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Major Issues of the 80th Legislature, Regular Session

In 2007, the 80th Texas Legislature enacted 1,481 bills and adopted 17 joint resolutions after considering more than 6,341 measures filed. This report is an overview covering many of the highlights of the regular session. It summarizes 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 legislation featured in this report is a sampling and not intended to be comprehensive.

Other House Research Organization reports covering the 2007 session include those examining the bills vetoed by the governor and the constitutional amendments on the November 6, 2007, ballot and an upcoming report summarizing the appropriations for fiscal 2008-09, including HB 1, HB 2, and HB 15 by Chisum.

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SYNOPSIS OF LEGISLATION

80th Legislature, Regular Session

	Introduced	Enacted*	Percent enacted
House bills	4,140	955	23.1%
Senate bills	2,050	526	25.7%
TOTAL bills	6,190	1,481	23.9%
HJR s	108	10	9.3%
SJR s	43	7	16.3%
TOTAL joint resolutions	151	17	11.3%

*Includes 51 vetoed bills — 43 House bills and 8 Senate bills

	2005	2007	Percent change
Bills filed	5,484	6,190	12.9%
Bills enacted	1,389	1,481	6.6%
Bills vetoed	19	51	168.4%
Joint resolutions filed	145	151	4.1%
Joint resolutions adopted	9	17	88.9%
Legislation sent or transferred to Calendars Committee	1,492	1,692	13.4%
Legislation sent to Local and Consent Calendars Committee	921	1,056	14.7%

Source: Texas Legislative Information System



Business Regulation and Economic Development

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Revising operation of Texas Residential Construction Commission

HB 1038 by Ritter
Effective September 1, 2007

HB 1038 revises disciplinary actions and the inspections process under the Texas Residential Construction Commission (TRCC) Act. The bill also changes requirements for registered builders and the composition of the TRCC.

Contract requirements. A construction contract must include the builder's name, registration number, builder information available through TRCC, how to file a complaint, and a disclosure regarding binding arbitration if arbitration is required by the contract. HB 1038 lowers the value of interior home improvements subject to the TRCC Act from \$20,000 to \$10,000.

TRCC composition. In appointing the three public members of the TRCC, the governor must consider individuals who can represent the interests of homeowners. A person who is an officer, employee, manager, or paid consultant of a consumer association or Texas trade association in the field of residential construction may not be a member or employee of the TRCC. A lobbyist also may not be a member or the general counsel of the TRCC.

Disciplinary action. HB 1038 adds numerous violations for which a builder may be subject to disciplinary action. TRCC or the attorney general may obtain injunctions and issue cease and desist orders for violations of TRCC rules. TRCC may revoke or suspend a builder's license only if the builder engages in repeated violations resulting in disciplinary action. TRCC may assess an administrative penalty of up to \$10,000 for most violations and up to \$100,000 for fraud or misappropriation of funds. A builder and a person who controls a majority ownership interest in the builder are jointly and severally liable for any amount due the commission from administrative actions. The commission must make available to the public information about each complaint resulting in disciplinary action.

Inspections. HB 1038 adds requirements for builders to have a fee inspector inspect residential construction conducted in areas not subject to municipal inspections. A homeowner is not bound by the state-sponsored inspection and dispute-resolution process (SIRP) if the homebuilder was not registered when the contract was made or the homebuilder's license has been revoked. If an alleged defect that would violate the statutory warranty of habitability is not reasonably discoverable within the warranty period, SIRP may be requested up to the second anniversary of

the discovery of the alleged defect. The recommendation of a third-party inspector or a panel of state inspectors is considered admissible as evidence as a business record.

Registration requirements. A builder must meet continuing education requirements in order to maintain registration, including five hours of continuing education every five years. A municipality must verify that a builder is registered with TRCC or exempt from registration before issuing a building permit. The bill requires registration of colonias, and a homeowner of a colonia who claims a post-construction defect must go through the SIRP.

Supporters said

HB 1038 is a balanced bill that would make TRCC a stronger, more effective agency with increased power to protect homeowners and punish the bad actors in the residential construction industry. The bill would make the commission more impartial by making it unlawful for the officers of a builders' trade association or consumer advocacy groups to be members or employees of the TRCC. Conflict of interest provisions for the commission would be consistent with those for other Texas regulatory bodies.

The bill would include significant increases in TRCC power to authorize disciplinary action for a variety of new offenses. Remedies for these violations would be enforceable because TRCC and the attorney general could issue cease and desist orders for violations and could obtain court-ordered injunctive relief if builders did not comply. These powers, combined with increased administrative penalties, would encourage homebuilders to perform work properly the first time and to address quickly any issues that were identified after construction.

The rights and remedies of homeowners in actions against builders would be expanded. If a builder contracted for work while not registered, a homeowner could disregard the SIRP and go directly to court. With respect to the warranty of habitability, the time period to request the SIRP if a defect was not discoverable would be extended to two years after the date of discovery. The homeowner's presumption of a defect in subsequent civil actions would be strengthened because an inspector's recommendation would be self-authenticating. HB 1038 would expand the parties against whom a homeowner could take action to include

those who had a majority interest in the builder, so these individuals could not evade their shared responsibility to homeowners.

The bill simultaneously would maintain appropriate protections for builders. It would ensure that a revocation or suspension of registration could not occur unless repeated prior violations had occurred. This would recognize that some builders conduct more business than others, and large builders should not have their registration revoked for isolated incidents.

The TRCC Act already contains appropriate flexibility for TRCC to define warranty standards. Minimum standards for warranties have been established, and TRCC has rulemaking authority to create more stringent warranty standards if research on residential construction practices indicates changes to warranties would be appropriate.

Opponents said

Although many of the provisions in the bill would be beneficial, HB 1038 would not go far enough to help homeowners and would decrease consumer protections in some areas. Builders are afforded four places on the commission, yet a person who had certain affiliations with a consumer association could not be a member or employee of TRCC. This provision is at odds with the provision requiring that consideration be given to individuals who represent the interests of homeowners in filling the three public member slots on the commission. Many of those most well-informed regarding homeowner interests likely would have some prohibitive affiliation with a consumer association.

Certain violations perpetrated by builders are so egregious that they merit immediate revocation or suspension of registration with the first incident. HB 1038 would prevent such immediate disciplinary actions from occurring because it would not allow TRCC to revoke or suspend a builder's license unless the builder engaged in repeated violations resulting in disciplinary action.

In addition, the bill specifies that a builder who failed to pay a court judgment would be subject to disciplinary action. The current statute is more appropriate because it is general enough to apply to failure to pay an arbitration judgment. The vast majority of contracts between builders and homeowners include binding arbitration agreements, so disputes between homeowners and builders rarely are settled in court. The added specificity in HB 1038 would render this cause for disciplinary action largely useless to the majority of consumers who must address their grievances with builders in arbitration.

Ideally, the bill would remove stipulations regarding the length of warranties from the Property Code so that the commission could use its judgment to set appropriate warranty periods. Short of removing such stipulations, the bill at a minimum should extend the warranty periods from one year to two years for workmanship and from two years to three years on electrical and appliances.

Notes

The **HRO analysis** of HB 1038 appeared in Part Two of the April 24 *Daily Floor Report*.

Incentives for film, television, and related industries

HB 1634 by Dukes

Effective June 8, 2007

HB 1634 renames the Film Industry Incentive Program the Moving Image Industry Incentive program and provides incentives for digital interactive media productions in addition to incentives already provided for films, television programs, and commercials. Program qualification and grant awards will be determined based on the amount of a production company's in-state spending rather than the amount of wages paid to Texas residents.

To be eligible for moving image industry incentive grants, a project must generate \$1 million in in-state spending for film or television programs or \$100,000 in in-state spending for commercials. At least 70 percent of the production crew, actors, and extras must be Texas residents, and at least 80 percent of the project must be filmed in Texas. A grant application may be denied because of content that is inappropriate or that portrays Texas or Texans in a negative fashion.

Qualifying applicants may receive a grant not to exceed the lesser of 5 percent of the total amount of a production company's in-state spending or \$2 million for a film; \$2.5 million for a television program; \$200,000 for a commercial or series of commercials; or \$250,000 for a digital interactive media production. The bill adds Houston and Fort Worth to the areas designated as under-used that may receive an additional 1.25 percent grant of total in-state production costs. The bill also would create a moving image industry personnel training program and a film archive program.

Supporters said

HB 1634 would help support the state's moving image production industry, which now employs more than 18,000 Texans, and would entice producers to locate more projects in Texas. The Texas Film Commission estimates that since 2003, Texas has lost more than \$700 million in production budgets and 4,500 jobs to other states that have implemented the types of incentives that the bill would allow.

Thirty-seven states and all Canadian provinces already have similar programs, and these incentive programs are dramatically altering film production location decisions. For example, the New Mexico State Film Commission saw production revenues soar from \$8 million in 2002, before

incentives were enacted, to \$428 million in 2006. At the same time, Texas lost its market share in the moving image industry, commanding nearly 85 percent of the regional market in 2002 and only 18 percent of the market in 2006. Without an active incentive program, Texas risks losing its once promising moving image production industry.

HB 1634 would improve the state's existing grant program by increasing some project grant caps, tailoring the grant caps to encourage specific types of projects, and ensuring that productions increase employment for Texas production crews. The current grant program ignores the impact of the gaming and animation industries, which currently employ 1,835 people in Texas and have significant overlaps with the film industry in the development of post-production and special effects editing talent. The bill would add incentives to encourage digital interactive media production and would place more emphasis on television production, because it creates a more stable source of in-state spending and local jobs than do feature films.

The bill also would require that 70 percent of the production crew, actors, and extras be from Texas and more than 80 percent of the filming be done in the state. This change to the program is vital, because it would ensure that productions receiving funding would do the bulk of their work in Texas and would keep Texans from leaving the state for seasonal work. It is of primary importance that productions not depend on the relocation of crews from other states when Texas has its own base of expert production crews.

HB 1634 would ensure the Moving Image Industry Incentive Program was fiscally responsible. Because Texas is home to highly skilled production crews, it could provide a fraction of the incentives other states offer and still make an impact. In addition, the funding appropriated for this program by HB 1 for fiscal 2008-09 would be contingent on the comptroller's certifying that the moving image industry generated sufficient revenue to offset the cost of the appropriation. To further ensure financial accountability, any funding requests above the current appropriation would undergo an extensive approval process. The bill would not create a dedicated account, so if the grant program was found not to be self-sufficient, the funding would remain in general revenue to fund other state priorities.

Opponents said

While increasing film production is important, the state cannot afford to support corporate welfare. The current budget for Film and Music Marketing in the state is \$1.8 million, and the Moving Image Industry Production Incentive Program aims to dole out more than ten times that amount over the biennium. In 2003, Illinois initiated a film incentives program and by 2006 had to double its tax incentive in order to remain competitive. Like any spending program, this budget is not a fixed cost, but likely would grow over time. While it is contended that the incentive program would be self-supporting, it is unclear if the comptroller's calculations also would examine the benefits the state could derive by simply returning the \$22 million to Texas taxpayers.

The state of Texas is not in the business of moving image production. The industry is made up of private businesses and is region-specific. Because most of the moving image production happens in the Dallas and Austin areas, these municipalities should develop more robust incentive packages to attract projects to their areas. It would be unfair to tax every person and business in the state in order to provide incentives that ultimately would benefit only one or two metropolitan areas. Moreover, filmmakers already are eligible for several incentives, including exemption from sales tax on many of the items and services used in the manufacture of the film, exemption from the state hotel occupancy tax if they stay for more than 30 days, and fuel sales tax refunds for fuel used off-road, such as for generators and boats.

Other opponents said

HB 1634 would not do enough to support Texas talent. Texas residents should make up more than 70 percent of a production crew, actors, and extras. Also, the bill should designate a portion of the incentive funding to support the projects of Texas production companies rather than base eligibility solely on in-state spending and provide all benefits to out-of-state production companies.

This bill should include a minimum diversity standard. Texas production crews should reflect the makeup of our state. Historically, crews in the moving image production industry have been predominantly Anglo, but the state includes a diverse population of skilled workers.

Notes

The **HRO analysis** of HB 1634 appeared in the April 10 *Daily Floor Report*.

HB 1 by Chisum, the general appropriations bill for fiscal 2008-09, appropriates \$22 million over the biennium to fund the moving image incentive program. Appropriations may exceed this amount with approval from the Legislative Budget Board and the Office of the Governor. Any appropriation for the program is contingent on the comptroller certifying that there is sufficient revenue generated by the film industry and related activity in Texas to offset the cost of the appropriation. Not more than \$2 million may be used for the personnel training and film archive programs.

Restructuring the Texas Windstorm Insurance Association

HB 2960 by Smithee

Died when no action taken on conference committee report

HB 2960 would have amended Insurance Code provisions for operating and funding the Texas Windstorm Insurance Association (TWIA), which provides homeowners' insurance for coastal residents and businesses that are denied coverage by private carriers.

Funding structure. TWIA's current funding structure, which includes several stages for covering catastrophic losses that exceed the association's premium income, would have been revised. The first stage for covering these losses, a \$100 million assessment on member insurers, would have been eliminated. The funding mechanism to cover excess losses and operating costs would have included the following, in this order:

- up to 75 percent of the amount in the catastrophe reserve trust fund could have been used to cover each catastrophic event. If the trust fund had been reduced by more than 75 percent in one year, TWIA could have required member companies to collect a premium surcharge for one year from their policyholders who lived or had insured property in the catastrophe area;
- an assessment on member insurers of up to 1.25 percent of direct premiums;
- income from Class 1 bonds issued before a catastrophic event;
- an assessment on member insurers of up to 4 percent of direct premiums; and
- up to \$3.5 billion in Class 2 bonds issued on or after a catastrophic event.

Unlimited assessments on insurers for major catastrophic events and related premium tax credits for five or more successive years after paying these assessments would have been eliminated.

Revenue bond program. HB 2960 would have established procedures for the issuance of Class 1 and Class 2 revenue bonds. For Class 1 bonds, debt service and bond-related expenses would have been covered by a premium surcharge on policyholders in the catastrophe area. For Class 2 bonds, debt service and bond-related expenses would have been covered by a statewide premium surcharge of up to 4.5 percent of annual premium over a 12-month period. The bill would have specified that neither the state nor a state agency, political corporation, or political subdivision of the

state was obligated to pay the principal or interest on Class 1 bonds except as provided by the bill.

Notice to policyholders and applicants for insurance. TWIA would have had to issue a notice to policyholders and applicants for insurance that read substantially as follows:

"Insurance policies issued by the Texas Windstorm Insurance Association are not guaranteed by the state or federal government. In the event of a major catastrophe, the association may not have sufficient funding resources to pay all losses to all policyholders suffering damage. In such an event, you may be paid less than the full amount of damages that you suffer. You may obtain additional information as to the association's potential exposure and its available funding resources at www.tdi.state.tx.us."

Rates. The TWIA board could have filed and used rates without prior approval by the insurance commissioner if the filed rates were made 60 days before being used, did not exceed 105 percent of current rates, did not reflect a rate change of more than 5 percent for any individual rating class, and were not disapproved in writing by the insurance commissioner.

The bill would have allowed recognized catastrophe models to be used as a factor in determining TWIA rates. TWIA would have been authorized to establish rating territories and vary rates among territories.

Mandatory compliance with building codes. To be eligible for insurance coverage through TWIA, all construction, alteration, remodeling, enlargement, and repair of any structure in the catastrophe area begun on or after January 1, 2008, would have had to be constructed in compliance with applicable building codes. The bill would have authorized TWIA to make exceptions and charge a premium surcharge for certain structures that were altered before January 1, 2008, and had been insured in the private market for the 12-month period immediately preceding the date of the application.

Inspections. The bill would have transferred authority for conducting building inspections from the Texas Department of Insurance (TDI) to TWIA and would have allowed the association to charge a reasonable fee for each inspection. The bill would have authorized TWIA to fund

inspections after a catastrophe as necessary to facilitate recovery, rebuilding, and repair in the affected catastrophe area. TWIA would have adopted procedures for the appointment and oversight of qualified inspectors.

Incentive plan. TDI would have had to maintain a list of all property and casualty insurers that sold insurance in the voluntary market in the seacoast territory and developed incentive programs for insurers to write insurance on a voluntary basis and to minimize the use of TWIA as a means of obtaining insurance.

Composition of the board of directors. The nine-member TWIA board of directors would have been appointed by the commissioner of insurance and would have included:

- four insurer representatives who were members of TWIA, who could reside anywhere in the state;
- three public members, one of whom would have had to own property or have resided in one of first-tier coastal counties and be a TWIA policyholder; and
- two licensed insurance agents, one of whom would have had to maintain a principal office in a first-tier coastal county.

The commissioner also would have had to appoint a non-voting member to advise the board regarding issues related to the inspection process. All board members would have had to demonstrate experience in insurance, general business, or actuarial principles sufficient to make the success of TWIA probable.

Supporters said

HB 2960 would give TWIA the tools it needs to cover losses in the event of one or a series of catastrophic storms along the Texas coast. TWIA's current funding level and mechanism for covering losses is insufficient to cover losses should one or more catastrophic events like hurricanes Katrina or Rita occur in the coming years. Without a new funding structure, the state would have to use general revenue to cover most losses in such a catastrophic event.

In the wake of hurricanes Katrina and Rita, many private insurers have withdrawn from the coastal market, leaving TWIA as the insurer of last resort for an increasing number of coastal residents. Over the past five years, policies in force at TWIA have increased dramatically. Between 2001 and 2006, the number of TWIA policies has nearly doubled, from 68,758 to 135,000, in the 14 coastal counties and a portion of Harris County that make up the

TWIA coverage area. As of November 30, 2006, TWIA's exposure for windstorm losses from all costs reached more than \$40 billion. As of January, 2007, the association had about \$180 million of premiums in force, of which about \$100 million could be used to cover the cost of windstorm-related losses.

HB 2960 would give TWIA more flexibility in setting rates to meet projected demands and in issuing bonds to cover losses in the event of one or more catastrophic storms. By authorizing the use of catastrophe models, the bill would allow TWIA to predict more accurately the likelihood of catastrophic events and related funding needs.

This improved structure would better prepare TWIA to cover losses in the event of one or more catastrophic storms and would stimulate economic growth along the coast by providing sufficient windstorm coverage. This economic growth would benefit the whole state by generating increased tax revenue. While windstorm insurance may be an issue of special importance to coastal residents, it is in the entire state's interest to establish a solid system to protect against windstorm losses.

Opponents said

HB 2960 would give TWIA too much latitude by allowing the use of recognized catastrophe models in setting rates. These models easily can be manipulated to justify rates that otherwise might be considered unnecessarily high. The bill could lead to higher TWIA rates in coastal areas, which could inhibit economic activity and growth.

Requiring TWIA to issue a notice to every policyholder and applicant that suggests that coverage might not be provided in a major catastrophe would be confusing to consumers and could have other, more serious effects on the coastal economy. For example, mortgage companies might be hesitant to provide funding if insurance coverage were provided with the sort of caveat implied by such a notice. Rather than requiring the notice, the bill should add an additional layer of assessments on insurers for the most catastrophic events so that adequate coverage was available. If a notice is required, it should include clearer and more specific parameters indicating when coverage might be curtailed.

Notes

The **HRO analysis** of HB 2960 appeared in Part One of the May 7 *Daily Floor Report*.

Prohibiting insurance rate increases during judicial review

HB 3358 by Smithee

Effective September 1, 2007

HB 3358 prohibits an insurer that files in district court a petition for judicial review of a disapproved rate from raising rates for the same line of insurance before the matter under judicial review is finally resolved, unless the new rate is filed with the Texas Department of Insurance (TDI) and approved by the insurance commissioner.

If an insurer is required to file its rates, the commissioner must issue an order specifying the reasons for the required rate filings. The affected insurer is entitled to a hearing if a written request is filed with the commissioner no later than 30 days after the date of the order.

Supporters said

HB 3358 would discourage insurers from using the court system to their advantage while challenging the disapproval of a rate increase by the insurance commissioner. This would prevent another situation like the one that occurred following the enactment of SB 14 by Jackson in 2003, when the insurance commissioner did not approve a rate increase proposed by State Farm. The company appealed the commissioner's decision but has been able to charge the higher rate while the matter is under judicial review. Experts estimate that State Farm has made more than \$600 million in premium and interest charges during its court challenge to TDI's initial rate adjustment.

The bill would provide an incentive for insurers to resolve court cases as quickly as possible rather than dragging them out over several years. If insurers were prohibited from raising rates until a court case was resolved, they would be more likely to seek a more timely resolution.

Opponents said

The Legislature enacted the file-and-use system in 2003 to allow insurers to adjust rates in response to changing market conditions. Any litigation involving past rate decisions should not have an effect on future rate filings, which affect current and future rates.

Notes

The **HRO analysis** of HB 3358 appeared in the Part Three of the May 3 *Daily Floor Report*.

Mortgage counseling for complex loans

SB 987 by Lucio ***Died in the House***

SB 987 would have prohibited a lender from making a complex loan to a borrower with a credit score of 650 or less unless the loan applicant presented a certificate of completion of counseling from an approved housing counseling agency regarding complex loans and financial alternatives. A complex loan would have been a loan:

- that had a principal amount of less than \$125,000;
- that was secured by a first lien on the principal residence of the borrower;
- for which the aggregate of the principal balance of all loans secured by the property to the value of the property was at least 90 percent; and
- that contained a variable interest rate with an initial interest rate that was significantly lower than the fully indexed rate at the time the loan was closed or a provision that permitted periodic payments that were less than the amount of accrued interest on the scheduled payment date.

The counseling agency could have charged the loan applicant a reasonable fee for the counseling. The counseling requirement would not have applied to an interim construction loan with a maturity of less than 18 months. An attorney who provided the counseling could not have represented or advised another party to the loan.

Before the applicant received counseling, the lender or broker would have had to provide the applicant and counselor written notice explaining the proposed terms of the loan, that the loan was a complex loan, and available financial alternatives.

Supporters said

SB 987 would educate consumers regarding their loan alternatives and the risks associated with the loan product they choose. Texas ranks sixth among states in the rate of mortgage foreclosures, largely due to the number of consumers obtaining complex loans that they did not realize they could not afford. While foreclosures obviously are negative for consumers, they also adversely impact legitimate lenders and the building industry. The high level of foreclosures has contributed to many sub-prime lenders recently going out of business, and the demand for new home building decreases with a decreased pool of lenders.

A home is the largest purchase most people will make in their lives, and loan products change constantly – to the degree that often the lender does not understand fully the way a product works. If a consumer did opt for a complex loan, counseling would prepare the consumer for any changes in payment level as the loan term progressed, and the consumer could make financial arrangements accordingly. Counseling could take place in person or on the phone, and flexible options would allow counseling to occur quickly without interfering with the consumer's obtaining the desired property.

SB 987 would be focused narrowly to address the riskiest loans obtained by higher-risk consumers. It would address only negative amortizations and variable rate arrangements that had up-front teaser rates to make initial payments significantly lower. The borrower population would be limited to people with credit scores no higher than 650 who were borrowing less than \$125,000. The bill would draw the line at \$125,000 because consumers who could qualify for higher loan amounts would have a greater ability to recover from a loss.

More elaborate disclosures would not confer the benefits of counseling, because disclosures would be provided with the rush of other documents a borrower received on the closing date after the borrower already had made arrangements and was determined to sign on the dotted line. Even if a borrower carefully reviewed disclosures on the closing date, the borrower would not have the same opportunity to ask clarifying questions that would be afforded through counseling. While the borrower could ask the loan officer questions, the loan officer might be biased to answer in a way that ensured the borrower completed the loan transaction. Predatory lenders also could deceive the borrower, and because the Deceptive Trade Practices Act does not cover lending, the borrower would have little recourse.

Opponents said

SB 987 would place the state government in an inappropriate role mandating mortgage loan counseling for borrowers who should be responsible for their own decision-making. A consumer intending to make such a large investment should be responsible for independently seeking

education about the loan products available and choosing the most appropriate product. In certain instances, a complex loan is the only loan for which a consumer can qualify. If a consumer found a complex loan was the only borrowing option and felt such a loan would pose too great a risk, it would be the responsibility of the consumer to delay the decision to borrow or to pursue a more affordable property.

SB 987 could be detrimental to consumers who were well educated about the type of loan they sought. Non-traditional loan types were created to suit borrowers with unique needs. A person should not be dissuaded from pursuing a certain type of loan if he or she had researched the loan independently and deemed it the most appropriate financing option. In a competitive market, the delay associated with having to obtain counseling could cause a consumer to lose a desired property to another buyer who could obtain immediate financing. Rather than require counseling that could interfere with a consumer's closing a loan, complex loans could be accompanied by more detailed disclosures that made it clear what the borrower should anticipate and would ensure that the lender could not deceive the consumer.



Criminal Justice

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Death penalty, other punishments for repeat sex crimes committed against children

HB 8 by Riddle

Effective September 1, 2007

HB 8 increases penalties for sex crimes committed against children by authorizing the death penalty for certain repeat offenders and creating a new offense for continuous sexual abuse. The bill is to be known as “the Jessica Lunsford Act.”

Super-aggravated sexual assault and death penalty.

HB 8 authorizes the death penalty or life-without-parole for second convictions of “super aggravated sexual assault” against children. First offenses are punished with 25 years to life and are ineligible for parole.

The term “super aggravated sexual assault” describes an enhancement created by HB 8 to the existing aggravated sexual assault statute. It applies to convictions for aggravated sexual assault if the victim was:

- younger than six years old; or
- younger than 14 years old and the offense included certain aggravating factors involving bodily injury, threats to kill or hurt, deadly weapons, acting with multiple people to commit the offense, or giving certain drugs to the victim.

New offense of continuous sexual abuse. HB 8 creates a new offense of “continuous sexual abuse.” The offense is committed if a person who was at least 17 years old committed two or more “acts of sexual abuse,” regardless of the number of victims, against a child younger than 14, over a period of 30 or more days. The offense is a first-degree felony punishable by a term of 25 years to life, and offenders are not eligible for parole. Second convictions are punished with life without parole.

“Acts of sexual abuse” are defined as sexual assault; aggravated sexual assault; indecency with a child involving contact with the sex organ or anus; aggravated kidnapping with the intent to violate or abuse the victim sexually; burglary with intent to commit one of these offenses; and sexual performance by a child.

If a jury tries the case, it does not have to agree unanimously on which specific acts of sexual abuse were committed or the exact date on which they were committed.

The jury must agree unanimously that during the 30-day-plus period, the person committed at least two acts of sexual abuse.

It is an affirmative defense to prosecution that the person was not more than five years older than the victim, did not use force, and did not have previous convictions for certain sex crimes.

Statute of limitations. HB 8 removes the statute of limitations for sexual assault of a child, aggravated sexual assault of a child, and indecency with a child and establishes no statute of limitations for the new offense of continuous sexual abuse of a child.

The bill creates a new statute of limitations of 20 years from the 18th birthday of a victim for crimes against victims who were younger than 17 at the time of the offense and applies it to sexual performance by a child, aggravated kidnapping with intent to violate or abuse the victim sexually, and first-degree burglary with intent to commit certain serious sex crimes.

Miscellaneous. HB 8 makes several other changes to the laws governing sex offenses committed against children. It adds sexual performance by a child to the list of serious and violent crimes in Code of Criminal Procedure Art. 42.12, sec. 3(g), which restricts probation and requires offenders to serve one-half of their sentences or 30 years, whichever is less, before being eligible for parole. The bill also adds 3(g) sex offenses committed against children to the list of offenses that are not eligible for jury-recommended probation.

It increases penalties for sexual performance by a child if the victim is younger than 14 years old and makes all indecency with a child offenses, all sexual assault offenses, sexual performance by a child, and continuous sexual abuse ineligible for release on mandatory supervision, under which certain inmates automatically are released on a certain date under supervision similar to parole.

The bill also authorizes the attorney general to offer to assist local prosecutors in prosecuting certain sexually violent offenses, and it requires the attorney general to assist local prosecutors with those cases upon their request.

Supporters said

HB 8 is necessary to provide the best protection possible for Texas children from sex offenders who commit horrific crimes and to punish appropriately those who victimize children. HB 8 would be Texas' version of Jessica's Laws, the name given to a set of proposed laws targeting sex criminals who commit offenses against child victims.

Super-aggravated sexual assault and death penalty.

Sex offenses against children are so horrific that the death penalty for repeat offenders would be appropriate and just punishment. HB 8 would apply the death penalty only to the most dangerous offenders – those who repeatedly sexually assault very young children or assault children with aggravating factors. Other punishments, such as long prison sentences, are not adequate to address the harm these repeat offenders have caused and the danger to the community they represent.

Concerns that making serious sex crimes against children eligible for the death penalty would prompt offenders to kill victims are unfounded. Other states with similar laws have seen no rash of child killings. Authorizing the death penalty for repeat child rapists would be a powerful deterrent to offenders who have been convicted once of raping a child. A potential death sentence should not deter family members from protecting children from heinous crimes by reporting those crimes.

Long, mandatory prison terms are appropriate punishment for first offenses of super-aggravated sexual assault. In addition to protecting victims, witnesses, and other children by keeping sex criminals behind bars, long sentences would help deter other potential offenders. Long mandatory sentences would not make crimes more difficult to prosecute, but instead would ensure that offenders were punished appropriately. Instead of accepting plea bargains that reflect less serious offenses, prosecutors should be required in some cases to devote the resources necessary to obtain convictions for the actual crimes that were committed.

Texas should join the growing number of states instituting such laws. At least five states – Florida, Louisiana, Montana, Oklahoma, and South Carolina – have authorized the death penalty for people who commit repeat serious sex crimes against children, and other states are considering it.

Texas should do whatever is necessary to protect its children without waiting for the U.S. Supreme Court to rule specifically about the death penalty for child rapists. When the court ruled in 1977 in *Coker v. Georgia*, 433 U.S. 584,

that the death penalty was disproportionate punishment for the crime of raping an adult woman and therefore forbidden by the Eighth Amendment as cruel and unusual punishment, it did not rule on the constitutionality of sentencing child rapists to death. The issues involved in cases of repeat child rapists are different than those in the Coker case, and the language in Coker was limited specifically to the rape of an adult and did not touch on the rape of children.

New offense of continuous sexual abuse. By creating the new offense of continuous sexual abuse, HB 8 would address the problem of sexual predators who abuse children repeatedly. By requiring that the sex crimes be committed over a 30-day period, the bill would capture serial offenders who were a threat to public safety. Allowing a series of crimes to be prosecuted as one offense would give prosecutors more flexibility to allege crimes under continuous sexual abuse or under existing law. It would allow prosecutors to present a more accurate picture of a predator to a jury and would allow more appropriate punishments than considering each incident individually. Courts in at least five other states have held that using a continuing-course-of-conduct approach upon which jurors must unanimously agree on certain factors satisfies constitutional requirements.

A mandatory minimum of 25 years, with no parole, would be appropriate punishment for these serious crimes and would protect children from these predators. Life without parole for second offenses is necessary to ensure that repeat offenders never again victimize a child. Although a long mandatory minimum sentence and parole restrictions would be important to ensure these offenders would not ever be released, they would not be a significant departure from current law because certain repeat offenders already must serve at least 35 years without parole consideration and are rarely, if ever, paroled.

The bill would include a “Romeo and Juliet” clause so activities by teenagers engaging in consensual sexual activity would not be considered continuous sexual abuse.

Extending the statute of limitations for the prosecution of some sex crimes. Lengthening the time limit for filing charges in certain cases of sex crimes against children would be warranted because of the special circumstances surrounding child sex abuse cases and the seriousness of these crimes. Extending the statute of limitations would allow these child victims to mature and gain the financial and emotional stability necessary to speak out. Extending Texas' statute of limitations would bring the state in line with about 30 other states in which the statute of limitations is more favorable to child victims of sex crimes.

Opponents said

Texas' current law works adequately to punish and supervise sex offenders, and while HB 8 is well intended, it actually could make it more difficult to protect children from harm. Resources should be used to enforce current law allowing long prison sentences and restricted parole for dangerous offenders and to invest in the treatment of sex offenders and the prevention of child abuse. With its many deficiencies, the death penalty in Texas should not be expanded.

Super-aggravated sexual assault and death penalty.

The death penalty would be a disproportionate punishment for admittedly heinous sex crimes against children. The death penalty should be reserved for especially vicious murders, and although raping a child is a hideous offense that warrants severe punishment, it should not be equated with murder by punishing offenders with death. Long prison terms, such as those imposed by current law, or life without parole could be used to punish repeat child rapists and protect the public.

Texas law already allows for a range of appropriately harsh punishments to deal with sex offenders. Requiring mandatory sentences of 25 years for first offenses and the death penalty or life without parole for second offenses could backfire by making defendants less inclined to plead guilty. In cases in which evidence was not airtight or the victim was reluctant to testify, this could lead prosecutors not to file charges or to accept plea bargains to lesser crimes. Fewer guilty pleas also might lead to more trials that could further traumatize child victims.

There is no evidence that the death penalty would deter child rapists, many of whom are sexually violent predators who habitually prey on children. The prospect of receiving a death sentence actually might be counterproductive by giving offenders a perverse incentive to kill their victims so those victims could not serve as witnesses to a crime potentially punishable by death. In addition, children and their families might be less likely to report sexual assault by a relative for fear that the family member might be executed.

Since the reinstatement of the death penalty in 1976, most states have limited the punishment to murder cases. Texas should not enact a law of questionable constitutionality simply because it is politically popular, especially given clues by the U.S. Supreme Court that death penalty laws that would be rarely imposed or that are not supported by a broad national consensus would be ruled unconstitutional.

New offense of continuous sexual abuse. It is unnecessary to create a new offense of continuous sexual abuse. All of the crimes that constitute the new offense already are serious offenses that carry tough penalties that should be enforced. HB 8 would set an arbitrary time frame of committing two offenses within 30 days, which unfairly would exclude from the offense those whose crimes occur within 29 days. HB 8 could violate constitutional requirements of juror unanimity by requiring juries only to agree unanimously that during the 30-day-plus period the person committed at least two acts of sexual abuse but not requiring that the jurors be unanimous as to the dates or the acts committed.

Setting a 25-year mandatory minimum sentence for continuous sexual abuse would reduce prosecutors' flexibility to handle these cases and have the same problems as the mandatory minimum sentence for first offenses of super-aggravated sexual assault. Current law requires these inmates to serve long terms before being eligible for parole, and the Board of Pardons and Paroles has been extremely cautious about releasing sex offenders on parole. Although very few are approved for parole now, it would be better to continue allowing these offenders to be eligible for parole, for both prison management reasons and to recognize that some offenders could be rehabilitated and society best served if they were released on parole under close supervision.

Extending the statute of limitations for the prosecution of some sex crimes. Current law already has carved out a unique, exceptionally long time limit for filing charges in serious child sex crimes, which is both appropriate and adequate. Extending the statute of limitations even further could render defendants unable to defend themselves adequately and infringe upon their right to due process.

Notes

The **HRO analysis** of HB 8 appeared in the March 5 *Daily Floor Report*.

Felony for owners of dogs causing serious bodily injury or death

HB 1355 by Gattis

Effective September 1, 2007

HB 1355 creates “Lillian’s Law” in memory of Mrs. Lillian Stiles and in dedication to various others who have been victims of unprovoked dog attacks. It creates an offense punishable as a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) if the owner of a dog is criminally negligent by failing to secure a dog that causes serious bodily injury to someone off the owner’s property. The same penalty applies to a dog owner who already knows the dog is dangerous and whose dog causes serious bodily injury to another person through an attack outside of a secure enclosure.

If a dog attack under the circumstances described above results in a person’s death, the penalty for the owner is increased to a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000). In these cases, HB 1355 allows the court to order the destruction of the dog and to prosecute the owner under another section of the law that may apply.

In addition, the bill establishes various defenses to prosecution, including provisions for people who work with animals, people sanctioned by the government to handle dangerous dogs, and disabled people who rely on dogs for assistance. The bill also creates a defense for the owner of a dog that attacks someone who is committing a crime against a person or property, including murder, sexual assault, arson, robbery, or burglary.

Supporters said

HB 1355 would establish Lillian’s Law to ensure that dog owners were held responsible for the vicious acts of their dogs and would help to prevent future attacks. In late 2005, 76-year old Lillian Stiles was brutally killed by a pack of six pit bull-rottweiler mixed breeds that escaped from a neighbor’s yard. Holding a dog owner responsible for such an event is difficult under existing law because the dog previously must have been designated as dangerous. While a dog will be destroyed if it seriously attacks a person, the dog owner is not penalized until the dog has been deemed dangerous. This allows negligent dog owners to duck responsibility when they get new dogs because an owner’s previous poor stewardship is not taken into account.

HB 1355 would apply only to an unprovoked attack that caused serious bodily injury. This would limit the offense to serious attacks in which people were seriously hurt, and the bill would not apply to a dog who harmed someone only in a minor way. In addition, actions by the dog owner would have to be taken with criminal negligence or while knowing the dog was “dangerous” as defined in current law. Leash and enclosure laws are not enough. Dogs have been known to cause serious bodily harm while tied to fences or trees, which has allowed owners to avoid taking responsibility for the actions of their dogs. In addition, enclosure laws unfairly burden owners who do not keep dangerous dogs.

HB 1355 is not intended to apply to an attack that occurred while someone was trespassing in an enclosure. The bill is designed to protect people from dangerous dogs by deterring negligent behavior by dog owners. To that end, penalties would apply only if a dog owner did not take reasonable steps to keep the dog in a secured enclosure or if a dog attack happened somewhere off a dog owner’s property, as in the case of Lillian Stiles. The bill is designed to protect innocent people from suddenly being attacked by a dangerous dog and would provide liability protections for a dog owner if a dog caused serious bodily harm or death to a person engaged in certain criminal acts, including burglary and criminal trespass. In addition, the bill would not refer to any specific breed nor impose any breed-specific regulations.

Opponents said

HB 1355 would be unnecessarily severe. Under current law, a person cannot be prosecuted for an attack by a dog unless the dog already has been labeled dangerous, meaning that the person must have been aware of the possibility of an attack. Under this bill, a person could be prosecuted for a felony without any previous indication that the person’s dog might hurt someone. The bill would make no distinction in penalizing a first-time offender versus the owner of a dog that already had been deemed dangerous – both owners, regardless of past history, could be prosecuted for a second- or third-degree felony.

HB 1355 would not ensure protection for people from dangerous dogs because the law would be solely punitive and not preventive. The bill would provide penalties only

after a dog had attacked. To protect innocent victims, the bill instead should require dog owners to accept responsibility for their dogs before any attack occurred by creating statewide leash and enclosure laws. While the bill aims to penalize irresponsible dog owners, such a person would have little incentive to claim ownership should the dog be involved in an attack and might be shielded from prosecution altogether.

Notes

The **HRO analysis** of HB 1355 appeared in Part One of the April 23 *Daily Floor Report*.

Cruelty to animals penalties

HB 2328 by Woolley
Effective September 1, 2007

HB 2328 establishes the separate offenses of cruelty to livestock animals and cruelty to non-livestock animals.

Non-livestock animals. Under the offense of cruelty to non-livestock animals, animals are defined as domesticated living creatures, including stray or feral cats or dogs, and wild living creatures previously captured. Acting recklessly, in addition to knowingly and intentionally, against a non-livestock animal constitutes an offense if the person:

- tortures an animal;
- in a cruel manner kills or causes serious bodily injury to an animal;
- without the owner's effective consent, kills, poisons, or causes bodily injury an animal;
- fails unreasonably to provide necessary food, water, care, or shelter to an animal in the person's custody;
- transports or confines an animal in a cruel manner;
- causes one animal to fight another;
- uses an animal as a lure in a dog race; or
- seriously overworks an animal.

It is a defense to prosecution if the person killed or caused bodily injury to a non-livestock animal without the owner's effective consent if the person was acting within the scope of the person's employment as a public servant or during activities involving electricity transmission, distribution, or generation or natural gas delivery.

Livestock animals. Under the offense of cruelty to livestock animals, livestock animals are defined as cattle, sheep, swine, goats, ratites, poultry commonly raised for human consumption, horses, ponies, mules, donkeys, hinnies, and hoofstock and fowl raised under agricultural practices. The bill establishes an offense for intentionally failing unreasonably to provide necessary water to a livestock animal in one's custody. The offense is a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000).

Definition. Torture is defined, for purposes of both offenses, as an act that causes unjustifiable pain or suffering.

Exception. The bill establishes an exception to either offense for someone engaging in conduct that is a generally accepted and otherwise lawful form of conduct for wildlife

management, depredation control, shooting preserve practices, or agricultural practice involving livestock animals.

Penalties. For purposes of enhanced penalties on a third occurrence of either offense, a person may have committed the first two offenses against livestock animals, non-livestock animals, or both.

The bill stipulates that it does not create a civil cause of action for damages or enforcement related to either offense.

Supporters said

In a balanced way, HB 2328 would establish separate laws on animal cruelty for livestock animals and non-livestock animals. The bill would expand protections for non-livestock animals while largely retaining the status quo for treatment of livestock animals to avoid interfering with agricultural practices. The strengthened protections for non-livestock animals would help close loopholes in existing law and prevent future acts of cruelty.

Non-livestock animals. HB 2328 would strengthen protections for non-livestock animals by establishing that acting in a cruel manner to kill or injure an animal, short of torture, was an offense. Also, allowing "reckless" conduct, in addition to "knowing" and "intentional" conduct, to constitute an offense would enhance prosecution of abusive animal owners. This culpable mental state would apply to those who were aware their conduct was dangerous, thereby adding to the incidents that could be considered offenses.

Current laws on animal cruelty contain vague, inconsistent wording, leaving room for heinous crimes against animals to go unpunished. Texas' animal cruelty laws have not kept up with national standards, but this bill would address loopholes in current law to provide prosecutors with more legal tools to protect non-livestock animals. Under current law, pet owners sometimes escape punishment for certain acts of cruelty because causing serious bodily injury to an animal is an offense only if it is committed against an animal owned by another individual and because the definition of torture can be narrowly interpreted. In one example, a pet owner ran over his puppy

with a lawn mower and escaped prosecution because causing serious bodily injury would apply only to animals owned by someone else and defining the act as torture was precluded by the puppy's instant death. The definition of non-livestock animal also would help protect stray cats and dogs. Whether an owner of an animal can be identified should not determine whether an offense has been committed against that animal.

Evidence suggests a link between animal cruelty and family violence. Violence toward animals can be an indicator of other abuse being perpetrated within families, and perpetrators of animal cruelty are at risk of becoming violent offenders. The bill would improve prosecution of animal abuse and potentially prevent future acts of violence.

Livestock animals. While expanding protection for non-livestock animals, the bill would not interfere with certain currently permissible practices. It would retain exceptions to the offense for agriculture, hunting, fishing, trapping, and lawful wildlife control, while adding an exception for lawful depredation control. As a result, it actually would expand protections for certain activities. It would retain horses under the definition of livestock animals so that they could continue to be used in certain ranch activities.

Opponents said

Amending current animal cruelty laws, as HB 2328 would do, is not an appropriate way to prevent animal cruelty. Social ills cannot be ameliorated by establishing more offenses and strengthening the state's ability to prosecute. This would not adequately deter some individuals from committing heinous acts against animals. The state instead should provide public education to prevent future incidents of animal cruelty. Also, funding is needed to shelter animals treated inhumanely.

Other opponents said

Aside from a few minor changes, the bill would not do enough to address animal cruelty or to close the loopholes in current law. It would not establish clear standards on what acts constitute cruelty to animals and what acts do not. Broad exceptions to prosecution remain in the bill, creating the potential for some people to avoid prosecution on technicalities. The penalties for acts of cruelty against animals would not be increased, so Texas would do little to remedy its negligence concerning animal cruelty compared to other states.

Horses should be defined as non-livestock animals in order to be placed under the stricter protections provided by the bill. Most horses are used for pleasure activities rather than agricultural practices and are exposed to the same general public as non-livestock animals. Because horses are not consumed as food in the United States, they should not be placed in the same category as livestock animals, many of which are consumed as food. Also, although cockfighting is legally permissible only in New Mexico and Louisiana, the Texas law is weak and replete with loopholes, which the bill would not address. The bill specifically should prohibit cockfighting as well as the training and conditioning of animals to be used in fights.

Notes

The **HRO analysis** of HB 2328 appeared in the April 18 *Daily Floor Report*.

State basic supervision funding for local probation departments

HB 3200 by Madden *Vetoed by the governor*

HB 3200 would have altered the computations for determining state basic supervision funding for local probation departments for felony defendants placed on probation. Instead of having the per capita funding for felons based on those directly supervised by local probation departments, it would have been based on each felony defendant placed on probation and on each felony defendant participating in pretrial programs.

The Criminal Justice Assistance Division of the Texas Department of Criminal Justice (TDCJ) would have annually established a per capita funding formula that included:

- higher per capita rates for felony probationers who were serving the early years of their probation terms than for those who were serving the end of their terms;
- penalties in per capita funding for each felony probationer whose probation was revoked due to a technical violation of probation; and
- awards in per capita funding for each felony defendant who was discharged due to an early termination of probation.

The TDCJ board would have been authorized to adopt a policy limiting the percentage of benefit or loss that a department could have realized under the new formula.

The formula would have to have been established by January 1, 2008, and been used for the state fiscal year that begins on September 1, 2008.

Supporters said

HB 3200 would adjust the computation used to send money to local probation departments to encourage more intensive supervision in the early years of probation terms, to discourage probation departments from keeping offenders on probation longer than necessary, and to discourage revocations of probation for technical violations of probation terms.

Front-loading probation funding by requiring higher rates for offenders in the early years of their terms would give local probation departments the resources to intensely

supervise probationers during this critical period when most re-offending occurs.

The current formula used to determine state funding can create an incentive to keep felony offenders on probation longer than necessary because funding continues as long as they are on supervision. Also, sometimes the fees paid by those who continue to meet their obligations to pay them are used to make up funding from offenders who do not pay their fees. HB 3200 would address this by requiring awards for early terminations of probation. Decisions about early terminations still would be made solely by judges who are accountable to voters and would not be influenced by the funding formula to make decisions that jeopardized public safety.

HB 3200 also would discourage probation departments from revoking offenders' probation and sending them to prison for technical violations, which are violations of supervision that do not include new offenses. In some cases, these technical violations do not warrant using a prison bed for a probationer, especially given that the state prison system is operating at capacity and beds should be reserved for violent and serious offenders. The change in the funding formula would give the local probation departments incentives to work with offenders to improve their success on probation, but decisions about revocations would continue to be made by judges who do not receive the funding.

By requiring the funding formula to contain awards for early termination and for TDCJ to adopt a policy limiting benefits or loss to departments, the bill would mitigate its effects on probation departments.

Opponents said

HB 3200 could upset the sentencing dynamics in Texas by providing incentives for probation departments to terminate probation early and disincentives to revoking probation.

If prosecutors and courts felt that early termination of probation had become the norm as a result of the awards required in HB 3200, they might support longer probation terms or more incarceration. Current law allows judges to

review offenders at their own discretion and to reduce or terminate a probation term after the lesser of one-third of the original term or two years had been served. Probation departments should not receive incentives to push for early termination in inappropriate cases.

In the same way, providing a financial disincentive to revoke probation for technical violations could result in some probationers remaining free on probation when they should have had been sent to prison. Some technical violations of probation are serious and warrant revocation. For example, absconding from probation or coming in contact with a victim both could be technical parole violations. Under HB 3200, a probation department would have a financial incentive to keep offenders who committed these violations on probation instead of sending them to prison, which might be warranted.

Notes

The **HRO analysis** of the HB 3200 appeared in Part Two of the *Daily Floor Report*.

For more information on HB 3200, see HRO Focus Report Number 80-6, *Vetoed of Legislation, 80th Legislature*, July 9, 2007, pp. 63-64.

Revising Texas Youth Commission authority and operations

SB 103 by Hinojosa Effective June 8, 2007

SB 103 makes a number of changes to the oversight and internal operations of the Texas Youth Commission (TYC).

Governing structure. SB 103 temporarily changes the governing structure of TYC from a seven-member board appointed by the governor. Instead, it will be governed until September 1, 2009, by an executive commissioner appointed for a two-year term by the governor, with the consent of the Senate.

The bill establishes a nine-member advisory board to advise and assist the executive commissioner. Three members are to be appointed by the governor, three by the lieutenant governor, and three by the speaker of the House. The governor designates the board's chair. At least one member must be a physician, one an experienced member of a victims advocacy organization, one a mental health professional, and one a current or former prosecutor or judge. A majority of the board members must be qualified, by experience or education, in programs for the rehabilitation and reestablishment in society of children in the custody of agencies similar to TYC.

The sections of SB 103 establishing the executive commissioner and the advisory board will expire September 1, 2009, and as of that date, TYC will be governed by seven-member board appointed by the governor with the advice and consent of the Senate.

The Sunset Advisory Commission will study the merits of moving TYC toward a regionalized structure of smaller facilities and more diversified treatment and placement options. The commission also will study the merits of an executive commissioner governing the TYC as compared to a citizen board. The Sunset commission must include its recommendations on these issues in its Sunset review report on the TYC, which will be abolished September 1, 2009, unless continued by the Legislature.

Misdemeanor offenses. SB 103 prohibits youths from being sent to TYC for misdemeanor offenses.

Age limit and determinate sentences. SB 103 lowers the maximum age limit for youths in TYC from age 21 to age 19.

Youth placement restrictions. TYC is prohibited from placing youths younger than age 15 in dormitories with youths age 17 and older unless it is to ensure the safety of TYC youths or for short-term assessment and orientation. The commission must adopt scheduling, housing, and placement procedures to protect vulnerable children in TYC. When deciding where to house a child, TYC must consider the proximity of the child's family.

Lengths of stay and review panel. TYC must establish a minimum length of stay for offenses. After youths have completed the minimum length of stay, TYC must discharge the child, release the child on parole, or extend the child's stay.

TYC must appoint a panel to review and determine which action will be taken. The panel may extend the length of a stay only on a majority vote and only on the basis of clear and convincing evidence that the youth needs additional rehabilitation and that TYC would provide the most suitable environment for that rehabilitation. Panel members must be commission employees who work at the commission's central office and cannot be involved in any supervisory decisions concerning TYC youth. TYC must establish a process for youths, parents and guardians, employees, and volunteers to request the reconsideration of an extension order.

Training, staffing. TYC is required to give each juvenile correction officer (JCO) at least 300 hours of training before that person begins work.

TYC must maintain a ratio of at least one JCO for every 12 youths in correctional facilities with dormitories. TYC must consider the age of a JCO so that, to the extent practicable, JCOs are at least three years older than the youths they supervise.

The TYC executive director is required to perform state and national criminal background checks of employees, contractors, volunteers, ombudsmen, and advocates working for the commission and those who provide direct delivery of services to the youths or have access to TYC records.

Office of Inspector General (OIG). SB 103 establishes an office of inspector general to investigate crimes committed at TYC facilities and fraud committed by TYC

employees. The executive commissioner must select a commissioned peace officer as chief inspector general, and the OIG is authorized to employ and commission peace officers to carry out the duties of the office.

The OIG is required to report the results of its investigations to the TYC commissioner and advisory board, the governor, legislative leaders and committees, and other entities. The report is public information. The chief inspector general also must prepare a quarterly report on the operations of the office. The OIG must immediately report to agency and state officials any particularly serious or flagrant problem concerning the administration of a TYC program or operation or any interference by the executive commissioner or a TYC employee with an investigation by the office. The OIG is required to immediately provide the Special Prosecution Unit with a report about an alleged offense if the offense is believed to be particularly serious and egregious.

The TYC commissioner is required to file a complaint immediately with a law enforcement agency if the director has reasonable cause to believe that a youth was the victim of a crime committed at a TYC facility.

Special prosecution unit. SB 130 recognizes in statute the Special Prosecution Unit (SPU) and extends its authority to offenses relating to TYC. The SPU is an independent unit that cooperates with and supports prosecuting attorneys handling criminal offenses and delinquent conduct on TDCJ or TYC property or committed by or against anyone in their custody or while a person was performing a duty away from department or commission property. Prosecutors are authorized to request that the SPU handle any criminal offense or delinquent conduct that fits these criteria.

The SPU's executive board must elect a "counsellor," who will coordinate prosecution issues and monitor cases dealing with TYC and may conduct certain types of investigations of alleged illegal or improper conduct by commission officers, employees, or contractors.

The attorney general is authorized to offer assistance to prosecutors handling criminal offenses concerning TYC.

Office of the ombudsman. SB 103 establishes the Office of Independent Ombudsman of the Texas Youth Commission as a state agency to investigate, evaluate, and secure the rights of youths committed to TYC. The ombudsman is independent of TYC.

Duties of the office include reviewing TYC procedures and services to ensure youths' rights are observed, reviewing complaints, conducting investigations of non-criminal

complaints, reviewing facilities and procedures, and providing assistance to youths and their families, including advocating for the best interests of the child.

The first ombudsman is appointed by the executive commissioner for a term that ends February 1, 2009, and the governor appoints subsequent ombudsmen with the advice and consent of the Senate for two-year terms.

Increased penalty for improper sexual activity. SB 103 increases the penalty for certain crimes that violate the civil rights of someone in custody and for improper sexual activity with a person in custody. The penalty increases from a state jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) to a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) if the offender employs, authorizes, or induces a youth in TYC to engage in sexual conduct or a sexual performance.

Other provisions. SB 103 makes numerous other changes to the laws governing TYC, including:

- requiring TYC to offer appropriate rehabilitation programs for its youths and, if not able to do so, to report to the Legislature about which programs were not offered or available and why;
- establishing a permanent, toll-free number for information about abuse, neglect, or exploitation of youths that is prominently displayed in each facility and accessible to the youths; and
- requiring TYC to create a parents' bill of rights that includes a description of the agency's grievance procedures and requiring TYC to give parents or guardians a quarterly report on their child's progress in language that is clear and easy to understand.

Supporters said

SB 103 is necessary to address the problems that played significant roles in the recent scandal involving allegations of sexual abuse and other crimes in TYC facilities. The bill would address these problems by significantly reforming the internal operations of the agency and increasing oversight of it. The bill would enhance accountability at the agency, require transparency in its operations, establish checks and balances on agency staff and operations, establish oversight and reporting of agency operations and alleged crimes, and institute training and safeguards to protect the children committed to the agency and to help the agency staff.

The agency will undergo Sunset review this interim, and the 81st Legislature will have the opportunity to make additional changes in 2009.

Governing structure. Given the large number of changes being implemented at the agency, it is necessary temporarily to give the reins of the agency to an executive commissioner. This would be the best way to focus responsibility for the agency and make it clear who is in charge and whom to hold accountable as the agency reorganizes.

To ensure that this model is scrutinized in 2009, SB 103 would sunset the commissioner's position and reinstate a governor-appointed board. The 81st Legislature could impose whatever structure it deemed appropriate because the agency would be undergoing Sunset review and would be abolished in 2009 unless continued by the Legislature.

Misdemeanor offenses. It is important to prohibit the placement in TYC of youths who commit misdemeanor offenses so that space and resources can be devoted to those who commit more serious offenses. To properly refocus its efforts and implement some of the provisions of SB 103, including lower staff-to-youth ratios, the agency must downsize. The Legislature would be able to revise the ban on misdemeanants in two years if it felt the agency had the resources to handle them.

Prohibiting misdemeanor placements would not mean that youths who committed misdemeanors would go untreated or go without sanctions. Local juvenile probation departments are well equipped to handle these youths, and the Legislature is increasing their resources through the appropriations process.

It is unclear how often youths are influenced by the technical aspects of sentencing. Any effect on plea agreements would be minimal and would influence only a small number of cases. Only about 6 percent of the misdemeanants in TYC have committed a felony that was pled down to a misdemeanor offense.

Age limit and determinate sentences. Lowering the age limit of youths at TYC from 21 to 19 would allow the agency to focus on its core mission of rehabilitating youths. This would reserve TYC for younger offenders who should not be mixed with older offenders who are really adults.

TDCJ is equipped to handle these older youths. Currently, if youths are 17 years old when they commit an offense, they are handled in the adult system, and many are

sent to TDCJ. Housing 19-year-olds in prisons would be more appropriate than housing them with 13-year-olds in TYC facilities.

Youth placement restrictions. To address the problem of very young offenders being housed and sometimes victimized by older offenders, SB 103 would place restrictions on the ages that could be housed together.

Length of stay and review panel. To help create transparency and fairness, SB 103 would establish a review panel to make formal decisions about whether youths should remain at TYC longer than their minimum lengths of stay. In the past, some of these decisions seem to have been made arbitrarily. The bill would ensure these decisions were made fairly and that youths and their families understood and could appeal them. The bill's statistical reporting requirements and requirements that decisions be transparent, consistent, and objective would allow oversight.

Training and staffing. SB 103 would address problems caused by untrained and unsupported staff by significantly increasing the training required of juvenile corrections officers from 80 hours to 300 hours. SB 103 would implement a ratio of one JCO to 12 youths, which would be within the range of national ratios and a reduction from the current rate of one-to-24 at night and one-to-15 or one-to-24 during the day.

Office of Inspector General (OIG). Creating the OIG would address the problem of alleged crimes committed at TYC not being prosecuted because the allegations were not properly investigated or forwarded to law enforcement officers and prosecutors. Under TYC's current system, in numerous cases the initial and only investigations of criminal allegations were done by civilian TYC staff who were untrained and unqualified to perform criminal investigations and whose focus was on whether the agency should take administrative actions. Staffing the OIG with peace officers who would have a duty to investigate and report crimes would ensure that investigations into all crimes were handled properly. The system established by SB 103 would be modeled on the one that works well in the adult criminal justice system.

Several provisions in SB 103 would ensure the independence of the office and proper oversight of its investigations and operations. For example, the OIG would report on its operations and investigations directly to several independent entities, including the Legislature, and the reports would be public information.

Special prosecution unit. SB 103 would address the problem of alleged crimes at TYC not being prosecuted due to a lack of local prosecutorial resources. The bill would allow the state resources of the Special Prosecution Unit (SPU) to be used to prosecute criminal offenses that occur in TYC facilities, just as they are used to prosecute offenses in adult correctional facilities. SB 103 would help prevent TYC cases from falling through the cracks by requiring the appointment of a counsellor to have the direct responsibility for alleged crimes in TYC.

The bill would create another check and balance by authorizing the attorney general to offer assistance to prosecutors handling criminal offenses concerning TYC.

Office of the ombudsman. SB 103 would establish an ombudsman to create an independent entity focused on the needs of the youths. Currently, no one is charged explicitly with advocating for the youths, and the youths and their families often feel that they have nowhere to turn with their concerns. SB 103 would keep the lines of authority clear by limiting the investigatory powers of the office to non-criminal cases that under SB 103 would be handled by the office of inspector general.

Opponents said

Governing board. SB 103 should keep the current structure of a governor-appointed board overseeing agency operations. The problems plaguing the agency resulted from the structure of agency operations and the personnel appointed and hired to run the agency, not from the governance structure itself. The board and much of the staff who were in charge when the problems occurred have resigned or been terminated. SB 103 should keep the board structure, but set requirements for the qualifications of those appointed and allow a new board to implement the numerous improvements in the bill.

Even temporarily changing the structure to a single governor-appointed commissioner would not ensure more oversight for TYC, but actually might diminish oversight because instead of a diverse board with six members, only one person would be in charge. The answer to the problems with the agency lies in more oversight rather than less.

Misdemeanor offenses. Prohibiting the placement of misdemeanants at TYC would reduce the flexibility of judges to handle youths and would upset the sentencing dynamics in the state's juvenile justice system. In many cases, although a youth may be adjudicated for a misdemeanor, factors such as their past crimes, the danger

the child represents to the community, the child's success in local programs, and their home and school situations can result in judges deciding that the TYC is the best place for them.

Plea agreements could be reduced because prosecutors who want to keep the option of sending a youth to TYC would not be willing to agree to reduce a charge to a misdemeanor. This could translate into more felony charges and convictions. Crime could increase if youths realized that they could commit misdemeanors and not be sent to TYC.

SB 103 could shift problems to the local level. Although new funding may be available this session for local probation departments to handle more youths, increased funding and shifts to local communities historically have not translated into permanently increased resources.

Age limit. Requiring all 19-year-olds to be released or transferred to the adult system could have a negative impact on those youths who are best served at TYC where rehabilitation programs are more accessible than at TDCJ. Some youths still are immature at age 19 and face a better chance at rehabilitation if they can stay in the juvenile system.

Reducing the age cap on youths would result in some youths having shorter stays at TYC even though they received long determinate sentences. This could influence judges to order the transfer of more of these youths to the adult system when they reached age 19 so that they would stay incarcerated. It also could increase the number of youths being certified to stand trial as adults if prosecutors wanted to ensure that older youths – 16-year-olds, for example – were locked up for a number of years.

Office of Inspector General. The OIG that would be established by SB 103 would not be far enough removed from TYC to ensure its independent and objective investigation of alleged crimes. This could result in a conflict of interest in which the office felt pressure not to raise issues that might place the board or agency in a bad light. To ensure the true independence of the office, the OIG should be appointed by an outside entity, and the appointment should be for a set term with removal only for specified reasons.

Other opponents said

Governing structure. The important job of running TYC warrants a permanent, independent, full-time professional, rather than a short-term commissioner who

gives up power to a volunteer board of lay persons in 2009. This system could result in a caretaker commissioner whose long-term authority was unclear. The current problems demonstrate the lack of accountability and oversight when no one has clear, continuing oversight of the agency.

A permanent, professional commissioner would be the best way to focus responsibility for the agency and would make it clear whom to hold accountable. The public holds the governor responsible for the agency, and the governing structure should allow the governor to meet that responsibility by appointing the commissioner. This commissioner model is being implemented more often and has been successful in the state's insurance and health and human service agencies.

Notes

The **HRO analysis** of the companion bill, HB 2807 by Madden, appeared in Part One of the May 7 *Daily Floor Report*.

Creating a Texas Innocence Commission

SB 263 by Ellis ***Died in House committee***

SB 263 would have created the Texas Innocence Commission to investigate thoroughly each post-conviction exoneration to:

- discover errors and defects in the criminal procedures used in the case;
- identify errors and defects in the criminal justice process;
- develop solutions and methods to correct the errors and defects; and
- identify procedures and programs to prevent future wrongful convictions.

The commission would have had nine members serving two-year terms, as follows:

- two appointed by the governor, including the dean of a law school and a law enforcement officer;
- one appointed by the lieutenant governor;
- one appointed by the speaker of the House;
- one judge appointed by the presiding judge of the Court of Criminal Appeals;
- one professional in the forensic science field, appointed by the presiding officer of the Texas Forensic Science Commission;
- one prosecutor, appointed by the Texas District and County Attorneys Association;
- one criminal defense lawyer, appointed by the Texas Criminal Defense Lawyers Association; and
- one attorney representing an innocence project appointed, on a rotating basis, by the University of Texas School of Law, the University of Houston Law Center, and the Texas Tech University School of Law.

The commission would have been required to report its findings and recommendations to the governor, the lieutenant governor, and the speaker. The report would have been made available to the public on request, and the findings and recommendations could not have been used as binding evidence in a subsequent civil or criminal proceeding.

Supporters said

SB 263 is necessary for Texas to address the problem of wrongful criminal convictions. In Texas, DNA testing has been used to help exonerate almost 30 people who were wrongfully convicted, and these and other cases of wrongful convictions should be studied to help prevent additional miscarriages of justice. The bill would establish a process to investigate cases in which innocent persons had been wrongfully convicted, identify what went wrong and why in those cases, and recommend changes to prevent wrongful convictions in the future. In addition to the burden placed on people convicted in error, a wrongful conviction may mean that a guilty person remains free, which is also a miscarriage of justice.

It is necessary to create a commission dedicated to investigating these cases because currently there is no institutional mechanism to do so. An innocence commission investigating cases would be similar to the way that transportation accidents are investigated by a national safety board. The Legislature would have the power to eliminate or revise the commission.

SB 263 would not lead to finger pointing or eliminating the death penalty. It is designed to identify causes of wrongful convictions and to prevent additional miscarriages of justice. Cases of wrongful conviction that do not involve DNA evidence or the death penalty deserve scrutiny just as much as the higher-profile cases. The bill would not be punitive and could not be used to establish criminal or civil liability for a person who was part of a wrongful conviction. The commission would not have subpoena power or any other authority that could be used against anyone involved in such a case.

Opponents said

SB 263 would be a back-door way to erode the death penalty in Texas. If the goal of the bill is to study post-conviction exonerations and the criminal justice process in Texas, that could be accomplished in numerous ways under current law.

The bill would create a new bureaucracy biased toward eliminating the death penalty, focused only on negative aspects of criminal cases, and lacking the traditional adversarial process central to the criminal justice system. This could institutionalize opposition to the death penalty and allow public funds and the weight of the state to be used to further the political goal of eliminating the death penalty, an objective not shared by all Texans. Such a commission might be hard ever to abolish because governmental entities traditionally are difficult to eliminate and tend to grow in scope to justify their continued existence.

Use of force or deadly force in self-defense

SB 378 by Wentworth

Effective September 1, 2007

SB 378 creates a presumption of reasonableness for a person's belief that the use of force or deadly force to protect the person is immediately necessary and therefore justified. The belief is presumed to be reasonable if:

- the actor knows or has reason to believe that the person against whom force or deadly force is used has unlawfully and with force entered or is trying to enter the person's occupied home, vehicle, or work place; unlawfully and with force removes or is trying to remove the person from the person's home, vehicle, or work place; or is trying to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;
- the actor did not provoke the person against whom force is used; and
- the actor is not engaged in criminal activity at the time force is used, other than a minor traffic violation.

An actor is not required to retreat from a person against whom force or deadly force is used if the actor has a right to be present at the location, has not provoked the person against whom the force is used, and is not engaging in criminal activity at the time. The failure to retreat may not be considered in determining whether an actor reasonably believed the use of force or deadly force was necessary. A defendant who uses force or deadly force that is justified by the bill is immune from civil liability for personal injury or death resulting from that defendant's use of force or deadly force.

Supporters said

SB 378 would provide Texans with broader power to protect themselves. It would shift the burden from victims to aggressors by creating a presumption that a victim's belief was reasonable that the use of force or deadly force was immediately necessary under certain circumstances and therefore justified. The expanded "castle doctrine" would protect people not only in their homes, but also in their vehicles and work places. In modern life, people spend more time in these places and should enjoy the same justifications for self-defense there that they enjoy at home.

The bill also would return the law to what it was before 1973, when Texas did not impose a duty to retreat in the face of an attack. In addition, protecting victims from civil liability would allow them to focus on defending themselves and their families instead of being concerned about potential lawsuits.

The bill would address organized crime and gang activity by explicitly stating that the right to stand your ground did not extend to those engaged in criminal activity, those who had provoked their attackers, or those who did not have a right to be present at the location where force was used.

Opponents said

SB 378 would be a solution in search of a problem because current law provides a good balance between a person's right to self-defense and the value of human life. Under existing law, if a reasonable person is able to retreat, that person should do so, but people may resist deadly force with deadly force if they are unable to retreat. This rule avoids violence and conserves human life.

The bill would prevent a jury from considering reasonableness or proportionality, which could cause a miscarriage of justice as some thieves are intent only on committing property crimes, not on physically harming anyone. Texas juries historically have done a good job siding with property owners against home invaders, so no change in the law is necessary. Eliminating the duty to retreat also could increase the number of people who used deadly force and claimed it was justified by the provisions of the bill.

Notes

The **HRO analysis** of the House companion bill, HB 284 by Driver, appeared in the March 19 *Daily Floor Report*.

Continuing of the Texas Department of Criminal Justice

SB 909 by Whitmire
Effective June 15, 2007

SB 909 continues the Texas Department of Criminal Justice (TDCJ) until September 1, 2011, and makes several changes to the laws governing the agency. It removes the Sunset date for the Correctional Managed Health Care Committee (CMHCC) but continues the committee and requires that it be reviewed during any review of TDCJ. The bill amends laws governing the Board of Pardons and Paroles, requiring it to review, update, and report on parole guidelines and to institute a process formally to identify and make recommendations about releasing some offenders early from parole supervision.

Criminal Justice Legislative Oversight Committee. SB 909 establishes the Criminal Justice Legislative Oversight Committee to provide objective research, analysis, and recommendations to guide state criminal justice policies. The committee has six members: the chairs of the Senate Criminal Justice Committee and the House Corrections Committee; two members of the Senate appointed by the lieutenant governor; and two members of the House appointed by the speaker of the House. The presiding officer is designated alternately by the lieutenant governor and the speaker, with the speaker appointing the first chair by January 15, 2008. The committee will examine the criminal justice system, including its cost-effectiveness, critical problems, and long-range needs. It will advise the Legislature and recommend policy priorities and problem-solving strategies.

MRIS for state jail felons. SB 909 authorizes judges to release from state jails certain state jail felons under the Medically Recommended Intensive Supervision (MRIS) program to a medically suitable placement. This is allowed if the judge finds the offender does not constitute a threat to public safety and is identified as elderly, physically disabled, mentally ill, terminally ill, or mentally retarded or as having a condition requiring long-term care. If released, the offender must be supervised and remain under a physician's care in a medically suitable placement.

Payment for overtime. TDCJ must pay employees for overtime worked at the same time they are paid for work at the regular rate for that month.

Miscellaneous. The bill makes many other changes in the laws governing TDCJ, including requiring a feasibility study on relocating the Central Prison Unit from Sugar Land to a location that more appropriately addresses the needs of

the correctional system and requiring the agency to study the possibility of a prisoner exchange with foreign countries

Correctional managed health care. SB 909 continues the CMHCC, which manages a statewide managed health care network for inmates, removes its individual Sunset date, and requires that its responsibilities be reviewed under the Sunset Act during any review of TDCJ.

The bill revises TDCJ's role in monitoring health care by removing limits on the department's monitoring activities and requiring it to monitor certain aspects of the quality of care delivered by providers. TDCJ must ensure that certain types of information about health care and the process for filing inmate grievances about health care are available to all inmates.

Parole guidelines, early release from parole supervision. SB 909 requires the Board of Pardons and Paroles (BPP) to meet annually to review and discuss parole guidelines. Based on the review, the BPP may update the guidelines. The BPP annually must report to the newly created Criminal Justice Legislative Oversight Committee and legislative leaders on its application of the parole guidelines. SB 909 requires that when a parole board member or a parole commissioner deviates from parole guidelines, instead of making a brief written statement, they produce a written statement describing in detail the circumstances of the departure. The bill imposes a new requirement that the statement be provided to the inmate.

SB 909 requires TDCJ to establish a system for recommending persons on parole and mandatory supervision for early release from supervision. Annually, parole officers must identify releasees who meet certain criteria and determine whether early release from parole would be appropriate. Parole officers must forward their recommendations to the regional parole supervisor, and if the regional parole supervisor approves the recommendation, the parole division must allow the releasee to serve the remainder of the sentence without supervision.

Supporters said

TDCJ should be continued, but the agency should be reviewed again in 2011 because of growth in the offender population, the significant changes being instituted in the

criminal justice system, and an increase of \$200 million for offender diversion and treatment programs appropriated by the 80th Legislature. In 2011 the Legislature should be able to evaluate the criminal justice system and decide if statutory changes are necessary, using studies done by the oversight committee created in the bill.

Criminal Justice Legislative Oversight Committee.

SB 909 would fill a gap in the information available to legislators by creating a legislative oversight committee to provide independent, objective information and analysis. Since the abolishment of the Criminal Justice Policy Council in 2003, no entity has filled its role in providing comprehensive and ongoing analysis of the criminal justice system for the Legislature. Creating the committee is warranted, given the size of the criminal justice system and the significant challenges it faces with prisons and many jails operating at capacity. Information provided by the Legislative Budget Board (LBB) and other entities does not provide objective, independent analysis of the system as a whole or include recommendations.

MRIS for state jail felons. Because current law does not specifically allow state jail offenders to be released on medically recommended intensive supervision, judges often are reluctant to release them early for medical reasons. There is no reason to deny this option for state jail offenders when in some cases medical release would be warranted and release would save the state the costs of extraordinary medical care.

Payment for overtime. Requiring TDCJ to pay employees soon after their overtime is earned would codify current agency policy. In January 2007, when the agency had 3,250 vacant correctional officer positions, it modified its overtime policies and began paying officers for their overtime in the next pay period instead of requiring them to bank 240 hours of overtime before receiving any payments. This policy could help retain correctional officers and is so important to employee retention and morale that it should be established in law so that it could not easily be changed.

Correctional managed health care. SB 909 would update the CMHCC's duties to better reflect its purpose in making decisions about health care delivery and would improve monitoring of inmate health care by removing a current restriction on TDCJ's monitoring efforts. TDCJ needs more authority to monitor the health care system provided by the universities so that it can identify and address individual and systemic problems.

Parole guidelines, early release from parole supervision. SB 909 would require the BPP to explain its efforts to meet parole guidelines so the Legislature could have more information about the board's deviation from the guidelines. Focusing more attention on the guidelines could help the Legislature, the board, and the public determine if the parole process was adequately objective, consistent, flexible, and accountable. Requiring the updating of the guidelines annually would ensure that the guidelines best served the needs of the parole process.

Requiring parole decision makers to provide reasons for their departures from the guidelines would increase transparency and confidence in the process. This would not infringe on a parole panel's discretion to make appropriate decisions because it would not be required to adhere to the guidelines and there would not be a penalty for failing to follow the guidelines.

SB 909 would institute a formal system for parolees to be identified and assessed for early release from parole, because TDCJ does not use its current authority in this area. By facilitating the early release of some offenders, SB 909 would provide incentives for parolees to meet parole conditions, reduce parole supervision caseloads, and enhance public safety by allowing parole officers to focus on high-risk and newly released offenders who needed more intensive supervision. Under the system outlined in SB 909, offenders would be released early only from supervision, but they would not be formally discharged from parole, so their parole still could be revoked if warranted.

Opponents said

TDCJ's next date for Sunset review should be 2019, which would allow for the standard 12 years between agency reviews. The agency was reviewed by the Sunset Commission in 1987, 1999, and 2007. Having another review in 2011 would mean that it has been reviewed three times in 12 years. The Sunset Commission staff should focus their limited resources on other areas of state government in the next 12 years. Other entities, including the new oversight committee, are capable of evaluating trends in the criminal justice system.

Criminal Justice Legislative Oversight Committee. It is unnecessary to create a new entity to provide information about criminal justice matters because several entities now fill this need. These include the LBB, the criminal justice agencies, the state auditor, the newly created Criminal

Justice Statistical Analysis Center in the Governor's Office, and the House and Senate committees with jurisdictional oversight of criminal justice agencies.

MRIS. Before releasing a state jail felon on MRIS, judges should have to hold a hearing to allow prosecutors and the offender a chance to present evidence concerning the release.

Payment for overtime. Statutorily requiring TDCJ to pay overtime would reduce the Legislature's and agency's flexibility to allocate its budget. Although TDCJ's current overtime policies are in compliance with SB 909, in 2003 the agency had to change its policy and restrict overtime payments due to budget constraints.

Parole guidelines, early release from parole supervision. Many of the requirements in SB 909 are unnecessary. The BPP already meets regularly to discuss its parole guidelines and reports on them in an annual report.

The requirement in SB 909 that the parole board describe in detail the specific circumstances of a departure from the parole guidelines would be difficult to meet. When votes are cast, parole board members do not know if they have exceeded the parole guideline percentages for that month, and this knowledge could lead to charges

that the board members were voting to meet quotas for release. Parole decisions are made based on a number of factors, such as the type of crime, a person's criminal history, the impact on victims, and public safety, and parole guidelines are just one tool. Decisions should continue to be made based on these factors without overly elevating the importance of the parole guidelines.

SB 909 would institute a system in which TDCJ parole division staff, and not the parole board, could make decisions about releasing offenders early from parole supervision. Decisions to release offenders from supervision would better be made by the BPP, whose members are appointed by the governor.

Notes

The **HRO analysis** of SB 909 appeared in the May 18 *Daily Floor Report*.

HB 431 by Madden, effective September 1, 2007, contains similar language authorizing the release of state jail offenders on medically recommended intensive supervision for state jail felons.

Creating office of capital writs for death penalty habeas corpus petitions

SB 1655 by Ellis, Duncan
Died in the House

SB 1655 would have created a statewide office of capital writs. The office would have provided legal representation for indigent capital murder defendants who were sentenced to death and appointed counsel for a writ of habeas corpus, which is a type of legal challenge sought from a judgment that typically centers on constitutional rights, such as effectiveness of counsel or satisfactory disclosure of evidence by prosecutors, and may be filed in both state and federal court.

If an indigent defendant who had been sentenced to death desired the appointment of counsel for a writ of habeas corpus, the court would have been required to appoint the office of capital writs to represent the defendant, unless specific conditions in the bill were met. The office would have been prohibited from accepting an appointment if there were a conflict of interest, if the office had insufficient resources to provide adequate representation, if the office were incapable of providing representation in accordance with the rules of professional conduct, or if there were other good cause.

If the office had not accepted the appointment or had been prohibited from accepting the appointment under the restrictions in the bill, the convicting court would have been required to appoint an attorney from a list of competent counsel that would have been maintained by the presiding judges of the judicial administrative regions, instead of being maintained by the Court of Criminal Appeals as under current law.

The bill would have established a procedure for selecting the director of the office of capital writs. A five-member committee appointed by the president of the State Bar of Texas with ratification by the executive committee of the State Bar would have been established. This committee would have had to submit to the Court of Criminal Appeals the names of persons whom it would recommend to be director of the office, and the court would have had to appoint the director from those on the list for a four-year term. The Court of Criminal Appeals could have removed the director only for good cause.

Supporters said

SB 1655 would help ensure that competent attorneys were appointed to help indigent defendants with writs of habeas corpus for death sentences. Because of the finality of a death sentence, the state needs to do all it can to make the appeals process fair and just and to provide consistent representation throughout the state.

The office of capital writs that would be created by SB 1655 would be fundamentally different from the federally funded Texas resource center, which aided death row inmates with appeals and was closed in the mid-1990s. The resource center was funded almost entirely with federal money and was not a state agency. The office of capital writs would be a state agency subject to standard oversight and monitoring mechanisms, and any problems with the agency could be addressed at the state level.

The office of capital writs would have a pool of talented professionals who could handle these highly technical, specialized cases. Current law requiring district courts to appoint attorneys from a list maintained by the Court of Criminal Appeals has resulted in the appointment of some lawyers who clearly are unqualified and inexperienced and some who have done substandard work. The current list of attorneys who may be appointed includes some serving probated suspensions of their licenses, some with no capital experience and no habeas corpus experience, some with mental illness, and some who have filed no cognizable claims. In addition, the work of the lawyers is not monitored or evaluated, so incompetent lawyers can continue to be appointed. This especially creates problems in habeas appeals because, in most situations, only one state habeas appeal is allowed, and a federal appeal can hinge on the quality and content of a state appeal.

Giving presiding judges in the administrative judicial regions the responsibility for the list of attorneys who could be appointed if there were a conflict of interest would improve the current system, in which the Court of Criminal Appeals maintains a list.

Having qualified and experienced lawyers working these writs would result in a more efficient and effective system for handling death penalty appeals. It would address the problem of incompetent attorneys wasting the resources of the criminal justice system by raising issues that were improper or by making other errors. It would be appropriate for SB 1655 to be limited to writs of habeas corpus because it is difficult to find competent attorneys to perform this challenging, technical, and specialized part of the death penalty appeals process.

SB 1655 also would go far in addressing the problem of compensation for attorneys currently appointed for these cases. In many cases, judges cap the compensation for these appointed attorneys at the state-funded level of \$25,000, which is inadequate in almost every case. Also, courts sometimes deny claims for reimbursement for investigatory expenses. An office of professionals dedicated to this work could be compensated adequately through their salaries, and the office would have resources for investigations. According to the fiscal note, SB 1655 would cost the state in fiscal 2008-09 about \$58,000 in addition to the \$500,000 currently spent for court-appointed habeas attorneys for capital writs. If necessary, the Legislature could revisit the issue of compensation after the office of capital writs had been in operation.

The bill would enact recommendations by the State Bar Task Force on Habeas Counsel Training and would put Texas in line with the vast majority of other death penalty states with publicly funded offices of specialized lawyers to handle these cases. It also would mirror the structure in many prosecutors' offices that have divisions specializing in habeas corpus work.

Opponents said

SB 1655 would establish a flawed system for providing representation of capital defendants for writs of habeas corpus. The statewide office of capital writs could turn into a publicly funded anti-death penalty office, similar to the federal death penalty resource centers that were abolished in the mid-1990s. This could institutionalize opposition to the death penalty and allow public funds and the weight of the state to be used to further the political goal of eliminating the death penalty, a goal not shared by all Texans. The current system, having courts appoint attorneys from a list maintained by the Court of Criminal Appeals, helps ensure that this does not occur.

Other opponents said

SB 1655 would not go far enough to address the problems with appointed attorneys in capital cases. While the bill would help with writs of habeas corpus, which come at the very end of the process, it would be better to institute a statewide defender's office or other reforms earlier in the process for trial and direct appeals.

SB 1655 also would not do enough to address the need for higher compensation for attorneys working on death penalty cases. Attorneys outside of the office of capital writs who were appointed to a case due to a conflict of interest still would be under the cap for cases and still could have requests for expenses denied.

Notes

The **HRO analysis** of SB 1655 appeared in Part Two of the May 17 *Daily Floor Report*.

SB 528 by Seliger, which died in the House, would have revised requirements for attorneys appointed to defend indigent criminal defendants in death penalty cases for both the trial and direct appeals. The bill would have established separate sets of requirements for trial attorneys and direct appeals attorneys in these cases.

For appellate attorneys, instead of the requirement of having tried to verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second- or first-degree felonies or capital felonies, SB 528 would have required the attorneys to have authored a significant number of appellate briefs, including appellate briefs for homicide cases and other cases involving capital felonies, first-degree felonies, or certain other serious and violent offenses.

SB 528 would have required that trial attorneys and appellate attorneys in death penalty cases not have been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case unless the conduct underlying the finding failed to reflect accurately the attorney's current ability to provide effective representation. The bill also would have removed the requirement for an appointed attorney to have at least five years of criminal litigation experience and replaced it with a requirement of at least five years of criminal law experience.

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Requiring voters to present proof of identification

HB 218 by B. Brown
Died in the Senate

HB 218 would have required a voter to present to an election officer at the polling place a valid voter registration certificate and either one form of photo identification or two different forms of non-photo identification. The bill would have modified the list of acceptable proof of identification, specifying eight acceptable forms of photo ID and 11 acceptable forms of non-photo ID.

If the voter's identity could have been verified from the documentation presented and the voter's name was on the precinct list of registered voters, the voter could have proceeded to vote. A voter whose identity had been verified by the documentation presented could have proceeded to vote if the voter:

- had not presented a voter registration certificate but the voter's name had appeared on the precinct list of registered voters;
- had presented a correct voter registration certificate but the voter's name had not appeared on the precinct list; or
- had presented a voter registration certificate showing registration in a different precinct and the voter's name had not appeared on the precinct list, if the voter had sworn that the voter was a resident of the precinct and would vote only once in the election.

A voter with or without a voter registration certificate who had not presented proof sufficient to meet the identification requirements would have been allowed to cast a provisional ballot.

HB 218 would have prohibited the Department of Public Safety (DPS) from collecting a fee for a personal identification certificate issued to a person who stated that it was being obtained for the sole purpose of proof of identity for voting – as long as the person either was a registered voter in Texas who presented a valid voter registration certificate or was eligible to register and submitted a registration application to DPS.

The presiding election judge would have posted in a prominent location outside of each polling place a list of the acceptable forms of photographic and non-photographic identification. The bill would have required election judges and clerks to receive training on the acceptance and handling of identification presented by voters.

Supporters said

HB 218 would protect and strengthen the electoral system by requiring voters to present identification at the polls. The bill would establish a uniform standard for voting at the polls, reduce voter fraud, bring voting in line with other transactions that require proper identification, and raise the bar in restoring confidence in elections.

Stricter identification requirements would not impose an unreasonable burden on voters. The bill would allow many ways to fulfill the identification requirements and would not force anyone to bear great cost. Some people even would be eligible for a free identification card.

HB 218 would protect the rights of citizens and serve as a reasonable precaution to prevent ineligible people from voting. Proper identification is necessary to ensure that voters are who they say they are, that voters cast only one ballot each, and that ineligible voters – including undocumented persons, felons, and people using the names of deceased voters – are not allowed to vote.

Cheating at the polls makes a mockery of the electoral process and dilutes the votes of honest citizens. Even a small amount of fraud could tip a close or disputed election, and the perception of possible fraud contributes to low confidence in the system. Many activities in everyday life require the presentation of photo ID, including air travel and cashing checks. Society has adapted to these requirements and benefited from the safeguards they provide.

Opponents said

The voter identification requirements in HB 218 would create substantial obstacles to voting for otherwise eligible voters that would inhibit voter participation and likely would disproportionately affect certain groups, including the elderly, minorities, and low-income voters. By placing an extra burden on voters and creating confusion among election officials and the public, the bill effectively would lead to the needless disenfranchisement of many voters.

Claims that voter fraud makes it necessary to demand ID at the polls are not supported by evidence. In fact, the effect of stricter ID requirements would not be reduction of

voter fraud but the suppression of legitimate votes. While almost all voter fraud involves absentee and mail-in ballots, the bill would do nothing to make mail-in balloting more secure. Instead, it would attempt to address the nonexistent problem of voter impersonation at the polls. Evidence of such fraud is anecdotal at best, and the penalty for voter impersonation is a third-degree felony, a strong deterrent to anyone who might consider casting a dishonest vote.

Voter identification requirements should be limited to the minimum needed to prevent duplicate registration and ensure eligibility. Texas already has taken steps to diminish the threat of fraud, including the implementation of requirements under the federal Help America Vote Act (HAVA). Current registration requirements are sufficient because registrants must swear they are U.S. citizens under penalty of perjury. Falsely claiming citizenship and voting

fraud are federal offenses. Texas should attempt to curb voter fraud by vigorously prosecuting election fraud cases rather than hassle legitimate voters with unnecessary new requirements aimed at solving a nonexistent problem.

Other opponents said

The provisions in the bill would be a major departure from current law, so a grace period of at least one election would be needed to educate election workers and voters.

Notes

The **HRO analysis** of HB 218 appeared in Part One of the April 23 *Daily Floor Report*.

Exemption for disabled voter accessibility in certain elections

HB 556 by Hilderbran
Effective June 15, 2007

HB 556 exempts certain small counties and the political subdivisions within those counties from having to provide at least one voting station at each polling place that complies with federal Help America Vote Act (HAVA) requirements on accommodations for people with disabilities, unless the election is held jointly with another election in which a federal office is on the ballot. The exception is based on population criteria or on proof that the accommodation will create an undue burden. A county or political subdivision must file an application with the secretary of state no later than 90 days before an election to seek an exception from the requirements.

A county with a population of less than 2,000 is exempt, but if a disabled voter requests reasonable accommodation by the 21st day before the election, the county must make reasonable accommodations for the person to vote. A county with a population of less than 5,000 must provide at least one voting station that meets the HAVA accessibility requirements on election day. A county with a population of less than 10,000 must provide at least one accessible voting station on election day and during early voting by personal appearance. A county with a population of less than 20,000 that makes a showing that compliance constitutes an undue burden must provide an accessible voting station on election day and early voting by personal appearance and must provide a mobile voting station during early voting by personal appearance that meets the accessibility requirements.

Also, the secretary of state is authorized to reimburse political subdivisions for expenses incurred in conducting a special election that is held statewide.

Supporters said

HB 556 would provide a balanced compromise between the disabled community and small political subdivisions that have experienced financial hardships in complying with voting accessibility requirements. It would reduce the burden on small counties and political subdivisions while maintaining the ability of disabled Texans to cast a secret ballot.

Some small communities face significant financial hardships in complying with the HAVA requirement. At this point, the only voting system that complies with accessibility standards under federal law is the DRE, or direct recording electronic voting machine. These machines are extremely expensive and often unaffordable for small entities.

While all counties in Texas are required to have electronic machines and received federal funding to make the initial purchase, continued funding for maintenance and operations is not available. The machines are expensive to program – a process also referred to as coding – which must be done for each election. Some counties do the coding themselves, while others do not have the resources to perform these duties and must pay a vendor to do it. Smaller political subdivisions, like cities, school districts, and MUDs, did not receive funding for the machines, and although some counties do hold joint elections, the expense often is passed on to the cities and school districts. Some small cities bought the voting machines, which increased the cost of their elections by thousands of dollars, only to find out that they have been under-used or not used at all. Others did not buy the machines but instead lease them from the counties. If there are not enough machines to go around, some are forced to spend money to buy them or risk being noncompliant.

The bill would follow current ADA requirements by allowing exceptions for small entities that could prove a financial burden, yet still would require them to provide reasonable accommodations. Also, disabled voters always have the option of voting early by mail.

Opponents said

The bill could undo many years of hard-fought efforts to secure voting rights for the disabled to have a chance to cast a private ballot. It would send a message that polling places no longer had to comply with the Americans with Disabilities Act (ADA) and could open the door for more local entities to become exempt because they did not want to pay for electronic voting systems. Some disabled voters would not be able to cast a private ballot, resulting in a city or county being vulnerable to ADA lawsuits. If someone arrived to vote and no accommodation were available, that person would have a legitimate ADA complaint.

A large number of disabled voters are visually impaired, and this voting technology has benefited them the most by allowing them, for the first time in their lives, to vote a private ballot without having someone read it aloud to them. This includes the elderly who are losing their eyesight and voters who are unable to read.

Also, the 20,000 population trigger is arbitrary and should be raised. There are still many small communities with slightly larger populations that would not be able to apply for an exemption to the HAVA voting accessibility requirement.

Notes

Other bills to exempt small communities from accessible voting station requirements for certain elections were introduced during the 80th Legislature. HB 1031 by Chisum, which would have exempted political subdivisions with a population of less than 5,000, except for elections held jointly with another election in which a federal office was on the ballot, died in Senate committee. SB 1776 by Duncan, which contained many of the same provisions as HB 556 but would have provided specific requirements for political subdivisions located in more than one county, died in the House.

Proving U.S. citizenship to register to vote

HB 626 by P. King *Died in Senate Committee*

HB 626, as passed by the House, would have required that, when registering to vote, a U.S. citizen by birth provide the city, county, state, and country of that applicant's birth and a naturalized citizen provide the city, state, and year of taking the naturalization oath or the applicant's alien registration number.

Using the applicant's information regarding citizenship by birth or naturalization, the voter registrar would have had to verify with the secretary of state that the applicant was a U.S. citizen. The secretary of state would have adopted rules and entered into any necessary agreements to verify an applicant's citizenship. An applicant whose citizenship could not be verified would have been able to execute an affidavit stating that the applicant was a U.S. citizen. The affidavit would have created a rebuttable presumption that the applicant was a U.S. citizen. HB 626 would have prohibited a notary public from charging a fee for notarizing the affidavit required to verify citizenship for a voter registration application.

Supporters said

HB 626 would ensure that voting was a right reserved only for U.S. citizens as established by the U.S. and Texas Constitutions. It simply would require that those registering to vote include the city, county, state, and country of their birth, if the applicants were citizens by birth, or the city, state, and year of taking a naturalization oath or their alien registration number, if they were naturalized citizens. HB 626 would safeguard the foremost democratic right, the right to vote, from gaps in Texas election laws and procedures.

Throughout Texas, applicants who check "yes" to the question of citizenship on voter registration applications simply are taken at their word. The Office of the Secretary of State, which oversees the administration of elections, conducts no formal verification of a voter registration applicant's citizenship status. In a letter dated June 15, 2006, the Secretary of State's Office wrote that Texas relies on the applicant to provide accurate, truthful information on a voter registration application and that, to the extent that an applicant must sign the application verifying qualifications to register, including U.S. citizenship, the application is processed on those merits. Such an admission is sufficient basis for legislative action to assure that only those eligible are allowed to register to vote.

Under the Help America Vote Act of 2002 (HAVA), the secretary of state, as of January 1, 2006, checks voter registration applications against driver's license numbers, DPS-issued personal identification numbers, and Social Security numbers. While this procedure can serve to authenticate the name and address of an applicant, it does not prevent foreign nationals from registering to vote because both Texas driver's licenses and Social Security numbers are available to non-citizens. A DPS driver's license application provides a place to check citizenship status, but the agency does not verify the information.

In June 2006, the Harris County tax assessor-collector and voter registrar testified before the U.S. House Administration Committee that he identified at least 35 non-citizens who either applied for or received voter registration cards. Since 1992, the Harris County registrar has cancelled 3,742 registered voters for non-citizenship. Officials in Harris County discovered non-citizens on the voter rolls when the district clerk received returned jury summons from people who were on the voter rolls but claimed not to be citizens and ineligible for jury service. Incidents such as these provide compelling reasons to address the problem of non-citizens successfully registering to vote.

HB 626 would be consistent with efforts in other states to secure the registration and voting process. Even a few fraudulent votes can make a difference, and elections can be won and lost by a handful of votes. In November 2004, voters in Arizona approved a statewide ballot initiative, Proposition 200, requiring all applicants who register to vote to prove their citizenship and present identification at polling places. The National Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker, recommended requiring a national voter ID card with a photograph and confirmation of U.S. citizenship.

Opponents said

HB 626 would create an additional impediment to voting, impose an onerous burden in trying to solve a problem that does not exist, and end up creating new problems. The 2000 Census information for Texas recorded 1,985,316 non-citizens out of 20,851,820 people, or 9.5 percent. HB 626 would impose greater difficulties on

the 90.5 percent of people in the state who are citizens, particularly naturalized citizens and citizens born in states other than Texas or overseas of U.S. parents.

The bill's requirement that the secretary of state verify citizenship would be costly – an estimated \$21.2 million in fiscal 2008-09 – and impractical. No federal or state agency maintains a comprehensive database of U.S. citizens. Verification of citizenship as directed by HB 626 would result in expensive cross-checks with the Texas Bureau of Vital Statistics, the U.S. Citizen and Immigration Services SAVE (Systematic Alien Verification for Entitlements) program, and vital records bureaus of the 49 other states.

There is no reliable evidence of non-citizens intentionally voting illegally in Texas. In election contests, parties must prove by clear and convincing evidence that specific voters were ineligible and voted fraudulently. While there is evidence of ineligible felons voting illegally before the 75th Legislature in 1997 last changed those requirements, in the last 30 years no incontrovertible evidence has emerged in Texas for a non-citizen voting, except one. In 2005, in the Heflin v. Vo election contest, a non-citizen, a Norwegian living in Katy, voted in the November 2004 election even though he was not a U.S. citizen. He said he did not recall registering, but an application on file in the Harris County registrar's office appeared to bear his signature with a check that he was not a citizen. The Harris County registrar acknowledged that his office erred in giving the non-citizen a voter card and the vote was not counted. In the report and findings of the master in that case, the summary said that the contestant had produced no evidence of intentional voter fraud affecting the final vote tally to his detriment. No amount of required documentation would eliminate clerical error, and HB 626 would not fix such a problem.

Under current law, voter registration applicants must mark their citizenship status under penalty of perjury and must sign a statement that they understand that giving false information to procure voter registration is perjury and could result in jail time of up to 180 days, a fine up to \$2,000, or both. The applicant also could be subject to imprisonment of up to three years or a fine of \$250,000, or both, under federal law. These penalties, plus having to make an oath as to citizenship, would seem sufficient to keep non-citizens from registering and voting illegally in Texas. The current provision to affirm citizenship on a voter registration application is the legal equivalent of executing an affidavit, which HB 626 would mandate, but more practical for both the applicant and election officials.

Evidence of an occasional non-citizen registering has surfaced, but usually due to an over-zealous volunteer registrar and an unaware applicant. The non-citizen ultimately is stopped short of voting illegally. Non-citizens generally are the least likely to vote because they want to remain "under the radar" if they are in the country illegally. A violation could lead to more charges and deportation.

The Carter-Baker Commission's recommendations include requiring that a federal voter ID card (with the voter's photograph) be issued free of charge. The recommendations also would mandate every state to have an active recruitment program to locate people who were not registered and give them a voter identification card. The report stated that voter registration and address changes should be made easier, and this bill would directly contradict that goal.

Notes

The **HRO analysis** of HB 626 appeared in Part One of the April 23 *Daily Floor Report*.

Moving the primary election date to the first Tuesday in February

HB 2017 by Giddings *Died in the Senate*

HB 2017 would have changed the presidential primary and general primary date to the first Tuesday in February and the runoff primary election date to the second Tuesday in March. The filing deadline for placement on the general primary election ballot would have been not later than 6 p.m. on November 15 in the odd-numbered year preceding the general primary election day, and the application for filing would have begun after 8 a.m. on October 15 in that odd-numbered year.

The bill would have added a provision to the current requirements for a candidate's application for a place on the ballot to include a statement that the candidate was aware of the provisions of Texas Constitution, Art. 16, sec. 65, which relate to automatic resignation from certain county and district offices upon announcement of candidacy for another office.

The bill would have specified that an application for a place on the ballot for the general primary election had to be challenged for compliance not later than the 15th day after the filing deadline. A candidate in the general primary election could have been declared ineligible not later than 15 days after the date of the regular filing deadline.

A candidate would not have been able to withdraw from the general primary election after the second day following the regular filing deadline. The bill would have created other deadlines relating to a deceased applicant and an applicant who sought the office of a withdrawn, deceased, or ineligible candidate.

HB 2017 would have required the county and senatorial district conventions to be held on the fourth Saturday in March after general primary election day, unless that date fell during Passover or the day after Good Friday, in which case the conventions would have been held the following Saturday.

Supporters said

HB 2017 would move up the presidential primary election and the general primary election from the first Tuesday in March to the first Tuesday in February to allow Texans to have meaningful input in choosing the presidential

nominees for both major political parties. The bill represents a bipartisan effort among House members, the Texas Democratic Party, and the Republican Party of Texas.

Texas should play a significant role in the presidential nominating process because of the size of its delegate pool. The state has the second-highest delegate total to the Republican National Convention and the third-highest total of delegates to the Democratic National Convention. We should not place our delegates in a mostly symbolic role by keeping the presidential primary in March, when the presidential nomination likely already will have been decided.

The demographic composition of this state is what the country will look like in 20 years, but primary states resembling the past determine the future of our nation. We should not continue to yield the interests of Texas to unrepresentative states like New Hampshire, Iowa, and South Carolina.

Advancing the primary date by only a month would not inconvenience candidates or give incumbents an advantage. Challengers usually are prepared to run long before the filing date, whenever it may be. Separating the presidential and general primary dates as some states do would be prohibitively expensive, and it also could mean that those who voted in the presidential primary for one party would be barred from voting for state and local candidates in the other party's primary in a subsequent election. Shifting the primary dates back and forth between presidential and non-presidential years also would cause voter confusion.

Opponents said

Because as many as 23 states representing more than a majority of convention delegates could choose their party's presidential nominee on February 5, 2008, HB 2017 could cause that primary date to become a national referendum and give too much of an advantage to the front-running candidates who are better known and better financed. With so many large states, including California and New York, conducting presidential primaries on one day, candidates could not campaign in the "retail" fashion associated with early presidential primaries, making personal appearances

and engaging in single-state debates. Instead, the proposed February 5 primary would be more like a de facto general election, with candidates having to rely more heavily on television advertising and direct mail to reach voters. The candidate with the most campaign money would have the biggest advantage – even more than is customary in a presidential primary.

Several nationally recognized presidential campaign experts and pundits for both political parties concur that the concentration of such a large number of states conducting presidential primaries on February 5 could have the opposite effect of the one intended. A February 5 “super duper” Tuesday could make the outcome of earlier primaries in states like Iowa and New Hampshire even more significant because voters would not have adequate time to assess candidates and could be influenced more easily by the national media and voter sway in these earlier state primaries and caucuses. Another scenario would be that no single candidate could emerge on the first Tuesday in February. Quite possibly, two well-funded front runners could be deadlocked after February 5, giving Texas a crucial role in determining the nominee in March.

An early February primary would make the period before the general election of unprecedented length – nine full months, in which candidates would have a hard time avoiding voter apathy. Such a long campaign could give the advantage to better-funded incumbents, especially as challengers would have to compete for attention with holiday distractions during much of the primary campaign. Candidates seeking office would have to file almost a year before the general election. During the long period before the general election, new issues could emerge, yet voters could choose only from candidates chosen in primaries nine months earlier.

Residency for candidates for the Legislature is determined as of one year before the general election. Under current law, a candidate has to establish residency before filing because the filing period begins in early December, less than a year before the general election. By allowing candidates to file beginning October 15 of an odd-numbered year, a candidate could file to run in any district simply by declaring residency intent as of the date of the filing deadline. As long as the candidate maintained residency from a year before the general election, a residency challenge could be difficult to sustain.

Other opponents said

A sound alternative to moving both the presidential primary and the party primaries to the first Tuesday in February would be to have split primary election dates. Most of the states that have enacted or are considering a presidential primary election on the first Tuesday in February have dual primaries and choose their party nominees for Congress and state and local offices at a later date closer to the general election. If the Legislature wanted the presidential primary moved up, nothing would prevent setting the general primary election at a later date. The overall benefit to the voting public and the state would outweigh any cost considerations.

Notes

The **HRO analysis** of HB 2017 appeared in the April 12 *Daily Floor Report*.

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Funding and jurisdiction of TPWD and Historical Commission

HB 12 by Hilderbran *Generally effective June 15*

HB 12 amends the Texas Historical Commission's Sunset statute to continue the commission until September 1, 2019, and requires the Texas Parks and Wildlife Department (TPWD) to transfer 18 historic sites to the commission by January 1, 2008. The bill requires 6 percent of sporting goods sales tax collections each biennium to be credited to the Historical Commission in the newly established Historic Site Account, which can be used to administer, operate, preserve, repair, expand, or maintain those historic sites. To aid in the transition, the bill requires the commission to prepare a base operating plan for each historic site before initiating a transfer and a management plan filed each legislative session about upcoming maintenance and funding priorities. This bill also includes protections for existing employees after the transfer.

The bill allows the Historical Commission to establish fees at all historic sites under its jurisdiction; accept grants and donations; and enter into agreements with non-profit entities for the expansion, renovation, management, operation, or financial support of any site.

The bill revises the dedication of revenue from the sporting goods sales tax to TPWD. The bill requires that 74 percent of the \$32 million from the sporting goods sales tax annually credited to TPWD go to the State Parks Account. Ten percent of the tax will go to the newly established Large County and Municipal Recreation and Parks Account, 15 percent to the Texas Recreation and Parks Account that benefits smaller counties and municipalities, and 1 percent to the Texas Parks and Wildlife Conservation and Capital Account. The bill also creates a joint legislative task force to review funding of TPWD from the sporting goods sales tax and to provide recommendations to more evenly match revenue from the tax with the needs of the agency.

TPWD must comply with recommendations made by the State Auditor's Office, including certain park management-related provisions, annual equipment reviews, evaluation of its facility reservation system, and an assessment of whether maintenance tasks can be done more cost effectively by a third-party contractor. TPWD may use inmate labor, sell livestock, establish variable facility and lodging fees, establish on-site speed limits, and work to enhance revenues based on suggestions made by the Legislative Budget Board (LBB).

The bill establishes a legislative task force to review the use and appropriation of the sporting goods sales tax. In addition, it includes various parks and wildlife-related measures, including:

- physical fitness standards for law enforcement officers (also in SB 1722 by Ogden, effective September 1, 2007);
- the nuisance or noxious aquatic vegetation program (HB 2001 by Creighton);
- the regulation of party boats (SB 997 by Watson);
- regulating the power to take or unload fish (HB 3765 by O'Day, effective September 1, 2007);
- giving preferential consideration to parks programs with matching funds (SB 1848 by Duncan);
- permits for the possession or transport of non-indigenous snakes (HB 1309 by Hilderbran, generally effective September 1, 2007); and
- hunting of raptors from public rights-of-way (HB 2414 by Isett).

Supporters said

HB 12 would protect and honor the state's most valuable historic sites. TPWD handles many different tasks, including the management of statewide recreation, hunting, fishing, coastal preservation, natural resource preservation, and historic site maintenance. TPWD has done an admirable job with historic sites in the past, but the Texas Historical Commission is the logical agency to manage the state's historic sites because its mission is to protect the state's architectural, archeological, and cultural landmarks.

The bill further would develop Texas historic sites as optimum cultural and tourist attractions. Heritage tourism currently is the third-largest segment of the travel industry, and in recent years, the marketing of historic sites has changed from a focus on single sites to a decentralized historic program that provides a more complete picture of an entire region. By transferring historic sites to the Historical Commission, HB 12 would enable the agency to develop a distinct franchise for Texas Heritage Tourism. One example of the commission's success includes the Texas Main Street Program, which helps revitalize historic downtown and neighborhood commercial districts by using preservation and economic development strategies. To date, the Main

Street Program has resulted in the private reinvestment of more than \$860 million in Texas downtowns and commercial districts, created more than 18,200 jobs, and established more than 4,600 new businesses.

The Historical Commission has a proven track record for assuring better visibility and user experiences that have created financial benefits, especially in rural Texas, where park fees, lodging, food, and related travel expenses contribute greatly to the local tax base. The bill would ensure that the commission could provide improved historic site services by creating the Historic Sites Fund, requiring the commission to develop a base operating plan before transferring a site, and dedicating additional revenue to benefit historic sites.

Along with the substantial increase in TPWD funding under HB 1 by Chisum, the general appropriations act, HB 12 would provide much-needed support to TPWD. Further, the bill would establish a legislative task to study the issue of TPWD funding via the sporting goods sales tax to ensure that these funds are collected fairly and that the tax adequately supports the needs of the state's parks system. The bill would take into consideration several of the issues concerning TPWD operations raised in the state auditor's report and the LBB report. By instituting these best practices, HB 12 would ensure greater efficiency and improve the profit potential at TPWD sites.

Opponents said

This bill would mandate unnecessarily the transfer of historic sites from TPWD to the Texas Historical Commission. TPWD already can transfer sites by interagency agreements that would ensure both agencies developed a public plan of action. At this time, there has been no public input, study, or evaluation to suggest a cost savings or operational benefit would result from transferring 18 historic sites to the Historical Commission. A recent Sunset Advisory Commission review did not make such a recommendation, nor has there been a feasibility study on transferring these 1,604 acres, which

include 100 archaeological sites. This transfer would result in a significant duplication of efforts, with both TPWD and the commission engaging in recreational activities, archeological programs, and natural resource management. The LBB found that it costs the TPWD \$5 million to operate these 18 sites annually, while the Historical Commission is estimating an annual cost of \$7 million and a one-time repair and restoration budget of \$34 million.

HB 12 would transfer historic sites to an agency with no experience in facility operations and management. While the commission points to the success of the Courthouse Restoration program, the Main Street program, and the Heritage Trail program, none of these programs included site operation and management. Rather, all of these programs were marketing and grant-making projects of the Historical Commission that depended on the operation and management of sites by local jurisdictions. In addition, many of the historic sites being proposed for transfer do not have robust non-profit organizations that could provide ample operation and management support.

HB 12 would miss an important opportunity to ensure that the entire balance of the State Parks Account accruing from the sporting goods sales tax went to its intended purpose of supporting Texas' system of public parks. In recent years, TPWD has been denied the full amount of the \$32 million from the sporting goods sales that goes into this account, leading to well-publicized problems with the upkeep and maintenance of Texas' parks system. Diversion of sporting goods sales tax revenue violates the principle of truth-in-taxation, because tax dollars ostensibly collected for the benefit of the state parks system have not been supporting that function. HB 12 at least should require that the full balance of the State Parks Account go to the agency, if not lift the \$32 million cap entirely to ensure that TPWD received adequate funding from the sporting goods sales tax.

Notes

The **HRO analysis** of HB 12 appeared in Part One of the *May 2 Daily Floor Report*.

Implementation of advanced clean energy projects

HB 3732 by Hardcastle/HJR 93 by Chisum

HB 3732 Effective September 1, 2007/HJR 93 Died in Senate Committee

HB 3732 establishes the advanced clean energy project grant and loan program, to be administered by the State Energy Conservation Office (SECO). A dedicated account is to be created in the general fund, and each biennium it will receive roughly \$30 million in general revenue funds and any future general obligation bond revenues that may be issued to the fund by the Texas Public Finance Authority. SECO can provide up to \$20 million per biennium in private sector matching grants and no more than \$10 million for loans.

The bill defines an “advanced clean energy project” as one that:

- uses coal, biomass, petroleum coke, or solid waste in generating electricity, process steam, or industrial projects, including gasification, and creating liquid fuels, hydrogen for fuel cells, and other co-products;
- reduces sulfur dioxide emissions by 99 percent;
- reduces mercury emissions by 95 percent;
- maintains a nitrogen oxide (NOx) emission rate of no more than 0.05 pounds per million British Thermal Units (lbs/MMBTU); and
- captures, sequesters, or abates carbon emissions.

The Texas Commission on Environmental Quality (TCEQ) will have 18 months from the date of accepting an application to issue or deny the applicant a permit, with a three-month extension allowed. Applicants will not have to prove that the technology proposed for use in the project is commercially feasible, and emission rate requirements cannot be set based on existing facilities that are operating with the help of advanced clean energy project incentives. TCEQ will establish a non-exclusive list of pollution-control facilities, devices, or methods that will have to be updated at least once every three years. If the U.S. Environmental Protection Agency (EPA) adopts a final rule or regulation considering carbon dioxide a pollutant, the program will cover capture and sequestration technology. In addition, TCEQ and SECO must publish a joint report every four years evaluating the implementation, effectiveness, and continuation of the advanced clean energy program.

The bill also includes additional tax benefits for:

- operators of facilities, devices, or other methods of controlling pollution;

- enhanced oil recovery projects that make use of sequestered carbon dioxide; and
- sellers of electricity generated by an advanced clean energy project.

HJR 93 proposed two constitutional amendments that would have authorized issuance of up to \$250 million in general obligation bonds for incentives to use carbon-free hydrogen technologies and up to \$250 million in general obligation bonds and credit enhancement agreements for incentives to use advanced clean energy technologies.

Supporters said

HB 3732 would promote and support the development of advanced clean energy projects and technology. As the demand for electric power grows and the drawbacks associated with carbon-based fuels become more apparent, Texans have increasingly called for more environmentally clean technologies. Many of the technologies associated with advanced clean energy still are in the experimental stage and require grant support for the initial start-up costs associated with research, development, and large-scale implementation. To that end, HB 3732 would provide a mix of financial, tax, and regulatory incentives to encourage businesses to develop advanced clean energy projects in the state.

The bill would streamline the permitting process for advanced clean energy projects. One of the chief stumbling blocks to getting innovative technologies on line is the administrative uncertainty associated with obtaining an energy project permit. While energy plants should be subjected to public scrutiny, the state has a vested interest in providing a more predictable turn-around time for those plants that ultimately will reduce emissions.

The bill would uphold the highest clean-energy standards currently recommended. In the Energy Policy Act of 2005, the federal government set clean coal power emissions goals for 2020. HB 3732 would create incentives for projects that met or exceeded those goals up to 12 years early. While other clean-energy technologies exist, the bill would aim to improve the efficiency of coal, biomass, and solid waste technologies because they are cheap and abundant sources of energy that will be a part of the power grid for the foreseeable future.

Rather than creating a financial hardship for the state, HB 3732 would spawn more economic development. In much the same way that solar and wind projects receive subsidies to be competitive and develop cleaner sources of energy, clean coal technology is expensive and will require some public subsidy to be sold on the market and developed on a large scale. The bill would motivate private businesses to locate advanced clean energy projects in the state, which would create jobs and generate additional tax revenue. While the initial plants would be experimental and therefore would produce energy at a higher rate per kilowatt-hour, these technologies eventually will no longer require subsidies as they become commercially viable and costs decrease.

Opponents said

This bill proposes an emission standard for NOx that would be too low. While HB 3732 would use the minimum 2020 standards recommended by the federal Energy Policy Act of 2005, current coal plants across the state already are meeting these standards. In fact, this bill would set the NOx emission standard for advanced clean energy at 0.05 lbs/MMBTU, which is no cleaner than the average coal plant operating in Texas today. In contrast, research by the EPA and projects currently being proposed in the state suggest that advanced clean energy projects could achieve a NOx emission standard of 0.02 lbs/MMBTU. Also, this bill would allow businesses to secure tax exemptions before actually proving that their projects would have a positive environmental impact. By setting such a low emissions standard, this bill could have the unintended consequence of subsidizing business as usual rather than stimulating technological innovation.

The bill would sacrifice accountability by fast-tracking the permitting process. The proposed 18-month application schedule would be too compressed and would leave little time for public input. The governor recently tried to fast-track coal plants on an 18-month schedule, which encountered public resistance. To meet such an aggressive permitting timeline, TCEQ would have to focus staff resources on these applications rather than on other environmental issues affecting the state. HB 3732 would represent an unfunded mandate for TCEQ and instead should provide the agency with enough time thoroughly to examine each permit request to ensure the plants were the best value for taxpayers.

There is no clear reason to provide the incentives proposed by this bill. Texans have made it clear that they want more environmentally clean technologies. To meet that need, the private market will respond to consumer demand and the stricter federal regulations on air pollution that are sure to follow. Two coal gasification plants currently are being proposed in Texas, without the benefit of the incentives proposed by this bill. In addition, TCEQ currently may offer tax incentives for pollution-control projects. Due to the experimental nature of advanced clean energy technology, the state should not put taxpayers at risk by investing \$30.2 million per fiscal biennium in projects that are not yet commercially viable. Further, like any spending program, this budget would not be a fixed cost but likely would grow over time.

Notes

The **HRO analysis** of HB 3732 appeared in Part Two of the April 25 *Daily Floor Report*. The HRO analysis of HJR 93 appeared in Part Two of the May 7 *Daily Floor Report*.

Three bills would have funded the proposals authorized by HJR 93. In addition to HB 3732 by Hardcastle, HB 2972 and HB 2970 by Chisum would have provided incentives for a hydrogen energy loan program and hydrogen-powered vehicles, but both died in the House.

Water resources development and management

SB 3 by Averitt

Effective September 1, 2007

SB 3 makes numerous changes to the management of Texas' water resources.

Environmental flows. SB 3 creates an administrative process to determine the environmental flow needs in Texas' rivers, bays, and estuaries. The bill requires (Texas Commission on Environmental Quality (TCEQ) to:

- determine the environmental flow standards that are necessary to support the ecological environment of each river basin and bay system in the state;
- establish an amount of unappropriated water to be set aside to satisfy the environmental flow standards; and
- create a process for reducing the amount of water available under a water rights permit in order to protect environmental flows. This provision applies only to a permit approved after the bill's effective date.

After determining environmental set-asides in basins with unappropriated water rights, TCEQ may not grant an appropriation of water that interferes with those set-asides. After an environmental flow set-aside has been determined, any new water permit or new amendment to an existing water right increasing the size of that water right must include conditions for the protection of the environmental flow set-asides.

TCEQ will take these actions in response to recommendations from advisory groups operating in an administrative process created under the bill. Four new types of entities will contribute to the administrative process established under SB 3:

- an environmental flows advisory group;
- an environmental flows science advisory committee;
- environmental flows stakeholders committees for each river basin and bay system in the state; and
- expert science teams for each river basin and bay system in the state.

In adopting environmental flow standards for a river basin and bay system, TCEQ will consider multiple criteria, including recommendations and information provided by these entities.

The bill prohibits TCEQ from issuing a new permit for instream flows dedicated to environmental needs or bay and estuary inflows. TCEQ may approve an application to amend a permit or certificate of adjudication to change a use to environmental needs or bay and estuary inflows.

The bill creates a nine-member environmental flows advisory group made up senators, representatives, and state environmental agency board members. Through studies and public hearings, the advisory group will examine the balance between the water needs of Texas' population and the protection of environmental flows of the state's river, bay, and estuary systems. By December 1, 2008, and every two years thereafter, the advisory group must issue a report summarizing its activities, including proposed legislative changes and documenting progress in developing environmental flow regime recommendations initiated under the bill.

The bill also establishes the environmental flows science advisory committee to aid the environmental flows advisory group's evaluation of environmental flows. For each river basin and bay system in the state, the environmental flows advisory committee will appoint a river basin and bay area stakeholders committee that reflects a balance of interest groups concerned with environmental flows in the basin. Each river basin and bay system stakeholders committee will develop recommendations regarding environmental flow standards and strategies. Those recommendations will be submitted to TCEQ and to the environmental flows advisory group.

A new permit or amendment to an existing water right that would increase the amount of water that could be taken will have to provide for the protection of environmental flows. After an expedited public comment process, an adjustment may be made by TCEQ if such an adjustment was required to comply with environmental flow standards.

Taken with any other adjustments by TCEQ, an adjustment to a permit for compliance with environmental flow standards may not increase the amount of water taken for protection of environmental flows by more than 12.5 percent of the annualized amount of that requirement contained in the permit. For an amended water right, no more than 12.5 percent of the annualized total of the amount of the increase in the water authorized under the amended right may be taken for protection of environmental flows.

A water-right holder will receive credit for contributing water for the benefit of environmental flows against an adjustment considered by TCEQ. Water that had been set aside by TCEQ to meet environmental flow needs may be used temporarily for other essential needs in the event of an emergency.

Reservoir designation. SB 3 designates the 19 sites recommended in the 2007 state water plan as having unique value for the construction of a dam and reservoir, determining that the sites are necessary to meet water supply needs. This designation will last until September 1, 2015, unless there is an affirmative vote for a reservoir project by a project sponsor.

The bill also designates 15 river and stream segments of unique ecological value that were recommended in the 2007 state water plan.

The bill establishes a study commission on water supply in the Region C Regional Water Planning Group (which includes Dallas/Fort Worth). The commission will review water supply alternatives available to Region C, including existing and proposed reservoirs.

No later than December 1, 2010, the study commission will report its findings and recommendations, including a recommendation as to whether Marvin Nichols should remain designated as a reservoir site.

The former owner of real property used for agricultural purposes that was acquired for a reservoir will be able to lease the property from the person who acquired the property in order to continue using the property for agricultural purposes until the lease is terminated for the construction of the reservoir.

Water conservation. SB 3 makes several changes in policy related to water conservation. It creates a 23-member water conservation advisory council to provide state leaders with expertise on the issue of water conservation. The Texas Water Development Board (TWDB) executive administrator is directed to develop and implement a statewide public awareness program to educate Texas residents about water conservation.

A retail public utility providing potable water service to 3,300 or more connections must submit to the TWDB chief administrator a water conservation plan based on specific goals generated in accordance with best management practices developed by TCEQ and TWDB. The entity is subject to enforcement actions by TCEQ if it commits a violation.

The bill directs TWDB to give priority to applications for funds for water supply projects in the state water plan that demonstrate water conservation savings or would achieve water conservation savings.

The bill adds a procedure by which a regional water planning group may adopt a minor amendment to its regional water plan.

The bill states that it is the policy of the state to encourage voluntary land stewardship to benefit the water of the state and to encourage public participation in the groundwater management process in areas within a groundwater management area not represented by a groundwater conservation district.

Edwards Aquifer. SB 3 makes several changes to the regulation of the Edwards Aquifer by the Edwards Aquifer Authority (EAA).

On January 1, 2008, the cap on permitted withdrawals from the Edwards Aquifer will be raised from 450,000 acre-feet to 572,000 acre-feet.

The EAA cannot allow withdrawals from wells drilled after June 1, 1993, except for:

- replacement, test, or exempt wells; or
- an amendment to an initial regular permit authorizing a change in the point of withdrawal under that permit.

If the level of the aquifer is equal to or greater than 660 feet, rather than 650 feet, above mean sea level as measured at well J-17, the authority can authorize withdrawals from the San Antonio pool, on an uninterruptible basis, of permitted amounts.

By January 1, 2008, the EAA must adopt a critical period management plan with withdrawal reduction percentages in specified amounts when well levels or spring flows fall below certain thresholds. Greater withdrawal reductions will be triggered if the 10-day average of springflows drops below the lowest trigger levels.

Beginning on September 1, 2007, the EAA cannot require withdrawals to be less than an annualized rate of 340,000 acre-feet, under Stage IV critical period.

Without respect to the critical period adopted by the authority, a person authorized to withdraw groundwater for irrigation can finish one already planted crop in that calendar.

The EAA must develop a recovery implementation program for threatened or endangered species with input from the U.S. Fish and Wildlife Service, other federal agencies, interested stakeholders, and environmental interests

A steering committee, with input from an expert science committee and other stakeholders, must submit recommendations to the EAA, which must review those recommendations and adopt a critical period management plan.

The EAA may operate facilities as long as those facilities are not used to recirculate water at the Comal or San Marcos springs.

Other provisions. SB 3 establishes a legislative joint interim committee on state water funding made up of senators and representatives.

The bill also includes other provisions creating and modifying various local water districts.

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 a minimum of flow in rivers and into bays and estuaries. Instead, priority is given to agricultural, commercial, residential, and other 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.

While important for the environment, instream flows do more than support fish, aquatic organisms, and wildlife. River flows provide recreation, dilute and disperse treated wastewater, and support commercial activity. Aquatic species need sufficient flows of water to facilitate their life cycles. Coastal wetlands rely upon freshwater flows from rivers to sustain their unique habitats. These bays and estuaries support the economy of the Texas Gulf Coast through the tourism industry and commercial fishing and shrimping. For these reasons and many more, environmental flows are crucial to Texas' economy and quality of life.

In order to determine standards and set-asides for environmental flows, SB 3 would establish a consensus-based process relying upon the best available science to determine the amount of flows needed for environmental

considerations. The bill would allow input from stakeholders from every group with a substantial interest in water rights and flows, while expert science teams would report the environmental needs of river basins and bays directly to TCEQ. Under this process, TCEQ could balance the best available science with the other water needs of Texas' growing population. In this manner, the process would resemble the successful regional water planning process established under SB 1, enacted by the 75th Legislature in 1997. 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.

Reservoir designation. SB 3 would follow the recommendations in the 2007 state water plan by designating 19 reservoir sites that could be needed to meet the state's water needs in the next half century. The bill would provide state and local water supply interests with the certainty needed to plan for and meet future water needs. Texas' population is expected to more than double by 2060, and water demand will increase while water supplies decline. While conservation, reuse, desalination, and other strategies will be important to meet Texas' water needs, those strategies are unlikely to be sufficient. Reservoir construction will be an essential and unavoidable component of the state's water planning future.

The bill would not seize any private property or put any undue restrictions on landowners. Landowners would remain free to engage in virtually any action or make any improvement to property in a designated reservoir site. The bill would incorporate compromise provisions to balance the interests of affected landowners with entities that wish to construct reservoirs.

SB 3 would not require the construction of any reservoir, nor would the designation of a reservoir site guarantee that a reservoir would be constructed on the site. The bill simply would provide legislative action in order to keep these sites available for future reservoir construction if it was determined that their construction was necessary. Without designation, the few remaining reservoir sites could be preemptively foreclosed as an option due to the actions of the federal government such as a wildlife refuge designation.

Water conservation. SB 3 would establish and expand several important programs to encourage conservation of water resources in the state. It would incorporate state-of-the-art industry standards and techniques to realize efficient use of water resources. The bill 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.

Edwards Aquifer. SB 3 appropriately would balance environmental, residential, and other concerns with respect to the EAA. By allowing a reasonable increase in withdrawals from the aquifer, the bill would prevent ratepayers from having to support a costly buy-down of water rights above the current withdrawal level. To protect environmental considerations, the bill would establish reduction requirements during critical periods of drought when springs were impacted most severely.

The bill would create a thorough Recovery Implementation Program developed in accordance with U.S. Fish and Wildlife Service practices that would involve an extensive group of stakeholders engaged in the sustainability of the Edwards Aquifer. The Recovery Implementation Program would provide recommendations to the EAA in order to determine the appropriate withdrawal level going forward. This consensus-based process would balance the interests of communities and entities relying on the aquifer for residential, commercial, recreational, and agricultural uses while protecting the delicate environmental balance that sustains threatened species associated with the aquifer.

The bill would raise the withdrawal limit to 572,000 acre-feet, an amount that would be subject to adjustment through the Recovery Implementation Program. Further, the critical period management procedure would hold down withdrawals when well levels and spring flows were reduced by drought. This would protect the San Marcos and Comal springs and protected species. Further, history has shown that permitting in itself is an effective method for managing demand, as permit holders become more aware of their allotted amounts. Removing the conflict in current law would provide certainty to permit holders and allow more effective management of demand from the aquifer.

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. Recommendations made by these four groups would have to work their way up to TCEQ, which would make the final determination on environmental flow standards and set-asides. Aside from the elected officials on the environmental flows advisory board, the majority of members on these policymaking bodies would not be accountable to the voters. These bodies would be granted excessive influence, a serious concern since the bill would contemplate seizing water rights for what could be

marginally important purposes. Such important and binding determinations should not be delegated by the Legislature to TCEQ.

Reservoir designation. SB 3 needlessly would cloud the title of landowners within the designated reservoir sites, because the threat of a future reservoir negatively would affect their property value. While supporters of reservoir designation point out that many of these reservoirs may never be built, a cloud would remain on the title to property in a designated site from the moment the bill was enacted. It would be unfair to make this designation without providing immediate funds to offset the loss in value that landowners would see.

Reservoir construction is an arcane, environmentally destructive, and wasteful strategy that should not be used to address the state's water supply needs. Reservoirs do not "create" water, but actually contribute to water loss due to evaporation. Given the looming threat of global warming, it is likely that evaporation of water stored in reservoirs will become an even greater problem. Reservoir creation can harm severely both downstream and upstream wildlife and ecosystems, in addition to the area flooded to create the reservoir. Lawmakers should not ratify this outmoded water development strategy and instead should focus on other strategies to meet Texas' water needs, including conservation, reuse, desalination, improved marketing of existing water resources, and aquifer storage and recovery.

Edwards Aquifer. By allowing pumping of the Edwards Aquifer up to the currently permitted amount, SB 1341 effectively would eliminate the pumping cap for all practical purposes. This level of pumping on a regular basis likely would be unsustainable over the long term. Although the bill would incorporate 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.

Under current law, the EAA is empowered to raise the 400,000 acre-feet cap if the authority can demonstrate scientifically that doing so would not be environmentally harmful. SB 3 would undermine this consideration, allowing the cap to be raised due to permit considerations rather than scientific considerations. The substantial increase in the withdrawal limit under the bill could put the aquifer on a collision course with the Endangered Species Act, representing a step back in protection of the ecosystem of the Edwards Aquifer and the communities that rely on Edwards Aquifer spring flow.

The current system has been effective as an inducement to entities to repair infrastructure, implement conservation policies, develop efficient agricultural water practices, and diversify water sources. Withdrawals have gone down from a peak of more than 542,000 acre-feet in 1989 to 366,000 acre-feet in 2005. If the withdrawal limit were raised, it is likely that pumping would float up to the limit.

Other opponents said

Environmental flows. SB 3 would not go far enough in protecting environmental flows. The bill would provide no remedy for the many basins in which all available water has been permitted. In addition, the provision enabling diversion of environmental flows during an emergency is problematic. When a drought strikes – precisely the time that instream flows are so crucial to river and bay ecosystems – environmental flow set-asides would be available for diversion to other uses. The only reasonable method for reliably protecting environmental flows would be to buy back more senior water rights from private interests and keep those flows in the river. If the Legislature fails to appropriate funds for this purpose, it is unlikely that SB 3 substantially would benefit those river basins that are most desperately in need of a base level of flows.

Notes

The **HRO analysis** of SB 3 appeared in Part Two of the May 21 *Daily Floor Report*.

The provisions of HB 3 by Puente, dealing with environmental flows and the Edwards Aquifer Authority, and HB 4 by Puente, dealing with water conservation, were incorporated into SB 3, but also were enacted separately. HB 3 takes effect September 1, 2007, except the Edwards Aquifer provisions were effective June 15, 2007. HB 4 was effective June 15, 2007, except a requirement that on-site water reclamation technologies be incorporated into state buildings will be effective September 1, 2009.

Air quality enhancement programs, including energy efficiency standards

SB 12 by Averitt
Effective June 8, 2007

SB 12 amends various state programs with the objective of enhancing the state's air quality. It modifies guidelines set by Texas Commission on Environmental Quality (TCEQ) for the Low-Income Vehicle Replacement Program (LIRAP) at the county level. The bill adjusts eligibility criteria for participation in LIRAP to include a vehicle owner with an income up to 300 percent of the federal poverty level. The maximum amount of funding distributed under LIRAP may not exceed \$3,000 for a replacement car of the current model year or the three previous model years, \$3,000 for a replacement truck of the current model year or the two previous model years, or \$3,500 for a replacement hybrid vehicle of the current or previous model year. Subject to the availability of funds, replacement vehicles must have a gross weight rating of less than 10,000 pounds and may not cost more than \$25,000.

The bill includes requirements for the dismantling of replaced vehicles. TCEQ must work in conjunction with the steel industry and automobile dismantlers to ensure that replaced vehicles are scrapped. An automobile dealer who takes possession of a replaced vehicle must prove that the vehicle has been retired. The vehicle dismantler must scrap the emissions control equipment and engine and may be subject to a civil penalty for not doing so. Mercury switches must be removed from the vehicle in accordance with the law.

TCEQ may require certain documentation procedures for the purchase of a replacement vehicle. An automobile dealer participating in LIRAP must be located in Texas. TCEQ must work with dealers to publicize information about LIRAP using funding allocated for this purpose. A participating county is required to provide an electronic means of distributing LIRAP funds to automobile dealers.

No more than \$5 million per fiscal year may be distributed through LIRAP to fund local initiative projects. Examples of local initiative projects include:

- expanding the AirCheck Texas Repair and Replacement Program;
- remotely determining vehicle emissions;
- implementing TCEQ's smoking vehicle program;
- combating the use of counterfeit state inspection stickers;

- enhancing transportation system improvements; and
- adopting new air control strategies.

SB 12 expands the scope of eligibility for Texas Emissions Reduction Plan (TERP) funding to include projects with a maximum cost effective amount of up to \$15,000 per ton of nitrogen oxide (NOx) emissions reduced. Miles traveled by a qualifying vehicle outside of a nonattainment area or affected county are allowed to count toward meeting TERP's percentage-of-use standard for the operation of vehicles in nonattainment areas. For eligible infrastructure projects, TERP funding can be used for auxiliary power units designed to dispense electricity to marine vessels. Also, funding can be distributed for the lease, purchase, or installation of idle reduction technologies and facilities at rest areas and other public facilities in areas eligible for funding.

The bill extends TERP to August 31, 2013. TCEQ can hire staff and consultants to carry out duties established under the program. The commission will investigate various Internet procedures for submitting applications for rebate grants through TERP. An Internet-based application process will be implemented by June 1, 2008. The TERP fund is administered by TCEQ instead of the comptroller.

SB 12 sets certain priorities for grant distribution under the New Research and Technology Development (NRTD) program, with grants awarded reflecting a balanced mix of:

- advanced technologies to reduce emissions from the existing stock of engines;
- advanced technologies for new engines and vehicles; and
- testing facilities to evaluate these advanced technologies.

NRTD funding may be distributed to a nonprofit organization or a higher education institution to implement and administer the NRTD program. TCEQ will supervise the nonprofit organization that currently receives NRTD funding.

If the State Energy Conservation Office (SECO) determines that the latest provisions on energy efficiency in the International Residential Code and the International

Energy Conservation Code result in improved commercial energy efficiency and air quality, the office will adopt the more stringent provisions. Parties with an interest in the adoption of energy efficiency codes – including builders, architects, engineers, government authorities, and environmental groups – will have the opportunity to comment on the codes under consideration.

Energy efficiency programs for certain political subdivisions are extended to include higher education institutions and state agencies. In consequence, these entities and school districts will implement measures to reduce electricity consumption by 5 percent each year for six years, beginning September 1, 2007. Contingent upon availability and cost-effectiveness, TCEQ or another state agency will purchase equipment and appliances for state use that meet or exceed federal Energy Star standards.

SB 12 also establishes a grant program for the installation of solar electric systems in certain residences and businesses. To qualify for such a grant, the solar electric system must generate electricity using solar resources, have a generating capacity of no more than 1,000 kilowatts, and include a manufacturer's warranty.

The bill also modifies the extent to which TCEQ may prohibit or limit motor vehicle idling. It stipulates that such idling is not necessary to power a heater or air conditioner if the vehicle is within two miles of a facility offering external heating and air conditioning connections. Drivers using a vehicle's sleeper berth are prohibited from idling in a residential neighborhood or within 1,000 feet of a hospital. Motor vehicle idling requirements are extended by two years, to expire on September 1, 2009.

SB 12 amends various actions followed by TCEQ. If the commission determines there are multiple violations of the federal Clean Air Act, only the violations that require the initiation of formal enforcement will be included in any proposed enforcement action. The commission will not include violations in enforcement action that are new or have been corrected within a certain time frame. SB 12 also modifies TCEQ's notification requirements to provide that an application for certain permits must be sent to the county judge and the presiding officer of the municipality's governing body where the facility is located.

Supporters said

SB 12 would enhance the various state programs designed to improve air quality in key areas of Texas. The state's deadline to comply with federal air quality standards

is set for 2010. Currently, several areas in Texas remain in noncompliance. In order to not jeopardize federal funding, the state must implement more aggressive measures to reduce NOx emissions. By maximizing the potential of air quality programs approved by past legislatures, the bill more rapidly would improve the state's air quality, thereby advancing the removal of non-attainment areas from noncompliance status.

Through the reduction of NOx emissions, LIRAP and TERP are meaningful programs to protect the environment and health of Texas residents. Other than smog creation, NOx emissions can contribute to acid rain, oxygen depletion in bodies of water, and global warming. Also, NOx emissions result in health problems, such as asthma and emphysema, while also aggravating heart disease and damaging lung tissue. By bolstering LIRAP and TERP, the bill would help reduce future costs to the state in public health and environmental remediation.

In order to meet federal air quality improvement requirements, Texas must accelerate the turnover of the automobiles that operate in the state and replace older vehicles with newer, cleaner cars. Monetary incentives are needed to achieve the objective of removing old vehicles from the state's roadways. Since the inception of LIRAP, program demand generally has been less than the supply of program funding. The bill would increase LIRAP participation by requiring TCEQ to partner with participating automobile dealers to publicize program information. Other modifications to LIRAP would entice more vehicle owners to participate in the program by increasing grant amounts for the purchase of replacement vehicles and expanding eligibility requirements.

SB 12 would expand the reach of the TERP program by broadening project eligibility requirements and extend its expiration date to 2013, giving the program more time to achieve emission reductions to comply with federally mandated targets. Like LIRAP, much of the funding generated for TERP-related programs remains underappropriated and underutilized. The bill would give TCEQ greater authority to distribute TERP funds by transferring control of the fund from the comptroller to the agency.

The bill would make important strides toward increasing energy efficiency in Texas. New energy efficiency standards for buildings and appliances serve as an important means of reducing NOx emissions, enabling the state to meet its reserve margin for energy production and achieving cost savings for consumers. SB 12's inclusion of equipment and appliances that meet federal Energy Star

standards would spur the use of more efficient products. The inclusion of higher education and state agencies in current energy efficiency programs would set an important example for reducing electric consumption. Grants for solar electricity systems would be helpful in spurring renewable energy production.

Opponents said

SB 12 promises many important benefits, but should not be considered the state's main strategy for meeting compliance with federal air quality standards in non-attainment areas and affected counties. Incentive-based programs would not go far enough to achieve the necessary NOx emission reductions. Moreover, power generation plants represent an estimated 27 percent of NOx emissions and should be addressed in this omnibus air quality legislation.

More than just NOx emissions must be considered in the state's efforts to improve air quality. Currently, El Paso fails to meet federal air quality standards for carbon monoxide and particulate matter. Outside of El Paso, several areas exhibit near-nonattainment status in particulate matter levels. The incentive -based programs included under LIRAP and TERP should include carbon monoxide and particulate matter in their scope.

An alternate version of SB 12 would have permitted SECO to establish minimum energy efficiency standards for certain appliances and prohibit the sale of such appliances until energy efficiency standards were met. It also would have included product certification and labeling standards for certain appliances. These energy efficiency standards would have led to a significant reduction in electricity consumption, resulting in cost savings for consumers. The establishment of such standards would not pose a fiscal hardship for the state. In fact, energy efficiency standards for certain appliances would help the state meet its reserve margin for energy production, thus reducing the need to build coal plants that negatively impact the state's air quality and public health.

Notes

The **HRO analysis** of SB 12 appeared in Part One of the May 14 *Daily Floor Report*.

Requiring low-emission vehicle standards

SB 124 by Ellis

Died in Senate committee

SB 124 would have allowed the Texas Commission on Environmental Quality (TCEQ) to establish a low-emission vehicle program in Texas. The program would have to have been consistent with Phase II of the California low-emission vehicle program and would have applied to vehicles beginning in model year 2009.

Supporters said

SB 124 would allow TCEQ to adopt California's stricter low-emission vehicle standards, which would improve air quality in Texas by targeting a major source of pollution. California first adopted low-emission vehicle standards in 1990 and is now implementing Phase II of its program to further reduce nitrogen oxide (NO_x) emissions and greenhouse gases. Ten other states have adopted California's low-emission vehicle standards, and air quality studies show a reduction of up to 15 percent in nitrogen oxide (NO_x) and volatile organic compounds under the California standards compared to federal standards.

More than two-thirds of Texans live in areas where the air is unhealthy to breathe. This poor air quality creates health problems, resulting in missed work days and health care costs to the state. In addition, Texas is required to meet air quality standards set by the U.S. Environmental Protection Agency and will lose federal funding if these standards are not met. Current incentive-based programs are an insufficient means of achieving required improvement in air quality because such gains are offset by a greater number of cars on the road and a corresponding increase in vehicle miles.

The adoption of Phase II of California's low-emissions vehicle standards would be an effective way of addressing mobile source pollution, moving Texas forward in its objective to reduce ozone precursors from vehicular emissions. SB 124 would demonstrate the state's keen desire to reduce health problems associated with air pollution. Moreover, by mandating improved vehicular emissions standards, the bill would enhance fuel economy and ultimately reduce gasoline costs for consumers.

Opponents said

SB 124 would accomplish little in helping Texas comply with federal air quality standards. There is insufficient evidence to support the claim that stricter vehicle emissions standards significantly improve air quality. Furthermore, imposing tougher standards would hurt consumers, particularly the state's low-income population, by increasing the cost of new vehicles. Instead, the state should work to improve air quality by focusing on the Low Income Vehicle Assistance, Retrofit and Accelerated Vehicle Replacement Program (LIRAP) and the incentive-based Texas Emissions Reduction Plan (TERP), because these programs improve air quality without placing additional cost burdens on Texans.

Restricting a city's ability to regulate air pollution outside its city limits

SB 1317 by Jackson ***Died in the House***

SB 1317 would have restricted a city's ability to regulate as a nuisance air pollution that occurred outside the city's boundaries.

A city would have been authorized to define and prohibit a nuisance within 5,000 feet of its city limits only if the definition of the nuisance did not address levels of emissions authorized in a Texas Commission on Environmental Quality (TCEQ) air permit. The bill also would have specified that an ordinance for the control and abatement of air pollution would have to be consistent with TCEQ permits and could not apply outside the city's limits.

Supporters said

SB 1317 would prevent cities in Texas from overreaching beyond their boundaries to impose onerous air quality regulations and restrictions on surrounding cities and counties. For example, the city of Houston has proposed fining industrial plants outside its city limits to require stricter enforcement of air quality standards. Such a proposal would allow Houston to impose restrictions on businesses in other cities and political jurisdictions, improperly encroaching upon the sovereignty of other political subdivisions.

Pollution is a regional and statewide issue that should be addressed in a comprehensive manner. Without SB 1317, Texas cities would be free to adopt a patchwork of confusing and conflicting local air pollution regulations. TCEQ is the state agency charged with monitoring, permitting, and enforcing the state's air pollution laws, and SB 1317 would prevent conflicts between local regulations and official state environmental policy.

Problems with urban air quality in cities like Houston primarily are a consequence of automobile exhaust. Regulating industries outside a city's boundaries provides a politically expedient scapegoat, allowing local officials to avoid making tough decisions about the most significant causes of poor air quality, such as traffic, sprawl, and a lack of public transportation options.

Opponents said

SB 1317 would remove an important tool that Texas cities have to control air quality and ensure the health and well-being of their residents. Many Texas cities, including the city of Houston, have to contend with industrial facilities located just outside their boundaries. The businesses emit harmful pollutants into the air that harm air quality throughout the region. Pollution knows no political boundary, and it is appropriate to allow a city to mitigate pollution occurring outside its limits when that pollution substantially harms the residents of the city.

Houston is one of the nation's most polluted cities, due in large part to refineries and other regional industries that the state of Texas has failed to properly regulate. In the absence of effective regulation of these industries, the city of Houston has been forced to take the lead by addressing pollution occurring outside its boundaries.

Texas cities need the ability to protect their citizens from air pollution. TCEQ has shown an unwillingness to adequately protect Texas citizens against air pollution, most recently by overruling the recommendation of an administrative law judges by permitting the Oak Grove coal-fired power plant despite serious concerns about pollution from the plant.

Studying strategies for combating greenhouse gas emissions

SB 1687 by Watson
Died in the House

SB 1687 would have required the Texas Commission on Environmental Quality (TCEQ) to prepare a report by December 1, 2008, listing strategies for reducing greenhouse gas emissions in Texas. TCEQ would have been directed to consider strategies for reducing emissions from other states and countries. The study would have taken into account strategies that could be achieved without financial cost or strategies that could result in savings for consumers or businesses over the life of the strategy.

Supporters said

SB 1687 would direct TCEQ to evaluate and identify economically beneficial policies to minimize the production of greenhouse gas, a leading cause of global climate change. Such a study would help transform Texas from a leading contributor of carbon dioxide to a true global leader in the fight against global warming. Greenhouse gas emissions such as carbon dioxide and nitrous oxide have been established as primary causes of global warming, a phenomenon with potentially severe consequences for our way of life. Without innovative, technology-driven solutions to dramatically curtail pollution caused by human activity, the pattern of rising temperatures likely will worsen.

SB 1687 would initiate a study to identify economically neutral or beneficial strategies to address the problem of global warming. Such solutions are key to safeguarding the health of Texas citizens and preserving the environment while minimizing negative economic consequences. The longer Texas, the United States, and industrialized nations wait to mitigate carbon dioxide and other greenhouse gas emissions, the more costly such policy changes will become.

Opponents said

SB 1687 would open the door to extensive and potentially economically disruptive environmental regulation. With a growing population and expanding economy, Texas has distinct energy needs that will be challenging to accommodate even without the burden of untested restrictions on greenhouse gases. The vague strictures in the study required under SB 1687 could unfairly place the burden of compliance with recommended strategies on private business, with potentially negative consequences for employment and economic performance in the state.

Regulation of air pollution typically has been addressed through federal guidelines such as the Clean Air Act, and Texas environmental policy appropriately has been focused on attaining federal standards. SB 1687 could launch Texas down an uncharted road of regulation that could put Texas at a comparative disadvantage with neighboring states or put Texas in conflict with federal greenhouse gas legislation that Congress is likely to consider in the future.

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Marriage license fee waiver for premarital education and marriage promotion grants

HB 2685 by Chisum/HB 2683 by Chisum
Effective September 1, 2007

HB 2685 revises the premarital education course and increases the marriage license fee from \$30 to \$60. Those who complete a specified premarital education course will be exempt from both the fee and a three-day waiting period between the receipt of a marriage license and the performance of a wedding ceremony.

The minimum suggested hours for a premarital education course are increased from four to eight. Each course must teach conflict management, communication skills, and the key components of a successful marriage. The bill specifies the training requirements, eligible instructors, and curriculum requirements for a premarital education course.

To receive a waiver from the marriage license fee and the three-day waiting period, a person must present to the county clerk a certificate signed and dated by the course provider during the year preceding the filing of a marriage license application with the clerk. A county clerk who collects a fee for issuing a marriage license must send \$20 of that fee, or \$12.50 of each \$25 fee collected for a declaration of informal marriage, to the comptroller for deposit in the child abuse and neglect prevention trust fund account. The clerk also must send \$10 of each marriage license fee to the comptroller for deposit in the family trust fund account.

Supporters said

HB 2685 would improve premarital education programs and benefit the people who completed them and decided to get married. Couples planning to marry sometimes focus on the wedding at the expense of thinking seriously about issues of children, finances, and family dynamics.

By creating an incentive for marriage license applicants to complete a premarital course, the bill would encourage more couples to educate themselves about how to prevent some of the possible conflicts associated with marriage.

Studies show that the completion of premarital education often is associated with higher levels of marital satisfaction. Helping couples think carefully about the commitments associated with marriage can lower the risk of marital problems and divorce. According to recent data, as much as eight hours of premarital education can contribute to lower rates of divorce.

Premarital education under the bill would not be counseling but would focus on skills-based and research-based education. Education programs would teach couples many of the necessary skills for a good marriage, including effective communication, teamwork, problem solving, conflict management, and the importance of preserving love, commitment, and friendship.

HB 2685 would not require premarital education. It simply would offer incentives to couples already seeking to marry.

Opponents said

Marriage without financial security is not a solution to poverty and is likely to lead to the divorce of low-income couples, if not spousal abuse or other negative outcomes. What low-income Texans really need is access to education and training, leading to jobs that provide stable employment, living wages, and access to health benefits. For those who cannot afford the higher fee, the premarital education course would be all-but-mandatory, which would be too much state interference into private, personal matters.

HB 2683 requires the Health and Human Services Commission (HHSC) to spend a minimum of 1 percent of money from the federal Temporary Assistance to Needy Families (TANF) block grant on programs that provide services that support the development of healthy marriages or strong families. Funds will benefit the Healthy Marriage Development Program and the new Healthy Marriages and Strong Families Grant Program established by the bill.

Grants made through the Healthy Marriages and Strong Families Grant Program may provide up to \$50,000 to a program supporting the development of healthy marriages or strong families. Grant recipients may use funds to provide direct services to participants, develop a program, enlarge program capacity, or pay other related expenses. Programs using grant funds may not charge for services provided to program participants.

In selecting grant recipients, HHSC must give preference to applicants whose programs will contribute to the geographic diversity of program locations or who operate small programs and seek to maximize service delivery and build capacity.

Supporters said

HB 2683 would benefit adults, children, and society as a whole by funding programs to promote healthy marriages and strong families. Happily married couples provide a stable and healthy environment for raising children. Married people live up to eight years longer than their divorced or never-married counterparts, and marriage tends to provide increased financial security. Children of married parents also fare better. They are less likely to engage in criminal behavior, abuse drugs or alcohol, become pregnant out of wedlock, or experience emotional and psychological troubles. The initiatives funded by this bill would give low-income Texans the skills and knowledge to form and sustain healthy marriages and strong families.

By promoting strong marriages and families, the state would not withdraw support and services for single-parent families. There are many legitimate and federally approved uses for TANF block grant funds, including the strengthening of families and encouragement of two-parent households. Promoting marriage and supporting single-parent families are not mutually exclusive.

Healthy marriage initiatives do not encourage people to remain in abusive relationships. They are designed to do the opposite – strengthen families by giving couples the necessary skills to deal with conflict and anger within

a relationship. Grant applicants seeking TANF funds for marriage promotion initiatives would have to demonstrate how their proposed programs addressed domestic violence and would be required to consult with domestic violence experts in the administration of the programs. Abusive marriages are good for no one, and programs funded with the grants authorized by HB 2683 would not provide comfort to abusers.

Choosing to marry is a private decision, and the state of Texas has no intention of interfering with anyone's private life. Marriage is directly related to a child's well-being. The purpose of this bill would be to fund programs that give families the tools they need to succeed in marriage and in life.

Opponents said

By promoting marriage to low-income people, the state would send a message that the way out of poverty is dependence on a spouse rather than economic self-sufficiency. The purpose of TANF is to provide assistance to needy families to end dependence on government benefits. Rather than diverting these funds toward marriage promotion, Texas instead should invest TANF funds in strategies to support the transition from welfare to work or in giving working-poor families tools to escape poverty, such as training in job skills, child care, and adult literacy.

Marriage does not eliminate poverty. Studies show that most low-income unmarried women still would be poor or near-poor if they were married and working. Educational attainment and the job market have more influence on poverty than marital status. What low-income people really need is access to education and training opportunities, leading to jobs that provide stable employment, living wages, and access to health benefits.

An unintended consequence of marriage promotion programs could be to encourage victims of domestic violence to marry or stay married to their abusers. Promoting marriage to women who were not in safe or healthy relationships could harm them and cost the state in increased medical expenses and loss of economic productivity.

While the promotion of marriage by the state might spring from noble motives, it intrudes into fundamentally private matters. The decision to marry is one of the most personal and important decisions that people make in their lifetimes. When reaching this decision, people turn to their family and friends, not the government.

Notes

A related bill, HB 2684 by Chisum, would have extended the waiting period for grant of a divorce on grounds of insupportability from 60 days to two years from the date of filing suit unless the couple completed a marriage education course that included instruction in conflict management, communication skills, and forgiveness skills. HB 2684 was considered on the House floor, then died in committee after being recommitted on a point of order.

The **HRO analyses** of HB 2683 and HB 2685 appeared in Part One of the April 11 *Daily Floor Report*.

Obtaining noncertified copies of adoption-related birth certificates

SB 221 by Lucio
Died in the House

SB 221 would have allowed an adopted person age 18 or older who was adopted after January 1, 2008, or a spouse or relative if the adopted person was deceased, to obtain a noncertified copy of the person's original birth certificate. The bill would have created a contact preference form on which birth parents could have indicated whether they wished to be contacted by the adopted person, possibly through an intermediary, and whether they consented to the release of a noncertified copy of the adopted person's original birth certificate. If a parent had indicated that the birth certificate not be released, the state registrar could not have released a copy without a court order. If resources allowed, the Department of State Health Services (DSHS) could have released a noncertified copy of a birth certificate to a person who was adopted before January 1, 2008, if the birth parents had indicated approval for release on a contact preference form.

The bill would have allowed a birth parent to file an updated medical history form with DSHS. It would have required the Department of Family and Protective Services (DFPS), a licensed child-placing agency, or a person other than a close relative placing a child for adoption to inform the birth parents about the rights of an adopted child to obtain a noncertified copy of the birth certificate. These entities also would have been required to provide the contact preference form to the birth parents, and the petition for adoption would not have been granted until the parents had filed a completed form.

Supporters said

SB 221 would establish a system in Texas to allow release of adoption-related information while accounting for the needs of all parties involved, including people who were adopted, their birth parents, and DSHS. The bill would help many adopted people who currently rely on private investigators, the Internet, and their own financial resources to track down information on their birth parents. Use of the contact preference form would streamline the process of enabling adopted people to communicate with their biological parents, if both parties agreed.

It is very important for adopted children to know about any genetic diseases that run in their biological families. The bill would provide a way for birth parents to update their medical records and forward this information to their biological children. In addition, it would require the agency or other entity that placed a child for adoption to notify the birth parents about the requirement to complete and file contact preference forms, which would alleviate concerns about birth parents not being aware of these reporting requirements.

Because the bill would apply prospectively, SB 221 would not place a burden on DSHS to provide records from adoptions that took place decades ago. Nevertheless, resources permitting, it would allow DSHS to comply with requests for noncertified copies of birth certificates from people who were adopted before January 1, 2008.

Opponents said

The bill assumes that a biological parent who did not indicate otherwise on a contact preference form would not object to his or her biological child's receiving a noncertified copy of the person's birth certificate. In many cases, parents who gave up their children for adoption did so with the understanding that this information would remain confidential for life. Additionally, many parents might not know about the existence of contact preference forms or the consequences of failing to file one with the state, especially those who gave their children up for adoption many years before. The bill should err on the side of non-release to protect the birth parents' confidentiality if the state did not have affirmative evidence that such parents wished to be contacted by their biological children.

Other opponents said

SB 221 would be much more beneficial to adopted people seeking information if the bill applied retrospectively, rather than prospectively. Even though the department could issue a noncertified copy to someone adopted before January 1, 2008, it is not certain that DSHS would have the resources to comply with all the requests from adopted people seeking to find out the identities of their birth parents.

Notes

The **HRO analysis** of SB 221 appeared in Part Two of the May 17 *Daily Floor Report*.

The House companion bill, HB 525 by Goolsby, passed the House on May 11, but died in Senate committee. HB 525 would have required DSHS to provide a noncertified copy of a birth certificate on request to an adopted person regardless of when the adoption took place.

Advance directives and health care and treatment decisions

SB 439 by Deuell *Died in the House*

SB 439 would have amended Health and Safety Code, ch. 166 to expand directives regarding health care and treatment for incompetent patients diagnosed with terminal conditions. It would have defined “surrogate” to mean a legal guardian, an agent under medical power of attorney, or a person authorized to make a health care decision or treatment decision for an incompetent patient.

The bill would have specified that if an attending physician disagreed with a health care or treatment decision of a surrogate made on behalf of an incompetent patient who had been diagnosed with a terminal condition that had been certified in writing by the attending physician, life-sustaining treatment would be provided to the patient, but only until a reasonable opportunity presented itself for the transfer of the patient to another physician or health care facility willing to comply with the decision.

If artificial nutrition and hydration were the only life-sustaining treatment provided to a patient with a terminal condition, the process for handling treatment disagreements could not have been invoked unless reasonable medical evidence indicated that artificial nutrition and hydration could hasten the patient’s death or seriously exacerbate other major medical problems.

If an attending physician requested a consultation with an ethics or medical committee, the committee would have:

- appointed a patient liaison familiar with end-of-life issues and hospice care options to assist the patient’s surrogate throughout the process; and
- appointed one or more representatives of the ethics or medical committee to conduct an advisory ethics consultation with the surrogate, which would have been documented in the patient’s medical record.

If a disagreement over a health care or treatment decision persisted following an advisory ethics consultation, the attending physician could have requested a meeting with the ethics or medical committee and would have advised the surrogate that the attending physician would initiate the review process and present medical facts at the meeting. The attending physician could not have participated as a member of the committee in the case being evaluated.

On receipt of a request for a meeting of the ethics or medical committee, the surrogate would have been offered a written description of the ethics or medical committee review process and any other possible policies and procedures adopted by the health care facility, as well as other information that the surrogate was entitled to receive, including statements about the surrogate’s right to seek a second opinion and a patient’s right to transfer.

If the attending physician or the surrogate had not agreed with the decision reached during the review process, the physician would have had to make a reasonable effort to transfer the patient to a physician who was willing to comply with the surrogate’s health care or treatment decision. The facility personnel would have assisted the physician in arranging the patient’s transfer to another physician, an alternative care setting within the facility, or another facility.

If the surrogate had requested life-sustaining treatment that the attending physician had decided – and the ethics or medical committee had affirmed – was medically inappropriate treatment, the patient would have received available life-sustaining treatment pending transfer. The bill would have established that the patient receive treatment to enhance pain relief and minimize suffering, which would have included the provision of artificial nutrition and hydration. The patient would have been responsible for any costs incurred in transferring to another facility. The attending physician, any other physician responsible for the care of the patient, and the health care facility would not have been obligated to provide life-sustaining treatment, except for the provision of artificial nutrition and hydration, after the 21st calendar day after the required written decision had been provided to the surrogate.

Under the bill, a patient’s surrogate could have submitted a motion for extension of time for a patient transfer in any county court at law, court with probate jurisdiction, or district court, including a family district court, and served a copy on the health care facility.

Any party could have appealed the lower court’s decision to the court of appeals with appropriate jurisdiction for expedited review. Any party could have filed a petition for review of the court of appeals decision no later than three business days after the appeals decision had been issued.

Other parties could have filed responses within three days after filing of the petition for review. The Supreme Court would have had to rule on the petition for review within three business days after the day on which the response had been due. If the Supreme Court had granted review, it would have exercised its sound discretion in determining how expeditiously to hear and decide the case. The bill would have prohibited the assessment of a fee for any proceeding in a trial or appellate court.

On submission of a health care facility's application to renew its license, a facility in which one or more meetings of an ethics or medical committee had been held would have filed a report with the Department of State Health Services that contained aggregate information regarding the number of cases considered by the committee relating to a physician's disagreement with health care and the disposition of those cases by the facility. The report could not have contained any data specific to an individual patient.

In the case of a person who was incompetent but previously had executed or issued a directive to physicians requesting that all treatment, other than treatment necessary for keeping the person comfortable, be discontinued or withheld, the physician could have relied on the directive as the person's instructions to issue an out-of-hospital do-not-resuscitate order and would have placed a copy of the directive in the person's medical record.

Supporters said

SB 439 would revise the current Texas Advance Directives Act to give additional direction for dealing with patients who are in such a condition that their physician, hospital, or family no longer believe that they should be treated. Since 1999, Texas law has held that a hospital wishing to withhold treatment must notify a family that a committee meeting to consider cutting off support be held within as little as 48 hours. Following that meeting, treatment may be stopped after 10 days unless another hospital or medical facility can be found to take the patient. This system is not working. Families often are not ready to make such a decision – often the hardest of their lives – in such a short amount of time. Finding a place to transfer a patient in this time period frequently is difficult as well.

SB 439 would give families more time to make these painful decisions by increasing from 10 days to 21 days the length of time that a family had to transfer a dying loved one. In addition, the minimum notification time that a family would receive before the hospital ethics or medical committee met would be extended from two days to seven days to allow the family to prepare themselves. Hospitals would be required to provide relevant medical records within 72 hours of a family member's request, and the hospital would appoint a liaison to further assist the family. The procedures that a hospital would follow in cases involving life-sustaining treatment and transfer decisions and the new judicial processes in the bill would help families in times of great difficulty.

Opponents said

SB 439 would thwart the promise made by doctors to take care of their patients to the best of their abilities. The bill's provision to extend life-sustaining treatment considered medically inappropriate from 10 days to 21 days unnecessarily would prolong suffering for the irreversibly ill. With added delays from court procedures, a person could be made to experience pain and suffering for an indefinite period. It is important to acknowledge that medical treatment has limits and not to stretch out a loving family member's efforts to maintain expensive care that serves no medical purpose.

Notes

The **HRO analysis** of SB 439 appeared in Part One of the May 22 *Daily Floor Report*.

Child Protective Services revisions

SB 758 by Nelson

Effective September 1, 2007

SB 758 requires the Department of Family and Protective Services (DFPS) to implement a Child Protective Services (CPS) improvement plan with the primary goals of keeping families together while ensuring child safety in the home, reducing the time children remain in state care, and improving the quality and accountability of foster care.

Case management and substitute care. DFPS no longer must privatize all case management and substitute care services, as the Legislature had required be done by 2011 in SB 6 by Nelson, enacted in 2005, and the independent administrator role is eliminated. By September 1, 2008, DFPS must contract for case management services in one or more geographic areas with a goal of contracting in 5 percent of cases. Case management includes developing and revising the child and family case plan, coordinating and monitoring permanency services, and assisting DFPS in the child's custody suit. DFPS must provide conservatorship services, including approval of child placements and case plans. DFPS must assess the need for substitute care services and contract with providers if it will improve services to children and families. In an emergency, DFPS employees may provide temporary care for a child in a place other than the employee's residence, or a residential child-care facility may exceed its capacity for up to 48 hours.

Child-care facility regulation. A team of at least two residential child-care monitoring staff must conduct annual, unannounced inspections of licensed residential child-care facilities. DFPS must investigate reports of incidents or alleged violations at agency foster homes pertaining to a child under the age of six. Child-placing agencies (CPAs) must report to DFPS required information about closed foster homes. Foster homes must report their violation histories when transferring to a new CPA. The child-care facility regulation division must employ an investigation safety specialist and a risk analyst who work to reduce the risk of harm to children in child-care facilities. The division must include a performance management unit that recommends improvements based on quality assurance reviews of randomly selected monitoring and investigative reports. A committee on licensing standards will recommend policy changes on licensing and facility inspections. The owner or operator of a day-care facility commits a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) if that person operates a day-care facility without a qualified director or does not comply with criminal history and background check requirements for caregivers.

Improving child and family services. DFPS will provide enhanced in-home support for families in which poverty could be a significant cause of child neglect. Family service plans must be adapted to meet the special needs of children under the age of two. The bill expands the drug-endangered child initiative. Children who have been in the conservatorship of DFPS are eligible for enrollment in a pre-kindergarten class. Pediatric centers of excellence will be identified that assist DFPS in evaluating medical findings for children who are suspected victims of abuse and neglect. DFPS must provide children discharged from foster care with relevant personal records and those about to be discharged with information regarding Preparation for Adult Living (PAL) program benefits. DFPS must cooperate with other entities to expand recruitment of foster parents and increase adoption assistance payments based on the level of care a child needs. DFPS will study the effect of providing reimbursements for education expenses on the ability to retain qualified CPS caseworkers and target caseworker recruitment toward those with specific degrees.

Supporters said

SB 758 would improve the quality and accountability of child-care licensing, strengthen families, and enhance outcomes for children in substitute care. The bill also would rebalance the level of outsourcing enacted through SB 6 by Nelson in 2005 to ensure that outsourcing efforts were implemented in a measured way that enhanced the well-being of children.

Given that outsourcing represents a major change to the traditional service delivery system, SB 758 judiciously would implement case management outsourcing among 5 percent of providers across the state. This approach would reveal how the outsourced modeled worked in diverse areas. Independent review of outsourcing efforts would help uncover issues to consider in the development of best practices before expanding the program. Case management outsourcing would decrease duplication of efforts between CPS and private case managers and increase efficiency. 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. As the managing conservator ultimately responsible for a child's well-being, the state would retain oversight to approve case plans and

represent the child in court. Contracts could be structured to enhance outcomes for the child by rewarding private providers for meeting performance measures or sanctioning providers that keep children in substitute care longer than appropriate for the case.

SB 758 would recognize that there are circumstances under which the state is the best provider of substitute care. Often, private providers shy away from providing care to high-needs children. The bill would allow Texas to maintain its public substitute care provider infrastructure to ensure that the children most in need had adequate care. DFPS' child-care regulation division is independent of the division providing substitute care services. The regulation division sanctions for non-compliance the substitute care facilities run by the state as it would sanction a private provider.

The bill appropriately would retain a child-care facility's right to refuse certain child placements. Some homes are not equipped for special needs children, and it could be unsafe for all the children in residence if a facility took on a child it could not handle properly. With a shortage of providers, well-run facilities should not have to jeopardize their licenses by risking incidents with children that a facility was forced to accept in an emergency.

Opponents said

The state has not given the CPS outsourcing model enacted by SB 6 in 2005 an opportunity to work. SB 758 should not delay plans to fully privatize case management in Texas by 2011. The plan to outsource only 5 percent of case management throughout the state would cause confusion in the courts and among CPS and providers because different regions could have both outsourced and traditional provider relationships. By requiring that the state approve case plans developed by outsourced case managers but not allowing private case managers to assume court-related duties, SB 758 would hold contracted service providers accountable for performance outcomes that the contractor would not have control over meeting. The case plan approval process also could harm children if a state caseworker who was less informed about the case denied plan recommendations made by a private caseworker.

Efforts to achieve full outsourcing of substitute care services should not be eliminated. DFPS faces a conflict of interest because it is responsible for both the operation and regulation of agency child-care facilities. Given that private providers already provide about 80 percent of substitute care services, it would not be disruptive to outsource the remaining 20 percent of care provided through state

facilities. Lack of substitute care providers in serving certain child populations is due to inadequate reimbursement rates for children with higher service needs. Certain private providers already provide all the types of care the state provides, including basic care, emergency shelters, therapeutic foster care, group homes, and residential treatment centers. This array of services assures that the remaining children in public foster care could be absorbed into the private system if higher reimbursement rates were provided.

The bill should require child-care facilities to take children on an emergency basis if a facility has an empty bed and the child has no alternative placement. Too many children are placed temporarily in ill-equipped CPS offices despite a child-care facility having an empty bed. In addition, SB 758 should require yearly inspections of foster homes, which are inspected by DFPS staff only once every three years. The current frequency of inspections is not enough to ensure the safety of children, as evidenced by tragic deaths that could have been prevented if more frequent inspections had uncovered risk factors in foster homes.

Other opponents said

SB 758 would provide better protection for Texas children if it eliminated all CPS privatization efforts. Private organizations should never play a role in case decision-making for people under the state's care. Conflicts of interest arise in privatized case management models because the case managers have an incentive to make decisions that benefit their facilities. In addition, privatizing case management responsibilities held by CPS caseworkers would impose increased liability on the state because state caseworkers would be approving case plans and placement recommendations despite more limited exposure to other aspects of the child's case. Even if privatization were an option that should be explored, the aggressive timeline for implementation of the case management pilot program would not allow for appropriate planning. Rather than spending more money to privatize case management, the state should redirect funds intended for privatization to hiring more conservatorship caseworkers to reduce caseloads, providing state caseworkers more time to interact with children and families.

Notes

The **HRO analysis** of SB 758 appeared in Part One of the May 21 *Daily Floor Report*.

Abortion reporting and review of ultrasound image

SB 785 by Shapiro/SB 920 by Patrick ***Died in the House***

SB 785 would have added reporting requirements for physicians performing abortions, including specific information about the physician, the abortion facility, the patient, the fetus, the father, and the abortion procedure. If the patient had been a minor, reporting requirements would have included whether a parent or guardian had given written consent required by law or whether a judicial authorization was received and other information.

The Department of State Health Services (DSHS) would have had to require abortion providers to maintain a list of domestic violence shelters and assistance programs and to provide referrals if a woman had communicated she was being abused or forced to have an abortion. The bill also would have required a physician who treated an illness or injury related to an abortion complication to complete an abortion complication reporting form and submit it to DSHS.

DSHS would have had to issue a public report each year summarizing the information submitted on individual reports of abortion providers and ensure that none of the information in the report could reasonably have led to the identification of a physician who performed an abortion or a woman who had an abortion. The information would have been confidential and not subject to disclosure under the Public Information Act.

Physicians would have been subject to late fees or sanctions for civil contempt for failing to submit reports. Failing to submit a report, disclosing confidential information, or intentionally submitting false information would have subjected a person to a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000). Citizens of the state could have petitioned a court for an injunction against the executive commissioner of the Health and Human Services Commission for failure to produce the report or failure to enforce reporting requirements.

The Texas Supreme Court would have had to adopt rules governing the collection of statistical information on applications and appeals by judges authorizing minors to undergo abortions without parental notification. Information

collected on judicial bypasses would have had to be made available to the public in aggregate form by county and produced in a manner that could not reasonably have led to the identification of the minor.

Supporters said

SB 785 would produce better information about abortions in order to craft better public policy. DSHS already requires reporting of general information, but that reporting does not provide the broad range of accurate, reliable data needed. Strengthening reporting requirements would provide insight into the circumstances leading women to seek abortions and would assist maternal health groups in directing their outreach efforts. The U.S. Supreme Court has said that reporting requirements that are reasonably directed to preserving maternal health and that properly respect privacy are permissible. The bill would not require collection of information not already required by some other states. In addition, collecting information on judicial bypasses granted to minors would help the Legislature assess the efficacy and frequency of the parental notification provision.

Opponents said

SB 785 would burden patients, target elected judges, and make public an experience that should be respected as private and confidential, while doing nothing to improve public health. The reporting proposed by the bill would be more detailed and burdensome to both the patient and the physician than what is currently required. Physicians estimate that compliance would require at least 20 minutes per patient, time that is lost to treating patients and that is uncompensated. As a result, some physicians could be discouraged from offering abortion services and follow-up care because of the administrative burden and legal liabilities involved. There is no compelling justification with respect to maternal health for collecting statistics on judicial bypass cases, and it could jeopardize the confidentiality and safety of judges. Reporting by county effectively would identify the judge hearing the case because many counties have only one or two district judges.

SB 920 would have required a physician who performed an abortion to take an obstetric ultrasound image of the unborn child and review the image with the woman. A woman would have been required to certify that she had been provided with and had the opportunity to review the image. The physician would have been responsible for informing the woman that she was not required to view the image, and neither the physician nor the woman would have been penalized if the woman refused to look at the image. A physician found intentionally in violation of this and other informed consent requirements would commit a misdemeanor offense punishable by a fine of up to \$1,000.

Supporters said

SB 920 would help to ensure that a woman making a decision about abortion had access to all medical information pertaining to the decision, including an ultrasound. A recent study indicated a pregnant woman develops a powerful bond with her unborn child once she actually sees the fetus in the womb. Clinics often conduct only perfunctory counseling sessions before abortions and rush women through the process without ensuring that they understand the information and have considered their options. Some women say they would not have had an abortion if they had known more about the procedure and the development of the unborn child. Informing a woman fully of her unborn child's gestational development through ultrasound images could reduce the number of abortions by demonstrating more graphically the humanity of the child in the womb. Requiring a physician to take an obstetric ultrasound image and review it with a woman considering abortion merely would provide an additional measure of informed consent. A woman who chose not to view the image would not be required to do so.

Opponents said

The bill would infringe needlessly on the relationship between a woman and her doctor. The doctor, in consultation with the patient, should determine whether a woman should undergo an ultrasound before an abortion. In addition, informed consent is required for all surgical procedures, including abortion, and most women already have an ultrasound and the opportunity to view the images before an abortion. Requiring a woman to review an ultrasound image with her doctor also would emotionalize her decision inappropriately. Choosing to end a pregnancy is a difficult choice. A woman who had wanted to become pregnant but chose to terminate the pregnancy when she discovered that the fetus had a severe and life-threatening abnormality should not be faced with reviewing an image that would have no bearing on her decision and only would make a tragic situation more painful. The real intent of this legislation would not be to help a woman make an informed choice but to shame her for a choice to terminate her pregnancy. Finally, the bill would place physicians in the difficult and contradictory position of having to provide a woman with an image and review that image with her, while informing her that she was not required to view the image.

Notes

The **HRO analysis** of SB 785 appeared in Part One of the *May 22 Daily Floor Report*.

The **HRO analysis** of SB 920 appeared in Part Two of the *May 21 Daily Floor Report*.



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Providing prosecution defense to certain gambling for Native American tribes

HB 10 by Chavez Died in the House

HB 10 would have provided a defense to prosecution for gambling or other gaming activity that is or may be permitted under the federal Indian Gaming Regulatory Act (IGRA) for certain Native American tribes on certain lands. The defense would have applied to gambling or gaming if it were conducted by a tribe recognized by the federal government on January 1, 1998, and on tribal land recognized by the federal government on January 1, 1998, and designated by the tribe for gaming. The defense would have applied whether or not the gambling or gaming was conducted by a tribe governed by the IGRA.

The tribes would have had to pay to the comptroller 5 percent of the revenue from the gambling or gaming, which could be used only to fund the TEXAS grant program for higher education students.

Supporters said

HB 10 would allow only the three federally recognized Native American tribes in Texas – the Tiguas, Kickapoos, and Alabama-Coushattas – to have a narrow defense to prosecution for limited gaming on tribal property recognized as part of their reservations on January 1, 1998. It would not legalize casino gambling throughout the state, which is barred by the Texas Constitution. HB 10 would extend to Native American tribes in Texas the same authorization as the state to operate only games that already are legal in Texas. The bill would not require a constitutional amendment because it would not authorize anything that is prohibited by the Texas Constitution. Slot machines and video lottery machines are illegal in Texas now and would remain so with HB 10. The defense would be limited to a type of gaming called class 2 gaming, which is bingo, pull-tab bingo, and non-banking card games.

Indian gaming is highly regulated by the federal government, the tribes, and the states. Under IGRA, the federal Indian Gaming Commission has broad authority to oversee tribal gaming, and the tribes, which have adopted stringent regulatory schemes, have historically proved capable and successful in their regulations.

Concerns that HB 10 would be used to authorize gaming by tribes not currently recognized in Texas or on lands other than the sites of the Alabama-Coushatta, Tigua,

or Kickapoo tribes outside of Livingston, in El Paso, and near Eagle Pass, are unfounded. HB 10 would allow gaming only by tribes with federal recognition on January 1, 1998, and on land they held on that date.

The bill would legitimize an income source that has helped Native Americans in Texas and allowed them, for a short time, to become self-sufficient. The Tiguas operated a casino for about eight years and the Alabama-Coushattas for about nine months before they were closed in late 2002 by federal court rulings in lawsuits brought by the state against the tribes. The Kickapoos opened the Lucky Eagle Casino on their land near Eagle Pass in August 1996 and now conduct bingo-based games and card games in which players compete against each other but not against the house with no banking by the house or another player. HB 10 would provide the seeds for a long-term, self-sustaining economic model and help prevent gambling dollars, jobs, and other economic benefits from going to other states.

Gambling opponents predicted increased crime in the areas around the tribes' gaming centers, but in fact, crime dropped significantly in the area around the Tiguas' casino. Gambling addictions are like other unfortunate compulsions, such as alcohol addiction and compulsive shopping, that the state does not try to stop by prohibiting the activities. Most Texans support the rights of the tribes to conduct gambling on their lands. In a 2007 poll, 71 percent of Texans surveyed said they favored Indian gaming because it would keep hundreds of millions of gaming dollars in Texas, and 69 percent said they supported Indian gaming to help tribes in Texas.

HB 10 also would benefit higher education in Texas by requiring that some of the gaming revenue be allocated to the state for the TEXAS Grants program, a needs-based financial aid program for qualified Texas high school students.

Opponents said

Gambling in Texas should not be expanded with HB 10. The broad language in the bill would allow any type of Indian gaming authorized under the federal IGRA, which authorizes a range of gaming, including casinos, and could make Indian casinos legal in Texas. If HB 10 is meant to

allow only bingo and other class 2 gaming, it should clearly state this. Also, the broad type of gaming addressed by HB 10 should not be authorized without amending the Texas Constitution. HB 10 would provide a defense to a type of gambling that is unconstitutional.

The bill would reward the tribes' earlier illegal behavior, which was stopped by federal court rulings that shut down two casinos operated by Texas tribes. They should remain closed. When the Tiguas and Alabama-Coushattas were restored to federal jurisdiction, they agreed to an identical provision in the federal law that says: "All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."

HB 10 would provide no mechanism for regulating the gaming authorized by the bill and no requirement for a state-tribal compact that could do so. In the absence of a state-tribal compact, it is unclear what, if any, authority the state would have to oversee tribal gaming and how the bill's requirement that tribes remit to the comptroller 5 percent of the gaming revenue would be enforced.

HB 10 would provide an incentive for other tribes to press for recognition in Texas and for the three currently recognized tribes to seek to expand both land holdings and gaming.

The bill would have a far-reaching statewide impact, and any economic benefit to tribe members and others should not outweigh concerns about expanded gambling in Texas. Gambling carries with it social and other costs, such as increases in crime, unemployment, and bankruptcy, as well as the costs of regulation and potential corruption, that offset economic or other gains. The Legislature must consider the concerns not only of the Native Americans who would benefit from this bill but also of the 22 million Texans whom it could affect. Texans should have the right to express their opinions on legalizing Indian gaming by voting on this issue.

Notes

The **HRO analysis** of HB 10 appeared in Part One of the *May 2 Daily Floor Report*.

The House adopted three amendments to HB 10 before it failed to pass to engrossment. One of the amendments would have stated that the defense to prosecution applied to conduct that consisted of activities "permitted as class II gaming." Another amendment would have limited the defense to gambling conducted by a tribe "with a reservation in this state" on January 1, 1998, and the third would have increased the percentage of revenue paid to the state from 5 percent to 10 percent.

Another bill related to gaming by Native American tribes, HB 2535 by Chavez, was placed on the May 9 General State Calendar but was not considered. HB 2535 would have expanded the definitions in the Bingo Act so that the Tigua tribe, under certain conditions, could have conducted bingo under the state's Bingo Act. Under the bill, the bingo would have to be conducted by a Tigua fraternal organization that performed charitable, benevolent, patriotic, employment-related, or educational functions. The tribe would have had to adopt rules that conformed to the substantive provisions of the Bingo Act and Texas Constitution, Art. 3, sections 47(b) and (c), and would have been able to conduct bingo under the tribe's rules without submitting to Texas' regulatory jurisdiction, including licensing requirements. The tribe would have had to remit to the state 5 percent of its gross receipts from bingo.

Homeland security, border security, TDEx database, immigration enforcement

HB 13 by Swinford

Died in the House (see Notes)

HB 13, as considered by the House, would have:

- required the Department of Public Safety (DPS) to oversee the Texas Data Exchange;
- established the Office of Homeland Security in the Governor's Office;
- created the Border Security Council;
- prohibited the state and cities from adopting policies under which they would not enforce or would violate certain immigration and drug laws;
- required peace officers and their agencies to report the commission of federal crimes;
- authorized local agreements with federal immigration authorities; and
- created a legislative oversight committee on homeland and border security issues.

Texas Data Exchange (TDEx). HB 13 would have required DPS to oversee the TDEx database of law enforcement information. The governor's Division of Emergency Management would have been required to provide DPS with the necessary project management resources for TDEx, including operational support and personnel.

State Office of Homeland Security. HB 13 would have established the State Office of Homeland Security in the Governor's Office, which would have performed the tasks of coordinating homeland security activities among local, state, and federal agencies and the private sector. The governor would have continued to direct the state's homeland security efforts through the office. The Office of Homeland Security would have continued the current funding activities carried out by the Governor's Office but would have done so with the advice of the newly created Border Security Council.

Border Security Council. HB 13 would have created the Border Security Council to advise the Office of Homeland Security about the allocation of funds for border security. The council also would have developed and recommended performance standards, reporting requirements, audit methods, and other procedures to ensure that money allocated by the Office of Homeland Security for security efforts along the Mexico border was used properly and that recipients were accountable for its use. The governor would have appointed the members of the council.

Prohibitions against certain policies. State government entities and political subdivisions would have been prohibited from adopting rules, policies, or ordinances under which they would:

- refuse to take an action authorized under 8 U.S.C., sec. 1252c, which gives state and local law enforcement officials authority, as permitted by state and local laws, to arrest and detain persons who were present unlawfully in the United States and previously had been deported or left the country following a felony conviction;
- violate federal laws under 8 U.S.C., sec. 1324, which creates criminal penalties for several offenses related to bringing certain aliens into the country or harboring them; or
- not fully enforce state or federal laws relating to drugs, including the Texas Controlled Substance Act and Dangerous Drugs Act.

These same prohibitions would have been placed in the Local Government Code and would have applied to cities, county commissioners courts, sheriffs, city police departments, city attorneys, county attorneys, district attorneys, and criminal district attorneys.

If the Attorney General's Office had determined that a state governmental entity or a political subdivision had violated these prohibitions, the entity would have forfeited and had to repay funds they received for homeland or border security purposes. State governmental entities and political subdivisions would have been able to appeal a determination that they had violated this prohibition.

State governmental entities and cities would have been prohibited from adopting rules, policies, or ordinances – and from following or establishing commonly accepted practices – that required peace officers to violate state or federal criminal law. Peace officers would have been required to disregard any such rule or policy that required them to violate a state or federal criminal law.

It would have been the duty of peace officers to report to their agencies the commission of federal crimes or conspiracies to commit federal crimes if the officer had knowledge of the offense. It would have been the duty of

the officer's law enforcement agency, if it received such a report, to pass it on to the State Office of Homeland Security.

Performance of immigration officer functions. HB 13 would have authorized political subdivisions of the state to enter into agreements under the federal Immigration and Nationality Act to perform functions of immigration officers.

Supporters said

HB 13 would strengthen the state's homeland and border security efforts. The bill would not encroach into the federal responsibilities relating to immigration law and is not an attempt to require local governments to enforce immigration law. The bill would focus efforts on border security, which plays a large role in homeland security.

Texas Data Exchange. HB 13 would place TDEx under DPS' authority because DPS is the state's premier law enforcement entity and has experience managing and protecting databases. The TDEx database was developed with authority given to the Governor's Office in 2005, in SB 9 by Staples, and should be continued and properly supported. By allowing law enforcement agencies to share information, TDEx is helping prevent terrorism and crime. The TDEx database contains only law enforcement information and is accessible only by law enforcement authorities.

It is necessary to give the Governor's Division of Emergency Management authority to support TDEx to meet federal requirements that federal funds used to support it go through a homeland security agency. HB 13 would clearly give DPS, not the Governor's Office, authority over the database and limit the division to project management.

State Office of Homeland Security. HB 13 would formalize the State Office of Homeland Security by giving it an official name and establishing it within the Governor's Office. In 2003 and 2005, the Legislature gave the governor authority to direct the state's homeland security efforts, and HB 13 would continue this policy decision. Because homeland security efforts are spread across several state agencies and the majority of law enforcement resources exist at the local level, it would make sense to have the state's executive coordinate efforts.

It is necessary to keep the Office of Homeland Security outside of an agency like DPS and to name the office as the entity to allocate state and federal homeland security grants

to ensure that the state meets federal requirements that grant funds go through a homeland security agency. Giving this responsibility to another state entity could jeopardize these federal funds, which may be as much as \$100 million.

Border Security Council. By establishing the Border Security Council, HB 13 would create a structure to allow formal input into the allocation of border security funds and the evaluation of how they are spent. The bill would give the governor flexibility to appoint the members of the council so that the council could include people possessing the necessary range of expertise. The Legislature has given the governor responsibility for homeland security, so he should receive the authority to appoint the council in the same way other state advisory boards are appointed. The council would be charged only with providing advice, not with making any decisions, and its meetings and plans would be subject to the state's public meetings and information laws so that there would be checks and balances on its activities.

Requiring the council to develop performance standards and audit methods to track border security funds would help ensure the proper use of the money. The state has seen tangible, positive results from money directed to the area, and HB 13 would provide a way to monitor the success of future funds spent in this manner.

Prohibitions against certain policies. HB 13 would ensure that state and local governmental entities were not actively working against immigration and drug laws, but would not force any entity to take over the federal responsibility of immigration law enforcement. Federal law takes precedence over state laws and local policies, and state and local entities should not be able to pick and choose which laws they follow. The bill deals with criminal laws, not civil laws, and would not be the appropriate place to address concerns about civil violations that may affect immigrants, such as municipal housing ordinances.

HB 13 would require only that entities not adopt policies requiring peace officers to violate state or federal criminal laws. Peace officers would not be required to act as immigration agents, to investigate anyone's immigration status, or to detain or deport illegal immigrants. Following the requirements in HB 13 simply would mean that when an officer knew that a person had committed a federal crime, the officer would report it.

These provisions would help address the problem of so-called "sanctuary cities." Some of these cities have official policies under which law enforcement officers are not required to ask or to report on the immigration status of people they encounter.

Performance of immigration officer functions. HB 13 would establish the necessary authority for local law enforcement entities to enter into agreements with the federal government to take on some immigration functions, if they desired. The performance of immigration officer duties must be done under a formal memorandum of understanding and with required training and education. While only a handful of entities nationwide have received this designation, it should be available to Texas entities.

Opponents said

Texas Data Exchange. While HB 13 would place TDEX under the control of DPS, it also would charge the governor's Division of Emergency Management with supporting the database. Authorizing the Division of Emergency Management to provide operational support and personnel to the database would mean that the Governor's Office would continue to have some control over the administration of TDEX, which would be inappropriate given the civilian, political nature of the Governor's Office.

State Office of Homeland Security. A formalized Office of Homeland Security should be placed within a law enforcement agency such as DPS, not within the Governor's Office, as HB 13 would do. Many of the duties of the Office of Homeland Security – especially duties related to intelligence gathering – traditionally have been handled by law enforcement agencies, not civilian, political offices. Just because the Legislature chose to give the governor some oversight on homeland security issues does not mean that the responsibility should not be moved now that the duties have evolved.

Authority given to the governor in HB 13 to allocate funds to assist law enforcement agencies in homeland security efforts, including border security and law enforcement emergencies, would be too broad and not provide enough accountability. Grants of this nature should be made through a fiscally accountable state agency, include objective requirements that account for factors such as population and crime rates, and stipulate how the money should be used and how success would be measured. Questions have been raised about the success of current border operations, and HB 13 would continue the process that has produced these questionable results.

Border Security Council. HB 13 is not specific enough about the composition of the Border Security Council to ensure that it would have balanced, fair representation. The bill would give the Governor's Office the sole authority

to name the council without placing any requirements on the members. The bill should specify geographic and law enforcement agency diversity so the Office of Homeland Security would receive balanced advice. Without this diversity on the council, it could continue sending homeland and border security funds to a small number of law enforcement entities. Several entities, such as municipal police departments, should be included in the decision making and receipt of funds. Having the council both develop performance methods and give advice about awarding funds could be a conflict of interest.

Prohibitions on certain policies. HB 13 would take discretion away from local entities to set their own policies governing immigrants and public safety. HB 13 would go too far in requiring local law enforcement officers to enforce complex federal immigration laws and participate in immigration efforts, something they have neither the training nor the manpower to do. The role of local law enforcement officers is to solve and prevent local crimes, and even requiring officers to inquire or report about someone's immigration status could harm the trust and good relationships necessary for an officer to operate successfully in the community.

The reporting functions required by HB 13 would add to the burden of local law enforcement entities, which already are spread thin. In some cases, such as drug crimes that are both state and federal offenses, the federal government might not want to know that an officer had knowledge of a federal crime if the crime was being handled at the state level. Police often investigate actions that may violate federal law, but have no homeland security implications.

HB 13 would go too far in penalizing local entities for any rule, policy, or ordinance they enact. Decisions about policies can be made by numerous people in a department who may have no intention of affecting immigration actions.

Notes

The **HRO analysis** of HB 13 appeared in Part One of the May 7 *Daily Floor Report*.

The House adopted numerous amendments to HB 13 before passing it to engrossment, including ones designating the Department of Public Safety as the only state agency or governmental entity authorized to develop, maintain, operate, and control access to the TDEX and allowing the governor's Division of Emergency Management to provide only funding to support the database. An amendment

would have required the governor to appoint a director of homeland security, with the advice and consent of the Senate.

The bill also was amended on the floor to require at least one-third of the members of the Border Security Council to be residents of the border region. The provisions creating a Border Security Council were enacted as part of SB 11 by Carona, effective September 1, 2007, except as otherwise provided.

HB 13 was approved by the House and the Senate, but died in the House on a point of order during consideration of Senate amendments.

Illegal immigration restrictions: Prohibiting children of illegal immigrants from receiving state benefits

HB 28 by Berman
Died in House Committee

HB 28 would have prohibited a person born in Texas whose parents were illegal immigrants from receiving any benefit provided by the state or a political subdivision of the state. These benefits would have included employment, retirement, public assistance such as welfare and food stamps, health care, disability, public housing, unemployment compensation, professional and commercial licenses, and primary, secondary, or higher education.

Supporters said

HB 28 is necessary because the federal government is not addressing the issue of illegal immigration. Allowing children of illegal immigrants to receive state and local government benefits in Texas encourages more illegal immigration, which is imposing an enormous cost on state and local governments.

HB 28 could become a needed test case for the U.S. Supreme Court to interpret the 14th Amendment, which grants birthright citizenship. Such a test could help determine the extent of the constitutional rights of children of illegal immigrants and would be a good use of the state's resources, which are currently being used to provide these benefits. It simply is not fair or proper for the state to give benefits to children of parents who break the law by their very presence in the United States.

Opponents said

HB 28 would be unconstitutional. It is clear that under the 14th Amendment to the U.S. Constitution anyone born in the United States is a citizen and is entitled to all the benefits of citizenship. HB 28 would unfairly punish children – who under the U.S. Constitution are citizens – for the actions of their parents. If HB 28 were enacted, it would be challenged in court, and Texas would have to spend resources defending a clearly unconstitutional law. Immigration is a federal issue, and the Texas Legislature should not act until Congress does.

Notes

Several other bills introduced in the 80th Legislature related to illegal immigrants. HB 127 by Delisi, which died in the House State Affairs Committee, would have required state agencies to report on the cost of services and benefits provided to illegal immigrants.

HB 29 by Berman, which died in the House State Affairs Committee, would have assessed a transmission fee on money sent from Texas to Mexico and to Central and South America. A similar bill, SB 268 by Patrick, which died in the Senate Finance Committee, would have assessed a fee on money sent to any destination outside of the United States. Under both bills, U.S. citizens or others lawfully present in the United States would have been eligible for a refund of the fee.

Several bills, all of which died in committee, would have prohibited local governments from adopting policies under which they would not fully enforce state or federal immigration laws. A similar provision was included in HB 13 by Swinford, an omnibus homeland security bill, which died in the House. Other bills, which also died in committee, would have authorized or required peace officers to inquire into the immigration status of people they arrested or detained under certain circumstances and in some cases to report or arrest those who violated civil or criminal federal immigration laws. HB 3507 by Hernandez, which died in the House Law Enforcement Committee, would have prohibited peace officers from being directed or required to enforce federal immigration law. Other bills would have required certain state agencies to enter into agreements with the federal government so that state or local peace officers could be trained to enforce federal immigration law.

HB 1196 by Kolkhorst, effective September 1, 2007, bars any public subsidy designed to promote economic development to a business that does not certify that it does not and will not employ an undocumented worker, and any business convicted under federal law of hiring an undocumented worker must repay to the state the amount of any public subsidy, with interest.

Prohibiting mandatory participation in an animal identification system

HB 461 by Miller
Died in the Senate

HB 461 would have made an animal identification program developed by the Texas Animal Health Commission (TAHC) voluntary unless otherwise required by the U.S. Department of Agriculture (USDA). The commission could have adopted rules and required program participation only if USDA had set a timeline for the creation and implementation of a mandatory national program.

The bill would have eliminated TAHC's authority to require the use of animal identification numbers as identification for commission programs. Also, TAHC's existing authority to establish a date by which all premises must be registered would have been repealed.

HB 461 would have required the inclusion of certain information on application forms for participation in the animal identification program. This information would have included a notice of the program's voluntary status unless mandated by USDA and an explanation regarding the disclosure of information collected under the program and persons to whom this information can be disclosed. Also, a person enrolled in the animal identification program could have withdrawn, in which case their personal information would have been deleted.

TAHC could not have used information collected under the program for anything other than disease control. The executive director of the commission could not have released information collected for the program to certain persons. For other entities permitted to receive information under current law, the commission would have been able to release information only if adequate protection for the confidentiality of information had been guaranteed.

The commission would have been required to provide notice of the changes under the bill to each individual registered under the program by November 1, 2007.

Supporters said

TAHC's ability to impose a mandatory animal identification system should be revoked. This would be consistent with a decision made by the commission in 2006, when TAHC postponed action on proposed mandatory registration rules authorized by the 79th Legislature's enactment of HB 1361 by Hardcastle in the previous year. A

large, centralized system is not the most effective method for preventing and tracing animal diseases. The current process employed by TAHC to identify and track animals functions effectively, with regional or statewide quarantines imposed on animal movement during a disease outbreak.

A mandatory animal identification system consistent with the USDA's National Animal Identification System (NAIS) would be costly to implement statewide. The fee for premise registration would create a financial burden for animal owners, especially small producers who are subject to the same fees as large commercial operators. Animal owners should not be required to pay for a system designed to benefit the general public. By making participation in the animal identification system voluntary, HB 461 would permit animal owners to determine whether participation in the program would be beneficial. Letting the market drive the use of the animal identification system would be fairer and more efficient.

Being forced to register with the government constitutes an invasion of privacy, and TAHC should not have this authority unless USDA requires the commission to move forward with NAIS compliance. Although the initial phase of compliance with NAIS involves only premise registration, the next two components of the system – tagging and tracing animals – would constitute an especially intrusive form of government oversight. Owners should not be forced to provide the government with information to be stored and possibly shared with others, with no assurances that the information would remain confidential. The information generated through the program could be used against the agricultural industry, and market prices easily could be manipulated with new information available on animals in Texas.

Opponents said

As part of its mission to ensure animal health, TAHC needs proper tools to respond to animal disease emergencies. Current law allows the commission to administer valuable programs to identify disease and infestation problems, register premises, and move quickly in case of an emergency, such as an outbreak of avian flu. These provisions are justified due to the devastating potential of an infectious animal disease or a terrorist using animal pests or diseases to destroy the state's food supply. Under HB

461, TAHC would not be able to achieve the level of animal identification necessary for effective disease control, and its ability to adequately to protect the state's livestock and public health would be weakened.

Certain identification processes are required when transporting animals across state and international borders. Several TAHC programs use identification components to administer these processes, such as the agency's efforts to stamp out cattle tuberculosis, cattle brucellosis, scrapie in sheep and goats, and equine infectious anemia. With oversight by TAHC, the state's livestock industry complies with standards imposed by other states, the federal government, and other countries. HB 461 could impede TAHC's ability to ensure compliance with these standards. The agency no longer would be able to use certain identification processes to administer important programs. In this case, the state's livestock industry could become quarantined, and HB 461 could negatively impact the Texas economy.

Although TAHC does not have plans to require premise registration, current law allows the agency to do so in the future as needed. HB 461 would weaken this important standby authority. At the same time, current authority

given to TAHC to register premises is permissive and not mandatory. The agency lacks the resources and authority to suddenly implement a mandatory program. To implement such a system, the commission would have to follow standard rule-making procedures for state agencies. Other components of the animal identification system, such as tagging and tracking, are even further from implementation.

Other opponents said

HB 461 would not offer necessary protection against NAIS, which requires Texas to cede jurisdiction over its sovereign land and people to the federal government. The program is a violation of states' rights and could lead to the federal seizure of animals and land. Texas should adopt legislation stating that it will never implement NAIS, even if required to do so by USDA.

Notes

The **HRO analysis** of HB 461 appeared in Part One of the April 23 *Daily Floor Report*.

Limiting disclosure of concealed handgun licensees

HB 991 by Rose

Effective May 23, 2007

HB 991 amends Government Code, sec. 411.192 to remove the requirement that the Department of Public Safety (DPS) furnish to anyone information on whether a person holds a concealed handgun, leaving exceptions for a criminal justice agency or the applicant or license holder. Under prior law, any individual could file a written request to discover if a particular person had a concealed handgun license, in which case DPS was required to release the licensee's name, date of birth, gender, race, and zip code to the requestor. HB 991 continues the requirement for DPS to notify a concealed handgun licensee when it releases such information to an authorized agency.

Supporters said

HB 991 would safeguard the privacy of Texans, including more than 42,000 female license holders, who choose to protect themselves or their families by carrying a concealed handgun. Allowing the release of this personal information to the public puts license holders at risk. Access to someone's name, date of birth, gender, race, and zip code is sufficient for a stalker or burglar to locate that person, especially with the search capabilities available on the Internet. The safety and privacy of individual license holders outweigh abstract concerns about open government, and the state should err on the side of caution in protecting the identities of those who legally carry concealed weapons.

HB 991 would not prevent the public from finding out about a concealed handgun license holder who committed a weapons crime. Records concerning concealed weapons licenses already are tied to other criminal justice databases. Licensees accused of crimes have their licenses suspended, and the privilege is revoked upon conviction. The names of those with suspended or revoked licenses currently are open records under other statutes.

Current law allows the release of statistical data on concealed handgun licensees, and HB 991 would not affect the availability of that information. The media and academic researchers can reach conclusions about licensees and their behaviors without knowing the names of individuals.

Inquiring whether specific individuals – such as elected officials or celebrities – are exercising their constitutional right to protect themselves is intrusive and unnecessary for public safety. The bill would strike a fair balance between the public's need for information and the safety and privacy concerns of licensees.

Opponents said

The government should not collect records that no one has the right to see. Names of those who hold driver's licenses or professional licenses are public record, and those licensed to carry deadly weapons should be subject to the same degree of scrutiny by the media and other citizens. If a person commits a crime involving a handgun, the public has a right to know if the state licensed that person to carry a gun. This free flow of information helps keep the government responsible and responsive to the people.

There is no reason to believe that public knowledge about a person holding a concealed handgun permit makes that license holder less safe. In fact, one could argue that a person who is known to carry a concealed weapon would be less likely to become a target for crime. Besides, burglars and stalkers are unlikely to make a public record search to target their victims. Most criminals commit their crimes impulsively, and even those planning a crime probably would be unwilling to request information about a potential victim when their name would be recorded and reported to that potential victim.

Notes

The **HRO analysis** of HB 991 appeared in Part One of the April 18 *Daily Floor Report*.

During the 2005 regular session of the 79th Legislature, the House passed a similar bill, HB 318 by Hupp, which died in Senate committee. In 2003, another similar bill, HB 220 by Hupp, passed the House, but also died in Senate committee.

Revised standards for authority to use eminent domain power

HB 2006 by Woolley
Vetoed by the governor

HB 2006 would have modified processes governing eminent domain proceedings, standards of evidence that could be considered by a court in the course of making decisions regarding damages, obligations placed upon condemning entities, and the rights of previous owners to repurchase taken property.

As a basis for assessing actual damages to a property owner from a condemnation, HB 2006 would have allowed special commissioners to take into account evidence relating to the change in value of the property, including any injury or benefit to the property owner. If property was condemned for purposes related to the state highway system or a county toll project eligible for designation as part of the state highway system, special commissioners also would have had to consider diminished access to highways for any remaining property to the extent that it affected the present value of the property, including factors considered when determining market value for property tax purposes.

The bill would have defined “public use” as a use of property that allowed the state, one of its political subdivisions, or the general public to possess, occupy and enjoy the property. Governmental and private entities could not have taken property except for a public use and would have had to provide relocation services for displaced persons.

The bill would have modified the price at which previous owners could repurchase condemned property on which a public use was cancelled within 10 years of the acquisition. The repurchase price would have been the price paid to the owner by the governmental entity at the time the property originally was acquired, rather than the fair market value of the property at the time the public use was canceled. The repurchase provision would not have applied to a port that was acquiring property for deep water navigation. (The constitutional authorization for this provision, HJR 30 by Jackson, is on the November 6, 2007, ballot.)

HB 2006 would have added the “Truth in Condemnation Procedures Act” to require a governmental entity, for each property or group of jointly owned contiguous properties to be condemned, to formally authorize by motion the initiation of condemnation proceedings at a public hearing by a record vote. The bill would have required entities that intended to acquire property for a public use to make a bona fide offer to acquire

the property by voluntary purpose or lease. Such an offer would have to have been based on a reasonably thorough investigation and honest assessment of just compensation for the taking. A court, upon finding that a condemning entity did not make a bona fide offer, could have ordered the condemning entity to pay all costs and any reasonable attorney’s fees incurred by the subject owner.

In response to a request by the property owner under the Public Information Act, condemning entities would have had to furnish only documents relating to the condemnation of the specific property. Any condemning authority not subject to public information requirements intending to exercise the power of eminent domain would have had to serve property owners with notice prior to initiating proceedings.

Supporters said

HB 2006 would make critical amendments to existing statutes regulating eminent domain to ensure that individual property rights were balanced appropriately against legitimate public needs for property acquisition. The bill would make the use of eminent domain a public process by subjecting it to authorization by a governing body and ensure accountability by requiring disclosure of documents related to a condemnation beyond the appraisal records required in current statutes.

Property owners rightfully deserve to be compensated for diminished access to their property due to certain road projects. These costs should be borne by entities that use eminent domain for road construction and are necessary to fairly compensate property owners for their losses due to these takings. The costs of paying for diminished access would be substantially less than what has been estimated by critics of the provision, and any cost increase would mean that property owners have not been fairly compensated in the past.

HB 2006 would provide a definition of public use that both holds condemning authorities accountable and has sufficient flexibility to avoid discounting legitimate public interests. Public use would be defined generally to include specific uses added by previous legislation or uses that allow public interests to access and otherwise enjoy the property. This definition would preclude conspicuous examples of

condemnations that result in private commercial uses but that are justified as being publicly accessible, incidental to the primary use, and having economic benefits.

The bill would leave sufficient room for fair consideration of evidence in eminent domain transactions. Expanding evidence standards would provide recognition of the special status of condemnation proceedings caused by the fact that the property owner would not have sold under normal circumstances. Current standards of evidence do not provide for unique conditions associated with each property. Property owner rights would be protected by the bona fide offer requirement expressly placed on condemning authorities. Recourse would be available, along with compensable court fees, for an owner who was unable to partake in fair negotiations with the condemning authority. Entities using the power of eminent domain would have a strong incentive to negotiate in good faith and try to secure a settlement up front.

HB 2006 would provide for the repurchase of condemned property at the price the entity paid at the time of acquisition. Permitting the repurchase price to be set at the original sale value, and not the current fair market value as currently required in the Property Code, would enable subject property owners to reclaim equity for appreciating property to which they were entitled. The bill would not confer any special advantage upon an individual because it would permit only the redress of a taking that was not justly executed. The bill under no conditions would guarantee the transfer of positive value to an individual. The bill would create a strong disincentive against the speculative exercise of eminent domain authority by condemning authorities, including school districts, municipal and county governments, state agencies, pipelines, and utilities. Condemning authorities would be discouraged strongly from acquiring land through eminent domain for which there were no immediate plans.

Opponents said

HB 2006 would introduce more liabilities into eminent domain proceedings than it would resolve. The bill unnecessarily would change statutory provisions that have not given rise to any substantial issues since they were enacted in 2005 through SB 7 by Janek, 79th Legislature, second called session.

Provisions requiring compensation to land owners for diminished access to their remaining property as a result of an eminent domain taking for certain road construction would go too far. This requirement would cost taxpayers extraordinary sums – with one estimate putting it at easily

over \$1 billion annually – and stop or seriously delay needed road projects by making their costs prohibitively high. This requirement could lead to excessive compensation for those whose access was reasonably preserved and only would enrich condemnation lawyers who bring suits for these damages.

HB 2006 would add an overly broad standard to the criteria of admitting evidence for the determination of damages in a condemnation hearing. Allowing the consideration of the impact of highways built as part of toll plans would open up a dangerous and indefinite realm. This standard could include evidence of items that did not necessarily have any bearing on value of the property, the purpose for which the land was being taken, or the material damage to the owner. Allowing an expanded variety of evidence could create greater inconsistencies in the hearing process and reduce the overall equity of damage claims across the state.

The bill also would introduce vague provisions regarding the definition of public use and bona fide negotiations. While the bill appropriately would count the permitted uses specifically listed in statute as public, it would not define clearly the relationship between primary and incidental uses. HB 2006 would require future clarification about the permissibility of public uses that had an incidental private benefit. In addition, the determination of a good faith effort would be left to a court. This could place many condemning authorities in the difficult position of being unaware of what steps to take to ensure a finding of a bona fide offer. The provision could encourage litigation to clarify what constituted a good faith effort in the context of eminent domain.

HB 2006 would allow “double recovery” for property owners who had undergone eminent domain proceedings and were eligible to repurchase their property. The bill would confer a windfall upon property owners who were compensated justly for the original taking. An owner who was eligible to repurchase at the price originally paid could accrue all the equity from appreciation without having to pay property taxes, maintenance expenses, and other costs normally incurred as part of property ownership. The bill would allow any appreciation that accrued in the property while it was in the custody of a government organization to be transferred to an individual in the form of equity. Allowing an individual to repurchase at the original price effectively could result in the state being used as an instrument of financial gain for that individual. There is a good reason for the longstanding and rarely amended constitutional prohibition against transferring things of public value to individuals.

Notes

The **HRO analysis** of HB 2006 appeared in Part One of the May 7 *Daily Floor Report*.

For more information on HB 2006, see HRO Focus Report Number 80-6, *Vetoed of Legislation, 80th Legislature*, July 9, 2007, pp. 46-49.

Requiring legislators to cast record votes

HJR 19 by Branch

Effective if approved by voters at the November 6, 2007, election

HJR 19 would amend Texas Constitution, Art. 3, sec. 12 to require a vote taken in either house of the Legislature be by record vote if it was on final passage of:

- a bill;
- a joint resolution proposing or ratifying a constitutional amendment; or
- any other resolution except one of a purely ceremonial or honorary nature.

A vote on final passage would mean a vote on:

- third reading;
- second reading, if the applicable house suspended or otherwise dispensed with the requirement for three readings;
- whether to concur in the amendments of the other house; or
- whether to adopt a conference committee report.

Either house could pass a rule to provide for exceptions for a bill that applied only to one district or political subdivision of the state. Each member's vote would be recorded in the appropriate journal and made available for at least two years on the Internet or future electronic communications technology in a form accessible to the public by referencing the number or subject of the bill or resolution.

Supporters said

HJR 19 would require legislators to be accountable for their votes and help the public assess how each member stood on each significant issue before the Legislature. A key tenet of democracy is open government and the ability of voters to hold their elected officials accountable. Texas is one of only nine states that does not require record votes on final passage of legislation. Although the House Rules require final votes to be recorded, the requirement should be written in the Constitution because the rules can be changed every session. Any member can request a record vote at any time, but that does not occur on many of the votes cast, meaning that less than half of the votes taken are helpful to the public in deciding if their elected officials are voting in their best interests.

Too many votes have been hidden under the "voice vote" provision, which is a common method of passing or defeating legislation in both chambers. House members have their votes recorded as "aye" unless they state their preference for a "no" vote, so an "aye" vote is merely presumed. Members should be required to affirmatively vote one way or the other as a matter of public record.

HJR 19 appropriately would require record votes on third reading or final passage because final passage is the key vote on any bill. On other matters, any House member or any three senators may ask for a record vote and frequently do, so the most important votes already can be recorded. However, if the Constitution required record votes on second reading or on every vote on every amendment, it significantly would slow the lawmaking process.

Opponents said

The House rules already require record votes on third reading and final passage, and any member can ask for a record vote on any measure at any time. Under House Rules, passage of a bill or joint resolution without objection is equivalent to a recorded vote because the House Journal reflects the fact that all members voted for the measure and are allowed to register opposition if they choose. The Senate has recorded all votes on final passage since the 79th Legislature in 2005, so it is not necessary to amend the Constitution to require this. Placing the requirement in the Constitution could create a time-consuming, logistical burden for future legislatures. Legislators should maintain the flexibility to determine how many of the hundreds of hours members and staff spend in session should be devoted to counting and recording votes. Current procedures adopted by rule in both chambers offer a practical way of informing the public while allowing the Legislature to carry out its business in an efficient manner during the brief biennial sessions.

Other opponents said

HJR 19 also should require record votes on second reading, which is the most important stage in the process of considering legislation. Votes cast during the second reading of a bill carry significant importance because

amendments can be adopted at this stage with a simple majority, rather than the two-thirds vote required to amend a bill on third reading. As a result, bills rarely are amended on third reading, and most of the substantive debate takes place on second reading. The ability to view record votes on second reading would provide true transparency and allow the public to express their opinions on a bill prior to final passage. As a practical matter, votes on second reading already are posted on the Internet, and the proposed amendment should reflect this practice.

Allowing legislators to adopt rules to except local bills from the third-reading record vote requirement could allow controversial local bills to be overlooked. Although neither house would be required to adopt such a rule and any House member or any three Senators may request a record vote at any time under current rules, the proposed amendment might have the perverse effect of requiring record votes on routine measures without shedding light on how members voted on important bills that applied to only one district or political subdivision.

Notes

The **HRO analysis** of HJR 19 appeared in the April 17 *Daily Floor Report*.

HB 83 by Branch, which would have required by statute that each house of the Legislature record on final passage votes on all bills, resolutions, and other resolutions that were not purely ceremonial or honorary in nature, died in the House.

Allowing the Legislature to override a veto after *sine die* adjournment

HJR 59 by Elkins *Died in Senate Committee*

HJR 59 would have amended the Constitution to require the Legislature to convene after the 20-day post-session deadline for filing veto proclamations to reconsider vetoes by the governor. The period for reconsidering vetoes would have begun at 10 a.m. on the day after the veto deadline and could not have exceeded five consecutive days. Unless the Legislature had been called into special session by the governor, it could not have considered any subject except vetoes of bills or appropriation line items that the governor had returned within three days before or any time after *sine die* adjournment of a session.

Supporters said

HJR 59 would give the Legislature an opportunity to exercise its authority under the Constitution to reconsider legislation vetoed by the governor following *sine die* adjournment. The Texas Constitution requires the governor to sign or to forward a veto with objections to the house that originated the bill within 10 days while the Legislature is in session. For bills sent to the governor during the final 10 days, not counting Sundays, of a session or after *sine die* adjournment, the governor has 20 days after adjournment to veto a bill or a line item in the appropriations bill, leaving the Legislature with no opportunity to attempt to override the veto.

Texas is one of 17 states where only the governor may call a special session, while the remaining 33 states permit either the governor or legislature to call a special or extraordinary session, which may include review of vetoed items. As such, the governor can kill measures approved by both chambers secure in the knowledge that the Legislature is powerless to challenge a veto decision. Providing the option to override a governor's veto would enhance the authority to enact laws by the people's representatives, where it belongs, and reinforce constitutional checks and balances. It makes little sense for the Legislature to have the authority to override vetoes if it rarely has the opportunity to exercise that authority.

Rather than addressing specific debates between the governor and the Legislature, the proposed constitutional amendment would deal with general issues of accountability

and balance of power. Under the bill, existing constitutional requirements would remain unchanged, and overriding a veto still would be extremely difficult. The governor would retain the power to veto legislation, and the vote necessary to override the veto would remain a two-thirds majority in both chambers. The call for the session would be limited to overriding vetoes, unless the governor also had called a special session.

The Legislature often must consider complex legislation for which it may be difficult to reach agreement until the very end of the session. No matter the length of a session, some legislation always will be passed within the final 10 days before *sine die* adjournment. HJR 59 effectively would give lawmakers additional time to complete that challenging task. Just as legislators could reach compromises and build alliances to override vetoes, the governor would have the opportunity to reach agreement to prevent a veto from being overridden. Bills that survive the winnowing of the legislative process, only to be vetoed, should not have to wait until the next regular session to be considered. The same members who passed the original legislation should have the opportunity to address the veto.

Opponents said

The governor of Texas constitutionally has limited authority, and the ability to veto legislation after *sine die* adjournment and call special sessions are among the few strong powers of the office. HJR 59 would weaken further the office of the governor. Quarrels between legislators and the governor can be resolved without amending the Constitution.

The Legislature could recapture its ability to respond to vetoes if it did not send an overwhelming majority of bills to the governor during the final 10 days of the session. During the 2007 regular session, the Legislature sent to the governor 1,226 of the 1,481 bills passed, or 83 percent of the total, during the last 10 days, allowing the governor to wait until 20 days after the session adjourned to act on those bills. If the Legislature believes a bill may be vetoed, then it should enact the bill early in the session to allow an override vote to be taken.

Other opponents said

HJR 59 would be too inflexible and would require the Legislature to convene for up to five days whether or not there was a need or desire to do so. The amendment would include no mechanism to determine whether there was a necessary majority to override a veto. For example, Gov. Perry vetoed two bills during the 2007 regular session before the final 10 days, and the Legislature made no effort to override either veto when it had the chance.

Notes

The **HRO analysis** of HJR 59 appeared in the March 21 *Daily Floor Report*.

Emergency management, mutual aid system, wiretaps, vehicle tags, Border Security Council

SB 11 by Carona

Generally effective September 1, 2007

SB 11 changes the structure of the state's emergency management system, exempts certain discussions about school security audits from open meetings requirements, expands wiretap authority, allows the use of toll road technologies for criminal investigations, creates a Border Security Council to advise the governor on the distribution of border security funds, and creates a state database for temporary vehicle tags, among other provisions.

Emergency management. SB 11 designates certain local officials as emergency management directors to serve as the governor's designated agents for duties under the Texas Disaster Act. The bill requires public officers whose duties involve emergency management responsibilities to complete a training course developed by the governor's division of emergency management

SB 11 divides the state into disaster districts for homeland security preparedness and response activities. The districts follow the boundaries of state planning regions under Local Government Code provisions dealing with regional planning commissions.

Mutual aid systems. SB 11 establishes the Texas Statewide Mutual Aid System to provide for statewide mutual aid responses between local governments that do not have written mutual aid agreements. A request for mutual aid assistance between local governmental entities is considered to be made under the system in SB 11 unless the entities requesting aid and responding have a written mutual aid agreement.

School security audits. SB 11 exempts school boards and charter schools from open meetings requirements when deliberating about a district security audit. The bill requires school districts to report the results of the security audit to the Texas School Safety Center and allows institutions of higher education to use any appropriate model for a multi-hazard emergency operations plan developed by the center.

Wiretap authority. SB 11 expands the current authority to use wiretaps from investigations of capital murder, child pornography, and certain drug crimes to include investigations of kidnapping, aggravated kidnapping, trafficking of persons, and money laundering if the money laundering involved an offense against a person.

Toll road technology and emergency vehicles. SB 11 repeals the current prohibition against evidence from automated toll road enforcement technologies, such as photographs, being used in the prosecution of any offenses except for capital murder and certain offenses relating to paying tolls. The bill also prohibits toll project entities from requiring tolls from certain emergency vehicles used by a nonprofit disaster relief organization exclusively for emergencies and allows certain vehicles to be authorized to operate as emergency vehicles during a disaster.

Border Security Council. SB 11 creates the Border Security Council to advise the governor about the allocation of border security funds and to develop and recommend to the governor performance standards, reporting requirements, audit methods, and other procedures to ensure funds allocated by the governor for border security are used properly and that fund recipients are held accountable for the funds. The council is composed of members appointed by the governor, at least one-third of whom must be residents of the Texas-Mexico border region.

Temporary vehicle tag database. SB 11 establishes a system for generating and tracking temporary cardboard tags placed on new vehicles. The Texas Department of Transportation is required to develop and maintain a secure, real-time database of information on vehicles on which dealers and converters had affixed temporary cardboard tags and with information on persons to whom temporary tags were issued. The database must allow law enforcement agencies to use vehicle-specific numbers to obtain information about the dealer or buyer of a car. Dealers will charge \$5 for each temporary cardboard buyer's tag, and the money will be deposited in the state highway fund. The bill also creates criminal penalties for illegal actions involving the tags.

Public Safety Commission. SB 11 increases the size of the Public Safety Commission, which oversees the Department of Public Safety (DPS), from three to five members and requires that all members reflect the diverse geographic regions and population groups of Texas.

Immunization records of first responders and disease management. SB 11 establishes a state registry of information about persons who receive immunization or

other medications to prepare for a potential disaster, attack, military action, or other emergency.

SB 11 revises the powers of a regional health authority and the Department of State Health Services in attempting to limit the spread of a contagious disease. If they believe that five or more people had been exposed or infected with a communicable disease, they can order those exposed to take control measures to prevent the spread of the disease. The bill establishes procedures for the isolation and quarantine of a group of five or more individuals by court order.

Enhanced driver's licenses. SB 11 authorizes DPS to issue an enhanced driver's license or identification card for crossing the Texas-Mexico border. These may be issued only to applicants who prove their U.S. citizenship, identity, and Texas residency. DPS must implement a biometric matching system for the enhanced license.

Human trafficking. SB 11 expands the kinds of activities that may be considered part of the criminal offense of human trafficking, requires certain hotels and other public lodgings that have tolerated human trafficking and are part of a common nuisance civil suit to post a toll-free number concerning human trafficking, and directs the attorney general and the Health and Human Services Commission to conduct studies on human trafficking.

Supporters said

SB 11 is necessary to improve the state's disaster and emergency readiness and to give law enforcement necessary tools to ensure homeland security.

Emergency management. SB 11 would codify parts of the state's emergency management structure and response currently found in executive orders. Placing this information in statute would help ensure consistency and make it easier to find the guidelines.

Mutual aid agreements. SB 11 would establish a single statewide mutual aid system to cover situations in which a local entity needed aid but had not already entered into an agreement. Outlining a default system in statute would allow aid to flow more quickly and efficiently, streamline the delivery of aid in an emergency, and cut red tape. Allowing local entities to enter into any type of agreement they wanted, with the model agreement in the bill available as a back-up, would allow these agreements to be tailored to specific local needs.

School security audits. SB 11 would protect school districts from having to reveal security information that should be kept private, such as a planned meeting point for children in a terrorist attack, by exempting school boards from open meetings requirements when discussing these plans. School board members, who are elected to represent the public, would have access to this information, but it would not have to be revealed in a public meeting. Allowing public access to information in security audits could give terrorists or others with bad intentions information that they could exploit and could compromise the ability of the school to keep students safe.

Wiretap authority. SB 11 would expand the wiretap statutes to address kidnapping, trafficking in persons, and money laundering, all crimes that have an impact on homeland security. The state should allow wiretaps in these cases because these are serious crimes for which law enforcement may need to gather information and act quickly. It would be appropriate to include money laundering in the wiretap authority because this offense has a clear connection to homeland security and often involves narcotics, something for which wiretaps already are authorized.

Toll road technology and use by certain vehicles. Repealing restrictions dealing with toll road enforcement technology would give law enforcement another tool that would be used only in limited, but important circumstances, such as a kidnapping or terrorism case. Concerns about this provision leading to harassment and false arrest are unrealistic. SB 11 would allow evidence of toll road violations to be used in any criminal prosecution just as a parking ticket can be used in any criminal prosecution. There is no reason to continue to arbitrarily limit the type of evidence that may be used by prosecutors.

Border Security Council. By establishing the Border Security Council, SB 11 would create a structure to allow formal input into the allocation of border security funds and the evaluation of how they are spent. The bill would give the governor flexibility to appoint the members of the council so that it could include people possessing the necessary range of expertise. It makes sense that the governor, who has the responsibility for homeland security, should have the authority to appoint the council in the same way other state advisory boards are appointed. The council would be charged only with providing advice, not making any legally binding decisions, and its meetings and plans would be subject to the state's open meetings and public information laws so that there would be checks and balances on their activities.

Temporary vehicle tag database. SB 11 would create a temporary tag database with unique numbers to track sales of new vehicles, because currently law enforcement authorities cannot readily identify owners and drivers of vehicles with temporary tags. The current system raises concerns related to homeland security because the tags are counterfeited easily and can be used by criminals to move anonymously across the state roadways and to transfer stolen vehicles across the border.

Opponents said

Emergency management. Placing in statute the language governing emergency management that currently is found in executive orders could reduce the state's flexibility to respond to emergencies. Under SB 11, any changes to these directives would have to wait until the law could be amended when the Legislature was in session, whereas now they can be changed through an executive order to meet the needs of a particular emergency.

Mutual aid agreements. SB 11 would add to the confusion concerning mutual aid agreements by establishing yet another kind of agreement to go with the three that already exist. It would be better to develop a single statewide mutual aid system.

School security audits. Texas needs to publicly vet its school security audits so that predictable errors can be identified and plans improved before a problem occurs. School security audits should be developed with maximum public input and accountability, and shielding them from open meetings requirements could be counterproductive.

Wiretap authority. The expansion of wiretap authority to money laundering would go too far. Current law limiting wiretap authority to murder, possession or promotion of child pornography, and drug crimes rightfully limits this tool to the most serious crimes in which immediate information can be crucial. While kidnapping and trafficking of persons may fit these circumstances, money laundering would not.

Even worse would be an expansion of the state's wiretap statutes, which some have proposed, to authorize roving wiretaps, which allow tapping of any phone used by a person, because this would go too far in allowing potential violations of Texans' privacy rights, especially for a person not under investigation. For example, if a person frequently used a phone at a neighbor's house or at a business, that phone could fall under the wiretap, which could violate the privacy of the neighbor or business.

Toll road technology and use by certain vehicles. By repealing the current restriction on using toll road photos for law enforcement purposes, SB 11 would go too far and could result in an unwarranted expansion of surveillance information. This could lead to misuse and misidentification, resulting in harassment and false arrest of innocent people who look similar to people suspected of crimes.

Border Security Council. SB 11 is not specific enough about the composition of the Border Security Council to ensure that it would have balanced, fair representation. The bill would authorize the governor to name the council without placing any requirements on the members, such as geographic and law enforcement agency diversity. Without this diversity, the council could continue sending homeland and border security funds to a small number of law enforcement entities. Numerous entities, such as municipal police departments, should be included in the decision making and receipt of funds.

Other opponents said

Wiretap authority. SB 11 would not go far enough in revising the state's wiretap statutes. It also should authorize roving wiretaps in narrow circumstances. Roving wiretaps, which are tied to a person, not a particular instrument, are increasingly necessary because criminals have become more sophisticated in their knowledge of the law and are using cell phones for a short time – sometimes only one day – before discarding them. Tapping the person and not the instrument in limited circumstances would modernize the state wiretap statute to recognize this use of cell phone technology, which was not in existence when the original statute was enacted.

Roving wiretaps would continue to have to meet the numerous restrictions and regulations on wiretaps, including receiving authorization from a limited number of high-level judges who monitor the authority and having DPS operate the equipment. Requirements that wiretaps be minimized and turned off if conversations did not pertain to an investigation would apply.

Notes

The **HRO analysis** of SB 11 originally appeared in the May 17 *Daily Floor Report*.

Several of the provisions in SB 11 appeared in other bills considered by the 80th Legislature. The provisions creating the Border Security Council were in HB 13 by Swinford, which died in the House.

Reporting the value of gifts of cash or cash equivalent to public officials

SB 129 by West

Effective September 1, 2007

SB 129 specifies that a gift of cash or cash equivalent such as a negotiable instrument or gift certificate reported on a personal financial statement disclosure filed with the Texas Ethics Commission (TEC) on or after January 1, 2008, must include in the description of the gift a statement of the gift's value.

Supporters said

SB 129 would close a loophole in current law that allows a state official to receive cash or the equivalent without disclosing the amount of the gift. While a state officer annually must disclose any gift worth more than \$250, including a description of the gift and the person who gave it, current law does not specifically require the description to include a value. In 1999, TEC issued Ethics Advisory Opinion No. 415, which held a state official need not report the specific value of a gift. The commission reaffirmed this position in 2006, stating that the description of a gift of cash or cash equivalent is not required to include its value because the term "description" is not defined in the relevant statutes. As a result, a person subject to personal financial disclosure requirements need only report a gift as a "check" or "money order" without having to disclose the face value, even if a check is for \$100,000. By specifically requiring the description to include a statement of the gift's value, SB 129 would strengthen public trust in financial disclosure laws.

Current law requires that most financial activity on personal financial statements include a specific amount or range, or a dollar category. SB 129 would follow a recent recommendation for statutory change from TEC by including a statement of actual cash value for gifts reported in financial disclosure statements. This common sense requirement would set clear guidelines for state officers and generate more confidence in state government accountability and the state agency responsible for personal financial statements and their disclosure.

Opponents said

SB 129 is not needed because Texas has had strict prohibitions involving gifts to public servants and elected officials and their employees in all three branches of government since 1973. Current law does not require officials to declare the value of gifts because the exceptions for gift-giving are so narrow, and TEC has issued an opinion upholding this principle as recently as 2006.

Other opponents said

A better approach for the Legislature to enhance financial disclosure would be to clarify that TEC has the authority to interpret statutes that are consistent with its mission, including being able to define certain terms and adopt applicable rules.

Notes

The **HRO analysis** of SB 129 appeared in Part One of the May 15 *Daily Floor Report*.

Continuing the Office of State-Federal Relations

SB 903 by Brimer

Died in conference committee

SB 903 would have continued the Office of State-Federal Relations (OSFR) until September 1, 2013. OSFR, the state's advocate with the federal government in Washington, D.C., seeks federal funding for the state, prioritizes the state's agenda at the federal level, and acts as a conduit between state and federal entities regarding Texas issues. An advisory committee of the governor, the lieutenant governor, and the speaker of the House annually reviews the state's federal priorities and strategies.

The bill would have required that any political subdivision or state agency report to the OSFR any contract it had entered or ended with a federal-level lobbyist within 30 days of a change of status. It would have added duties for the agency, including notifying certain state and congressional officials of important state and federal actions and conducting conference calls with the lieutenant governor and the speaker, or their representatives.

The House-passed version would have funded the agency through the Governor's Office, which would have provided human resources and administrative support for the OSFR. The agency could not have contracted with federal-level lobbyists. The advisory board would have been required to approve the hiring of any employees, except for the executive director, who would have been appointed by the governor, subject to the advice and consent of the Senate.

The Senate-passed version would have abolished the OSFR as an independent agency and transferred all its duties and functions to the Governor's Office. It also would have abolished the advisory committee, allowing the executive director to approve all employee hiring. The governor still would have appointed the executive director but would not have needed the advice and consent of the Senate to do so. The agency would have been permitted to contract with federal-level lobbyists, provided the governor had signed a contract that would have included performance measures, termination clauses, and oversight provisions. The OSFR would have been required to adopt written procedures for any contract with a federal-level lobbyist that provided for a competitive procurement process, a method to assign value to a bidder's ability and experience level in providing the needed services, and a way to assure that a consultant or a consultant's clients did not have interests that conflicted with those of the state.

Supporters said

SB 903 appropriately would continue the OSFR, which the Sunset Advisory Commission found plays a vital role not only in securing federal dollars for Texas but also in serving as a resource to Texas legislators and federal officials in Washington. The bill would establish the agency as the central resource for all governmental lobbying efforts originating from Texas.

The OSFR still is a vital resource, especially on occasions when the state's congressional delegation may be unable to put aside differences for political reasons or parochial interests. It is essential the state have an advocate in Washington that reflects the view of the entire state, and Texas is not alone in this endeavor. Thirty-seven states have established a Washington office staffed by government employees, and two others use consultants to represent their interests at the federal level. The bill would make the OSFR a clearinghouse through which all state and local entities would report any federal lobbying contracts. This procedure would ensure the state and its federal legislators were on the same page with all government entities. It also would allow the OSFR to craft a consistent message from all levels of state and local government.

Supporters of the House-passed version said

SB 903 would ensure the agency could not become entangled with partisan politics by administratively attaching it to the Governor's Office and adding new restrictions, such as a prohibition on contracts with federal-level lobbyists.

During the 2003 budget shortfall, the Legislature cut the OSFR's staff from 17 to seven, prompting the agency to subcontract some of its lobbying work, which will end up costing the state \$1.2 million. In early 2006, two of those contracts made headlines when it was revealed that the state had hired two lobbyists with ties to former U.S. House Majority Leader Tom DeLay and convicted lobbyist Jack Abramoff. Critics were concerned about the potential partisanship of contracted state government workers, whose records showed they met mostly with Republican members of Congress.

The House-passed version of SB 903 would prevent this from happening again by prohibiting future contracts with lobbyists. The state has a wealth of resources in Washington, along with the sitting president and several high-ranking officials in the executive branch, that include the OSFR, other lobbyists working for state or local entities, and Texas' 34-member congressional delegation. The main role of these officials, especially those who work directly for the government, is to advocate for the needs of Texans. On any number of issues, from hurricane relief to the exemption of state sales taxes on federal returns, these government employees have put aside partisan politics to focus on the needs of Texas.

The bill would follow the spirit of the Sunset commission's recommendation to remove costly and inefficient administrative functions from the OSFR's domain, but it would depart from the letter of the recommendation to place the agency under the direction of the governor. In a state in which the executive branch is decentralized, the lieutenant governor and speaker of the House also should have a significant voice in determining federal priorities.

Supporters of the Senate-passed version said

This version of SB 903 would recognize certain realities about the federal process and allow for the state to enter into contracts with lobbyists under strict requirements. The bill more closely would follow the recommendations of the Sunset commission, which carefully researched the agency and crafted solutions that would allow it to advocate more effectively for the state while reducing the potential risk of contracting with outside consultants. Placing the agency under the governor's direct authority would create a more efficient and responsive chain of command.

Of the 37 states with Washington offices, 13 hire additional consultants. Although the Sunset commission did not make a value judgment on whether the state should pursue this option, it did find the role of outside help to be beneficial for the states that used the assistance properly. Certain lobbyists have expertise and networks that are unmatched by OSFR employees. The OSFR attributes \$1.1 billion in federal money for the state to the work of the outside lobbyists, whom it credits with successfully pressing for increases in federal highway money and authorization of maintenance dredging in the Matagorda Ship Channel. By subcontracting out the work, the Governor's Office estimates the state saved about 15 percent of the amount it would have paid to perform the same functions itself.

The Senate version would give the state the option of hiring lobbyists if doing so gave Texas an advantage in receiving more funding or achieving a specific policy goal. By setting clear guidelines for hiring and evaluation, and ensuring lobbyists had the ability to work with all members of Congress without conflicting interests, the bill would provide ample safeguards to prevent a repeat of recent controversies. Also, given recent staff cuts, the agency should have some leeway in hiring additional staff to handle a particularly taxing or overwhelming problem.

The Sunset commission found that Texas is the only state whose federal advocacy office is an independent agency. The Senate version of the bill would move the agency under the governor's authority, providing a clear chain of command that would allow the agency to act quickly in a fast-paced Washington environment. Maintaining the advisory committee of the governor, the lieutenant governor, and the speaker of the House would leave the OSFR with too many masters. If any of the three members were from different political parties, for example, the agency's ability to set clear priorities and serve as a central voice for Texas in Washington would be undermined.

Opponents said

The state should not continue to spend money to lobby the federal government when that money could be used for more urgent local needs. Thirty-four elected officials represent the interests of Texas in Washington, and although they may take parochial views on certain issues, they have shown the ability to unite across party lines on issues of statewide significance. It is not the role of government to create an office of lobbyists or – even worse – to fund additional lobbyists to champion state interests in Washington. Using state tax dollars to chase federal tax dollars is an inherently wasteful process, especially when significant amounts of federal money are dedicated through guaranteed funding formulas.

Notes

The **HRO analysis** of SB 903 appeared in Part One of the May 14 *Daily Floor Report*.

HB 3249 by Truitt extended OSFR's Sunset date by two years, to September 1, 2009. The governor signed the bill on June 15.

Modifying provisions for statewide and local housing programs

SB 1908 by Ellis

Effective September 1, 2007

SB 1908 amends provisions governing the allocation formula by the Texas Department of Housing and Community Affairs (TDHCA) for distributing housing tax credits, modifies criteria for evaluating tax credit applications, makes administrative revisions to agency operations, and creates statutory authorization for a first-time homebuyers program administered by TDHCA. The bill also establishes a statewide land bank program and revises an existing land bank program in Houston.

Modifying the Regional Allocation Formula (RAF).

SB 1908 requires TDHCA to allocate 15 percent of available housing tax credits for at-risk developments prior to distributing funding through the regional allocation formula (RAF). TDHCA also must allocate 20 percent or more of the housing tax credits in an application cycle to developments in rural areas. Of this allocation, at least \$500,000 must be reserved for rural developments in each service region designated in the RAF. Any funds that remain following an initial allocation for rural developments will be available for allocation in urban areas in each service area.

The bill calls for TDHCA to allocate 5 percent of housing tax credits in each application cycle to developments that receive federal financial assistance through the Texas Rural Development Office. Tax credits allocated to these developments for rehabilitation must come from funds set aside for at-risk developments. Housing Trust Fund (HTF) revenue in an amount less than \$3 million and funds designated primarily to serve disabled persons will be exempt from distribution through the RAF. The bill also recodifies requirements relating to regional allocation developed by TDHCA that account for the need for housing assistance and the availability of housing resources in urban or rural areas.

Revising low-income tax credit allocation. SB 1908 amends provisions governing the points allocated for housing tax credit applications. Statutes providing for the administration of points on the basis of written statements from elected officials are modified to specify that such statements must come from the state representative or the senator representing the district containing the proposed development site. The bill repeals provisions requiring each written statement received to be equally weighted. An applicant will be awarded full points for demonstrating a good faith effort to obtain community participation in the event there is no neighborhood association corresponding

to the proposed development. The absence of an association must be verified by an officer of a municipality or county clerk, as applicable. Additional points may be awarded for an application located in a disaster area declared by the governor, and applicants are encouraged to provide free notary public service to the residents of proposed developments.

Modifications to TDHCA. SB 1908 establishes the Texas First-Time Homebuyer Program to facilitate the origination of single-family mortgage loans for eligible first-time homebuyers and to provide loans for down payment and closing cost assistance. The bill allows the TDHCA board to adopt rules governing the administration of the program, the provision of loans to eligible applicants, and terms of contracts made with mortgage lenders. To be eligible for a mortgage loan through the program, an individual must qualify as a first-time homebuyer and meet income eligibility and other departmental requirements.

The bill makes other administrative and operational changes to TDHCA, including requiring transcripts of public meetings, exempting personal information from disclosure, allowing for the imposition of administrative penalties of up to \$1,000, and providing for alternative dispute resolution procedures. The annual low-income housing report will be treated as an administrative rule, and TDHCA must follow standard statutory rulemaking procedures to adopt it as such.

Modifying receivership programs. SB 1908 modifies provisions authorizing the receivership and rehabilitation of property. The bill strikes references restricting the scope of applicability of the receivership statute – which allows a municipality to bring action against a property in court and arrange for temporary custody to be granted to a nonprofit organization or developer – to residential property. Receivers may collect a receivership fee of 10 percent of total costs and expenses, which are added to the amount an owner has to pay to recover a property. Receivers are allowed to impose a lien on the property in the amount of the receivership fee and all unrecovered costs and expenses.

The bill eliminates procedural distinctions between properties whose owners had been notified and those with no identified owner. After providing sufficient public notice, receivers may petition for termination of their custody of the property, and a court may order the sale of a property if an owner fails to pay rehabilitation expenses and the

receivership fee within one year of the property being received. A receiver may bid on the property at a court-ordered sale and apply any existing liens as credit toward the purchase of the property.

Expanding and revising land bank programs. SB 1908 creates the Urban Land Bank Program Act to allow a city to adopt a land bank program in which certain eligible property acquired through foreclosure proceedings for delinquent taxes may be resold by private sale for purposes of affordable housing development. The governing body of a municipality adopting such a program must establish or approve the land bank for the purposes of acquiring, holding, and transferring real property in accord with statutory provisions. A municipality adopting a land bank program must operate the program in accordance with a land bank plan to be adopted annually. A land bank plan must account for other existing municipal housing plans, including federal plans, and must list community housing development organizations eligible to participate in the program. A plan also must contain a list of parcels that could become eligible for sale to the land bank during the next year, the municipality's plan for affordable housing development on those parcels, and the account of revenue estimated to be available for the development of affordable housing. A land bank plan is subject to a public hearing. SB 1908 also revises existing statutory provisions regulating the Houston land bank program.

Additional provisions. A person who is awarded state or federal funds through TDHCA to construct affordable, single family housing must ensure that each circuit breaker box is located no higher than 48 inches above the floor inside the building on the first floor. Any lease agreement signed with a tenant in a housing development that received tax credits through TDHCA must comply with applicable laws and state standards identified by departmental rules and establish an e-mail system for notifications associated with tax credit applications. SB 1908 also provides for a tax increment financing tool for the renovation of historic structures in a reinvestment zone designated by a municipality with fewer than 18,000 residents.

Supporters said

SB 1908 would make important changes in the housing funding allocation process at the point when funds are reserved for low-income housing located in rural areas or in support of the development of housing for disabled persons. The bill would take positive measures to resolve shortcomings in the current application of the RAF that result in an insufficient availability of funds in some areas and an oversaturation in others.

The bill's set-aside provisions would resolve deficiencies and other problems that result from the allocation of rural funds based on the application of the RAF in each of TDHCA's 13 service areas. The bill would assure a \$500,000 minimum for rural developments in each service area, which would provide a necessary baseline of funding while allowing for variations in the number and extent of development proposals by service area over time. The bill would recodify statutory standards to be used in the adoption of the RAF annually and highlight TDHCA's ability to modify the RAF to accommodate changing patterns of low-income housing development and need statewide.

SB 1908 would make necessary revisions to the receivership statute to increase its utility for municipalities and nonprofit housing rehabilitation organizations. Existing statutory provisions make receivership processes prohibitively difficult to exercise and discourage interest among nonprofit organizations. Current law requires a receiver to wait two or three years, depending on whether a property owner has been located, before petitioning to terminate the receivership and thereby authorizing a court-ordered sale of the property. This lengthy timeframe impairs a nonprofit's ability to apply tied-up capital to other projects and limits interest in participating in a receivership program. Decreasing the minimum receivership period to one year and allowing receivers to collect a 10 percent fee would make receivership a viable option for nonprofit housing rehabilitation organizations and other qualified individuals. Broadening the scope of receivership to include nonresidential properties would allow for rare but critical restorations of historical, commercial, and agricultural properties that have been abandoned or fallen into severe disrepair.

Opponents said

SB 1908 would limit the effectiveness of TDHCA's RAF, which is designed to ensure an equitable distribution of resources for low-income housing around the state. Establishing a mandatory allocation for rural areas by statute would not allow the RAF to adjust for changing demands and market conditions annually. Tax credit allocations must respond to both a societal need for affordable housing and sufficient development activity to produce tax credit proposals. Setting aside a fixed percentage for rural proposals statewide could result in underserving metropolitan areas with significant needs for low-income housing. The RAF represents an objective, quantifiable instrument that can be modified incrementally and on the basis of public input. Any statutory provisions that limited the funds subject to the RAF could compromise the objectivity of the allocation process.

HB 2063 could have unintended consequences for the geographic distribution of low-income housing tax credits. By removing set-aside funding for at-risk development proposals from the RAF, the bill could make available roughly \$6 million in fiscal 2008 for development proposals involving the rehabilitation of low-income housing. This may give such proposals an advantage in high-demand areas and leave a small remainder for other applicants around the state. There is much annual variation in low-income tax credit development proposals, and setting aside 15 percent of funding prior to allocation could jeopardize funding in underrepresented areas of the state. Legislation providing for an initial set-aside should include provisions to ensure the equitable distribution of funding.

Notes

The **HRO digest** of SB 1908 appeared in Part One of the May 22 *Daily Floor Report*.

Requiring legislative approval of certain claims against the state

SB 2031 by Ogden

Effective June 15, 2007

SB 2031 provides a means for the Legislature to determine the extent to which the state waives its sovereign immunity with regard to a settlement of a claim or action against the state that requires an expenditure of state funds.

The attorney general or other attorney representing Texas may not enter into a settlement or a claim or action against the state without the consent or approval of the Legislature if the settlement:

- requires the state to pay total monetary damages in an amount greater than \$25 million in a state fiscal biennium; or
- commits the state to a course of action that would in reasonable probability entail a continuing increased expenditure of state funds over subsequent state fiscal bienniums.

Such a settlement entered into without the prior consent or approval of the Legislature will be void unless it expressly is conditioned on obtaining subsequent approval through a resolution adopted by both houses of the Legislature. The resolution can grant permission to sue the state and limit the relief to which a claimant is entitled or provide additional conditions on the permission to sue. An appropriation of state funds to pay or comply with a settlement does not constitute consent to or approval of the settlement. A resolution consenting to or approving a settlement does not and cannot require the Legislature to appropriate a particular amount for a particular purpose.

By September 1 of each even-numbered year, the attorney general must send to the lieutenant governor, the speaker of the House, and each member of the Senate Finance Committee and the House Appropriations Committee a report describing each pending claim or action that has been or could be settled in a manner that would require prior consent or subsequent approval by the Legislature.

Supporters said

SB 2031 would limit the types of settlements that the attorney general or another attorney representing the state could enter into without the approval of the Legislature. There is no current means of limiting the extent to which

the state waives its sovereign immunity with regard to a settlement of a claim that requires a significant expenditure of state funds. Requiring the Legislature to consent would provide checks and balances on the authority of the attorney general to negotiate settlements paid out of state funds.

The bill also would prevent a situation in which the attorney general committed the state to a settlement for which the Legislature was unwilling to appropriate funds. The Legislature is the client in these situations, and as such, the attorney general should consult and negotiate with the Legislature before agreeing to a large settlement on its behalf. The Legislature must pay the bill, so its consent is crucial for the settlement actually being honored by the state. Having the Legislature's agreement before the settlement was finalized would avoid recent appropriations-related problems and makes the entire process more efficient.

Opponents said

This bill would tie the hands of the attorney general or other attorneys representing the state. SB 2031 essentially would require a plaintiff to try his or her lawsuit in front of the Legislature when it was session. Meanwhile, during the interim, a settlement agreement would incur additional attorney's fees and interest due to the inability to obtain timely legislative consent. A better approach would be to require the Legislative Budget Board and the governor to consent to the attorney general's paying the settlement. This would avoid the complications with the timing of sessions and the difficulty of essentially trying cases in front of the Legislature.

Notes

The **HRO analysis** of SB 2031 appeared in Part One of the May 22 *Daily Floor Report*.



Health & Human Services

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Banning smoking in all workplaces and public places

HB 9 by Crownover *Died in the Senate*

HB 9 would have prohibited a person from smoking:

- in a public place or place of employment;
- within 15 feet of an entrance, operable window, or ventilation system of a public place or place of employment;
- in the seating area of an outdoor arena, stadium, or amphitheater; or
- in bleachers or grandstands for spectators at sporting or other public events.

As passed by the House, the bill would not have applied to:

- a private residence, except when used as a child-care, adult day-care, or health care facility;
- a hotel or motel room rented to a guest and designated exclusively as a smoking room;
- a private or semiprivate room in a nursing home or long-term care facility occupied exclusively by consenting smokers;
- a fraternal or veterans organization;
- a private club not open to the general public;
- a bingo hall or a premises that conducted charitable bingo;
- property owned or leased by a church, synagogue, religious society, nonprofit veterans organization, or fraternal organization;
- a tobacco shop;
- a private club that was not established for the sole purpose of avoiding compliance with the bill and did not employ anyone, unless the club was being used for a public function;
- a bar, if the operator of the bar provided health benefits coverage for each of its employees; or
- privately owned property designated as exempt.

Under the bill, a person who owned real property could have designated the property as exempt by posting conspicuously on the property a statement that smoking was permitted.

The bill would have defined “public place” as an enclosed indoor area the public is invited or permitted to enter. Examples would have included a bar, restaurant, theater, bus, polling place, hospital, public restroom, hotel lobby, and shopping mall.

A person in control of a public place or place of employment would have had specific requirements, including posting a conspicuous “NO SMOKING” sign, removing all ashtrays, and making a reasonable effort to request that any person known to be smoking in a prohibited area extinguish the tobacco product.

An employer subject to the bill could have offered to employees a smoking cessation program. An employer that offered such a program would have been entitled to credit against the state franchise tax for the cost of the program. To qualify for the credit, the program would have had to offer assistance to an employee through at least two attempts to quit smoking and could have been offered directly by the employer or through a provider.

The Department of State Health Services (DSHS) or a public health official could have enforced the provisions of the bill and inspected a public place. Under HB 9, a person could have filed a complaint concerning a violation with DSHS or a political subdivision of the state. In addition to other provided remedies, the attorney general, or a district, county, or city attorney, could have brought an action for injunctive relief to enforce these requirements.

A violation of the bill, including smoking in a prohibited place or failure by a person with authority to create an environment to prevent smoking in public or at work, would have committed a misdemeanor punishable by a fine of no more than \$100. If it were shown at trial that the defendant had a previous conviction for the same offense within one year, upon conviction the defendant would have been punished by a fine of \$500 or less, and a third offense would have been punished by a maximum fine of \$1,000.

HB 9 would have repealed Penal Code, sec. 48.01, which penalizes smoking in certain public places. It could not have been construed to permit smoking where it was restricted by other law. The bill would not have preempted or superseded a local ordinance, rule, or regulation adopted before September 1, 2007, by a political subdivision with a population of fewer than 50,000 people that prohibited or restricted smoking to a lesser degree. It would not have prohibited a political subdivision adopting a local ordinance, rule, or regulation after September 1, 2007, from prohibiting or restricting smoking to a greater degree than the bill.

The voters in a municipality could have voted, in the same manner as for a charter amendment, to allow its governing body to adopt a local ordinance that restricted or prohibited smoking to a lesser degree than the bill would have provided. The bill would have directed such an election be held on May 10, 2008.

Supporters said

HB 9 would protect the health of employees by eliminating smoking in all indoor public and private workplaces, including restaurants and bars, unless the bar operator provided all employees health benefits. A recent statewide poll shows that 66 percent of Texans favor a statewide comprehensive law to eliminate smoking in all indoor workplaces and public facilities, including public buildings, offices, restaurants, and bars. HB 9 would ban smoking in all of those places as well as seating areas of outdoor arenas and stadiums and grandstands at sporting or other public events.

A June 2006 report issued by the U.S. Surgeon General states that there is no risk-free level of exposure to secondhand smoke and that the only way to protect the population from this health hazard is to eliminate exposure completely. According to the National Cancer Institute, secondhand smoke kills 53,000 non-smoking Americans each year and is the third leading cause of preventable death. HB 9 would protect employees and the public at large from the dangers posed by second-hand smoke. Seventeen states have enacted smoke-free laws, and 14 other states, including Texas, are considering such legislation.

Opponents said

HB 9 would violate the rights of individuals and business property owners. Smoking tobacco is a choice made by millions of Americans, and this bill represents an assault on a legal product that has been part of Western culture for 500 years.

Small business owners, particularly restaurant and bar owners, in Texas cities that have adopted various smoking ordinances claim that their revenues have dropped as much as 30 percent due to smoking bans. This economic factor has affected not only owners but also employees, including waitresses and other restaurant and bar staff.

Notes

The **HRO analysis** of HB 9 appeared in the May 4 *Daily Floor Report*.

Cancer research funding

HB 14 by Keffer/HJR 90 by Keffer

Effective pending voter approval on November 6, 2007

HB 14, which would take effect if voters approve the constitutional amendment proposed by HJR 90, would dissolve the Texas Cancer Council and transfer all rights, duties, and obligations of the council to a new Cancer Prevention and Research Institute of Texas. The purpose of the institute would be to:

- create and expedite innovation in the area of cancer research enhancing the potential for a scientific breakthrough in the prevention of and cure for cancer;
- attract, create, or expand research capabilities of higher education institutions and other public or private entities that would promote a substantial increase in cancer research and in the creation of high-quality new jobs in Texas; and
- develop and implement the Texas Cancer Plan.

The institute could provide grants to public and private entities, medical research facilities, educational institutions, and collaborations to fund research into the causes, cures, and treatments for cancer. To receive a grant, the recipient would be required to have an amount of funds equal to at least one-half of the grant dedicated to the research for which the grant was received. Not more than 5 percent of total money awards could be used for facility construction and not more than 10 percent could be used for cancer prevention and control programs in any year.

The Cancer Prevention and Research Institute of Texas Oversight Committee would be the governing body of the institute. The Research and Prevention Programs Committee would perform grant application review and make recommendations to the oversight committee regarding the award of research, therapy, development, and clinical trial grants. Standards would be established requiring grant recipients to use Texas suppliers and historically underutilized businesses to the extent reasonably possible.

The Cancer Prevention and Research Institute would be funded by the issuance of up to \$300 million in general obligation bonds per year beginning January 1, 2008. Proceeds of the bonds could be used for the purposes of the institute and to pay the cost of issuing the bonds. The state could collect appropriate royalties from projects undertaken with grant funds. The Cancer Prevention and Research general revenue-dedicated account could contain

patent, royalty, and license fees received under contract. The institute could solicit and accept gifts and grants from any source.

The lung cancer advisory council would create a summary of the advantages, disadvantages, risks, and descriptions of all medically efficacious and viable alternatives for the treatment of lung cancer. The Department of State Health Services would make these summaries available to physicians for distribution to patients.

HJR 90 would amend the Texas Constitution to establish the Cancer Prevention and Research Institute of Texas and enable the Texas Public Finance Authority to issue general obligation bonds on behalf of the Cancer Prevention and Research Institute in an amount not to exceed \$3 billion, with no more than \$300 million in bonds authorized to be issued in a year, for grants for cancer research and operation of the institute.

Supporters said

HB 14 and HJR 90 would make Texas a global leader in cancer research and prevention. The Texas Cancer Council indicates that cancer is the number two killer of Texans, killing more than 35,000 Texans each year. Approximately 85,000 Texans are diagnosed with cancer annually. The estimated direct economic cost of cancer to Texas in 1998 was \$4.9 billion and estimated indirect costs the same year were \$9.1 billion.

Texas already has the infrastructure in place to support cancer research, but needs more funding and direction to encourage collaboration to better leverage its existing infrastructure. HB 14 and HJR 90 would accelerate landmark discoveries in cancer research and allow scientists and practitioners to translate these discoveries into practical tools and techniques to treat and prevent cancer.

Grants through the Cancer Prevention and Research Institute would infuse the cancer research and treatment community with up to \$300 million each year. Total research spending would far exceed this level, because grant recipients would be required to dedicate funding equal to at least half the grant reward. This contribution also would

legitimize the research since grant recipients would share the risk of the undertaking. The total investment from both the state and grant recipients not only would enhance cancer research, but also would attract private businesses to emerging Texas technology clusters. This would create more jobs in Texas as companies capitalized on local intellectual resources.

Recommendations for the awarding of grants would be directed by the professional expertise of the oversight and research and prevention committees. The oversight committee would create standards that would balance Texas' economic interest in contracting for intellectual property rights and royalties with the need to provide incentives to grantees to conduct worthwhile research. Bond proceeds would be subject to the appropriations process so that the Legislature could maintain its role as the steward of this large sum of taxpayer dollars.

HB 14 and HJR 90 would not require that bonds be utilized, but this legislation would provide the option to issue bonds to pay for the Institute in years during which the Legislature found it most prudent to do so. If the general obligations bonds were utilized, the debt service on the bonds for the Cancer Prevention and Research Institute would be a small price to pay for the ground-breaking advances in cancer research that could occur. Much of the financing cost also would be offset by new jobs generated in Texas, incoming royalties, and the decreased direct and indirect costs of cancer that resulted from the discovery of breakthrough medical advances.

HB 14 and HJR 90 would lead to such breakthroughs not because the state government singularly was performing cancer research but rather because Texas would provide a sustained source of funding fostering a collaborative environment for both public and private entities to advance the field. Given that the availability of federal cancer funding is declining, making Texas the epicenter of a collaborative cancer research environment would optimize the use of cancer research funds to make unprecedented advances in cancer research. This focused investment has greater potential to facilitate advances than an environment in which diverse bodies vie for independent funding.

Opponents said

While cancer research doubtless is a worthwhile undertaking, medical research should be left in the hands of private organizations. Creative research is neither the

role nor the talent of government. There are countless other pressing needs in this state that represent more appropriate uses of state general revenue and pose less of a gamble with taxpayer dollars, such as insuring Texas children and reducing the waitlist for community services for the disabled. Expenditures in these and other areas will have a more predictable and measurable influence on the welfare of Texans.

Other opponents said

The state should demonstrate that cancer research is a priority by funding the Institute with general revenue in the state budget process rather than by issuing bonds. Long-term financing costs could approach \$1.6 billion. Legislatures over the next 30 years could be obligated to repay financing costs in lieu of funding other state priorities such as education, transportation, or health and human services issues. If general revenue was used instead, the state would pay fully its commitment to cancer research in only ten years. In addition, royalties and other funding generated by the Institute could assist in paying for the research on a cash basis. While the constitutional authorization would not require that bonds be issued to finance cancer research, the state has demonstrated over the years that if the opportunity exists to issue bonds to finance a project rather than use general revenue, bonds most likely will be issued.

The amendment would assure a stronger impact on cancer research if bond proceeds could be used by the Institute without appropriation. The amendment already would establish the permissible use of Institute funds. Having the Legislature micromanage cancer research funding allocations would not be beneficial and could risk that legislators may attempt to influence appropriations for the Institute to fund their pet projects.

Notes

The **HRO analysis** of HB 14 appeared in Part Five of the *May 7 Daily Floor Report*, and the analysis of HJR 90 appeared in the *May 9 Daily Floor Report*.

Children's Health Insurance Program eligibility revisions

HB 109 by Turner

Effective June 15, 2007

HB 109 establishes Children's Health Insurance Program (CHIP) income eligibility levels using net family income rather than gross family income. The definition of net family income allows a reduction for child-care expenses for determining income eligibility.

The period that a child remains eligible for CHIP benefits increases from six months to a period not to exceed 12 months. By September 1, 2008, the eligibility for children in families whose initial eligibility was established with a net family income in excess of 185 percent of the federal poverty level still will be verified at six months. An electronic verification method may be used if one is available and appropriate. If the net family income exceeds eligibility limits at the six-month verification, the child can be disenrolled from CHIP after the Health and Human Services Commission (HHSC) provides the family with proper notice and the opportunity to establish eligibility.

HB 109 limits the 90-day waiting period that previously applied to all children to only those children who had health insurance during the 90 days prior to applying for CHIP coverage. The family allowable asset limit for CHIP eligibility increases from \$5,000 to \$10,000. The value of vehicles that may be exempted from the asset calculation increases as well.

HHSC will contract with community-based organizations to conduct community outreach promoting knowledge of and enrollment in child health programs. The outreach campaign will include school-based clinics and a toll-free number. Outreach materials must be written in Spanish and English.

Supporters said

HB 109 would restore many of the eligibility standards that were in place when CHIP began in Texas in 1999, making health coverage available to more of Texas' uninsured children. It would reverse some of the negative impact of CHIP policy changes enacted in 2003, which resulted in an enrollment decline of an estimated 152,000 children, according to HHSC. Lack of insurance leaves families no choice but to seek care at local emergency rooms, which is more costly and provided at taxpayer expense. Uninsured children often go without vital preventive care.

Period of eligibility. Extending the CHIP eligibility period from six to 12 months would ensure that children in need received continuous health care coverage. The state has experienced poor performance from the CHIP eligibility system, and processing errors at re-enrollment have led to eligible children being disenrolled. Increasing eligibility to 12 months would decrease the CHIP application-processing workload by half, eventually leading to decreased error rates.

It is more cost effective to serve a child on CHIP than on Children's Medicaid because the federal match rate is more favorable for CHIP. Verifying eligibility at six months causes the state to move those identified as qualifying for Children's Medicaid more quickly to that program than if eligibility were determined at 12 months. In addition, administrative costs are higher when verifying eligibility twice a year. Finally, the majority of children who leave CHIP become uninsured, which ultimately increases the population of children with poorer health outcomes and greater needs for emergency care. HB 109 appropriately would limit initial six-month eligibility verification only to those at the higher end of the income eligibility range.

Assets test. HB 109 would align the asset limits on the assets test for determining CHIP eligibility with values that are more reasonable for a fiscally responsible family at 150 percent to 200 percent of the federal poverty level. The current assets test limits were based on the food stamp standards created for populations at 100 percent or less of the poverty level. A higher-income family making prudent decisions to have a financial safety net or maintain reliable vehicles can risk losing CHIP coverage due to the low assets test limits.

Income calculation. HB 109 appropriately would add an income disregard for child-care expenses similar to one that already exists in the Medicaid program. Child care is a large expense that effectively can reduce a family's disposable income to the income levels of other families who qualify for CHIP. In 2007, a family of four at 200 percent of the federal poverty level has an income of \$41,300, which is insufficient to support the cost of private insurance. Many families do not qualify for CHIP because they have incomes slightly above this level yet need child care in order to hold jobs and support their families.

Ninety-day wait period. HB 109 would give families much needed health care coverage during the first 90 days following the establishment of eligibility. The original policy was intended to avoid “crowd out” of private health care benefits to prevent people from opting to use CHIP rather than private or employer health insurance. The 2003 change made Texas the only state that has required all children to wait 90 days for coverage. This wait period prevents coverage for children who have never been insured as well as for newborns in need of infant care.

Opponents said

The CHIP reforms implemented in 2003 were sound public policy. While Texas has yet to use fully its federal CHIP funding, caseloads will continue to increase under the current eligibility requirements and eventually reach the funding ceiling. The time will come when CHIP funding is limited, and it would be prudent now to retain policies ensuring that CHIP benefits are used only as a safety net for those most in need.

Period of eligibility. The eligibility period should not be extended to 12 months. Maintaining the six-month eligibility period would provide the best stewardship of state funds because a family’s financial circumstances can change drastically over the course of a year. The state is working to resolve CHIP application-processing issues, and timeliness rates for application processing have improved. The state should not determine the eligibility period based upon the assumption that processing errors will continue to occur. Recertifying eligibility at six months would ensure the state’s limited resources were used only for those truly eligible for benefits.

Assets test. As a safety-net program, CHIP should not be open for abuse by families trying to protect their assets while relying on the government for assistance with health care. In addition, a family that experiences a short-term loss of income should not receive CHIP funds if they have large amounts of assets that could pay for necessary health-care costs. These sorts of situations unfairly burden all taxpayers, including people receiving CHIP benefits. The family allowable asset limit should not be increased to permit such abuse. In addition, there are a variety of programs that promote savings and are exempted from the assets test, including certain retirement accounts, prepaid burial funds, and certain savings funds for higher education.

Income calculation. In 2007, a family of four making \$41,300 annually would be eligible for CHIP. A variety of private health-care options would be affordable for a family above this income level if a consumer were willing to do the research for a plan best-suited to that family’s needs. The continuation of the use of gross family income would be the fairest means of determining eligibility.

Ninety-day wait period. The current 90-day wait for all CHIP applicants to receive benefits should be maintained to avoid “crowd out” of other available insurance. The 90-day wait period provides a family an opportunity to obtain a reasonable private insurance option. In addition, many public and private sector employers also have 30- to 90-day wait periods for health insurance coverage. If CHIP eliminated the 90-day wait, such individuals might opt to obtain CHIP to receive immediate benefits rather than wait for their employer insurance to take effect. The 90-day waiting period discourages people with other available coverage from taking public slots.

Other opponents said

Assets test. More children in need of health care could be served through the elimination of the assets test. Texas and Oregon are the only states that have implemented assets tests. While it does prevent some abuse, the assets test, regardless of how high limits are set, causes children in need to lose CHIP coverage. The mere threat of losing coverage is a disincentive for families to make the responsible decision to save. A child should not lose CHIP benefits because his or her family was saving for college or for a better home.

Income calculation. All income disregards in alignment with those allowable in Medicaid should be restored. This would allow families to deduct child support payments and work-related expenses up to \$120 per month in the income calculation. These are reasonable deductions, without which a family’s disposable income could appear inflated.

Notes

The **HRO analysis** of HB 109 appeared in the April 3 *Daily Floor Report*.

Preventing HPV vaccine from being required for admission to school

HB 1098 by Bonnen
Effective May 8, 2007

HB 1098 establishes that immunization against human papilloma virus is not required as a condition for admission to any elementary or secondary school. It preempts any contrary executive order issued by the governor and prevents the executive commissioner of the Health and Human Services Commission (HHSC) from adding HPV vaccination to the list of vaccinations required for school admission. The bill also requires HHSC to provide educational materials about the HPV vaccine to schools to distribute to parents or guardians during the immunization schedule. These provisions expire January 11, 2011.

Supporters said

HB 1098 is necessary to address an executive order from the governor that prematurely mandated that young girls receive an HPV vaccine. On February 2, 2007, Gov. Perry issued Executive Order No. RP-65, which ordered the health and human services executive commissioner to mandate vaccination against human papilloma virus (HPV) for all female children before their admission to the sixth grade. However, too many questions remain about this vaccine for its use to be made mandatory for young girls. The vaccine has been tested for only five years. It typically takes 10-15 years for HPV to develop into cervical cancer, so five years is not long enough to determine whether the vaccine will be effective. Also, there still are unanswered questions about whether this vaccine would provide lifelong immunity, what side effects the vaccine might produce, and the effect of the vaccine on pregnant women. Until those questions have been answered, it would be appropriate for the Legislature to exercise its judgment and decide not to mandate the vaccine.

Mandating HPV vaccination is unnecessary because other measures would be as effective in preventing cervical cancer – such as education and early diagnosis, along with voluntary immunization as the vaccine is proven. While most women will be exposed to HPV, most HPV infections are spontaneously cleared from a woman's immune system. The rates of cervical cancer have decreased over the last 50 years, in part because of the increasing use of pap smears to diagnose pre-cancerous cells and improvements in medical technology. The focus should continue to be on education and prevention with regular pap smears, rather than on mandatory vaccination with a yet-to-be-proven vaccine.

The Legislature in 2005 promoted these goals by enacting HB 1485 by Delisi, establishing the Texas Cervical Cancer Strategic Plan to diagnose and prevent HPV infection and eliminate mortality from cervical cancer by 2015, and HB 1485 by Thompson, requiring health benefit plans to cover screening tests to detect HPV infection and cervical cancer.

Mandatory immunization against HPV would be inappropriate because mandatory vaccination typically is used for diseases spread by casual contact, not for sexually transmitted diseases. While hepatitis is spread both sexually and more casually, the vaccine against that disease was not mandated in Texas until 15 years after it was licensed.

HB 1098 would not prohibit anyone from receiving vaccination against HPV voluntarily. It simply would block mandatory HPV vaccination for all young girls as a prerequisite for attending school.

The bill would protect the right of parents to control the upbringing of their children. Executive order RP-65 would have undermined parents' control of their children's health care. HB 1098 would allow parents to educate themselves and their children about HPV and the vaccine at their discretion and to make private decisions about whether to vaccinate their children.

Opponents said

HB 1098 would undermine efforts to provide effective health care to Texas women for a preventable cancer. The currently available HPV vaccine, Gardasil, is effective on the strains of HPV that cause 70 percent of cervical cancers. Although most HPV infections are spontaneously cleared from a woman's immune system, the infections that do not spontaneously clear could be the strains of HPV that cause cervical cancer. Pap smears can be misinterpreted by physicians, and they have a false negative rate that may be as high as 30 percent. Although the HPV vaccine is new, it has undergone rigorous testing with peer review from the federal Food and Drug Administration. Even if the immunity is not for a lifetime, the need for booster shots to update immunity to the virus would be much like what is required for some other vaccinations. There is no evidence that the vaccine has a negative effect on pregnancy or future fertility.

If the vaccine is not required, girls from low-income families or whose families are unaware of the vaccine could be less likely to be vaccinated. In Texas, cervical cancer rates are highest among Hispanic women, and mortality rates are highest among African-American women and in rural counties, according to a report from the Department of State Health Services.

In addition, the executive order provides for parents to opt out of the HPV vaccine requirement. The opt-out provision would be no more onerous than existing opt-out provisions for other vaccines and would allow parents or guardians to file the forms over the Internet.

Mandatory vaccination has been used in the past for diseases that can be spread sexually. For example, Hepatitis A vaccination and Hepatitis B vaccination are mandatory. Hepatitis B can be transmitted through blood or infected bodily fluids. Mandating vaccination is one of the best ways to control disease. Incomplete vaccination of a person or population can cause vaccine- and drug-resistant strains of viruses to develop.

HB 1098 would foreclose the option of further discussion on the merits of mandating the HPV vaccine. Rather than just preempting Gov. Perry's executive order and the agency rulemaking process, the bill would, unlike for any other disease, prohibit state health officials from mandating HPV vaccination, regardless of the demonstrable health benefits, until 2011. Whether mandated by executive order or legislative directive, the HPV vaccination would save thousands of lives, and state officials should be allowed to require it like other vaccinations against infectious disease.

HB 1098 also would impose upon HHSC an unfunded mandate by requiring it to disseminate educational information but not providing additional funding to accomplish this goal. HHSC's budget already is stretched by other priorities and does not have available resources to produce brochures and documents effectively. Also, educational materials are most effective at outreach when they are targeted to specific groups along with clear mechanisms for informing the public. Brochures simply distributed to parents on a complex medical issue would not be effective in educating parents. The materials would be more effective if coupled with a mechanism to direct questions to medical professionals.

Other opponents said

This bill would not go far enough to prevent government intrusion into the health care decisions of its citizens. Government should not be able to mandate vaccinations. Through education efforts, most parents would choose to have their children vaccinated when the vaccine has been proven safe and effective, but they should be able to weigh the risks and make that choice themselves.

Notes

The **HRO analysis** of HB 1098 appeared in the March 13 *Daily Floor Report*.

HB 1379 by Deshotel, which requires development of educational materials and programs on HPV, is effective on September 1, 2007.

Monitoring and update of health and human services eligibility systems

HB 3575 by Rose

Effective June 15, 2007

HB 3575 prescribes goals for the enhanced health and human services eligibility system, a system that consists of the Texas Integrated Eligibility Redesign System (TIERS); the System of Application, Verification, Eligibility, Referral, and Reporting (SAVERR); and integration and delivery processes and practices used for health and human services benefit programs. Goals for the enhanced eligibility system include:

- increasing the quality of and client access to services provided through the programs;
- implementing more efficient business processes to reduce application processing times and staff workloads;
- implementing simplified application and enrollment processes;
- enhancing the integrity of and reducing fraud in benefit programs; and
- ensuring compliance with applicable federal law and rules.

HB 3575 requires the Health and Human Services Commission (HHSC) to develop a transition plan to meet the goals of the enhanced eligibility system by January 1, 2009. The State Auditor's Office (SAO) will establish or contract for an independent validation and verification (IVV) program for the eligibility system during the development of the transition plan. The IVV program will allow for the determination of whether the goals for the transition plan and enhanced eligibility systems are being met, what actions are necessary to achieve these goals, and whether the eligibility system is progressing toward becoming fully functional relative to the needs of benefit-eligible Texans.

HB 3575 establishes an HHSC eligibility system legislative oversight committee to support the commission's implementation of the enhanced eligibility system. The committee consists of seven members, including the chairs of the Senate Health and Human Services and House Human Services committees, two members of the Senate appointed by the lieutenant governor, two members of the House appointed by the speaker, and one member appointed by the governor. The committee will review information and recommendations from the public, HHSC, SAO, and the Department of Information Resources quality assurance team to make recommendations to the Legislature. The

oversight committee also will monitor and regularly report to the Legislature on the effectiveness and efficiency of the implemented enhanced eligibility system.

Each contract with the commission or a health and human services agency that requires providing call center services or written communications related to call center services must include performance standards that measure the effectiveness, promptness, and accuracy of the contractor's oral and written communications with people of limited English proficiency.

Supporters said

HB 3575 would provide the planning and oversight necessary to ensure that performance problems in the state eligibility system were resolved without further harm to Texas benefit recipients. During the Accenture TIERS development contract, a variety of issues arose, including the contractor's failing to deliver certain technology capabilities, which led to a processing backlog of applications and renewals. These delays affected the issuance of benefits to eligible Texans and caused Texas to fall below federal timeliness standards. In addition, many eligible people mistakenly were denied benefits. The integrated eligibility system had only internal testing and quality control processes.

HB 3575 would institute three major mechanisms of enhanced quality control and oversight. HHSC would identify the enhanced eligibility system as a major information resources project in HHSC's biennial operating plan to qualify the project for review by the state quality assurance team. The legislative oversight committee would monitor the process and recommend further statutory change before the next session. Finally, the project would be reviewed by an IVV program, which would ensure an independent verifications process. This would add general state, legislative, and independent oversight to the enhanced eligibility system.

The bill would not address outsourcing requirements because in focusing on general oversight functions, many levels of authority would have oversight concerning whether HHSC contracted for the appropriate balance of state and outsourced responsibilities. The bill does not need to address

staffing issues because the fiscal 2008-09 budget would authorize HHSC to augment HHSC staff in response to any decision to use fewer contractor staff.

Opponents said

While HB 3575 would take many positive steps toward resolving issues with the Texas eligibility system, it would fall short of incorporating all the unanimous recommendations of the House Human Services Subcommittee on Integrated Eligibility and TIERS Implementation. For example, subcommittee recommendations that included performance measures of “full functionality” were not included in the bill.

The bill does not include subcommittee recommendations to establish clear limitations for outsourcing processes that involve decision making. While outsourcing is appropriate in creating technology, it should be limited to standardized, measurable tasks when an outsourced employee communicates with benefit recipients.

Problems with dividing responsibilities between state and outsourced staff were a main driver of many of the issues that emerged during the first TIERS pilot rollout.

Finally, HB 3575 would not address the need for a staffing analysis to ensure that staffing levels were appropriate to maintain program integrity. The bill should require a staffing analysis and should require HHSC to demonstrate that the commission still could reach performance measures with any proposed reduction in staff. These measures would be a safeguard against the staff shortage and subsequent scarcity of policy knowledge that occurred after HHSC informed too many state staff that they would lose their jobs following the signing of the Accenture contract.

Notes

The **HRO analysis** of HB 3575 appeared in Part Two of the May 8 *Daily Floor Report*.

Nursing home quality assurance fee

HB 3778 by Rose Died in Senate Committee

HB 3778 would have collected a quality assurance fee (QAF) from nursing homes, convalescent homes, and related institutions. Exemptions from imposition of the nursing facility QAF would have included:

- state-owned veterans' nursing facilities;
- entities that provided multiple services on a single campus and operated under a continuing care retirement community certificate of authority; and
- entities at which the combined patient days of service provided to independent and assisted living residents exceeded the patient days of service provided to nursing facility residents.

The Health and Human Services Commission (HHSC) would have assessed the QAF on a per patient, per day basis in an amount that would not have produced annual revenues equaling more than 5.5 percent of the facility's total annual gross receipts. A nursing facility could not have listed the QAF as a separate charge on a patient's billing statement or indirectly charged the QAF to a patient.

HHSC could have used the money from the dedicated general revenue QAF account together with federal matching funds to offset an institution's allowable Medicaid expenses and to increase reimbursement rates paid under Medicaid to institutions. If for any reason it was determined that QAF funds could not draw down federal matching dollars, HHSC immediately would have ceased collection of the QAF and would have returned any collected QAFs to the appropriate institutions.

Supporters said

HB 3778 would allow Texas nursing facilities and other state health care providers to capitalize upon a QAF collected from nursing facilities similar to legislation enacted in at least 30 other states. Texas already has successfully implemented a QAF on intermediate care facilities for the mentally retarded, and the bill would confer the same benefits on nursing facilities and the health care industry at large.

The state would use the QAF to draw down matching federal funds, first apportioning funds back to nursing facilities and then providing these facilities and other Medicaid providers with rate increases. Provider rate

increases desperately are needed to expand the number of providers taking new Medicaid patients before the state reaches a critical provider shortage. The QAF would provide an alternative funding source for rate increases that would not require the use of existing general revenue.

Assuming Texas received the appropriate federal waivers, HB 3778 would prohibit the collection of QAFs from continuing care retirement communities and other facilities that predominately provided services to independent and assisted living patients. This would minimize the number of facilities that would pay the QAF without being fully reimbursed for their contribution.

The imposition of QAFs is an all-or-nothing venture, because federal regulation governing permissible health care-related taxes would not allow a tax to be imposed only on Medicaid beds. While this federally imposed limitation inevitably would create some cost to private pay facilities, this fee would serve the greater good of the nursing home community and the Medicaid health care community at large. The bill would prohibit passing the QAF on to nursing facility residents, so no private payor would be adversely affected.

Opponents said

Imposition of the nursing facility QAF proposed in HB 3778 would represent yet another example of the state's unwillingness to support important services through the use of existing general revenue. The QAF would place a monthly fee on all eligible nursing-home beds, with the exception of certain facilities exempted through federal waiver. This QAF assessment would include nursing homes that did not take Medicaid patients.

Forty-nine out of Texas' 1,100 nursing homes contain a significant number of private-pay beds, and 22 contain purely private-pay beds. These homes are not connected with any health care system that could benefit from QAF reimbursements. A QAF on these nursing homes would be a "granny tax" passed on by the nursing home to elderly, private payors. Even though facilities could not pass on the QAF to a private payor directly on a billing statement, the private facility's increased costs inevitably would cause a private payor's bills to increase. Such increases could be masked as cost increases related to other facility overhead.

Notes

The **HRO analysis** of HB 3778 appeared in Part One of the May 7 *Daily Floor Report*.

Revisions to the Medicaid program and access to health care

SB 10 by Nelson

Effective September 1, 2007

SB 10 revises certain Medicaid programs and requires the initiation of Medicaid-related studies and pilot programs. An eight-member Medicaid Reform Legislative Oversight Committee will facilitate Medicaid reform efforts, the process of addressing uncompensated hospital care, and the establishment of programs addressing the uninsured.

Access to health care. The Health and Human Services Commission (HHSC) will promote access to federally qualified health centers or rural health clinics. In contracts with health maintenance organizations, HHSC will establish outcome-based performance measures and incentives designed to increase recipients' access to appropriate health services. HHSC directly will supervise and administer the medical transportation program providing non-emergency transportation services to those who are eligible for HHS programs and have no other means of transportation. Former foster care youth enrolled in an institution of higher education may receive Medicaid benefits up to the age of 23. Individuals preferring to enroll in a group health benefit plan may opt-out of Medicaid coverage, and HHSC will pay the individual's share of required premiums up to the estimated total Medicaid cost. The individual must pay all deductibles, co-payments, or other cost-sharing obligations.

With federal approval, Texas will create a health opportunity pool trust fund to offset hospital uncompensated care costs, reduce the number of persons in Texas who do not have health benefits, and maintain and enhance the community public health infrastructure provided by hospitals. The fund will contain federal money from supplemental hospital payment programs, state appropriated funds, gifts, grants, and donations.

One or a group of counties may establish regional or local health care programs to provide health care benefits to the employees of small businesses. In addition to contributions from the employers and employees, state or other funds collected by the program's governing body may be used to pay program costs.

Client-centered revisions. If cost-effective and feasible, HHSC will implement a health savings account pilot program to encourage health care cost awareness and promote appropriate utilization of Medicaid services among volunteer participants. The HHSC may seek a federal waiver to implement tailored benefit packages customized to meet the health care needs of recipients

within defined categories of the Medicaid population. If cost-effective and feasible, certain Medicaid recipients may designate a primary care provider to provide the recipients' initial and primary care and initiate referrals to other health care providers. Exceptions will be made to limitations on benefits provided under certain home and community-based waiver programs if further benefits are necessary to protect patient health and safety. HHSC will undertake initiatives to encourage managed care organizations to provide more services to improve the health status of plan enrollees. The bill establishes a means of provider selection and access for Medicaid recipients to receive eligible eye health care services.

Prevention. HHSC will develop and implement a pilot program in one region under which Medicaid recipients receive incentives to lead healthy lifestyles. HHSC may provide guidance to Bexar County in establishing a pilot program to prevent the spread of infectious and communicable diseases, which may include an anonymous needle exchange program. Women eligible for Medicaid coverage to treat breast or cervical cancer will be eligible for coverage for screenings for these cancers.

Technology. HHSC will contract for an acute care Medicaid billing coordination system and implement fraud detection and deterrence measures proven effective by a study. HHSC may permit, facilitate, and implement the use of health information technology to allow for electronic communication among HHSC, operating agencies, and participating providers. A pilot program will provide health information technology for use by primary care physicians providing services to Medicaid recipients. HHSC may expand systems such as health passport technology.

Hospital care. The executive commissioner will establish a work group on uncompensated hospital care to assist in implementing an uncompensated hospital care reporting and analysis system and studying the impact of standardizing the definition of uncompensated care and the computation of its cost. HHSC may require a Medicaid recipient who chooses certain high-cost medical services provided through an emergency room to pay a share of the cost of the service if the recipient does not require the treatment. The hospital may provide the recipient with a referral to a non-emergency provider who can provide the service without co-payment.

Demonstrations and studies. HHSC may implement a demonstration project to determine whether paying an enhanced Medicaid reimbursement rate to a physician-centered nursing facility specializing in geriatric medicine improves resident health and results in cost savings. Studies will be conducted on reducing reliance on Medicaid through offering tax and other incentives to employers to provide health and long-term care insurance; the cost-effectiveness of implementing an integrated Medicaid managed care model for the aged, blind, disabled, or chronically ill; providing child health passports to children receiving Medicaid or enrolled in the Children's Health Insurance Program (CHIP); increasing the availability of small employer health plans; and increasing the number of medical residency programs, medical residents, and physicians practicing medical specialties in Texas.

Supporters said

SB 10 would optimize funding available for health coverage while maintaining consumer choice and protections. According to the U.S. Census Bureau, Texas had the highest rate of uninsured in 2005 at more than 24 percent. This high level of uninsured not only leads to poor health outcomes for individuals, but also contributes to the high cost of uncompensated care in hospital emergency rooms.

The bill would allow for experimentation with different health care program models without undermining fundamental principles of the Medicaid program or putting vulnerable clients at risk. The bill would implement consumer protections for enrollees in experimental approaches to delivering health care services, including voluntary participation on the part of enrollees, consumer counseling, and the ability to return to more traditional means of service delivery if the consumer was not happy with a particular health care alternative.

SB 10 would implement measures to reduce overall state health care spending. By focusing on attaining preventive care and encouraging healthy behaviors, the overall demand for health care services would decrease. More individuals could access health care through increased availability of premium assistance funds and encouraging participation in employer-based health plans. Such initiatives also would reduce the burden on hospitals, which are the safety net used to defray the costs of uncompensated care. The bill would promote wise consumer decision-making in health care spending through health savings accounts and tailored benefit packages. SB 10 would modernize service provision through enhanced technologies that would

protect patient confidentiality, reduce fraud, and create a more efficient and cost-effective health care system. The legislative oversight committee would provide continuity and direction for the implementation of Medicaid revisions by making recommendations that programs with greater potential be revised and successful programs be expanded.

The local and regional health care programs permitted in SB 10 would allow for a significant reduction in the number of uninsured working for small businesses. Many small businesses and their employees cannot afford the high cost of health plans without assistance. This lack of subsidy is why small business health care cooperatives alone are not as effective as supplementing employer and employee contributions with public, private, or non-profit funds. Encouraging participation in such programs would reduce reliance on Medicaid and uncompensated care.

It would be appropriate that HHSC provide guidance to Bexar County in its disease management pilot program, including a needle exchange program. Studies have demonstrated that such programs do not increase drug use, yet they reduce the spread of diseases such as hepatitis and HIV/AIDS. Needle exchange programs also provide an access point for health care professionals to connect drug abusers with treatment programs. Texas is the only state that has yet to support a needle exchange program.

Opponents said

The bill would implement many different types of reforms at once on both a state and local level without a template for how these various options should fit together. This could lead to different levels of funding, eligibility standards, and levels of benefits being provided in different areas of the state. Such variance in levels of coverage could lead to inequities in poorer areas of the state. These disparities would be counter to the objectives of the Medicaid program, and Texas should implement the reforms in a more coordinated fashion.

The local and regional health care programs that SB 10 would permit could allow too much of the financial burden of these programs to fall on state government if individuals and employers refused to proportionally increase their level of program contribution to align with the rising cost of health care. The state should allow more time to demonstrate if small business health care cooperatives enabled by 2003 legislation provide a viable option to promote affordable, group-rate health care before the state permits multi-share programs that discourage self-reliance among small businesses and their employees.

The bill should not permit HHSC to assist Bexar County in the creation of a needle exchange program. In effect, such programs condone and facilitate drug abuse. Any funds directed towards the drug addicted should focus on treatment and encouraging abstinence from illegal drug use.

The language in the bill should be tightened to ensure that any reforms implemented would protect state funds. For example, the bill would direct HHSC to implement any methods determined effective to strengthen fraud detection and deterrence. This provision should require that HHSC first determine that projected savings from Medicaid fraud detection would be greater than the cost to implement the technology.

Notes

The **HRO analysis** of SB 10 appeared in Part One of the May 21 *Daily Floor Report*.



Higher Education

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Determination of resident status of students by public universities

HB 159 by Zedler
Died in the House

HB 159 would have repealed current law allowing a person to be classified as a resident for purposes of college tuition on the basis of having graduated from a public or private high school and having maintained a residence in Texas continuously for the three years preceding graduation. Only those who had lived in Texas for one year prior to the academic term in which they were enrolled in a higher education institution and whose parents had lived in Texas for one year prior to the academic term in which the dependent was enrolled would have been classified as a resident for tuition purposes.

The bill would have eliminated the option for persons who were not citizens or permanent U.S. residents to submit as information required to establish resident status an affidavit stating that the person would apply to become a permanent resident of the United States upon becoming eligible to apply. HB 159 also would have permitted universities to reclassify resident students as nonresident students if they had qualified for residency status under the provisions that would have been eliminated by the bill, if the student otherwise would not have been eligible to be classified as a resident.

Supporters said

HB 159 would help right a wrong allowed under current law. Granting resident tuition to illegal immigrants provides an incentive for illegal behavior. There is no other circumstance in the United States where people are rewarded for breaking the law. It is unfair to allocate limited state resources to illegal immigrants who are breaking the law – especially at a time when many American citizens cannot afford to attend college.

The current law is in violation of sec. 1623 of the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C.) and needs to be repealed. Offering in-state tuition to illegal immigrants violates federal law because it discriminates against U.S. citizens and legal immigrants. The federal law says that a state is not permitted to treat non-residents who are U.S. citizens worse, with respect to college benefits, than it treats illegal immigrants who are physically present in the state. As a result, many illegal immigrants are paying in-state tuition rates to attend Texas colleges and universities, while

U.S. citizens who do not reside in Texas are required to pay higher, out-of-state tuition rates. Such laws circumvent federal requirements by simply not asking students whether they are in the United States legally. Students should have to prove they are citizens or legal residents before receiving in-state tuition eligibility.

Opponents said

In 2001, the Texas Legislature, with the support of the governor, recognized that it was good public policy to further the education of immigrants who already were integrated into local communities and wanted to fully participate and contribute to the Texas economy. While recognizing that immigration is an emotional issue, it still is good policy to support the education of Texas resident students regardless of their citizenship status. Most children of undocumented immigrants are in the United States to stay, so society benefits by providing them access to higher education that results in increased earnings and taxes and in lower crime and poverty rates. Denying in-state tuition to undocumented students would not curtail the population of illegal immigrants. The law encourages them to change their status from illegal to legal, which is a step in the right direction.

Claims that the law violates federal immigration laws because it does not offer the same tuition rates to U.S. citizens and nationals who live outside Texas are unfounded. Under Texas law, undocumented students must graduate from a Texas high school and live in Texas for at least three years before applying to college. Other residents establish Texas residency in only one year, so the requirements imposed on undocumented students are more stringent. A suit brought against a similar law in Kansas was dismissed after a judge ruled that the plaintiffs could show no potential harm or injury to themselves because their own non-resident status would not change whether or not resident tuition applied to undocumented immigrants.

The 1982 U.S. Supreme Court decision in *Plyler v. Doe*, 457 U.S. 202, 228-30 (1982), requires states to provide a free K-12 education to children regardless of immigration status, paving the way for undocumented children to reap the benefits of public education. According to the Texas Education Agency, it costs about \$100,000 to educate

one student from kindergarten through 12th grade. This substantial investment made by Texas taxpayers is lost if students cannot go on to college once they graduate from high school.

Without the opportunity to qualify for in-state tuition, many undocumented students could not obtain an affordable college education and an entire class of law-abiding students would graduate high school without being able to plan for the future. Undocumented students who have grown up in the United States and graduate from American high schools should not be punished for the actions of parents who brought them illegally to this country. Until Congress addresses the complex issues surrounding immigration, the young people caught in the crossfire should continue to have access to higher education through affordable tuition rates.

Other opponents said

The bill negatively could affect permanent residents of Texas and U.S. citizens because students who were living legally in Texas with family members other than legal guardians, such as grandparents, would lose their claim to residency. Likewise, if a student's family moved out of state and the student wanted to stay in Texas to attend college, the student would lose a claim to residency because minors are dependent on their parents and cannot establish residency on their own. Even students who had lived in Texas their entire lives could be faced with having to pay out-of-state tuition.

Notes

The **HRO analysis** of HB 159 appeared in the May 9 *Daily Floor Report*.

High school curriculum requirements for higher education admission

HB 3826 by Morrison
Effective June 15, 2007

To qualify for admission to a general academic institution of higher education in Texas, **HB 3826** will require, beginning with admissions for the 2008-09 academic school year, all high school students who graduate from a public or an accredited private high school in Texas to:

- graduate under the recommended or advanced high school curriculum or its equivalent;
- satisfy ACT's college readiness benchmarks; or
- score at least 1,500 on the SAT exam.

HB 3826 will require students graduating with a grade point average in the top 10 percent of their high school class to complete the recommended or advanced high school curriculum, or its equivalent, to qualify for automatic admission to a Texas university. In addition, the bill requires students who graduate in the top 25 percent of their high school class and apply to a university with an optional automatic admissions policy to satisfy the same requirements. The children of certain public servants killed in the line of duty also qualify for automatic university admission if they meet certain minimum academic requirements.

Supporters said

HB 3826 would allow Texas to take the next step toward fully implementing the curriculum recommendations in "Closing the Gaps," the state's higher education plan, by requiring all students to graduate from high school under the recommended or advanced high school program in order to be eligible for admission to Texas universities. Texas has experienced roughly 3 percent growth each year in the number of students graduating under the recommended high school program (RHSP), and more than 80 percent of all Texas high school students graduate under these requirements. In fact, a survey of Texas public and private general academic institutions shows that 97 percent of freshman entering public institutions in the fall of 2006 graduated under the RHSP, as well as 95.5 percent of the freshman entering private or independent colleges and universities during the same time period. Now that Texas is reaching a critical mass of students who already are graduating under these requirements, it is time to make them mandatory for admission to universities.

These higher standards would improve the college readiness of new students by significantly reducing the number who are academically unprepared to continue their studies after high school and require remedial education at the college level. Currently, the remediation rate for students who graduate under the tougher graduation plan is half that for students who graduate under the minimum requirements. In addition, the bill would provide a safety net for students who did not take the recommended or advanced curriculum by allowing those who score at least 1,500 on the SAT – which is the college-readiness standard – or satisfy the ACT's college-readiness benchmarks to qualify for admission.

Opponents said

It is critical for Texas that more students go to college, yet the bill unfairly would penalize and eliminate an entire pool of highly qualified students. For example, students who have career interests that do not require advanced mathematics and science education – such as music, dance, performing arts, or athletics – might be better served by following the minimum high school curriculum. Students who graduated under such a plan and did not perform sufficiently well on the SAT or ACT would find the doors of higher education in Texas closed to them.

Notes

The **HRO analysis** of HB 3826 appeared in Part Two of the May 7 *Daily Floor Report*.

Performance incentive funding for higher education institutions

HB 3828 by Morrison
Died in the Senate

HB 3828 would have established a performance incentive funding system to encourage public universities and colleges to meet the statewide goal of increasing the number of students completing high-quality degrees and certificates. The Texas Higher Education Coordinating Board (THECB) would have distributed appropriated incentive funds to higher education institutions based on a point system. The bill would have established funding mechanisms using a matrix of weights by type of institution, including general academic teaching institutions, two-year institutions, and health-related institutions, including Baylor College of Medicine.

Universities would have been rewarded for bachelor's and advanced degrees granted, with additional weight for bachelor's degrees awarded in critical fields and to at-risk students. Community, technical, and public state colleges would have been rewarded for certificates and associate degrees granted, with additional weight for certificates and degrees awarded in critical fields and to at-risk students. Additional weight would have been awarded for certain students transferring to a university from a two-year institution. Health-related institutions would have been rewarded under the point system for degrees and residencies completed. The THECB would have been charged with establishing a method to assess the quality of degrees and certificates awarded, including minimum standards that a degree or certificate would have to satisfy in order to qualify for points under the system.

Supporters said

HB 3828 would implement Gov. Perry's proposal for incentive funding for Texas public universities and colleges. The current funding formula is based on the number of semester credit hours students take but does nothing to address quality, and there are few incentives to improve performance. Incentive funding would benefit universities because if students graduated and earned degrees or certificates, the institutions would receive formula funding plus the incentive funding. If a student did not graduate,

the institutions still would receive formula funding. The state would benefit in several ways because incentive funding would encourage schools to graduate students, not merely enroll them, and would increase the number of graduates in critical fields, such as nursing, physical science, mathematics, and engineering. The funding system would be simple and understandable and link directly to the goals of Closing the Gaps, the state's master plan for higher education.

Opponents said

Community colleges have a broad mission to respond to the needs of the state by offering economic and workforce training and development as well as customized training for industry. Degrees or certificates usually are not awarded for this training, and community colleges would be penalized for this by not receiving incentive funding. There should be some latitude for including certificates of completion for continuing education or workforce training as a factor to generate the incentive funding.

Notes

The **HRO analysis** of HB 3828 appeared in Part Four of the May 4 *Daily Floor Report*.

Establishing the Texas Tomorrow Fund II prepaid tuition program

HB 3900 by Morrison
Effective June 15, 2007

HB 3900 establishes the Texas Tomorrow Fund II pre-paid tuition unit undergraduate education program, to be administered by the Prepaid Higher Education Tuition Board in the Comptroller's Office. The fund will receive money from the purchase of prepaid tuition contracts, plus income earned from investment of fund assets.

Purchasers may pre-pay the costs of all or a portion of a student's undergraduate tuition at four-year and two-year institutions, both private and public, or at accredited out-of-state institutions. The beneficiary must be a state resident or the child of a state resident at the time the purchaser enters the pre-paid tuition contract. Purchasers may transfer money between Texas Tomorrow Fund II accounts and similar prepaid plans established in Texas or other states.

The program offers three types of pre-paid tuition units to Texas residents. Type I units are based on the cost of undergraduate resident tuition and required fees charged by the universities with the highest tuition and fee costs. Type II units are based on the cost of the weighted average undergraduate resident tuition and fees at universities. Type III are based on the cost of the weighted average resident tuition and fees of two-year institutions. Each unit costs 1 percent of a year's tuition and fees at current rates. The board must adjust the purchase price of the tuition units annually based on the actual cost of tuition.

Purchasers may buy one type of unit or a combination of unit types. The value of a tuition unit is equal to 1 percent of the amount necessary to cover undergraduate tuition and fees for the academic year in which the unit is redeemed. One hundred Type I units are worth one year's tuition and fees at the highest-priced public university, 100 Type II units are worth one year's tuition and fees at a university at the weighted average, and 100 Type III units are worth one year's tuition and fees at a community college at the weighted average. The beneficiaries, or students, must be enrolled in the plan at least three years before the funds can be used, and when the student redeems units, universities must honor the unit's value.

The bill also establishes the Texas Save and Match program under which money paid by purchasers for pre-paid tuition contracts may be matched with contributions made by anyone on behalf of certain student beneficiaries selected as provided by board rule. It also may be matched with funds appropriated by the Legislature to be used for

the purchase of additional tuition units for certain student beneficiaries whose annual household income is below the state median family income; whose enrollment would promote target goals of "Closing the Gaps," the state's master plan for higher education; or who meet other criteria as established by board rule.

Supporters said

HB 3900 would establish a new Texas Tomorrow Fund II, structured in a sound manner, that would help many Texas families, particularly those in middle-income categories who do not qualify for financial assistance, to manage the costs of higher education. Families would have some predictability in planning for their children's future higher education needs by being able to lock in tuition at today's rates.

The Higher Education Prepaid Tuition Program, originally called the Texas Tomorrow Fund, was established in 1995 and helps Texans save for college through two programs – a prepaid plan and a savings plan. Both plans are authorized under sec. 529 of the federal Internal Revenue Code, so investments grow tax-deferred, and distributions to pay for college are federally tax-free. Because new enrollment in the pre-paid plan has been suspended, the savings plan currently is the only state-sponsored tool to help families save for college. The Prepaid Higher Education Tuition Board suspended enrollment in the prepaid plan in June 2003 because it could not accurately predict future college costs once the Legislature deregulated tuition. The state constitutionally guarantees that contributions to the prepaid plan will cover the costs of attending college at some point in the future, so the state is obligated to pay the actual cost of tuition, whatever that might be. The board could have jeopardized the plan's assets by selling new tuition contracts at inadequate prices. Likewise, any university with tuition and fees above the weighted average tuition must waive the difference in cost between their tuition and the weighted average amount. According to the Sunset Advisory Commission, the six largest universities waived more than \$7 million in tuition for pre-paid plan beneficiaries in 2005.

Under the proposed unit redemption system, the state would be obligated only to pay contract contributions and earned interest, and the purchase price of the units could

change each year to reflect changing tuition. Institutions would receive the unit price plus interest, so in years when the value of a student's education units exceeded the cost of the weighted average of tuition and required fees, schools would earn additional income. If universities raised tuition and fees at a slower rate, they could make money from the program. If they raised tuition and fees at a faster rate, they would have to make up the difference. Universities would have an incentive to be judicious in raising tuition and required fees. Moreover, the bill has a built-in safety net to keep the fund actuarially sound. The board could impose a \$25 fee to be used only to maintain the actuarial soundness of the fund. Also, to protect institutions from a shortfall, the bill would permit institutions to receive a minimum 5-percent return on investments, if the money is available.

The Save and Match program would encourage low- to moderate-income families to prepare for their children's higher-education expenses by pre-paying for all or part of their tuition in advance. Increasing the program's participants ultimately would enhance the actuarial soundness of the program. Eight other states have similar state match pre-paid plans to ensure that pre-paid tuition programs are available to a wide variety of individuals, not just higher-income families that can afford to set aside money to invest in their children's higher education.

Opponents said

The bill would shift the cost burden of pre-paid tuition from the state to higher-education institutions. If investments of fund assets did not perform well in a given year, the investment return fell short of tuition increases, and there were not enough dollars to cover the pre-paid contracts, the institutions would be responsible for the remaining amount. If the Legislature pulled back on appropriations because of lean budgetary years, this could pose a real problem. If institutions raised tuition to make up the difference, the burden could fall on the students who had not prepaid their tuition.

The original Texas Tomorrow Fund's average rate of return over a five-year period ending in 2005 was 4.93 percent. If the Texas Tomorrow Fund II performed similarly, the new fund would be under-funded, just like the original one, and the state would not be obligated to appropriate money to keep the fund actuarially sound.

Notes

The **HRO analysis** of HB 3900 appeared in Part Two of the April 30 *Daily Floor Report*.

Limiting increases in tuition and required fees at higher education institutions

SB 85 by Hinojosa/SB 96 by Ellis/SB 100 by Shapiro/SB 578 by Ellis/SB 589 by Ellis
Died in Senate committee

Several bills were introduced to limit increases in designated tuition and required fees charged at public institutions of higher education and would have taken a variety of approaches. **SB 85** by Hinojosa would have placed a moratorium on any increases until 2010, at which time tuition increases would have been capped at 5 percent annually. **SB 96** by Ellis would have repealed the authority of institutions to set designated tuition in 2010 unless the Legislature voted to continue it. **SB 100** by Shapiro would have frozen tuition amounts for incoming freshmen for four or five years. **SB 578** by Ellis would have capped at 5 percent annually any tuition increases, and **SB 579** Ellis would have capped increases at 10 percent of a certain amount calculated using median income.

Supporters said

Increases in tuition and fees at public universities are out of control and need to be reigned in. The Legislature formerly limited how much public universities could charge but relinquished that authority in 2003 because of a budget shortfall. It was a huge mistake because increases now can be imposed at any time for any amount. The amounts should be set by state lawmakers instead of unelected university regents. Tuition and fees at four-year public institutions have climbed an average of 40 percent from 2002-03 to 2006-07, adjusted for inflation. The big increases have taken students and their families by surprise, making it difficult to budget for higher education expenses. Even though part of the increase is used for financial aid, the best financial aid would be not to raise tuition.

As of October 2006, Texas surpassed the U.S. average in the cost of a four-year public education. The rising costs of going to college impacts lower income students the most and Texas has a high percentage of low income families. Increases also hurt middle-income families because those students often do not qualify for financial aid. Texas is number 41 in the national rankings on the number of people who graduate with a four-year degree, and affordability plays a role in that. Freezing tuition amounts would eliminate financial surprises that impede graduation. Limiting the increases in tuition and fees would ensure that those who can least afford it are not priced out of higher education. Institutions need to do their share in holding

down costs, including reviewing faculty productivity, scheduling more classes, better utilizing their space, and reducing the costs of instruction.

Opponents said

Higher education is still a bargain in Texas because the cost of going to college in Texas before tuition and fees were deregulated was extremely low. However, the cost of higher education has increased even more than the cost of health care, and the state needs to find a reasonable medium between what the state subsidizes and what students and their families pay for higher education. If institutions were limited in how much tuition can be raised, Texas would not have the kind of world-class universities it needs and deserves and long-term planning would be greatly inhibited.

Even though state support for higher education has increased by about 1.8 percent a year over the last four or five biennia, the state's share has gone down compared to other sources of funding, while the cost to provide educational services has increased even more. All aspects of educating students have increased, including faculty and staff salaries, utility costs, information technology, construction, and compliance with federal research requirements. In addition to state support, constitutional funding, federal research dollars, and philanthropic support, universities have to be able to count on tuition as a source of funding. Universities need to retain the flexibility to set tuition, especially in lean budgetary times when the Legislature pulls back on state support because of competing state needs.

Deregulation has allowed universities to be innovative in addressing pricing at different colleges and for different degrees. Universities have been able to experiment with flat-rate tuition, rebates, and guaranteed tuition while providing additional financial aid, because 20 percent of any increase over a certain amount has to be set aside for financial aid. Students at the median income have not seen any increase because of the offset in additional financial aid, and students at double the median income have had half of increases offset by financial aid.

Limiting top 10 percent automatic undergraduate admissions

SB 101 by Shapiro

Conference committee report died in the House

SB 101 would have capped at 60 percent the proportion of first-time resident undergraduate students each general academic teaching institution would be required to admit automatically in an academic year under the top 10 percent law. To be eligible for automatic admission, applicants would have been required to have completed the recommended or advanced high school program or its equivalent. The cap on the number of automatic admissions would have expired on August 31, 2015.

If the number of applicants who qualified for automatic admission had exceeded 60 percent of an institution's enrollment capacity for those slots, institutions could have offered automatic admission to those applicants and filled the remaining slots using other admissions criteria, or they could have capped at 60 percent the number of automatic admissions. If an institution had capped automatic admissions at 60 percent, applicants qualified under the top ten percent law would have been admitted based on percentile rank according to class standing based on GPA, beginning with the top percentile rank, until a sufficient number of admission offers were made to fill 50 percent of the freshman slots. An institution would have had to offer admission to all applicants with the same percentile rank. Among remaining applicants qualifying for automatic admission, an additional 10 percent would have been considered in the same manner as generally admitted first-time freshman students until the number of automatic admissions reached 60 percent. Once 60 percent of the slots had been filled with those qualifying for automatic admission, remaining students qualifying for automatic admission would have been admitted in the same manner as generally admitted first-time freshman students.

Qualified applicants who had not been admitted because there were not enough slots remaining for automatic admissions would have been admitted to their second choice institution within the university system.

Institutions would have had to adopt a written policy on recruiting and retention of underrepresented groups with the input of community leaders. Institutions also would have had to demonstrate a commitment to providing opportunities for postsecondary education for members of all racial or ethnic minority groups, ensuring racial and ethnic diversity in the institution's faculty and administrative staff.

Automatic admission would have been granted to a transfer undergraduate student who completed core curriculum requirements at another institution if that student had qualified for automatic admission under the top 10 percent law at the time of graduation and had maintained a 3.25 GPA at the institution where core curriculum requirements were completed.

Supporters said

SB 101 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, not just a certain population. The admissions process of any university is an exercise both in selecting qualified students with a high probability of achieving success and in admitting an entering class that serves the university's mission. By requiring universities to admit all applicants who graduated in the top 10 percent of their high school class, the law has had some negative consequences that the bill would address. Many top-notch students who are not in the top 10 percent are being overlooked.

The current automatic admissions law is based on one factor, graduation rank, which limits an institution's flexibility. One of the state's flagship schools, the University of Texas at Austin, is particularly burdened by the current law and is losing control of enrollment through the number of slots it must dedicate to top 10 percent graduates. According to the university, about 71 percent were admitted under the plan in the fall of 2006, compared to 69 percent in the fall of 2005. As a result, only 28 percent of an entering freshman class is made up of students admitted under a holistic review process. Such a rigid admissions policy is hampering the university's ability to admit an ethnically diverse student body and is choking the flow of other talented students into fields such as music and the arts.

Only one in four top 10 students at UT-Austin is African-American or Hispanic, so the law has not had a dramatic effect on minority enrollment. Capping the number of automatic admissions would allow for more discretionary admissions, and a holistic approach would allow institutions to recruit a broad array of students, including minority students. Without a cap, it would be difficult to increase the number of minority students because the percentage of students being admitted under other criteria is so small that

those slots have become very competitive. If other factors could be used, such as test scores, special talents, leadership ability, and personal achievements, along with the continued use of targeted scholarships and outreach, institutions could admit a more well rounded class of students that could include more minorities, student leaders, and individual virtuosos.

Opponents said

The number of automatically admitted students should not be capped because the law is doing exactly 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 them to their peers, no matter what school they attended. It is simple to understand and sends a “play-by-the-rules” message to students across Texas.

The law has helped Texas’ flagship universities fulfill their mission to serve students from across the state by granting broader opportunities to the very best students from every high school. Not only has it helped create a more diverse freshman class – racially, economically, and geographically – at UT-Austin and at Texas A&M, it has done so in a way that benefits all regions of the state, especially rural and large urban area schools. Historically, increasing ethnic diversity has been more successful, especially for Hispanic students, under the top 10 percent plan than under holistic review admissions that included race-conscious affirmative action policies in place before 1996. It would not make sense to restrict the only program that is working. Schools with a high percentage of low-income students, especially border area schools, would lose if the bill is enacted.

Data from UT-Austin indicate that the top 10 percent students are performing well, so the law has enabled Texas universities to enroll highly qualified, superior, and motivated students. Furthermore, class rank appears to be a good predictor of student performance. Because of the nature of selective universities, someone is going to be left out, and the only question is who that is going to be. Under the current law, a student population that better reflects the population of Texas is being admitted to the state’s top universities.

Other opponents said

If other state universities would aggressively recruit students, it would relieve some of the burden on UT-Austin. The Legislature also should create more attractive flagship institutions. Rather than amending the existing admissions policy, adopting a return to a statewide policy of race-conscious university admissions would be the surest way to ensure true diversity. U.S. Supreme Court decisions permit the use of race-sensitive admissions criteria, and UT-Austin has been using race and ethnicity as criteria in discretionary admissions since 2005. Such policies should be adopted by all public universities in Texas.

Notes

The **HRO analysis** of SB 101 appeared in Part One of the *May 22 Daily Floor Report*.



Judiciary

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Amending venue rules for lawsuits involving maritime workers

HB 1602 by Van Arsdale

Effective May 24, 2007

HB 1602 establishes new venue rules for civil actions under the federal Jones Act, which provides a cause of action for the injury or death of maritime workers in the course of their employment. If all or a substantial part of the events or omissions giving rise to a Jones Act claim occurred in Texas or on the state's inland waters, the suit may be brought in the county in which a substantial part of the events occurred or where the defendant's principal Texas office is located.

If a substantial part of the events or omissions occurred ashore in a Gulf Coast state other than Texas or on inland waters outside Texas, the venue may be in the county:

- where the defendant's principal office in Texas is located, if the office is located in a coastal county;
- in the county where the plaintiff resided at the time the cause of action accrued, if the defendant does not have a principal office in a coastal county; or
- in Harris or Galveston counties, depending on the plaintiff's residence.

All other suits brought under the Jones Act may be filed in the county where the defendant's principal Texas office is located, where the plaintiff resided at the time the cause of action accrued, or in which a substantial part of the events or omissions giving rise to the claim occurred.

Supporters said

HB 1602 would help protect the maritime industry in Texas, which contributes \$178 billion to the Texas economy each year, by creating venue rules for Jones Act suits more consistent with other civil actions. Current law, which allows suits to be brought in the plaintiff's county of residence, differs sharply from the laws of other states. The current Jones Act venue rules were intended to be temporary, and HB 1602 finally would set appropriate venue rules for Jones Act suits.

The bill would provide a particular benefit to the dredging industry, which has been crippled in recent years by a dramatic increase in lawsuits. The current Jones Act venue statute has allowed plaintiffs to forum-shop and find sympathetic juries that provide disproportionately high damage awards. In a single year, more than 50 percent of Jones Act lawsuits filed against dredgers nationwide

were filed in four counties in the Rio Grande Valley. One company experienced 13 lawsuits in six years, causing its insurance costs to increase by 288 percent. Texas' venue exception for workers covered by the Jones Act has made the state a high-risk area for employers and directly discourages companies from hiring Texas employees. Restricting the ability for plaintiffs to file certain Jones Act claims in their counties of residence would allow generations of families to continue to work for a thriving maritime industry in South Texas.

Opponents said

HB 1602's venue rules for injured maritime workers in Texas would be unfair. In most cases, plaintiffs injured ashore or on the inland waters of any Gulf Coast state, including Texas, would have to file in a county other than their residence. This harsh requirement would represent a significant departure from current law, which recognizes the need to create a venue exception for injured maritime workers. The Jones Act affects about 25,000 Texas employees, and the occupational hazards facing these workers are much more severe than those experienced by average land-based workers. Most of the injuries suffered by workers covered by the Jones Act prohibit travel to other parts of the state for trials or health care. As a result, the plaintiff's residence should be allowed as a choice of venue no matter where the worker was injured.

The spike in Jones Act lawsuits and awards is due to the maritime industry's safety problems and shoddy business practices, not special venue rules. The argument that the maritime industry is being crippled by Jones Act lawsuits is directly refuted by evidence of dredging companies' record profits over the last several years. The four counties that have seen the so-called lawsuit spike are the counties where the dredging companies do most of their hiring. The plaintiffs are not "forum-shopping" – they simply are filing in the counties where they live. It is insulting to suggest that judges and juries in this part of the state somehow are not trustworthy.

Notes

The **HRO analysis** of HB 1602 appeared in Part One of the April 25 *Daily Floor Report*.

Establishing a qualified privilege of a journalist not to testify or disclose

SB 966 by Ellis *Died in the House*

SB 966 would have established a “shield law” for journalists. With certain exceptions, a journalist could not have been compelled to testify, produce, or disclose in an official proceeding any information, document, or item, or the source of information, obtained while that person was acting as a journalist.

Limited disclosure provisions. A court could have compelled disclosure if the person seeking information had made a clear and specific showing that:

- reasonable efforts had been exhausted to obtain the information from alternative sources;
- the subpoena was not overbroad, unreasonable, or oppressive, and the request was limited in scope;
- reasonable and timely notice was given;
- the interest of the party seeking the information outweighed the public’s interest in news gathering and dissemination in that case; and
- the information sought was not peripheral or speculative.

To have compelled disclosure, the information requested also must have been:

- relevant and material to the proper administration of the official proceeding for which the disclosure was sought and essential to the maintenance of a claim or defense of the person seeking the disclosure; or
- central to the investigation or prosecution of a criminal case regarding the establishment of guilt or innocence and, based on something other than the assertion of the person requesting the subpoena, stemming from reasonable grounds to believe that a crime had occurred.

If a court had found that the person seeking information had exhausted all reasonable efforts to obtain the information from alternative sources, disclosure also could have been compelled with a clear and specific showing that the information was obtained from the journalist’s eyewitness observation of criminal conduct or that the journalist had obtained the information from someone:

- who had confessed to committing certain violent offenses or a crime against a child victim; or
- for whom there was probable cause to believe had participated in committing such an offense.

Disclosure could not have been compelled if the alleged crime to which the journalist was an eyewitness was the communicating, receiving, or possessing of the information. However, disclosure could have been compelled if the information had been disclosed in violation of a grand jury oath administered to either a juror or a witness under Code of Criminal Procedure, art. 19.34 or 20.16, or if it had related to certain violent offenses or a crime against a child victim.

A journalist also could have been compelled to disclose information if it were reasonably necessary to prevent reasonably certain death or substantial bodily harm.

Definition of journalist. A “journalist” would have been someone who for a substantial portion of the person’s livelihood or for substantial financial gain, gathered, compiled, prepared, collected, photographed, recorded, wrote, edited, reported, investigated, processed, or published news or information that was disseminated by a news medium or communication service provider, or the parent, subsidiary, division, or affiliate of such a person.

Supporters said

SB 966 would support the free flow of information to the public by protecting journalists from being compelled to disclose information they obtained while gathering the news, including the names of confidential sources. Under current law, a journalist who declines to reveal this information can be jailed for contempt of court. More than 30 states already have some form of “shield law” providing a journalist’s privilege, and it is time for Texas to do the same.

Prosecutors should not be permitted to rely too heavily on information gathered by journalists or to use journalists as an investigative arm. This creates a time-consuming burden for journalists and threatens the freedom and independence of the press. The press plays a vital role in a democracy by helping to protect the public from powerful interests, both private and governmental, and the press often is the first entity to expose wrongdoing within these institutions. The bill would provide an incentive for whistleblowers to come forward to the press by preventing journalists from having to reveal whistleblowers’ names in response to a subpoena in most cases. If sources think they

will be exposed when a journalist is compelled to disclose information, sources will be reluctant to confide in the press, and the information they have may never reach the public.

SB 966 would provide not an absolute but a qualified privilege. Journalists could be compelled to disclose information under certain circumstances, but the party seeking information would have to establish reasons the information was needed from the journalist. The bill would provide a good balance between protecting the free flow of information and allowing prosecutors to discover important evidence to prosecute crimes.

Opponents said

SB 966 is unnecessary. Texas has enjoyed a functioning democracy and press throughout its history. Current law provides adequate protection for journalists faced with orders to compel disclosure of information. Prosecutors do not, as a rule, rely excessively on journalists for information, and those who inappropriately subpoena journalists would be unable to defend those subpoenas to a judge. In addition, the press enjoys substantial protections under the First Amendment.

SB 966 could hinder the capacity of prosecutors to gather information they need to prosecute crimes. One purported goal of the bill would be to make government and corporate institutions accountable to the public, but

prosecutors need to speak with whistleblowers to investigate effectively their accusations. SB 966 inappropriately would shift the burden to prosecutors to show they had exhausted other sources of information and had a specific need to obtain it from the news media. This standard too easily could be capriciously interpreted by judges and result in wasted prosecutorial time and resources. Shifting the burden to prosecutors to prove that a journalist was an appropriate source for information could delay or prevent the administration of justice.

Other opponents said

SB 966 would not go far enough to protect the free flow of information because it would provide too many exceptions to the journalist's privilege not to testify or to disclose information. In addition, the bill would provide legal protections to some journalists but not to others, setting up a kind of licensing system for journalists to qualify for statutory protection. The bill would apply only to journalists who practiced the craft for substantial financial gain, leaving out many amateur bloggers and student journalists.

Notes

The **HRO analysis** of SB 966 appeared in Part One of the May 21 *Daily Floor Report*.

Court system reorganization and administration

SB 1204 by Duncan *Died in the House*

SB 1204 would have reorganized the Texas court system by:

- increasing Supreme Court oversight of presiding judges in administrative judicial regions;
- standardizing trial courts and their jurisdictions;
- authorizing the promulgation of rules for small claims courts;
- providing additional resources to courts handling certain cases; and
- establishing a grant program for court system enhancements.

Administrative judicial regions. SB 1204 would have allowed the chief justice of the Supreme Court, rather than the governor, to appoint one judge in each administrative judicial region as presiding judge. The Supreme Court could have removed the presiding judge for good cause by a majority vote of the court after notice and a hearing.

Trial courts. The bill would have allowed a district court, statutory county court, county court, or justice court to transfer a case to any other of those courts in the county, whether or not the receiving court had jurisdiction of the matter, provided that all parties and the receiving court agreed to the transfer.

District courts. The bill would have codified options for exchanging cases and benches among district courts in counties with more than one district court, including:

- transferring a case to another district court in the county;
- hearing a pending case without transferring it;
- sitting for another district court in a pending case;
- temporarily exchanging benches with a judge of another district court;
- trying different cases in the same court at the same time; and
- allowing a judge temporarily to sit in a case for another district judge who was sick or absent.

When the sitting judge in a district court had determined on the judge's own motion that the judge was disqualified or should be recused, the presiding judge of the administrative judicial region could have assigned a new judge to the case or transferred a case to another district court in the county, depending on the number of district courts in the county.

The local board of district judges in a county with more than one district court could have designated a court to give preference to certain types of cases, such as family law matters. Giving preference to certain types of cases would not have limited the jurisdiction of that court or any other district court in the county.

A district court would have been required to sit in the county seat for a jury trial in a civil case. The commissioners court of the county could have authorized a district court to sit in any municipality in the county to hear non-jury trials in civil cases and to hear motions, arguments, and other matters not heard before a jury in a civil case. The district clerk temporarily could have transferred necessary books, minutes, records, and papers while the court was in session.

SB 1204 would have standardized district court terms to begin on the first Mondays in January and July. The bill would have made equal the county-provided supplemental compensation to all district judges in a county and would have required the same amount of supplemental compensation to be paid to a district judge serving on a county juvenile board as was provided to other judges serving on the juvenile board.

County courts at law. SB 1204 would have converted into district courts 45 county courts at law with civil jurisdiction, generally beginning January 1, 2011. The bill would have made statutory changes to ensure continuity, including providing for existing juries and pending cases. The initial vacancy in a newly created district court would have been filled by election, and subsequent vacancies would have been filled as provided by law. A judge in a converted county court who was elected to fill the initial vacancy in the district court could have chosen to continue participating in the county retirement system or become a member of the retirement system for state judges.

County criminal courts at law in Harris County would have been granted concurrent jurisdiction with county civil courts to hear appeals of driver's license suspensions, original proceedings on occupational driver's licenses, and existing appellate jurisdiction in criminal cases from justice of the peace (JP) courts and municipal courts in the county.

JP courts. The maximum amount in controversy for general civil jurisdiction in JP courts would have increased from \$5,000 to \$10,000. SB 1204 would have eliminated

the current designation of some JP courts as “small claims courts” and directed all JP courts to adjudicate small claims. The Supreme Court would have defined “small claims” and established rules for resolution of small claims cases with the advice of a committee of JPs and public members.

Resources for certain complex cases. SB 1204 would have established a committee – including the chief justice of the Supreme Court as presiding officer and the nine presiding judges of the administrative judicial regions – to allocate additional resources to courts in certain complex cases. Resources would not have been provided for more than 10 cases a year and would have been awarded based on criteria adopted by the Supreme Court, including whether a case was likely to involve:

- a large number of separately represented parties;
- coordination with related actions pending in other courts;
- several pretrial motions or novel legal issues;
- many witnesses or a large amount of documentary evidence;
- substantial post-judgment judicial supervision;
- a trial lasting more than four weeks; or
- a substantial burden on the trial court’s docket and available resources.

Development grants. The Task Force on Indigent Defense would have developed and administered a grant program for counties to improve the courts. Applicants would have had to match the amount of a grant with local funds. The Supreme Court would have determined whether to award a grant to a county that met eligibility requirements, and the task force would have monitored use of the grant money. The Supreme Court also would have administered a program of grants to counties to alleviate a backlog of child protection cases.

Supporters said

SB 1204 would bring simplicity and rationality to the legal process by reforming the organization and administration of the court system. Since the court system was established, it has been restructured on a piecemeal basis, resulting in an outdated system of inconsistencies and overlapping jurisdictions.

The bill would improve efficiency. The Supreme Court already has extensive powers to set administrative rules for the state’s courts, so it would be appropriate to grant the court more authority to oversee who executes these rules. County courts at law were intended to provide quick

resolution of simple cases, but overlapping subject matter jurisdictions have prevented many from doing so. The bill would restore their original functions by converting 45 county courts at law into district courts. In addition, increasing the amounts in controversy adjudicated by JP courts would allow district courts and county courts at law to give more attention to higher value and more complex cases. Designating a preference for certain kinds of cases in certain courts would allow judges to build specializations and improve efficiency of district courts countywide. Authorizing district court judges to exchange cases and benches also would speed up dockets.

As the population and economy of Texas grow, so will its needs for an efficient and rational system of courts. The bill’s reforms and investments would be geared toward creating more efficient and uniform justice across the state.

Opponents said

SB 1204 would try to fix what is not broken. The court systems in each county reflect careful compromises among the local judiciary, the commissioners court, and the Legislature to address local needs, including the number, types, and jurisdiction of courts. Streamlining for the sake of streamlining would disrupt this balance. Texas is too diverse to demand statewide uniformity of the court system. Problems should continue to be addressed locally in keeping with longstanding Texas tradition.

The bill could result in some cases being heard in inappropriate courts. Increasing the amount in controversy in JP courts would bring to those courts more complex cases requiring additional legal and factual analysis, but most justices of the peace are not attorneys. JP courts traditionally have had relatively limited jurisdictions to ensure that they disposed only of relatively simple cases. In addition, allowing trial courts in a county to transfer cases between each other on agreement of the parties and the courts, which could result in a JP court hearing serious and complex cases, would be too broad a grant of authority. The bill also could change significantly the jobs of some county court-at-law judges, who specifically sought to preside in these courts with their limited jurisdiction, because the new courts would have expanded jurisdiction and hear substantially different kinds of cases.

Notes

The **HRO analysis** of SB 1204 appeared in Part One of the May 21 *Daily Floor Report*.

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Adding study of the Bible as public school elective course

HB 1287 by Chisum
Effective June 15, 2007

HB 1287 allows school districts, beginning with the 2009-2010 school year, to offer an elective course for students in grades nine or above on the Bible's Hebrew scriptures (Old Testament) and its impact, the New Testament and its impact, or a course combining the two.

The bill also adds religious literature, including the Hebrew Scriptures (Old Testament) and the New Testament, and their impact on history and literature to the required enrichment curriculum in public schools.

The purpose of the course is to teach students biblical content, characters, poetry, and narratives that are prerequisites to understanding contemporary society and culture, including literature, art, music, mores, oratory, and public policy. The course will familiarize students with the contents, history, and literary style of the Hebrew scriptures (Old Testament) or New Testament of the Bible, as well as their influence on law, history, government, literature, art, music, customs, morals, values, and culture. A course authorized by the bill must abide by all applicable laws, including any state and federal guidelines in maintaining religious neutrality.

A course teacher must hold a minimum of a high school composite certification in language arts, social studies, or history with, where practical, a minor in religion or biblical studies. A teacher selected to teach the course must complete training designed by the Texas Education Agency (TEA), which will provide:

- expertise in the appropriate Bible course curriculum;
- understanding of applicable U.S. Supreme Court rulings and current constitutional law regarding how Bible courses are to be taught with objectivity as part of a secular program;
- understanding of how to present the Bible in an objective and academic manner that neither promotes nor disparages religion;
- proficiency in instructional approaches that present course material in a manner that respects all faiths and religious traditions, while favoring none; and
- expertise in how to avoid devotional content or proselytizing in the teaching of the course.

Before adopting rules identifying the essential knowledge and skills of the course, the State Board of Education must submit them for approval to the attorney general to ensure that the course complies with the First Amendment. The bill does not prohibit a school board from offering an elective course based on books of a religion other than Christianity, according to student and parent demand.

Supporters said

HB 1287 would provide students with biblical knowledge necessary for a full appreciation of other academic subjects. Educators widely agree that the study of the Bible is an important part of a complete education. Knowledge of biblical stories and concepts is necessary to understand fully courses in literature, history, law, and art, which contain allusions to the Bible. According to one estimate, Shakespeare alone has more than 1,300 biblical references. Schools that fail to teach about the Bible put students at a disadvantage educationally and deprive them of knowledge essential to being a well rounded citizen.

An academic and objective study of the Bible would not violate the First Amendment. As a federal district court has stated, "The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion. When such insulation occurs, another religion, such as secular humanism, is effectively established," *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983). The case emphasizes that, "[bible study] when presented objectively as part of a part of a secular program of education, may...be effected consistently with the First Amendment." The court in the *Crockett* case acknowledged that without some basic understanding of the Bible, one cannot truly appreciate such great works as da Vinci's Last Supper, Handel's Messiah, or Melville's *Moby-Dick*.

The teacher training required under the bill would ensure an objective study of the Bible and not the teaching of religion. All teachers of the course would receive specialized training on instructional approaches to presenting the course material in an objective manner that would respect all faiths and meet constitutional guidelines. TEA also would provide training materials and resources

to help teachers manage an objective classroom and avoid the inclusion of devotional content. With religious literature offered as an elective in public schools, students would receive the benefit of learning about a text foundational to society and culture without any imposition of religious traditions or perspectives.

Opponents said

The constitutionality of a religious literature course does not ensure its academic quality. Texas lacks what is needed to provide academic quality in Bible courses in public high schools. Only serious university study prepares someone to teach English, history, or chemistry, and it should not be different for the Bible and other religious texts. The bill would not require that, absent certain course work, a teacher pass a comprehensive test in the subject, while coursework and testing are required for other subject areas, such as English and biology.

Texas should not authorize high school instruction in a subject for which it does not have adequate resources. Texas public universities have opposed adopting religion

departments, unlike some other states. At the university level, biblical studies include several ancient languages, archaeology, and the histories and literatures of ancient Near Eastern cultures. True academic study accounts for methods of historical inference, dating of artifacts, and linguistic analysis.

Even with the inclusion of safeguards, the teaching of religious texts in public schools could subject some students to religious views contrary to their own. The Bible is the source of many people's religious faiths. Teachers and students could have a difficult time remaining objective in their focus and interject their religious views in classroom discussion. For this reason, study of the Bible should be kept in church or parochial schools.

Notes

The **HRO analysis** of HB 1287 appeared in Part Two of the May 7 *Daily Floor Report*.

Requiring school districts to conduct feasibility studies before taking land

HB 1387 by P. King
Died in the Senate

HB 1387, as passed by the House, would have required a school district to conduct a feasibility study before acquiring title to certain property through eminent domain. A study would not have been required for property that was less than one acre or that was adjacent to property already owned by the district.

The study would have had to include an analysis of 14 specific items outlined in the bill and be approved by a licensed engineer or architect. If the study determined that the property would not be needed within 10 years of the study's completion, the study also would have been required to include justification for immediate acquisition of the property.

Supporters said

HB 1387 would help ensure that school district land acquisitions remained fair for all parties involved. The initial costs and administrative burden of the feasibility study would be outweighed in the long run by the value of informed decisions. Existing law offers few protections against imprudent land takings by school districts and does not define standards for determining which properties to acquire. By requiring a school district to conduct a feasibility study before acquiring property, HB 1387 would establish safeguards against common grievances associated with poorly planned and executed takings decisions.

The misuse of eminent domain has resulted in some bad outcomes in public schools. In the El Paso area, for instance, poorly planned eminent domain decisions have led to schools that are sited in dangerous locations that municipal entities have zoned for higher-intensity land uses. In the Dallas area, school takings have needlessly derailed development plans and deprived owners of irretrievable development-related expenses.

Careful site selection also benefits school districts. School expansions undertaken based on a careful cost-benefit analysis result in new schools that are well timed and placed in a good location. Feasibility studies would require school districts to attend to major factors affecting a school's

long-term success, such as flood hazards, infrastructure, and comprehensive municipal land use plans. HB 1387 also would force schools to look at broader city planning goals, the comparative development potential of different sites, and the costs and benefits of proposed acquisition plans.

The feasibility study would include a determination of whether property acquisition was necessary within 10 years of the end of the study. This would allow schools to acquire property when it was justifiable even if it were for a long-range project. This would give schools enough flexibility to exercise eminent domain when it was warranted while preventing them from acquiring property when it was gratuitous or speculative.

Opponents said

HB 1387 would place an inordinate burden on school districts trying to exercise their right to acquire land through eminent domain. The requirements would add excessive costs ultimately borne by taxpayers. Rapidly expanding districts would be disproportionately affected, and the bill would provide no offsetting compensation for the mandates it would impose.

Expanding districts often do informal feasibility studies in less time with fewer resources, conditioned by local circumstances. HB 1387 would establish a rigid, bureaucratic prerequisite that could make future property acquisitions difficult. Any value of the mandatory study would be outweighed by the administrative burdens of doing the study.

Placing administrative hurdles at the beginning of the process could lead to higher land values and diminished availability of developable land, especially in areas where development is rapid. HB 1387 would present an obstacle to school districts' ability to engage in long-range planning. More obstacles to school districts translate into valuable revenue diverted from much-needed educational resources.

Other opponents said

A feasibility study would be a good means of ensuring the decision to take property was made only when necessary. HB 1387 should be broadened to apply to other entities with the power of eminent domain, such as universities, utility districts, and economic development corporations.

Notes

The **HRO analysis** of HB 1387 appeared in the March 26 *Daily Floor Report*.

Programs and grants for dropout prevention, high school success, and college readiness

HB 2237 by Eissler
Effective June 15, 2007

HB 2237 establishes a variety of pilot projects and grant programs for dropout prevention, high school success, and college readiness.

Dropout prevention pilot programs include up to \$4 million per biennium for a program to fund student club activities for students at risk of dropping out of school and up to \$4 million per year for school districts and charter schools to collaborate with local businesses, non-profit and faith-based organizations, or other interested parties to reduce dropouts and increase employment opportunities for students who might otherwise drop out. Another pilot program will offer intensive academic instruction during the summer for students at risk of dropping out.

The bill also directs TEA to contract with one or more centers for education research to conduct a study of best practices for dropout prevention and requires school districts and charter schools with high dropout rates to submit to TEA a plan for using the compensatory education and high school allotments for developing and implementing research-based strategies for dropout prevention. A high school innovation grant program will provide grants to support the implementation of innovative high school improvement programs for high school reform, dropout prevention, and preparation of students for postsecondary coursework or employment.

The bill establishes a High School Completion and Success Initiative Council to identify strategic priorities for and make recommendations to improve the effectiveness, coordination, and alignment of high school completion and college and workforce readiness. Beginning with the 2008-09 school year, the State Board of Education must incorporate college readiness standards and expectations into the foundation curriculum for high school students.

Teacher training programs include a grant program to train teachers and administrators to align curriculum requirements with college readiness standards; a pilot grant program to provide content and instructional training for middle and high school mathematics teachers; teacher reading academies to provide training for teachers who provide reading instruction to students in sixth, seventh or eighth grade; and academies at higher education institutions

for teachers certified to teach in science, technology, and mathematics (STEM) programs.

The bill directs TEA to establish a competitive grant program for school districts to construct or renovate high school science laboratories. Construction costs must be limited to \$200 per square foot for new construction projects or \$100 per square foot for renovation projects. To be eligible for a grant, school districts must demonstrate that existing science laboratories are insufficient to comply with the recommended and advanced high school curriculum requirements. Grants will be awarded based on a ranking of school districts by wealth per student, with low-wealth districts receiving priority.

An intensive technology-based academic instruction pilot program will provide up to \$3 million in grant funding to school districts with a high percentage of dropouts to provide intensive technology-based supplementary instruction in English, mathematics, science, or social studies to high school students at risk of dropping out. Another pilot program will provide grants to rural school districts to finance supplemental technology-based instruction, such as distance learning, teacher training, and academic tutoring, for students in sixth through twelfth grades.

The bill requires school districts and charter schools that teach middle and high school students to participate in “Education: Go Get It” week by providing students with comprehensive grade-appropriate information regarding the pursuit of higher education.

Supporters said

HB 2237 would help students complete high school ready for postsecondary success and help teachers at all school levels to strengthen their content knowledge and instructional expertise.

The bill would address the state’s high dropout rates with a variety of approaches, including research into best practices in dropout prevention and small grants to schools to support academic or co-curricular clubs that should strengthen connections between students and educators.

A collaborative dropout reduction pilot program between school districts and community-based organizations would provide at-risk students with job skills and continuing education opportunities.

Opponents said

HB 2237 would create a number of relatively small dropout prevention and high school completion programs that would not be effective in confronting the state's dropout program. Rather than establishing a variety of pilot programs, the state should provide funding for a more limited number of programs that have demonstrated success in preventing dropouts.

Notes

The **HRO analysis** of HB 2237 appeared in Part One of the May 4 *Daily Floor Report*.

Alternative school placement of students expelled for felonies and registered sex offenders

HB 2532 by Patrick
Effective June 15, 2007

Alternative education program placement revisions.

HB 2532 revises the laws governing when students may be sent to alternative educational placements called Juvenile Justice Alternative Education Programs (JJAEPs) and disciplinary alternative education programs (DAEPs).

HB 2532 allows school boards to expel students and place them in either a JJAEP or a DAEP for engaging in any felony offense under Title 5 of the Penal Code, which involves offenses against persons, regardless of where the offense occurred. Under the previous law, DAEPs were used for students who committed serious off-campus offenses that were not school-related, those who committed violations of the student code of conduct, and those who committed certain other misdemeanor offenses on campus. JJAEPs were used for certain students who were expelled from school for serious on-campus or school-related offenses listed in Education Code, sec. 37.007, some of which are Title 5 offenses. This applies in the 26 Texas counties with populations greater than 125,000, which are required to work with school districts to establish JJAEPs.

Under HB 2532, a student may be expelled and, under a memorandum of understanding between the school board and the local juvenile board, sent to a JJAEP if the student:

- is charged with engaging in conduct defined as a felony in Title 5, Penal Code, which involves offenses against persons;
- has been referred to a juvenile court for an adjudication hearing after an allegation of committing a Title 5 felony;
- has received probation or deferred adjudication for a Title 5 felony;
- has been convicted of a Title 5 felony; or
- has been arrested for or charged with a Title 5 felony.

In addition, the student's presence in the regular classroom would have to threaten the safety of other students, be detrimental to the educational process, or not be in the best interest of the district's students.

A student expelled and placed in an alternative setting is subject to that placement until graduating from high school, completing the term of placement or being assigned to another high school, or having the charges dismissed

or reduced to a misdemeanor offense. The bill allows for review of the placement of students in alternative settings. School boards are required to reimburse a JJAEP for the actual cost per day for the student.

School districts are required to assess the academic growth of students placed in DAEPs for 90 school days or longer.

Placement of sex offenders in public schools. HB 2532 requires school districts, on receiving notice from a law enforcement agency that a student is required to register as a sex offender, to remove the student from the classroom and determine the appropriate placement using criteria outlined in the bill.

A school superintendent, within 24 hours of receiving notice from a prosecutor that a student is required to register as a sex offender, must notify all instructional and support personnel who have regular contact with the student. The superintendent also must notify these personnel within 24 hours of being notified of a student's conviction, deferred prosecution, or deferred adjudication for felony offenses and certain misdemeanor offenses. The bill also establishes procedures to follow when students who are sex offenders transfer among schools.

A registered sex offender under any form of court supervision must be placed in an appropriate alternative education program for one semester. Districts have the option of placing registered sex offenders who are not under court supervision in an alternative education program for one semester. The bill establishes criteria for returning these students to a regular classroom.

At the end of the first semester of a student's placement in an alternative education program, the school board must convene a committee to review the student's placement and to make a recommendation about whether the student should be returned to the classroom or remain in the alternative education program. If a student has to remain in the alternative education program, the committee will conduct additional reviews before the beginning of each school year. The bill allows a student or the student's parent or guardian to appeal a school board's decision to place the student in an alternative education program.

The placement of students with disabilities must comply with the federal Individuals with Disabilities Education Act and the review may be made only by an admission, review, and dismissal committee, which may request the assistance of the kind of committee established in the bill for other students.

Supporters said

HB 2532 would give more flexibility to schools and juvenile boards to determine the best placement for students involved in certain serious crimes. Under current law, students who commit certain serious off-campus offenses must be sent only to a DAEP, and this placement may not be appropriate. In some cases, students involved with serious crimes should not be in the same learning environment as other students who have not committed serious crimes. HB 2532 would ensure that, when appropriate, other students were able to learn in a safe environment without fear of intimidation or disruptions from students who had been involved in Title 5 felony offenses. HB 2532 also could benefit students sent to alternative placements who may need a more specialized learning environment. JJAEPs should be able to adapt to long-term placements.

HB 2532 also would clarify and strengthen notification laws so that students who were registered sex offenders were not placed in regular classrooms without review. It would require that teachers and other personnel be notified promptly when a registered sex offender enrolled in their school.

Registered sex offenders should not attend school alongside other students. Placing these students in an alternative education program for at least one semester would help protect students and teachers while still giving the offender access to an education.

Opponents said

HB 2532 would allow students to be expelled and placed in JJAEPs even if they had only been accused of a felony offense. Placing these students in a JJAEP before they had been convicted of a crime could violate these students' rights. HB 2532 could result in a student being left in a JJAEP for several years because it would allow placement until high school graduation. JJAEPs were not designed for and may not be equipped for such long-term placement.

The highly charged atmosphere surrounding sex offenders could lead some review committees to assign students who were registered sex offenders to alternative education programs indefinitely, without a serious review of the student's situation. Typically, the quality of education provided by alternative education programs is not comparable to that of regular public schools. Students who are registered sex offenders should be given more avenues to appeal long-term placement in alternative education programs.

Notes

The **HRO analysis** of HB 2532 appeared in Part Four of the May 4 *Daily Floor Report*.

Numerous other bills considered by the 80th Legislature dealt with alternative educational placements. HB 2532 contains provisions similar to those found in of HB 494 by Madden that require school districts to give an assessment test to students placed in a DAEP for 90 days or longer. HB 494 died in the Senate.

Many of the provisions of HB 2532 dealing with the placement of sex offenders in public schools were in SB 1067 by Shapiro, which passed the Senate but died in the House.

HB 425 by Madden, which is effective September 1, 2007, requires the commissioner of education to determine instructional requirements for education services provided by school districts or open-enrollment charter schools in pre-adjudication secure detention facilities and post-adjudication secure correctional facilities. The requirements would address the length of the school day, the numbers of days of instruction, and the curriculum.

HB 426 by Madden, which is effective June 15, 2007, requires the Texas Education Agency to adopt minimum standards for disciplinary alternative education programs and requires DAEPs to offer at least the minimum amount of instructional time per day required by the Education Code, currently seven hours a day.

HB 1324 by Madden, which died in the Senate, would have established procedures to review the placement of certain students with disabilities into JJAEPs.

Requiring TEA to establish a dual language education pilot program

HB 2814 by Eissler

Effective June 15, 2007

HB 2814 requires the Texas Education Agency (TEA) to establish a dual language education pilot program to examine dual language education programs and their effect on a student's ability to graduate from high school. TEA will administer the project, selecting participating school districts that commit to a operating a dual language program for at least three years and giving preference to districts that:

- implement the program at the kindergarten level and demonstrate the potential to expand the program through middle and high school;
- offer at least one language other than English used in the pilot program; and
- demonstrate parent, teacher, and community support for a language immersion program.

TEA will select no more than 10 districts and 30 campuses to participate in the pilot program. The first year of the program must be devoted to planning activities, including hiring and training teachers, establishing parental and community support, and acquiring adequate learning materials in both program languages.

Each participating school district or campus must establish a community education pipeline team, made up of educators, district-level administrators, community leaders, and parents, to create an academic improvement plan and suggest how the immersion program should be implemented. The team will consider the educational challenges and the necessary resources specific to the district or campus and recommend how grant funds should be used to implement the improvement plan, with the approval of TEA. The pilot program will expire August 1, 2013.

To expand language learning opportunities for all public school students, including those not participating in the pilot program, TEA will contract for up to \$4 million annually to license language-learning software using language immersion methods. The contract must meet the needs of up to one million public school students and employees for three years. The software must be made available online to public school students and employees no later than January 1, 2008. Districts may not use the software to supplant a bilingual education, English as a second language, or dual language education program. By January 1, 2013, TEA must report to the Legislature on the utilization and effectiveness of the software.

Supporters said

HB 2814 would give TEA an opportunity to test a language learning program to better prepare students to succeed in college and to compete in an era of globalization. Bilingualism and multilingualism are considered marketable skills in Texas and abroad.

Language immersion products offer interactive technology that allow students to master a language at their own pace. One program, for example, presents a carefully chosen selection of four images and asks the student to select the image that matches the written text and the voices of native speakers. A student can learn a language without the traditional need for translation or memorization. Schools now experimenting with this type of instruction already are showing significant gains.

The bill also could benefit bilingual education initiatives. Language software would provide online support to non-English speakers by supplementing bilingual education curricula with English immersion software.

Opponents said

Rather than investing in solutions offered by for-profit vendors, TEA should invest in other opportunities for students to acquire new language skills, such as dual language education or Texas' Two-Way language immersion program. These programs not only promote biliteracy and bilingualism, but also place English-speaking and non-English speaking students in the same classrooms, which allows them to help each other in learning another language.

With Texas schools already experimenting with language immersion programs, there is a marginal value to implementing a pilot program in this area. HB 2814 would require TEA to use budgeted funds to implement the language immersion pilot program. TEA instead could spend significantly less researching existing programs and not have to redirect funds from established programs.

Notes

The **HRO analysis** of HB 2814 appeared in Part One of the April 23 *Daily Floor Report*.

Voluntary expression of religious viewpoints in public schools

HB 3678 by C. Howard
Effective June 8, 2007

HB 3678 requires a school district to treat a student's voluntary expression of a religious viewpoint in the same manner that the district treats a student's expression of a secular or other viewpoint on a permissible subject. The bill may be cited as the Religious Viewpoints Antidiscrimination Act or the Schoolchildren's Religious Liberties Act.

School districts must adopt a policy to establish a limited public forum for student speakers at school events in order to:

- provide a forum that does not discriminate against a student's voluntary expression of a religious viewpoint on a permissible subject;
- provide a neutral method for selecting students to speak at school events and graduation ceremonies;
- ensure a student speaker does not engage in obscene, vulgar, offensively lewd, or indecent speech; and
- provide a disclaimer, in writing or orally, that the students' remarks do not reflect the endorsement, sponsorship, position, or expression of the school district.

The bill stipulates that adopting and following a model policy contained within the bill would put school districts in compliance.

Students may express their religious beliefs in homework, art work, and other assignments. Assignments must be judged by ordinary academic standards of substance and relevance, and students may not be penalized or rewarded because of the religious content of their work.

Students may organize prayer groups, religious clubs, "see you at the pole" gatherings, and similar activities before, during, and after school to the same extent as students participating in other non-curricular groups. Religious groups must have the same access to school facilities as other non-curricular groups. Schools may disclaim sponsorship of student groups and events in a way that neither favors or disfavors students meeting to engage in prayer or practice religious speech.

Supporters said

HB 3678 is an anti-discrimination bill that would protect students' voluntary expression of religious viewpoints. The bill would not require or suggest that students express religious viewpoints at any time but would protect them if they decided voluntarily to express their views, religious or otherwise. Under the bill, school children wishing to express religious views would have the same privileges as students expressing secular views.

The bill is drafted to align with recent Supreme Court opinions. The case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), while considered by some to be the leading case on this issue, has not been widely referenced in recent cases. Arguably, the new standard is neutrality. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), for example, pronounced that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." The Supreme Court never has declared that the expression of religious views in a school setting is unconstitutional. While a school district may not provide, write, or require a prayer, nor endorse prayer as a preferable practice, these restrictions do not prohibit a student from voluntarily initiating a prayer at school events. The bill would support neutrality and prevent speech from being excluded based on its content.

HB 3678 would be aligned with the U.S. Department of Education's Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools. The department's guidance states that students may pray or study religious materials during non-instructional times, such as student recess or the lunch hour. The guidelines also state that students may express religious beliefs in homework, art work, or other assignments, which should be evaluated according to ordinary academic standards. While not established law, these guidelines establish permissible activities referenced in the bill.

The bill would prevent religious expression from being treated as second-class speech. Schools are not faith-free zones, and teachers should not be asked to be prayer police. Current policies have been ineffective in both protecting a

student's free speech rights and making clear the freedom that teachers have to allow these student liberties. The bill would clarify the law to dispel many misconceptions about that have led to the unconstitutional suppression of individual speech in Texas schools.

Opponents said

HB 3678 would interfere with the management of school campuses by adding new state mandates. Principals and teachers must provide students an environment suitable for learning, and schools need order and the discretion to discipline to maintain such an environment. The bill could prevent schools from disciplining students for comments and behavior. What is offensive to some may not be to others, and schools must have discretion to determine what is appropriate for their classrooms and local communities.

The bill's constitutionality is questionable. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) established the Lemon test, used by courts for more than 30 years to maintain the separation of church and state. It is one of the fundamental principles of the First Amendment's Establishment Clause that the Constitution forbids not only one religion over another, but also practices that endorse or prefer religion over non-religion. Under the test, the government's action must have a secular legislative purpose, must not have the primary effect of either advancing or inhibiting religion, and must not result in an "excessive entanglement" with religion. HB 3678, without a secular purpose, could serve to advance the presence of religion in schools. The Lemon test still embodies the dominant line of reasoning on the separation of church and state. If litigation ensued under the bill, the Lemon test still could be used to review a related constitutional challenge.

The bill could serve as a tool to proselytize the majority religious view, Christianity, in Texas schools. The United States is made up of people of many faiths. Children are required to attend school and should be allowed to do so without someone else's religion being imposed on them. An example in Texas schools of majority religious insensitivity was the scheduling of the TAKS exam for the 2006-2007 school year, when the exam was scheduled on the first day of Passover, a Jewish holiday. Families who practice the Jewish faith were forced to choose between having their child miss an important exam or honoring their faith. Promotion of religion should be reserved for homes, places of worship, and individual hearts, not the public school system.

Other opponents said

The bill would cause further confusion on the issue of religion in schools. For fear of litigation, many schools improperly have made efforts to silence religious viewpoints in the classroom and at school events. The bill should require training on constitutionally supported free religious speech in order to eliminate uncertainties about what are legal and appropriate expressions of religious views in schools.

Notes

The **HRO analysis** of HB 3678 appeared in Part One of the April 30 *Daily Floor Report*.

Establishing a new system of public charter schools

SB 4 by Shapiro Died in the House

SB 4 would have repealed current statutes governing open-enrollment charter schools and created a new system of public charter schools. The State Board of Education would have been authorized to grant up to 215 charters for public charter districts to eligible applicants, including public, private, or independent higher education institutions, nonprofit organizations, or governmental entities.

All existing charter holders would have had to apply for a new license following procedures outlined in the bill. The State Board of Education could have approved or denied applications based on criteria it adopted and on financial, governing, and operational standards adopted by the Texas Education Agency (TEA). A public charter district could not have begun operations until TEA certified that the district had implemented acceptable administrative and accounting systems.

TEA would have had to grant a charter immediately to governmental entities holding an existing charter, charter holders that served primarily students in residential facilities, and those in which at least 25 percent of students passed assessment tests for mathematics and for language arts in the 2006-07 school year and the entity's assets equaled or exceeded liabilities in fiscal 2006 or its total liabilities exceeded its assets by not more than 20 percent of total expenditures. Schools that met the financial requirements but did not meet the academic performance requirements, including those affected by Hurricane Rita, could have had test scores averaged for the 2005-06 and 2006-07 school year.

TEA would have been able to modify, place on probation, or revoke a charter without a hearing if the commissioner determined that the charter holder committed a material violation of the charter, failed to satisfy generally accepted accounting standards of fiscal management, failed to protect the health, safety, welfare, or best interests of the students, or failed to comply with regulations governing charter schools. Charter holders would have been able to appeal a revocation only by following procedures outlined in the bill and otherwise could not have appealed to the commissioner or to a district court. If a charter were revoked or if a district surrendered its charter, the district could not have continued to operate or receive state funds.

Charter holders would have been eligible for a facilities allotment of up to \$1,000 per student in average daily attendance (ADA) if any campus had for two consecutive years been rated exemplary or recognized under state accountability standards and had satisfied fiscal management standards. These charter holders would continue to be eligible for facilities funding unless they received an accountability rating of unacceptable.

The bill would have established new regulations for charter school management companies, which would have been liable for damages incurred by the state or a school district for failure to comply with its contractual or other legal obligations. The attorney general could have sued board members for breach of fiduciary responsibility or management companies for damages incurred by the state.

TEA would have had the authority to audit the records of a public charter district or campus, a charter holder, and a management company, but would have had to limit the audit to matters directly related to management or operations and would have had to limit audits to no more than one on-site audit per fiscal year without specific cause. TEA could have issued a subpoena to compel the attendance and testimony of a witness or the production of materials relevant to an audit or investigation. The bill would have established procedures for receivership and disposition of assets of a charter school that previously held a charter, but was not authorized to operate as a public charter district or elected not to do so.

TEA could have authorized up to three charter holders to grant a charter to an eligible entity to operate a "blue ribbon" charter campus if the new charter replicated a distinctive education program, the charter holder had demonstrated the ability to replicate its program, and the program to be replicated had been in operation for at least seven years and had been rated recognized or exemplary for at least five years. These charters would not have been subject to the limit on the number of charters issued in the state.

SB 4 would have allowed college or university charters to operate as advanced technical academies, which would have focused on advanced career and technology education, allowed students to combine high school and college courses

in grades 9-12, and allowed participating students to receive an associate's degree or trade or occupation certificate within five years of starting high school. The program would have had to provide flexible class scheduling and academic mentoring and would have had to be designed based on input from employers. Paid student internships, arranged through local chambers of commerce, local employers, and the Texas Workforce Commission, also would have been incorporated into the program.

Supporters said

SB 4 would give TEA the tools it needs to weed out and shut down low-performing charter schools while establishing a new 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 comparable funding, including facilities funding, as regular public schools.

The bill would reward the highest performing charter schools by providing them with facilities funding of \$1,000 per student in ADA. The lack of state facilities funding is the single biggest problem facing most charter schools, and SB 4 would begin to address this problem.

Many charter schools that serve the most difficult-to-educate students have met or exceeded state accountability standards. Those charter schools that cannot meet these accountability standards should not be allowed to continue to operate year after year.

Opponents said

Many of the charter schools that would be closed under SB 4 are offering opportunities for the most difficult-to-educate students, including those who otherwise would drop out of school altogether. These schools should not be judged solely on test scores and compared to other public schools that serve a much different student population. Instead, other criteria should be used to measure their success.

Charter schools that receive an accountability rating of adequate also should have access to facilities funding. State support for facilities funding is the greatest need facing charter programs, and programs that are meeting basic standards should not be denied this support.

Other opponents said

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.

Although SB 4 would allow TEA to deny charters to the lowest-performing schools, many others that have produced mediocre results likely would have their charters approved. Even though many charter schools perform more poorly than their public school counterparts, they are not subject to the same scrutiny regarding the use of public funds. The bill would not go far enough in ensuring that TEA would hold all charter schools to the same academic and financial accountability standards as public schools, such as class-size limits and minimum teacher qualifications.

Notes

The **HRO analysis** of SB 4 appeared in Part Two of the *May 22 Daily Floor Report*.

The Senate in a floor amendment by Sen. Shapiro added the provisions of SB 4 to HB 2237 by Eissler, but the amendment was removed from the enrolled version of the bill.

Random steroid testing in public high schools

SB 8 by Janek
Effective June 15, 2007

SB 8 requires high school students participating in athletic activities sponsored or sanctioned by the University Interscholastic League (UIL) to submit to random testing for steroids.

The UIL must adopt rules to administer the steroid testing program. The rules must:

- require the random testing of a statistically significant number of students to be tested;
- provide for the selection of students through a process that randomly selects from a single pool of students participating in any UIL athletic activity;
- administer the program at about 30 percent of participating high schools;
- provide for a process for confirming any initial positive results through a subsequent test;
- require the testing to be conducted at an approved and certified laboratory; and
- provide for a period of ineligibility for students with confirmed positive results.

Results of steroid tests will be confidential and, except by court order, may be disclosed only to the student, the student's parent, activity directors, and the principal and assistant principals of the student's school.

A student prescribed steroids by a medical practitioner for a valid medical purpose is not subject to a period of ineligibility from UIL events. Licensed practitioners with prescriptive authority are included in the parents' statement of acknowledgment of who may prescribe steroids.

Each employee who serves as an athletic coach at or above the seventh grade level for a UIL-sponsored athletic activity must complete an educational program regarding the health effects of steroid use.

The steroid testing program will be financed through funds budgeted to the Texas Education Agency. The UIL must conduct a study on potential mechanisms for future funding of the program and report findings and recommendations to the Legislature no later than December 1, 2008.

Supporters said

The random testing program required by SB 8 would help discourage steroid use in public schools. The number of Texas schools testing athletes for steroids has nearly doubled since 2002, and a recent study by Texas A&M University found that steroid use among Texas students in grades 7-12 decreased from 2 percent in 2004 to 1.5 percent in 2006. The downward trend indicates that increased testing could be the deterrent schools need to maintain clean competition.

Young athletes often feel the need to become stronger and faster to remain competitive and may turn to steroid use. However, steroids can produce lasting, harmful health effects. Major side effects from steroid abuse include cancer, liver and kidney tumors, jaundice, fluid retention, high blood pressure, and stunted growth in adolescents. Psychiatric side effects can include aggression, extreme mood swings, irritability, delusions, and impaired judgment from feelings of invincibility. Research also indicates that users may turn to other drugs to alleviate some of the negative effects of steroids, compounding the problem.

In 2004, the National Institute on Drug Abuse and the University of Michigan found that more than 40 percent of 12th graders described steroids as "fairly easy" or "very easy" to get, and the perception among high school students that steroids are harmful dropped from 71 percent in 1992 to 56 percent in 2004. With students losing perspective on the dangers posed by steroids, schools should facilitate programs that discourage their use.

Under the bill, students who used steroids improperly would face a period of ineligibility from participation in athletic events. Random testing could be the necessary stimulus to keep students clean. Students aspiring to play at the college level understand that playing time is essential to advancement, and SB 8 would send a strong message to young athletes that Texas schools insist on clean competition.

Opponents said

Random drug testing does not effectively reduce drug use among young people, including athletes. A study in the *Journal of School Health* (April 2003) reported that the strongest predictor of drug use by students is their attitude toward drug use and their perceptions of peer use. Random testing does not bring constructive changes to students' attitudes about drugs or their beliefs in the dangers associated with them.

With 733,000 public school athletes in Texas, more than any other state, SB 8 would create administrative and financial burdens on school districts, and some of the testing logistics for the districts remain unclear.

Drug testing programs can result in false positives, and innocent students could be unfairly stigmatized. Eliminating false positives would require schools to ask students to

identify their prescription medications before taking a test. This could compromise the student's privacy rights and create an additional administrative burden for schools to ensure that private information was safeguarded.

SB 8 could undermine students' relationships with teachers and coaches because drug testing can erode trust. Students often confide in their teachers and coaches about their fears and concerns, and this trust could be jeopardized if teachers and coaches acted as confidantes in some instances and as "police" in others.

Notes

The **HRO analysis** of SB 8 appeared in Part One of the May 21 *Daily Floor Report*.

Requiring criminal background checks for public school employees

SB 9 by Shapiro
Effective June 15, 2007

SB 9 requires criminal background checks for public school employees and establishes a criminal history clearinghouse within the Department of Public Safety (DPS). A national criminal history record information (CHRI) review will have to be conducted for:

- applicants for or holders of teaching certificates who currently are employed by a school district, charter school, or shared service agreement;
- teachers, librarians, educational aides, administrators, and counselors at charter schools (TEA must approve these applicants for employment);
- non-certified and contract employees for school districts who are hired after January 1, 2008, if the contract employee has or will have continuing duties related to the contract service as well as direct contact with students; and
- substitute teachers.

Student teachers and volunteers who are not a student's parents or guardians will be subject to name-based criminal background checks. This does not apply to volunteers accompanied by district personnel or volunteering for only one occasion. By September 1, 2011, the State Board of Educator Certification (SBEC) must complete a CHRI review for all current certified educators, and the Texas Education Agency (TEA) must complete a CHRI review for all substitute teachers.

School districts, charter schools and other employers affected by the background-check requirements may be required by TEA to collect a fee to cover the cost from those who must submit to a CHRI review. School districts may use third-party vendors other than the FBI or DPS to run background checks.

SBEC may suspend or revoke a person's certificate, impose other sanctions, or refuse to issue a certificate or permit to a person who has been convicted of a felony or misdemeanor offense relating to the duties and responsibilities of the education profession, including an offense involving:

- moral turpitude;
- a form of sexual or physical abuse of a minor or student or other illegal conduct in which the victim was a minor or student;

- the possession, transfer, sale, or distribution of a controlled substance, or conspiracy to possess, transfer, sell, or distribute a controlled substance;
- the illegal transfer, appropriation, or use of school district funds or other school district property; or
- an attempt by fraudulent or unauthorized means to obtain or alter a teaching certificate or license.

SBEC must adopt a procedure for placing a notice of alleged misconduct on an educator's public certification records. The notice must be placed immediately if the alleged misconduct presents a risk to the health, safety, or welfare of a student or minor, as determined by the board. SBEC must notify the educator in writing when placing such a notice on the educator's certification records and provide an opportunity for the educator to appeal. If the board determines that the educator did not engage in this conduct, the notice must be removed immediately. This provision takes effect September 1, 2007, and applies regardless of whether the conduct occurred or was committed before, on, or after that date.

SBEC may put an educator's certificate on inactive status for failure to comply with background check requirements.

School districts, charter schools, or other potential employers must discharge or refuse to hire an employee or applicant for employment or a contract employee, if the criminal background check shows that the employee or applicant has been convicted of one of the following offenses and the victim was under 18 years old or was enrolled in a public school at the time of the offense:

- a felony offense under Title 5, Penal Code, which includes offenses against the person, including homicide, kidnapping, and sexual assault;
- an offense on conviction of which the person is required to register as a sex offender; or
- an equivalent offense under the laws of another state or federal law.

These provisions do not apply to an offense committed more than 30 years before the effective date of the bill or more than 30 years before the date the person's employment began and the employee or applicant satisfied all terms of the court order entered on conviction.

SBEC may sanction an educator who does not discharge an employee or who does not refuse to hire an applicant if the educator knew or should have known, through a criminal background review, that the employee has been convicted of an offense cited in the bill.

Campus visitors. School districts may require a person who enters a district campus to show a driver's license or another form of photo ID issued by a governmental entity. School districts may create electronic databases to store information about visitors and may verify whether a person is a convicted sex offender registered with DPS. Information collected for a school database may be used only for school security and may not be sold or otherwise disseminated to a third party.

Criminal history clearinghouse. DPS must establish an electronic clearinghouse for criminal history record information and a subscription service to provide updated information. The clearinghouse will provide either an individual's state and national criminal history information or a statement that the individual does not have a criminal history, as well as the date any information was received from the FBI. This information will be confidential and may be provided only to persons authorized to receive it.

Updated information about a person's criminal record must be provided through the subscription service within 48 hours after DPS becomes aware that a person's criminal history has changed. Subscribers who no longer are entitled to receive this information must notify DPS and cancel their subscription. The subject of the criminal history record information must consent to the release of the information. DPS must notify SBEC of the arrest of any educator who has fingerprints on file with the department.

Supporters said

SB 9 would help protect children by expanding criminal background checks to include a broader range of individuals who come into contact with children at school, including non-certified staff, substitute and student teachers, and contract employees. It also would include certified staff who were hired before 2003, when criminal background checks were required of all new certified employees.

The bill would improve communication among school districts, SBEC, DPS, and local law enforcement, so that these organizations could share information that could prevent acts by educators against children that can happen in communities anywhere in the state.

Since Texas began requiring national criminal background checks for candidates for educator certification in October of 2003, almost 300 candidates for certification have been found to have serious offenses on their records, including sexual misconduct and crimes against children. As recently as 2004-05, SBEC found that 35 certified educators were registered sex offenders.

The cost of these background checks would be covered by modest fees of about \$50 per employee. This is about the same fee that new applicants for teacher certification pay to cover the cost of criminal background checks. While name-based background checks may be less expensive than fingerprinting, they are less reliable and more subject to identity theft and other fraud.

Opponents said

SB 9 would cast too wide a net in an effort to ensure children's safety. Educators who have served in the profession for 10 or 20 years should not be subjected to criminal background checks by the FBI.

The cost of conducting national criminal background checks would be passed on to those who could least afford it, particularly substitute teachers. The state should cover the cost of adopting a policy of conducting criminal background checks for all educators, rather than passing it on to educators.

Other opponents said

Rather than establishing a criminal background check clearinghouse within DPS, the state could save money and get more complete information by contracting with private vendors to conduct criminal background checks. Name-based criminal background checks would be less expensive than fingerprinting and national criminal background checks. DPS criminal background checks are likely to miss a significant number of criminal convictions because counties are not required to forward criminal records to the state.

Notes

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

Increased physical education requirements for public school students

SB 530 by Nelson

Effective June 15, 2007

SB 530 transfers authority for establishing physical education requirements for public school students from the State Board of Education to school districts and sets minimum standards for student physical activity. Beginning with the 2007-08 school year, students below sixth grade will have to participate in moderate or vigorous daily physical activity for at least 30 minutes throughout the school year. Beginning with the 2008-09 school year, students in grades six through eight must participate in daily physical activity for at least 30 minutes for at least four semesters during those grade levels.

If a school district determines, for any particular grade level below sixth grade, that this requirement is impractical due to scheduling concerns or other factors, students in that grade level may participate in moderate or vigorous physical activity for at least 135 minutes during each school week. For districts that use block scheduling, students must participate in moderate or vigorous physical activity for at least 225 minutes during each two-week school period.

Students who participate in an extracurricular activity with a moderate or vigorous physical activity component will be exempted from this requirement, as will students with illnesses or disabilities that prevent them from participating.

The local school health advisory committee will have to consider and make policy recommendations on the importance of daily recess for elementary school students, taking into account research on unstructured and undirected play, academic and social development, and the health benefits of daily recess. Any policy recommendation by the council to the district must reflect local community values.

School districts will have to annually assess the physical fitness of students in grades three through 12, unless a disability or other condition would make the assessment inappropriate. For the 2007-08 school year, the Texas Education Agency (TEA) will have to adopt an assessment instrument to be used by school districts that is based on factors related to student health, including aerobic capacity, body composition, and muscular strength, endurance, and flexibility. The assessment must include criterion-referenced standards specific to a student's age and gender and based on the physical fitness level required for good health.

Districts must compile the results of the fitness assessments and provide TEA with summary results, aggregated by grade level and any other appropriate category. These summary results may not contain the names of individual students or teachers. Individual student performance on the assessments will be confidential and may be released only in accordance with state and federal law.

TEA will have to analyze the assessment results and identify any correlation with the following:

- student academic achievement levels;
- student attendance levels;
- student obesity;
- student disciplinary problems; and
- school meal programs.

By September 1 of each year, TEA will report these findings to the School Health Advisory Committee for use in assessing the effectiveness of coordinated health programs and developing recommendations for modifications to coordinated health programs.

By September 1, 2008, TEA must submit a report to the Legislature that details options and recommendations for providing moderate or vigorous daily physical activity for students for at least 30 minutes outside the seven-hour instructional day.

Supporters said

SB 530 would address the need for physical activity by students while also giving schools enough flexibility to meet other, equally important state requirements. The bill would help the state address a growing crisis of childhood obesity and related health problems by giving a better understanding of the relationship between student fitness and other factors, such as academic performance, dropout rates, and absenteeism. Good health is as fundamental as reading, writing, and arithmetic, a lesson students must learn.

More than one third of Texas students are overweight, putting them at higher risk for numerous chronic diseases, including heart disease. Adolescents are developing the type of diabetes that used to show up only in middle-aged adults.

Most shocking of all, our youth are at risk of becoming the first generation of Texans to live shorter lives than their parents. Action now would reverse this trend.

A lack of physical education requirements in Texas is fueling this crisis. National guidelines recommend that middle and high school students should receive 225 minutes of exercise per week. SB 530 offers a flexible approach that would take into account outside physical activities while still ensuring that students got at least a minimal amount of physical activity.

Opponents said

An increase in physical education requirements could limit the time available for other electives, particularly art and music for elementary students. While physical activity is important, it should not be emphasized at the expense of these other important pursuits.

Other opponents said

Increasing physical education requirements would not have a significant impact on student obesity. Nutrition education and attention to the types of food served in cafeterias also should be emphasized to have a greater impact on student health.

Notes

The **HRO analysis** of SB 530 appeared in Part One of the May 21 *Daily Floor Report*.

School vouchers for students with autism

SB 1000 by Shapiro Died in the Senate

SB 1000 would have established an Autism Services Accessibility Program and directed the Texas Education Agency (TEA) to spend up to \$125,000 each fiscal year to fund the provisions of the bill. The bill would have allowed students diagnosed with autism or an autism spectrum disorder to attend public school in the district in which they resided, another public school district, or a private “qualifying school.”

To participate in the program, a qualifying school would have been required to be accredited or have applied for accreditation by an accrediting organization recognized by TEA; not advocate or foster unlawful behavior or teach hatred of any person on the basis of race, ethnicity, national origin, or religion; comply with health and safety laws, including laws on criminal background checks; and hold a valid occupancy permit if required by the municipality in which the school was located. Admissions standards would have had to comply with federal laws and nondiscrimination provisions established in the bill. A private school with more qualified applicants than available positions would have had to fill the available positions by a random selection process.

If a student had attended school in a district in which the student did not reside, the district in which the student attended school would have been entitled to include the student in its average daily attendance for state aid purposes. If a student had attended a private qualifying school, TEA would have distributed directly to the school the amount that the student’s home district would have received and deducted this amount from the home district’s state funding. The student’s program funding would have been the entitlement of the student under the supervision of the parent, and not that of any school, but the qualifying school could not have shared a student’s program funding with or have refunded or rebated any share of the money to the student or student’s family.

For each eligible student, qualifying schools would have had to establish academic goals similar to an individualized education program and provided a report to the student’s parents every six weeks. They also would have to have administered each spring either the TAKS test or another nationally norm-referenced assessment instrument approved by TEA. Individual test results would have been provided

to the student’s parents, and aggregated results would have been made available to the public. Qualifying schools would not have been required to implement individualized education programs for eligible students.

It would have been the responsibility of the parent and student to locate and select a qualifying school, apply for admission to the school, and submit required information to TEA in order to qualify for funding. Funding then would have been distributed to the school following procedures established in the bill.

TEA would have designated an impartial organization to evaluate the program without the use of state funds and report to members of the Legislature by December 1, 2010. An evaluation would have compared differences between qualifying and public schools, including such factors as student and parent satisfaction, behavioral problems, class size, the fiscal impact to the state and school districts, student academic performance, and practices of a qualifying school that contributed to any change in student behavior or academic performance. The program would have been subject to sunset review and, unless continued as part of the sunset process, would have expired September 1, 2017.

TEA also would have been required to contract with a regional education service center to coordinate statewide services and training for educators serving students with autism. As part of this initiative, the regional education service center would have studied available training options, developed new ones as appropriate, coordinated statewide training, and developed procedures for school districts to use in determining the training needs of educators. The service center would have developed a guidebook for educators and parents on appropriate practices for students with autism and maintained a web site with information about available services. The web site also would have included information about the diagnosis of and current research on autism, recommended instructional practices for students with autism, and state and national autism organizations. The service center would have collaborated with the Texas Council on Autism and Pervasive Developmental Disorders to administer the initiative.

Supporters said

SB 1000 would give parents of students with autism flexibility to determine the kind of education that best meets their children's needs by allowing students to transfer within or between districts or to a private, accredited school. Funding would follow the child and be limited to the amount the student's public school would have received to provide educational services. If tuition at a private school exceeded this amount, parents would be responsible for paying the difference.

To be eligible for participation, students would have to qualify for special education services, have an individualized educational program (IEP), and be diagnosed with autism or a related disorder. The bill would not open the door to a statewide voucher program but instead would provide a narrowly defined benefit for students needing services that a public school district may not be willing or able to provide.

One in every 150 children is diagnosed with autism each year, and the number of students in Texas public schools with autism has increased by 600 percent over the last 20 years. Research shows that with early, intensive intervention, almost 50 percent of children with autism can become indistinguishable from their peers. While some school districts provide excellent services, others do not have programs to meet the needs of these unique students. Children with autism can learn and progress if placed in an appropriate educational setting to meet their individual needs, but effective teaching strategies are crucial to their positive development and could be the difference between a generation of healthy, taxpaying citizens and institutionalized adults.

Opponents said

SB 1000 would open the door to other voucher programs in which state funds would be used to fund private school educations for certain students. Instead of diverting money from public schools, the state should invest in improving public school services for children with autism. There are many excellent programs in public school districts throughout the state that could serve as models for other school districts.

Allowing students to transfer to other school districts without allowing the districts to limit enrollment could undermine the quality of education in school districts doing a good job of providing services for students with autism. School districts without the capacity to meet the additional demand for services could be overwhelmed if a large number of new students transferred into the district.

The state share per student is estimated to be about \$14,000 per student per year, which probably would not be enough to cover the annual cost of private school tuition. Parents with the means to make up the difference would benefit from the bill, while those who could not cover the additional tuition would not be able to participate in the program. Families who lived in small towns likely would not have access to such programs at all.

Replacing TAKS with end-of-course exams for graduation

SB 1031 by Shapiro

Effective September 1, 2007

SB 1031 replaces the exit-level and other high school TAKS tests with end-of-course exams, which students will be required to pass in order to graduate from high school. The bill also establishes test security procedures and penalties for those who violate these procedures.

End-of-course exams. To receive a high school diploma, students taking the recommended or advanced high school program will have to perform satisfactorily on end-of-course exams in each of the following subjects:

- English I, II, and III;
- Algebra I and II and geometry;
- biology, chemistry, and physics; and
- world geography, world history, and U.S. history.

Students taking the minimum high school program will have to perform satisfactorily on end-of-course exams only for the courses listed above that are required to complete the program.

Students who do not perform satisfactorily on an end-of-course exam must have multiple opportunities to retake it and be provided with accelerated instruction. If a district determines that a student, on completion of grade 11, is unlikely to achieve the cumulative scores required to pass these exams, the district must require the student to enroll in a corresponding content-area college preparatory course. The student may use the score on the end-of-course exam in the college preparatory course toward the cumulative score requirements.

Performance on any of these exams will account for 15 percent of a student's final grade in the course. Students must have an average cumulative grade of 70 on all exams and receive a score of 60 in order for a test score to count toward the cumulative score. If a student retakes an exam, the school district does not have to use the grade on the repeat exam in determining the student's final grade for the course. A student's performance on the end-of-course exams must be included in the student's academic achievement records.

End-of-course assessments may be adopted for other courses, but grade and performance requirements will not apply to those tests. Spring test administration may be no earlier than the first week of May, with the exception of tests

in English I, II and III. Tests may not be administered to any student on more than 10 percent of instructional days in any school year. The Algebra I and II and geometry tests must be administered with the aid of technology.

The Texas Education Agency (TEA) will adopt rules for the transition to end-of-course exams, so that the last students to take the exit-level TAKS test will be those entering 10th grade in the 2011-12 school year, and students entering ninth grade in that year will be subject to the new requirements for end-of-course exams. By the time they are in seventh grade, students subject to the new requirements will receive written notice of the change to end-of-course assessments.

Tests must be developed to allow for the measurement of annual student achievement. Existing test instruments may be used, provided that they are aligned with the essential knowledge and skills of the subject being assessed and allow for the measurement of annual improvement. Special-purpose questions will be included in the test to measure college readiness and to identify students likely to succeed in advanced high school courses. These students and their parents must be notified by the district of their potential to succeed in advanced courses. The tests may not be used to screen students for eligibility for those courses.

A student's satisfactory performance on an advanced placement test, international baccalaureate examination, an SAT subject test, or another assessment considered by TEA to be equally rigorous may be used as a factor in determining whether the student has satisfied requirements for an end-of-course examination.

Assessment instruments must be designed so that they could be administered by computer. By September 1, 2008, school districts must notify TEA of their ability to administer assessments by computer. TEA must compile this data and submit a report to the Legislature by December 1, 2008.

The bill will limit field testing of questions for any end-of-course exams to every other year. TEA will have to conduct a study of the sample size and procedures used in field testing questions for assessment instruments and report the results to the Legislature by December 1, 2008.

By June 1, 2008, TEA must develop a vertical scale for evaluating and comparing student test performance from one grade to the next. This scale will be implemented

beginning with the 2008-09 school year.

Test security. TEA must establish procedures for administering tests to ensure security and may establish record retention requirements for school districts for test security. TEA also may develop and implement statistical methods and standards for identifying potential security violations beginning with the 2008-09 school year. These standards may include indicators of potential violations that are monitored annually and patterns of inappropriate testing practices that occur over time. TEA may establish one or more advisory committees to advise the agency on these issues and require training for those responsible for administering tests.

TEA may investigate school districts for potential violations of test security. Each school year, the agency must identify the districts that were investigated and the statistical methods and standards used to select the district. Beginning with the 2007-08 school year, TEA may conduct random audits of school districts to determine compliance with security requirements.

The bill authorizes TEA to issue subpoenas as part of an investigation or audit of test security violations, including an investigation of an educator, or for an agency accreditation investigation.

Intentional disclosure of the contents of any portion of a test, including answers, is a class C misdemeanor (maximum fine of \$500).

College preparation assessments. Each school year and at state cost, if funding is appropriated, school districts must administer the following tests:

- for eighth graders, a nationally norm-referenced preliminary college preparation assessment instrument to diagnose student strengths and deficiencies before entering high school;
- for 10th graders, a nationally norm-referenced preliminary college preparation assessment test to measure a student's progress toward readiness for college and the workplace; and
- for 11th and 12th graders, at state cost, a nationally norm-referenced assessment instrument selected by the student that is used by colleges and universities as part of their undergraduate admissions process.

TEA will select and approve vendors of the specific assessment instruments, pay all fees from funds allotted from the Foundation School Program, and reduce allotments to school districts accordingly. Vendors may not be paid for a test that was not administered. TEA must develop a refund system in which vendors return any payment for a student

who registered for but did not take a test.

Test results must be included in TEA's electronic student records system, and the student's parents must receive a copy of test results.

Review of accountability system. The bill establishes a 15-member committee to study the state's public school accountability system. The committee will examine the mission, organizational structure, design, processes, and practices of similar accountability systems in other states, as well as federal requirements, and will conduct a thorough review of several aspects of the state accountability system. The committee will hold public hearings throughout the state and solicit testimony from public school parents and other interested parties. By December 1, 2008, the committee will report on its findings and recommend statutory changes.

Supporters said

SB 1031 would phase out the exit-level TAKS exam, which has outlived its usefulness, and replace it with an assessment method that better reflects high school achievement and college readiness. The bill would maintain accountability for schools while providing multiple pathways to graduation by allowing a student to satisfy graduation requirements in different ways instead of depending on a single pass/fail test.

End-of-course exams would allow a more in-depth study of a particular subject and provide a more timely assessment of a student's grasp of that subject. These exams would be more relevant to the content of the course than is the broad-based TAKS test. Students would be tested at the end of the course, when the material was fresh in their minds, instead of having to pass a test covering information about subjects they may have studied years ago.

The bill would move the state away from a system in which one test is used to measure the quality of teaching as well as student performance. A random survey by one teachers' organization found that more than three out of four teachers believe the TAKS does not accurately measure a student's academic level and is turning students into test-takers rather than critical thinkers. More than 60 percent of teachers and parents surveyed said that TAKS had reduced learning to how well a student can take a test.

The bill would promote college readiness by encouraging all students to take nationally normed tests such as the SAT, ACT, and PSAT. All eighth graders would take a

diagnostic test such as EXPLORE, an assessment designed by ACT to measure a student's strengths and weaknesses in preparation for high school. Students would not be required to take the SAT or ACT, and the state would be reimbursed if a student signed up for a test but did not take it.

Opponents said

Overemphasis on the TAKS test could be replaced with overemphasis on end-of-course exams, which could lead teachers to design entire courses around one final exam. Currently, teachers develop their own final exams based on the elements they have emphasized during the year. Standardized end-of-course exams could lead to more conformity in teaching.

By requiring students to pass at least four end-of-course exams rather than one exit-level TAKS test, the bill could lead to an increase in dropout rates. Students who failed one or several of these exams may choose to drop out of high school instead of retaking these exams.

Administering all tests by computer could create problems for districts not set up to administer exams in this way. In some courses, such as mathematics, paper exams are preferable to computer-administered assessments because of the need to show a student's work in solving a problem. School districts should have the option of administering

paper tests in some cases.

More than half of the cost of the bill in fiscal 2009 and 2010, about \$13 million, would cover the state cost of such nationally normed tests as the ACT, SAT, PSAT and, in eighth grade, an assessment instrument produced by ACT. Most of these tests traditionally have been paid for by students as part of the college admissions process. If students have some financial investment in test results, they are likely to take such tests more seriously.

The EXPLORE assessment, in particular, would add another layer of testing at a time the state is trying to scale back on assessments. In addition to the EXPLORE assessment, eighth-grade students still would have to take the TAKS test, which would provide a similar measurement of the student's strengths and weaknesses. School districts still should be able to decide whether they want to participate in this diagnostic program.

Notes

The **HRO analysis** of SB 1031 appeared in Part One of the May 14 *Daily Floor Report*.

Tying educator evaluations to test scores

SB 1643 by Shapiro Died in the Senate

SB 1643 would have required that the appraisal process for teachers include student achievement, including improvement in test scores, and a teacher's relevant subject area expertise. A majority of the teacher's appraisal would have been based on consideration of annual student achievement on the TAKS test and other locally adopted measures, including benchmarking systems, portfolio assessments, and nationally norm-referenced assessments. These criteria would not have applied to teachers in subjects for which objective and quantifiable measures did not exist. Teachers employed under probationary contracts would have been appraised more frequently than those employed under a term or continuing contract.

If a teacher received an unsatisfactory appraisal or one that identified important instructional deficiencies related to student achievement, the teacher's supervisor, in consultation with the appraiser and teacher, would have had to develop a performance improvement plan. The improvement plan would have identified all areas in which the teacher was in need of improvement, professional development and instructional effectiveness requirements, and a timeline for completion of the performance improvement plan.

Teachers who had received an overall unsatisfactory rating for three consecutive years either would have been discharged or not had their contracts renewed, as applicable.

The bill would have required that appraisals of principals and assistant principals be based on student test scores on that campus, as well as staff and parent evaluations and other observable measures, when appropriate. At least 25 percent of the principal's or assistant principal's evaluation would have had to be based on objective and quantifiable measures of student achievement on that campus.

The State Board for Educator Certification (SBEC) would have had to include in its accountability standards for educator preparation programs the achievement on standardized tests of students of teachers who were in the first three years following certification, as well as perseverance of beginning teachers in the profession. Perseverance would have been measured by the number of beginning teachers who had remained on active status in the Teacher Retirement System for at least three years compared to similar programs.

SBEC would have had to adopt rules allowing the Texas Education Agency (TEA) to impose sanctions on educator preparation programs that did not meet accountability standards. These sanctions could have included requiring technical assistance from SBEC or TEA or contracting for professional services, appointing a monitor to participate in and report on the activities of the program, or appointing a conservator to direct the program.

Programs rated unacceptable under the educator preparation program accountability system could have been taken over by a board of managers. Those rated unacceptable for two consecutive rating periods could have been closed, and a program rated unacceptable for three years would have been closed. These actions could also have been applied to educator preparation programs in a certain field. A program could have sought recertification after two years.

The bill would have required SBEC and the Texas Higher Education Coordinating Board to review and assess educator certification programs every two years.

Supporters said

SB 1643 would ensure that evaluations of teachers, principals, and assistant principals were based on the academic performance and improvement of students by taking student test scores into account as a significant part of the evaluation process. Evaluations also would consider other factors, such as relevant subject area expertise.

A fair, accurate, and sound method of evaluating teacher and administrator performance is essential to strengthening the overall quality of education in the state. In Texas, teacher evaluation relies too much on inputs and efforts rather than on results and effectiveness. As a result, effective teachers are not properly rewarded, teachers in need of improvement do not receive help, and persistently ineffective teachers are not properly removed.

The bill would improve the quality of teacher preparation programs by establishing stricter accountability programs and giving SBEC clear authority to close programs or to provide assistance to programs that consistently did not meet standards for student and teacher performance.

Opponents said

SB 1643 would lead to even more emphasis on TAKS scores by tying teacher salaries to student test scores. The bill could create an incentive for the best teachers to gravitate to schools with the highest TAKS scores and avoid more challenging teaching assignments in schools where test scores needed improvement.

Under the current system, schools and school districts have wide latitude in evaluating teachers and deciding not to renew the contracts of teachers who do not meet performance standards, particularly during a teacher's first three years on the job. Teachers are evaluated based on a wide variety of factors, such as classroom management techniques and other observable behaviors, which are not reflected in student test scores. Any effort to tie teacher performance to student test scores should be part of an overall review and revamping of the state accountability system.

Creating a state virtual school network

SB 1788 by Shapiro

Effective September 1, 2007

SB 1788 establishes a state virtual school network to provide electronic courses or programs for Texas students, as well as equitable access to the courses. TEA will administer the network, employing a limited administrative staff and contracting with a regional education service center to operate the program. The State Board of Education (SBOE) will establish criteria for course and program content based on Texas essential knowledge and skills (TEKS) requirements. The courses must be in specific subjects that are part of the required state curriculum and must be equivalent in instructional rigor and scope to a course provided in a traditional classroom setting.

Electronic courses are those in which instruction and content are delivered primarily over the Internet, a student and teacher are in different locations for most of the student's instructional period, most instructional activities take place in an online environment, online instructional activities are integral to the academic program, extensive communication between a teacher and students is emphasized, and the student is not required to be on the physical premises of the school.

TEA will evaluate and approve electronic courses or programs and provide public access to a list of those that are approved, including advanced placement courses and those required for high school graduation. The agency will establish a schedule for the annual submission and approval of electronic courses to be approved by August 1 of each year.

TEA will establish the cost of providing an electronic course, which may not exceed \$400 per student per course or \$4,800 per full-time student. School districts or charter schools that submit courses for approval must pay a fee to cover the cost of evaluating the electronic courses and programs.

Funding. The state must pay for operating the state virtual school network. The costs may not be charged to a school district or charter school. School districts or charter schools in which a student is enrolled in an electronic course are entitled to state and local funding equal to the cost of providing the course, as established by TEA, plus 20 percent. Payments may be based on contact hours or on the student's successful completion of a course.

Home-schooled students must pay a fee that may not exceed the lesser of the cost of providing the course or \$400.

Teacher qualifications. Teachers of on-line courses must be certified under state certification requirements to teach that course and grade level and must complete the appropriate professional development courses, provided through the virtual school network. The network also may provide other teacher development courses.

Student eligibility. Electronic courses may be offered to state residents younger than 21 and eligible to enroll in a public high school. Students may enroll full time in the virtual school network only if they were enrolled in a public school the previous year or if they were a dependent of a member of the military, were previously enrolled in high school in Texas, and did not reside in Texas because of a military deployment or transfer.

Full-time public or charter school students may enroll in one or more classes through the state virtual school network. The district or school must notify students and parents about the option of enrolling in on-line courses at the time and in the manner that the district informs students and parents about traditional courses. School districts may not require students to enroll in an on-line course, but also may not unreasonably deny the request of a student or parent for a student to enroll in one.

To deny this option, the district or school must demonstrate that the course does not meet state or district standards, the course load is inconsistent with the student's graduation plan or could negatively affect the student's performance on the TAKS test, or the student requested permission to enroll in an on-line course at a time that was not consistent with district or school enrollment periods. Districts or schools must make all reasonable efforts to accommodate a student's enrollment under special circumstances.

Home-schooled students may take up to two on-line classes per semester, but will not be considered public school students and must gain access to the courses through the district or charter school attendance zone in which the student resides.

Attendance and accountability. TEA must adopt rules to verify attendance of students in electronic courses or programs. Students enrolled in on-line courses must take the same assessment tests required of students in traditional classrooms. School districts or charter schools must report results of assessment tests to TEA through the Public Education Information Management System (PEIMS).

The virtual charter school network must begin operations with the 2008-09 school year by providing electronic courses for grades nine, 10, 11, and 12 only, with grades six, seven, and eight added in the 2009-10 school year, and all grades covered starting in the 2010-11 school year.

Supporters said

SB 1788 would move education in Texas into the 21st century by expanding opportunities for students to use technology as an alternative way to gain access to a high-quality education through a statewide virtual school network. The network would increase equity in the educational system by providing access to courses for all students.

The network would be established within the state's existing educational framework and would build on recent pilot projects that tested the use of electronic courses and programs at individual school districts. SB 1788 would be different from virtual charter school bills the Legislature has considered in the past two sessions, particularly one that would have been offered by a private company that provided equipment directly to participating students. The virtual school network would be administered by TEA and operated through participating public school districts, charter schools, and higher education institutions.

Safeguards would be included to ensure that students enrolled in electronic courses or programs received an education 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 certified teachers would teach the courses.

While the bill would not prevent private companies from contracting with districts or charter schools, the cap of no more than \$400 per student per course would limit the amount of money a company could make. The company would have to meet the same standards for content as the school district or charter school.

While home-schooled students would be eligible to participate in a limited number of courses, the programs would benefit many kinds of students, including students in rural areas who may not have access to advanced courses, children with disabilities such as autism, gifted and talented students, and students from families who must travel a great deal. Home-schooled families might choose not to participate because of the assessment and attendance requirements.

SB 1788 simply would offer another educational option for Texas students and families in the same way that charter schools offer such alternatives. The bill would not divert significant funding from traditional programs, but rather would provide public schools with an important supplement to existing programs.

Opponents said

SB 1788 would divert money from traditional public schools 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 \$13.4 million in fiscal 2008-09 to \$38 million in fiscal 2010-11. While electronic courses could benefit many students, the cost should be borne by individual students, families, and, in many cases, individual school districts.

The bill would not prohibit a private company from contracting with a district or charter school to develop on-line courses. This could be a windfall for some on-line vendors.

Notes

The **HRO analysis** of SB 1788 appeared in Part One of the May 21 *Daily Floor Report*.

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Restricting ERS and TRS pension fund investments in Sudan

SB 247 by Ellis

Effective January 1, 2008

SB 247 establishes a “targeted divestment” process by which the Employees Retirement System (ERS) and the Teacher Retirement System (TRS) – following a series of notifications outlined in the bill – must sell, redeem, divest, or withdraw, beginning in January 1, 2008, all publicly traded securities of certain “scrutinized businesses” with operations in Sudan.

A company is considered to have engaged in “scrutinized business operations” if it has business operations that involve contracts with or provides supplies or services to the Government of Sudan, if that government has any direct or indirect equity share in the company, or if the company is a consortium or project commissioned by the Government of Sudan – or is involved in such a consortium or project – and its revenues or assets linked to Sudan exceed certain thresholds established in the bill.

The Comptroller’s Office and ERS and TRS will have to follow timelines for identifying and notifying “scrutinized companies” – companies that engaged in scrutinized business operations or were “complicit” in the Darfur genocide during any preceding 20-month period. Before initiating divestment, the agencies must notify the companies of their “listed” status and give them the opportunity to cease these investments under timelines established in the bill.

ERS or TRS may stop divesting from or reinvest in a listed company only if the agencies determine in good faith that divestment would result in a loss such that the value of all assets in the fund equaled 99.7 percent of what the value would have been if the agency had not divested from those companies. The agencies may maintain investments in these companies only to the extent necessary to ensure that the overall value of the fund does not fall below 99.7 percent of what it would be without divestment.

The provisions of the bill expire on the earliest of:

- the date the U.S. Congress or the President of the United States declare that the Darfur genocide has been halted for at least 12 months;
- the date the U.S. government revokes its sanctions against the Government of Sudan; or
- the date the U.S. government declares that mandatory divestment interferes with the conduct of U.S. foreign policy.

By December 31 of each year, ERS and TRS must file a publicly available report identifying all investments sold, redeemed, divested, or withdrawn and all prohibited investments, and summarize any changes made by investment funds regarding listed companies.

Supporters said

SB 247 would send a powerful message about corporate responsibility in the face of mass murder and human rights atrocities by requiring the state’s two largest pension funds to divest in companies that actively do business in the Darfur region of Sudan. On September 26, 2006, the U.S. House of Representatives stated that “an estimated 300,000 to 400,000 people have been killed by the Government of Sudan and its Janjaweed allies since the Darfur crisis began in 2003, more than two million people have been displaced from their homes, and more than 250,000 people from Darfur remain in refugee camps in Chad.” The Darfur crisis represents the first time the United States government has labeled ongoing atrocities a genocide.

The bill would put further pressure on the Government of Sudan, which has been subject to sanctions by the U.S. government since 1997, by requiring ERS and TRS to divest in companies actively doing business with the Sudanese government. This is necessary because current political and diplomatic pressure has imposed virtually no cost to the Sudanese government for continuing its genocide in Darfur. Divestment, however, would force the Sudanese government to pay a price for its refusal to restore peace and security to Darfur.

The bill would establish a “targeted divestment strategy” designed to have the greatest impact by affecting those companies, all of them foreign and mostly in the energy sector, that conduct a significant amount of business with the Government of Sudan while doing little for the country’s underprivileged population.

Under a series of notice requirements specified in the bill, companies would have up to 15 months to cease active business operations that made them subject to divestment. A small fraction of companies in the ERS and TRS portfolios would be affected, and any losses to either pension fund

likely would be minimal. The bill would set limits to ensure that neither fund faced significant losses as a result of divestment.

SB 247 would allow Texas to join the growing number of states taking action to stop the genocide through targeted investments. These actions are having an effect. Unlike isolated countries that tend to shrug off sanctions, Sudan is desperately trying to attract foreign investment. Threats to these efforts are taken very seriously by the government in Khartoum.

Texas Constitution, Art. 16, sec. 67(a)(3) specifies that the Legislature by law may further restrict the investment discretion of the board of a statewide benefit system. The Legislature has clear constitutional authority to direct or restrict ERS and TRS investments in companies doing business in Sudan.

Opponents said

Although the human rights abuses occurring in Sudan are reprehensible, it is unlikely that requiring Texas state employee and teacher pension funds to divest would affect the targeted companies or the Government of Sudan. However, such action could violate fiduciary and trust standards and cause these pension funds, neither of which currently is actuarially sound, to lose money, which ultimately would harm the retirees these funds are intended to benefit.

SB 247 could violate Art. 16, sec. 67(a)(1) of the Texas Constitution, which states that “the assets of a system are held in trust for the benefit of members and may not be diverted.” The Constitution is very clear that after state money or member contributions are deposited into a pension system, the Legislature has no authority over that money. Any divestiture bill causing losses to a fund would cause a trustee to violate the fiduciary duties established in the state Constitution.

Any sale of investments would clash with Texas Constitution, Art. 16, sec. 67(a)(3), which requires that pension funds be managed in a manner that “persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs.” While the same section authorizes the Legislature to restrict the investment discretion of the board, this refers to whether trustees are exercising prudent risk in carrying out their responsibilities. For example, the Legislature could direct the board to switch to relatively safe investment-grade debt from riskier junk bonds. The provision does not authorize the Legislature to direct trustees to violate their fiduciary duty by divesting certain stocks or other securities altogether for reasons unrelated to prudent investing.

SB 247 could cause the pension funds to lose money. According to the fiscal note, ERS estimates that its potential loss from divestment in fiscal 2008 could be as high as \$69 million. TRS, meanwhile, would stand to lose \$51 million in fiscal 2008, with ongoing losses in future years. The bill also could raise tax issues because the assets of a pension fund must be exclusively held for the benefit of members in order to be qualified under the federal tax code, which also prohibits diversion of member funds.

Divestment also would be ineffective. While Texas’ retirement funds might divest themselves of Darfur-related investments, other investors would be quick to purchase these assets. The Illinois attorney general’s office, arguing in defense of a similar Illinois statute, admitted that its law “does not impose any substantive economic pressure on Sudan ... the act is merely moral investment style ... codified into law.”

Notes

The **HRO analysis** of SB 247 appeared in Part One of the May 15 *Daily Floor Report*.

Increasing TRS contribution rates and issuing a “13th check” for retirees

SB 1846 by Duncan
Effective September 1, 2007

SB 1846 allows the Teacher Retirement System (TRS) board of trustees to make a one-time supplemental payment, or “13th check,” to eligible TRS annuitants if the pension fund is determined to be “actuarially sound,” meaning that unfunded liabilities can be amortized over a period of 30 years. If issuing such a payment would cause the fund to become actuarially unsound, the TRS board may increase the TRS member contribution rate from 6.4 to no more than 6.58 percent of salary. The bill increases the state contribution rate to 6.58 percent of payroll.

The “13th check” will be the lesser of \$2,400 or the amount of the annuitant’s August 2007 gross annuity payment and subject to all applicable tax withholding and other required deductions.

Supporters said

SB 1846 would divide responsibility for the long-term health of the TRS pension fund between the state and active teachers by allowing TRS to raise the contribution rate for active teachers if necessary so that the pension fund was determined to be “actuarially sound,” even if TRS issues a “13th check” to eligible retirees in September 2007.

The long-term financial strength of the pension fund should not be only the state’s responsibility. Active members, for whom the fund provides retirement security, also should have to increase their contributions if the fund’s soundness is in question. It would be irresponsible to issue a “13th check” to eligible retirees without taking significant steps to address the overall financial health of the pension fund.

TRS retirees have not had a benefit increase since 2001 and should not have to wait another two years or more until market gains are sufficient for the pension fund to be determined actuarially sound. Since the last benefit increase, retirees living on fixed incomes have struggled with higher costs for health care, food, and other necessities.

Opponents said

In view of other budget needs, the state contribution rate should not be raised to match the contribution level of active teachers. Improving market conditions, changes in TRS investment strategies, and new TRS eligibility requirements adopted in 2005 eventually should lead the fund to become actuarially sound and allow TRS to grant benefit increases by 2010.

Other opponents said

A February 2007 valuation of the TRS pension fund determined that an increase in the state contribution rate to 6.6 percent of payroll would be sufficient to make the fund actuarially sound. The state then could issue a “13th check” without taking about \$50 million per year out of the pockets of working teachers and other education employees.

A “13th check” should not be held hostage by a requirement that active teachers contribute more to the pension fund. Over the past two decades, the state has decreased its TRS contribution rate to the constitutional minimum, which negatively has impacted the long-term financial health of the fund. Rather than asking active TRS employees to contribute more, the state should make a long-term commitment to funding levels that would ensure solvency.

Notes

A related bill, HB 1105 by McLendon, would have increased the TRS state contribution rate to 6.7 percent of payroll but would not have increased contribution rates for active employees. The bill also would have required TRS to issue a “13th check” to retirees in September 2007. These provisions were adopted by the House as a complete floor substitute to SB 1846 but were not included in the conference committee report.

The **HRO analysis** of SB 1846 appeared in Part One of the May 22 *Daily Floor Report*.

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Increasing school district margin of error in comptroller's property value study

HB 216 by Otto
Died in Senate Committee

HB 216 would have required the comptroller to use a margin of error of 10 percent, rather than the current 5 percent, in determining whether the taxable value of property for a school district was valid.

The property value study is an annual study conducted by the comptroller's Property Tax Division to determine the taxable value of property in each school district in the state to help ensure that state funds for public schools are distributed equitably. A secondary purpose of the study is to measure county appraisal district performance.

For a specific school district, the property value study compares the district's appraised value with the district's market value. A school district's "appraised value" is determined by the school district's central appraisal district. A school district's "market value" is the fair price at which a property would sell under normal conditions. If a school district's reported value falls within a 5 percent margin of error above or below the district's taxable value as estimated by the Property Tax Division, the value is considered valid.

Supporters said

By increasing the margin of error used in the comptroller's property value study from 5 percent to 10 percent, HB 216 would help slow the burdensome "appraisal creep" that has afflicted property owners across the state. Currently, the state forces local appraised value to fall within a stringent and unrealistic 5 percent margin around an estimate of market value by the comptroller's Property Tax Division. If a school district's appraised value falls outside that range, the school district must choose between raising property appraisals or losing state education funding – generally, the higher a district's property value, the less state aid it receives. HB 216 would correct this problem by authorizing a more appropriate margin of error, lessening the upward pressure on appraisals that have burdened property owners across the state with increasing tax bills.

Tax appraisal is more of an art than a precise science, and the 5 percent margin of error in the property value study is unreasonable. Market value is an inexact number, and two independent appraisals rarely will be within 5 percent of each other, as required under current law. The 5

percent margin is too stringent to account for the variation in appraisals that local appraisal districts and the state often report.

Without a method of holding down appraised value, increases in property value will undermine the progress made under the package of school finance legislation enacted by the 79th Legislature in 2006 during its third called session. Those bills bought down local property taxes while expanding the state's share of public education funding. However, if property appraisals are allowed to rise, citizens and businesses will see their taxes increase while the state's share of education funding erodes.

Opponents said

According to the Legislative Budget Board, HB 216 would cost \$1.9 billion in general revenue from the Foundation School Fund from fiscal 2008 through fiscal 2012, a substantial diversion of state funds that should be used for other priorities in the state budget. State budget writers struggle every session to provide adequate funding for health care, public and higher education, criminal justice, and other important programs, and it would be imprudent to dedicate such a large amount of money simply to allow below-market property appraisals.

HB 216 would undermine the accuracy of property appraisals by authorizing a wider range of property valuation. Current law indirectly encourages appraisal districts to keep values appraised at a level that is at least 95 percent of market value by tying state education funding to appraised value. The state's school finance system is predicated on accurate local appraisals, and undermining the accuracy of those appraisals would upset the balanced school finance partnership shared by the state and local school districts.

The way to address the problem of rising appraisals is not through undermining the accuracy of property appraisals by allowing greater deviation from market value. Several other potential fixes exist, such as lowering the current 10 percent annual appraisal cap on residence homestead property taxable value increases or increasing the residential homestead exemption. Ultimately, the problem with

appraisal creep lies in a state school finance system that relies too heavily on local property taxes rather than funding from other, more diverse state sources.

Notes

The **HRO analysis** of HB 216 appeared in the April 16 *Daily Floor Report*.

Entry fee for sexually oriented businesses to fund sexual assault prevention

HB 1751 by Cohen
Effective January 1, 2008

HB 1751 imposes a fee of \$5 on each entry by each customer to a sexually oriented business that provides live nude entertainment and allows on-premises consumption of alcoholic beverages. The money generated by the fee, up to \$25 million per fiscal biennium, will go into the sexual assault program fund. Money from the sexual assault program fund may be appropriated for state programs and grants to outside organizations to combat sexual violence and provide sexual assault victim assistance.

The amount of money received from the fee that exceeds \$25 million will go to the Texas health opportunity pool established under SB 10 by Nelson, 80th Legislature, for health benefits coverage premium payment assistance to low-income persons.

A sexually oriented business must record each day the number of customers admitted to the business and make those records available for inspection by the comptroller. A business may determine the manner in which it derives the money to pay the fee and is not required to pass the \$5 fee on to customers.

The bill also establishes the sexual assault advisory council to coordinate state and local sexual assault programs. It also authorizes the Legislature to appropriate funds for a third-party assessment of the sexually oriented business industry that could provide recommendations on how to regulate the growth of the sexually oriented businesses in Texas.

Supporters said

HB 1751 would provide a dedicated source of revenue to support essential sexual abuse prevention and survivor support programs. By dedicating \$25 million to a range of programs, the bill would allow the state to devote resources to aid the survivors of sexual assault and support training and prevention programs to reduce future incidents of sexual assault.

HB 1751 claims no defined link between sexual assault and strip clubs. The bill simply would use a fee generated from inessential and entirely discretionary behavior to

fund important services for victims of sexual assault. Sexually oriented businesses employ women, and HB 1751 would benefit survivors of sexual assault, a group that disproportionately includes women.

Contrary to arguments that a fee on customers of sexually oriented businesses would be unconstitutional, HB 1751 would not suppress or make illegal the activities at any sexually oriented business. Texas uses narrowly applied fees to fund many areas of state government, so there is ample precedent for the program contemplated under the bill.

Opponents said

While the \$5 fee in HB 1751 would support a worthy cause, the fee to be paid by patrons of strip clubs is unrelated to this goal. No link exists between strip clubs and sexual assault, meaning that the bill would institute unfair tax profiling on individuals who legally visit these establishments.

The fee imposed under HB 1751 could prove difficult to implement for the Comptroller's Office, which would have to audit sexually oriented businesses and ensure that the amount of money collected was accurate. Some businesses do not collect door charges. Other businesses that collect door charges might keep an artificially low count of customers to inappropriately divert the money to their own coffers.

The state should not use behavior that many Texans find objectionable and offensive to fund important state priorities. To do so would be hypocritical and could send a message that this type of behavior somehow is encouraged or condoned.

Notes

The **HRO analysis** of HB 1751 appeared in Part One of the *May 3 Daily Floor Report*.

Further compression of school district property tax rates

HB 2785 by Paxton

Died in Senate committee

HB 2785 would have reduced the school district maintenance and operations (M&O) tax compression rate from 66.67 to 60.67 percent of the district's 2005 tax rate. It also would have repealed the current expiration date of September 1, 2009, for the new tax rate.

Supporters said

HB 2785 would make use of the record state surplus by providing additional property tax relief. Both the House and the Senate have approved budgets that leave at least \$3 billion in general revenue unspent, plus another \$4 billion in the rainy day fund. This money should be returned to taxpayers in the form of additional property tax relief instead of being left on the table.

The property tax cut authorized in HB 1, 79th Legislature, third called session, is barely sufficient to keep up with increases in local property tax appraisals. HB 2785 would ensure genuine tax relief for Texans.

Opponents said

Further tax cuts would cripple our state's ability to pay for essential services such as education and health care. The state should not spend every bit of extra money to further reduce property taxes when so many other pressing needs have not been met. The additional school tax compression in HB 2785 would cost \$2.5 billion in fiscal 2008-09 alone and continue to drain the state budget in future years, with none of this money benefiting public education, only replacing local funding with state money.

The new taxes enacted in 2006 cover less than half of the cost of tax cuts from the special session. HB 2 by Chisum, which provided \$14.1 billion in state aid to school districts to replace local property tax revenue, used general revenue to cover much of the cost of the tax cut. The state already is diverting funds from its historically inadequate general revenue stream to fund the current tax cut, and to cut property taxes even further would be fiscally irresponsible.

Notes

The **HRO analysis** of HB 2785 appeared in the May 10 *Daily Floor Report*.

HB 2785 was amended on the House floor to prohibit the state from appropriating funds to reduce the compression percentage below 66.67 percent unless each school district and charter school in the state received the product of \$6,000 times the number of teachers, librarians, nurses and counselors. According to the fiscal note for the House engrossed version of HB 2785, this provision would have cost \$4 billion in fiscal 2008-09, in addition to the \$2.5 billion cost of the further compression of school property tax rates.

Allowing limitations on appraised value for nuclear and coal gasification plants

HB 2994 by Bonnen
Effective June 15, 2007

HB 2994 adds nuclear power generation and electric power generation using integrated gasification combined cycle (IGCC) technology to the list of projects eligible for limitations on the appraised value of property for school district maintenance and operations (M&O) property taxation under the Texas Economic Development Act, effective January 1, 2008. Districts negotiating their appraised values through such agreements will be held harmless by the state for purposes of state education aid.

The bill allows the owner of a nuclear electric power generation facility by agreement with a taxing unit to defer the effective date of an abatement up to seven years after the agreement is made. An agreement including such a deferral may have a term no longer than 10 years following the effective date of the agreement.

The bill also requires the comptroller to file a report with the lieutenant governor, the speaker of the House, and the governor assessing the progress of every agreement for appraised value limitation under the Texas Economic Development Act. The report must include information on the number and quality of jobs created by a project, the amount of investment made under an agreement, the impact of a limitation on taxable value, and other information.

Supporters said

By adding nuclear electric power generation and IGCC facilities to the Texas Economic Development Act, HB 2994 would put Texas at the cutting edge of developing clean, reliable, and efficient power solutions. Allowing school property tax abatements for nuclear and IGCC plants would benefit the local economy in communities in which plants were located and would increase Texas energy production with a low-emissions alternative to pulverized coal plants.

Nuclear energy is a safe, reliable energy option. Only two accidents have occurred in 12,000 cumulative reactor-years of commercial operation in 32 countries, and only Chernobyl released harmful radiation. Critics of nuclear power provide no guidance about what else can viably be done to address the growing demand for energy. Coal is too dirty, natural gas is limited in supply and expensive, and wind and solar power are unreliable and unrealistic

as a large scale solution. Nuclear power is an essential component of a multi-part strategy to address Texas' growing need for energy.

While nuclear power is an affordable source of energy once a facility is online, the permitting and construction process is very expensive. For this reason, tax incentives are required to make new nuclear plants economically viable. The process to obtain a license from the Nuclear Regulatory Commission takes years and can cost up to \$100 million. The total cost of a nuclear project is estimated between \$2.5 billion and \$3 billion. Without abatements such as those that would be authorized under HB 2994, it is unlikely that any additional nuclear capacity will be brought online in Texas.

A new nuclear or IGCC plant would provide a significant economic benefit to any community in which it was located. For this reason, these projects clearly fall under the intent of the Economic Development Act. In particular, the proposed addition of two new units to the South Texas Nuclear Project in Matagorda County would create an estimated 3,000 jobs at peak construction of the \$5.2 billion unit. It is estimated that the project would result in as many as 1,000 high paying, highly skilled permanent jobs.

Opponents said

HB 2994 would allow public subsidies for the construction of costly and dangerous nuclear power plants in Texas. Nuclear plants take years to construct and are economically unfeasible without millions of dollars in public subsidies, making nuclear power an unrealistic way of addressing pollution and climate change. Texas instead should focus public subsidies to support IGCC plants like the ones included under HB 2994, in addition to renewable energy such as wind and solar power. Further, Texas should focus on reducing demand through energy efficiency and conservation.

The nuclear power industry has not settled the issue of disposal of radioactive waste produced in the generation process. High- and low-level radioactive waste remains dangerous for several hundred thousand years. Transportation and storage of high level radioactive waste is an unsettled issue, with the Yucca Mountain waste disposal

project in Nevada mired in controversy and unlikely to open any time soon. On-site waste storage remains the most likely option at existing and future nuclear power plants, a non-permanent solution that poses its own risks.

Security and safety at nuclear plants is a serious concern. A terrorist attack at a nuclear facility similar to the 9/11 attacks would be catastrophic. The South Texas Project nuclear plant, site of two proposed new nuclear facilities, was the subject of a report by the Union of Concerned Scientists that highlighted deficient security protocols at the existing plant. In addition, the possibility of a leak or failure at a plant could contaminate ground or surface water or the land close to a plant. The public safety concerns associated with nuclear power simply are too great to encourage the construction of additional nuclear plants.

HB 2994 could represent a very large cost to the state for planned nuclear power projects that likely will be built even without this bill. If the value of a \$2.5 billion nuclear electric generation facility was limited at \$10 million, the state could be required to contribute approximately \$25 million per year to hold the local school district harmless for the loss in property tax revenue. The cost to the state of a more expensive plant would be even greater. Because local school districts would be held harmless by the state under HB 2994, they would have no reason not to enter into such agreements, which ultimately could cost state taxpayers hundreds of millions of dollars.

Notes

The **HRO analysis** of HB 2994 appeared in Part Two of the April 24 *Daily Floor Report*.

Mandatory property sales price disclosure

HB 3821 by Villareal Died in House committee

HB 3821 would have required any person filing with the county clerk documents conveying certain types of property to include in those records a form disclosing the property's sales price. Certain types of sales or transfers, such as those involving government sales or purchases, court orders, bankruptcy, foreclosures, or specified family members, would have been exempt from this requirement. The comptroller would have been required to create a form for the purchaser to submit. A purchaser would have been allowed to disclose under the form the financing method of the purchase, additional property included in the sale, or other unusual terms of the sale that affected the sales price.

A chief appraiser could not have used the report as the sole basis for increasing the property's market value. A county clerk could have accepted documents of sale or transfer without the disclosure report. A chief appraiser would have been authorized to send a purchaser notice of the absence of a report, and if the report was not filed within 30 days of this notice, the purchaser could have been liable for a civil penalty equaling 5 percent of the property's sales price.

Supporters said

HB 3821 would give appraisal districts another tool with which they could more equitably assess property value. It especially would benefit middle- and low-income homeowners, who currently bear a large share of the tax burden because of appraisal districts' inability to accurately assess the value of commercial and high-end residential property. By enabling appraisal districts to accurately assess property value, the bill would allow school districts to collect more local property tax revenue, saving the state millions of dollars in payments from the Foundation School Fund. This bill would not result in higher property taxes for all property owners. Instead, it would create a more equitable assessment structure that would require all property owners to pay their constitutionally mandated fair share.

At least 35 states require a property's sales price to be disclosed, and this bill would allow appraisal districts access to vital information that currently is limited. It was one of the recommendations in the 2007 report of the Texas Task Force on Appraisal Reform. Although appraisal districts generally can ascertain the fair market value of residential

property by collecting data from listings, realtors, and the Multiple Listing Service (MLS), that information is not as readily available for high-end residential homes and commercial properties. In some cases, homes are removed from MLS before a deal closes because a buyer does not want the appraisal district to learn the sales price.

The enactment of this bill would create a more uniform system of valuation and would not necessarily lead to increases in all property taxes. Taxing units are limited to annual increases in taxes collected, and property owners also are protected from large tax increases through appraisal caps. The bill further would protect property owners by specifying that the sales price could not be used as the sole factor in appraising a property's value. It also would allow property owners to disclose other factors that may have led to a sale at a particular price. Taxpayers should not be allowed to benefit from all the government services funded through taxes if they are not paying their full tax burden, and HB 3821 simply would ensure that all property owners paid their fair share.

Opponents said

HB 3821 would encourage "sales chasing" – building up appraised values beyond a property's market value – which would lead to a larger tax burden for all property owners. Once one home in a neighborhood sold for a certain amount, owners of similar properties could expect an increase in the assessed value of their properties. Sales price disclosure would erode the confidentiality of a property owner's financial dealings. It also could enable appraisers to use sales price as the primary factor in assessing value without properly accounting for a variety of other factors that led to a property being sold for a certain amount. For commercial properties, giving this tool to appraisers without a thorough understanding of the complexity of transactions likely would lead to more overvaluations, unfairly shifting the burden of proof from the appraisal district to the property owner.

Sales price data should not be used to assess the value of commercial property and high-end homes because those properties are inherently unique. Differences in designs, floor plans, and amenities – not to mention location – play significant roles in the sales prices of high-end homes. Sales prices of commercial properties take into account the

business conducted, client lists, the value of potential future rental income, and other factors that have little to do with the actual property itself. Additionally, the financing of a sale plays a large role in a property's sales price. A buyer paying in cash likely could purchase a property for less than a buyer financing the purchase with loans. Commercial sales can be extremely complex – stock purchases, tax exchanges, and portfolio exchanges can influence a sales price. Some investors also overpay for real estate to avoid capital gains on a different property they have sold.

Other opponents said

This bill should be coupled with a reduction in appraisal caps or the rollback rate in order to ensure sales price disclosure did not become another method for local governments to raise revenue. The governor's task force recommended that any enactment of sales price disclosure legislation be tied to a reduction from 10 percent to 5 percent on the average annual tax increase for property owners on their residence homesteads.

Notes

HB 3820 by Villareal, which died in House committee, is identical to HB 3821 except that it would have allowed a county commissioners court to call an election to trigger the sales price disclosure requirements.

SB 270 by Wentworth, which died in the Senate, contained the same basic disclosure requirements as HB 3821 but would not have provided for inclusion of additional information aside from the sales price, nor would it have included a role for the chief appraiser. A substitute version of the bill would have limited the requirements to commercial property, vacant land, and multifamily residential property.

Correcting and modifying the revised franchise tax

HB 3928 by Keffer

Effective January 1, 2008

HB 3928 makes numerous changes to the revised franchise tax created under HB 3 by Keffer (79th Legislature, third called session), which will take effect January 1, 2008.

Small business tax discount. The bill creates a discount on tax liability for small businesses:

- a taxable entity with annual total revenue that is at least \$300,000 but less than \$400,000 will be eligible for a discount of 80 percent on its tax liability;
- a taxable entity with annual total revenue that is at least \$400,000 but less than \$500,000 will be eligible for a discount of 60 percent on its tax liability;
- a taxable entity with annual total revenue that is at least \$500,000 but less than \$700,000 will be eligible for a discount of 40 percent on its tax liability;
- a taxable entity with annual total revenue that is at least \$700,000 but less than \$900,000 will be eligible for a discount of 20 percent on its tax liability.

Beginning in tax year 2010, these thresholds will be indexed biennially for inflation.

E-Z tax computation. The bill will allow a taxable entity with no more than \$10 million in total revenue to compute its tax liability by apportioning the entity's total revenue to Texas and multiplying this amount by a rate of .575 percent. An entity choosing this method of computation may not take another credit or deduction, including a compensation or cost-of-goods-sold deduction.

Treatment of rental income for partnerships. In determining total revenue, the bill will require partnerships to include gross rental income instead of net rental income.

Apportionment of securities income. The bill revises the manner in which a taxable entity's revenue from the sale of securities will be apportioned to Texas. If a loan or security is treated as a seller's "inventory" for federal income tax purposes, the gross proceeds from the sale of a loan or security will be considered gross receipts for apportionment purposes.

Business loss carryforwards. The bill establishes a method by which a taxable entity may claim a credit on its taxable margin for business loss carryforwards that existed under the previous franchise tax.

Business tax advisory committee. The bill creates the Business Tax Advisory Committee to study the effects of the revised franchise tax on businesses in Texas. The committee will consist of:

- two members of the House of Representatives, appointed by the speaker of the House;
- two members of the Senate, appointed by the lieutenant governor;
- at least five residents of the state, appointed by the comptroller, who are engaged in a private business subject to the tax; and
- at least two residents of the state, appointed by the comptroller, who have expertise in state business taxation.

The comptroller will serve as the presiding officer of the committee. The committee will submit a report to the Legislature before each regular session.

Elimination of reporting requirements on certain entities. The bill repeals a requirement that an entity with more than 100,000 employees in the state file an annual report on the number of its employees that receive assistance under Medicaid or the Children's Health Insurance Program (CHIP).

Controlling interest. The bill changes the definition of a "controlling interest" to include a 50 percent interest in an organization, rather than 80 percent under previous law.

Supporters said

HB 3928 would retain the essential characteristics of the revised franchise tax that the 79th Legislature enacted overwhelmingly in its third called session in 2006. HB 3928 is a revenue-neutral clean-up bill that would make numerous corrections to clarify the existing tax and improve its administration. The bill would make several changes to ensure that all taxable entities were treated similarly and fairly, leading to a modest increase in revenue that the tax would generate. This revenue increase would be offset by

a technical correction in the apportionment of securities income and by creating a small business tax discount to provide tax relief to all entities with annual total revenue of up to \$900,000.

By establishing an optional alternative calculation method for businesses with annual total revenue of less than \$10 million, HB 3928 would allow an option to enable easier calculation of the tax for small businesses. Many small businesses face paying more in accounting fees to determine their tax liability than they actually might owe under the revised franchise tax. The E-Z tax computation option in HB 3928 would give a business owner the option of simply applying a rate of .575 percent to the business's total revenue and remitting that tax, saving the time and cost of complying with the revised franchise tax's more complicated calculations.

It is important that HB 3928 retain the essential characteristics of the revised franchise tax that was enacted under HB 3. The bill cannot eliminate the possibility that an unprofitable business might be taxed under the revised franchise tax, because to do so would establish a de facto unconstitutional state income tax. Courts have considered the potential of a business to owe taxes in a year in which it lost money as an essential test in determining whether a tax is a personal income tax. Further, a reduction in the rate of the tax would shrink the amount of funds flowing into the property tax relief fund, to which all revenues from the revised franchise tax are dedicated. This fund is essential to ensuring the constitutionality of the state's school finance system and to provide businesses and homeowners with an ongoing source of relief from excessively high property taxes.

Opponents said

HB 3928 would miss an opportunity to improve a deeply flawed business tax that will have a disproportionately negative effect on small and marginally profitable businesses. This bill would not alter the revised franchise tax's characteristics as a modified gross receipts tax. The central problem remains that a business could be

required to owe taxes in a year in which it lost money. The bill should incorporate an exemption so that a business's tax liability would be removed if it had negative or only slightly positive net income in a particular tax year. It is unfair to require a business owner to render state taxes when the owner's business operated at a loss in a tax year, a scenario that very likely could occur under the revised franchise tax with this bill.

HB 3928 also would fail to take advantage of a record state surplus to reduce the rate that businesses would have to pay under the revised franchise tax. A 50 percent reduction in the twin tax rates of the revised franchise tax easily could be absorbed in the state budget by either a modest increase in the sales-and-use-tax or by dedicating a portion of Texas' current budget surplus. Further, the Legislature should amend the tax to ensure that no business would be subject to any greater than a 100 percent increase in its tax liability under the revised tax. This would ensure that a business was not severely affected with a tripling of its tax liability or worse.

Small business should play a more prominent role on the business tax advisory committee proposed under HB 3928. As it stands, there is no safeguard to prevent larger firms from dominating this committee because it contains no guaranteed positions for small business owners. Many small businesses are likely to be swept up under the revised franchise tax, so it is important that the business tax advisory council be acutely responsive to the concerns of small business owners.

Notes

The **HRO analysis** of HB 3928 appeared in Part One of the May 1 *Daily Floor Report*.

Changing limitations on taxable appraised values of properties

HJR 16 by Leibowitz (and nine others) *Died in House and Senate committee*

Ten proposals were introduced to amend the Texas Constitution to authorize the Legislature to change the limitations placed on the average annual increase in taxable appraised value of a residence homestead, which is currently set at 10 percent.

Four measures would have authorized the Legislature to reduce the appraisal cap to either 5 percent (**HJR 16** by Leibowitz and **HJR 27** by Callegari) or 3 percent (**SJR 14** by Patrick and **HJR 52** by C. Howard). Two others would have provided for a local option to reduce the appraisal cap below 10 percent to no less than 3 percent: **SJR 10** by Janek would have authorized a governing body of a taxing unit to set the new cap, while **HJR 21** by Riddle would have allowed county voters to set the lower cap.

Two proposals would have combined the statewide mandate with a local option. **HJR 47** by Bohac would have allowed the Legislature to reduce the cap to 5 percent for all school districts and authorized all other taxing units the option to set a 5 percent limit in lieu of a 10 percent limit. **SJR 23** by Nichols would have allowed the Legislature to set a cap at 5 percent or less but would have provided for a local election to raise the cap for any taxing unit to no more than 10 percent.

Two other proposals would have changed the types of properties eligible for the cap but would not have reduced the limit below 10 percent. **HJR 41** by Vo would have applied the cap to all real property, and **SJR 15** by Patrick would have applied the cap to all property used for residential purposes, not just residence homesteads.

Supporters said

Homeowners no longer can sustain annual increases in their property tax bills due to rising values, despite the 10 percent cap on average annual growth in taxable appraised value. Although the Legislature recently reduced school property taxes by one-third over a three year period, much of that relief was not realized by homeowners because of “stealth taxes” imposed by local governments that passively raise and spend more money without raising tax rates merely because appraised values increased.

The persistent escalation of residential property values, in effect, penalizes Texans for home ownership. It unfairly increases their taxes regardless of their ability to pay. 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. In the vast majority of cases, owners of lower-valued homes have benefited the most from the cap because their appraised values have been more likely to increase significantly. Regardless of capped values for tax appraisal purposes, property owners still would be able to sell their homes at true market value.

Appraisal caps do not interfere with local government spending or revenue streams. If anything, they require local jurisdictions to be more honest with their constituents by requiring them to raise tax rates in order to increase revenue. Caps merely restrict the rate of growth in taxable property values, protecting property owners from shouldering a disproportionate share of the tax burden. Elected officials still could raise rates for property or sales taxes or for fees if more revenue were required or if priorities and needs dictated greater expenditures for public goods and services.

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. Reducing the cap beyond the current 10 percent level would exacerbate the inequities of the current system, making it more regressive by requiring lower- and middle-class homeowners to absorb a larger share of the tax burden at the benefit of higher-income homeowners whose rapidly appreciating property values more frequently benefit from the cap.

Reducing the cap would further limit the ability of local governments to raise the revenue they need to provide essential goods and services. It would adversely impact bond ratings, constrain local financial flexibility, and limit the ability of local governments to meet vital infrastructure needs. As outstanding debt mounted due to

decreased property tax revenues, local governments would be saddled with higher interest payments, resulting in lower bond ratings and deteriorating ability to finance needed infrastructure improvements. Caps inhibit government's ability to respond to external factors such as population growth, recession, and emergencies.

The Texas Task Force on Appraisal Reform, which the governor created to respond to escalating property taxes, recommended several options the state should explore in lieu of reducing the appraisal cap. Proposed fixes include requiring voter approval for any taxing unit imposing taxes in excess of 5 percent of its previous budget's tax revenue, improving the fairness of the appraisal process, and reducing the number of unfunded state mandates. The task force did not endorse a reduction in the cap on its own and supported the measure only in conjunction with the disclosure of a property's sales price.

Notes

Of the ten proposals introduced, four (SJR 10, 14, 15, and 23) were heard in the Senate Finance Committee, but none was reported from committee.

HJR 40 by Hochberg, which would amend Texas Constitution, Art. 8, sec. 1-i to authorize the Legislature to limit the increase in appraised taxable value of a residence homestead to 10 percent since the property's most recent appraisal, rather than the current maximum of 30 percent if the last appraisal had occurred three years previously, was approved by the Legislature and will be presented to voters at the Tuesday, November 6, 2007, election.

Revising motor fuels taxes, including 90-day gasoline tax holiday

SB 1886 by Williams

Died in conference committee

SB 1886 would have amended various sections of the Tax Code, Water Code, and Code of Criminal Procedure to make administrative and technical changes to the implementation of state motor fuel taxes. The bill would have conformed laws governing motor fuel taxes with statutory revisions made in previous sessions.

As passed by the House, the bill included an amendment by Rep. Martinez Fischer that would have instituted a temporary reduction in the state gasoline tax from 20 cents to zero cents on each gallon of gasoline. The temporary reduction would have been in effect for 90 days following the effective date of the bill, and would have expired on the 91st day.

The bill would have taken immediate effect if it had been approved by two-thirds of both houses of the Legislature on final passage. Otherwise it would have taken effect September 1, 2007.

Supporters said

SB 1886 would provide all Texans with substantial immediate relief from high gasoline prices. In May 2007, the price of a gallon of unleaded gasoline approached the inflation-adjusted all-time high, set in 1981. Working Texans need a break from these historically high gasoline prices, and a gas tax holiday would mean tax relief for Texas families that are struggling to make ends meet. The estimated \$500 - \$700 million cost of the three month gas tax holiday easily could be covered with the state's multi-billion dollar budget surplus or rainy-day fund balance.

Because the gas tax is regressive, a three-month tax holiday particularly would benefit low-income and working Texans. According to the comptroller's 2007 Tax Exemptions and Tax Incidence report, Texas households in the lowest income quintile pay the greatest percentage of their income in gasoline taxes. Instead of dedicating the state's fiscal surplus to additional school property tax rate reductions, this money should be used to temporarily reduce the gasoline tax. Property tax rate reduction mostly benefits owners of highly-valued residential and commercial properties, and the Legislature has dedicated billions of dollars to reduce these tax rates in recent years. SB 1886 would provide an opportunity to extend tax relief to low-income citizens and other taxpayers such as renters who

have not sufficiently benefited from recent school property-tax cuts approved by the Legislature.

Opponents said

The gas tax holiday included in SB 1886 would seriously undermine state finances by denying the State Highway Fund hundreds of millions of dollars of revenue that goes toward public road construction and maintenance. The gas tax is a vital revenue source for the state transportation finances that already are stretched too thin. Providing a temporary holiday from the tax would provide no long-term solution to the problem of high fuel costs and could increase demand for gasoline, ultimately leading to even higher fuel costs. In addition, consumers would experience an overnight 20 cent jump in the price of a gallon of gas upon expiration of the 90-day holiday, which could cause chaotic supply disruptions as motorists rushed to fill their tanks before the tax holiday expired.

Other opponents said

In order to appropriately address fiscal issues related to transportation policy, the Legislature should raise the motor fuel tax or at least index the tax to account for inflation. The gasoline tax has not been raised since 1991, while inflation has eroded its ability to pay for the state's substantial unmet transportation infrastructure needs. The insufficiency of the gasoline tax as a means to support highway construction is a major reason behind the shift in transportation policy toward toll road construction and reliance on public debt to finance road construction. Without improving the fiscal stability of the motor fuel tax, Texans will face traffic congestion, highway disrepair, and increased use of toll roads.

Notes

The **HRO digest** of HB 3320 by Keffer, the House companion bill to SB 1886, appeared in Part One of the May 7 *Daily Floor Report*.

During floor consideration of SB 1886, the House tabled an amendment by Rep. Krusee that would have adjusted annually the motor fuels tax rate based on the increase in the Consumer Price Index.

Proportionate reduction in elderly and disabled school tax freeze amount

SJR 13 by Averitt/HB 5 by Berman

Approved by voters at the May 12, 2007, election

SJR 13 adds Art. 8, sec. 1-b(d-1) to the Texas Constitution, to specify, for homeowners who are age 65 or older or disabled and receiving a limitation on school property taxes in the 2007 tax year, that the Legislature can reduce the limitation amount to reflect a reduction in the tax rate from tax year 2006. The Legislature also can reduce the limitation amount to reflect a rate reduction that occurred between tax year 2005 and tax year 2006.

Texas Constitution, Art. 8, sec. 1-b(d) freezes the amount of taxes imposed by a school district on the residence homestead of a person who is age 65 or older or disabled. The tax amount may not be increased while the property remains the residence homestead of the person or the person's spouse. In accordance with that section, the Legislature can provide for the continuation of the limitation amount until the limitation expires.

HB 5, which took effect with the voter approval of Proposition 1/SJR 13 at the May 12 election, amends the Tax Code to make the necessary statutory changes to apply the proportionate reduction in a school district's property tax rate from tax year 2006 to tax year 2007 in calculating the maximum amount of school property taxes owed by individuals whose tax bills are frozen because they are disabled or at least 65 years old. If the new calculations result in a school property tax bill lower than the amount at which it was frozen, the lower amount is established as the new cap. A homeowner eligible for the limitation prior to tax year 2006 also receives a proportional tax reduction for tax year 2007 based on a reduction in the school district tax rate that occurred between tax year 2005 and tax year 2006. The adjusted amount also takes into account improvements that increased the value of the homestead. To the extent that adjustments authorized by HB 5 reduce the revenues districts can collect from taxable property, school districts are entitled to additional state aid. HB 5 ensures the reductions made under this section will not be applied in calculating the amount of money distributed to school districts under state funding formulas.

Supporters said

SJR 13/HB 5 would provide tax relief to senior citizens and to those who receive federal disability payments by ensuring that school tax amounts frozen for these citizens

were reduced proportionally to reflect recent school tax reductions granted by the Legislature for all other property owners. For example, if a school district reduced its tax rate by one third, a tax bill that previously was frozen at \$1,000 would drop in the following tax year to \$667, where it would remain frozen. Without this amendment, many elderly or disabled homeowners who have had their school district taxes frozen for a number of years would be unlikely to benefit from property tax relief measures recently enacted by the Legislature.

HB 1 by Chisum, enacted in 2006 during the third called session of the 79th Legislature, provided for state aid to school districts to reduce school property taxes for maintenance and operations by 11.3 percent in tax year 2006 and one third (33.3 percent) in tax year 2007 and beyond. Many elderly and disabled homeowners live on fixed incomes and should be granted the benefit that other homeowners received last year and will receive starting this year from the reduction in school property taxes. The Legislature made a similar adjustment in the tax freeze amount in 1997 when it increased the homestead exemption amount so that every home owner would receive tax relief from the change.

The primary purpose of offering a school property tax freeze to senior citizens and the disabled is to give budget certainty to people who live on fixed incomes, and the adjusted freeze should operate in the same way. Proposals that would adjust the limitation amount upward if school tax rates subsequently were increased could cause elderly and disabled homeowners to face a substantial increase in their expenses, which might make it financially difficult for some to continue living in their homes.

Opponents said

The property tax reduction enacted recently by the Legislature was intended to provide tax relief to those Texans whose tax bills have soared in recent years as a result of rising property values and increases in local school property tax rates. Senior citizens and disabled homeowners generally have been shielded from these increases by having their property tax bills frozen, regardless of their income or ability to pay local school district taxes. These individuals already have received significant tax relief, especially those

whose residence homesteads have increased substantially in value since their tax bills were frozen. There is no need to provide a special additional benefit to these individuals by reducing their taxes even more.

The property tax freeze already benefits individuals owning higher value homes more than those with modest residences. Any future reduction should be targeted only to the elderly and disabled under a certain income level.

Other opponents said

It would be fairer to all property owners if the tax freeze amount were allowed to float. While elderly and disabled homeowners deserve to receive the extra tax relief, they also should have to assume the proportionate tax burden when rates inevitably rise – at least until the amount reached the level at which their taxes originally were frozen. Elderly and disabled homeowners still would receive additional tax relief under such a system because, unlike other property owners, their tax bills would never rise above the amount they paid in school taxes for 2006. Moreover, elderly and disabled

residents who participate in school tax rollback elections would have no incentive to vote against higher taxes if their tax burden remained unchanged regardless of the outcome.

While school property tax rates may continue to drop after 2007, these measures would not allow for any corresponding reductions in the tax freeze amount. As a result, the Legislature would have to repeatedly change the law and seek voter approval to amend the Constitution to allow seniors and disabled citizens to benefit from future tax cuts. The Legislature should amend the law and the Constitution one time to allow for automatic tax freeze reductions in the future.

Notes

The **HRO analysis** of HB 5 appeared in Part One of the February 28 *Daily Floor Report*. The analysis of HJR 1, the companion to SJR 13, appeared in Part One of the February 19 *Daily Floor Report*. Also, see HRO Focus Report Number 80-5, *Constitutional Amendment Proposed for May 2007 Ballot*, April 19, 2007.



Transportation

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Three-point seat belts for school buses

HB 323 by Hamilton

Effective September 1, 2007

HB 323 requires that each bus transporting school children be equipped with three-point – lap/shoulder – seat belts for the driver and each passenger. Each school district must require students riding buses equipped with lap/shoulder belts to wear the belts and can create disciplinary procedures to enforce compliance. The requirements apply to all buses purchased by the school district on or after September 1, 2010, and to all school-chartered buses used by a school district on or after September 1, 2011. If the Legislature fails to appropriate money necessary to reimburse school districts for costs incurred in meeting these requirements, they will not take effect. A school district can use its own money or a private donation to finance the addition of lap/shoulder belts to its existing bus fleet.

School districts will be required annually to submit to the Texas Education Agency information regarding school bus accidents, which will be published on its web site. The State Board of Education must develop and distribute to school districts training materials and best practices related to proper usage of lap/shoulder belts.

Supporters said

HB 323 would require that all buses used by a school district contain seat belts – an important safety feature required in automobiles. The bill would give school districts and the companies with which they charter buses a reasonable amount of time – three and four years, respectively – to comply in a cost-effective manner with these required vehicle upgrades. This mandate would not apply if it were not funded by the state. Studies have shown the lap/shoulder belt to be the best safety option for school buses, and any concerns about cost should not be placed ahead of the protection of our children.

The bill is designed to protect the lives of school children, particularly in view of a recent, tragic bus accident. On March 29, 2006, a chartered bus carrying 23 soccer players from West Brook High School overturned and killed two of the players. The bus did not come equipped with seat belts, causing some players to be thrown about inside and outside of the vehicle. In July, the Beaumont Independent School District became the first in Texas to require that all new buses come equipped with lap/shoulder seat belts.

Although the Beaumont students were in a chartered bus, most children in Texas still are traveling to and from school in buses employing a technology developed in the 1970s called “compartmentalization.” Federal law has required that any new school bus made on or after April 1, 1977, use this method, which requires the installation of closely spaced seats with energy-absorbing seat backs, although smaller buses weighing less than 10,000 pounds are required to have seat belts. Compartmentalization has serious flaws – especially for a child sitting in the front row – and is designed to adequately protect children only in low-speed frontal crashes. Compartmentalization is especially unsafe in side-impact crashes, and its safety level varies from bus to bus depending on the height and padding of each seat back.

The National Highway Traffic Safety Administration (NHTSA), in its most recent study on school safety belts in 2002, found that lap/shoulder seat belts are the safest option for school buses, ahead of compartmentalization and lap belts, which cause problems because of the amount of pressure they place on the abdominal area of still-developing children. Lap/shoulder seat belts do not cause these problems and can be adjusted to properly fit a child of any age. According to NHTSA, usage of lap/shoulder seat belts could reduce frontal crash fatalities in school buses by an annual average of 50 percent and significantly reduce head and neck injuries. The data show they are particularly effective in reducing ejection in rollover crashes.

Seat belts also would help improve discipline problems on buses because children would not be able to stand up or roam the aisles while the bus was moving. Wearing a seat belt on a bus also would teach children good safety habits. For many children, the school bus is the only place where they do not wear a seat belt, and it is difficult to impart a consistent message about the importance of wearing seat belts if children are unable to use them in the vehicle they ride in every weekday.

Concerns about cost and bus capacity are overblown. Although three elementary school students can fit in a row of seats on an average school bus, buses carrying older – and generally larger – students typically fit two to a seat, so the capacity of these buses would be unchanged with lap/shoulder seat belts. Additionally, NHTSA reports that the average bus operates at 72 percent of its passenger capacity,

so a 20 percent reduction might have no effect on a single bus route or at least could be absorbed by reconfiguring certain routes without requiring additional vehicles. By removing requirements for full compliance before a set date, the bill simply would require that any new buses purchased by a school district come equipped with lap/shoulder belts. Such a requirement would save money by allowing buses recently purchased by school districts to run their average life span of around 10 years.

Opponents said

School buses are the safest form of ground transportation in America today, and this bill would impose significant costs on the state without any real safety benefit. Installing lap/shoulder seat belts reduces the capacity of a bus by 20 percent, which would lead to more districts buying more buses. The costs would add up quickly after that – more fuel, more bus drivers, more salary and benefits, and more space needed to park the buses. This bill assumes a school district could find enough drivers, which would be difficult in some areas, given strict state requirements.

The Legislative Budget Board projects the state would cover all these additional costs to the tune of \$231.7 million in the first two years in fiscal 2011-12, which assumes that school districts would be replacing only one-fifth of their bus fleets during those years. The costs would continue to escalate for at least another eight years under this scenario, and the total cost could exceed \$1 billion. If the state were to more narrowly interpret the reimbursement of “expenses incurred” in complying with this bill, local school districts would bear significant costs to purchase these buses.

These costs would not pose a great concern if the new buses significantly increased the safety of our children, but that is not necessarily true. Riding in a school bus today is eight times safer than traveling in a car, with a fatality rate of 0.2 percent for each 100 million vehicle miles traveled. Although NHTSA has shown lap/shoulder seat belts to

be the safest option, that is predicated on the idea that they are worn properly by 100 percent of the passengers. Given the demographic involved, such a scenario is not very likely. Improperly wearing a seat belt could do more damage to a child than not wearing one at all. If this were such a definitive safety solution, it would be required by the federal government and employed in more than five states. Other tangential safety benefits, such as reducing driver distraction, are questionable. In fact, this bill can lead to different distractions for drivers, such as trying to ensure that all the children properly fasten their safety belts.

Other opponents said

The bill should be funded to ensure safety enhancements for all children were guaranteed, not just promised. This bill would be nothing more than an empty gesture without state funding because school districts would not be obligated to comply with the safety belt requirements without state funding.

The bill also should restore requirements, included in the version reported out of the House Transportation Committee, that would mandate full compliance by 2014. Given the average 10-year life span of a school bus, those school districts that have recently purchased buses – or worse, those that decide to buy additional belt-less buses in the next two years to maintain current capacity levels – would not be providing the enhanced safety protections to all its students for at least a decade.

Notes

The **HRO analysis** of HB 323 appeared in Part One of the April 30 *Daily Floor Report*.

Driver record monitoring pilot program

HB 1439 by Chisum *Died in the House*

HB 1439 would have authorized the Department of Public Safety (DPS) to create a one-year driver monitoring pilot program, allowing the agency to enter into contracts with certain entities with which it would have shared specific information from its driver's license records. Upon completion of certain requirements and at the recommendation of the agency, the Public Safety Commission could have authorized DPS to implement a permanent program.

An entity eligible to receive driver's license record information under the Motor Vehicle Records Disclosure Act (Transportation Code, ch. 730) would have been allowed to participate in the program, provided it also was:

- an insurance support organization or employer support organization;
- an employer or insurer; or
- an entity that self-insured motor vehicles.

In order to obtain the status of a driver's license and information regarding each moving violation during the preceding three years, such an entity would have submitted specific information and a \$6 fee per record to the agency, as required under current law.

DPS would have been required, under a contract entered into through this program, to monitor the driving record of each driver requested by the contractor, identify any changes in the status of the driver's license or any time the driver was convicted for a traffic offense, and periodically provide the contractor with reports of those changes. In exchange, the contractor would have been required to purchase a copy of the driving record of any person identified as having an updated record. The contractor also would have been prohibited from sharing the information with unauthorized parties.

The Attorney General's Office could have filed suit against a contractor to seek injunctive relief to prevent or restrain the violation of contract terms governing illegal disclosure of information. If the contract was violated, the attorney general could have sought a civil penalty of up to \$2,000 for each day the violation continued or occurred. An employee of the contractor who violated information disclosure requirements under the contract could have been charged with a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000). If the action was

considered an offense under other statutes, the violator could have been prosecuted under HB 1439, another statute, or both.

A House floor amendment would have required the attorney general to allocate the civil penalty fines equally to anyone whose personal information was illegally released. Another amendment would have required DPS to charge a fee equal to one-third of the contractor's net profits under the contract and use that revenue for trauma care.

Supporters said

HB 1439 would authorize DPS to establish a driver record monitoring pilot program to enable insurance companies and employers of large vehicle fleets, among others, to obtain up-to-date information on their clients or employees. Such a system would create a way to more quickly identify dangerous drivers and allow companies to take action leading to safer driving conditions. This program would change little about the existing system regarding those eligible to obtain information, but it would create a more efficient and expedient process. Thirty-six states already use a program like this.

Texas long has allowed access to driving records for purposes of employment verification, law enforcement, insurance coverage, legal cases, antifraud cases, and other public safety purposes. Insurance companies can use this information to check driving behaviors of new and existing customers. Companies employing drivers can do the same to avoid additional liabilities associated with unsafe motorists, and school districts can check drivers' records to ensure the safety of students who ride their buses.

Today, an average insurance company purchases only about 20 percent of its clients' driving records each year because it too expensive to buy every record on an annual basis. Most motorists' driving histories, therefore, are reviewed only once every five years or so, limiting the ability of an insurance company to determine which of its insured drivers are high-risk and which never or rarely run afoul of the law. Because of this limitation, insurance companies must spread the cost of potential risks across the entire pool of insured motorists. While insurers could not promise rate reductions, it is safe to say that good drivers'

insurance rates would be stabilized while dangerous drivers would pay higher rates and bear the majority of costs incurred through contracting with a third-party vendor.

The bill would protect the security of private information by penalizing those who illegally released information and authorizing the attorney general to file suit against these parties. The bill contains other safeguards, such as making the program temporary, to ensure that Texas did not enter into a permanent contract without first protecting its citizens.

Opponents said

HB 1439 would create a program that not only would have little benefit for drivers but actually could cause them harm. It would add yet another avenue for the release of motorists' personal information and driving records and could create additional problems for those trying to secure their private data in an age of identity theft. This bill is unnecessary because insurance companies already have several mechanisms through which they can monitor a driver's record.

Giving another entity access to drivers' personal information and driving history would create another source from which hackers and identity thieves could obtain private data. One of the three companies that has indicated an interest and an ability to bid on this program recently has acknowledged security lapses that led to the release of private information to the public. Restoring a credit record and financial standing after identity theft is an arduous process that eats up time, money, and patience of those whose personal information had been stolen. This bill would not create any way for the state to monitor or oversee the third party.

Drivers are more likely to see an increase in rates than a decrease or stabilization of rates because this program would add another layer to the process – the third-party vendor – whose cost would be borne by all ratepayers. The correlation between moving violations and the likelihood of a driver getting involved in an accident is tenuous. In most cases, insurance companies currently receive accident notifications, and this information is the most crucial and telling as to the risk an insurance company must absorb for a particular driver. By raising a driver's rates after a moving violation, an insurance company is doubly penalizing a driver who already has been required to pay a substantial fine associated with the citation.

Notes

The **HRO analysis** of HB 1439 appeared in Part One of the April 23 *Daily Floor Report*.

SB 876 by Seliger, the identical companion to HB 1439 as passed by the House Transportation Committee, was approved by the Senate, but died in the House.

Two-year moratorium and local priority for certain toll road projects, revised standards for CDAs, higher highway bonding capacity

SB 792 by Williams

Mostly effective June 11, 2007

SB 792 establishes a two-year moratorium, with certain exceptions, on all statewide toll projects that involve a private entity operating or collecting revenue on a toll road. The bill creates requirements for comprehensive development agreements (CDAs), including shortening their maximum duration, and new standards for interaction between the Texas Department of Transportation (TxDOT) and entities authorized to build toll roads. It authorizes, for all toll projects, TxDOT and the Texas Transportation Commission (TTC) to take any action necessary in their reasonable judgment to comply with federal requirements enabling the state to receive funding. SB 792 also adds reporting requirements and oversight for TxDOT.

TTC is authorized to issue bonds secured by the State Highway Fund (Fund 6) up to \$6 billion instead of \$3 billion and can only issue bonds or other securities in an aggregate principal amount of up to \$1.5 billion annually, \$500 million higher than the previous limitation. The aggregate principal amount required to be spent on projects that reduce accidents or improve hazardous situations is doubled from its former requirement to \$1.2 billion.

Moratorium. TxDOT and local toll project entities are prohibited from selling or entering into a contract to sell a toll project to a private entity for two years. If those entities entered into a CDA with a private party after May 1, 2007, any agreement reached prior to September 1, 2009, must not contain a provision allowing the party to operate or collect revenue from a toll project.

The moratorium specifically includes any toll project or managed lane facility project on any portion of U.S. Highway 281 in Bexar County, but exempts CDAs in connection with projects:

- in Cameron, El Paso, and Hidalgo counties, unless a toll project adopted by the El Paso Metropolitan Planning Organization (MPO) prior to May 1, 2007, meets specific criteria;
- associated with the Trinity Parkway in Dallas;
- including one or more managed-lane facilities added to an existing controlled-access highway, primarily located in a nonattainment or near-nonattainment air quality area for which TxDOT issued a request for qualifications prior to May 1, 2007;
- on any portion of the Loop 9 project in a nonattainment air quality area in Tarrant and Dallas counties;
- on any portion of the State Highway 99 project;
- on certain portions of the proposed Interstate 69 project south of Refugio County;
- on the State Highway 161 project in Dallas County; and
- outside the scope of the Trans Texas Corridor located in the jurisdictions of regional mobility authorities (RMAs) meeting specific criteria.

A legislative study committee will explore the public policy implications of allowing a private party to operate and collect revenue from a toll project and must submit its findings to the governor and legislative leaders by December 1, 2008.

Comprehensive development agreements. A CDA may run for multiples of 10 years, but no more than 52 years in total, taking all factors into consideration. The contract must contain an explicit mechanism for setting the price at which TxDOT would purchase the interest of a private entity. TxDOT and an RMA may pay an unsuccessful bidder for work done in submitting the proposal, but no longer are required to do so.

TxDOT and TTC must use any revenue received under a CDA to finance construction, maintenance, or operation of a regional transportation or air quality project. Funds must be proportionally allocated based on TxDOT districts covering the CDA project area. Payments received by TxDOT under a CDA, surplus revenue from a toll project or system, and other specified income must be placed in a separate account in Fund 6, which will be broken down into subaccounts for each project, system, or region. A subaccount also will receive any interest it accrues.

A toll project entity must develop a formula for making termination payments to end a CDA under which a private party operated and collected revenue from a toll project. The formula must estimate the amount of loss a private party would incur as a result of the termination but cannot be based on any new estimate of future revenues. An entity that terminates a CDA that allowed a private party to operate and collect revenue from a toll project could issue bonds, if

authorized, to make termination payments or purchase the private party's interest.

A CDA may not contain any provisions limiting or prohibiting work on transportation projects by any governmental entity or contracted private entity. A CDA may allow a toll entity to compensate a private party in the event of a loss of toll revenues due to the construction of certain nearby highway projects, excluding safety or maintenance improvements, work required by an environmental regulatory agency, or a project providing a mode of transportation not included in the CDA.

County toll road authorities (CTRAs). A CTRA may exercise the powers of an RMA, allowing it to enter into a CDA with a private entity. In case of a conflict, CTRAs supersede RMAs. If a CTRA requests or is requested to participate in the development of a project that is part of the Trans-Texas Corridor, the county will be granted all the powers of TxDOT in developing that part of the project.

A county commissioners court or a local government corporation, without state approval, supervision, or regulation, may authorize and use surplus toll project revenues for road work or planning in its jurisdiction. A third party may not pay off the bonds and bond interest of a CTRA toll project, causing it to become part of the state highway system, without the consent of the entity that initially issues the bonds. A commissioners court of a CTRA may pool other existing projects into its tolling authority.

Transportation authorities. Regional tollway authorities (RTAs) may enter into CDAs in the same fashion as other local toll authorities. Under certain situations and after an agreement with a prescribed government entity, an RTA may use surplus revenue for a turnpike project or certain other transportation projects. A member of the RTA board of directors is subject to prohibitions on solicitation or acceptance of certain gifts and benefits. A violation of these provisions is a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) under this section or under Penal Code, sec. 36.08, which governs gifts given to a public servant. Each MPO policy board must adopt in its bylaws provisions aimed at preventing conflicts of interest.

Uniform toll project contract standards. All toll projects are subject to uniform standards governing financing, construction, operation, and maintenance. Local entities have the primary responsibility for financing, construction, and operation of a toll project, but that does not limit the authority of TxDOT or TTC to participate in those endeavors. Local entities have the right of first refusal to develop toll projects in their jurisdictions. If they exercise their option to move forward with a project but fail to take

certain steps within the prescribed time frame, TxDOT and TTC have the opportunity to develop the project if they take the same steps in the same time frame. TxDOT must assist the local entities in financing, construction, and operation of a toll project by allowing them to use state highway right of way (ROW) and access to the state highway system. Any entity operating a toll road has the same powers as TxDOT for toll collection and enforcement. Fines for failing to pay a toll may not exceed \$250. Revenue may be used by the entity for any work on a toll road or lane.

Market valuation study. A local toll project entity – a county, RTA, or RMA – must reach an agreement with TxDOT to build a toll project. The agreement must contain provisions governing the initial toll rate and escalation methodology and requiring that the project undergo a market valuation study. TxDOT and the local entity must select an independent party, which cannot have a financial stake in the actual project, to appraise the value and corresponding upfront concession fees a project would realize on the private market. The local entity has first option to build the project, except for an RMA, for which its respective MPO makes the decision. If the local authority cannot raise the up-front payments or follow certain procedures within six months, TxDOT may proceed with the project with the private sector. If the local authority develops the project, it must commit to using the surplus revenue from the toll project to build additional road projects or deposit that money into a TxDOT account to be used for regional road projects. Both TxDOT and a local authority may issue bonds to pay any costs associated with a toll project. If TxDOT and the local entity cannot agree on the terms and conditions of an agreement, neither the entity nor the agency may develop the toll project.

Oversight. TxDOT must seek transparency in its role related to the Trans-Texas Corridor by providing, to the greatest extent possible under the Texas Public Information Act and other open-records statutes, any information the agency collects, assembles, or maintains on the project. A toll project entity may not enter into a CDA until:

- the attorney general vets the agreement and determines it to be legally sufficient;
- it provides the Legislative Budget Board (LBB) with copies of the proposed agreement, proposal, and a financial forecast detailing revenue the entity expects to derive from the project, estimated construction costs and operating expenses, and the amount of income the entity expects a private party to realize under the agreement;
- it allows the state auditor to review and comment on a traffic and revenue report; and

- it publishes prescribed information in an area newspaper and conducts a public hearing on the proposed project.

Supporters said

SB 792 would recognize the will of the people by placing a two-year moratorium on most toll projects that involve private entities running or building state roads. The bill would ensure that the state moved cautiously before leasing what could be valuable property to private industry for several decades, while providing local tolling authorities additional tools needed to build and finance toll and non-toll projects to meet growing demands for new roads. The bill also would create protections and more financial options for state transportation authorities by allowing them to ensure that procedures used by local entities did not risk the state's federal funding and by increasing the state's bonding authority limits.

Moratorium. The bill would allow the state to take a step back before leasing more land for highway projects to private entities. The moratorium would not stop all projects underway because most that are far enough along in the planning stages would be exempted under the bill. It also would not prevent construction of toll roads – state and local tolling authorities still could build them independently. Planning on toll roads also could continue. SB 792 would, however, have a significant effect on up to 25 projects on which TxDOT could put out a bidding request in the near future. These projects are not as far along as those that have been exempted. It would be more than appropriate to take a two-year pause to explore the types of contracts created under CDAs and the type of legacy they would leave for taxpayers in 50 years. Although TxDOT still could explore a loophole through which it could pursue private participation in toll projects, passage of the bill would convey the Legislature's disapproval of such a financial arrangement. Most projects still would be subject to a lengthy environmental review period, which would give legislators time to close any loopholes TxDOT tried to pursue during the next legislative session.

SB 792 would respond to the legitimate reservations many Texans have about allowing private enterprise to run a vital piece of infrastructure and perform a role that should be a government function. Government is more beholden to the will of the people and would be less likely to raise toll rates to the degree a private company would. It also is more accountable than a private entity, which, due to demands for higher profits, could take shortcuts in materials used to build these roads that might not be apparent until after the contract had expired. The fact that private companies are

itching to bid on these projects demonstrates their value, and instead of allowing private industry to make money off the state, Texas instead should be exploring ways to finance these projects itself. Toll revenue should not be used to enrich a few private investors but instead should be used to benefit the people who pay the tolls. The bill would require a legislative study of outsourcing toll roads, allowing serious contemplation about the ramifications of such an endeavor.

By doubling the limit on bond financing backed by the State Highway Fund, the bill would add financing options for transportation projects over the next biennium, which would help fill the void created by instituting a moratorium. TTC has been issuing bonds and allocating money to MPOs since it was first granted this authority in 2003, and this has proven to be an important source of funding for essential transportation projects.

Comprehensive development agreements. SB 792 would grant locally elected officials more control over toll projects in their jurisdictions. If a state agency wanted to build a toll project in a county, the bill would give local authorities the right of refusal and would give areas with local tolling authorities the ability to prevent the project altogether. Local decision makers know what is best for their areas.

The bill would keep money generated by toll roads in one region from being spent in another region. The bill would allow surplus toll revenues to be spent on free non-tolled projects in the same district, such as roads, highways, transit systems, and bicycle and pedestrian projects. It would not shift policy but instead would require what was a permissive procedure, preventing TxDOT from using toll money – essentially local tax dollars – for projects in other parts of the state. It would provide local tolling authorities access to state rights-of-way for a reasonable fee instead of the excessive terms TxDOT had been seeking in at least one proposed contract. These rights-of-way belong to state taxpayers, not any specific state agency, so charging local governments above the cost of land acquisition would be akin to double taxation.

It also would mitigate industry-friendly contract terms dealing with buy-back provisions and non-compete clauses. By prohibiting the use of future project revenue in calculating how much money a private company would receive if the state bought the road from a private industry, the bill would act as a safeguard against prohibitively high buyout costs. Non-compete clauses can lead the state to shortchange maintenance and improvements to existing free roads, tying the hands of local governments seeking solutions to transportation problems to the benefit of a private company. Non-compete clauses also force the state

to compensate private interests if certain transportation projects reduced traffic along a toll road, and by prohibiting them, this bill would reduce yet another cost borne by Texas motorists that would benefit a private company.

A pilot project, which would affect only State Highways 161 and 99 in Dallas and the Harris County area, respectively, would allow a tolling authority and TxDOT to enter into a market valuation study under which the local entity would pay costs equal to the estimated project value into Fund 6 or build additional road projects. This market valuation study would allow those critical of the current concession model to see if more revenue would be generated under that format or the traditional model of collecting tolls over the life of the project.

Oversight. SB 792 would continue the Legislature's efforts to press TxDOT into being more forthcoming with the public about toll projects. Audits over the past few years have shown the agency has not been as transparent as it could have been in its planning process and has not been fairly representing expected costs and revenues related to the Trans-Texas Corridor.

Opponents said

SB 792 would be an overreaction to the unpopularity of toll roads in certain segments of the state that only would serve to exacerbate Texas' already backlogged highway construction process. If the objective of the bill is to slow down or scale back programs the Legislature created without fully vetting them four years ago, passage of a "fix" bill that has had very little public examination while being rushed through both chambers would show the state has not learned its lesson. Many of these provisions would serve to scare off potential investors both by showing that any long-term agreements could be subject to significant change and by reducing other incentives aimed at encouraging investment.

Moratorium. The Legislature saw fit four years ago to create an expansive, long-range solution to the state's transportation needs and revised those plans just last session. Suspending that program now, without fully seeing exactly what the program would do, would be short-sighted. Coupled with a lack of any real alternative to build new roads for a rapidly growing population, this decision would have severe repercussions for Texas roads. While TxDOT's lack of transparency and other actions have not necessarily instilled confidence in members of the Legislature and the public, any such attempt to punish the agency ultimately would hurt Texas motorists. Instead of

studying the ramifications of a program that already is in place, the Legislature should allow the program to continue and modify it or explore other changes as necessary.

The political incentives for placing a moratorium on this program are the exact reasons why the private sector is best equipped to manage toll roads. Governments concerned about a backlash against raising rates, even at the risk of losing revenue, would not necessarily operate the roads in the same manner a business would. Although a private entity could raise rates, it has to answer to the people in its own way. Drivers who found the costs excessive would speak with their cars and stop using toll roads, and if such an action were widespread, the market eventually would force the entity to respond by lowering rates. Private firms also can experiment with ideas, such as peak pricing, because they have more flexibility to try a market-based approach to solve congestion problems. Governments and taxpayers also benefit under such a scenario because the up-front payments required in most CDAs allow local entities and the state not only to use that money on other roads and urgent needs but also any money that would have come out of their own coffers for the road project.

Increasing the bond limit would require appropriations the state cannot afford to spend on interest. At a time when skyrocketing gasoline prices could cause people to reduce how much they drive, it would be unwise to use bonding authority backed by Fund 6, which is heavily dependent on revenue from state and federal motor-fuel taxes.

Comprehensive development agreements. This bill would prevent TxDOT from overseeing tolling authorities and would essentially be granting local tolling authorities the same powers it is trying to strip from TxDOT, creating a number of smaller versions of the agency. Granting a local entity right of first refusal on any project would increase inefficiencies and expense for any toll projects by eliminating any competition. The advantage of the current system is the role of the market in driving costs down, which compounds the advantages of issuing bonds to pay back these lower costs over time. Large, up-front concession payments from private entities have been used for other transportation projects, and by removing these companies from the initial phase and potentially from more toll projects in the state, other construction projects likely would not be built.

Amending non-compete clauses could result in lower, fewer – or, in some cases – no bids from private entities that might not find a toll project as enticing if another highway could be built to serve the same market of drivers at which the toll road was aimed. Existing non-compete clauses have

been designed to ensure the state does not use proceeds from the agreement to build a free roadway that reduces traffic on that private partner's tolled road. These agreements do not prevent a toll authority from building roadways that might compete with those toll roads in the district. Further, it does not prevent the state from repairing or improving existing thoroughfares.

Adding a buy-back provision also would have serious implications for the types and levels of bids for toll projects and could eliminate up-front payments altogether. The state essentially would be allowing private entities to finance and build a project based on the long-term revenue potential, but before the companies could actually recoup those costs, it could take the project back at a price that would not allow the companies that took the risk to realize the full reward.

Oversight. TxDOT contends that it has publicized as much information as it could as quickly as it could with regard to CDAs, and some of the bill's provisions would have the effect of scaring off businesses from investing in the state. The agency backed Cintra-Zachry in its legal fight against the publication of certain sensitive contract language in the master development plan of the first stage of the Trans-Texas Corridor to ensure the integrity of the competitive process by not releasing proprietary information before the contract was finalized. Once a final agreement was reached, the agency put the document on its Web site. Protecting the public interest is important, but if the state is to entice businesses to invest in its road projects, it must ensure that competitors cannot access key strategic information.

Other opponents said

A two-year moratorium on toll road agreements with private companies that would exempt almost every project in the advanced planning stages would not be much of a moratorium. However, halting private involvement – and its associated up-front concession fees – for the next two years would reduce potential funding sources for new road construction. Texas' road construction needs are immense, as is its project backlog, and other existing resources for road construction are not enough to reduce traffic congestion and improve air quality in the most heavily trafficked areas. Any moratorium should be coupled with imposition of new state fuel taxes that would provide a funding source for the most urgent problems over at least the next fiscal biennium.

Moratorium. This bill should be amended to ensure TxDOT could not find loopholes through which it could still pursue privately financed or operated toll roads, such

as facilities agreements or other accounting tricks. Banning the overarching toll-road contract would not necessarily prevent a facilities agreement, under which individual segments of the Trans-Texas Corridor are expected to be built. Private companies also could finance and build toll roads by collecting annual fees from the state based on traffic, as opposed to collecting profits, and circumvent the moratorium imposed by the bill.

This bill should be amended to remove the exemptions granted to several toll projects. If the premise of SB 792 is to say that toll roads, especially those financed or built by private enterprise, are not the responsible option, the act of exempting so many projects seriously would undermine that rationale. If this is bad public policy for some, it should be bad public policy for all. Some of the proposed projects, such as the proposed Interstate 69 corridor, would be exempted from the moratorium even though there is virtually no chance a CDA could be reached during the next two years.

The moratorium should be extended to all toll road projects because tolls are an unfair double tax on drivers who already have paid for road projects through fuel taxes. They are regressive taxes that impose the same fee on all classes yet represent a greater hardship on low-income and middle-class drivers.

Comprehensive Development Agreements. The market-valuation study would undercut one of the critical benefits that could be attained by a moratorium. Because a government entity would not be as prone to squeezing as much money out of the driving public as would a private company, a moratorium should be expected to reduce motorists' toll burden. Unfortunately, requiring an assessment of the market value of a road would force a local government to compete with private industry in trying to achieve the greatest amount of profit for a road project. Government's job is to serve the public, not to make a profit. This provision would change little about today's current problems with privately run toll roads. Instead of facing escalating toll rates from a company, drivers would be charged excessive rates by a local government.

TxDOT should be required to gain approval of local governments before starting any toll project, whether or not there was a local toll authority. Also, the local involvement should be expanded to include voters, who should be allowed to vote on a new project in the same way they can for bond issues.

Notes

The **HRO analysis** of SB 792 appeared in Part One of the May 17 *Daily Floor Report*.

HB 1892 by W. Smith, which contained much of the same language as SB 792, was approved by the Legislature but vetoed by the governor. Notable differences between SB 792 and HB 1892 are that SB 792 increases the maximum length of CDAs, adds exemptions to the moratorium, and allows TxDOT and TTC to take any reasonable action to ensure eligibility for federal funds is not compromised. The HRO analysis of HB 1892 appeared in Part One of the April 10 *Daily Floor Report*. For more information on HB 1892, see HRO Focus Report Number 80-6, *Vetoed of Legislation*, 80th Legislature, July 9, 2007, pp. 43-45.

Statewide standards for use of red-light cameras

SB 1119 by Carona

Effective September 1, 2007

SB 1119 establishes procedures for local entities opting to use cameras to cite owners of vehicles illegally running red lights. It caps civil penalties at \$75 and late fees at \$25 and requires net proceeds be split between the state and local entity for health and safety programs.

Establishing a program. The governing body of an entity authorized to enact traffic laws may, by ordinance, implement a red-light camera (RLC) system to issue a civil penalty to the owner if a vehicle runs a red light. Before implementing a program, a local entity must compile accident report statistics for any eligible intersection for the 18 months before installation of a camera and send subsequent accident information annually to the Texas Department of Transportation (TxDOT).

Installing a system. A governmental entity may install and operate a system itself or contract with a vendor to do so. Intersections for the program must be determined by traffic volume, accident history, and frequency of red-light violations without regard to ethnic or socioeconomic characteristics of an area. The local entity must perform a traffic engineering study of an intersection approach proposed for the program to determine whether a design change could be used in lieu of, or in addition to, an RLC to reduce violations at the intersection. A citizen committee must advise the local government on installing RLCs.

A local government must erect a sign at least 100 feet from an intersection with a RLC to notify drivers that cameras may document violations, resulting in a citation and fine. A traffic signal under the program must maintain a steady yellow light for the minimum time specified in the Texas Manual on Uniform Traffic Control Devices.

Revenue. An entity may authorize a vendor to administer the system, but cannot enter into a contract granting a company a specified percentage or dollar amount for each civil penalty collected. At the end of the fiscal year, a local entity may deduct from the revenue generated through civil penalties and late fees money necessary to run the program. Of the remaining money, 50 percent must go to the state and 50 percent to a local account used only to fund traffic safety programs. The executive commissioner of the Health and Human Services Commission (HHSC) will use the state share to fund uncompensated care of designated trauma facilities and certain emergency medical services in

the same regional advisory council jurisdiction as the entity that remitted the revenue.

Enforcement. A civil penalty is initiated by mailing a notice of violation to the owner of a vehicle caught running a red light by the camera. The notice, including penalty amounts and adjudication procedures, must be sent within 30 days after the violation to the owner at the address provided through registration records.

A civil penalty is not considered a conviction. A local entity may not forward information on a civil penalty to a credit bureau. Failure to pay the penalty may not result in an arrest warrant nor may it be noted on the owner's driving record. It may result in TxDOT or a county assessor-collector refusing to register the vehicle.

Implementing a RLC program does not preclude an officer from citing a person for running a red light. Any person using the cameras for other than documenting red-light running is subject to a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000).

Presumptions. A RLC program presumes the owner of a vehicle shown in a photo depicting a violation committed the infraction. If, at the time of the violation, the vehicle was owned by a different person or a person in the business of selling, renting, or leasing vehicles, a civil penalty may not be imposed on that owner upon presentation of evidence within a certain time frame. If a vehicle owner proves another person was driving the vehicle, that person will be assumed to have committed the violation and be subject to a civil penalty.

Adjudication. A person receiving a violation notice may contest the civil penalty by requesting an administrative adjudication hearing. An owner contesting the finding may appeal, and the court will hear the appeal through a new trial without regard to the finding made at the administrative hearing.

Supporters said

SB 1119 would create a uniform statewide standard for red light camera programs, which have been used successfully for the last several years by cities across Texas. Codifying uniform standards would remove lingering

uncertainty about the legality of the programs and establish a procedure for all entities to follow to ensure that safety was the paramount concern. The bill would ensure that cameras were used to benefit public safety and not as a revenue stream for local governments.

Accidents caused by Texas drivers who run red lights are costly in human and economic terms. A recent Federal Highway Administration study identified Texas as one of the worst states for red-light running. Red-light accidents often are among the worst because they can involve vehicles crashing directly into the driver or passenger side of another car at high speeds. More than 110 cities and at least 12 states and the District of Columbia employ RLCs. Several studies have shown their benefit in reducing violations and accidents. Although most studies have shown some increase in rear-end crashes, due partly to drivers slamming on their brakes to avoid running a light, those accidents are not as dangerous as a “T-bone,” or sideswipe, accident.

Uniformity. SB 1119 would create a statewide standard clear to drivers, who otherwise could face different rules in different jurisdictions. No uniform state statute specifically addresses this program, and because this statute would be more recent and more specific than any other provisions under which RLC programs have been implemented, this statute should govern all RLC programs in Texas.

SB 1119 would prevent an entity from using a RLC program as a cash cow by standardizing penalties and requiring revenue be used for certain purposes. At least one Texas city already has exceeded the \$75 fine by \$50, and another is using the revenue for its general budget. This bill would prevent that. Municipalities also would be prohibited from entering contracts based on the number of citations issued, reducing incentives to issue large numbers of citations. Municipalities would be able to cover expenses and net proceeds would have to be spent on local safety efforts and uncompensated trauma care.

Effect on enforcement. Under most RLC programs in Texas, municipalities have little ability to compel payment from offenders, and SB 1119 would increase the motivation to pay. It would allow a county or TxDOT to deny registration to the owner of a vehicle with unpaid fines. However, a county or TxDOT could decide, with proper evidence, not to use that authority under certain circumstances. The bill also would prevent credit bureaus and insurance companies from accessing RLC violations.

Effect on motorists. The standards for RLC programs in SB 1119 would allow a person who felt wrongly accused several opportunities to be heard. The hearing and appeals

process would give motorists ample opportunity to explain what happened and give administrative officials the same discretion an officer at the scene would have had. It also would alert drivers of an intersection using a RLC with a sign along the road.

Privacy claims brought by drivers on public roads have been rejected by courts around the country. The fact that cameras already are used widely in Texas, including at toll booths, with little public complaint proves they not only are effective but relatively noninvasive. The cameras are triggered to take photos only after a motorist has run a red light. Under SB 1119, RLCs could photograph the vehicle and license plate but not the driver. The bill would protect privacy by sending an offender a copy of the license plate but not the vehicle.

Opponents said

This bill would create statewide standards for a system with questionable safety benefits. The state should do the opposite – ban RLCs and explore other options that could have beneficial safety effects, such as lengthening yellow-light time, making lights more visible, and exploring engineering solutions to problems that may have caused drivers to run the light.

While some studies have touted the success of RLCs, several states and municipalities have reached different conclusions. Two states have canceled their programs, and at least four others have banned the cameras altogether. Studies have found installing the cameras increased rear-end crashes and crashes resulting in severe injuries and fatalities.

Effect on enforcement. Cameras cannot use discretion the way an officer on the scene can by choosing not to cite a motorist because of bad weather or participation in a funeral procession, for example. Cameras also cannot remove reckless or drunken drivers from the road and could evolve into a replacement for uniformed traffic officers.

Effect on motorists. RLCs deny a driver’s ability to confront the accuser as guaranteed under the Sixth Amendment. A camera cannot testify about what happened, and an accused motorist cannot defend against a machine that may have malfunctioned and snapped a picture when the light was not red.

Use of RLCs is akin to “big brother” spying on Texas drivers. Surveillance cameras are popping up everywhere, with public and private cameras installed on streets and buildings to monitor traffic and guard against break-ins.

RLC programs violate the Fourth Amendment's protection against unreasonable search and seizure. City governments unreasonably deploy cameras on public roads without probable cause to believe that a particular motorist will violate the law.

Other opponents said

Although this bill wisely would create statewide standards for RLC programs, several provisions would undercut this effort, including the lack of a requirement that an entity follow this model. Also, limitations on penalty amounts and revenue expenditures could hamstring local governments.

Uniformity. Repealing provisions that local governments now use to employ RLC programs would ensure all entities followed the procedures in the bill and would reduce the opportunity for municipalities to use penalties against motorists for violating other laws or ordinances. While municipalities so far have used this provision only to operate RLC programs, it could be construed to govern other actions not explicitly covered by state law, such as prohibiting the use of a cell phone while driving.

Limiting fines is a good idea, but the bill should provide more flexibility. Smaller cities with less net revenue should be exempted from these limitations because their budgets for public safety programs are limited. The bill could turn RLC programs into a liability, making it difficult for entities to use them if they did not have enough money to cover the costs. This bill should provide for a penalty range to allow for increases in program costs and other inflationary factors.

To ensure safety was the paramount concern, the bill should enhance requirements for an engineering study at an intersection selected for the program. Simply mandating a study and creating an advisory committee without any

power to veto use of an RLC would not be enough. The bill should require an entity to implement engineering changes that would reduce accidents and violations and determine if it would eliminate the need for an RLC. Otherwise, it could appear a city was more interested in generating revenue than preventing accidents.

Effect on enforcement. Denying registration to a vehicle owner would be excessive. Although the bill would prohibit an entity from issuing a civil penalty if a criminal citation already had been issued for the violation, it would not provide for what happened if a person inadvertently were issued a civil and a criminal penalty, allowing an enterprising motorist to pay the civil penalty and contest the criminal violation on the basis that the driver already had been punished for the offense. It also would not fully provide for interactions with uniformed officers. If an officer used discretion not to cite a driver at a monitored intersection, a civil penalty still could be issued under this program.

Notes

The **HRO analysis** of SB 1119 appeared in Part One of the May 15 *Daily Floor Report*.

SB 1119 incorporates SB 125 by Carona, which was analyzed in Part Three of the May 22 Daily Floor Report.

A related bill, HB 922 by Truitt, which took effect on June 15, 2007, prohibits a municipality from using an automated traffic control system on a highway or street under its jurisdiction to enforce compliance with posted speed limits.

Authorizing \$5 billion in general obligation bonds for highway projects

SJR 64 by Carona

Effective if approved by voters at the November 6, 2007, election

SJR 64 would add Texas Constitution, Art. 3, sec. 49-p to allow the Legislature to authorize the Texas Transportation Commission (TTC) or its successor to issue state general obligation bonds in a total amount no greater than \$5 billion for highway improvement projects. TTC would prescribe terms, denominations, and installments of the execution of the bonds. A portion of the proceeds from the sale of the bonds and a portion of interest earned on the bonds could be used to pay the costs of administering authorized projects, the cost or expense of issuing the bonds, and all or part of a payment owed under a credit agreement.

The bonds authorized under this section would constitute a general obligation of the state, which would be required to pay the principal of and interest on the bonds that matured or became due during the fiscal year, including an amount necessary to make payments under a related credit agreement.

Supporters said

SJR 64 would help the state finance badly needed highway infrastructure to meet its transportation and economic development needs. The state has a funding gap between transportation needs and available funding of at least \$77 billion. While toll roads have increasingly been used as an alternative to finance highway construction, the two-year moratorium enacted this session (SB 792) that prevents the state from entering into an agreement with a private firm to build a toll road and receive up-front payments that could be used for other transportation projects shows the limitations of this funding source.

The Texas Department of Transportation (TxDOT) has been moving in a new direction since the approval of Proposition 15 in 2001, when the state's longstanding "pay-as-you-go" policy for transportation funding was modified to allow transportation officials to borrow money to construct new roads instead of waiting to build until funding was appropriated. The Constitution prohibits state-supported debt from exceeding 5 percent of uncommitted general revenue, and the state debt currently is below 2 percent, leaving roughly \$21 billion available for general obligation bonds. The bonds authorized by SJR 64 would not have a significant impact on the state's fiscal standing because Texas has a low debt burden compared with other states.

Although the state has dedicated transportation funding sources, bonds supported by general revenue likely would have a lower interest rate because the revenue stream is more consistent than the revenue stream from the State Highway Fund (Fund 6). Additionally, transportation projects affect many other sectors and have a statewide benefit to the economy and the improvement of statewide infrastructure. Other states, as well as local governments, use bonding authority backed by general funds for transportation projects under this same rationale.

Opponents said

Short-term borrowing would require general revenue appropriations the state cannot afford to spend on debt service. Borrowing would increase the state's costs in terms of forgone interest earned on cash balances and interest charges for new borrowing. Texas has a longstanding policy of funding transportation projects solely through dedicated funds and minimizing obligations of general revenue. Trusting an agency such as TxDOT that has not been forthright with the Legislature or the public regarding its expenditures and budgeting with even more money outside of the traditional appropriations process would be irresponsible.

Borrowing money for construction increases costs and passes them along to future taxpayers and legislatures. Texas should continue to pay for the amount of highway construction it can afford, rather than encumber scant resources and drive up the cost of already expensive projects. Adding even more debt would increase the amount of money needed for debt financing, which could limit the state's ability to meet unforeseen needs.

Transportation projects should be funded through Fund 6 and not general revenue. It would not be in the state's best interest to tie up money that could be used to certify the budget or for other urgent state needs such as public education and children's health care on debt service for bonds to build highways.

Other opponents said

Rather than using strained resources to incur more debt, the state should put more money into Fund 6 by raising gas tax rates, vehicle registration fees, or both, or by dedicating other revenue streams to Fund 6, such as motor-vehicle sales taxes or vehicle inspection fees.

Notes

The **HRO analysis** of SJR 64 appeared in Part Two of the May 22 *Daily Floor Report*.



Utilities

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Repealing the Telecommunications Infrastructure Fund assessment

HB 735 by Straus

Effective September 1, 2008

HB 735 will repeal the Telecommunications Infrastructure Fund assessment, a 1.25 percent tax on the taxable receipts of telecommunications providers. Collection of the assessment will continue until September 30, 2008, but not after that date. The bill repeals Utilities Code ch. 57, subch. C and other sections of code governing the TIF board and policies.

Supporters said

HB 735 would eliminate an assessment paid by telecommunications consumers that raises revenue to fund a government program that has accomplished its original purpose and needs to be ended. TIF was created in 1995 to finance access to telecommunications services for public schools, nonprofit hospitals, public libraries, and higher education institutions across the state. The fund was maintained through an assessment of 1.25 percent on telecommunications providers' taxable receipts and was authorized to collect up to \$1.5 billion over 10 years. The program has helped purchase computers and install networks in schools, libraries, and hospitals throughout Texas. However, more recently proceeds from the TIF assessment have been diverted into the general revenue fund rather than being earmarked for their original intended purpose to combat the "digital divide." Now that it has achieved its purpose, there is no reason to continue collecting TIF money.

The TIF assessment is a burdensome tax paid by telecommunications consumers. According to the Tax Foundation, as of 2004, Texas had an effective tax rate on telecommunications services of more than 14 percent, a rate of state telecommunications taxation surpassed only by Rhode Island. Having a vibrant telecommunications sector is crucial to continued future growth, and this sector should not be subject to excessively high taxation. Texas can afford to abolish TIF in the current fiscal environment, and policymakers should not wait any longer to eliminate a tax that was due to expire years ago.

Opponents said

By eliminating the TIF assessment, the bill would result in an estimated loss to the state of \$176 million in fiscal 2009 and an additional \$424 million in fiscal 2010-11. TIF funds have been used to support essential government services in recent years and may be necessary to contribute to property tax relief or other important programs in the future. It would be imprudent for the state to eliminate this important source of revenue without accommodating the change by augmenting other taxes or reducing state spending.

While the TIF's success is commendable, its original mission has not completely been accomplished. Schools, libraries, and hospitals continue to need new computers, and Texas still has a need to upgrade local telecommunication networks. All these projects require a secure and dedicated source of funding. The state should continue collecting the TIF assessment, but the money should be dedicated to its original purpose instead of diverted to general revenue.

Other opponents said

Collection of the TIF assessment should end as quickly as possible rather than waiting until September 2008. Delaying that provision of HB 735 only would compound the unfairness of this tax. The Legislature should reconsider the decision made last session to divert the TIF assessment revenue to pay for other general revenue expenditures. This biennium is projected to end with a substantial surplus, so any revenue loss from ending the TIF assessment as soon as possible would not affect current spending priorities.

Notes

The **HRO analysis** of HB 735 appeared in the March 19 *Daily Floor Report*.

Grants to encourage electric energy generation with biomass materials

HB 1090 by Swinford

Effective September 1, 2007

HB 1090 establishes an agriculture biomass and landfill diversion incentive program at the Department of Agriculture. The program will distribute grants to encourage electric energy generation with certain types of biomass materials. Grants will be distributed with the intent of moving the state forward in its goal to generate more renewable energy.

A farmer, logger, or diverter can receive a monetary grant for delivering qualifying biomass to an eligible facility. Qualifying biomass includes agricultural biomass, storm-generated biomass debris, forest wood waste, urban wood waste, and agricultural livestock waste nutrients. Grants amount to \$20 for each ton of qualifying biomass. The agriculture commissioner may compensate a farmer, logger or diverter for an amount greater than \$20 per ton in order to encourage the submission of qualifying biomass.

To qualify for program participation, a facility must generate electric energy through biomass materials. Among other criteria, the facility is required to use the best available emissions control technology and be operational after August 31, 2009. Facilities must verify and document the amount of qualifying biomass received for electric energy production. The facility will disburse the grant to the farmer, logger or diverter on behalf of the Department of Agriculture. Each quarter, the department will reimburse facility operators for grant distribution. Grant provisions for farmers, loggers, and diverters also apply to facility operators, including grant amounts.

The Texas Commission on Environmental Quality and the Public Utility Commission (PUC) will assist the Department of Agriculture in implementing the bill's provisions. The total amount awarded by the department for qualifying biomass material may not exceed \$30 million per fiscal year, and no single facility may receive more than \$6 million per fiscal year. The agriculture biomass and landfill diversion incentive program will expire on August 31, 2019.

HB 1090 also amends the Utilities Code to make certain modifications to the renewable energy program. PUC will establish an alternative compliance payment that entities can pay in order to meet renewable energy purchase requirements. Also, if a customer notifies PUC that it chooses not to support the state's renewable energy generation goals, the commission will reduce the renewable

energy purchase requirements for the appropriate retail electric provider, municipally owned utility, or electric cooperative.

The bill requires the completion of two studies by January 1, 2009. The commissioner of agriculture will conduct a study of the volume of wood waste in the East Texas and Central Texas forest regions. The PUC will examine the effect of the renewable energy credits trading program on the state's market power and residential electricity rates.

Supporters said

As the nation's second-largest agricultural producing state, Texas represents an ideal location to promote the conversion of biomass into energy. By establishing such a program, HB 1090 would open new markets for Texas' agricultural industry and create job growth through the operation of biomass facilities. The bill's potential positive economic and environmental impact would more than outweigh its cost, offering lawmakers a rare "win-win-win" opportunity as producers, consumers, and the environment all stand to benefit from the program's implementation.

Emissions from fossil fuel plants generate harmful air contaminants, posing serious health risks for Texans. By contrast, biomass constitutes a renewable and reliable energy source, capable of generating clean electricity 24 hours a day. The bill also would benefit the environment by diverting waste from landfills and reducing the amount of refuse openly burned. Typically, biomass materials are considered a burden to farmers, loggers, landowners, and communities. Wood waste often is the primary substance in landfills, and the decay of timber leads to methane emissions that contribute to global warming. Under HB 1090, these materials would be used to produce energy instead of damaging the environment.

HB 1090 would promote biomass production in Texas, increasing the diversity of energy sources and leading to a drop in energy prices for consumers. Facilities specializing in biomass energy production are expensive to build and require a sustainable source of biomass for use as fuel. By ensuring a ready supply of biomass, the distribution of grants for qualifying biomass would make this form of

energy production more economically feasible. Moreover, the use of biomass for energy contributes to national and regional energy security.

Modifications to the Utilities Code would give customers and energy providers greater flexibility in the renewable energy credits program. Additionally, a study of the program would generate important information on program outcomes.

Opponents said

Prior to program implementation, the life cycle of biomass should be evaluated to determine its true environmental impact in energy production. Although biomass is renewable, making it ready for use as an energy source still could contribute to global warming. For instance, the process of transporting biomass to production facilities could lead to increased emissions of air contaminants and carbon dioxide.

According to the Legislative Budget Board, the bill would cost the state over \$15 million per year, starting in fiscal 2010. Currently, a market for certain forms of energy production exists. A government program should not distribute economic incentives to alter this market. Instead, market forces should determine the production and use of certain fuel sources. When biomass becomes a viable economic option for energy production, the market will demand it.

Notes

The **HRO analysis** of HB 1090 appeared in the April 30 *Daily Floor Report*.

Electricity efficiency and conservation incentives

HB 3693 by Straus

Effective September 1, 2007

HB 3693 requires local governments, state agencies, and universities to adopt various policies to save energy; revises building codes to encourage energy savings; and provides incentives to electric utilities and consumers to reduce the growth in demand for electricity.

School boards must establish a goal for the reduction of energy consumption by 5 percent each fiscal year during the six years after September 1, 2007, and school districts and higher-education institutions are required to buy energy-efficient light bulbs. State agencies also will be required to buy energy-efficient products, including light bulbs. Energy-saving devices are required for vending machines in state agency buildings.

Governmental entities responsible for utility payments must post information on their electricity, water, and natural gas utility bills on an Internet site accessible to the public. Single or multi-family dwellings built with state or federal loan funds must include energy conservation and efficiency measures. The State Energy Conservation Office is authorized to adopt energy efficiency standards based on standards in the most current International Residential Code or the International Energy Conservation Code.

HB 3693 requires electric utilities to give school districts credit for any surplus energy produced by solar panels on the roofs of schools. It also allows for the interconnection of distributed renewable generation into the bulk electric grid.

Other provisions of the bill establish goals for reduction of growth in demand, beginning with a target of a 15 percent reduction of demand by December 31, 2008, and for retail electric providers in the Electric Reliability Council of Texas (ERCOT) region and electric utilities outside the ERCOT region to provide customers with energy efficiency educational materials. Municipally owned utilities and electric cooperatives with retail sales of more than 500,000 megawatt hours in 2005 must report to the State Energy Conservation Office by September 1, 2009, on the combined effects of their energy efficiency activities.

The bill exempts certain energy-efficient products – including light bulbs and some appliances – from sales and use taxes during the Memorial Day weekend.

The Public Utility Commission will be required to review a merger or consolidation, sale of 50 percent of stock, or transfer of controlling interest in a transmission and distribution utility, if the transaction took place after May 1, 2007.

Supporters said

HB 3693 would provide a comprehensive approach to energy efficiency, with the state setting an example on how those programs work and by aligning these programs with the restructured electricity market. These measures should result in reductions in electricity consumption to avoid peak demand problems and avoid new costs for power plants and power lines. Texas must have electricity capacity to continue to grow, but the state cannot solve the projected shortfall in reserve capacity by building generation facilities or by conservation measures alone. The state must do both and needs to be a better steward of our energy resources.

Government should not mandate any program for businesses and consumers that it would not apply to its own operations. State and local governments have the obligation to set an example. HB 3693 also would provide for transparency and accountability in energy efficiency programs by requiring entities to set goals and post the results where the public could see them.

HB 3693 would be designed so that energy efficiency programs matched the Texas marketing structure. Under the old regulatory regime, the PUC could mandate energy savings as part of the rate hearing and adjust rates to account for energy savings. Policymakers must be flexible and innovative to design these new programs under restructuring. HB 3693 would provide a schedule of goals and incentives rather than mandates so that electric utilities and retail service providers could be compensated fairly for energy efficiency programs. Also, consumer concerns about global warming and energy efficiency have changed electric utilities' expectations and marketing strategies. An increasing number of consumers want to "go green," so utilities must be able to provide electricity from renewable sources and encourage conservation and efficiency programs.

Lost time cannot be made up or past decisions reversed. Texas has a completely different political culture and history than does California, and the Lone Star State has continued restructuring and competition in electric utilities. Differences in the climate and topography within the state prevent a one-size-fits-all solution from being feasible. However, Texas would join Colorado and North Carolina, which approved comprehensive energy conservation programs this spring.

School systems and other small generators who produce power through solar and alternative methods should have access to the electric grid. Texas needs to encourage alternatives to large generating stations. The technology required to meter this off-grid transmission is simple and proven, and the flows of electricity would pose no overall problems to the transmission grid.

Creating a tax holiday for certain energy-efficient products would encourage consumers to replace inefficient appliances and use energy-efficient technologies in their homes. Tax policy is an important tool for influencing consumer behavior, and this provision would help reduce energy consumption and associated air pollution. High energy demand can lead to inflated costs for consumers and shortages during peak use periods, as well as to a need for costly construction of additional generation capacity. A sales tax holiday also would provide an opportunity to educate the public about the benefits of energy conservation.

Opponents said

HB 3693 is more of a Christmas tree of tangentially connected concepts than a coherent energy savings program. It is uncertain how the incentives would mesh with the existing restructuring of the electricity industry to provide for retail electric competition. The experience Texas had with the “price to beat” is not an encouraging sign for the incentives under HB 3693. The “price to beat” deliberately was set to be artificially high. The goal was to persuade customers to switch to other retail providers or even select another plan with their existing provider. Despite all the publicity and consumer education programs, almost one-third of ratepayers stubbornly refuse to choose another, and potentially lower, rate plan. Consumers might know how efficiency programs could affect their electricity bill and ignore that information.

The bill would impose an unfunded mandate on school districts and local governments to pay for energy programs with an uncertain return on the investment. Other provisions, such as the energy savings requirement for vending machines, would impose unnecessary burdens and costs for the individuals and private companies who contract with the state, while the cost-savings would be kept by the agency or university.

Allowing school districts with solar panels or small generators to interconnect to the bulk electric transmission system could compromise safety and reliability of electric service. These sources tend to provide insignificant and unpredictable amounts of power that do not justify the risk to the grid.

A sales tax holiday for certain energy-efficient products unfairly would affect local jurisdictions that levy sales taxes. It would deny local governments this revenue without allowing them to decide whether or not to participate. Also, instituting a tax holiday for energy-efficient products would run counter to the goal of tax simplification. The proposal could complicate Texas’ participation in the Streamlined Sales Tax Project, a project under which a consortium of states are attempting to simplify their sales tax structures in order to gain federal approval for the taxation of online commerce.

Notes

The **HRO analysis** of HB 3693 appeared in the May 4 *Daily Floor Report*.

HB 1000 by Burnam, which would have established a sales tax holiday for certain energy-efficient products during two weekends each year, died in the Senate and was analyzed in the April 10 *Daily Floor Report*.

Competition incentives for retail electric customers

SB 482 by Fraser *Died in the House*

SB 482 would have established incentives and sanctions for electric utilities to persuade retail customers still paying the regulated price-to-beat rate to choose an alternative plan and would have provided for Public Utility Commission (PUC) review of future sales of electric utilities in the state. The bill also would have codified PUC rules on disconnection for non-payment of electric bills during weather emergencies, prohibited the collection of deposits from low-income customers or those who had not made late payments in 12 months, and required that utility bill surcharges collected for the System Benefit Fund be used to provide consumer education about electric retail choice and a discount for low-income ratepayers ranging from 10 percent to 20 percent.

All versions of SB 482 would have required large electric utilities to persuade customers still served at the price-to-beat rate to switch to alternative service plans or to new retail electric providers. Failure to do so would have resulted in financial penalties for utilities. The conference report for SB 482 would have required a utility serving one million customers as of December 31, 2006, to gain 120,000 residential customers outside its traditional service area and for a utility serving fewer than one million customers to gain 45,000 residential customers outside its traditional area. Penalties would have been assessed based on the difference between the goals and the actual number of customers switched, starting with \$100 per customer as of December 31, 2007, rising to \$200 per customer as of December 31, 2008, and increasing to \$300 per customer as of December 31, 2009.

The House version and conference report for SB 482 included provisions that would have mandated a reduction of rates based on the price to beat and would have reinstituted a limited ability for PUC to regulate retail electricity rates. Customers who remained on the old price-to-beat rate would have been granted a 10 percent rate reduction on July 1, 2007, and an additional 5 percent reduction on September 1, 2007. However, the requirement would not have applied to any price-to-beat customer who had received a 10-percent reduction before June 30, 2007, from the price charged on June 30, 2006. The House version and conference report of SB 482 also would have required PUC to conduct a market review of electric rates for a transmission and distribution utility where 25 percent of the customers remained on a plan comparable to the price to beat at the end of 2007 or more than 20 percent remained at

the end of 2008. If the price charged by the equivalent rate to the price to beat were more than two cents per kilowatt hour greater than the average of other available plans, the PUC could have ordered a rate reduction of not less than one cent per kilowatt hour.

SB 482 would have required a transmission and distribution utility and its affiliated power generation and retail electric providers and holding companies to have separate names and logos, independent boards of directors, and separate headquarters. The conference report added provisions that would have required a transmission and distribution company that served more than 850,000 customers on December 31, 2006, along with its affiliated power generation and retail electric provider companies and associated holding company, to implement safeguards and a code of conduct and to prevent the non-regulated portions from pledging the regulated transmission and distribution company's assets to obtain credit or assume debt.

The House version and conference report for SB 482 would have required PUC review and approval for mergers or consolidations, sales of at least 50 percent of stock, or transfer of a transmission and distribution utility, but those provisions would not have applied to any transaction agreed to before April 1, 2007, or for which an application had been filed for PUC review before May 1, 2007. The conference report also included provisions in SB 483 by Fraser that would have revised penalties and required refunds or disgorgement for market power abuses in the wholesale power generation sector. The conference report also would have included provisions from HB 2818 by Ritter that would have delayed the beginning of retail electric competition in the Southwest Power Pool region in southeast Texas without specific legislative approval before January 1, 2017.

Supporters said

SB 482 would provide meaningful rate reductions and safeguards for consumers in Texas while allowing lawmakers to fulfill their promises to protect all ratepayers during the transition to retail competition in electricity. The bill would grant a 15-percent reduction for those paying the price-to-beat rate and allow the PUC to exercise continuing oversight on that rate. It would prohibit electric companies from charging deposits for low-income or elderly customers or those who had paid their bills on time for the past year

to establish service. In addition, the elderly and consumers with critical medical conditions would be protected from having their electricity disconnected during the extremely cold or hot days that occur frequently in Texas.

Texas should be proud of its success and achievements in restructuring the electric industry through the enactment of SB 7 by Sibley in 1999, and SB 482 would adjust market rules without resorting to re-regulation of electric utilities in the state. The price to beat, the partially regulated price for residential electricity customers, was a uniquely successful transition tool. In retrospect, Texas probably maintained the regulated rate for too long, and that program distorted prices and market behavior throughout 2006. While the PUC's 2007 Scope of Competition in Electric Markets in Texas concedes that too many Texans remain at the price-to-beat rates, there are plenty of opportunities to lower their rates. The bill would create the right mix of incentives and penalties to encourage the incumbent utilities to look beyond their traditional service areas and persuade more consumers to choose electric plans that are right for their needs.

Texas must assure existing utilities and potential investors that its markets are fair and efficient even as it provides safeguards for ratepayers. SB 482 would strike the right balance between enhancing the state's business friendly climate and ensuring that private-equity investors would not burden the regulated TXU "wires" company with debt from its other operations. In February, Kohlberg Kravis Roberts and Texas Pacific Group, a private-equity consortium, announced plans to purchase TXU, the investor-owned electric utility serving most of North Texas, for \$45 billion. Transactions for the "wires" portion of TXU were subject to review by the PUC, but the purchase of the wholesale generation and retail electric sales divisions were not. SB 482 would require prior PUC approval for large sales, including any future transactions involving TXU, without interfering with existing contracts or creating additional tax burdens for the utility's potential purchasers. The bill also would address continuing concerns about abuse of market power and unfair practices by TXU and other utilities.

The Legislature cannot afford to reverse its decision on electric utility restructuring and introduction of market competition. Re-regulating electric rates for residential customers would not be sound public policy. Competition already is flourishing among large industrial users and smaller businesses, and the marketplace has increased choices and lowered prices for these ratepayers. Mixing regulation and competition would increase the burden of managing the system for government, business and industry, and residential customers. Setting arbitrary price caps and

mandatory rate reductions would not stop imposition of higher electricity costs, as shown by the experiences in California and Maryland, among other states.

Admittedly, transition to a new market structure has been painful at times. However, recent higher electric rates cannot be attributed to competition. Disruptions caused by hurricanes Katrina and Rita in 2005 caused spikes in natural gas prices. Gas-fired units produce 73 percent of power in ERCOT, including 86 of the capacity in the Houston region. While natural gas prices tripled, however, electric rates did not increase by that proportion. Notwithstanding those unprecedented increases, competitive prices for electricity are near the former regulated rates.

SB 482 would establish meaningful, but attainable, goals for larger utilities to compete outside their traditional service areas. The requirements would apply mainly to TXU and Reliant. Requiring each of these large companies to compete directly in the other's service area would draw more attention to the advantages of competition. Even if customers did not switch to the large competitor, there could be beneficial spillover effects as consumers selected alternative plans with their current provider or signed up with other retailers.

Even though SB 482 failed to pass, the debate raised awareness about the future of electric competition in the state. One positive effect was the announcement that TXU decided on a further reduction of rates from 10 percent to 15 percent shortly after the end of the legislative session.

Opponents said

The conference report on SB 482 was a mere shell of the strong version passed by the House. Most of the claimed consumer protections already exist in statute or PUC rules. The conference committee stripped out meaningful environmental protection provisions and the requirement that the PUC report on how to re-regulate the industry. Also removed was a requirement that utility companies consider a bill paid when it was postmarked. The proposed 15 percent reduction largely would have been an empty gesture, as most TXU ratepayers still on the price to beat would not have qualified because they already had received a 10-percent reduction. The System Benefit Fund was not protected, and even a provision allowing discounts for nursing homes did not survive the conference committee deliberations.

SB 482 fundamentally would change the rules of the game and put the future of competitive markets in Texas at risk. The bill would attempt to address past problems without necessarily improving prospects for the future. Two of the major problems have been high electricity rates caused by spikes in natural gas prices after hurricanes Katrina and Rita and alleged market abuses by TXU. By definition, future natural disasters are unpredictable. It is uncertain whether the bill would provide adequate oversight or sanctions to prevent future market abuses.

The benefits of electric utility competition for residential customers were oversold initially, and the experience with increasing electricity bills during the past eight years only has increased the skepticism and anger most ratepayers feel. Freedom to choose among competing electric providers turns into an empty abstraction when the customer receives a monthly electric bill of \$700 or more during a hot Texas summer. The Legislature should reconsider its decision on SB 7 and begin the process of re-regulating residential electric rates again.

Notes

The **HRO analysis** of SB 482 appeared in the April 12 *Daily Floor Report*.

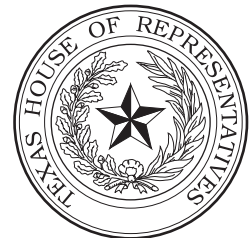
HB 624 by P. King, which took effect June 15, allows for securitization for costs related to the transition to competition that are not defined as “stranded costs.” It also includes a provision that was in SB 482 authorizing PUC to review and approve future mergers, sales, and transfers of transmission and distribution utilities. HB 3693 by Straus, effective September 1, contains a similar provision (see page 209).

SB 483 by Fraser and HB 2818 by Ritter, contained provisions that also appeared in the conference committee report for SB 482. SB 483 died in conference committee, and HB 2818 died in Senate committee.

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