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## ***Major Issues*** ***of the 79th Legislature, Regular Session*** ***and First and Second Called Sessions***

During its 2005 regular session, the 79th Texas Legislature enacted 1,389 bills and adopted nine joint resolutions after considering more than 5,600 measures filed. It also enacted two bills during the first called session and three bills during the second called session. This report provides an overview of some of the highlights of the regular session and the first and second called sessions, 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. The measures featured in this report are a sampling and are not intended to be comprehensive.

Other House Research Organization reports covering the 2005 sessions include those examining the bills vetoed by the governor and the constitutional amendments on the November 8, 2005, ballot and an upcoming report summarizing the general appropriations act for fiscal 2006-07.

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# SYNOPSIS OF LEGISLATION

## 79th Legislature, Regular Session

	Introduced	Enacted*	Percent enacted
<b>House bills</b>	3,592	876	24.4%
<b>Senate bills</b>	1,892	513	27.1%
<b>TOTAL bills</b>	5,484	1,389	25.3%
<b>HJR</b> s	102	5	4.9%
<b>SJR</b> s	43	4	9.3%
<b>TOTAL joint resolutions</b>	145	9	6.2%

\*Includes 19 vetoed bills — eight House bills and 11 Senate bills

	2003	2005	Percent change
<b>Bills filed</b>	5,596	5,484	-2.0%
<b>Bills enacted</b>	1,383	1,389	0.4%
<b>Bills vetoed</b>	48	19	-50.0%
<b>Joint resolutions filed</b>	161	145	-10.0%
<b>Joint resolutions adopted</b>	21	9	-57.1%
<b>Legislation sent or transferred to Calendars Committee</b>	1,255	1,492	18.9%
<b>Legislation sent to Local and Consent Calendars Committee</b>	1,096	921	-16.0%

*Source: Texas Legislative Information System.*

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# Workers' compensation revisions

**HB 7 by Solomons**

**Effective generally September 1, 2005**

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**HB 7** revises the Texas workers' compensation system, a no-fault, state supervised, employer-funded system established under the Workers' Compensation Act (Labor Code, Title 5, subtitle A) to pay the medical expenses of employees who are injured on the job and to compensate them for lost earnings.

**Administrative structure.** HB 7 abolishes the Texas Workers' Compensation Commission (TWCC) and creates a Division of Workers' Compensation (TDWC) within the Texas Department of Insurance (TDI) with a commissioner appointed by the governor. The new commissioner exercises all authority over workers' compensation with the advice of the TDI commissioner. The bill creates an Office of Injured Employee Counsel (OIEC) administratively attached to, but independent of, TDI to represent the interests of injured employees as a group and to supervise and advise ombudsmen.

Other regulatory functions that TDWC performs include performance-based oversight and prioritization of complaints, preparation of return-to-work educational materials, and a requirement that insurers offer skilled case management for certain injured workers.

**Networks of providers.** Medical care under HB 7 is managed through networks of providers, certified by TDI and similar to those used in group health. Under the bill, a network must include providers within 30 miles of an employee's home in urban areas and within 60 miles in rural areas, with a 75-mile standard for access to specialists. It also establishes a structure for out-of-network care. The bill permits a group health network to become certified as a workers' compensation network. Employers that choose to use a workers' compensation network may require their employees who live in the network area to use an in-network provider, but a carrier is required to pay for out-of-network care for employees who live outside the network. An employee in an HMO group health plan also may opt to receive care from his or her HMO primary care provider.

The bill sets up treatment guidelines, fee guidelines, prompt pay requirements, limited liability of \$7,000 for medical care prior to a denial of compensability, and preauthorization requirements and prohibits retrospective denial. It requires the adoption of a closed formulary for prescription drugs. Networks are not required to accept any willing provider.

**Dispute resolution.** Much of the existing dispute system is maintained for medical disputes, including the use of Independent Review Organizations for medical necessity disputes both in and out of network, although in-network fee disputes will not be subject to outside review. Appeal to the State Office of Administrative Hearings no longer is included in the dispute resolution process. TDWC also will adopt rules determining the requirements for doctors that perform peer review and rules regarding electronic billing.

Dispute resolution for income benefits largely is retained, although the number of Benefit Review Conferences is limited, with mediation as their goal. HB 7 permits involvement of a designated doctor in more disputes where the central issue is related to a medical determination and establishes appeal and evidentiary standards. The appeals panel process remains but is modified to include a three-member panel.

**Income benefits.** HB 7 sets the basis for the cap on weekly workers' compensation income benefits, the State Average Weekly Wage, at 88 percent of the average weekly wage computed by the Texas Workforce Commission (TWC). The TDWC commissioner also is authorized to increase the State Average Weekly Wage up to 100 percent of the TWC rate. The current requirement that an injured employee who receives supplemental income benefits make a "good faith effort" to find work was strengthened.

**Post-injury waivers.** The bill establishes a "cooling-off" period for post-injury waivers by non-subscribers – companies that do not participate in workers' compensation through TDWC. The waiver is not effective if it is signed less than 10 days post-injury and after the employee has been evaluated by a non-emergency provider.

## Supporters said

The Texas workers' compensation system is broken: return-to-work rates are too low; utilization is too high; physicians are leaving the system; and premiums are rising. The regulatory structure under TWCC has little strategic direction, inefficient management, and no accountability. Nothing short of a complete overhaul of workers' compensation in Texas will give injured employees the assistance they deserve. Injured employees bear the brunt of this inefficient system. Compared to other states, Texas



workers are off work longer, and fewer return to work within two years. After two years, one-third of injured workers in Texas have not returned to their jobs, and 15 percent never go back. It also is more difficult for Texas workers to find doctors to treat them. According to physician groups, the number of doctors who will treat workers' compensation patients has declined by 50 percent over the last two years.

The regulatory structure is to blame for many of the problems in the workers' compensation system. Two of the most significant hurdles the regulatory structure creates are the time it takes to resolve complaints and an inability to implement measures to stem rising costs of medical care. Merely applying new fixes to the existing regulatory structure would doom any reform. TWCC should be abolished because the agency has a long history of failing adequately to manage the workers' compensation system. The agency is burdened by layers of administration and history, as attempts to reform the workers' compensation system over the years have created a Byzantine administrative structure. For example, the policy goal in the 1980s of moving dispute resolution out of the courts created a duplicative and endless dispute resolution and appeal process at TWCC. Also, the six-commissioner structure leads more often to gridlock than to efficient administration.

TDI, with a single commissioner and experience in other insurance products, would be the best place for the new workers' compensation system. A single commissioner would be responsive and accountable, and the department has demonstrated efficient regulation of the insurance industry for years. Because the medical side of workers' compensation would be modeled after group health, TDI would be the logical place to put the new regulatory structure.

The new Office of Injured Employee Counsel would improve employees' access to information and assistance. Even though workers' compensation would not be under a stand-alone agency, employees actually would have better access because the OIEC would serve as a single point of contact for assistance in obtaining benefits, sorting through disputes with carriers, receiving information about return-to-work, and helping navigate services at other state agencies.

Networks of providers would fix many of the problems in the system. Because networks use primary-care doctors to ensure appropriate utilization, injured employees would be treated more efficiently and appropriately. No longer would they be seen for weeks or months on end by a practitioner whose motivation is continued payment by the workers' compensation carrier. Providers also would be better off under a network structure. The current system

requires retrospective review and can make payment very slow because the carrier has little assurance that the medical service is appropriate. Also, providers are paid a fixed rate under the current system, whereas networks base their negotiations on market rates, which would result in more appropriate compensation for providers.

Because workers' compensation networks would look like group health networks, dispute resolution for medical necessity and fee disputes would be removed from the state regulator to the well established and universally agreed-upon system of independent review and contract agreements. In addition, the bill would offer an alternative to independent review for claims that were too small to justify the cost.

What constitutes an adequate network is clearly defined in this bill and would ensure that all workers in Texas have access to care, no matter where they live. Requiring the availability of a broad range of medical services within a 30-mile radius in urban areas and within 60 miles in rural areas would assure the availability of care. In areas of the state without sufficient medical resources, the bill includes procedures for out-of-network care.

The bill includes prompt pay protection for providers and carriers to ensure that bills are submitted and paid in a timely manner. The issue of compensability, unique to workers' compensation, is addressed by requiring carriers to pay for services until the compensability issue is identified by the carrier, but limiting their exposure to \$7,000. This would ensure that patients received timely treatment and that providers were not left with unpaid bills.

In addition to improving the medical side of workers' compensation, HB 7 would increase the income benefits that injured workers receive. The basis for wages currently used to calculate income benefits lags behind the market and leaves workers under-compensated. The bill would tie it to the basis used for unemployment, which is higher and tracks the market.

This package of changes represents a new era in workers' compensation for Texas and could lay the groundwork for more participation by employers. The current system is so fraught with problems that many employers choose to go without workers' compensation insurance or to purchase policies outside the system that offer neither employer nor employee significant protections. Making workers' compensation mandatory is not feasible from an economic development perspective, but it makes sense to improve the system so that more companies will join.

## Opponents said

HB 7 would not produce all of the promised improvements in the workers' compensation system. Although the bill would prescribe sweeping changes, lawmakers should consider closely the finer points of the proposed revisions.

Moving workers' compensation to TDI would be a mistake. Workers' compensation is not an insurance product like property or health insurance, but is a way to manage the relationship between employers and injured workers without involving the courts. Without a dedicated, stand-alone agency, workers would not have adequate influence concerning the rules governing the system and could be treated unfairly without legal recourse. A better approach would be to take the elements that work at TDI – a single commissioner, streamlined review processes, and an office that represents individuals – and apply them to TWCC. TDI could have a conflict of interest with workers' compensation under its purview. The agency that regulates the carriers that write workers' compensation policies should not also administer dispute resolutions between carriers and providers or employees.

The bill should have more stringent return-to-work requirements. The problem with injured employees returning often is not with the employee but rather with the employer. Even if the worker is ready to come back at light or modified duty, some employers are reluctant to allow them due to fears of subsequent injury or low productivity. The longer an employee stays off work, the less likely he or she is to return, which may result in permanent disability or the need for public assistance. Texas seriously should encourage employee reintegration with work by requiring employers to accept employees when they are ready to return.

HB 7 also would fail to address the suitability of work for injured employees trying to comply with the requirement that they look for work in order to receive Supplemental Income Benefits. The requirement would be a step in the right direction, but injured employees should not be forced into taking jobs that are far below their skill levels in order to avoid penalties. The Texas Unemployment Compensation

Act and TWC rules address this issue for unemployed workers because the goal is to get workers back into sustainable, appropriate jobs or careers, which also should be the goal for workers' compensation.

Compensability is a difficult issue to reconcile with prompt pay, and this bill would not completely solve the problem. Although a \$7,000 limit on carrier liability would pay for some services, it would not come close to covering spinal surgery or multiple bone scans, for example. A higher limit would be more appropriate, particularly one that floats with the market because any fixed amount could be outpaced by new technology and higher costs within a few years.

Because networks are designed to reduce costs and improve treatment outcomes, which should translate into reduced workers' compensation premiums, the bill should ensure that all employers can participate. Carriers might offer network access only to large employers because their business is more valuable. Small employers have experienced similar discrimination in group health where it has been difficult for them to obtain affordable health coverage for their employees.

The "cooling off" requirement before workers sign waivers of liability could cause workers to go without care. Some companies that do not have workers' compensation insurance still carry an insurance product that would give injured workers some benefits and often ask the worker to sign a waiver of future liability in exchange for access to the benefits. Companies are not required to carry any insurance, and requiring a cooling off period might cause them to withhold medical treatment until the waiver was signed.

## Notes

The **HRO analysis** of HB 7 appeared in the March 30 *Daily Floor Report*. The analysis of the companion bill, SB 5 by Staples, which included the substance of HB 7 as passed by the House, appeared in the May 13 *Daily Floor Report*.

# Regulation of payday loans

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## HB 846 by Flynn *Died in the House*

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**HB 846** would have revised provisions governing deferred presentment transactions, commonly known as “payday loans,” by both lenders and third-party providers. A lender could not have advanced more than \$1,000, engaged in a transaction with a term of less than seven days or more than 45 days, or assessed a finance charge of more than \$15 for every \$100 advanced. A borrower could have rescinded the transaction by 5 p.m. on the business day after the transaction. A borrower could not have entered into more than two consecutive transactions following an initial transaction, and each consecutive transaction would have required a 10 percent reduction in the principal amount of the debt. The borrower could have entered a repayment plan if the borrower entered into a second consecutive transaction.

The lender could have collected a one-time insufficient funds fee of \$20 or less per returned instrument and only could have used civil means to collect unless the borrower had employed deception in obtaining the loan. A lender could not have contacted a borrower’s employer about a deferred presentment debt, communicated facts about a borrower’s indebtedness to an employer, or threatened criminal prosecution to collect an amount due. A lender could not have garnished the wages of a borrower who was a member of the armed forces or engaged in collection activity against a member of the armed forces or national guard member on active duty.

The consumer credit commissioner annually would have prepared a consolidated analysis and recapitulation of reports from each lender to the Legislature and the governor and made aggregate data available to the public. A licensed lender or third-party provider could have been examined and investigated by the commissioner. The bill also would have required distribution of certain consumer education materials and reference information on credit counseling agencies.

### Supporters said

HB 846 would provide extensive protections to consumers who seek payday loans. It would limit the amounts of fees that could be charged and the number of times a transaction could be renewed, add requirements for an extended repayment plan and a 10 percent pay-down

for the principal on a loan, and allow rescission of the loan if the borrower had concerns after signing an agreement. In addition, the bill would provide special protections for military personnel.

HB 846 would reduce the cost of payday loans to Texas consumers, who currently pay between \$17 and \$24 per \$100 borrowed from out-of-state banks and about \$30 per \$100 to Internet and disguised payday lenders. The \$15 per \$100 fee in this bill generally would be less than fees for bouncing a check, overdraft protection, or late fees on bills. A more restrictive rate would prohibit most businesses from operating in Texas, and Texas consumers would be forced to do business either with more expensive out-of-state banks or unregulated operators. Annualized percentage rates are a deceiving comparison for the cost of loans. Consumers have choices in financing short-term needs, and they routinely choose payday loans over other options.

Payday loans are not targeted specifically to low-income families. More than 50 percent of Texans who use this product earn between \$25,000 and \$50,000 per year. A \$1,000 loan limit would be appropriate to meet the loan needs of many middle-income people without unduly burdening them with debt. Most payday lenders use income testing as a criterion for extending a loan so that people whose salaries could not support such an extension of credit would receive only the appropriate amount of funds.

### Opponents said

HB 846 would allow lenders to prey on poor and working-class families. It would increase the cap on interest rates consumers pay on loans to \$15 per \$100 loan. For an average loan of two weeks, this would be the equivalent of 390 percent APR – almost one-third higher than the cap allowed under current law. In addition, most of the 34 other states regulating payday loans set the maximum loan at \$500 or less. Even with a 45-day term, a \$1,000 loan is equal to 75 percent of a minimum wage worker’s gross salary during that time period.

Many low-income borrowers find themselves unable to repay their loan amounts plus fees at the end of the loan term, and these individuals are forced to carry their debt past the original term, incurring more fees in the process.

Although the bill would allow borrowers to engage in no more than three consecutive transactions, new fees would be added each time, and the borrower would be required to pay down only 10 percent of the principal. In addition, even when a borrower paid off one loan, he or she still could obtain another one the next day. This bill would not provide enough protections to advance a borrower out of a cycle of debt.

Regardless of all its supposed protections, HB 846 would not protect Texas borrowers from higher rates charged by lenders affiliated with out-of-state banks. If

Texas wishes to compete more effectively with out-of-state-banks, it should close the loophole allowing out-of-state banks to export exorbitant rates to their Texas affiliates instead of increasing the rate cap on loans at Texas-chartered banks.

## Notes

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

# Prohibiting Internet hunting

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**HB 2026 by Hilderbran**  
**Effective June 18, 2005**

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**HB 2026** prohibits a person from engaging in computer-assisted remote hunting or providing or operating facilities for computer-assisted remote hunting, if the animal being hunted is located in Texas. This practice involves the use of computer technology, including the Internet, to shoot animals or birds using a firearm or archery equipment via remote control in real time. The first offense is a class B Parks and Wildlife Code misdemeanor, punishable by a fine of between \$200 and \$2,000 and/or a jail term of 180 days. A subsequent offense is a class A misdemeanor, punishable by a fine of between \$500 and \$4,000 and/or a jail term of one year. Simply providing materials that could be used in the process of computer-assisted hunting, such as a computer or camera, does not constitute an offense.

In addition to prohibiting Internet hunting, HB 2026 makes numerous other changes to the Parks and Wildlife Code.

## Supporters said

Computer-assisted remote hunting is not “hunting” in any meaningful sense of the word because animals have no chance to sense and flee the hunter, who is miles away in front of a computer screen. In reality, Internet hunting is cruel, pay-per-view slaughter. No self-respecting hunter would condone such a practice, and neither should the state.

Hunters in Texas must have a hunting license. When someone “hunts” in Texas via the Internet, there is no way to verify that the person sitting in front of the computer screen has a valid Texas hunting license. This practice should be banned altogether, if only for the sake of enforcing hunting license requirements.

There is no assurance that a remote hunting company would have a safety manager on site because the state does not regulate these businesses. Also, Internet hunting would not be the only opportunity for people with disabilities to participate in hunting because many groups offer assistance that allows such people to participate in legitimate hunting activities.

## Opponents said

Internet hunting is a new development that allows many people to enjoy the sport of hunting who otherwise could not. For example, computer-assisted remote hunting gives people with severe disabilities the chance to participate in this activity. Also, because there is always a human managing the rifle on site for safety reasons, animals have the chance to sense the hunter’s assistant. Internet hunting should not be banned because it could be a growth industry in Texas and a potential source of tax revenue.

## Notes

The **HRO analysis** appeared in Part One of the May 11 *Daily Floor Report*.

HB 391 by T. Smith, which died in the House, also would have outlawed computer-assisted remote hunting. It would have made a first offense and subsequent offenses class A Parks and Wildlife Code misdemeanors. The HRO analysis appeared in Part Two of the May 12 *Daily Floor Report*.



# Penalties for insurers that unsuccessfully appeal rate rollbacks

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**SB 14 by Jackson**

***Effective September 1, 2005***

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**SB 14** increases the interest penalty required if an insurer unsuccessfully appeals a rate refund in court. The interest will be the lesser of 18 percent or 6 percent plus the prime rate for the calendar year in which the commissioner's order was issued. Interest accrues beginning on the date when the commissioner issued the order and continues to accrue until the refund is paid. An insurer will not be required to pay any interest penalty if the company prevails in an appeal of the commissioner's order. An insurer may not claim a premium tax credit to which it otherwise would be entitled if it does not comply with the requirements of the bill.

SB 14 also adds a new section to the Insurance Code governing regulation of insurer market conduct to establish a framework for market conduct actions by the Texas Department of Insurance (TDI), including:

- processes and systems for identifying, assessing, and prioritizing market conduct problems that have a substantial adverse effect on consumers, policyholders, and claimants;
- development of appropriate market conduct actions by TDI to substantiate and remedy market conduct problems; and
- procedures to communicate and coordinate market conduct actions with other states to foster the most efficient and effective use of resources.

## Supporters said

Prompted by skyrocketing property insurance premiums, the 78th Legislature in 2003 enacted SB 14 by Jackson, which authorized the insurance commissioner to order rate cuts if rates were found to be excessive. Two

of the state's largest insurers challenged the rate cuts in court, denying immediate relief to Texas homeowners. By imposing stiff penalties on insurers that unsuccessfully challenge rate rollbacks, SB 14 would provide fair compensation to consumers and serve as a deterrent to companies that try to game the system. The penalties in existing law are not severe enough to prevent insurers from using court challenges as a stalling tactic when a refund is ordered.

The bill would help deter companies from charging consumers excessive or unfairly discriminatory premiums, as State Farm has continued to do even though TDI ordered the company to roll back its rates by 12 percent in 2003. By using appeals to the courts as a stalling tactic, State Farm has withheld from consumers an estimated \$155 million in overcharges each year. Stiffer penalties are needed to prevent such actions in the future.

## Opponents said

SB 14 is unnecessary because the current penalty of 1 percent interest is sufficient to prevent a company from pursuing an unsuccessful appeal in court as a stalling tactic. The bill would not have affected State Farm because their appeal was successful, and the company continues to contend that its rates are justified.

## Notes

The **HRO analysis** of SB 14 appeared in Part One of the May 24 *Daily Floor Report*.

# Prohibiting Internet “spyware” transmission of unauthorized software

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**SB 327 by Zaffirini**

***Effective September 1, 2005***

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**SB 327** prohibits a person who is not the owner or operator of a computer from knowingly transmitting computer software to a computer in Texas and using the software, through intentionally deceptive means, to collect personally identifiable information, modify settings, disable software, open advertisements, or produce other results, each specified in the bill, that are typically the effects of computer “spyware.”

The bill allows a provider of computer software, an owner of a web page or trademark, or a telecommunications carrier or Internet service provider adversely affected by violations in the bill to bring a civil action against the person committing the violation and makes a person who commits a violation liable to the state for a civil penalty of up to \$100,000 for each violation. If it appears to the attorney general that a person is engaging in, has engaged in, or is about to engage in a violation, the attorney general may request a temporary restraining order or a permanent or temporary injunction.

## Supporters said

SB 327 would prohibit a number of activities related to “spyware,” which is software secretly placed on a user’s computer to monitor, collect, and transmit personally identifiable information without the user’s knowledge or consent. Spyware is installed for a myriad of reasons, including tracking a user’s online behavior, browsing for market research, sending pop-up ads, redirecting computer users to web sites, or recording keystrokes, and can be transferred via spam or bundled with freeware, shareware, or games downloaded from the Internet. Spyware can cause the drastic slowing of infected computers, corruption of the hard drive, or disabling of hardware and software settings.

According to the National Cyber Security Alliance, nine out of 10 computers connected to the Internet are infected with spyware. A recent audit by Earthlink found that the average computer had more than 26 spyware programs installed. The net impact of this problem will be citizens’ loss of confidence in the Internet and a reluctance to engage in online business transactions.

The bill would protect the privacy of Texas consumers and establish a cause of action for those adversely affected by spyware, including software companies, web page or trademark owners, and the general public through actions brought by the attorney general. Existing statutes do not expressly prohibit activities relating to spyware. By specifically identifying such prohibitions, the bill would provide clear authority for the attorney general and others to pursue civil actions against those who knowingly and deceptively transmit and use spyware.

The bill is carefully crafted to define and outline prohibited behaviors, rather than actually to define spyware. Beneficial uses of technology that could be defined as spyware would not be prohibited because the bill would specify that prohibited activities must be conducted with an intent to deceive.

## Opponents said

The activities addressed in SB 327 already are prohibited under existing laws addressing fraud and deceptive trade practices. Nothing prevents the attorney general or anyone else from taking civil action under these statutes. The bill broadly would apply the term “intent to deceive” in connection with prohibited behaviors, establishing a standard that could be difficult to prove and would raise the bar for litigation. Because of the difficulty of proving intent, the bill could be virtually unenforceable. Spyware is difficult to define, and beneficial uses, such as using “cookies” to collect and save credit card information so that it does not have to be reentered, could be affected. This is a rapidly changing technology, and many potentially beneficial uses yet to be developed could be outlawed.

## Other opponents said

SB 327 should include provisions on notice, consent, and specification of purpose when spyware was used without the intent to deceive and thus not prohibited by most provisions in the bill. The bill would have limited impact on the spyware problem because it does not address all

uses of spyware. Various types of known spyware, many of which are not addressed by SB 327, could continue to be distributed.

## Notes

The **HRO analysis** of SB 327 appeared in Part One of the May 23 *Daily Floor Report*.

A related bill, HB 1098 by McCall, effective September 1, 2005, prohibits Internet “phishing” fraud. It prohibits creating a web page or Internet domain name representing a legitimate online business without the business owner’s authorization and using that web page or domain name to solicit personal identifying information with the intent to use it fraudulently. The bill also prohibits sending an e-mail that falsely represents itself as being sent from a legitimate business, refers the recipient to a falsely represented Web site, and solicits personal identifying information from the recipient for a purpose that the recipient believes to be legitimate. The HRO analysis of HB 1098 appeared in the April 4 *Daily Floor Report*.





# Civil Liability

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# Barring lawsuits alleging injuries related to obesity or weight gain

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**HB 107 by Van Arsdale**  
**Effective September 1, 2005**

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**HB 107** bars lawsuits against a manufacturer, seller, trade association, livestock producer, or agricultural producer for claims arising from weight gain or obesity or a health condition associated with weight gain or obesity. The following actions are not barred: claims for damages arising from obesity-related injuries caused by cosmetics, medicine, or dietary supplements; claims alleging that a manufacturer or seller knowingly and willfully violated a federal or state law in the manufacture, marketing, distribution, advertisement, labeling, or sale of a food if the violation was a cause of the person's obesity-related injury; claims under the Texas Food, Drug, and Cosmetic Act; and requests by the attorney general for restraining orders for deceptive trade practices. The bill limits discovery for claims permitted by the bill.

## Supporters said

Frivolous claims alleging obesity or weight gain recently have been filed in the United States and should not be permitted in Texas. The bill would protect manufacturers, sellers, trade associations, livestock producers, and agricultural producers against liability from frivolous claims. Individuals are responsible for their food and nutrition choices, and excessive litigation restricts the range of choices that otherwise would be available to those who consume products responsibly. Changing regulation of the food industry through lawsuits rather than new laws or regulations undermines the balance between personal responsibility for one's food choices and the supplier's right to provide those choices. HB 107 would affirm that each individual must assume responsibility for his or her own food choices.

## Opponents said

Food companies should not have immunity from suit for intentionally enticing children to eat unhealthy food. Young children should not be held to the same standard of personal responsibility in food choices as adults. Children are not personally accountable for their food choices in the same way that adults are because children do not have the capacity to make educated decisions about nutrition. Many food companies take advantage of this by marketing unhealthy food specifically to children. Very few of these suits have been filed in the United States, and none has succeeded.

HB 107 is a solution in search of a problem. Legislative intervention in the form of blanket immunity is not necessary. Consumers are entitled to due process, which the bill would deny them. The Legislature should not interfere with the job of the courts.

## Notes

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

# Civil claims involving exposure to asbestos and silica

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**SB 15 by Janek**

**Effective September 1, 2005**

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**SB 15** requires persons who claim an asbestos or silica-related injury to file a report proving that they meet certain medical criteria before they can proceed with their action in court. The bill establishes a pretrial multidistrict litigation process and changes the statute of limitations for bringing an action for personal injury or death related to asbestos or silica.

**Asbestos claims.** A plaintiff claiming an asbestos-related injury must serve on each defendant a report prepared by a board-certified doctor establishing that the plaintiff has been diagnosed with mesothelioma or another asbestos-related cancer and that the plaintiff's exposure to asbestos was a likely cause of the plaintiff's illness. Alternately, a separate report may establish that the plaintiff has been diagnosed with a less serious health condition as a result of exposure to asbestos. In order to proceed with the suit, a certain level of impairment is required. For plaintiffs who have filed actions before May 1, 2005, a lower level of impairment is required.

**Silica claims.** A plaintiff claiming a silica-related injury must serve on each defendant a report prepared by a board-certified doctor confirming that the doctor has performed a physical examination of the plaintiff and that the plaintiff's condition probably was caused by silica exposure. The report must include numerous medical reports, including pulmonary function tests and lung volume tests, that the doctor reviewed to reach the conclusions. In order to proceed with the suit, a certain level of impairment is required.

**Multidistrict litigation.** SB 15 establishes multidistrict litigation (MDL) proceedings for asbestos and silica claims. MDL rules apply to any action pending on September 1, 2005, unless the action was filed before September 1, 2003, and:

- the trial already had begun or begins within 90 days of September 1, 2005;
- the plaintiff serves a report compliant with the one required by the bill within 90 days after September 1, 2005; or
- the plaintiff has malignant mesothelioma or a malignant asbestos or silica-related cancer.

For a case that is pending on September 1, 2005, the plaintiff has the option to file an alternate medical report based on different criteria than the previously described medical reports to determine asbestos- or silica-related impairment. The doctor making such a report must conclude that the plaintiff's condition probably was caused by exposure to asbestos or silica and that the plaintiff has physical impairment comparable to the impairment a person would have if the plaintiff met the criteria established in the medical report that would be required of a plaintiff whose case was not pending on September 1, 2005.

An alternate report also may be introduced in lieu of a regular medical report for an action filed on or after September 1, 2005, under certain circumstances. For example, a MDL court could find that, due to unique or extraordinary physical or medical characteristics of the plaintiff, the criteria in a regular medical report do not adequately assess the plaintiff's impairment.

**Statute of limitations and other provisions.** The bill changes the date on which the two-year statute of limitations begins to run for asbestos and silica-related injuries. The period begins to run either on the exposed person's death or when the plaintiff serves on the defendant a report that complies with the bill. The change in the statute of limitations applies only to an action that commences or is pending on or after September 1, 2005.

## Supporters said

SB 15 would establish a fair compromise between the interests of those who have been exposed to asbestos and silica and companies that may be sued for such exposure. The bill would ensure that only those who were already ill from exposure to asbestos or silica could bring a case in Texas. It also would protect those people who had been exposed to asbestos or silica but had not become ill by changing the way the statute of limitations applies to their claims.

Exposure to asbestos or silica does not necessarily mean that a person will become ill. Under current law, however, persons who believe they might have an asbestos or silica-

related disease must file a claim for damages within two years or lose the ability to file a claim at all. This results in thousands of people filing claims each year simply so they will not lose the ability to file a claim later should they develop an illness. SB 15 would address this problem by changing the statute of limitations as it applies to asbestos and silica-related illnesses such that the two-year period would not begin to run until a plaintiff served a defendant with a medical report establishing that the plaintiff had an asbestos- or silica-related impairment. This alone would clear thousands of cases from Texas courts, allowing cases involving plaintiffs who already are gravely ill to be heard much more quickly.

The bill also would require plaintiffs to meet certain minimum medical criteria to establish that they truly are ill. This would save millions of dollars for businesses that might have exposed their workers to asbestos or silica because people who were not sick could not file claims, and these businesses, as a result, would not have to pay attorney's fees and damage awards to people who were not, and might never become, ill.

By establishing a pretrial MDL process, SB 15 dramatically would decrease forum shopping in Texas. While asbestos cases may be filed in either state or federal court, the percentage of cases filed in federal court has fallen to less than 20 percent since the early 1990s when the federal court system began transferring cases to a single judge for multidistrict litigation. At that time, Texas saw a sharp increase in the number of asbestos cases filed in state court. Texas has about half of all asbestos claims filed in the nation. Claimants frequently "forum shop" and often wind up in Texas courts because the laws governing punitive damages and the juries in Texas are favorable to plaintiffs. By routing cases through MDL proceedings, rather than allowing them to go straight to trial before a jury, SB 15 would reduce the number of asbestos and silica cases filed in Texas.

## Opponents said

SB 15 unfairly would limit Texans' access to courts, rationing justice by limiting those who could pursue their claims. Many people who have asbestos- or silica-related illnesses would be precluded by the minimum medical criteria from seeking justice through the courts. Many workers would not be qualified to bring a case even if they were too ill to work. Under the current system, juries decide whether a claimant is impaired as part of their deliberations

about liability. SB 15 would take that power away from juries and give it the Legislature. Texas relies on juries to make decisions in highly complex cases, including life and death decisions in capital murder cases, and they are sufficiently qualified to evaluate asbestos and silica cases as well. Additionally, only 6 percent of personal injury suits filed in Texas do not involve auto accidents, and asbestos and silica cases are only a small portion of those non-auto cases. Texas courts are not overwhelmed by asbestos and silica cases, so there is no justification for limiting access to the courts in this way.

The implication that healthy individuals are filing claims is false. Asbestos cases are very difficult and costly to pursue, so lawyers have an economic interest only in taking cases in which an actual injury occurred. Texas may have a larger proportion of asbestos cases than other states because it has a significant industrial base, a large resident retiree population that was exposed to asbestos years before, a transitory industrial workforce that has temporary residency, and a history of product liability litigation with specialized legal practices. Changes in the venue laws in the mid-1990s required that plaintiffs plead and prove sufficient facts to show that a Texas venue was proper in filing such cases. The new venue rules authorize judges to remove cases that do not belong in the state. Because cases take years to resolve, there may be cases in the system that were filed under old venue rules, which may have inflated Texas' numbers.

The recent resurgence in the number of cases filed in Texas is due to a one-time underlying factor — mass screening. During the late 1990s, some plaintiff law firms offered free x-ray screening for members of certain unions whose work might have exposed them to asbestos. That screening caught a number of cases that otherwise would have gone undetected for many more years. It created a false "bubble" in filings because workers who otherwise would not have filed until a disease was diagnosed proceeded with a claim while the statute of limitations still applied.

Applying SB 15 retroactively to certain claimants who already have cases pending would be unfair. These cases should be governed by the law in effect when they were filed.

## Notes

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



# Criminal Justice

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# Penalties and community supervision conditions for intoxication offenses

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**HB 51 by T. Smith**  
***Effective September 1, 2005***

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**HB 51** requires those granted community supervision (probation) for intoxication while driving, boating, flying, or operating an amusement ride to install ignition interlock systems on their vehicles when placed on probation if they had a blood-alcohol concentration of 0.15 or greater when the offense took place. The bill repeals provisions in the Penal Code that limit consideration of previous intoxication offenses to 10 years for purposes of enhancing penalties. It also allows consideration of previous offenses of driving while intoxicated (DWI) with a child in the vehicle for penalty enhancement.

## Supporters said

HB 51 would require careful monitoring of the most serious DWI offenders, which could save lives. A person with an alcohol level of 0.15 or higher is much more intoxicated than a person with an alcohol level of 0.08, the minimum point at which the Penal Code deems someone to be intoxicated. Texas is among the states with the highest rates of alcohol-related traffic deaths, and lawmakers should do everything possible to change that. In 1999, Texas drivers with blood alcohol levels of 0.15 or greater were involved in an estimated 161,900 crashes that killed 1,345 people and injured 55,600. Statistics show that although these drivers represent only 1 percent of all drivers on a weekend night, they are involved in about 50 percent of fatal crashes in that period. HB 51 also would deter offenders on probation from committing repeat offenses and subject them to a high level of monitoring by requiring them to install ignition interlock systems.

By removing the current 10-year limit on using a prior offense to enhance punishment, the bill would make the enhancement for repeat intoxication offenses similar to that used for all other types of criminal offenses. There

is no logical reason for this 10-year limit because there is no such limitation for any other offense. Eliminating this rule is especially important when a repeat offender commits a serious intoxication offense such as intoxication manslaughter. Limiting prior convictions to those that occur within 10 years allows a person periodically to start with a clean slate. This is inappropriate for alcohol offenses because it limits courts in their analysis of a person's crimes and potential to behave dangerously in the future.

## Opponents said

It would be unfair to eliminate the current 10-year time limit on intoxication offenses. This could allow for an enhanced punishment even if a previous offense occurred 25 years before, when the driver was a teenager. The former law was designed to enable someone convicted of an intoxication offense to earn a fresh start by abiding by the law for a decade. This is especially important when dealing with intoxication offenses, because without these provisions, a small lapse in judgment, especially during a period when society viewed alcohol use more leniently, could lead to an enhanced penalty later.

## Notes

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

HB 49 by T. Smith, which also would have allowed prior convictions of driving while intoxicated with a child in the vehicle and certain intoxication convictions that were more than 10 years old to be used for enhancement purposes, passed the House but died in the Senate.



# Increasing the penalty for burglary of a vehicle offense

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**HB 151 by Truitt**  
***Died in Senate committee***

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**HB 151** would have increased the penalty for burglarizing a vehicle from a class A misdemeanor to a state jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000).

## Supporters said

Since 1994, when the penalty for burglary of a vehicle was reduced to a misdemeanor, burglaries of vehicles have increased dramatically in Texas. Many offenders arrested for burglary of a vehicle are repeat offenders, indicating that the current punishment is not an effective deterrent. Many offenders deliberately choose to burglarize vehicles rather than commit other crimes because they are aware of the minimal punishment for vehicular burglary.

In addition, many repeat offenders burglarize vehicles to support their drug habits. Because drug treatment programs in state jails can be more effective than those in county jails and misdemeanor probation programs, HB 151 could result in addicted offenders receiving the treatment they need to rehabilitate themselves. Even if such offenders were not rehabilitated in state jail, it could be better to keep them safely behind bars while they struggled with their drug problems than to release them into society, where they almost certainly would commit more criminal offenses. Increasing the penalty also would give more leverage to prosecutors, who frequently accept plea bargains for vehicular burglary charges in order to move cases more quickly through the overcrowded misdemeanor docket.

## Opponents said

The statistics showing that vehicular burglaries have increased during the past decade neglect the fact that poverty and drug use – two key reasons people burglarize vehicles – also have increased during this time. As a result, increasing the penalty would not affect the cause of the increase, and vehicular burglary rates would continue to rise. The Penal Code properly reserves incarceration in state facilities for the most serious and violent crimes, and burglary of a vehicle does not rise to that level.

Many repeat offenders burglarize vehicles for money to support their drug addictions. Statistics have shown that imprisoning drug addicts does not help them conquer their addictions. Substance abuse programs in state jail would offer no solution because funding for these programs has decreased in the past few years, reducing their effectiveness. The answer to reducing the rate of vehicular burglaries lies in treatment for drug addiction, not in increased penalties. Increasing the penalties for even first-time offenders would dramatically increase the number of felons in Texas each year, and making this crime to a felony would stigmatize more Texans, making it more difficult for them to find employment and safe housing while not addressing the underlying reasons for this offense.

## Other opponents said

The prison system in Texas already is nearing capacity and could not bear the burden of hundreds, possibly thousands, of additional felons entering the system each year. It would make more sense to focus on repeat offenders and enhance the penalty in those cases than to raise the penalty for all cases, including first offenses.

## Notes

The **HRO analysis** appeared in the March 29 *Daily Floor Report*.

A related bill, HB 1324 by Pena, which would have increased the penalty for third and subsequent offenses of burglarizing a vehicle from a class A misdemeanor to a state jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000), passed in the House on April 20 but died in the Senate Criminal Justice Committee along with HB 151.

# Restricting the sale of products used to manufacture methamphetamines

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**HB 164 by Berman**

***Effective August 1, 2005***

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**HB 164** restricts the sale of over-the-counter products containing ephedrine, pseudoephedrine, or norpseudoephedrine to pharmacies and to licensed non-pharmacies. It does not apply to the sale of liquid products containing these chemicals. Any business that sells such products in solid form is required to display them either behind the counter or in a locked case. In deciding whether to issue a license to a non-pharmacy, the Department of State Health Services (DSHS) must consider whether the business sells a variety of medicines and whether it employs measures to deter the theft of products containing ephedrine, pseudoephedrine, or norpseudoephedrine.

A person who wishes to purchase products containing these chemicals must show a driver's license, be at least 16 years of age, and sign for the purchase. The store must keep a record of the sale that includes the name of the customer, the date of purchase, and the amount of pseudoephedrine or related substances purchased. The store must limit a customer's single-transaction purchase of pseudoephedrine or related substances to either two packages or six grams. Violation of the laws regulating the sale of ephedrine, pseudoephedrine, or norpseudoephedrine may result in an administrative penalty of up to \$10,000. Any wholesaler who furnishes products containing these chemicals to retailers must make available to the Department of Public Safety (DPS) all records of such transactions and must notify DPS of any order for a suspicious quantity of such products.

A Department of Family and Protective Services employee, a law enforcement officer, or a juvenile probation officer may take possession of a child if the child's parent or a person who had possession of the child permitted the child to remain on premises used for the manufacture of methamphetamine. Such an action could lead to a conviction of abandoning or endangering a child, punishable as a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000).

Any wholesale distributor of either prescription or nonprescription drugs must obtain a wholesale drug distribution license from DSHS. The department may refuse

an application or suspend or revoke a license if the applicant or licensee created or sold a counterfeit drug or violated the Texas Controlled Substances Act or the Texas Dangerous Drugs Act.

Possession or transport of anhydrous ammonia in violation of procedures delineated in HB 164 is a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000).

## Supporters said

HB 164 would restrict the ability of a person to obtain large quantities of chemicals necessary in the process of manufacturing methamphetamine. Ephedrine, pseudoephedrine, and norpseudoephedrine normally are obtained within the United States by chemically processing cold tablets. The number of meth labs operating in Oklahoma has decreased dramatically since that state began regulating the purchase of products containing such chemicals. Texas could achieve similar success in reducing the manufacture of methamphetamine by adopting such measures.

Methamphetamine abuse has become an enormous problem in Texas, hitting rural areas the hardest. This drug is highly addictive and inexpensive to make, and methamphetamine addicts have very low rates of recovery, even with full drug rehabilitation treatment. Addicts often manufacture the drug themselves by combining with other common chemicals pseudoephedrine or related substances from cold tablets. The manufacturing process involves highly combustible substances – explosions in meth labs are common, and cleaning up a meth lab is hazardous and can cost between \$45,000 and \$50,000. The fumes and chemical residue produced by the manufacturing process are highly dangerous, especially to the children of addicts who often are exposed to such chemicals. Police frequently find children in meth labs, and children of methamphetamine addicts are much more likely to be neglected and physically and sexually abused.



HB 164 would allow cold and allergy sufferers to continue to purchase products containing pseudoephedrine and related substances and would not penalize people who purchase such products for legal use. It would require only common sense regulations that have been adopted by other states and have proven effective in reducing the manufacture of methamphetamine. While the bill would not affect pseudoephedrine or related substances imported illegally from Mexico, it would take an important first step in decreasing the number of meth labs and the amount of the drug available in Texas.

## Opponents said

Products containing pseudoephedrine or related substances are very effective in combating allergy and cold symptoms, helping millions of people lead productive lives. Regulating products containing pseudoephedrine or related substances by requiring purchasers to sign a log could discourage people from making legitimate purchases, which might injure pharmaceutical companies or result in other unintended consequences. The existence of such logs also could result in the abuse of purchasers' personal information and privacy.

Only a very small percentage of people who purchase products containing such chemicals do so in order to produce methamphetamine. Tightly regulating sales of such products in the hopes of targeting this minority would be unfair to the majority of people who purchase those products for legal use. People who live in rural areas many miles away from pharmacies legitimately may need to buy large quantities of cold and allergy products, which this bill would not allow.

## Other opponents said

People who manufacture methamphetamine using products purchased in the United States that contain pseudoephedrine or related substances typically run small labs and are producing mainly to satisfy their own addictions. The largest manufacturers illegally obtain such chemicals from Mexico, and the bill would not target those large-scale manufacturers.

Currently, only ephedrine, pseudoephedrine, or norpseudoephedrine contained in a solid form can be used to manufacture methamphetamine. However, it is possible that one day manufacturers of methamphetamine may learn how to extract these chemicals from liquid preparations, so the bill also should regulate the sale of liquid products.

Instead of simply targeting the production of methamphetamine, the Legislature should attempt to reduce demand for the drug by expanding treatment programs and increasing public awareness about the dangers of methamphetamine.

## Notes

The **HRO analysis** appeared in the May 12 *Daily Floor Report*.

SB 66 by Nelson, effective September 1, 2005, establishes the Methamphetamine Watch Program, administered by DSHS, which is designed to:

- educate retailers about the problems associated with methamphetamine use and production and how to deter theft or improper purchase of products containing ephedrine, pseudoephedrine, or norpseudoephedrine;
- inform farmers and retailers about the use of anhydrous ammonia in the production of methamphetamine and how to deter theft of anhydrous ammonia;
- prevent methamphetamine use among school-age children and help parents and teachers identify kids who might be using the drug; and
- require DSHS to work with DPS to protect children exposed to methamphetamine or the chemicals used in its production.

# Qualifications of appointed counsel for indigent defendants in capital cases

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## HB 268 by Keel *Died in the Senate*

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**HB 268**, as adopted by the House in the conference committee report, would have established separate requirements for attorneys appointed for the trial and the direct appeal stages of death penalty cases involving indigent defendants. It also would have changed the qualifications for attorneys to be appointed at the trial and appellate stages.

The bill would have allowed prosecutors, and others who are not now eligible, to be appointed as lead attorneys by eliminating the current requirement that appointed attorneys have tried a significant number of felony cases to a verdict as lead defense counsel. Instead, attorneys appointed as lead counsel would have to have tried felony cases to a verdict as either a lead prosecutor or lead defense counsel. The bill also would have removed a requirement that appointed attorneys, both lead and appellate, have experience investigating and presenting mitigating evidence at the penalty phase of a death penalty trial. HB 268 would have required experience for lead attorneys in the presentation or cross examination of mitigating evidence at the penalty phase of a homicide trial. Appeals attorneys would have to have participated in the presentation of appellate briefs or in the drafting of appellate opinions as an attorney for an appeals court in felony cases, including homicide and other capital or first or second-degree felonies.

HB 268 also would have authorized the Task Force on Indigent Defense to set guidelines for attorneys appointed in habeas corpus appeals and eliminated the current requirement that the Court of Criminal Appeals adopt rules for the appointment of these attorneys. The bill listed some qualifications the guidelines could have included. The Task Force would have been required to determine on a case-by-case basis whether attorneys were qualified for appointment. The Task Force would have had to keep a list of attorneys qualified for appointments in habeas proceedings, which could have been reviewed annually by the Court of Criminal Appeals.

The bill would have prohibited the appointment of attorneys found to have rendered ineffective assistance of counsel during the trial or appeal of any capital case.

## Supporters said

HB 268 would raise the bar on indigent defense by changing the qualifications required of defense attorneys appointed to death penalty cases so more capable, skilled attorneys could qualify for appointments. Current law does not distinguish among skills necessary for trial, appeal, and habeas corpus proceedings, although each requires a unique set of skills and experience. HB 268 would require skills and experience unique to the appellate and trial stages of defense. It also would address the problem of an insufficient number of qualified attorneys to represent indigent capital defendants by expanding the available pool of qualified attorneys. The bill would retain the requirement that an appointed attorney exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases.

HB 268 would improve current requirements for appointed attorneys by removing the meaningless requirement for experience in a “significant number” of felony cases and specifically outlining other standards that would have to be met. Allowing former prosecutors to serve as defense counsel would not weaken current law because prosecutors can have valuable experience and skills that defense attorneys lack. A former prosecutor also may be able to foresee how another prosecutor would think and anticipate a prosecutor’s strategy and how a prosecutor would cross-examine a witness. Current law requiring attorneys to have presented mitigating evidence in a death penalty trial unnecessarily excludes many qualified attorneys. HB 268 would address this by allowing the appointment of attorneys who have been involved with mitigating evidence in the penalty phase of a homicide trial. Both types of trials are essentially the same in the type of evidence that is presented.

While outlining high standards for defense in a habeas proceeding and authorizing the Task Force to adopt guidelines for appointed attorneys could potentially result in Texas being declared an “opt-in” state and in shorter deadlines for habeas proceedings in federal courts, this ultimately is a federal decision and not a good reason for failing to improve standards. Texas has a duty to provide the best representation possible, regardless of federal law.

HB 268 also would transfer the responsibility for maintaining a list of qualified attorneys to the Task Force on Indigent Defense, which would be better equipped to gauge the quality and effectiveness of eligible attorneys.

## Opponents said

Expanding the pool of available counsel for appointment in death penalty cases would not guarantee a larger pool of qualified attorneys. The better route would be to require an attorney to develop skills by serving as second chair in a death penalty trial before acting as lead defense counsel.

HB 268 would weaken minimum standards for attorneys defending capital crimes and could result in more inferior lawyers being appointed in death penalty cases. For example, removing the current requirement that appointed trial attorneys have tried *a significant number* of cases as lead defense counsel could result in the appointment of lawyers with little or no experience. This bill also could result in the appointment of lawyers whose only experience was as a prosecutor and who may lack crucial experience in unique and key aspects of defense in capital trials. For example, an important role of the defense counsel is to humanize the defendant by developing and presenting the client's social history, a skill that can take years to develop. While a former prosecutor may have excellent trial skills, a prosecutor's job is to dehumanize the defendant, and

after doing so for many years, an attorney could become entrenched in this role. By eliminating a requirement that those handling the punishment phase of a trial and an appeal have defense experience in death penalty cases, the bill would increase the likelihood that trials or appeals would be inadequate.

If the Task Force were to establish a certain type of mandatory guidelines under HB 268 for appointments in habeas proceedings, Texas could qualify as an "opt-in" state, which would shorten the time for filing a habeas petition and limit federal courts' authority to intervene by granting execution stays. Under federal law, when a state statutory scheme for representation of indigent capital defendants meets certain standards, federal law shortens deadlines in the federal post-conviction proceedings.

## Notes

The **HRO analysis** appeared in the March 17 *Daily Floor Report*.

SB 60 by Lucio and HB 1701 by Keel, effective September 1, 2005, prohibit the appointment of a lead attorney found to have rendered ineffective assistance of counsel during the trial, appeal, or habeas proceeding of any death penalty case.

# Creating the Texas Forensic Science Commission

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**HB 1068 by Driver**  
**Effective September 1, 2005**

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**HB 1068** creates the Texas Forensic Science Commission to investigate allegations of professional negligence or misconduct that substantially would affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity. The commission also is charged with developing and implementing a system to report professional negligence and misconduct and with requiring all labs and other entities that conduct forensic analyses to report professional negligence or misconduct to the commission. The commission comprises nine members, of which the governor appoints four, the lieutenant governor appoints three, and the attorney general appoints two. HB 1068 requires that many of these appointments have specific types of expertise or hold certain faculty positions at Texas universities.

HB 1068 also gives the Department of Public Safety (DPS) more authority to inspect crime labs and DNA labs in Texas. It authorizes DPS to enter and inspect the premises of an accredited crime lab or one seeking accreditation and to audit a lab's records, reports, procedures, and other quality assurance matters. The bill expands DPS' current authority to inspect the premises and audit the procedures of DNA labs that *provide* DNA records or forensic analysis to DPS. The department also can audit the records, reports, and other quality assurance matters of DNA labs that provide DNA records to DPS or that *conduct* forensic analysis.

The bill also expands who must contribute samples for the state DNA database by requiring a sample from all persons confined in the Texas Department of Criminal Justice system and from all juvenile offenders adjudicated of felonies who are committed to the Texas Youth Commission.

## Supporters said

HB 1068 would be another step in addressing problems with the state's crime labs. Creating an independent, expert body to investigate problems and misconduct at the labs would help ensure the quality of their work and maintain the integrity of evidence used in criminal trials. The bill would allow legislation enacted by the 78th Legislature to require

accreditation of crime labs in Texas to come to fruition with the newly created commission providing a check and balance to the accreditation process. An independent entity divorced from DPS and local officials is necessary to ensure that problems and misconduct are handled appropriately and impartially.

The bill also would address some problems identified since 2003 by putting more teeth into the law that requires crime labs to be accredited and would clarify provisions in that law. HB 1068 would expand DPS' audit and inspection powers so that DPS could examine a lab if it lost its accreditation or evaluate a situation at an accredited lab and determine if further agency or accreditation action were necessary. It also would expand the state's inspection authority over DNA labs to include records, reports, and other quality assurance matters and would ensure that DPS could enter and inspect private labs and labs that had lost their accreditation. The state currently does not have authority to enter private labs, even though it has an obligation to regulate them.

## Opponents said

It is unnecessary to establish a new commission to oversee the allegations of problems or misconduct at crime labs. DPS has authority to look into accredited labs, and local officials are in the best position to undertake investigations into problems at local labs. There is no need to create a new state entity to oversee crime labs when DPS has the experience and expertise to perform this duty.

## Other opponents said

HB 1068 would not go far enough in addressing the state's need for independent crime labs. It also should establish regional crime labs so that work done by the state's crime labs would be subject to scrutiny by an outside, independent entity and would be divorced from local law enforcement agencies and DPS.

## Notes

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

The provisions creating the Texas Forensic Science Commission were added to HB 1068 through an amendment by Sen. Juan Hinojosa on the Senate floor. SB 1263 by Whitmire, which was approved by the House Law Enforcement Committee and sent to the Calendars Committee, also would have created the Texas Forensic Science Commission and given it the same duties as those in HB 1068.

HB 1788 by Bailey, which died in the House Law Enforcement Committee, would have required DPS to designate existing laboratories as regional DNA labs if a lab accredited by DPS did not exist in that region. These regional labs would have been authorized to collect a fee for performing forensic analysis.

# Revising the community supervision (probation) system

**HB 2193 by Madden**  
***Vetoed by the governor***

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HB 2193 would have revised the state's community supervision (probation) system and, in general, would have applied to persons on probation on or after September 1, 2005, regardless of when the person initially was placed on probation. The reduction in the maximum probation terms would have applied only to those placed on probation on or after September 1, 2005.

***Length of probation terms.*** HB 2193 would have reduced from 10 years to five years the initial probation and deferred adjudication terms that judges could impose for third-degree felonies that were not "3g" or sex offenses. ("3g" offenses are certain violent and serious crimes listed in Code of Criminal Procedure, art. 42.12, sec. 3g.) These probation terms could have been extended up to 10 years through a maximum of five one-year extensions. HB 2193 would have kept the 10-year maximum period of probation and deferred adjudication for offenders guilty of "3g" felony offenses, offenses that result in a person having to register as a sex offender, and first- and second-degree felonies.

HB 2193 would not have changed the minimum or maximum probation terms for state-jail felons. The bill would have repealed certain minimums, maximums, and extensions for probation terms that could be given to some sex offenders. It would have expanded the current mandate that some low-level state jail drug offenders be placed on probation to include state-jail felons with previous state-jail drug offenses that were punished as misdemeanors. HB 2193 would have prohibited a person convicted of murder from receiving jury-recommended probation.

***Mandatory review for possible reduction or termination of probation.*** Judges would have been required to review defendants' records and consider whether to reduce or terminate probation after defendants had served one-half of their sentences. Judges would have retained their current authority to reduce or terminate probation terms after the lesser of one-third of the term or two years.

Judges would not have had to review defendants' records if defendants were delinquent in paying restitution, fines, costs, or fees that they had the ability to pay or if they had not completed court-ordered counseling or treatment. Judges could not have refused to terminate probation solely

on the grounds that a defendant was indigent and unable to pay restitution, fines, costs, or fees.

HB 2193 would have applied provisions on early termination to state jail felons but made "3g" defendants ineligible for early termination and continued the prohibition on early termination for offenders subject to the state's sex offender registration laws.

***Giving credit against a sentence.*** HB 2193 would have made changes in the laws governing when judges had to give probationers credit for time spent in court-ordered residential treatment programs or facilities.

***Community service.*** The bill would have given judges discretion about whether to require probationers to perform community service, instead of the current mandate requiring all defendants to do so.

***Drug courts.*** HB 2193 would have required more counties to establish drug courts, but the requirement would have taken effect only if a county received federal or state funding for the courts. The requirement to establish drug courts would have been applied to counties with populations of at least 200,000, instead of the current 550,000. The bill would have authorized a new \$50 fee to fund the state's drug courts, which would have been charged to defendants convicted of driving while intoxicated and other intoxication, alcoholic beverage, and drug offenses. Counties would have been able to keep 10 percent of the fee.

## Supporters said

HB 2193 would create a stronger and more effective probation/community supervision system that better supervised and rehabilitated probationers, which would enhance public safety. This could encourage judges to place appropriate offenders on probation, rather than sending them to prison, and could result in fewer probationers being sent to prison after having their probations revoked.

The changes made in HB 2193, in conjunction with additional funding provided in the general appropriations bill for fiscal 2006-07, would give judges more community



resources to do a better job of handling probationers. The budget would fund about 500 local beds, which would serve about 1,500 offenders per year and 3,000 over the biennium, to be used for residential treatment and for sanctioning offenders. Some \$7.2 million would fund outpatient substance abuse treatment for about 2,000 offenders per year or 4,000 for the biennium. About \$28.2 million would provide funds to local probation departments for 350 to 400 new probation officers so that the average direct supervision caseload could be reduced from 116 cases per probation officer to about 95 cases per officer.

***Length of probation terms.*** HB 2193 would allow for shorter, but more intense, probation terms for some felons, which would result in more judicial involvement and more meaningful probation oversight and would improve public safety. Judges would be able to extend probation terms for third-degree felonies to up to 10 years. HB 2193 would not shorten terms for the more serious and violent “3g” offenses and sex offenses. For many of the third-degree felonies that would fall under the provisions of HB 2193 – for example, assaulting a peace officer – there are different degrees of the offense, and probation already is an option in these cases. A defendant who seriously assaults a peace officer or commits another serious offense most likely would not – and should not – receive probation.

HB 2193 more closely would align some of Texas’ probation terms with those in other states. According to a 2002 report, Texas probation terms were about 67 percent longer than the national average, with a Texas average of 67 months compared to a national average of 40 months.

***Mandatory review for possible reduction or termination of probation.*** HB 2193 would ensure that judicial involvement with probationers was increased and that judges took a critical look at all probationers by instituting a required review of a defendant’s probation. This would give judges a formal opportunity to release from probation those defendants who were doing a good job. The bill would not institute a bias toward early release because judges would retain full authority to continue under supervision any offender for whom they deemed it appropriate. Although current law authorizes judges to review probationers, it would be better to have a requirement for review so all cases were examined. Public safety would be protected by making those convicted of “3g” offenses and sex crimes ineligible for early termination. Probation officers could concentrate on supervising those offenders who needed closer watching and on trying to find those who had absconded from probation.

***Giving credit against a sentence.*** HB 2193 would provide judges with more flexibility to give defendants credit against a sentence for time spent in court-ordered treatment programs. This is only fair since the time spent in the program is court-ordered and analogous to time spent in jail. Judges have discretion to deal with offenders who have not become rehabilitated through treatment programs.

***Community service.*** HB 2193 would give judges more discretion and flexibility in assigning community service. It is more important that judges have authority to make decisions on a case-by-case basis about imposing community service than to have a uniform statewide requirement. Defendants who would benefit from community service still could be required to perform it, and local governments and charities could continue to use that service.

***Drug courts.*** HB 2193 would expand the state’s successful drug court programs so that more probationers could take advantage of the opportunities they afford. HB 2193 would not be an unfunded mandate because the bill would make this requirement take effect only if the county received state or federal funding for the courts. Lowering to 200,000 the population threshold for requiring counties to have drug courts would take in 13 additional counties, six of which already have drug courts, and bring the state total to 20 counties. HB 2193 would enable the state to fund these new drug courts through a new \$50 fee.

## Opponents said

HB 2193 could result in more – not fewer – criminals being sent to state prisons and could compromise public safety if defendants did not receive adequate, long-term supervision. Shorter probation terms for some felons and a mechanism for early release from probation would make probation a less attractive option in many cases, which could result in defendants being sentenced directly to prison. Many of the changes in HB 2193 would be unnecessary because judges already have authority to do these things but choose not to.

Not enough study has been done of the effect that proposed changes such as early release would have on the state. HB 2193 could create a system biased toward early release of offenders as a way to address a lack of state resources and growth in the prison population similar to the one employed decades ago when the state’s parole rate peaked at almost 80 percent. That resulted in increased crime, which preceded the state’s massive prison expansion program.

***Length of probation terms.*** Reducing the maximum length of probation terms for some offenders would upset the state's current sentencing dynamics. Long probation terms can help ensure that a defendant is rehabilitated and not a danger to the public. Without this option, prosecutors could be less inclined to agree to probation in some cases, which could lead to more direct prison sentences. Some third-degree felonies that would be subject to the shorter probation terms are serious crimes such as assault on a peace officer.

***Mandatory review for possible reduction or termination of probation.*** It is unnecessary to require judges to review probationers upon completion of half of their terms. Current law allows judges to review offenders at their own discretion and to reduce or terminate a probation term after one-third of the original term, or two years, whichever is less. The mandatory review established in HB 2193 would contribute to distortions in the state's sentencing dynamics. Because many prosecutors would assume up front that any term of probation could or would be cut in half, they could be less willing to place people on probation and work for more direct prison sentences. The bill would expand this review requirement to misdemeanor probations, which could burden misdemeanor courts without saving the state any money since misdemeanants who have their probation revoked go to county jails.

***Giving credit against a sentence.*** HB 2193 would infringe on judicial discretion by requiring judges to give credit to defendants for time spent in court-ordered residential programs or facilities in some situations. It would be better to give judges authority to make these decisions on a case-by-case basis without a mandate. Mandatory credit also could lead to instances in which credit was given to someone who wasted limited treatment resources and did not become rehabilitated.

***Community service.*** Eliminating the requirement for mandatory community service for probationers could result in disparate treatment of defendants from court to court. Community service helps rehabilitate offenders and can help local governments and charities get much-needed work done.

***Drug courts.*** The state should not mandate that any counties establish drug courts. It would be better to authorize or encourage the courts but not to institute something that could become an unfunded mandate in the future.

## Notes

The **HRO analysis** appeared in Part One of the May 12 *Daily Floor Report*.



# Life without parole for capital murder and eliminating life sentences

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**SB 60 by Lucio**  
**Effective September 1, 2005**

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**SB 60** institutes “life without parole” as a possible sentence in death penalty cases and eliminates “life” sentences as an option for capital murder. In capital murder cases in which the state seeks the death penalty, a person found guilty must be sentenced either to life without parole or death. In capital murder cases in which the state does not seek the death penalty, the sentence must be life without parole. Capital felons sentenced by a judge rather than a jury must receive life without parole. Those serving sentences of life without parole are not eligible for release on parole or on medically recommended intensive supervision.

SB 60 also changes from 17 to 18 years old the minimum age that a defendant must be when a capital murder is committed for the death penalty to be imposed.

## Supporters said

Juries in capital murder cases now are limited to a choice of death or a life sentence that carries a possibility of parole – not always acceptable alternatives. Under the bill, juries could reserve the death penalty for the most heinous cases, while ensuring that other criminals stayed behind bars for life. Life without parole would allow a more appropriate sentence when the crime was heinous but for other reasons the prosecutor did not seek the death penalty.

Life without parole also would apply when an offender committed a capital murder while under age 18. Since the U.S. Supreme Court banned execution of such offenders, only a life sentence is available for these cases in Texas. SB 60 would change the minimum age for an offender to be given the death penalty so that the Texas statutes comply with the U.S. Supreme Court ban on the execution of persons who committed their offense when younger than 18.

Life without parole would not mislead victims’ families or the public because it would mean just what it says – that offenders would spend the rest of their lives in prison. Concerns that a person sentenced to life without parole would be released under clemency or a prison management act are far-fetched.

There is no evidence that allowing a sentence of life without parole would dilute the death penalty or lead to its demise. The procedures for imposing a sentence of death

or life in prison in capital cases would not be changed, so the changes proposed by SB 60 would not generate court challenges that could jeopardize Texas’ death penalty system.

Texans support life without parole. A fall 2004 survey by the Scripps Howard Texas Poll reported that 78 percent of those surveyed favored creating a sentence of life without parole. SB 60 would bring Texas in line with the federal government and 36 of the 38 states with the death penalty that have a sentence of life without parole.

The Texas Department of Criminal Justice has the expertise and resources to manage a prison population sentenced to life without parole. Studies have shown that these offenders do not pose a disproportionate risk of violence in prison.

It would be unwise for Texas to have three capital murder sentencing options – death, life without parole, and a life sentence. Jurors easily could be confused over when to impose each type of sentence.

## Opponents said

SB 60 is unnecessary because the options already available to Texas juries in capital cases punish offenders adequately and protect the public. Texas now has a statute that effectively is life without parole. Capital murderers sentenced to life imprisonment face 40 years of calendar time in prison before they are eligible for parole, and being eligible does not guarantee release. Two-thirds of the Board of Pardons and Paroles must approve an eligible capital felon’s release, an unlikely scenario in light of the tough parole policies of the last decade.

SB 60 would be misleading and would give only the illusion of comfort to victims because it would not guarantee that a person would never be released from prison. Releases due to court decisions, medical parole, executive clemency, or a prison management act designed to reduce overcrowding could lead to those given life without parole getting out of prison.

SB 60 inappropriately could replace the death penalty or weaken the state’s death penalty scheme if judges and

juries consistently sentenced capital offenders to life without parole. But life without parole would be inadequate for the most heinous crimes. While the sentence might satisfy one purpose of the death penalty – protecting society – it would not serve other functions, such as deterring crime and giving closure to victims’ families and friends. Procedures used in Texas to determine punishment in capital murder cases have been well litigated and established and may not easily withstand change.

Comparisons to the experiences of other states with sentences of life without parole are not valid. Other states have small death rows and few, if any, states execute as many people as Texas. Also, SB 60 could result in problems with prison management. Being unable to use parole as an incentive for good behavior could be difficult and expensive.

## Other opponents said

Texas should have three options for sentences in capital murder cases – death, life without parole, and life in prison. This would give juries maximum flexibility to tailor sentences to individual crimes and offenders. SB 60 would not give juries any flexibility when the jury had decided against the death penalty but thought a defendant deserved at least a remote possibility of release later in life.

## Notes

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

# Prohibitions against identity theft

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**SB 122 by Hinojosa**

***Effective September 1, 2005***

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**SB 122** prohibits a person from obtaining, possessing, transferring, or using the personal identifying information of another without the other's consent and with intent to obtain a good, service, insurance, extension of credit, or any other thing of value. It requires peace officers who receive reports of criminal violations involving the fraudulent use or possession of identifying information to make a written report. Businesses must implement and maintain procedures to prevent the unlawful use of personal identifying information that they collect. In addition, businesses must destroy customer records that they are not retaining that contain personal identifying information.

A person or business is required to disclose any unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of sensitive personal information. The security breach must be disclosed to people whose sensitive personal information was acquired, or reasonably believed to have been acquired, by an unauthorized person. A person who was injured by a security breach or has filed a complaint alleging criminal identity theft can file an application with a district court to be declared a "victim" of identity theft, defined as a person whose identifying information was used by an unauthorized person. A violation of a provision in SB 122 can be punished by a civil penalty ranging from \$2,000 to \$50,000.

## Supporters said

SB 122 would address a problem some identity theft victims encounter in obtaining police reports by requiring law enforcement authorities to make written reports about these crimes. Police reports often are necessary to trigger other actions or protections for victims, and without these reports, it can be difficult for victims to convince creditors that they should not be held responsible for unauthorized purchases.

A specific provision prohibiting identity theft and placing requirements on businesses is needed in the Business and Commerce Code so that identity theft can be battled on all fronts. It is not unusual for the state to prohibit in the civil codes something that is also a crime. This helps to serve as an additional deterrent and gives enforcement of the laws more teeth.

SB 122 would help protect individuals by specifically requiring businesses to safeguard personal information, to destroy certain information, and to notify consumers about breaches in the security of computerized data. Self-regulation of the industry has not worked, and individuals can take action to protect their bank accounts, credit rating, and identity if they learn quickly that their personal information may have fallen into the wrong hands. The prevalence of identity theft makes it essential that all businesses, even small ones, safeguard personal information. The requirements in SB 122 would be reasonable and would not burden businesses or significantly increase their costs. Consumers who are victims of identity theft carry a far larger burden than any cost that may be passed on to them as a result of SB 122. Businesses also accrue costs due to identity theft and already pass these on to consumers.

SB 122 also would establish procedures and definitions so that victims could receive a court order naming them as victims, which would help them in challenging financial transactions and in establishing their identities for criminal law purposes. In some cases, individuals have reported difficulties in having law enforcement authorities, credit bureaus, and others involved with personal information consider them victims because such entities tend to consider merchants that have been defrauded as the only victims.

The bill would hold businesses accountable if they did not adequately safeguard personal information by allowing the imposition of civil penalties. It includes a wide range of penalties, from \$2,000 to \$50,000, to give the courts flexibility to assess an appropriate penalty based on various factors, such as the nature of a violation and the size of a business.

## Opponents said

The state should not dictate decisions about when to generate police reports, which is best left to the discretion of officers who can determine the merits of each case.

It is unnecessary to place in the Business and Commerce Code what already is a crime in the Penal Code – obtaining, possessing, transferring, or using another's information without authorization. The requirements

for handling information and notification about security breaches that SB 122 would impose on businesses could be interpreted by some businesses as a new mandate that might increase business costs, which in the long run would be borne by consumers. New mandates especially burden small businesses.

The penalties authorized by the bill could be too onerous in some situations. The range for the penalties is wide, and the imposition of a large penalty on a small business for what might be an honest oversight could be too harsh.

## Notes

The **HRO analysis** of the companion bill, HB 1321 by Giddings, appeared in Part Two of the May 11 *Daily Floor Report*.

Numerous other bills dealing with identity theft were considered by the 79th Legislature, including:

**HB 699** by McCall (effective September 1) increases the penalty from a class B misdemeanor to a class A misdemeanor for displaying or possessing a driver's license or certificate that is fictitious, altered, or belongs to another individual. The penalty also is increased for possessing more than one currently valid driver's license or certificate, lending one of these documents to another person, or applying for one of these documents using false information. If a minor presents false identification in an attempt to purchase alcoholic beverages, the severity of the penalty would be governed by separate provisions in the Alcoholic Beverage Code.

**HB 1323** by Swinford (effective September 1) makes it an offense to possess, rather than sign or write one's name on, another individual's credit or debit card without the individual's effective consent and with intent to use it. The offense is a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000).

**HB 628** by Giddings (effective September 1) prohibits debt collectors from attempting to collect an obligation if a transaction was not initiated by an authorized user, and the authorized user had filed a report with law enforcement and sent the debt collector written notice that the transaction was unauthorized. The debt collector may collect on such obligations if the collector has credible evidence that the report was fraudulent and that the transaction was indeed authorized.

**HB 2223** by Giddings and Bohac (effective September 1) describes procedures by which a customer who has closed an account at a financial institution due to identity theft may provide the institution certain documentation of the identity theft and request that the institution return checks with the notation "forgery." The financial institution would be held harmless for acting in accordance with the individual's request and would not be held liable for dishonoring a check.

**HB 1379** by J. Jones (effective June 18) makes a business record inadmissible in a civil trial if the record was provided to a law enforcement agency in connection with the investigation of identity theft. If a party seeking to admit the record into evidence obtains the record from a source other than a law enforcement agency, the record is not automatically inadmissible.

**SB 99** by Ellis (effective September 1) prohibits a lender from denying or restricting the extension of credit solely on the basis that an individual has been a victim of identity theft. A creditor who violates this provision is subject to license suspension or revocation. An insurer authorized to write property and casualty insurance may offer and issue coverage for a loss suffered by a policyholder as a result of the policyholders' being a victim of identity theft or attempted identity theft.

**HB 345** by Solomons (effective June 17) prohibits a voter registrar or other county official with access to information furnished on a voter registration application from posting the following on a web site – a telephone number, a Social Security number, a date of birth, or the number on a driver's license or personal identification card.

**HB 607** by Giddings (effective June 1, 2006) prohibits a check provider, such as a check-printing company or bank, from delivering check-form orders by courier to unattended addresses without the consent of customers. The bill allows for the imposition of a \$1,000 civil penalty per violation.

**HB 698** by McCall (effective September 1) requires businesses that have personal identifying information of customers in their records to shred, erase, or modify them upon disposal and authorizes a civil penalty of up to \$500 per record. The bill exempts insurers subject to laws in the Insurance Code on privacy of health information as well as financial institutions that are required to maintain certain financial records for five years under the Gramm-Leach-Bliley Act, a federal law that combats money-laundering and other crimes.

**HB 853** by Solomons (effective September 1) requires merchants to use Social Security and driver's license numbers only for identification purposes in the course of accepting returned merchandise from customers without receipts. Each violation of this provision can be punished by a civil penalty of up to \$500.

**HB 982** by Reyna (effective September 1) requires restaurants and bars to post signs on their premises warning employees that the fraudulent use of debit or credit cards is a state-jail felony. Failure to comply with the posting requirements can be punished by a fine of \$25.

**HB 1855** by Giddings (effective September 1) directs a business that accepts checks from customers to delete, in the event of receiving an unauthorized bad check, any electronic record, except for the customer's checking account number or bank routing number, indicating that a customer had issued a dishonored check. The business must delete such records within 30 days after the date that the customer demonstrated to the business that the dishonored check was unauthorized. Failure to comply with these provisions may result in a civil penalty of up to \$1,000. The bill exempts financial institutions subject to the federal Gramm-Leach-Bliley Act.

# Requiring written, oral permission for police to conduct consent searches

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**SB 1195 by Hinojosa**  
***Vetoed by the governor***

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**SB 1195** would have prohibited peace officers who stop motor vehicles for alleged violations of the law from searching the vehicle unless the officer:

- had probable cause or another legal basis for the search;
- conducted a search for weapons based on an articulation of a reasonable fear for the officer's safety or the safety of others;
- obtained the written consent of the vehicle's operator on a form that complied with provisions of the bill; or
- obtained the oral consent of the vehicle's operator and ensured that the oral consent was recorded in compliance with the bill.

DPS would have established requirements for the written consent form and for the audio and video recordings in line with the minimum requirements set forth in the bill. The written form and the recording would have included a statement that the driver understood that he or she could refuse to give consent and a statement that the driver voluntarily had given consent to search the vehicle.

## Supporters said

SB 1195 is necessary to stop an unproductive law enforcement practice that also could be used to inflict injustices or unfairly target minorities. Rather than ban all consent searches, the bill would take the reasonable approach of allowing these searches as long as drivers gave their written or oral permission.

Many people agree to consent searches because they do not understand their right to decline a search, which is illustrated by the experiences of law enforcement agencies that require written permission for consent searches. In some cases, the current approach results in people being harassed by law enforcement officers with no justification. SB 1195 would educate drivers about their rights.

Consent searches sometimes are used for racial profiling by disproportionately targeting minority drivers' vehicles. SB 1195 would help ensure that minority drivers were clear about their right to refuse a search.

SB 1195 would not prevent law enforcement officers from doing their jobs, and far from impeding their efforts, it would help them. It is more difficult for a person to contest a vehicle search when an officer has written permission. This makes prosecution easier in cases where illegal items are found.

## Opponents said

In the majority of cases, consent searches are used as a law enforcement tool, not as a means of harassment or racial profiling. SB 1195 is unnecessary because drivers know they have the right to refuse a search and often agree to a search in order to cooperate with law enforcement officers. The U.S. Supreme Court has ruled that written permission is not needed for consent searches and that it is presumed that people know they can refuse.

Although SB 1195 would not outlaw consent searches, the requirements for the consent form are so detailed that they could result in a bias toward those who refuse to give permission for the search. If people agree to consent searches because they do not know that they can refuse, a better response would be to educate people about their rights.

## Other opponents said

It would be better to prohibit explicitly all consent searches rather than to allow them with written or oral permission. Law enforcement still could intimidate drivers, intentionally or not, into agreeing to a consent search even with the written or oral permission requirement. Searches should be based solely on probable cause.

## Notes

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





# Economic Development

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# Establishing the Texas Emerging Technology Fund

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**HB 1765 by Morrison**  
***Effective June 14, 2005***

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**HB 1765** establishes the Texas Emerging Technology Fund (TETF) to finance projects designed to expedite innovation, commercialize research, create businesses, increase high-quality jobs, and improve research capabilities. An entity is eligible for funding if it proposes to create new, high-quality jobs in Texas and if its work has the potential to result in a medical or scientific breakthrough. The following industries are eligible for funding: semiconductor; information; computer and software technology; energy; manufactured energy systems; micro-electromechanical systems; nanotechnology; biotechnology; medicine; life sciences; petroleum refining and chemical processes; aerospace; and defense.

The TETF is overseen by the Texas Emerging Technology Committee, made up of 17 members appointed by the governor. The fund is a dedicated account in the general revenue fund that is considered a trusteed program within the Office of the Governor. The governor will negotiate on behalf of the state in awarding money from the fund, with approval from the lieutenant governor and the speaker of the House. The bill describes the terms of contracts made with entities funded as well as other administrative requirements and requires an entity to return to the fund any money received if the entity fails to perform specific actions guaranteed to provide benefits to the state.

Fifty percent of the money appropriated to the fund by the Legislature is allocated for use as incentives for private or nonprofit entities to collaborate with institutions of higher education on economic development projects. These regional centers of innovation and commercialization will be established in Harris, Lubbock, Bexar, and El Paso counties, the Dallas-Fort Worth metroplex, the Middle and Lower Rio Grande Valley, and other locations deemed suitable. Twenty-five percent of the money appropriated to the fund is allocated for the purpose of matching research grants awarded by federal or private sponsors, with a focus on partnerships with Texas colleges and universities. The remaining 25 percent is allocated for use in creating or attracting to Texas world-class or nationally recognized researchers in relevant technology fields.

## Supporters said

The TETF would boost the state's reputation as a global leader in technology. It would foster innovation, attract high-quality jobs, and increase research capabilities at universities. The plan is an outgrowth of the Governor's Council on Science and Biotechnology Development, and the TETF also would dovetail with the governor's long-term strategic job creation plan, which focuses on many of the same industry clusters. The TETF would provide economic development incentives targeted to emerging technologies with the highest job-creation potential rather than requiring such projects to compete with more generalized projects backed by the Texas Enterprise Fund.

Many states, including California, Florida, North Carolina, Ohio, and Pennsylvania, are infusing billions of dollars into high-tech research and development. Studies show that \$3 trillion in revenue will be generated worldwide by emerging technologies over the next decade. Without the TETF, Texas could be left behind. In addition, this fund would provide a vital link to close the present market funding gap between research and commercialization. Also, by attracting outside businesses, the bill would broaden the state's tax base, which would help pay for essential services. Entities receiving incentives from the TETF would have to guarantee specific benefits to the state or else refund the money.

## Opponents said

The Legislature should not approve this new fund until it finds money to fund higher priorities, including health care and public education. Tax-funded incentive packages for businesses are inefficient and often play a minor role in relocation and expansion decisions. Instead, tax dollars should support job training programs and infrastructure improvements that are more generally beneficial for promoting economic development.

The bill should require the governor to submit a report outlining a long-range plan for use of the funds. It also should include more specific accountability requirements to ensure that the incentives produce the promised benefits to the state.



## Notes

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

HB 10 by Pitts, the supplemental appropriations bill, grants \$100 million from the general revenue fund for the TETF. Also, if during fiscal 2005-06 the amount in the state's "rainy day fund" exceeds comptroller's estimate, the first \$100 million in excess of the estimate will be appropriated from that fund to the TETF.

# Reporting and oversight of grants from the Texas Enterprise Fund

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**HB 1938 by Ritter**

***Effective generally September 1, 2005***

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**HB 1938** makes several changes to the reporting and oversight process for grants from the Texas Enterprise Fund (TEF), an economic development grant program established in 2003 by the 78th Legislature. It requires the governor to enter into a written agreement with a recipient of a TEF grant. Under this agreement, the state can retain a lien on a capital improvement funded with a TEF grant and can require the grant recipient to repay the grant if a capital improvement is sold. If a grantee has not used the grant money for the purposes for which the funds were intended by a date certain, the recipient must repay that amount plus interest to the state. If a grantee does not meet specific performance targets established by the governor, the state will withhold grant disbursements or require repayment of disbursements already made. Grantees must issue annual progress reports on the attainment of performance targets to the governor, the lieutenant governor, and the speaker of the House.

The governor must submit to each member of the Legislature a biennial report on TEF grants that includes such information as the number of jobs grantees have committed to creating, the median wage of jobs created, the amount of capital investment by grantees, and the number of positions with health insurance created by each grantee. In addition, the governor must issue an economic impact statement for a proposed grant, stating the grant's size and the jobs, wages, and taxes expected to result from a project.

## Supporters said

HB 1938 would introduce much-needed accountability controls and reporting requirements to the TEF, ensuring that the fund would operate no differently than other state programs in terms of open government and accountability. Current state law governing the TEF does not require the governor to report to the Legislature on the fund's grants, activities, or performance. The bill would create reasonable performance standards to demonstrate the effectiveness of projects funded by the TEF and hold companies accountable for the money they receive. It also would require the governor to report to the Legislature on projects funded by

the TEF. With this detailed information, legislators could decide how effectively money appropriated to TEF had been spent and how best to reform the TEF's administration in the future.

## Opponents said

HB 1938 is unnecessary because the TEF already has safeguards to prevent misuse of grants from the fund. Every project funded by the TEF requires the unanimous written consent of the governor, the lieutenant governor, and the speaker of the House. The Governor's Office has included in all agreements "clawback" provisions that deny funds to grantees that do not meet their performance targets. The additional requirements in HB 1938 could slow the application and approval process, causing Texas to miss out on investment from some firms.

## Other opponents said

The bill should be strengthened to ensure the maximum economic benefit from TEF grants. Companies receiving TEF money should be required to provide a minimum level of health care coverage, a living wage, and a safe workplace for employees. Projects should be distributed geographically across the state and directed particularly to areas of the greatest economic need.

## Notes

The **HRO analysis** appeared in the April 11 *Daily Floor Report*.

HB 2421 by Chavez, effective June 18, 2005, establishes a funding mechanism for the Skills Development Fund and the TEF to support job training and economic development grants and programs in the state. The funds are supported through an assessment of 0.1 percent on wages paid by employers participating in the state's unemployment insurance program.

# Direct shipment to consumers by domestic and out-of-state wineries

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**SB 877 by Madla**  
**Effective May 9, 2005**

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**SB 877** allows holders of winery permits and out-of-state winery direct shipper's permits issued by the Texas Alcoholic Beverage Commission (TABC) to ship wine directly to Texas consumers, including consumers in dry areas. These permit holders cannot sell or ship wine to a minor and cannot deliver more than three gallons of wine within any 30-day period to the same Texas consumer. The wine delivery carrier must be permitted by TABC, and the recipient must be at least 21 years of age, among other mailing and delivery requirements.

SB 877 also creates an out-of-state winery direct shipper's permit. These permit holders cannot sell more than 35,000 gallons of wine annually to direct Texas consumers. These out-of-state permit holders are allowed to sell and deliver only wine that they produced or bottled, must keep certain sales records, and must pay excise and sales and use taxes at the same rate as if the winery were located in Texas.

Any person without an out-of-state direct shipper's permit who sells or ships alcohol from outside the state to a consumer in Texas commits an offense. A first offense is a class B misdemeanor, a second offense is a class A misdemeanor, and a third offense is a state-jail felony.

## Supporters said

SB 877 would take advantage of an important economic development opportunity by allowing Texas wineries to sell their products directly to consumers. At present, Texas wineries can ship wine only to consumers who first have visited in person. The bill would expand the possible market for Texas wineries by allowing them to take orders over the Internet and ship wine anywhere in the world. SB 877 contains provisions to enforce the law and require out-of-state permit holders to pay taxes and submit records of sales and delivery to TABC. The bill would establish a reasonable regulatory system that has proven effective at protecting minors in other states.

SB 877 would remedy problems with current law governing transportation of wine that were ruled unconstitutional in *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003). In this ruling, the 5th U.S. Circuit Court of Appeals held that Alcoholic Beverage Code, sec. 107.07 discriminates against out-of-state wine producers and shippers by compelling them to go through Texas wholesalers and retailers. As a result, out-of-state wineries now may ship to Texas consumers, but Texas wineries are prohibited from doing the same thing, a situation that SB 877 would correct.

## Opponents said

SB 877 could create a public safety problem by making it easier for minors to purchase alcohol. The bill also would place improper responsibility on package delivery companies, which are not trained to recognize false identification. It would weaken the established three-tier alcohol retail system that is easily regulated by TABC. Allowing wineries to ship wine to consumers in dry areas would subvert the will of the people who voted to keep these areas dry.

## Notes

On May 16, 2005, in its ruling in *Granholm v. Heald* (03-1116), the U.S. Supreme Court struck down laws in Michigan and New York that prevented or made it difficult for out-of-state wineries to sell and ship directly to consumers.

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

# Authorizing the Legislature to exempt commercial loans from interest rate caps

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**SJR 21 by Averitt/HB 955 by Solomons**  
*Rejected by voters at November 8, 2005, election*

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**SJR 21** would have amended the Texas Constitution to allow the Legislature to create exemptions from the maximum rates of interest on commercial loans. A commercial loan would have been considered a loan made primarily for business, commercial, investment, agricultural, or similar purposes and not primarily for personal, family, or household purposes.

**HB 955**, which was generally effective September 1, 2005, makes various revisions to the Finance Code and included the enabling legislation for SJR 21. If voters had approved SJR 21, HB 955 would have allowed parties to an exempt commercial loan to contract for, charge, and receive any rate or amount to which the parties had agreed. An exempt commercial loan would have been any commercial loan of \$7 million or more that was secured primarily by real property or any loan of \$500,000 or more that was not secured primarily by real property.

## Supporters said

SJR 21 would allow the Legislature to exempt certain commercial loans from maximum interest rates. Texas' commercial lending laws place both Texas borrowers and lenders at a competitive disadvantage compared to the laws of 46 other states, which give sophisticated commercial lenders and borrowers greater freedom to structure the unique loan arrangements that commercial parties often require. Texas-chartered banks and other commercial lenders do not share this freedom.

Because of Texas' low interest-rate ceiling, the vast majority of commercial loan transactions are made by out-of-state entities in accordance with the lending laws of other states. Texas' existing commercial lending laws increase costs for Texas businesses, limit opportunities for Texas-chartered banks attempting to make commercial loans, and require Texas businesses to obtain loans from lenders whose decision makers are located out-of-state. SJR 21 would allow the Legislature to level the playing field by permitting Texas' commercial borrowers and lenders to compete with

financial institutions from across the country. This limited change also would provide opportunities for economic development because it would increase incentives for large banks to locate their headquarters in Texas.

Often, Texas banks and lenders cannot obtain a great enough yield to make high-dollar commercial lending worthwhile because of the greater risk involved in making large loans. Loosening the restrictions on certain commercial lending further would reduce costs because parties to large commercial loans with Texas banks often must obtain elaborate legal opinions to navigate the complex laws governing which fees and charges constitute interest.

SJR 21 would grant sophisticated borrowers the freedom to structure loan deals with proper incentives to compensate banks with reasonable rewards for the risk they assumed. This change would not remove the protections of rate ceilings for less sophisticated borrowers because the Legislature, as demonstrated in the reasonable criteria set forth in HB 955, still would exercise judgment in determining eligibility criteria for which commercial loans would receive interest-ceiling exemptions. In addition, regardless of whether or not Texas institutes such exemptions, out-of-state banks and commercial lenders still would have the ability to contract with small, commercial borrowers according to the rate standards in accordance with laws from their home states.

## Opponents said

The interest-rate ceilings in the Texas Constitution and statutes create a protection from usurious lending practices. While some commercial borrowers have the sophistication to enter into complex loan agreements, not all commercial loans are obtained by sophisticated borrowers. Certain borrowers may not recognize the implications of all the terms included in a loan contract and often do not possess adequate resources to subject the contract to legal review prior to signing. The exemption criteria included in HB 955 is based upon the loan amount, and the size of a loan is not

always an accurate measure of borrower sophistication. Even though HB 955 sets forth exemption criteria to protect less sophisticated borrowers, SJR 21 would open the door for the Legislature to change these criteria in the future. Texas should not follow the dangerous lead of other states that have exempted all commercial lending from interest-rate ceilings.

## Notes

The **HRO analyses** of SJR 21 and HB 955 appeared in Part One of the May 9 *Daily Floor Report*.



# Elections

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# Limiting uniform election dates to May and November

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**HB 57 by Denny**  
***Effective October 1, 2005***

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**HB 57** eliminates two uniform election dates – the first Saturday in February and the second Saturday in September – and moves the uniform election date in May from the first Saturday to the second Saturday. General and special elections are required to be held on either the uniform election date in May or the uniform election date in November, which is the first Tuesday after the first Monday.

The exception for bond elections for education institutions is eliminated, and those elections now must occur on uniform election dates in May or November. The period for early voting by personal appearance for an election held in May must begin on the 12th day before election day and continue through the fourth day before election day. Finally, the time for local canvassing for the May election date is delayed to account for the receipt of overseas ballots.

## Supporters said

HB 57 would make voting more convenient, increase public awareness of elections, and reduce the costs of holding elections. Texas has 254 counties, more than 1,000 school districts, and more than 1,000 cities, as well as many other political subdivisions. Each of these entities hold elections, and all can be held on different dates. Texas has so many elections that voters have “turnout burnout” and are staying away from the polls, even though Texas has a two-week early-voting period with accessible and convenient voting locations. Limiting uniform election dates would help alleviate voter fatigue.

School district elections held on non-uniform dates in large districts have cost more than \$180,000 per election, and a city election in Dallas held on a non-uniform date in early 2000 cost \$1.1 million. Reducing the number of uniform dates would encourage political subdivisions to combine elections and could result in significant savings for some local governments.

Current election law allows an exception to the uniform date requirement for school and college districts to hold elections to levy taxes or issue bonds. These elections are costly and often are not well publicized, which tends

to restrict voter turnout to those with a vested interest in approving the bonds. The exception has been removed for every other governmental body except school districts, and it has not proved to be a hardship.

Moving the May election date one week later would address concerns of elections administrators regarding the potential for conflict in even-numbered years between the primary runoff election, which is the second Tuesday in April, and early voting for the May uniform election date.

## Opponents said

HB 57 would remove local control from school boards and other local entities by eliminating their ability to hold elections when needed. School districts that are experiencing dramatic enrollment increases must be able to respond to the needs of the community, and bond funding is an important way to address rapid growth.

Many school districts choose to hold bond elections on either the September or November uniform date or on a non-uniform date during the months before winter break. Similarly, many districts use the February date or a non-uniform date in the spring because students are in school and the community is more likely to be informed and involved. School districts should continue to be able to determine what election date best corresponds to local needs.

An issue as critical as setting aside tax money for debt service sometimes should be a single-focus issue. Allowing school districts to hold bond elections on non-uniform dates enables voters to devote their full attention to the specifics of the bond campaign. Advocates on both sides of bond issues especially would have difficulty reaching voters in the midst of electioneering that accompanies local, state, and federal elections.

## Notes

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

# Defining and clarifying political contributions and expenditures

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## HB 1348 by Eiland *Died in House committee*

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**HB 1348** would have made various revisions to the Election Code provisions concerning political contributions and expenditures. It would have specified that a political party that accepted authorized corporate or union contributions could use those contributions only for its own administrative expenses, for administration of a primary election, for the establishment or administrative expenses of a convention held by the party, or for expenses related to redistricting. A political party would have had to maintain these funds in a separate account and pay vendors directly from that account.

The bill would have raised the threshold for reporting individual, independent expenditures in an election from \$100 to \$1,000. It would have defined what constituted coordination resulting in attribution of a third-party expenditure as a contribution to a candidate, political committee, or political party.

The current corporate campaign prohibition would have applied to any entity with a parent, subsidiary, or affiliate under the Texas Business Corporation Act, the Texas Non-profit Corporation Act, federal law, or law of another state or nation. HB 1348 would have clarified that a corporation, labor organization, or membership organization could use treasury funds to communicate with their restricted class and conduct non-partisan voter registration drives and get-out-the-vote campaigns aimed at that group.

A “restricted class” would have been defined as the group of individuals who could be solicited for contributions. For a corporation, this would have included its employees, stockholders, and their respective families; for a union, its members, employees, and their respective families; for a membership organization, its members, employees, and the employees’ family members.

The bill would have provided explicitly for when a corporation, labor organization, or membership organization could use its funds for administrative expenses. A related organization could have solicited only its own restricted class with its funds. A corporation or labor organization could not have made more than two written solicitations for contributions in one calendar year to employees who were not stockholders, executive or administrative personnel, or their respective families. Current law prohibiting

a corporation or labor organization from making a contribution for 60 days before a general election for state and county officers also would have applied to a primary election.

The bill would have authorized the Texas Ethics Commission to adopt rules to implement the legislation and to ensure that corporate or labor organization funds were not used for political activity in circumvention of these provisions.

The bill would have defined several terms to be consistent with federal law. “Administrative expense” would have been an expenditure incurred in the normal course of business, including for office space, phones, supplies, and utilities but not for political activity. “Direct campaign expenditures” would have included express advocacy and electioneering communications that were not made in coordination with a candidate or political committee. “Electioneering communication” would have included broadcast ads, mass mailings, and telephone banks that referred to an identified candidate that were publicly distributed within 60 days of a general election or 30 days of a primary, and that targeted the candidate’s electorate. “Express advocacy” would have been a communication that referred to a candidate and expressly advocated the election or defeat of the candidate.

## Supporters said

HB 1348 would clarify and modernize current law to strengthen the state’s 100-year prohibition against the use of corporate money and union funds in political campaigns, mostly by adopting well established federal standards. The bill would ban corporate-funded “issue ads” that target candidates 60 days before a general election and make clear that donations from political action committees or individuals used for political attack ads must be disclosed. Under the legislation, any direct-mail or broadcast ads funded by corporate or union money would be prohibited within 30 days of a primary election and 60 days of a general election if they clearly targeted a candidate – even if the mailing or ad did not ask a person to vote a certain way.

## Opponents said

HB 1348 contains vague terminology and would be overly broad for such a complex issue. Under the legislation, voter guides and newsletters of advocacy groups could be prohibited, and the restriction on corporate and labor organization speech could infringe upon First Amendment rights. The public would be better served by an interim study to further clarify the bill's provisions.

## Other opponents said

The bill would not stop last-minute attack ads financed by wealthy individuals or remove the influence of large donations from state politics. It should include limits on political contribution amounts, as under federal law.

# Requiring voters to present proof of identification at polling places

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**HB 1706 by Denny**  
***Died in the Senate***

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**HB 1706** would have required a voter to present to an election officer at the polling place his or her voter registration certificate and either one form of specified photo identification or two different forms of specified non-photo identification. If the voter's name was on the precinct list of registered voters or if the voter was eligible under other existing eligibility provisions, and if the voter's identity could have been verified from the identification presented, the voter would have been accepted for voting without a voter registration certificate. An election officer could not have considered whether the voter's address on the voter's identification forms matched the voter's address on the voter registration certificate or the list of eligible voters.

The bill would have modified the list of acceptable proof of identification, specifying acceptable forms of photo identification and acceptable forms of non-photo identification. A county commissioners court could have authorized the county elections administrator or the county clerk to issue photo identification cards for use as proof of a voter's identity.

The bill would have allowed a voter who did not show either the specified photo identification or two forms of non-photo identification to cast a provisional ballot if the person executed a provisional ballot affidavit. Proof of identification would have been added to requirements for a provisional ballot to be accepted by the early voting ballot board. A voter accepted for provisional voting could have submitted proof of identification to the voter registrar not later than the fifth day after the date of the election. The office of the voter registrar would have been open on a Saturday within the five-day period in which the voter had to present identification. The secretary of state would have prescribed procedures as necessary to implement identification provisions for these voters who were accepted for provisional voting.

The presiding election judge would have posted in a prominent location on the outside of each polling place notice that a provisional ballot would be provided to a person who executed the appropriate affidavit and a list of the acceptable forms of photo and non-photo identification.

The notice would have had to be printed in English, Spanish, and any other language appropriate to the polling place's precinct and in at least 24-point type.

The bill also would have prohibited the Department of Public Safety (DPS) from collecting a fee for a personal identification certificate issued to a person who executed an affidavit stating that the person was financially unable to pay the required fee, who was a registered Texas voter and presented a valid voter registration certificate, or who was eligible for voter registration and submitted a voter registration application to DPS.

## Supporters said

HB 1706 would increase public confidence in voter registration rolls and election outcomes and help prevent voter fraud. No statutory provisions now provide for verifying the identity of those who present voter registration certificates at polling places, and the bill would close a potential loophole for fraud. More situations in everyday life require photo identification, including traveling on airplanes and cashing checks. It is time to conform the voting system to provide identity protection.

Voters with voter registration cards would have to show photo identification from an acceptable list or show two forms of acceptable non-photo identification. A voter without a registration card but on the registered voter list still could vote by presenting the required identification – in most cases, a Texas driver's license. Those unable to present the required identification could cast provisional ballots by completing a related affidavit. The bill would not result in voters being turned away from the polls.

The bill would not be an onerous burden on Texas voters. According to the National Conference of State Legislators, five states now require some form of photo ID for voter identification, and 14 more require proof of identification that does not necessarily include the voter's picture. In addition, by authorizing DPS to issue personal identification cards without a fee to those unable to pay, the bill would assure inclusion of the state's diverse voting population.

## Opponents said

HB 1706 would address a perceived problem for which there is no evidence – identification fraud at polling places by registered voters. Anecdotal reports of voter fraud in other settings have not involved registered voters with valid voter registration certificates, and no one has produced evidence of eligible voters falsifying identities at polling places. Rather than combatting voter fraud, the bill's onerous requirements would disenfranchise some eligible voters.

The bill would discourage some voters by creating long lines at the polls as election officials were required to verify more forms of identification. In addition, a prospective voter without the specified forms of identification who went home to retrieve acceptable identification, assuming he or she possessed it, might face even longer lines upon returning to the polling place. While such a voter could cast a provisional ballot under this bill, a voter who has voted faithfully for many years by presenting a voter registration card should not be left to wonder whether the provisional ballot actually would count.

While citizens are required to show proof of identification in situations ranging from flying on an airplane to renting movies, none of those is a constitutional right and only one ID is necessary in such settings, not two or three as this bill could require. Also, when the state of Texas accepted federal Help Americans Vote Act (HAVA) funds, it agreed to certain conditions. As written, these bills could jeopardize additional HAVA federal funds for Texas, estimated at \$103.2 million.

## Other opponents said

HB 1706 would be impractical and difficult to enforce. Mandating that every person who appears at a polling place to vote have specified proof of identification – beyond a voter registration card – would be a major departure from current law. A grace period of at least one election would be needed to educate election workers and voters. Even that might not be sufficient time to change habits among voters accustomed to needing only voter registration certificates to vote at the polls.

With respect to the list of acceptable non-photo IDs, a variety of official documents are issued to people under age 18, including library cards, temporary driving permits, and junior hunting or fishing licenses. By recognizing these forms of ID, the bill could generate more problems with voter eligibility and underage voting than it would solve.

## Notes

The **HRO analysis** of HB 1706 appeared in Part Two of the April 19 *Daily Floor Report* and Part Two of the May 2 *Daily Floor Report*.

The House-passed version of SB 89 by Averitt, which died in conference committee, contained similar requirements with regard to the presentation of voter identification at a polling place. In addition, it would have permitted election officers to access electronically readable information from driver's licenses to determine a voter's identity. As amended on the House floor, the bill would have allowed a business to access the electronic information to verify the identification of an individual or the validity of a check at the point of sale.

# Residency eligibility to be a candidate for or to hold public office

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## HB 2030 by Nixon *Died in the House*

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**HB 2030** would have established residency requirements to be eligible to hold or be elected to public office. It would have applied to public offices established under state law, including offices of political subdivisions. A person would have been considered a resident of a territory if the person had maintained a principal, regular place of residence in that territory at a specified time or throughout a specified period. A person's stated intent to reside at a place other than the individual's principal, regular place of residence would not have determined residency.

A person would not have been considered a resident of a territory if:

- the person received a residence homestead exemption from ad valorem taxes for a residence outside the territory, unless the person acted to cancel the exemption;
- the person was registered to vote at a residence outside the territory, unless the person acted to change the registration to a residence in the territory; or
- at the specified time or period, the person identified the address of a residence, other than the person's business address, outside the territory as the person's residence address, or failed to identify a residence address in the territory as required, on one of the following: a tax document the person filed with a governmental entity, on any other document the person submitted to a governmental entity for any purpose, or on a document submitted to a political party in connection with the person's status as a candidate for public office.

The homestead exemption requirement would not have applied for one year after the election of a person to an office if the person previously met residency requirements for election and no longer met requirements as a result of the redrawing of districts used to elect a person to the Legislature or the governing body of a political subdivision.

HB 2030 would have required a candidate to have lived in Texas for two years and in the territory from which the office was elected for 12 months to be eligible for office. An eligible candidate could not have been convicted of

providing false information on a ballot application in the previous 24 months. The bill would have lengthened residency requirements from 12 months to two years for home-rule city office holders and candidates from areas that recently had undergone redistricting.

Candidates would have had to sign affidavits stating that they were not currently violating the constitution or laws of the United States or Texas. Providing false information would have been an offense punishable as a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000).

## Supporters said

HB 2030 would ensure that elected officials represented the territories in which they actually lived. The bill would establish qualifications and standards for determining whether a candidate or office holder could be considered a resident and would encompass state and local elections. It would define two important factors in deciding residency – physical conduct and intent. Residency would be fixed when those two elements coincided. Rather than relying on case law, the bill would provide a statutory standard to determine residency. It is designed not to conflict with the Election Code and would apply to several other statutes in the Water Code, Election Code, and other codes affecting elected officials.

## Opponents said

No one-size-fits-all pattern fits the residency issue. The courts have long reviewed residency for office holders and candidates on a case-by-case basis and examined the issue as a matter of both presence and intent. The provision in HB 2030 declaring that "The person's stated intent to reside at a place other than the individual's principal, regular place of residence does not determine whether the person resides at that other place," would pose constitutional problems. Federal courts have rejected attempts to fix residency regardless of intent, and Texas courts have rejected using homestead or homestead exemptions in determining residency.



## Other opponents said

The provision in HB 2030 related to receiving a homestead exemption could favor a person without a homestead who thus would not be held to that standard. Because it would not treat prospective candidates or office holders equally, it could raise discrimination issues.

The candidate affidavit requirement is overly broad and should be refined. As written, it would require candidates for office to sign an oath stating that they were not currently violating the constitution or laws of the United States or Texas. The implications of such an oath could encompass many circumstances not contemplated by the bill.

## Notes

The **HRO analysis** appeared in Part One of the May 11 *Daily Floor Report*.

# Return of marked, early mail ballot from a voter without application

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**HB 2405 by Keel**  
***Died in Senate committee***

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**HB 2405** would have prohibited counting a marked ballot voted by mail from a person who had not applied for that ballot. A person would have committed a class C misdemeanor (maximum fine of \$500) if, with the intent that an unlawful ballot be cast, the person had directed the return of a marked, early mail ballot with the knowledge that the ballot was from a voter who was not entitled to receive a mail ballot. The bill would have instructed the early voting clerk to include with the balloting materials a notice prescribed by the secretary of state informing the voter of the categories of people eligible to vote by mail and stating that the voter should not cast the ballot unless the voter, or a person authorized by the Election Code to assist that voter, requested the ballot.

## Supporters said

HB 2405 would create a penalty for intentionally directing a person to vote a ballot by mail if that person had not applied for the ballot, thus establishing an enforcement mechanism for a practice already prohibited. More reports of fraud related to early voting by mail are cropping up. If the elections process in Texas is to have integrity, the state must be able to punish fraudulent voting by mail.

The Election Code makes it expressly clear that a person who has not applied for an early ballot by mail is not entitled to receive a mail ballot, regardless of whether the voter meets one or more eligibility requirements. In recent elections, however, evidence has surfaced that the law has been interpreted to allow such mail ballots to be cast and counted, despite voters' ineligibility to receive them in the first place. To protect unsuspecting voters, the bill would require a prosecutor to show that a person who directed the

return of a marked, early mail ballot with the knowledge that the mail ballot was from a voter not entitled to that ballot had the intent to cast an unlawful ballot.

HB 2405 further would reduce the chance of ensnaring innocent voters by requiring early voting clerks to include with the balloting materials information prescribed by the secretary of state on the categories of those eligible to vote by mail and a statement that the voter, or a person authorized by the Election Code to assist that voter, should not cast that ballot unless the voter or the authorized person requested it.

## Opponents said

If a sizeable number of voters who did not request mail ballots are receiving them, the problem lies with county clerks and elections administrators, not with voters. These officials should be trained to watch for signature discrepancies and other irregularities because confusion surrounding procedures for requesting and accepting mail ballots likely will increase with time. For example, the federal Help America Vote Act (HAVA) contains provisions stipulating that voters cannot be questioned if they identify themselves as disabled, which will likely increase the number of voters who use mail ballots. The best approach to avoid future problems is to educate election officials.

## Notes

The **HRO analysis** appeared in Part Two of the April 18 *Daily Floor Report* and Part Two of the May 2 *Daily Floor Report*.



# Environment

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# Standards for compliance histories of TCEQ-regulated entities

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**HB 86 by W. Smith**  
***Died in the Senate***

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**HB 86** would have repealed the classification system implemented in 2001 that ranks entities regulated by the Texas Commission on Environmental Quality (TCEQ) according to their compliance histories based on a formula. TCEQ no longer would have been required to classify regulated entities into the categories of “high,” “average,” and “poor” based on compliance history. TCEQ would have evaluated compliance histories using varying standards, including the size of a regulated entity and any violations. Individualized criteria also would have been used in determining if an emissions event were excessive.

The bill would have changed the definition of “repeat violator” to include only entities that committed violations of the same nature in the same environmental media rather than entities that had committed any repeated violations. “Repeat violators,” unlike other regulated entities, would have been denied the chance to correct violations after receiving notice. TCEQ would have included notices of violations only as part of the compliance histories of “repeat violators.”

HB 86 would have allowed regulated entities to use alternative pollution control or abatement methods that were as protective, rather than more protective, of the environment and public health than the standard prescribed by law.

Compliance history information held by the federal Environmental Protection Agency (EPA) about a regulated entity would have been used by TCEQ only when readily available, and violations in other states no longer would be included in an entity’s compliance history. TCEQ would have had to notify entities before displaying their compliance history information on its website, giving an entity time to review the accuracy of the information.

## Supporters said

TCEQ’s current way of evaluating compliance history is unnecessarily restrictive and prevents the agency from assessing compliance histories on a case-by-case basis. TCEQ’s use of a uniform standard for all regulated

entities creates a bias against small businesses as they do not have the same resources nor do they cause as much environmental damage as large industries. HB 86 would eliminate the bias against small businesses by allowing TCEQ to consider important factors when evaluating compliance history, including an entity’s size and the magnitude of the environmental impact of any violations.

The definition of “repeat violator” now used is overly broad and does not target only entities that commit the same violation on more than one occasion. A “repeat violator” should be an entity that repeats an identical violation in the same environmental medium rather than any entity that has more than one serious violation. For example, an entity that failed to obtain an air permit and later failed to obtain a water permit should not be considered a repeat violator because the violations involved different environmental media.

## Opponents said

HB 86 would decrease the regulatory authority of TCEQ by excluding notices of violations from most entities’ compliance histories and by relaxing restrictions on polluters. Notices of violation are a vital component of compliance history and should not be eliminated. Including them in compliance history allows permit reviewers, inspectors, and citizens to recognize patterns of repeat notices of violation. HB 86 also would allow polluters that repeatedly violate the agency’s rules to avoid classification as “repeat violators.” The bill further would assist polluters by permitting them to use alternative pollution control or abatement methods not proven to have a better impact on the environment and public health than the standard prescribed by law.

## Notes

The **HRO analysis** appeared on the March 16 *Daily Floor Report*.

# Revising the Texas Emissions Reduction Plan

**HB 2481 by Bonnen**

***Effective September 1, 2005***

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**HB 2481** extends the Texas Emissions Reduction Plan (TERP) until 2013, revises the plan's funding structure, requires the Texas Commission on Environmental Quality (TCEQ) to adopt new federal Environmental Protection Agency (EPA) rules, and establishes rebate programs to streamline TCEQ's emissions-related grant programs.

***Allocation of TERP funds.*** HB 2481 changes the allocation of TERP funding by increasing the portion of TERP funds used for research and development. Beginning in 2008, 64 percent of TERP funding will be directed toward reductions in diesel emissions and 33 percent will be used for research and development. Until 2008, TERP funding will maintain the current allocation of 87.5 percent for diesel reductions and 9.5 percent for research and development.

The bill requires at least 10 percent of research and development funds to be used to support air quality research in the Houston-Galveston-Brazoria (HGA) and Dallas-Fort Worth (DFW) areas, where emissions exceed federal standards. A minimum of 25.5 percent of the HGA and DFW research is reserved for a Houston-based technology research nonprofit organization charged with responsibility for administering the new technology research and development program. The bill gives a representative of the Houston-based non-profit a seat on the TERP advisory board.

***TERP Title Transfer Fees.*** Beginning in 2010, a \$28 title transfer fee will be assigned to applications for certificate of titles in all counties of the state. Between 2008 and 2010, \$5 of the title transfer fee will continue to be deposited in the TERP account. In 2010, title transfer fees will be deposited entirely into the Texas Mobility Fund instead of the TERP account.

HB 2481 establishes rebate programs designed to streamline TCEQ's emissions reductions grant programs.

***EPA Clean Air Interstate Rule and Clean Air Mercury Rule.*** HB 2481 requires TCEQ to implement the EPA's Clean Air Interstate Rule and Clean Air Mercury Rule. The Clean Air Interstate Rule is designed to reduce emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>), and the Clean Air Mercury Rule is designed to reduce utility emissions of mercury. Each program works through a cap-

and-trade system by which the EPA allocates emissions allowances to the state. The state then distributes the allowances to sources of emissions (i.e., power plants or utilities), which can trade them. The bill creates additional restrictions that specifically pertain to NO<sub>x</sub> emissions.

## Supporters say

By prioritizing investment in cutting edge, emissions-reducing technologies, HB 2481 would facilitate complying with federal air quality standards. Increasing the state's investment in the development of new emissions-reducing technology has proven to be a cost-effective strategy in combating air pollution. State funding for research and air planning activities has yielded optimum results in developing science-based, practical, economically viable state implementation plans for non-attainment areas and air planning activities for near-non attainment areas. The availability of more efficient emissions technologies on the market would save the state money by reducing the cost per ton of emission reductions.

HB 2481 significantly would increase the bonding authority of the Texas Department of Transportation (TxDOT) by requiring that title transfer fees be temporarily deposited in the Texas Mobility Fund. The additional leveraging authority given to TxDOT could help relieve the state's current congestion crisis. The bill simultaneously would benefit TCEQ and TxDOT by providing funding for TERP and allowing TxDOT to finance needed transportation projects around the state.

## Opponents say

The bill's incremental approach to investment in research and development of new technologies would not be substantial enough to bring Texas into compliance with EPA standards in 2010. The bill would not increase funding for research and development until 2008 – leaving little time to develop new emissions-reducing technologies. Further, the provisions of the bill would not be strong enough to bring the HGA area into compliance with the EPA's new eight-hour ozone standard. Texas has a long way to go before meeting EPA standards on air quality, so the majority of

TERP funds should continue to be used to fund emission reductions, not research. If Texas failed to comply with federal standards, the state could risk losing vital federal highway funding or suffering restrictions on industrial development in major metropolitan areas.

## Notes

The **HRO analysis** appeared in the April 27 *Daily Floor Report*.

HB 3469 by Hochberg, effective June 17, 2005, establishes a grant program for projects to reduce emissions of diesel exhaust from school buses by way of the TERP if money is available after allocations from the fund

have been made for other purposes required by the State Implementation Plan (SIP). HB 1611 by Chisum, effective June 18, 2005, creates a sub-account within the clean air account in an amount not to exceed \$20 million, with funds available but otherwise not appropriated for vehicle repair and retrofit to fund programs to improve air quality. SB 784 by Shapleigh, effective September 1, 2005, authorizes TCEQ to allow substitution of emissions reductions either if reduction of emissions of one air contaminant for which an area is designated non-attainment are substituted for reduction of emissions of another air contaminant for which the area is designated non-attainment, or if the TCEQ finds the reduction clearly will result in greater health benefits for the community than would reductions at the original facility. Previous law required the TCEQ to meet both standards. HB 2481 also includes this provision.



# Revising regulatory takings to include impervious cover restrictions

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**HB 2833 by R. Cook**

***Died in the Senate***

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**HB 2833** would have specified that a taking of private property by a governmental entity could result not just from a governmental action but from a series of governmental actions. Governmental actions resulting in a taking would have included those that limited impervious cover – surfaces that prevent the infiltration of water into the soil – to less than 45 percent of a property’s surface area, excluding land within the 100-year floodplain and lands sloping 35 percent or more.

The bill would have removed an exemption for municipal actions, including actions that imposed regulations on a city’s extraterritorial jurisdiction but not on the city itself. It would have retained exemptions for certain actions when they did not affect building size, lot size, or impervious cover, including municipal regulations of sexually oriented businesses, fireworks, noise, and smoking, among other matters.

HB 2833 would have required impact assessment statements to be made before governmental actions were taken and would have provided recourse for the public to ensure impact assessments complied with attorney general guidelines.

Under the bill, a suit or a contested case would have to have been filed not later than two years from the later of the date on which a governmental action was enforced and affected private real property, the date on which a governmental action was enforced and affected a permit application on the property, or September 1, 2005.

## Supporters said

HB 2833 would strengthen takings provisions for land owners when certain regulations unfairly devalued their property. Municipal regulations continue to impose restrictions on the use and development of private property, despite federal and Texas constitutional protections with respect to the taking of private property by government entities. The bill would not prevent a city from applying any regulations deemed necessary to protect public health and safety.

Through technological advances, development – specifically, impervious cover – can take place while preserving environmental quality. Engineered storm water retention/detention systems can help maintain water quality, regardless of impervious ground cover, to protect water quality downstream.

Property owners should not have to bear the costs of regulations imposed to support the public good. Cities already issue bonds and purchase mitigation lands to prevent hazards and protect the public. Private property owners should not be required to subsidize what government already can do with tax dollars.

Expanding use of impact assessments would save the state money in the long run by preventing actions that could require compensation. While finding that a governmental action was a taking could keep a regulation from being enforced until compensation was made, the process of proving a government action had reduced property value and was cause for compensation could be difficult. Under such circumstances, a property owner and a regulatory agency might well be more inclined to negotiate on the regulation and agree upon a less intrusive means of accomplishing regulatory goals.

## Opponents said

HB 2833 would create a new cause of action for regulations to preserve environmental standards and drinking water quality. Many city ordinances, including some adopted by Austin, Buda, and San Antonio, that limit impervious cover on environmentally sensitive areas would amount to takings of property requiring compensation at market value.

Raising impervious ground cover limits would endanger stream flow, groundwater recharge, stream banks, and water quality. Safe drinking water supplies could not be maintained at 45 percent impervious cover. Pollutants would increase, even with engineered water quality controls. Storm flow – the volume of water flowing during storms – would increase, as would erosion and flooding. Base flow, water that flows between storms, could decrease, preventing water from reaching the recharge zone.

The bill would reverse protections for water sources such as the Edwards Aquifer. The aquifer's unique geology increases its vulnerability to pollution. Regulations on surrounding land owners may seem severe, but preserving the aquifer's water quality is essential for the 1.5 million people who depend on it for drinking water. It also provides fresh water flows for rivers that feed bays and estuaries along the Texas coast, supporting fish, wildlife, and economic activity. Even with structural controls, pollution could enter the aquifer. Relying on structural controls would require a political subdivision's maintenance and upgrades, which could increase fees to developers.

The bill would hamper a city's ability to regulate land use to protect property values. In cities such as Austin, where impervious cover limits have been adopted, the bill would invalidate voter initiatives instituted by the public. HB 2833 would require a city to pay for enforcing regulatory protections for which city residents hold government responsible. City residents depend on regulation to protect drinking water. While the bill would

not prevent cities from enforcing regulations, it would make enforcement prohibitive and coerce cities into diluting regulatory protection. Cities would have to pay landowners not to pollute water.

Cities would have to pay for more public notices and impact assessments, providing 30 days' notice by publication in a newspaper of a governmental action that could result in a regulatory taking. The bill would require impact assessments for regulations that might reduce property value, which would be administratively and fiscally demanding on local governments and would penalize cities for proposing routine regulations. Some cities could afford the increased costs, but others would have to forego regulatory enforcement. With weakened ability to regulate land use, property values would decrease.

## Notes

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

# Allowing redesignation of river basins based on scientific evidence

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## HB 2915 by Puente *Died in the House*

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**HB 2915** would have allowed the Texas Water Development Board (TWDB) to redesignate a river basin based on scientific or hydrologic evidence, whether or not such a redesignation facilitated the transfer or diversion of water.

### Supporters said

By specifying that TWDB could redesignate river basins when there was a sound hydrologic basis for doing so, HB 2915 would clarify that state law restricting interbasin transfers of surface water was based upon accurate scientific data. When defining the parameters of a river basin, TWDB bases its determination on the extent to which an area is linked hydrologically. If water in a region flows into a single watershed that empties into the Gulf of Mexico, that watershed is designated as a single river basin. However, years ago the determination was made to classify the Guadalupe and San Antonio river basins separately, even though they are linked hydrologically. The current designation contradicts policy governing river basin classification across the state, and HB 2915 would correct this inconsistency.

Current law requires a person to apply to the Texas Commission on Environmental Quality (TCEQ) before diverting water from one river basin to another. Upon receiving an application for an interbasin transfer, TCEQ must hold public hearings and review the effect of such a transfer on factors such as the economies of both basins, existing water rights, and bays and estuaries. TWDB is prohibited from redesignating a river basin in order to allow a transfer of water that otherwise would violate provisions governing interbasin transfers. An application is pending that would divert water from the Guadalupe River basin into

what currently is the San Antonio River basin, and TWDB has interpreted the law to prevent it from redesignating these two basins as one. Without direction from the Legislature, the current designation would continue, even though this designation does not reflect the hydrology of the Guadalupe and San Antonio rivers.

### Opponents said

HB 2915 would allow for circumvention of current laws restricting interbasin transfers, a pillar of state water policy. Redesignation of the San Antonio and Guadalupe rivers as one basin would enable diversions from the Guadalupe to go forward without meeting the public hearing and evaluation requirements in current law. The bill would provide an end-run around the reviews, studies, and junior water rights protections established by the Legislature to protect water rights holders and residents in the Guadalupe River basin.

### Other opponents said

The bill should be amended to protect instream flows in the unified river basin. Freshwater flows from the Guadalupe River are vital to the unique ecological balance in bays and estuaries along the coast. Specifying a minimum flow in case of drought could address many of the environmental and other concerns associated with the project.

### Notes

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

# Developing, managing, and conserving water resources

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## SB 3 by Armbrister *Died in the House*

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**SB 3**, as reported by the House Natural Resources Committee, would have made comprehensive changes in state water policies concerning environmental flows, water conservation and planning, and water project financing. It also would have modified the Edwards Aquifer Authority and created two new groundwater districts.

***Environmental flows.*** SB 3 would have established a system for evaluating and setting aside in-stream surface water flows in watersheds throughout the state.

The bill would have established an Environmental Flows Commission (EFC) that would have issued a report to the governor with recommendations on environmental flows. EFC recommendations would have been based upon recommendations for environmental flow protection made by an environmental flows Science Advisory Committee (SAC).

Under the bill, the EFC would have defined geographically each river basin and bay system for the purpose of developing environmental flow recommendations. For each river basin and bay system, the EFC would have appointed a stakeholders' committee consisting of representatives from such interests as agriculture, municipalities, water districts, commercial fishermen, environmental interests, and recreational water users, among others. This stakeholders' group would have appointed an expert science team to submit environmental flow recommendations. Each expert science team would have recommended an environmental flow regime based solely on the best science available, without regard for other water use needs. The Texas Commission on Environmental Quality (TCEQ) would have adopted environmental flow standards based on those recommendations and would have determined the amount of unappropriated water to be set aside for environmental flow standards.

TCEQ could not have issued a new water right that would impair an environmental flow set-aside, but the agency could have adjusted a permit for a new water right or amendment to an existing water right to protect instream flows or freshwater inflows. This provision would not have affected any water right or amendment issued before September 1, 2005.

***Water Conservation and Planning.*** A retail public utility providing potable water service to a population of at least 3,300 would have been required to submit to the Texas Water Development Board's (TWDB) chief administrator a water conservation plan that was consistent with minimum requirements adopted by TWDB and TCEQ.

TWDB would have been required to implement a statewide public awareness program to educate Texas residents about water conservation. TCEQ would have been required to contract with a private vendor, at no cost to the state, to install electronic water conservation systems on toilets, sinks, and showers in state buildings. Private vendors would have had to demonstrate that water conservation systems would result in an annual cost savings of at least 50 percent of current costs.

A municipality with a population of 5,000 or greater would have had to require an irrigation system installer to hold a license and obtain a permit prior to installing a system in the municipality or the municipality's extraterritorial jurisdiction. Such a municipality also would have been required to establish minimum standards for irrigation systems.

A change in the purpose and place of use under an historic or existing-use permit could not have been made without a permit amendment. In addition, the bill would have prevented a groundwater district from discriminating between an owner of land that was irrigated for production and a landowner participating in a federal conservation program.

The bill would have established a stakeholder committee to study management of groundwater underneath state-owned lands. The committee would have made recommendations to the Legislature regarding appropriate management techniques and availability of groundwater under such lands.

For applications for funds to implement water supply projects in the state water plan, TWDB would have given priority to entities that had demonstrated significant water supply savings or that would achieve savings by implementing the project for which funding was sought.

**Financing of water projects.** SB 3 would have established a Legislative Oversight Committee on Water Financing to study the implications of a water conservation and development fee as a source for funding water infrastructure.

**Edwards Aquifer Authority.** The amount of permitted withdrawals from the Edwards Aquifer could not have exceeded the sum of all regular permits issued or for which an application had been filed and issuance was pending as of January 1, 2005.

The Edwards Aquifer Authority (EAA) would have adopted a critical period management plan with withdrawal reduction percentages that would have reduced the amount of withdrawals from the aquifer during varying stages of drought.

The EAA could not have allowed withdrawals beyond specified levels during serious droughts unless the EAA determined that a different volume of withdrawals was consistent with maintaining protection for endangered species as required by federal law.

**Creation of groundwater districts.** The bill would have created two new local groundwater conservation districts, the Victoria County Groundwater Conservation District and the Val Verde County Groundwater Conservation District.

## Supporters said

**Environmental flows.** SB 3 would mark an historic step toward protecting the environment by dedicating instream flows for rivers and freshwater inflows for bays and estuaries. Currently, no state law provides designated protection to ensure minimum flows in rivers and into bays and estuaries. Instead, priority is given to other uses such as agricultural, commercial, and residential uses. Water rights in several river basins have been over-permitted, and other basins likely will follow suit. SB 3 would provide a means to balance agricultural, commercial, and residential needs with important environmental considerations.

In order to determine standards and set-asides for environmental flows, the bill would establish a consensus-based process relying upon the best available science to determine the amount of flows needed for environmental considerations. Because water is a vital resource for so many diverse interests, it is important that the environmental flow planning process be as inclusive as practicable.

The planning process established under SB 3 would establish set-asides in rivers where unappropriated water still exists. The bill would not infringe on the water rights of existing water holders. It would include protections for other beneficial uses in case a drought or other emergency required diversion of environmental flows.

**Water conservation.** The bill would establish and expand several important programs to encourage conservation of water resources in the state. It would recognize the importance of such strategies as private land stewardship and residential conservation measures, while moving cities toward more efficient use of the state's limited water resources.

The bill would prevent discriminatory treatment in the groundwater permitting process against landowners who placed their property in the federal conservation reserve program, an important conservation program that helps prevent overuse and improves the ecological balance of pastureland in the state.

**Water infrastructure funding.** By establishing a legislative oversight committee on water infrastructure financing, the bill would help future legislatures address pressing needs for funding water development. Texas has a rapidly growing population, and this committee could provide recommendations regarding how best to fund water infrastructure demands.

**Edwards Aquifer Authority.** The bill appropriately would balance environmental, residential, and other concerns with respect to the EAA. To protect environmental considerations, the bill would establish reduction requirements during critical periods of drought when springs were affected most severely.

## Opponents said

**Environmental flows.** SB 3 would establish an unnecessarily complicated tangle of bureaucracy. The bill would create two new statewide committees as well as stakeholder and science boards in every river basin and bay system in the state. The majority of members on these policymaking bodies would not be accountable to the voters in the way that elected officials are. These bodies would hold excessive power to seize water rights for what could be marginally important purposes.



**Water conservation.** CSSB 3 would place several unfunded mandates on local governments that would have to comply with the bill's extensive water conservation requirements. For example, water utilities would have to develop and abide by water conservation plans, and municipalities would have to regulate more extensively residential irrigation facilities and installers. It would be inappropriate for the state to mandate these requirements without providing the funds for their implementation.

The provision on nondiscrimination against conservation reserve program lands is unnecessary because current law sufficiently protects the water rights of landowners enrolled in a government program. Districts must consider idle land in a government program as agricultural land, preventing disparate treatment of these types of land.

**Water infrastructure funding.** Establishing a legislative oversight committee on water infrastructure financing could lay the groundwork for new taxes and fees for costly water projects. A water infrastructure fee is an idea that the Legislature repeatedly has rejected, yet this committee could serve as a vehicle to resurrect this discredited concept.

**Edwards Aquifer Authority.** The level of pumping from the Edwards Aquifer allowed under SB 3 likely would be unsustainable over the long term. Although the bill would incorporate important reductions in pumpage during drought periods, it would be better for the aquifer ecologically and hydrologically if a lower level of regular pumping were allowed.

## Notes

The **HRO analysis** appeared in the Part Three of the May 24 *Daily Floor Report*.

As passed by the Senate on April 29, SB 3 included several provisions relating to management of groundwater resources, including:

- providing remedies for interference with a domestic or agricultural well;
- requiring registration and reporting of water transactions;
- establishing training requirements for groundwater conservation districts; and
- establishing a groundwater management area council to coordinate the activities of groundwater conservation districts.



# Transfer to TCEQ of responsibilities concerning radioactive substances

**SB 1667 by Duncan**  
***Died in the House***

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**SB 1667** would have shifted jurisdiction from the Health and Human Services Commission (HHSC) and the Department of State Health Services (DSHS) to the Texas Commission on Environmental Quality (TCEQ) for the licensing and regulation of:

- the processing of low-level radioactive waste or naturally occurring radioactive material (NORM) waste received from other persons, except oil and gas NORM waste;
- the recovery or processing of source material;
- the processing of by-product material; and
- sites for the disposal of these regulated materials.

The Texas Railroad Commission would have licensed and regulated the possession, storage, processing, handling and disposal of oil and gas NORM waste and the decontamination and maintenance of oil-field equipment.

A licensee authorized to dispose of radioactive substances from other persons would have transferred 8 percent of its gross receipts from disposal operations to the state as general revenue and 2 percent to the host county. TCEQ could have held contested case hearings on license applications under the Texas Radiation Control Act only if an affected person filed a timely request regarding the renewal or amendment of a license if a requested change had constituted a major amendment. TCEQ could have issued, as a component of an injection well permit, authorization for *in situ* mining of radioactive substances in a specified area. The authorization could not have required additional approval by TCEQ or any additional hearing for the permit holder to conduct minor *in situ* mining in the production area.

## Supporters said

SB 1667 would consolidate regulatory powers over waste disposal under one agency, assure consistent regulations across the board, and ensure that the state and counties received more financial benefits from radioactive waste disposal, adding an estimated \$4,334,332 in general revenue over the upcoming biennium. The U.S. Nuclear Regulatory Commission (NRC) has cited the number of overdue inspections, vacant positions, and staff turnover

from the DSHS radiation program as the basis for its “heightened oversight” of Texas. Transferring the licensing and regulatory duties to TCEQ would address the issues cited by NRC and eliminate the threat of NRC’s resuming regulatory functions in Texas. If Texas lost “agreement state” status, it would increase administrative burdens and costs to businesses, which would discourage industry development in Texas.

The transfer of radioactive materials jurisdiction to TCEQ would provide for a more holistic regulatory approach because TCEQ would be equipped to address the disposal, geological, engineering, and safety aspects of the process. The timelines provided for the transfer would be adequate to meet the need to review thoroughly applications to ascertain their validity and adherence to public safety requirements. Ensuring efficient processing of applications would protect current applicants who should not have to encounter processing delays due to reorganization of the state’s licensing authorities.

The current process in Texas to obtain permits to mine uranium is unlike any other in the nation in that a business can do all that was required to obtain a permit to drill in a certain area yet later have permits denied to drill individual wells. An initial permit thoroughly reviewed by TCEQ should be enough for a company to carry out business within the parameters of the permit. The public still would have a mechanism to hold a contested case hearing if a major amendment were made to a permit that would change the outcomes of drilling for which the business initially applied.

## Opponents said

DSHS has an extensive history and greater expertise in regulating radioactive materials than does TCEQ. Duties should not be transferred at a time when TCEQ and DSHS are beginning to find a balance of authority in their respective areas of expertise, and the transfer could interfere with pending applications. An attempt to move programs from the Texas Department of Health (TDH) regulating radioactive issues in 1993 failed because the bulk of the staff with the expertise on radioactive matters remained with TDH. SB 1857 in 1997 reversed the transfer

of the by-product materials program primarily because the need was recognized to take advantage of the expertise in radioactive matters that remained with TDH.

The bill's deadlines would not provide enough time for the responsible transfer of powers and duties among departments and would rush the processing of pending license applications. This would include deadlines for decisions on applications pertaining to uranium mining waste recovery, low-level waste processing, and by-product disposal. Such a fast review of applications for a company to dispose of radioactive waste would be irresponsible and serve only the business interests of applicants.

The bill would eliminate the public's recourse to hold contested case hearings on minor in situ mining and would limit their ability to conduct all contested case hearings except on amendments deemed major. The public has a right to protect its health and should retain all proper protections to ensure it is not threatened by exposure to radioactive substances.

## Notes

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

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# Penalties for serving alcohol to minors

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**HB 1357 by Flores/HB 2868 by Frost**  
***Effective September 1, 2005***

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## ***Driver's license suspension***

**HB 1357** requires the automatic suspension of the driver's license of a person convicted of purchasing alcohol for a minor or supplying it to a minor. It also prohibits the Department of Public Safety (DPS) from issuing a driver's license to anyone convicted of these offenses. For a first offense, the driver's license is suspended for 180 days after the final conviction or cannot be issued for 180 days after an application for a license is made. A second offense results in a one-year suspension after the conviction or after the submission of a license application.

If a minor who is a repeat offender for certain offenses involving alcohol does not present to the court evidence showing successful completion of a required alcohol awareness program, the court must order DPS to suspend the minor's license or permit, or deny the issuance of such documents, for up to one year.

## **Supporters said**

HB 1357 would give the courts another tool to combat the problem of underage drinking. Studies show that minors most often get alcohol from adults, and current law making it a misdemeanor for adults to supply alcohol to minors is not a sufficient deterrent. Providing alcohol to minors, who often drive after drinking, is akin to giving them a lethal weapon. The seriousness of this offense and its key role in enabling underage drinking warrants suspending the driver's licenses of adults who provide alcohol to minors. At least four other states have enacted similar legislation.

The bill would not place an undue hardship on anyone who had a legitimate transportation need that could not be met except by driving. Current law includes procedures by which adults may request a provisional license from a court. The state has chosen in other situations to suspend driver's licenses for non-driving actions, including non-payment of child support by a non-custodial parent and conviction for graffiti-related offenses.

HB 1357 would change only the penalty, not what is considered a criminal offense or existing exceptions to the law. The current exception allowing parents to give alcohol

to their own children or to their underage spouses would remain, as would the laws allowing use of alcohol for religious or sacramental purposes.

## **Opponents said**

Adults who provide alcohol to minors already are subject to criminal penalties, which should be enforced. The state generally reserves the penalty of license suspension for offenses tied to driving, and obtaining a provisional license could be expensive and time consuming for adults who supplied alcohol to minors. Driver's license suspension also could make it difficult or impossible for such adults to perform necessary tasks, such as driving to work or taking family members to school.

## ***Civil liability***

**HB 2868** makes an adult 21 years of age or older liable for damages caused by the intoxication of a minor under the age of 18 if the adult knowingly served or provided alcohol to the minor or if the adult allowed the minor to be served or provided with alcohol on the adult's premises. This liability does not extend to the minor's parent, guardian, spouse, or an adult who has legal custody of the minor.

## **Supporters said**

HB 2868 appropriately would impose civil liability on an adult who knowingly served or provided alcohol to a minor and would help discourage such behavior. Parents who permit the consumption of alcohol by minors in their homes and then allow intoxicated children to leave in automobiles are not providing a safe environment in which to drink. On the contrary, these adults are contributing to the problem of drunk driving on Texas roads, and they should be liable for damages caused by intoxicated teenagers who drive away from their homes.

In addition to the personal costs to families who lose children to drunk driving are the associated medical costs, which are borne by society. Imposing liability for damages associated with drunk driving on adults who knowingly

provide minors with alcohol would decrease these costs to taxpayers and result in fewer adults providing alcohol to minors, which would lead to fewer drunk driving accidents.

## Opponents said

A large percentage of minors drink and can find ways to obtain alcohol, with or without the help of adults. To protect their children, some parents allow them to drink or hold parties in the safety of the home in an effort to keep drunk teens off the road. HB 2868 would impose liability on any parent who allowed a child to have a party with alcohol

if one of the minor party goers caused damage because of being intoxicated. This would discourage parents from providing a safe environment in which their children and their children's friends could drink and might result in those teenagers drinking and driving elsewhere.

## Notes

The **HRO analysis** of HB 1357 appeared in Part Two of the April 26 *Daily Floor Report*, and the analysis of HB 2868 appeared in Part Two of the May 9 *Daily Floor Report*.

# Defining marriage as a union of one man and one woman

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## HJR 6 by Chisum

*Approved by voters at November 8, 2005, election*

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**HJR 6** amends the Texas Constitution by adding Art. 1, sec. 32 stating that marriage in this state would consist only of the union of one man and one woman. The provision also prohibits the state or a political subdivision of the state from creating or recognizing any legal status that is identical or similar to marriage.

### Supporters said

The Legislature should bring this issue before voters in November so that the citizens of Texas, not the courts, can decide what constitutes marriage in this state. A constitutional amendment would prevent a possible challenge to the state's marriage statutes. Even though Texas courts may be unlikely to interpret the Constitution to allow same-sex marriage today, it could happen in the future. Texas' equal protection clause is not so different from that of other states that it could not be interpreted to permit same-sex marriage. Preserving marriage for unions between a man and a woman should be defined beyond doubt, not left to the whims of future judges.

A constitutional provision also would protect the definition of marriage by ensuring that civil unions would not be permitted in the future. Civil unions are a way for same-sex couples to circumvent laws protecting marriage by creating a legal arrangement that is substantially the same as marriage in all but the name.

The amendment would not discriminate against individuals based on their sexual preference but merely would permit the voters of Texas to decide the scope of marriage in the state. Same-sex couples would not be prohibited from pursuing their lifestyle if this amendment were approved by voters. It just would not be sanctioned by the state. Also, a constitutional provision is not written in stone, and future citizens and lawmakers could amend the provision if values and mores change in the future.

The prohibition against recognition of any legal status that is identical or similar to marriage would not infringe on individuals' ability to enter into contracts or change the way common law marriage is treated today. The amendment would not apply to contracts because they would not be

considered the same or similar to marriage, and common-law marriage would not be affected because it is viewed as marriage today.

The contention that this proposed amendment would invalidate traditional marriage is erroneous and false. No court in Texas would interpret the wording of the amendment to deny recognition of a traditional marriage. Judges are reasonable and take intent into account when deciding how the law should be applied. This amendment simply would place into the Constitution an existing provision in Texas law.

### Opponents said

Amending the Texas Constitution to ban same-sex marriage is entirely unnecessary because, in practical terms, no case would get far enough to challenge the state's marriage statutes. The courts in Texas are considered so unlikely to be sympathetic to arguments favoring same-sex marriage that no one has even filed a suit to start the process. Recent examples of how the courts likely would rule prevent challengers from wasting time and resources filing in Texas. Other challenges have been a part of a national campaign, with national funding and resources, to seek same-sex marriage status in certain states. Texas is not one of them, so the state should not change the Constitution unnecessarily.

This proposed amendment would take the issue of same-sex marriage out of the hands of citizens even though the institution of marriage has proven dynamic. It is noteworthy that anti-miscegenation laws banning inter-racial marriage were struck down less than 40 years ago. Although same-sex marriage is not contemplated widely today, future generations may see value in creating alternatives to traditional marriage. Already many Texas families are being formed that look different from the traditional format, either because of divorce and remarriage, single parenthood, or other circumstances. A constitutional amendment would limit future lawmakers' ability to respond to constituents' changing needs.

This proposed amendment essentially would determine that the state's equal protection clause would not apply to one group of people. Texas should not discriminate against



a group of citizens in the state constitution. Nowhere else in the constitution is a group of people singled out to be denied rights.

This proposed amendment could threaten some contracts and other arrangements between individuals, such as common law marriage or certain domestic partner arrangements. Though not all contracts are similar to marriage, some relating to the transfer of property, medical decision-making authority, and other family issues could be construed as granting privileges similar to those enjoyed by married people. Common law marriage also could be threatened as it is not explicitly excluded from the prohibition this amendment would add to the Texas Constitution.

Further, this proposed amendment is clumsily worded and could be interpreted to mean that the state might not recognize existing marriages. Other states have worded their amendments to specify that the prohibition against recognizing or creating a legal status identical or similar to marriage does not include traditional marriage. Courts in Texas are unlikely to invalidate existing marriages, but they are equally unlikely to conclude that marriage can include same-sex unions given the existing statutory prohibition.

## Notes

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

# Child and adult protective services revisions

SB 6 by Nelson

Effective September 1, 2005

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## *Child Protective Services (CPS)*

**SB 6** changes the CPS system by implementing statewide privatization of substitute care and case management services by September 1, 2011. The Department of Family and Protective Services (DFPS) will develop performance-based contracting practices and new payment methodologies to maintain oversight of the newly privatized system and hold service providers accountable for outcomes. Independent administrators will manage substitute care services and case management services regionally if it is deemed cost beneficial. Services provided by an independent administrator will include recruiting and subcontracting with community-based substitute care providers to ensure a full array of services, managing placements and making referrals for placement, monitoring services delivered by subcontractors, providing training and technical assistance to contract providers, and ensuring accountability for achieving defined client and system outcomes. Residential treatment facilities and administrators will be licensed and monitored by DFPS.

DFPS will develop and implement a staffing and workload distribution plan to reduce caseloads and improve the quality of investigations. CPS investigators will incorporate forensic methods of investigation with an emphasis on screening out less serious cases not requiring further investigation and responding to cases on a shorter timeline based on severity. Along with the new screening procedures, penalties are increased for people knowingly making false reports of abuse. Caseworkers will conduct joint investigations and training with law enforcement, incorporating the use of forensic methods of investigating alleged abuse, and will co-locate, to the extent possible, with law enforcement, shelters, and health care providers. The use of technology will be encouraged throughout the system. Attorneys *ad litem* will complete continuing education on child advocacy and will be appointed not only for children but also for indigent parents. DFPS will support the expansion of court-appointed volunteer advocate programs into counties in which there is a need for such programs.

DFPS first will seek placement for a child with relative caregivers, and these individuals may be located through the use of a child placement resources form upon which

parents will indicate potential caregivers. Assistance may be provided to relative caregivers in obtaining permanent legal status for a child and by providing, based upon a family's need, a one-time cash payment of not more than \$1,000, specified reimbursements for child-care expenses, and support services. Children in foster care will receive medical care through a medical home at which the child will receive necessary treatments to meet the child's ongoing physical and mental health needs. Medical care will not be provided to a child in foster care unless approval is obtained from a person authorized to provide consent for medical care. Health and education passports will be readily accessible to authorized individuals containing the child's full educational and medical history. The department will increase discharge planning and coordinate, to the extent possible, extended foster care eligibility, transition services, workforce-related services, referrals for short-term housing stays, and Medicaid coverage for youths age 21 or younger who formerly were in foster care. If DFPS determines that the number of children of a particular race or ethnicity in the CPS system is not proportionate, the department will attempt to reduce the disproportionate representation by documenting it and instituting policies to promote parity in outcomes for all children.

## **Supporters said**

SB 6 would roll out privatization of substitute care and case management services in a highly planned and responsible fashion so that Texas children no longer would be endangered by the failings of the current CPS system. Evidence and experience have shown that adding more resources to the current system has not resolved CPS's problems. Privatization would balance the need for immediate action with a process to assess each regional privatization effort so that the state could learn from best practices and implement them in other regions. Contracting with community-based organizations for substitute care and case management services would allow CPS to focus on performing effective investigations and making determinations on child removals in each child's best interest. The infrastructure already exists for privatization because about 75 percent of foster care services currently are privately provided. The array of private services available, including basic care, emergency shelters, therapeutic foster

care, group homes, and residential treatment centers, assures that the remaining children in public foster care easily would be absorbed into the private system.

The current system is inefficient because case management services are duplicated by CPS staff and case managers within child care facilities. The privatized system would result in greater efficiency because those best equipped to determine each child's needs — the people who work with the child on a daily basis — would make case management decisions. Under the current system, DFPS both regulates and manages itself, which creates a conflict of interest. The privatization plan would remove this conflict because the independent administrators who select the substitute care provider statutorily would be prevented from providing such services themselves or having a financial interest in such providers. Performance measures would be built into each contract, and payment methodologies would be aimed at achieving desired outcomes. In addition, nonprofits would be accountable to multiple stakeholders, including donors, and many have longstanding reputations for providing quality service.

DFPS would maintain the authority to provide services in emergencies. Ultimate decision-making authority would remain with DFPS as the child's managing conservator, so the department could weigh in on contested terminations and exercise its authority when necessary. Other states have demonstrated positive outcomes from privatization, and costs would not be too high unless DFPS micromanaged at the case level, rather than effectively monitoring results and ensuring compliance with federal and state laws.

The bill would include other positive provisions, including proven prevention services, enhanced collaboration with law enforcement and the community, more cultural awareness, increased assistance to foster and adoptive children and families, heightened emphasis on kinship care, and increased use of technology. Enhanced call-screening processes would allow caseworkers to reduce caseloads through better fact-gathering, allowing the state's overburdened investigators to focus more time on helping true victims of abuse and neglect. Increasing the penalty for false reports would allow caseworkers to focus on cases where the safety of children truly was at risk. Following recommendations on the proper administration of psychotropic drugs would safeguard children against over-medication when they could have benefited from other treatments or were the subject of misdiagnosed behavioral problems. Medical passports would be a tremendous resource because medical histories would be maintained as children move from place to place and could provide

critical information relevant to determining treatments and understanding what therapies previously had been attempted.

Requiring DFPS to inquire about the sexual orientation of prospective families is unnecessary. The department already screens families for their suitability as foster parents and any person exhibiting behavior that truly is unstable or unhealthy is disqualified. There is no justification for discriminating against homosexual or bisexual applicants based solely on their sexual orientation. They may be the best placement for children given the small pool of families willing to become foster parents.

## Opponents said

Privatization is not the answer to problems caused by a shortage of well trained CPS workers, a dearth of high-quality foster homes, and insufficient social services such as mental health and drug and alcohol counseling. The major crisis in the CPS system, contributing to the tragic, recent cases of child abuse and death despite CPS involvement, is occurring at the investigations level, which privatization would not resolve. Although financial resources have been added to the current system, sufficient resources have never been committed to keep pace with caseload growth, leaving CPS starved for adequate funding to achieve its mission. The reason children often are sent to far-off treatment facilities is not because of a lack of effort by DFPS to obtain services locally but rather because reimbursement rates are not adequate to fund the higher costs of providing services in certain areas. Only more money will entice service providers into these hard-to-serve areas, which could be allocated without privatization.

It makes no sense to transfer case management to private providers when many of the supposed benefits of privatization could be obtained under the current system. With more resources, caseloads would be reduced and CPS caseworkers could spend more time interacting with children and families and ensure that parents' input was heard and addressed. DFPS could build, train, and support networks of providers on a regional basis and also could enhance outcomes for children through performance-based contracting and various payment methodologies. Privatizing on the basis of benefits that DFPS could provide under the current system only would add another administrative layer of costs for oversight of cases and contract management.

The definition of case management would leave room for harmful conflicts of interest because the independent administrator only would make the initial child placement,

after which case managers working for specific providers would make determinations on child and family service needs and would have an incentive to make decisions that could benefit their facilities. If payment methodologies intended to prevent abuses by minimizing the time a child spent in out-of-home care were not implemented carefully, they inadvertently could provide an incentive to deny children and families the full array of services needed. Although reunification is ideal, it should not be promoted at the expense of child welfare.

Private providers would lack the relevant experience, including dealings with the court system, to take over case management responsibilities. While CPS caseworkers deal with case decisions and related litigation, case managers at facilities deal with specific services provided to children and families. Privatizing case management responsibilities currently held by CPS caseworkers only would impose increased liability on the state. While ultimate responsibility for child outcomes still would fall to the state, CPS no longer would have control over case decision-making. Instead of implementing privatization statewide, Texas should implement a pilot program to examine fully various privatization models and weigh the consequences of each. Such a pilot would prevent resources from being pumped into a system that has not been proven safe or beneficial to the welfare of children and families in Texas.

Other harmful outcomes could arise from this bill. Placing a greater emphasis on screening calls could influence intake specialists to report fewer cases allowing more cases of real neglect and abuse to be overlooked. Increasing penalties for giving false reports could deter some sincere individuals from making reports of abuse for fear that they could be prosecuted if their allegations were not proven. Caution should be exercised in introducing stringent protocols regulating a doctor's administration of psychotropic drugs to children because a physician is in the best position to assess a child's treatment needs and sometimes treatment should involve the proper mix of multiple medications. The proposal for medical passports accessible by computer poses a privacy concern given the rise in incidences of identity theft and recent break-ins to major computer systems.

## Other opponents said

DFPS should require foster parents to state whether they are homosexual or bisexual and disqualify applicants who answer affirmatively from becoming foster parents or continuing as foster parents. If DFPS determined after a

reasonable investigation that an applicant had not answered truthfully, the department also should remove the children. This would ensure that children were not placed in unstable or unhealthy environments. Already children in the foster care system have undergone traumatic events, and the state should not compound their difficulties by placing them with individuals who live such lifestyles.

## *Adult Protective Services (APS)*

**SB 6** makes systemic changes to the APS program. The bill transfers authority over the state's guardianship services from DFPS to the Department of Aging and Disability Services (DADS). The bill establishes new risk assessment criteria for use by APS personnel in determining whether an elderly or disabled person requires protective services due to imminent risk of abuse, neglect, or exploitation. It requires the creation of an investigation unit for APS that will investigate reports of abuse and contact the appropriate law enforcement agency if it finds abuse, neglect, or exploitation due to the criminal conduct of another person. The investigation process will provide for a special task unit and qualified personnel to handle complex cases and for an internal review of completed investigations.

APS will implement a quality assurance program based on client-centered outcome measures, including the intake process, investigations, risk assessment determinations, and the delivery of protective services. APS also will develop and implement a training program that new employees must complete before initiating an investigation of a report of alleged abuse or providing protective services to elderly or disabled persons. The Health and Human Services Commission must implement a caseload reduction program, a pilot program to monitor and remediate certain unlicensed long-term care facilities, and, if funding is available, a media campaign to educate the public and potentially prevent the mistreatment of elderly and disabled people. The commission also must develop an annual community satisfaction survey.

The bill also allows DADS to contract with a political subdivision of the state, a guardianship program, a private agency, or another state agency for the provision of guardianship services. DADS must develop or implement a quality assurance program for guardianship services to monitor any contracts DADS entered into to ensure the quality of the guardianship services. A guardianship advisory board will study the feasibility of adult protective services provided through a statewide network of local adult protective services boards making up a statewide guardianship program.

## Supporters said

SB 6 would raise the bar for APS investigations and improve the quality of caseworkers that citizens depend on to safeguard the vulnerable adults of the state. Widespread problems have been documented in the state's existing systems for protecting elderly and disabled persons from abuse and neglect, and the state cannot depend on the agency to reform itself. Provisions in the bill would improve investigative practices concerning elder abuse and neglect, support quality casework, improve the effectiveness of ongoing services, reform the guardianship system, increase the coordination with and involvement of community organizations, and enhance agency accountability. SB 6 also would improve the training of direct delivery staff to improve incapacity determinations. The current assessment test, consisting of a handful of questions, is ineffective and inconsistently applied and allows cases to be closed early without intervention. The new test would evaluate better the mental capacity of elderly individuals by assessing their living conditions, financial status, physical and medical status, and social interaction and support. SB 6 would encourage the retention of effective caseworkers by providing better training and support for employees who provide protective services to the aged and disabled.

The caseload reduction plan mandated by the bill would help to maintain caseloads and increase the quality of investigations. SB 6 would improve state guardianship services by transferring responsibilities from DFPS to DADS. Currently, there is a conflict of interest regarding placement of the guardianship program in APS because the agency also is responsible for reviewing and determining the necessity for guardianship. The agency that investigates should not be the same one handling guardianship duties. Individuals would be better served if the guardianship responsibilities were given to another agency.

## Opponents said

APS should not contract with protective services agencies for the provision of direct services to elderly and disabled persons. The state should be responsible for the care of its citizens, and services offered by private protective services agencies might be inferior to those offered by the state, as well as more difficult to supervise. SB 6 should require funding for a public awareness campaign, rather than base its implementation on the availability of funds. A public education campaign would improve citizens' awareness of the abuse, neglect, and exploitation that face elderly and disabled persons. The public must learn about, and be encouraged to help prevent, the mistreatment of the elderly and disabled. The bill also should provide for the creation of a second probate court in certain counties that face large and rising caseloads. Probate courts around the state have struggled with their dockets due to a lack of resources to handle growing caseloads.

## Notes

HB 920 by Uresti, which passed the House but died in the Senate Health and Human Services Committee, was identical to the adult protective services provisions in Article 2 of SB 6 by Nelson.

The **HRO analysis** of SB 6 appeared in Part One of the April 19 *Daily Floor Report*. HB 920 was analyzed in the April 28 floor report.



# Abortion – parental consent and third trimester restrictions

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**SB 419 by Nelson**  
***Effective September 1, 2005***

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**SB 419**, the State Board of Medical Examiners Sunset bill, adds to the list of prohibited activities by a physician the performance of an abortion on an unemancipated minor without the written consent of the child's parent or guardian or without a court order permitting the abortion.

The bill also adds to the list of prohibited activities the performance of a third-trimester abortion of a viable unborn child unless the abortion would prevent the death or imminent, severe brain damage or paralysis of the woman. Such an abortion also would not be prohibited if the fetus had a severe, irreversible brain impairment.

## Supporters said

Requiring consent would improve parental involvement in a minor's decision about whether or not to have an abortion. While Texas has a parental notification requirement, physicians do not always follow it, and parents may find out too late or not at all. The bill would make Texas consistent with neighboring states as well as 18 other states currently requiring parental consent.

Parental involvement is important. By involving parents in a medical procedure performed on their children, parental consent could reduce the medical risk to minors. Parents are a key source of important medical information that may be relevant to surgery, such as allergies, medical conditions, and medical histories. After a minor had an abortion, a parent who had been involved could watch for and react to any possible negative consequences, such as infection or depression. Some school districts require consent of the parent before giving children aspirin in school and Texas requires it for ear-piercing, so the state should require parental consent for the much more serious procedure of abortion.

Requiring consent would not compromise a minor's ability to obtain alternate authorization under certain circumstances. Minors still would have available the option of seeking authorization from a court.

Parental consent, rather than notification, could make the decision process less difficult for a minor. Under the notification law, a minor still could have the procedure performed regardless of whether her parents had a moral

objection. With required consent, parents would have veto power and would not have to convince their child not to have the procedure.

An abortion of a viable child in the third trimester should be performed only to prevent the death or severe, irreversible brain damage or paralysis of the mother. A caesarian section to deliver a healthy unborn child in the third trimester often can be performed if continuing the pregnancy could jeopardize the mother's health.

## Opponents said

The existing notification law adequately ensures parental involvement in a minor's decision about whether or not to have an abortion. Parents who otherwise might be left out of their daughters' life choices have the chance to counsel and advise them. There is no evidence that parents are not being notified under the existing law. No court case has been brought by a parent against a provider alleging that the physician performed an abortion on an identified minor without first notifying the parents.

Texas' notification law is consistent with those of comparable states, such as New York and Florida, that, along with 10 other states, require parental notification. None of Texas' neighboring states require consent, as New Mexico's and Oklahoma's consent statutes currently are not in effect as a result of an attorney general opinion or because they are enjoined by the courts. California's consent statute also currently is enjoined by the courts based on state constitutional challenges.

Requiring parental consent could endanger a woman's health. Many young women who are pregnant wait as long as possible before seeking medical care and are likely to put off their decisions even longer if required to get consent from parents. Any delay increases the medical risk for a pregnant girl, and the risk grows as the pregnancy progresses. Judicial bypass can delay access to abortion by several more weeks.

In Texas and most other states, minors are assured of confidentiality when they seek sensitive medical services, such as pregnancy and delivery, treatment of sexually transmitted disease, and therapy for drug abuse. These



conditions often entail greater health risk than abortion, yet the decision is left to the minor and remains confidential. Mandatory consent for abortion cannot be compared to receiving aspirin in school because school districts have adopted those policies voluntarily to protect themselves from liability concerns.

Requiring parental consent, rather than notification, could increase the number of judicial bypass cases. Young women who have been abandoned by their parents or whose only surviving parent is in jail would be forced to go to court, even if the reason consent could not be obtained was not a parent's objections. The panoply of family situations for young women could not adequately be accounted for under a parental consent law. Notification strikes the right balance between encouraging parental involvement and respecting a young woman's ultimate right to choose.

Restricting a physician's authority to perform a third trimester abortion to instances when the mother's life was at risk of severe, irreversible brain damage or paralysis would ignore other equally devastating outcomes, such as risks to her health. No woman who has carried an unborn child to the third trimester wants an abortion, but there are medical conditions and other unforeseen complications that can occur, and families, with their physicians, should make decisions based on individual circumstances rather than the Legislature's making arbitrary distinctions.

## Other opponents said

This amendment would not go far enough and could be open to challenge in court because it is not explicit in its provisions for judicial bypass of parental consent for a minor to have an abortion. The additional requirements in HB 1212 by P. King and SB 1150 by Harris would include extending the time frame for a judge to hear and decide such cases from two to five business days, limiting venue to the minor's county of residence or the county where the abortion would be performed, requiring the judge to determine whether the abortion was in the minor's best interests, and changing the burden of proof from a preponderance of evidence to clear and convincing evidence. In addition, HB 1212 would have required disclosure of certain judicial information and made coercing a woman to have an abortion an offense.

## Notes

The **HRO analysis** appeared in the May 16 *Daily Floor Report*. The abortion consent amendment and third trimester abortion restrictions were added on the House floor and did not appear in the original analysis of SB 419 .

HB 1212 by P. King and SB 1150 by Harris, requiring parental consent for abortion by a minor, both died on the House floor. The HRO analysis of HB 1212 appeared in Part One of the May 10 *Daily Floor Report*, and the analysis of SB 1150 appeared in the May 22 *Daily Floor Report*.



# Government Affairs

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# Continuing the Texas Lottery Commission

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## HB 1434 by Hamric *Died in the Senate*

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**HB 1434** would have continued the Texas Lottery Commission, the State Lottery Act, and the Bingo Enabling Act until September 1, 2017.

**General agency administration.** HB 1434 would have changed the size of the commission from three to five members. The bill would have directed the commission to develop a comprehensive business plan and to make an annual assessment of the performance of each project described by the business plan.

The bill would have made the general law governing purchasing and contracts by state agencies apply to the commission, except as otherwise provided by the lottery act. HB 1434 would have required the commission to analyze complaints to identify any trends related to certain types of violations. The bill would have required the commission to identify and adopt policies complying with relevant laws governing consumer information and protection.

**Lottery.** The bill would have added a definition of “minor” to specify that a prize could be paid directly to a person age 18 or older. It would have allowed a lottery sales agent’s license to be transferred from one location to another under certain circumstances and would have allowed a license that had been expired for not more than 10 days to be renewed under certain circumstances.

**Bingo.** HB 1434 would have prohibited the use of certain types of equipment by stating that the definition of bingo equipment would not include an electronic monitoring terminal, a site controller, or any electronic device used to play an electronic version of pull-tab bingo. The bill also said that this provision would prevail over any other conflicting act of the 79th Legislature.

The commission would have had to establish comprehensive qualifications for licensure and renewal of licenses, develop a standard license renewal process, and establish standards of conduct for licensees. It would have had to consider the compliance history of licensees when deciding whether to renew a license.

HB 1434 would have required, instead of authorized, the commission to take certain actions when suspending or revoking a license for failure to comply with a code or rule or for a reason that would allow or require the commission

to refuse to issue or renew a license in the same class. It would have established a new option for a reprimand in these cases. The bill would have allowed the commission to place on probation those whose licenses were suspended. Upon a suspension of a bingo organization’s license, the commission would have been required to issue an amended or temporary license to other organizations that conducted bingo at the same location so they could conduct bingo during the time that the suspended organization conducted games.

HB 1434 would have eliminated current requirements that certain types of organizations be in existence for a specified number of years to be authorized to conduct bingo. Instead, the commission would have been able to specify by rule the length of time that organizations must have been in existence.

## Supporters say

**General agency administration.** The Texas Lottery Commission should be continued since the state lottery and bingo are important sources of revenue for the state, local jurisdictions, and charities. The work of the commission in operating the lottery and regulating charitable bingo is hampered by having only three commissioners. In the absence of one commissioner, for example, the other two cannot informally discuss the work of the agency without violating the Open Meetings Act. Also, because of its small size, the commission cannot form subcommittees to help it oversee the agency.

**Lottery.** It is necessary to clarify the definition of a minor because current law refers to a definition in the Property Code that describes a person younger than 21 years of age. This limit prevents people between the ages of 18 and 20 from receiving major winnings directly. Since people above the age of 18 legally are allowed to purchase lottery tickets, they should be able to receive any winnings as a result. The bill would resolve this conflict.

**Bingo.** Electronic pull-tab bingo should be prohibited explicitly by the bill to ensure that gambling would not be expanded in Texas and that authorization of electronic pull-tab bingo would not be used as a back-door way to legalize video lottery terminals or other gambling machines.

HB 1434 would make numerous changes to the commission's licensing procedures to ensure a consistent licensing process and to standardize enforcement provisions. These changes would help ensure that the procedures were fair to licensees, adequately protected the public, and safeguarded charitable revenue. The bill would achieve these objectives by requiring that the commission establish the qualifications for licensure and renewal so that all licensees were subject to the same requirements and aware of the qualifications. The bill also would give the commission more flexibility to respond appropriately to licensees by authorizing a system of probation.

## Opponents say

**General agency administration.** The Lottery Commission should be merged with the Racing Commission to form a new gaming commission. Alternatively, the operation of the lottery should be transferred back to the Comptroller's Office, allowing the agency to operate more independently. The regulation of bingo should be separated. A three-member commission properly ensures that two commissioners cannot discuss business in a casual way outside of a formal meeting. This restriction assures the public that business is never discussed behind closed doors.

If the Lottery Commission is to be expanded, it should include two representatives of bingo interests, instead of the one currently required. This would help ensure that the bingo industry was adequately represented. If more commissioners were added, the governor should appoint a representative who could speak for underprivileged people, who play the lottery in disproportionate numbers.

**Bingo.** HB 1434 should include authorization for electronic pull-tab bingo. This would not expand gambling but simply would be a new way to play the existing game of pull-tab bingo and would increase revenues to the charities and the state. Authorizing electronic pull-tab bingo would not be a back-door way of authorizing video lottery terminals or other gambling machines.

The commission should continue to be authorized, instead of required as in HB 1434, to take certain actions when it considers a license suspension or revocation. The bill would tie the hands of the commission by requiring certain types of actions, which in some cases may not be appropriate or could result in less money for charitable purposes.

## Notes

The **HRO analysis** appeared in Part One of the May 12 *Daily Floor Report*.

HB 1116 by Solomons, revising the Sunset schedule, continued the Texas Lottery Commission, the State Lottery Act, and the Bingo Enabling Act until 2011, at which time the Sunset Advisory Commission will conduct a full review.

The House engrossed version of HB 1434 would have prohibited bingo-related electronic monitoring terminals, site controllers, or any devices used to play an electronic version of pull-tab bingo. However, the Senate adopted an amendment by Armbrister to HB 3 by J. Keffer, the omnibus revenue bill, that would have authorized electronic pull-tab bingo. When the House appointed its conferees for HB 3, it adopted a motion to instruct the conferees to remove the Armbrister amendment from the bill. HB 3 died in conference committee.

An unsuccessful amendment to HB 3540 by Pitts, appropriations-related legislation that was not enacted, would have authorized the Lottery Commission to establish a system to sell lottery tickets through the Internet.

# Continuing the Texas Alcoholic Beverage Commission

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**HB 2544 by Hamric**  
***Died in Senate Committee***

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**HB 2544**, the Texas Alcoholic Beverage Commission (TABC) Sunset bill, would have continued the commission until September 1, 2011.

**General powers and public health.** The bill would have given TABC a number of general powers and duties, including the protection of public safety, promotion of legal and responsible alcohol consumption, and enforcement of the Alcoholic Beverage Code and the licensing and permitting process. Among the bill's provisions, on-premise permit and license holders would have been required to display on the door to each restroom a warning sign informing the public of the risks of drinking alcohol during pregnancy.

**Enforcement.** TABC would have been required to adopt a schedule of sanctions to ensure that the severity of each sanction appropriately matched the severity of the corresponding violation. TABC could have used funds gained through the sale of seized alcoholic beverages to help defray the costs of forfeiture lawsuits.

**Regulation of business practices.** The bill would have repealed Alcoholic Beverage Code, sec. 101.44, which requires that beer be sold only in specific container sizes. It would have removed the requirement that TABC approve liquor and wine labels and conduct chemical analyses of liquor and wine. Some requirements of beer testing also would have been relaxed.

The commission could have issued licenses that expired in two years, rather than one, to businesses that had no previous violations. HB 2544 would have required the commission to authorize payment for beer deliveries to retailers by electronic funds transfer initiated on or before the day of delivery.

## Supporters said

According to a recent survey, up to 50 percent of women do not connect the consumption of alcohol with the risk of birth defects. Posting signs to inform the public about these risks would be an important step in preventing health problems among many of the state's citizens.

Currently, TABC cannot use proceeds from the sale of seized property to pay the costs of forfeiture lawsuits, which establish the state's right to illegal property. HB 2544 would allow TABC to file forfeiture suits and give it a mechanism for paying the associated court costs. This would bring the process in step with other law enforcement agencies and enable TABC to afford to file more forfeiture lawsuits. Also, developing a new schedule of sanctions would help ensure that penalties were fair and consistently applied.

The bill would allow market preference, not the size of a bottle, to determine which beers could be sold in Texas. The consumer would benefit from this choice. Also, the proposed biennial license renewal would ease administrative burdens.

## Opponents said

The commission should go further in its efforts to combat the damage created by alcohol abuse by abolishing happy hour practices at bars and restaurants. Also, rather than eliminating all size restrictions for beer containers, the commission should set a maximum size limit, which would help prevent alcohol abuse.

In reviewing its sanctions on license holders, the commission should consider limiting the lifetime of a violation on record. Also, graduated penalties should be tied to the relevant licensed location where an offense took place, not to the entire company.

## Notes

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

Two of the Sunset commission's recommendations initially included in HB 2544 ultimately were included in SB 1255 by Brimer (effective June 18), allowing TABC to use funds gained through the sale of seized property to help defray the costs of forfeiture lawsuits and repealing Alcoholic Beverage Code, sec. 101.44, which required that beer be sold only in specific container sizes.

HB 1116 by Solomons, revising the Sunset review schedule, continues the TABC until September 1, 2007.

# Restricting eminent domain use for economic development purposes

**SB 7 by Janek, Second Called Session**  
**Effective November 18, 2005**

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**SB 7** prohibits governmental or private entities from using eminent domain to take private property if the taking confers a private benefit on a particular private party through the use of the property or is for a public use that merely is a pretext to confer a private benefit on a particular private party.

It also prohibits the exercise of eminent domain to seize private property if the taking is for economic development purposes, unless economic development is a secondary purpose that results from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under specific provisions of the Local Government Code or the Tax Code.

A determination by a governmental or private entity that a proposed taking of property does not involve one of these prohibited reasons does not create a presumption about what the taking involved.

SB 7 does not affect the authority of any entity authorized to use eminent domain for:

- transportation projects, including railroads, airports, or public roads or highways;
- conservation and reclamation districts created under the Texas Constitution, including port authorities, navigation districts, and any other conservation or reclamation districts that act as ports;
- water supply, wastewater, flood control, and drainage projects; public buildings, hospitals, and parks; and provision of utility services;
- a sports and community venue project approved by voters at an election held on or before December 1, 2005, under Local Government Code, chapters 334 or 335;
- pipeline operations;
- a purpose authorized by Utilities Code, ch. 181 regulating private gas and electric utilities;
- oil and gas underground storage operations subject to Natural Resources Code, ch. 91;
- a waste disposal project; or
- a library, museum, or related facility and any infrastructure related to the facility.

The bill does not affect the authority of a governmental entity to condemn a leasehold estate on property owned by that entity.

These provisions apply to the use of eminent domain under all state laws, including a local or special law, by any governmental or private entity including:

- a state agency, including an institution of higher education;
- a political subdivision of the state; or
- a corporation created by a governmental entity to act on behalf of the entity.

The Texas Department of Transportation (TxDOT) is prohibited from using eminent domain to take property for an ancillary facility, such as a gas station or convenience store, on both the Trans-Texas Corridor and other state-owned toll roads unless the acquisition is for one of multiple ancillary facilities included in a comprehensive development plan approved by the county commissioners court of each county in which the property is located.

SB 7 prohibits a governing board of an institution of higher education from using the power of eminent domain to acquire land for a lodging facility, parking, or a parking structure intended to be used in conjunction with the use of a lodging facility.

The bill creates an interim legislative committee to study the use of the power of eminent domain, including its use for economic development and the issue of what constitutes adequate compensation for property taken through eminent domain, and to report to the 80th Legislature by December 1, 2006.

## Supporters said

SB 7 is necessary to protect property rights in Texas following the recent U.S. Supreme Court ruling that allowed a local government to seize property from private owners and transfer it to another owner simply to increase tax revenues through economic development. Under the precedent established by the U.S. Supreme Court's decision in *Kelo v. City of New London*, cities or other entities with



eminent domain authority could argue that nearly any project benefited the public through economic development and could, for example, take private homes to enable the construction of a shopping mall that would generate more tax revenue than the homes. Without SB 7, the state and local governments could subject Texans to the same abuse of eminent domain power that has occurred in the *Kelo* case. The bill is not an overreaction to the *Kelo* decision because similar cases have occurred in Texas, including in the cities of Freeport and Hurst. The bill would be in line with similar policies in use or under consideration in several other states and in the U.S. Congress.

The language in SB 7 is specific enough to protect private property from inappropriate takings for economic development, yet also to allow state and local governments to continue to use eminent domain in clear public-use situations. To avoid confusion, the bill specifically lists certain types of projects that clearly would not be subject to the prohibitions in the bill. SB 7 also would require local approval for the use of eminent domain for ancillary toll-road facilities to ensure that there was local support and a local official to hold accountable in these cases.

The bill would not violate the state's policies of local control or of encouraging economic development. It would not take away the authority that any entity currently has to use eminent domain and would not prohibit the exercise of that authority for projects with economic development ramifications as long as these projects were undertaken for legitimate public uses in which economic development was not the primary purpose. Even if done purely for economic development, such projects could proceed with government participation without the use of eminent domain.

## Opponents said

Enacting new restrictions on eminent domain use would be an overreaction to the *Kelo* decision. The laws and Constitution of Texas allow for a broad interpretation of public use to include economic development in some situations involving eminent domain, and that flexibility should not be eliminated. Economic development is an

accepted role for government that in some cases has a defined public benefit and can satisfy a public purpose as much as more traditional government projects. An overly broad statewide limit on the use of eminent domain for all economic development projects could conflict with the state's policy of encouraging state and local officials to think creatively about economic development and of local control.

The *Kelo* decision illustrates when it might be acceptable to exercise eminent domain for economic development purposes, such as when an area is distressed enough to justify an economic development program and when the property is taken under a carefully formulated development plan to provide appreciable benefits to the entire community, rather than a particular class of identifiable individuals. For example, the exercise of eminent domain over the objections of a few property owners might be appropriate if an entire community stood to benefit from a carefully crafted economic development project, such as the development of a consumer/retail area.

SB 7 could have the unintended consequence of restricting many legitimate uses of the power of eminent domain for public purposes. Private property owners could challenge its legitimate exercise by claiming that almost any project was being undertaken primarily for economic development reasons and could take the matter to court.

This bill would conflict with the principle of local control by interfering with decisions made by local officials about when to use eminent domain for public uses and when public use should be broadly interpreted to include economic development. Local officials are in the best position to make these decisions about the greater good of local communities because these officials are closest to the projects and can be held accountable for their actions by voters.

## Notes

The **HRO analysis** of the companion bill, HB 16 by Woolley, appeared in the August 10 *Daily Floor Report*.

# Expansion and modification of homeland security efforts

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**SB 9 by Staples**  
**Effective May 28, 2005**

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**SB 9** changes the name of the Critical Infrastructure Protection Council to the Homeland Security Council. Fifteen government entities will be newly represented on the council, and representatives are to be appointed by December 1, 2005. The bill establishes a First Responder Advisory Council as a permanent special advisory committee to advise the Governor's Office on homeland security issues relevant to first responders, radio interoperability, the integration of statewide exercises for hazards, and the related use of available funding. It also creates the Private Sector Advisory Council to advise the Governor's Office on homeland security issues relevant to the private sector.

The Governor's Office must develop and administer a strategic plan to design and implement a statewide integrated public safety radio communications system to promote interoperability within and between local, state, and federal agencies and first responders. A report on the status of its duties must be submitted to the Legislature by the Governor's Office not later than September 1 each year. The bill abolishes the Public Safety Radio Communications Council (PSRCC) and makes the Governor's Office responsible for the interoperability of radio communications. The Governor's Office will take ownership and custody of all property, including records, of PSRCC by December 1, 2005.

The bill requires an owner, agent, manager, operator, or other person in charge of a public water supply system or wastewater system providing services for public or private use to notify the Texas Commission on Environmental Quality (TCEQ) of certain events that negatively could affect the production or delivery of safe and adequate drinking water, such as unauthorized entry on property, an act of terrorism, property theft, or a natural disaster, accident, or act resulting in damage to the water supply or system.

The Texas Department of Agriculture (TDA) and Texas Animal Health Commission (TAHC) must pursue a policy of ensuring that state borders are secure from shipments of potentially dangerous pests and diseases carried by plants and animals. TDA and TAHC must jointly conduct road station and interstate shipment inspections, as feasible and

appropriate, at strategic locations throughout the state. TDA may enter into agreements with private entities to implement these requirements.

SB 9 includes a comprehensive definition of critical infrastructure facility and increases the penalty from a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) to a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) for trespass on or in refineries, chemical and power plants, and the other critical infrastructure facilities. The enhanced penalty will not apply if a defendant can prove by a preponderance of the evidence that the defendant entered or remained on or in a critical infrastructure facility as part of a peaceful or lawful assembly.

SB 9 also repeals a requirement that the operator of a crane or similar apparatus, any part of which is capable of vertical, lateral, or swinging motion, post a warning sign and install and equip the crane with an insulating device or guard to prevent electrocution.

## Supporters said

A strategy to detect, deter and respond to homeland security threats and emergencies is crucial for the safety and security of the state and its citizens. Much has been accomplished, but the state needs consistently to strengthen its capacity to enhance domestic security and combat terrorist activities. SB 9 would provide for improvements in areas not now covered for homeland security purposes, including efforts to protect public health, agricultural crops and livestock, drinking water, and critical infrastructure. The bill would improve anti-terrorism planning, coordination, and communication between state and local agencies and would encourage more inspections of livestock, produce, and pesticides entering the state.

Adding the 15 state agencies to the Homeland Security Council would provide a more balanced and complete representation of the entities crucial to homeland security. Establishing two permanent special advisory committees would keep the Governor's Office better advised on homeland security issues in the public and private sectors.

In Texas, several different radio systems are used by federal, state, and local emergency responders and law enforcement officials. These overlapping systems fail to communicate for several reasons, including frequency variations, age, incompatible equipment, or lack of coordination among interested parties. SB 9 would require the Governor's Office to link various existing radio systems regionally and throughout the state with radio systems that would be purchased in the future by using some of the Homeland Security grant program money.

The tougher penalty for trespassers on or in critical infrastructure facilities would make it more difficult for terrorists to scout and investigate targeted facilities. The extra time that a terror suspect remained in custody would increase the likelihood of law enforcement agents obtaining information on plans and accomplices, as well as deter others from committing similar acts.

Current federal safety regulations, which require cranes to be kept a certain distance from power lines, are sufficient. The repeal of the installation requirements would assist municipalities, districts, first responders, and emergency services in protecting critical infrastructure facilities and in disaster recovery.

## Opponents said

SB 9 should provide harsher penalties for those trespassing on or in critical infrastructure facilities. This bill would increase the penalty for trespassing at refineries, ports, and other prime infrastructure facilities from a class B to a class A misdemeanor, which would amount to merely a harder slap on the wrist for offenders. Instead of risking six months in the county jail, the maximum penalty under current law for a class B misdemeanor, a trespasser scouting a refinery as a potential target could wind up in jail for a year, the maximum penalty for a class A misdemeanor. Such a penalty would be unlikely to make a terrorist, such as a suicide bomber, think twice about committing a terrorist act.

This bill also would repeal an important safety requirement for operators of cranes and similar apparatuses. According to the U.S. Bureau of Labor Statistics, between 10 and 36 workers have died each year since 1992 as a result of a crane coming into contact with electric current. By removing the 16-year-old requirement for installing insulating devices on cranes, SB 9 could result in unnecessary deaths of crane workers.

## Notes

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

# Requiring legislators to cast record votes

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## **SB 1140 by Carona** ***Died in House committee***

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**SB 1140** would have required record votes on votes taken by the House or the Senate or a committee on any of the following:

- approval or disapproval of a bill, amendment, or substitute bill;
- approval or disapproval of a joint resolution or related amendment or substitute;
- appointment or election of a legislative officer or other public official; or
- confirmation of an appointment to public office.

Record votes would have been published in the journals and committee minutes of each house and for two years following the vote would have been published and maintained on the Internet in a user-friendly manner.

### **Supporters said**

SB 1140 would require that legislators be accountable for their votes. Texas legislators currently record their votes on just a fraction of the bills and amendments they pass each session. According to the National Conference of State Legislatures, Texas is one of a handful of states that does not require record votes on final passage of legislation or other important stages in the legislative process. For example, the California Assembly takes more than 5,000 votes in a two-year session, all of which not only are recorded but are easily accessible online. Further, Arizona's part-time legislature routinely records votes without creating unreasonable delays in the legislative process. Texas should demonstrate a similar commitment to open government by requiring the elected representatives of its citizens to cast record votes.

While the votes of individual legislators on some measures are printed in the House or Senate journals, there is no way to determine how each member voted during a voice vote, a common method of passing or defeating legislation in both chambers. Texas citizens did not elect their lawmakers to vote anonymously on major issues that

affect the state, and SB 1140 would prohibit legislators from picking and choosing when to be accountable for the ballots they cast. In addition, SB 1140 would make it easier for the public to view members' voting records on the web by requiring online storage of such information "in a manner that is easily accessible and searchable." Although the journals of both legislative chambers currently are available online, it is very difficult to uncover even a record vote on the state's online system without knowing, for example, the exact bill number or date on which the vote or debate took place. Recent procedural changes have made finding record votes somewhat easier, but the Legislature by law should be required to make record votes readily accessible.

### **Opponents said**

Requiring record votes on all legislation, even when the vote is routine and unanimous, would be expensive, time-consuming, and logistically burdensome. According to the House Journal Clerk, the estimated cost of each recorded vote is \$55, which would have cost approximately \$200,000 if all votes, including amendments and votes on second and third reading, had been recorded during the 2003 regular session and subsequent special sessions. Requiring record votes also could hinder behind-the-scenes negotiations, which allow lawmakers to pass bills that, while regionally unpopular, might benefit state as a whole.

Under recent House rules changes, any member can ask for a record vote on any measure at any time. In addition, voice votes are recorded in the journal with the understanding that each member voted "yes" unless otherwise indicated. Even on non-record votes, members may notify the journal clerk to have their votes recorded, and members also may submit statements to the journal explaining their votes, which sheds additional light on the process. Current procedures in both chambers offer a practical way of informing the public while allowing the Legislature to carry out its business in an efficient and cost-effective manner during brief biennial sessions.

# Appropriations-related statutory changes

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**SB 1863 by Ogden**

**Effective September 1, 2005**

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**SB 1863** makes appropriations-related statutory changes that are expected to result in a gain to general revenue and related funds of \$725 million in fiscal 2006-07. Significant provisions include:

***Telecommunications Infrastructure Fund (TIF).***

SB 1863 repeals the current \$1.75 billion cap on the total revenue that can be raised for the TIF. The bill also extends the expiration date of the fund until September 1, 2011. Revenue collected under this TIF assessment will go into the general revenue fund.

After the amount paid into the fund by all utilities equals \$1.5 billion, a telecommunications utility can recover the amount that it paid into the fund from its customers through their monthly bills. A utility can collect from its customers only the amount assessed after the fund reaches \$1.5 billion. The comptroller will publish in the *Texas Register* the date on which the fund equals this amount. A utility that wishes to recover its assessment will have to file an affidavit no later than February 15 of each year stating the amount it paid to the fund and the amount it collected from its customers during the previous year.

***Delayed transfers.*** The bill deposits driver's license and other fees to general revenue, rather than the Texas Mobility Fund, in fiscal 2006-07. This section took effect September 1, 2005, and will expire January 1, 2008.

***Increased fees.*** SB 1863 raises the registration fee for lobbyists from \$300 to \$500 per year.

***Audits.*** The bill requires agencies with expenditures of greater than \$100 million each biennium to participate in recovery audits.

***Health and human services (HHS) changes.*** SB 1863 continues six-month eligibility for Medicaid and the Children's Health Insurance Program and continues the existing quality assurance fee for intermediate care facilities for the mentally retarded. HHS agencies are permitted in conjunction with other states to jointly purchase prescription drugs, if feasible and cost effective.

***State employee waiver of health benefits.*** A state employee wishing to waive health coverage is required to show coverage by a substantially similar plan or eligibility

for benefits under TRICARE military coverage, in which case an employee will be eligible for an incentive payment in an amount set by the general appropriations act. If an employee is eligible for TRICARE, the state also will offer a supplemental health coverage program. The state can reduce its contribution for employees who waive health coverage or those who waive and choose an incentive payment or supplemental coverage.

***Petroleum storage tank remediation.*** The bill extends the reimbursement deadline to August 31, 2007, for eligible petroleum storage tank owners or operators who take corrective action, which increases the number of sites that can participate in the state-lead remediation program. Operators of storage tanks in sites that are admitted into the remediation program may not be held liable for releases of regulated substances or for costs related to corrective action. The bill also removes limitations on the amount of funds within the petroleum storage tank remediation account that can be spent on administration of the account and the groundwater protection cleanup program.

Collection of fees for the petroleum storage tank remediation account will be maintained at fiscal 2003 levels, rather than reduced annually. This account cannot be used after March 1, 2008, and the reimbursement program will expire September 1, 2008.

***Collection of court costs, fees, and fines.*** Counties with at least 50,000 inhabitants and cities with at least 100,000 inhabitants, unless granted a waiver, are required to develop a program to improve collection of court costs, fees, and fines. The comptroller will assist counties and cities with developing and implementing the program.

***Interest on tax refunds.*** The bill sets the interest rate paid by the state on tax refunds at the lesser of the annual rate of interest earned on deposits in the state treasury during December of the previous year or the prime rate plus 1 percent, which was the rate paid before the enactment of SB 1863.

***Existing Debt Allotment (EDA).*** The bill rolls forward the eligibility cutoff date for the EDA for school facilities by two years so that bonds for which school districts made payments during the 2004-05 school year are eligible for state debt assistance.



**State employee benefits and pay.** The bill changes the accrual rate for longevity pay from increments of three years' service to two-year increments. It also makes changes affecting the following employee groups:

- **Annuitant state employees.** A retired state employee who returns to work is not eligible for longevity pay or benefit replacement pay, an additional amount covering Social Security costs for senior employees. The employee's vacation time is calculated based on the length of employment after the employee retires and returns to work.
- **Benefit replacement pay.** The bill shortens from 12 consecutive months to 30 days the amount of time an employee or state-paid judge can leave state employment before becoming ineligible for benefit replacement pay. Unpaid leave-of-absence or periods when an employee usually does not work do not count toward the 30 days.

**Teacher Retirement System (TRS).** The bill incorporates the following provisions of SB 1691 by Duncan:

- increasing active employees' required contribution to TRS-Care, the retired teacher health insurance program, from 0.5 percent to 0.65 percent of salary;
- requiring school districts to contribute to the TRS pension fund the state contribution rate during a new employee's first 90 days of employment; and
- transferring the administration of supplemental salary, such as the health insurance passthrough, from TRS to the Texas Education Agency.

SB 1863 also amends the Government Code to specify that the state contribution to the TRS pension fund must be between 6 percent and 10 percent.

## Supporters say

**TIF.** The 74th Legislature in 1995 created the TIF to finance access to telecommunications services for public schools, nonprofit hospitals, public libraries, and higher education institutions across the state. The fund was created and maintained through an assessment of 1.25 percent of the telecommunications providers' taxable receipts and was authorized to collect up to \$1.5 billion over 10 years. Eliminating the revenue cap for TIF would result in \$200 million per year that could be used for property tax relief and essential government services, including education. Given that the telecommunications utilities have met their obligations up to the original revenue cap of \$1.5 billion, it would be reasonable to allow those incumbent local exchange carriers (ILECs) that have not been passing on the 1.25 percent assessment to consumers to now do so.

## Opponents say

**TIF.** Allowing ILECs to pass on their 1.25 percent assessment to customers would amount to a new tax that millions of consumers would have to pay each month. Eliminating the revenue cap on TIF and using these additional receipts for programs other than technology grants would violate the spirit of the original TIF agreement and amount to a discriminatory sales tax on telecommunications services. The state has fulfilled the goal of the original legislation by disbursing more than \$1 billion for technology grants since 1995, and TIF now should be retired.

## Notes

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





# Health & Human Services

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# Creating a Medicaid buy-in program

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## HB 1135 by Delisi *Died in the House*

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**HB 1135** would have directed HHSC to develop and implement a Medicaid buy-in program for people with disabilities as authorized under the federal Ticket to Work and Work Incentives Program Act of 1999 and the Balanced Budget Act of 1997. A Medicaid buy-in program is a way for people with disabilities to obtain employment without exceeding the Medicaid income threshold and thus losing their benefits.

The program would have been based on a model developed through a stakeholder workgroup that included:

- eligibility for disabled individuals with incomes below 250 percent of the federal poverty level (\$23,275 per year);
- an asset limit of \$2,000 to \$3,000, including disregards for certain work expenses;
- a focus on work with required employment and income of about \$300 per month; and
- a sliding-scale monthly premium that could range from \$25 to \$400.

### Supporters said

A Medicaid buy-in program would remove a significant barrier faced by people with disabilities when they contemplate employment. Although many such people are unable to earn enough to pay their significant medical costs, some can earn enough to contribute to them. Instead of not working and paying nothing for Medicaid, this program would get such people into the workforce and allow them to participate in the cost of their medical care as if it were a private health plan. Employment benefits people in intangible ways through community involvement, skills development, and social interaction. It also may reduce medical costs as people who are shut out of the working world often show symptoms of neglect or depression that could be remedied by purposeful, regular work.

Many people who are hampered by the regulations of Medicaid and Medicare – including the waiting period for Medicare for people with disabilities and the de facto employment prohibition in Medicaid – would benefit

from this program. Often people with disabilities face changes in their situation, such as a new diagnosis or loss of a spouse's health insurance, that can result in a period without insurance. Untreated and without resources, these individuals often are ruined financially and physically by the gap in coverage. A Medicaid buy-in program would give them a way to obtain health insurance when their income and health were on the brink and possibly prevent them from needing more public services.

This program would not be a significant expansion of Medicaid. Concerns about the rising future cost of Medicaid and calls for holding the line on eligibility would not apply directly to this program. Because the program would have eligibility standards and cost-sharing requirements, the number of people who participated could be calibrated to the state's finances. Also, not all of the participants would be new to Medicaid because a portion of them already receive Medicaid services without any cost-sharing.

### Opponents said

Medicaid is one of the largest and fastest growing state expenses each biennium, and Texas should not expand the program in any way. Although the numbers of those who could participate in a Medicaid buy-in program may look small today, creation of such a program would add another entitlement group. The state would be required under federal law to pay for any and all eligible recipients.

Instead of loosening the eligibility requirements for Medicaid, the state should ensure that all people who receive state assistance really deserve it. Medicaid benefits should be reserved only for individuals whose income truly makes them eligible, and people with disabilities who can work should do so.

### Notes

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

# Establishing a Medicaid integrated care management pilot project

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**HB 1771 by Delisi**  
**Effective June 18, 2005**

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**HB 1771** establishes an integrated care management (ICM) model for Medicaid recipients. The model is a non-capitated primary care case management program with no per participant charge that assigns recipients to a medical home – a medical professional who oversees all care; uses utilization management techniques; and performs health and functional needs assessments, case management, health education, and initiatives to prevent institutionalization. The ICM model is considered a managed care plan under the Medicaid program and could be implemented by a third party under contract. The bill permits the commissioner of the Health and Human Services Commission (HHSC) to create a statewide ICM advisory committee.

## Supporters said

ICM would achieve savings for the state without hospitals losing federal funds. In 2003, HHSC was charged with expanding Medicaid managed care because it is a better and less expensive model of delivering health care. As HHSC prepared to carry out that charge, the nine transferring hospitals made it clear that they would lose a significant source of federal funds – the Upper Payment Limit (UPL) – if the STAR+PLUS capitated model were implemented. Because those hospitals financially would be unable to continue sending intergovernmental transfers for federal disproportionate share funds if they lost UPL, many hospitals would face reduced federal funds. The implementation of ICM, however, would preserve the transferring hospitals' ability to bill for services and receive UPL matching funds because ICM is not a capitated model, meaning that the fees associated with the model are not on a per-patient basis, but are associated with the service rendered.

ICM would offer recipients every benefit that STAR+PLUS could. The program would create a medical home for patients and would monitor best practices and reward providers that improved the system. The client-focused approach to the program also would improve services for recipients, particularly the elderly and disabled who have a wide range of needs and for whom proper care can mean the difference between staying in the community and living in a nursing home.

Texas should ensure that its safety-net hospitals do not lose federal funding. Already these hospitals, which serve the entire spectrum of patients and conditions from trauma to indigent primary care, deliver millions of dollars in uncompensated care every year. The state does not have sufficient funds to pay for all the public benefit these hospitals deliver and should not jeopardize other sources of funding in any way. Other proposals to compensate the transferring hospitals for a loss of federal UPL funds would not be equivalent to what would be lost under STAR+PLUS.

## Opponents said

ICM is an unproven theory, and its implementation could result in a provider rate cut of \$110 million and a loss of \$168 million in federal funds in the coming biennium. The budget includes a cost savings of \$278 million in all funds for fiscal 2006-07, which is assumed to be generated by the implementation of a non-capitated managed care program. If ICM does not deliver, HHSC will have to find a way to cut up to \$278 million from existing services, and provider rates would be the most likely source of cuts. Doctor, hospital, and other health care provider rates already suffered a round of cuts in 2003, and further cuts would be unsustainable. Instead of implementing an unproven model, Texas should strongly consider other options, including proposals from HHSC. While many of these proposals are short-term funding solutions, HHSC reports that they would generate \$104 million, an amount that would soften the transition from UPL to other sources. The long-term options could draw down more than \$215 million each biennium, more than replacing UPL.

STAR+PLUS is a proven model of health care delivery. The debate about which method of managed care is best for the state and for patients was derailed by the UPL discussion, and the proven value of STAR+PLUS was overshadowed. Patients are happy and well cared for under STAR+PLUS, and it has been operating for more than six years. One of the many benefits of a capitated model is that the risk for achieving savings is transferred to the HMO, and such a model would assure the state of \$110 million in savings in fiscal 2006-07. The state's primary responsibility is to taxpayers and patients. Only STAR+PLUS can address the needs of both.

The financial hurdles for ICM may be insurmountable. Not only would it be required to achieve the same cost and utilization savings as STAR+PLUS, but it would cost about \$125 million in administrative expenses and cost the state \$21 million in premium taxes collected from HMOs. Because ICM would be starting out in a hole, it is unlikely that it could achieve the savings needed by the state.

## Notes

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

# Stem cell research and ban on human cloning

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**HB 1929 by Woolley/HB 864 by P. King**  
***Died in House committee***

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**HB 1929** would have prohibited reproductive human cloning and established penalties, including a civil penalty of up to \$10 million for each violation and a criminal offense punishable as a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000). The bill explicitly would not have restricted stem cell research but would have directed the Health and Human Services Commission to establish an advisory committee to develop guidelines for such research. Stem cell research only could have been conducted using female reproductive material that was voluntarily and knowingly donated; such material could not have been purchased or sold.

## Supporters said

Stem cell research is one of the most promising – and poorly understood – potential advances in medicine. Often confused with human cloning, stem cell research employs therapeutic cloning, which simply involves using a donor egg to reproduce the patient’s own genetic material. This technique potentially can offer the benefit of undifferentiated stem cell transfer to treat a wide range of diseases and a lower risk of rejection by the patient. Texas should ensure that its scientists can participate in this new frontier of medicine.

By ensuring that Texas scientists could conduct stem cell research, HB 1292 would help the state attract economic development and investment. The state’s institutes of higher education as well as its biotechnology industry would benefit, possibly bringing some of the nation’s leaders in science and medicine to Texas.

Other states already have staked their claim on investment in stem cell research. In California, voters approved a bond initiative that will commit \$3 billion to stem cell research over the next 10 years. Illinois, Maryland, New Jersey, New York, Wisconsin, and other states have plans at various stages to commit state funding toward stem cell research. If Texas prohibits stem cell research, the state quickly will be eclipsed by other states that are making a commitment to the future of scientific research and investment.

**HB 864** would have prohibited reproductive human cloning and established penalties. It also would have prohibited somatic cell nuclear transfer, a cloning process by which the nucleus of an unfertilized egg is removed or destroyed and the nucleus of a somatic cell – a cell other than a sperm or egg cell – is then placed in the emptied egg.

## Supporters said

Texas should not condone ethically abhorrent research based on dubious claims of future benefit. While stem cell research in general may produce medical advances, there is no way to predict the outcome of research using cloning techniques.

A ban on certain forms of stem cell research in Texas would not impede the state’s economic development because other areas of research are active here, with strong public-private partnerships, higher education research departments, and world-renowned medical centers. Texas can grow into a center of excellence for other types of research and leave somatic cell nuclear transfer work to other states or even other countries.

## Notes

Other bills that would have prohibited reproductive cloning and protected stem cell research included SB 128 by Shapleigh and SB 1164 by Zaffirini, both of which were left pending in the Senate Health and Human Services Committee.

SB 943 by Armbrister, which was left pending in the Senate Health and Human Services Committee, also would have prohibited somatic cell nuclear transfer but would not have prohibited research using genetic material created by fertility treatments that otherwise would be discarded.

In addition to bills concerning stem cell research, legislation was filed and left pending in committee regarding the funding of such research, including:

- HB 2269 by Woolley and SB 1041 by Janek, which would have authorized the issuance of bonds to fund stem cell research;
- HB 3076 and HJR 96 by Naishtat, which would have established a grant program for stem cell research;
- HB 2469 and HJR 71 by Thompson, which would have established a statewide funding program for stem cell research; and
- HB 2081 by Paxton, which would have prohibited the use of state funds for any stem cell research.



# Local MH/MR authorities serving as providers

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## HB 2572 by Truitt *Vetoed by the governor*

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**HB 2572** would have directed the Health and Human Services Commission (HHSC) to establish roles and responsibilities for local mental retardation authorities and permitted them to offer intermediate care facilities for the mentally retarded (ICF-MRs) services and waiver services if needed to ensure access or under certain capacity limitations. Local mental health authorities also would have been permitted to serve as qualified service providers.

The bill would have restricted HHSC from decreasing the number of local mental health or mental retardation (MH/MR) authorities in a community until September 1, 2007, unless two or more local authorities requested the reduction or HHSC determined that the local authority had failed to meet contract terms.

The bill also would have required HHSC to include in its rate setting a review of different payment methods and the effect of payment changes before implementing any rate change, although the requirement would not have applied to payment rates for ICF-MRs, some waiver services, and mental retardation service coordination.

### Supporters said

Local mental health and mental retardation authorities should not be the providers of last resort as established by HB 2292 by Wohlgenuth, the omnibus health and human services reorganization bill enacted by the 78th Legislature. Not enough private provider resources are available to fill the need that would be created if the local authorities could not also serve as providers in some areas of the state. Individuals need access to services, and repealing the provider of last resort and privatization amendments would ensure access.

The approach taken in HB 2572, which would build on local networks, is more appropriate than the one in HB 470 by J. Davis, which would centralize contracts, taking management of the contracts from the local authorities and placing them at the agency. Managing local contracts from

afar is difficult and can mean working less closely with providers or with fewer providers. It also distances local donors and supporters from the local networks, which can lead to less funding, fewer volunteers, and a reduced sense of community for the people these programs serve.

### Opponents said

Local mental health and mental retardation authorities should not serve as both state contractors and providers. Already the contractor has significant influence over a client's access to services, but if it also were the provider, the client would have no other entity to which that client could turn. This inherent conflict of interest should be avoided wherever possible.

### Other opponents said

A better approach, contained in HB 470, would mandate a split in responsibilities between authority and provider and would move the state toward a more efficient and consumer-driven system by proposing a needs-based, rather than diagnosis-based, system and allowing for innovation at the local level.

### Notes

The **HRO analysis** of HB 2572 appeared in Part Two of the May 9 *Daily Floor Report*.

HB 470 died in the House. The HRO analysis of HB 470 appeared in Part Two of the May 12 *Daily Floor Report*.

For more information on HB 1572, see HRO Focus Report Number 79-9, *Vetoed of Legislation, 79th Legislature*, July 29, 2005, pp. 15-18.

# Standards for Canadian pharmacies shipping prescription drugs to Texas

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**SB 410 by Whitmire, amendment by Hochberg**  
***Effective generally September 1, 2005***

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**SB 410**, the State Board of Pharmacy Sunset bill, in addition to other provisions, establishes a designation for Canadian pharmacies to lawfully ship prescription drugs to Texas residents.

To obtain designation, a pharmacy must meet Texas licensing standards and submit certain information, such as the name and address of the pharmacy's owner and pharmacist-in-charge. In addition, the Canadian pharmacy must have a Canadian license in good standing and be able to produce a record of a prescription drug order within 72 hours of a request by the board, an affidavit that the pharmacist has read and understands applicable Texas law and rules, and evidence that the pharmacy meets the board's safety, dispensing, and other standards.

In addition to meeting Texas pharmacy requirements, a designated Canadian pharmacy must meet other standards, including dispensing only drugs prescribed for long-term use, only drugs that are approved by Canada's Therapeutic Products Directorate for sale to residents of Canada, and only drugs in the original, unopened manufacturer's packaging whenever possible. A Canadian pharmacy may dispense only refilled prescriptions. It may not fill an initial prescription, dispense an amount that exceeds a three-month supply, dispense a drug for which there is not an equivalent drug in the United States, or dispense certain other classes of drugs, such as controlled substances, biological products, or infused drugs.

The board will conduct random, annual inspections of designated pharmacies to ensure compliance. Other than the initial inspection, the board can contract with another state to perform the inspection. Designated Canadian pharmacies must send complaint reports by Texas residents to the board and compile and maintain a 30-day effective price list for prescription drugs provided to Texas residents.

The bill directs the board to designate between one and 10 Canadian pharmacies and authorizes necessary fees to cover inspections. The board will create a web site containing information needed for Texans to order prescriptions from designated Canadian pharmacies.

## Supporters said

Inspecting and designating certain Canadian pharmacies would better protect Texas consumers. Because prescription drugs are significantly cheaper in Canada, many Texas residents already order their drugs from Canadian pharmacies or over the Internet. The cheaper prices spare some Texans from having to choose between purchasing needed drugs and paying rent or buying food and can prevent people with inadequate or no prescription drug coverage from rationing their medications. Unfortunately, some purchasers of medications from foreign pharmacies currently fall victim to online scams and receive fraudulent drugs as a result. Official state designation of Canadian pharmacies and the accompanying web site would help ensure that Texas residents obtained their prescriptions from legitimate foreign businesses that comply with standards similar to those required of a Texas pharmacy.

Other states have similar programs, including Minnesota, Nevada, Rhode Island, and Wisconsin. For example, Minnesota's state-administered web site ([www.minnesotarxconnect.com](http://www.minnesotarxconnect.com)) lists prescriptions that can be obtained from Canadian and British pharmacies along with their prices. The Canadian pharmacies featured on the site are licensed by Canada and inspected by Minnesota state officials. Consumers can compare prices and obtain the information necessary to purchase drugs through reliable foreign pharmacies.

Although the national debate about prescription drug importation ultimately will be decided by Congress, offering information to Texas residents in the meantime could protect them from scams and dangerous drugs. Already, many Texans buy their drugs from other countries, either in Mexico or online from foreign pharmacies. Access to a list of certified pharmacies simply would allow consumers who already buy foreign prescriptions to make safer purchases.

Federal law does not prohibit states from creating web sites containing information about Canadian pharmacies. Other states have done the same thing, and the Food and Drug Administration (FDA) has not taken enforcement action against them. In a May 2005 letter to

Gov. Kenny Guinn of Nevada, the FDA stated: “To date, FDA has focused its enforcement resources on those who commercialize the practice of importing drugs into the United States from abroad. ... As a matter of enforcement discretion, FDA generally has not seized drugs from those who have taken buses across the border and then brought foreign drugs back into the United States for their own personal use.” It is unlikely that the FDA would take enforcement action against the state of Texas for establishing an informational web site or against any citizen who used it to make purchasing decisions.

## Opponents said

This bill would give consumers a false – and potentially harmful – sense of security. Even if Texas inspected Canadian facilities and ensured that the pharmacies were licensed, the board still could not determine where the drugs were manufactured, if a specific lot had been recalled, or if re-dispensing had occurred. Canada allows the sale of drugs manufactured in third-world countries and under conditions not permitted in the United States for safety reasons. By endorsing foreign pharmacies, Texas could mislead residents into thinking the drugs they purchased from abroad were safe, which could not be assured. Also, because Texas has no jurisdiction over Canadian pharmacies, any complaint resolution or recourse performed by the board would have no effect.

This bill would violate federal law, which the FDA has affirmed in more than 10 letters sent to governors and local government officials in charge of similar plans. Importing drugs by individuals from abroad is illegal, and those who can be found civilly and criminally liable include any who cause a prohibited act under the Federal Food, Drug, and

Cosmetic Act (21 U.S.C. § 331). The fact that the FDA has not yet taken enforcement action does not mean the agency would not choose to go after Texas.

Not only might consumers be exposed to fraudulent drugs through importation, they unwittingly could be supporting terrorist networks in the process. In a recent report by the Pharmaceutical Research and Manufacturers of America, the industry calls on the Department of Homeland Security to conduct a threat and vulnerability assessment for imported drugs because of a possible link between counterfeit goods, including pharmaceuticals, and terrorist groups.

Other, safer, options exist for consumers seeking lower-cost prescription drugs. Some manufacturers have programs through which low-income or uninsured people can obtain their prescriptions free or at a reduced cost. A web site with information on how to enroll in such programs would be more helpful to Texans than one directing them to Canadian pharmacies. Nationally, the federal government has launched initiatives to bring down the cost of medications, including accelerated approval of new medical procedures and drugs and fewer delays in bringing generic drugs to market. The Medicare prescription drug discount card also will offer seniors discounts and expanded coverage for prescriptions.

## Notes

The **HRO analysis** of SB 410 appeared in the May 22 *Daily Floor Report*. The portion dealing with Canadian pharmacies was added by amendment on the House floor and did not appear in the original bill analysis. A similar provision was proposed in HB 173 by Hochberg, which died in the House Public Health Committee.



# Higher Education

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# Authorizing tuition revenue bonds for higher education institutions

**HB 6 by Morrison, Second Called Session**  
***Died in the Senate***

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**HB 6** would have authorized the issuance of a total of \$2.75 billion in tuition revenue bonds (TRBs) for institutions of higher education to finance construction and improvement of infrastructure and related facilities. It also would have appropriated \$108 million to pay debt service on the bonds authorized by the bill. The bonds would have been payable from pledged revenue and tuition and, if a board of regents did not have sufficient funds to meet its obligations, funds could have been transferred among institutions, branches, and entities within each system or university.

HB 6 also would have added junior college districts with a total headcount enrollment of 40,000 or more to the statutory list of entities eligible to issue debt obligations.

## Supporters said

HB 6 would authorize financing for a wide range of critical facilities projects at higher education institutions throughout the state that play an important role in closing the gaps in higher education. Renovations, repairs, upkeep, and new facilities are essential to the state's ability to provide high quality education to Texas students. Higher education institutions depend on state support for maintenance and expansion to keep pace with the exploding growth in student enrollment and to maintain and enhance the quality of education these students receive. Economists and higher education experts say that economic prosperity and better jobs depend on having a highly skilled and well educated workforce.

TRBs are the most cost-effective way to finance higher-cost construction or improvement of long-lasting infrastructure, which can be used while the debt is being paid off. With interest rates near all-time lows, now is the ideal time to finance the construction of new classrooms, laboratories, and student housing. The state should make an investment in higher education that would pay for itself many times over by supporting each institution's bond program. The bonds would be pledged against university revenues and thus would pose little financial risk for the state.

While the cost of supporting these bonds is significant, it is in the state's best interest to continue to support higher education by paying a significant portion of debt service on

TRBs. In its 2004 report, the Joint Interim Committee on Higher Education recognized the importance of supporting TRBs in its recommendation that the Legislature require that general revenue funding be used to reimburse higher education institutions for the cost related to debt service of all legislatively approved TRBs. HB 6 would continue the Legislature's recent practice of funding part, but not all, of the debt service on the TRBs authorized.

An increase in cost-sharing between the state and higher education institutions would be a significant policy shift, and the state should not retreat from the long-held practice of assisting with the funding of debt service with general revenue. The ability to support cost-sharing would vary widely among universities. It would be difficult for smaller institutions that are less able to raise tuition to make debt-service payments and would create a burden for students attending institutions that did raise tuition in response to cost-sharing pressures. According to credit rating agencies, any change to the state's long-standing commitment to fund TRBs could lower the bond ratings of public universities, thereby increasing the cost of debt for needed projects.

## Opponents said

TRBs have become popular because they allow lawmakers to support more projects by paying only a small portion of the cost and leaving the remaining financial commitments for future legislatures and taxpayers. Because of limited state resources, there should be greater cost-sharing between the state and the institutions that issue the bonds. The Legislature and higher education institutions need to move in the direction of less reliance on state funding for debt service on TRBs, requiring institutions to include bond debt as part of their overall operating budgets. Cost-sharing would allow institutions to issue larger amounts in TRBs, thereby funding more capital projects. Institutions have other sources to fund the cost of buildings, including bonds backed by the Permanent University Fund and the Higher Education Fund, indirect research cost reimbursements earned on externally funded research programs, tuition revenues, and private funds. With tuition deregulation, these institutions have more flexibility to raise the revenue they need to finance capital improvements.

## Other opponents said

HB 6 would be a step in the right direction but is significantly underfunded. While the bill would authorize \$2.75 billion in bonds requiring \$476 million in debt service for fiscal 2006-07, the related appropriation for debt service would be only \$108 million through the next biennium. It is assumed that the institutions would be responsible for the remaining debt service, which most institutions – smaller universities in particular – would have difficulty supporting. This could force university systems to choose among critically needed projects and could result in projects being postponed.

## Notes

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

During the first called session, the House passed HB 6 by Morrison, which would have authorized \$2.7 billion in TRBs for higher education institutions. The bill died in the Senate.

During the regular session, the House and the Senate passed HB 2329 by Morrison, which would have authorized a total of \$2.2 billion in TRBs for higher education institutions. The bill died when neither the House nor the Senate considered the conference committee report for the bill. Sec. 14.61 of Article 9 of SB 1 by Ogden, the general appropriations act for fiscal 2006-07, included \$108 million for TRB debt service, contingent on passage of HB 2329 or similar legislation. Gov. Perry line-item vetoed this provision because HB 2329, or similar legislation, was not enacted.

A related bill introduced in the first called session, SB 80 by Ogden, would have authorized the issuance of TRBs at higher education institutions, but would have limited state reimbursement for debt service beginning September 1, 2007. The state reimbursement could not have exceeded 60 percent of the amount of the debt service for as long as the bonds were outstanding, unless the limit imposed a hardship for an affected university. SB 80 was left pending in the Senate Finance Committee.



# Limiting Top 10 Percent automatic admissions of undergraduate students

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**HB 2330 by Morrison**  
***Died in Senate committee***

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**HB 2330** would have required each state university to reserve at least 50 percent of its enrollment capacity for first-time undergraduate students for admission of students who graduated in the top 10 percent of their high school classes and, under existing law, gained automatic college admission. If the number of top 10 percent applicants exceeded 50 percent, priority would have been given to students who completed the advanced high school program or the equivalent.

The commissioner of higher education could have developed a standard method of computing a high school student's grade point average to be used in determining eligibility for automatic admission. The computation method would have given extra weight to honors courses and other advanced courses, would have applied to students who entered 9th grade during or after the 2007-08 school year, and would have expired September 1, 2010.

Automatic admission would have been granted to a transfer student who completed the core curriculum at another university and who otherwise qualified for automatic admission.

## Supporters said

HB 2330 would maintain the benefits of the Top 10 Percent Law while giving universities the flexibility they need to carry out their duty to all the people of Texas. The admissions process of any university is an exercise in both selecting qualified students with a high probability of success and crafting an entering class that meets the university's mission. By requiring universities to admit all applicants who graduated in the top 10 percent of their high school classes, the Top 10 Percent Law has had some negative consequences that HB 2330 would address.

Current law requires state universities to admit certain students based on a single criteria – graduation rank – that limits an institution's flexibility and creates an unhealthy academic environment. Texas' flagship institutions are losing control of enrollment through the number of slots they must dedicate to top 10 percent graduates. The share of students admitted automatically at Texas A&M-

College Station already is approximately 50 percent, and the situation at the University of Texas (UT)-Austin is fast approaching the point where Texas residents will be admitted exclusively on the basis of high school class rank. Students are not one-dimensional, and a university needs room in its admissions decisions to consider criteria other than high school rank.

Capping the number of automatic admissions would allow institutions more discretionary admissions, and a holistic approach could be used so that other factors, such as test scores, special talents, leadership ability, personal achievements, or other relevant aspects of a student's application were considered. The bill would allow institutions the flexibility to admit a greater number of other students, including minority students and those highly qualified students who did not graduate in the top 10 percent of their classes.

Another negative consequence of the current law is that it is unfair to bright students who attend competitive high schools but do not graduate in the top 10 percent of their classes. This has caused a "brain drain" – forcing top students to attend universities outside Texas because they were denied admission to the flagship universities. Conversely, some students who graduate in the top of their classes at less demanding high schools may not be qualified to attend the state's best public universities. HB 2330 would establish balance in this area by allowing for the admission of more second-decile graduates to state universities and encouraging high school students to take rigorous courses by giving preference to students who took the advanced high school curriculum.

HB 2330 is based on data published in recent studies and presented to the Senate Subcommittee on Higher Education during the interim. A study published in 2004 by Princeton University called for allowing no more than half of top 10 percent Texas freshmen to be admitted automatically. Additionally, a report issued last year by the Commission of 125, an advisory group of prominent citizens from within and beyond Texas, contains recommendations that UT-Austin exercise primary control over admissions and efforts to ensure diversity and that no single factor should be used for admissions.

## Opponents said

The number of students allowed to be automatically admitted should not be capped because the Top 10 Percent Law is doing what it was designed to do – provide a race-neutral method of admitting a diverse class of highly qualified students. It is fair because basing admissions on class rank levels the playing field for students across the state and compares students to their peers based on how well they have taken advantage of available resources. Capping the number of students admitted automatically would undermine the college aspirations of students from all racial, ethnic, geographic, and economic backgrounds and would diminish the duty and accountability of flagship institutions to all Texans.

The existing Top 10 Percent Law has helped Texas' flagship universities fulfill their mission to serve students across the state by granting broader opportunities to the very best students from every high school. Not only has it helped create more diverse freshmen classes at UT-Austin and Texas A&M, but it has done so in a way that benefits all regions of the state, especially poorer rural and urban areas. According to an analysis performed by UT-Austin, the freshman class of 2003 was the most diverse in the university's history, and minority students made up a slightly greater percentage of the incoming classes of 2004 and 2005.

In response to concerns about the academic qualifications of many students who gain automatic admission under current law, data from UT-Austin's admissions office indicate that since 1996, among all racial and ethnic groups, top 10 percent students have outperformed students who scored significantly higher on standardized college entrance exams. In addition, class rank appears to be a good predictor of student performance. The study published by Princeton University revealed that top-ranked students from resource-poor schools are enrolling out of state in some of the most competitive public and private institutions. If these students truly were unprepared for the rigors of higher education, they would not be getting into these schools.

The Princeton study also showed that, contrary to anecdotal claims, top-ranked students from so-called competitive high schools who did not graduate in the top 10 percent of their classes still have a substantial advantage in their access to the flagship institutions. Virtually all who graduated in the top 20 percent from these schools who identified UT-Austin or Texas A&M as their top college choice succeeded in enrolling there. Lastly, the

study revealed that most students who attend out-of-state universities do so by choice, not because they were denied admission to a Texas flagship.

The Top 10 Percent Law should be maintained in its current form because it has proven the most effective method of promoting diversity in higher education in Texas. Minority representation in the state's universities is greater now than it was during the days when Texas universities practiced race-conscious affirmative action policies, so it is unlikely that a "holistic" admissions policy that gave more weight to factors other than class rank would be any more successful in ensuring diversity in higher education.

## Other opponents said

The debate about changing the Top 10 Percent Law misses the point. The problem is not that the state has too many students entering higher education under automatic admission but that there are not enough flagship institutions to accommodate the number of qualified students who want to attend. Texas should have about seven more flagship universities based on its current population.

Universities need the ability to regain control of their admissions policies, but the answer should not be the capping of automatic admissions. Instead, a top 10 student should be guaranteed admission to a university system, rather than a particular school, which would allow the system administrators to make the institutional assignment in a way that was responsive to the carrying capacity of the higher education system.

Although some aspects of the law are beneficial, the Top 10 Percent Law has not done enough to meet the state's need to build minority representation in higher education. Adopting a holistic admissions approach would be a step in the right direction, but a return to a statewide policy of race-conscious university admissions, as permitted under recent U.S. Supreme Court decisions, would be the surest way to ensure true diversity in freshman admissions.

## Notes

The **HRO analysis** appeared in Part One of the May 11 *Daily Floor Report*.

A related bill, SB 111 by Shapleigh, effective September 1, 2005, authorizes the higher education commissioner to develop a standard method for computing a student's

high school grade point average that gives additional weight for each honor's course, advanced placement course, international baccalaureate course, or dual-credit course completed by a student for purposes of determining automatic undergraduate admission under the Top 10 Percent Law, beginning with students starting the 9th grade during the 2007-08 school year. It also requires higher education institutions to grant undergraduate credit to entering freshmen for completing the international baccalaureate program, achieving a required score on

advanced placement or college-level examinations, or successfully completing courses while concurrently enrolled in high school and a college or university.

SB 333 by West, which would have required the commissioner to develop a weighted computation method for determining the top 10 percent and also would have limited application of the law to students who completed the recommended or advanced curriculum, passed the Senate but died in House committee.

# Student financial aid revisions and nonvoting student regent

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**SB 1227 by Shapiro**  
**Effective September 1, 2005**

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**SB 1227** revises student financial aid programs. It requires the Texas Higher Education Coordinating Board (THECB) to develop a comprehensive financial aid training program for public school counselors, employees of student financial aid offices, and members of community-based organizations.

The bill authorizes use of funds paid to the THECB by the federal Lender's Special Allowance Program to pay for the administration of loan and grant programs, including the awarding of grants through the Towards Excellence, Access and Success Grant Program (TEXAS Grants).

TEXAS Grant awards for students attending private higher education institutions are phased out beginning with the fall 2005 semester. However, students who received TEXAS Grant awards for that semester or an earlier academic period are "grandfathered" and continue to receive them.

SB 1227 changes the name of the TEXAS Grants II program, for students attending community and technical colleges, to the Texas Educational Opportunity Grant and establishes the same hardship provisions and satisfactory academic progress requirements as for TEXAS Grants.

The bill allows students to pay tuition and fees on an installment basis, except when a student has financial aid available to cover the total amount, in which case the university must apply the financial aid toward the total amount of tuition and fees and release the balance to the student. Payment options for students with delayed awards of financial aid are authorized. An institution may allow a student waiting for disbursement of financial aid to register on an accounts-receivable basis and postpone the due date of unpaid tuition and fees. A student whose financial aid award later was cancelled or reduced would have up to 30 days to pay any unpaid tuition or fees.

SB 1227 establishes the Higher Education Enrollment Assistance Program through which the THECB provides enrollment and financial aid information to students in three areas of the state that have low rates of students enrolling in higher education.

The bill requires the governor to appoint a nonvoting student regent to the board of each general academic teaching institution, medical unit, and dental unit in each university system. The student regent has the same powers and duties as other board members except that the student regent may not vote on matters before the board, make or second any motion, or be counted in determining a quorum.

## Supporters say

SB 1227 would implement a number of changes recommended by the Joint Interim Committee on Higher Education that would enable the state, higher education institutions, and students to make better use of financial aid.

Prior law allowed the state to use the federal Lender's Special Allowance to pay for the administration of loan and grant programs. SB 1227 would allow these federal funds to be used directly as financial aid, including for TEXAS Grants, instead of merely to pay administrative costs, which could be covered by other appropriated funds.

Adjusting the installment plan and allowing students to enroll on an accounts-receivable basis would provide more payment options for students and their families. Currently, students who qualify for financial aid but have not received the award by the time they register must obtain alternate funding to pay their initial charges for tuition, fees, books, and supplies, which can create a severe financial hardship. If a student's award was delayed, SB 1227 would authorize universities to allow the student to register at the beginning of the semester and pay tuition and fees when the financial aid became available. The fact that such students already would have been processed and approved for aid would serve as collateral on a university's postponement of the payment due date.

The name of the TEXAS Grant II program should be changed to eliminate the confusion with the TEXAS Grant program. Conforming the hardship provisions and satisfactory academic progress requirements for the Texas Educational Opportunity Grant with those for the TEXAS Grant also would streamline the two programs.

While university boards of regents have done a good job of reaching out to students, these bodies should contain student representation in some form. In the years since the Legislature began allowing boards of regents to set designated tuition, many students have expressed concern that their voices have not been heard. Texas has many students capable of serving in this capacity who could handle sensitive, confidential issues that can come before boards of regents. Student regents are present on the board of the Texas Guaranteed Student Loan Corporation and on university boards in 39 other states, where they have proved to be valuable assets.

## Opponents said

The bill should prohibit a student regent from being present during executive sessions. It would be awkward to air certain proceedings in the presence of a student, including sensitive matters such as the termination of a president that best would be left to the voting regents of the board.

## Notes

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

SB 34 by Zaffirini, which requires students to complete undergraduate degrees in four or five years to qualify for the tuition rebate program, also provides for a nonvoting student regent.



# Statewide accountability system and tuition deregulation review

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## SB 1228 by Shapiro Died in the House

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**SB 1228** would have required the Texas Higher Education Coordinating Board (THECB) to develop and implement a statewide assessment and accountability system to measure the performance of each Texas higher education institution and public junior college and the effectiveness of each institution in managing and using available funds. The bill would have created a legislative oversight committee that would have reviewed affordability and accessibility of higher education, including the impact of tuition deregulation. It would have set forth reporting requirements for the oversight committee and THECB.

The bill would have outlined performance goals used in measuring an institution's progress in certain areas, including the number of students served, the number of degrees or certificates awarded, retention and graduation rates, institutional research, and each institution's overall excellence determined in part by its number of nationally recognized programs. Each year, using composite measures for all the goals, THECB would have rated and assessed each institution against its peers in Texas and in other states. If an institution received an unacceptable performance rating, it would have been prohibited from increasing designated tuition, except for cost-of-living increases, until it received an acceptable performance rating.

The committee would have reviewed tuition deregulation and made recommendations to the 80th Legislature for its continuation or repeal. Tuition deregulation would have been repealed as of September 1, 2008, if not continued by the Legislature.

### Supporters said

SB 1228 would improve the performance of all institutions of higher education in Texas and help control huge increases in designated tuition. *Closing the Gaps by 2015*, the state's higher education plan adopted in 2000, outlines the goals of increasing enrollment and success in higher education among students statewide but does not contain any benchmarks or mandates to ensure that institutions meet these objectives. Taxpayers deserve to know how Texas institutions compare to their peers statewide and nationally, and leaders in higher education

need data with which to measure and monitor the progress of institutions. Moreover, institutions must be held accountable in meeting the standards of excellence set by THECB.

In addition to setting goals and measuring performance, SB 1228 appropriately would prevent low-performing institutions from increasing designated tuition. This would help control escalating increases in tuition that, by some accounts, have priced many Texans out of higher education. In response to an historic budget shortfall, the 78th Legislature in 2003 deregulated designated tuition by giving universities authority to set that portion of the tuition rate. According to the comptroller, tuition rate increases in the first year of deregulation averaged 17.5 percent statewide, and tuition at some of the larger universities, including the University of Texas at Austin, increased nearly 40 percent. While institutions need the flexibility to increase designated tuition in order to meet their needs and make long-range plans, SB 1228 would demand accountability from institutions of higher education to the Legislature and the public.

### Opponents said

SB 1228 would reverse a recent policy decision that has not had enough time to work and could cause universities to increase fees. Even with tuition deregulation, higher education in Texas is still a bargain compared to tuition at public institutions in other large states. Texas does not have the resources to fully fund higher education in light of the other competing demands for state funds, and Texas institutions, through the freedom to set designated tuition, now are playing "catch-up" with other states that previously have made significant investments in higher education. In order for Texas universities to remain competitive, there must be cost-sharing in tuition between the state and the public. Current policy is a market-based model that allows tuition to fluctuate with demand and allocates students to various state institutions according to affordability.

Allowing the Legislature to regain control of setting tuition rates would create uncertainty about future funding among state universities. Higher education officials have



used their authority to set tuition responsibly, incorporating student input and committing new revenue toward hiring faculty and creating scholarships. As long as higher education institutions do not have adequate state support, they must be able to raise enough funds to keep pace with growing enrollment and the costs of instruction and faculty. Far from helping to close the gaps, a return to state-regulated tuition would cause Texas institutions to fall behind.



# Judiciary

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# Increasing compensation for state judges and adding court fees

**HB 11 by Hartnett, Second Called Session**  
**Effective December 1, 2005**

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**HB 11** raises judicial salaries, institutes a new fee on criminal court convictions and civil court filings, and requires the collection of data about judicial turnover.

**Judicial salaries.** HB 11 increases judges' salaries and bases them on the salary of district judges, instead of Supreme Court justices. District court judges' minimum annual state salaries will rise from \$101,700 to \$125,000. Appellate court justices, other than chief justices, will have minimum annual state salaries of 110 percent of district judges, meaning that their minimum salaries increase from \$107,350 to \$137,500. Supreme Court justices will have minimum annual state salaries of 120 percent of district judges, meaning that their minimum state salaries increase from \$113,000 to \$150,000. District judges and courts of appeal justices can receive county supplements up to the caps in HB 11.

**Fees on criminal and civil cases.** HB 11 increases fees in civil and criminal cases. A person convicted of any offense, other than a pedestrian or parking offense, will pay an additional \$4 in court costs. Sixty cents of this fee will go to the general fund of the municipality or county to promote the efficient operation of municipal courts and the investigation, prosecution, and enforcement of municipal and state offenses. The other \$3.40 will be deposited in the state judicial fund. The bill also adds a \$37 civil case filing fee in district courts, statutory county courts, and county courts, to be deposited in the judicial fund.

## Supporters said

**Judicial salaries.** In order to attract and maintain the highest quality judges, Texas must raise its judicial salaries. State judges make important decisions that affect the entire state, and their pay should be commensurate with their responsibilities, duties, and skills. Currently, Texas ranks 39th among states in judicial salaries. HB 11 would address this by giving needed, modest raises to the state's judges, who have not had a salary increase since 1997. To attract and maintain quality judges, judicial salaries must be raised to compete with private sector and other public service salaries. The low judicial salaries paid in Texas discourage experienced judges from remaining on the bench, which inevitably affects the quality of justice and leads to inefficiency and uncertainty.

HB 11 is not the vehicle to undertake a change to sever the link between the pensions of the elected class of state officials and judicial salaries. Any change in this arrangement should be considered independently of this bill. Legislators receive low pay for their hard work, making many sacrifices during the course of their public service, and their pensions are a fair part of the compensation received by those who serve long enough to qualify.

**Fees on criminal and civil cases.** Monies from the state judicial fund traditionally are appropriated – along with general revenue – to pay judicial salaries. Depositing the fees generated by HB 11 in the judicial fund in no way would tie judicial pay directly to decisions made by judges. This mechanism simply is a method of finance that would not create a judicial conflict of interest. An increase in court fees would be the most logical way to afford a judicial pay raise at this time, which would help ensure that those in the court system received the highest quality justice. Anyone who could not afford the fees could file an affidavit asking the court to waive the costs.

HB 11 is not the appropriate vehicle for a new fee to fund indigent criminal defense, and the topic may not even be germane to the bill. The debate over increased funding for indigent criminal defense should take place independently of HB 11.

## Opponents said

**Judicial salaries.** Judges are adequately compensated. They earn significantly more than most Texans and most other public servants. Salaries in the private sector are not the appropriate benchmark by which to evaluate a judge's salary. Pay in a private law firm is vastly higher than most other occupations, even other areas of the legal profession. Individuals are attracted to the bench not for the salary but for the desire, prestige, and the privilege of public service. It is unreasonable to expect that a judge's salary could compete with earnings in the private sector.

HB 11 should sever the link between judicial salaries and legislative pensions so that an increase in judicial salaries did not result in an increase in retirement benefits for legislators and others in the elected class. Lawmakers should not enact legislation that automatically and indirectly would

boost their own pensions, especially when the Legislature has restricted future teacher retirement benefits and has failed to fully fund the Employees Retirement System and the Teacher Retirement System so that regular retired state employees and retired educators might receive long-delayed pension increases. If legislators and other elected officials deserve higher pensions, that issue should be debated separately.

***Fees on criminal and civil cases.*** A judge's salary historically has been and should continue to be funded through general revenue, not through fees on criminal and civil cases. Coupling an increase in judicial salaries with a fee on criminal convictions would raise questions about the appearance of judicial conflict of interest and the impartiality of judges' decisions about guilt or innocence.

The new fee that HB 11 would impose on criminal convictions should be increased and the money dedicated to supporting local governments' efforts to provide attorneys for indigent criminal defendants. State funding for indigent defense is inadequate, and the fee created by HB 11 would be an appropriate way to raise such revenue.

## Notes

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

An earlier version of HB 11 died in the Senate during the first called session, and its companion bill, SB 11 by Duncan died in the House Calendars Committee. A similar bill, SB 368 by Duncan, died during the regular session after the House did not consider the conference committee report on the bill.

# Creating new judicial districts in certain counties

**SB 1189 by Wentworth**

***Generally effective September 1, 2005***

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**SB 1189** creates the following judicial districts:

- 6th and 7th criminal judicial districts, composed of Dallas County;
- 412th Judicial District, composed of Brazoria County;
- 424th Judicial District, composed of Blanco, Burnet, Llano, and San Saba counties;
- 425th Judicial District, composed of Williamson County;
- 426th Judicial District, composed of Bell County;
- 427th Judicial District, composed of Travis County, which will give preference to criminal matters;
- 428th Judicial District, composed of Hays County;
- 430th Judicial District, composed of Hidalgo County, which will give preference to family violence and criminal matters;
- 433rd Judicial District, composed of Comal County; and
- 434th Judicial District, composed of Fort Bend County.

The new district courts in Dallas, Brazoria, and Hays counties and the 425th multi-county court are created September 1, 2005. The rest will take effect January 1, 2007.

SB 1189 establishes when the terms of the 6th, 7th, 207th, 406th, 424th, and 426th district courts begin.

The bill also makes the following changes in jurisdiction:

- the 264th and 426th judicial districts are added to the list of districts that have concurrent jurisdiction in Bell County;
- the 424th District Court now has concurrent jurisdiction with the 33rd District Court;
- Willacy County is removed from the jurisdiction of the 103rd, 107th, 138th, 357th, and 404th district courts, which now are composed solely of Cameron County;
- the 406th District Court now has concurrent jurisdiction with the other district courts in Webb County; and

- the family violence and criminal matters preference for the 398th district court and the criminal matters preference for the 389th district court, both in Hidalgo County, are eliminated.

All civil cases in the 92nd, 93rd, 139th, 206th, 275th, 332nd, 370th, 389th, 398th, and 430th district courts must be assigned and docketed at random by the district clerk using an automated system.

SB 1189 changes the composition of the juvenile boards in Blanco, Burnet, Comal, Leon, Llano, San Saba, and Webb counties.

The bill immunizes judges of Tarrant County criminal courts from suits arising from the performance of the judges' duties, except for acts committed intentionally, willfully, wantonly, with gross negligence, or with conscious difference or reckless disregard for the safety of others. It also allows judges in the 33rd and 424th district courts to hear certain non-jury cases.

## Supporters said

SB 1189 would promote judicial efficiency by creating new district courts in Texas counties where overloaded dockets currently are denying parties the right to obtain timely justice. Texas has experienced massive population growth in the last five years, which has had a significant impact on the district courts. The workload in district courts has increased significantly, causing long docket delays and forcing judges to work exceedingly long hours. Adding district courts would be a cost-effective way to relieve existing district courts of overcrowded dockets while speeding up the administration of justice.

Adding new courts would decrease the necessity of using visiting judges. The visiting judge fund was cut substantially in 2003, and because the general appropriations act does not increase funding of the program in fiscal 2006-07 to its former level, it is unlikely that counties could rely on the use of visiting judges in the future.

Reducing the number of district courts in Willacy County to one would be sufficient to meet the county's docket needs and save the county much needed money.

## Opponents said

This bill would cost the state \$1.3 million by fiscal 2007 and \$1.1 million per year thereafter, money that should be directed toward more pressing state budget needs. If counties need help to reduce their dockets, they should rely on visiting judges already paid for by money appropriated to the visiting judge fund.

## Other opponents said

By cutting the number of district courts with jurisdiction over Willacy County from six to one, this bill would create long docket delays for county residents. In addition, Willacy County residents might be unable to vote an unpopular judge out of office because the county would share the judge with Cameron County.

## Notes

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



# Raising the pay for jury service

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**SB 1704 by Ellis**

***Effective September 1, 2005***

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**SB 1704** requires that jurors be paid a minimum of \$6 for the first day of jury service and a minimum of \$40 for each additional day. The state will reimburse a county \$34 per day after the first day for juror pay. A county will file a claim for reimbursement through the comptroller, and the comptroller will reimburse counties quarterly. These changes will take effect January 1, 2006.

The bill requires anyone convicted of any offense, other than one related to a pedestrian or a parking offense, to pay a \$4 fee in addition to all other court costs. The fee is to be used to reimburse counties for juror pay. This court cost applies to a defendant convicted of an offense committed on or after September 1, 2005.

The bill also penalizes the act of knowingly providing false information in a request to be exempted or excused from jury service. Such an act is subject to a contempt action punishable by a fine between \$100 and \$1,000 in addition to any other criminal penalties authorized by law. The bill allows a person to postpone jury service for up to six months if the person has not been granted a postponement in that county during the previous year. This applies to a person summoned for jury service who is required to appear on or after September 1, 2005.

## Supporters said

SB 1704 would fund a much needed pay increase for Texas jurors, who are the lowest paid in the nation. The current \$6 per day minimum pay often does not cover even the cost of parking near a courthouse. Juror pay in Texas has not been increased in more than 50 years, and the minimum is woefully insufficient to encourage people to fulfill their civic duty of performing jury service. People with lower incomes are disproportionately burdened by this low pay as they simply cannot afford to perform jury duty, which often results in the inadequate representation of minorities on Texas juries. For example, Latinos make up 30 percent of the population of Dallas and Harris counties but make up only 10 percent of juries.

The minimum pay of \$6 for the first day of jury duty would not dissuade low-income citizens from appearing for jury duty. El Paso County has increased the pay of its jurors but continues to pay only \$6 for the first day of service. Even so, the county has seen a dramatic increase in the percent of people, including low-income people and minorities, who appear for jury duty.

The \$4 court cost fee that would be required of people convicted of most offenses would fully fund the increased juror pay, resulting in no loss to the state or to counties. It correctly would place the responsibility of financing juror pay raises on the responsible party — the offenders. Because the fee would be only \$4, offenders would not be overly burdened in funding the system.

## Opponents said

This bill still would set minimum pay at only \$6 for the first day of jury service. This low pay may continue to dissuade people with low incomes from appearing for jury duty.

Court costs for people convicted of criminal offenses already are very high, and many people cannot afford to pay the costs. Felons in particular experience great difficulties in readjusting to society and should not be burdened by additional costs. Additional court costs disproportionately would affect persons with low incomes and minorities, who are convicted of crimes at much higher rates. Taxpayers should pay for the costs of increasing juror pay because society as a whole benefits from having fully representative juries.

## Notes

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

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# School finance and public education revisions

## HB 2 by Grusendorf, Second Called Session *Died in the House*

**HB 2**, as reported by the House Select Committee on Public Education Reform during the second called session, would have restructured the state's method of funding public education and established new requirements for school districts, including salary increases for teachers and other professionals, mandatory school start and end dates, end-of-course assessments for high school students, and restrictions on the amount of funding that could be used for purposes other than direct instruction. The bill would have required school districts to reduce local school property taxes and obtain local voter approval for any subsequent tax increase. HB 2 would have taken effect only with the enactment of HB 3 by J. Keffer (see p. 135).

**Salaries and benefits.** The bill would have revised the minimum salary schedule for teachers and other professional staff and would have required school districts to provide an increase of \$150 per month, or \$1,500 per year, over 2004-05 salaries, including supplements. Districts also would have had to provide an average increase in compensation, defined as salaries, incentives, or other compensation, of \$500 in 2005-06 and another \$500 in 2006-07. The state would have been required to pay 50 percent of contributions for districts that currently pay into Social Security.

**Incentives.** Districts would have been required to use 1 percent of professional staff payroll to fund teacher incentive programs. HB 2 would have established a separate incentive program of up to \$100 million in state funds for the 2006-07 school year for educationally disadvantaged schools. At least 75 percent of these funds would have been used to provide rewards of at least \$3,000 for each teacher at a campus receiving a grant award. Teachers who continued to work but were eligible to retire with full retirement benefits would have received additional salary supplements of between \$1,000 and \$4,000 per year, based on their years of retirement eligibility.

**Textbooks and technology funding.** HB 2 would have established new procedures for the review, adoption, and purchase of "instructional materials," including textbooks, workbooks, and computer-adaptive materials. The current system of funding textbooks would have been eliminated, and textbook funds would have been combined with the current \$30 technology allotment for an "instructional materials and technology" allotment of \$100 per ADA (an unweighted count of students in average daily attendance)

in the 2006-07 school year and \$150 per ADA in 2007-08 and beyond. Beginning in the 2006-07 school year, districts would have been required to use a portion of this allotment for targeted technology programs.

**Local property taxes.** School district taxes would have been capped at \$1.20 per \$100 of valuation or a lower rate for any school year provided by appropriation. School districts could have imposed local enrichment taxes of up to 15 cents per \$100 of valuation with no recapture of these funds. These rates would have been limited to 5 cents in 2007, 10 cents in 2008 and 2009, and 15 cents thereafter and would have to have been approved by district voters by majority vote. Districts could have exceeded these limits and taxed up to the maximum maintenance and operations (M&O) tax rate – \$1.50 per \$100 of valuation – with at least two-thirds approval of district voters.

**State funding.** The bill would have distributed funding to school districts through two tiers. The first tier would have provided a basic "accreditation allotment" and a series of special program allotments based on dollar amounts rather than weights. All districts taxing at the minimum rate would have been guaranteed a particular sum of money adjusted based on student and community characteristics. This entitlement would have been divided into a state and local share depending on local district property wealth.

State funding in the enrichment tier would have been distributed through a guaranteed yield. Initially, the guaranteed level would have been based on a target percentile equivalent to these amounts per penny of tax effort for the following school years: \$39.20 for 2006-07, \$40 for 2007-08, and \$40.70 for 2008-09. In 2009-10, the guaranteed yield would have been determined based on a target percentile of the 94th percentile in wealth per student, which would have been increased to the 96th percentile in 2010-11.

**Funding formulas and special allotments.** State funds distributed through formulas would have been based on dollar amounts instead of weights. Districts would have received a basic accreditation allotment of \$4,600 per student and special allotments for special education, compensatory and bilingual education, career and technology education, gifted-and-talented education, and public education grants. School districts would have had

flexibility in the use of special allotments, except that they could not have spent less per student than they did in 2005-06.

Each school district or county that operated a transportation system would have received a transportation allotment of \$1.50 per mile for each approved route mile. Fast-growing districts would have received \$375 per student in ADA for the first year in which students attended a new instructional facility and, for the second and third years, \$375 for each new student. For other districts, this allotment would have been \$250 per student in ADA for the first year and \$250 for each new student in the second and third years. The bill would have applied a cost of education index (CEI) to adjust for differences among districts for such costs as inflation and teacher salaries.

**Recapture.** Local revenue would have been limited to the amount of each district's entitlement under funding formulas and adjustments. Any local property tax revenue exceeding that amount would have been subject to recapture, which would have been capped at an amount equal to 38 percent of the M&O tax revenue used in determining the district's local share, provided the district was taxing at a level of at least 75 percent of the maximum tax rate. The cap would have been tied to the level of equity in the guaranteed yield for the enrichment tier.

**Hold harmless and limitations on increased funding.** School districts would have been guaranteed an increase of at least 3 percent in state funding over levels in current law. Increases in state aid would have been limited to 108 percent in the 2006-07 school year, 116 percent in 2007-08, and 124 percent in 2008-09.

**Expenditures on classroom instruction.** By the 2009-10 school year, each district would have had to allocate at least 65 percent of its total available revenues to fund direct instructional activities. This requirement would have been phased in, with an initial requirement that at least 50 percent of revenue be allocated to direct instructional activities, with a 5 percent increase each following year.

**Sanctions for low-performing schools.** The bill would have established additional procedures for the Texas Education Agency (TEA) to intervene in the operation of low-performing campuses and authorize takeover by an outside entity if a low-performing school failed to show improvement.

**School start and end dates.** In most cases, schools would have had to start the Tuesday after Labor Day and could have ended no later than June 7.

**School board elections and term lengths.** School board elections would have been held on the uniform election date in November of even-numbered years. School board members would served staggered four-year terms.

**End-of course-examinations.** TEA would have been required to develop end-of-course assessments in secondary-level courses in mathematics, science, English, and social studies and could have required the administration of these tests to students. A joint legislative oversight committee would have been established to monitor the development of end-of-course assessments.

**Charter schools.** The bill would have repealed current statutes governing open enrollment charter schools and established new procedures for licensing charter schools and revoking the licenses of low-performing charter schools. High-performing charter schools would have received state facilities funding of \$1,000 per student.

**Facilities.** The Legislative Budget Board (LBB) would have been directed to conduct a study of instructional facilities funding and needs, including age of facilities, capacity issues, and bond indebtedness.

**Continuation of TEA.** The bill would have continued TEA until September 1, 2017.

## Supporters said

HB 2 would provide \$2.4 billion in new money for public education, increase significantly the state's overall share of education funding, improve the equity of the system, and establish new standards to ensure that Texans get more for their education dollars. The bill would provide tax relief by reducing local school property taxes and limiting the ability of school districts subsequently to increase taxes without local voter approval. New funding formulas in HB 2 would offer more flexibility in using state funds to meet each district's priorities, while also taking account of variations in cost due to student need, regional price variations, and district size.

**Salaries and benefits.** HB 2 would ensure that every teacher and professional staff member received a salary increase. Teachers would be assured of receiving \$1,500 for each of the next two years in place of the \$500 health insurance passthrough through an increase in the minimum salary schedule. The bill would allow school districts flexibility in determining the actual range of an additional pay increase of \$500 in each of the next two years. Districts have discretion in developing compensation plans for all of

their employees, and they could continue to cover the cost of a health insurance passthrough for all employees if they so chose.

**Incentives.** The bill would require districts to design incentive plans that promote cooperation while also encouraging teachers to compete for incentives. A separate \$100 million state incentive program would provide a \$3,000 award for teachers who had helped failing campuses show improvement in student academic achievement.

**Textbooks and technology funding.** HB 2 would move public education in Texas into the 21st century by giving school districts the resources and tools needed to harness the promise of technology. For continued economic growth and improved employment opportunities, Texas cannot afford to fall behind in providing a modern learning environment. Public education should follow the example of business in embracing technology as an integral part of its operations.

The bill would break the near monopoly of a handful of publishing giants in providing textbooks and related materials for Texas students and allow state funding for instructional materials to be used for technology as well. For too long, textbook publishers – with the encouragement and support of the elected SBOE – have benefited from a system that sets prices and locks out competitors years before the final product is purchased. The bill would end a process in which textbooks are updated every six years while information and technology evolve far more rapidly.

HB 2 also would set up a process to ensure that instructional materials were reviewed in a timely manner, were free of factual errors, and contained appropriate instructional content. School districts would have more flexibility in determining their own funding levels for instructional materials and technology, depending on their existing resources. Rather than having to select from conforming and nonconforming lists of approved materials, districts could select from the wide array of products on the market and choose instructional materials that support their curricula.

**Recapture.** While every district would be guaranteed an increase in overall funding of 3 percent, no district would receive a significant and immediate windfall because funding increases would be capped at 8 percent, 16 percent, and 24 percent over the next three years. By imposing a cap on recaptured funds, the bill would provide relief to a small number of wealthy districts that currently are sending up to 70 percent of local property tax revenue back to the state. This cap would be tied to the percentage of equity in the

enrichment tier. As long as the state met its commitment to guarantee equity in the enrichment tier, recapture would be limited.

**Equity.** Under HB 2, equity among Texas schools would reach record levels. For the enrichment tier, school districts would be guaranteed a higher yield per penny of tax effort than is available under the current system. HB 2 would allow school districts to seek additional funding for enrichment but would require a vote of the people each time a school district sought a tax increase. By requiring these elections, the bill would give taxpayers more say in how their money is spent.

**Instructional costs.** The bill would simplify funding formulas by converting from weights to dollar amounts and ensure by 2009 that at least 65 percent of tax dollars were being spent in the classroom on direct instruction. Districts still would be able to use a significant portion of their budgets to fund other costs, such as cafeterias, school security, and school nurses, but the bill would require that a reasonable percentage of funds were being used to provide classroom instruction.

**Low-performing schools.** HB 2 would put more muscle into the state accountability system by allowing outside entities to bid for contracts to take over failing schools if other efforts to turn the school around were unsuccessful. Too many of the state's lowest-performing schools are allowed to fail year after year with minimal consequences for the district or the state. No child should have to wait years for a public school district to produce better results.

**Facilities.** While facilities funding is an important issue, policymakers need more information before they can address the problem. The study authorized by HB 2 would assist the Legislature in developing programs to provide assistance for facilities funding where it is needed most.

**School board elections.** Elections for school board trustees should be held in November when the voter turnout is about four times higher than in May elections. Because fewer voters go to the polls in May elections, most trustees are elected by a small minority of voters. Holding school board elections in the fall, along with other elections, would result in more citizens expressing their preferences about who should manage their schools. The bill would encourage joint elections, which would save money because the expenses would be shared by the political subdivisions holding the joint election. Currently, school districts that have trustees who serve three-year terms must hold an election every year. By mandating that trustees serve staggered four-year terms, a two-year election cycle would



result, substantially reducing the number of elections. Even if some joint elections have increased costs, holding fewer elections overall still would save money.

**Charter schools.** HB 2 would give TEA the tools it needs to weed out and shut down low-performing charter schools while establishing a framework to nourish successful charter programs so that they could fulfill the original purpose that the state envisioned when it began offering charters in 1995. There are many high-performing charter programs in the state that need additional support in order to succeed. These programs should have access to funding, including facilities funding, comparable to regular public schools.

**School start dates.** Postponing the school start date would extend the summer for students, families, and teachers, providing more options for vacations, summer camps, and professional education for teachers and generating significant economic benefits to the state as well as to school districts. The later start date would benefit migrant students who now must start school later than their peers, putting them at a significant academic disadvantage.

## Opponents said

HB 2 would not provide enough money to meet the state's current or future educational needs and would create a variety of unfunded mandates that quickly would consume any increases in funding for districts. Even though all school districts would be guaranteed increases of 3 percent, this barely would be enough to keep up with inflation. The bill would not begin to replace education cuts suffered during the 2003 session, and some of the "new funds," such as the increase in the minimum salary schedule and the increased technology allotment, simply would be a different way of spending funds already allocated for education.

**Salaries and benefits.** HB 2 would provide a minimal across-the-board raise for teachers, counselors, librarians, and nurses because the \$1,500 increase would include \$1,000 per year these professionals already were promised to restore the health insurance passthrough that was reduced to \$500 per year in 2003. The additional \$500 would amount to only \$41.66 per month over a 12-month period. The bill would take away an important benefit from 300,000 other public school employees who would lose the passthrough and receive no offsetting benefit.

**Incentives.** Before approving any incentives, the state should provide funding for a more significant across-the-board pay raise for all teachers. The state will continue

to lose teachers and face ongoing shortfalls without a meaningful increase in overall salaries. Past experience has shown that performance incentive measures run out of steam when it comes time to pay for them. The career ladder experiment failed in Texas when funds ran out to pay deserving teachers, and today's incentive proposals likely would meet the same fate.

**Textbooks and technology funding.** School districts are not prepared to make the transition to technology-based instruction, and HB 2 would not provide sufficient resources to cover the full array of technology expenses it would take to support and maintain this level of instruction. Investments in technology would be wasted if a school district could not commit enough resources to cover maintenance, upkeep, replacement, training, and other elements that make up the "total cost of ownership" in a technology program. While a textbook is durable, and paper workbooks can be replaced from year to year, a laptop computer would require regular maintenance and oversight to ensure that it was being used appropriately. In many subjects, such as the study of literature, printed books are superior to technology-based materials. HB 2 should include requirements for categorical funding to ensure that school districts did not spend too much on hardware and too little on instructional content.

HB 2 would diminish Texas' influence on the instructional materials development process at many publishing companies. Protections in current law designed specifically to ensure that small, rural districts receive the same priority from publishers as larger districts would be eroded. Changing the State Board of Education's review process to an ongoing review and approval process would diminish the authority of the board and the content quality of the instructional materials. All materials – print or electronic – should meet the same review and approval requirements. Removing the requirement that districts select instructional material approved by the state board would eliminate the incentive for publishers to go through the approval process.

**Recapture.** HB 2 eventually would generate such inequities between wealthy and poor districts that the public school finance system again could be subject to constitutional challenge over funding equity issues. The 38 percent cap on recapture would lead to wide inequities between a handful of "super wealthy" districts and the rest of the school districts in the state. While some districts would see increases of slightly more than 3 percent, others would experience double-digit increases over the next several years.

**Equity.** Any gains in equity as a result of increased equalization in the enrichment tier would be more than offset by the significant inequities in the basic accreditation



allotment. The “hold harmless” provisions would carry over existing disparities in funding between property-wealthy and property-poor districts.

**Instructional costs.** The current system of distributing state funds through student weights does a good job of accounting for the different student needs in a diverse state and should not be changed. A directive specifying the proportion of funds that should be spent on direct instruction unfairly would affect schools and districts with higher non-instructional expenses, even if these expenses contribute directly to student performance.

**Low-performing schools.** Current law already establishes procedures for school districts and TEA to work together to address the problems of failing schools. Even the federal No Child Left Behind Act gives a low-performing school four or five years before it is subject to outside takeover. These solutions take time, and school districts should have the chance to correct the situation before a problem is turned over to outside entities.

**Facilities.** Any revision of school funding formulas should include a component for facilities funding. This is one of the areas that the district court recently deemed to be unconstitutional, and it is important to the fast-growing districts in the state that continually must build new classrooms to accommodate rapidly growing student populations. This issue should not be put off until next session while another study is conducted. Sufficient evidence was presented in the school finance trial to document the urgency of the problem.

**School board elections.** School districts should be allowed to retain local flexibility in choosing whether to hold school board elections in May or November. School board members are not elected by party, and November elections in even-numbered years are very partisan. School-related issues easily could be lost in the midst of partisan elections for federal, state, and county offices. Straight-party voters could become confused about why they were unable to vote for their party’s nominee for school-board trustee or might skip the nonpartisan school trustee election. Nonpartisan school board candidates would have to vie for support, such as inclusion on a slate card or other advertisement, from organizations with partisan agendas and be evaluated on their positions on issues that may not be school-related.

**Charter schools.** The bill does not go far enough in ensuring that TEA would hold all charter schools to the same academic and financial accountability standards as

public schools. Although HB 2 would allow TEA to deny charters to the lowest-performing schools, many others that at best have produced mediocre results likely would have their charters approved. The state should not commit to providing facilities funding for charter schools until it addresses the disparities and lack of facilities funding for its regular public schools.

**School start dates.** School start dates should be based on local needs and preferences rather than economic interests such as tourism. If a district has a large number of migrant students or a major tourist attraction, there is nothing to prevent that district from starting school in early September. For many districts, savings in utilities and other costs would be offset by similar expenses in late May and early June. Many school districts and families would prefer to start school earlier in order to finish the first semester before the winter holidays. High school students in particular benefit from completing final exams before the holidays. These students should not have to compromise their academic achievement so that the state’s tourism industry can profit.

## Notes

The **HRO analysis** of HB 2, second called session, appeared in the July 26 *Daily Floor Report*. The HRO analysis of HB 2, regular session, appeared in the March 8 *Daily Floor Report*. The HRO analysis of HB 2, first called session, appeared in the June 28 *Daily Floor Report*.

SB 8 by Shapiro, second called session, was approved by the Senate on August 9. While substantially similar to HB 2, SB 8 did not include the caps on recapture and non-instructional costs or requirements for fall school board elections and end-of-course assessments. SB 8 would have:

- required school districts to increase salaries for all employees for the 2005-06 school year in an amount equal to the product of \$500 per professional employee and provided state aid in an amount equaling \$2,000 per professional employee for the 2005-06 school year;
- allowed districts to impose an initial enrichment tax of 2 cents per \$100 of valuation without voter approval;
- delayed adoption of the technology allotment until 2007; and
- specified that various provisions of the bill, including increases in the guaranteed yield in the enrichment tier, would be subject to specific appropriation.

# Funding instructional materials and technology for public schools

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## HB 4 by Grusendorf *Died in the Senate*

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**HB 4** would have abolished the current system for reviewing, adopting, and purchasing textbooks and established a process for the review, adoption and purchase of “instructional materials,” including books, supplementary materials, computer software, interactive videodiscs, magnetic media, CD-ROMs, computer courseware, online services, electronic media, or other means of conveying information to a student. School districts and charter schools would have received an instructional materials and technology allotment per student in average daily attendance of \$70 beginning September 1, 2005, and \$150 beginning September 1, 2006. Districts would have had to use \$40 of the \$70 allotment and \$60 of the \$150 allotment to fund targeted technology programs, provide teacher training, and acquire other infrastructure, components, and technologies necessary to enhance student performance.

The bill would have established a review process by which publishers could at any time submit instructional material to the State Board of Education (SBOE) with a statement identifying the essential knowledge and skills for a subject and grade level that the material covered. The SBOE would have had to meet quarterly to review and approve instructional materials and would have had to approve or reject them no later than two board review meetings after submission. For each subject and grade level, the SBOE would have listed approved instructional materials, periodically reviewing it and, by majority vote, removing materials that the board determined no longer adequately covered essential knowledge and skills. School districts and charter schools would not have had to select instructional materials approved by the SBOE but would have had to certify to TEA annually that each student was being provided with instructional materials aligned with essential knowledge and skills adopted by SBOE for that subject and grade level.

The bill would have eliminated distribution of textbooks through the textbook depository system and allowed school districts and charter schools to purchase instructional materials directly from the publisher or through the Department of Information Resources (DIR). Prices would have been determined through negotiation between the publisher and DIR, which could have executed a contract to purchase or license each approved instructional material.

To the extent practicable and appropriate, TEA would have had to require school districts to administer the TAKS test by computer by May 1, 2007. TEA would have had to develop or acquire ongoing, computer-adaptive, interactive assessment tools for each subject and grade level TAKS test and, from funds appropriated for this purpose, make them available to public schools at no cost. TEA could have adopted rules governing computer-adaptive assessments and delayed the release of TAKS test questions and answer keys as necessary to implement computer-adaptive testing.

TEA would have been required to review all state- and federally funded grant programs and incentives designed to improve student academic performance and would have determined the extent to which funds awarded under these programs could be used to enhance technology use in public schools. The TEA commissioner would have had to appoint an advisory committee of business, education, and public members to help the agency monitor changing technology in business, industry, and education.

## Supporters said

HB 4 would move public education in Texas into the 21st century by giving school districts the resources and tools needed to harness the promise of technology. Other states and school districts already are successfully implementing this vision with positive results. For continued economic growth and improved employment opportunities, Texas cannot afford to fall behind in providing a modern learning environment. Public education should follow the example of business in embracing technology as an integral part of its operations.

Investing in technology is expensive, and HB 4 likely would not fund all of a district’s technology needs. But most school districts have used the current \$30 technology allotment to develop technology programs, and the additional funding that HB 4 would authorize would allow them to expand on that basic programming. Districts also could use their own resources to provide enough funding to cover the “total cost of ownership.”

The bill would break the near monopoly of a handful of publishing giants in providing textbooks and related materials for Texas students and allow state funding for instructional materials to be used for technology as well. For too long, textbook publishers – with the encouragement and support of the elected SBOE – have benefited from a system that locks in prices and locks out competitors years before the final product is purchased. The bill would end a process in which textbooks are updated every six years while information and technology move at a far more rapid pace. Under the current system, students effectively are restricted from learning of spectacular advances in human achievement until years after they occur. Technology offers the promise of delivering a wide array of information to students in a variety of formats suited to particular subjects.

HB 4 would set up a process to ensure that instructional materials were reviewed in a timely manner, free of factual errors, and with appropriate instructional content. Instructional materials would be reviewed on an ongoing basis, rather than every six years, to ensure that they met state requirements for curriculum content. The bill would give school districts flexibility to determine their own funding levels for instructional materials and technology, depending on their existing resources, while providing safeguards to ensure that districts met the state's constitutional responsibility to provide instructional materials for all children. Rather than having to select from conforming and nonconforming lists of approved materials, school districts could select from the wide array of products on the market and choose which instructional materials would support their curriculum.

The bill would provide a strong incentive for school districts to convert to online testing by imposing a deadline of May 1, 2007, for TEA to provide online assessment materials and for school districts to administer the TAKS test online if practicable and appropriate. Interactive online testing could give teachers immediate feedback, which would improve students' learning and reduce the criticism of "teaching to the test" by enabling educators to fine-tune their assessment of each child's progress and needs.

The bill would help embed technology into the state's educational structure by requiring TEA to review all state- and federally funded grant programs to determine the extent to which grant funds could be used to enhance or expand the use of technology in schools. This proactive approach would help ensure that more districts made technology use a priority in developing and carrying out grant-funded programs.

## Opponents said

Schools do not need to embrace technology for its own sake but should make informed decisions about the use of technology in a broader context. It would be a mistake to assume that the state's already inadequate education budget should be spent on laptop computers rather than decreasing class sizes, hiring qualified teachers, funding pre-kindergarten, and other priorities. Businesses have harnessed technology mainly to enhance efficiency to boost profits, but schools are not businesses.

HB 4 would not provide enough resources for school districts to cover the full array of technology expenses and most are not prepared to make the full-scale transition to technology-based instruction envisioned by the bill. Investments in technology would be wasted if a school district could not commit enough resources to cover maintenance, upkeep, replacement, training, and other elements that make up the "total cost of ownership" in a technology program. While a textbook is durable and paper workbooks can be replaced from year to year, a laptop computer would require regular maintenance and oversight to ensure that it was being used appropriately. In many cases, such as the study of literature, textbooks and hard copy are superior to technology-based materials.

HB 4 would diminish Texas' influence on the instructional materials development process at many publishing companies. Without the advance commitment of funds and timelines for adoption, companies would not create project timelines to coincide with Texas. The more than 800 school districts with enrollments of fewer than 2,000 students would get little attention in marketing and sales efforts if the state adoption cycle disappeared. Once each district could determine what it wanted, when it wanted, the larger school districts would receive the sales, marketing, and implementation attention, but the smaller districts would have difficulty selecting and securing instructional materials in a timely manner. Protections in current law designed specifically to ensure that small, rural districts receive the same priority from publishers as larger districts would be eroded.

Changing the SBOE's review process to an ongoing review and approval process would diminish the authority of the SBOE, which is accountable to the voters, and the content quality of the instructional materials. Allowing the SBOE, by majority vote, to remove approved materials that the board determined no longer adequately covered essential knowledge and skills would open the door to board rejection

of materials based on subjective criteria. The bill should require the SBOE to provide publishers with notice if their materials were removed from the approved list.

If state funds were allocated for instructional materials, schools should be required to spend those funds on SBOE-reviewed and approved materials, regardless of the materials' format. All materials – print or electronic – should meet the same review and approval requirements. Removing the requirement that districts select instructional material approved by the SBOE would eliminate the incentive for publishers to go through the approval process.

HB 4 should include requirements for categorical funding to ensure that school districts did not spend too much on hardware and too little on instructional content. Texas has invested in and is a national leader in tying accountability standards to assessments and instructional materials. Without adequate controls, the quality of this system could be compromised.

The bill would encourage districts to move quickly to online testing when this may not be the best method for the state's current high-stakes accountability system. These summative assessments are designed to measure specific knowledge and to control for other variables, such as environment, test time, and other factors. These factors would be easier to control with the current paper-and-pencil system than with the online system envisioned by the bill. Online testing would be costly, and the benefits would not justify the expense. The Legislative Budget Board estimates that online testing would cost school districts an additional \$11 million per year, which could be spent in other, more beneficial ways.

## Notes

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

Similar provisions appeared in HB 2 by Grusendorf, first and second called sessions, and HB 62 by Grusendorf, second called session, none of which were enacted.



# Prevention of bullying in public schools

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**HB 283 by Hope**  
**Effective June 18, 2005**

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**HB 283** requires school districts to prohibit students from bullying, harassment, and making “hit lists.” School districts must ensure that district employees enforce these provisions and must provide staff with appropriate methods for managing students in the classroom and on school grounds, disciplining students, and preventing and intervening in student discipline problems. Districts also must adopt and implement a discipline management program that provides for prevention and education concerning unwanted physical or verbal aggression, sexual harassment, and other forms of bullying in school, on school grounds, and in school vehicles.

The school board or its designee must grant a victim of bullying a transfer to another classroom or campus at the request of the parent or other person authorized to act on behalf of the victim. The board or its designee must verify that the student was a victim of bullying before granting the transfer and may consider past student behavior when identifying a bully. The decision of the board or its designee is final and may not be appealed. The board does not have to provide transportation for a student who is transferred to another campus.

Bullying for the purpose of student transfers is defined as engaging in written or verbal expression or physical conduct that a school board determines would have the effect of physically harming a student, damaging a student’s property, or placing a student in reasonable fear of harm to the student or the student’s property, or that is sufficiently severe, persistent, or pervasive that the action or threat creates an intimidating, threatening, or abusive educational environment for a student.

## Supporters said

HB 283 would help reduce or eliminate bullying and related behavior in public schools, provide teachers and other school staff with tools to address the problem, and provide alternatives for students who have been victims of bullying. Research shows that almost one-third of school-age children are victimized by their peers. Students who are bullied are five times more likely to be depressed and have low self esteem than are other children, conditions that can last well into adulthood. A 2002 report by the U.S. Department of Education and the U.S. Secret Service, which

studied 10 students who committed school shootings, found that bullying played a role in a majority of those incidents.

School districts cannot afford to provide transportation for every student who wishes to transfer to another school to avoid a bully. If the problem is serious enough to require a transfer, the parents or other responsible party should be willing to provide transportation.

## Opponents said

HB 283 defines bullying broadly to include behavior that, while wrong, may not by itself justify transferring a student to another class or school. School districts or their designees should have the flexibility to respond to individual incidents in other ways that may be more effective than simply removing the victim from the classroom or school. Rather than punishing the bully, prevention should focus on teaching the victim to respond appropriately to bullying. Most serious school violence associated with bullying has been conducted by the victims of bullying and not the bullies themselves. Victims should be provided with anger management and other behavioral tools to shield themselves from the negative effects of bullying.

## Other opponents said

HB 283 should require school districts to provide transportation for victims of bullying who wish to transfer to another school. If a school or district has been unsuccessful in controlling the bullying, it should bear the cost of removing the victim from the situation. Many students who need to transfer to another school to avoid a bully would be unable to do so due to lack of transportation.

## Notes

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

HB 308 by Hope, effective June 18, 2005, requires school districts to authorize a transfer for a student who has been sexually assaulted by a student attending the same campus.

# Consideration of intent or disciplinary history in student discipline policies

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**HB 603 by Eissler**

***Effective June 17, 2005***

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**HB 603** directs school boards, in adopting a required student code of conduct, to specify whether consideration is given, as a factor in a decision to order suspension, removal to a disciplinary alternative education program, or expulsion, to:

- self-defense;
- intent or lack of intent at the time the student engaged in the conduct;
- a student's disciplinary history; or
- a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct.

The bill specifies that, except in cases involving firearms, the student code of conduct need not specify a minimum term of removal for students suspended or expelled from school.

If a student is removed from class for assaulting a teacher, the student cannot be returned to that class without the teacher's consent, and the teacher cannot be coerced to consent. Each educator who has responsibility for the instruction of a student must be notified if the student has been placed in an alternative education program or expelled. This information must be kept confidential from anyone not entitled to it.

## Supporters said

HB 603 would provide more flexibility in enforcing the state's zero-tolerance laws by requiring school districts to specify whether consideration is given to certain factors in determining whether a student who violates the code of conduct should be suspended, placed in an alternative education program, or expelled. This would allow school districts to give principals and other school authorities more discretion in determining the appropriate consequences for violations of the code of conduct.

Since these zero-tolerance laws were enacted in 1997, there have been reports of students being expelled for such actions as accidentally bringing a paring knife to school even though the student had no intention of using the knife.

Under current law, principals have no discretion to respond to individual situations in which suspending or expelling a student or placing the student in an alternative education program may not be warranted. As a result, many students end up in alternative education programs that often do not offer the same quality of education as a regular classroom, and even excellent students have difficulty maintaining their grades. The bill would not limit a principal's authority to expel students who intentionally bring weapons to school.

HB 603 would protect teachers who have been assaulted from further violence by allowing that teacher to refuse the student readmission into the class. During the 2003-04 school year, the Texas Education Agency reported that 1,221 students committed assaults against school employees. By allowing teachers to refuse to accept a student who has assaulted that teacher, the bill would affirm to teachers that they are safe and supported in their jobs. One of the main reasons teachers leave the teaching profession is because of student discipline problems. Teachers need the peace of mind of knowing that they do not need to continue to teach students who have assaulted them.

## Opponents said

The bill would give principals too much discretion in deciding whether a student should be suspended, placed in an alternative education program, or expelled for violating the student code of conduct. This should be handled by courts rather than by a principal, who may know the offender and be too inclined towards leniency or stringency depending on the particular student.

## Notes

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



# Establishing a state virtual school network

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**HB 1445 by Madden**  
***Died in the House***

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**HB 1445** would have established a state virtual school network to provide electronic courses or programs for Texas students. The network would have been governed by the State Board of Education (SBOE), which would have established criteria for course and program content, evaluated and approved electronic courses or programs, placed courses or programs on an approved list, provided public access to the list of approved courses or programs, and solicited new courses or programs in which there was a demonstrated interest. The commissioner of education could have overruled the board's refusal to approve an electronic course or program.

The virtual school network would have been prohibited from developing its own curriculum, courses, or programs or providing educational services directly to a student. Electronic courses or programs could have been submitted to SBOE for approval by school districts rated academically acceptable or higher or by charter schools rated recognized or higher. Charter schools could serve as provider schools only to students in the school district in which the charter school was located or within its service area, whichever was smaller, or to any other student in the state through an agreement with the enrolling school.

The SBOE would have set the cost of each course or program, which could not exceed \$400 per student per course or \$4,800 per full-time student. An electronic course offered through the state virtual school network would have had to provide for at least the same number of instructional hours as required for a course offered in a program that met the state's required minimum number of instructional days and required length of school days. School districts or charter schools in which a student was enrolled in an electronic course would have been entitled to state funding equal to the cost of providing the course, as established by the SBOE, plus 20 percent. The number of courses available to students not enrolled in a public or charter school would have been capped at 6,000 courses in the 2006-07 school year and 15,000 courses in the 2007-08 school year.

The board would have had to adopt rules for verifying the attendance of students enrolled in electronic courses or programs. School districts or charter schools would have had to report results of assessment tests to TEA through the Public Education Information Management System (PEIMS). Teachers of electronic courses and programs

would have had to be certified by the state to teach that subject and grade level. The virtual charter school network would have begun operations beginning with the 2006-07 school year.

## Supporters said

HB 1445 would move education into the 21st century by expanding opportunities for students to use technology as an alternative method of gaining access to a high-quality education through a statewide virtual school network. The network would be firmly established in the state's existing educational framework and would build on recent pilot projects that have tested the use of electronic courses and programs at individual school districts. The bill is significantly different from a 2003 virtual charter school bill that would have provided equipment directly to participating students because the virtual school network would be operated through participating public school districts.

The bill would include safeguards to ensure that students enrolled in electronic courses or programs received an education that was equal to or better than traditional courses. The programs would be developed by school districts and charter schools and based on state content standards. Students would be subject to testing and attendance requirements, and courses would be taught by certified teachers.

While a limited number of home-school students would be eligible to participate in the virtual school network, these programs would benefit many other kinds of students, including students in rural areas who may not have access to advanced courses, children with disabilities, gifted-and-talented students, and students from families who must travel a great deal. Home-school families actually might not wish to participate because of the assessment and attendance requirements.

## Opponents said

HB 1445 would divert money from public school classrooms at a time when the state is having trouble meeting basic educational needs for public school students. According to the bill's fiscal note, the cost of the program

would increase from \$20.6 million in 2007 to \$52.6 million in 2010. In addition to paying for the creation of these courses, the state would have to cover the cost of reviewing and approving electronic courses and publicizing their content.

The program outlined in the bill would support home schools that are private schools and ought to be funded privately. This is a form of “virtual voucher” that would provide public funding for private schooling.

It would be premature to adopt HB 1445 before the state has had time to evaluate the results of studies of virtual school pilot programs. The 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

The **HRO analysis** appeared in Part Three of the May 11 *Daily Floor Report*.

# Prohibiting sexually suggestive performances at school events

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**HB 1476 by Edwards**  
***Died in Senate Committee***

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**HB 1476** would have prohibited a school dance, drill, or cheerleading team or any other performance group from performing in a manner that was overtly sexually suggestive at an athletic or other extracurricular event or competition sponsored or approved by a school district or campus. The Texas Education Agency (TEA) could have submitted a written request that a district review performances to determine whether they were overtly sexually suggestive and, if so, require the district to take appropriate action, as determined by the district, against the performance group and the group's sponsor.

## Supporters said

HB 1476 would make it clear to school districts and students that sexually suggestive performances are not acceptable in Texas public schools. Many people have expressed concern about the sexual nature of half-time shows at football games and other school-sponsored events. While overtly sexually suggestive performances may be difficult to define, they are easy to recognize, and every school administrator should be required to ensure that they do not take place.

While existing statutes include sanctions for lewdness and indecent exposure at school and school-sponsored activities, they do not speak directly to performances by cheerleaders, drill teams, and other groups at school-sponsored athletic events. School administrators are unlikely to place cheerleaders or school band members in an alternative education program because of their performance in a half-time show. This bill would not impose penalties because it is not intended to be punitive, but rather to serve as a directive to school districts that sexually explicit performances are prohibited.

The fact that cheerleading organizations voluntarily have adopted standards prohibiting sexually explicit performances illustrates that there is a problem. Cheerleading squads may perform different routines at football games than they perform in competitions because they know the behavior is prohibited. Those squads that voluntarily prohibit these movements would not be affected by the bill.

TEA and school boards are responsible for cooperating to ensure that school-related activities promote a positive self-image for young women. The bill would establish the appropriate level of state involvement by directing TEA to serve as a referral agency but giving school districts the responsibility for taking appropriate action.

## Opponents said

HB 1476 is unnecessary because existing statutes and policies already address public lewdness and indecent exposure. The bill would be difficult to implement because it does not define what would be considered "overtly sexually suggestive" and would impose no penalties for this behavior. One person's sexually suggestive behavior may be another's idea of artistic expression. A high school musical production, for example, might contain elements that some consider suggestive and others find perfectly acceptable, even charming. School districts already have sufficient authority to respond to inappropriate and suggestive performances by placing students in alternative education programs. Most cheerleading teams have adopted voluntary standards for content that prohibit sexually explicit performances, and the National Cheerleading Association penalizes squads that have vulgar or suggestive elements in their competition routines.

The state should not be involved in legislating morality. Dress codes and other guidelines should be adopted locally and should reflect local tastes and morals. TEA is in no position to decide the appropriateness of a half-time performance at a particular high school football game. If parents believe that extracurricular activities at their children's school are in violation of good taste, they have ample opportunity to seek corrective action by appealing to campus and district administrators and school board trustees.

## Notes

The **HRO analysis** appeared in the May 3 Daily Floor Report.

# Creating a publicly funded school voucher pilot program

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**SB 422 by Jackson**  
***Died in the House***

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**SB 422**, the Texas Education Agency (TEA) Sunset bill, as substituted in the House Public Education Committee included a provision that would have established an urban school choice pilot scholarship program for eligible students in the San Antonio, Dallas, Houston, Fort Worth, Austin, Edgewood, and North Forest school districts. Eligible districts would have been the largest school districts in counties with populations of more than 750,000 in which a majority of students were economically disadvantaged or at least 90 percent of students were economically disadvantaged during the preceding year. The program would have expired June 1, 2014.

For three consecutive school years, beginning with the 2005-06 school year, the number of students eligible for the program would have been capped at 5 percent of the number of students in the district. The cap would have expired September 1, 2008, and would not have applied to students who had dropped out, were starting school for the first time, or who had been the victims of assault by a student on the same campus.

To be eligible for the program, a child would have had to meet criteria established in the bill, such as being at risk of dropping out of school, having been assaulted by another student, or being of limited English proficiency or low-income. A child who established eligibility would have remained eligible until graduating from high school or reaching the age of 21, whether or not the student had continued to live in an eligible district. The child would have been entitled to receive an annual scholarship of the lesser of 90 percent of the statewide average annual cost per student for the preceding school year or the qualifying school's average actual annual cost per student. If a child were eligible for special education or bilingual education, the scholarship would have had to include the amount that the school district received for these special programs for the child.

Applications for participation in the program would have been handled by schools-of-choice resource centers – independent and privately funded nonprofit organizations selected by TEA – that would have issued scholarship certificates to parents of eligible students. The parent would have had to endorse the certificate and present it to the qualifying school chosen by the parent. The qualifying

school would have had to present the certificate, along with documentation verifying attendance, to TEA, which would have issued payments in monthly installments. A qualifying school would have to have been accredited or be applying for accreditation by a recognized accreditation association and not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, or national origin. The school could not have denied admission by discriminating on the basis of the child's race, national origin, or ethnicity and would have had to comply with federal anti-discrimination laws. A school with more scholarship applicants than available positions would have had to fill the available scholarship positions by a random selection process. A school could have given preference to a previously enrolled student, siblings of current students, victims of school violence, and students from low-performing schools.

Each qualifying school that enrolled a child under the program would have had to administer annually the TAKS or other state-administered assessment test or a nationally norm-referenced test approved by TEA. A qualifying school that accepted a scholarship under the program would not have been considered an agent or an arm of the state or federal government and would not have been subject to state regulation. The bill specified that the purpose of the program was to allow the private sector maximum freedom to respond to and provide for the educational needs of the children of Texas without governmental control and that the regulations authorized by the bill would be construed liberally to achieve that purpose. TEA would have had to contract with one or more researchers experienced in evaluating school choice programs to study the program.

## Supporters said

SB 422 would provide students with the opportunity to reach their full potential, regardless of their economic circumstances or where they lived, by providing individual students with the resources they need to pursue educational alternatives. The bill would offer hope and choice to students trapped in failing public schools who did not have the economic means to leave the system and attend private schools.

The state cannot afford to wait any longer to offer an alternative to students being failed by the current system. SB 422 would extend a lifeline to these students by establishing a school choice program that initially would serve only 5 percent of students but eventually could offer educational options to all students in the state's five largest urban districts and other eligible low-income districts. These are the students that would gain the most from a school choice program and who are in the most immediate need. If the program were successful, it could be expanded to other parts of the state.

The bill would improve public schools by creating competition for students and student dollars, just as the private marketplace depends on competition to improve products and services. In every community that has adopted a school choice program, the nearby public schools have improved as a result. There is no reason why education should not be subject to the same competitive forces as other elements of the economy.

Education is personal, and no one is better qualified to determine what is best for a child than the child's parent. The bill would give parents the opportunity to make informed choices about the best educational program for their children. Even if some of the beneficiaries of the program would have attended private schools anyway, these families are taxpayers and should be able to benefit from taxpayer-supported education programs.

Schools that accepted vouchers would be subject to state testing requirements, and TEA would have the authority to investigate complaints or disputes and withhold funds from districts or schools that violated TEA rules governing the program.

## Opponents said

SB 422 would drain taxpayer dollars from public education when schools already face a budget crisis. Dollars siphoned for vouchers would be taken from funding that could pay for smaller classes, education for at-risk students, and higher teacher salaries. The state should not consider funding a voucher pilot program until it has committed to providing sufficient funding for public school students.

Texas school children are not trapped in failed neighborhood public schools. Only a handful of neighborhood schools have been rated low-performing for even two years. The consistently failing schools are charter schools, which are privately run using taxpayer dollars and already have cost the state more than \$1 billion. The state's

experience with charter schools should prove that vouchers and alternatives to public education should be approached with caution.

SB 422 would make Texas the first state to devote significant public funding to private and parochial schools through a voucher program. Communities in other states that have experimented with voucher programs have had mixed results. Texas should not take the lead in using public funds on this educational experiment at a statewide level.

The program is likely primarily to benefit students who would have attended private schools anyway. In Washington, DC, only 433 students from public schools labeled as needing improvement applied for and received voucher funds through the nation's first federally funded voucher program. Nearly half of the students who applied for and received vouchers already were attending private schools. The bill offers opportunities for students to attend public school briefly to qualify for state funding that could then be used to finance private school education for the rest of the student's school years. This would result in a higher cost to the state than the bill's fiscal note estimates.

The bill would allow public money to go to private schools with very few of the controls governing public schools. While these schools would have to administer the TAKS test, the bill would include limited sanctions if the students did not perform well on the test and no real accountability for the expenditures of taxpayer dollars.

## Other opponents said

Vouchers should be considered only if the state adopts a constitutional amendment prohibiting the imposition of state regulations on private and parochial schools. Although the bill specifies that private schools would not be subject to state regulation, it would include testing requirements and authorize TEA enforcement actions against private schools in certain situations. Private and parochial schools should not participate in a program that would open the door to regulation by the state. The bill would open the door to court challenges on whether the teaching of religious topics in private and parochial schools violated constitutional prohibitions against state subsidies of religion.

The program unfairly would concentrate on five major urban districts, which would lose millions of dollars in state funding if a large number of students chose to participate. If vouchers are such a good idea, every district in the state should be required to offer this option and face the loss of state funds.

## Notes

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

SB 422 would have continued the TEA until September 1, 2017, repealed statutes requiring Sunset reviews for regional education service centers, and given TEA rulemaking authority for teacher certification. The bill would have authorized TEA to close low-performing charter schools, expanded the state's accreditation system, adopted safety requirements for athletic activities, and authorized administrative changes. HB 1116 by Solomons continues TEA until September 1, 2007, and authorizes a limited Sunset review of the agency.

SB 422 was amended in the House Public Education Committee to add a provision substantially similar to HB 1263 by Harper-Brown concerning a school voucher pilot program.



HB 1795	Crownover	Authorizing health savings accounts for state employees	132
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# Authorizing health savings accounts for state employees

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**HB 1795 by Crownover**  
***Died in Senate committee***

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**HB 1795** would have required the state Employees Retirement System (ERS) to offer health savings accounts (HSAs) for eligible individuals and their dependents, to fund or purchase at least one high-deductible health plan, and to provide information to eligible individuals about the option to participate in HSAs and high-deductible health plans. Each state agency would have had to offer employees the option of participating in the program.

To participate in the program, individuals eligible for group health insurance through ERS would have had to waive basic plan coverage and purchase a high-deductible health plan. For each participant and dependent, the state would have contributed annually the same percentage to a high-deductible health plan that it contributed for an employee or dependent covered by the basic coverage plan and, to the person's health savings account, an amount determined by ERS. Each participant would have had to contribute any amount required to cover the cost of participation in a high-deductible health plan that exceeded the state contribution amount.

ERS would have had to develop and implement the program in a manner that was as revenue-neutral as possible and would have had to develop enrollment requirements during 2005-06, with coverage beginning September 1, 2006.

## Supporters said

HB 1795 would let state employees take control of their own health care expenses and could help the state control the increasing cost of employee health insurance coverage. Texas could be a model for other states and private employers by offering employees this new health benefit option.

The bill could save the state money because employees who chose HSAs would enroll in high-deductible health insurance plans, which typically cost hundreds of dollars less in monthly premiums. While a portion of this cost savings would be passed on to the employee through funds deposited in the employee's HSA, the state's overall contribution for that employee's health insurance coverage still would be lower. There is no evidence to suggest that sicker people would not select HSAs over traditional health

plans. While individuals with chronic conditions may not be able to build substantial savings, HSAs give everyone more choice and control over their health care decisions. Sicker employees still would have high-deductible insurance to cover health care costs after the deductible had been met. These employees could save money with HSAs because they would be able to use pre-tax dollars to pay ongoing health care costs.

State employees who chose HSAs likely would be more careful consumers of health care. Traditional health insurance plans tend to insulate patients from the cost of care because out-of-pocket costs such as deductibles usually are a small portion of the actual cost of care. A patient who is responsible for the full cost of health treatment would be more likely to question the cost of treatment and the necessity of particular procedures, which would help control overall health costs.

HSAs are a more attractive employee benefit than the TexFlex accounts the state now offers. TexFlex accounts allow employees to pay deductibles and other health care expenses with before-tax dollars but must be used up entirely from one year to the next. An employee who leaves state employment is not entitled to any remaining funds in a flexible health spending account. HB 1795 would offer the potential for the state to control health insurance costs so that it would have money to provide state employee salary increases in the future rather than the benefit cuts of recent years.

## Opponents said

HB 1795 could lead to higher costs for the state as a result of "adverse selection" that results when healthy employees leave a group insurance pool while sicker employees, who cost more to insure, remain. While healthy state employees would be likely to opt out of traditional health insurance in favor of HSAs, those with more illnesses probably would continue to choose traditional health insurance, raising the cost of this coverage for the state and for these employees. Even though the bill directs ERS to adopt a plan that is revenue neutral, the ERS actuary estimates that the cost to the state of this adverse selection would be \$13.4 million between fiscal 2007 and fiscal 2010.

Any long-term savings to the state from HSAs likely would be the result of cost-shifting rather than lower health care costs. Employees could choose not to seek preventive care because they did not wish to drain money from their HSAs, which could lead to higher costs for more serious illnesses later. The HSA plan design would put the greatest burden on those employees who require ongoing care for chronic illness, such as diabetes or asthma. The state already offers employees a way to save money on deductibles and other health insurance costs through TexFlex accounts. Any money in these accounts that is not spent remains with the state, rather than being withdrawn when an employee leaves a job.

## Other opponents said

Offering HSAs to Texas state employees would be premature. The Legislature should postpone consideration of HSAs until at least next session, when more information will be available about the experience of public employers, particularly the federal government, in offering the option of HSAs to their employees.

## Notes

The House adopted an amendment to SB 1176 by Armbrister, generally effective September 1, 2005, making various ERS revisions, that would have required ERS to offer HSAs, but it was removed in conference committee.

The **HRO analysis** of HB 1795 appeared in the May 11 *Daily Floor Report*.

# Revising TRS retirement and benefit plans

**SB 1691 by Duncan**  
**Effective September 1, 2005**

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**SB 1691** includes changes concerning retirement eligibility, employee contributions and administration of the Teacher Retirement System (TRS).

Retirement annuities are based on the member's highest five years of salary rather than the highest three years. To be eligible for a partial lump-sum payment at retirement, the sum of the member's age and amount of service credit must equal the number 90. These provisions do not apply to a TRS member who, as of August 31, 2005, was at least 50 years old, whose age plus amount of service credit equaled 70, or had 25 years of service credit.

To be eligible for full retirement benefits, TRS members hired on or after September 1, 2007, will have to be 65 years old with five years of service or at least 60 years old and qualify under the "rule of 80" (age plus amount of service credit equals 80.) Otherwise, their annuities will be reduced in 5 percent increments for each year of age that they retire under age 60. The bill also repealed the option of purchasing additional service credit, known as "air time," for retirement eligibility.

SB 1691 also increases the amount that active employees must contribute to TRS-Care, the retiree health insurance program, from 0.5 percent of the employee's salary to 0.65 percent. School districts that hire retired TRS members must pay the difference between the amount the retiree is required to pay for TRS-Care and the full cost of that retiree's participation, as determined by TRS. This applies only to employees who were not on the payroll in January 2005.

For new members as of September 1, 2005, employers must pay the state's share of contributions to the TRS pension fund for the first 90 days of employment. A school district that hires a retired TRS member must pay TRS an amount currently equal to both the state's and employee's share of retirement contributions as if that person were an active employee.

The bill also amends statutes governing TRS administration and transfers responsibility for the health insurance passthrough for public school employees from TRS to the Texas Education Agency.

## Supporters said

SB 1691 would help improve the financial soundness of TRS and reduce escalating pressures on TRS that threaten the solvency of the fund. The bill also would improve the system's administrative efficiency and clarify the TRS board's authority to manage and protect pension assets.

Although TRS has experienced solid investment gains in recent years, the fund has about \$11 billion less than the amount needed to pay current and future benefits to retirees. Under state law, TRS cannot increase pension payments to retirees unless the fund is deemed "actuarially sound," meaning that it is sufficiently funded to pay current and future benefits over the next 31 years. TRS needs to limit its costs in order to become actuarially sound so that it can provide annuity increases for current and future retirees. The bill would reduce future benefits for all current members by \$1.5 billion, which in turn would reduce the state contribution rate that would be needed to make the fund actuarially sound from 8.11 percent to 7.01 percent. The cost of making the fund actuarially sound would be reduced by \$250 million in fiscal 2006.

Current teachers, school employees, and retirees would not be affected by changes in retirement eligibility related to the rule of 80. These changes would be phased in over future years and would affect only new hires.

The bill would help reverse a trend toward early retirement that is beginning to have a significant impact on TRS. The average age of TRS retirees has dropped from 61.7 years in fiscal 1998 to 59.4 years in fiscal 2004, in part as the result of early retirement incentives such as the purchase of air time and retire/rehire. As the retirement age decreases, TRS faces significantly higher health insurance costs for retirees who are not yet eligible for Medicare, as well as the loss of employee contributions to the pension fund. Retirees should not be able to take advantage of these early retirement options while also expecting the state to shore up the pension fund. Changes should be made to discourage early retirement before the state commits to an increase in its contribution rates.

The bill would clarify the TRS board's authority as a trust to manage and protect pension assets by exercising authority over risk management, contract disputes, purchasing, contracting, administrative appeals, salaries and travel, and data management. These clarifications of board authority should raise awareness that TRS is distinguishable from state agencies. Provisions in the Texas Constitution and various statutes require that pension assets be held for the exclusive benefit of the members and cannot be diverted to other uses.

## Opponents said

SB 1691 would take benefits away from current and especially future retirees without making the pension fund solvent enough to provide annuity increases for current retirees. The real cause of the TRS solvency problem is that the Legislature over the past several budget periods has reduced its contribution rate from 8.5 percent to the constitutional minimum of 6 percent of payroll. The retirement restrictions in this bill would reduce the state contribution rate required to make the fund solvent but still would not commit the state resources necessary to make TRS fully funded and thereby allow a long overdue increase in retiree benefits. Instead of reducing retirement benefits, the Legislature should address the TRS solvency problem by increasing its share of payments to the pension fund.

The bill could increase costs for school districts by eliminating early retirement incentives, which were adopted to allow school districts to save money in salary costs for experienced teachers, and by requiring districts to pay pension benefits during the 90-day waiting period. The waiting period was supposed to be temporary to address the state's 2003 budget shortfall and should not be established as an ongoing expense for districts.

If the purpose of reducing benefits this session is to ensure fund solvency and provide future benefit increases, this should be clearly stated in the bill. Current and future TRS members should be guaranteed annuity increases if the fund is deemed actuarially sound. Also, the bill would not address the problems of TRS-Care, the retiree health care plan, which is still underfunded and structurally unsound.

## Notes

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

A related bill, HB 1579 by Kolkhorst, et. al., was amended in the Senate to establish a minimum retirement age of 60 for certain TRS members. This provision would not have applied to members who, as of August 31, 2005, were 50 years old, met the rule of 70, or had 25 years of service credit. The bill died on the Senate floor after failing to receive a two-thirds majority needed to consider the bill.



# Taxation & Revenue

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# Restructuring the Texas tax system

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## HB 3 by J. Keffer, Second Called Session Died in the House

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**HB 3**, as reported by the House Select Committee on Property Tax Relief, would have reduced school property taxes through offsetting increases in state taxes and fees.

**Property tax rate reduction.** HB 3 would have set the maximum ad valorem tax rate for school districts at \$1.25 per \$100 of taxable property in the 2005 tax year and \$1.21 beginning with the 2006-07 school year. It also would have permitted an additional tax of up to 15 cents for enrichment, if authorized by an election.

**Ongoing property tax rate buy-down.** The bill would have dedicated to reducing school tax rates each biennium 15 percent of any increase in the comptroller's biennial revenue estimate plus the amount distributed for property tax reduction in the previous biennium, ultimately reducing school property taxes to a floor of 75 cents per \$100 of taxable value. It also would have dedicated any funds in excess of the anticipated amount raised by HB 3 to the school property tax relief fund.

**Increasing the homestead exemption.** HB 3 would have increased the homestead exemption for public school taxation purposes for residential property from the current \$15,000 to \$22,500, if voters had approved HJR 12 by J. Keffer, an accompanying constitutional amendment. The tax freeze amount for elderly or disabled homeowners would have been adjusted to reflect the additional homestead exemption in 2006 and any proportionate change in school property tax rates.

**Franchise tax.** The franchise tax would have been applied to a corporation holding an interest in a partnership doing business in Texas. A partner in an upper-tier partnership would have been considered a partner in each lower-tier partnership of the organization for the purposes of the franchise tax. Taxable earned surplus under the tax would have included a corporation's share of the gross receipts of each partnership or joint venture in which the corporation directly or indirectly owned an interest.

**Sales tax.** The state sales and use tax rate would have increased from 6.25 percent to 7 percent, and the rate on motor vehicle and boat sales would have increased from 6.25 percent to 7 percent. The tax base would have been

broadened to include computer program repairs and motor vehicle repairs. The timely filer deduction would have been repealed.

**Standard presumptive value.** A system would have been established to use the standard presumptive value of a vehicle to assess the state sales and use tax on the purchase of a vehicle.

**Tobacco taxes.** The bill would have raised taxes on all tobacco products, including an increase of the cigarette tax from 41 cents to \$1.41 per pack.

**Radioactive substances fee.** A fee of 10 percent would have been levied on the gross receipts of a permit holder from the storage and disposal of radioactive substances. Of this fee, 8 percent could have gone to the general revenue fund and 2 percent would have gone to the county in which the facility was located.

**Collection of state delinquent obligations.** Third-party collection of delinquent state debt could have been contracted by the attorney general under certain conditions.

## Supporters said

HB 3 would provide meaningful property tax relief to Texas citizens while ensuring that more Texans paid their fair share for the public services they enjoy. Any net revenue increases in the bill would be offset entirely by a reduction in the maximum school district maintenance and operations ad valorem tax rate. This rate reduction would lessen the burden of an onerous tax that increasingly has consumed household incomes and business profits.

**Property tax rate reduction.** Property taxes have increased dramatically in recent years, and a reduction in the school property tax rate to \$1.21 or less would provide meaningful relief to all Texans. A higher sales tax would partially be offset by the property tax reduction because consumers would see lower prices for goods and services made possible as businesses realized the property tax savings under this bill.

Under HB 3, the state share of public education funding is projected to reach about 55 percent, compared to less than 40 percent in the current system. New state taxes would replace school property taxes, and a lower cap on school property taxes would prevent school districts and the state from becoming overly dependent on increases in local property values for school funding. This change would bring more equity to the state's school finance system because districts would be less dependent on local property bases of widely varying value, and a larger share of education dollars would flow through the state funding formulas.

**Ongoing property tax rate buy-down.** Texas should develop a mechanism to continue lowering school tax rates and increasing the state share of education costs, thereby promoting greater equity. HB 3 would ensure that if the state's finances improved or new state tax efforts raised more money than expected, continued school tax rate reduction would be the top priority. A wide range of interests compete when the state has additional money. Requiring that a portion of any revenue increase go toward reducing the school tax rate would put property tax reduction at the top of the priority list, while preserving most of any state revenue increase for other priorities, including increases in education spending.

**Increasing the homestead exemption.** By increasing the homestead exemption, HB 3 would provide property tax relief that particularly would benefit low- and middle-income homeowners. The proposed amendment would result in a proportionately larger tax cut for people who own less valuable homes and who would be less likely to receive significant savings from any school-tax rate reductions. In this way, an increase in the homestead exemption would help offset increases in sales and other consumer taxes.

**Franchise tax.** By closing the current "Delaware sub" and "Geoffrey" loopholes, HB 3 would address a serious shortcoming with Texas' largest business tax. The franchise tax has proven to be a stable source of revenue and has weathered well, even during economic downturns. The primary problem with the current tax is that many businesses have been able to reorganize as partnerships in order to avoid the tax. Many large, profitable businesses such as Dell and SBC do not pay the tax. These and other companies rightly would be drawn into the franchise tax under HB 3, reinforcing this revenue stream.

Retaining the current franchise tax and closing its loopholes would be a better option than other business tax proposals. The franchise tax is a well established source of revenue that the state has relied upon for decades. A new business tax on payrolls or gross receipts that applied to all income-producing entities could cause a serious

disruption in the state's economy, potentially harming investment or exacerbating unemployment. Further, given the constitutional prohibition against the taxation of personal income, any payroll-based tax or tax on sole proprietors almost certainly would be challenged in court and could be ruled unconstitutional. Given these uncertainties, it would be imprudent for the state to rely upon an unproven and potentially unconstitutional system of business taxation to fund vital government services.

**Sales tax.** Sales taxes remain one of the most stable and reliable revenue sources, tracking a wide variety of economic activities in the state conducted by both individuals and businesses. The general sales tax rate has not increased in 15 years, and the vehicle sales tax rate has not increased in 14 years. A 0.75-cent sales tax rate increase still would give Texas a maximum combined sales tax rate lower than eight other states, including neighboring Louisiana, Arkansas, and Oklahoma. Texas' average combined rate likely would not be significantly higher than those three bordering states.

Sales taxes mostly are discretionary. They derive revenue from purchasing decisions that businesses and individuals can choose not to make. The regressiveness of sales taxes compared to other taxes is exaggerated. It is mitigated in Texas by numerous exemptions or exclusions on necessities (e.g., groceries, medicine) or goods and services with great social or economic benefits (e.g., child care, advertising).

The state is facing a property tax crisis that could be mitigated by this modest sales tax rate increase and base expansion. Any new taxes levied in the bill are necessary to provide meaningful property tax relief to Texas citizens. Texas families and businesses are burdened with some of the highest property tax bills in the nation, and this relatively modest shift in state sales tax policy would generate revenue that could be refunded to taxpayers, benefiting the state and its economy.

**Standard presumptive value.** HB 3 would give state and local authorities the tools to collect vehicle sales taxes that already should be paid. Currently, no mechanism exists to ensure that people who transfer titles on used vehicles accurately state the sales price. This bill would allow the state to gain significant additional revenue from improved collection of the sales tax on automobiles.

**Tobacco taxes.** Increasing taxes on cigarettes and other tobacco products would provide government with a reliable revenue stream while reducing tobacco use, saving lives, and lowering health care costs. While tobacco is an addictive product that many customers will continue buying

regardless of price hikes, tobacco taxes still are a self-assessing user fee on discretionary consumption. No one is forced to start smoking, and ample resources are available to smokers who wish to quit for health or economic reasons. Avoiding the tax is a matter of individual choice.

Higher tobacco taxes would help the state recoup some of its tobacco-related health care costs by discouraging smoking among Texans, particularly among price-sensitive young people. For example, the American Cancer Society estimates that Texas eventually could save up to \$1 billion a year in Medicaid expenses and up to \$10 billion overall by raising the rate \$1 per pack. Tobacco tax revenue need not be dedicated to health care programs because under the Texas tobacco settlement, the tobacco industry already provides funding for this purpose.

## Opponents said

HB 3 is an unfair bill that would benefit only the state's wealthiest citizens while hiking taxes for the vast majority of Texans without generating any net increase in revenues to fund the state's many unmet needs. With the bill's heavy reliance on sales and consumption taxes, only families with incomes greater than \$100,000 would benefit from the bill, with the wealthiest 10 percent benefiting by far the most, according to the Legislative Budget Board's tax equity note.

**Property tax rate reduction.** While HB 3 would lower school property tax rates, this would amount to a "tax shift" rather than a true tax cut. The property tax cuts in HB 3 would be achieved not by fiscal restraint and improved efficiency but by creating new taxes and raising existing rates. Merely reshuffling the tax burden in the state would make little economic sense.

HB 3 would raise taxes for the majority of Texans in order to reduce school property taxes primarily for the benefit of the wealthiest. This property tax cut largely would be funded through an increase in the state sales tax to 7 percent, a rate that would make Texas' rate among the highest in the nation. The Legislature should try to reverse what already is a regressive tax system rather than move the state even further in the wrong direction.

**Ongoing property tax rate buy-down.** This proposal would create a budget structure at odds with the state's economy by dedicating 15 percent of any state revenue growth to replacing school property taxes before the Legislature even had the opportunity to review state spending needs and priorities for the next biennium. The primary drivers in the state budget are not new programs but population growth and inflation.

This provision would deplete growth in state finances and become a fiscal albatross in periods of static or declining revenues. It would require the comptroller to distribute 15 percent of the increase in state revenue plus the amount distributed in the preceding biennium. This would be an ever-increasing portion of new state revenue going toward property tax reductions rather than other state needs. Without an overall cap on the percentage or amount of new revenue tied up by this buy-down provision, legislative budget writers could be forced into a fiscal strait jacket even as population demands rose and costs increased.

**Increasing the homestead exemption.** Increasing the homestead exemption would benefit only a limited group of property tax payers. Businesses, which shoulder more than 40 percent of property tax payments in Texas, would receive no benefit from the higher exemption because it would apply only to homestead residences.

HB 3 would result in only a short-term gain for homeowners who in a few years could see any reduction eclipsed by rising appraisals. When the homestead exemption was increased in 1997, homeowners barely noticed the change because any benefits from the increased exemption quickly were offset by rising appraised values and increased taxes. As appraised values continue to increase, most homeowners would be unlikely to experience any long-term tax savings from this homestead exemption increase.

**Franchise tax.** By retaining the inequitable and problematic franchise tax, HB 3 would squander an important opportunity to truly revamp the state's outmoded system of business taxation. Even with the closure of current loopholes, the base of the franchise tax would be very narrow, and the tax would continue disproportionately to burden capital-intensive industrial and mercantile enterprises. The state's rapidly growing service and information economy largely would continue to escape taxation.

Art. 8, sec. 24(a) of the Texas Constitution requires a binding statewide referendum on any law that imposes a tax on net income, "including a person's share of partnership and unincorporated association income." This provision could lead a court to declare the provisions of HB 3 unconstitutional in the likely event that they were challenged. For this reason, the franchise tax expansion in the bill should be put to a public vote in accordance with the Constitution. Such a vote would clarify the will of the electorate with regard to taxation of businesses and individuals in the state.

**Sales tax.** Sales taxes are notoriously regressive. They have a greater proportional impact on low- and moderate-income taxpayers than on the affluent, who better can absorb increases in the costs of goods and services caused by higher sales taxes. In the current school finance context, it would be poor public policy to use such hikes to relieve the tax burden on a smaller segment of the overall tax base – i.e., property owners – by shifting more of the tax burden to the more numerous and already overburdened sales tax payers.

Consumers in Texas' still shaky economy would have to pay state sales tax at a rate of 7 percent and absorb a sales tax rate increase of 12 percent. Texas would be tied with Tennessee, Mississippi, and Rhode Island for the highest state sales tax rate in the nation, and all four states that border Texas would have lower state rates. Texas' average combined state and local sales-tax rate likely would be near 8.7 percent, second only to Tennessee and higher than all bordering states, with the rate in most urban areas as high as 9 percent.

Service industries constitute a high-growth sector of the state's economy that is not paying its fair share. It would be unfair to increase the burden on a few consumers but not on those of a huge segment of the economy.

**Standard presumptive value.** This bill would put tax assessor-collectors in the position of policing a tax collection program for which they might not be qualified, a change that would create greater inconvenience for sellers and buyers. A clerk would have to spend 15 minutes or more to research values not included in the system before processing the transfer application. Tax-assessor offices typically are the busiest during the first and last five days of a month, and the delays caused by this bill could push lines out the doors.

**Tobacco taxes.** Raising tobacco taxes to enhance revenue is not sound fiscal policy. Tobacco use, particularly smoking, already is declining, which has led to an average annual revenue decrease of 2 percent (inclusive of population growth), according to the Comptroller's Office. Funding for crucial governmental functions should not be dependent on a shrinking revenue source.

Raising tobacco taxes would force a narrow class of taxpayers to subsidize a public good to a greater degree than other taxpayers. Smokers already are taxed at the state and federal levels and indirectly through the tobacco settlement. In addition, cigarette taxes are regressive because they charge all smokers the same rate, regardless of ability to pay. A tax increase would disadvantage lower-income smokers, particularly young smokers, to a greater degree than higher-income smokers.

A \$1-per-pack rate hike on cigarettes would be a 244 percent increase that would put Texas at a competitive disadvantage with regard to its neighboring states, all four of which would have substantially lower rates. It would increase black-market trade and encourage out-of-state shopping, especially on Indian reservations, in duty-free shops in Mexico, and over the Internet.

## Notes

The **HRO analysis** of HB 3, second called session, appeared in the July 26 *Daily Floor Report*. Similar revenue bills considered by the 79th Legislature also were designated as HB 3. The HRO analysis of HB 3, regular session, appeared in the March 9 *Daily Floor Report*. The HRO analysis of HB 3, first called session, appeared in the July 6 *Daily Floor Report*.



# Indexing gasoline taxes to inflation

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**HB 5 by Krusee**  
***Died in House committee***

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**HB 5** would have adjusted the gasoline tax rate and diesel fuel tax rate of 20 cents per gallon by the percent increase or decrease in the Consumer Price Index of the preceding state fiscal year. The adjustment in the tax would have been made by the Legislative Budget Board (LBB) by September 1 of each year.

## Supporters said

HB 5 would address the fact that inflation has eroded the state tax on gasoline and diesel fuel. Currently, the tax on gasoline is defined in statute at a rate of 20 cents per gallon, which has not changed since 1991. A fixed tax on the amount of fuel sold does not take into account inflation that has occurred since 1991. Consequently, in real dollars, the gasoline tax does not provide as much revenue as it did when it was set originally. Indexing the tax to inflation would prevent further erosion of this important revenue source, which helps fund the transportation infrastructure and public school system of Texas.

Because the Consumer Price Index is a general measure of prices paid by consumers, it would be an appropriate measure with which to account for rising costs in addition to rising incomes. While gas prices are volatile, the Consumer Price Index is comparatively stable, fluctuating gradually over time. While inflation may be imperceptible on a day-to-day basis, the cumulative effect of the value of money over several years can be significant. A gasoline tax that was indexed to inflation would not lead to a drastic increase in the cost of gasoline in Texas, but it would ensure over the long term that the integrity of this important revenue source was maintained.

It is misleading to characterize an indexed gasoline tax as a tax hike, as the tax actually would decrease when the Consumer Price Index declines.

## Opponents said

HB 5 would authorize an ongoing gasoline tax increase at a time of painfully high fuel prices. With gasoline prices in Texas approaching \$3 per gallon, now is not the time for legislation that would require the LBB to calculate an increase in gasoline prices every year based on the Consumer Price Index.

The Consumer Price Index would not be an appropriate measure by which to index gasoline prices. The index bears limited relation to transportation and education costs on which gas tax revenue must be spent. Further, in a deflationary economic context, revenue from the indexed tax would decrease even as transportation and education expenses might remain constant or increase.

## Other opponents said

While the relative value of the gasoline tax has eroded since 1991, indexing the tax to the Consumer Price Index would be an inappropriate means of dealing with the problem. The proper, accountable way to adjust the tax would be for the Legislature to vote for a direct increase in the amount of the tax. Given the fluctuations that consumers are subject to at the pump and the variations in state government revenue and expenditures, the best way for the Legislature to deal with the gasoline tax is on a regular, biennial basis.

# Authorizing video lottery terminals and casino gambling

**HB 9 by Flores (and numerous other bills)**  
***Died in House Committee***

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**HB 9** would have authorized the operation of video lottery terminals (VLTs) at racetracks and on the lands of the state's three federally recognized Native American tribes. It also would have authorized casino gambling at these locations and up to 12 other locations throughout the state. The bill would have created the Texas Gaming and Boxing Commission to oversee and manage the state lottery, VLTs, casino gambling, bingo, pari-mutuel racing, and boxing. These provisions would not have taken effect without approval of a constitutional amendment authorizing VLTs and casino gambling.

VLTs could have been operated, under licenses issued by the commission, at Class 1 or Class 2 horse racetracks and greyhound tracks with a license or an application for a license in effect on June 1, 2005. VLTs could have been operated by the Ysleta del Sur Pueblo (Tiguas) tribe, the Alabama-Coushatta tribe, and the Kickapoo Traditional Tribe of Texas. VLTs would have been controlled through a central system linked to the individual terminals.

The bill would have authorized the commission to award up to 12 licenses for casinos at which gaming could have been conducted. Voters in a county would have to have approved the constitutional amendment authorizing casino gaming before one of these 12 licenses could have been issued. In addition, authority to operate casinos could have been given to persons with Class 1 and 2 horse track or greyhound track licenses or applications in effect on June 1, 2005, and to the state's federally recognized Indian tribes.

The state would have received 30 percent of net terminal income from all VLTs not on Indian lands, and the location would have received the remaining 70 percent. Income from VLTs operated on Indian lands under a gaming agreement would have been distributed as authorized by that gaming agreement. Racetracks would have been required to allocate a percentage of their share of net terminal income to a purse fund for race winners.

Casinos would have had to pay a tax of 15 percent of their gross gaming revenue. Five-sixths of the tax would have gone to the state. The remaining one-sixth would have been split between the city and county where the casino was located. One-tenth of 1 percent of the state revenue would have been allocated for a compulsive gambling program.

## Supporters said

Authorizing VLTs and limited casino gambling could raise significant revenue that could be dedicated to public education, other state programs or property tax relief without raising taxes. The bill would allow VLTs at established racetracks already engaging in gaming and allow 12 highly regulated and tightly controlled tourist-destination casinos.

VLTs as authorized by HB 9 would generate about \$1.5 billion per year in state revenue and about 26,000 additional permanent jobs. These estimates already account for possible revenue losses from other gaming activities and the sales tax, and studies have shown that social costs do not exceed the economic benefits of gaming. Since playing VLTs is purely voluntary, the money collected for the state should not be considered a tax.

Any social costs related to gambling already exist because Texas currently allows numerous other forms of gaming, and Texans routinely travel out of state to gamble. Authorizing VLTs in Texas would not significantly increase pathological or problem gambling, which appears to be fairly rare, potentially afflicting only about 1 percent to 5 percent of the population by some estimates. It is unfair to penalize the large majority of Texans who are not compulsive gamblers for the problems experienced by a few. Playing VLTs would be a strictly voluntary form of entertainment and would victimize no one. Some studies have shown that social costs, including crime, can actually decrease after gaming is introduced.

In addition to directly adding dollars to the state coffers, VLTs and casinos would help stimulate the Texas economy and increase tourism. While shifts in the economy and jobs may occur as some entertainment or discretionary money is spent on VLTs, there still would be a net gain to the Texas economy. It is estimated that Texans lose about \$1 billion annually gambling on electronic gaming machines in other states, and some of these funds could be spent in Texas if VLTs are approved.

Gambling is an increasingly popular form of entertainment, and it would be appropriate to let voters decide whether to amend the Constitution to allow VLTs and casinos in the state. As in any business, growth in the gaming industry is driven by consumer demand.



It is a myth that Texans oppose gambling. In an autumn 2004 Texas Poll, 72 percent of those surveyed favored legalizing state-taxed video lottery terminals at Texas' horse and dog tracks to help fund public schools. Voters already have approved numerous other gaming opportunities, including the lottery, bingo, and pari-mutuel wagering.

Authorizing VLTs actually could help combat the expansion of unregulated, illegal gambling that occurs throughout the state using "eight-liners." With the clearly legal option of playing state-regulated VLTs that return a high percentage of wagers, bettors likely would forego eight-liners for VLTs.

## Opponents said

Authorizing VLTs and casino gambling would not generate significant revenue for the state, would damage the economy, and would expand gambling to the detriment of Texas. Estimates of the potential tax revenue gain from VLTs are overblown and the costs, which often prove to be higher than the revenue generated, are underestimated. Every dollar gained for the state is offset by costs due to regulation, lost state revenue, and social costs.

Gambling will not solve Texas' fiscal problems, as the lottery and pari-mutuel racing have shown. While state gambling revenue can fluctuate greatly, at best it would raise only a fraction of the revenue needed to meet the state's public education needs.

Unlike most other forms of entertainment, gambling imposes high social costs. It can undermine the work ethic and be highly addictive, with studies indicating that as many as 5 percent of adults may be problem or compulsive gamblers. VLT machines can be especially seductive and damaging because they offer bettors speed, convenience, and repetition, leading some to refer to these machines as the "crack cocaine" of gambling.

State and local economies could suffer if VLTs were authorized in Texas and Texans spent their money at VLTs instead of at local restaurants, theaters, or retail stores or on other taxable gambling activities. Some Texans spend money gambling out of state while traveling for other reasons, and the authorization of VLTs would not necessarily keep these dollars in Texas. The state should not use VLTs as a way to support the agricultural industry or to prop up foundering horse and dog tracks that have never produced the rosy revenue estimates touted by their supporters.

Allowing casinos in Texas and introducing tens of thousands of VLTs at Texas racetracks – or anywhere else in the state – would be a significant expansion of gambling. It is unsavory and immoral to finance essential state services such as public education through expanded gambling.

Texans do not overwhelmingly support gambling. Those surveyed in a February 2003 Texas Poll were divided evenly on the question of whether video slot machines that take bets and pay prizes should be legal in Texas. Only 45 percent of those surveyed said they should be legal, while 46 percent said they should be banned. While some respondents said they supported the legalization of casinos, 43 percent opposed it with 4 percent undecided, statistically very close to an even split of opinion in a poll with a margin of error of plus or minus 3 percent.

## Notes

Numerous bills and constitutional amendments to authorize VLTs and casino gambling were introduced during the 79th Legislature. They would have taken a variety of approaches, including approving VLTs at racetracks and other locations, authorizing casino gambling, and authorizing electronic gambling on cruise ships. The bills and resolutions also varied in the amount of money that would go to the state or local governments, with some dedicating the money to specific purposes, and in their designation of whom would oversee the gaming. None of the bills or resolutions were reported from committee.

# Authorizing sale of local governments' tax receivables

**HB 879 by Madden/SB 447 by Janek**  
***Died in the House/Died in the House***

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**HB 879** would have authorized local governmental entities – municipalities, counties, school districts, special-purpose districts and authorities, or other political subdivisions – to sell their tax receivables under their own terms and conditions, including the price at which the tax receivable was offered. The holder of a tax receivable certificate would have been entitled to proceeds from the sale or resale of property sold in a lien foreclosure lawsuit.

Sale proceeds of tax receivables could not have been included in calculations of local governmental entities' effective tax rates or rollback rates. Tax receivables sold by a school district would have been required to meet a minimum price of 95 percent of the outstanding principal for receivables delinquent less than one year, 90 percent for receivables delinquent between one year and two years, and 75 percent for receivables delinquent more than two years.

Amounts to be sold could have included the original amounts of delinquent property taxes plus any unpaid penalties and interest through the date of sale and the original amounts of delinquent assessments or other charges plus any unpaid interest through the date of sale. Interest and penalties would have continued to accrue on the unpaid original tax amount after the sale of delinquent property tax receivables. Sales could have been negotiated or made through competitive bidding or negotiated sale and would not have affected existing relationships with private tax collectors. A local government could not have sold a tax receivable to a private individual under contract to collect the tax or enter into such a contract with the purchaser of a tax receivable.

If a property owner paid in full prior to the date of the sale, the sale could not have proceeded. The local government entity could have postponed or canceled a sale and would not have been liable for any resulting damages. A purchase and sale agreement would have had to include the purchase price and any contingency amounts, as well as a waiver of liability for the local government against damages from failure to collect delinquent taxes. The agreement could not have required local governments to prohibit paying delinquent taxes in installment, nor could it have interfered with contracts for performance of services in lieu of taxes or with individuals' rights to defer or abate a delinquent tax lawsuit. The agreement could not have demanded different collection standards than are customary.

## Supporters said

HB 879 would make the budgets of local governmental entities, especially school districts, more certain. Allowing local governments to sell their delinquent tax rolls would help improve their fiscal stability as they would realize the value of the sale immediately, rather than projecting the collection of delinquent taxes that might never be paid. Approximately 30 states already allow this type of financing.

When the receivables are sold, the local government realizes the income, and the receivables move off the local government's books. This reduces risk for the local government because it no longer matters to the local government if the tax is ever paid. All risk is borne by the purchasers.

## Opponents said

The authority to sell tax receivables could encourage local government entities to undersell their tax rolls for ready cash in a pinch. Across the state, local governments have experienced budget problems, and this new tool could seem like a windfall. Instead of conducting a thorough financial analysis of the potential lost tax revenues in relation to the cash generated by a sale, local governments could be tempted to rush forth with a sale of all outstanding tax receivables.

Local tax delinquency rates rarely exceed 3 percent, and most of that amount is collected the next year. So local governments would have relatively small and difficult accounts to sell, many of which would be bankruptcies or businesses that had closed. School districts would benefit only if they could anticipate that their collection rates were going to decline.

## Notes

The **HRO analysis** of HB 879 appeared in Part One of the May 12 *Daily Floor Report*, and the analysis of SB 447 appeared in the May 17 *Daily Floor Report*.

# Lowering the rollback tax rate and setting notification requirements for taxing units

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**HB 1006 by Isett**

***Died in conference committee***

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**HB 1006**, as passed by the House, would have lowered the maintenance and operations (M&O) rollback rate for taxing units from 8 percent to 5 percent above the effective tax rate. It would have required that a rollback election petition be signed by at least 10 percent of registered voters who voted in the last gubernatorial election rather than 10 percent of all registered voters.

The bill would have required all taxing units to publish notice of any increase above the effective tax rate. In addition to notifying the public, taxing units that levy property taxes in excess of \$5 million would have been required to call a public hearing on any proposed increase beyond the effective rate. If a taxing unit failed to hold a required hearing, the tax rate would have reverted to the effective tax rate. After the hearing, the taxing unit would have been required to issue another public notice on the time and date of the taxing unit's subsequent vote on the tax rate. If the taxing unit did not adopt a tax rate greater than the effective tax rate by the 14th day after the public hearing, it would have been required to issue another notice announcing when and where it would vote on the tax rate increase.

The bill also would have allowed, via petition of 10 percent of registered voters, a taxing unit to increase its rollback rate up to a maximum of 1.08 times its effective rate when it needed the revenue to comply with unfunded state mandates.

## Supporters said

HB 1006 would hold local governments more accountable for proposed tax increases. By lowering the rollback rate, the bill would help ratchet down tax increases due to skyrocketing appraisal values. While the bill could raise city and county costs by increasing the frequency of rollback elections, it is more important to provide long-term taxpayer relief by keeping property taxes under control. The cost of such elections is far less than the exponential growth of property taxes.

The bill also would strengthen the truth-in-taxation provisions by requiring a local taxing unit to notify the public of any proposed increase beyond the effective

rate. Taxpayers would benefit from this more transparent approach because local officials would have to expose any proposed increase beyond the effective rate to a process that ensured public participation. Local governments would have to justify any increase in revenue they sought without simply relying on increases in appraised value to automatically boost revenue.

Cities and counties would not fiscally be constrained by HB 1006. A 5 percent rollback rate would allow taxing units to collect adequate revenue while accounting for inflation, which averages between 2 percent and 3 percent nationally. Local taxing units already are familiar with rollback procedures and work to ensure financial efficiency, and if a rollback election were called, voters still could approve rate increases when local governments justified higher spending or when voters authorized the increase to cover the costs of a state mandate.

## Opponents said

Basing rollback petition requirements on a percent of registered voters who voted in the last gubernatorial election would destabilize city and county governments. Voter participation fluctuates greatly between elections and across the state. In areas of low voter participation in the gubernatorial election, very few signatures would be needed for a rollback petition. The bill would allow a small minority of voters to override local policy decisions, which would force many local governments to implement tax rates that did not represent the will or needs of the majority. With minimal petition requirements, more rollback elections would take place, costing local governments time, effort, and money.

Lowering the rollback rate to 5 percent would decrease property tax revenues at a level below the annual rate of municipal inflation. Municipal costs rise at an average rate of nearly 6 percent, which is double the overall rate of inflation. To compensate, cities and counties would be forced to increase sales taxes and impact fees and rely more on debt financing to avoid rollback elections.

Cities and counties are entrusted by voters to provide growing populations with quality, essential services. At the same time, they must be responsive to unfunded state mandates, public safety, and emergencies. When the public demands expanded or improved services, local governments cannot always avoid increased taxes. Current law provides a sensible compromise between the needs of local governments and taxpayers. The built-in buffer of a 3 percent increase beyond the effective rate allows local taxing entities to handle routine adjustments for higher property values while keeping local governments accountable to citizens for larger increases, with an 8 percent increase triggering a possible rollback election if only 10 percent of registered voters petition to hold one.

## Other opponents said

Proposed tax rates that exceed the rollback rate should trigger automatic elections rather than require voters to petition for a rollback election. Automatic elections would require taxing units to justify directly to the voters any significant revenue increase purely derived from higher property values.

While HB 1006 would strengthen “truth in taxation,” and soften rollback petition requirements, it would not protect taxpayers from sharply increasing appraisal values. The current 10 percent cap on appraised value increases should be lowered. This method would be a more effective constraint on local taxing units benefiting from a revenue windfall from rising property values than merely requiring them to follow a few extra procedures before they adopt tax rates above the effective rate.

## Notes

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

Under HB 1006 as introduced, an increase of 3 percent or greater in the effective tax rate automatically would have triggered a rollback election without a voter petition.

The committee substitute of HB 1006 would have set the rollback rate at 3 percent and established a “super-rollback rate” for an increase of 5 percent or greater in the effective tax rate. If a taxing unit adopted a rate above the rollback rate, a petition calling for a rollback election would have required the signatures of at least 10 percent of registered voters who voted in the last gubernatorial election. If a taxing unit adopted a rate above the super-rollback tax rate, a petition calling for a rollback election would have required the signatures of at least 5 percent of such voters.

While HB 1006 died in conference committee, two related bills were enacted by the 79th Legislature.

SB 567 by Deuell, effective June 17, 2005, requires a governing body of a taxing unit or a school district to add budget and appraisal value information to the notification of a public hearing on a tax increase above the effective tax rate. The notice must include the annual difference, expressed as a percent increase or decrease, in the amount budgeted for M&O, debt service, and total expenditures. It also must include the total appraised value and taxable value of all property and all new property within the taxing unit, as well as the total amount of unpaid bond debt.

SB 18 by Williams, effective June 18, 2005, requires a taxing unit to notify the public and hold two public hearings in different weeks on any increase beyond its effective rate. The difference between the proposed rate and the effective rate, among other information, must be included with the notification and must be posted on the taxing unit’s web site, if one exists. The bill also changes the petition requirement for a rollback election following the adoption of a tax rate that would impose M&O taxes in excess of \$5 million. Signatures of 7 percent of registered voters, rather than 10 percent, are required to trigger a rollback election.



# Authorizing a 5 percent cap on real property appraised value increases

**HJR 35 by Bohac**  
***Died in the House***

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**HJR 35** would have amended the Texas Constitution to authorize the Legislature to set the maximum increase on annual taxable appraised value as low as 5 percent and apply it to all real property. The Constitution currently allows the Legislature to cap the annual appraised value increase at 10 percent or more for residential homesteads only.

## Supporters said

Homeowners no longer can sustain annual increases in their property tax bills due to rising values, despite the 10 percent cap on annual growth in taxable appraised value. In 1997, the Legislature approved significant property tax relief by increasing the value of the mandatory homestead exemption. Few homeowners realized any benefit, however, because the savings were consumed by rapid growth in appraised values that primarily drove up school property tax bills. The appraisal cap should be lowered to curtail the ability of local government to passively raise and spend more money merely because appraised values increased. Lowering the cap would continue helping homeowners living in areas with rapidly appreciating property values level out their property tax payments to make it more affordable to remain in their homes. Higher values still would be taxed, but increases would be spread out more reasonably to avoid the sharp increases seen under the current cap.

Extending the cap to business property would encourage economic growth. Failure by local governments to rein in property tax growth exceeding inflation or income growth has hurt the state's economy. Managing appraisal growth would attract business investments as well as help keep home ownership affordable as the housing market continued to thrive. Caps are wisely used in 14 other states, and lowering the permissible appraisal cap to 5 percent would give Texas a competitive advantage over neighboring states.

Appraisal caps do not interfere with local government spending or revenue streams. They merely balance local jurisdictions' need for additional resources with taxpayers' need for protection against surging tax bills. Taxing entities would be able annually to increase the appraised value of property by up to 5 percent and would continue raising substantially more money each year without changing their tax rates.

## Opponents said

Appraisal caps interfere with real estate market forces and create artificial levels of taxable property value that distort the market value appraisal standard. Caps inhibit government's ability to provide public goods and services and respond to external factors such as population growth, recession, and emergencies. The existing 10 percent cap took nearly \$11 billion in residential property value off the tax rolls in 2003, according to the comptroller – \$2.4 billion in Houston alone. Lowering the cap and extending it to all real property would make matters considerably worse.

Any tax limitation disproportionately benefits owners of more expensive property. Because high-end property value growth tends to exceed cap levels more than lower-end property, appraisal caps, even at 10 percent, shelter a greater amount of expensive property's taxable value, which benefits its owners to the detriment of all others. Lowering the cap to 5 percent only would exacerbate the inequity.

Because the cap is removed when property sells, property taxes on newly purchased real estate may be much higher than identical real estate nearby, depending on the sales price and the age and value trends of the area. Consequently, inequities arise among various segments of property owners – lowering the cap only would exacerbate this inequity.

## Other opponents said

The limitation on appraisal increases should be reduced lower than 5 percent to ensure meaningful property tax relief and protect against "appraisal creep." Also, while appraisal caps should be lowered, they should continue to apply only to residential property. Business's share of property taxes has been declining steadily since 1982, and they do not need further relief in the form of an appraisal cap.

## Notes

The **HRO analysis** of HJR 35 appeared in the April 12 *Daily Floor Report*. HB 784 by Bohac, the enabling legislation for HJR 35, was recommitted to committee on April 14.

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# Repealing authority to use red-light cameras and to civilly enforce traffic offenses

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**HB 1347 by Isett**

***Died in Senate committee***

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**HB 1347** would have prohibited local authorities from using photographic traffic signal enforcement systems. The bill also would have repealed Transportation Code, sec. 542.202(b)(3), which was added by the 78th Legislature in 2003 and permits local authorities to regulate traffic and certain traffic-related issues within their jurisdictions provided such regulation does not conflict with state law.

## Supporters said

HB 1347 would prohibit red-light cameras and close a loophole that has allowed cities to use these cameras contrary to the expressed will of the Legislature. In 2003, the 78th Legislature permitted local authorities to regulate traffic and certain traffic-related issues, including criminal and civil enforcement of state laws and municipal ordinances, provided that that regulation does not conflict with state law. Before 2003, cities could issue only criminal citations for running red lights, which must be served personally to offenders. Since then, several cities have made running a red light a civil offense and enforced violations with photographic traffic signal enforcement systems, also known as “red-light cameras.” Because civil citations do not have to be served personally to offenders, creating a civil violation for running a red light facilitates the use of automated traffic enforcement systems that photograph offenders’ license plates and send citations to vehicle owners through the mail. HB 1347 would prevent the use of red-light cameras as an instrument of law enforcement while also repealing the authority of local municipalities to civilly enforce traffic offenses.

Red-light cameras do not increase public safety. Recent studies have found that these cameras increase accidents, particularly rear-end collisions caused by motorists slamming on the brakes after seeing a red-light camera. These cameras also may be used to justify reducing the number of police officers or shifting officers to non-traffic divisions, further decreasing safety because, unlike officers, red-light cameras cannot remove drunk or reckless drivers from the road.

Cities with red-light cameras also have a perverse incentive to maintain or even increase the number of violations in order to maximize revenue. Several cities

with these cameras in other states have been suspected of reducing the length of time their traffic lights stay yellow in order to increase the number of offenses, which suggests that some cities are more interested in generating revenue than in increasing public safety.

Red-light cameras remove discretion in issuing citations and violate constitutionally assured rights, such as equal protection and the right to privacy. Human discretion is needed to evaluate extenuating traffic circumstances and to guard against issuing a ticket to an owner who was not driving the vehicle when the red light was run. The penalties associated with red-light cameras also violate equal protection by assigning a civil penalty to the offense when caught by camera, although the offense is punishable as a criminal misdemeanor when caught by an officer. Red-light cameras violate the Fourth Amendment right to privacy against unreasonable search and seizure because with no probable cause to believe that any particular person will run a red light, there is no individual reason for mounting a camera.

By unintentionally giving local authorities power to enforce violations civilly and administratively, the Legislature unwittingly may have opened the door to inconsistent city regulation. Such inconsistency can confuse drivers and reduce safety. The broad enforcement powers in current law also could allow individual cities to penalize other violations not authorized by the Legislature, such as driving while talking on a cell phone. Traffic regulation should be consistent statewide to ensure the highest level of safety.

## Opponents said

Red-light cameras should not be prohibited because Texas has one of the highest rates of vehicular accidents and fatalities due to red-light running in the nation, and red-light cameras are effective in reducing crashes and saving lives. Cities should be allowed to continue using this proven public safety tool. About 100 Texans die annually and thousands more are injured in accidents when drivers run red lights. Even excluding property damage, these accidents cost between \$1 billion and \$3 billion each year in medical, insurance, and related expenses.

Automatic traffic signal enforcement systems can reduce red-light violations more effectively than traditional enforcement because motorists know that the lights are being monitored. This consistent enforcement against violators has led to a drop in violations of up to 60 percent in cities that have used these cameras, which corresponds to a decline in accident rates of up to 40 percent over time. Cameras also have permitted more efficient and safer use of law enforcement resources as officers can be freed from red-light monitoring to fight other types of crimes and are not required to chase cars running red lights, which can create a dangerous traffic situation.

Cameras do not reduce enforcement discretion because cities require their police departments to evaluate the photographs to determine whether a citation should be issued. Those receiving citations also may request a hearing to explain extenuating circumstances and request dismissal of the citation. Fines also are not a financial boon to local law enforcement because they are used for traffic and public safety. The accusation that cities manipulate the length of yellow lights is unfounded because the length of lights is set by the Texas Department of Transportation and local traffic departments and is sequenced according to federal and state regulations.

Cities have shared information and implemented the same or similar ordinances. To ensure conformity with state regulation, they have copied sections of the Transportation Code on civil enforcement of parking violations and

procedures for enforcing them. Thus, there is little danger of conflicting or confusing local regulations. Moreover, the fee for a civil penalty is equivalent to that paid by those receiving criminal citations who take defensive driving or deferred adjudication.

The use of cameras does not invade privacy any more than does traditional enforcement of red-light violations. Taking a photograph of a vehicle's license plate is less invasive than requiring a motorist to produce a license when stopped by an officer. The probable cause is the same as when an officer pulls someone over – the red light was run, which in the case of automatic enforcement is detected by sensors. Use of surveillance cameras already is widespread in office buildings and public areas and on roadways. Texas already has approved photographic enforcement of the payment of tolls on toll roads.

## Notes

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

HB 259 by Elkins, which would have repealed Transportation Code, sec. 542.202(b)(3) that permits civil enforcement of traffic offenses by local authorities, passed the House on February 28, but died in the Senate. The analysis of HB 259 appeared in the February 24 *Daily Floor Report*.

# Creating the Texas Rail Relocation and Improvement Fund

**HB 1546 by McClendon/HJR 54 by McClendon**  
*Approved by voters at November 8, 2005, election*

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**HB 1546** creates the statutory framework for the establishment of the Texas Rail Relocation and Improvement Fund. The fund would be administered by the Texas Transportation Commission (TTC) as a revolving fund used to finance the relocation, construction, reconstruction, acquisition, improvement, and expansion of certain rail facilities. The fund would be subject to the same investment rules as are applied to the State Highway Fund.

The bill would allow TTC to issue bonds against the fund with a maturity period not to exceed 30 years. Bond proceeds would have to be used to improve mobility and protect public safety around the state. Bond money could be used to finance projects for state-owned rail facilities or to partially fund projects for privately owned rail facilities. Before issuing bonds, TTC would be required to develop a strategic plan outlining the proposed use of funds and potential benefits to the state. In order to relocate rail lines, TTC is required to obtain approval from the local governing body in the area where the lines are to be located.

**HJR 54** amended the Texas Constitution to authorize the Legislature to create the fund and allow the TTC to issue the bonds.

## Supporters said

HB 1546 would help alleviate traffic congestion and improve safety by financing the relocation and construction of rail lines in Texas. It would authorize the Texas Department of Transportation (TxDOT) to negotiate with railroads to move freight rail lines, especially those carrying hazardous materials, outside of densely populated urban centers and help pay for separated grade crossings that can produce fatal accidents. Right-of-way obtained by relocating railroads out of urban areas could be used for the placement of commuter rail lines or new highways, both of which would decrease traffic congestion. The current

congestion crisis on Texas highways stems in part from the inability of railroads to keep up with increasing demands for the transport of freight by rail. Allowing for the shipment of more goods by train would decrease the number of trucks traveling on highways, which would decrease congestion and potentially dangerous truck traffic.

Relocating rail lines would help boost the state's economy by encouraging investment, improving efficiency, and preventing existing businesses from moving out of the state. With a revamped rail system, investors would look to Texas as a prime location through which to ship their goods. Also, freight would be delivered much faster if freight rail lines did not pass through congested cities, making multiple stops at railroad crossings.

## Opponents said

Railroad relocation should be left entirely to the private sector. It is not the responsibility of the state to finance construction of additional freight rail lines. The proposed rail relocation fund could be used to finance an unlimited amount of bonds that could obligate the state for years to come.

TTC should use TxDOT resources to carry out its primary functions that relate to the planning, construction, and maintenance of the state's highways. The railroad industry is no longer a state-regulated industry, and the state government should not involve itself in that industry's investment decisions.

## Notes

The **HRO analyses** of HB 1546 and HJR 54 appeared in the April 25 *Daily Floor Report*.

# Image verification system for issuance of driver's licenses

**HB 2337 by Corte**  
***Effective September 1, 2005***

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**HB 2337** requires the Department of Public Safety (DPS) to establish an image verification system for driver's license applicants using biometric identification. DPS will authenticate the applicant's facial image and thumbprint or fingerprint using image comparison technology before issuing an identification certificate, driver's license, or commercial driver's license or permit. The technology will ensure that an applicant is issued only one original license, permit, or certificate; does not fraudulently obtain a duplicate of any of these documents; and does not commit other fraud in connection with an application for any of these documents. DPS will have authority to use the image verification system to aid other law enforcement agencies in investigating criminal conduct or establishing the identity of a victim of a disaster or crime if a local law enforcement agency is unable to do so.

An application for a license must include, in addition to a thumbprint and a brief description of the applicant, a photograph and signature. DPS may use the image of an applicant's thumb or finger to verify the identity of the individual as needed by law enforcement agencies. The bill also extends indefinitely the \$1 fee required at the time of application or renewal of registration of a motor vehicle to finance the state highway fund. DPS will have to provide a statistical report annually to the Legislature describing the rate of error presented in the image verification system, including the rate of incorrect matching of facial images, categorized by race. The report requirement expires September 1, 2010.

## Supporters said

Image verification technology would enable DPS to compare photographs on licenses and identification cards in its system to verify that each person held a license or identification card in only one name. This would combat identity theft and driver's license fraud. The technology would alert DPS when a person tried to establish a false identity and would ensure that DPS did not issue licenses or identification cards to those persons. The information would be stored on DPS's secure computer system and be available to other agencies only with DPS approval and supervision. The bill would combat fraudulent driver's licenses, bolster homeland security, and provide DPS the funds to update its

aging driver's license computer system while still protecting the privacy of licensees and safeguarding Texans' private information.

Using biometric identification in the license process would increase confidence in the accuracy of the cards and make them more difficult to forge. Current law requires license applicants to state their full names, addresses, and dates of birth, and to verify that information by presenting proof of identity to DPS. DPS has no way to verify many documents, such as birth certificates, used as proof of identity, which can allow people to obtain licenses under false names or multiple licenses by presenting fraudulent documents. Capturing a biometric identifier when a person applied for a license or ID card would allow DPS to use that identifier to ensure that the person did not obtain licenses under false names. This would help prevent identity theft and ensure the accurate identification of drivers by DPS and others, such as merchants who use the cards to verify identity.

The benefits of having a reliable, accurate database that law enforcement could use to authenticate identity in combating terrorism outweigh unfounded concerns about privacy. HB 2337 would not expand current law broadly. DPS already collects applicants' thumbprints, which are biometric identifiers. The bill simply would direct DPS to set up its identification system based on biometrics, provide funding to do so, and allow DPS to use other biometric identifiers, such as facial recognition. Thumbprints would be used only to authenticate identity. Other safeguards would prevent abuse or sharing of biometric information. Transportation Code, sec. 730.007, limits the disclosure of personal information collected for motor vehicle records to disclosure for use by government agencies carrying out government functions. Accordingly, biometrics could be disclosed only when the thumbprints and photographs already collected could be disclosed – for example, for legitimate law enforcement purposes.

## Opponents said

The technology provided by HB 2337 effectively would allow the government to create a colossal database of its citizens' faces, facilitating the intrusion of the government into the lives of average citizens while doing little to target

or thwart criminals. 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.

The image verification system greatly would expand DPS's ability to use personal information. The law now restricts use of thumbprints to, for example, license issuance, child support collection, and the U.S. Selective Service. However, DPS intends to share image information with other government agencies, and computer hackers or other criminals also could gain access to this information. Biometric identifiers can contain more personal information than the photographs used on current licenses. Analysis of biometric information can go beyond identifying a person and reveal sensitive information, such as a person's genetic makeup or medical history, which could be shared with government or private entities.

HB 2337 would allow DPS to collect facial images and fingerprints, vastly expanding the agency's current authority to collect thumbprints. The thumbprints now collected are not in a searchable database like the one this bill would

establish. Also, using biometrics on driver's licenses would not make the licenses fraud proof. 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. This technology is untested for large populations and often fails properly to identify people. Law enforcement use of the DPS biometric database could lead to increasing harassment of innocent people.

## Notes

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

SB 89 by Averitt, which died in conference committee, would have permitted election officers to access electronically readable information from driver's licenses to determine a voter's identity. As amended on the House floor, the bill would have allowed a business to access the electronic information to verify the identification of an individual or the validity of a check at the point of sale.



# Trans-Texas Corridor revisions and toll road conversion restrictions

**HB 2702 by Krusee**  
**Effective September 1, 2005**

**HB 2702** makes a number of changes to the Transportation Code related to the construction and financing of the Trans-Texas Corridor, the conversion of non-toll to toll roads, and other associated issues.

**Toll conversion.** In order to convert a non-toll highway or lane to tolled highway or lane, the Texas Department of Transportation (TxDOT) must hold a public hearing and gain approval from the Texas Transportation Commission (TTC) and local voters. However, non-tolled roads and lanes may be converted without voter notice and approval if:

- the road was designated by TTC as a toll road before the construction contract was awarded;
- the road, prior to September 1, 2005, had been operating as a toll road or was designated by a Metropolitan Planning Organization as a toll road;
- the number of non-tolled lanes on the road would not be reduced by the conversion;
- a facility is built adjacent to the converted road to provide the same number of non-tolled lanes that existed previously; or
- a high-occupancy vehicle lane in operation prior to May 1, 2005, that is converted to a toll lane continues to allow vehicles containing a certain number of passengers to use the lane without paying a toll.

## ***Comprehensive Development Agreements (CDAs).***

The bill authorizes TxDOT to enter into CDAs with private entities for toll and non-toll transportation projects, including Trans-Texas Corridor facilities. In a CDA, a private entity can design, develop, finance, construct, maintain, repair, operate, extend, or expand a project.

CDAs are subject to the following regulations:

- funds appropriated by the Legislature expressly for engineering, design, management, or planning purposes cannot be used to finance CDAs with private entities;
- TxDOT is required to use a best value approach when selecting between competing private proposals for CDAs;
- a private entity must present TxDOT with evidence of financial security to provide assurance that the entity can afford to carry out the project;

- highways and facilities built through CDAs are public property;
- highways built and maintained through CDAs must be returned to TxDOT at the end of the agreement; and
- the terms of CDAs are to expire within 50 years unless the contract contains provisions for the state to buy a developer's interest in the project, in which case CDAs can last up to 70 years.

**Rail.** HB 2702 allows TxDOT to enter into CDAs to include both rail and highway components in the development of the Trans-Texas Corridor. Contracts for CDAs for rail must be selected based on the best value method rather than the lowest bidder method. The bill authorizes TxDOT to enter into pass-through toll agreements with public or private entities for freight or passenger rail projects in the process of developing the Trans-Texas Corridor. Pass-through toll agreements for rail projects can be funded through the State Infrastructure Bank.

The bill eliminates the \$12.5 million cap on TxDOT annual rail expenditures. It also transfers to TxDOT all railroad-related functions formerly under the Texas Railroad Commission.

**Ancillary facilities.** HB 2702 restricts the types of gas stations and convenience stores that can be located along the Trans-Texas Corridor that directly benefit motorists. Gas stations and stores must be located at least 10 miles away from intersections with interstate highways and other legs of the corridor. The bill prohibits TxDOT from condemning land adjacent to the corridor or limiting public access to the corridor for the benefit of commercial establishments. TxDOT cannot enter into agreements that give private entities the ability to lease or license property to commercial facilities.

Private developers and businesses along any toll road are subject to local taxation. The bill allows for the condemnation of property on segments of toll roads that are not located along the Trans-Texas Corridor for commercial establishments, including garages, stores, hotels, and restaurants.

**Pass-through tolling.** The bill authorizes the use of reverse pass-through tolling, in which a local government or private entity repays TxDOT the cost of road construction.



through a per-vehicle fee based on the expected volume of traffic on the completed road. The bill authorizes local authorities – including municipalities, counties, Regional Mobility Authorities (RMAs), and Regional Tollway Authorities (RTAs) – to enter into pass-through toll agreements with private entities to carry out transportation projects.

**Advance acquisition agreements.** Advance acquisition or “quick-take” agreements between TxDOT and willing property owners expire in five years. Quick-take agreements can be renewed for additional five-year periods following the initial expiration.

**Bonds.** The bill authorizes TxDOT to borrow twice the average monthly revenue deposited in the State Highway Fund. HB 2702 increases TxDOT’s toll equity cap from \$800 million each year to \$2 billion. The bill authorizes local governments to issue bonds secured with pass-through toll revenue.

Pending congressional action, the bill directs TxDOT to administer a private activity bond program authorizing the issuance of tax-exempt bonds to finance highway and surface freight transfer projects.

**Mitigation of environmental impact.** TxDOT can opt to pay a fee or transfer property in exchange for the mitigation of adverse environmental impacts caused by highway projects. Before buying or condemning land for mitigation purposes, TxDOT is required to offer to purchase a conservation easement from the owner. TxDOT must produce and display on its web site a detailed statement on the environmental impacts of the Trans-Texas Corridor.

**Privately operated tolls.** TxDOT must approve a private operator’s methodology for setting and increasing toll rates. The department also is required to approve methods used by a private operator to collect tolls, including any penalties charged for late or delinquent toll payments. The bill authorizes the private or public operator of a toll road to contract with peace officers to enforce payment of tolls and to regulate traffic flow.

**Compensation for acquisition of private property.** HB 2702 requires TxDOT to pay damages caused by the division of property along the route of a controlled access highway, including costs associated with the lack of reasonable access to property on both sides of the highway. The bill enables owners to choose to be compensated for the remainder of a severed tract with free use of a section of the toll road or the rights to a percentage of revenue gained from

a section of the toll road. If an environmental study found evidence of hazardous materials on the property in question, TxDOT would not be required to offer compensation.

**Water.** TxDOT is required to provide notice to local water authorities before agreeing to extract groundwater for transport along Trans-Texas Corridor utility lines. The bill does not allow ground water to be extracted along the Trans-Texas Corridor’s right-of-way for the purpose of providing water to a public utility. Wells along the corridor are subject to the rules of the applicable groundwater district.

**Access.** The bill gives former owners the opportunity to build and operate commercial facilities along the Trans-Texas Corridor in a manner that fulfills TxDOT objectives for the property. An owner whose property was divided by the corridor also could build alternative access routes.

**Transfer.** The bill allows a county to transfer a transportation project and associated debt to TxDOT under certain circumstances. HB 2702 allows counties to request authorization from the TTC to create RMAs and/or transfer county transportation projects to RMAs, provided the transfer is not prohibited by bond proceedings. The bill also allows for the dissolution of RTAs and the transfer of an RTA’s financial obligations, toll projects, and toll roads to an RMA or other transportation authority.

**RMA mass transit authority.** The bill authorizes RMAs to build, own, operate, and maintain mass transit systems, including the property and facilities of existing mass transit providers. An RMA is required to hold a public hearing before setting fares or service charges and to provide criminal penalties for failing to pay fares for transit services. The RMA must assume all financial obligations of a transit authority. RMAs also obtain any sales tax authority previously held by the former transit provider.

## Supporters said

**Toll financing.** HB 2702 would establish procedures for conversion of existing non-toll roads into toll facilities by requiring county commissioners court approval of any proposed conversion by a local entity and local voter approval if TxDOT proposed such a conversion. Toll roads are a superior method of financing projects to address the state’s congestion problems rather than steep increases in the motor fuel tax or other proposed alternatives. TxDOT estimates that the motor fuel tax, currently 20 cents per gallon, would need to be increased by \$1 per gallon in order to meet the state’s transportation needs. While increased

use of mass transit, high-occupancy vehicle lanes, and other such measures could be a part of the solution, no method other than toll-related financing could fund the number of transportation projects the state must complete quickly.

**Economy.** The Trans-Texas Corridor would boost the state's economy by providing jobs and improving transportation infrastructure. There is a direct relationship between transportation and the economy. Williamson County alone has lost an estimated 10,000 potential jobs in the technology industry as result of the inadequacy of the state's infrastructure to accommodate the increase in truck traffic necessary to carry out the industry's shipping and receiving activities.

**Property rights.** The bill would allow the state to acquire only land that was necessary for the Trans-Texas Corridor and its operation. The condemnation of property along the route of the Trans-Texas Corridor in the interest of private entities would be prohibited. HB 2702 would prevent the state from taking land and holding it indefinitely without putting it to its assigned use. If property acquired through the "quick take" process was not used for the corridor within five years, it automatically would revert to the landowner from whom the property was taken, who then could decide whether to renew the old agreement. Also, landowners would be able to lease condemned land for agricultural and recreational purposes until needed for construction by TxDOT.

**CDAs.** HB 2702 would allow for the use of CDAs, rather than the design-build method, in the construction of the Trans-Texas Corridor. A CDA is an innovative tool that helps contractors minimize delay in completing transportation projects by allowing them to exercise flexibility in design. CDA contracts also save money by including a provision through which the contractor agrees to provide road maintenance for a negotiated amount.

**State resources.** The Trans-Texas Corridor would solve many of Texas' transportation problems without burdening the state financially. The contract for the Trans-Texas Corridor ensures that the state would not be held responsible if the developer went bankrupt. The participation of private investment in the development of the corridor in return for future tolls would free up state money to relieve congestion in Texas' urban areas.

## Opponents said

**Economy.** HB 2702 would facilitate plans for the Trans-Texas Corridor, which, as proposed, would create a 4,000-mile network of multimodal corridors for transporting commodities and people by car, truck, rail, and utility line. Each corridor would have six lanes for cars, four additional lanes for 18-wheeler trucks, half a dozen rail lines, and a utility zone for moving oil, water, gas, and electricity – even broadband data. This gigantic superhighway spanning more than half a million acres dramatically could reduce output in Texas' agricultural industry as a result of the amount of land taken out of production.

**Public input.** The citizens of Texas should be more involved in the planning process for the Trans-Texas Corridor. The TTC entered into 50-year exclusive contract with a foreign company without legislative approval that allowed for the condemnation of right-of-way for the exclusive use of the developer. More public oversight is needed to ensure that future such deals are not struck.

**Environmental impact.** The Trans-Texas Corridor is not an environmentally sensitive solution for the state's congestion crisis. Its construction negatively would impact wildlife and hunting in many areas of the state in which hunting has become a major part of farm and ranch income. In addition, the corridor would increase air pollution by encouraging motor vehicles as the state's principal method of transportation.

## Notes

The **HRO analysis** appeared in Part One of the May 11 *Daily Floor Report*.

# Prohibitions against cell phone use while driving

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**SB 1257 by Lindsay**  
**Effective September 1, 2005**

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**SB 1257** prohibits a person under age 18 from operating a motor vehicle while using a cell phone during the first six months after receiving a driver's license. The bill places the same restriction on the first six months that a person under the age of 17 holds a restricted motorcycle or moped license. It also prohibits the operator of a bus containing minor passengers from using a cell phone except in an emergency or while the bus is not in motion. The bill also makes other changes dealing with commercial driver's licenses.

## Supporters said

SB 1257 would make Texas roads safer by prohibiting young, inexperienced drivers from talking on cell phones while operating a motor vehicle. Research demonstrates that talking on the phone while driving increases the probability of accidents, and young drivers especially could be easily distracted by a cell phone conversation. A specific law is necessary because of the prevalence of cell phone use and to ensure that drivers know what is required of them. Special restrictions on new, young drivers are appropriate and not discriminatory or unusual. The prohibition against using a cell phone would be one more restriction contained in the graduated driver's license program for young drivers, which already prevents them initially from driving between midnight and 5 a.m. and from driving with certain other passengers under the age of 21.

## Opponents said

SB 1257 would discriminate against young drivers by restricting their cell phone use on the road based not on their abilities or driving records but on their age. It would be unfair to enact a blanket prohibition on all young drivers, some of whom may have good judgment and driving skills. This bill should not single out cell phone use because data shows that cell phones do not contribute to a significant number of crashes, and there are countless distractions related to unsafe driving that the bill would not cover, including eating or applying makeup while driving. In any case, SB 1257 is unnecessary because reckless drivers who are distracted by phone conversations can be charged with driving offenses.

## Notes

The **HRO analysis** appeared in the May 18 *Daily Floor Report*. SB 1257 was amended on the House floor to include the provisions prohibiting the use of cell phones by minors and bus drivers.

# Creating a motor vehicle liability insurance verification program

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**SB 1670 by Staples**  
**Effective September 1, 2005**

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**SB 1670** requires the Texas Department of Insurance (TDI), in consultation with the Texas Department of Transportation (TxDOT) and the Department of Information Resources (DIR), to establish a program for verifying whether owners of motor vehicles have established financial responsibility. TDI, through a competitive bidding process, must select an agent to develop, implement, operate, and maintain the program for up to five years.

The three agencies must convene a working group to facilitate implementation, help develop rules, and coordinate a testing phase and necessary changes identified in the testing phase. The working group must include representatives of implementing agencies and the insurance industry, as well as technical experts with skills and knowledge, including knowledge of privacy laws, required to create and maintain the program. The program established must be the one most likely to reduce the number of uninsured drivers in the state, operate reliably, be cost-effective, protect privacy, ensure the security and integrity of information provided by insurers, identify and employ a compliance method that improves public convenience, and provide accurate and current information. The program must be capable of being audited by an independent auditor.

An insurance company providing motor vehicle liability insurance policies in Texas must provide information to allow the chosen agent to implement the program, subject to the agent's contract with the implementing agencies and rules governing the program. The agent is entitled only to information that is at that time available from the insurance company. Information is confidential and may not be used for commercial or other purposes. Using the information for an unauthorized purpose is a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000).

The implementing agencies and the Texas Department of Public Safety (DPS) must jointly adopt rules to administer the program. TDI must select an agent before December 31, 2005, and the program must be implemented for personal automobile policies by December 31, 2006. The agencies must adopt rules seven months before the full implementation. A program for commercial vehicles must be implemented when the agencies determine it to be feasible.

## Supporters said

SB 1670 would allow Texas to address its uninsured motorist problem by authorizing TDI, in consultation with TxDOT and DIR, to come up with a program for identifying uninsured motorists and to contract with a qualified private vendor to carry out such a program by the end of 2006. The bill would help lower insurers' costs for uninsured motorist claims and would bring Texas alongside more than 20 other states with similar programs that have reduced the number of uninsured motorists by double-digit percentages. A verification system would provide easier access to information and help fight the growing problem of counterfeit insurance cards.

As part of a feasibility study authorized by the Legislature in 2003, DPS and TDI recommended that Texas consider alternatives to a database software interface system that would provide the maximum reduction in the uninsured motorist rate in Texas. The bill would authorize TDI to request proposals that could include either a database interface system or other possibilities that the agencies charged with overseeing the program determined to be a better approach.

While some people might be identified mistakenly as uninsured in start-up stages of a verification program, motorists could correct these mistakes by sending in proof of insurance or by correcting errors in registration information. Many of these errors would be due to motor vehicles that were not registered or titled to the current owners, despite existing laws requiring owners to hold title and registration.

Financial responsibility laws are not to blame for the lack of affordable insurance. Insurers' discriminatory practices are more to blame than proof-of-insurance requirements.

## Opponents said

SB 1670 would require TDI to award a huge state contract to a private entity for a system with questionable value. According to the Legislative Budget Board, this

system would cost \$6 million to implement in the first year and some \$2 million to maintain in each following year. While the bill would authorize TDI to seek bids for alternative methods of verification, the agency would have to adopt a program and choose a contractor by December 31, 2005. Because of this short timeline, TDI may feel pressured to adopt a database reporting system, which the state's own feasibility study advised against because of problems revealed by the use of similar systems in other states.

The DPS/TDI feasibility study pointed out that for a database reporting system, the primary concern is with the error match rates associated with combining insurance company databases and motor vehicle registration information. The bill would add reporting costs for insurers, which could be passed on to policyholders in the form of

higher rates. Smaller insurers, in particular, could have trouble keeping up with the regular reporting requirements needed for a verification system.

The state should not increase enforcement of the proof-of-liability law until access to affordable insurance improves. Less intrusive methods are available to increase the number of insured motorists — for example, a “pay-at-the-pump” system of insurance, under which a tax on gasoline would fund an insurance pool for all motorists.

## Notes

The **HRO analysis** of the companion bill, HB 2573 by Callegari, appeared in the May 4 *Daily Floor Report*.



# Utilities

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# Prohibiting use of credit scoring by electric and telecommunications providers

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**HB 412 by Turner**

***Effective September 1, 2005***

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**HB 412** prohibits a retail electric provider from denying, on the basis of an applicant's credit history or credit score, an applicant's request to become a residential customer. A provider may use an applicant's utility payment data until either January 1, 2007, or the date on which "price to beat" is no longer in effect in the region where the customer is located. However, a provider may not use utility payment data to deny service in an area in which the provider is required to provide service. After January 1, 2007, a retail electric provider may not deny service based on an applicant's credit history, credit score, or utility payment data but may deny service based on the applicant's electric bill payment history. Credit history or a credit score may not be used to determine the price of electric service if the agreement is for 12 months or less.

The bill also prohibits a provider of basic local telecommunications service and nonbasic services from denying, on the basis of the applicant's credit history or credit score, an applicant's request to become a residential customer.

## Supporters said

HB 412 would protect Texas electric and telecommunications consumers from a discriminatory and unfair practice. Credit scoring disproportionately harms minorities and low-income Texans because individuals in those groups are more likely to have unfavorable credit scores, often through no fault of their own. Credit scoring is an inaccurate practice that relies upon data with little relation to customers' ability to or likelihood of paying their electric or telephone bills. An individual with no outstanding debt or with a history of large insurance claims or health care costs could have a very high credit score. These factors have little bearing on an individual's risk of nonpayment to an electric or telecommunications provider.

## Opponents said

Credit scoring should not be prohibited because it is an effective strategy for electric service providers in mitigating their risk. Credit agencies are developing newer, more targeted models to isolate high-risk customers, and these innovations likely will address most current concerns regarding credit scoring.

## Other opponents said

HB 412 would not go far enough to protect electric customers. Providers would be able to deny electric service based on utility or electric bill payment data, and no standards would govern the manner in which a provider could use that data. As little as one late bill payment could result in denial of electric service.

## Notes

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

# Restructuring telecommunications and cable regulation

**SB 5 by Fraser, Second Called Session**  
**Effective September 7, 2005**

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**SB 5** makes numerous changes to the regulation of cable and telecommunications in Texas.

***Deregulation of certain ILEC markets.*** SB 5 deregulates the markets of all incumbent local exchange carriers (ILECs) on January 1, 2006, unless the Public Utility Commission (PUC) determines that a market should remain regulated. The PUC cannot prevent deregulation in any market in which the population was at least 100,000. The commission also cannot prevent deregulation in a market with a population between 30,000 and 100,000 that contains competitors to the ILEC that meet specific criteria.

The bill establishes new categories to govern companies that are partially deregulated and transitioning to full deregulation. A company transitioning to deregulation can exercise pricing flexibility and introduce a new service after providing informational notice.

In a deregulated market, a company cannot engage in discriminatory or predatory pricing or subsidize the rate for services in a deregulated market with services provided in a regulated market. A company cannot increase the rate for stand-alone basic service until the PUC has revised its monthly per-line support under the Texas High Cost Universal Service Plan. The company must make available the same price, terms, and conditions to all customers uniformly throughout its market.

***Reduction of switched access rates.*** Under the bill, a deregulated ILEC must reduce its intrastate switched access rates to parity with the company's federal switched access rates. Schedules are established to reduce the rates of transitioning companies to parity with federal rates within three to four years. No company can increase its rates above the level prescribed in the bill after they have been reduced. If federal switched-access rates are reduced, a company must reduce its intrastate rates as well.

***Legislative oversight committee.*** The bill establishes a nine-member legislative oversight committee on telecommunications competitiveness consisting of the chair of the Senate Business and Commerce Committee, the chair of the House Regulated Industries Committee, three senators, three representatives, and the chief executive of the Office of Public Utility Counsel. The committee will

submit a biannual report to the governor, the lieutenant governor, and the speaker of the House that includes an analysis of problems caused by deregulation and legislative recommendations to address those problems.

***Statewide cable franchise.*** SB 5 creates a method for an entity seeking to provide cable or video service in the state to receive a statewide franchise from the PUC. The franchise certificate authorizes the entity to provide cable or video service and to use public rights-of-way to deliver that service.

A cable or video service provider that currently holds a cable franchise cannot seek a statewide franchise until the expiration date of the current franchise. However, as of September 1, 2005, a cable provider that serves less than 40 percent of all cable customers in the municipal franchise area can terminate its franchise and apply for a state-issued franchise, as long as that the provider remits to the affected municipality any unpaid franchise fees.

The holder of a state-issued franchise must pay each municipality a fee equal to 5 percent of the provider's gross revenues from cable services derived in the municipality. This revenue is in lieu of compensation for a provider's right to provide service or use a public right-of-way.

Until the expiration of an incumbent cable provider's agreement, the holder of a state-issued franchise must pay a municipality in which it offers cable service the same cash payments as required by the provider's franchise agreement. Upon the expiration of the agreement, the holder of a state-issued franchise must pay a municipality 1 percent of the provider's gross revenues or the per-subscriber fee that was paid under the expired agreement, in lieu of in-kind compensation and grants, whichever the municipality elects. Until the later of the date when a franchise was to expire or January 1, 2008, a provider must continue offering network capacity for noncommercial use by the municipality and cable services to community buildings.

A cable or video provider cannot deny access to service by a group of potential residential subscribers in an area because of the income of residents. A provider can satisfy this requirement by using an alternative technology, even if that alternative differs in terms of content or functionality.

Neither the state nor a political subdivision can require a provider to build out a network, except as specifically required under federal law.

The bill requires a cable or video service provider to provide a municipality with capacity in its network to allow up to three public, educational, and governmental access channels (PEGs).

A municipality can exercise police power-based regulations toward a franchise holder in a non-discriminatory manner in order to protect the health, safety, and welfare of the public. A municipality can require a cost-free construction permit for a franchisee that locates facilities in a public right-of-way. Otherwise, municipal authority over a franchisee is limited to requiring a franchisee to maintain a point of contact, establishing guidelines governing PEG channels, and submitting service complaints to the PUC.

A municipality or cable, voice, or video service provider can seek clarification of its obligations under federal law.

**Broadband over power lines (BPL).** SB 5 authorizes an affiliate of an electric utility to operate a BPL system, defined as the provision of broadband services over electric power lines, and provide BPL services on an electric utility's electric delivery system.

An electric utility can allow an affiliate or an unaffiliated entity to own or operate a BPL system on the utility's electric delivery system or to provide Internet service over a BPL system. A utility must ensure that operation of a BPL system on its electric delivery system does not interfere with the reliability of its delivery system. The governing body of a municipality does not have jurisdiction over a BPL system, rates, or services. The operator of a radio frequency device must cease operating the device upon notification by the Federal Communications Commission (FCC) or the PUC that the device caused harmful interference.

An electric utility's investment in a BPL system that directly supports services used by the utility can be included in the utility's invested capital and be included under a rate proceeding. Such expenses must be directly allocated to customers receiving those services.

**Texas Universal Service Fund (TUSF).** A telecommunications provider can meet its provider-of-last-resort obligations using any available technology, and the TUSF can be used to fund the use of technologies other than traditional wireline technologies to meet these obligations. A certificate holder must meet 911 and other service standards that are comparable to those for wireline technologies.

The PUC must conduct a study to assess whether the TUSF's purposes have been achieved, whether it should be phased out, and the manner in which money was collected and disbursed. The report must include recommendations such as how TUSF money should be collected, how money should be disbursed, the purposes for which it should be used, and how to ensure accountability for its use.

The bill establishes a program to provide financial assistance from the TUSF for a free audio newspaper assistance service that offers the text of newspapers over the telephone to visually impaired individuals.

**Basic service revisions.** After July 1, 2006, residential call waiting service no longer will be part of basic service under Utilities Code ch. 58. For customers age 65 or older, however, basic service will include caller identification service. The bill requires local exchange providers to ensure that customers are informed of the Lifeline program upon the initiation of service.

## Supporters said

By making telecommunications law compatible with the latest technological and competitive innovations, SB 5 would update Texas' outmoded regulatory framework for telecommunications and cable technologies. The bill would open the Texas marketplace to true and extensive competition, providing a legal structure that would encourage technological innovation and improve service for customers.

**Deregulation.** Texas should eliminate the artificial subsidy of basic telephone service because it does not take into account the options customers have for telecommunications service. With the advent of intermodal competition among telecommunications technologies, consumers can abandon basic telephone service in favor of other technologies, such as wireless or voice over Internet protocol (VOIP), that provide technological and economic advantages. However, current law enforces a policy preference toward outmoded landline services through an artificial subsidy of that service in the basic service rate cap. By eliminating that cap, the Legislature would align regulation with the important technological innovations of recent years.

By lowering intrastate access rates to parity with interstate rates, Texas long-distance consumers would see significantly reduced prices for in-state long-distance. Because of the current inflated intrastate access rates, it can cost more to call from Dallas to Houston than it does to call from Dallas to Albuquerque. Reducing intrastate rates

to parity with interstate rates would allow access charges to resemble more closely the actual cost of switching calls, facilitating more efficient competition in the long-distance market.

SB 5 would foster competition and benefit consumers through free-market policies. Since Texas started down the road toward deregulation in the mid-1990s, competition for telecommunications services has flourished throughout the state. The Texas market is sufficiently dynamic to absorb the reforms laid out under this bill.

**Cable franchise.** By establishing a level playing field for competition and choice in cable and video services, SB 5 would put Texas at the forefront of regulatory modernization in this rapidly innovating industry. This bill is necessary to allow deployment of integrated technologies and to encourage private investment that would benefit Texas consumers.

SB 5 would streamline state and municipal regulation of cable service providers. Currently, before a cable provider enters a market, that provider must negotiate a franchise agreement with a municipality, an expensive and inefficient process. The result is a maze of regulations that presents a barrier to entry for cable competitors. By establishing a statewide franchise, the bill would eliminate the need to negotiate individual agreements while establishing a system of stable, predictable franchise fees that have become a vital component of city budgets.

SB 5 would allow Texas customers to enjoy the benefits of competition in cable service that they have enjoyed in telecommunications service since the mid-1990s. Currently, incumbent cable companies generally operate as monopolies under local franchise agreements, limiting the amount of competition and consumer choice in most communities. The bill would tear down barriers to market entry and competition by ensuring that all video service providers operated under a single set of clear, equitable rules.

The bill would affirm current safeguards that benefit cities, schools, and consumers. It would provide for a base number of public access channels that many cities use for educational and civic purposes. Also, SB 5 would incorporate federal requirements prohibiting discriminatory treatment of low-income citizens, allowing companies to meet this obligation through new technologies.

**Broadband over power lines.** SB 5 would establish a framework for deployment of BPL technology across Texas. Because electric service is ubiquitous, the potential exists for equally expansive broadband service, provided the state establishes a framework for deploying BPL technology.

Recognizing that the FCC has exclusive jurisdiction over radio frequencies, SB 5 would establish appropriate measures to prevent interference of BPL services with amateur radio services. The bill would require BPL providers to comply with all applicable federal laws and would require a BPL service to be halted if the FCC found evidence of interference.

**Texas Universal Service Fund.** Companies with provider-of-last-resort obligations should be allowed to use any available technology to satisfy those obligations. It can be extremely expensive to run a basic landline to a remote rural location that otherwise could be served effectively by a mobile phone or other technology. There is no practical reason to discriminate against new technologies, as occurs under current law. It would be wise to study how the TUSF is managed to ensure that grants from the fund adequately serve the purpose of providing ubiquitous access to telephone service in the state.

## Opponents said

**Deregulation.** SB 5 would allow major local telephone companies, such as SBC and Verizon, to raise the price of basic local service virtually without restriction in most markets. In doing so, this bill would run counter to historic state policy ensuring that all Texans have affordable access to basic local service. By deregulating basic telephone service, this bill would result in Texas consumers facing higher prices for local phone service.

The minimal level of competition that now exists in the state would not be an effective bulwark against higher prices for telephone service. The market test established for smaller markets would not sufficiently protect competitors or ensure low phone rates. When the Legislature has deregulated nonbasic services, the cost of these services has gone up, often dramatically. Consumers could expect similar increases in local phone service under this bill.

The bill should not tie higher local telephone prices to lower intrastate long-distance prices. In effect, this provision would force consumers of basic local service to subsidize lower rates for high-volume long-distance customers. Companies could be expected to more than make up for the cost of reduced access charges with higher rates, and local phone service consumers would bear this burden.

SB 5 would mark a major step backward for telecommunications competition in Texas, the only check on prices that would exist under this new framework. Under this bill, large ILECs would be able to raise rates on consumers who have no access to competing service



providers while they lowered rates in areas of competition. This would make it very difficult for competitive local exchange companies (CLECs) to compete with SBC and other large companies and could drive many out of business.

With its overemphasis on “intermodal competition,” SB 5 would ignore the significant competitive differences between basic phone service and newer telecommunications technologies. The cost of a basic line is very affordable – currently around \$10 to \$15 per month. On the other hand, the most basic monthly wireless plan can cost more than \$40, and VOIP is even more expensive. The Legislature should not count these other services as providing sufficient competitive pressure to maintain affordable rates for basic service.

Basic service is robust and reliable, while technologies such as wireless and VOIP are less so. While basic phone service runs on an independent network isolated from problems caused by electricity blackouts, other platforms, such as wireless, could be affected by disruptions in electrical distribution. Basic service also ensures that individuals have access to E-911, which is vital in case of emergency because it allows emergency responders quickly and accurately to locate the caller.

**Cable franchise.** SB 5 would discriminate against existing cable providers that are subject to extensive federal, state, and local regulations governing network build-out, quality of service, and public access channels, among other requirements. Cable companies that have built networks throughout entire cities would be at a disadvantage compared to new entrants that could build only in neighborhoods with the most profit potential. SBC and other major telecommunications providers that receive public TUSF subsidies would be able to corner the most lucrative sections of the market, harming consumers and providing only the illusion of true competition.

Under the guise of “intermodal competition,” SB 5 would open the door to abusive redlining practices by new entrants in the cable market. The bill would purport to allow “alternative technologies” to satisfy nondiscrimination mandates. However, the availability of ubiquitous yet expensive direct-to-home satellite technology likely would satisfy nondiscrimination requirements while remaining an

unrealistic option for low- or middle-income consumers. New providers would be free to build video networks in higher income areas while denying the cost and service benefits of new technologies to low-income Texans.

SB 5 would undermine local control for cities that currently can negotiate cable franchise agreements that are appropriate to the diverse needs of cities across the state. The bill would allow cable providers to opt out of negotiated agreements that often provide cities with the ability to enforce customer service standards and ensure universal service.

**Broadband over power lines.** BPL is an unproven technology that has been shown to cause substantial interference with radio services, particularly amateur radio services. Because power lines are not designed to prevent radiation of radio frequency energy, interference with certain licensed broadcasters is likely. Studies by the U.S. National Telecommunications and Information Administration have demonstrated interference from BPL systems and have suggested that the recently adopted FCC regulations are insufficient.

**Texas Universal Service Fund.** Companies that reap the benefits of deregulation should not be able to keep millions of dollars in public subsidies from the TUSF. It would be unfair for taxpayers to continue subsidizing companies that receive a huge profit windfall from price deregulation under the bill, particularly as the Legislature is making it easier for those companies to enter the cable market at the same time. If the Legislature is going to require an expansive study on the TUSF but withhold substantial changes to the fund until the study is complete, the same approach should be taken to competition and price deregulation.

## Notes

SB 5 was considered in lieu of its identical companion, HB 13 by P. King, and passed by the House on August 10. The **HRO analysis** of HB 13 appeared in the August 9 *Daily Floor Report*.

# Expanding the state's renewable energy portfolio standard program

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**SB 20 by Fraser, First Called Session**  
**Effective September 1, 2005**

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**SB 20** establishes new requirements for generating capacity from renewable energy in Texas. The bill requires a total of 5,880 megawatts (MW) of renewable capacity by January 1, 2015. It also establishes the target of 10,000 MW of additional installed renewable energy capacity by January 1, 2025. All renewable energy capacity installed in the state and all renewable energy credits in the state count toward the goal. The PUC can cap the price of renewable energy credits and suspend the renewable energy goal if necessary to protect the reliability of the grid.

The PUC will designate “competitive renewable energy zones” in which resources and land areas are sufficient to develop renewable energy generating capacity and develop a plan to construct the transmission capacity required to deliver the output from renewable energy technologies to customers.

The PUC also will consider the level of financial commitment by generators for each zone in determining whether to designate an area as a competitive renewable energy zone and whether to grant a certificate of convenience and necessity.

## Supporters said

SB 20 would continue and expand the state's successful Renewable Portfolio Standard (RPS) program. The benefits of renewable energy are significant. Unlike depleting and polluting fossil fuels, renewable energy represents a real, unlimited, clean source of energy. The current RPS has been successful because it has required electricity providers to get a specific amount of energy from renewable sources. By expanding this program, SB 20 would require this amount to increase every two years so that at least 5,880 MW of electricity would come from renewable sources by 2015.

Beyond its environmental benefits, renewable energy offers many ancillary economic benefits for landowners and local governments in areas of the state where wind energy facilities are located. For example, some have estimated that wind energy production in the state generated close to \$15 million in local school property taxes in tax year 2004, and

an expansion of generating capacity to attain the 5,880 MW requirement could mean more than \$60 million in annual school property tax revenue.

SB 20 would balance support for renewable technologies with concerns for system reliability. Like the current standard, the target established in SB 20 would represent a floor above which supplies of renewable energy sources could expand in order to meet growing demand. The bill incorporates important safeguards to ensure that necessary investments in the transmission grid would be made and that the electric grid's integrity would be maintained.

## Opponents said

All electricity generation should be determined by the market. Wind and solar plants cannot produce the same amount of energy as more traditional types of generating plants. Renewable energy is more expensive and therefore is not a cost-effective way to produce energy. Requiring utilities to use this more expensive energy increases electric rates for customers.

Building wind farms or solar energy generating facilities requires a source of backup energy from a traditional source, duplicating generation and increasing costs. In addition, because most zones for renewable energy production exist in areas isolated from urban markets, expansion of wind energy requires substantial investment in transmission capacity. Further, because the generation of wind energy depends on unpredictable weather patterns, renewable energy is not a reliable or consistent source of energy. All of these factors contribute to the economic inefficiency of renewable energy.

## Other opponents said

The RPS requirement set by the SB 20 should be increased in order to more effectively develop renewable energy resources in the state. Some estimates are that the likely output of renewable energy by 2015 will be 8,000



MW under the current rate of development, a level well above the one envisioned under SB 20. A better proposal would be to increase the renewable energy standard to 10,880 MW by 2015, a level that truly would set Texas on the way toward meaningful expansion of important renewable technologies.

## Notes

The **HRO analysis** appeared in the July 14 *Daily Floor Report*.

# Continuing the Public Utility Commission and revising ERCOT

**SB 408 by Nelson**  
***Effective September 1, 2005***

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**SB 408** continues the Public Utility Commission (PUC) until 2011 and institutes new oversight measures for the Electric Reliability Council of Texas (ERCOT). ERCOT is an independent organization responsible for facilitating wholesale electricity transactions among power generators and retailers, ensuring customer information is provided to retailers, maintaining the reliability of the transmission network, and ensuring open access to the network.

SB 408 makes ERCOT directly accountable to the PUC and authorizes the PUC to oversee and audit ERCOT finances and operations. The bill also alters ERCOT's governing structure, replacing the current 14-member board with a 16-member governing body that includes:

- the PUC chairman as an ex officio non-voting member;
- the Office of Public Utility Counsel (OPUC) counselor as an ex officio voting member representing residential and small commercial consumer interests;
- the chief executive officer of ERCOT as an ex officio voting member;
- six market participants elected by their market segments to serve one-year terms, with one member each representing independent generators, investor-owned utilities, power marketers, retail electric providers, municipally owned utilities, and electric cooperatives;
- a representative of industrial consumer interests, elected by this market segment to serve a one-year term;
- a representative of large commercial consumer interests, selected by the outgoing large commercial consumer representative to serve a one-year term; and
- five representatives unaffiliated with any market segment, selected by the other members of the governing body to serve three-year terms.

Meetings of the ERCOT board of directors are open to the public. A member of ERCOT's governing body who has a direct interest in a matter that comes before the board must disclose the interest and recuse himself or herself from deliberations on the matter.

SB 408 also establishes a wholesale electric market monitor within ERCOT to prevent manipulation of the electric market under the jurisdiction of ERCOT. The bill also increases the penalty for a violation of a PUC statute, rule, or order from \$5,000 to \$25,000 for each day a violation occurs.

## Supporters said

SB 408 would institute much needed oversight and accountability reforms for ERCOT and its board of directors. ERCOT has been the target of serious allegations of mismanagement and wasteful spending, and several former employees and contractors have been indicted for felony charges related to contracting fraud. Due to ambiguity surrounding the applicability of state open meetings and public records laws, members of the public have been stymied in their attempts to learn more about ERCOT's business practices and participate in its decision-making process. ERCOT performs vital functions in its management of the state's electric market, and it is imperative that this powerful organization be accountable to the public it serves.

Increasing the administrative penalty for an administrative violation by a utility would strengthen the commission's enforcement authority. If a utility or provider perpetrated a single type of violation that lasted several days, that entity could be punished for each day a violation occurred, providing an effective deterrent against a utility that might otherwise choose to pay the nominal current fine and continue its abusive practices.

## Opponents said

A \$25,000 fine per day, per violation would be excessive. Doubling the fine from \$5,000 to \$10,000 would be more appropriate. However, if the Legislature chooses to increase the maximum administrative penalty five-fold, it also should adopt a two-year statute of limitations on violations to provide utilities and providers with a measure of regulatory certainty in their dealings with the commission and consumers.

## Other opponents said

Although the bill would increase the number of independent members on ERCOT, consumer representation on the board would remain weak. Consumers pay the fees through which ERCOT is funded, and they deserve a strong voice to ensure that these funds are spent prudently. Market participants would continue to outnumber residential, industrial, and commercial consumers. The Sunset Commission found that industry representatives on the ERCOT board have little incentive to act in the best interest of consumers, and increasing public representation could address this imbalance.

While SB 408 would strengthen protections against wholesale generation market manipulation, additional reforms are needed. Market manipulation can be difficult to identify after an abuse has occurred. A more effective method of preventing abusive practices by wholesale generators would be to require that no company control more than 20 percent of the generation capacity in a single congestion area, rather than the current, more general limitation of 20 percent across the entire ERCOT region.

## Notes

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

SB 408 as passed by the House included provisions that would have established a statewide franchise for offering cable services and provided a framework for municipal compensation for use of public rights-of-way. While these provisions were removed from the bill in conference committee, similar provisions were included in SB 5 by Fraser (see p. 160), enacted during the second called session.

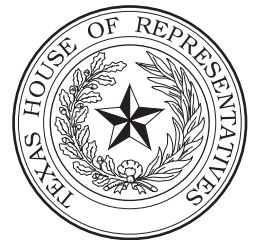
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