawful medical procedure performed by a doctor or other licensed health-care provider who had the required consent, and the death of the unborn child was the intended result of the procedure;
- a lawful medical procedure performed by a doctor or other licensed health-care provider with consent as part of an assisted reproduction as defined by the Family Code; or
- the lawful dispensation or administration of a drug.

Penal Code provisions regarding intoxication assault and intoxication manslaughter do not apply to the death or injury of an unborn child if the conduct was committed by the child’s mother.

SB 319 applies the Civil Practice and Remedies Code provisions regarding wrongful death if an individual (including an unborn child) who is injured would have been entitled to bring an action for his or her injury if the child had been born alive. Civil remedies for wrongful death of an unborn child are subject to exceptions similar to those under the criminal statute.

Supporters said SB 319 would close a gap in current law by allowing criminal and civil penalties for a third party who wrongfully injured or killed an unborn child against the mother’s wishes through actions such as murder, assault, or drunk driving. Current criminal law does not protect an unborn child from harm inflicted by a third party against the mother’s wishes, and civil law does not allow parents to sue for the wrongful death of their unborn child. SB 319 would be only a modest change to Texas law because other existing laws recognize unborn children independently of their mothers and give them certain protections and rights.

SB 319 would not infringe on a woman’s right to have an abortion or any other legal medical procedure to which the mother had consented. Concerns that the bill is designed to limit abortions or lay the groundwork to limit abortions are unfounded. The bill would make clear, specific exceptions to the applications of the law for any action to which a pregnant woman consented, including abortion. Similar laws in other states have been upheld and have not limited a woman’s right to abortion.

A majority of states allow civil and criminal penalties along the lines of those in SB 319. Thirty-seven states and the District of Columbia allow parents to sue for the wrongful death of an unborn child, and 27 states treat the killing of an unborn child against the mother’s wishes as a form of homicide.

Predictions that SB 319 would limit health care by exposing doctors to increased liability are unfounded. The bill's specific, clear exceptions for lawful medical procedures performed with a woman's consent would protect health-care providers from frivolous lawsuits. SB 319 simply would expand the class of people on whose behalf civil suits for wrongful death could be brought. Liability should not be limited when it comes to pregnant women and their unborn children. Courts could weigh whether lawsuits were frivolous.

Opponents said SB 319 could establish a statutory foundation to restrict a woman's right to abortion. The bill could result in a fetus being elevated to the legal status of personhood, resulting in a back-door approach to restricting women's access to abortion. The bill could be used to bring endless lawsuits or criminal charges against abortion providers, making them reluctant to perform this legal procedure and reducing access to abortion for women.

SB 319 would expose doctors to increased liability for medical malpractice suits. It could result in higher malpractice insurance rates for doctors and in their restricting or limiting the medical procedures they were willing to perform on pregnant women. This could increase the costs of an already overburdened health-care system and could result in less access for women to obstetricians and gynecologists. The bill unwisely would create a new cause of action for civil lawsuits and could lead to increases in frivolous litigation and to the imposition of criminal penalties in inappropriate situations.

The **HRO analysis** appeared in Part Three of the *May 26 Daily Floor Report*.

Allowing life without parole for capital murder

SB 348 by Lucio, et al.
Died in the Senate

SB 348 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 juries in capital murder cases are limited to choosing between death and a life sentence that carries a possibility of parole — not always acceptable alternatives. Though the current parole rate is low, it has been as high as 79 percent, 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 some other capital murderers are never released back into society and live the rest of their lives in prison. SB 348 would give victims' families and friends the peace of mind of knowing that a murderer sentenced to life in prison never would be eligible for release, and it would give prosecutors another tool for reaching plea agreements. The bill also would help ensure that an innocent person was not executed and would address concerns about the morality of the state 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 46 states that offer a sentence of life without parole with 35 of the 38 states that have the death penalty offering the option. Life without parole could be legislated so as to withstand court scrutiny and fit into Texas' death penalty punishment scheme. Resources now spent on pursuing the death penalty and responding to a lengthy appeals process would be used better 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 to protect the public. Life without parole already is available in effect, since capital murderers given life sentences must serve 40 year before being eligible for parole, and the average age of persons received on death row is about 27. Also, 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. The procedures that Texas uses to determine punishment in capital murder cases have been well-litigated, and any changes to current law would have to undergo 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. Life without parole inappropriately could replace the death penalty if juries consistently exercised that option, which would be inadequate punishment for the most heinous crimes.

Notes: The companion bill, HB 590 by Dutton, et al., and a similar bill, HB 366 by Dutton, died in the House Criminal Jurisprudence Committee.

Preventing, prosecuting, and punishing identity theft

SB 405 by Hinojosa
Died in the House

SB 405 would have created new offenses and remedies relating to identity theft. A person could not have obtained, possessed, transferred, or used personal identifying information of another person without that person's consent and with fraudulent intent. Businesses would have had to implement and maintain procedures to prevent unlawful use of personal identifying information collected by them. The bill would have established a state-jail felony (punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000) for using a scanning device or re-encoder to access, scan, store, or transfer information encoded on the magnetic strip of a payment card without the authorized user's consent and with intent to harm the user.

A person who violated the above provisions would have been liable for a civil penalty of between \$2,000 and \$50,000 for each violation in a suit brought by the attorney general, as well as attorney's fees, court costs, and restitution for a victim. The attorney general could have brought an action for a restraining order or injunction to prevent a person from engaging in prohibited conduct. A person injured by a violation could have applied to a district court for issuance of a court order declaring that the person was a victim of identity theft.

A person who accepted a debit or credit card for a business transaction could not have printed more than the last four digits of the account number or the month and year of the card's expiration date on a receipt. A violator would have been liable to the state for a civil penalty not to exceed \$500 for each month during which a violation occurred.

A peace officer who received a report of identity theft would have had to make a written report and provide the victim with a copy of the report. Identity theft could have been prosecuted in any county where the identifying information was obtained or used or in the victim's county of residence. The director of the Department of Public Safety (DPS) would have had to create an identity theft unit to help local law enforcement agencies investigate identity theft.

The bill would have prevented a state or local governmental entity from disclosing certain personal information, including social security numbers. Governmental entities would have had to establish procedures to ensure that they collected personal information only to the extent reasonably necessary to accomplish a legitimate governmental purpose. Local and state governments would have had to develop written privacy policies. A consumer reporting agency would have had to follow procedures in preparing or disseminating information to ensure maximum possible accuracy of the information about the consumer.

Supporters said SB 405 would help combat identity theft, the nation's fastest growing crime. It would protect victims of identity crimes and give relief to Texans who have lost valuable years of their lives and large sums of money trying to reestablish their credit ratings. Victims would be entitled to a court order declaring them to be victims of identity theft, which they could provide to employers who requested a criminal background check or, in a worst-case scenario, to police officers who arrested them because thieves had committed crimes in their names.

SB 405 would give law enforcement the tools to investigate these crimes effectively by creating an identity theft unit within DPS to assist local law enforcement. Because credit bureaus often will not believe a victim's story without a report to back it up, the bill would require a peace officer to make a police report of an allegation of identity theft. The attorney general could pursue identity thieves and impose hefty civil fines for violations.

SB 405 would ensure that government agencies were more responsible when collecting and distributing personal information that citizens must provide for everyday purposes, such as to obtain a driver's license. It also would impose reasonable requirements on businesses to protect consumers' identifying information. For example, if a request for a consumer report included an address for the consumer that differed from the address in the file, the agency would have to notify the requestor, and credit issuers would have to verify a change of address before issuing a new card. This would prevent an identity thief from substituting his or her home address for that of the victim and having new credit cards sent directly to the thief.

Opponents said better enforcement of existing laws and better education for consumers on how to protect themselves would make SB 405 unnecessary. While the bill's goals are worthy, the cost to the state of implementing it, estimated at \$500,000, would be too high in view of the state's current fiscal crisis. The financial impact on cities would be especially harsh. Developing privacy policies, establishing procedures to limit the collection of personal information, redacting public records, or creating separate systems of records for information that could or could not be disclosed would require additional resources such as computer programs and personnel. Also, preventing cities from disclosing personal information could harm businesses that use this information for a wide range of legitimate purposes.

The requirement that a credit-card issuer verify a change of address would be burdensome and costly and would not prevent identity theft. Only a very small portion of identity theft occurs through address changes. Also, complying with provisions that would prohibit more than four numbers to be printed on a credit card receipt could be costly, because new receipt machines cost about \$500, which could be a large expense for small businesses.

Other opponents said HB 405 would not go far enough. It should require consumer reporting agencies to take simple precautions to identify consumers before releasing credit reports, such as matching at least four separate items of identification regarding the consumer with information about the consumer in the file.

Notes: HB 254 by Kolkhorst, effective September 1, 2003, allows identity theft to be prosecuted either in the county where the offense occurred or in the county where the victim lives. SB 235 by Fraser, also effective September 1, requires sellers to print no more than the last four digits of a credit card account number or the month and year of the card's expiration date on a receipt.

The **HRO analysis** appeared in Part Two of the May 27 *Daily Floor Report*.

Allowing consumers to place security alert and freeze on consumer files

SB 473 by Ellis, et al.
Effective September 1, 2003

SB 473 gives consumers the right to request a security alert or a security freeze on their files held by consumer reporting agencies. A security alert notifies a recipient of a consumer report that the consumer's identity may have been used without the consumer's consent to obtain goods or services fraudulently. A security freeze prohibits a consumer reporting agency from releasing a report relating to the extension of credit involving that consumer without the consumer's express authorization.

A consumer reporting agency must place a security alert on a consumer's file within 24 hours of receiving the consumer's request to do so, and the alert must remain in effect for at least 45 days. A person who receives notification of a security alert in connection with a request for a consumer report for the approval of a credit-based application or for an application for a noncredit-related service may not lend money, extend credit, or authorize an application without taking reasonable steps to verify the consumer's identity.

Upon a request that includes a copy of a valid police report or complaint of identity theft, an agency must place a security freeze on a consumer's file within five business days. Within 10 days, the agency must send confirmation to the consumer along with a unique identification number or password that the consumer may use to authorize removal or temporary lifting of the security freeze. Security freezes do not apply to a consumer report provided to a state or local governmental entity acting under a court order, warrant, subpoena, or administrative subpoena. Security freezes and alerts do not apply to certain companies, including check service companies. The attorney general may file suit for injunctive relief to prevent a violation of these provisions or for a civil penalty not to exceed \$2,000 per violation.

Effective January 1, 2005, SB 473 also generally prohibits a person, other than a governmental entity, from:

- intentionally communicating or making available to the general public a person's social security number;
- displaying a person's social security number on a card or other device required to obtain a product or service;
- requiring a person to transmit a social security number over the Internet, unless the connection is secure or the number is encrypted;
- requiring a person's social security number for access to an Internet website, unless a password or other authentication device also is required; or
- printing a person's social security number on any materials, other than a form or application, sent by mail, unless required by state or federal law.

Supporters said SB 473 would help curb identity theft, one of the nation's fastest growing crimes. It would enable victims of identity theft to control the flow of their credit information by imposing a security alert or freeze on their consumer files. Security alerts have been proven effective in other states in preventing identity theft. A security alert also is an effective first line of defense

against fraud, because it requires verification of the consumer's identity. While some consumer reporting agencies already use a security alert system, their practices are inconsistent and ineffective. A security freeze only would prohibit an agency from releasing a report relating to the extension of credit, so any concerns about helping criminals conceal their records are misplaced. Agencies could release information to employers regarding prospective employees' backgrounds regardless of whether or not a security freeze was in place.

A consumer could lift the security freeze for a certain period or for a specific person and could ask that the freeze be removed if the case was resolved or if the consumer found the freeze to be inconvenient. A freeze would not prevent a consumer from locking in an interest rate for a home loan. In fact, the ability to lift a freeze within three days would allow consumers to designate a period of time or requestor so that a mortgage loan could be made.

SB 473 also would help reduce the risk of identity theft by restricting public availability of social security numbers. It would prohibit the public display or disclosure of social security numbers in mail, on receipts, and on the Internet. The bill would not prohibit private entities from using social security numbers but would affirm their right to do so for internal purposes. The bill's provisions for confidentiality of social security numbers would not apply to the public sector because of the overwhelming cost of converting records. However, reducing the private sector's reliance on social security numbers would minimize the impact of identity theft.

Opponents said SB 473 would take consumers down the wrong path by allowing them to impose a security freeze on their files. Shoppers who imposed a freeze would be inconvenienced later if they wanted to make a major purchase such as a car. Also, shoppers at retail stores could not obtain in-store credit, because an agency could take up to three days to lift a security freeze. Many consumers would forget to remove the freeze, which would deny them access to credit. A freeze also could prevent a consumer from locking in an interest rate for a home loan.

SB 473 could have the unintended consequence of helping criminals conceal their history. Some consumer reporting agencies run background checks for employers and apartment owners, among other entities. A sexual predator could impose a security freeze on his or her consumer file in an attempt to prevent prospective employers from obtaining information.

The bill would harm Internet commerce. Consumers shopping online do not realize which credit reporting agencies are used by which lenders or even who the lenders are. Therefore, they would have a hard time knowing which agency to call to lift the freeze on their consumer files.

Other opponents said SB 473 is unnecessary. Consumer credit agencies already use effective security alert systems to protect consumers from identity theft.

SB 473 would not go far enough. It should prohibit display or disclosure of social security numbers by the public sector, which also can lead to identity theft.

The **HRO analysis** appeared in Part One of the May 23 *Daily Floor Report*.

Defense to prosecution for trespass by people licensed to carry handguns

SB 501 by Armbrister, et al.
Effective September 1, 2003

SB 501 creates an exception to the application of the criminal offense of trespass by a holder of a concealed handgun license if the property on which the license holder carried a handgun was owned or leased by a governmental entity and was not a premise or other place on which the license holder was prohibited from carrying the handgun by Penal Code, sec. 46.03 or 46.035. The bill creates a defense to prosecution for criminal trespass if the basis on which entry on the property, land, or building was forbidden was that entry with a handgun was forbidden and if the person was carrying a concealed handgun and was licensed to do so. The bill also makes the Penal Code prohibition against weapons in certain places apply to the premises of government courts and court offices, instead of only to the courts and court offices themselves.

Supporters said SB 501 would make it clear that local governments or entities could not prohibit concealed handgun licensees from carrying concealed handguns on certain properties. Some cities, counties, and transit authorities have misinterpreted current law and an attorney general's opinion as authorizing them to ban concealed handguns from public places.

Cities and counties ignore the Constitution and the concealed-carry law's original intent when they ban weapons from any location other than the specific places listed in state statute. The Legislature considered and rejected bans on concealed handguns in many of the places where local governments now say they are off limits. Under the Texas Constitution, only the Legislature or a federal authority can regulate where licensees may carry concealed handguns. Local control, although an important concept in Texas, does not extend to constitutional rights. Prohibiting weapons in public places violates the rights of license holders and could make it needlessly difficult for a person lawfully carrying a concealed handgun to perform necessary tasks such as paying a utility bill or renewing a car registration.

Opponents said rescinding the authority of local governments to ban concealed weapons on public property by changing current law would erode local control and would result in local governments being treated differently from other property owners. Current law gives local governments the same rights as private property owners to regulate property under their control and to prohibit concealed handguns on their property. Local governments, not the state, should make decisions about the use of local public property and the need for public safety restrictions.

Local government entities are not overstepping their authority or violating the Texas Constitution but are using authority granted to them by the Legislature. Following enactment of the original concealed-handgun law in 1995, the 75th Legislature in 1997 authorized property owners, including local governments, to ban concealed handguns. Local governments are not violating anyone's rights by prohibiting handguns on certain public properties. License holders are not being barred from conducting any necessary public business; they simply are prohibited from bringing their concealed weapons onto certain properties.

The **HRO analysis** appeared in Part One of the May 9 *Daily Floor Report*.

Requiring use of biometric identifiers for driver's license system

SB 945 by Ogden
Died in the House

SB 945 would have required the Department of Public Safety (DPS) to create an identification system for driver's license applicants using the biometric identifiers of facial images, thumbprints, and fingerprints. DPS would have had to authenticate the biometric identifiers of applicants for personal identification certificates, driver's licenses, and commercial driver's licenses so that an applicant received only one original license, permit, or certificate; did not obtain a duplicate fraudulently; and did not commit other fraud in connection with the application. DPS would have had to accept as proof of identity when issuing driver's licenses an identity document issued by another country's government, such as a passport, consular identity document, or national identity document, if the document contained certain information and the other country had procedures by which DPS could verify the document.

SB 945 would have raised the fee for obtaining and renewing a driver's license from \$24 to \$30. Before September 1, 2005, \$6 of each fee collected for a general license issuance or renewal would have gone to support reengineering of the driver's license system. After August 31, 2005, \$2 of each fee would have gone to replace, maintain, or support the driver's license system, and \$4 of each fee to the state highway fund.

Supporters said SB 945 would help combat fraudulent driver's licenses, help prevent identity theft, bolster homeland security, and give DPS the funds to update its aging driver's license computer system and failing hardware, while continuing to protect the privacy of licensees and to safeguard Texans' private information. SB 945 would not expand current law broadly — DPS already collects applicants' thumbprints, which are biometric identifiers — but simply would allow the department to collect another type of identifier and to base its identification system on the identifier. The benefits of the state having a reliable, accurate database that law enforcement could use to authenticate identity in combating terrorism far outweigh concerns about privacy. Other states use biometric identifiers in connection with driver's licenses without violating drivers' privacy.

Safeguards in the bill would prevent abuse or sharing of biometric information. Biometric data could be disclosed only for legitimate law enforcement purposes or under other restricted circumstances, such as a grand jury subpoena. Concerns about the use of biometrics for some type of mass identification program using cameras in public places are unfounded, because such situations would not meet the requirements for disclosure.

Allowing the use of identity documents from other countries to verify identity when applying for a license would not lead to an increase in fraudulent documents or jeopardize the integrity of driver's licenses for identification purposes, because the bill would require that DPS be able to verify the identity document. Other countries, including Mexico, have databases that can be accessed to make such verifications. Also, allowing the use of other countries' documents would not reward illegal immigrants. A driver's license is not proof of citizenship, and granting one should not be contingent on a person's immigration status. Immigration is a federal matter, and DPS should not be involved in enforcing immigration laws at driver's license bureaus. It is far better for all drivers — including undocumented workers — to be licensed and insured than for them to drive illegally.

The license renewal fee increases in SB 945 would be modest and affordable — amounting to only \$1 per year — since licenses need to be renewed only every six years.

Opponents said using biometric identifiers for the driver’s license program would erode Texans’ individual privacy and unwisely would expand the government’s reach and power. This would be another step in government’s efforts to gather more and more information on private citizens. SB 945 would allow biometric information on law-abiding people to be compiled into a massive database of all licensed drivers. If this database were connected with the expanding network of cameras positioned in many public places, the government could invade Texans’ privacy by tracking their everyday movements.

Biometric identifiers can contain a greater amount of personal information than the photographs used on current licenses. Analysis of biometric information can go beyond identifying a person and can reveal highly sensitive information, such as a person’s genetic makeup or medical history. SB 945 would allow DPS to collect facial images, vastly expanding the agency’s current authority to collect thumbprints. Also, the thumbprints now collected are not in a searchable database like the one that SB 945 would establish.

Using biometrics on driver’s licenses would not make the licenses fraud-proof and would not help significantly to combat terrorism. A different person’s biometric identifier could be placed on a license, just as a photograph of one person can be placed on a license with another person’s name and address. Most of the September 11 terrorists were in the United States legally, and most obtained their driver’s licenses legally.

Requiring DPS to accept certain types of identity documents issued by other countries could make it difficult to verify an applicant’s identity, thereby increasing the possibilities for fraudulent identification and jeopardizing the integrity of driver’s licenses as a source of identification. Also, Texas should not make it easier for people who are in this country illegally to obtain driver’s licenses by requiring DPS to accept other countries’ identity documents. This would facilitate their living and working illegally in the United States.

The proposed fee increases are unwarranted, given that biometric technology is unproven for use with a large population like that of Texas drivers. The fee increases would hit low-income drivers hardest.

The **HRO analysis** appeared in Part One of the May 27 *Daily Floor Report*.

Determining competency to stand trial in criminal cases

SB 1057 by Duncan
Effective January 1, 2004

SB 1057 changes procedures for determining the competency of criminal defendants to stand trial. Standards for considering a person incompetent to stand trial remain the same as under current law. The defense, prosecution, or court can raise the issue of whether a defendant is competent to stand trial. SB 1057 sets minimum requirements for the background and experience of experts who examine the defendant and requires the experts to consider several specific issues when reporting on a defendant's competency. A court need not hold a hearing to decide whether a defendant is incompetent to stand trial if all parties agree that a defendant is incompetent. A court can decide whether a defendant is competent unless the defense or prosecution or the court itself asks the jury to decide. The jury must be different from the jury selected to decide whether the defendant was guilty.

SB 1057 also establishes a procedure for forcing certain defendants to take psychoactive medications. A court, after a hearing, can issue an order to compel medication only if it is supported by two physicians and if it finds that:

- the medication is medically appropriate, is in the defendant's best medical interest, and does not present side effects that cause harm greater than its medical benefits;
- the state has a clear and compelling interest in the defendant's maintaining competency to stand trial;
- no other less invasive means exists to maintain the defendant's competency; and
- the medication would not prejudice unduly the defendant's rights or use of defensive theories during a trial.

The bill also establishes procedures for initial 120-day commitments to mental health or mental retardation facilities, extended commitments to facilities, and redeterminations of competency.

Supporters said SB 1057 would streamline and clarify the process used to determine if criminal defendants are competent to stand trial. It would make changes recommended by a legislative task force to address complaints that current law on determining competency is confusing, complex, repetitive, and difficult for attorneys and judges to use. SB 1057 would make the process more efficient by no longer requiring that competency hearings be held when all parties agree that a defendant is incompetent. However, a defendant could choose whether to have a judge or jury make the decision.

SB 1057 would set standards for the qualifications of experts who examine defendants and would set minimums for what they must report. Current law, which has no such requirements, results in discrepancies in the qualification of experts and in incomplete or inadequate reports. Texas has substantial medical expertise, so it should not be difficult to find people who meet the bill's criteria.

The bill's provisions for forcibly medicating a defendant would not violate a defendant's constitutional rights. Current law allows forcibly medicating a person who is committed civilly to a mental health facility. SB 1057 passed the scrutiny of constitutional law experts while being

developed, and it contains many safeguards to protect defendants and to ensure that they would be forced to take medications only when appropriate. These provisions could help stop a vicious cycle in which defendants go to mental health facilities and, with the use of medications, become competent to stand trial, but then stop taking the medications, become incompetent, and are recommitted to the facilities to regain competency.

Opponents said SB 1057's requirements for the qualification of experts to investigate claims of incompetency could make it more difficult for courts to find experts and would increase costs, especially in smaller counties without a big pool of medical specialists. The provisions allowing defendants to be medicated forcibly would violate their rights under the U.S. Constitution, including the right to be free from unwanted physical and mental intrusions. The bill also could violate a person's liberty interest in bodily integrity. It would allow medication to be forced on a person who had not even been tried or convicted of a crime and without a determination that the person was dangerous. Forcing medication on defendants also could violate their rights to a fair trial by changing the defendants' demeanor and interfering with their ability to assist in their own defense.

The **HRO analysis** of the House companion bill, HB 2014 by Keel, appeared in the April 25 *Daily Floor Report*.

Reorganizing the parole board and authorizing parole commissioners

SB 1678 by Whitmire
Died in conference committee

SB 1678 would have reduced the number of members of the Board of Pardons and Paroles from 18 to seven, authorized the board to hire parole commissioners to make decisions about parole, and eliminated the current board policy committee. The governor would have continued to appoint the board's presiding officer, who would have hired and supervised the parole commissioners with advice and consent of the board. Parole commissioners, along with the seven board members, would have determined which inmates were released on parole or mandatory supervision, the conditions of release, and the continuation, modification, and revocation of parole and mandatory supervision. Board members and parole commissioners would have acted in panels of three to make their decisions, and the presiding officer would have designated the composition of each panel, which would have had to be composed of at least one board member and any combination of board members and parole commissioners.

Supporters said SB 1678 would improve the organizational structure and chain of command of the Board of Pardons and Paroles so that it could operate more effectively and efficiently. The current 18-member board is too large to handle efficiently both its policy-making role and its day-to-day role in deciding whether to release inmates on parole. It also can be difficult to ensure that 18 gubernatorial appointees follow the board's procedures and rules without a clear chain of command among board members. SB 1678 would authorize the hiring of parole commissioners to work with the board in dealing with day-to-day parole decisions. Parole commissioners, common in other states, would be criminal justice professionals and would be trained in parole decision-making and in the use of parole guidelines. Parole board members and commissioners would retain independence and discretion in making decisions about parole. The board has policies and rules in place, and the newly appointed board members and newly hired commissioners could include people now on the board.

Because of constitutional requirements, board members — not parole commissioners — would continue to make decisions about commutations and pardons. Because of other statutory provisions, board members would continue to make decisions about parole for offenders convicted of capital murder, certain sex offenses, and certain repeat offenders.

The bill should not amend current law to require board members to meet as a body to consider clemency in capital murder cases. Courts have found the board's current procedure constitutional, and instituting such a requirement in regard to capital cases could open the door for litigation against the board. SB 1678 is not the proper vehicle for such a change in state law.

Opponents said the board's current structure was established in 1989 to address problems caused by a smaller appointed board working in conjunction with hired parole commissioners. SB 1678 unwisely would move the parole system back to that problematic structure. Under the current system, gubernatorial appointees — instead of bureaucrats hired as parole commissioners — are held accountable for the decisions they make concerning public safety. The parole board is a constitutionally mandated board, and its authority should not be diluted by having state employees perform the same job as appointed board members. Also, SB 1678 could cause disruptions in the

parole process while newly hired parole commissioners got up to speed on board policies and procedures.

Other opponents said SB 1678 should include a requirement that the board meet as a body to consider clemency in capital cases and that the decisions of individual board members be announced publicly. Those measures would help prevent the execution of innocent inmates, enable board members to be held more accountable for their decisions, and make certain decisions more transparent to the public.

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

Allowing certain applicants for habeas corpus to be released on bond

SB 1948 by Whitmire, et. al.
Effective June 2, 2003

SB 1948 allows a convicting court to order the release on bond of an applicant for a writ of habeas corpus, other than from a judgment imposing the death penalty, subject to conditions imposed by the convicting court, until the applicant is denied relief, remanded to custody, or ordered released. The convicting court can release the applicant on bond only if it makes proposed findings of fact and conclusions of law jointly stipulated to by the applicant and the state, or if the court approves proposed findings of fact and conclusions of law made by an attorney or magistrate appointed by the court to perform that duty, and jointly stipulated to by the applicant and the state.

Supporters said SB 1948 would end the injustices suffered by the 13 Texans who remain in prison after the notorious drug raid in the Panhandle town of Tulia. The uncorroborated testimony of one undercover law enforcement officer there led to the conviction of 38 defendants for drug trafficking, more than two dozen of whom went to prison for terms ranging from 20 to 90 years. Thirteen wrongly convicted Texans remain in prison, although the undercover officer has been indicted and arrested on felony perjury charges. An evidentiary hearing has been held, and joint, stipulated findings of fact and conclusions of law have been submitted to the Court of Criminal Appeals. All parties agree that the case presented against those defendants was rife with inconsistencies and blatant perjury and that allowing the convictions to stand would be a travesty of justice.

The parties have asked the Court of Criminal Appeals to remand the cases to the convicting court, and the special prosecutors have said they will dismiss the cases at that time. However, it could take the court up to two years to act on this matter. In the meantime, the 13 Texans whose lives already have been destroyed will be forced to remain in prison. The imprisoned defendants include a mother of two young children and an elderly defendant with acute diabetes, who desperately need their freedom now.

The bill had **no apparent opposition**.

Notes: A related bill, HB 2625 by Lewis, which died in the House, would have prohibited a defendant from being convicted of a controlled-substance offense based solely on the uncorroborated testimony of an undercover officer.

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

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Creating the Texas Residential Construction Commission

HB 730 by Ritter, et al.
Effective September 1, 2003

HB 730 creates the Texas Residential Construction Commission; requires builders to register with the commission and allows residential construction arbitrators to be certified by the commission; establishes a state-sponsored inspection and dispute-resolution process; and requires the commission to adopt limited statutory warranties and building and performance standards for new homes. The nine-member commission includes four registered builders, three public members, and a licensed professional engineer. A builder who is not registered with the commission may not build a home. The commission must establish a voluntary Texas Star Builder Program for registered builders that meet certain requirements, as well as requirements for certifying residential construction arbitrators. The bill establishes the commission's disciplinary powers and allows the commission to impose a \$5,000 administrative penalty for each violation of the law.

A builder or homeowner may ask the commission to resolve a dispute arising from an alleged construction defect. The request must be made within two years of discovering the defect, but no later than 30 days after expiration of the applicable warranty. The bill sets timetables for the homeowner to notify the builder of an alleged construction defect, for the commission to appoint a third-party inspector, for the inspector to issue a recommendation, and for the homeowner or builder to appeal the inspector's recommendation to a review panel appointed by the commission's executive director.

A homeowner must comply with the state-sponsored inspection and dispute-resolution process before initiating an action to recover damages or other relief arising from an alleged construction defect. In any action brought after a recommendation by a third-party inspector or a ruling by a panel of state inspectors, the recommendation or ruling is a rebuttable presumption of the existence of a construction defect or reasonable manner of repair. A party seeking to dispute, vacate, or overcome that presumption must establish by a preponderance of the evidence that the recommendation is inconsistent with applicable warranty and building standards.

The commission must adopt limited statutory warranties and building and performance standards for residential construction. The bill adopts construction codes for residential construction in unincorporated areas. The construction of each new home or home improvement must include a warranty of habitability. A contract between a builder and homeowner may not waive the limited statutory warranties or building and performance standards. A builder may choose to provide a warranty through a third-party warranty company approved by the commission.

Supporters said HB 730 would establish a method for builders and homeowners to resolve disputes without resorting to costly and lengthy litigation. The new commission would oversee dispute resolution based on the recommendations of independent inspectors. All builders in Texas would have to register with the commission, which would adopt building performance standards and statutory warranties that would apply to all new homes built in Texas.

Through the state-sponsored inspection and dispute-resolution process, homeowners and builders could resolve disputes fairly without resorting to the adversarial process set up under current law.

Upon noticing a construction defect in a new home, a homeowner first would contact the builder to remedy the defect. If they could not resolve a dispute over the defect, either party could ask the commission to resolve it. The commission would have to appoint the next available inspector within 15 days, and the inspector would have to issue a recommendation within 15 or 60 days of being appointed, depending on the nature of the defect. Current law provides no guarantee that an inspector would be on-site this quickly to perform an inspection. In fact, both sides probably would be hiring lawyers and experts already.

The bill would not prevent a homeowner from seeking redress at the courthouse. Following the inspection process — including an opportunity to appeal the inspector’s recommendation to a review panel — either party could file an action to recover damages or other relief.

HB 730 also would establish clear performance standards and warranties for new homes. Though building codes specify how a home is to be built, they are silent as to how a home should perform when built. The bill would specify performance standards so that both homeowners and builders would know exactly what standards a new home should meet. The warranties would ensure clear and consistent application, instead of the vague implied warranties that courts have imposed.

Opponents said HB 730 would diminish the rights of homeowners who are victims of negligent or fraudulent construction practices. It would create a commission dominated by builders, rather than representing builders and consumers equally. In the event of a dispute between a homeowner and builder, the homeowner would have to pay for a complex and costly bureaucratic process with significant legal consequences.

HB 730 would increase costs for homeowners. If a dispute arose with a builder, a homeowner would have to participate in a so-called administrative process before going to court. The stakes for navigating this process unwittingly would be high enough that homeowners would have to hire lawyers to see them through it. Participating in the mandatory process also would require a homeowner to pay an application fee and bear the expense of a third-party inspector.

The limited warranties that the commission would adopt are in use today. In most cases, a third-party company provides a warranty covering the entire home for one year, mechanical systems for two years, and major structural defects for 10 years. These warranties are nearly worthless for expensive foundation defects, because the standard for what constitutes a major structural defect is so high. A cracked foundation is very expensive to repair and usually is covered by a limited warranty only if it affects a load-bearing wall, rendering the house unsafe or uninhabitable. HB 730 would codify these flawed warranties in state law.

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

Restricting unsolicited commercial e-mail or “spam”

HB 1282 by McCall
Effective September 1, 2003

HB 1282 restricts electronic mail (e-mail) sent without the recipient’s consent by a person with whom the recipient does not have an established business relationship. The subject line of an unsolicited commercial e-mail containing obscene or sexual content must begin with “ADV: ADULT ADVERTISEMENT.” The subject line of an unsolicited commercial e-mail that does not include sexual content must begin with “ADV:”.

The sender of an unsolicited commercial e-mail must provide a return address to which the recipient can request removal from the sender’s e-mail list. The sender must remove the recipient from the list within three days of such a request. A sender may not provide a recipient’s e-mail information to another entity after that person has requested removal from the list. The bill also prohibits intentional transmission of a commercial e-mail that falsifies or obscures the message’s routing information, contains deceptive information in the subject line, or uses the domain name of another person without that person’s consent. An e-mail service provider is not liable for an action to block a prohibited e-mail if the provider has a dispute resolution process for senders of blocked e-mail. A telecommunications utility or e-mail service provider cannot be held liable, and a person does not have cause of action against such an entity, if it only provides intermediary or transmission services of a prohibited e-mail.

A person or e-mail service provider injured under HB 1282 may sue for damages, including lost profits or the lesser of either \$10 for each prohibited message or \$25,000 for each day a prohibited message is received. Failure to identify properly a sexually explicit email is a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of \$2,000. The attorney general can intervene in a suit, but a court cannot certify an action as a class action. A court can protect business trade secrets in any case brought under the legislation.

Supporters said HB 1282 would combat the growing problem of unwanted commercial e-mail messages, often called “spam.” Industry sources estimate that spam accounts for up to 40 percent of all e-mail traffic, costing businesses millions of dollars through lost productivity and computer server upgrades required to handle the immense volume of messages. The bill would protect consumers by requiring senders of spam to identify these e-mails clearly, allowing computer users to recognize and delete unwanted messages. More importantly, by requiring clear labeling of sexually explicit messages, HB 1282 would help protect children, families, and others with no interest in pornographic messages from unwittingly opening offensive emails.

Opponents said HB 1282 would not curtail out-of-state spam. Texas has no authority to regulate commercial e-mail sent from other states, and courts have struck down similar laws in other states. This issue would be addressed most effectively at the federal level.

The **HRO analysis** appeared in the April 2 *Daily Floor Report*.

Allowing exhibition of amusement redemption machines by charities

HB 1407 by Hupp
Died in the House

HB 1407 would have allowed the exhibition of amusement redemption machines by organizations authorized to conduct charity bingo in Texas; required the Lottery Commission to regulate the exhibition, display, and promotion of the machines; and required the machines to be approved by voters in a city or county through a local-option election. The bill would have established an annual registration fee for each machine and an annual license fee each holder of a license to exhibit the machines. It would have defined an amusement redemption machine as a coin-operated machine that by chance or a combination of skill and chance affords the player an opportunity to receive a prize. The term would not have included a machine that awards the user a prize directly from the machine or a machine from which the opportunity to receive a prize varies depending on the user's ability to place a ball or other object into the machine.

Supporters said HB 1407 would narrow the scope of gambling in Texas by requiring that amusement redemption machines be operated only by charities and by requiring local-option elections to approve use of the machines in any area. This would close loopholes in current law that have allowed electronic gambling to proliferate under the cover of a law that was intended only to legalize amusement games that offer no significant payoff. HB 1407 would provide the clarification that law enforcement officers have been requesting so that they can combat illegal gambling, while allowing Texans to enjoy legitimate amusement machines.

The definition of an amusement redemption machine would ensure that the bill authorized only machines used purely for amusement, not for gambling. The bill clearly would outlaw true gambling machines that gave cash payouts. The Lottery Commission would restrict amusement machines to certain charities to ensure that only appropriate entities — not large casino-style houses — could operate the machines. HB 1407 would respect the will of voters by allowing local control of whether an area could have amusement redemption machines. This would help with enforcing the law, because law enforcement officers would know where the machines could be placed legally.

Opponents said HB 1407, rather than clarifying the law on amusement machines, would complicate the law further. It would continue to allow the proliferation of “eight-liner” machines, which should be considered illegal slot machines, by charities that could operate an unlimited number of them. If an outright ban on the machines cannot be instituted, the law should be made more clear so that only purely amusement machines are allowed. A nongambling amusement machine should have to operate solely on skill with no element of chance involved. The confusing definition in HB 1407 would make it difficult to determine whether a machine was legal, which, in turn, would make it difficult to prosecute cases of illegal gambling.

Allowing local-option elections to determine where the machines would be located would make it difficult for law enforcement to combat illegal gambling. Allowing people in one jurisdiction to have a defense to prosecution for gambling while that defense would not be available in another jurisdiction could raise issues of equal protection under the law.

Other opponents said HB 1407 is unnecessary. Current law outlawing gambling devices and defining legal amusement machines is adequate to control gambling. If illegal games are proliferating, the state should step up enforcement and prosecution instead of changing the law. Also, it would be unfair and inappropriate to limit the machines to charities. If the machines are for amusement, there is no reason why other entities should be prohibited from offering the machines to Texans who enjoy this type of harmless entertainment.

The **HRO analysis** appeared in Part One of the May 8 *Daily Floor Report*.

Continuing the Lottery Commission and amending bingo regulations

SB 270 by Jackson
Died in conference committee

SB 270, as passed by the House, would have continued the Texas Lottery Commission (TLC), the State Lottery Act, and the Bingo Enabling Act until 2015.

Lottery. As laid out in the House, SB 270 would have allowed the TLC to enter into a written agreement with other states or jurisdictions, including foreign countries, to participate in multijurisdiction lottery games. A floor amendment removed a provision that would have allocated \$500,000 from the state lottery account in each fiscal biennium to the comptroller to provide grants to Texas residents to pay the costs of attending a public junior college, technical institute, or state college.

The bill would have repealed current law requiring denial, suspension, or revocation of a license to sell lottery tickets for a person whose location for the lottery sales agency was a location for which a person held a wine and beer retailers' permit, mixed beverage permit, mixed beverage late-hours permit, private club registration permit, or private club late-hours permit. However, a floor amendment removed this authority.

Bingo. SB 270 would have made many changes to the statutes governing bingo. It would have created a new category of people who would have to be licensed by the TLC, called authorized organization employees. A person could not have participated or assisted in the conduct, promotion, or administration of bingo in any capacity unless the person held an authorized organization employee license. The TLC would have had to develop a standard license renewal process and establish qualifications and standards of conduct for licensees. The commission could have established procedures for suspending licenses summarily, would have had to adopt an administrative penalty schedule, and could have issued subpoenas to compel the attendance and testimony of witnesses or the production of evidence.

The TLC would have had to establish a maximum amount of net proceeds as operating capital that a bingo conductor could retain in its bingo account, not to exceed \$50,000. Instead of requiring organizations to disburse for charitable purposes at least 35 percent of their adjusted gross receipts, organizations would have had to disburse all of their adjusted gross receipts, under a new calculation, except for the amount that could be retained in their bingo accounts.

The bill would have amended the definition of a prohibited video lottery machine and created criminal and civil penalties for violating rules relating to prohibitions on video lottery machines. It also would have increased certain criminal penalties associated with bingo.

Gaming machines. SB 270 would have authorized the comptroller to seal a prohibited gaming machine so that it could not be operated and to assess penalties against a person who exhibited, displayed, or provided to another a prohibited gaming machine. In each fiscal biennium, the bill would have allocated from the state lottery account \$5 million to the comptroller to enforce statutes against prohibited gaming machines and \$5 million to the criminal justice division of the Governor's Office to provide grants to help local governments prosecute offenses involving bingo, keno,

blackjack, lottery, roulette, video poker, or other gambling devices. The bill would have restricted issuance of certain licenses relating to bingo and the lottery if gambling devices were on or near certain premises relating to the games.

Supporters said:

Lottery. SB 270 would make necessary changes in the law governing the state lottery. The current budget shortfall requires the state to embrace other means of raising revenue without punishing residents with untimely tax increases. For example, participation in a multijurisdiction lottery like the successful “Powerball” lottery game likely would yield about \$100 million in the coming biennium, with a similar revenue stream in later years. Allowing restaurants and bars to sell lottery tickets, as in other states, similarly would yield an additional \$4.5 million to \$30 million each year. Since its inception in 1992, the lottery has returned more than \$10 billion to Texas, without which the state could not have funded adequately public education and other critical services. Provisions of SB 270 were crafted carefully to ensure that the lottery grows as a viable revenue source funded exclusively by volunteers.

The bill would authorize but not require the TLC to enroll the state in a multijurisdiction lottery. The commission could decide against entering into any agreement with another state or country that would not benefit Texas.

Current standards that apply to applicants for lottery sales licenses would apply to applicants who operated restaurants or bars, ensuring that only responsible sales agencies could sell lottery tickets. Patrons drinking alcoholic beverages are at least 21 years old and presumably could exercise reasonable judgment about their spending.

Bingo. SB 270 would improve the state’s regulatory oversight of charity bingo to help ensure that the games are honest and that charities benefit from the profits. Because of the large amounts of cash involved in these games, the state must have oversight powers to ensure that qualified, honest charities — and not unscrupulous entities — benefit from the games.

A new, broad class of bingo licensees is necessary to give the TLC adequate regulatory authority. Currently, the commission’s regulatory reach stops at the organization that is licensed to conduct bingo. The commission can take action against an employee of the organization only by going after the organization itself. SB 270 would give the commission authority over all bingo employees, but the provisions are not so broad as to include people who are not part of the bingo games. SB 270 would amend the commission’s licensing procedures to ensure that they are fair to licensees, adequately protect the public, and safeguard charitable revenue.

SB 270 would simplify the distribution of bingo proceeds to charities to ensure that a fair amount of money went for charitable purposes. The current formula is confusing and burdensome and can result in some charities not being required to make any charitable contributions. The bill would change the distribution formula so that charities would have to distribute all of their adjusted gross receipts except for amounts that the commission determined could be retained. It would be appropriate to give the commission the flexibility to determine the amount that could be retained, rather than establishing a statutory amount that could not be changed when necessary.

The penalties established by SB 270 would be appropriate for bingo offenses and necessary to punish properly those who abuse the public trust by violating bingo laws. It is not unusual for a state regulatory body to be given subpoena power.

Gaming machines. SB 270 would help stop the proliferation of illegal gambling machines, including so-called “eight-liners.” By allowing the comptroller to seal illegal gaming machines, establishing penalties relating to breaking a comptroller’s seal, and restricting bingo and lottery licenses if illegal machines were on the premises or nearby, the bill would establish some state oversight and regulation of the machines, instead of relying solely on local law enforcement authorities. SB 270 would help in the fight against these machines by directing money to the comptroller and the Governor’s Office to combat the machines. These provisions would apply only to illegal gambling machines, not to any legal amusement machines. The TLC would not overstep its authority by going after grocery stores or other entities with pure amusement machines that were located near bingo premises or lottery sales agents, because the commission’s authority would be limited to illegal machines.

Opponents said:

Lottery. SB 270 would place Texas and its residents on a slippery slope of permissive lottery dealings that would cost the public more in the long term by increasing the “footprint” of state-sponsored gaming. Participation in a multijurisdiction lottery would lead state government further from its core purposes. By offering the prospect of winning larger sums, albeit with the smallest of odds, the state would entice more residents to spend frivolously and diminish their security instead of investing their earnings for the future. While the private market may offer people opportunities to spend unwisely, state government should not act as a sponsor of such activity on an increasing scale.

Additional lottery sales likely would not remedy the state’s financial problems, because lottery profits typically are a substitute for tax dollars, not a supplement. Rather than resort to a lottery and other gaming contrivances to pay for public education and other necessities, the state should reform its tax policies to accommodate needed spending.

The multijurisdiction lottery provision would allow the state to entangle itself in gambling enterprises extending to Mexico and beyond. Enforcement of any international compact to ensure that Texas received its share from a common lottery account would prove difficult, if not impossible, if the member in breach were a foreign state. Also, the prospect of larger winnings through a multijurisdiction lottery likely would entice spending by gaming enthusiasts who otherwise would play bingo. This change would cost charities and others who benefit from and rely on bingo expenditures.

SB 270 would repeal a sensible prohibition on the operation of lottery sales agencies in private clubs, the premises of wine and beer retailers, and other places where people buy and consume alcohol. This restriction provides some separation between a temptation created by the state and the impulses of people who may be suffering from impaired judgment or even alcoholism, depression, or another disease caused by alcohol consumption. The buffer between lottery sales and alcohol consumption should remain in effect.

Bingo. SB 270 would impose unnecessary burdens on organizations that conduct bingo and would give the TLC too much oversight authority. By requiring state licensure of all people who

participated or assisted in bingo in any capacity, SB 270 would create an overly broad category of licensees that could result in anyone with even the remotest affiliation with bingo — perhaps as many as 20,000 people — having to obtain a license. Current law, which requires licensing of people who conduct bingo, lessors of bingo premises, and manufacturers and distributors of bingo equipment and supplies, is adequate to regulate bingo. The fee charged to these licensees would come from money that otherwise could be spent on charitable endeavors. Also, allowing the TLC to establish the maximum amount that charities could retain as operating capital could result in the commission setting the amount so low that charities could not weather the normal cyclical downturns in bingo.

SB 270 would increase some penalties associated with bingo so that they would be overly harsh. For example, failing to maintain proper records for whatever reason would carry a potential one-year jail term. Authorizing the TLC to issue subpoenas and to compel attendance and testimony of witnesses would give the commission too much power with too much potential for abuse. Subpoena power is inappropriate for a state commission, given that a prosecutor must go to a court or a grand jury to have a subpoena issued. People issued subpoenas by the commission would have to go to court to challenge subpoenas that were not issued by the court originally.

Gaming machines. It would be inappropriate to give the comptroller regulatory authority over illegal gaming machines, which would be handled better by law enforcement agencies. Also, provisions in the bill that would restrict the TLC's licensing authority if illegal gaming machines were nearby are too broad. They could lead to innocent bingo operators or lottery sales agents being penalized for other people's actions, or to penalties being imposed for the possession of legal machines.

Notes: HB 2455 by Chisum, et al., continues the Lottery Commission and its current functions until September 1, 2005. HB 3459 by Pitts authorizes the commission to enter into a multijurisdiction lottery game and gives it accompanying rulemaking authority. HB 2519 by Flores and Raymond, effective September 1, 2003, makes numerous changes to the bingo statutes.

The **HRO analysis** appeared in Part One of the May 27 *Daily Floor Report*.

Continuing TDED as the Texas Economic Development and Tourism Office

SB 275 by Nelson
Effective September 1, 2003

SB 275 renames the Texas Department of Economic Development (TDED) as the Texas Economic Development and Tourism Office (TEDTO), which will be transferred into the Governor's Office and continued until September 1, 2015. TDED's governing board will be abolished, and the governor will appoint the TEDTO executive director and assume the duties previously held by the governing board, such as directing the office's activities, establishing its policies, and reviewing its budget.

Tourism promotion, including out-of-state tourism marketing, is TEDTO's primary duty. TEDTO will enter into a memorandum of understanding with other state agencies involved in tourism promotion and will develop a strategic plan to coordinate and evaluate all tourism efforts.

SB 275 abolishes the Texas Aerospace Commission and transfers its functions into TEDTO. The renamed Texas Aerospace and Aviation Office will analyze space and aviation research, promote and develop these industries, and support state and local spaceport authorities. The office also will administer a spaceport trust fund that will be used to pay for the development of spaceport infrastructure.

TEDTO will work with industry organizations to identify and develop concentrations of interconnected businesses and industries known as "industry clusters" throughout the state. The bill also creates the Economic Development Bank, which combines several existing economic development finance programs. The Economic Development Bank will offer financial incentives and assistance to communities and businesses to fund local development efforts. The bill also creates the Product Development and Small Business Incubator Program, which will issue bonds to finance the development, production, and commercialization of new products, particularly in the areas of biotechnology and biomedicine.

SB 275 transfers the department's enterprise project program to the Economic Development Bank and expands the definition of a project eligible for funding under the program. Businesses will be able to petition local governments to apply for funding under the program, and the bill creates a formula by which the department will award tax refunds to businesses based on the amount of capital investment and the number of jobs created.

The bill also extends a funding mechanism established by the 76th Legislature to pay for bids to recruit major sporting events, such as the Olympics, Pan American Games, Super Bowl, NCAA Final Four, NBA All-Star Game, or World Games, among others.

Supporters said SB 275 would refocus TDED's mission, redefine its relationship with other agencies involved in economic development, and build upon the successful program it administers. Texas has a continuing need for a state-level economic development program, and the department has addressed many of the problematic issues that have plagued it in the past.

SB 275 would strengthen economic development in Texas by creating a centralized office under the governor's supervision. This would enable successful coordination of economic development activities across multiple state agencies. According to the Legislative Budget Board, consolidation of TDED into the Governor's Office also would save the state approximately \$1.5 million in general revenue annually.

Over half of TDED's budget currently goes to tourism promotion, and the agency should focus on this function as its main priority. Requiring the new TEDTO to coordinate tourism efforts across state agencies would ensure efficient use of resources by requiring the office to develop a comprehensive plan for marketing the state to visitors and setting specific performance measures to evaluate all tourism marketing efforts.

TEDTO should be engaged in identifying and promoting industry clusters across the state, which often form the basis of strong local economies. In addition, by combining the current maze of debt financing programs into a centralized economic development bank, the bill would create a comprehensive program to manage state incentive programs that contribute to industrial expansion.

Opponents said SB 275 would relegate TDED to promoting tourism and marketing Texas to business, a limited role compared to the functions performed by similar economic development agencies in other states. The bill would give too much authority over economic development to the governor, and would eliminate the diverse policy perspectives represented on TDED's governing board.

SB 275 would not incorporate enough safeguards to ensure that the business incentive programs issued by the Economic Development Bank would yield a return or generate new investment. The tax refunds administered under the bank could undermine local tax bases, since new residents would take jobs generated through business investment while taxing entities would have to forgo tax revenue in the name of business growth.

Other opponents said TDED should be abolished. Economic development primarily is a local activity, and the state should not award grants from funds collected statewide to specific local projects. State tourism functions can and should be handled by the private sector. TDED's budget should be redirected to health care, schools, transportation, and environmental protection in order to more effectively contribute to state economic development.

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

Deregulating broadband Internet service

SB 377 by Armbrister/HB 1658 by Goodman
Died in Senate committee/Died in House committee

SB 377 would have prohibited the Public Utility Commission (PUC) from imposing any regulation or obligation on a provider of broadband or high-speed Internet service, except to the extent required by the Federal Communications Commission (FCC). It would not have deprived the PUC of its authority over basic local telephone service for retail customers.

HB 1658 would have prohibited the PUC from requiring “unbundling” of a network element used to provide broadband or high-speed Internet service, the discounted resale of broadband or high-speed Internet service, or other measures prescribed by federal law, unless the FCC specifically authorized state agencies to impose such a requirement. The bill would not have affected requirements imposed by the PUC before January 1, 2003, or the agency’s authority to regulate voice telecommunications service.

Supporters said SB 377/HB 1658 would prohibit the PUC from regulating broadband Internet service, unless required by the FCC. Telecommunications carriers such as SBC that operate in multiple states must comply with a myriad of state regulations in addition to federal requirements. Meeting different requirements in every state has driven up costs, discouraging investment in broadband infrastructure. In Texas, the possibility that the PUC could impose regulations more onerous than federal requirements has had a chilling effect on broadband deployment. For example, if the PUC required broadband providers to grant competitors access to their networks, it would discourage investment because companies could be required to provide access at rates below cost. The uncertainty of the regulatory environment for broadband has made some major lenders wary of financing new investment. SB 377/HB 1658 would foster new investment in Texas by reassuring telecom companies and lenders that the PUC would not impose regulations, beyond those required by the FCC, that could hinder broadband deployment. The bills would not deregulate the entire public telephone network. Their language was crafted carefully to apply only to broadband or high-speed Internet service.

Opponents said SB 377/HB 1658 could remove the PUC’s regulatory authority over the entire public telephone network. Broadband Internet service does not exist on its own network but runs through the same sets of wires that carry telephone service. The bills’ definitions of broadband or high-speed Internet service are so broad that they could encompass virtually the entire telephone network. In effect, the bills could prevent the PUC from requiring incumbent telecom companies to provide access to their networks to competitors at wholesale rates. That requirement is essential to preserving competition in telephone service.

SB 377/HB 1658 would not benefit consumers. Removing the PUC’s authority to ensure fair competition among broadband service providers could allow incumbent service providers to create barriers to new competitors entering the market to provide broadband Internet service. The state should not give up its authority over broadband in the name of regulatory certainty. Although supporters tout the bills as promoting new investment, neither bill would require additional investment by telecom companies.

Revising regulation of sale and ownership of manufactured homes

SB 521 by Staples
Generally effective June 18, 2003

SB 521 amends and repeals various statutes governing the sale and ownership of manufactured homes. The bill establishes the statement of ownership and location for a manufactured home in lieu of a title document. It stipulates that a manufactured home is personal property but allows the owner to convert it to real property by filing a certified copy of the statement of ownership and location with the county in which the home is located.

A consumer must receive disclosures before completing a credit application for purchase of a manufactured home, including notice that:

- the consumer can acquire the manufactured home by a real estate or a chattel mortgage and that a real estate mortgage might have a lower interest rate than a chattel mortgage;
- the manufactured home will be appraised and subject to ad valorem taxes as would other single-family residential structures;
- the consumer can rescind, without penalty or charge, a purchase, exchange, or lease-purchase contract for the manufactured home within three days after signing the contract;
- the lender can require the consumer to obtain insurance meeting the lender's requirements to protect the consumer's investment; and
- the consumer must install a septic tank system on a lot not served by a sewer system or utility.

The Texas Department of Housing and Community Affairs (TDHCA) must adopt rules governing disclosure statements in regard to chattel mortgage transactions. The statements must include certain loan specifications. Failure to provide the disclosures subjects a retailer to a fine ranging from \$1,000 to \$4,000. The retailer must deliver the disclosure statement, signed by the lender, at least 24 hours before full execution of the contract. The consumer may not accept the offer within 24 hours after delivery of the documents and may rescind the installment contract under certain conditions. The TDHCA director may deny, revoke, or suspend licenses in certain cases in which manufactured homes are sold as personal property.

A retailer's sale price estimate must be in good faith and in writing if it makes certain material representations. A retailer cannot require a consumer to make a down payment on the acquisition of a manufactured home until the parties execute an installment contract.

Supporters said by restoring manufactured houses to their former classification as personal property, SB 521 would relieve consumers, retailers, and manufacturers of a burden and would reignite the industry's growth. An act of the 77th Legislature in 2001, HB 1869 by Wohlgemuth, et al., classifying the houses as real property has depressed the industry artificially by causing slower sales and production. As a result, creditors have curtailed chattel (movable personal property) lending for financing purchases, and sales fell 35 percent during the year following the law's enactment. SB 521 would restore the personal property classification to revive lending for manufactured housing and to encourage demand for the product.

Even with higher interest rates for personal property loans, many buyers have an incentive to use them. Personal property loans for manufactured homes allow buyers to sever the homes from their land— either to move or to sell the manufactured home and replace it with different construction— free from prohibitions often present in real property loans.

The bill also would provide strong consumer protections, including notices and penalties. Historically, simplified lending practices and creditor recourse rights have helped the industry to serve consumers who wanted to build home equity but who could not afford traditional houses. Imposing more disclosure and other requirements on retailers and clarifying regulatory standards and penalties would balance consumers' risks by providing them information and strengthening basic industry standards.

Opponents said weakened demand for manufactured houses is unrelated to their proper classification as real property. HB 1869 took effect in January 2002, but the trend of declining sales dates back to 2000. Retailers nevertheless continue to sell thousands of manufactured houses each year, showing that options abound for financing these homes. Current law does not prohibit any particular method for financing the homes. The real causes of sluggish sales in the industry are a slowing economy and publicity surrounding the repossession of manufactured houses, including revelations of high interest rates for personal property loans.

SB 521 could hamper recovery and long-term growth in the manufactured housing industry. The current classification of the houses as real property reflects the industry's efforts to make this housing option more attractive to consumers. This classification gives manufactured houses legal treatment equal to that of traditional houses, thus helping industry to legitimize and market its product. SB 521 would remove basic legal protections for buyers of manufactured houses that are afforded to residents of traditional houses and apartments. Classifying manufactured houses as personal property would allow creditors to repossess residences and evict residents without granting them the express right to cure a loan default or any right to a judicial proceeding.

The **HRO analysis** of the House companion bill, HB 1009, appeared in Part Two of the April 28 *Daily Floor Report*.

Allowing direct shipment of wine to consumers

SB 770 by Madla
Died in the House

SB 770 would have allowed direct shipment of wine to an individual buyer by a retailer holding a shipper's permit. The retailer would have had to label clearly a shipment of wine and obtain the signature of a person at least 21 years old upon delivery. A permit holder would have had to pay all taxes due on shipped wine. The retailer would have had to pay an initial fee of \$100 and a \$25 renewal fee annually thereafter. The retailer also would have had to hold a wine-selling license in the state or country from which the wine was shipped and would have had to report to the Texas Alcoholic Beverage Commission each year.

Supporters said SB 770 would capitalize on an economic development opportunity by allowing Texas wineries to sell products directly to consumers. Small Texas wineries could expand their markets by taking orders from around the world through the Internet, phone, and mail. Many states allow their residents to receive direct wine shipments only from states that allow their own residents to receive such shipments. SB 770 would spur rural economic development, benefitting not only wineries but also suppliers, shippers, and the tourism industry. It would establish a sensible regulatory system to protect minors and to collect taxes. Every shipment would have to be marked clearly as containing alcohol, and an adult's signature would be required on every delivery. Violators of these provisions would have their shipping permits revoked, and a shipper's permit could be suspended if the shipper did not remit sales taxes.

Opponents said SB 770 would create a public safety problem by undermining the established, easily regulated alcohol retail system, making it easy for minors to buy alcohol through the mail or online. Texas' alcoholic beverage laws would be unenforceable against out-of-state retailers. Texas also would find it hard to collect taxes, particularly in light of court decisions and federal laws preventing taxation of out-of-state companies.

Other opponents said the bill could be improved by requiring a wine purchaser to obtain a permit to receive wine from a shipper. Such a provision would make it easier to address concerns about tax collection, sale to minors, and shipment into "dry" areas.

The **HRO analysis** appeared in Part Two of the May 27 *Daily Floor Report*.

Creating a Texas Enterprise Fund for economic development

SB 1771 by Brimer, et al.
Effective September 1, 2003

SB 1771 creates a Texas Enterprise Fund to be used for economic development, infrastructure development, community development, job training programs, and business incentives. The fund is a dedicated general revenue account and a trustee program in the Governor's Office. The governor may negotiate on behalf of the state to award grants from the fund, but only with written approval from the lieutenant governor and House speaker. The governor can enter into an agreement stating that a grant recipient must repay the amount to the state if the recipient does not use the money for specified purposes. An agreement also may specify that a grant recipient must repay the money to the state if a capital improvement is sold and that the state retains a lien on a capital improvement financed through the fund.

The Texas Department of Economic Development (TDED) or its successor may recommend that a taxing unit enter into a tax abatement agreement or that a school district grant a limitation on appraised value in relation to the fund. TDED's executive director must work with the Legislature and state agencies to identify programs and grants and to maximize federal economic development funds. The executive director also must work with agencies involved in job training and creation to address challenges regarding these issues and develop connections with private entities to better market the state to businesses.

SB 1771 creates a board of economic development stakeholders to disseminate information on public and private economic development programs. The board comprises seven members: four appointed by the governor, two by the lieutenant governor, and two by the House speaker.

Supporters said SB 1771 would give the governor the flexibility to respond quickly to economic development opportunities. Interstate competition for economic expansion and retention is fierce. Without the ability to respond to business prospects quickly and meaningfully, Texas could lose projects to other states. The Texas Enterprise Fund would provide the governor with enough money for the state to offer incentives to the next large project like the Toyota plant in San Antonio. The best way to improve the economy is to facilitate the expansion of the state's economy, and SB 1771 would contribute to this goal.

Opponents said the state has a multibillion dollar budget shortfall, and until Texas' basic health care, education, environmental, and other needs are met, an economic development fund is a luxury the state cannot afford. The governor should not have a "slush fund" to spend with too little oversight, subject only to approval by the lieutenant governor and the House speaker rather than the Legislature as a whole. The bill would open the door to corporate welfare projects by allowing the governor to award taxpayer's money to private businesses with no assurance that the state would receive economic benefits equal to the cost of investment.

Notes: HB 7 by Heflin, the supplemental appropriations bill for fiscal 2003, appropriates \$295 million from the economic stabilization fund to the Texas Enterprise Fund for fiscal 2004-05.

The **HRO analysis** appeared in Part One of the May 25 *Daily Floor Report*.

Authorizing home equity lines of credit

SJR 42 by Carona
On September 13, 2003 ballot

SJR 42 proposes amending the Texas Constitution to allow home equity lines of credit, not to exceed 50 percent of a homestead's fair market value, or 80 percent when added to total indebtedness secured by the home. A borrower could debit the account from time to time, request advances, repay debt, and reborrow money. No single advance could be less than \$4,000, and the borrower could not use a credit card, debit card, check, or similar device to obtain an advance. The amendment would establish provisions under which a lender would forfeit all principal and interest if the lender failed to comply with legal obligations regarding issuance of a home equity loan, unless the lender cured noncompliance by specified means. It also would allow refinancing of a home equity loan with a reverse mortgage loan. The Legislature could delegate a state agency the power to interpret the home equity lending provisions in the Constitution.

Supporters said home equity borrowing should be more flexible and easily tailored to individual needs. Currently, Texans may apply only for lump-sum home equity loans, forcing them to borrow the entire amount of a home equity loan even if they do not need all of the money immediately. SJR 42 would allow home equity lines of credit that give homeowners the freedom to use their homes as they see fit and to obtain smaller loans over time as money is needed. Home equity lines of credit could supplant almost \$13 billion in higher-cost, non-tax-deductible loans such as credit cards and auto loans. That could save Texans an estimated \$741 million annually in interest and taxes. Also, the borrower could take out a smaller loan with lower interest rates and a lower monthly payment, all of which actually would lower the likelihood of delinquency or foreclosure on home equity lines of credit, as opposed to traditional home equity loans.

SJR 42 also would enable consumers to refinance home equity loans with reverse mortgages, benefitting senior homeowners in particular. Volatile financial markets have caused the investment income of many retirees to shrink, making it difficult for some to continue monthly payments on home equity loans. Paying off a home equity loan with a reverse mortgage would decrease monthly obligations and enable them to receive a monthly income from the lender.

Opponents said home equity loans should not be expanded to include lines of credit until the state regulates traditional home equity loans more effectively. Hearings around the state have confirmed that borrowers do not understand consistently that their homes can be foreclosed if they default on a home equity loan. Many Texans still face personal economic pressure. With the foreclosure rate increasing, government should be working to protect homeowners' investments rather than making it easier for them to lose their homes, particularly since other avenues exist for consumers to finance the costs of items such as college and health care.

Notes: HJR 23 by Hochberg, on the September 13, 2003, ballot, also would allow refinancing of home equity loans with reverse mortgages.

The **HRO analysis** of SJR 42 appeared in Part One of the May 23 *Daily Floor Report*.



Elections

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Enhancing penalties for fraud in early voting by mail

HB 54 by Wolens, et al.
Effective September 1, 2003

HB 54 defines conduct that constitutes assisting a voter with casting an absentee mail ballot; expands the offense of illegal voting and the penalties for unlawful assistance; sets forth requirements for handling and possessing carrier envelopes and ballots; and prohibits the buying and selling of balloting materials.

Assisting a voter is defined as reading the ballot to the voter, directing the voter to read the ballot, marking the voter's ballot, or directing the voter to mark the ballot. The bill expands unlawful assistance of a voter to include knowingly assisting a voter who did not request assistance. The penalty for this offense is a Class A misdemeanor.

A person who witnesses or who directly assists a voter with an application for early voting by mail or in preparing an early voting ballot must sign and provide a name and address. A person who knowingly fails to comply commits a Class A misdemeanor, unless the person is a close family member or is registered to vote at the same address. Knowingly providing false information on an application is enhanced from a Class A misdemeanor to a state jail felony, unless the person is the applicant, a close relative, or a registered voter at the same address as the applicant, in which case the original penalty still applies.

A person who witnesses a voter signing a carrier envelope or deposits a carrier envelope in the mail or with a carrier also must provide a name and address. Knowingly failing to do so is a Class B misdemeanor unless the person is a close family member or is registered to vote at the same address. No unauthorized person can possess another person's ballot or carrier envelope. Violations range from a Class B misdemeanor to a second-degree felony, depending on the circumstances.

Early voting information on individual voters cannot be released until the day after the early voting clerk receives the mail-in ballots. Unlawful buying and selling of balloting materials is a state jail felony unless the voter is the seller, in which case it is a Class B misdemeanor.

The bill also prohibits prosecution, for purposes of intimidation, of a person under this statute on account of race, ethnicity or age.

Supporters said HB 54 would offer the same protection to homebound voters as enjoyed by voters at the polling place. The Election Code is clear on what constitutes proper and improper procedure in the polling place, but the law governing absentee voting by mail (homebound voting) needs to be tightened, and oversight needs to be stricter. By its nature, mail-in voting from home is out of the public view and therefore vulnerable to fraud.

The bill would make it easier to punish bad actors by increasing penalties for fraud and by clarifying what constitutes assisting a voter. It would create new tracking abilities by requiring people who witnessed and assisted voters with their early voting applications, ballots, and carrier envelopes to provide their names and addresses. It would not prohibit anyone from assisting a voter but would ensure that a homebound voter's vote was delivered safely and securely to the elections

administrator. Volunteers still could work in their neighborhoods and communities and could assist voters in person. Likewise, anyone still could mail or send a preprinted application for a mail-in ballot to any voter, and the bill would not alter the ability to send direct-mail material to voters.

Opponents said the bill could disenfranchise certain voters and suppress voting by making time-honored behavior illegal. Some residents, especially minority and elderly residents, depend on community volunteers and neighbors to help them vote. The bill could curtail election volunteerism, because people would be less willing to provide assistance in their communities if they perceived that a single misstep could result in a criminal act. Not all neighborhood leaders would be aware of the stricter requirements, and some could find themselves involved in criminal allegations even though their intentions were good.

The **HRO analysis** appeared in the April 8 *Daily Floor Report*.

Implementing the Help America Vote Act

HB 1549 by Denny, et al.
Effective January 1, 2004

HB 1549 changes Texas election law to conform with requirements of the federal Help America Vote Act (HAVA) of 2002, which provides states with \$3.9 billion in federal funds from 2003 through 2006. States can use these funds to replace outdated voting equipment, improve election administration, and train poll workers. HB 1549 requires the secretary of state to implement and maintain a statewide computerized voter-registration database and an administrative complaint procedure to remedy grievances; requires the use of provisional ballots to ensure that no eligible voter is turned away from the polls; requires each precinct to provide at least one voting machine that is accessible to voters with disabilities; and creates an election improvement fund in general revenue to hold funds for these purposes. The Legislative Budget Board estimates that Texas will receive about \$80 million in federal funds during fiscal 2004-05, for which the state must provide \$2.9 million in matching funds from the existing Chapter 19 account, used to pay for voter registration. HB 1549 also requires additional voter identification at the time of initial registration; moves the uniform election date in May from the first Saturday to the third Saturday; and prohibits use of mechanical voting machines and punch-card ballots by January 2006.

Supporters said implementing HAVA would improve Texans' access to the polls and help avert problems brought to light during the 2000 presidential election. The Florida recount during the 2000 election revealed widespread problems with voting machines and ballots. HAVA will strengthen the integrity of the election process, ensure that no eligible voter is denied the right to vote, and assure citizens that their vote is counted. It would be appropriate to use Chapter 19 funds to draw down the federal funds. If the Legislature failed to enact HB 1549, the state still would have to comply with the federal requirements, including setting up the statewide voter registration list and providing an accessible voting machine in each polling place, but without federal funds. In any case, counties should receive more in federal funds than the amounts taken from Chapter 19 funds. The secretary of state has the necessary rulemaking authority and has requested guidance from the U.S. Department of Justice that should make it possible to issue clear guidelines to implement HAVA.

Opponents said HAVA requires that voting technology and election administration, including a state-based administrative complaint procedure, be uniform and nondiscriminatory. However, HB 1549 would not address how election officials could track whether these provisions had been applied in a uniform and nondiscriminatory manner, and it would not address procedures for maintaining the statewide voter-registration list. For example, it would not specify how the list would be purged of ineligible voters or how to prevent eligible voters from being purged from the list accidentally.

Other opponents said Chapter 19 funds should not be used as matching funds for federal HAVA dollars. Even if these funds were replaced later with federal money, it is not clear who would be reimbursed — the counties or the voter registrars. Currently, Chapter 19 funds are earmarked only for defraying expenses of the registrar's office. The bill should guarantee that federal reimbursement money be returned to Chapter 19 funds to be used solely for voter registration.

The **HRO analysis** appeared in the April 23 *Daily Floor Report*.

Changing the dates of primary elections

HB 2496 by Branch, et al.
Effective September 1, 2003

HB 2496 changes the date of the state's general primary election from the second Tuesday to the first Tuesday in March in each even-numbered year. It moves the runoff primary election date from the second Tuesday to the first Tuesday in April following the general primary election, and it moves the presidential primary election date from the second Tuesday to the first Tuesday in March in each presidential election year. The secretary of state by rule must modify applicable procedures, dates, and deadlines to implement these changes.

Supporters said the purpose of HB 2496 is to enfranchise as many voters as possible. The current primary election dates often coincide with spring break for many Texas schools and universities, preventing many voters from taking part in the elections because voters are out of town with their families. This bill would allow millions of Texas parents, grandparents, and teachers to vote on election day before leaving on family vacations. It also would save money for the state because the state pays for primary elections. Many polling places are in schools, and if a school is closed for spring break, the state must pay a rental fee to use the building.

Texas moved its presidential primary date from May to March in hopes of having more influence on presidential nominations. However, during the 2000 presidential campaign, the nomination of then-Gov. George W. Bush became virtually certain after the primaries that occurred the week before the Texas primary. Other states may move their primary and caucus dates even earlier for the 2004 election. An earlier primary election would enable Texas to play a larger role in the nominating process. Moving the primary from March back to May, as some have suggested, would eliminate any influence that Texas might have on that process.

Moving the primary date up by one week while leaving the filing deadline in early January would shorten the period between filing and the election, which could reduce the cost of primary campaigns.

Opponents said the state should not set primary election dates earlier than they are now. Texas already has one of the earliest primary election dates in the nation. The campaign season has become too long and expensive, especially for challengers. Moving the primary date even earlier would exacerbate these trends. Because the filing deadline is in early January, a challenger for an election to be held in November must raise enough money to finance a viable campaign for almost an entire year. This is one reason why many incumbents remain unopposed. The long campaign season also disenfranchises voters and makes it difficult for them to remain focused on the issues. Voters would benefit from a shorter, uninterrupted campaign.

Other opponents said moving the primary date back to May and the filing deadline to March, at least in nonpresidential years, would allow campaigns to focus more effectively on their messages and to use their campaign funds more wisely during a more compact political season.

The **HRO analysis** appeared in Part Two of the *May 8 Daily Floor Report*.



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Funding the Texas Emissions Reduction Plan

HB 1365 by Bonnen et al.
Effective June 22, 2003

HB 1365 amends the Texas Emissions Reduction Plan (TERP) and creates new funding sources. It increases the fee for a vehicle title certificate; increases and expands a surcharge on construction equipment; changes the allocation formula for distributing money from the TERP fund; eliminates the light-duty vehicle purchase or lease incentive program; and prohibits the Texas Commission on Environmental Quality (TCEQ) from declaring a speed limit for environmental purposes.

HB 1365 increases the fee for a vehicle title certificate from \$13 to \$33 if an applicant lives in an ozone nonattainment area designated by the U.S. Environmental Protection Agency (EPA), or to \$28 if an applicant lives in any other part of the state. After September 1, 2008, the fee will be \$28 statewide. The county tax assessor-collector must remit to the comptroller \$20 or \$15 of the fee, depending on where the applicant lives. Before September 1, 2008, the fees will be deposited to the TERP fund, and thereafter, to the Texas Mobility Fund. The bill also increases the surcharge on construction equipment from 1 percent to 2 percent of the retail sale, lease, or rental cost and extends the surcharge to storage, use, or consumption in Texas of equipment purchased outside the state. HB 1365 also imposes a 1 percent surcharge on the retail sale, lease, or use of heavy-duty on-road diesel vehicles made in 1997 or later.

The diesel emissions reduction incentive grant program will receive 87.5 percent of the money in the TERP fund, instead of 72 percent. No money is allocated to the light-duty vehicle purchase or lease incentive program or the energy efficiency grant program. The technology research and development program will receive 9.5 percent of the fund, instead of 7.5 percent.

The bill makes changes to TERP administration, grant programs, and building energy-performance standards and creates a program to provide access to TERP grants for small businesses. The General Land Office may develop an energy-efficient building accreditation program for buildings that exceed certain performance standards by at least 15 percent. For contracts performed in certain counties, state agencies and political subdivisions may give preference to vendors that meet or exceed air-quality standards or may require a vendor to demonstrate that it meets or exceeds air-quality standards.

Supporters said HB 1365 would restore TERP funding so that Texas could avoid losing vital federal highway funding or suffering restrictions on industrial development in the state's two largest metropolitan areas. The bill also would help improve Texas' air quality by bringing the state into compliance with EPA standards under the federal Clean Air Act. It would increase the state's investment in developing new emissions-reducing technology that could result in far-reaching benefits in the future. It would achieve these goals in a cost-effective manner by concentrating on TERP programs that earn credits for emissions reductions in the State Implementation Plan (SIP) required by the EPA and by incorporating TCEQ suggestions to improve TERP operations.

HB 1365 would restore TERP funding by increasing the fee on vehicle title transfers, increasing and expanding the construction equipment surcharge, and imposing a 1 percent surcharge on newer-model heavy-duty diesel vehicles. Vehicle owners contribute to Texas' air-quality problems and

should play a part in helping to clean the air. The structure of the title transfer fee would ensure that people who live in ozone nonattainment areas, and who thus will benefit the most from restoring TERP, pay a greater share than people in other areas. The bill would amend the construction equipment surcharge to reflect the intentions of the 77th Legislature by imposing the surcharge on equipment purchased out of state for use in Texas.

HB 1365 would eliminate the light-duty vehicle purchase or lease incentive program. Although encouraging consumers to buy low-emission vehicles is a worthy goal, the program has put no clean cars on the road. Because of the TERP revenue shortfall, the program has been put on hold, and no incentives have been paid. The program receives 15 percent of the TERP fund but earns the state no emissions-reduction credit in the SIP. Considering the state's budget crisis and the importance of achieving enough credited emissions reductions to forestall federal sanctions, the state should spend no more money on this program.

Speed limits adopted for environmental purposes are highly unpopular among residents of areas where they have been applied. Prohibiting environmental speed limits might not cause the state to lose as large a volume of emissions reductions in the SIP as some claim. EPA has found that vehicles on the road today are cleaner than had been thought.

Opponents said while HB 1365 would restore funding to TERP so the state could comply with EPA requirements, it also would eliminate some programs that contribute greatly to improving Texas' air quality. The state should not focus simply on complying with bureaucratic regulations but also on developing a long-term solution to Texas' air-quality problems.

The bill would eliminate the light-duty vehicle purchase or lease incentive program. While this program earns the state no emissions-reduction credit in the SIP, the 9.5 percent of the TERP fund that HB 1365 would allocate to new technology research and development would not earn such credit either. If operated properly, the light-duty vehicle program could encourage the development of a public fueling infrastructure for natural gas vehicles. This would be of enormous benefit to the state's efforts to improve air quality, because it would make it more feasible for consumers and industry to buy cleaner natural gas vehicles.

Although unpopular, environmental speed limits earn credit in the SIP. If TCEQ could not adopt environmental speed limits, the state would have to make up the credited reductions some other way. Also, TCEQ might need to use speed limits in the future to achieve last-minute reduction credits to forestall punitive federal sanctions. The state should not eliminate this option permanently.

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

Suspending enforcement of the public beach access law

HB 1457 by Eiland
Effective June 18, 2003

HB 1457 authorizes the General Land Office (GLO) commissioner to suspend for two years a suit by the attorney general or by a county or district attorney to obtain a court order to remove a house from a public beach if the commissioner determines that:

- the line of vegetation establishing the boundary of the public beach has moved as a result of a meteorological event;
- the house was located landward of the line of vegetation before the meteorological event; and
- the house does not present an imminent threat to public health and safety.

The land commissioner must consult with the UT-Austin Bureau of Economic Geology to determine vegetation lines and the effect of a meteorological event on the public easement. The act does not apply to a house located below mean high tide or more than 50 percent destroyed. A home repair permit may be issued only to make the house habitable and only under certain circumstances. HB 1457 also repeals the attorney general's authority to remove or prevent improvements on public beaches, unless asked to do so by the commissioner.

Supporters said HB 1457 would give state and local governments flexibility to assess the difficult case of a property owner whose home or other investment became located in a public beach area where private property was prohibited under state open beaches law. Vegetation lines sometimes restore themselves during the first months or years following a meteorological event such as a hurricane. Coastal homeowners, who often have large investments in property, should not be forced unjustly from land they have bought, since beach restoration later might make them rightful owners of the land once again. HB 1457 properly would grant discretion to the land commissioner to prohibit legal action by the state against the owners of affected beach property. The GLO already has legal obligations and technical expertise in regard to public beaches, and the commissioner is more of a policymaker than the attorney general, whose role is mainly to enforce state laws.

Opponents said HB 1457 would compromise the rights and remedies of the public with respect to Texas beaches. For centuries, unrestricted public access to beaches has provided inhabitants with access to food and recreation, and the open beaches law has long protected such access. Current law charges the attorney general to enforce strictly and vigorously the state's prohibition against encroachments on the public beach easement. HB 1457 would erode that mandate. Buyers of coastal property receive ample written notice that certain coastal lands are subject to public ownership or easement, and these buyers should not gain special relief when coastlines erode and their properties become located in prohibited areas. Exercise of discretion by the attorney general allows better handling of difficult cases involving shifting coastal property rights.

The **HRO analysis** appeared in Part One of the May 8 *Daily Floor Report*.

Licensing a private entity to dispose of low-level radioactive waste

HB 1567 by West, et al.
Effective September 1, 2003

HB 1567 allows the Texas Commission on Environmental Quality (TCEQ) to license a private entity to operate a facility to dispose of waste from Texas' low-level radioactive waste disposal compact with Maine and Vermont. TCEQ also may authorize the license holder to dispose of low-level waste from federal facilities. The bill establishes a licensing procedure and timetable, criteria for evaluating license applications, and a license review process. The license holder must indemnify the state against any liabilities, provide at least \$20 million in financial security, and pay 5 percent of the facility's gross receipts to the host county and 5 percent to state general revenue. TCEQ must set disposal fees for compact waste that are sufficient to allow the licensee to recover the costs of operating and maintaining the facility, plus a reasonable profit.

If TCEQ allows the license holder to dispose of waste from federal facilities, the disposal site for federal waste must be separate and distinct from, but adjacent to, the compact waste disposal facility. For the first five years after licensing, the federal disposal site may not have a disposal capacity greater than 3 million cubic yards and may not accept more than 300,000 cubic yards of Class B or C waste. TCEQ may double the limits after five years.

By January 1, 2004, TCEQ must publish notice that it is accepting applications for the license. TCEQ must accept applications for a 30-day period beginning 180 days after publishing notice, evaluate applications according to specific criteria, and select the application with the highest comparative merit within 270 days of receiving the last timely filed application. TCEQ must complete a technical review and prepare a draft license within 15 months of selecting the application with the highest merit. The bill also establishes a procedure for judicial review of TCEQ's decision.

Supporters said HB 1567 would allow TCEQ to license a private company to operate a facility to dispose of low-level radioactive waste in Texas. The state has spent \$50 million over 20 years in unsuccessful attempts to develop a facility. Meanwhile, radioactive waste has been stored at medical research facilities, hospitals, public universities, and nuclear power plants across the state. Because one of only two disposal sites available to Texas generators is scheduled to close in five years, the state needs to move ahead with developing a waste-disposal facility in Texas.

Establishing a facility to dispose of Texas' low-level radioactive waste would improve homeland security. Although security at the current temporary storage sites is adequate, it would be far safer to dispose of the waste permanently in a single facility. Moreover, containing all of Texas' low-level radioactive waste in a single facility would allow isolation and disposal away from the state's population centers. Toxic chemicals and other dangerous wastes already are transported by truck on Texas highways. HB 1567 would ensure security and safety by requiring that any waste be properly processed and packaged before shipment to the facility.

Authorizing the license holder to dispose of federal waste, such as from the U.S. Department of Energy (DOE), would benefit Texas waste generators, who likely would pay less for disposal because the revenue from federal waste disposal could lower the overall cost of operating the facilities. The additional revenue also would help to ensure the long-term financial stability of the

operation, creating more jobs and tax revenue. DOE waste is no different in radioactivity from waste produced by a hospital, research university, or nuclear power plant. In fact, much of the DOE waste would have lower levels of radioactivity. Before sending waste for disposal, DOE would conduct an audit of the proposed facility, bringing additional expertise to oversight of the facility.

HB 1567 would not favor a specific applicant for the license. It would, however, create a licensing process that would allow a facility to begin operation by the time it will be needed. Meeting this deadline necessarily would require that an applicant already have begun collecting site-specific data.

Opponents said HB 1567 would allow a private company to make millions of dollars in profit while leaving Texas stuck with a mountain of radioactive waste. Authorizing the license holder to dispose of federal waste would invite a private company to make a fortune by burying hundreds of millions of cubic feet of radioactive waste in West Texas. Every commercial low-level radioactive waste disposal facility in the nation has leaked. Because of the length of time that radioactive waste remains dangerous, long after a private company had made its money and gone, the state would be stuck with the long-term bill to clean up the site.

Private companies are eager to dispose of federal waste because the amount of waste expected to be generated by DOE dwarfs the expected volume of waste from the state compact. With the facilities for compact waste and federal waste located on the same site, the vast majority of the site would be devoted to the disposal of federal waste in large underground trenches.

Creating a radioactive waste disposal facility would not improve homeland security. Trucks and trains crisscrossing the state with radioactive cargo en route to a disposal facility would provide easy targets for terrorists. It would be preferable to store radioactive waste at Texas' nuclear power plants. These secure facilities are heavily guarded and already contain the vast majority of Texas' low-level radioactive waste, greatly reducing the need to put large shipments of waste on the state's roads and highways.

Other opponents said the bill would not establish a competitive licensing process. The narrow time frame for licensing would favor an applicant with an already established site, such as Waste Control Specialists, which operates a hazardous waste facility in Andrews County. Because of the data required in the application, a company would have to be collecting site-specific data now to be eligible for a license.

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

Amending requirements for removing contaminants from groundwater

HB 3152 by Bonnen
Effective September 1, 2003

HB 3152 allows the Texas Commission on Environmental Quality (TCEQ) to grant a municipal setting designation (MSD) certificate that waives requirements for removing groundwater contaminants in areas where the groundwater will not be used as a future source for irrigation of crops intended for human consumption, drinking, showering, bathing, or cooking. A person, including a local government, may request an MSD for a property within a municipality of at least 20,000 residents that has a public drinking-water system that can deliver potable water to all affected properties within one-half mile of the MSD.

An applicant must give notice to each municipality within one-half mile of the proposed MSD, and to each municipality, private citizen, and retail public utility that owns or operates a groundwater supply well within five miles of the proposed MSD. The application must include a legal description of the boundaries of the proposed MSD and a statement of support from municipalities and retail public utilities entitled to legal notice. It also must include an affidavit affirming that the property meets MSD criteria, the legal description of the property, a statement of the type of known groundwater contamination, proof of notice by signed delivery receipts, and a \$1,000 fee.

Within 90 days of receiving an application, the TCEQ executive director must issue or deny an MSD certificate or request additional information. Within 45 days of receiving the requested information, the MSD must be approved or denied. Before an MSD is issued, the applicant must ensure that the application is supported by a resolution of affected city councils and the governing body of affected retail public utilities and that the property is subject to an ordinance or restrictive covenant prohibiting the use of contaminated groundwater beneath the property for potable uses.

The executive director must deny an application if the property is ineligible, if the application is incomplete or inaccurate, or if, after the 60-day comment period, TCEQ determines that the MSD will harm the current and future water resource needs of a municipality, a retail public utility, or a private well owner.

If potable water wells are located within one-half mile of the MSD, TCEQ must require an investigation to determine whether groundwater contamination has caused or could cause human health or ecological standards to be exceeded.

The bill does not alter the private rights of legal action for personal injury or property damage caused by the release of contaminants. Municipalities may regulate the pumping, extraction, and use of groundwater by people other than retail public utilities to prevent the use of groundwater that presents an actual or potential threat to human health.

Supporters said HB 3152 would provide a common-sense, balanced approach for dealing with contaminated groundwater left behind by businesses such as dry cleaners, high-tech industries, and service stations. Current law is so restrictive and expensive to comply with that businesses find it nearly impossible to do so. Cleaning up contaminated groundwater can run small businesses into bankruptcy, yet remediating shallow groundwater to the level of drinking water adds little practical

value to the affected property, because rarely would the water be used for drinking. This bill would save businesses and communities hundreds of thousands of dollars in unnecessary remediation costs while ensuring minimum negative impact on area groundwater.

HB 3152 would not allow MSDs to be granted for contaminated aquifers or other sources of drinking water. A building situated over an aquifer would not qualify for an MSD, and any business or individual who contaminated city drinking water in an aquifer still would be held responsible for cleaning it up. TCEQ would have final review and discretion over the granting of MSDs, so an exemption from cleanup most likely would not be granted in egregious cases.

The bill would stimulate economic development, increase property values, and create jobs in urban areas that now have unusable property. By reducing the expense of remediating groundwater back to drinking-water levels, the bill would allow urban areas to market properties for redevelopment that otherwise would remain neglected. Three other states, Illinois, Pennsylvania, and Ohio have enacted such legislation, which has allowed cities to use MSDs successfully to restore and revitalize the local property-tax base and to stimulate job creation in economically depressed areas.

HB 3152 would protect property rights and would not take away a landowner's water well. Water in a well located in an MSD still could be used for watering grass or for certain industrial uses. Since an MSD could not be established unless a public water supply was available, no property owner would be deprived of safe water. Notice would be given to the affected municipality, public utilities, and to private landowners who had registered their wells with TCEQ. The bill would preserve any private right of action that a property owner might have if his or her property were contaminated.

Opponents said HB 3152 would give a free pass to polluters. Current law requires a business that moves after contaminating groundwater to clean up its mess. If the state relieved responsible parties of the burden of cleanup, it essentially would say that Texas aquifers were not worth cleaning up. The bill would create a subsidy for polluters and shift the burden to future generations who might need that water when alternative city water sources were tapped out.

The bill would remove the right of landowners to consent before permanent deed restrictions were placed on their properties, thus infringing on property rights. Although the bill would require that neighboring landowners with wells receive notice, it would not require their consent before granting the MSD, after which polluters either could file a restrictive covenant with landowners' permission or simply apply to expand the MSD. Given the choice of whether or not to obtain landowners' buy-in, it seems clear which option most polluters would select.

HB 3152 would protect only citizens within one-half mile of the MSD. However, groundwater contamination does not confine itself to a limited area, but spreads throughout the water table and can pollute the affected aquifer for miles around. The bill would devalue private property for the sole benefit of polluters and future developers who no longer would have to meet certain standards for further commercial development.

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

Prohibiting operation of motorized vehicles in streambeds

SB 155 by Zaffirini
Effective September 1, 2003

SB 155 prohibits operation of a motorized vehicle in a protected freshwater area beginning January 1, 2004, except on the Canadian River or Red River. A protected freshwater area means the portion of the bed, bottom, or bank lying below the gradient boundary of any navigable river or stream. It does not include the portion of a bed, bank, or stream below tidewater limits. The prohibition does not apply to a state, county, or municipal road right-of-way, to a private road crossing established before the prohibition takes effect, or to operation of a vehicle for authorized activities. The Texas Parks and Wildlife Department (TPWD) must establish a program to facilitate development of vehicle recreation sites not located in protected freshwater areas.

A county, municipality, or river authority can adopt a local plan for providing access to a freshwater protected area. The plan may allow limited vehicle use, provide for collection of a fee, or establish other measures. Before a plan can take effect, the county, municipality, or river authority must file the plan with TPWD, which can approve, disapprove, or modify a plan and must consider whether the plan meets certain criteria.

A prescriptive easement over private property may not be created by recreational use of a protected freshwater area, including portaging around barriers, scouting obstructions, or crossing private property on the way to or from a protected freshwater area. The bill does not limit a person's right to navigate in, on, or around a protected freshwater area. Except as otherwise allowed by law, a person may not restrict, obstruct, interfere with, or limit public recreational use of a protected freshwater area.

All state peace officers must enforce the bill's requirements. Violating the prohibition against driving a vehicle in a protected freshwater area, limiting public recreational use of a protected freshwater area, or using private property without permission to reach a protected freshwater area is a Class C misdemeanor, punishable by a maximum fine of \$500, unless a defendant previously has been convicted of such an offense at least twice, in which case the offense is a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of \$2,000.

Supporters said SB 155 would prohibit operation of motorized vehicles in Texas rivers or streambeds but would provide exemptions for legitimate activities in which vehicle access to a riverbed was necessary, such as for agriculture or utility maintenance. It also would exclude the Canadian River and Red River, both of which have experienced fewer problems with vehicle activity than have other rivers. Counties or river authorities could adopt local river-access plans to provide limited vehicular access, such as for a family to reach a favorite swimming hole or to transport disabled or elderly people down the river. TPWD would have to pursue development of alternative sites for vehicle recreation. Development of authorized off-road vehicle parks or similar sites would provide vehicle enthusiasts with places where they could recreate without causing environmental harm to Texas rivers or streams.

Under current law, some rivers in Texas suffer under a nearly year-round crush of off-road vehicle groups and individual drivers. The vehicles leak engine fluids into the rivers, loosen chunks of granite

while “crawling” over rock obstacles, contribute to erosion along river banks, and destroy fish and wildlife habitat. Motorized vehicles also harm water quality in rivers, many of which provide drinking water for downstream communities. Along the Nueces River, for example, this has resulted in a steady decline of vegetation, tire tracks and ruts running through fish-spawning beds, and signs of oil spills and other discharges.

Preliminary investigations and other studies clearly show the destructiveness of motorized vehicles in streambeds. A comparison of two sites along the Nueces River, conducted for the Nueces River Authority, found far fewer environmentally sensitive species present at a popular spot for motorized vehicles than at a similar site with no vehicular activity. A preliminary investigation by TPWD found that motorized-vehicle traffic had destroyed vegetation along the banks of the Nueces, contributing to soil erosion and destabilization.

Opponents said the public has a right to enjoy Texas’ rivers, whether traveling by foot, canoe, kayak, or in a motorized vehicle. Because about 97 percent of Texas land is owned privately, state-owned riverbeds are among the few areas where those who cannot afford to buy their own property may drive their vehicles freely away from roads, traffic, and stop lights. Many local residents along Texas rivers have traveled by motorized vehicles to their families’ favorite swimming holes or fishing spots for decades. In some cases, motorized vehicles may be the only feasible way for disabled or elderly people to reach the wild and scenic parts of a river.

SB 155 would overreact to violations by a few “bad apples” by banning this form of recreation for the many conscientious operators. Most users of motorized vehicles are responsible operators. Organized groups minimize their impact on the environment by adhering to guidelines that recommend slow crossing of streams only at low-water points and that prohibit unnecessary spinning of a vehicle’s wheels. Most users prefer to drive along gravel floodplains next to the water.

Little conclusive evidence exists to support the claim that motorized-vehicle activity in streambeds necessarily harms river ecology. No in-depth, Texas-specific scientific investigations of this issue have been conducted. Some studies have shown that severe weather events have a greater impact on water quality than does even concentrated motorized-vehicle activity. The periodic floods common to many Texas rivers wipe out traces of vehicle activity in riverbeds.

Other opponents said the bill should specify that local river-access plans created by counties or river authorities could allow limited and responsible vehicle use for recreational purposes. Vehicles can have an impact on streambeds if driven imprudently, but responsible operation largely mitigates any potential harm. Local access plans need to allow some limited vehicular recreational use in areas that would like to benefit from the economic activity associated with vehicle enthusiasts.

The **HRO analysis** appeared in the May 19 *Daily Floor Report*.

Sending peace officer reports of environmental crimes to TCEQ

SB 1265 by Armbrister
Effective September 1, 2003

SB 1265 requires peace officers to notify the Texas Commission on Environmental Quality (TCEQ) in writing of certain alleged criminal environmental violations before they notify prosecutors of the violations. SB 1265 does not apply to an alleged violation that clearly involves imminent danger of death or bodily injury under one of the 10 endangerment offenses listed under Water Code, ch. 7, and does not limit a peace officer's power to arrest a person for an alleged offense.

Within 45 days after receiving a notice from a peace officer, TCEQ must evaluate the report and decide whether an alleged environmental violation exists and whether administrative or civil remedies would address the violation adequately and appropriately. If TCEQ does not make its decision within the 45-day period, a prosecutor may begin criminal prosecution. If TCEQ decides that an alleged violation exists and that administrative or civil remedies would be inadequate or inappropriate, it must notify the peace officer and recommend criminal prosecution. In all other cases, the commission must notify the peace officer in writing that the alleged violation is to be resolved through administrative or civil means. Prosecutors may not prosecute alleged violations if TCEQ determines that administrative or civil remedies are adequate and appropriate.

Seventy percent of any fines, penalties, or settlements recovered through a prosecution under the bill goes to the state to cover the bill's costs. The remaining 30 percent goes to any local government significantly involved in prosecuting the case.

Supporters said SB 1265 would help ensure that Texas' environmental laws were interpreted and enforced fairly and consistently and would reinstate a process used until 1997, under which a state agency reviewed some alleged environmental criminal violations before prosecution. The bill would not constrain prosecutors unconstitutionally, because the Legislature has authority to establish what is a crime and how it will be handled. Also, Water Code, sec. 7.068 contains a similar preclusion to prosecuting crimes by stating that payment of an administrative penalty under the subchapter fully satisfies the violation and precludes any other civil or criminal penalty for the same violation.

The bill would help protect individuals and companies against overzealous and unfair prosecutions. Some local prosecutors use criminal charges to pursue alleged environmental violations without adequately considering the facts and circumstances of an event. In other cases, an alleged violation might be pursued criminally in one jurisdiction and not in another. Some prosecutors file criminal charges for minor or nonexistent infractions. In many instances, civil or administrative penalties would be more appropriate and more effective than criminal charges.

SB 1265 would address these problems by requiring cooperation among local law enforcement officers and state environmental regulators. It would allow TCEQ to review an alleged environmental violation and decide how best to handle it after considering certain statutory factors. TCEQ is the best entity to determine whether a crime has occurred, because the commission writes and interprets the complex environmental regulations.

It is not unusual for the state to keep a portion of environmental fines. The Water Code allows counties to keep only 50 to 75 percent of some fines.

Opponents said SB 1265 unfairly would constrain criminal prosecutions of environmental crimes by preventing local law enforcement officers from taking their cases directly to the prosecutor's office. It would violate the constitutional separation-of-powers doctrine by prohibiting prosecutions outright if TCEQ determined that administrative or civil remedies were adequate and appropriate.

Local prosecutors are in the best position to analyze alleged crimes and to decide whether to pursue cases, and courts are the best entity to decide culpability and punishments for actions that the Legislature has made criminal offenses. Texas traditionally has given local prosecutors the discretion of when to file criminal charges without review by a state agency.

Reducing the power of local prosecutors and substituting civil and administrative penalties for criminal penalties could lead to a decline in the enforcement of environmental laws. In the past, the state has sought criminal prosecution for very few environmental crimes, whereas some local jurisdictions have active environmental enforcement teams. Local prosecutors can pursue environmental crimes that the federal government or state agencies are too busy to handle or choose to ignore.

It would be unfair to limit local governments to 30 percent of fines recovered under SB 1265 if they incur significant expenses in prosecuting environmental cases.

The **HRO analysis** of the House companion bill, HB 3164 by Capelo, appeared in Part Two of the May 2 *Daily Floor Report*.

Environmental in-stream flows in surface water permitting

SB 1639 by Staples
Effective June 20, 2003

SB 1639 specifies that the Legislature requires the Texas Commission on Environmental Quality (TCEQ) to provide for the amount of freshwater inflow necessary to maintain the state's bay and estuary system in granting permits to use state waters. It also specifies that the Legislature has not authorized granting water rights for leaving water in a river or stream for environmental needs.

The bill creates a Study Commission on Environmental Flows to conduct public hearings and study the policy implications of balancing the demands on water resources of a growing population with the requirements of river, bay, and estuary systems, including granting surface water permits for in-stream flows dedicated to environmental needs, use of the Texas Water Trust, or other relevant and important issues. The commission must issue a report on its findings and any recommendations by December 1, 2004. The bill abolishes the commission on September 1, 2005.

Until September 1, 2005, TCEQ may not issue a new surface water permit for in-stream flows dedicated to environmental needs or the bay and estuary system. TCEQ may amend an existing permit to change use or add a use for in-stream flows dedicated to environmental needs or bay and estuary inflows. In considering a water permit application, TCEQ must include in the permit, to the extent practical, conditions necessary to maintain existing in-stream uses, the water quality of the stream or river, or fish and wildlife habitat.

SB 1639 allows a groundwater conservation district to adopt different rules for specific geographic areas of the district if it determines that groundwater conditions in those areas differ substantially. It also requires a district to select a method for regulating groundwater production that is appropriate to groundwater conditions and allows a district to limit groundwater production based on contiguous surface acreage.

Supporters said SB 1639 would affirm that state law does not allow surface water permits to be granted solely for environmental uses. However, it would recognize the debate over how best to meet the environmental needs of rivers, bays, and estuaries by establishing a study commission to examine the issue and make policy recommendations for the next Legislature. In the meantime, TCEQ could not grant permits solely for environmental in-stream flows, continuing the state's current policy.

The health of Texas' rivers and bays needs careful consideration in the water permitting process. However, using environmental reasons to justify requesting permits for all of the unappropriated water flowing in a river jeopardizes the ability of cities and communities to meet future water needs. The state water plan projects that the state's population will nearly double by 2050 and that water demand will increase 18 percent. Reserving water for environmental flows without careful study and scientific investigation could hinder the state's ability to cope with population growth. The study commission would help to develop a balanced water policy, meeting both the needs of the environment and those of population growth.

The bill would not encourage a "gold rush" for water permits. In fact, it would strengthen current provisions governing TCEQ's consideration of environmental factors in water permits by allowing

the commission to impose conditions on a permit necessary to maintain water quality and fish or wildlife habitat.

Opponents said SB 1639 would deny citizens and public-interest groups the right to apply for permits for environmental in-stream flows. The bill would prevent TCEQ from granting permits for environmental flows while a commission studied the issue, but it would impose no restrictions on permits for consumptive uses. Enacting the bill could create a “gold rush” of permit applications at TCEQ for the unappropriated water remaining in the state’s river basins. By the time the study commission had concluded its work, it could find that its options had been precluded by the rush for water permits during the interim.

Current law is far from clear that TCEQ lacks the authority to grant water rights for environmental in-stream flows. In fact, the agency’s decision on the San Marcos River Foundation permit application already has been appealed in court. State law allows the agency to issue a permit for any beneficial use, but does not specify what constitutes a beneficial use. It is reasonable to assume that most people would consider preserving the health of rivers, bays, and estuaries a beneficial use of water. Moreover, although current law provides a mechanism for the agency to consider environmental needs in issuing water permits, the law does not suggest that this authority is exclusive of other means of providing for the environment through permitting.

Notes: As passed by the Senate and reported by the House Natural Resources Committee, SB 1639 only would have allowed a groundwater district to adopt different rules for each aquifer or subdivision thereof or for each geographic area overlying an aquifer. The House considered the bill on the Local, Consent, and Resolutions Calendar and added several amendments with which the Senate refused to concur. The conference committee attached the provisions of SB 1374 by Armbrister, which had died in the House several days earlier.

The **HRO analysis** of SB 1374 by Armbrister appeared in Part Three of the *May 27 Daily Floor Report*.

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Requiring informed consent from a woman before abortion

HB 15 by Corte, et al.
Effective September 1, 2003

HB 15 requires an abortion provider to obtain the voluntary and informed consent of a woman seeking an abortion to be performed after January 1, 2004, except in a medical emergency. At least 24 hours before the abortion, the physician must inform the woman of:

- the name of the physician performing the abortion;
- medical risks associated with abortion, including infection and hemorrhage;
- danger to subsequent pregnancy and risk of infertility;
- increased risk of breast cancer and the natural protective effect of a completed pregnancy in avoiding breast cancer;
- probable gestational age of the unborn child at the time of abortion;
- medical risks associated with carrying a child to term;
- medical assistance that might be available for mother and baby care;
- the father's liability for paying child support;
- the statistical likelihood of collecting child support;
- contraception counseling and referrals available from public and private agencies;
- her right to review Texas Department of Health (TDH) materials that describe the unborn child and that list agencies offering alternatives to abortion; and
- the website address for viewing TDH materials online.

Before the abortion, a woman must certify in writing that she received the information, and the physician who performs the abortion must receive a copy of written certification. The materials prepared by TDH must:

- describe the unborn child's probable anatomical and physiological characteristics at two-week increments, with the possibility of the unborn child's survival;
- include nonjudgmental, realistic color pictures and dimensions of the child at two-week gestational increments;
- list agencies that offer alternatives to abortion;
- include either geographically indexed information on agencies to help a woman through pregnancy, childbirth, and the child's dependency, or a toll-free, 24-hour phone number from which a person can obtain this information; and
- comprehensively list adoption agencies and provide contact information.

The materials cannot include agencies that provide abortions or related services or that make referrals to abortion providers. If a woman chooses to view TDH materials, they must be provided to her at least 24 hours before the abortion, or 72 hours before the abortion if the materials are mailed. A doctor does not have to provide the materials if a woman certifies that she viewed the materials online.

An abortion of a fetus age 16 weeks or older must be performed at an ambulatory surgical center or at a hospital licensed to perform an abortion.

Supporters said HB 15 would ensure that women seeking abortion receive the same kind of medically accurate information they receive for any surgery, including risks, benefits, and the chance for a second opinion. The bill would help protect women's health by making sure that if they choose abortion, they do so in a fully informed manner. It would allow women to take charge of their health care. Information could be given over the phone, and a woman could wait wherever she lived for the 24-hour period to elapse. A woman who did not want TDH materials would not have to receive them, but they at least would enable her to rethink her decision. HB 15 is similar to legislation in 30 other states and upheld by the U.S. Supreme Court.

Many women seek abortions within only a few days of discovering their pregnancy and may not have considered their decision thoroughly. Typically in this situation, a woman is confused and scared. Although women already must consent before nonemergency abortions, they do not necessarily receive complete information about the procedure or its possible health risks. Some women say they would not have had an abortion if they had known more about the procedure, their unborn child, or the post-procedure medical complications.

Opponents said HB 15 is based on the erroneous and patronizing assumption that women make uninformed choices about abortion. The Texas Medical Practice Act already requires informed consent for all surgical procedures, including abortion, and most women have a sonogram and see fetal development pictures before an abortion. In practice, women must wait more than 24 hours anyway, because most clinics have several days' wait before an appointment is available.

The information that HB 15 would require doctors to provide to women is biased and, in some instances, medically inaccurate. Studies show that abortion is ten times safer than carrying a baby to term, and no scientific evidence supports a link between breast cancer and abortion. Also, no justification exists for requiring color pictures of fetal development, since black-and-white pictures can convey the same information. Requiring TDH to distribute misinformation based on bad science would undermine the department's credibility and would bias women against abortion rather than helping them make informed decisions. The real intent of this legislation is to exaggerate the difficulty involved in an abortion and to influence women not to undergo the procedure, even when it is medically recommended. The cumulative effect of the barriers in HB 15 would be to restrict access to abortion, a *de facto* reversal of *Roe v. Wade*.

The **HRO analysis** appeared in Part One of the April 28 *Daily Floor Report*.

Regulating gestational agreements under the Uniform Parentage Act

HB 729 by Goodman, Dutton
Effective September 1, 2003

HB 729 allows a prospective gestational mother, her husband if married, each donor, and each intended parent to enter into a written agreement regarding a gestational mother's pregnancy by means of assisted reproduction, her relinquishment of all parental rights, and the establishment of the intended parents' parental rights. The intended parents must be married to each other. The parties can begin a court proceeding to validate their written agreement, and a court can validate a gestational agreement after making certain required findings. The intended parents must file a notice of the child's birth within 300 days of the date the assisted reproduction occurred, and the court must render an order confirming that the intended parents are the child's parents, requiring the gestational mother to surrender the child, and requiring the Bureau of Vital Statistics to issue a birth certificate naming the intended parents as the child's parents.

Supporters said HB 729 is necessary to ensure the well-being of children who are born with the use of assisted reproduction and who deserve to know who their parents are. Under current law, if intended parents want to become the legal parents of a child born through the use of assisted reproduction technology, they must undergo a suit terminating the parental rights of the gestational mother and then a lengthy adoption process, and they do not even have standing to file suit for adoption until the child actually is born. Also, without clear legislation in place, courts' ad hoc decisions about the validity of gestational agreements could lead to confusion and inconsistencies among jurisdictions. Gestational agreements are not tantamount to "baby selling" because they are entered into before the child is born, and the child's genetic makeup generally is derived from one of the intended parents. Concerns that HB 729 would undermine traditional family values are misplaced, because only a married man and woman could obtain court validation of a gestational agreement. Unmarried couples or single people only could enter into private contracts regarding the use of assisted reproduction, as they can under current law. Even if Texas outlawed gestational agreements, intended parents could go to other states or abroad and then return to Texas with their offspring, whom the state would have to recognize.

Opponents said gestational agreements should be outlawed because they treat babies like commodities. HB 729 would do nothing to prevent intended parents from paying the gestational mother for her services, which could result in lucrative financial deals. Also, the bill would undermine traditional family values by encouraging the use of assisted reproduction. The bill is unnecessary, because parents who cannot have children of their own can adopt children in need of loving homes.

Other opponents said the bill should not limit court-validated gestational agreements to a married couple. Single people, as well as gay and lesbian and other unmarried couples, also should have the right to enter into such agreements.

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

Prohibiting human cloning

HB 1175 by King, et al.
Died in the House

HB 1175 would have prohibited human cloning through somatic cell nuclear transfer (SCNT) technology or therapeutic cloning, which involves removing the nucleus of an unfertilized egg cell and replacing it with material from the nucleus of a body cell. The cell then is stimulated to divide into stem cells, which can form specialized tissues and organs that make up an organism in a laboratory environment. The bill would not have restricted other research, such as nuclear transfer or other cloning techniques for producing molecules, DNA, cells other than human embryos, tissues, organs, plants, or animals other than humans. A person who intentionally engaged in human cloning would have committed a first-degree felony, and the attorney general could have sued to collect a civil penalty of between \$5 million and \$10 million.

Supporters said human cloning degrades human life. Though cloning may have the potential to yield advances in the treatment of debilitating diseases, this end does not justify the means. HB 1175 would prevent the further creation and destruction of cloned human embryos that, even at the one-cell stage, are human life in its earliest form. A one-cell embryo has to mature before being recognizable as a fetus but, if given an environment in which to grow, could be viable.

HB 1175 would not restrict any vital medical research. It would not affect cloning and SCNT for nonhuman organisms, nor research on existing human embryonic stem-cell lines. However, there is no scientific evidence that embryonic stem-cell research has resulted in any of the therapeutic benefits for disease that have been claimed. Also, stem cells can be obtained from umbilical cords and from adult humans without destroying human embryos. Using adult stem cells may be more effective than using embryonic stem cells. Embryonic stem-cell research has been conducted for more than 20 years but is still not as developed or as effective, in most cases, as adult stem-cell therapy.

Opponents said HB 1175 would go too far by banning SCNT research for therapeutic purposes, even though, in this technology, an egg is not fertilized or implanted in a woman's uterus. The bill would define a human embryo to include the one-cell stage. A single-cell organism is not viable human life. It could develop into human life if it multiplied and was implanted within a woman's uterus but, as a zygote in a petri dish, it is not human life. Embryonic research is an area in which knowledge is incomplete and should be kept open to investigation. Research shows promise for treating Parkinson's disease, juvenile diabetes, and spinal cord injuries. The prospect of this work leading to significant improvements in quality of life for people for whom existing treatments are ineffective is worth continued investigation.

Notes: During consideration of SB 1652 by Shapiro, higher education revisions, Rep. Phil King, the author of HB 1175, offered a related amendment that would have prohibited a higher education institution from receiving or spending appropriated funds if it engaged in human cloning. The amendment was withdrawn after the House adopted a substitute by Rep. Mark Homer that would have permitted scientific research using human SCNT to develop regenerative or reparative medical therapies or treatment.

The **HRO analysis** appeared in Part Two of the May 13 *Daily Floor Report*.

Prohibiting placement of foster child with homosexual or bisexual parents

HB 1911 by Talton
Died in House committee

HB 1911, as filed, would have required the Department of Protective and Regulatory Services (DPRS) to promulgate standards to prevent the placement of a child in a foster home with any unmarried people. During public testimony, the House State Affairs Committee laid out a substitute bill that would have prohibited the placement of a child in a foster home with any homosexual or bisexual people after the bill's effective date.

Supporters say children placed in foster care have been abused or neglected and deserve to be placed in a traditional home with a mother and a father. A foster child should not have to face the confusion of having two mothers, two fathers, or a single parent whose sexual orientation is socially unaccepted. Children have the best opportunity to heal and develop into well-adjusted adults under the care of a heterosexual mother and father.

One of the most important aspects of raising children is to teach them the difference between right and wrong. Sexual orientation is a learned behavior, and a child placed in a home with gay parents might come to perceive that homosexuality is an acceptable lifestyle. Providing care and moral instruction for children in an institutionalized setting would be preferable to placing them in a foster home that would teach them immoral behavior. Also, because Texas does not recognize gay marriages or civil unions, allowing homosexual couples to act as foster parents would deprive foster children of the security of knowing that their caregivers' relationship was stable and legal.

Opponents said the state's first priority is and should continue to be placing children with loving, nurturing parents in a safe home, which DPRS assures through extensive screening and training of foster parents. HB 1911 would force children into institutions by decreasing the number of available foster homes. The longer children stay in institutions rather than in loving foster families, the longer and more difficult will be their healing from abuse.

Studies by respected organizations have identified no difference in parenting ability based on the parent's sexual orientation. No evidence suggests that children with gay parents are themselves gay more often than children in the general population, because sexual orientation is innate, not learned. By the same token, heterosexual couples are not necessarily good parents simply because of their sexual orientation. In some cases where a child has been abused primarily by a parent of one sex, the child may feel more secure in a foster home without a parent of that sex. Also, implementing the bill would be very difficult, because DPRS has no workable way of ascertaining a foster parent's sexual orientation.

Prohibiting recognition of same-sex marriages or civil unions

SB 7 by Wentworth, et al.
Effective September 1, 2003

SB 7 declares that same-sex marriages or civil unions are contrary to Texas' public policy and are void. It prohibits the state and any agency or political subdivision from recognizing a same-sex marriage or civil union granted in Texas or in any other jurisdiction or any legal rights asserted as a result of such a marriage or union. It defines a civil union as any relationship status other than marriage intended as an alternative to marriage or applying primarily to cohabitants and that grants the parties legal protections, benefits, or responsibilities granted to spouses in a marriage.

Supporters said SB 7 would preserve Texas' right under the federal Defense of Marriage Act not to recognize same-sex marriages from other states. Though state law already prohibits same-sex marriages from being granted in Texas, the state could be required under the "full faith and credit" clause of the U.S. Constitution to recognize civil unions granted in Vermont or elsewhere. SB 7 would not deny same-sex couples the right to seek a power of attorney, directive to a physician, and other legal contracts that ensure that a same-sex partner has similar rights and decision-making authority as a spouse.

The procreative marriage relationship between a man and a woman is a fundamental institution whose purpose is the propagation of the species in humanity's collective interest. The state has an interest in protecting this relationship, because it gives women and children the surest protection against poverty and abuse, provides for the healthy psychological development of children, and avoids health risks of same-sex relations and promiscuity. The state's recognition of same-sex marriages would undermine the institution of marriage and society's ability to transmit its values to younger generations.

Opponents said SB 7 was unnecessary because state law already prevents same-sex couples from marrying, and legal unions can be ignored under the federal Defense of Marriage Act. However, the bill would deny same-sex couples some important rights. While a homosexual person today can appoint his or her partner as an agent, solicit a physician's directive, and use private contracts to establish and protect his or her rights, seeking those protections is expensive, and they should be recognized automatically through civil unions.

The U.S. Constitution requires that each state give full faith and credit to the public acts, records, and judicial proceedings of every other state to prevent states from making value judgments about what other state governments do. If Texas expects other states to recognize its laws, it should honor the laws of other states. It is not the government's role to establish correct ideology or theology or to intervene in the private lives of adult citizens whose consensual actions harm no one. Texas is a freedom-cherishing state and should continue to keep government out of adults' private lives.

The **HRO analysis** of the companion bill, HB 38 by Chisum, et al., appeared in Part One of the April 29 *Daily Floor Report*.



Government Affairs

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Omnibus government reform initiatives

HB 2 by Swinford, et al./SB 1952 by Ellis
Died in the House/Died in conference committee

HB 2 would have changed the structure and operations of various state agencies. The original bill considered by the House would have:

- required school districts to reduce administrative and noninstructional operating costs;
- granted the governor additional power to manage executive agencies and to direct state economic development policy;
- created a centralized system to determine value of motor vehicles for the purpose of increasing sales-tax collections on sales of used vehicles;
- established a Private Correctional Facilities Commission to oversee contracts with private vendors for correctional facilities and services;
- changed various environmental permit and hearing procedures;
- capped the number of management and human relations personnel in large state agencies;
- delayed membership and contributions for new state employees into the Employees Retirement System (ERS);
- replaced the three-member Texas Workforce Commission (TWC) board with a single commissioner;
- moved the Office of State-Federal Relations to the Governor's Office;
- abolished the Commission on Private Security and moved its functions to the Department of Public Safety;
- consolidated or abolished several smaller state agencies and raised licensing fees for some professions; and
- transferred administration of the state property tax system from the comptroller to a new State Board of Property Valuation.

HB 2 was removed from the House's May 10 calendar on a point of order, and a revised HB 2 was placed on the May 13 calendar, where it died. Among other changes, the revised HB 2 deleted the provisions for reducing administrative and noninstructional operating costs in school districts and for replacing the TWC board with a single commissioner.

SB 1952 as passed by the Senate retained portions of HB 2 relating to a centralized system for determining value of motor vehicles; capping management and human relations staff in large agencies; expanding the governor's economic development powers; increasing fees for various professions; and delaying membership and contributions for new state employees into ERS. Other provisions not contained in HB 2 would have:

- required the governor to declare an emergency and consult with the Legislative Budget Board (LBB) before reorganizing a state agency;
- abolished the Sunset Advisory Commission and replaced it with a Performance Review Commission headed by the lieutenant governor and House speaker, along with three senators and three House members;
- abolished the State Auditor's Office and the Legislative Audit Committee and moved their functions to a new Performance Review Commission and to LBB;

- redistributed functions of the Texas Legislative Council by placing its computer operations in a new Legislative Information Services Board and by splitting its legal and research functions between the House and the Senate;
- provided zero-interest student loans to students who maintained a certain grade-point average and who graduated from college within four years;
- established a school-based individual health-care plan for students with diabetes;
- established a registry of insurance policies sold to Holocaust victims and set criminal penalties for collecting premiums on insurance policies sold on race-based grounds;
- replaced the 18-member Board of Pardons and Paroles with a new seven-member board;
- created a corporate integrity unit within the Attorney General's Office; and
- changed the definition of "express advocacy" in political advertising.

The House Government Reform Committee substituted language from HB 2 when the House considered SB 1952. The House on second reading added floor amendments that would have:

- changed the procedure for water-quality permits for concentrated animal feed operations;
- required repayment of any money appropriated from the economic stabilization (rainy day) fund during the succeeding biennium;
- required the governor to inform House members of any proposed appointment of residents of their districts to a state board or commission;
- prohibited construction in a pipeline right-of-way without notifying the pipeline's owner;
- abolished the Aircraft Pooling Board;
- allowed the use of aggregated student standardized test scores in evaluating an individual teacher's performance;
- created a pilot program allowing public junior colleges to award baccalaureate degrees in applied science and technology;
- required that Texas participate in an interstate compact for the return or supervision of juveniles under legal supervision who had fled the state; and
- established a state retirement oversight board.

The House on third reading deleted the provision that would have required the comptroller and the Texas Department of Transportation (TxDOT) to create rules for determining the presumptive value of used motor vehicles for sales-tax purposes.

Supporters said HB 2 and SB 1952 represent a thoughtful effort to reorganize and bring efficiency to state government. This legislation would settle some longstanding questions about government organization and would save the state hundreds of millions of dollars during a period of tough budget choices.

School district nonclassroom expenses. This provision in the original substitute for HB 2 would ensure that state funds were spent to benefit students and classroom teachers, not administrators and bureaucrats. The school finance system is based primarily on student attendance and ignores the relationship between expenditures for instructional and noninstructional purposes. Money available to school districts — particularly the portion of costs paid by the state — should be directed to the classroom and not to auxiliary functions.

Private correctional facilities. HB 2 and SB 1952 would move the establishment and oversight of private prisons in Texas to a commission that could facilitate the use of private prison beds and

save the state money by operating more efficiently than the Texas Department of Criminal Justice (TDCJ). Because TDCJ has a vested interest in state-run correctional beds, it has a conflict of interest when establishing and overseeing private prison beds. TDCJ is a large agency, often unresponsive to innovation and plagued with inefficient bureaucratic procedures. These bills would move responsibility for private prisons to an entity that could focus on establishing those prisons and would be small enough to operate efficiently.

Environmental permitting. HB 2 would define more properly who should have standing in a contested case hearing. These adjudicative hearings are not required by federal regulations and are a vestige of earlier state programs in place before federal regulations took effect. Since then, technical review and other procedures have become more sophisticated, reducing the need to hold adjudicative hearings on permits.

Governor's powers. HB 2 would remedy the relative lack of power delegated to the governor by the 1876 Texas Constitution. Texas needs strong leadership, particularly in the months when the Legislature is not in session. Governors have expanded their authority over executive agencies informally over the years, and this bill would recognize the governor's ability to make changes through executive orders. Those orders still would have to conform to the Texas Constitution and statutes, and the Legislature could review those changes when it returned in session.

Used car sales-tax collection. HB 2 and SB 1952 would give state and local authorities the tools to collect sales taxes on vehicles that already should be paid. No mechanism exists to ensure that people who transfer titles on used vehicles state the sales price accurately. The state maintains a sophisticated computer network that tracks millions of vehicle titles. It would be technologically feasible to add objective information about vehicle values to the system without a significant impact on TxDOT's budget or on operation of the system. The comptroller's revenue estimators project \$172 million in additional revenue for fiscal 2004-05 from improved collection of the sales tax on automobiles.

Opponents said HB 2 and SB 1952 fall well short of a comprehensive effort to reform state government in Texas. The bills are hodgepodes of minor changes and rely heavily on budget gimmicks to shift costs to nongeneral revenue funds and local governments. They would provide no overall organizing principle to guide state government into the 21st century.

School district nonclassroom expenses. HB 2 would impose a financial penalty on school districts equating to 4 to 5 cents of the local property-tax rate, because each penny in property taxes raises about \$100 million statewide. It would create a retroactive standard based on information from the 2001-02 school year to penalize school districts for spending decisions that were proper at that time and cannot be reversed now.

Private correctional facilities. It would be unwise to expand the state's private prisons, since the ones that exist have not been entirely successful. Existing private prisons have had many ongoing problems with public, inmate, and employee safety. Studies show that private prisons offer little in the way of cost savings for states and that savings often are due to low salaries, lax oversight, and poor performance. TDCJ has done a good job of overseeing private facilities, especially since the 77th Legislature in 2001 established enhanced monitoring procedures.

Environment permitting. These provisions of HB 2 would weaken state laws providing for public hearings on environmental permits and would deprive many property owners of the right to pursue a contested case hearing on a permit for a facility that could affect their property rights.

Governor's powers. Texans may like their governor's personalities, but they retain a suspicion of gubernatorial power. In 1999, more than 52 percent of Texas voters rejected constitutional amendments that would have allowed the adjutant general and human services commissioner serve at the governor's pleasure. Voters should be allowed to voice their opinions about whether to grant additional power to the governor. HB 2 could weaken some of the checks and balances and separation-of-powers protections in the Texas Constitution by granting the governor authority to reorganize state government unilaterally.

Used car sales-tax collection. HB 2 and SB 1952 unfairly would shift the tax burden to low-income Texans who buy used vehicles. This policy not only would be inequitable but would not generate as much revenue as closing the so-called "Delaware sub" loophole by which Texas companies incorporate out of state to avoid paying the franchise tax. Sales taxes are collected on the market price of items, and it would set a bad precedent to allow the government, rather than the free market, to set the values used to calculate taxes.

Notes: Portions of SB 1952 that carried potential savings were included in other bills enacted late in the session. A delay on making state contributions for new state employees and teachers into their respective retirement systems, estimated to save \$91 million, was included in HB 2359 by Ritter and HB 3459 by Pitts and McCall. Changes in management of state facilities estimated to save \$42 million were included in HB 3042 by R. Cook, and various changes in management and personnel policies in state agencies estimated to save about \$29 million were added as amendments to HB 3442 by Pickett.

The **HRO analysis** of HB 2 appeared in Part One of the May 10 *Daily Floor Report* and in Part One of the May 13 floor report. SB 1952 was analyzed in Part One of the May 27 floor report.

Establishing a statewide homeland security strategy

HB 9 by Flores, et al.
Effective June 22, 2003

HB 9 requires the governor to develop a homeland security strategy to detect and deter threats, respond to and recover from emergencies, and coordinate activities of other jurisdictions and the private sector. It creates the Critical Infrastructure Protection Council (CIPC), including the governor or governor's designee and representatives of 13 governmental entities, to advise the governor on homeland security, and the Texas Infrastructure Protection Communications Center (TIPCC) at the Department of Public Safety (DPS) to plan, coordinate, and integrate communications for homeland security. The bill designates DPS as the repository, disseminator, and primary analyst for intelligence related to homeland security. HB 9 makes certain information confidential, including information related to emergency response providers, risk or vulnerability assessments, encryption keys, and critical infrastructure. It also requires reporting of disease outbreaks to authorities.

Supporters said HB 9 would create a state homeland security structure using the same nomenclature as the federal system to facilitate coordination and communication among federal, state, and local emergency responders, without creating a new agency or requiring new financial resources. Texas' current emergency management is reactive, even though security threats have changed fundamentally since September 11, 2001. HB 9 would institutionalize a culture of proactive coordination and communication through the CIPC and TIPCC to prevent terrorism, reduce the state's vulnerability to disaster, and minimize damages from disasters. It would change state-level policy primarily by coordinating emergency response under the governor, who, as commander-in-chief, should be in charge of ensuring that the state's security strategy protects Texans well. HB 9 would equip state leaders to manage risk better by constantly assessing new threats and how to deal with them successfully. Its purview would cover all disasters, from hurricanes to bioterrorism to a nuclear attack.

Opponents said HB 9 would result in two state-level disaster response coordinating bodies, as the proposed CIPC would have duties similar to those of the existing Emergency Management Council. This duplication would waste scarce resources and confuse the chain of command, which could make emergency response less effective in the short run. The existing emergency response framework works well and should not be changed. Also, HB 9 would give Texans a false sense of security by shifting existing responsibilities into new hands without adding new resources to the state's homeland security effort. There is no apparent difference between what now is called "emergency management" and what HB 9 calls "homeland security." Local responders acutely need assistance from DPS in the form of training, technical assistance, and completion of emergency management plans, but HB 9 would not meet these needs. Also, the bill would allow a council headed by the governor or the governor's designee to make tactical decisions in an emergency, thus potentially politicizing decisions more properly made by emergency management professionals.

The **HRO analysis** appeared in the March 31 *Daily Floor Report*.

Prohibiting involuntary annexation

HB 568 by Mowery, et al.
Died in House Calendars Committee

HB 568, as reported by the House Land and Resource Management Committee, would have prohibited a municipality from annexing an area unless a majority of municipal voters approved annexation and one of the following conditions was met:

- residents in the area subject to annexation voted to approve the annexation;
- residents in that area petitioned the municipality for annexation; or
- no voters lived in the area subject to annexation.

A municipality would have had to disannex an area if a majority of registered voters in the area petitioned for disannexation and a majority of voters in a municipal election approved it. Residents of disannexed areas still could have been taxed by the municipality to pay for the area's share of municipal indebtedness.

Supporters said residents of territories targeted for municipal annexation deserve the right to reject annexation. By giving an equal voice to county residents in the annexation process, SB 568 would stop cities from abusing their authority by annexing surrounding land to increase municipal tax revenues without providing corresponding city services. Residents could stop cities from imposing unwelcome and unneeded changes in land-use regulations, as often happens after annexation. County residents contribute to municipal institutions by patronizing local businesses, paying surcharges for using municipal libraries and swimming pools, and sometimes by attracting boaters and campers who spend money in cities.

Opponents said preserving municipal discretion to annex is critical to preserving cities' ability to satisfy the needs of municipal and nonmunicipal residents alike. HB 568 would set an unrealistically high hurdle for municipalities to obtain approval for annexation. Overly restricting annexation would result in diminished public services and would limit cities' ability to pay for sewer line extensions, wastewater treatment plants, and other infrastructure needed to accommodate safe and responsible development of surrounding land.

Other opponents said the 76th Legislature in 1999 enacted SB 89 by Madla, requiring a public notice and hearing procedure before a city may annex. The Legislature should give that law more time to work before adopting a much more restrictive new standard.

Revising ethics laws and Texas Ethics Commission procedures

HB 1606 by Wolens
Effective September 1, 2003

HB 1606 revises ethics and campaign-finance laws pertaining to most state and local candidates and officeholders and to lobbyists; adds regulations for the campaign for House speaker; and revises procedures of the Texas Ethics Commission (TEC), which underwent sunset review in 2002 but as a constitutionally created agency law cannot be abolished.

Standards of conduct and personal financial disclosure. Attorney-legislators who apply for or obtain legislative continuances — postponements until 30 days after legislative session adjournment of civil or criminal proceedings in which they legally represent parties — must report detailed information about the continuance motions and file copies of continuance applications with TEC. State officers who are attorneys must report referrals made or received for compensation and fee amounts accepted. Required personal financial statements filed late by state officers and employees incur a civil penalty of \$500, as opposed to an amount set by TEC not to exceed \$10 per each day late. The bill also imposes new requirements for the operation and reporting of blind trusts.

Effective January 1, 2005, municipal officers (mayors, governing body members, municipal attorneys, and city managers) and candidates for elective office in municipalities of 100,000 or more; trustees of independent school districts with enrollment of 5,000 or more; and certain other local officials must file annual personal financial statements with their respective entities and, except for municipal reports, with TEC. Financial statements are public records but are subject to destruction two years after the officer leaves office. Knowingly failing to file a statement is a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of \$2,000. Municipal officers and candidates who fail to file statements within 30 days of notice of failure to file timely are subject to a civil penalty of up to \$1,000.

Legislative conflicts of interest. Legislators may not represent other people for compensation before state executive agencies after September 1, 2003, except clients in criminal matters. If legislators' spouses, children, or parents are registered to lobby on the subject matter of measures or bills, legislators must notify their respective houses and TEC before introducing, sponsoring, or voting on the legislation.

Campaign finance and political advertising. All filers must report “cash on hand,” rather than only amounts collected, at the end of each reporting period. Candidates must report within one business day any contributions exceeding \$1,000 received during the last eight days before an election. Legislative and statewide executive office candidates and committees supporting, opposing, or assisting them must report the principal occupations or job titles and employers' names of contributors of \$500 or more (aggregated). Candidates for major political party chairs in counties of 350,000 or more must file the same finance reports as do candidates for public office. Out-of-state political committees raising and spending money in Texas must file reports. Residents may seek court orders compelling candidates, officeholders, or committees to file reports if they are delinquent after 60 days. The bill increases civil penalties for late filing of campaign contribution reports to \$500 for most reports.

Treasurers of general-purpose committees must identify money spent by corporations or labor organizations to establish or administer the committees or to raise political contributions. Legislative caucuses, statewide officeholders, legislators, and specific-purpose committees may not receive political contributions until 20 days after final adjournment of a regular legislative session, instead of immediately after adjournment.

Campaign advertisements that promote the electoral success or failure of a candidate or proposal are considered “express advocacy.” Such ads may not be published, distributed, or broadcast without identifying who paid for them or which candidates or political committees authorized them. Violations are punishable by a civil penalty of up to \$4,000, as determined by TEC. The definition of political advertising includes information posted on an Internet website.

Lobbying. HB 1606 defines circumstances that pose conflicts of interest for lobbyists and prohibits lobbyists from representing clients in communications to influence legislative or administrative action unless the lobbyist notifies affected clients within two days, and TEC within 10 days, after learning of any conflict. TEC must assess a civil penalty of up to \$2,000 for violations of conflict-of-interest provisions in addition to any other action TEC or another person might pursue. By December 1, 2004, TEC must develop an electronic filing system for lobbyists. TEC may increase lobbyist registration fees in 2004 and 2005 to cover development and implementation costs.

House speaker’s race. Candidates for House speaker must file written declarations with TEC before knowingly accepting loans, contributions, or promises of contributions or making or authorizing campaign expenditures. By September 1, 2004, TEC must implement and candidates must use an electronic filing system for speaker candidate reports. Political contributions, interest earned on contributions, and assets purchased with contributions may not be donated or spent on speaker’s races. Any unexpended campaign funds must be reported annually to TEC. A violation of the bill’s provisions is a Class A misdemeanor, punishable by up to one year in jail and/or a maximum fine of \$4,000.

TEC functions and duties. HB 1606 establishes a two-tiered enforcement process for TEC and shorter deadlines for notice, response, and other procedures. Category One violations include failure to file required reports and statements timely, make required disclosures in political advertisements, include right-of-way notices on political advertisements visible from roadways, and respond to a notice letter from TEC. All other violations are considered Category Two. The bill establishes deadlines for responding to each type of complaint and timetables for preliminary review hearings, which are conducted if preliminary reviews do not produce agreement on resolving complaints or if respondents request hearings in writing. If TEC finds credible evidence of a violation that is not technical or minuscule and cannot resolve or settle the complaint, the commission must order a formal, rather than an informal, hearing. The burden of proof at a formal hearing is a preponderance of, rather than clear and convincing, evidence.

By a vote of at least six members, TEC may subpoena documents and witnesses during preliminary reviews for good cause. TEC must believe reasonably that the documents or witnesses will produce the specific information sought and that the information cannot be obtained less intrusively.

TEC may affirm, reduce, or waive civil penalties in the public interest or the interests of justice. The executive director may refer matters arising from complaints to prosecutors based on a reasonable belief that violations of statutes governing bribery, corrupt influence, or abuse of office have occurred.

Supporters said HB 1606 would balance the dangers of ethics violations, the potential harm of ethics allegations, and the public’s right to know how election campaigns are conducted and public decisions are influenced. The bill would require disclosure of legislative continuances and legislators’ conflicts of interest regarding legislation on which family members lobby. It would increase campaign-finance disclosure by political committees and candidates and would streamline TEC investigations and enhance TEC’s oversight and enforcement functions.

Standards of conduct and personal financial disclosure. HB 1606 would balance the public’s right to know about potential conflicts of interest with the need for legislators and their relatives to earn a living. Prohibiting legislators from representing paying clients before state agencies they oversee would remove a means of undue influence that can intimidate agency officials and be unfair to opposing parties. Candidates for municipal, school, and other local offices should have to face the same level of scrutiny as those who seek state and party chair offices. People who believe that they deserve public office should give voters the opportunity to review their financial holdings and assess what conflicts of interest they might have if elected.

Campaign finance and political advertising. HB 1606 would give the public much-needed information about the activities of candidates, political action committees, and their supporters. Because the governor considers and, in some cases, vetoes bills up to 20 days after adjournment of the regular legislative session and because special sessions often are announced during that period, political contributions during that period can appear unseemly. Waiting three weeks after the regular session ends would create no hardships on those who make or receive contributions. Defining “express advocacy” in relation to campaign advertisements would be an appropriate means of prohibiting such ads masquerading as “issue ads” or “voter education,” especially those paid for with unregulated contributions. Voters and candidates deserve to know who is behind the political messages they hear.

Lobbying. The bill would broaden unlawful conflicts of interest to include both those arising between lobbyists’ clients and those between clients and lobbyists’ employers, associates, or the lobbyists themselves. Criminal acts still could be prosecuted under other statutes, and clients would retain the ability to seek civil redress.

House speaker’s race. Even though not elected by the general public, the House speaker is one of the three most powerful officers in state government. Speaker candidates conduct campaigns and exert tremendous sway over legislation and policy. This contest should be subject to more disclosure and public scrutiny.

TEC functions and duties. By incorporating almost all recommendations of the Sunset Advisory Commission, HB 1606 would enhance TEC’s ability to fulfill its mission. Expectations that TEC should police all state electoral campaign activity and prosecute every allegation of governmental misconduct aggressively are unrealistic. The bill would ensure a fair and orderly process for subpoena issuance through specific guidelines and the requisite six-vote approval. Allowing the executive director to determine complaint jurisdiction and eliminating the informal hearing stage should speed up the process. Criminal referral authority would ensure that the most egregious violations were subject to the full force of the law.

Opponents said HB 1606 would make some marginal improvements in TEC functions but would do little to move the agency toward the level of scrutiny and enforcement needed to bring campaigns and officeholders into full compliance with disclosure and election laws.

Standards of conduct and personal financial disclosure. Mere reporting of legislators' conflicts of interest over legislation on which their close relatives lobby is insufficient protection against self-dealing. The bill should prohibit legislators from filing, sponsoring, or voting on such bills under any circumstances. Also, legislative continuances no longer should be tolerated. Court delays should be granted for legitimate reasons, not because a legislator has been hired or added as counsel to a pending case before a legislative session. Such manipulation of the judicial system is unfair to parties who cannot or will not engage in it, cheapens legislative office, and discriminates against other professions that lack similar privileges. City and school board elections are local matters, and their regulation should be left to local discretion. Requiring local candidates to disclose their personal finances could discourage well-qualified citizens from seeking public office.

Campaign finance and political advertising. Requiring disclosure of contributors' employers or occupations would invade contributors' privacy without necessarily enhancing public knowledge of the political process. The express advocacy definition is too broad and could run afoul of federal case law. It would restrict free speech unduly and could hamper political discourse.

Lobbying. Additional legislation is not needed to address lobbyist-client conflicts of interest. No compelling reason exists for the state to regulate a business relationship simply because it may affect public policy.

House speaker's race. The speaker is chosen by House members, not by voters. Because there is no public campaign to be disclosed, subjecting speaker candidates to TEC regulation and disclosure is unnecessary, and criminalizing noncompliance would be too severe.

TEC functions and duties. TEC is the only state regulatory agency whose board, rather than staff, must issue subpoenas. This requirement renders meaningful investigations virtually impossible in view of the five-vote minimum and six votes required for subpoenas. TEC never has issued a subpoena or initiated an investigation; only one complaint ever has reached the final hearing stage. HB 1606 would not rectify this situation, leaving the staff and public thwarted from pursuing full compliance with campaign and ethics laws. The bill should create a new enforcement division or should authorize the attorney general or a local law enforcement agency to help TEC conduct investigations.

Other opponents said the bill's requirements for legislators to report financial conflicts of interest should be strengthened, and the annual filing fee and lobbyist registration fee increase should be reinstated. The House speaker should be elected by secret ballot to curtail intimidation. Reducing TEC's requisite majority votes from six to five, in most instances, would speed up decision-making and enforcement. A three-fourths majority is needlessly burdensome.

The **HRO analysis** of HB 1606 appeared in Part One of the May 5 *Daily Floor Report*.

Transferring Commission on Human Rights to Texas Workforce Commission

HB 2933 by Flores
Effective upon federal certification

HB 2933 transfers the Commission on Human Rights to a new civil rights division of the Texas Workforce Commission (TWC). Governed by a seven-member commission appointed by the governor, this independent division will administer laws prohibiting discrimination in employment and housing and will collect and report statewide information on employment and housing discrimination complaints. Information on complaints filed with the division, federal agencies, or local commissions must include analyses of employment or housing complaints by basis of the complaint, issue, cases closed, and average processing time.

An investigator may not conduct an investigation without having completed a training and education program. The training must provide information on the Americans with Disabilities Act, types of disabilities and accommodations appropriate in an employment setting, and fair employment and housing practices.

The bill takes effect upon certification of the TWC civil rights division by the federal government and the transfer of related federal funds.

Supporters said HB 2933 would make the Commission on Human Rights a separate division within the TWC. The commission has a history of management problems and complaints of employment discrimination. The state auditor found gross fiscal mismanagement at the agency from 1998 through 2001, putting state and federal funds at the risk of loss or abuse. The auditor's report also found that the commission had failed to perform nearly 70 percent of the required reviews of state agency or higher education institution employment policies.

Despite a change of leadership in 2001, the agency remains troubled by poor management. In reviewing the commission's management, the League of United Latin American Citizens (LULAC) found that directors and managers of the housing program lack adequate experience to run the program and estimated that the agency will lose out on \$660,000 in revenue from federal housing programs during fiscal 2004-05. LULAC also estimated that the commission will miss out on additional revenue from the U.S. Equal Employment Opportunity Commission (EEOC) by failing to meet the number of case closures called for by the EEOC contract. Moreover, 12 employment discrimination complaints have been filed against the commission with EEOC and are pending in court. LULAC analyses indicate that a number of the complainants had superior qualifications, yet were passed over for employment opportunities.

Making the commission a separate division within the TWC would improve the state's efforts to combat employment and housing discrimination and to enforce antidiscrimination policies. The human rights commission is top-heavy with management. Moving it could eliminate redundant positions and save the state money, while enhancing the agency's mission.

Opponents said abolishing the commission and transferring its duties to the TWC would not benefit the state, victims of discrimination, or the general public. The transfer of responsibilities could create confusion among clients and could lead to some agency duties being abandoned.

Since new management took over in 2001, the commission has made substantial progress in correcting past problems. In less than one year, the commission has completed 98 percent of the measures in its remedial plan approved by the state auditor. Also, the agency has met or exceeded nearly all of its performance measures.

Many of the problems attributed to the commission are inaccurate or misleading. LULAC's estimates are based on erroneous information and faulty assumptions. Both the U.S. Department of Housing and Urban Development and the EEOC have stated that the commission fulfilled its contract obligations for fiscal 2002 and that the federal agencies have an excellent working relationship with the commission's new management. Despite critics' claims of discrimination, EEOC found no reasonable cause to believe that discrimination had occurred in any of the complaints of former commission employees.

The **HRO analysis** appeared in Part Three of the May 10 *Daily Floor Report*.

Continuing the Texas Department of Housing and Community Affairs

SB 264 by Lucio
Effective September 1, 2003

SB 264 continues the Texas Department of Housing and Community Affairs (TDHCA) until 2011 and makes changes to the agency's programs, including:

- requiring notification of prospective TDHCA-governed housing projects to local interests, including the U.S. representative, members of the Legislature, the political subdivision's governing body, and neighborhood organizations;
- specifying the issues that must be considered in public hearings for state-aided housing projects;
- eliminating tax credits in certain cases for low-income housing developments in areas with existing high concentrations of such housing;
- mandating a deposit and reserve account system for property repairs and improvements in housing projects overseen by TDHCA;
- establishing a process for identifying and executing repairs and improvements in low-income housing projects;
- authorizing both nonprofit and for-profit housing providers to apply for federal housing funds and preventing TDHCA from giving preference to nonprofit providers;
- specifying that the state must allocate federal housing funds to all "urban/exurban and rural areas" of each uniform state service region;
- delineating a point system by which to rank applications for funds under the state's allocation of private activity bonds that are set aside for affordable housing; and
- altering the prioritization of private activity bond reservations for rental projects.

Supporters said SB 264 would continue TDHCA for eight years. The department serves an important mission and largely has overcome the major problems that prompted lawmakers to continue the agency conditionally last session.

The bill would strengthen community input into TDHCA's decision-making process, increasing public awareness of and participation in the agency's evaluation of housing applications. Members of the public have the right to be informed of low-income housing developments planned for their communities, and the bill's public notification requirements would help build the public support that is crucial for successful projects.

SB 264 would address concerns that affordable housing is becoming overly concentrated in limited, less desirable areas, away from quality schools and employment opportunities. The bill would help disperse housing developments throughout a city, minimize undue burdens on local taxing entities, and ensure that unwanted and unneeded projects would not commence.

The evaluation plan for awarding tax credits would emphasize important considerations such as financial feasibility, community support, and the income levels of families served. The bill also would reform allocations of private activity bonds, granting housing developers more flexibility in serving needy populations and basing allocation decisions on such criteria as income levels, unit rent levels, and rental unit quality.

Opponents said SB 264 would introduce new barriers that could impede seriously the construction of affordable housing in Texas. Because of the widespread “not in my backyard” mindset, public housing developments already are scarce in desirable suburban communities with solid bases of employment and strong schools, and SB 264 could aggravate this situation.

A development should not be ineligible for tax credits simply because its surrounding metropolitan area has a relatively high level of affordable housing. The need remains great for affordable housing in many urban and suburban areas. Also, the bill’s provision that TDHCA could not give preference to nonprofit housing providers in distributing federal funds could lead the agency unfairly to allocate these organizations the minimum funds required by federal law, even though nonprofit providers often depend on public financial support.

Other opponents said while TDHCA has addressed many of the financial and administrative problems that have plagued the agency in the past, the agency needs to be monitored very closely. The agency should be continued for only four years before undergoing sunset review again.

The **HRO analysis** appeared in Part One of the May 23 *Daily Floor Report*.

Continuing the Texas Department of Licensing and Regulation

SB 279 by Jackson
Effective September 1, 2003

SB 279 continues the Texas Department of Licensing and Regulation (TDLR) and most of its functions until September 1, 2015. It replaces references to a TDLR “commissioner” with references to the executive director or the commission, depending on the function. The executive director will perform administrative duties, including setting salaries, while the Commission of Licensing and Regulation will establish policy and can adopt rules to implement TDLR’s various regulatory programs. The bill increases the size of the commission to seven members and repeals the governor’s authority to appoint advisory board members, requiring the commission’s presiding officer to appoint them with commission approval.

The commission must revoke, suspend, refuse to renew a license, or reprimand a license holder for violating agency statutes. The bill waives conditions for obtaining a license after determining that the applicant holds a license issued by another jurisdiction that has substantially the same licensing requirements as Texas. The commission may enter into reciprocity agreements with other states. In addition, the bill:

- transfers to TDLR, from the Department of Agriculture, the responsibility for administering weather modification grants and creates a process for voters to approve issuance of a weather modification permit;
- transfers to the Department of Public Safety regulatory responsibilities for transportation service providers and repeals the registration requirement for this occupation;
- requires a certificate of compliance for elevators, escalators, and related equipment stating the date of the last inspection, the due date for the next inspection, and TDLR contact information to report a violation of the applicable regulations;
- requires the commission to adopt rules specifying the information contained in a certificate of elevator and escalator compliance, describing the procedure for issuing a certificate, defining a “publicly visible” area of a building, and requiring that a certificate related to an elevator be posted there;
- requires that a person who operates a valet parking service have financial responsibility for each employee, established through insurance, surety bond, or a deposit; and
- requires TDLR to regulate the use of loss damage waiver contracts that consumers may enter into with merchants.

The bill also requires a person who plugged an abandoned or deteriorated well in a groundwater conservation district to submit a report to the district’s board of directors and TDLR’s executive director within 30 days after the date the well was plugged. It authorizes a groundwater conservation district to enjoin behavior and seek civil damages for violations. TDLR and the Texas Commission on Environmental Quality (TCEQ) must adopt or revise a joint memorandum of understanding to coordinate the efforts of the departments, groundwater districts, and TCEQ field offices relating to investigations of complaints about abandoned and deteriorated wells.

Supporters said that by reorganizing TDLR to give the commission more authority, SB 279 would ensure its responsiveness and independence. The commission would gain key authority to

make rules and appoint advisory committee members. SB 279 would divide the commission's policy-making functions from the executive director's administrative responsibilities, thus helping TDLR improve its responsiveness and better insulating the department from excessive influence by industries it regulates.

The bill would preserve TCEQ's authority over irrigators and other water-related occupations without the confusion of involving TDLR in the licensing process. Water specialists should continue their direct relationship with TCEQ to ease the implementation of conservation measures the agency likely would adopt in the future.

SB 279 would help ensure timely inspections of elevators by requiring the posting of certificates of compliance in publicly visible places. Elevators are moderately complex systems that result in accidents and injuries each year. In light of these risks, the public should have ready access to current inspection certificates. The commission would have discretion in determining where to post the certificates, which would not have to be displayed in the elevators. It also would regulate valet parking and loss damage waiver contracts.

Certain occupations and professions require specialized regulation and oversight best accomplished by separate licensing and regulatory agencies. Merging these duties into TDLR would result in an unwieldy conglomeration that could reduce needed oversight.

Opponents said SB 279 should transfer certain licensing programs from TCEQ to TDLR. TCEQ does not prioritize its licensing programs but instead focuses on reviewing permit applications, enforcing substantive law, and planning programs. As a result, TCEQ's licensing programs do not receive proper attention. SB 279 should enable TDLR, the state's principal licensing agency, to assume more responsibility for these administrative duties, allowing TCEQ to attend more to its own specialities.

SB 279 could result in an inefficient and unsightly inspection certificate for elevators, which serve as the "front door" of many businesses and residences. Paper certificates subject to replacement when they expire often appear tattered and yellowed. On occasion, the date of the certificate does not correspond with inspections that have been performed. These imperfections in prominently placed elevator certificates might prevent businesses from presenting their best initial impressions and could alarm the public unnecessarily.

Other opponents said eliminating separate licensing and regulatory agencies for funeral directors, plumbers, cosmetologists, barbers, land surveyors, geoscientists, and other occupations and merging them into TDLR with separate advisory committees would reduce administrative overhead and duplication.

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

Continuing the Texas Workforce Commission

SB 280 by Nelson
Effective September 1, 2003

SB 280 continues the Texas Workforce Commission (TWC) until 2009 and makes many changes to the agency and its programs, including:

- requiring the TWC to partner with the business community to meet the needs of Texas businesses and workers;
- requiring local workforce development boards (LWDBs) to address the skills development needs of recipients of Temporary Assistance for Needy Families;
- requiring development of rules to govern relationships between LWDBs and independent contractors;
- integrating federal block-grant programs and caseworker services at local career development centers;
- requiring a LWDB to notify a working-poor recipient of child-care subsidies when the recipient's subsidy is terminated;
- establishing an advisory committee of LWDB members and staff directors to advise TWC on policies that affect LWDBs and the state's workforce delivery system;
- creating an evaluation process for the distribution of federal child-care development funds and the effectiveness of child-care programs in helping parents maintain employment;
- requiring TWC to collaborate with the Texas Education Agency on adult education programs and directing TWC to create a demand-driven workplace literacy curriculum;
- clarifying the types of career schools exempt from TWC oversight;
- granting TWC cease-and-desist authority to close unlicensed career schools; and
- expanding the tuition refund program for students of a closed career school.

Changes to TWC's administration of the unemployment compensation trust fund include:

- allowing TWC to issue bonds to avoid borrowing from the federal unemployment trust fund when bond financing is the most cost-effective way to fund unemployment benefits;
- imposing an assessment rate on employers when interest on a federal unemployment advance is due and the money to make this payment is not available;
- adding criteria that must be met before TWC can approve the transfer of an unemployment insurance rating from a previous to a subsequent employer;
- allowing the commission to deny transfer of an unemployment insurance rating if an acquisition is engineered to circumvent the experience rating system; and
- prohibiting chargebacks against an employer if the employee's separation results from the employee leaving the workplace to protect the employee from family violence or stalking.

Supporters said TWC should be continued, but because of the commission's challenging relationship with LWDBs, it should undergo sunset review in six years rather than 12. TWC's current governing structure of three appointed commissioners and an executive director should be left intact, since this arrangement provides transparency and long-term stability and effectively balances the interests of the commission's constituencies.

SB 280 would reinforce TWC's primary role of addressing the needs of businesses by requiring the commission to partner with the business community. The bill would improve services to customers by requiring LWDBs to offer a single point of contact for people to navigate the maze of workforce programs and requirements. It also would improve the efficiency of child-care development fund expenditures by requiring TWC to take into account the child-care needs of each local workforce development area.

The bill would help end manipulation by businesses that organize acquisitions to avoid the unemployment compensation experience rating system. It would enable Texas to pay for unemployment insurance benefits more cost-effectively by allowing the state to issue bonds to refinance outstanding federal unemployment advances, potentially saving the state millions of dollars.

Opponents said SB 280 would not address findings of the Sunset Advisory Commission staff that TWC's three-member governing structure contributes to confusion among agency staff and often results in duplication, delays, and unnecessary expenses. A single commissioner could oversee a more efficient and open system.

Although TWC should strive for integrated workforce services at the local level, SB 280 would not provide additional resources to implement this directive. It also would not address many problems with the commission's administration of Texas' payday law. The bill should require that public information workers who receive telephone requests seeking compensation for unpaid wages be able to speak Spanish.

SB 280 also would miss an opportunity to address problems with the unemployment compensation program that burden Texas employers excessively. The bill should require TWC to strengthen work-search requirements and crack down on fraudulent unemployment insurance claimants, and it should strengthen TWC's authority to reclaim benefit overpayments.

The **HRO analysis** appeared in Part One of the May 20 *Daily Floor Report*.



Health & Human Services

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Revising state policies on child immunization

HB 1920 and HB 1921 by Capelo/SB 43 and SB 486 by Zaffirini
Effective September 1, 2003

The 78th Legislature enacted legislation amending state policy on child immunization, particularly with regard to ImmTrac, the state immunization registry, which tracks immunization of children from birth to age 18 and allows disclosure of information with written consent of the child's parent.

HB 1921 amends regulation of the immunization registry by requiring consent only once, adding additional protection for the information, and allowing providers to use the registry to send reminders. The bill makes consent valid until a child turns 18 years old, unless withdrawn in writing, and allows the parent or guardian to consent to the registry by an electronic signature on the child's birth certificate. On receiving initial consent, TDH must notify the parent or guardian that the immunization record can be included in the registry and must provide information about the registry, including who could obtain the information and how to have records removed. TDH may not retain individually identifiable information about a person for whom consent was withdrawn or for whom consent cannot be verified.

HB 1920 requires the Texas Department of Health (TDH) to develop continuing education programs for vaccine providers relating to immunizations and the federal Vaccines For Children program, which provides free vaccines to health-care providers for children of families that lack sufficient insurance coverage for early childhood immunizations and cannot pay for them. A provider may enroll in the program on the same application form used for Medicaid health-care providers; report vaccines administered under the program to the immunization registry; and use the registry to determine whether a child has received a vaccination.

SB 43 requires TDH to report to the Legislature on results of the Raising Immunization Through Education (RITE) pilot program, a collaborative state effort funded by the federal Centers for Disease Control and Prevention to implement peer training in best practices for increasing immunization levels in medical offices. The report, due by October 1, 2005, must include the program's effect on immunization rates, its cost-effectiveness, recommendations for expansion, and possible funding sources.

SB 486 requires TDH to develop and maintain partnerships with public and private entities to increase public awareness and support of early childhood immunizations. TDH must work with the Texas Education Agency to increase awareness and participation among preschool and school-age children. The bill protects a health-care provider who acts in compliance with the immunization registry laws and rules from criminal and civil liability for furnishing the required information. Providers are not liable for administering a vaccine under the state program unless they would have been liable if they had administered the vaccine outside of the program.

Supporters said Texas has a compelling interest in increasing immunization rates, and data from the state immunization registry should be part of this effort. Once commonplace diseases such as polio virtually have been eradicated by immunization programs. Any risks associated with immunization are insignificant compared to the proven risk of not immunizing children against preventable killer diseases. It would be appropriate for providers to use registry data to send

immunization reminders, particularly since parents who had opted out of the registry would not receive them.

HB 1921 would improve TDH's registry by allowing one-time consent. Some providers do not send vaccination information because they must verify consent before doing so. This bill would place the responsibility in TDH's hands, where consent easily could be verified according to whether or not there was a record in the registry. If there were no record, consent could not be verified and the information would be sent back to the provider. The bill would state clearly that TDH could not maintain data on people for whom consent had been withdrawn. This would ensure that the registry contained only information that parents wanted to be stored there.

HB 1920 would help TDH improve Texas' lackluster vaccination rates by encouraging providers to participate. Allowing providers to enroll in the program by using the Medicaid provider form would remove one of the main barriers to recruitment faced by Vaccines for Children. The bill also would generate accurate and useful immunization data for organizations that need it. By using the database, a provider could determine what vaccines a new patient needed and could ensure that a child would not receive a duplicate immunization, thus preventing waste. A complete and accurate registry also would enable providers to print reminder cards to be sent to parents when it was time for a child's next immunization.

Opponents said because vaccines can harm children, the choice of whether to vaccinate should rest with parents and doctors. The state should not pressure parents to vaccinate their children. It would be inappropriate for the state to use registry information to send reminders to encourage parents to have their children vaccinated. Also, the registry could pose confidentiality concerns. People who had declined immunizations might worry that their decision could be held against them some day by an insurer or some other group. For this reason, efforts to expand access to the immunization registry should be discouraged.

HB 1921 would undermine a parent's right to refuse consent to the registry. By allowing one-time consent on the child's birth certificate, the state unfairly would ask parents to make a very important decision at a time of great stress and distraction, when parents must deal with many forms to sign and activities to perform.

Although it might be easier for some providers to enroll in the vaccine program by using Medicaid forms, HB 1920 would be of little help to the many providers in Texas who do not accept Medicaid patients. The registry database is difficult to use and requires much data entry, another reason why already overworked providers likely would not flock to this program. Providers still would be discouraged from participating because the Vaccines for Children program pays only for the vaccine and not for the cost of the visit.

Notes: HB 2292 by Wohlgenuth, effective September 1, 2003 (see next page), prohibits punitive action against parents and caretakers who do not immunize their children and creates an affidavit for parents or caretakers to sign exempting children from immunization for reasons of conscience.

The **HRO analysis** of HB 1921 appeared in Part Two of the May 7 *Daily Floor Report*. The analysis of HB 1920 appeared in Part One of the April 29 *Daily Floor Report*. The analysis of SB 43 appeared in Part One of the April 30 *Daily Floor Report*. The analysis of HB 1926 by Capelo, the companion to SB 486, appeared in Part One of the April 29 *Daily Floor Report*.

Reorganizing the delivery of health and human services

HB 2292 by Wohlgemuth
Effective September 1, 2003

HB 2292 makes many changes to the delivery of health and human services (HHS) in Texas, including reorganizing the state agency delivery system and programmatic changes related to Medicaid, the Children's Health Insurance Program (CHIP), Temporary Assistance to Needy Families (TANF), and other HHS programs.

Reorganization. The bill reorganizes HHS delivery by combining 10 state agencies into four: a Department of Aging and Disability Services, Department of State Health Services, Department of Assistive and Rehabilitative Services, and Department of Family and Protective Services. It consolidates eligibility determination, family violence services, and administrative support in the Health and Human Services Commission (HHSC). The HHSC commissioner must submit a transition plan to the governor and the Legislative Budget Board by December 1, 2003.

The bill establishes a Health and Human Services Council to advise HHSC on policy; an advisory council for each of the four HHS agencies; and a public assistance health-benefit review and design committee to advise regarding Medicaid and CHIP policies. It abolishes existing advisory committees except those required by federal law or concerned with licensing. The HHSC commissioner can exempt other advisory committees from abolition. The bill also:

- abolishes the Texas Rehabilitation Commission's (TRC) Extended Rehabilitation Services program and directs TRC to assess the need for transitional services;
- expands the Commission for the Blind's education, screening, and treatment program to offer transitional services;
- transfers the Communities in Schools Program from the Department of Protective and Regulatory Services to the Texas Education Agency;
- authorizes the Department of Mental Health and Mental Retardation (MHMR) to contract with a private provider to operate a state mental hospital under certain circumstances;
- establishes a "family protection fee" of \$15 to be paid at the time a suit for dissolution of a marriage is filed, which will support family violence prevention services; and
- transfers medical transportation programs from HHS agencies to the Texas Department of Transportation.

Medicaid. HHSC must offer the health maintenance organization model of Medicaid managed care across the state as the default Medicaid program. Other options can be used if found more cost-effective, including primary-care case management, a prepaid health plan, traditional fee-for-service, or another managed care arrangement. The commissioner may adjust rates, fees, and charges paid to Medicaid providers to ensure efficient operation of the program. Insurers must waive any waiting period for people leaving the Medicaid or CHIP programs and joining a private plan.

HB 2292 limits prescriptions for a Medicaid recipient to four per month and limits the size of a prescription to a 34-day supply, except as authorized by HHSC in consultation with the attending physician or advanced practice nurse. HHSC may evaluate and implement a prior authorization system for high-cost medical services and procedures. To the extent possible under federal law,

HHSC must require sliding-scale cost sharing in the form of copayments, enrollment fees, a deductible, or, for managed care recipients, coinsurance or a part of the plan premium. Cost-sharing levels must be set at the maximum allowable level under federal law.

HHSC must implement a federal requirement to impose a lien on the property of a person who receives Medicaid payments for nursing home care (42 U.S.C., sec. 1396p(b)(1)). Upon the recipient's death, the house under lien will be sold, and the state will seek recovery for Medicaid payments made on that person's behalf. The lien may not be applied to a person's home if a spouse, minor or disabled child, or sibling with an equity stake in the house lives there.

Other provisions in HB 2292 relating to Medicaid include:

- reducing the personal needs allowance for elderly recipients in nursing homes from \$60 to \$45 per month;
- creating a pilot program to allow Medicaid-eligible children join the CHIP program;
- third-party billing requirements; and
- performance-based contracting for nursing homes.

CHIP. HB 2292 extends a 90-day waiting period to all children who apply for CHIP, regardless of their previous insurance history. Children who became eligible for CHIP will maintain eligibility for only six months and will be limited to four prescriptions per month and to a 34-day supply of each medication. Copayments and premiums in CHIP must be raised to the maximum levels allowed under federal law.

Vendor drug program. In addition to the mandatory rebates that manufacturers pay for inclusion in the Medicaid program, HHSC must negotiate voluntary supplemental rebates from manufacturers of drugs reimbursed by Medicaid, CHIP, or a state hospital. HB 2292 establishes a preferred drug list (PDL) for Medicaid and CHIP, with prior authorization required for certain prescriptions. The list may include only drugs from a manufacturer who has negotiated supplemental rebates. The bill establishes a prior authorization requirement for drugs on the less-preferred tiers of the PDL, except for any drug exempted by federal law.

TANF. The asset test for determining eligibility for case assistance is lowered from \$2,000 to \$1,000 for all households. The agency that verifies eligibility can use information from third parties, such as a consumer reporting agency, county appraisal district, or the state's vehicle registration database, to check the accuracy of an applicant's information. Income earned by a person who marries a TANF recipient will be disregarded for six months following the wedding for purposes of determining eligibility or the level of cash assistance.

An eligible TANF recipient must show one month's compliance with the personal responsibility agreement before receiving assistance. A recipient who fails to cooperate for two consecutive months becomes ineligible for cash assistance for the individual and the entire family, but the person may reapply. The bill establishes exemptions from this requirement for good cause. A recipient of cash assistance must have developed an employment plan that must include strategies that support a family's transition from assistance to self-sufficiency. The bill also creates a program, subject to federal funding, to offer instructional courses on premarital counseling; physical fitness and active lifestyles, including sexual abstinence for unmarried and previously married people; and parenting skills. TANF recipients who take the courses may receive additional financial assistance.

Other provisions. HB 2292 also:

- authorizes certain counties to establish a hospital district, primarily Travis County;
- changes the disbursement of certain funds, including the Telecommunications Infrastructure Fund, unclaimed lottery funds, and tobacco settlement funds;
- establishes a nonprofit Border Health Foundation;
- establishes a nursing home incentive program to promote quality of care;
- prohibits punitive action against parents or caretakers who do not immunize their children and establishes an affidavit for parents or caretakers to sign, exempting children from immunization for reasons of conscience;
- authorizes an investigation of abuse or neglect in a nursing home without the completion of an on-site survey by DHS;
- establishes a quality assurance fee for all facilities operated by MHMR;
- authorizes MHMR to adopt a schedule of initial and annual renewal compliance fees for people that provide services through a federal waiver program; and
- increases fees related to licensing and certification of certain health professionals.

Supporters said HB 2292 is integral to the state's budget planning for fiscal 2004-05. Facing a revenue estimate that could not support current services, legislative appropriations committees opted to preserve services over administration and to fund, as fully as possible, current direct services over those that are more preventative. This bill would save the state a substantial amount of money that could be used for pay for services.

The state should consolidate HHS agencies to achieve efficiencies in delivery and to make it easier for clients to navigate the system. The current system divides clients by age or condition, forcing them to work their way through many programs at different locations throughout their lives. It makes more sense to build the state's HHS infrastructure around functional areas: health, protective and regulatory, and long-term care services. Program fragmentation among state agencies confuses clients and drains available resources. All HHS agencies can share functions such as purchasing, human resources, and information technology. This would enable the state to use its resources more efficiently and would make it easier for employees and vendors to deal with a single entity.

Opponents said HB 2292 would destroy the system it purports to save. Disrupting HHS administration and delivery would cause the state's safety net to disintegrate. Much of the bill's savings would result in reducing funds to local economies, especially in rural Texas, and would cause an additional loss of associated federal funds.

The bill would disrupt HHS delivery without necessarily resulting in greater coordination. HHS agencies and programs face greatly reduced funding and will need to perform the same level of services with less money and with fewer administrative employees. The proposed major reorganization would put a fatal strain on an already weakened system. Also, the interests of specific client populations would be lost in the mega-agencies proposed by HB 2292. Agencies such as the Department of Health and the Department of Human Services are large and broad, while other agencies represent and provide services to smaller populations, such as the elderly and the blind. Current agency directors and boards serve as advocates for specific populations. Leadership by generalists would marginalize the concerns of these populations.

Other opponents said the state should reorganize HHS agencies but must preserve public input on policy. HB 2292 would abolish all advisory committees except those required by federal law or specifically exempted by the commissioner. This would reduce stakeholder input in policy making to an advisory role without the authority to set policy. The state should preserve public input to ensure that HHSC sets policies that are fair and reasonable.

Notes: HB 2292 contains many provisions enacted in other legislation, including:

- a disease management and jail diversion program for people with certain mental illnesses, in SB 1145 by Madla (see HRO analysis in the May 16 *Daily Floor Report*);
- return of unused prescription pharmaceuticals by the Medicaid program to a pharmacy for credit, in HB 3486 by Delisi, et al. (see HRO analysis in Part Three of the May 10 *Daily Floor Report*); and
- third-party billing and fraud prevention, in HB 1743 by Delisi, et al. (see HRO analysis in the April 10 *Daily Floor Report*).

HB 2292 also contains provisions proposed in other bills that were not enacted but that were analyzed in an HRO *Daily Floor Report*, including:

- a consumer-directed services program for people with disabilities who receive services through a waiver program, in HB 3182 by Delisi, et al. (May 13, Part One);
- definition of personal care services, in SB 1498 by Madla (May 25, Part Two);
- public health preparedness, in HB 2988 by Capelo (May 13, Part One);
- authority of the attorney general to enforce certain regulations relating to nursing homes, in SB 1204 by Lindsay (May 25, Part Two);
- a Medicaid fraud prevention pilot program, in HB 3204 by Delisi (May 12, Part Two);
- authority for local entities to permit all residents to participate in a local medical assistance plan, in SB 309 by Gallegos, et al. (May 27, Part Two); and
- a system of care for children with certain mental illnesses and emotional disturbances, in SB 60 by Zaffirini (May 27, Part Two).

The **HRO analysis** of HB 2292 appeared in Part One of the April 24 *Daily Floor Report*.

Creating a patient protection office within the Health Professions Council

HB 2985 by Capelo
Effective September 1, 2003

HB 2985 establishes an Office of Patient Protection (OPP) within the Health Professions Council to serve as an ombudsman for consumer complaints at health profession licensing agencies. The governor will name an executive committee, consisting of at least three public members of licensing boards, to appoint a director for the office. The office will represent consumers before licensing agencies and may appeal agencies' decisions on behalf of consumers as a class. It may not appeal an individual complainant's case. The office will evaluate rules proposed by licensing agencies and will recommend statutory changes to the Sunset Advisory Commission during review of a relevant licensing agency. Funding for the OPP will be generated through a \$5 fee on initial licensing or registration of health professionals and a \$1 fee on renewals.

Supporters said health-care consumers need an advocate. The boards that regulate health professions tend to overrepresent the interests of the professions they regulate. The majority of board members are licensees, and even public members tend to rely on the professionals they regulate for information and perspective. Often, legislators and the public never hear of trouble with a licensing board until news reports of egregious problems surface. The public lacks regular contact with these boards, and the Legislature may not know what questions to ask to ferret out problems. The OPP would track trends in consumer issues with the boards, and the Legislature or the boards themselves could take corrective action before problems grew dire.

In dealing with regulatory boards, consumers often report that they cannot determine where their complaints are in the process or what action has been taken. The OPP would help in this capacity by representing the interests of all patients in the aggregate, rather than in individual cases. The office would be self-funded by a fee on professionals' licenses. It would require no additional general revenue, nor would it reduce funding for a licensing board's activities.

Similar offices have represented consumer interests well. The Public Utility Commission, Department of Insurance, and Texas Commission on Environmental Quality have independent advocate offices that represent consumers. Patients should enjoy the same representation.

Opponents said the proposed new office is unnecessary. The state has enough oversight in place to ensure that boards represent the public. Each board has public members and is subject to oversight by the Health Professions Council, the Texas Department of Health, the Health and Human Services Commission, and the Legislature. Also, each board is reviewed periodically by the Sunset Advisory Commission, the state auditor, and the comptroller.

Other opponents said the OPP should be given some real authority. The bill should require the office to report to the Legislature regularly, such as during appropriations hearings or before each legislative session, so that consumers' problems would not be lost in the sunset process.

The **HRO analysis** appeared in Part One of the April 28 *Daily Floor Report*.

Regulation of physicians by the Board of Medical Examiners

SB 104 by Nelson
Effective June 10, 2003

SB 104 changes the requirements for physician licensure; directs the Texas State Board of Medical Examiners (BME) to prioritize complaints and adopt a schedule of sanctions; establishes an expert panel to assist in investigation of complaints; changes the complaint resolution and enforcement process; and changes the fee structure for physician licensure.

The physician profile that the board makes public must include any charges, disciplinary action, or complaints against the physician, rather than only those within the previous 10 years; the full text of the formal complaint or board order, except for any patient identifying information; and a description of any medical malpractice claim for which the physician was found liable and against whom a final judgment and monetary award have been determined. Physicians must comply with continuing medical education requirements and must submit a physician profile for a license to remain in effect.

BME may deny licensure when the applicant is on deferred adjudication for a felony or certain misdemeanors. The board must suspend the license of a physician convicted of certain misdemeanors, including assaultive offenses that are not punishable by fine alone, failure to register as a sex offender, and violation of a protective order. BME must revoke a license if the physician's license has been revoked in another state.

BME must give priority to complaints that allege sexual misconduct, substandard quality of care, and physician impairment and must investigate immediately complaints against a physician who is being monitored as part of a previous disciplinary action. The board must convene an expert physician panel to assist in complaints and investigations when medical competency is at issue. The panel will be funded through an \$80 surcharge on registration and renewal.

Supporters said SB 104 would give BME the tools it needs to ensure that bad doctors do not practice medicine in Texas. The board could deny or revoke a license for a broader range of reasons, including deferred adjudication, assaultive crimes, and license revocation in another state. The expert panel would give BME a broader range of expertise in evaluating standard-of-care cases. A stronger BME could help reduce medical malpractice insurance premiums in Texas. A very small proportion of physicians account for the majority of malpractice cases, driving up the rates for all. Targeting those few physicians would reduce the risk for insurers, who would pass the savings on to Texas doctors.

SB 104 would throw the weight of legislative intent behind current board activities. The bill's major requirements would support recent efforts the board has made to perform its duties better. BME has made great strides in investigating more complaints more quickly, but the board needs additional authority to do its job. In addition to enforcement actions resulting in removal of a license, the board has launched a public information campaign to make patients aware of their right to file complaints against a physician, and BME has reduced the amount of time it takes to investigate a complaint. BME is underfunded for the important work it must perform, and SB 104 would generate additional money for enforcement. It would secure funding through fees for ongoing enforcement so that the board could investigate and resolve complaints in a timely manner.

The bill would target repeat offenders by requiring BME to investigate complaints against doctors who are under disciplinary orders and by expediting informal hearings involving physicians who have been disciplined before. This is a better way to focus on repeat offenders than simply reviewing insurance claims, because it prompts immediate action against doctors who have been through the process before, yet filters out claims that did not result in a complaint to BME.

Opponents said SB 104 would offer consumers too few protections, while expanding protections for physicians by adding new rights for physicians during the complaint resolution process, requiring more extensive research of standard-of-care cases, and dismissing complaints if BME did not act by certain deadlines. These protections by far would outweigh consumer benefits from SB 104.

A lax BME is a primary cause of Texas' medical malpractice crisis, and SB 104 would not do enough to address that problem. According to a report by Public Citizen, in the past 12 years, 272 physicians have lost or settled at least four malpractice complaints in Texas but have not been disciplined. The bill would not accelerate enforcement because it would not alter the current system. Under current law, BME meets with an accused physician in an informal settlement conference, and the case goes to the State Office of Administrative Hearings if no agreement is reached. The bill only would require that BME schedule the informal settlement conference within 180 days, unless the board could show good cause for delay. BME can do this now, yet actions come so late that they are ineffective.

SB 104 would not crack down on repeat offenders. According to Public Citizen, the bulk of medical malpractice is at the hands of physicians who have settled at least two malpractice claims in the past. The law should require BME to investigate any physician against whom an expert report was filed in multiple malpractice cases, rather than requiring the board to investigate all claims, as in current law.

The bill would not resolve BME's inherent conflict of interest. The majority of board members are physicians, and all standard-of-care issues are determined by physicians. This biases the board's actions toward protecting physicians' interests rather than public safety. The bill should require a public member on the expert panel.

The **HRO analysis** of the House companion bill, HB 6 by Allen, appeared in the March 18 *Daily Floor Report*.

Allowing hospital districts to provide nonacute care for certain immigrants

SB 309 by Gallegos
Died in the House

SB 309 would have authorized county hospital districts to provide nonacute medical care — such as doctor’s visits, physical therapy, and disease management services — for people who otherwise would be ineligible under the 1996 federal welfare-reform law, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Funding for this medical care could have come only from local funds, and the district would have had to establish a cost-sharing system. Under PRWORA, undocumented immigrants are eligible for certain health services, including immunization, emergency medical care, and treatment for communicable diseases. A state may make these immigrants eligible for additional services by enacting a statute that affirmatively authorizes their eligibility, and SB 309 would have made that authorization.

Supporters said SB 309 would give hospital districts undisputed legal authority to include undocumented immigrants in their indigent health-care programs while allowing districts to comply with PRWORA through a state exemption, thus enabling districts to save money and manage their costs better. Counties would save money by paying for preventive and ongoing care so that patients would not come to emergency rooms with untreated, advanced diseases. Instead, immigrants could schedule routine visits at doctors’ offices or clinics, making it easier for the entire health-care system to absorb the flow of patients. This would benefit all Texans by ensuring that local emergency rooms were available when needed.

Texas has a public health interest in treating immigrants to prevent the spread of infectious disease. In many border counties, rates of hepatitis A, chicken pox, dengue fever, and tuberculosis are more than double the national average. Federal exemptions to PRWORA allow undocumented immigrants to obtain vaccinations and treatment for communicable disease, but these services alone are not sufficient to protect the public health.

The state ultimately could save on Medicaid payments for infants if county hospital districts provided access to health care for pregnant undocumented immigrants. Children born on American soil are U.S. citizens even if their parents are not, and children of undocumented immigrants are likely to be eligible for public benefits, including Medicaid. Pregnant undocumented immigrants who are denied access to prenatal care may experience poor birth outcomes for their infants, including low birth weights. These infants’ conditions then must be treated and paid for by Medicaid.

Because the majority of a hospital district’s funds are supported by taxes in which undocumented immigrants participate, these residents should be entitled to health-care benefits. Undocumented immigrants living and working in Texas pay sales taxes and may contribute to property taxes, which pay for indigent health care at the local level. Also, they often pay federal taxes that support Medicaid and Medicare. The *Washington Post* reported in 2001 that many undocumented immigrants pay uncredited Social Security taxes using false numbers and have federal income taxes withheld from their salaries.

Immigrants come to the United States to work, not to obtain benefits. Providing health care for undocumented immigrants would not encourage more people to cross the border. Immigration

trends suggest that the enactment of PRWORA, prohibiting undocumented immigrants from receiving public benefits, has not reduced immigrants' desire to come to the United States.

Opponents said SB 309 would drive up the cost of caring for undocumented immigrants and would increase local tax burdens. With health-care costs soaring, local taxpayers should not be asked to pay for health care for new populations.

In the case of undocumented immigrants, the perceived higher cost of emergency care versus that of ongoing care is a myth. While a single visit to an emergency room costs more than a visit to a doctor's office or clinic, the low frequency with which people use emergency rooms results in a lower overall cost. The problem of patients clogging emergency rooms with nonacute conditions is due more to people's impatience than to their ability to pay. Undocumented immigrants and other indigent patients have access to a number of private free or sliding-scale clinics in most metropolitan areas, yet they continue to misuse emergency rooms.

While prenatal care is important to birth outcomes, SB 309 likely would have no effect on prenatal care. Pregnant undocumented immigrants in particular would be unlikely to take advantage of publicly supported prenatal care for fear of possible deportation. If they were deported before giving birth, their infants would not be U.S. citizens.

Undocumented immigrants do not participate in all of the taxes that support indigent health care and therefore should not receive the benefits. Medicaid and Medicare are primary revenue streams for community hospitals. To avoid detection, many immigrants are paid in cash and do not pay federal income or Social Security taxes.

Even though the law denies most public benefits to undocumented immigrants, other factors have encouraged immigration, including educational opportunities and private businesses' demand for labor. Creating a safer and more attractive environment for these immigrants would undermine the nation's immigration laws and encourage illegal activity. Texas should not reward undocumented immigrants for breaking U.S. laws by guaranteeing them health care.

Other opponents said SB 309 is not necessary, since the Texas Constitution authorizes a hospital district to pay for indigent health care without regard to immigration status. Art. 9, sec. 4 requires hospital districts to assume "full responsibility for providing medical and hospital care to needy inhabitants of the county." Texas voters added this language to the Constitution in 1954. In 1999, voters approved Proposition 3 (HJR 62 by Mowery), designed to eliminate duplicative or obsolete language in the Constitution. The amendment did not change the language about hospital districts' responsibilities but deleted two other minor provisions in Art. 9, sec. 4. By reaffirming hospital districts' responsibilities, Texas voters affirmatively have included undocumented immigrants.

Notes: HB 2292 by Wohlgemuth, the health and human services reorganization act, includes a provision allowing local authorities to include all residents in a local medical assistance plan.

The **HRO analysis** appeared in Part Two of the May 27 *Daily Floor Report*.

Revising procedures for determining Medicaid eligibility

SB 1522 by Zaffirini
Effective June 18, 2003

SB 1522 directs the Health and Human Services Commission (HHSC) to implement rules to establish 12-month continuous Medicaid eligibility for children by June 1, 2005, rather than by June 1, 2003. The Department of Human Services may obtain information from consumer reporting agencies, from a county appraisal district, or from the Texas Department of Transportation's vehicle-registration database for use in verifying the assets and resources of people who apply for medical assistance. HHSC may require a personal interview for Medicaid applications or recertification for children if HHSC determines that this procedure is needed to verify eligibility. Procedures for determining the need for a personal interview for recertification must be based on objective, risk-based factors to focus on people for whom there is a high risk that eligibility would not be recertified.

Supporters said SB 1522 represents a compromise between what the state must do to save money and what the state ought to do to protect children's health. Postponing implementation of continuous 12-month eligibility for Medicaid would save the state \$114 million in general revenue for fiscal 2004-05. The state already has implemented six-month continuous Medicaid eligibility, and SB 1522 just would postpone the next phase of broadening continuous eligibility without taking anything away from those currently served. The state is in a difficult fiscal position and must use scarce dollars wisely to avoid cutting children's services whenever possible. Twelve-month continuous eligibility is important for children's health, but it can wait two more years if more children can be served today.

Postponing 12-month continuous eligibility would not remove any children from the program. The only way for a child to be turned away from Medicaid is if the family income or assets rise above eligibility levels. In this time of scarce state funding, Medicaid resources should go to children who are the most in need, not to those whose family income exceeds the eligibility requirements.

Opponents said the bill represents no compromise but simply would avert a tax increase at the cost of children's health. Texas does not have a spending problem, but rather a revenue problem. Because the state was unwilling to close tax loopholes for business or to establish a progressive system of taxation, children could go without medical care.

Eligible children would fall off the Medicaid program if the state postponed 12-month continuous eligibility. Some children's parents would be unable to return the paperwork in time, causing their children to lose coverage even though they still were eligible. Many children who fell off the program would go without routine care only to wind up very sick in hospital emergency rooms, forcing taxpayers to pay for care at their local hospitals in a more expensive, less appropriate setting. SB 1522 might allow the state to save money up front, but local taxpayers would foot the bill eventually.

Notes: Continuous eligibility also was included in HB 2292 by Wohlgemuth, the health and human services reorganization bill, but that legislation gave preference to SB 1522, if enacted.

The **HRO analysis** of SB 1522 appeared in Part One of the May 27 *Daily Floor Report*.



Higher Education

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Allowing public universities to retain overhead expenses

HB 1887 by Morrison
Effective June 18, 2003

HB 1887 prohibits funds generated by teaching institutions, medical schools, or dental schools and used to conduct research and to pay overhead expenses (indirect cost recovery) from being applied to higher education funding formulas in such a way as to reduce the general revenue appropriations to those institutions. The institution or school must spend the retained funds for projects encouraging further research and to support approved research.

Supporters said research universities in Texas work hard to generate external funding for research and development (R&D) and sponsored projects, yet the state deducts from their general revenue appropriations 50 percent of the indirect cost recovery (ICR) — used to pay for overhead expenses — the institutions earn on externally funded research projects. Overhead expenses are incurred in building use and depreciation, equipment use, operations and maintenance, interest expense, library expense, and administration. This policy amounts to a tax on institutions that are successful at securing funding from federal agencies, corporations, foundations, and individual donors.

The ICR is very important not only to large research institutions but also to regional universities competing for outside funding. In addition to being used to reinvest in research capacity, renovate space, buy equipment, and hire technicians, these funds are also used to leverage federal funds. Forfeiting half of the ICR seriously undermines the efforts of public universities to continue building research capacity and puts Texas at a disadvantage nationally in securing essential federal R&D dollars. Other large states, including California, Florida, and Michigan, allow universities to retain all or nearly all of the ICR they recover from sponsors.

Texas leaders and policy experts at the state and federal level agree that Texas' ICR policy should be changed to increase federal funds for research. The comptroller's e-Texas report, *Limited Government, Unlimited Opportunity*, recommended that the state move toward allowing colleges and universities that conduct sponsored research to keep 100 percent of ICR funds they receive. The report states that every dollar invested in research produces \$3.32 in additional economic activity. Therefore, if the state redirected to research purposes the \$35 million in annual ICR now used to offset state support for higher education, the overall state economy would gain more than \$115 million per year. The general appropriations act for the past two biennia have contained special provisions to allow health-related institutions to retain 100 percent of their indirect research costs covered by grants.

HB 1887 would not increase inequity among public institutions but would give schools an equal incentive to pursue federal funding aggressively and enhance their research enterprises. It would enable institutions to grow and reach their potential in serving the needs of the students, their communities, and local and regional economies.

Opponents said the bill would cost the state more than \$43 million per year in general revenue through fiscal 2008. These institutions are funded with taxpayers' money and are partners with the state, which provides the seed money for generating federal research funds. The ICR policy is not a tax, and it is appropriate that some of these funds be returned to general revenue.

Other opponents said HB 1887 would increase inequities among higher learning institutions. Large, research-intensive schools that generate more external funding and that receive allocations from the Permanent University Fund and the Available University Fund would be able to keep more money, while institutions on the cusp of becoming research-intensive would continue to lag behind, because they do not generate as much external funding.

Notes: Gov. Rick Perry used a line-item veto to eliminate \$45 million that HB 1 by Heflin, the general appropriations act for fiscal 2004-05, would have appropriated for the Texas Excellence Fund and the University Research Fund. In addition, the governor vetoed a proposed \$9.5 million for the advanced research program at the Texas Higher Education Coordinating Board. The governor said that the goal of increasing the amount of research carried out by general academic institutions was met by allowing all institutions to keep 100 percent of their ICR for research purposes.

The **HRO analysis** appeared in the April 22 *Daily Floor Report*.

Deregulating tuition at public higher education institutions

HB 3015 by Morrison
Effective June 22, 2003

HB 3015 allows governing boards of Texas public higher education institutions, beginning with the Fall 2003 semester, to charge any student an amount designated as tuition that the board considers necessary for the effective operation of the institution. The governing board can set a different tuition rate for each program and course level as a means of increasing graduation rates, encouraging efficient use of facilities, or enhancing employee performance. For designated tuition charges of more than \$46 per credit hour, each institution must set aside at least 20 percent of resident undergraduate tuition and 15 percent of tuition for graduate and professional programs to provide financial assistance, including grants, scholarships, work-study programs, student loans, and student repayment assistance. The Texas Higher Education Coordinating Board (THECB) must disseminate information to Texas public and private high schools regarding the availability of this financial assistance.

The bill establishes a legislative oversight committee on higher education made up of six senators appointed by the lieutenant governor and six House members appointed by the speaker. Each institution must make satisfactory progress toward the goals in its master plan and in the statewide master plan, *Closing the Gaps*, and meet acceptable performance criteria, including measures such as graduation rates, retention rates, enrollment growth, educational quality, efforts to enhance minority participation, opportunities for financial aid, and affordability. The legislative oversight committee will monitor and regularly report to the Legislature on each institution's progress and make recommendations for legislative action.

Each institution must report annually on such affordability and access issues as the percentage of gross family income required for a resident student to pay tuition and fees, criteria used in making admissions and financial aid decisions, demographic information, and comparisons of these factors with peer institutions in the state.

For beneficiaries of a senior college prepaid tuition contract, institutions must accept as payment the amount of tuition and fees charged by the institution or the weighted average amount of tuition and required fees of all public senior colleges and universities as determined by the Prepaid Higher Education Tuition Board.

Supporters said HB 3015 would give higher education institutions the flexibility they need to respond to cuts in state funding while continuing to work toward the state's goals for increasing access to higher education. Any increase in tuition would be accompanied by more aid for middle-income families to ensure that students were not priced out of higher education.

Increasing tuition would enable institutions to respond immediately to state budget cuts. Cost-cutting efforts, such as reducing salaries, take longer to implement and would not meet the immediate need to balance next year's budgets. Without the ability to increase tuition, institutions would have to offer larger and fewer classes, extending the time it would take for students to complete their degrees.

The bill would continue a trend that began several years ago to give institutions more flexibility and control in setting tuition and fees. Colleges and universities have been judicious in using this authority, as only 10 of the state's 35 public universities have reached their caps. Annual reports about the affordability and access of each institution would provide additional information needed to establish appropriate tuition levels. The bill would enable institutions to use tuition decisions to improve the efficiency of operations and to motivate students to finish their educations sooner.

Higher education is both a private and a public good, and taxpayers and families should share responsibility for financing this education. In the face of declining state revenues, families with higher incomes should be asked to pay a greater share of college costs. The bill would allow the state to keep its promise to families who already had bought contracts with the Texas Guaranteed Tuition Plan (formerly the Texas Tomorrow Fund).

Opponents said HB 3015 would allow higher education institutions to balance their budgets on the backs of Texas families instead of following the state's lead by reducing expenses in the face of a budget shortfall. Before being allowed to reach into the pockets of Texas families, institutions first should find other ways to balance their budgets, such as reducing salaries or increasing teaching loads. In the current economy, higher education institutions might not be able to meet the ambitious goals for "closing the gaps" that were envisioned during more prosperous times. These goals might need to be modified or delayed to reflect current economic conditions.

The state should not take additional steps toward authorizing governing boards to set tuition and other fees. These boards, appointed by the governor, are not directly accountable to students or voters. Without this accountability, the boards likely will continue to finance high salaries, new buildings, and other expenses by raising tuition rather than cutting expenses. Widespread tuition increases could close the door to higher education for many low-income students by reducing the availability of TEXAS Grants. At current project appropriation levels, THECB expects the demand for TEXAS Grants to exceed the availability of funds. Increases in tuition further would limit this availability.

Allowing institutions to charge different rates for the same courses depending on when the course was taught could limit students' options unfairly. The best professors tend to teach courses at popular times. The bill could relegate students with limited incomes to less desirable teachers and class times.

Other opponents said the entire system of financing higher education in Texas is too complex. Before granting new authority to increase tuition, lawmakers should review the funding system and adopt carefully considered changes designed to meet the state's goal of closing the gaps in education as well as the institutions' need for greater flexibility.

The **HRO analysis** appeared in Part One of the April 28 *Daily Floor Report*.

Consolidating two higher education excellence funds

HB 3526 by Hamric, et. al.
Effective September 1, 2005

HB 3526 abolishes the Texas Excellence Fund (TEF) and the University Research Fund (URF) and creates a new Research Development Fund (RDF) to promote increased research capacity at Texas' general academic institutions. Beginning September 1, 2005, each fiscal year, the comptroller must distribute the total amount of assets in the RDF to eligible institutions based on the average amount of restricted research funds spent by each institution in each of the three preceding fiscal years. The Texas Higher Education Coordinating Board (THECB) must prescribe standards and accounting methods for determining eligible research expenditures, and a committee representing eligible institutions must approve those standards.

RDF funds may be used only to support and maintain activities that promote increased research capacity at each institution. By December 1 following each fiscal year, RDF-funded institutions must report to the Legislative Budget Board on how each institution used the money. Any funds remaining in the TEF or the URF will be transferred to the credit of the RDF.

Supporters said HB 3526 would create a more equitable way of distributing “excellence” funding among eligible higher education institutions by establishing a single fund and requiring every institution to conform to the same eligibility standards. The bill would help achieve the goals for which the two funds were created by helping more Texas institutions achieve national reputations as research institutions. The objective in creating these funds was to increase the number of flagship research institutions in Texas so that they could attract more federal research money and premier faculty, as well as easing enrollment pressures at the largest state universities. However, the distribution of the two funds is inequitable, and some institutions unfairly receive more support for their efforts than others. HB 3526 would ensure that research funds were distributed to institutions that could use them effectively. It also would help strengthen accountability in the distribution and use of excellence funds by setting up auditing and reporting systems overseen by THECB.

Opponents said the two existing funds should be retained until 2005, when they are scheduled for sunset review, so that a decision about establishing a single fund could be based on four years of experience. Also, the bill would not address a larger inequity. The two funds primarily benefit a handful of institutions, and those that do not qualify for significant funding — particularly those in the Rio Grande Valley — are losing out on the opportunity to become top-tier institutions.

The **HRO analysis** appeared in Part Two of the *May 9 Daily Floor Report*.

Admission to undergraduate institutions under top 10 percent law

SB 86 by Wentworth
Died in the Senate

SB 86 would have allowed public general academic institutions, under the existing law that requires the top 10 percent of a high school's graduating class to be admitted, to limit admissions to 60 percent of the total number of spaces available for first-time resident undergraduates. It also would have required that graduates of public high schools complete the recommended or advanced high school curriculum to qualify for automatic admission. The recommended curriculum requirement would have applied beginning with admissions for the 2008-09 academic year but would not have applied to a graduate of a public high school that did not offer the recommended or advanced high school program or if the student could not complete the appropriate curriculum solely because necessary courses were unavailable at the appropriate times in the student's high school career. The Texas Higher Education Coordinating Board, after consulting with the Texas Education Agency, could have established standards for determining whether a student from an accredited private school had completed a program equivalent to the recommended or advanced program.

Supporters said SB 86 would help ensure that students admitted to college under the top 10 percent law were prepared academically to succeed in college. It would discourage students from taking less rigorous courses to obtain higher grades that might qualify them for admission under that law. The bill would ensure that students who could not take advanced courses for reasons beyond their control would not be penalized. Students who attended schools that did not offer these courses or who otherwise could not complete the recommended curriculum would be treated the same way as students who had. By allowing institutions to cap the number of students gaining automatic admission at 60 percent of incoming freshman, SB 86 would give institutions some flexibility in determining class makeup. Without such caps, some institutions quickly will reach the point at which all or almost all students were admitted under the top 10 percent law, leaving no room for students who might bring other aspects of diversity to the institution, such as artistic skills or athletic ability.

Opponents said SB 86 unfairly would limit automatic admissions that were designed to increase diversity at higher education institutions and enhance opportunities for minority and low-income students, particularly UT-Austin and Texas A&M. It also would penalize students who finished high school before the recommended curriculum was required. The reasons why students do not complete the recommended curriculum vary and may include lack of timely information about curriculum requirements or insufficient interest in advanced courses. Until the recommended curriculum is required for all students, those who qualify for undergraduate admission under the top 10 percent law should not be penalized for not completing it.

The **HRO analysis** appeared in Part One of the May 23 *Daily Floor Report*.

Continuing the Texas Higher Education Coordinating Board

SB 286 by Shapleigh
Effective September 1, 2003

SB 286 continues the Texas Higher Education Coordinating Board (THECB) until 2015 and:

- reduces the size of the board by August 31, 2009, from 18 members to nine;
- abolishes the Joint Advisory Committee (JAC) and replaces it with the P-16 Council;
- requires THECB to publish performance data on academic teaching institutions and to collect and publish information on higher education authorities;
- abolishes the Texas Academic Skills Program (TASP) and establishes the Success Initiative to assess the readiness of entering college students and to provide advising and educational support for students who are not ready to enroll in college coursework;
- establishes the Doctoral Incentive Loan Repayment Program and changes the Teach for Texas Conditional Grant Program to a conditional loan repayment program;
- establishes a pilot program to examine allowing junior colleges to offer baccalaureate degree programs in applied science and applied technology; and
- allows junior colleges to offer a Mexican American Studies program.

Supporters said SB 286 would put into place most of the Sunset Advisory Commission recommendations for THECB and would help position the board as a more effective force in determining the direction of higher education in Texas. A nine-member board would be more manageable while still reflecting the state's diverse interests. Abolishing the JAC and establishing the P-16 Council in statute would eliminate current redundancies between the policy bodies and would establish the clear priority of creating a more seamless educational system. SB 286 would help students and teachers compare institutions by requiring THECB to publish a comparison of institutions on the agency's website.

SB 286 would eliminate an obstacle to higher education for thousands of Texas students by replacing the TASP with a more appropriate and individualized assessment method and would give higher education institutions more responsibility and flexibility in determining the appropriate levels of student assessment. The bill would encourage minority students and other members of underrepresented groups to pursue doctoral degrees by creating a loan repayment program for these students. It also would help expand opportunities for minorities and others by creating a pilot program to allow certain community colleges to offer baccalaureate degrees.

Opponents said a nine-member board would be too small to represent effectively the state's diverse interests in higher education. The board should have 15 members, as recommended by the Sunset Advisory Commission, rather than nine. By abolishing the TASP, the bill would dismantle more than a decade of progress in preparing students to succeed in higher education by replacing an effective standardized method of identifying students who need developmental education with a patchwork system that could cause many students to fall through the cracks.

The **HRO analysis** of SB 286 appeared in Part One of the May 25 *Daily Floor Report*. The analysis of HB 796 by Delisi, which also would have abolished the TASP, appeared in Part Two of the May 10 *Daily Floor Report*.

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Requiring licensing and regulation of mold assessors and remediators

HB 329 by Naishtat, et al.
Effective September 1, 2003

HB 329 requires a person who inspects a structure for mold, develops a mold management plan or remediation protocol, or collects or analyzes a mold sample to hold a mold assessor license from the Texas Department of Health (TDH). A person must obtain a separate mold remediation license from TDH to remove, clean, act to prevent, or otherwise treat mold. A holder of both licenses cannot provide mold assessment and remediation on the same project.

TDH must conduct a statewide program to teach people about the health consequences of indoor mold and how to recognize, clean, and prevent it. TDH must investigate any complaint regarding mold-related activities and must adopt rules by April 1, 2004, to regulate various aspects of mold inspection and remediation, including licensing. The bill provides for administrative and civil penalties and appeals for violations of the act, immunizes government from liability for mold, and prohibits insurers from making underwriting decisions based on previous mold damage, under certain circumstances.

Licensing and other requirements of HB 329 do not apply to many activities, including routine cleaning; work on plumbing, electrical, and HVAC systems and appliances; real estate inspections; pest-control inspection; an inspection and remediation in an area where mold contamination affects a surface area of less than 25 contiguous square feet; custodial activities and routine assessment of property owned or operated by government; cleaning or repairing materials while building a structure; and actions by owners of certain rental properties, their agents, and some residential properties.

Supporters said HB 329 would establish needed standards and oversight for the public's first line of defense against the proven, harmful effects of some types of mold. TDH already licenses people qualified to remove from buildings another substance — asbestos — that occurs naturally but threatens people. Public demands to address toxic mold deserve similar attention.

By requiring licensing of mold assessors and remediators, HB 329 would help eliminate one cause of the mold crisis. Mold caused more than \$1 billion in insurance losses during the two-year period ending January 2002. In some cases, fraudulent assessors provided mold estimates tailored to match homeowners' policy limits, rather than the cost of remediation. Just as consumers need government to license plumbers and electricians to ensure good service and to make these contractors more attractive candidates for insurance coverage, consumers also need licensing of mold contractors. By restricting insurers from discriminating against homeowners or their properties "tainted" by mold, the bill would protect consumers to the degree that insurers write policies covering mold. Licensing also would benefit legitimate mold assessors and remediators by enforcing standards and weeding out bad actors who hurt the profession.

Opponents said HB 329 would impose unnecessary regulation based on the false premise that mold poses a public health hazard. Mold occurs naturally where moisture and moderate temperatures combine with nutrients like dirt and with almost all common construction materials and furnishings. It is almost always present in buildings. A special licensing program for people to identify

and clean mold is no more necessary than a program to license common cleaning businesses and maids.

HB 329 would enact belated regulation driven by prospective profiteers and by insurers attempting to assign blame for rising rates. An order of the insurance commissioner already allows insurers to exclude mold damage from policies, thus shielding insurers from future mold costs. Also, in contrast to widespread media reporting of fraud, communities report no unusual number of complaints concerning mold remediation work.

The bill would not overturn the commissioner's order allowing insurers to exclude mold coverage but simply would prohibit insurers from discriminating based on a property's relevant history of mold. Because insurers cannot project the likelihood of mold claims by using historical data, the bill could discourage insurers from writing policies to cover mold damage.

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

Changing regulation of insurance rates, forms, and practices

SB 14 by Jackson, et al.
Effective June 11, 2003

SB 14 makes comprehensive changes in the regulation of homeowners and automobile insurance in Texas. By July 1, 2003, residential property insurers (including Lloyd's plans, whose rates previously were unregulated) must file and begin using rates that are just, fair, reasonable, adequate, not confiscatory, not excessive, and not unfairly discriminatory. The insurance commissioner will have 60 days to approve, reject, or modify the new rates (90 days for small insurers) and may order refunds or credits if rates are found to be excessive. SB 14 also makes the following changes:

- After an initial filing, residential property insurers must obtain prior approval of new rates. If the commissioner does not act within 30 days of a rate filing, the rate will be deemed approved. As of December 1, 2004, a file-and-use system will take effect under which insurers can file new rates that will take effect immediately unless subsequently revised by the commissioner for failing to meet rating standards.
- All personal automobile insurers (including county mutuals) are subject to rating standards immediately. Currently rate-regulated auto insurers must continue to operate under the benchmark rating system until December 1, 2004, after which all auto insurers will be subject to a file-and-use system.
- Insurers may use credit scoring to set premiums on the basis of a consumer's credit history, but may not use it solely to deny, cancel, or decline to renew a policy, nor may they discriminate on the basis of lack of credit. Credit scoring models must be filed with the commissioner and are not subject to "trade secret" exceptions to public disclosure.
- An auto insurer may not transfer more than 10 percent of its business to a county mutual insurance company without the commissioner's prior approval.
- Commercial automobile insurance is subject to a file-and-use system.
- Until December 2004, an insured, the Office of Public Insurance Council (OPIC), and any other interested person may petition the commissioner in writing for a public hearing on a rate filing. After that, only OPIC will have standing to do so.
- Insurers must file quarterly reports with the commissioner on changes in losses, premiums, and market share, and the commissioner must file similar reports with the Legislature. A report on the effects of credit scoring must be filed with the Legislature before January 1, 2005.
- Insurers may file and use policy forms without the commissioner's prior approval, so long as the forms meet "plain language" requirements.
- Insurers must file underwriting guidelines with the commissioner, who may reject unfair or discriminatory guidelines.
- Insurers (other than farm mutuals or surplus lines) must file withdrawal plans before leaving the Texas market or substantially reducing market share in Texas.
- A \$75 million tax-exempt revenue bond program is created to finance the FAIR Plan (residential property insurer of last resort for those who otherwise cannot obtain coverage). Bond payments will be made from service fees assessed on participating insurers and the Texas FAIR Plan Association.
- It is a state jail felony (punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000) for certain insurance companies to discriminate on the basis of race, color, religion, ethnicity, or national origin.

- All insurers who did business in Texas during the Holocaust period (1920-1945) must file information with the commissioner on the payment status of claims from that time period, and the commissioner must establish a Holocaust Era Insurance Registry.
- Specialty physician groups or physicians in certain geographic regions may form “medical trusts” to provide medical malpractice insurance to their members.
- Many premium discounts for homeowners and auto insurance are repealed, such as discounts for anti-theft devices or security systems.
- A Property and Casualty Legislative Oversight Committee is established to monitor the progress of regulatory reforms and to recommend legislative action.

After January 1, 2004, no insurer may use a rating territory that subdivides a county, except under specific circumstances. As a condition for qualifying for windstorm insurance in certain geographic areas, building specifications may be supplemented by structural provisions of the International Residential Code.

A file-and-use system will take effect December 1, 2004, for all residential property insurance and for personal and commercial auto insurance. Prior approval still may be imposed on insurers under supervision because of their financial condition or rating practices, or in the case of a statewide insurance emergency.

Supporters said SB 14 could provide much-needed rate relief to Texas homeowners by requiring an initial rate filing within 20 days of the bill’s effective date. Texans pay the nation’s highest homeowners insurance rates. A consumer who paid \$1,000 per year for a comprehensive policy in 2000 now pays \$1,446 per year for a new policy that limits coverage for mold or water damage. Data gathered in response to SB 310 by Fraser, effective in February 2003, showed that homeowners rates have risen by an average of 45 percent statewide since 2000 and that part of the increase would have occurred in the absence of mold claims. The Texas Department of Insurance (TDI) estimated that individual company rates could be reduced by as much as 25 percent from their current levels.

SB 14 would be an acceptable compromise between the extremes of tighter regulation and total deregulation. Requiring an initial rate filing and moving companies to a file-and-use system on December 1, 2004, would bring rates down initially, then create a competitive environment in which companies could file rates based on their actual costs, not on an artificial benchmark. Rate regulation may keep premiums down, but it does not reduce the insurer’s underlying costs. No product can be sold for long when prices do not recover costs. In the long run, freeing companies from benchmark rating would increase the availability of insurance while promoting price competition.

Bringing all Lloyd’s plans and county mutuals under regulatory oversight would provide an ongoing source of insurance data to aid state decision makers in determining whether rates are unfair or discriminatory. Until the enactment of SB 310, limited data were available on how many Lloyd’s plans were setting rates outside the flexibility band, and while TDI knew the rates for county mutuals, it did not know what factors made up the rates. SB 14 would allow the commissioner to monitor insurance rates and underwriting guidelines through annual rate filings, making it possible to avert another insurance crisis before it developed.

SB 14 would regulate the use of credit scoring, creating a transparent process that would protect consumers and prevent discrimination. Safeguards in the bill would ensure that consumers with little or no credit would not be discriminated against. A study by Fair Isaac, a company that develops credit scoring models, found that policyholders with credit accounts in delinquency filed more insurance claims, resulting in higher losses for insurers. Using reliable predictors such as credit scoring to assign risk helps insurers to price their policies more accurately, ultimately creating more equitable insurance rates for all consumers.

The bill would grant freedom of forms to Texas insurers. For years, national companies have used national forms in every state except Texas, resulting in distorted economies of scale and higher costs to Texas consumers. If insurers could have adopted national forms four years ago, a mold coverage crisis would not have arisen, because insurers already would have excluded major cost drivers such as mold and water damage from the standard form. Forms freedom would allow insurers to respond quickly to vulnerabilities in the marketplace, averting potential crises. This ultimately would benefit all consumers by giving them greater choice and lower costs.

SB 14 would protect consumers in the rate-setting process by allowing them to request a public hearing on an insurer's rate structure within 20 days of rate filings between now and December 1, 2004. This would expand a consumer's right to complain to the commissioner beyond issues over individual premiums or policies. Under current law, consumers lack access to information about 96 percent of the homeowners insurance market. Even after a rate is in effect, history with the file-and-use system for commercial insurance has shown that consumer complaints are the most common trigger for a special rate review.

Opponents said SB 14 would move insurance regulation in the wrong direction. The state should return to the more restrictive "prior approval" system in use before 1991, so that TDI would review every rate filing from now on. Data gathered by TDI in response to SB 310 showed steep rate hikes among homeowners insurance companies, including the unregulated Lloyd's companies, proving that insurance companies cannot regulate themselves. Oversight of personal lines of insurance should be stricter than that of commercial lines, because the average person does not have a lawyer or other analyst to evaluate the myriad of confusing choices in an unregulated marketplace.

The bill would provide no guarantee of a rate rollback, as consumers were promised during the last election, thus failing to meet the primary promise of insurance reform. Since January 2001, homeowners insurance rates have exploded in response to the mold and water damage crisis. The SB 310 data call confirmed that rates have risen faster than could be justified by insurers, especially since all but \$5,000 in mold and water coverage has been stripped from the most popular policy. SB 14 would allow insurers to eliminate mold and water coverage altogether, yet consumers would not receive a mandatory rate rollback in return.

The state should ban the practice of credit scoring. Tornadoes do not strike homeowners on the basis of their credit scores, and no independent studies have proven any statistical relationship between a consumer's credit history and his or her ability to drive or maintain an automobile. The SB 310 data call showed that credit scoring has a significant impact on the rates charged individual policyholders, causing some rates to be reduced by as much as 27 percent or increased by as much as 75 percent. Credit scoring is discriminatory, especially against women, minorities, low-income consumers, and consumers who conduct all of their personal business on a cash basis. Also, credit reports often contain errors that can take months to fix, while consumers are left to pay higher insurance rates.

Other opponents said SB 14 would grant too much discretionary authority to the commissioner under the prior-approval plan in effect until December 1, 2004, thus creating potential barriers to entry in the insurance marketplace. Vesting that much power over rates in the commissioner could lead to differences of opinion on actuarial models, which could damage the marketplace. Commissioner authority is best directed toward regulation of solvency, market conduct, and consumer complaints, not toward rate review, in which consumers can protect themselves.

SB 14 should move the state directly to a file-and-use system without an initial rate filing. The one area in which the Legislature can provide certainty is in the regulatory environment. If lawmakers would create a predictable, consistent environment more in line with successful models in other states, more companies would be willing to write policies in Texas. Improving availability of coverage is a function of regulatory certainty and lifting barriers to entry, neither of which would be accomplished by changing horses in mid-stream. Instituting a prior-approval system up front, then switching to a file-and-use system in 2004, only would delay true insurance reform another year.

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

Handling water-damage claims and licensing public insurance adjusters

SB 127 by Fraser, et al.
Effective June 11, 2003

SB 127 establishes requirements for underwriting, handling, and settling water-damage claims and requires licensing of public insurance adjusters (PIAs). Generally, an insurer may not use a prior appliance-related claim as a basis for determining a rate or for determining whether to issue, renew, or cancel an insurance policy if the insured properly remedied such a claim and had the remediation inspected and certified. The insurance commissioner may adopt rules identifying types of water-damage claims that require more prompt, efficient, and effective handling.

PIAs who do business in Texas must be licensed by the commissioner. Practicing without a license is a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of \$2,000. The commissioner can assess administrative penalties against those who engage in unfair competition or unfair trade practices.

A PIA must provide a written contract to a policyholder clearly explaining that the adjuster represents only the insured and allowing the consumer up to 72 hours to cancel the contract after signing. A licensed PIA may not:

- represent a policyholder in a bodily injury claim, render legal advice, or use his or her license to practice law in Texas;
- collect a commission of more than 10 percent of the insurance settlement on a claim, excluding reasonable compensation for expenses and services rendered;
- represent both the insured and the insurance company against which a claim is made;
- act as a contractor or remediator on a claim that the PIA is adjusting;
- own interest in a contracting or remediation firm that benefits from the adjusted claim;
- solicit business during a natural disaster; or
- offer to advance money to a client to solicit business.

The bill sets forth requirements for PIA licensees, including criteria designed to exclude applicants with recent felony convictions, inadequate training and experience, and inadequate proof of financial responsibility. It allows a nonresident to obtain a Texas PIA license and allows issuance of a PIA license to a business entity in certain circumstances.

The commissioner can deny, suspend, or revoke a license for any violation of the law or for other causes, subject to the licensee's right to appeal. The commissioner can impose an administrative penalty of up to \$2,000 per violation in lieu of suspension or revocation and can order the PIA to cease and desist from any conduct prohibited under the bill.

Supporters said SB 127 would protect policyholders and their property from being stigmatized for previous water-damage claims, particularly appliance-related claims, by requiring the commissioner to establish underwriting rules related to these claims and by requiring residential property insurers to file their underwriting guidelines related to water damage. It would create more stringent claims-handling procedures and guidelines than those in current law, which are considered minimum standards for prompt payment of claims. Delayed and improperly handled water-damage

claims have contributed to the current crisis in homeowners insurance, particularly with regard to mold claims. SB 127 would change current procedures so that insurers would have to respond promptly and efficiently to claimants with water damage.

By requiring licensing of PIAs, the bill would help consumers protect their largest and most important assets — their homes — when filing insurance claims. PIAs provide a valuable service to consumers who need a qualified person to manage the complicated process of insurance claims on their behalf. By creating consistent standards, setting forth ethics policies, and giving consumers a forum to complain about unscrupulous practitioners, SB 127 would make PIAs more accountable to their clients and to the state. Disreputable players have given PIAs a bad name in recent years, and honest public adjusters would benefit from state licensing. Texas is one of only five states in which PIAs remain unlicensed or unregulated.

The bill would prevent conflicts of interest by prohibiting remediators or building contractors from acting as PIAs. It also would prevent scam artists from exploiting public fears or benefitting from the hysteria that surrounds catastrophic events such as floods, tornadoes, hurricanes, or events such as the current “mold crisis.” The bill would define clearly a PIA’s role in handling insurance claims, making it plain that public adjusters are not authorized to practice law, nor to mediate disputes with insurance companies.

Opponents said SB 127 would not go far enough in requiring speedier handling of water-damage claims. It would not require the commissioner to adopt rules to ensure more prompt, efficient, and effective handling of claims, but would make such rules optional. The Legislature should compel the creation of such standards.

The bill’s definition of a PIA would appear to authorize license holders to negotiate disputes with insurance companies. PIAs should be limited clearly to assessing and valuing property damage. While the bill would prohibit licensed PIAs from representing clients in bodily injury claims, it should state explicitly that adjusters cannot represent clients in any third-party claim.

The bill could damage consumers by legitimizing a profession that preys on unsuspecting citizens during stressful events. Private insurance company adjusters already are trained and licensed to handle claims for property damage or loss. Public adjusters merely seek commission fees for claims that an insurer would have paid anyway.

Legitimate, honest contractors and roofers spend hours of time providing free estimates of the costs to repair damaged property. It is much more convenient for a consumer to designate the claims process to a knowledgeable contractor or roofer in a one-stop process than to assign a claim to an adjuster who wants to take a percentage of the claim.

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

Requiring prompt payment of physicians by managed care organizations

SB 418 by Nelson
Effective June 17, 2003

SB 418 establishes new prompt-payment regulations for transactions between health-care providers and insurers, including preferred provider organizations and health maintenance organizations. The new regulations cover “clean claims,” payment timelines, audits, coordination of payment, verification, and penalties. SB 418 sets a timeline for submitting a clean claim to an insurer and for paying the claim. The health-care provider must submit a claim by the 95th day after the service was rendered. An insurer must determine if a claim is payable, partially payable, or not payable and act accordingly within 30 days for electronic submissions, or within 45 days for nonelectronic claims. A pharmacy claim submitted electronically must be paid or the pharmacy provider notified within 21 days of adjudicating the claim.

The bill defines “verification” as a reliable representation by an insurer to a health-care provider that a service will be reimbursed. An insurer that needs additional information to determine payment must request the information within 30 days of receiving a clean claim. Payment cannot be delayed pending the receipt of requested information from a third party. If an insurer intends to audit a claim, it must pay the full amount of the claim within the normal amount of time. An insurer who overpays a claim can recover the overpayment by reducing future payment to the provider only if the insurer had notified the provider of overpayment within 180 days of the initial payment and the provider did not arrange to repay the amount within 45 days of the notice.

SB 418 establishes a tiered system of penalties based on the lateness of a payment. If the insurer does not pay a clean claim on time, the insurer owes the provider the full contracted amount of the claim and a penalty. The penalty is the lesser of half the difference between the billed charges and the contracted rate or \$100,000. If a clean claim remains unpaid, the penalty increases in tiers to the highest level after 91 days. At that point the penalty is the lesser of the full difference between the billed charges and the contracted rate or \$200,000, with 18 percent annual interest added to the amount.

The bill also establishes a technical advisory committee and requirements for electronic transactions.

Supporters said SB 418 represents years of work and negotiation among stakeholders to develop fair prompt-payment standards. HB 610 by Janek, enacted in 1999, sought to accelerate payment to providers for their services. However, insurers have been able to work around some of those requirements in ways that run counter to prompt payment, leaving providers in similarly dire situations as before HB 610 was enacted. HB 1862 by Eiland, enacted in 2001, would have closed loopholes, cleaned up areas of confusion in current law, and improved the payment process for providers. However, Gov. Rick Perry vetoed that bill, leaving providers without remedy for another two years.

SB 418 contains many of the provisions of HB 1862 that are agreed upon by insurers and providers, while excluding provisions that the governor cited as reasons for vetoing the bill. Specifically, SB 418 would not limit insurers’ ability to include alternative dispute resolution clauses in their contracts with providers. The governor stated that, at the time of his veto, final rules

implementing HB 610 had been adopted only recently and deserved a chance to achieve their intended results. Time and additional focus on prompt-payment issues by the Texas Department of Insurance have helped insurers and providers come together to work out the provisions of SB 418.

The bill would not conflict with federal laws governing the Employee Retirement Income Security Act (ERISA) program. Federal regulations for ERISA address the relationship between insurers and enrollees. SB 418 would regulate only the relationship between insurers and providers. ERISA covers insurance policies; this bill would cover claims.

Opponents said while many provisions in SB 418 may be acceptable both to insurers and providers, a few exceptions prevent it from taking a balanced approach to changing the payment transaction between insurers and providers. Business practices such as verification and pre-authorization by insurers cannot be changed without driving up insurers' cost of doing business, and ultimately, the cost of health insurance. Also, the level of penalties and fines would make it prohibitively expensive for insurers to do business in Texas.

Some changes proposed by SB 418 — for example, the requirement for insurers to promise payment for services before a claim is submitted — might not stand up to an ERISA challenge in court. Federal regulations could bar some of the bill's provisions.

The **HRO analysis** appeared in Part One of the May 8 *Daily Floor Report*.

Allowing some health insurance policies to exclude mandated benefits

SB 541 by Williams
Effective September 1, 2003

SB 541 allows health maintenance organizations (HMOs) and small-business insurance carriers to offer “standard” accident or sickness insurance policies that do not include some or all state-mandated health benefits. The bill defines state-mandated benefits to include required coverage for specific health services, limitations on cost sharing, or inclusion of a specific category of licensed health-care practitioner.

An insurer may not exclude from the standard plan benefits mandated by federal law or certain required provisions such as continuity of coverage, coverage of beneficiaries with preexisting conditions, coverage of certain dependents, services of certain providers, some cancer screening, childhood immunizations, reconstructive surgery for craniofacial abnormalities for children, dietary treatment of phenylketonuria, and diabetic treatment supplies and services. HMOs may not exclude benefits mandated by federal law or required provisions such as continuity of coverage, coverage of beneficiaries with preexisting conditions, coverage of certain dependents, and some cancer screening. Treatment for serious mental illness may not be excluded from either an insurance or HMO standard plan issued to a large employer.

An application for or document of a standard health-benefit plan must include a standard disclosure to consumers, stating that the plan “does not provide state-mandated health benefits normally required in accident and sickness insurance policies in Texas” and presenting a list of the state-mandated benefits the plan excludes. An insurer that offers a standard health-benefit plan also must offer at least one plan with the state-mandated benefits.

The bill also prohibits small-employer insurance carriers from excluding any additional health-status or experience premium from the calculation of an agent’s commission or from paying a smaller commission on the additional premium. It also prohibits insurers from paying per-capita compensation rather than a percentage commission.

Supporters said the current package of state-mandated benefits prevents some employers — especially small businesses — from offering health coverage to employees. SB 541 would allow insurers to offer stripped-down policies at a lower price, making health insurance more accessible and affordable. Already, insurers report that their most popular plan for small businesses has the least extensive coverage and costs the least.

The bill would ensure fair competition among insurers and would protect consumers’ interests. An insurer that offered a plan without the mandated benefits also would have offer a plan with those benefits. Employers could choose which plan better suited the needs of their employees — a plan with more benefits at a higher cost or a plan with fewer benefits at a lower cost.

Because insurers would have to offer plans with the mandated benefits if they wanted to offer plans without them, consumers would be guaranteed lower rates. If the prices of the two plans were the same, a consumer would have no incentive to choose a plan with fewer benefits.

The bill also would close certain loopholes that insurers have found in previous legislation relating to the fair marketing of small employers' health-benefit plans. Refusing to pay commission on the extra premiums paid by higher-risk groups makes insurance agents less likely to write the policies, as does payment on a per-capita basis.

Opponents said in the absence of data establishing a strong link between mandated benefits and premium rates, the state should not change the current mandates, which are necessary to maintain minimum standards in health insurance coverage. SB 541 would offer no guarantee that removing mandates would make insurance coverage more affordable. Instead, it could make health care unaffordable for people who have insurance. Because many services would not be covered under the mandate-free plan, people who needed those services would have to pay out of pocket for treatment.

This bill would not be limited to small businesses that otherwise could not afford to offer insurance. Larger employers facing slow economic growth could buy stripped-down coverage, and the mandates would not be in place to protect patients' benefits, which would result in eroding employer-sponsored health care for all Texans.

The provisions relating to fair marketing of small employers' health-benefit plans are unnecessary. While some insurers may have manipulated agents' commissions in the past, such practices no longer occur. If insurers do not follow the law, they can be disciplined by the Texas Department of Insurance. No specific evidence exists of attempts by small-employer carriers to manipulate agents' commissions in order to avoid writing insurance.

Other opponents said the state should evaluate the cost-effectiveness of individual mandates separately. Each mandate was enacted separately, with discrete cost-benefit consideration, and the mandates should not be eliminated as a group. For example, benefits such as prenatal care should not be lumped together with treatment of the temporomandibular joint (TMJ). The Legislature should establish a review process to examine each mandate and consider its effect on affordability and accessibility of health insurance.

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



Judiciary

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Continuing the State Bar of Texas

HB 599 by Chisum, et al.
Effective September 1, 2003

HB 599 continues the State Bar of Texas until 2015. The bar must develop a comprehensive, long-range strategic plan for use in fiscal planning. Among other requirements, the bar must collect an additional \$65 annual fee from each active member, subject to certain exemptions based on age, status, and place of employment. Half of this fee will be credited to the judicial fund for programs approved by the Texas Supreme Court that provide basic civil legal services for the poor, and the other half will be credited to a fair defense account in general revenue to be used for demonstration or pilot projects that promote the best practices for representing indigent defendants in criminal cases.

HB 599 changes the disciplinary process for attorneys by removing a level of hearings. The bar no longer must hold an initial investigative hearing but must allow attorneys to choose to have grievances against them heard either in district court or in a closed hearing by a panel of the grievance committee. The bill also establishes an executive committee to review the continuing need for and functions of standing and special committees of the bar.

Supporters said mandating a \$65 fee for legal services to the poor would further the bar's mission to provide equal access to justice, ensuring that low-income Texans receive the legal services they need. This fee would provide a steady source of funding for legal services for the poor without discouraging attorneys from performing *pro bono* work.

Removing a level of hearings from the disciplinary process would streamline the grievance process while preserving the same rights that attorneys have enjoyed since the State Bar Act became law in 1939.

Opponents said the mandatory \$65 additional fee would not be fair to the many attorneys who already go above and beyond their duty to ensure equal access to justice by working *pro bono* or for substantially reduced fees. Voluntary donations have been successful in the past, and making the indigent defense fee mandatory would be counterproductive by discouraging attorneys from performing *pro bono* or discounted services.

Removing the district court option from the grievance process, as recommended by the Sunset Advisory Committee, would streamline the appeals process further, thereby saving money and promoting efficiency.

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

Revising judicial selection of state judges

SJR 33/SB 794 by Duncan, Ellis
Died in House committee

SJR 33 would have proposed a constitutional amendment to require a justice or judge appointed by the governor to fill a vacancy on the Texas Supreme Court, Court of Criminal Appeals, or a district court to stand for a retention election on a nonpartisan ballot at the end of the appointed term. **SB 794**, the enabling bill, would have established election procedures for these judges. After serving an initial term of up to six years, depending on when a judge was appointed, the judge would have had to stand for election on a November ballot. Judges retained by voters would have served additional terms. If voters failed to retain a judge, that seat would have become vacant and subject to being filled by gubernatorial appointment. The retention system would have applied to all affected justices or judges in office as of January 1, 2004, for the last general election preceding the expiration of the regular or unexpired term for which they were elected or appointed.

Supporters said judicial races too often are decided more by party affiliation than by individual merit or qualifications. Shifting tides of party fortunes, not judicial performance, have caused the defeat of significant numbers of qualified, capable judges. Because judges are barred from stating their positions on specific issues, factors such as party affiliation or campaign advertising have gained undeserved importance in judicial elections. Requiring nonpartisan retention elections for appointed appellate judges 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 or the mere familiarity of their names.

Opponents said the proposed retention election system would put the onus on voters to mount a campaign to oust bad judges. The effort to collect funds to combat a retention election would be doubly difficult without a specific candidate to oppose the incumbent. Also, voters could be swayed to reject judges for reasons unrelated to the judge's competence or qualifications. The current partisan election system has served the state well by allowing judicial candidates from outside the legal establishment to serve on the bench rather than only those with a political connection to the governor who appoints them. Voters in an area with a different political slant than the incumbent governor might keep a bad judge in office rather than allow the governor to appoint the judge's successor, while under the current system that judge could be defeated by a better candidate in a primary or general election.

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Changing public school finance and restructuring the state tax system

HB 5 by Grusendorf/SJR 1 by Shapiro
Died in the Senate/Died in House committee

HB 5, as passed by the House, would have repealed the current public school finance system effective September 1, 2004; provided each school district an additional \$100 per student in average daily attendance (ADA) for the 2003-04 school year and an additional \$200 per ADA for the 2004-05 school year; and delayed August 2005 payments to school districts by one month to finance the additional interim aid, among other measures.

The Senate substituted SB 2 by Shapiro in its entirety for HB 5, retaining none of the House-passed provisions. The House refused to concur with the change, and the bill was returned to the Senate, where it died without appointment of a conference committee. As passed by the Senate, HB 5 would have replaced the local maintenance and operations (M&O) property tax with:

- a statewide property tax capped at 75 cents per \$100 of valuation;
- an increase in the state sales tax from 6.25 percent to 7.25 percent;
- an expansion of the state sales-tax base to include certain services; and
- an increase in the motor-vehicle sales tax from 6.25 percent to 8.75 percent.

The bill would have provided a student allotment initially set at \$4,300 per weighted student in average daily attendance (WADA). Current weights and adjustments would not have changed, except that the cost-of-education adjustment would have been converted to a “rolling average.”

The Senate version of HB 5 contained a hold-harmless clause guaranteeing that the “minimum per-student aid” would meet the total M&O funds of a district for the 2002-03 or 2003-04 school year, whichever was greater. Any gain that a district received from raising its 2003 tax rate over its 2002 tax rate would have been subtracted from hold-harmless funding, as would a district’s optional homestead exemption. Local taxes for debt service for facilities would have remained the same, along with state assistance programs that help local schools service that debt, except that the bill would have rolled forward the eligibility date for the Existing Debt Allotment automatically each biennium.

School districts could have supplemented state funding with a voter-approved local enrichment tax of 10 cents per \$100 of valuation, with a state-guaranteed yield at the 90th percentile of wealth (around \$32 per WADA). The enrichment tax would have been capped at 10 cents and could have been used for any purpose, including capital outlays and debt service.

In addition to raising the state sales-tax rate by one cent, the bill would have expanded the tax base to include services performed for a fee. Exempted services would have included any health-care or dental services performed by a health-care provider licensed under Occupations Code, Title 3, except for athletic trainers and morticians.

The comptroller would have been authorized to administer a statewide property tax. The state would not have participated in appraisal district governance but could have challenged and appealed the exclusion of property from appraisal rolls for state ad valorem taxes. Property appraisals and

collections still would have been performed locally. The bill would have deleted the 10 percent cap on annual increases in residential homestead tax appraisals and would have authorized the Legislature to set the cap at any amount.

A 40 percent sales-tax exemption would have applied to certain recipients of financial assistance and food stamps who showed a Lone Star Card when buying goods and services. Landlords would have had to pass on 75 percent of the value of property-tax relief to renters in 2005, 2006, and 2007. The comptroller would have had to report to the governor and the Legislature by December 1, 2007, on the effects of the tax rebate on rental rates and affordable housing.

The bill would have created an Education Excellence Task Force to study academic and funding elements of the school finance system, “best practices” of exemplary schools, improving student performance on the Texas Assessment of Knowledge and Skills, formula weights, adequacy, the effectiveness of laws regarding dropouts, and patterns of student advancement that create obstacles to graduation, among other issues.

The Senate-passed version of HB 5 was the enabling legislation for **SJR 1**, which the Senate adopted but which died in the House Ways and Means Committee. SJR 1 would have proposed amending the Texas Constitution by:

- authorizing a 75-cent-per-\$100 statewide property tax for education and a 10-cent-per-\$100 local enrichment tax;
- increasing the rates of the state sales tax and motor-vehicle sales tax;
- removing the requirement that Available School Fund revenues be distributed on a per-student basis;
- including in the Constitution the statutory requirement that lottery proceeds be dedicated to education; and
- allowing the dedication of other funds to education by creating a new Texas education fund.

Supporters said the current school finance system is broken, and nothing less than total reform of the system is required. School districts and taxpayers need action now. So many districts have reached the statutory cap on M&O tax rates that it is only a matter of time before the courts declare that school districts no longer have meaningful discretion in setting local tax rates and, therefore, that the state has established an unconstitutional state property tax. The Legislature must craft a fair and practical solution before the courts declare the school finance system unconstitutional.

HB 5 would reduce local property taxes dramatically, granting immediate and much-needed relief to taxpayers. Overreliance on the local property tax is unfair, and school districts and taxpayers are tapped out. Over the past decade, 70 percent of the new money in the school finance system has come from local property taxes, placing an enormous burden on capital investment in Texas. The state must be held accountable for its share of the solution and must reduce its dependence on local property taxpayers to pay for the state’s responsibilities. The state cannot decouple taxes and school finance, nor can it save its way out of the problem. Other proposals this session merely would delay the inevitable. Only HB 5 would address the key underlying issue of revenue capacity, or restructuring the state’s tax system.

Opponents said while property tax relief is necessary, increasing and broadening the sales tax would be the wrong approach. The sales tax is regressive, forcing lower-income consumers to bear

a higher proportion of the tax burden relative to their income than higher-income consumers bear. Taxes on advertising could be passed on to consumers through higher prices, and taxes on auto repair or child care could hit low- to medium-income workers particularly hard. Also, taxing services could put Texas companies that provide business and professional services to multistate clients doing business in Texas at an economic disadvantage.

Legislators are on notice that they must find a solution for school finance and tax equity during the interim between the 78th and 79th Legislatures. The state's tax structure and the school finance system are connected, so it would make sense that lawmakers examine both issues concurrently in a special session. Rather than rushing to find a solution without adequate time for deliberation and public comment, lawmakers should determine how much a public education should cost and what the appropriate state and local shares should be, then examine the available resources for reaching those targets.

Notes: Provisions of the House-passed version of HB 5 were added to HB 3459 by Pitts, which takes effect on June 10 and September 1, 2003, except that the one-time delayed payment scheduled for August 2005 will happen on a recurring basis, beginning in August 2003 (see pages 156-157 of this report).

The **HRO analysis** of HB 5 as considered by the House appeared in Part One of the April 28 *Daily Floor Report*.

Allowing parochial and private schools to join University Interscholastic League

HB 580 by Nixon
Died in House committee

HB 580 would have created a 15-member Texas Interscholastic League (TIL) board of directors appointed by the governor to replace the University Interscholastic League (UIL), a part of the University of Texas that has administered athletic, academic, and artistic competition among public school students since 1909. The new league would have been open to students enrolled in public schools, private schools, or open-enrollment charter schools.

HB 580 would have allowed the new TIL to adopt rules for competition, but it would have kept the “no-pass, no-play” provision requiring students to maintain at least a 70 grade on a 100-point scale to be eligible to compete in athletic, academic, or artistic events. Funding would have come from participation fees, similar to the current funding mechanism for UIL. The bill also would have prohibited scholarships for extracurricular activities.

Supporters said UIL lacks statutory authorization. No legislative committee oversees its operations or approves its appropriations, and the entity is not subject to sunset review. HB 580 would establish a legal basis for the UIL and would provide greater public accountability. Forty-seven other states allow private schools to compete in athletic and academic competition with public schools. Texas could join these states in creating common rules and standards.

UIL has a history of discrimination and continues to discriminate against parochial, private, and home-school students. In response to a legal challenge, UIL has changed its rules to admit two nonpublic schools — Dallas Jesuit and Houston Strake Jesuit — beginning in August 2003, but more than 500,000 Texas students remain ineligible for UIL competition. The U.S. Supreme Court held in *Brentwood Academy v. Tennessee Secondary Athletic Association*, 531 U.S. 288 (2001) that high school associations essentially are governmental entities subject to Fourteenth Amendment requirements that schools and students be treated equally. HB 580 would allow these excluded students to participate in athletic and academic competition and would preclude further legal challenges based on equal-protection principles.

Opponents said HB 580 is unnecessary. The 74th Legislature in 1995 recognized and codified the UIL in SB 1, the public education reform act. The league is accountable to students, parents, and the public through its governing body, appointed by school superintendents. Meshing different schools with varying philosophies, educational missions, and organizational structures would be difficult. The *Brentwood* case illustrates the difficulty in enforcing rules against recruitment and scholarship offers by nonprivate schools. UIL serves an educational mission by requiring all coaches and advisors to be full-time teachers, and the new governing body might allow both public and nonpublic schools to hire part-time coaches and advisors.

Deregulating home-rule charters and changing election procedures

HB 859 by Madden
Died in the House

HB 859 would have expanded the list of exemptions from state law for home-rule school districts; revised election procedures, including eliminating the minimum voter-turnout threshold for home-rule charter elections; and repealed the education commissioner’s authority over a home-rule school board’s decision making.

The bill would have eliminated state oversight of home-rule districts in regard to educator certification and contract rights, interdistrict and intercounty transfers, elementary class-size limits for low-performing schools, prekindergarten programs, excused-absence policies for students, and specific health and safety provisions. It would have eliminated the requirement for a home-rule school board to appoint a charter commission representing the district’s racial, ethnic, socioeconomic, and geographic diversity and would have allowed a home-rule school board to override a State Board of Education (SBOE) rule adopted specifically for home-rule districts.

HB 859 would have made continuation of a home-rule charter contingent on the district’s maintaining its performance rating under the accreditation standards of state law. It would have imposed new conditions for probation or revocation related to accountability and accreditation and would have deleted the requirement for home-rule districts to include a description of the use of program-weight funds under the school finance formulas.

A proposed charter and any amendments would not have had to pass legal muster with the education commissioner. Instead, a school board’s legal counsel could have reviewed the charter for compliance with applicable state and federal law. The commissioner’s review no longer would have been needed before a charter election.

Supporters said HB 859 would remove unnecessary barriers to educational innovation by making it easier for local school districts to adopt home-rule charters. Home-rule districts have had no chance to work because current law places such onerous requirements on communities that wish to try them. Since charter schools were authorized in 1995, not one home-rule charter district has been created, primarily because of election expenses connected with ensuring an unreasonably high voter-participation level and because of excessive state regulation.

HB 859 would give local school boards the flexibility to respond to local needs. Since 1995, more than 60 unfunded or partially-funded mandates have been added to state law, not counting agency rules resulting from legislation. Such mandates strain overextended school district budgets, partly explaining why local property taxes have risen so dramatically. State-mandated “one-size-fits-all” policies no longer work for school districts, each of which could do a much better job tailoring policies and programs to suit its own unique characteristics.

The original logic applied to many home-rule district exemptions was to align the authority of those districts with that of home-rule cities. In general, state oversight is much less burdensome for home-rule cities than for general-law cities. Under HB 859, the state would regulate funding for home-rule districts in general without dictating local policies on employees and programs.

HB 859 would eliminate state restrictions on categorical funds such as set-asides and program weights, thus giving school districts flexibility in using resources to meet their students' needs. Categorical funding involves paperwork, audit requirements, and other administrative burdens that detract from the primary focus of public schools in Texas: helping all students develop and learn to their maximum potential.

The approval process for charters would require voter approval, a major test of community buy-in. The current requirements for charter commissions and minimum voter turnout create roadblocks to community reform. The only time a district realistically may hold a home-rule charter election or an amendment election is during a presidential or gubernatorial election.

HB 859 would add a requirement that the SBOE revoke a home-rule charter if the district did not meet high standards. A successful accountability system requires consistent application to all schools without regard to size, location, or demographics, and home-rule districts would receive no exemptions from the accountability system.

Opponents said HB 859 would wipe out state education standards in districts where home-rule charters were adopted, allowing local districts to abandon statewide policies that have proven beneficial for Texas students, teachers, and school employees. Many state requirements, such as the 22:1 student-teacher ratio for kindergarten through fourth grade, have helped students greatly and should not be abandoned. The open-enrollment charter school experiment has proven that innovation does not necessarily result in high performance. At the least, the bill should prevent the state from granting home-rule charters to at-risk school districts with low academic ratings.

Eliminating the requirement for a 25 percent minimum voter turnout would lower standards dangerously for community involvement in local schools. Petitions could be brought by as few as 5 percent of the number of voters in the latest gubernatorial election. Thus, in a school district with 10,000 registered voters, as few as 180 voters could petition for a home-rule charter or amendment. Furthermore, a small group of citizens in a home-rule school district could elect a majority of the school board who might make the public schools a vehicle for advancing extreme religious or political agendas.

A home-rule school district is not the same as a home-rule city. In terms of writing a district's charter, HB 859 would give the school board much greater power than a city council has in a home-rule city. Full community involvement is crucial in determining the goals of a home-rule charter, especially when the state no longer provides safeguards.

HB 859 would go too far in expanding the list of rules from which charter schools are exempt. The Legislature went through the Education Code with a fine-tooth comb in 1995. Everything left in the code is there for a good reason, and many of the provisions protect the health and safety of school children. Other than to allow school districts to reduce their budgets, the state could find no justification for lifting such regulations.

The **HRO analysis** appeared in Part Two of the April 28 *Daily Floor Report*.

Authorizing state funding for virtual charter schools

HB 1554 by Grusendorf
Died in the House

HB 1554 would have authorized a public senior college or university to operate a “virtual” charter school, defined as a charter school that uses technology, including the Internet, to deliver a significant portion of the school’s instruction outside of a central campus. The virtual charter school would have been entitled to funding for each student in average daily attendance at a level equal to that of an open-enrollment charter school.

The virtual charter school would have had to provide each student enrolled in the school with access to a secular curriculum that met or exceeded state standards; allow each student to work at a grade level other than the level at which the student was enrolled; assess each student’s performance an average of at least once a week during the school year in each basic subject; ensure that a parent or guardian of each student verified the number of hours of educational activities the student completed each year; make available to the parent or guardian a computer, printer, physical copies of instructional materials, and reimbursement for any fees related to Internet access used for educational activities; and maintain a student/teacher ratio of not less than one teacher for each 60 students in average daily attendance. The college or university that held the charter would have had to conduct an annual evaluation of the school to assess gains in student achievement, student performance on state assessment tests, and the school’s academic, fiscal and operational performance.

Amendments adopted on the House floor would have required the State Board of Education, in granting a charter for a virtual charter school, to give preference to a school for which at least 75 percent of prospective students were at risk of dropping out; allowed computers, printers, and Internet access to be provided only to families at or below 150 percent of the federal poverty level; specified that a virtual charter school would be entitled to a funding level that was the lesser of the school’s actual cost of efficiently providing educational services or the level of funding for a student in an open-enrollment charter school; specified that enrollment in virtual charter schools would have to be limited so that a school district would not lose more than \$35 per student in Foundation School Program funding for each student enrolled in a virtual charter school; and required that purchasing contracts for educational services for virtual charter schools could not exceed the lowest price paid by any other state or school campus or district in Texas.

Supporters said HB 1554 would take advantage of advances in technology to provide Texas students with an alternative method of gaining access to a high-quality education and would open the door to new educational opportunities for students who may not fit the traditional mold, such as those in isolated areas, military families, or students with disabilities. The bill would include safeguards to ensure that students attending virtual charter schools received an education that was equal to or better than the education they could receive in a traditional school. The programs would be operated under the direction of colleges and universities, and students would be subject to testing and attendance requirements. Each year, the sponsoring college or university would have to scrutinize the performance of the virtual charter school and its students, including student performance on standardized state tests. The minimum attendance requirements would include time spent in hands-on activities and other pursuits, as well as time spent at the computer on Internet

activities. These activities would be conducted under the direction of certified teachers using high-quality materials that otherwise might not be available to these students and that would all be available at no cost to all families, regardless of income.

The bill would include funding mechanisms needed to cover the cost of operating a high-quality virtual charter school. These costs are comparable to regular school expenses, minus building costs, and include teacher salaries, equipment, and travel; school management, including salaries for principals and assistant principals; operation of call centers; expenses related to testing and accountability standards; and reporting expenses.

Opponents said HB 1554 would divert money from public schools to for-profit companies that would operate virtual charter schools at a time when the state is having trouble meeting basic educational needs for public school students. The program outlined in the bill, though described as a virtual charter school, actually is designed to support home schools, which are private schools and ought to be funded privately. The bill would state broad academic requirements without ensuring that students received a high-quality education. It would not require that a student ever meet face-to-face with a certified teacher, only that parents meet at least four times a year with a teacher. According to the bill's fiscal note, the eventual cost to the state could be more than \$2 million per year for a program that would be subject to none of the reporting and assessment requirements that apply even to other charter schools.

Other opponents said it would be premature to adopt HB 1554 before the state has had time to evaluate the results of studies of virtual school pilot programs established by the 77th Legislature in 2001. Initial findings about the benefits of these programs are inconclusive. While online education may offer promising opportunities, the state should not authorize resources to fund these programs until more information is available about their costs and benefits.

Notes: SB 933 by Shapiro, which would have limited virtual charter schools to 2,000 students, died in the House Calendars Committee. A Senate amendment to HB 411 by Grusendorf, creating the master science teacher certification and grant program, would have authorized a pilot program for virtual charter schools but was removed in conference committee.

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

Creating a publicly funded school voucher pilot program

HB 2465 by Grusendorf, et al.
Died in House Calendars Committee

HB 2465 would have created a pilot program to provide publicly funded “freedom scholarships” (vouchers) for eligible children to attend the private schools of their choice, beginning with the 2003-04 school year. The program would have applied to 11 school districts with enrollment of more than 40,000 where a majority of the students were educationally disadvantaged. Beginning with the 2005-06 school year, any school district could have opted into the program with a local school board resolution. A child would have to have lived in and attended school in an eligible district for a majority of the preceding semester and have been from a household with an annual income not exceeding 200 percent of the qualifying income for the federal free or reduced-price lunch program (\$66,970 for a family of four). Beginning with the 2005-06 school year, any child in an eligible district, regardless of family income, would have been eligible to participate.

To be eligible to receive freedom scholarship students, a private school either would have to have been accredited or have applied for accreditation and could not have discriminated on the basis of race, national origin, or ethnicity. A school with more qualified scholarship applicants than openings would have had to fill available slots by lottery, but preference could have been given to students who were enrolled previously in the school and to other children living in the same household as previously enrolled students. Home schools would not have been eligible for the scholarships, nor would schools that limited enrollment to relatives of the school’s staff. Private schools that accepted eligible scholarship students would have had to administer annually either a Texas Assessment of Knowledge and Skills (TAKS) test or another norm-referenced test and make the aggregated results publicly available.

An eligible child who elected to use a freedom scholarship would have been counted toward the resident district’s average daily attendance for school finance purposes. A private school would have received 90 percent of the scholarship amount or the private school’s average cost, whichever was less, and the resident school district would have retained the other 10 percent. A parent of an eligible child could not have been charged tuition in addition to the scholarship amount.

The education commissioner would have had to establish performance standards in conjunction with the Charles A. Dana Center at the University of Texas at Austin, including a rating system to measure students’ yearly academic progress, and could have revoked vouchers if a student or group of students received academically unacceptable ratings for two consecutive years. The comptroller would have had to evaluate the program in conjunction with the Dana Center and would have had to select nonprofit groups to administer “schools of choice resource centers” in each eligible district.

Supporters said HB 2465 would restore educational choice to families through competition. At present, educational choice is concentrated among wealthy families, who can either opt for private schooling or relocate to areas with better public schools. The educationally disadvantaged children targeted by the bill tend to be left behind in dilapidated inner-city public schools. These poorer schools have provided a baseline against which all other schools are compared, thus doing a disservice to students, parents, and taxpayers alike.

Freedom scholarships would provide students and their parents with greater choices and a higher-quality educational product for the same amount of money or even less than now is being spent. Because the public education system has limited resources, no profit motive, and no competition, public schools lack the innovation observed in private schools, resulting in low quality and high costs for a stagnant product. The state's huge educational bureaucracy prevents the natural force of competition from improving the school system. If public schools had to compete with private schools, they would have a greater impetus to improve their quality.

Several studies have found improved student achievement based on private school attendance. Students who attend private schools are more likely to graduate than are students who stay in failing public schools. School choice also improves family participation in education, a driving force for educational achievement. Some studies also have shown that having a choice of which school a child attends improves both parents' and students' satisfaction with the school, which may lead to improved achievement over the long run.

Opponents said HB 2465 would siphon money away from public schools and spend it on private school vouchers at a time when the state and local schools can ill afford this experiment. Schools have worked hard to meet the increasing demands of the accountability system and to comply with hundreds of other state and federal mandates. Taking money and students away from a school district does not change a school's fixed costs. When voucher students leave the public schools, the costs of staff, maintenance, and debt service for school facilities remain. Losing 90 percent of the cost per student could have an adverse trickle-down effect on students, school districts, and taxpayers. The money proposed to be spent on vouchers would be spent better on improving the public school system to benefit all students.

Private schools should not receive public funds because they are not accountable to the state to the same degree that public schools are. Private schools are not subject to open records and meetings requirements, nor are they bound by other state and federal laws, regulations, and court decisions. Thus, a voucher system would be rife with potential abuse of public dollars. HB 2465 would not even require private schools to be accredited but only to have applied for accreditation, and it would place no time limit on achieving accreditation. Nothing in the bill would prevent a private school from discriminating on the basis of a student's academic or athletic ability.

The bill would create incentives for wealthy families who already had children in private school to "game the system" in order to qualify for public subsidies. After 2005, any child would be eligible for the voucher program, regardless of family income. Because students who previously were enrolled in private school (and their siblings) could be given priority over other students, the few available spots likely would go to wealthier families who already could afford private school on their own. Because there would be no means testing once a student was qualified, the bill essentially would create a permanent public subsidy for private school students.

Other opponents said that public funding inevitably comes with strings attached and eventually would bring private schools under government regulation on matters such as testing and curriculum, class size, and other mandates.

Appropriations-related changes to education statutes

HB 3459 by Pitts
Generally effective September 1, 2003

HB 3459 amends the Education Code and other statutes as required to implement provisions for public and higher education in the general appropriations act for fiscal 2004-05.

School finance. HB 3459 repeals the existing school finance system on September 1, 2004, contingent on enactment of a replacement system by that date. It delays the state's annual August payment to school districts until September and requires the education commissioner to reduce payments to a school district in the second year of a biennium if the district's final taxable property values exceed the amount used to estimate payments. The commissioner may use excess funds to update the cost-of-education index.

Monitoring and compliance. The bill makes monitoring by the Texas Education Agency (TEA) permissive rather than mandatory, except in the areas of special education and accreditation. Dropout records will be audited electronically, and TEA may perform cyclical monitoring only as necessary to ensure a school district's compliance with federal law, financial accountability, and data integrity requirements. The bill assigns local school boards primary responsibility for ensuring compliance with all applicable requirements of state educational programs.

Technology allotment. HB 3459 maintains the state technology allotment at \$30 per student and authorizes payment from the Telecommunications Infrastructure Fund (TIF), the Available School Fund (ASF), or any other fund identified for that purpose. The TIF board may use money remaining in the TIF account to award grants to public schools and to the Health and Human Services Commission for certain technology initiatives.

Existing Debt Allotment (EDA). The bill rolls forward the eligibility cutoff date for the EDA by two years, so that bonds for which school districts made payments during the 2002-03 school year are eligible for state debt assistance. If the state does not have enough funds to cover all debt service on newly eligible bonds at the existing state yield, the commissioner may reduce the \$35 guaranteed yield (for newly eligible debt only) to the level necessary to fund all allotments within appropriations limits. This provision will expire September 1, 2005. The bill also makes \$20 million available for the Instructional Facilities Allotment for fiscal 2005.

TRS-Care. The bill incorporates provisions of SB 1369 by Duncan, restructuring group health benefits for retired public school employees. It also adds a new cost-sharing provision requiring school districts to contribute on a monthly basis between 0.25 percent and 0.75 percent of an active employee's salary toward TRS-Care.

TRS-ActiveCare passthrough. Effective September 1, 2003, the \$1,000 annual passthrough that active public school employees receive from the state for health insurance will be reduced to \$500 per year for full-time employees, other than professional staff, and to \$250 per year for part-time employees. The passthrough is restored to \$1,000 for all employees, except professional staff, on September 1, 2005.

Waiting periods. The bill imposes a 90-day waiting period on membership in the Teacher Retirement System, both for new employees and for those returning to employment after withdrawing contributions for previous service credit. New employees of public and higher education institutions must wait 90 days to become eligible for health-care benefits, and new public school employees must wait 90 days to receive the state passthrough.

HB 3459 makes many other changes, including:

- authorizing school districts to request legal assistance from the attorney general;
- limiting the number and length of written reports a classroom teacher must prepare;
- allowing local school districts to develop local consolidation agreements;
- setting forth hearing procedures for suspension or termination of teacher contracts;
- expanding the potential uses of compensatory education allotment funds;
- reimbursing public school teachers for classroom supplies;
- authorizing school districts to enter into political subdivision corporations to purchase electrical service;
- changing the Permanent School Fund accounting method to an accrual basis to allow the deposit of accrued interest and dividends to the ASF at the end of each fiscal year;
- modifying purchasing options for school district contracts in excess of \$25,000;
- sunsetting the Texas Veterinary Medical Diagnostic Laboratory on September 1, 2007;
- subjecting regional education service centers to a comprehensive audit; and
- authorizing the state to participate in a multijurisdictional lottery game.

HRO analyses are available for the following bills, all of which were amended into HB 3459 in some form:

- HB 5 by Grusendorf, repealing the school finance system, which died when the House refused to concur with Senate amendments (see pages 146-148 of this report and the HRO analysis in Part One of the April 28 *Daily Floor Report*);
- SB 13 by Zaffrini, restricting written reports of classroom teachers, which died in the House (see Part Three of the May 27 *Daily Floor Report*);
- SB 1240 by Shapiro, allowing school districts to develop local consolidation agreements, which died in the House (see Part Three of the May 27 *Daily Floor Report*);
- SB 893 by Bivins, setting forth hearing procedures for suspension or termination of teacher contracts, effective June 20, 2003 (see Part Two of the May 26 *Daily Floor Report*);
- SB 894 by Bivins, requiring electronic monitoring of dropout rates and expanding uses for compensatory education allotment funds, effective September 1, 2003 (see the May 19 *Daily Floor Report*);
- HB 1844 by Grusendorf, reimbursing public school teachers for classroom supplies, effective June 18, 2003 (see Part One of the May 2 *Daily Floor Report*);
- SB 1369 by Duncan, restructuring group health benefits for retired public school employees, generally effective September 1, 2004 (see pages 169-170 of this report and the HRO analysis in Part One of the May 26 *Daily Floor Report*); and
- SB 929 by Shapiro, auditing and sunsetting regional education service centers, effective September 1, 2003 (see pages 163-164 of this report and the HRO analysis in Part One of the May 26 *Daily Floor Report*).

Requiring pledges of allegiance and a minute of silence in public schools

SB 83 by Wentworth, et al.
Effective September 1, 2003

SB 83 requires school trustees to require students to recite the pledges of allegiance to the U.S. and Texas flags every school day at each public school in the state. Students must be excused from participating on written request from their parents or guardians. The bill amends existing law by requiring, rather than allowing, a school district to provide for the observance of one minute of silence following the pledges, during which students may pray, meditate, or engage in any other silent activity that does not interfere with or distract other students. Teachers or other school employees supervising students must ensure that they remain silent and do not interfere with or distract other students.

Supporters said public education involves developing character, citizenship, and patriotism by extolling the common values of Americans and Texans. SB 83 would establish in law two common practices furthering these goals in schools. The national and state pledges of allegiance embody core values deeply rooted in U.S. civics and Texas history. Imparting such values to school children is an essential function of the state educational system in preparing young people to be responsible citizens and effective leaders. Reciting the pledges helps to instill these values, notwithstanding the opinion of some that two words — “under God” — in the U.S. pledge may be religious in nature. Such public expressions reflect a deeply held national sentiment that students should be taught to understand and encouraged to express, if they so choose.

Because reciting the pledges would not be mandatory, no one’s rights would be infringed or beliefs denigrated. The required minute of silence would emphasize reflection on the importance of the school day, suggesting nonsectarian contemplation or reverence. It would present prayer as an option without directing anyone to pray. The minute of silence would be neutral toward religion in general and unbiased in favor of any religion in particular. Observing silence would lend solemnity to the educational endeavor, promoting unity and an ethos that teachers and administrators should welcome. Courts have upheld similar laws in other states.

Opponents said SB 83 is unnecessary, because state law does not preclude reciting pledges to flags. Texas law already allows moments of silence in public schools and ensures students’ right to pray there. At issue is whether the government — either the state or a school board — may direct them to do so. In that context, SB 83 might violate the principle of separation of church and state without producing any tangible educational benefits. It also would violate the principle of local control, forcing an arbitrary and inflexible state mandate on local schools with no consideration for varying local circumstances or preferences.

In February 2003, the 9th U.S. Circuit Court of Appeals in San Francisco upheld a three-judge panel’s 2002 ruling that a school policy requiring recitation of the U.S. pledge of allegiance during class violated the First Amendment prohibition against government establishment of religion (*Newdow v. U.S. Congress* (No. 00-16423), 9th Cir. 2003)). The decision has yet to take effect in the court’s nine-state jurisdiction pending defendants’ appeal to the U.S. Supreme Court. The appellate court struck down a California law similar to what SB 83 proposes in part — a mandatory daily classroom pledge in which individual students need not participate. The majority

held that the school district’s policy “impermissibly coerces a religious act.” The court found the pledge’s reference to the United States as a nation “under God” to be a profession of belief in monotheism. According to the majority opinion, the coercive effect is pronounced among school children and extends to mere observers. It follows that this also would be true of a minute of silence, a stated purpose of which is to provide an opportunity for prayer.

Mandating that students maintain silence for a full minute could create discipline problems, especially among young children. Explaining and enforcing this policy among diverse student bodies could prove problematic and alienating.

Other opponents said students, especially those in high school, should be allowed to decide whether to participate and to opt out of the minute of silence, not only the pledges. Logistical details of the period of silence, including length, should be left up to teachers and administrators, but the bill should guide them as to what language would be appropriate to use.

The **HRO analysis** of the companion bill, HB 793 by Branch, et al., appeared in Part One of the *May 5 Daily Floor Report*.

Sunsetting State Board for Educator Certification, shifting duties to TEA

SB 265 by Lucio
Died in the House

SB 265 would have given the education commissioner, rather than the State Board for Educator Certification (SBEC), exclusive rulemaking authority for teacher certification. Texas Education Agency (TEA) staff would have assumed responsibility for all duties formerly assigned to SBEC staff. The bill would have continued until 2015 a smaller SBEC board with reduced authority, limited to disciplinary, ethical, and continuing education standards for educators. It would have repealed the authority of the State Board of Education (SBOE) to reject rules related to educator certification and repealed certification requirements for superintendents.

Supporters said SB 265 would save the state money by moving teacher certification authority back to TEA and eliminating duplicative costs in purchasing and human resources. The Legislative Budget Board (LBB) projects annual general revenue savings of \$137,000, based on a Sunset Advisory Commission analysis. Adjusting that estimate to include savings from eliminating three employees, the true annual savings would be closer to \$179,000.

SB 265 rightly would vest rulemaking authority for certification in the education commissioner, putting supports in place to ensure that all Texas schools had a highly qualified teacher in every classroom by 2005-06. This and other bills enacted during the session would align state policy with federal standards to ensure that the state could secure funds through the federal No Child Left Behind Act (NCLB). The commissioner already has authority to approve school district teaching permits and to grant waivers that allow a certified teacher to teach outside his or her area of certification. Granting the commissioner authority over certification would be a logical extension of those powers and could lead to greater consistency in rulemaking.

SB 265 would streamline the rulemaking process by removing oversight authority from the SBOE. In the past, SBOE veto power over SBEC rules has delayed rule implementation by as much as a year. It also has allowed interest groups to delay actions on issues by playing one board against the other.

The bill would separate entry into the teaching profession from the disciplinary process, creating a parallel structure to the one established for other professions. For example, lawyers have two separate organizations to manage licensing versus disciplinary proceedings and continuing education for legal professionals. Rulemaking for policing and oversight of certified education professionals should be concentrated in a single appointed board of teachers and administrators. This would enhance and focus SBEC's enforcement powers and ensure that educators who violated ethical standards would be sanctioned and barred from the profession.

Opponents said SB 265 would diminish the autonomy and professionalism of educators in Texas by punishing an agency that has done a good job in raising standards for the profession. One reason why educator certification was taken away from TEA in 1995 was that the agency could not handle the job, resulting in a massive backlog of certificates and disciplinary complaints. The Sunset Advisory Commission recommended that SBEC be continued in its current form, noting that no substantial benefits would result from transferring its functions to another agency.

SBEC is meeting or exceeding all of its performance measures. In little more than a year, it reduced the credentialing backlog from more than 13,000 certificates to only 2,000. It reduced the amount of time it takes to issue a certificate from 87 days to less than 10 days for in-state credentials and to less than 20 days for out-of-state credentials. It reduced its disciplinary case backlog from more than 1,800 cases to a current docket of 550 to 650 cases. Before SBEC was created, only 2 to 4 percent of educators were disciplined as a result of an ethics or disciplinary complaint. Today, 25 percent of teachers brought before SBEC for disciplinary infractions receive punishments ranging from reprimands to revocation of their certificates.

The bill would disrupt an autonomous, well-functioning organization to save a small amount of money. The resulting backlogs in credentialing and discipline could lead to qualified teachers being unable to teach while waiting for their credentials and to bad teachers remaining in the classroom or being passed from district to district. The savings projected in LBB's fiscal note could be achieved by executing a memorandum of understanding to share SBEC's purchasing and human resources costs with TEA.

In giving authority over educator certification to a political appointee of the governor, SB 265 would weaken educator representation in setting standards for entry into the profession. The new rulemaking process would depend on the values of a single official who would not have to invite constituents to comment or participate, thus compromising the integrity of a process that has valued stakeholder input in the past. An appointed commissioner could be motivated to produce more teachers at any cost in order to qualify for more federal money through the NCLB.

Under SB 265, only four of SBEC's nine board members would be certified teachers and four would be administrators. Texas has about 280,000 certified teachers and 20,000 administrators. Membership on the SBEC board, whose authority would be limited to discipline, ethics, and continuing education, should be directly proportional to the profession it represents.

Notes: HB 2455 by Chisum, et al., continues SBEC until 2005 and directs the board to enter into a memorandum of understanding with TEA to consolidate administrative functions and services.

The **HRO analysis** appeared in Part One of the May 25 *Daily Floor Report*.

Expanded use and electronic monitoring of compensatory education funds

SB 894 by Bivins
Effective September 1, 2003

SB 894 requires that compensatory education (comp ed) allotment funds be used to meet the costs of providing a compensatory, intensive, or accelerated instruction program for at-risk or economically disadvantaged students. However, these funds may be used for such supplementary education expenses as program and student evaluations, instructional materials, staff expenses, teacher salaries, smaller class sizes, and individual instruction for the targeted students. School districts may use the comp ed allotment to fund programs specifically designed to serve students at risk of dropping out of school. The bill also eliminates the requirement that school districts conduct an annual audit of dropout data expenditures and instead requires the Texas Education Agency (TEA) to develop a process for auditing these records electronically. The State Board of Education, with the assistance of the state auditor and comptroller, must set up electronic reporting and auditing systems for comp ed fund expenditures.

Supporters said SB 894 would give school districts more flexibility in deciding how to use comp ed funds and would eliminate burdensome auditing and reporting requirements. School districts still would have to use these funds to help bridge academic gaps for at-risk and economically disadvantaged students, but they could do so without the cumbersome and impractical requirement that comp ed funds be used “only” for these purposes. Separating activities that benefit students who qualify for comp ed funds from other activities can result in duplication and confusion about which expenses can be paid from these funds. The bill also would establish a more targeted and cost-effective electronic system for monitoring the use of comp ed funds. The current requirement that every school district pay for an annual audit of this information, even if funds are being used properly, is expensive and unnecessary. TEA can and should conduct basic oversight electronically using data submitted by school districts. Eliminating the audit requirement for reporting of dropout data would save an estimated \$40 million for Texas school districts.

Opponents said SB 894 would dilute the purpose of the comp ed allotment by giving school districts broad discretion to fund programs that might benefit other students at the expense of those who need extra help. Existing statutes were drafted to prevent districts from using comp ed funds to supplant funding for regular programs. Without these protections, districts would be more likely to use at least part of these funds to cover the cost of programs that benefit students who are not at risk. The bill would allow school districts to use comp ed funds to pay the full cost of alternative education programs (AEPs) for students at risk of dropping out. This quickly could drain the resources of regular campus programs for at-risk students, because the cost of operating an AEP is about six times higher than the cost of operating a regular program.

Other opponents said SB 894 should require an accountability system to ensure that comp ed audits, whether conducted by TEA or individual districts, include some mechanism to measure the disparities between at-risk students and other students not funded with comp ed funds.

The **HRO analysis** appeared in the May 19 *Daily Floor Report*.

Auditing and sunseting regional education service centers

SB 929 by Shapiro
Effective September 1, 2003

SB 929 subjects regional education service centers (ESCs) to sunset review and a comptroller's audit and abolishes them on September 1, 2005, unless the Legislature continues them. Audit costs will be paid out of ESC appropriations for fiscal 2004-05, in an amount not to exceed \$750,000. The comptroller must complete its audit and report the results to the Sunset Advisory Commission and the Legislature by June 1, 2004. The audit must include a detailed analysis of all services provided by each ESC and whether those services could be provided at a lower cost elsewhere; an analysis of ESC governance structures; a review of ESCs' financial condition and current funding sources; a review of the number and geographic distribution of ESCs; a review of ESC institutional structures and whether the Texas Education Agency (TEA) could take over any of their functions; and an evaluation of whether ESC support functions could be reduced through business processes or application redesigns.

The bill also limits the amount of compensation that a regional ESC may receive when acting as a fiscal agent or broker for agreements between school districts that allow ESCs to retain a portion of a district's equalized wealth level. An ESC may charge only the actual administrative cost of providing the service, or another amount agreed to in writing by the district receiving transferred funds under the agreement.

Supporters said SB 929 would restore accountability to the ESC system by subjecting ESCs to an audit and sunset review. Since 1967, regional ESCs have received public funds for a growing array of services, yet the state never has conducted a comprehensive review of how ESCs fit into the overall educational delivery system. The education commissioner holds rulemaking authority for regional ESCs and has the power to hire and fire ESC executive directors, but high-level oversight has been sporadic and limited. Since TEA also will undergo sunset review in 2005, the time is right to study how services provided by regional ESCs fit into state and local systems and whether those services are duplicative or can be provided elsewhere for less money.

SB 929 would take the profit margin out of ESC contracts and would enable school districts to approve contracts in advance that designate Chapter 41 funds directly to ESCs. Education Code, ch. 41 allows property-wealthy districts to reduce their wealth levels by buying attendance credits from property-poor districts ("Option 4 arrangements"). Because students are weighted differently by the school finance formulas in poor and rich districts, when attendance credits are purchased, a "net gain" results that stays at the district level. As service brokers between districts, ESCs may retain a portion of the net gain to develop programs that benefit all districts in the region. In 2002, a study by the Legislative Budget Board found that 13 percent of the contracts brokered by ESCs provided services to districts outside the service center's regional boundaries, thus taking regional money away from districts that should benefit from the funds. Also, some ESCs have used this net gain to build and maintain regional facilities that require significant capital expenditures. Under SB 929, regional ESCs no longer could profit from net gains under Option 4 arrangements without prior approval by the affected school districts.

The bill would restore competition to the provision of core ESC services, ensuring that local school districts get the best deal possible for their limited dollars. An audit by the comptroller would give legislators and school districts more information about competitive contracting opportunities than normally is produced by a sunset review. By subjecting regional ESCs to a “Yellow Pages test” — whereby services are identified, costed, and compared to what similar services would cost in the private sector — legislators would gain valuable information to aid in the next biennial budget process. Instead of a coordinated regional system, ESCs operate like 20 different “silos” charging whatever the market will bear. Shedding light on inefficiencies in the system ultimately would give school districts more choices and thus more control over the expenditure of limited funds.

Opponents said regional ESCs provide valuable, individualized services to school districts that they otherwise could not afford. ESC services include detailed data collection and reporting; training on testing, accountability, and special education compliance; purchasing co-ops for food, computers, and instructional supplies; bulk buying of Internet services; and licensed alternative certification programs for teachers, especially in shortage areas such as special and bilingual education. Many small and rural schools no longer could make ends meet if their regional ESC was abolished, because providing services in-house or outsourcing them to private contractors has proved too expensive. Also, shifting regional ESCs to a one-size-fits-all approach would create a centralized bureaucracy contrary to the goals of local control.

SB 929 represents an attempt to justify cutting more money from the state’s education budget at a time when school districts need all the help they can get. In the fiscal 2004-05 budget, lawmakers eliminated 125 TEA employees and cut funding for ESC core services by 23 percent. TEA now provides only limited technical assistance, and with the agency’s program dollars being squeezed, it is unlikely that shifting training and technical assistance from regional ESCs back to TEA would benefit local districts. While private companies might compete to provide training and technology services to the top 25 school districts, cutting ESC services would hurt rural districts that are struggling to meet new state and federal accountability standards.

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

P ublic Employees

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Authorizing lump-sum bonus payments to certain retiring state employees

HB 3208 by Heflin
Effective June 20, 2003

HB 3208 establishes a temporary provision for lump-sum payments to certain retiring members of the Employees Retirement System of Texas (ERS). A member who is eligible to retire and receive a service annuity on or after August 31, 2003, and before September 1, 2005, is eligible to receive a one-time, lump-sum payment equal to 25 percent of the member's total annual salary during the 12-month period preceding the month in which the employee retired. To receive a lump-sum payment, a member who qualifies to retire on August 31, 2003, must retire on that date. A member who becomes eligible to retire after August 31, 2003, but before September 1, 2005, must retire in the month in which that member first becomes eligible. The bill does not apply to a member who retires due to a disability.

Supporters said HB 3208 would offer a bonus of 25 percent of annual salary to encourage eligible state employees to retire on the last day of the current fiscal year or in their first month of eligibility during fiscal 2004-05. This would enable the state to reduce its work force and save money without resorting to additional layoffs or salary reductions. As many as 12,000 employees could qualify before the conclusion of the program at the end of fiscal 2005. For each state employee who received a lump-sum retirement bonus, the comptroller would reduce agency appropriations by 35 percent of the employee's final salary for the remainder of the biennium. Bonuses would be paid from the appropriations so reduced. According to the bill's fiscal note, HB 3208 would save the state about \$21 million through fiscal 2004-05.

Opponents said while HB 3208 would create incentives for some state employees to retire early, other legislation contradicts its purpose by making retirement less attractive. Currently, minimum eligibility for retirement with health insurance benefits is either age 60 with at least 10 years' service or the "rule of 80" — an employee's service credit plus age equaling or exceeding 80 — with at least five years' service credit. SB 1370 by Duncan, effective September 1, 2003, raises the minimum eligibility for retiree health insurance to age 65 with 10 years of service, or satisfying the rule of 80. While HB 3208 might encourage eligible employees to retire on August 31, 2003, SB 1370 will encourage some employees to wait to retire in order to qualify for health insurance, creating a disincentive for as many as 1,200 ERS members to retire within the next fiscal biennium. Also, HB 3208 would require considerable money for its initial startup and would not prevent retired employees from being rehired after they receive the bonus.

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

Creating a health reimbursement arrangement program for school employees

HB 3257 by Delisi
Effective September 1, 2003

HB 3257 requires that the full amount of the passthrough that active public school employees receive from the state for health insurance — whether \$1,000 or another amount by appropriation — be directed toward an employer-paid health reimbursement arrangement (HRA), effective with the 2004-05 school year. An HRA is an employer-paid health benefit plan that reimburses a participant for qualified health-care expenses up to a maximum dollar amount at the end of a coverage period and provides that any unused portion is carried forward for use in a subsequent coverage period. The bill repeals the current options to use the passthrough money for salary compensation, a medical savings account, or a cafeteria health plan.

The Teacher Retirement System (TRS) may pay administrative expenses for the HRA program out of the passthrough and may begin collecting an administrative fee on the passthrough during the 2003-04 school year to pay for administrative program expenses in 2004.

Any unspent funds in a cafeteria plan that an employee has designated for health care as of September 1, 2003, must be spent for qualified health care-expenses before the employee may spend any funds from the HRA account. Any unspent funds in a medical savings account will be transferred to an HRA account as of September 1, 2004. On an employee's separation from service, the employee may continue to use any unspent money carried over in the HRA for qualified health-care expenses.

By September 1, 2004, TRS and the comptroller must develop a funding structure that allows employees to carry over money allocated to them and ensures favorable federal tax treatment for employees. The comptroller either must establish separate individual accounts within the TRS-ActiveCare trust fund or must transfer funds from TRS-ActiveCare to trust accounts in the custody of the comptroller for the benefit of employees.

Supporters said HB 3257 would create a consumer-directed health benefit arrangement to give active school employees more control over how their out-of-pocket health-care dollars are spent. Greater control would lead to greater responsibility for using health-care dollars wisely. Employees could be reimbursed for a wide range of qualified medical expenses, including health and dental costs, eye examinations, glasses, contact lenses, chiropractic care, premiums for spousal or dependent coverage, premiums for long-term care coverage, psychiatric treatment, prescription drugs, and more. The choices provided by an HRA account would allow employees to tailor health-care services to their individual and family needs.

HB 3257 would ensure that all passthrough dollars went to health care rather than to other purposes. The 77th Legislature created TRS-ActiveCare to provide health insurance for school employees, not to provide a salary increase. Employees who elect to receive the passthrough as salary may be using the money for health care, but salary compensation is after-tax money, which cuts down on the benefit of the passthrough by up to 20 percent. In the past 20 years, health-care costs have risen at twice the rate of income, and health spending continues to soar. Allowing employees to receive the passthrough money as a salary limits the health-care dollars available to employees and could leave health-care needs unaddressed.

The HRA option could be carried forward from year to year, unlike the “use it or lose it” aspect of current cafeteria plans offered to school employees. This would create an incentive for school employees to be more efficient health-care consumers and to save for major medical expenses. Consumer-driven plans motivate consumers to seek out information, assess value versus cost, and understand the economic consequences of their decisions.

HB 3257 would create a more attractive benefits package, helping districts recruit and retain teachers and other school employees. Providing customizable health benefits would help school districts remain competitive with the private sector. The ability to roll over the HRA account would motivate employees to remain employed in public schools so that they could keep adding to their savings for future health-care expenses.

Opponents said HB 3257 would restrict school employees’ choices in the name of consumer choice by severely limiting options for spending the passthrough. Rather than strait-jacketing school employees into a one-size-fits-all plan, lawmakers simply should add the HRA to the list of options and let a natural consumer process unfold. By offering the HRA plan as another choice rather than as the only alternative, lawmakers could assess how many employees chose the plan over the course of a biennium to see whether HRAs truly had consumer appeal or not.

While the rollover feature is an attractive option, it would not be very useful without money to roll over. The passthrough took a major hit during the appropriations process, leaving part-time employees with a total of only \$20.83 per month to spend on health care. This barely would pay for a single visit to a doctor, let alone accumulate enough over time to pay for a major medical expense. Allowing TRS to deduct a monthly fee to administer the HRA program could reduce the benefit further for all employees.

The **HRO analysis** appeared in Part Three of the May 10 *Daily Floor Report*.

Restructuring group health benefits for retired public school employees

SB 1369 by Duncan
Effective September 1, 2004

SB 1369 redefines public school retirees eligible for TRS-Care group health benefits to allow retirees to substitute five years of military service for five years of creditable service in Texas public schools. All retirees may calculate their eligibility based on the “Rule of 80,” which is met if the sum of the retiree’s age and total years of service credit equals or exceeds 80.

During an open enrollment period, any retiree over age 65 who is covered by Medicare and is enrolled in TRS-Care as of August 31, 2004, may enroll and add dependent coverage in any of the three coverage tiers. Retirees not covered by Medicare may enroll and add dependent coverage only in the next-higher coverage tier. Any retiree may select a lower level of coverage at any time. The Teacher Retirement System (TRS) may not deny basic (Tier 1) coverage to a retiree during an open enrollment period unless the retiree has defrauded the program. The bill establishes a sum-certain state contribution to assist retirees with dependent coverage under the Tier 1 plan, subject to appropriation. TRS must collect the balance of the dependent coverage premium from the retiree.

Effective September 1, 2003, the state’s contribution to TRS-Care will increase from 0.5 percent to 1 percent of the salary of each active employee who is a contributing member of TRS, and an active employee’s contribution will rise from 0.25 percent to 0.50 percent of his or her salary. The state no longer must maintain a two-to-one ratio in its contribution relative to active employees’ contributions.

Also effective September 1, 2003, the bill requires cost sharing for TRS-Care program costs. The state must pay up to 55 percent of the program’s total costs, retirees must pay at least 30 percent, and the balance must be paid by active employees and school districts. TRS must establish a range of premium levels for retirees, taking into account years of service and whether or not the retiree is covered by Medicare, Part A.

On September 1, 2003, the comptroller must transfer \$42 million from TRS-ActiveCare, the state-run health insurance program for active public school employees, to TRS-Care to compensate for money transferred from the TRS-Care fund in 2001 to pay startup costs for TRS-ActiveCare.

Supporters said TRS-Care is insolvent and must be restructured to be financially viable over the long term. A report by the state auditor in January 2003 found that “significant changes” are necessary to keep the TRS-Care plan solvent. Since 1993, the program’s expenditures consistently have exceeded revenues. Early projections for fiscal 2006-07 put the funding gap for TRS-Care at more than \$2 billion. TRS trustees have worked with retirees over the years to institute a series of network design changes that TRS-Care participants could accept. Retirees voluntarily have paid more to keep their system intact, and they support the structural changes proposed by SB 1369.

The bill would increase substantially the amount of state assistance to retired teachers while asking active teachers to share the costs of a serious funding crisis at TRS-Care. The state would double its minimum contribution, to a level equal to twice the employee’s contribution. The fiscal impact of doubling the state’s contribution would be neutral, since it merely would provide more money in payroll contributions in exchange for less money in solvency supplementation.

It would be unreasonable to ask school districts to come up with a payroll contribution, which would shift an ever greater burden onto local property taxpayers. More than 400 school districts have reached the statutory cap on maintenance and operations taxes, and another 200 are close to the cap. Payroll typically accounts for 85 percent of a school district's costs, and when the proposed district contribution is coupled with proposed state funding cuts for education programs, districts would be left between a rock and a hard place. Such a proposal would necessitate a tax increase for 60 percent of Texas school districts and budget cuts for the 40 percent of districts that already have reached their fiscal capacity. Either way, school children and local taxpayers would suffer.

Opponents said SB 1369 would allow the state to back away from its commitment to TRS-Care by shifting all responsibility for rising costs onto employees. The state's increased contribution from 0.5 percent to 1 percent of payroll would be a shell game, since the state would have to make up the difference through a solvency supplement. Imposing higher payroll contributions on active school employees would be unfair, especially since the TRS-ActiveCare passthrough of state money to school employees has been reduced drastically and its future is in doubt. The bill also would revoke the state's promise to keep the ratio of state to employee contributions at two-to-one, so even though the state's contribution is twice that of active employees this biennium, more costs could be shifted to employees in future years.

SB 1369 should have retained the requirement for a school district payroll contribution, which the conference committee stripped from the bill. Cost sharing by school districts has become necessary now that the Legislature must come up with a solvency supplement for TRS for the third session in a row. The school district contribution would have been set on a sliding range by appropriation at between 0.25 percent and 0.75 percent of the district's active employee payroll. This would not have been an unreasonable request, since most private-sector employers pay a contribution toward their employees' retirement health-care coverage. The state has committed to paying a majority share of program costs, even though teachers are not state employees. School districts should pay their fair share too.

Notes: HB 3459 by Pitts, generally effective September 1, 2003, authorizes a school district contribution to TRS-Care of between 0.25 percent and 0.75 percent of payroll, as determined by appropriations. (See pages 156-157 of this report.)

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

Changing health benefit plans for certain state employees and retirees

SB 1370 by Duncan
Effective September 1, 2003

SB 1370 changes group health insurance benefits for state employees covered through the Employees Retirement System (ERS), the Teacher Retirement System (TRS), and the University of Texas (UT) and Texas A&M University (TAMU) systems. Among other measures, the bill:

- requires uniformly that an eligible employee be either 65 years old with 10 years of state service or satisfy the rule of 80 — a combination of age and service credits equal to or greater than 80 — eliminating the current eligibility category of age 60 with at least 10 years of service credit;
- requires a 90-day waiting period for health-care benefits for newly hired employees and for retirees who do not retire directly from state employment;
- reduces state contributions for part-time employees to 50 percent and designates a part-time worker as anyone with fewer than 40 hours per week;
- discontinues state contributions for nonemployee board members but allows current board members to retain benefits by paying for their contributions; and
- reduces contributions for graduate teaching assistants by 50 percent.

On or after September 1, 2005, TRS must deliver to each school district, charter school, and regional education service center state funds in an amount equal to \$1,000 per active employee, or a greater amount as provided by the general appropriations act. Effective September 1, 2003, the comptroller must transfer \$42 million from TRS-ActiveCare, the state-run health insurance program for active public school employees, to TRS-Care, the health program for school retirees, to compensate for money transferred for the startup of TRS-ActiveCare in fiscal 2003. The bill increases the contribution to the TRS-Care fund by an active employee to one-half of 1 percent of the employee's salary, from one-quarter of 1 percent in current law.

For employees within the two university systems who are designated as working at least 40 hours a week, the system can contribute the full cost of basic coverage and not more than 50 percent of the cost of dependent coverage. An eligible adjunct faculty member may receive not more than 50 percent of the cost of basic coverage for the employee and not more than 25 percent for dependent coverage. A university system may contribute amounts in excess of those specified if the monies come from other than general revenue.

Supporters said SB 1370 would make necessary changes in health-care plans for state employees, teachers, and higher education employees to meet current fiscal constraints. ERS, TRS, and the UT and TAMU systems provide group health insurance for more than 1 million Texans. State costs for these programs total nearly \$3.7 billion for the current biennium. Initially, these agencies sought an additional \$1.7 billion to maintain current benefit levels for fiscal 2004-05. Both the Senate Finance and House Appropriations committees determined that this funding level would be impossible. Budget writers asked these agencies to produce a list of money-saving options regarding the state's employee benefits package to create plans that can be accomplished by the various boards under existing authority. The measures proposed by SB 1370 would save the state an estimated \$325 million in fiscal 2004-05, critical to balancing the budget for the coming biennium.

To the extent possible, the bill aims to treat equally the existing group benefit programs through ERS, TRS, and the two university systems. It would establish uniform retirement ages for all three employee groups. The state would realize enormous savings if a higher percentage of its retirees were eligible for Medicare rather than totally dependent on state health benefits.

Opponents said SB 1370 would translate into a pay cut for part-time active employees and would delay the benefits that many prospective retirees have earned and expected. By changing retirement eligibility for health coverage in the largest state benefit programs, the Legislature would switch rules for dedicated employees late in the game. A state employee no longer would be eligible for health benefits at age 60 with 10 years of service credit. This change would be demoralizing to employees who have counted on such provisions for early retirement soon after September 1, 2003, and could influence those employees to delay retirement by as much as five years to retain medical insurance through the state. The bill's intent seems at cross purposes with other retirement policies and legislation that would create incentives for some state employees to retire early.

Proposed hiring freezes and reductions in force by state agencies in response to the budget shortfall could reduce savings expected from the 90-day freeze on benefits for new employees. A 90-day waiting period for qualified retirees who do not retire directly would seem almost punitive after these employees' many years of service to the state. Reducing the state's benefit contribution by 50 percent for employees who work fewer than 40 hours a week would represent a salary cut. The state already underpays most of its employees in comparison with comparable private-sector functions.

The bill would allow the state to back away from its commitment to TRS-Care by shifting responsibility for rising costs onto employees and school districts. Increasing active teachers' contributions to TRS-Care would be particularly burdensome in view of increases in copayments already in place.

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



Redistricting

Redrawing Texas congressional districts

HB 3398 by Crabb, King
Died in the House

HB 3398 would have reconfigured Texas' existing congressional districts, which were approved by a three-judge federal court's ruling in *Balderas v. Texas*, which the U.S. Supreme Court refused to review in June 2002, after the 77th Texas Legislature in 2001 had failed to enact any redistricting plan based on the 2000 census. According to Opinion No. GA-0063, issued by Attorney General Greg Abbott in April 2003, "the Legislature has the authority to adopt a redistricting plan for the electoral period 2003 through 2010, but it cannot be compelled to do so," and the plan drawn by the *Balderas* court will remain Texas' congressional redistricting plan until changed by the Legislature.

Supporters said Texas' current congressional districts do not represent Texans' true political leanings. Republican candidates received 53 percent of the votes for congressional candidates in 2002, yet Democrats hold a 17-15 majority of the state's delegation in Congress. The *Balderas* court unfairly gerrymandered congressional districts to protect incumbents, particularly Anglo Democratic representatives. HB 3398 likely would result in the election of more Republican candidates, reflecting the partisan preferences of the state, while providing more opportunities for minority Democratic candidates. The Legislature, rather than the courts, should decide the composition and boundaries of congressional districts.

Opponents said by redrawing congressional lines without being required to do so by a court, the Legislature unnecessarily would reopen a highly divisive and partisan issue. The plan adopted by the *Balderas* court meets federal Voting Rights Act requirements to avoid diluting minority voting strength. It is unlikely that HB 3398 would meet that standard, particularly on the issue of retrogression or reducing minority voting strength. Texans often split their tickets, voting for statewide Republican candidates and for their incumbent Democratic congressmen. They should be able to vote for the candidates of their choice. The bill also would reduce representation of rural Texas in favor of suburban areas and would create sprawling, bizarrely shaped districts without communities of interest for the purpose of partisan gerrymandering.

Other opponents said Texas should adopt some "fail-safe" mechanism to draw congressional districts if the Legislature cannot reach a decision. The Texas Constitution requires the Legislative Redistricting Board (LRB) to decide on legislative districts in such circumstances, and the LRB was called on to redistrict legislative boundaries in 1971, 1981, and 2001. One alternative would be to allow a nonpartisan commission to redistrict legislative, congressional, and other districts.

The **HRO digest** of HB 3398 appeared in Part One of the May 12 *Daily Floor Report*.



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Increasing cigarette taxes to pay for various programs

HB 53 by Wolens/HB 267 by Naishtat/HB 1603 by Griggs/HB 3192 by Uresti/SB 1153 by Shapleigh
Died in House and Senate committees

HBs 267, 3192, and 1603 and SB 1153 each would have increased the state's 41-cent tax on cigarettes by \$1 per 20-count pack. HB 1603 also would have raised taxes on cigars and other tobacco products. Including the 39-cent federal tax and maximum combined state/local sales taxes of 8.25 percent, total cigarette taxes would have risen to \$2.05 per pack. **HB 53** would have increased the state tax by 50 cents per pack, raising total taxes to \$1.55 per pack. The bills would have allocated the additional revenue to dedicated accounts as follows: HBs 267 and 3192 — eight health-care agencies and programs; HB 1603 — Foundation School Fund; SB 1153 — Texas Workforce Commission child-care programs for low-income parents; HB 53 — county sheriffs' departments and municipal police and fire departments.

Supporters said Texas is well below the national average state tax rate of 61 cents per pack (68 cents in non-tobacco-producing states). In the past two years, 21 states have increased cigarette taxes by an average of 42 cents per pack, according to the National Conference of State Legislatures. Cigarette tax increases would discourage behavior that is well documented to be a major health risk and social liability. Smoking would decline even as revenue increased to help offset health-care costs (HB 1603 would raise \$1.6 billion during fiscal 2004-05, according to its fiscal note). Public- and private-sector spending on tobacco-related health care would decline as fewer young people became addicted. The extra revenue would be spent best on antismoking campaigns or health care, but education, child care, and local law enforcement would be worthy recipients. The state uses various revenue sources for unrelated expenditures — for example, motor-fuel taxes help pay for public education — that benefit the public as a whole over time, if not every Texan all the time.

Opponents said Texas should not try to rectify its budget shortfall by penalizing smokers, who already pay high taxes and face restricted use of a legal product. Three of the bills would cost the state general revenue during fiscal 2004-05, according to their fiscal notes (HBs 267 and 3192 — \$221 million; HB 53 — \$89 million), because taxable cigarette consumption would decline while the general revenue allocation from the cigarette tax would remain at 41 cents per pack. The broad-based tobacco tax proposed by HB 1603 would be especially regressive. Spending cigarette-tax revenue on general or non-health-care-related purposes would be tantamount to “tax profiling.” It would benefit the general public at the expense of a narrow class of taxpayers who would not benefit directly from the extra revenue. Higher taxes disproportionately affect the young, who can least afford to pay them and no longer may be targeted for advertising, instead of adults who represent the greatest share of potential health-care costs. Such tax hikes produce only slight reductions in tobacco consumption, which already is declining due to enhanced government regulation and ongoing negative publicity about adverse side effects.

Implementing the multistate streamlined sales tax initiative

HB 2425 by McCall

Relevant provisions effective either October 1, 2003, or July 1, 2004

HB 2425, the comptroller's omnibus financial management bill, makes statutory changes and delegates rulemaking authority to the comptroller to conform Texas' sales-tax policy to the final agreement adopted in November 2002 by the Streamlined Sales Tax Implementing States. The governor, lieutenant governor, House speaker, and comptroller must agree unanimously that it would be in Texas' best interests to sign the agreement before the comptroller may do so. After the agreement takes effect or Texas signs it, whichever is later, the comptroller may settle a claim for taxes, penalties, or interest if necessary for compliance.

Certified retailers and others wishing to be a seller in Texas must agree to collect any applicable local use taxes, even if they are not doing business in the local jurisdictions into which taxable items are shipped or delivered. Like state and transit-authority sales taxes in Texas, local sales taxes on services will be levied where services are performed or otherwise delivered, other than out of state. Sales of tangible personal property (TPP), however, still will be taxed locally at the point of origin, typically the place of purchase. By January 1, 2005, the comptroller must study and report to the legislative leadership on the economic and other costs to political subdivisions of changing the sales and use tax sourcing laws.

As set forth in the multistate agreement, the bill delineates three new categories of sellers, based on their chosen sales-tax collection methods; excludes some items from the uniform definitions of food products and soft drinks and clarifies exemptions for prepared food; allows electronic signatures on resale certificates; and requires sales-tax rate changes to occur on the first day of calendar quarters.

Supporters said Texas is one of 35 states seeking to modernize sales-tax administration and to lessen the burden of tax compliance. By providing greater uniformity among their sales and use tax laws and practices and by simplifying vendors' collection methods, the implementing states hope to overcome federal prohibitions against collecting taxes on transactions involving in-state taxpayers and out-of-state vendors. The 77th Legislature in 2001 codified its endorsement of the concept by adding Tax Code, ch. 142 (HB 1845 by Oliveira). Texas has been a leader in this project and must change its sales-tax laws only nominally to comply with the agreement. If enough states do so, Congress or the U.S. Supreme Court may allow interstate taxation of remote sales, which could bring the state more than \$350 million a year in revenue from Internet, catalog, and mail-order sales that now goes uncollected.

Allowing local governments to maintain origin-based tax sourcing is only fair during the current fiscal crisis and economic downturn, until the comptroller can determine how detrimental the change to destination sourcing would be. Either 10 states or 20 percent of the nation's population must be represented for the agreement to be valid. Thirteen states have signed so far, and they may need Texas' participation to reach the population threshold. The agreement will evolve over time, and states will have to make statutory changes accordingly; 100 percent conformity is not required for participation.

Opponents said because of the current economic downturn and fiscal turmoil, Texas should postpone any tax-code changes until 2005. Now is not the time to increase the sales-tax burden on

retail customers — whether they buy from the Internet, from conventional “brick and mortar” retailers, or both — or on businesses that transact sales remotely with each other. Major sales-tax policy decisions should be made in conjunction with a comprehensive revision of the tax code once the economy rebounds and the fiscal situation stabilizes.

Other opponents said Tax Code, sec. 142.007(c)(1) stipulates that the streamlined sales tax agreement establish uniform sourcing requirements. By allowing local taxing entities to retain origin-based sourcing for TPP sales, this bill flies in the face of the agreement’s destination-based sourcing and risks Texas’ exclusion from the implementing states’ eventual compact. Texas must change its statutes to conform to the agreement sooner or later; not all changes can occur by rule. Waiting two more years for the completion of a study would jeopardize all the hard work and cooperative effort up to now and would give Congress another opportunity to declare the Internet tax-free or to set superseding tax policies.

Notes: HB 2425 includes provisions originally contained in HB 3143 by Wilson and SB 823 by Fraser. However, HB 3143 would have made all tax sourcing destination-based and would have repealed the annual sales-tax holiday opt-out provision for local governments. Both bills died in the House Ways and Means Committee.

Rewriting the motor-fuel tax code and moving the tax collection point

HB 2458 by Krusee

Generally effective January 1, 2004

HB 2458 replaces Tax Code, ch. 153 with a new ch. 162, which, among other measures:

- moves the motor-fuel tax (MFT) collection point from the distributor level to the storage terminal level;
- replaces the existing MFT system's delivery-based framework with one based on the amount of fuel removed from terminals;
- preserves all existing exceptions to application of the tax, including off-road and agricultural use, and the aviation fuel exemption;
- limits the purchase of tax-free diesel fuel to "dyed" diesel, except for independent school districts and the federal government;
- tightens controls on imported and exported fuel and requires importers and exporters to register with the state; and
- allows exporters to use interim payment and proof methods to verify the tax liability of a destination state until other states fully authorize payments by Texas suppliers (sunsets in 2005).

The bill shifts MFT collection from distributors, who buy fuel tax-free from intermediate storage facilities for retail sale, to suppliers, who own the fuel, the terminals, or both. Both distributors and suppliers still must file reports and maintain records, but suppliers will remit taxes based on the amount of fuel that distributors obtain for delivery and sale.

Suppliers must remit MFTs to the comptroller by the 25th day of the month following the date of fuel sales, as in current law. Distributors may defer tax payments to suppliers until the 23rd day of the following month. Suppliers have 60 days to request credits from the comptroller for taxes remitted by suppliers but not paid by distributors. The current 2 percent collection allowance rate will be split between distributors, who will keep 1.75 percent of collections for continuing to file reports, and suppliers, who will receive 0.25 percent to cover their new collection costs.

As of January 1, 2005, users of undyed ("clear") diesel fuel for tax-exempt purposes no longer may claim tax refunds. The comptroller may issue refunds only for exempt uses of gasoline and dyed diesel fuel. The comptroller must compute monthly how much tax has been paid on exempt usage of undyed diesel fuel and must deposit those amounts into general revenue.

The comptroller must report to the Legislature in October of each even-numbered year on enforcement methods and the use of the special MFT administrative fund. The comptroller allocates the first 1 percent of gross tax collections for MFT administration and enforcement. Unexpended amounts revert proportionally to other funds that receive MFT revenue.

Supporters said HB 2458 would track federal MFT collection policy adopted by 20 other states. This change would generate much-needed revenue without a tax-rate increase. According to the May 23 fiscal note accompanying the bill as reported by the Senate Finance Committee, HB 2458 would net more than \$27 million in all-funds revenue during fiscal 2004-05, including \$8.3

million in general revenue-related funds and \$18.8 million for the State Highway Fund. The Texas Department of Transportation (TxDOT) estimates that, after a few years, the bill would generate more than \$300 million a year from reduced fraud and more taxed gallons reported, leading to increased federal highway fund allocations and administrative cost savings.

The bill would eliminate the dual method of collecting from gasoline distributors and interstate truckers and from diesel fuel suppliers and truckers. Basing MFTs on fuel removal, rather than on delivery, would reflect more accurately the volumes being sold at the point of assessment. Taxes would be assessed on the amount of fuel that suppliers disbursed from storage facilities at the “loading rack,” the highest point in the petroleum distribution chain.

The state could use 111 terminals’ automated systems for calculating and remitting taxes, thus reducing human error. Collection efficiency would increase as the number of tax filers fell from more than 14,000 to fewer than 1,000. Enforcement costs should decrease with the filing of reports by both suppliers and distributors that could be used to verify data without field auditing. When audits were needed, the paper trail would be clearer because pretaxed fuel would have changed hands fewer times. This should reduce opportunities for tax evasion and fraud.

Opponents said HB 2458 needlessly seeks to fix an efficient system that is not broken. The projections of additional revenue due to collection of MFTs at the rack are exaggerated. The comptroller, for example, calculated the fiscal note with no revenue gain due to fraud reduction, one of the major reasons touted for changing the collection point. Other states’ revenue gains have been short-lived, tending to level off once new systems are in place.

The bill would retain too large a collection allowance and would not allocate it fairly. Instead of reducing the 2 percent reimbursement rate, it merely would divide it among two different segments of the petroleum marketing industry.

Other opponents said MFTs should be based on price, not volume, so that the state could take advantage of inflation and insulate the revenue stream from the effects of improved fuel efficiency and motorists’ driving habits.

The **HRO analysis** appeared in Part One of the May 8 *Daily Floor Report*.

Extending the franchise tax to additional business concerns

HB 3146 by Wilson
Died in House committee

HB 3146 as filed would have expanded the franchise tax — generally levied on corporations’ and limited liability companies’ (LLCs) net worth or earned surplus (modified net income), whichever yields more tax — to limited partnerships, real estate investment trusts (REITs), and other entities for which owners have limited liability. Tax liability would have been prorated to the extent that direct owners were natural persons. Management fees, interest, or royalties paid to related, nontaxable entities would not have been deductible. A proposed committee substitute would have exempted REITs, professional entities, self-insurance trusts, investment and publicly traded partnerships, entities with fewer than 75 ultimate related owners, and noncorporate, non-LLC entities with receipts of less than \$500,000. However, HB 3146 died in the House Ways and Means Committee.

The Senate Finance Committee substitute for HB 2425 by McCall, an omnibus fiscal management bill, would have extended the franchise tax to corporations doing business in Texas that directly or indirectly own interests in partnerships, trusts, or joint ventures. Investment trusts, REITs and their subsidiaries, real estate mortgage conduits, certain wholesale electricity generators, and pre-2003 publicly traded partnerships and their subsidiaries would have been exempt. However, the Senate removed these provisions during floor debate.

Supporters said the franchise tax base is weighted too heavily toward capital-intensive industries and is outdated because its revenue stream does not reflect growth in the “information economy,” especially services. Extending the franchise tax base to partnerships and/or sole proprietorships would make the tax more equitable. All business entities should bear an equitable share of the tax burden, regardless of their corporate structure or previous lack of liability. By forming wholly-owned out-of-state subsidiaries known as “Delaware subs,” some large Texas firms organized as partnerships have avoided paying the state hundreds of millions of dollars in franchise taxes. Texas cannot afford to remain one of the few states that do not tax out-of-state corporations operating as limited partnerships. Closing this loophole would be a simple matter of fairness. The impact on individuals’ income could be reduced by allowing compensation deductions for personal services partnerships.

Opponents said partners and sole proprietors are entitled to different tax treatment because they lack the legal advantages of corporations. Partnerships and sole proprietorships should not be subject to the franchise tax because, in effect, this would impose a tax on individual partners’ and owners’ personal incomes. The unintended consequences of taxing parent corporations would harm many businesses that never before had paid the franchise tax.

Other opponents said any proposed franchise tax legislation should address broader issues of the state’s overall tax policy for business and industry, rather than focusing only on closing so-called loopholes.

Notes: HB 694 by Y. Davis, which would have subjected to the franchise tax business trusts and other entities taxed federally as corporations with a Texas nexus, died in the House Ways and Means Committee. SB 1030 by Shapleigh, which would have taxed for-profit Texas partnerships while excluding individual partners’ net income, died in the Senate Finance Committee.

Limiting increases in real property appraisals for nonschool taxes

HB 3223 Bohac, et al.
Died in the Senate

HB 3223 would have limited increases in the appraised value of real property for taxation by a taxing unit, other than a school district or public junior college district, to 5 percent per year, excluding the value of improvements. Current law limits to 10 percent the annual increase in appraised values of residential homesteads for property tax purposes. HB 3223, the enabling legislation for HJR 4 by Bohac, et al., would have expanded the limitation to all real property for nonschool tax purposes. As passed by the House, the limitation would have expired on December 31, 2005. The Senate Intergovernmental Relations Committee removed the sunset provision.

Supporters said HB 3223 would provide relief to county, city, and special district residents who are paying excessively high property taxes because of higher appraisals. These increases have occurred despite the 10 percent limit on increases in residential homestead appraisals, in place since 1998, and despite the truth-in-taxation provisions established more than 20 years ago. Local taxing entities should be prevented from collecting more revenue by hiding behind higher tax appraisals instead of raising their tax rates and being held accountable by citizens. HB 3223 would expand the limitation on appraisal increases to benefit all property owners, rather than only owners of residence homesteads. Business owners and apartment renters would benefit from tax relief as well. Treating all county, city and special district property owners the same would meet the constitutional requirements for equal and uniform taxation.

Opponents said HB 3223 would create separate categories of taxable property and would treat even the same properties unequally in assessing taxes for school districts and junior college districts as opposed to those for counties, cities, and special districts. The Constitution requires that taxation be equal and uniform and that all taxable property be taxed in proportion to its value. This bill would establish a 5 percent difference between appraisals for school and nonschool taxes. Also, the bill would cost cities and counties millions of dollars in lost revenue that the state would not be obligated to replace, as compared with requirements that the state reimburse school districts for lost property taxes.

Notes: HJR 4 by Bohac, et al., which would have proposed amending the Constitution to allow the Legislature to limit increases in nonschool appraisals for all real property, also died in the Senate. Similar legislation limiting annual increases in appraised value to less than 10 percent died in the House Local Government Ways and Means Committee.

The **HRO analysis** appeared in Part One of the May 9 *Daily Floor Report*.

Requiring repayment to the rainy day fund

HJR 2/HB 3207 by Heflin
Died in Senate Committee

HJR 2 would have amended Texas Constitution, Art. 3, sec. 49-g to require that any money borrowed from the economic stabilization or “rainy day” fund be returned the following biennium. The amendment would have required the comptroller to deduct any amounts owed to the fund from the biennial revenue estimate, then return one-half of the amounts owed in the first year of the biennium and the other half in the second year, unless the comptroller determined that fiscal conditions made unequal transfers necessary. Any appropriation made by the 78th Legislature from the rainy day fund would have had to be repaid during fiscal 2006.

HB 3207 would have appropriated from general revenue any amounts borrowed from the rainy day fund for fiscal 2003 to be transferred back to the fund in fiscal 2006.

Supporters said Texas voters should have the opportunity to decide whether the rainy day fund should have to be repaid in a timely manner. With a shortfall for fiscal 2003 that had to be eliminated by the end of fiscal 2004-05, the 78th Legislature approved borrowing nearly \$1.3 billion from the fund in HB 7 by Heflin. Without a constitutional amendment or a similar statute, there is no mandate for the Legislature to repay those funds. The state should be required to restore the balance of the rainy day fund, which had risen to its recent high level because of the growth in excess natural-gas production tax revenues. The amendment would provide constitutional protection for the fund, ensuring that it never would be depleted.

Repaying the rainy day fund would create fiscal benefits for the state. Bond credit rating agencies consider the presence of a reserve fund and the relative size of that fund when determining a state’s creditworthiness. Repaying the fund could save on debt-service payments for new bond issues.

Opponents said the 78th Legislature should not tie the hands of future legislatures in dealing with budget imbalances. The state never has experienced a “double-dip” contraction in revenues, but it might in the future. If the rainy day fund were tapped when the first wave of contraction hit, the budget problems during the second wave could be exacerbated by the constitutionally required repayment deadline. The state should try to replenish the fund but should be wary about setting a firm repayment schedule.

Notes: HB 7 by Heflin, the supplemental appropriations bill for fiscal 2003 enacted by the 78th Legislature, appropriates \$1.26 billion from the economic stabilization fund to various programs, representing nearly all of the expected fund balance.

The **HRO analyses** of HJR 2 and HB 3207 appeared in Part One of the May 10 *Daily Floor Report*.

Penalties for failure to report business personal property to tax appraiser

SB 340 by Staples
Effective January 1, 2004

SB 340 penalizes a property owner 10 percent of the property tax due for a tax year in which the owner fails to render (report) business personal property (BPP) on a timely basis to the county appraisal district (CAD). BPP is tangible personal property, other than real estate, used to produce income. Owners convicted of fraud or making false statements must pay a 50 percent penalty. Falsifying statements can be a state-jail felony (punishable by 180 days to two years in a state jail and a maximum optional \$10,000 fine) or a Class A misdemeanor (up to one year in jail and/or a maximum \$4,000 fine). CADs may keep up to 20 percent of penalty collections for cost recovery but must distribute the remainder among local taxing entities. New filers will receive amnesty for past omissions from September 1, 2003, until January 1, 2005, including the 2003 tax year. Renditions filed before December 1, 2003, for the 2003 tax year that comply with the bill's provisions and that include previously unreported BPP cannot be used to add to the value of property on the 2001 or 2002 appraisal rolls.

Some regulated industries and owners whose property is appraised by contractors hired by CADs do not have to render, and renditions need not include tax-exempt property. The bill specifies BPP rendition content, including owners' good-faith estimates of market value or acquisition costs, unless the property is worth less than \$20,000. Chief appraisers may ask property owners to document their BPP value estimates.

Beginning January 1, 2005 (or 2006 for counties with populations of 500,000 or less), agreements for electronic communication between CADs and taxpayers must specify the means of confirming delivery and the property owner's email address. CADs must notify electronically owners who have at least 25 accounts, but CADs may choose the media, formats, content, and methods from those prescribed by the comptroller.

Supporters said chief appraisers cannot enforce the state's BPP reporting law adequately. As a result, thousands of businesses are underreporting, inaccurately reporting, or failing to report billions of dollars worth of taxable property, by some estimates. This forces taxing entities to recover hundreds of millions of dollars in unpaid taxes through higher tax rates than would be necessary otherwise. SB 340 would balance governmental needs against taxpayers' rights by imposing reasonable penalties; specifying the data to be submitted to CADs; creating an efficient mechanism for CADs to obtain property information and for property owners to justify their submissions; and encouraging compliance by granting amnesty to delinquent filers.

The bill would establish enforceable penalties to help local taxing entities recover substantial revenue over the next five years without treating taxpayers like criminals. It would create common-sense incentives and would assess penalties commensurate with violations. Reporting property should not become adversarial, and appraisers should have to show cause to prosecutors before they begin investigating businesses. Property owners should not have to divulge business information unless they are protesting property valuations. The bill would protect owners against self-incrimination while allowing appraisers to obtain confirmation of taxable BPP. Giving appraisers audit and subpoena power would be tantamount to creating tax police.

Opponents said the current reporting system works well and does not need to be changed. Most Texas businesses comply with the law, but appraisers can seek court orders against those who do not, according to a 2001 ruling by the First Court of Appeals in Houston upholding enforcement of the rendition statute (*Robinson v. Budget Rent-a-Car Systems, Inc., et al.*, 51 S.W.3d 425 (Tex. App.-Hous. (1 Dist.))).

BPP represents a relatively small portion of overall property value, and because its exact extent is unknown, revenue-loss estimates are dubious. Some of this property, such as highly sophisticated technological or scientific equipment, is well identified but so difficult to appraise that CADs contract out much of the work. Even property owners cannot always assess the value of furnishings and equipment, some of which may be several or many years old, obsolete, or unique to their industries or businesses. Many other states do not tax BPP, and Texas should not either.

Other opponents said the bill's weak penalties would not increase compliance significantly, nor would they deter concealment of assets, the root of the problem. Appraisers need audit and subpoena power and/or the ability to seek court orders from the outset; otherwise, the system will remain essentially voluntary. Disclosure of the actual bases for owners' BPP value estimates should be mandatory to ensure appraisal accuracy.

CADs should have to reimburse property owners for attorney's fees if they are prosecuted for fraud but found by courts not to be liable for penalties, or if the cases are settled. Exonerated taxpayers should not have to pay for their legal defense. Requiring reimbursement by CADs would discourage overzealous prosecution.

Notes: According to the bill's fiscal note, SB 340 will produce net gains of \$23 million for the Foundation School Fund, \$135.7 million for school districts, \$64 million for cities, \$27.6 million for counties, and \$13.8 million for general revenue-related funds during fiscal 2004-05. SB 175 by Barrientos, which would have given appraisers limited auditing and investigative powers to enforce reporting, died in the Senate Finance Committee.

The **HRO analysis** appeared in Part One of the May 9 *Daily Floor Report*.

School district property value study and appraisal district accountability

SB 671 by Staples
Effective June 20, 2003

SB 671 modifies elements of the comptroller's annual property value study (PVS), which develops estimates of taxable property values for use in public school funding formulas by the Texas Education Agency (TEA). The bill provides for temporary "grace periods" beginning in 2004-05 for eligible school districts whose state funding is affected adversely by the PVS. SB 671 defines "local value" as the market value of property in school districts as determined by their county appraisal districts (CADs), less exemptions and allowable reductions. "State value" means the value determined by the PVS. School districts eligible for the two-year grace period must have:

- been assigned state values higher than their local values in the most recent PVS;
- had valid local values in the two preceding annual studies; and
- reported aggregate values in the most recent PVS that were at least 90 percent of the lower limit in their assigned range of acceptable values.

Beginning with the 2003 PVS, eligible school districts' local values will be used as their taxable values for that tax year and the next tax year. Within 12 months of an eligibility determination, the comptroller must review the appraisal standards of eligible school districts' CADs. Beginning with the 2002 PVS, school districts whose local values exceed state values will have their local values certified as taxable values for formula funding purposes. For the 2003-04 school year, TEA must calculate the impact on state funding of certifying local values higher than state values in the 2002 PVS. TEA must make a one-time distribution of the savings proportionately among school districts that meet three criteria: certified state values, additional funding under Education Code, ch. 42 (recapture), and maintenance and operations (M&O) taxes at rates exceeding \$1.42 per \$100 of property valuation.

SB 671 requires the comptroller to review the methods, standards, and procedures only of CADs of eligible school districts. CADs that do not comply with review recommendations and that fail to take remedial action within one year of review issuance become subject to conservatorship. In that case, state district judges must appoint five-member conservator boards to implement the comptroller's recommendations, at CADs' cost, until all school districts within the CADs have valid local values in the same annual PVS.

Supporters said SB 671 would take a balanced, graduated approach to the complex problem of school district property valuation, which can have an unexpectedly adverse fiscal impact on some school districts. Each year, for school finance purposes, the PVS assigns to up to one-quarter of all school districts property values that differ from those determined by their CADs. Many of these districts appeal, and some go to court, to rectify invalidation of their local values.

School districts whose appraised values are deemed too low by the PVS are assigned higher state values for formula funding. A finding of underappraisal creates a "double whammy" for districts. First, because state education aid is based largely on districts' property wealth per student, reporting higher values to TEA effectively reduces the districts' state funding below expected levels. Districts must make up any shortfalls in anticipated state funds. Second, by taxing against a relatively

smaller base, districts receive less local property-tax revenue than they would if they taxed property at the same rate but applied to PVS values. Consequently, some districts must address budget deficits either by reducing spending and cutting programs and services or by raising tax rates, if they are below the statutory M&O tax cap of \$1.50 per \$100 of value.

The opposite phenomenon occurs in school districts whose CADs are found to be overappraising property. Where appraisals are deemed higher than market value, the PVS assigns a district state values that are *lower* than its local values. This creates a boon called “double-dipping” — relatively more formula-generated state aid plus additional local revenue from taxing against higher local values — at other districts’ expense.

To address underappraisal, the proposed grace period would hold harmless for two years a school district whose CAD was deemed to be appraising too low but had not displayed a pattern of appraisal problems. The comptroller would have one year to determine why values were too low, giving the CAD an opportunity to correct any problems. Stronger measures could be taken if the problems were not corrected. School districts consistently receiving state values would be excluded from grace periods. As to overappraisal, requiring certification of school districts’ local values even when they were higher than state values would remove districts’ financial incentive to report property values that exceed market value. Reducing state aid to districts with inflated values would be fair from an equity standpoint.

SB 671 would create more efficient enforcement mechanisms to address appraisal problems prospectively, rather than retroactively. Allowing district judges to appoint conservators would bring objective third parties into the process.

Opponents said SB 671 is unnecessary. The proposed changes to the PVS address issues that ultimately affect fewer than 10 percent of the state’s more than 1,000 school districts in any given year. Appeals resolve most of the relatively minor inequities created by assignment of state values, bringing them closer to local values. Many of the CADs involved are well-known “repeat offenders.” Ample remedies are available to address their problems, including auditing and the appointment of special masters. Also, grace periods could encourage laxity among CADs by removing disincentives to appraise property at less than full market value. Eliminating the threat of reduced state aid could be counterproductive and might result in appraisals dropping below the PVS’ accuracy threshold. The state can ill afford the cost of grace periods and should not penalize districts whose CADs appraise values higher than the state.

Other opponents said SB 671 would not address technical problems in the PVS that undermine its credibility, including flawed sampling methodology and overreliance on CAD information. Instead of using its limited resources to render second opinions on school property values, the PVS should concentrate strictly on reviewing CAD performance. Rather than generating another set of values, unless egregious errors surface, the PVS should determine whether local appraisals are being conducted properly.

The PVS should undergo annual independent review. The state should grant school districts a blanket amnesty, regardless of the cost, and assign local values systemwide for formula funding purposes until the problems with the PVS can be corrected.

The **HRO analysis** appeared in Part Three of May 26 *Daily Floor Report*.



Transportation

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Creating a motor-vehicle financial responsibility verification program

HB 814 by Gutierrez/SB 422 by Bivins/HB 3588 by Krusee
Died in the Senate/Died in the House/Effective June 22, 2003

HB 814, as reported by the House Insurance Committee, would have required the Department of Public Safety (DPS) to create a motor-vehicle financial responsibility program in compliance with the federal Driver's Privacy Protection Act of 1994. DPS or its contractor would have had to develop, maintain, and administer a computer database containing automobile liability insurance coverage information provided by insurers to verify motor-vehicle owners' proof of financial responsibility under DPS guidelines. Insurers not providing required data would have been liable for a civil penalty of \$250 for each day in violation. Unauthorized disclosure of the information would have been a Class A misdemeanor, punishable by up to one year in jail and/or a maximum fine of \$4,000. The contractor could have disclosed the information only to state or local governmental entities enforcing the statute. At least monthly, the contractor would have had to update insurance data and compare it to all current motor-vehicle registrations provided by the Texas Department of Transportation (TxDOT) and to DPS driver's license data. Selected owners of uninsured vehicles would have received notices and would have had to prove financial responsibility through insurance or other means. A \$1 surcharge on vehicle-registration fees would have been deposited into the State Highway Fund (Fund 6), and TxDOT would have reimbursed DPS from Fund 6 for the contractor's implementation costs.

House floor amendments removed three enforcement mechanisms: a \$100 civil penalty for not responding within 30 days to an initial verification notice; termination of registration for not responding timely to a final warning; and registration reinstatement requirements, including penalty and fee payments. The Senate Infrastructure Development and Security Committee reported HB 814 favorably without amendment, but the bill died in the Senate.

SB 422 would have created a motor-vehicle financial responsibility verification program based on statistical sampling administered by TxDOT, which would have had to request from selected vehicle owners proof of compliance with financial responsibility requirements. TxDOT would have had to verify the information, with insurers and sureties required to respond. Failure by owners to respond or noncompliance with financial responsibility requirements would have resulted in a \$250 fine and termination of vehicle registration, which could have been reinstated upon paying any outstanding penalties or fees and showing proof of financial responsibility. The bill also would have increased penalties for failure to comply with financial responsibility requirements, allowed coverage waivers for noneconomic and exemplary damages, and established a standardized proof-of-insurance card. SB 422 failed to pass in the House on second reading.

HB 3588, effective June 22, 2003, requires a study of a financial responsibility verification system using database interface software. By July 1, 2004, DPS and the Texas Department of Insurance (TDI) must conduct a feasibility study on using interface software linking users to insurance company and vehicle registration data. If DPS and TDI determine that the system should be implemented, DPS will adopt administrative rules; contract jointly with TDI and the system manager, to be selected through competitive bidding; and adopt rules and develop forms with TDI for surcharge collection. If not, the statute will expire. The bill retains outside contracting, insurance company data access requirements, and confidentiality protection similar to HB 814, although unauthorized use of

information is a Class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000). A new \$1 vehicle registration surcharge will be deposited into Fund 6. Before August 31, 2005, surcharge revenue may be appropriated to upgrade the DPS driver's license system and for startup costs of the point-based driver responsibility program created by HB 3588. Surcharge revenue will not be available for appropriation for the financial responsibility verification program until fiscal 2006.

Supporters said at least 20 percent of Texas motorists are uninsured, causing higher premiums for law-abiding drivers. An effective financial responsibility verification system would lower insurers' costs substantially for uninsured motorist claims. Similar programs in 19 other states have reduced the number of uninsured motorists by double-digit percentages. HB 814 would use state-of-the-art technology, rather than ineffective sampling techniques, to measure the uninsured motorist problem in Texas. Identifying these drivers would result in more accessible and affordable insurance. While some people might be identified mistakenly as uninsured in the program's startup stages, motorists could correct these mistakes easily by sending in proof of insurance or correcting registration information. The sampling system in SB 422 would be much less intrusive on motorists' privacy than databases, which would be vulnerable to hacking and inappropriate uses of personal and proprietary information.

The HB 3588 approach would allow the two agencies most essential to the program's success to evaluate whether a software interface approach will work. If feasible, it would give peace officers real-time access to data needed to verify financial responsibility, just as they now verify driver's licenses or outstanding arrest warrants. Not having to update a stand-alone database periodically should thwart circumvention and reduce "false positives." This system would focus on identifying those who lack proof of financial responsibility rather than forcing selected vehicle owners to submit proof. The Legislature could reconsider the issue in 2005 if the agencies find interfacing unfeasible. The DPS driver's license system has not been upgraded in 30 years and is nearly obsolete. Allocating surcharge revenue initially to the driver responsibility program is a worthwhile expense that ultimately would benefit good drivers.

Opponents said HB 814 would require DPS to award a huge state contract to a private entity for an unproven system, funded by law-abiding motorists through an exorbitant vehicle-registration surcharge. It would raise almost \$42 million in fiscal 2004-05 to pay for a program that DPS estimates would cost only \$3 million to implement. A lack of database security would prevent the state from protecting private information or proprietary data sufficiently. Less intrusive methods are available to increase the number of insured motorists. SB 422 would require TxDOT to implement an unproven sampling system that would require low-income motorists to pay civil penalties and higher vehicle-registration fees and would deem as guilty those identified as uninsured until they proved themselves innocent by clearing their records. The state should not increase enforcement of the proof-of-responsibility law until access to affordable insurance improves.

The HB 3588 approach would give DPS and TDI too much discretion in deciding whether and how to implement the system. This approach would provide no new impetus to curtail driving without insurance or other forms of financial responsibility. The bill would divert surcharge revenue to other programs during fiscal 2004-05, effectively delaying implementation even with DPS/TDI approval. The surcharge should be contingent on implementation or else sunsetted.

The **HRO analysis** of HB 814 appeared in Part Three of the May 2 *Daily Floor Report*, and the analysis of SB 422 appeared in Part One of the May 23 *Daily Floor Report*.

Authorizing photographic traffic-signal enforcement by cities

HB 901 by King, et al.
Died in the House

HB 901 would have authorized municipalities to enact ordinances implementing photographic traffic-signal enforcement systems capable of producing at least two recorded images of the rear of vehicles, including license plates. Ordinances could have made owners liable for civil penalties of up to \$75 if their vehicles violated traffic-control signals while facing only steady red lights. Records related to violations would not have been public information.

Supporters said HB 901 would discourage irresponsible drivers from running red lights. Drivers would learn that they could be cited for this dangerous behavior even when no police were visible nearby. Disregarding red lights is the leading cause of urban automobile crashes and fatalities. Because police often cannot pursue drivers who run red lights without also running the lights themselves, cameras would aid enforcement and free up officers for other duties.

About 40 U.S. cities use traffic cameras, and red-light violations have decreased in some cities by as much as 60 percent. At least three Texas cities have had similar success. HB 901 would allow cities with such systems to recover costs only and to keep no more than half of late-payment fee revenue. Violations would be noncriminal misdemeanors punishable by civil penalties like parking tickets. Citations would be mailed; there would be no arrest option. Violations would not affect insurance premiums or driving records.

Privacy concerns are overblown. Driving is a public privilege, not a private activity. Surveillance cameras are common in office buildings and public areas, including state highways and toll-road booths. The bill's safeguards against misuse or disclosure of photos would protect privacy. Cameras are much less intrusive than traffic stops.

Opponents said HB 901 would be a self-defeating attempt at crime deterrence by creating a new enforcement mechanism with a lower penalty. It would be illogical and unfair to punish red-light runners caught on camera less severely than those caught in person. It also would create enforcement inequities. Since most red-light violations occur unintentionally or because of signal timing problems, cities should not reap financial benefits from inadvertent violators. The proposed camera systems would not solve the problem because drivers would learn to avoid monitored intersections. Also, traffic signal cameras would be a gross invasion of privacy. Police should not monitor law-abiding citizens arbitrarily. It would be more cost-effective to use proven signal modification methods, such as flashing green lights or longer yellow lights.

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

Standardizing, marketing, and creating new specialty license plates

HB 2971 by Harper-Brown
Effective September 1, 2003

HB 2971 standardizes the issuance of specialty and personalized license plates. It creates more than 30 new specialty plates and an administrative process for creating additional new specialty license plates at the initiative of either the Texas Department of Transportation (TxDOT) or an outside sponsor. If a sponsor requests a new plate, the sponsor must provide TxDOT with a \$15,000 deposit or 3,500 applications for the plate. The Texas Transportation Commission (TTC) may authorize TxDOT to contract with a private vendor for the marketing and sale of personalized prestige and other specialized license plates. If the commission authorizes TxDOT to enter into such a contract, it must establish reasonable fees for the plates offered for sale by the private vendor. Revenue from this fee is the only source from which a contract between TxDOT and a private vendor can be paid.

Supporters said inconsistency in the statutes governing specialty license plates increases TxDOT's administrative burden and confuses the public. HB 2971, by streamlining laws in regard to fees, replacement, and personalization of specialty license plates, would increase TXDOT's efficiency and make it easier for the public to understand the purchase of these plates. It would allow TXDOT to create new license plates without specific legislative approval. Legislators should not have to authorize the creation of each new plate when TXDOT has the expertise and ability to do so independently.

Currently, TxDOT offers specialty license plates but does little to market them. HB 2971 would allow TxDOT to contract with a third-party firm with the requisite experience to market the plates successfully. The TTC would not have to authorize a private contract unless it was in the public interest, but by contracting with a private vendor, the state would save an estimated \$2.4 million per biennium. Specialty plates are a discretionary purchase, and standard plates would remain available to drivers at the basic price.

Opponents said HB 2971 might result in the TTC's setting higher license plate fees to cover TxDOT's payments to the private vendor. Also, a private vendor could sell existing plates that benefit charitable causes for more than the cost of the same plate through a county tax assessor. This could mislead the public into thinking that buying the higher-priced plate would increase the amount the charitable cause receives, while the private vendor actually would receive the higher profit. HB 2971 also would create a new monopoly market, since only one or two firms are able and willing to contract with TxDOT for this service.

Notes: HB 2971 originally passed the House on the Local, Consent, and Resolutions Calendar. That version only would have allowed TxDOT's Motor Vehicle Board to adopt rules regulating the issuance and use of dealer's license plates. The Senate amended the bill by adding the provisions of SB 1704 by Wentworth, which had died on the House floor.

The **HRO analysis** of SB 1704 appeared in Part Two of the *May 23 Daily Floor Report*.

Trans-Texas Corridor and transportation policy and funding revisions

HB 3588 by Krusee, et al.

Most provisions effective June 22 or September 1, 2003

HB 3588 creates new initiatives and financing mechanisms designed to accelerate delivery of transportation projects and generate additional cash flow. It contains elements of several other bills affecting the Texas Department of Transportation (TxDOT), its appointed governing body, the Texas Transportation Commission (TTC), and the State Highway Fund (Fund 6). It covers intercity connectivity, local toll roads, state-owned turnpikes and rail, state fee and revenue structures and allocation, bonding, responsibility of drivers and vehicle owners, and public transportation.

Trans-Texas Corridor. HB 3588 authorizes TTC and TxDOT to begin implementing Gov. Perry's Trans-Texas Corridor Plan (TTCP), which calls for 4,000 miles of multimodal corridors linking major metropolitan areas and containing highways, toll roads, passenger and freight rail and utility lines in the same right-of-way. In addition to appropriations, fees, and bonds, financing may include contributions from or contractual obligations of other governmental entities; federal loans, grants, and reimbursements; State Infrastructure Bank loans; private investments; and donations. The bill limits Fund 6 spending on right-of-way acquisition (ROWA), initial highway construction, and nonhighway grading and bed preparation to 20 percent of the amount of federal highway reimbursement funding allocated to Texas each fiscal year. TxDOT may not spend more than \$25 million per year to buy or build nonhighway corridor facilities, other than for preliminary engineering, feasibility and environmental studies, and facility operations and maintenance. TTC and TxDOT may issue bonds for and charge tolls and fees on the TTCP as they do for turnpikes, but they may not charge public utilities for crossing the corridor.

TxDOT may authorize any other governmental or private entity to build or operate any part of a corridor. It may grant franchise rights and access licenses and may contract with rail operators, public and private utilities, communications systems, common carriers, transportation systems, or other entities to use corridor facilities. All state highway ROWA laws apply to the TTCP, unless in conflict. However, instead of selling their property outright, landowners may enter into corridor participation agreements paying them percentages of one or more identified fees related to a corridor segment. TxDOT may buy land and lease it back to sellers and may purchase options to buy land and other nonutility property from willing sellers in advance of final project location. TxDOT also may use expedited condemnation ("quick take" declaration) to acquire land for the TTCP.

Regional mobility authorities (RMAs). HB 3588 gives RMAs the power of eminent domain and the authority to issue revenue bonds for transportation projects. TTC may authorize creation of RMAs at the request and with the approval of one or more counties. RMAs may set tolls and lease facilities to private entities, including railroads. TTC may convert highway segments to turnpikes and transfer them to RMAs, which must reimburse TTC for the costs unless the state, TxDOT, and the public would benefit substantially. RMAs may use "quick take" for toll road ROWA.

Rail. TxDOT may acquire, finance, build, maintain, and operate (by contract) passenger or freight rail facilities, individually or as part of one or more systems. TxDOT employees may not be used to operate railroads, nor may TxDOT own or otherwise acquire rolling stock. TxDOT may contract

for the use of all or part of a rail facility or system and may lease or sell all or parts of facilities or systems, including track right-of-way, for any purpose, including storage or transfer facilities, warehouses, garages, parking facilities, telecommunications lines or facilities, restaurants, or service stations. The bill encourages TxDOT to build or negotiate the construction of a freight line adjacent to State Highway 130, now under construction in Central Texas.

Highway revenue bonds. HB 3588 authorizes TTC to issue up to \$3 billion in revenue bonds secured by Fund 6, but not more than \$1 billion per year, contingent on voter approval of the constitutional amendment proposed by HJR 28 (see pages 199-201 of this report).

Passthrough (“shadow”) tolls. TxDOT may make toll payments based on traffic volumes to public entities or private companies for road construction, operation, or both. Included would be tolls paid to counties, RMAs, and regional tollway authorities to cover costs of state highways converted to local toll roads.

Highway-to-toll-road conversion. Effective September 1, 2003, TTC may transfer nontoll highway segments to counties that plan to operate them as toll roads. All toll revenue must be spent on the roadway’s operations. TTC may waive some or all compensation for the transfer if the state would benefit substantially. Commissioners of all counties in which the highway segment is located must approve the transfer, and public hearings must be held in each affected county.

Advance acquisition. TTC may buy options to acquire real property from willing sellers for possible use before determining final highway routes. The General Land Office may manage property at TxDOT’s request.

Turnpike authority. TxDOT may lease turnpike property for ancillary facilities such as hotels, restaurants, and service stations to generate turnpike project revenue. In lieu of single fixed payments, TxDOT may compensate property owners through revenue sharing or rights to use or operate turnpike segments. Tolls may be imposed after bond retirement to fund construction and maintenance of other turnpike projects in a region.

County fee collection reimbursement. HB 3588 phases out the 5 percent reimbursement of counties from motor-vehicle registration fees (Fund 6) for their costs of collecting motor-vehicle sales taxes (general revenue) for the state. Beginning in fiscal 2006, counties will be reimbursed from motor-vehicle sales taxes at an annual rate of 10 percent of the reimbursement amount until the entire reimbursement comes from that source.

Driver responsibility program. Beginning September 1, 2003, the Department of Public Safety (DPS) must identify and penalize drivers habitually convicted of most traffic violations. The new system will assign two points to motorists convicted of most traffic violations and three points in cases involving accidents. Drivers who accumulate six points or more over a 36-month period must pay surcharges of \$100 for the first six points and \$25 for each additional point. A driver must receive notice from DPS upon earning a fifth point. Driving while intoxicated will incur a \$1,000 surcharge per year for three years, \$1,500 per year for second or subsequent violations, and \$2,000 if the driver’s blood alcohol concentration exceeds 0.16. A \$250 annual surcharge will be assessed over three years for driving with an invalid license or without proof of financial responsibility, and \$100 for driving without a valid license. Failure to pay surcharges will result in automatic suspension of a driver’s license.

DPS may contract out collection of surcharges and keep 1 percent for administrative costs. The remainder will be divided equally between general revenue and a new dedicated general revenue account for trauma facilities and emergency medical services (EMS). In any fiscal year in which combined deposits from surcharges and the new \$30 court cost for traffic violations (see below) exceed \$250 million, 49.5 percent of the surcharge collections overage will go to the trauma/EMS account and 49.5 percent to the Texas Mobility Fund (TMF). Surcharge collections allocated to general revenue in fiscal 2004 and not subject to DPS appropriation will be deposited instead into a dedicated account for TMF debt service. These monies will not be appropriated but may be transferred to the TMF if payments become due on bonds or other financial obligations.

Traffic violations fee. During fiscal 2004 through 2007, most traffic law violators will have to pay an additional court cost of \$30. Two-thirds will go to general revenue and one-third to the new trauma facilities/EMS account. Cities and counties that remit collections on time may keep 5 percent plus any accrued interest. If combined court-cost and point-surcharge general revenue deposits exceed \$250 million in any fiscal year, the court-cost collection overage will go to the TMF. Court-cost collections allocated to general revenue in fiscal 2004 will be deposited instead into the dedicated account for TMF debt service.

Verifying vehicle owners' proof of financial responsibility. HB 3588 requires DPS and the Texas Department of Insurance to conduct a feasibility study on using a computerized system to verify vehicle owners' proof of financial responsibility. (See discussion of HB 814 on pages 190-191 of this report.)

Capitalizing the Texas Mobility Fund. Fees and penalties collected or received by DPS for driver's licenses and records and motor-vehicle inspections (with some exceptions) will be redirected from general revenue to the TMF as of September 1, 2004. During fiscal 2004-05, however, the first \$90.5 million in fee collections will go to general revenue.

State public transportation management. HB 3588 requires TxDOT to coordinate all public transportation provided by the state. Health and human services agencies must contract with TxDOT to assume responsibility for any transportation services they now provide. TxDOT may contract with any public or private provider for these services. TTC may increase or reduce funding to providers based on their compliance with applicable laws.

Commercial driver's licenses. As of June 1, 2005, determination of commercial vehicle operator qualifications will include consideration of serious traffic violations occurring in any vehicle, not only commercial vehicles.

Commercial motor vehicle safety. DPS and certified police officers may stop and enter commercial vehicles in addition to detaining them. DPS may penalize commercial vehicle operators administratively for certain safety violations. Commercial vehicles are considered abandoned on the 11th day after impoundment if penalties are not paid.

Salvage and nonrepairable motor vehicles. The bill redefines "salvage" and "nonrepairable" vehicles by eliminating the model year and percentage-of-damage criteria. Title fees for salvage or nonrepairable vehicles increase from \$3 to \$8. An \$8 fee applies to each title issued in lieu of a no-charge salvage certificate. Titles for rebuilt salvage vehicles incur a \$65 fee, with \$50 allocated to DPS for enforcement and the remainder to general revenue.

Neighborhood electric vehicles and scooters. HB 3588 authorizes the use of “neighborhood electric vehicles” and motor-assisted scooters on bicycle paths, sidewalks, and roadways with posted speed limits of 35 mph or less. TxDOT, counties, and cities may prohibit their operation in the interests of safety.

Supporters said HB 3588 would advance transportation project management and give TxDOT new implementation tools. It would make a long-overdue reallocation of roadway-related fees and would use increases in traffic violation fines and fees and penalties on bad drivers to pay for the TMF and trauma care. This would improve traffic safety by holding irresponsible drivers accountable for their actions and would reduce the costs they impose on other Texans.

Cities, counties, and other states have used debt financing for transportation for years to build large, fixed assets. Additional bonding authority of up to \$3 billion, plus leveraging of the TMF balances, would generate immediate cash flow needed to start more projects sooner. Greater reliance on turnpikes would generate toll revenue, either from motorists or other arrangements, that could be used to expand existing projects or build new ones.

Passthrough (“shadow”) tolls are an innovative finance tool allowing a party with available cash to move forward with a project knowing that it will be repaid over time. A mutually agreed “shadow toll” is decided by agreement in advance, either on a per-vehicle or per-vehicle-mile basis, and the financing or constructing entity is repaid incrementally on that basis for its investment to build the project. Use of this mechanism would enable TxDOT to stretch out repayments to developers for startup costs and help reduce its huge project backlog.

Rerouting about \$230 million a year in DPS fees would enable the TMF to issue its first bonds, worth up to \$2.5 billion, to pay for much-needed transportation projects. It makes sense for fees paid by motorists to be spent on highways and mobility improvements. General revenue would be restored with the new point-system surcharges and \$30 court cost for traffic violations. Bad drivers who increase costs for good drivers should bear a greater burden of financing the state’s transportation system.

Greatly expanding RMA powers should encourage more communities to create them. Giving RMAs more flexibility in generating revenue, such as bonding, and in the ability to partner with TxDOT and other public and private entities will be key factors in addressing Texas’ mobility crisis.

“Quick-take” ROWA would allow immediate possession by TxDOT once a court determined that the public-purpose test of the condemnation law had been met. This would eliminate the time-consuming part of condemnation cases — value (price) determination — allowing the state to lock in prices and reduce overall costs.

Expanding TxDOT’s rail capabilities would be a modest but important step toward diversifying Texas’ transportation network. The bill would limit rail disbursements to \$12.5 million unless they were spent on the Trans-Texas Corridor network, abandoned rail acquisition, or grading and bed preparation, or unless they came from certain sources other than Fund 6.

Switching counties’ source of reimbursement for motor-vehicle sales tax collections back to that revenue stream is long overdue. Counties’ net funding levels would not change, but by 2015, Fund 6 would benefit fully from revenue directly related to roadway usage.

Adding nontruck traffic violations to the determination of commercial vehicle operator qualifications would bring Texas into compliance with the federal Motor Carrier Safety Improvement Act of 1999. This change would prevent the loss of 5 percent of federal highway funds in 2005 and 10 percent each subsequent year.

Consolidating the state's public transportation contracting under TxDOT would create economies of scale and would improve cost-effectiveness.

Opponents said the Trans-Texas Corridor is an unaffordable idea whose time has not yet come. The corridor concept may be sound, but questions of financial feasibility and demands of other transportation priorities dictate that it be postponed.

With its various fee hikes and fine increases, HB 3588 is a tax bill in disguise. Texas taxpayers, especially low- and middle-income families and inner-city residents, cannot afford the fee and fine hikes this bill would mandate. The Legislature should be willing to raise taxes if it needs more money for worthwhile projects, including highways.

HB 3588 would launch TxDOT and the yet-to-be-created RMAs into uncharted territory, such as rail, with a virtual blank check and little or no experience in the kinds of creative financing and cooperative agreements that the bill seeks to enable. It would provide too few safeguards for property owners tempted to do business with the state's new megahighway consortium and too few guidelines for an agency that heretofore has done little but contract for highway construction. The state should try some of these ideas in pilot projects before making wholesale policy changes backed by huge debt structures and reliance on unreliable toll revenue.

The bill would give TTC and TxDOT too much discretion and authority over state public transportation, an area in which they lack sufficient experience and expertise. TTC's control would extend over small urban and rural providers but not over metropolitan and other transit authorities. The result would be instability and unpredictability for rural and small urban transportation providers in providing transit services to local communities. Small urban and rural transit districts, but not metropolitan and other transit authorities, would be subject to vehicle emission standards not applicable to larger authorities.

Other opponents said some of the bill's funding priorities are backwards. For example, the proportional distribution of the additional \$30 court cost should be reversed so that more money would go to trauma centers than to the TMF. If inner-city taxpayers are going to subsidize rural and intercity megahighways, their health-care needs, often related to traffic, should receive a greater share of the revenue this bill would generate.

The **HRO analysis** appeared in Part One of the May 9 *Daily Floor Report*.

Short-term transportation borrowing and highway revenue bonding

HJR 28 by Pickett, et al./HB 471 by Pickett, et al.; HB 3588 by Krusee, et al.
On September 13, 2003, ballot

HJR 28 proposes amending the Texas Constitution to allow the Legislature to authorize the Texas Transportation Commission (TTC) to authorize the Texas Department of Transportation (TxDOT) to issue notes or borrow money from any source for up to two years to carry out its functions. The Legislature could repay the debts incurred by appropriating dedicated money from the State Highway Fund (Fund 6). HJR 28 also would allow the Legislature to authorize TTC to issue revenue bonds and other public securities and to make bond enhancement agreements (forms of insurance) to pay for highway improvement projects. The amendment would appropriate Fund 6 money annually to TTC to cover bond debt and related costs. No Fund 6 dedications or appropriations could be changed so as to interfere with bond repayment unless arrangements had been made to retire the debt.

HB 471, the primary enabling legislation, would authorize TTC to borrow money through short-term loans or notes (repaid within two years) to cover TxDOT operations, if voters approve HJR 28. Loan provisions would be up to TTC, but loan amounts, including any balances outstanding on other loans, could not exceed the average monthly revenue deposited into Fund 6 for the 12 months preceding the month in which the loan was made. Loans would not create a general state obligation but would be payable only as authorized by legislative appropriation and could be repaid from Fund 6.

The bill authorizes TxDOT to issue highway tax and revenue anticipation notes (HTRANs) to cover anticipated temporary cash-flow shortfalls in Fund 6 during any fiscal year, subject to approval of the Cash Management Committee (governor, lieutenant governor, House speaker, and comptroller). Notes are not state debts and may be used only for Fund 6 cash-flow shortfalls, subject to approval by the attorney general. All notes must be repaid in full during the biennium in which they are issued. Proceeds from notes and credit agreements must be deposited in a special interest-bearing treasury fund which the comptroller may invest. TxDOT must transfer net proceeds from that fund to Fund 6 as needed to pay authorized expenditures. HTRAN fund money may be pledged to secure note payments, performance of obligations under credit agreements relating to notes, issuance costs, and rebates to the federal government. TxDOT periodically must transfer cash from Fund 6 to its HTRAN fund to ensure timely payment of notes. Any money remaining in that fund after payment of all outstanding notes, federal rebates, and issuance costs must be transferred to Fund 6. If monies are insufficient to pay these costs, the Legislature may appropriate money from Fund 6 to cover them.

HB 3588 would allow TTC to issue up to \$3 billion in revenue bonds secured by Fund 6, but not more than \$1 billion per year, if voters approve HJR 28. At least \$600 million (20 percent) of the aggregate proceeds would have to be spent on highway safety improvement projects. No Fund 6 revenue bond money could be spent on the Trans-Texas Corridor established by HB 3588. Annual bond-related expenditures could not exceed 10 percent of Fund 6 deposits during the preceding year. Bond maturities could not exceed 20 years.

The short-term loan (HB 471) and highway revenue bond (HB 3588) provisions would take effect upon voter approval of HJR 28. The HTRAN provisions take effect September 1, 2003.

Supporters said lagging transportation funding has caused ongoing cash-flow problems at TxDOT. Fluctuations in federal highway spending reimbursements, the seasonal nature of road building, and revenue forecasting difficulties are key contributing factors. In October 2001, for example, an extraordinary payout reduced the Fund 6 balance one day to \$4 million, delaying payments to some contractors and vendors and leading to temporary suspension of many new projects. Texas motorists and business interests cannot afford unnecessary road work stoppages.

HTRANs would function like notes issued by the comptroller to meet other state agencies' periodic cash-flow shortfalls. Authorizing such limited borrowing, especially at a time of low interest rates, would improve TxDOT's cash flow. A TRAN functions much like a line of credit; it is a cash management tool, not a funding mechanism, and generates no new revenue. The borrowing limit on HTRANs would fluctuate monthly, beginning at \$476 million, according to the Legislative Budget Board, and would be reasonable for an agency of TxDOT's size. This financial cushion would enable TxDOT to manage its cash position more aggressively and focus less on managing to the lowest daily balance. This should improve project readiness and turnaround time, helping minimize the impact of inflation and lost economic opportunities.

Advancing the use of long-term debt financing for transportation projects is long overdue. Cities, counties, and other states have used this method successfully for years to build large, fixed assets, including roads and streets. Revenue bonding authority of up to \$3 billion would generate immediate cash flow to begin more projects sooner and relieve Texas' congested roadways faster. Accelerating construction would aid economic development and enhance productivity. Unlike general obligation bonds, bonds backed by revenue — both state and federal, in the case of highways — do not count against the state's constitutional debt limit (Art. 3, sec. 49-j). Highway revenue bonds are needed to augment the Texas Mobility Fund (TMF), an as-yet unused revolving state bond fund that should begin receiving revenue in fiscal 2004-05. The state must begin issuing highway bonds if it hopes to improve mobility. Temporary bonded indebtedness (about \$100 million per year) would be preferable to permanent tax or fee increases, most of which would be regressive.

Opponents said a fiscal crisis is the wrong time to increase debt of any kind. Borrowing would increase TxDOT's costs, both in terms of interest paid on loans or notes and forgone interest not earned on cash balances. Whether TxDOT actually could speed up projects and realize any savings is uncertain at best.

No other Texas state agency borrows short-term to pay for daily operations. The Comptroller's Office issues TRANs not to cover its own expenses but to pay other agencies' bills and fulfill state obligations on time. TxDOT is a \$6 billion-per-biennium agency with a constitutionally dedicated revenue source, yet it cannot manage its budget effectively. Its cash forecasting was off by more than 250 percent between 1999 and 2002, and since 2000, it has paid more interest on late payments to vendors (almost \$1 million) than any other agency. Such poor financial performance should not be rewarded by giving the agency unprecedented new ways of borrowing money to be repaid with tax dollars.

Bonding for highways would be a poor public investment. Borrowing for fixed assets would increase costs, obligate future legislatures, and burden the next generation of taxpayers. Texas should continue to pay for the amount of highway construction it can afford, rather than encumber scant resources to add to state debt. Fund 6 already is spread too thin, and bonding would generate

no new revenue. Fund 6 diversions to nontransportation purposes should be curtailed or eliminated, and motor-fuels taxes and vehicle registration fees should be increased before incurring debt.

Other opponents said the bonding limit could lead to overcommitment, hindering TxDOT's ability to respond to unforeseen circumstances. The limit should be lowered to a more reasonable level until TxDOT and TTC gain more experience with debt financing.

The bonding limit is too low, reducing the potential impact of the state's borrowing power on the underfunded highway system. The limit should be at least \$5 billion, preferably more, to avert a full-fledged transportation crisis.

Not allowing Fund 6 revenue bonds to be spent on the Trans-Texas Corridor would be shortsighted. The proposed statewide transportation network is precisely the kind of long-term approach best suited to debt financing.

Texas already has a state highway bond fund, the TMF, which should be capitalized before Fund 6 is diminished.

Notes: The highway revenue bond provision in HJR 28 is virtually identical to that of SJR 44 by Ogden, which died in the House. The highway revenue bond section added to HB 3588 originally was in SB 1083 by Ogden, which died in the House Transportation Committee.

The **HRO analyses** of HJR 28 and HB 471 appeared in Parts One and Two, respectively, of the April 24 *Daily Floor Report*. Analysis of HB 3588 appeared in Part One of the May 9 *Daily Floor Report*. The analysis of SJR 44 appeared in the May 21 *Daily Floor Report*.

Restructuring the Texas Transportation Commission

SB 409 by Lucio
Effective September 1, 2003

SB 409 expands the Texas Transportation Commission (TTC) from three to five members. The governor's appointments must reflect Texas' diverse geographic regions and population groups, and one member must live in a rural area. The commissioner, henceforth called the chair, must report to the governor and legislative leadership on legislative recommendations adopted by TTC and related to Texas Department of Transportation (TxDOT) operations.

Supporters said regional representation would enable TTC to recognize and respond to unique problems and situations not present in every part of the state. Over the years, some regions have received more attention and state resources than have others. The North American Free Trade Agreement has increased truck and other vehicular traffic dramatically throughout the state. A regional approach to transportation planning and spending makes sense to ensure that all regions of Texas are represented fully and all needs are met.

TTC's composition has been and remains weighted in favor of urban Texas. Since TTC's inception in 1917, nearly half of all members have been from the Dallas-Fort Worth, Houston, or San Antonio metropolitan areas. Only two have lived along the Texas-Mexico border. Regional representation is required on the governing bodies of river authorities and of some state colleges and universities and is encouraged in statute for most state agency boards and commissions. The existing TTC statute does not define rural, but that has not prevented rural representation.

Opponents said SB 409 is unnecessary. In recent years, TTC, TxDOT, and the governor have focused significant attention on the Texas-Mexico border and have channeled hundreds of millions of dollars to that area, as well as to other regions. Regional TTC members would not direct more money or projects to any region because TTC operates by consensus. Several areas of the state have had few, if any, TTC members, but that does not mean those areas have been discriminated against or ignored. TTC must make transportation policy based on the best interests of the entire state, not on demographics. Requiring geographic membership would move TTC toward a single-member-district governing structure that could foster regional factionalism.

SB 409 would not define a region, nor would it specify any regions, providing no benchmarks other than TxDOT's 25 engineering districts. The bill's lack of compliance guidelines would render it ambiguous and unenforceable, other than perhaps through the Senate confirmation process. The requirement that one member be from a rural area is unnecessary and undefined and could restrain the governor's appointment options needlessly.

The **HRO analysis** of the House companion bill, HB 3294 by Chavez, appeared in Part One of the May 2 *Daily Floor Report*.

Increasing driving-while-intoxicated fines to finance trauma care facilities

SB 1131 Harris

Effective September 1, 2003

SB 1131 requires a person convicted of an intoxication offense under Penal Code, ch. 49, other than public intoxication or possession of an open alcoholic beverage in a motor vehicle, to pay an additional \$100 in court costs. The additional cost is imposed regardless of whether the defendant is placed on community supervision or receives deferred disposition or adjudication for the offense. The bill creates a new account in general revenue, composed of the additional court fees and interest earnings, to help pay for emergency medical services (EMS), trauma facilities, and trauma care systems. This is in addition to an existing account that funds regional planning commissions, 9-1-1 jurisdictions, and regional poison control centers through a 9-1-1 emergency telephone service surcharge. The health and human services commissioner must maintain a reserve of \$500,000 in the accounts and must distribute at least 50 percent of the appropriated funds to regional trauma service areas.

Supporters said SB 1131 would force drunk-driving offenders to bear more of the cost of trauma care and other expenses directly caused by their recklessness. According to the National Highway Safety Administration, about 40 percent of all traffic fatalities are alcohol-related. Texas leads the nation in the number of deaths due to traffic accidents — 7.2 for every 100,000 residents — and in the number of drunk-driving-related fatalities. SB 1131 would provide a financial disincentive that would help reduce the death toll on Texas' streets and highways. The bill also would provide another funding source to help critically underfunded trauma centers. Most centers rely on local taxpayers to pay for the care of indigent out-of-county patients. Many state revenue sources, such as the Tertiary Medical Fund that comes from unclaimed lottery winnings, tend not to be reliable sources of money. In 2001, eligible hospitals requested \$260 million in reimbursement for documented out-of-county indigent patients, but they received only \$16 million from the state, or about 6 percent of the total request.

Opponents said SB 1131 would not provide an adequate or stable source of revenue for trauma facilities and EMS providers. It is unlikely that the state would meet the bill's optimistic revenue projections, because many drunk-driving offenders are indigents who cannot pay current fines. If the program were successful in increasing compliance, revenues would decrease as fewer Texans were convicted of intoxication offenses. The Legislature should provide adequate funding for important services such as EMS and trauma care, rather than relying on budgetary gimmicks such as unclaimed lottery funds or increasing fees for intoxication offenses.

Notes: HB 3588 by Krusee, the omnibus Trans-Texas Corridor/mobility bill, creates a driver's responsibility program and imposes additional surcharges on drunken and hazardous drivers, to be deposited in another fund to pay for trauma care and EMS. (See pages 194-198.)

The **HRO analysis** appeared in Part Three of the May 26 *Daily Floor Report*.

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