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Major Issues ***of the 82nd Legislature, Regular Session*** ***and First Called Session***

During its 2011 regular session, the 82nd Texas Legislature enacted 1,379 bills and adopted 11 joint resolutions after considering more than 6,000 measures filed. It also enacted eight bills during the first called session. This report includes many of the highlights of the regular session and the first called session. It summarizes some proposals that were approved and some that were not. Also included are 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 2011 sessions include those examining the bills vetoed by the governor and the constitutional amendments on the November 8, 2011, ballot, as well as an upcoming report summarizing the fiscal 2012-13 budget.

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	Introduced	Enacted*	Percent enacted
House bills	3,865	797	20.6%
Senate bills	1,931	582	30.1%
TOTAL bills	5,796	1,379	23.8%
HJR s	154	3	1.9%
SJR s	53	8	15.1%
TOTAL joint resolutions	207	11	5.3%

*Includes 24 vetoed bills — 17 House bills and 7 Senate bills

	2009	2011	Percent change
Bills filed	7,419	5,796	-21.9%
Bills enacted	1,459	1,379	-5.5%
Bills vetoed	35	24	-31.4%
Joint resolutions filed	190	207	8.9%
Joint resolutions adopted	9	11	22.2%
Legislation sent or transferred to Calendars Committee	1,770	1,302	-26.4%
Legislation sent to Local and Consent Calendars Committee	1,398	1,283	-11.4%

Source: Texas Legislative Information System, Legislative Reference Library

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Revising the Texas Windstorm Insurance Association

HB 3 by Smithee, First Called Session
Effective September 28, 2011

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HB 3 revises the claims resolution process and the administration and operation of the Texas Windstorm Insurance Association (TWIA). TWIA is a provider of last-resort insurance that provides basic wind and hail coverage to property owners in 14 coastal counties and parts of Harris County when such coverage is excluded from homeowner and other property policies.

Claims settlement and dispute resolution. HB 3 establishes claims resolution processes for disputes about whether damage is covered and for the amount of covered loss, as well as for appeals of denial of coverage. It also establishes an appraisal process for disputes about the amount of covered loss and allows claimants to appeal to a district court in instances of corruption, fraud, or other undue means. The bill establishes a binding arbitration process for certain coverage disputes.

In disputes involving denial of coverage, TWIA may require mediation. If the claimant is not satisfied with the result, or if mediation takes longer than 60 days, the claimant may submit the action to district court. A claimant bringing an action may recover both the covered loss and consequential damages if the claimant shows by clear and convincing evidence that TWIA intentionally mishandled the claim.

Payment of losses. Under HB 3, securities are issued as necessary in a principal amount not to exceed \$1 billion per occurrence or series of occurrences in a calendar year that resulted in insured losses. HB 3 also sets certain limits on the amount of bonded debt TWIA may issue.

Premium surcharge. The premium surcharge to pay for public securities is to be applied to:

- policies that cover automobiles principally garaged in the catastrophe area;
- fire and allied lines insurance;
- farm and ranch owners insurance;
- residential property insurance;
- private passenger automobile liability and physical damage insurance;

- commercial passenger automobile liability and physical damage insurance; and
- the property insurance portion of a commercial multiple peril insurance policy.

Premium discounts on TWIA policies. HB 3 allows TWIA to issue discounts or surcharge credits of up to 10 percent for insured structures that are built above code or for policies that contain binding arbitration clauses.

Interim study. The bill directs the House speaker and the lieutenant governor to create a joint legislative study committee to examine alternative ways to provide insurance to the coastal areas of the state through a quasi-governmental entity.

Sunset date. The bill changes the year for TWIA's Sunset review from 2013 to 2015.

Other provisions. The bill prohibits a person insured under the association's provisions from bringing a private lawsuit against TWIA under ch. 541 and ch. 542 of the Insurance Code. It also creates certain standards of conduct for TWIA board members and employees and creates a duty for them to report certain fraudulent conduct.

Supporters said

HB 3 adds much-needed regulation, transparency, and ethics reform to the windstorm insurance association, which was created to aid and protect insurance consumers on the Texas coast. In the aftermath of Hurricane Ike in 2008, TWIA's board members, management, and staff failed to fulfill the association's purpose of providing last-resort wind and hail insurance to policy holders on the coast.

Arbitration and appeals process. HB 3 would provide a fair, efficient, and effective process for claims disputes that arise between the association and coastal policyholders. The claims settlement and dispute resolution provisions created by HB 3 would allow policyholders to appeal different types of claims by

using processes appropriate for each issue. HB 3 would ensure fairness in the dispute process by instituting consumer-friendly deadlines designed both to provide structure and to make the association more accountable to policyholders. By setting deadlines, the bill would streamline the review and appeal process, making it more responsive and predictable. It also would present opportunities to extend deadlines.

Opponents said

HB 3 would remove crucial consumer protections available under chs. 541 and 542 of the Insurance Code. These protections, including treble damages, deter abusive conduct on the part of powerful insurers, compel them to honor their contractual and statutory obligations in a timely manner, and make it more likely that aggrieved policy holders will be made whole. These are protections that other insurance policy holders have, and the association's customers should have them as well.

The treble damages available under current law and other statutory attempts to deter bad actors give consumers more leverage when negotiating claims disputes with the association. Without these options, coastal policyholders would be limited in negotiations and could end up receiving even less than their policy coverage.

Treble damages are not bankrupting the association, nor will they in the future. Some argue that treble damages and other protections should be eliminated to keep the association solvent, but the association is able to cover its obligations with its capacity to purchase reinsurance, issue bonds, and collect and stockpile customer payments on policies. The association also can increase what it charges other insurance companies for support payments.

Other opponents said

HB 3 would not improve the broken TWIA dispute system because it fails to address the source of most disputes — inefficient and inequitable claims adjusting. The bill should adopt a single-adjuster claims process that uses qualified, competent adjusters of large companies already in the practice of adjusting these claims. Consumers would be protected from unqualified adjusters seeking to take advantage of a broken

system, and the association could reduce costs with a streamlined system that is working well for other states.

The bill would be ineffective in solving windstorm problems in Texas because it would continue the existence of the association. The government should not be involved as a regulator or a participant in the insurance market. It would be more effective for the market to set premium costs for this special type of coverage, rather than TWIA's regulating insurance premium rates. Also, because the bill would not require the association to purchase reinsurance, its current practice of bond financing would continue to be insufficient for its obligations.

Notes

The **HRO analysis** of HB 3 appeared in the June 15 *Daily Floor Report*. During the regular session, the House and the Senate passed different versions of HB 272 by Smithee, which would have made various changes to TWIA administration and procedures, but the bill died in conference committee.

Licensing and regulation of dog and cat breeders

HB 1451 by Thompson
Effective June 17, 2011

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HB 1451 requires certain persons acting as dog and cat breeders to be licensed by the Texas Department of Licensing and Regulation (TDLR). Dog and cat breeders are defined as those possessing 11 or more adult intact females and engaged in breeding their animals for direct or indirect sale or in exchange for consideration and who sell or exchange, or offer to sell or exchange, at least 20 animals annually. Breeders do not have to hold a license or comply with standards before September 1, 2012.

TDLR must adopt rules to administer HB 1451 and set fees to cover the costs.

Licenses. A person cannot act as a dog or cat breeder in Texas without a license issued by TDLR. HB 1451 does not apply to people breeding dogs for personal use and using them for hunting, agricultural purposes, field trial competitions, or hunting tests.

Inspections, fees. TDLR must inspect each facility of a licensed breeder at least once every 18 months and other times as necessary. Facilities must be inspected before a license may be issued. TDLR cannot require a prelicense inspection of facilities of applicants who hold a federal Class A animal dealers license and who have certified to TDLR that their facility meets the requirements of HB 1451.

TDLR can perform an inspection without advance notice if necessary to perform it adequately. Breeders must assist in the inspection, if requested. Inspectors cannot enter or access any portion of a licensed breeder's private residence, except as necessary to access animals or other property relevant to the care of the animals.

TDLR must investigate complaints alleging violations of HB 1451 or any applicable rules. Inspectors who notice animal cruelty or neglect during an investigation must report it to the local law enforcement agency within 24 hours.

TDLR can contract with state agencies, local law enforcement agencies, or local fire departments as third-

party inspectors to enforce HB 1451. The agency must use rules to establish training requirements, registration procedures, and policies for third-party inspectors.

Standards. TDLR must adopt minimum standards for the humane handling, care, housing, and transportation of dogs and cats by breeders to ensure the overall health, safety, and well-being of each animal. HB 1451 details numerous requirements for standards, including those dealing with animals' housing, exercise, care, and health.

Records. TDLR must adopt rules establishing the minimum information that breeders must keep for each animal. Breeders must keep a separate record for each animal in their facility, documenting the care of the animal. Breeders have to submit to TDLR an annual accounting of all animals held at the facility in the preceding year.

Advisory committee. TDLR is required to establish an advisory committee to make recommendations related to administration and enforcement of HB 1451, including licensing fees and standards. The advisory committee has nine members, including one animal control officer, two licensed breeders, two veterinarians, two representatives of animal welfare organizations with offices in Texas, and two public members.

Supporters said

HB 1451 is intended to ensure the humane treatment of dogs and cats by Texas breeders. Currently, some unscrupulous animal breeders keep dogs and cats in inhumane conditions that result in disease, malnourishment, and mistreatment. These breeders, some of whom operate so-called "puppy mills," often escape prosecution under Texas' animal cruelty laws. HB 1451 would address this problem by requiring breeders who are more than just hobby breeders to obtain a state license, be inspected, and meet some minimum standards to ensure that animals were healthy and treated humanely. The serious problem of animals being treated inhumanely warrants the narrowly tailored

and reasonable licensing standards that HB 1451 would establish. This would represent an appropriate, limited regulatory role for the state to protect health and safety.

Texas' current animal cruelty laws apply only after cruelty has taken place and animals have been harmed. Before law enforcement can intervene, animals often are dead or severely mistreated. Law enforcement officers and prosecutors, who often have competing demands for their time, may intervene in only the most extreme cases, leaving many mistreated animals to suffer. HB 1451 is designed to prevent cases of animal cruelty before they occur, rather than prosecute them after the fact.

The best way to address this situation is through licensing of breeders and uniform standards. Under the bill, the state could enforce standards for all licensed breeders and would have an additional tool to target bad breeders who did not get licensed.

HB 1451 should not adversely affect responsible breeders. The bill's standards and regulations would be reasonable and narrowly tailored to focus on the care of animals and would not cause undue expense for responsible breeders. The required paperwork and recordkeeping would not be burdensome, and the authority granted to TDLR, such as surprise inspections, is often standard for a licensing agency.

The bill would not apply to true hobby breeders. Meeting the 11-breeding-females and 20-animals-sold threshold would signal that a breeder was more than a hobby breeder and should be licensed and held to certain minimum standards. Once breeders were licensed, they could have any sized operation, as long as the care and keeping of the animals were humane.

The use of third-party inspectors would be a cost-effective way to administer HB 1451 without significantly adding state employees. Third-party inspectors would be trained, licensed, and monitored to ensure proper enforcement. TDLR currently uses third-party inspectors to inspect architectural barriers, elevators, and boilers, and the system works well. The bill would limit third-party inspectors to employees of state agencies and local law enforcement agencies and fire departments.

HB 1451 would not cost the state anything, according to the fiscal note. TDLR could raise fees to cover its costs.

Opponents said

Cruelty to animals is a serious problem that should be addressed through better enforcement of current laws, not by growing state government and burdening responsible, law-abiding dog and cat breeders with regulations and a new licensing requirement.

Texas' animal cruelty laws are broad enough to cover puppy mills that treat animals inhumanely. For example, unreasonable failure to provide necessary food, water, care, or shelter for animals can be an offense. Local law enforcement officials, not state employees, are best qualified to know an area and enforce the laws protecting animals from inhumane treatment.

HB 1451 would not adequately address current animal cruelty by unethical and irresponsible breeders because these operators simply would not apply for a license and expose themselves to the state's regulatory structure. Instead, good breeders would be burdened, and bad breeders would continue to operate.

The bill would set an arbitrary threshold to determine who had to be licensed. This threshold could be so low that it would force some true hobby breeders to become licensed.

The regulations and standards that HB 1451 would impose would be burdensome, costly, and too rigid, even for responsible breeders who take good care of their animals. HB 1451 would invest TDLR with broad, open-ended powers. The third-party inspectors might lack expertise or have personal agendas hostile to an animal breeder.

The fees that HB 1451 would allow TDLR to charge breeders are undefined by the bill and could be set so high as to put some breeders out of business. The fiscal note for the bill estimates that it would result in new state employees at a time when the Legislature should not expand state government.

Notes

The **HRO analysis** of HB 1451 appeared in the April 26 *Daily Floor Report*.

Continuing the Texas Department of Insurance

HB 1951 by L. Taylor
Effective September 1, 2011

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HB 1951 continues the Texas Department of Insurance (TDI) until September 1, 2023. It addresses practices related to rate regulation, property insurance in underserved areas, fire safety inspections, and health coverage for children. It abolishes certain committees and addresses membership of the Adjuster Advisory Board. The bill adds standard Sunset provisions governing conflicts of interest of the commissioner of insurance and agency staff, maintaining information about complaints, using technology to increase public access, and alternative rulemaking and dispute resolution procedures.

Rate regulation. Under HB 1951, health maintenance organizations (HMOs) must provide to individual enrollees written notice of increases in charges for coverage at least 60 days before the increase. The notice must list the charge for coverage on the date of the notice, the charge after the increase, and the percentage change between the two. An HMO may not require renewal or extension of coverage before 45 days after the notice. The law does not prohibit an HMO from responding to a request to negotiate a change in benefits or rates after the notice. Notices must include TDI's contact information, instructions for filing a complaint, contact information for the Texas Consumer Health Assistance Program, and other consumer protection information.

Accident and health insurers and small employer health benefit plans will be subject to these same notice requirements for increases in rates and premiums.

For property and casualty insurance lines, except those provided by exempted insurers or affiliates, insurers may use rates on or after the date they are filed. If the rate does not comply with requirements, the commissioner must disapprove it before its effective date or within 30 days of the filing, whichever is earlier. The commissioner may extend the 30-day period for good cause. TDI must track and analyze factors leading to rate disapproval.

The commissioner must establish a process for TDI's requests from insurers for supplementary rating information, including the number and types of requests

the department may make. The department must track and analyze its requests. TDI annually must release general information about its rate review processes.

For insurers subject to department approval of rate filings, the commissioner must assess periodically whether conditions requiring prior approval still exist. If the conditions have ceased, the commissioner must excuse the insurer from prior approval filing. If the commissioner requires an insurer to file rates for approval, the commissioner must issue an order detailing the steps the insurer should take to be excused. The commissioner must specify by rule financial conditions and rating practices that could subject an insurer to prior approval filing and how the commissioner determines the existence of a statewide insurance emergency requiring prior approval.

To ensure uniform application of rate standards to prior approval insurers, TDI will track patterns of rate disapprovals.

Residential property insurance in underserved areas. To determine whether an area is underserved, the commissioner must consider whether access to the full range of coverages and policy forms for residential property insurance exists. At least once every six years, the commissioner must designate underserved areas and conduct a study to determine the accuracy of designations to increase and improve access to insurance in those areas.

In TDI's next biennial report to the Legislature, the commissioner must report findings from a study of residential property insurers qualifying for exemption from the file-and-use system under sec. 2251.252 of the Insurance Code. The study must examine the impact of increasing the percentage of aggregate premiums collected by these insurers.

Advisory committees. HB 1951 abolishes certain boards, committees, councils, and task forces established under the Insurance Code and transfers their powers, duties, obligations, rights, contracts, funds, records, and property to TDI. The commissioner must create a process for the department to periodically

evaluate and determine the necessity of advisory committees. TDI has the discretion to keep or develop committees as needed.

State Fire Marshal's Office. The state fire marshal must follow the commissioner's directions to inspect state-owned and state-leased buildings on a periodic basis, regardless of the level of fire safety risk they pose. The commissioner must prescribe a reasonable fee for inspections by the state fire marshal that can be charged to property owners or occupants requesting inspections, as appropriate. The state fire marshal may take disciplinary and enforcement actions, and any administrative penalties imposed for violations must be applied according to a penalty schedule adopted by the commissioner.

Individual health coverage for children. HB 1951 authorizes the commissioner to adopt rules to increase health coverage availability to children younger than 19, set up an open enrollment period, and institute qualifying events as exceptions to the open enrollment period, including loss of coverage due to a child's ineligibility for the state's child health plan.

Adjuster Advisory Board. The commissioner must appoint nine people, including public insurance adjusters, independent adjusters, and Texas citizens, to serve as unpaid members of the Adjuster Advisory Board. Citizens representing the general public may not have connections to the insurance industry or be a close family member of such a person, nor may they be registered lobbyists.

The advisory board will make recommendations to the commissioner on licensing, testing, and continuing education of licensed adjusters, as well as claims handling, catastrophic loss preparedness, ethics, and matters submitted to the board by the commissioner.

Electronic transactions. If all involved parties agree, an entity regulated by TDI may conduct business electronically to the degree it is authorized to conduct business otherwise. The commissioner will establish minimum standards with which regulated entities must comply in conducting business electronically.

Claims reporting. Personal automobile or residential insurers and agents may not report to a claims database on coverage inquiries by a policyholder unless and until a claim is filed.

Supporters said

HB 1951 would improve TDI's operations, ensuring the efficiency of the department's regulatory actions and providing oversight for insurance markets. The bill appropriately would focus on processes and procedures within the department rather than on policy issues.

Regulation of property and casualty rates. HB 1951 would help clarify the file-and-use system, which currently discourages insurers from filing and using rates immediately because of fear that rates will be disapproved after implementation and of the resulting costs that could accumulate. If the commissioner had to specify the financial conditions and rating practices that could subject an insurer to prior approval, insurers could avoid costly mistakes that could lead to contested case hearings or being subject to prior approval rate filing. TDI's use of property and casualty insurance regulatory tools would be more predictable and transparent.

Market competition would be enhanced by continuing the file-and-use system, rather than a prior approval regulatory system. File-and-use allows insurers to assess risks and immediately use an actuarially justified rate. With prior approval, the state could interfere in an insurer's rate implementation, which is designed to ensure solvency by creating a reasonable buffer against annual fluctuations in claims filings. The file-and-use system protects the solvency of companies by ensuring premiums are not priced so low that insurers are unable to fulfill their obligations to consumers. Clearer requirements would help foster a competitive insurance market that encouraged more insurers to do business in the state.

Consumers would be placed at greater risk if insurers were regulated to the point of insolvency and prevented from paying consumer claims because of their inability to establish an adequate reserve. Reserves generated from profits during 2006 and 2007 allowed many insurers to stay in business despite the extreme natural disaster-related losses paid for consumer claims in 2008.

Claims reporting. The bill would keep coverage inquiries by policyholders from being reported to a claims database. Inquiries about coverage under a policy should not affect a consumer's rate, but reports of inquiries could stay in the claims database for years. Consumers are reluctant to inquire about coverage because they do not want inquiries to be counted against

them. Better informed consumers could consider options in the insurance market, and competition among insurers would increase.

Opponents said

HB 1951 would not provide enough mechanisms to protect Texas consumers or to ensure the fairness and competitiveness of the insurance industry for all companies desiring to do business in the state.

Regulation of property and casualty rates. HB 1951 would not sufficiently protect consumers from companies poised to take advantage of the deregulated system. Because rates would not be regulated on the front end before companies collected unfair premiums from policyholders, a pro-industry approach to insurance regulation would gain momentum. A prior approval system would require TDI to approve all rates before they were passed along to policyholders and would place the burden on insurers to justify them.

Insurers should not be allowed to determine whether their own rates are fair. The file-and-use system allows insurers to file notice of a rate change with TDI and begin to use that rate immediately. TDI cannot disapprove a rate-in-effect, even if it is deemed unfair or excessive, without an administrative hearing and possible appeal to a district court. The file-and-use system places undue pressure on TDI's staff and resources to review rates in a 30-day period to ensure fairness for consumers and the marketplace. This burdensome process is not effective or efficient, especially given the state's current fiscal condition.

Regulatory interventions would not influence market participation, as claimed by file-and-use proponents. Before 2003, insurers used affiliates as surrogates for different rating tiers. After regulatory changes in 2003, affiliates no longer were needed, and many affiliate operations ceased. Although the total number of companies seemed to decrease significantly, the actual decline in insurer group participation was negligible.

Claims reporting. For insurers, policy coverage inquiries serve as good ratemaking signals and as actuarially sound indicators of future risk. If insurers ceased to examine risk, financial crises such as that experienced recently by the nation could cripple the insurance industry. Because each underwriting tool available to an insurer is important, none of them should be taken away.

Notes

The **HRO analysis** of HB 1951 appeared in Part One of the May 10 *Daily Floor Report*.

Requiring certain retailers to collect sales taxes

HB 2403 by Otto/SB 1 by Duncan, First Called Session
Vetoed by the governor/Effective January 1, 2012

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SB 1, the state fiscal matters bill, expands the definition of a retailer doing business in Texas for purposes of collecting sales taxes to include one that has a substantial ownership interest in, or is owned by, an entity with a location in Texas where business is conducted if:

- the retailer sells the same or a substantially similar line of products as the person with the Texas location and sells these products under the same business name or one substantially similar to the business name of the person with the Texas location; or
- the facilities or employees of the person with the Texas location are used to advertise, promote, or facilitate sales by the retailer to consumers or perform any other activity on behalf of the retailer intended to establish or maintain a marketplace for the retailer in Texas, including receiving or exchanging merchandise.

The definition also includes an entity with a substantial ownership interest in another entity that has a distribution center, warehouse, or similar location in Texas and delivers property sold by the retailer to consumers.

SB 1 expands the definition of a seller or retailer to include a person or business who, under an agreement with another person, is:

- entrusted with possession of tangible personal property with respect to which the other person has title or another ownership interest; and
- authorized to sell, lease, or rent the property without additional action by the person having title to or another ownership interest in the property.

“Ownership” is defined as direct, common, or indirect ownership through a parent entity, subsidiary, or affiliate. “Substantial” means an ownership interest of at least 50 percent.

HB 2403 by Otto, a bill with provisions identical to those in SB 1, was enacted during the regular session, but vetoed by the governor.

Supporters said

SB 1 would clarify existing law requiring businesses that are physically present in Texas to collect sales tax on their sales to Texas customers. Currently, some businesses that sell to Texas customers attempt to skirt the statutory definition of doing business in Texas through creative corporate and ownership structures, in which certain business aspects are fulfilled by companies present in Texas while the taxable sales are performed by related out-of-state companies.

Texas may require only those businesses with a physical presence in the state to collect sales taxes. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the U.S. Supreme Court prohibited states from requiring sellers to collect sales tax on interstate shipments unless the seller had a physical presence, or “nexus,” in the state where delivery occurred. *Quill* stemmed from a case concerning mail-order catalogs. However, since 1992, the number of sellers making remote sales to customers online has grown exponentially.

SB 1 is narrowly drafted and would define retailers as being physically present in Texas only if they had control of more than 50 percent of a business entity in the state where the retailer sold substantially the same product line as the subsidiary and did so under substantially the same business name. The bill also would cover out-of-state retailers more than 50 percent-controlled by a Texas business. This narrow definition of nexus would fit within the *Quill* ruling, unlike broader definitions of taxable nexus.

Opponents said

SB 1 would regulate Internet companies that are regulated more appropriately by Congress. Internet commerce provides a textbook case of the issues entangling interstate and international commerce. The

U.S. Constitution assigns the regulation of interstate and international commerce to the federal government. Piecemeal state statutes, like SB 1, complicate an already byzantine system of sales taxes and regulations with which retailers must comply when doing business in multiple jurisdictions.

SB 1 inappropriately would declare that an out-of-state business had nexus in Texas because it had corporate ties to other businesses in Texas. In the *Quill* decision, the U.S. Supreme Court ruled that businesses should not have to collect sales taxes under the differing tax rules and rates imposed by the states, cities, counties, and other taxing jurisdictions unless the businesses are physically present there. Requiring otherwise would be onerous to business and would stifle interstate commerce. Even under SB 1's definition of control, the out-of-state business would not be physically present in the state. Absent congressional regulation, out-of-state businesses lacking physical presence should not be required to collect sales taxes.

Other opponents said

SB 1 would use a too-narrow definition of nexus and would not adequately tax out-of-state Internet sales. The bill should use click-through, or affiliate, nexus in order to capture millions more of the sales taxes that are lost to Internet sales. This would enable the state to collect taxes that already are due to it, and would better level the playing field between online and brick-and-mortar retailers.

Notes

The **HRO analysis** of HB 2403 appeared in the April 26 *Daily Floor Report*. The **HRO analysis** of SB 1 appeared in the June 9 *Daily Floor Report*.

Regulating payday, auto title lending industries

HB 2592 and HB 2594 by Truitt/HB 2593 by Truitt
Effective January 1, 2012/Died in the House

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HB 2592, HB 2593, and HB 2594 formed a trio of bills seeking to regulate the payday and auto title lending industry. HB 2592 and HB 2594 were enacted and signed by the governor and will be effective on January 1, 2012, but HB 2593 died in the House after being set on the Major State Calendar.

HB 2592 provides notice and disclosure requirements for a “credit access business” (CAB), and **HB 2594** adds subch. G to Finance Code, ch. 393 to require licensing of CABs by the Office of Consumer Credit Commissioner (OCCC). A CAB is defined as a credit services organization (CSO) that obtains or helps to obtain an extension of credit in the form of a payday loan or auto title loan for a consumer.

HB 2592 requires a CAB to post certain disclaimers conspicuously in its physical location and on its website, including a schedule of fees to be charged for services, notices regarding the intended use of payday and auto title loans and refinancing charges, and the contact information for the OCCC.

Before performing services, a CAB must provide consumers with a disclosure adopted by the Finance Commission that includes the interest, fees, and annual percentage rates charged on a payday or auto title loan compared to those charged on alternative forms of consumer debt; the accumulated fees a consumer would incur by renewing or refinancing an outstanding payday or auto title loan for various time periods; and information on the typical pattern of repayment of payday and auto title loans. The OCCC may assess an administrative penalty against a CAB that violates these requirements.

HB 2594 authorizes various fees associated with licensing and examination of CABs, as well as an annual assessment paid by CABs to support a Texas Financial Education Endowment. CABs must report aggregate consumer transaction statistics quarterly to the OCCC, and any contract between a CAB and a consumer must contain certain statements and disclosures related to prohibited CAB practices. The OCCC must assess an administrative penalty against a CAB that violates the requirements, and OCCC can

order the CAB to make restitution to a person injured by a violation.

Although the Finance Commission may adopt rules for specified purposes, neither the Finance Commission nor the OCCC has the authority to establish limits on the fees charged by a CAB.

HB 2593 would have established limits on the cash value of a payday or auto title loan. The bill also would have required a payday or auto title loan to be payable in two-week or one-month increments or in a single payment and would have required partial payments of the loan principal to be accepted. The bill would have set limits on the number of times a loan could be renewed, refinanced, or partially paid within certain time periods and would have allowed for the arrangement of extended repayment plans that did not charge fees. HB 2593 also included additional provisions for auto title loans.

Supporters said

The notice and disclosure requirements would increase consumer knowledge of payday and auto title loans, ensuring that customers received the unambiguous details needed to make informed borrowing decisions. The provisions would help bring the rapidly growing industry under meaningful state regulation for the first time. They would help prevent predatory practices and provide recourse for consumers exploited by rogue actors, while protecting the industry’s businesses and employees and consumers’ access to these short-term loans. CABs would be kept in ch. 393 of the Finance Code because they are loan brokers, not lenders.

The licensing requirements would enable the Finance Commission and OCCC to license, oversee, and collect data on the payday and auto title lending industry, ensure that CABs complied with consumer protection laws, and provide recourse for consumers exploited by predatory actors in the industry. The reporting provisions would shed light on the volume and nature of payday and auto title loan transactions for the first time.

The OCCC and the Finance Commission would be granted only limited, specified rulemaking authority to implement the requirements and could not cap fees charged by CABs. Reasonable fees would be established to fund investigations of consumer complaints, licensing investigations, and support of much-needed financial education in the state. Compared to the very healthy profits reaped by CABs, these fees would be minimal.

Although CABs provide a needed loan-brokering service and deserve to earn a profit, lack of oversight and regulation has led to many consumer complaints. The new regulations would create necessary, valuable business operating standards and allow market competition to bring CAB fees down naturally, rather than capping them in rule or statute. The proposed regulations result from negotiations between consumer advocacy groups and the payday and auto title lending industry, and they would benefit both consumers and businesses.

Tying the principal of a loan to the consumer's ability to repay, capping the allowable number of loan renewals, requiring acceptance of partial payments, and creating extended repayment plans would help consumers avoid the cycle of debt while encouraging them to pay off their obligations. These provisions would break the exploitative cycle of debt that too often results from payday and auto title loan use.

Opponents said

The proposed regulations would grant the Finance Commission broad and unclear new rulemaking authority, which could have unintended consequences, such as limiting consumer access to loans. In its efforts to protect consumers, the Finance Commission could end up regulating prices and harming consumers instead.

The licensing requirements would impose multiple fees, including an annual fee, upon businesses. These fees would be passed through to the consumer in the form of higher product prices, which would restrict consumer access to the market.

The restrictive structuring of loan products would drive CABs out of business and interfere with access to the free market for short-term credit. Consumers need a variety of product options to manage financial difficulties. The forfeiture of loan principal and auto title would harm CABs' ability to serve Texans frozen

out of the traditional credit market by allowing these borrowers to evade their obligations and not pay back the principal borrowed.

Other opponents said

The consumer protection provisions should be stronger. The proposed changes would create a licensing structure but would not establish many needed business operating standards that credit services organizations (CSOs) should have to meet or that OCCC could enforce. Many critical operating standards and loan product requirements would be provided, but the licensing structure alone would not be enough to address the cycle of debt that traps families.

Instead, exploitation of the CSO loophole would be legitimized. The proposed provisions would codify a CSO's freedom to charge exorbitant fees by explicitly not granting the Finance Commission or the OCCC the authority to cap them. Refraining from establishing fee or interest rate caps would allow the cycle of debt to continue. Creating the CAB designation within ch. 393 would entrench the three-party lending model that uses a credit-repair statute as a vehicle for 500-percent interest rate consumer loans.

Notes

The **HRO analyses** of HB 2592 and HB 2594 appeared in Part One of the May 11 *Daily Floor Report*. The **HRO analysis** of HB 2593 appeared in Part One of the May 12 *Daily Floor Report*.

Continuing PUC, reviewing ERCOT

SB 661 by Nichols
Died in the House

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SB 661, as reported by the House State Affairs Committee, would have continued both the Public Utility Commission (PUC) and Office of Public Utility Counsel (OPUC) until September 1, 2023, and would have required future Sunset Advisory Commission review of the Electric Reliability Council of Texas (ERCOT) in conjunction with subsequent Sunset review of PUC.

SB 661 would have granted PUC additional authority to regulate the electricity market and to oversee the governance of ERCOT, requiring it to approve the ERCOT budget. Other major provisions would have transferred regulation of water rates from the Texas Commission on Environmental Quality (TCEQ) to PUC and would have required OPUC to represent the interests of residential and small commercial consumers regarding water rates and services. SB 661 also would have changed the size and membership of the ERCOT board.

PUC. SB 661 would have allowed PUC to assess an administrative penalty for violation of a reliability standard set by ERCOT or by the North American Electric Reliability Corporation (NERC), the national standards-making body, for the wholesale electricity market. In cases of market power abuse under the Utilities Code, PUC also would have had to order disgorgement of all revenue exceeding what would have been generated absent a violation.

SB 661 would have amended the Utilities Code to require PUC to adopt rules on the procedures for adopting a cease-and-desist order. PUC would have been allowed to issue the order, with or without a hearing, if it determined that an action threatened electricity services, was fraudulent or hazardous, immediately endangered public safety, or was expected to injure a customer and was incapable of being rectified by monetary compensation.

SB 661 would have required ERCOT to submit its annual budget for review and approval by PUC, which would have had to establish a procedure for ensuring public notice of and participation in the budget review process.

SB 661 would have moved responsibility for ratemaking and other economic regulation for water and wastewater from TCEQ to PUC, but TCEQ would have retained jurisdiction to regulate water and sewer utilities to ensure safe drinking water and environmental protection.

ERCOT. SB 661 would have changed the number and qualifications of the ERCOT board members, removing the PUC chairman as an ex officio and nonvoting member and the OPUC counsel as an ex officio member and voting member representing residential and small commercial electric consumers. The ERCOT chief executive officer would have remained as an ex officio and voting member.

The bill would have kept the six market participants elected by their respective market segments for one-year terms, but the new lineup would have included one representative from entities serving retail customers rather than power marketers and two, rather than one, from organizations representing retail customers. The municipal utilities and cooperatives would have elected one representative for both groups, rather than each having its own representatives on the board. Four members would have been unaffiliated with any market segment and have served no more than two three-year terms.

Other provisions. SB 661 included other provisions that would have included gasified waste as a form of renewable energy technology and would have further defined renewable energy as any process that did not rely solely on energy resources derived from fossil fuels or waste products from fossil fuels or inorganic sources. The bill also would have restricted homeowners' associations' (HOAs') regulation of solar panels (enacted in HB 362).

Supporters said

SB 661 would provide clearer guidance for both PUC and ERCOT in overseeing the growing competition and technological changes in wholesale and retail electric markets. The bill would grant PUC

more oversight in ERCOT operations and help make the organization more responsive and accountable to the Legislature and all electricity customers.

PUC. The bill would return PUC to its traditional role of regulating rates and other economic aspects of water and sewage utilities since the agency has the expertise and experience to establish fair and responsive policies for both utilities and customers.

SB 661 would grant PUC basic enforcement powers to prevent dangers to the health, safety, and well-being of utility customers and to address market abuses. The bill would give PUC cease-and-desist authority similar to what other regulatory agencies, such as the Texas Department of Insurance, already possess. PUC also should be able to order the disgorgement of revenue improperly gained through market power abuses or manipulation of wholesale electricity rules.

ERCOT. SB 661 would change the composition of the ERCOT board to better represent groups advocating on behalf of retail customers and the public. The bill would help reduce the influence of electric market stakeholders, which can be seen as impairing the impartiality of the board.

Other provisions. SB 661 would properly expand potential portfolios of renewable energy sources and would permit the development of technologies such as municipal solid waste gasification. It also would allow for innovative uses of biomass fuels in conjunction with traditional fossil-based fuels.

Opponents said

PUC. SB 661 is a solution in search of a problem. Market manipulation historically has been limited, with only one alleged instance in nine years of competition. SB 661 could create an incentive for people seeking damages and liability.

The PUC should not be authorized to issue emergency cease-and-desist orders, which would represent an extensive and often dangerous level of power. Any problems should be solved by the marketplace or the legal system.

ERCOT. While ERCOT must be responsive to Texas electricity customers, SB 661 would not necessarily improve the accountability and transparency of its operations. The needs for stakeholder representation

and technical expertise on the board should be properly balanced.

Other provisions. SB 661 potentially would undermine current policies designed to encourage use of renewable energy sources. The bill would make no distinction between energy derived from the organic matter or “sustainable biomass” components of municipal solid waste, which plausibly may be considered “renewable,” versus the inorganic matter, such as plastics, waste tires, lead paint, mercury, or waste fuel. If renewable energy were redefined to include technologies that did not rely solely on fossil fuels, then anything using a small amount of biomass, even a single wood chip, with fossil fuel would be considered “renewable.”

Notes

SB 652 by Hegar, the Sunset revision bill, extended the Sunset date for PUC until September 1, 2013, and exempted it from full-scale Sunset review for the 83rd Legislature. It exempted ERCOT from additional Sunset review for the 83rd Legislature but coupled its future Sunset review with the PUC and extended the Sunset date for OPUC until September 1, 2023.

The **HRO analysis** of SB 661 appeared in Part One of the May 24 *Daily Floor Report*.



Civil Justice and Judiciary

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Operation and administration of judicial branch

HB 79 by Lewis, First Called Session
Generally effective January 1, 2012

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HB 79 makes several changes to the Texas court system.

District courts. Under HB 79, counties with two or more district courts may transfer cases from one district court to another and exchange benches between district courts without formal transfers of cases from one docket into another. This is a decrease from the current threshold of five or more courts. The bill grants district courts original jurisdiction in civil matters where the amount in controversy exceeds \$500.

All district judges within a county must be paid equal amounts of supplemental compensation from the county and are entitled to juvenile board supplements equal to what other judges serving on the juvenile board receive.

The bill directs the initial vacancy in a newly created district court to be filled by gubernatorial appointment.

Statutory county courts. HB 79 increases the jurisdictional limit in civil matters from \$100,000 to \$200,000 for all statutory county courts (SCCs). The 59 SCCs that already have jurisdiction limits above \$200,000 retain those existing limits.

HB 79 bars SCC judges from the private practice of law. Judges currently operating under a statute allowing them to engage in private practice part time may continue doing so during the remainder of their terms.

The bill requires SCC judges and statutory probate judges to be U.S. citizens. It also creates a new Webb County Court at Law No. 3.

Justice and small claims courts. Under HB 79, on May 1, 2013, all small claims courts will be abolished. Their dockets will be transferred by the presiding justice of the peace to a justice court in the county.

Small claims cases must be conducted according to rules set by the Texas Supreme Court to ensure fair, expeditious, and inexpensive resolution of small claims.

HB 79 requires justices of the peace yearly to take at least 10 hours of training in substantive, procedural, and evidentiary law in civil matters.

Associate judges. HB 79 makes several changes concerning criminal law associate judges (known as magistrates), civil law associate judges, and juvenile law associate judges.

The bill repeals several statutes specific to associate judges in individual courts and provides rules applicable to all associate judges regarding authority and powers, including the ability to conduct hearings, hear evidence, make findings of fact, formulate conclusions of law, and recommend rulings, orders, or judgments in a case.

Court administration. The bill creates the Judicial Committee for Additional Resources, which must provide assistance, on the request of a trial court, for particularly massive, complex, or burdensome cases. The state must pay the cost of this assistance, rather than counties or parties. The Texas Supreme Court must implement rules to determine whether a case requires additional resources to ensure efficient judicial management.

Trial independence period for foster children. HB 79 allows children aging out of the foster care system to remain under a court's jurisdiction. A court may authorize a "trial independence period" of between six and 12 months during which a young adult exits foster care with the option of returning to the system. The bill also expands reporting requirements on the young adults to monitor their progress.

Inmate litigation. HB 79 makes the Civil Practice and Remedies Code, ch. 14, dealing with certain inmate litigation, apply to appellate courts, including the Texas Supreme Court and the Court of Criminal Appeals. Civil Practice and Remedies Code, ch. 14 deals with litigation brought by inmates in district, county, justice of the peace, and small claims courts in which an affidavit stating inability to pay costs is filed by an inmate. The chapter includes provisions on the dismissal of claims, affidavits relating to previous filings, the grievance system and the exhaustion of administrative remedies, and court fees and costs.

Grant programs. HB 79 directs the Office of Court Administration (OCA) to develop a program to provide grants from available funds to counties for initiatives that enhance local court systems. The Judicial Committee for Additional Resources must decide which counties receive grants.

The bill directs the Permanent Judicial Commission for Children, Youth, and Families to develop a program to provide grants from funds raised through gifts, grants, or donations for initiatives that improve safety and permanency outcomes, enhance due process, or increase the timeliness of resolution in child protection cases.

Study by OCA of the Texas Judicial System. HB 79 directs the OCA to study the district courts and the county courts at law with overlapping jurisdiction in civil cases where the amount in controversy exceeds \$200,000. The study must determine the feasibility and potential cost savings of converting those statutory county courts into district courts. The report is due by January 1, 2013, and may be paid for with gifts, grants, and donations.

Other provisions. HB 79 conforms certain language in court cost provisions. For example, references to an “application for a writ of error” are replaced with “application for petition for review” to bring all references to the same application under one name.

No appropriation. HB 79 makes no appropriations. To the extent that local governments, the courts, or the courts’ support agencies are directed to create new programs, they are not mandatory unless the Legislature specifically appropriates funding for them.

Supporters said

HB 79 would bring simplicity and rationality to the legal process by reforming the organization and administration of the court system. Since its establishment in 1891, the current court system has been amended and restructured on a piecemeal and ad hoc basis, resulting in an outdated system of irregularities, inconsistencies, and overlapping jurisdictions. Litigants seeking to file suit must locate the specific jurisdiction of each statutory county court and district court in the state to see which cases the court may hear.

HB 79 would help to streamline the jurisdictional levels of these courts. The bill would make it easier for local courts to exchange cases, dockets, and benches,

simplifying the processes for addressing problems in judicial workloads such as illness, vacation, increases in the volume and complexity of cases, and recusal. The bill also would streamline the kinds of cases that SCCs could take by expanding the limit on the amount in controversy from \$100,000 to \$200,000. This would ease some of the caseload burden of local district courts.

The bill would allow children aging out of the foster care system to stay under the extended jurisdiction of a court for a “trial independence period” or to receive services. These changes would allow the foster care system to qualify for additional federal funding.

HB 79 would abolish small claims courts and replace them with a rule-based system. The rules would be drafted by the Texas Supreme Court after extensive hearings to gather evidence and examine best practices and would help to streamline substantive, procedural, and evidentiary practices for all of the state’s justice of the peace courts.

The changes included in HB 79 were suggested by the Judicial Council and the State Bar of Texas. Changes to the court often are made at the suggestion of the Texas Judicial Council after it has studied an issue and fully vetted suggested improvements.

HB 79 would represent an investment in the court system of Texas. As Texas’ population and economy grow, so will its need for an efficient and rational court system. The bill’s reforms and investments are geared toward creating more efficient and uniform justice across the state.

Opponents said

HB 79 would attempt to fix what is not broken. The court system in each county is a reflection of carefully constructed compromises among the local judiciary, the commissioners court, and the Legislature to address local needs for civil and criminal courts. Overall complexity in the state should not be surprising, as there are 254 counties of widely varying sizes and local circumstances. The number and kinds of courts and the jurisdiction of each reflect the individual needs of each locality.

Streamlining these courts just for the sake of streamlining would disrupt this local balance. Texas is too diverse to demand rigid uniformity of its court system, especially when uniformity of local needs for types and kinds of courts can never exist. Any problems

should be addressed locally, as Texas historically has done.

HB 79 should not abolish small claims courts. Litigants with claims of less than \$10,000 rely on these courts because their relaxed rules of evidence mean litigants may represent themselves successfully and because court dates are readily available. Justices of the peace who preside over small claims courts run these courts successfully under current law and have not heard complaints from litigants suggesting that they be abolished.

Notes

The **HRO analysis** of HB 79 appeared in the June 20 *Daily Floor Report*. During the regular session, an almost identical bill, SB 1717 by Duncan, passed both houses, but died when the Senate approved the conference committee report but the House did not consider it.

“Loser pays” and other tort reform

HB 274 by Creighton
Effective September 1, 2011

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HB 274 makes several changes to the Texas civil justice system, including:

- allocation of litigation costs;
- early dismissal of actions;
- expedited civil actions;
- appeal of controlling question of law; and
- limits on the designation of responsible third parties.

Litigation costs and attorney’s fees. HB 274 limits litigation costs that can be recovered by a party offering a settlement. Litigation costs cannot be more than the value of the judgment. The definition of recoverable litigation costs is expanded to include reasonable deposition costs in settlement proceedings or in an award of litigation costs.

Early dismissal of actions. HB 274 directs the Texas Supreme Court to create rules for dismissal of certain causes of action that have no basis in law or fact on motion and without evidence. The rules must provide that the motion to dismiss be granted or denied within 45 days of filing. These rules do not apply to actions under the Family Code.

Trial courts must award attorney’s fees to a prevailing party on the court’s granting or denial, in whole or in part, of a motion to dismiss under these rules. This provision does not apply to actions by or against the state, other governmental entities, or public officials.

Expedited civil actions. HB 274 directs the Supreme Court to adopt rules to promote resolution of civil actions in which the amount in controversy does not exceed \$100,000. The rules must address the need for lowering discovery costs and for expeditious movement through the civil courts.

Appeal of controlling question of law. HB 274 allows a trial court, on a party’s motion or its own initiative, to permit an appeal from an order that is not otherwise appealable if:

- the order to be appealed involves a controlling question of law as to which there are grounds

for difference of opinion; and

- an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Such an appeal does not stay the proceedings unless the parties agree to a stay or the trial or the appeals court orders a stay pending an appeal. The appeal is expedited if the appellate court accepts it.

Designation of responsible third parties. HB 274 prevents a defendant from designating a person as a responsible third party after the applicable limitations period on the cause of action regarding the responsible third party expired if the defendant failed to comply with applicable timely disclosure of responsible third-party requirements in the Texas Rules of Civil Procedure.

Supporters said

HB 274 would implement solid, fair, and necessary reforms to the Texas civil justice system to lower the cost of litigation. Since the 2003 tort reforms, Texas has made great strides in restoring balance between plaintiffs’ access to civil lawsuits and defendants’ right to not be subject to frivolous and costly lawsuits. However, time and experience have shown that further refinements are necessary to improve efficiency, lower costs, and improve access for litigants with smaller disputes. The governor, in his January state of the state speech, encouraged the Legislature to pass further civil justice reforms to strengthen the economy and ratchet up the fairness of the court system. HB 274 would provide an ideal balance between lowering costs and improving fairness, while still protecting access to the civil court system.

Litigation costs and attorney’s fees. The bill would level the playing field between plaintiffs and defendants by repealing certain limits on the recovery of costs and allowing prevailing parties to recover in attorney’s fees an amount up to the value of the judgment. Under current law, if a plaintiff wins a case after rejecting a settlement offer and the judgment amount is substantially greater than the settlement

offered, the plaintiff may collect the award and the costs of litigation. However, if a defendant wins the suit after the defendant's settlement offer was rejected, the defendant cannot collect litigation costs because current law requires that those costs be awarded as an offset against the plaintiff's recovery from that defendant. In other words, if the defendant owes the plaintiff nothing, there is nothing to offset with litigation costs. The bill would remove this inequity.

Early dismissal of actions. HB 274 would instruct the Texas Supreme Court to create rules for motions to dismiss frivolous lawsuits. The court could adopt rules that fit best with Texas jurisprudence and would not have to adopt the federal standard.

The bill would allow trial courts to award attorney's fees to a prevailing party on the court's granting or denial, in whole or in part, of a motion to dismiss. This would help deter groundless lawsuits and inappropriate motions to dismiss.

HB 274 would not change the forms of pleadings in Texas. The bill would not require the Supreme Court to make a change in specificity of pleadings. If the court thought changes in pleadings were necessary because of the rule change, the court would make any necessary changes. The court would take its normal approach to changes in the rules and would implement them only after careful study and deliberation.

Appeal of controlling question of law. HB 274 would allow appellate courts, with permission of the trial court, to address controlling questions of law in appropriate cases without the need for the parties to incur the expense of a full trial.

The bill would not cause a flood of new appeals. It provides for a two-tiered system of gate-keeping to prevent inappropriate appeals. The trial court would have to agree to allow the appeal, and an appellate court would have to agree to accept it.

Opponents said

The premise of HB 274 that the courts are clogged with frivolous lawsuits is false. Plaintiffs' attorneys work on commission. They have a strong incentive to take only cases they feel have merit in order to maximize their chances of winning the case and receiving their commission.

Current law contains sufficient checks on frivolous lawsuits. These sanctions are found in the Texas Rules of Civil Procedure, rule 13 and the Texas Civil Practice and Remedies Code, secs. 9 and 10. The changes that HB 274 would make are unnecessary. A 2005 *Baylor Law Review* article conducted a study of Texas trial court judges. The survey, which had a 78 percent response rate, found 86 percent of these judges said there was no need for additional tort law changes.

Litigation costs and loser pays awards of attorney's fees. Only parties with deep pockets or the judgment-proof poor would be able to file claims because only they could afford to risk paying both sides' attorney's fees if they did not prevail in a case.

Appeal of controlling question of law. These appeals could clog the appellate court system. Under the bill, every time a defendant lost a motion to dismiss a case, it could be appealed to the appellate courts.

Early dismissal of actions. The Supreme Court already is able to implement rules for an early dismissal of baseless actions. It is not at all clear that they are needed. If they were, the court likely already would have acted to create them. If the Legislature feels something must be done, it would be better to instruct the court to conduct a study to identify a problem, if one exists, and to suggest appropriate solutions.

HB 274 would fundamentally and inappropriately alter the way civil trials are conducted. If a motion to dismiss for failure to state a claim was created in Texas, it would move away from the general pleading system now in use. Federal law contains such a motion and, as a result, requires that pleadings be specific in order to survive such a motion. This is only possible after extensive discovery. The bill would not take this into account. The bill's failure to address the consequences of the proposed change reinforces the need for a study before legislation is adopted.

Notes

The **HRO analysis** of HB 274 appeared in the May 7 *Daily Floor Report*.

Dismissing SLAPP suits on free speech grounds

HB 2973 by Hunter
Effective June 17, 2011

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HB 2973 allows a party to file a motion to dismiss if a lawsuit is based on that party's exercise of the right of free speech, right to petition, or right of association. On the filing of a motion to dismiss, all discovery is suspended until the court rules on the motion. The court may allow specified and limited discovery on a motion by a party or on the court's own motion and on a showing of good cause.

A court must grant the motion to dismiss if the moving party shows by a preponderance of the evidence that the lawsuit is based on, relates to, or is in response to the party's exercise of the right of free speech, petition, or association. However, a court may not grant the motion to dismiss if the plaintiff establishes by clear and specific evidence a *prima facie* case for each essential element of the claim.

If the court grants the motion to dismiss, the court is required to award to the moving party:

- court costs, reasonable attorney's fees, and other expenses incurred in defending the lawsuit, as justice and equity may require; and
- sanctions against the plaintiff to deter similar actions.

If the court finds the motion to dismiss is frivolous or solely intended to delay, it may award court costs and reasonable attorney's fees to the responding party.

An appellate court must expedite an appeal of a motion to dismiss.

A motion to dismiss is not available for enforcement actions by the state or a political subdivision, a lawsuit against a person primarily engaged in selling or leasing goods or services when the intended audience is a customer, or a personal injury suit.

Supporters said

HB 2973 would allow a person to file a motion to dismiss a lawsuit that was based on that person's exercise of the right of free speech, petition, or association. These "SLAPP" suits, or strategic lawsuits

against public participation, are frivolous lawsuits aimed at silencing people. Citizen participation benefits society, whether it involves petitioning the government, writing a news article or blog post, or commenting on the quality of a business.

SLAPP suits chill public debate because they cost money to defend. In one case, a woman who complained to the Texas State Board of Medical Examiners and to a television station about a doctor was later sued by the doctor. While the suit was dismissed, the television station had to pay \$100,000 in legal expenses. These suits are particularly problematic for independent voices that are not part of a news or media company. SLAPP suits are becoming more common, in part because the Internet has created a searchable record of public participation.

Under current law, the victim of a SLAPP suit must rely on a motion for summary judgment. While summary judgment disposes of a controversy before a trial, both parties still must conduct expensive discovery. By allowing a motion to dismiss, HB 2973 would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system.

Anti-SLAPP legislation similar to HB 2973 has been passed by 27 states and the District of Columbia.

Opponents said

HB 2973, if interpreted broadly, could be used to intimidate legitimate plaintiffs. It could stifle suits brought legitimately under libel or slander laws because the plaintiff in such suits would have to overcome motions testing the plaintiff's pleadings.

Notes

The **HRO analysis** of HB 2973 appeared in the May 2 *Daily Floor Report*.



Criminal Justice

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Prohibiting policies that create “sanctuary cities”

HB 12 by Solomons/SB 9 by Williams, First Called Session
Died in the Senate/Died in House committee

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HB 12 by Solomons, as passed by the House during the regular session, would have prohibited local government entities from adopting rules, orders, ordinances, or policies that prohibited the enforcement of state or federal immigration law.

The bill would have applied to cities and counties and their employees, including sheriffs, police departments, city and county attorneys, district attorneys, and criminal district attorneys. It would not have applied to schools or hospital districts, but would have applied to commissioned peace officers employed by them. The bill would not have applied to the release of information in educational records, except in conformity with the federal Family Educational Rights and Privacy Act of 1974.

Entities to which HB 12 would have applied could not have prohibited their employees from:

- inquiring into the immigration status of a detained or arrested person;
- sending immigration status information about a detainee or arrestee to U.S. Citizenship and Immigration Services or U.S. Immigration and Customs Enforcement or requesting or receiving such information from those agencies;
- maintaining this information or exchanging it with another government entity;
- assisting a federal immigration officer as reasonable and necessary; or
- permitting a federal immigration officer to enter and conduct federal immigration law enforcement activities at a city or county jail.

These entities would have been prohibited from considering race, color, language, or national origin while enforcing the law, except as permitted by the U.S. or Texas Constitution.

Entities that violated HB 12 would have been denied state grant funds for a year. Citizens would have been able to file complaints about violations with the Texas attorney general.

Supporters said

HB 12 is necessary to give Texas law enforcement a uniform working standard for inquiring about the immigration status of lawfully arrested or detained people. Some so-called “sanctuary cities” have policies prohibiting law enforcement from asking about, or reporting on, a person’s immigration status. HB 12 would solve this by barring local entities from adopting policies prohibiting immigration law enforcement.

Local control. HB 12 would not weaken local control over law enforcement. Peace officers would not have to act as immigration agents. HB 12 would ensure that law enforcement officers were not restricted by local policies and would empower them to use their judgment when upholding the law, not infringe upon their authority.

Peace officers would not neglect their general duties to focus on immigration issues. Officers who did so could be sanctioned for not doing their jobs.

Local resources. HB 12 would not require any arrests or other actions, so it would not burden local resources, including jails. Since no entities identify themselves as sanctuary cities, most entities should be unaffected. Any actions of peace officers under HB 12 would be handled seamlessly with current resources.

Comparison with Arizona. HB 12 would differ significantly from Arizona’s immigration law, which *requires* law enforcement to ask about immigration status. Instead, this bill would *allow* peace officers to inquire at their own discretion.

School districts and hospitals. HB 12 would not violate federal law requiring schools to educate all students, would not affect educators, and would not require school districts to question students or act against undocumented students.

The bill would include school district and hospital peace officers under the same policies as all other peace officers in Texas. Excluding them could prevent the proper handling of serious crimes.

Law enforcement and local communities. HB 12 would not harm law enforcement's relationships with communities or apply to victims, witnesses, or bystanders. The bill would solely address inquiries of detainees or arrestees. Concerns that HB 12 would make communities unsafe fail to consider that law-abiding residents would benefit from the uniform enforcement of laws and from peace officers being able to use their discretion in enforcing the law.

Racial profiling. Despite concerns about racial profiling, HB 12 would not require officers to stop people based on appearance or on suspicion of being in the U.S. illegally. Officers could not consider race, color, language, or national origin, except as allowed by the U.S. or Texas constitutions. Under Texas law, all law enforcement agencies must have policies prohibiting officers from racial profiling, and that would not change.

Enforcement and penalties. Allowing the attorney general to sue entities that violated HB 12 would give the law some teeth and allow it to be enforced consistently statewide. To avoid losing state grant funding, entities simply would have to refrain from adopting policies prohibiting the enforcement of immigration laws.

Opponents said

HB 12 would undermine local control of Texas law enforcement, tax already scarce local resources, and hurt efforts to build safe communities through community policing. HB 12 is not needed because Texas does not have a problem with so-called sanctuary cities.

Immigration law already is being appropriately addressed in Texas, and local law enforcement already works with federal officials to handle undocumented persons accused of crimes. County jails and state facilities participate in the federal Secure Communities program, under which U.S. Immigration and Customs Enforcement can place holds on arrestees.

Local control. HB 12 would undermine local control by restricting local policies and authorizing local law enforcement to act in ways that could conflict with their supervisors' directives, thus removing authority from local police chiefs and city officials.

Law enforcement agencies no longer could prevent officers from asking about immigration status during traffic stops and street encounters, regardless of

local needs or priorities. This could distract officers from other crimes and increase response times for emergencies. If an officer decided to make an arrest in order to pursue an undocumented person, he or she could be busy for hours with the arrest and booking procedures.

Local resources. Local criminal justice resources, including detention space, already are stretched thin. Under HB 12, local resources could be used to handle higher numbers of undocumented immigrants accused of petty crimes. Many Texas jails are full or overcrowded, and HB 12 could worsen this. Training local law enforcement officers to avoid violating federal immigration laws also would be expensive.

Comparison with Arizona. HB 12 could put the state on the path to becoming like Arizona, where overzealous immigration law enforcement has hurt tourism and caused workers to leave the state, affecting labor markets and industries such as agriculture.

School districts and hospitals. HB 12 should not apply to any school district official, even peace officers. It could violate a U.S. Supreme Court ruling requiring public schools to educate all children, regardless of immigration status. School districts should be allowed to follow their own policies.

Any student who violated the law could face questions about his or her status. Parents of undocumented students might keep kids out of school if they believed that school officials could make immigration inquiries of students. School district funding could be reduced by students being kept out of schools or by students who dropped out of school.

Law enforcement and local communities. HB 12 could harm the trust necessary for law enforcement to operate successfully in the community. Crime victims and witnesses could be less likely to cooperate with police if they feared actions could be taken against them or their families for immigration violations.

Racial profiling. HB 12 could lead to racial profiling by law enforcement. Local law enforcement might need training in federal immigration law to prevent such profiling and other civil rights violations. This could lead to costly lawsuits if local officials tried to enforce federal law without the proper training.

Enforcement and penalties. The penalty of losing state grant funds for violating HB 12 would be too

severe. Immigration law is complex, and without the necessary expertise, local entities could struggle to comply with the bill and be penalized for simple mistakes.

Notes

The **HRO analysis** of HB 12 appeared in Part One of the May 9 *Daily Floor Report*.

After HB 12 died during the regular session, Gov. Perry added legislation relating to the abolishment of sanctuary cities to the call for the first called session of the 82nd Legislature. Rep. Solomons filed HB 9, which was identical to HB 12 in the regular session, but HB 9 died in the House State Affairs Committee. The Senate approved **SB 9** by Williams, which included language similar to HB 12, but it died in the House State Affairs Committee.

The House-approved version of HB 12, regular session, and the filed version of HB 9, first called session, would have excluded school districts and hospitals – but not their peace officers – while SB 9, as approved by the Senate in the first called session, would have excluded peace officers of school districts and hospitals. SB 9 also would have prohibited peace officers from taking certain actions solely to enforce federal immigration law, including stopping vehicles or conducting searches, and would have prohibited peace officers from arresting someone without a warrant solely on a suspected violation of civil immigration law, unlike HB 12.

Intrusive touching offense by public servant

HB 41 by Simpson, First Called Session/SB 29 by Patrick, First Called Session
Died in the House

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HB 41 would have expanded the crime of official oppression to make it an offense (class A misdemeanor with up to one year in jail and/or a maximum fine of \$4,000) if, without probable cause, a public servant:

- performed a search, without effective consent, to grant access to a publicly accessible building or form of transportation; and
- intentionally, knowingly, or recklessly touched the anus, sexual organ, buttocks, or breast of another person, including touching through clothing, or caused physical contact with the other person when the actor knew or reasonably should have believed that the other person would regard the contact as offensive or provocative.

Consent would have been considered effective only if, immediately before a search, the public servant described the area of the other person to be searched and the method to be used in the search and received express consent for the search.

The current definition of public servant in Penal Code, sec. 1.07(41), includes officers, employees, or agents of government, and HB 41 would have expanded it to include:

- officers, employees, or agents of the U.S. or of a U.S. branch, department, or agency, or other persons acting under contract with a branch, department, or agency of the U.S. to provide security or law enforcement service; and
- any other person acting under color of federal law.

The public servant would have had a defense to prosecution if he or she performed the search with an explicit grant of federal statutory authority consistent with the U.S. Constitution.

The House amended the bill on second reading to state that a public servant would have committed an offense if, without reasonable suspicion of the presence of an unknown, unlawful, or prohibited object, he or she:

- performed a constitutionally unreasonable search without effective consent to grant access

to a publicly accessible building or form of transportation; and

- intentionally, knowingly, or recklessly touched the sexual organ, breast, buttocks, or anus of another person, including through clothing, in violation of the U.S. Constitution.

Supporters said

HB 41 is needed to rein in public officials, especially those working for the federal Transportation Security Administration (TSA), who abuse their power by performing overly intrusive and unconstitutional pat-down searches. The right to be free from unreasonable search is protected under both the U.S. Constitution's Fourth Amendment and Art. 1, sec. 9 of the Texas Constitution. Texas legislators have a responsibility to uphold these individual rights.

Currently, travelers can be forced to undergo an unreasonable and humiliating invasive search because either they choose not to go through a high-tech scanner or they are targeted for a random pat-down. Men and women have reported that TSA employees have reached inside their pants, skirts, and underwear to touch breasts, genitals, and buttocks.

In other circumstances, this type of search can occur only with probable cause that someone has committed a crime or with consent. The TSA performs these searches without such requirements, treating innocent travelers like criminals.

HB 41 would address this issue by making it a crime for TSA officials and other public officials to perform invasive searches unless there was probable cause to believe someone had committed an offense or the person had given consent. These reasonable standards would preserve individuals' constitutional rights.

HB 41 would not hamper legitimate security measures, so the federal government would have no reason to shut down Texas airports. There is no legitimate security reason to grope people's private parts or reach inside their underwear to touch their private parts. The TSA could use other screening methods, such

as scanners, metal detectors, explosive-sniffing dogs, hand-held wands, or pat-downs conducted in accordance with HB 41.

HB 41 would not conflict with or pre-empt federal law or interfere with the TSA's legal responsibilities because no federal law requires inappropriate touching of travelers' genitals or intrusive searches without probable cause. Federal law authorizes searches for legitimate security reasons within the bounds of the Constitution, and this bill would honor that. HB 41 would not prohibit thorough searches, even as described by HB 41, with probable cause or consent. Criminal prosecution under HB 41 could occur only if there was inappropriate touching with no authorization under a federal law consistent with the U.S. Constitution. HB 41 would apply not just to TSA officials in airports, but to searches by other public servants granting access to public buildings or transportation. No public official should perform invasive, unconstitutional searches.

The state should not let the federal government's threats to cancel flights stop it from protecting travelers' constitutional rights.

Opponents said

HB 41 could unconstitutionally interfere with the federal responsibility to protect the public, unintentionally jeopardize public safety, and cause the federal cancellation of flights. TSA agents perform pat-downs within the scope of their federal responsibilities that require them to ensure safe travel, and their conduct should not be criminalized.

Safety must be the primary concern with air travel, and searches are a reasonable, necessary part of current safety procedures. Since September 11, 2001, all Americans know that travel, although an everyday event, can be dangerous. Terrorists reportedly have developed well-concealed explosives made of nonmetals. Something that may feel like a grope could be a way to detect explosive devices, which have gotten smaller and harder to find. The 2009 Christmas Day plot, when a passenger tried to detonate plastic explosives sewn into his underwear, and the attempted destruction of an airplane with explosives hidden in a shoe illustrate the importance of thorough searches by federal officials.

Current airline security procedures are designed to ensure the safety of all travelers, and Texas should not try to micromanage or interfere with how federal

officials perform safety screening. Terrorists come in all shapes, ages, and genders, and since some travelers are chosen randomly to be searched, some who appear nonthreatening will be searched. Pat-downs are a necessary part of airline security adjusted based on intelligence reports.

In a letter to Texas officials, the U.S. attorney for the Western District of Texas stated that a similar bill filed during the regular session could conflict with federal law and would threaten TSA staff carrying out federally required security measures with state criminal prosecution. He also stated that under the U.S. Constitution's supremacy clause, Texas cannot enact laws that conflict with federal law or regulate federal agents or employees in the performance of their duties.

There are alternatives for expressing concerns about the actions of TSA officials. Travelers whose constitutional rights are violated can sue, and violations of federal law or regulations can be prosecuted under federal law. Proposed changes to federal laws or regulations governing federal employees should be brought before federal agencies or Congress.

HB 41 is so broad that it would apply to all public servants granting access to public buildings or transportation and could threaten security in those venues. For example, it could cover sheriffs or others handling courthouse security, who could be hampered in their efforts to detect weapons or other contraband.

HB 41 could have serious consequences for Texas. The U.S. attorney said that if the bill considered during the regular session was enacted, the TSA would seek a stay of the statute and unless or until one was granted, likely would have to cancel flights. The Legislature should take the letter seriously and not provoke unnecessary conflict with federal officials acting within their clear authority concerning airline security.

Notes

During the first called session of the 82nd Legislature, HB 41 was approved by the House on second reading. The companion bill, SB 29 by Patrick, was then considered in lieu of HB 41 and approved by the House on second reading, but the House failed to suspend the three-day rule to consider the bill on the final day of the first called session. SB 29 would have defined the new offense similarly, but would have removed the defense to prosecution included in HB 41. The **HRO analysis** of HB 41 appeared in the June 24 *Daily Floor Report*.

Creating the Texas Innocence Commission

HB 115 by McClendon
Died in the House

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HB 115 would have created the Texas Innocence Commission. The commission would have had to thoroughly review each case in which an innocent person was convicted and exonerated in order to: identify the causes of wrongful convictions; identify errors and defects in the Texas criminal justice process and develop solutions to correct them; and identify procedures, programs, and educational or training opportunities shown to eliminate or prevent wrongful convictions and resulting executions.

The commission would have included nine members appointed by the governor who would have served six-year terms and elected the presiding officer.

The commission would have had to compile an annual report of its findings and recommendations and could have compiled interim reports. The findings and recommendations in official commission reports could have been used as evidence in any subsequent civil or criminal proceeding, according to the rules that applied for that proceeding. The commission's working papers would have been exempt from public disclosure requirements.

The commission would have been able to enter into contracts for necessary and appropriate research and services to facilitate its work or to investigate a post-exoneration case, including forensic testing and autopsies, and would not have been subject to Government Code provisions governing state agency advisory committees.

Supporters said

HB 115 would address the state's persistent problem of wrongful criminal convictions. The wrongful conviction and imprisonment of any innocent person is a miscarriage of justice that carries with it a moral obligation to prevent its recurrence. The bill would continue the work of the Timothy Cole Advisory Panel, created by the 81st Legislature to advise the state's Task Force on Indigent Defense in studying wrongful convictions, which finished its assignment in August 2010.

In Texas, at least 42 men have been exonerated after wrongful convictions, according to the Innocence Project. Many of these inmates served decades in prison before being exonerated through DNA evidence or on other grounds. The commission created by HB 115 could investigate such cases, help identify what went wrong and why, examine the criminal justice system as a whole, and recommend changes to prevent future wrongful convictions. This would help ensure public safety and confidence in the criminal justice system, since a wrongful conviction may mean that a guilty person remains unpunished.

The commission would not blur the lines between state entities and the courts because the bill clearly states that it would examine cases only after an exoneration. The commission would not work to achieve exonerations, only to investigate those that had occurred. The need for an innocence commission is not eliminated because certain facets of the criminal justice system have been reformed in recent years or because the Legislature is considering additional changes to front-end procedures, such as interrogations.

The Legislature needs to create a state entity to examine exonerations and recommend systemic changes because currently there is no adequate mechanism for doing so. A legislatively created entity would express the will of the Legislature that certain issues be examined, put the authority of the state behind its actions, be directly tied to lawmakers with power to make changes, and make the body more accountable to the public through legislative oversight. The commission's appointed members, limited mission, and legislative oversight would help ensure that it did not become an unwieldy bureaucracy.

The powers that HB 115 would grant the commission would be appropriate to perform its duty to investigate exonerations. The bill would allow the findings in the commission's reports to be admissible in court, according to procedural and evidentiary rules, to ensure that any use of the commission's findings was appropriate. Fears about the commission's overreaching its authority or eroding support for the death penalty are unfounded because it would be clearly tasked with

examining the causes of exonerations, not proving exonerations. The death penalty is not a cause of wrongful convictions, which is what the commission would be charged with examining.

Opponents said

It is unnecessary to create an innocence commission in Texas because the criminal justice and legislative systems already have checks and balances that work to achieve justice and to identify and address problems. Other entities in the state can and do review and report on wrongful convictions. The commission created by HB 115 would have powers that were too broad and open-ended and that would fall outside the state's traditional jurisprudence system.

The Legislature should focus on preventing errors at the front end of the criminal justice system, such as with eyewitness identification or interrogations. It is unfair to use cases that may be decades old to argue for an innocence commission. In the past two-and-a-half decades, the state's criminal justice system has improved substantially, resulting in a just and fair system that protects the public.

HB 115 would invest an innocence commission with inappropriate authority and quasi-judicial powers. The commission would have to investigate post-conviction exonerations, which are undefined. The authority would not be limited to cases involving a pardon or with other specific criteria. The commission would be allowed to contract for forensic testing and autopsies in individual cases, powers that would be inappropriate for a state entity tasked with studying convictions that already have been identified as wrongful. With these powers, the commission could become an entity working to prove an exoneration, rather than one studying those that already had occurred. The bill would allow findings and recommendations of the commission to be admissible in civil or criminal proceedings, which could lead to complications in the courts.

An innocence commission could be used as a back-door way to erode support for the death penalty in Texas. It would emphasize the relatively few mistakes – especially those from long ago – in a system for which rigorous standards are enforced and extensive opportunities for review afforded.

Post-conviction exonerations and the Texas criminal justice process could be studied without creating a new governmental entity and adding unnecessarily to state bureaucracy.

Notes

The House amended the bill to change the name of the commission to the Timothy Cole Innocence Commission, to prohibit the commission from reviewing the validity or constitutionality of practices and procedures for sentencing following final conviction, including the death penalty, and to make the commission subject to the state's open meetings and open records laws.

HB 115, as amended, was approved by the House on second reading on April 20 by 82-54. On third reading, the bill failed on final passage by 51-91.

The **HRO analysis** of HB 115 appeared in the April 14 *Daily Floor Report*.

Deferred adjudication for first intoxication offense

HB 189 by T. Smith
Died in Senate Committee

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HB 189, as reported by the House Criminal Jurisprudence Committee, would have allowed a judge to grant deferred adjudication for driving, flying, boating, or assembling or operating an amusement ride while intoxicated unless the defendant was a repeat intoxication offender, held a commercial driver's license or permit, or caused injury to a person or damaged property while committing the offense.

If the judge had granted deferred adjudication for an intoxication offense, the judge would have had to order the defendant to have an ignition interlock device installed, regardless of whether the installation otherwise would have been required if the defendant had been convicted.

A person on deferred adjudication for an intoxication offense would not have been allowed to petition the court for nondisclosure status for the intoxication offense record. For purposes of the intoxication enhancement statute, a deferred adjudication would have been considered a conviction.

Supporters said

HB 189 would allow a judge to grant deferred adjudication for first-time driving while intoxicated (DWI) and other intoxication offenses, which would have numerous benefits. Instead of taking a plea and accepting probation with the condition of treatment, most offenders now opt for a trial because of the chance for acquittal and serve jail time if so ordered. The current system does not help DWI offenders get the needed treatment that will ultimately make the streets safer. For the defendant, the deferred adjudication would not be considered a conviction for the purpose of applying for college, a job, or a credit card, or enlisting in the military.

Some county programs are granting deferred adjudication under other pretenses, usually for a reckless driving charge, to get people into treatment, but under this approach a person is not held responsible for repeat intoxication offenses. Under HB 189, deferred

adjudication would be limited to first DWI offenses, could be used for enhancement of penalties, and would include the added security of required ignition interlock installation, which has been shown to reduce accidents and recidivism. Also, a court would not be able to grant a nondisclosure order for the offense record.

Opponents said

Judges should have the discretion to decide whether a defendant should have the ignition interlock installed, rather than making it mandatory. HB 189 would raise community supervision costs for local probation departments, which would be required to review the ignition interlock reports for each defendant, analyze the tests done on the ignition interlocks for their probationers, and perform field tests.

Notes

The **HRO analysis** of HB 189 appeared in the May 7 *Daily Floor Report*.

HB 189 passed the House on May 13 with a number of amendments, then died in the Senate Criminal Justice Committee. HB 189, as passed by the House, would have made ignition interlocks permissive rather than mandatory and would have made several changes for driver's licenses and occupational licenses for DWI offenders. One of the license provisions would have required a four-time or more DWI offender to obtain, after any applicable suspension, a driver's license with a distinctive symbol or marking on the license identifying the person as a convicted DWI offender.

In addition, HB 189, as passed by the House, would have added three days of mandatory jail time for defendants on community supervision for a deferred adjudication intoxication offense and 14 days of mandatory jail time if deferred adjudication was revoked. HB 189, as passed by the House, also would have allowed a magistrate to require a defendant to use an alcohol monitoring device as a condition of release

on bond and would have allowed impoundment or immobilization of a vehicle for up to seven days for a third or subsequent DWI.

HB 1199 by Gallego, a related bill concerning driving while intoxicated, was enacted and took effect September 1, 2011. HB 1199, the Abdallah Khader Act, enhances the penalty for causing serious bodily injury while intoxicated, generally a third-degree felony (two to 10 years in prison 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 injury is a traumatic brain injury resulting in a persistent vegetative state. HB 1199 also enhances the penalty for driving while intoxicated, generally a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) with a minimum jail term of 72 hours for an alcohol concentration of 0.08 or more, to a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) if an analysis of a specimen of the offender's blood, breath, or urine shows an alcohol concentration of 0.15 or more at the time the analysis is performed.

Photo and live lineup identification policies

HB 215 by Gallego
Effective September 1, 2011

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HB 215 requires law enforcement agencies to adopt a detailed written policy for photograph and live lineup identification procedures. The written policy may be based on one developed by the Bill Blackwood Law Enforcement Management Institute of Texas at Sam Houston State University or developed independently if it conforms to certain minimum requirements.

The policy must be based on credible field, academic, or laboratory research on eyewitness memory and on policies and best practices designed to reduce erroneous eyewitness identifications and enhance reliability and objectivity. The policy must address:

- selection of photo and live lineup “filler” photos or participants (persons that police know did not commit the crime but were included in the lineup);
- instructions to witnesses before a lineup;
- documentation and preservation of lineup results, including witness statements, regardless of the outcome;
- procedures for administering a lineup to an illiterate person or one with limited English proficiency;
- if practicable, procedures in a live lineup for assigning an administrator who is unaware of who the suspect is or alternative procedures to prevent opportunities to influence the witness;
- for a photo lineup, procedures for assigning an administrator capable of administering a photo array in a blind manner or consistent with best practices designed to prevent opportunities to influence the witness; and
- any other research-supported procedures or best practices designed to reduce erroneous identifications and enhance the objectivity and reliability of eyewitness identifications.

The Blackwood Institute must develop its model policy and training materials in consultation with law enforcement agencies and associations, scientific experts in eyewitness memory research, and other appropriate organizations no later than December 31, 2011. A period of public comment must be provided before the institute

adopts the policy. Law enforcement agencies must adopt a policy by September 1, 2012.

By December 31 of each odd-numbered year, the Blackwood Institute must review the model policy and training materials and modify them as needed. By September 1 of each even-numbered year, each law enforcement agency must do the same.

Evidence or expert testimony presented by the state or the defendant on eyewitness identification is admissible only subject to compliance with the Texas Rules of Evidence. Evidence of compliance with the model policy is not necessary for the admissibility of an out-of-court eyewitness identification. Failure to comply substantially with the policy does not bar admission of eyewitness identification testimony in court.

Supporters said

HB 215 would produce more reliable evidence and help prevent innocent people from being wrongfully convicted. According to the Innocence Project of Texas, Texas leads the nation in the number of wrongful convictions exposed by DNA evidence, with more than 80 percent of them caused by mistaken eyewitness identification, yet only 12 percent of law enforcement agencies in the state have a written policy on how to conduct eyewitness identification. Other states, including North Carolina, New Jersey, and Wisconsin, have enacted laws similar to HB 215.

This bill is based on recommendations from the Timothy Cole Advisory Panel on Wrongful Convictions and has support from law enforcement, prosecutors, judges, the Governor’s Office, and inmates’ advocates. As a result of a collaborative process, the bill would ensure that large, medium, and small law enforcement agencies were consulted in developing the model policy and that modifications were made every few years as new research emerged and agencies learned what was or was not effective.

The photo or live lineup is critical evidence that should be carefully collected. Blind administration procedures, during which the suspect is unknown to the administrator, would prevent the administrator from influencing the witness. Alternative procedures to prevent opportunities to influence the witness also could be adopted when blind administration was not practicable, such as for a very small law enforcement agency.

A wrongful conviction is devastating to the convicted person and his or her family. It also jeopardizes public safety, since the real perpetrator remains free to commit more crimes. The best practices proposed would not be difficult to implement, nor would they impede prosecution.

Opponents said

Improvements in the past two decades have resulted in a just and fair criminal justice system that protects the public. It would be better to let law enforcement agencies develop and update their own identification procedures, depending on their resources and individual circumstances. If they could do this, the procedures would be updated more frequently.

Other opponents said

HB 215 has no enforcement mechanism to ensure compliance with best practices for photo and live lineups. Identifications made from noncompliant lineups should not be admissible as evidence in court. If noncompliant identification is considered admissible, then the jury at least should be instructed that witness identification evidence is subject to the limitations of human memory. The bill also should require corroborative evidence to admit noncompliant identification, and each witness should be required to submit a statement of certainty about his or her identification.

Notes

The **HRO analysis** of HB 215 appeared in the March 30 *Daily Floor Report*.

The 82nd Legislature enacted another bill, **SB 122** by Ellis, based on recommendations of the Timothy Cole Advisory Panel on Wrongful Convictions. SB

122 removes certain restrictions on the post-conviction testing of previously untested DNA evidence. The previous law allowed motions requesting DNA testing only if material was not previously tested because testing was unavailable at trial or was available but not technologically capable of proving guilt or innocence, or because through no fault of the defendant, testing was not performed but would be in the interest of justice. SB 122, effective September 1, 2011, allows motions requesting DNA testing if the material was not previously tested and repealed the other conditions. Current law allowing requests for re-testing if newer techniques could provide more accurate results remains unchanged.

Homeland security; Secure Communities program

SB 9 by Williams
Died in House Calendars Committee

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SB 9, as passed by the Senate, would have required the use of the federal Secure Communities program to verify the immigration status of people in law enforcement custody, required proof of lawful presence to obtain a Texas driver's license or identification card, established a Department of Public Safety (DPS) automatic license plate reader program, revised laws dealing with organized crime and criminal street gangs, expanded the duties of special rangers and special Texas Rangers, and required Texas counties to report to the state certain information concerning immigrants in jails.

Immigration status of detainees. Law enforcement agencies would have been required to use the Secure Communities program run by U.S. Immigration and Customs Enforcement (ICE) to verify the immigration status of people in custody.

Drivers' licenses. DPS would have had to require applicants for driver's licenses and identification certificates to prove U.S. citizenship or authorization to be in the country. The bill also would have established expiration dates for the licenses and certificates for noncitizens, tying them to the expiration dates of their lawful presence in the country. (Similar provisions were included in SB 1 by Duncan, the omnibus fiscal matters law enacted during the first called session and generally effective September 28, 2011.)

Automatic license plate reader pilot program. SB 9 would have required DPS to establish a pilot program using automatic license plate readers that read and recorded license plate numbers taken from digital photographs. The system could have been used only to record information necessary to identify a motor vehicle and could not have been used to record an image of a person in a vehicle.

DPS special rangers and special Texas Rangers. The director of DPS could have called special rangers and special Texas Rangers into service to preserve the peace and protect life and property, conduct background investigations, monitor sex offenders, serve as part of two-officer units on patrol in high-threat areas, and provide assistance to DPS during disasters.

Organized crime. The bill would have increased penalties dealing with organized crime and revised the crime of directing the activities of a criminal street gang.

County report on jail inmates with ICE detainer. SB 9 would have required counties to report monthly to the Commission on Jail Standards on the number of prisoners for whom an immigration detainer had been issued by ICE and to report on the total cost to the county for the preceding month to house these prisoners.

Supporters said

SB 9 would help Texas address homeland security issues, including threats from drug cartels and criminal illegal aliens. The bill would make state policy more consistent by requiring all law enforcement agencies to use the federal Secure Communities program to determine if people taken into custody were in the U.S. legally. While currently used by Texas counties, the system is not used by all local law enforcement agencies. This allows some dangerous criminals to be booked into local jails without undergoing a citizenship background check and possibly to be released on bail. SB 9 would close this loophole by ensuring the consistent, statewide use of Secure Communities. SB 9 also would help the state obtain better information on criminal illegal immigrants by requiring jails to report monthly on the number of criminal aliens held and the cost of housing them.

SB 9's requirements to prove citizenship or legal presence to obtain driver's licenses would help make the licenses more secure documents. Driver's licenses are used for traveling, banking, and other activities, and, post-9/11, the state has a responsibility to make sure these documents accurately identify people and are issued only to people in the country legally. While the policies in SB 9 currently are in DPS rules, SB 9 would express the will of the Legislature that the policy be permanent and answer questions raised about whether DPS has authority to adopt the rules.

The bill would give DPS additional law enforcement tools to combat drug cartels and other security threats, including authority for an automatic license plate reader

pilot program that would aid in criminal investigations of drug cartels, smugglers, and border crimes. This authority would be coupled with important safeguards, such as prohibiting the recording of images of persons and time limits on the retention of data. The bill also would allow retired DPS officers and Rangers to accept some duties, such as monitoring sex offenders and conducting criminal background checks, to free up active troopers for other duties.

SB 9 would help combat drug-related and other gangs by increasing penalties for organized crime and what is sometimes called the “gang kingpin” offense and by giving law enforcement authorities tools to dismantle these security threats.

Opponents said

SB 9 is unnecessary and could infringe on Texans’ civil rights. The decision of whether to use the federal Secure Communities program to verify the immigration status of detained persons should remain at the discretion of local officials, especially since its use could increase costs to local governments. The state should not mandate the use of a program that has been criticized for targeting those who have committed no crimes or petty crimes, as well as legal residents and U.S. citizens, instead of serious and dangerous offenders.

DPS employees should not be required statutorily to verify proof of citizenship for driver’s licenses and identification cards. Determining immigration status is complicated and not the responsibility of state employees who only should verify identity when issuing a driver’s license or identification card. SB 9 could result in the denial of licenses to some noncitizens who are in the U.S. legally.

The use of automatic license plate readers authorized by SB 9 would go too far in allowing the government to track people’s movements.

SB 9 could result in longer sentences for some offenses related to organized crimes, which could increase costs to the state without increasing public safety. Current law adequately punishes crimes relating to organized crime and street gangs.

Notes

The House committee substitute for SB 9 was approved by the Homeland Security and Public Safety Committee, but died in the House Calendars Committee.

The House committee substitute made numerous changes to the Senate engrossed version of SB 9, including adding provisions requiring the Texas Department of Agriculture to study the impact of illegal activity on the Texas-Mexico border on rural landowners and the agriculture industry; codifying a formula for distributing certain assets seized by law enforcement authorities; authorizing DPS to establish southbound checkpoints for guns, drugs, and money; declaring Texas’ state sovereignty; exempting certain state agencies from purchasing procedures if they negatively impacted homeland security or impaired the agency’s law enforcement functions; prohibiting employers from hiring unauthorized foreign nationals; and authorizing the use of the federal E-verify program as a way for employers to verify immigration status. The House committee substitute also removed provisions from the Senate engrossed version, including one authorizing driver’s license system improvement fees.

SB 1 by Duncan, the omnibus fiscal matters bill enacted during the first called session and generally effective September 28, 2011, contains provisions requiring proof of legal presence for drivers’ licenses similar to those in SB 9.

Revising human trafficking laws

SB 24 by Van de Putte/HB 2014 by Thompson
Effective September 1, 2011

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SB 24 redefines the offense of human trafficking, including adding specific definitions relating to trafficking children. The bill makes numerous other changes involving crimes and penalties related to human trafficking, including: making life in prison the automatic sentence for some repeat offenders who commit certain human trafficking offenses involving children; expanding the current offense of criminal solicitation of a minor to include prostitution and some trafficking offenses; increasing the penalty for compelling prostitution involving children; and adding human trafficking offenses involving children to the definition of what can constitute the crime of continuous sexual abuse of young children. The bill also allows judges to require human traffickers to serve sentences for multiple offenses consecutively, rather than concurrently.

SB 24 eliminates the statute of limitations for prosecution for some human trafficking offenses and increases the limit for others to 10 years from the offense or 10 years from the 18th birthday of the victim. SB 24 expands who can file requests for protective orders for trafficking victims.

SB 24 adds compelling prostitution and trafficking offenses to the list of serious and violent offenses in Code of Criminal Procedure, Art. 42.12, sec. 3(g), which are not eligible for judge-ordered probation. The bill also makes trafficking offenses ineligible for certain types of parole release.

SB 24 mandates lifetime registration with the state's sex offender registry for offenders convicted of some trafficking offenses, including those involving children.

SB 24 also makes numerous changes to other statutes, including: lengthening the statute of limitations for victims of human trafficking to bring civil suits; making human trafficking offenses subject to state laws concerning places that are common nuisances; and adding trafficking offenses to the statutes that deal with child abuse and neglect and parental-child relationships.

HB 2014 amends numerous statutes to make changes relating to human trafficking. The bill makes changes to the criminal laws, including imposing

restrictions on bail for human trafficking offenses, establishing mandatory restitution for child victims of some trafficking offenses, and placing trafficking among the offenses that can trigger a requirement that probationers and parolees stay out of "child safety zones."

HB 2014 also increases penalties for some crimes relating to human trafficking, including prostitution if the defendant solicits a child and the offense of employment harmful to children if the child is younger than 14 years old. It adds human trafficking offenses to the list of crimes that can affect the permitting process in the Alcoholic Beverage Code.

Supporters said

SB 24, HB 2014, and other related legislation would address comprehensively the heinous crime of human trafficking. This crime can involve forcing victims – sometimes children – to work in places such as hotels and sweatshops and in the sex trade. While some victims are forced into modern-day slavery in Texas, the state also functions as a nationwide corridor for human trafficking. SB 24 and HB 2014 would enact many of the recommendations of the January 2011 report of the Texas Human Trafficking Prevention Task Force.

These bills would tackle the trafficking problem by aiding trafficking victims and helping identify, prosecute, and punish traffickers. It would improve the tools for prosecutors to combat human trafficking by redefining crimes and increasing penalties. The bills also would better protect and help victims by expanding who can file protective orders for victims, lengthening statutes of limitations for prosecuting trafficking crimes, working trafficking offenses into the child abuse and neglect statutes and custody statutes, putting human trafficking offenders under the state's sex offender registry requirements and child safety zone prohibitions, and requiring mandatory restitution for certain child victims.

Human trafficking crimes are precisely the types of serious offenses for which the state should use its criminal justice resources.

Opponents said

Although human trafficking is an atrocious crime, Texans should be cautious about enhancing criminal penalties by lengthening sentences and restricting parole eligibility when existing punishments are adequate and the state budget is tight. Resources in the criminal justice system already are strained, and incarcerating offenders for longer periods could stress the system further and increase costs to taxpayers. In some cases, longer sentences do not deter crimes.

Notes

SB 24 and HB 2014 were approved by the House on the Local and Consent Calendar and not analyzed in a *Daily Floor Report*.

The 82nd Legislature enacted several other bills dealing with human trafficking.

HB 3000 by Thompson, effective September 1, 2011, creates a new criminal offense for the continuous trafficking of persons, punishable with a life sentence or a term of 25 to 99 years.

HB 2329 by Zedler, effective September 1, 2011, establishes a process for victims of human trafficking to request protective orders, requirements for the orders, and authority for victims to choose a pseudonym for use in public files and records concerning trafficking offenses.

HB 1994 by Weber, effective June 17, 2011, authorizes the creation of local first offender prostitution prevention programs for eligible defendants.

HB 260 by Hilderbran, effective September 1, 2011, redefines the offense of unlawful transport to mean the smuggling of persons and increases applicable penalties. The bill also adds smuggling of persons to the statutes on organized crime and the definition of contraband.

HB 289 by Jackson, effective September 1, 2011, adds four offenses to the list of activities that can constitute maintaining a common nuisance: employing a minor at a sexually oriented business, sexual conduct or performance by a child, employment harmful to a child, and trafficking of persons, a provision also included in **SB 24** by Van de Putte.

HB 1930 by Zedler, effective June 17, 2011, requires the state's Human Trafficking Prevention Task Force to examine how human trafficking is associated with sexually oriented businesses.

Creating sexting offense, educational programs

SB 407 by Watson
Effective September 1, 2011

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Sexting promotion and possession. SB 407 creates for minors a new offense in the Penal Code for what is commonly known as “sexting.” It is an offense for a minor to intentionally or knowingly:

- *promote* by electronic means to another minor visual material depicting a minor engaging in sexual conduct, if the minor promoting the material produced it or knew that another minor produced it; or
- *possess* in electronic format visual material depicting another minor engaging in sexual conduct, if the minor possessing the material produced it or knew that another minor produced it.

Penalties. For a 17-year-old minor, a promotion offense is a class C misdemeanor (maximum fine of \$500), but is a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) if the minor:

- promoted the visual material with intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or
- has been convicted once before for promotion or possession.

Promotion is a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) if the minor is convicted once or more of promotion with the intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another or if convicted twice or more for promotion or possession.

For a 17-year-old minor, a possession offense is a class C misdemeanor, but is a class B misdemeanor if the minor has been convicted once of possession or promotion, and is a class A misdemeanor if the minor has been convicted twice or more of possession or promotion.

For minors under 17, SB 407 expands the definition of “conduct in need of supervision” in the Family Code to include possession and promotion of sexting. Courts must waive their original jurisdiction of a misdemeanor

sexting case punishable by fine only and transfer the case to juvenile court.

There is an affirmative defense to prosecution for sexting between minor spouses or between minors within two years of age of each other and dating at the time of the offense. There is a defense to prosecution for sexting possession if the minor did not produce or solicit the visual material, possessed the material only after receiving it from another minor, and destroyed the material within a reasonable amount of time after receiving it from another minor.

Educational programs. SB 407 requires the Texas School Safety Center, in consultation with the Office of the Attorney General, to develop programs for use by school districts by January 1, 2012, that address specific issues dealing with sexting. Each school district must make these programs available on a yearly basis, beginning with the 2012-13 school year, to parents and students in a grade level the district considers appropriate.

If a court finds that a defendant committed a sexting offense or engaged in conduct indicating a need for supervision on the basis of sexting, it can require the defendant to attend and successfully complete an educational program. The same provision applies if a judge grants community supervision to a defendant for sexting.

Expunction and sealing of records. The bill establishes criteria for having certain sexting convictions expunged from minors’ criminal records and having certain juvenile records involving sexting sealed.

Supporters said

SB 407 would create a new legal response to sexting that would not carry the life-altering consequences of a felony conviction and would help prevent sexting through education.

The act of sending a sexually explicit text message currently can be prosecuted under adult pornography

laws, which can lead to felony convictions and sex offender registration for life. Expanding the definition of conduct in need of supervision to include sexting for a child under 17 would make sexting a noncriminal offense within the original jurisdiction of the juvenile court. This would allow for a proactive judicial approach that could include parental involvement and educational and probation requirements.

The educational requirements of SB 407 would emphasize the criminal, emotional, and psychological consequences associated with the crime before kids engaged in the harmful activity. A school district would retain maximum flexibility in conveying this information to parents and students in grade levels the school district deemed appropriate.

For a 17-year-old, both possession and promotion of sexting would be capped at a class A misdemeanor. The penalty would be a class C misdemeanor unless the minor promoted the content with the intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another, which would make the penalty a class B misdemeanor. The penalties would be enhanced for repeat offenses.

SB 407 also would ensure that sexting did not leave a stigma preventing a young person from going to college or finding meaningful employment. The bill would allow people convicted of sexting to have their criminal records expunged and would allow certain minors under 17 to immediately seal their sexting records.

Opponents said

Sexting reflects poor judgment, but a better response would be education, not criminalization. Very few minors are charged with child pornography now because it is such a serious charge. This bill actually would criminalize behavior that rarely is prosecuted now.

The criminal justice system is not equipped to handle the number of sexting cases necessary to enforce the new law fairly. According to the American Civil Liberties Union, at least 20 percent of youth have engaged in sexting, meaning that 1.5 million additional Texas youth could be subjected to the justice system under this bill. Prohibiting sexting also could raise free speech issues.

Education would be the best tool for preventing sexting. Parents and educators should inform teens about the need to respect their peers, privacy, and the potential long-term negative consequences of using electronic media for sexting.

Other opponents said

While SB 407 is a step in the right direction, a class C misdemeanor would be too low a punishment for a 17-year-old. Sexting can involve child pornography, so the equivalent of a traffic ticket would be inappropriate given the content of some images.

Notes

The **HRO analysis** of SB 407 appeared in the May 24 *Daily Floor Report*.

Creating the Texas Juvenile Justice Department

SB 653 by Whitmire
Effective September 1, 2011

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SB 653 abolishes the Texas Youth Commission (TYC) and the Texas Juvenile Probation Commission (TJPC) on December 1, 2011, and transfers their powers and duties to a new state agency, the Texas Juvenile Justice Department (TJJD). The newly created Texas Juvenile Justice Board will govern the agency, which will be subject to the state's Sunset Act and abolished September 1, 2017, unless continued by the Legislature.

The goals of the new agency will include:

- developing a consistent county-based continuum of effective services for youth and families that reduces the need for out-of-home placement;
- increasing reliance on alternatives to placement and commitment to secure state facilities;
- locating facilities as geographically close as possible to workforce and other services, while supporting youths' connections to their families;
- encouraging regional cooperation that enhances county collaboration;
- enhancing the continuity of care in the juvenile justice system; and
- using secure facilities sized to support effective youth rehabilitation and public safety.

Transition team. SB 653 creates a seven-member transition team to coordinate the transition of services and facilities during the merger and prepare a transition plan with goals for the new agency.

New governing board. A new 13-member board, appointed by the governor with the advice and consent of the Senate, will oversee the new TJJD and include:

- a juvenile district court judge;
- three county commissioners;
- a juvenile court prosecutor;
- three chief juvenile probation officers (one from a county with fewer than 7,500 people younger than 18 years old, one from a county with 7,500 to 80,000 people younger than 18 years old, and one from a county with 80,000 or more people younger than 18 years old);
- an adolescent mental health treatment professional;

- an educator; and
- three public members.

The governor will designate the presiding officer, and members will serve staggered six-year terms.

The board will employ the agency's executive director and will establish the mission of the department, with the goal of creating a cost-effective continuum of youth services that emphasizes keeping youths in their communities while balancing their rehabilitative needs with public safety.

Advisory council on probation issues. SB 653 establishes a 13-member advisory council on juvenile services to help the TJJD. Its duties include determining the needs of county juvenile boards and probation departments; reviewing and proposing revisions to standards for juvenile probation programs, services, and facilities; analyzing the cost impact of proposed standards; conducting long-range strategic planning; and advising the TJJD board.

The council members will serve two-year terms and will include:

- the TJJD executive director;
- the TJJD director of probation services;
- the Health and Human Services Commission (HHSC) executive commissioner;
- a representative of the county commissioners courts, appointed by the board;
- two juvenile court judges, appointed by the board; and
- seven chief juvenile probation officers, appointed by the board.

The seven juvenile probation officers will be appointed by the TJJD board from each of the state's regional probation chiefs associations from a list of nominees submitted by each regional chiefs association.

Office of Inspector General (OIG); complaints. The OIG, currently within TYC, is re-established at the new department under the direction of the board. The board will select the chief inspector general. The office

will continue its current duties, including investigating crimes committed by department employees and at department facilities.

Criminal complaints initially referred to the OIG relating to juvenile probation programs, services, or facilities must be sent to the appropriate local law enforcement agency. Other complaints must be referred to the appropriate division of the department. The department must immediately notify local juvenile probation departments of complaints relating to their programs, services, or facilities.

Office of the Independent Ombudsman (OIO). SB 653 continues the OIO, which currently investigates, evaluates, and secures the rights of youth committed to TYC. The OIO will continue to be independent of the department and be appointed by the governor with the advice and consent of the Senate. The office will continue to be subject to Sunset review when the new agency is reviewed but is not abolished under the Sunset Act.

The OIO will review and analyze reports received by TJJD describing complaints about juvenile programs, services, and facilities to identify trends and report possible standards violations by local probation departments to TJJD.

Other provisions. *Transfer of TYC facilities.* SB 653 allows the TYC or TJJD to transfer closed facilities to the county or city where they are located. Counties and cities must use the property only for a purpose that benefits the public interest of Texas.

Services for at-risk youths. The department must provide prevention and intervention services for at-risk youths ages 6 to 17 who are subject to the state's compulsory school attendance law or under juvenile court jurisdiction.

Charter school. The State Board of Education may grant a charter for a school upon the application of a detention, correctional, or residential facility for juvenile offenders. This charter will not count against the state cap on charter schools. Any facility receiving a charter must provide all the educational opportunities and services required of school districts.

Supporters said

TYC and TJPC should be merged to create an effective continuum of treatment and rehabilitation for juvenile offenders in Texas. A fragmented juvenile justice system is inefficient and ineffective in dealing with juvenile offenders. Merging the two agencies would produce cost savings that could be used to help youths. Juveniles who break the law should be treated as one population and addressed in a single system, regardless of the frequency and severity of their infractions.

Even after recent reforms, TYC remains a struggling agency working to improve youth services, education, treatment, medical care, and re-entry efforts. Due to its declining population and rising costs, the best way to improve the work of TYC would be with a new agency, governing board, and outlook.

SB 653 would establish goals for the new agency to ensure that both components of the current system – probation and state commitment – received the attention they deserved. Concerns that probation issues and funding would take a back seat to the care of youths committed to the agency are unfounded. The department's first goal would be to support a county-based continuum of services. In addition, the governing board would have a diverse membership, and a newly created advisory committee would be devoted to probation issues.

Violent, serious offenders would continue to be committed to state custody. Local juvenile probation departments would continue to handle the vast majority of offenders locally, and the state would continue to send grant funds to local departments.

New governing board. SB 653 would establish a diverse governing board for the new agency with strong representation from local juvenile justice officials. Having three representatives of county commissioners courts would ensure that local elected officials were represented. Three chief probation officers also would ensure that the board benefited from the knowledge of probation practitioners from counties of different sizes. These officers would be probation managers, not front-line staff, so they would appropriately help to oversee the new agency. The mental health professional, educator, and public members would bring important expertise to the board in areas impacting juvenile offenders.

Advisory council on probation issues. The advisory council created by SB 653 would formalize a way for practitioners to provide input to the agency on probation issues. SB 653 would continue the current advisory council's proven effectiveness in obtaining input from front-line, local probation officials. Judges and representatives of county commissioners courts would bring additional important perspectives.

Office of the Inspector General. SB 653 would recreate an OIG in the new agency, just as one now exists in TYC. This office, which would employ peace officers, is crucial to guaranteeing impartial, thorough, and professional investigations of alleged crimes in department facilities.

Office of the Independent Ombudsman. SB 653 would continue TYC's ombudsman's office as an independent office. The office was established in 2007 as an independent entity to focus on the needs of youth and to advocate for them and their families, and the need for this office continues.

Opponents said

TYC and TJPC should be continued as separate agencies because they have distinct mandates and responsibilities that are best accomplished independently. While TJPC focuses on the front end of the juvenile justice system by ensuring core probation services throughout the state and by supporting the counties' provision of alternatives to state commitment, TYC focuses on youths in correctional facilities and on parole. The TYC population includes the most serious juvenile offenders, many with significant mental health or other issues, and can differ considerably from juveniles who are on probation for crimes ranging from the minor to the serious but who are being treated in the community.

These different points in the juvenile justice system deserve the focus of the individual agencies without the competition for resources and attention that would accompany unification. For example, in a unified agency, it might be easy or become routine to channel state funds that now support county probation services to handle the youths committed to the department. Agency budget cuts could fall disproportionately upon the probation part of a unified agency, which in turn would hurt counties that provide probation services.

Consolidation would divert the agencies' resources and attention, which would be better focused – especially at TYC – on continuing to implement recent reforms. Consolidating the two agencies would not solve any problems but would simply move them under a new umbrella and could harm TJPC, generally perceived as a well-run, effective agency. TYC and TJPC have been collaborating increasingly and productively and should continue doing so as separate agencies.

New governing board. Putting chief probation officers on the new governing board would be inappropriate and could present conflicts of interest. These employees of local probation departments are better suited to other functions, such as serving the new department on the advisory council. It would be better to beef up representation on the governing board of elected officials responsible for providing juvenile services.

Advisory council on probation issues. The advisory council on juvenile services should include only practitioners such as probation chiefs or others working in the juvenile justice field. SB 653 would charge the council with specific duties relating to juvenile probation, including reviewing standards and analyzing their cost impact, and this type of work is best performed by practitioners.

Notes

The **HRO analysis** of the companion bill, HB 1915 by Madden, appeared in the April 28 *Daily Floor Report*.

Revising the Forensic Science Commission

SB 1658 by Hinojosa
Died in the House

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SB 1658 would have changed the composition and duties of the Forensic Science Commission (FSC), exempted certain information used in its investigations from the Public Information Act, required an annual report from the commission, and administratively attached the commission to Sam Houston State University.

Composition of the commission. SB 1658 would have reduced the size of the commission from nine to seven members and changed its composition. All seven members would have been appointed by the governor, instead of some being appointed by the lieutenant governor and the attorney general. Five members would have been required to have expertise in forensic science, and one member would have been required to be a prosecutor and one a defense attorney. The governor would have continued to appoint the presiding officer.

Commission duties. SB 1658 would have revised the duties of the commission. If certain conditions had been met, the commission could have initiated, for educational purposes, an investigation of a forensic analysis without a reported allegation of professional negligence or misconduct involving the forensic analysis. This could have occurred if the commission determined by a majority vote that an investigation would advance the integrity and reliability of forensic science in Texas. If the commission had investigated a forensic analysis under this authority, it would have had to prepare a written report.

The bill would have established different reporting requirements for FSC investigations, depending on the type of crime lab investigated and the type of investigation.

For two types of reports, the commission would have been prohibited from determining whether professional negligence or misconduct occurred or issuing a finding on that question. This prohibition would have applied when the commission conducted investigations that it initiated without a reported allegation of professional negligence or misconduct and when it investigated crime labs that were not accredited by the Department of Public Safety or involved allegations of a forensic

method that was not an accredited field of forensic science.

The commission would have been prohibited from issuing findings related to the guilt or innocence of parties in an underlying civil or criminal trial. The commission's written reports would not have been admissible in civil or criminal cases.

Public information exemption. Information filed as part of alleged professional misconduct or negligence or obtained during an investigation into one of these would not have been subject to release under the Government Code's public information statutes until the commission's investigation concluded.

Annual report. By December 1 each year, the commission would have had to publish a report that included several items listed in the bill, including a description of complaints filed in the preceding year and their disposition and status.

Affiliation with Sam Houston State University. The commission would have been attached administratively to Sam Houston State University, but neither the university nor the board of regents of the Texas State University System would have had authority or responsibility for the duties of the commission.

Supporters said

SB 1658 is needed to clarify the scope and duties of the Forensic Science Commission. Almost since its creation, the commission has been bogged down with questions about its authority and operations, especially during its investigation into the case of Cameron Todd Willingham, executed for capital murder after a fire that killed his three daughters. The changes in the bill would improve the structure of the commission and clarify its jurisdiction so that it could move forward with its work and increase public confidence in the Texas criminal justice system.

SB 1658 would require the governor to make all appointments to the FSC, which is not unusual for state

commissions. Requiring five of the appointees to have expertise in forensic science, one to be a prosecutor, and one to be a defense attorney would focus the expertise of the commission on forensic science and courtroom knowledge.

SB 1658 would broaden the FSC's powers so that it could launch an investigation without first receiving a complaint. This would give the commission more flexibility to address issues in the use of forensic science, leading to continued improvements. This authority, along with the authority to investigate nonaccredited fields of forensic science, would give the commission the necessary discretion to investigate junk science or other areas it deemed appropriate. The bill would clarify the FSC's duties by outlining the required content of reports on different types of investigations.

Prohibiting the commission from issuing findings about guilt or innocence and its reports from being used as evidence in civil and criminal cases would ensure that the commission focused its work on improving forensic science, not on issues in specific court cases.

SB 1658 would provide only a limited and temporary exemption to the Public Information Act so that during an investigation, the commission could keep its files confidential. This common-sense exception would allow the FSC to conduct proper investigations. Information on cases would become accessible and open to the public after investigations were completed.

Opponents said

SB 1658 would give too much power to the governor by allowing him to make all commission appointments. Current law splits appointments among the governor, the lieutenant governor, and the attorney general, ensuring that no single official has the power to dominate the commission. Reducing the size of the commission from nine to seven and eliminating requirements for certain types of expertise also would weaken the commission by reducing its depth and diversity of knowledge.

Allowing the FSC to investigate cases without a complaint would give the commission too much authority. Requiring that the commission operate after complaints, and not simply on its own, ensures that its investigations are focused on specific uses or misuses of forensic science. Also, prohibiting the commission from issuing findings about guilt or innocence would be too

restrictive. The commission should have the discretion to make these findings if deemed appropriate.

SB 1658 would thwart the goal of open and accessible government by exempting some FSC materials from the Public Information Act. One goal of the commission was to improve public trust in the criminal justice system, and denying access to information, even during an investigation, would work against this goal. SB 1658 would allow the commission to hide its ongoing investigations from the public, which could restrict public oversight.

Notes

The **HRO analysis** of SB 1658 appeared in Part Three of the May 24 *Daily Floor Report*. The bill died on the May 24 General State Calendar in the House when no further action was taken.



Elections and Redistricting

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Redistricting state and Congressional districts

HB 150 by Solomons/SB 31 by Seliger/HB 600 by Solomons/SB 4 by Seliger, First Called Session
Effective August 29, 2011/SB 4 effective September 28, 2011

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HB 150, SB 31, HB 600, and SB 4 (first called session) draw new electoral districts for Texas' 150 House, 31 Senate, 15 State Board of Education (SBOE), and 36 Congressional districts, respectively. HB 150 pairs 14 current House members (places two incumbent members in the same district) and creates seven districts with no incumbents. None of the other maps contain any pairings. SB 4 contains four new open congressional districts as a result of Texas' population growth over the past decade.

The U.S. Constitution, Art. 1, sec. 2 requires an "actual enumeration" or census every 10 years to apportion the number of representatives each state will receive in the U.S. House of Representatives. The release of population figures from the census also triggers redistricting – or redrawing of political boundaries – of the state's congressional and legislative districts and SBOE districts.

Texas Constitution, Art. 3, sec. 28 requires the Legislature to apportion the state into House and Senate districts "at its first regular session after the publication of each United States decennial census," but neither the Texas Constitution nor Texas state statutes address the standards or procedures for congressional or SBOE redistricting. Release of federal census data triggers redistricting of congressional and SBOE districts because federal court rulings require that district boundaries be altered to reflect population changes under the "one person, one vote" principle. New congressional districts also must be drawn if the state is apportioned additional seats due to its population growth relative to the other states. Texas gained four seats in this round of congressional redistricting because of its growth relative to other states after the 2010 census.

Supporters said

These redistricting bills reflect the changing demographics of the state and are compliant with the federal Voting Rights Act and other federal and state laws. The bills create a fair number of minority-majority districts that adequately reflect their percentage of the population as a whole.

Opponents said

These redistricting plans are invalid because they fail to account properly for surging growth in the state's minority population, specifically the booming Hispanic population. The plans improperly focus on creating or maintaining minority-majority districts rather than minority opportunity or coalition districts, which are the focus of the federal Voting Rights Act and related litigation. The redistricting plans should focus on creating these districts, which would better protect minority voting rights.

The redistricting plans split too many cities and counties and other communities of interest for purely partisan purposes. The maps should focus on preserving communities rather than maximizing potential political gains for one particular party.

Notes

The **HRO digests** of the redistricting plans appeared in the *Daily Floor Report* on April 27 (HB 150), May 20 (SB 31), April 14 (HB 600), and June 14 (SB 4).

Requiring voters to present photo ID

SB 14 by Fraser
Generally effective January 1, 2012

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SB 14 requires a voter to present one form of photo identification at the polling place. Certain disabled voters are exempt from this requirement. The bill enhances the penalties for illegal voting and authorizes free election identification certificates for qualified voters who claim to need them for voting identification requirements. The election ID certificates will not expire for people aged 70 or older, but will expire for younger people on a date determined by the Department of Public Safety (DPS).

Acceptable forms of photo ID include:

- a driver's license, election identification certificate, or personal identification card that is current or not expired for more than 60 days;
- a U.S. military identification card that has a photograph and that is current or not expired for more than 60 days;
- a U.S. citizenship certification with a photograph;
- a U.S. passport that is current or not expired for more than 60 days; or
- a concealed handgun license that is current or not expired for more than 60 days.

A voter with the required ID may vote if his or her name is on the precinct list of registered voters. If an election official determines, under standards adopted by the secretary of state, that a voter's name on his or her required ID is substantially similar to but does not match a name on the precinct list, the person may vote if the person submits an affidavit swearing to be the voter on the list.

A voter with the required ID who is not on the list of registered voters also may vote if he or she has a voter registration certificate indicating current registration in that precinct or indicating current registration in a different precinct but in the same county if the voter swears to being a current or former resident of the precinct, to not deliberately providing false information to obtain registration in the precinct, and to voting only once in the election.

A voter lacking the required ID may cast a provisional ballot. For the ballot to be counted, the voter must present the required ID to the voter registrar within six days of the election. Voters who have a consistent religious objection to being photographed or who do not have any photo ID as a result of certain natural disasters also may cast a provisional ballot. The ballot will be counted if the voter appears at the voter registrar within six days of the election and swears to the religious objection or natural disaster.

Illegal voting is a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) instead of a third-degree felony. Attempted illegal voting is a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) instead of a class A misdemeanor.

If a court finds any provision of SB 14 invalid, the remaining provisions will be unaffected.

Supporters said

SB 14 would strengthen the election process. The bill would deter voter fraud, keep ineligible voters from voting, align voting with other transactions that require photo ID, and restore and enhance public confidence in elections, which would promote higher turnout. Requiring most voters to show a government-issued photo ID and increasing the criminal penalty for voter fraud would help ensure the integrity of elections. The bill would guarantee continued access to the polls by providing exceptions for certain disabled voters and by authorizing free election ID certificates for eligible voters lacking a photo ID. In its interim report to the 82nd Legislature, the Texas House Committee on Elections recommended the enactment of legislation requiring voters to present photo ID at the polls.

Voter fraud drives honest citizens out of the democratic process and breeds distrust of government. Many everyday circumstances require citizens to present a photo ID, including air travel and cashing a check. Such safeguards benefit our society and enhance our security. When deceased or other unqualified

individuals are on the voter rolls, illegal votes may be cast, canceling out legitimate votes. Although real, voter impersonation is hard to prove because of existing law. Election officials lacking the authority to dispute a voter's identity hesitate to accuse someone of voting illegally. Since voters need not prove their identities at the polls, anyone can vote with anyone else's voter certificate. This lax screening process makes it impossible to know how many ineligible voters slip through the system. Stricter requirements would prevent people from voting with fake voter registration certificates and from voting more than once. Even a limited incidence of voter fraud could tip a close or disputed election.

Stricter identification requirements would not impose an unreasonable burden on voters, since the bill's requirements would be no more burdensome than the act of voting. Concerns about the bill's constitutionality are unfounded because the U.S. Supreme Court upheld Indiana's photo ID law in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), when it ruled that requiring a photo ID imposes only a limited burden on a voter's rights and is justified by the state's interest in improving election procedures and deterring fraud. Furthermore, although voter ID laws in other states have been heavily litigated, plaintiffs have been unable to produce a single individual who either did not already have an ID or could not easily obtain one.

Opponents said

SB 14 would unnecessarily complicate election procedures and disenfranchise voters by creating a substantial obstacle to the right to vote. Eligible voters should not be needlessly hassled by the state and discouraged or intimidated from exercising their fundamental right to vote without legitimate justification. There is no proof that the barriers to voting that this bill would erect are needed at all. This bill would be an extreme, costly solution in search of a problem not proven to exist. According to a 2006 interim report by the Texas Senate State Affairs Committee, almost all evidence of voter fraud involves mail-in ballots. However, this bill would address only voter impersonation at the polls, not mail-in balloting.

Texas already has taken steps to minimize fraud by implementing federal requirements that each state cull its voter registration databases and remove any voters who are deceased or are convicted of a felony.

Prospective voters already must prove their identity during the registration process and must swear under penalty of perjury that they are U.S. citizens.

Since the process of obtaining a photo ID is cumbersome and cost prohibitive for some citizens, SB 14 would suppress voting among eligible voters. The bill would inhibit voting in rural areas, where citizens may have to travel more than 100 miles to a DPS office. There is no DPS office in 77 of Texas' 254 counties. The bill also would give election workers too much power and pave the way for discrimination, since poll workers might not administer identification procedures fairly or correctly.

Although citizens must show proof of their identity when boarding an airplane or renting movies, these activities are not constitutional rights. This bill would give Texas one of most restrictive voter ID laws in the nation. Although the U.S. Supreme Court upheld Indiana's photo ID law, Indiana's law is less strict. The U.S. Justice Department or a panel of three federal district judges in the District of Columbia are mandated by the Voting Rights Act to examine closely any changes to Texas' voting laws due to the state's history of voter suppression and could invalidate the bill for unjustifiably inhibiting minority voting rights.

Other opponents said

Better alternatives exist to address potential election fraud. When executed properly, they would be less burdensome than a photo ID requirement. Signature comparison (comparing signatures used during voter registration and at the polls) has been used to determine legitimate mail-in ballots and could present a reliable alternative.

Texas should consider taking cues from states like Indiana, Michigan, and Georgia, whose less stringent voter ID laws contain photo ID alternatives, such as student IDs, expired driver's licenses, or valid employee ID cards with photographs.

Unlike illegal voting, low voter turnout is a proven problem. Texas should enact laws that encourage rather than suppress voting.

Notes

The **HRO analysis** of SB 14 appeared in the March 23 *Daily Floor Report*.

Implementing federal MOVE Act for elections

SB 100 by Van de Putte
Effective September 1, 2011

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SB 100 establishes new voting procedures to comply with the federal Military and Overseas Voter Empowerment (MOVE) Act, which requires balloting materials to be mailed or e-mailed to military and overseas voters no later than 45 days before all elections involving a federal office or vacancy in the state legislature.

The bill moves the filing deadline for an application to be on the general primary election ballot from January 2 in the primary election year to the second Monday in December of an odd-numbered year. This year, the filing deadline will be December 12, 2011. SB 100 also moves the runoff primary election date from the second Tuesday in April to the fourth Tuesday in May. The bill limits the May uniform election date in even-numbered years to elections held by political subdivisions other than a county. County election officials are not required to contract with political subdivisions to conduct elections in May of even-numbered years.

SB 100 authorizes a political subdivision, other than a county, to change to the November uniform election date. To facilitate a change in the election date or a change in the terms of office to conform to a new election date, SB 100 authorizes:

- a home-rule city to change the general election date or to allow the election of all members of the governing body at the same election;
- a school board to change the length of terms for trustees to staggered terms of either three or four years;
- a general-law municipality whose governing body serves one- or three-year or staggered terms to change the length of term to two years or allow for the election of all members at the same election; and
- any political subdivision that elects its governing members to a term with an odd number of years to change the length of term to an even number of years.

The secretary of state (SOS) must provide information regarding voter registration procedures and

absentee ballot procedures, including procedures related to the federal write-in ballot, to be used by eligible voters under the federal Uniformed and Overseas Citizens Absentee Voting Act. The SOS also acts as the state coordinator between military and overseas voters and county election officials. The SOS, in coordination with local county officials, must implement an electronic free-access system for someone voting early by mail to determine if his or her application and ballot have been received and the ballot's status.

Supporters said

SB 100 is necessary to allow voting procedures to conform to the federal MOVE Act, with which Texas must comply. The bill is needed to align state election law with the new federal requirements in time for the 2012 elections or else face possible sanctions from the federal government. Fourteen states or jurisdictions had federal intervention in 2010.

The current dates of the filing deadline, presidential primary election, primary runoff election, and nonpartisan city and school elections are too compressed to comply with the federal law. The issue is the amount of time needed to request, receive, and return a ballot by mail. The current Texas election schedule makes it almost impossible for most active military men and women serving overseas to vote in a timely fashion. To keep the current general primary election date, the January 2 candidate filing deadline has to shift to an earlier date. This would be the least disruptive option for voters and the most cost-effective option for the state to comply with the MOVE Act and leave the current primary election date in place.

Voting quite often is difficult for those on active duty. The distance of military personnel and individuals living overseas has made it difficult to comply with the election timeline. The goal is to ensure that military members and their dependents are not disenfranchised when trying to cast ballots. The federal government has acted in response to concerns that about a quarter of military and overseas ballots were not reaching voters in time.

Texas party primary elections currently are held on the first Tuesday in March, which is late enough already. Moving the primary election date to later in the year would rob Texas of clout in presidential primaries. It should remain part of Super Tuesday in March.

Having a later primary election date would shift other election dates and create conflicts with local elections. It would affect the nonpartisan May election date for school districts and cities, currently held in early May. Holding these elections so close to the primary elections and the potential primary runoff elections would be confusing for voters and cumbersome for election officials. Moving the May elections to the uniform November election date would allow partisan presidential contests and other issues to drown out nonpartisan issues, would be complicated by straight-party voting, and would create excessively long ballots. A November date would force a local election runoff to occur during the holiday season, when resources and manpower are scarce.

Opponents said

The state should move the primary election date to later in the year to accommodate the federal MOVE Act timeline for sending ballots to overseas voters. This would give voters more time to learn about the candidates and issues. The March election dates conflict with Spring Break, so having a later date would lead to higher voter participation and would reduce voter confusion. Keeping the current January 2 filing deadline for candidates to apply for a spot on the primary ballot would allow local candidates to avoid running afoul of the state's "resign to run" law. The Texas Constitution stipulates that a county officeholder must resign before seeking another office if more than a year is left on his or her term, and it would have to be amended if the filing deadline were set too early. Officeholders routinely file by January 2 because that leaves less than a year on their current term.

Additionally, because of rules adopted by the national Republican Party requiring states holding primaries before April 1 to award delegates proportionally, Texas will need to move its primary election to April in order to remain a "winner-take-all" primary state. Under Texas Republican Party rules, candidates receiving more than 50 percent of the presidential primary vote statewide or in a congressional district receive all of the delegates. If Texas retains this system for a March primary, it could risk being

penalized by the national party by losing half of its delegates to the national party convention.

An earlier candidate filing deadline would require candidates to declare their intentions almost a full year in advance of the November election. This would create an overly long and expensive campaign season, which could limit the number of candidates.

Notes

The **HRO analysis** of SB 100 appeared in the May 24 *Daily Floor Report*. The House committee version would have moved the general primary election date and left the filing deadline unchanged.

Environment and Energy

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Continuing TCEQ, abolishing wastewater council

HB 2694 by W. Smith
Effective September 1, 2011

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HB 2694 continues the Texas Commission on Environmental quality (TCEQ) until September 1, 2023. The On-site Wastewater Treatment Research Council is abolished and its authority and duties transferred to TCEQ.

Resign to run. HB 2694 prohibits commission members from accepting contributions for a campaign for elected office. A member who does so will be considered to have resigned, and the office will immediately become vacant.

Dam safety. HB 2694 directs TCEQ to focus on the state's most hazardous dams. It allows the agency to enter into agreements with dam owners required to reevaluate the adequacy of a dam or spillway, including a timeline to comply with TCEQ criteria. It exempts from safety regulations certain privately owned dams that impound less than 500 acre-feet and have a hazard classification of low or significant.

Transfer of certain groundwater protections to Railroad Commission (RRC). HB 2694 transfers, on September 1, 2011, the authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the RRC. It authorizes the RRC, not TCEQ, to issue letters of determination for geologic storage of anthropogenic carbon dioxide.

Public assistance and education. HB 2694 transfers the charge of ensuring that TCEQ is responsive to environmental and citizen concerns from the Office of Public Interest Counsel (OPIC) to the TCEQ executive director. The executive director is to provide assistance and education to the public on environmental matters under the agency's jurisdiction. HB 2694 states that OPIC's primary duty is to represent the public interest in matters before the commission. The bill also requires the commission to define, by rule, factors that the public interest counsel will consider in representing the public interest.

Compliance history and enforcement. HB 2694 revises requirements for evaluating compliance history, including removing the single uniform standard

currently in statute. It requires TCEQ to adopt a general enforcement policy by rule, including deterrence to prevent the economic benefit of noncompliance. It increases the maximum to \$25,000 for almost all penalties and \$5,000 for others, such as water rate penalties. Local governments may apply penalty money assessed by TCEQ toward a supplemental environmental project needed to achieve compliance or to remediate environmental harm.

Petroleum storage tanks (PST). HB 2694 reinstates common carrier liability for delivering or depositing petroleum products into underground storage tanks that have not been issued a delivery certificate by TCEQ. It also provides an affirmative defense under certain circumstances for common carriers of petroleum products. The bill also expands the use of the PST remediation fee to remove storage tanks if certain criteria are met and reauthorizes the remediation fee at the current level with no expiration date.

The bill allows TCEQ to award direct contracts for petroleum storage tank remediation projects, under certain circumstances, to those performing related work at the site on or before July 1, 2011.

Water use and watermasters. HB 2694 requires water right holders to provide reports on monthly water use to the commission upon request during times of drought or emergency shortages or in response to a complaint. The bill authorizes the executive director, during a drought or other emergency shortage of water, to suspend temporarily a water right and adjust diversion of water between water right holders. HB 2694 directs the executive director to evaluate at least once every five years whether a watermaster should be appointed in water basins for which a watermaster is not appointed. Findings and subsequent recommendations must be reported to the commission.

Texas Low-Level Radioactive Waste Disposal Compact Commission. HB 2694 requires that the compact waste disposal fee include funds to support activities of the Low Level Radioactive Waste Disposal Compact Commission and creates a dedicated account.

Repealing certain utility fees. The bill eliminates water and wastewater utility application fees for applications for rate changes, certificates of convenience and necessity (CCNs), and the sale, transfer, or merger of a CCN.

Abolishing the On-site Wastewater Treatment Research Council. HB 2694 abolishes the Texas On-site Wastewater Treatment Research Council and transfers its duties to TCEQ on September 1, 2011.

Contested cases on permits. HB 2694 prohibits a state agency from contesting the issuance of an air, water, or waste permit or license. It requires the executive director to participate as a party in contested case hearings. For a hearing with the State Office of Administrative Hearings using pre-filed testimony, all discovery must be completed before the deadline for the submission of that testimony, except for water and sewer ratemaking hearings.

Supporters said

Transfer of certain groundwater protections to Railroad Commission (RRC). HB 2694 would transfer certain groundwater protections to the RRC because TCEQ's role in making groundwater protection recommendations for oil and gas drilling activities creates confusion about the RRC's ultimate oversight responsibility.

TCEQ provides recommendations to the RRC on production of oil and gas and injection of oil and gas waste, but letters on surface casing recommendations for oil and gas drilling from TCEQ do not have the force of law and are not enforceable by TCEQ. The responsibility for controlling groundwater pollution from oil and gas production and the authority to enforce surface casing requirements on producers is the responsibility of the RRC, not TCEQ. TCEQ's middleman role in surface casing recommendations is unnecessary and should be transferred to the RRC.

Public assistance and education. HB 2694 would focus and strengthen both the TCEQ's public assistance function and the duties of the Office of Public Interest Counsel (OPIC).

Public assistance currently is divided among several agency programs with overlapping duties and with no specific statutory direction, contributing to a lack

of focus and prioritization. A centralized structure for public assistance would allow TCEQ to be more responsive to questions and proactively identify concerns.

Revising the duties of OPIC would clarify its role and prevent conflicts. OPIC's role in assisting the public dilutes its primary duty to represent the public interest in proceedings before TCEQ and can put it in potentially conflicting positions. Focusing OPIC's work on representing the public interest in TCEQ proceedings would allow it more effectively to use its resources to provide the public interest perspective to TCEQ.

Compliance history and enforcement. TCEQ's rigid, one-size-fits-all approach to measuring regulated entities' compliance histories results in inaccurate measures of performance, stripping compliance history classifications of meaning. Without a standard that can identify good and bad actors, TCEQ cannot target regulations effectively. HB 2694 would remove some statutory roadblocks that have negated the practical use of this important regulatory tool and allow TCEQ to revamp its approach to compliance history. HB 2694 would increase 20 of TCEQ's administrative penalty caps to match statutory levels for civil penalties for the individual programs. Increasing penalties to exceed the economic benefits for violations would help deter violations.

Water use and watermasters. HB 2694 would clarify current law on TCEQ's authority to curtail water rights during a period of drought or other emergency shortage of water. It also would require TCEQ to evaluate the need for additional watermaster programs at least every five years. The bill would require water use reporting by water right holders during a drought or other emergency shortage of water to more adequately manage the inventory of water resources.

Current law does not expressly articulate TCEQ's duties to enforce the allocation of water to permit holders in areas without a watermaster program. The state currently has only two watermaster programs.

Current law also does not expressly state under what circumstances TCEQ may curtail the right to divert state water under a water right to ensure senior rights are protected and adequate water supplies are available for domestic and municipal needs. TCEQ's express statutory authority to suspend permit conditions in times of drought or other emergency is limited to conditions

relating to instream uses or beneficial flows to bays and estuaries.

Time is critical during a water shortage or drought emergency, but current law does not allow for TCEQ to efficiently address water rights issues that arise during a water shortage in those areas where a watermaster has not been created.

Texas Low-Level Radioactive Waste Disposal Compact Commission. HB 2694 would clarify the funding mechanism for the Texas Low-Level Radioactive Waste Disposal Compact Commission by allocating a portion of the compact waste disposal fee to support its costs and operations. The compact commission employs an executive director, and its members are entitled to reimbursement for expenses, but it has no separate section in the budget and no full-time staff. It is funded by a pro rata share between Texas and Vermont, the member states, with Texas providing 75 percent of funding. In Texas, it is funded through a rider in the TCEQ section of the budget that provides \$100,000 for each of fiscal years 2010 and 2011. TCEQ reimburses expenses to the compact commission under a contract.

Abolishing the On-site Wastewater Treatment Research Council. While the On-site Wastewater Treatment Research Council has provided a valuable service in volunteering time and expertise to guide the grant process for on-site sewage research and the state continues to benefit from this research, Texas does not need a separate, stand-alone council to fund it. The council, without a staff of its own, receives all of its administrative support from TCEQ through interagency contract. TCEQ administers similar grant programs and has structures in place to assume this program with appropriate stakeholder input. It would be appropriate to abolish the council and transfer its authority to award grants for on-site sewage research to TCEQ.

Opponents said

Transfer of certain groundwater protections to Railroad Commission (RRC). The protection of groundwater is a direct responsibility of TCEQ, and the responsibility of protecting groundwater during oil and gas activities should remain within its authority.

It is not clear or certain that the RRC, which is underfunded and overloaded with existing duties, would

provide thorough oversight. The RRC also has had a history of being unresponsive to interested parties and is three or four years behind on the investigation of some complaints filed with the agency. Transferring the oversight of groundwater protection to the RRC could compromise groundwater protections and make it more difficult for interested parties to participate in the process.

Public assistance and education. The Legislature should ensure that the Office of Public Interest Counsel (OPIC) within TCEQ is able to fully represent the public interest and protect its ability to present an independent perspective on issues that come before TCEQ. Removing from OPIC the duty of responding to environmental and citizens' concerns, including environmental quality and consumer protection, and giving it to the executive director of TCEQ could be a barrier to public assistance because TCEQ historically has been unresponsive to citizens' concerns. The purpose of OPIC is to ensure that TCEQ promotes the public interest, and HB 2694 would stifle this purpose.

Compliance history and enforcement. The bill's requirements for enforcement standards to be placed into rule and the removal of the single uniform standard for evaluating compliance history were all that was needed for TCEQ to have a workable compliance history equation. Further changes that would prohibit TCEQ from looking at notices of violation when escalating a penalty unless TCEQ took subsequent action or if the person was a repeat violator could have adverse effects. This could severely limit TCEQ's ability to come up with a workable equation for compliance history and limit the available penalties. TCEQ should have all enforcement data at its disposal when determining compliance history and should look at overall compliance and individual violations when considering penalty enhancements.

Creating a minimum penalty per day for a violation that may go undetected for many days could amount to large sums in penalties when that money could have been used to correct the violation.

Water use. TCEQ already has authority to curtail water use during a drought or other emergency shortage. Addressing the issue again would leave too many open-ended questions. The bill could provide TCEQ authority to curtail water usage in a way that was inconsistent with prior appropriations doctrine.

Texas Low-Level Radioactive Waste Disposal Compact Commission. A cap is needed on funding for the compact commission, as well as guidance on spending.

Abolishing the On-site Wastewater Treatment Research Council. The On-site Wastewater Treatment Research Council has volunteered valuable time and expertise guiding the grant process for on-site sewage research in Texas. There is a continuing need for a separate, stand-alone council to fund on-site research. The requirement for TCEQ to seek the advice of experts would be no match for the council's skilled, experienced members from across the state.

TCEQ does not have the resources to hold the important annual wastewater conference sponsored by the council. Also, TCEQ's oversight of the on-site wastewater research grant award process could be a conflict of interest, as the process has potential to change rules and regulations enforced by TCEQ.

Notes

The **HRO analysis** of HB 2694 appeared in Part One of the April 19 *Daily Floor Report*.

Disclosing composition of hydraulic fracturing fluids

HB 3328 by Keffer
Effective September 1, 2011

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HB 3328 requires well operators using hydraulic fracturing treatments to disclose the chemicals used in the treatments.

The Railroad Commission (RRC) must, by rule, require an operator of a well undergoing hydraulic fracturing treatment to complete a form posted on the hydraulic fracturing chemical registry website of the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. Information on the form must include the total volume of water used in the treatment and each chemical ingredient that is subject to the Material Safety Data Sheet under the federal Occupational Health and Safety Act (OSHA).

The operator must post the completed form online and submit it to the RRC with the well completion report. In addition, the operator must give the RRC a list, also to be made publicly available, of all other chemical ingredients not listed on the completed form that were intentionally included and used to create a hydraulic fracturing treatment. The RRC rules must ensure that an operator, service company, or supplier is not responsible for disclosing ingredients that were not purposely added to the treatment, occurred unintentionally, or were not disclosed to the operator by the service company or supplier. The RRC rule may not require that the ingredients be identified based on the additive in which they are found or that the concentration of such ingredients be provided.

The RRC also must adopt rules to prescribe a process for an operator or service company to withhold and declare certain information, including the identity and amount of the chemical ingredient used in a treatment, as a trade secret not subject to public information.

A person wishing to challenge a claim of entitlement to trade secret protection must file the challenge within two years of when the well completion report is filed with the RRC. Only the landowner on whose property the relevant well is located, a landowner who owns property adjacent to the well, or a state agency or department can make such a challenge.

The rules also must prescribe a process for an operator or service company to provide information, including trade secret information, to a health professional or emergency responder who needs it.

The RRC must adopt rules by July 1, 2012. Rules regarding the additional list of ingredients and ingredients not purposely added to the hydraulic fracturing treatment must be adopted by July 1, 2013. Disclosure of composition of hydraulic fracturing fluids applies only to a hydraulic fracturing treatment performed on a well for which an initial drilling permit is issued on or after the RRC's initial rules take effect.

Supporters said

Despite the obvious economic benefits and potential to reduce dependence on foreign sources of oil from hydraulic fracturing, its safety recently has been questioned. There are concerns that hydraulic fracturing threatens the Texas water supply. Despite no documented cases of groundwater pollution attributable to hydraulic fracturing in Texas or any other state, the limited public understanding of the science of hydraulic fracturing and the scant transparency required of the industry have caused misperceptions and suspicions regarding the practice.

Although a list of chemicals used in fracking must be provided at each site for the benefit of employees and emergency first responders, this list is neither inclusive nor specific. The chemical additives used in fracturing fluids are not fully disclosed to the public, but instead remain proprietary trade secrets. Some of the additives are toxic. Even a small amount of a toxic substance would be unacceptable if leaked into a drinking water supply. Current oversight is inadequate to protect water sources from the effects of hydraulic fracturing. HB 3328 would be a step toward transparency by requiring the full, public disclosure of the chemical composition of hydraulic fracturing fluids on a well-by-well basis.

The bill would protect confidential business information while still disclosing the information

needed for research, regulatory investigations, and medical treatment. HB 3328 would protect trade secrets by allowing operators, service companies, and suppliers to withhold the names and amounts of chemicals considered trade secrets. However, the bill would allow a landowner on whose property the well was located, a landowner who owned adjacent property, or a state department or agency to challenge a trade secret claim.

The natural gas industry currently is painted as a bad actor by broad-brush attacks. Basic regulations, such as disclosure, would insulate responsible companies from the actions of those who may not have the best interests of the broader industry or public in mind. HB 3328 would strike a balance between creating a sustainable market for business and ensuring public health and safety.

Opponents said

HB 3328 is unnecessary. Hydraulic fracturing has occurred safely for more than 60 years with no incidence of groundwater contamination directly attributable to the process. Also, the chemicals used in fracking make up less than 1 percent of the fracturing fluid. The risk of groundwater contamination from fracking is extremely remote, especially in areas like the Barnett Shale, where more than a mile of dense rock separates shallow freshwater aquifers from petroleum deposits. The geology in Texas, combined with safeguards required by the RRC in its regulation of oil and gas exploration and production, would prevent water used in hydraulic fracturing from migrating to a water table.

Notes

The **HRO analysis** of HB 3328 appeared in the May 11 *Daily Floor Report*.

Groundwater owned as real property

SB 332 by Fraser
Effective September 1, 2011

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SB 332 amends the Water Code by stating that the Legislature recognizes that a landowner owns the groundwater below the surface of his or her land as real property.

The groundwater ownership and rights entitle the landowner, including lessees, heirs, or assigns, to drill for and produce the groundwater below the real property without causing waste or malicious drainage of other property or negligently causing subsidence, but does not entitle a landowner to capture a specific amount of groundwater below the land and does not affect the existence of common law defenses or other defenses to liability under the rule of capture.

The phrase “except as those rights may be limited or altered by rules promulgated by a district” in relation to the landowner’s rights is deleted from the statute, which now asserts that nothing in the law may be construed as granting the authority to deprive or divest a landowner of groundwater ownership and rights.

SB 332 does not:

- prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by a groundwater conservation district;
- affect the ability of a groundwater conservation district to regulate groundwater production; or
- require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner.

Exemptions. SB 332 does not affect the ability of the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, or the Fort Bend Subsidence District to regulate groundwater.

Groundwater conservation district rules. SB 332 adds factors that a district must consider in adopting rules, including:

- groundwater ownership and rights;
- the public interest in conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and in controlling subsidence caused by withdrawal of groundwater from those groundwater reservoirs or their subdivisions, consistent with the objectives of the Conservation Amendment (Art. 16, sec. 59) in the Texas Constitution; and
- the goals developed as part of the district’s management plan.

Supporters said

The Texas Water Code, sec. 36.002 does not clearly define the ownership rights of landowners to groundwater. Therefore, SB 332 is necessary to reaffirm that landowners have an ownership interest in groundwater and a right to capture groundwater. This legislation would provide consistency in regulating this private property right.

SB 332 simply would restate current case law regarding the property rights of landowners and the duties of groundwater conservation districts. The bill would provide guidance to the courts by declaring groundwater a real property interest. The bill also would clarify that groundwater is a manageable state resource, as declared by the Texas Constitution in the early 1900s. Management of this resource should be through local control, which is vitally important to the interests of landowners. The bill also would clarify to what extent local groundwater conservation districts could manage the resource.

Despite concerns that the unclear meaning of the term “real property” in relation to groundwater would lead to additional court cases and additional takings claims, the Supreme Court has clearly stated that groundwater is part of the owner’s land, so it is real property.

SB 332 would not trigger a flood of regulatory takings lawsuits from landowners and bankrupt groundwater conservation districts, as some have claimed. Such law in Texas is well settled, and the standards and procedures for determining a taking of property are well developed to protect the interests of groundwater conservation districts and landowners. Regulation of and limitations on property rights do not automatically give rise to a valid takings claim. While landowners have a right to take legal action if they believe their rights have been unfairly restricted or taken, the burden of proof is on them, not the district. Landowners must meet a difficult legal standard to prove that their property has been taken. Most landowners are unable to meet these difficult standards and rarely win these takings suits. In addition, if a landowner sues a district and loses, the landowner must pay the attorney and expert witness fees of the district. This is not required of the district if the landowner wins. Therefore, a landowner would need to ensure that he or she had a good case to avoid losing money. All of these factors would deter landowners from suing a district.

Opponents said

SB 332 would make groundwater a real property interest, but there has never been a clear understanding of what the term “real property,” as it relates to groundwater, means in practice. This could lead to additional court cases to determine the true meaning of real property, as well as to additional takings claims.

Establishing something so definitive as real property could increase the number of cases brought by landowners in takings claims. Even if guidelines for groundwater districts were established, by stating a real property right, the landowner would have a stronger argument that a groundwater district action was a taking and that he or she needed to be compensated for loss of value. Takings claims could bankrupt a district and hinder its ability to operate.

The bill states that a district would not be prohibited from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with

well spacing. This language is too limiting and should instead say that a district’s ability to limit or prohibit the drilling of a well under these circumstances would not be affected. This would give greater authority to the district to protect groundwater supplies.

Other opponents said

SB 332 is unnecessary because it would simply restate current case law regarding the property rights of landowners and the duties of groundwater conservation districts.

Notes

The **HRO analysis** of SB 332 appeared in Part One of the May 23 *Daily Floor Report*.

Abolishing RRC, creating Oil and Gas Commission

SB 655 by Hegar
Died in conference committee

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SB 655 would have abolished the Railroad Commission (RRC) and created the Texas Oil and Gas Commission (OGC). The OGC would have continued until September 1, 2023. The bill would have changed the agency's governing structure, restricted political contributions, allowed the OGC to impose surcharges on fees, required a formal enforcement policy, and eliminated propane marketing promotion.

Name change. The Senate-passed version of the bill would have abolished the RRC and created the OGC. The House-passed version would have changed the name of the RRC to the OGC.

Governing structure and political contributions. The Senate version would have provided for a single elected commissioner with a term of four years. The House version would have retained the agency's current governing structure of three elected commissioners with six-year terms. The commissioner elected in 2012 and every sixth year after would have served as chairman, replacing the current practice of allowing the commission elect the chair.

Both versions of the bill would have established a limited time frame during which a commissioner could accept political contributions and would have prohibited a commissioner from knowingly accepting a political contribution for another office. The House version would have required a commissioner who became a candidate for another office to have resigned automatically unless the remaining term was one year or less. It would have prohibited a commissioner from knowingly accepting a political contribution from someone with a contested case before the commission until 30 days after a decision.

Commission funding and surcharges on fees. Both bills would have replaced the Oil Field Cleanup Fund with a new Oil and Gas Regulation and Cleanup Fund. The new fund would have included newly allowed surcharges on fees, plus revenue currently deposited into the oil field cleanup fund, minus certain penalty charges. Fee surcharges would have been allowed to recover the costs of commission functions

but could not have been imposed on the oil field cleanup regulatory fee on oil or gas. In determining surcharge amounts, the OGC would have adopted rules taking into account the time required for regulatory work, the number of individuals or entities from which commission costs could be recovered, the effect of the surcharge on operators of all sizes, the balance in the fund, and other factors deemed important.

Money in the new fund could have been used for purposes related to regulation of oil and gas development. The House version would have allowed the Legislature to supplement the fund with general revenue.

Penalties that would have been redirected from the Oil Field Cleanup Fund to general revenue in both bills would have included those for violations related to safety, pollution, abandoned wells, underground storage facilities for natural gas, saltwater disposal pits, and hazardous liquid salt dome storage facilities.

The Senate version would have discontinued the Oil Field Cleanup Fund Advisory Committee. The House version would have retained it as the Oil and Gas Regulation and Cleanup Fund Advisory Committee.

Enforcement. Both versions would have required the commission to adopt an enforcement policy for evaluating safety and pollution violations. It would have included a process for classifying violations and standards on which violations could be dismissed once compliance was achieved. Employees would have had to take into account the permittee's history of violations in determining whether to dismiss a violation. The House version would have required commission guidelines to take into account the economic benefit gained through a willful violation.

The Senate version would have transferred the agency's contested case hearings to the State Office of Administrative Hearings. The House version would have retained current law allowing the commission to conduct its own enforcement hearings.

Propane marketing. Both bills would have abolished the Alternative Fuels Research and Education Division of the agency, which promotes propane.

Pooling. Both bills would have allowed the commission, upon request of an interested party, to hold a hearing on an application for pooling of mineral interests at a location near the proposed unit. The commission would have established procedures requiring an interested owner to notify the commission before withdrawing an application if a hearing had been scheduled and requiring an applicant who refiled an application withdrawn without proper notice to pay an extra filing fee.

Pipeline safety. Both bills would have directed the commission to adopt safety standards for the prevention of damage to interstate and intrastate hazardous liquid or carbon dioxide pipeline facilities, rather than only intrastate pipelines. The House version would have required the commission to study the odorization of natural gas transported in gathering and transmission lines in populated areas.

Hydraulic fracturing. The House version would have required the commission to submit an annual report to the Legislature on the effects of hydraulic fracturing treatments on environmental quality.

Well spacing. The House version would have required an applicant for an exception to a well spacing requirement in the Barnett Shale to provide a notice in plain language to those affected by the exception to the rule. The notice would have explained that the person had the right to object to the exception and that not objecting could result in the depletion of gas from the person's property.

Regulation of waste. The House version would have required the commission to adopt rules on the use of land application for treatment and disposal of oil field fluids or oil and gas wastes. The commission would have issued permits for this purpose. The House version also would have given the commission jurisdiction over pipelines used to transport saltwater oil and gas waste.

Supporters said

Name change. The Railroad Commission of Texas no longer regulates railroads, making its name both outdated and misleading.

Governing structure and political contributions. Supporters of the Senate version of the bill said that moving to a one-commissioner structure would save an estimated \$1.2 million each year in salaries and benefits for commissioners and their staff. The three-commissioner structure is inefficient and often leads to conflicting mission goals. It allows each commissioner to champion separate priorities instead of encouraging them to work together. The three-commissioner structure also has led to a lack of accountability when problems arise. The RRC is the only state agency with three elected officials. Several others operate with one commissioner, such as the General Land Office and the Department of Agriculture.

The bill would encourage the commissioner to focus on the OGC position rather than a campaign for another office by limiting when campaign contributions could be accepted.

Commission funding and surcharges on fees. Supporters of the Senate version of the bill said it would make the OGC self-supporting, saving \$25 million in general revenue, with a goal of ensuring that the agency was fully funded and able to attract qualified employees.

Enforcement policy and hearings. Requiring the OGC to adopt an enforcement policy in rule would lead to more consistent enforcement and allow for public input, which is not possible under the current informal penalty guidelines.

Supporters of the Senate version said the State Office of Administrative Hearings (SOAH) would add independence and impartiality to the regulatory process. Transferring hearings to SOAH would clearly separate the OGC's role as a party in a hearing from its role as the hearing conductor. SOAH routinely hears complex enforcement cases involving highly technical matters, such as for the Texas Commission on Environmental Quality and the Public Utility Commission.

Propane marketing. The commission's propane marketing expenses have exceeded revenue collected through industry fees in recent years. The agency's primary responsibility is to ensure the safe handling and distribution of propane, and involvement in promoting propane can present a conflict of interest. The state should avoid promoting a specific product in order not to appear partial to one industry or product over another.

Pooling. Pooling hearings currently are held in Austin, which can be inconvenient for those in major producing regions, such as the Barnett Shale. The bill would allow for in-person and telephone hearings in other locations and would introduce penalties for canceling hearings.

Opponents said

Name change. Opponents of the Senate version of the bill said that abolishing the RRC could result in the state losing primary enforcement responsibility for the Underground Injection Control Program, which is subject to Environmental Protection Agency approval. The RRC should be continued under a new name, as in the House version, rather than abolished.

Governing structure and political contributions. Opponents of the Senate version of the bill, which would have required a single commissioner, said that a three-member agency would keep the OGC as a deliberative body while allowing public discussion of policy issues in open meetings. The diversity of experience and knowledge provided by three commissioners enables better decision-making. Three commissioners are ideal because the agency decides contested case hearings, weighing facts and law similarly to an appellate court's panel of judges. Retaining three commissioners also would prevent major swings in Texas energy policy that could be detrimental to the state economy. With three commissioners, significant policy changes would not occur without the concurrence of at least one other commissioner.

Voters have elected the current commissioners. Switching to a one-commissioner structure, as the Senate version would do, would improperly remove duly elected officials.

Opponents of the Senate version said the political contribution provisions would not go far enough. Prohibiting contributions from those with business before the commission is necessary to avoid any appearance of impropriety.

Commission funding and surcharges on fees. Opponents of the Senate version said the Oil Field Cleanup Fund Advisory Committee should be retained. It has been an important part of efforts to accelerate the plugging of orphaned wells and the remediation of orphaned sites.

Enforcement policy and hearings. While a standardized enforcement policy should lead to more consistent enforcement, fine amounts should be evaluated and adjusted as necessary to ensure deterrence.

Opponents of the Senate version, which would have transferred contested case hearings to SOAH, said the OGC was best suited to conduct enforcement hearings because SOAH lacks both technical expertise and a comprehensive understanding of the industry, including conflicting property rights. The Legislature moved contested utility rate cases to SOAH in 2001, but moved them back to the RRC in 2003 when promised savings were not achieved. Prior experience indicates that the OGC would be best equipped to conduct the hearings.

Notes

SB 642 by Hegar, which revises the Sunset review of various agencies, extended the Railroad Commission until September 1, 2013. In reviewing the Railroad Commission again, the Sunset Advisory Commission is not limited only to determining the appropriateness of its report to the 82nd Legislature but may include whatever recommendation it considers appropriate.

The **HRO analysis** of SB 655 appeared in Part One of the May 2 *Daily Floor Report*.

Revising the Texas Water Development Board

SB 660 by Hinojosa
Effective September 1, 2011

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SB 660 makes various changes to Texas Water Development Board (TWDB) administration and water management. It amends the current process for developing desired future conditions (DFCs) for aquifers. This includes amending the public notice requirements for joint planning meetings in groundwater management areas and for the adoption of DFCs of aquifers and requiring proof of notice in submission of DFCs to TWDB. SB 660 requires groundwater management areas to document factors considered in adopting DFCs and to submit that documentation in an explanatory report to TWDB.

SB 660 requires a representative of a groundwater conservation district in each groundwater management area that overlaps with a regional water planning group to serve as a member of that regional water planning group. It requires regional water planning groups to use the DFCs in place at the time of adoption of TWDB's state water plan in the next regional water planning cycle. It requires the state water plan to include an evaluation of the state's progress in meeting future water needs. The bill provides for the development and use of a uniform methodology for calculating water use by a municipality or water utility for water conservation plans. It requires municipalities and water utilities with more than 3,300 connections to implement reporting measures established by TWDB and the Texas Commission on Environmental Quality (TCEQ). It defines TWDB's water financial assistance bonds status for the state debt limit so that nonself-supporting general obligation water bonds can be removed from the constitutional debt limit under certain circumstances. It provides for legal action to be taken for default of payment on TWDB's financial assistance programs. SB 660 charges the director of the Texas Natural Resources Information System (TNRIS) with serving as the state geographic information officer, and it abolishes the Texas Geographic Information Council.

The bill also adds and modifies standard Sunset provisions governing rulemaking and dispute resolution and complaints. TWDB will be reviewed under the Sunset process with agencies scheduled to be abolished in 2023.

Supporters said

As a result of the Sunset Advisory Commission's review of TWDB, SB 660 would make several statutory modifications to improve the functions and duties of the agency.

Membership on regional planning group. SB 660 would require a representative of a groundwater conservation district in each groundwater management area that overlapped with a regional water planning group to serve as a member of that regional water planning group. The management area representative would have to represent a district located in the regional water planning area. This would help prevent any disconnect in developing desired future conditions (DFCs) and planning to meet the state's future water needs.

Groundwater management area boundaries currently do not align with regional water planning boundaries. Groundwater conservation districts may informally reach out to regional water planning groups with overlapping jurisdictions, but nothing ensures coordination between the entities in determining the amount of available groundwater for planning.

Desired future conditions. SB 660 would establish a more rigorous process for adopting DFCs. It would promote more input into the joint planning process during the establishment of the DFC and improve the process for local decision-making in groundwater matters.

It is critical that there be meaningful checks and balances in the establishment of DFCs and in determining what is reasonable. The bill would require that the established DFCs provide a balance between the highest practicable level of groundwater production and the conservation of the resource. This was consensus language agreed to by stakeholders in developing the bill. Despite concerns that in the balancing test, the term "highest practicable level" of groundwater production was not defined and could be difficult to prove, similar

language on “highest practicable level” currently is in surface water law on water conservation related to applying for an interbasin transfer. In surface water law, however, there is nothing against which to balance the “highest practicable level,” leaving it open-ended. SB 660 would avert this problem because conservation, preservation, protection, recharge, and prevention of waste of groundwater and control of subsidence in the management area would be balanced against the highest practicable level of groundwater production.

While some feel that the process for challenging the reasonableness of a DFC at TWDB should be replaced with a process to appeal an individual district’s DFC at the State Office of Administrative Hearings (SOAH), TWDB is better informed and better able to make decisions regarding DFCs than SOAH. Requiring a district to request a contested case hearing could lead to more lawsuits decided by people with little knowledge of the water issues involved.

Opponents said

While SB 660 would make some statutory modifications to improve the functions and duties of the agency, some of the modifications are unnecessary and could confuse and burden existing processes.

Membership on regional planning group. SB 660 would require a representative of a groundwater conservation district in each groundwater management area that overlapped with a regional water planning group to serve as a member of that regional water planning group. This is unnecessary because the regional planning groups already are well balanced and well represented without adding more members. Adding members to an already large group could confuse and delay the process.

Desired future conditions. SB 660 would provide a balancing test for proposed DFCs. Proposed DFCs would have to provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area. While the balancing test is an important tool, the term “highest practicable level” of groundwater production would not be defined, making it difficult to prove that the highest practicable level of groundwater production was achieved when adopting a DFC.

The current process for questioning the reasonableness of DFCs at TWDB lacks standard components of administrative processes designed to ensure a clear, fair, and meaningful resolution. The current process should be replaced with a process to appeal a groundwater conservation district’s DFCs to SOAH. This would provide a due process remedy that currently is lacking. Appeals to district courts under substantial evidence review require some evidence for review, so the SOAH hearing would be important. Once a case reached district court, a substantial evidence review would be a simpler, faster, less expensive process than a trial de novo.

Notes

The **HRO analysis** of SB 660 appeared in the May 19 *Daily Floor Report*.

Defense to greenhouse gas nuisance lawsuit

SB 875 by Fraser
Effective June 17, 2011

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SB 875 creates an affirmative defense to a nuisance or trespass administrative, civil, or criminal action arising from greenhouse gas emissions if the actions that resulted in the alleged nuisance or trespass were authorized by a rule, permit, order, license, certificate, registration, approval, or other form of authorization issued by the Texas Commission on Environmental Quality (TCEQ) or the federal government and:

- the person was in substantial compliance with that authorization while the alleged nuisance or trespass was occurring; or
- TCEQ or the federal government exercised enforcement discretion in connection with the actions that resulted in the alleged nuisance or trespass.

These provisions do not apply to nuisance actions based solely on a noxious odor.

Supporters said

SB 875 would protect Texas businesses from greenhouse gas nuisance and trespass lawsuits that stem from the EPA's unilateral and flawed proposed regulation of greenhouse gases. Potential damage from greenhouse gases is complicated to assess, and a business should not have to protect itself from charges that it emitted an undefined and speculative harm. The EPA has not yet issued regulations, and any regulations will be subject to intense scrutiny and debate. SB 875 would apply only to environmental enforcement actions initiated by state or local governments because the bill specifically would address only administrative, civil, and criminal actions brought under Water Code, ch. 7. It would not impact the right of an individual to bring suit.

SB 875 would address the disturbing trend of government entities trying to impose environmental regulation through nuisance law, such as the attempt by former Houston mayor Bill White to use a nuisance ordinance to regulate air toxins that already were regulated by the state. A company that operates in substantial compliance with its permits should not have to spend hundreds of thousands of dollars defending

itself from speculative greenhouse gas claims, especially when this ultimately would result in passing legal expenses onto consumers.

Opponents said

SB 875 would leave the public without any viable legal avenue to protect itself from the harm caused by greenhouse gases and would gut the age-old common law right to protect one's health and welfare through nuisance and trespass lawsuits. Greenhouse gases have been defined by the EPA as harmful pollutants, and entities that suffer harm should be able to sue for damages. There is disagreement as to whether this bill would prevent individuals from prevailing on greenhouse gas nuisance suits, but either way, government entities should be able to protect their constituents. The legal actions of nuisance and criminal trespass are even more important to maintain in the absence of any currently operative state or federal permit requirements specifically limiting the emissions of greenhouse gases.

SB 875 is misleading because it appears to imply that since the government already protects the public through the permitting process, the public does not need the protections of nuisance and trespass actions. In fact, the permits currently required do not address greenhouse gases at all, so the permitting process never considered the level of harm caused by the greenhouse gases.

The bill also would appear to grant immunity from nuisance or trespass suits if TCEQ or the EPA exercised enforcement discretion related to greenhouse gas emissions. This also would imply that the public was already protected, but again, the enforcement discretion could be to take no action.

Notes

The **HRO analysis** of SB 875 appeared in Part One of the May 24 *Daily Floor Report*.

Revised energy efficiency goals

SB 1125 by Carona
Effective September 1, 2011

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SB 1125 amends Utilities Code provisions on energy efficiency goals and programs, public information, and the participation of certain energy markets. It requires electric utilities to submit energy efficiency plans to the Public Utility Commission (PUC) and requires the PUC to publish information on energy efficiency programs on its website.

Distributed renewable generation and renewable energy technology. Each electric utility in the Electric Reliability Council of Texas (ERCOT) must make its best effort to encourage and facilitate energy efficiency programs and demand response programs, including programs for demand-side renewable energy systems that use distributed renewable generation or reduce energy consumption by using a renewable energy technology, a geothermal heat pump, a solar water heater, or another natural mechanism of the environment.

Increased energy efficiency goals to reflect PUC rule. SB 1125 codifies recent PUC rules to increase the existing energy efficiency goals for residential and commercial customers, using criteria specified in the bill.

The PUC is required to establish a procedure for reviewing and evaluating market-transformation program and other options. In evaluating program options, the PUC may consider the ability of a program option to reduce costs to customers through reduced demand, energy savings, and relief of congestion. Utilities may choose to implement certain program options approved by the PUC after its evaluation in order to satisfy energy efficiency goals.

Change of metric to a percentage of peak demand. SB 1125 changes the metric for calculating energy efficiency goals for electric utilities to base it on peak demand rather than on new demand.

Cost cap. Energy efficiency measures will be subject to cost ceilings established by the PUC.

Alternatives to the program. An electric utility in an area outside of ERCOT can achieve its energy

efficiency goals by providing rebates or incentives to its customers to promote the program or develop a new program offering the same cost-effectiveness as standard-offer programs and market-transformation programs.

An electric utility can use energy audit programs to achieve these goals if they do not constitute more than 3 percent of the total program costs and do not cause a utility's program portfolio to be no longer cost-effective.

Rural carve-out. If an electric utility operating in an area open to competition shows the PUC that it cannot meet the energy efficiency requirements in a rural area through retail electric or competitive service providers, it instead can achieve the energy efficiency goals by providing rebates or incentive funds to customers in the rural areas to promote or facilitate the program.

Supporters said

Energy efficiency lowers utility bills for consumers by avoiding higher costs of electric generation. Consumers save between \$2 and \$3 for every dollar spent on energy efficiency programs. The American Council for an Energy Efficient Economy (ACEEE) estimates that Texas, under its current efficiency program, will drive a net savings to customers of \$3 billion over the period 2012 to 2030. A recent ACEEE report suggests that Texas could increase those savings to \$14 billion over the same time period with increased efficiency goals.

A recent PUC report, known as the Itron report, stated that increased energy efficiency goals would generate between \$4.2 billion and \$11.9 billion in net benefits to citizens of Texas. This past summer, the PUC undertook rulemaking to raise the goals from 20 percent of growth in demand to 30 percent. Energy efficiency also positively impacts the environment and eases stress on the electric grid. SB 1125 would take a step toward achieving those increased savings by changing the metric of the energy efficiency goals from a percentage of new demand to percentage of peak demand. The new metric would establish a more predictable goal instead

of one vulnerable to variables such as downturns in the economy, which impact the growth of new demand.

Opponents said

Since 2002, Texas consumers have paid \$591.1 million to support the state's energy efficiency program. The 2009 costs totaled \$104.8 million, and the program's estimated cost for 2010 is \$114.8 million. The bill's revisions to the state's energy efficiency goals could increase these costs.

It is unclear if Texans are getting their money's worth from energy efficiency programs because the full costs of the programs are not accurately measured and the benefits are overvalued. Given the existing data and methodology, the returns of the program could be negative. Government-mandated energy efficiency programs are designed to decrease energy use generally by increasing the cost of energy, which decreases energy use and, subsequently, economic growth. The state's evaluation of the energy efficiency program should encompass all the costs involved with energy efficiency, including those related to the program, consumers, and the economy. The state's energy efficiency program should be closely examined to ensure that it actually reduces the cost of energy use.

Notes

The **HRO analysis** of HB 1629 by Anchia, the companion bill to SB 1125, appeared in the May 3 *Daily Floor Report*.

Disposing of low-level radioactive waste

SB 1504 by Seliger
Effective September 1, 2011

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Texas is the host state for the Texas Low-Level Radioactive Waste Disposal Compact with Vermont, meaning Texas must develop a facility for the disposal of low-level radioactive waste generated within the compact's party states. In accordance with the compact and state law, the Texas Commission on Environmental Quality (TCEQ) has issued a license to Waste Control Specialists (WCS) to build and operate a facility in Andrews County for the disposal of the compact's low-level radioactive waste. Construction of the disposal facility is expected to be completed in late 2011.

SB 1504 allows WCS, as a compact waste disposal facility holder, to accept out-of-state, low-level radioactive waste from states not part of the compact (nonparty waste) for disposal, with an additional surcharge, in its facility in Andrews County. The bill limits the amount of nonparty waste the facility may accept and requires TCEQ to study the facility's available volume and radioactivity capacity for disposal of both party-state and nonparty compact waste. TCEQ also must review the adequacy of WCS's financial assurances, including its financial security and ability to cover the state's liabilities. The bill reopens compact membership to other states and establishes a joining fee.

SB 1504 also sets fees on any radioactive waste or elemental mercury stored at the compact facility for more than one year.

Supporters said

SB 1504 would finalize an eight-year process for the disposal of low-level radioactive waste that began in 2005 when authorization was given by the Texas Legislature and would create a new revenue stream for the state of Texas.

The bill would guarantee that the disposal facility opened upon completion of construction, ensuring the availability of a safe, secure, remote facility to dispose of low-level radioactive waste. Low-level radioactive waste is temporarily stored at thousands of locations throughout the state, mostly in heavily populated areas. This waste is generated by hospitals, universities,

research centers, and power plants. The compact facility would offer a safe, permanent disposal solution.

The WCS site in Andrews County was selected due to its location atop a ridge of almost impermeable Dockum red bed clay in a relatively remote, sparsely inhabited area of far west Texas. The nearest residence is about 3.5 miles to the west in New Mexico. Significant population growth in the immediate vicinity is unlikely because of the nature of land ownership and the lack of any surface water and readily potable groundwater.

The local water well drillers, oil and gas producers, and WCS have drilled thousands of wells and spent tens of millions of dollars to verify the subsurface properties of western Andrews County and, as a result, have delineated the boundaries of the Ogallala aquifer. No groundwater has ever been found in the red bed clays within the boundaries of the proposed disposal units.

SB 1504 would ensure that Texas had access to the facility by reserving facility capacity for Texas waste. Also, the bill would direct TCEQ to prepare a report for the Texas Legislature on the facility after the first year of operation. Completing the study before the importation of waste, as some have suggested, would significantly delay importation, the revenue driver for the state due to surcharges on out-of-compact waste.

By allowing limited importation of waste from nonparty states, this legislation would enable Texas to fulfill its obligation to the compact by ensuring a low-level radioactive disposal facility was open and operating for Texas generators when needed. Despite concerns about litigation if WCS entered into a contract before the capacity study was completed and results indicated it could not fulfill the contract, the contracts for disposal would be subject to state law, and the compact commission would not approve future waste disposal unless it was feasible.

As part of the license application process, WCS submitted a transportation impact assessment that noted the characteristics of the waste sources and transportation routes and described the radiological

and nonradiological impacts associated with waste transportation. The transportation of radioactive waste was considered thoroughly in the WCS license application. Based on the analysis in the license application, the low transportation incident rates for radioactive materials, and federal safeguards for shipments of radioactive materials, the transportation of nonparty waste is expected to have a negligible impact on communities along transportation routes to the WCS facility in Andrews County.

WCS has made a substantial real cash investment but has not received a penny of return on it. It is a general business practice to expect a return on an investment. The proposed rate of return is reasonable, especially compared to those for other high-risk investments, such as technology or biotechnology start-up ventures.

The primary benefit of importing nonparty waste to the compact facility would be the dramatic decrease in the cost of disposal for compact generators. The generators then could pass the savings on to their customers, benefiting the citizens of Texas and Vermont.

Opponents said

Among the many concerns about the importation and disposal of low-level radioactive waste into the facility in Andrews County are the risk of groundwater contamination, the risk of accidents resulting in exposure to waste during its transport from other states into Andrews County, and the possibility that opening the facility to out-of-state waste would cause insufficient capacity to meet Texas' and Vermont's disposal needs.

Due to the proximity of the WCS dump site in Andrews County to the Ogallala and Dockum aquifers, groundwater could intrude into the proposed disposal units and make contact with the waste from the water tables near the facility. Also, a leak could cause contamination of the aquifers. Burial most likely would be the method of disposal, and disposal sites of this type have leaked in the past. Further, there are no geological barriers in the sediments to stop the waste from infiltrating the aquifer water if a spill occurred. Contamination of the Ogallala aquifer would devastate the area environmentally and economically, since it is one of the most important water sources in the Plains Region, used for residential and industrial purposes and agriculture, the base of the area's economy. Texas is one

of the leading states irrigating from the aquifer, which accounts for about 40 percent of Texas' water use.

Another health and safety concern is the risk of accidents during transport of the waste from all over the country. In the U.S., low-level radioactive waste typically is transported by truck, and this bill would significantly increase the number of trucks carrying radioactive waste on highways throughout the country and in Texas. Some of the communities that occupy the areas surrounding interstate highways are heavily populated and could be exposed to radioactive materials and devastated by damages from any accidents. Although the radioactivity of the waste would be low level, the severity and potential of transportation accidents would be too high.

SB 1504 would direct TCEQ to prepare a capacity report for the Legislature after the first year of operation, but a great deal of waste is anticipated to be accepted by the facility in that first year. The study should be conducted before importing out-of-state waste in order to assess the validity of WCS claims that the site has excess capacity and to ensure adequate disposal capacity for Texas and Vermont waste generators. WCS should not be able to contract for importation of out-of-state waste before the study is complete. If WCS entered into a contract during the study and results indicated it could not fulfill the contract, expensive litigation could result.

WCS claims that for the facility in Andrews County to be profitable, it needs to allow nonparty, out-of-state waste. Yet WCS has exaggerated its high capital costs in making this claim. In addition, Texas should protect this state and bar other states' waste, rather than allowing it for the sake of profit.

The Andrews County waste dump is a state-owned facility leased to WCS. WCS would make the money, while Texas would get stuck with the waste and the liability. The state needs to ensure that Texas sets the rates for imported waste and receives the lion's share of the profits, while allowing WCS to get a reasonable return on investment.

Notes

The **HRO analysis** of SB 1504 appeared in the May 17 *Daily Floor Report*.



Government Regulation

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Modifying custodial arrangement for the Alamo

HB 3726 by Guillen
Effective September 1, 2011

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HB 3726 places the Alamo complex in San Antonio under the jurisdiction of the General Land Office (GLO). The bill requires the GLO to hire staff to preserve and maintain the Alamo complex and to contract for professional services. The GLO must prepare an annual budget and work plan that includes preservation, construction, and usual maintenance for the Alamo complex. The GLO may partner with any qualifying nonprofit organization for fundraising or other services and contract with the nonprofit for the performance of any activity.

The GLO must enter into an agreement with the Daughters of the Republic of Texas for the management, operation, and financial support of the Alamo. The agreement must provide for oversight by the GLO; require submission of financial information from the Daughters; establish management standards; address construction, maintenance, and repair; include a dispute resolution process; and address funding and payment for costs. The State Preservation Board must assist the GLO with duties relating to the Alamo complex upon the GLO's request.

The bill also creates the Alamo Complex Account in the General Revenue Fund to support the preservation and improvement of the complex. The account consists of fees and other revenue from Alamo operations, grants and donations designated for the Alamo, income earned on investments of funds in the account, and other transfers and legislative appropriations. The GLO can accept a gift or grant for any purpose related to preserving and maintaining the Alamo complex. The account is exempt from state laws governing dedicated funds.

The GLO may establish a nine-member Alamo Preservation Advisory Board to provide advice on promoting and supporting the Alamo complex, inspiring virtues of honor and Texas pride, and other topics.

Supporters said

HB 3726 would provide much-needed oversight to the current arrangement with the Daughters of

the Republic of Texas for management of the Alamo complex in San Antonio. The bill would forge an appropriate compromise that addresses concerns raised by the attorney general and other parties about potential mismanagement of the Alamo. It would present the statutory framework necessary to increase the accountability of the management of the Alamo while preserving the important and historic relationship with the Daughters.

The bill would avoid more drastic proposals that would completely sever the role of the Daughters and shift full responsibility for managing and operating the Alamo to a state agency, such as the Texas Historical Commission. Completely transferring responsibility from the Daughters would unwisely terminate what has been a successful stewardship for over a century and would relinquish a network of committed volunteers and long-standing educational programs that the Daughters have established.

The bill would empower GLO to craft an agreement with the Daughters that addressed legitimate concerns without eroding the benefits of the Daughters' management. The agreement would have to provide for needed physical repairs to the Alamo complex and require submission of key financial information from the Daughters, both of which have been subjects of ongoing controversy regarding management of the Alamo.

Opponents said

HB 3726 would add layers of bureaucracy to a beneficial arrangement that has prevailed for over a century. The Daughters of the Republic of Texas have impressively maintained the Alamo in good condition without charging admission to the more than 2.5 million tourists who visit each year and without relying on any funds from federal, state, or local government. Recent concerns about management of the Alamo have been exaggerated. The Daughters are well equipped to preserve and maintain the Alamo without state intervention.

Other opponents said

HB 3726 should go further and transfer responsibility for the management of the Alamo to a state agency. While the Daughters of the Republic of Texas have managed the Alamo effectively in the past, current reports suggest mismanagement. For example, the organization has been unable to raise the funds necessary to preserve the physical integrity of the structure, resulting in a leaky roof and other unresolved physical problems. The Daughters have shown poor decision-making by entering into a questionable contract for marketing and have resisted providing important information that would ensure financial transparency.

The Alamo is the cradle of Texas liberty and should be held to the highest standards of management. Texans deserve a clear window, as would be provided by a state agency, into how such an important piece of Texas history is managed.

Notes

HB 3726 passed the House on the Local, Consent, and Resolutions Calendar on April 21 and was not analyzed in a *Daily Floor Report*.

The 82nd Legislature considered numerous related bills that would have modified custodial arrangements of the Alamo:

SB 1841 by Van De Putte, as introduced, would have placed the preservation and maintenance of the Alamo under the Texas Historical Commission.

SB 1839 by Van De Putte would have required the custodian to submit an annual report to certain state agencies.

SB 1912 by Wentworth would have required an annual report and would have established an advisory board for the Alamo.

Revising standards for eminent domain authority

SB 18 by Estes
Effective September 1, 2011

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SB 18 modifies how the taking of private property through eminent domain authority is governed, including evidence to be considered by special commissioners in making decisions on awards for damages, the rights of property owners to repurchase taken property, the requirement of a bona fide offer to purchase property, and a landowner's right to access information from an entity taking his or her property. The bill prohibits a government or private entity from taking land not for a public use. It also requires government entities to pay relocation expenses for displaced property owners and provide a relocation advisory service.

Assessments and damages. Special commissioners, in assessing actual damages to a property owner from a condemnation, must take into account a material impairment of direct access on or off the remaining property that affected the market value of the remaining property, but they cannot consider any circuitry of travel and diversion of traffic common to many properties.

Right of repurchase. An owner of property taken through eminent domain may repurchase the property from any entity at the original price paid to the owner if the public use for which the property was taken is canceled before the property is used for that purpose or if, within 10 years after the taking, the property becomes unnecessary for the public use for which it was acquired or no "actual progress," as defined in the bill, is made toward the public use.

Bona fide offer. The bill requires an entity with eminent domain authority to make a bona fide offer to acquire property from an owner voluntarily. Under the bill, an entity with eminent domain authority has made a bona fide offer if its final offer is equal to or greater than a certified appraisal and the entity meets other requirements.

If a court hearing a suit determines that a condemning authority did not make a bona fide offer, the court must abate the suit, require the entity to make a bona fide offer, and order the condemning entity to pay costs authorized in current law and reasonable attorney's fees incurred by the property owner directly related to the failure to make a bona fide offer.

Eminent domain process. SB 18 requires a governmental entity to approve the use of eminent domain at a public meeting by a record vote. It also establishes procedures for voting on specific properties and groups of properties.

The bill expands disclosure requirements to pertain to all entities with the power of eminent domain instead of only governments. An entity may not include a confidentiality provision in an offer or agreement to take property. The entity must inform a property owner of his or her right to discuss the offer with others or to keep the offer confidential. An offer to purchase or lease a property must be sent via certified mail and include any appraisal reports acquired in the preceding 10 years.

General provisions. Entities that were created or that acquired the power of eminent domain before December 31, 2012, must submit a letter to the comptroller acknowledging that the entity was authorized by the state to exercise the power of eminent domain and identifying the legal source for that authority. An entity that does not submit a letter by September 1, 2013, will lose its authority to exercise eminent domain.

A property owner whose property is taken for an easement for a gas or oil pipeline may construct a road that meets certain restrictions in the bill at any location above the easement.

Supporters said

SB 18 would provide a balance between protections for private property owners and the needs of taxpayers generally.

Uses of eminent domain. The bill would add to statute a requirement similar to one added to the Texas Constitution in 2009 that land be taken only for a public use. The public use language in the bill would help protect property owners against abuse without going too far and requiring that land be taken only for a "necessary" use. Adding a requirement that all takings be necessary could create substantial legal confusion and force condemning authorities to defend the necessity

of each use of eminent domain authority in court. This would be a major cost to taxpayers, encouraging excessive litigation and potentially tying up critical public projects, neither of which Texans can afford.

Damages and assessments. Reasonably expanding the range of plausible damages that could be awarded to property owners is necessary to ensuring just compensation for those subject to condemnation. SB 18 would do this by allowing special commissioners, who are appointed to determine adequate awards for property owners, to consider a “material impairment of direct access” to a property. This would expand the current practice of allowing only “material and substantial” impairments to access to a property. Eliminating the word “substantial” would require special commissioners to award damages for impaired access to a property, such as eliminating one entrance and exit to and from a parking lot that had other entrances and exits.

Right of repurchase. SB 18 would provide for the repurchase of condemned property at the price the entity paid at the time of acquisition. This would implement authority granted by Art. 3, sec. 52(j) of the Texas Constitution, which was added in 2007 when voters approved Proposition 7 (HJR 30 by Jackson). Allowing the repurchase price to be set at the original sale value, and not the current fair market value as required in the Property Code, would enable property owners to reclaim equity for appreciating property to which they were entitled. Only property owners subject to takings that wrongfully resulted in canceled, absent, or unnecessary public uses would be eligible for restitution.

Bona fide offers. SB 18 would install clear requirements for initial offers to purchase property before an entity initiated eminent domain proceedings. The bill would require specific processes, including adhering to timelines and providing relevant appraisals and other information, and it would prohibit confidentiality agreements. If a condemning entity did not meet the bill’s requirements, the entity would have to pay court costs and other costs the property owner assumed in contesting the action.

Opponents said

SB 18 would impose additional costs on Texas taxpayers for the legitimate exercise of eminent domain authority. Expanding damages that special commissioners could consider when deciding on an award to include a “material” but not “substantial” impairment of direct access would add costs to takings

for transportation projects for the Texas Department of Transportation, mobility authorities, and local governments. The provision also could have unintended consequences if courts were more permissive than expected in allowing for damages that were “material impairments.”

Other opponents said

SB 18 would fall short of the eminent domain reform Texans need and deserve.

Uses of eminent domain. Not restricting property takings to a “necessary” public use is a major shortcoming of the bill. The Texas Constitution already requires that property takings be made for a public use, but it does not require that each taking be necessary to accomplish that public use. Requiring that a taking be necessary would force condemning entities to defend the taking as essential to a particular project. This would help rebalance the power relationship between condemning entities and property owners. Current law provides no firm legal ground to challenge the legitimacy of an unnecessary property taking.

Right of repurchase. The bill actually could weaken the right of repurchase in current law. Current law triggers the right of repurchase if a government entity cancels a public use on a parcel. The proposed bill would leave a loophole for local governments, which could enact resolutions to meet only one of the several conditions necessary to satisfy “actual progress” in the bill. Many of the conditions necessary to achieve “actual progress” are so loosely worded that most entities could satisfy the requirements with minimal effort.

Bona fide offers. The bill’s provisions for bona fide offers would not adequately protect property owners. SB 18 would provide specific conditions that, if met, would constitute a bona fide offer. The conditions in the bill are focused on small procedural matters and largely reflect current practices, which have proven decidedly to favor condemning entities over property owners. Bona fide offer provisions in the bill likely would compel condemning entities to minimally satisfy the provisions on paper but would not guarantee a fairer process for property owners.

Notes

The **HRO analysis** of SB 18 appeared in the April 13 *Daily Floor Report*.

New requirements for homeowners' associations

SB 142 by West/other bills
Died in the House/Various effective dates

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SB 142 would have revised procedures governing homeowners' associations (HOAs) by limiting the types of restrictive covenants associations could impose, amending laws on attorney's fees, and changing requirements for resale certificates. The bill also would have imposed requirements for HOA board meetings and public information, fines and assessments, foreclosure, notice, priority of payments, and voting requirements. While SB 142 died in the House, many of its provisions were included in other bills that were enacted.

Foreclosure. Under **HB 1228**, an association is prohibited from foreclosing to collect an owner's assessment lien without first obtaining a court order. The Texas Supreme Court must adopt rules by January 1, 2012, establishing expedited foreclosure proceedings for use by an association in foreclosing an assessment lien. HB 1228 also prohibits an HOA from foreclosing on a property unless it first complies with certain written notice requirements. The recipient of the notice has 60 days to cure the delinquency before an association may initiate a judicial foreclosure or post a notice to auction the property.

A covenant granting a right of foreclosure may be removed from or adopted into an association's declaration by a vote of at least 67 percent of property owners. A vote for this purpose may be initiated by a petition submitted by 10 percent of owners in the association.

SB 101 strengthens current protections against foreclosure for active military members. **HB 2761** prohibits associations from foreclosing on an owner for fines associated with records requests alone.

Payment schedule. Under **HB 1228**, an association with more than 14 lots is required to adopt reasonable guidelines to establish an alternative payment schedule for delinquent assessments or other amounts owed without accruing additional penalties. An association may charge interest and reasonable costs associated with administering the plan, which must have a term of at least three months. An association does not have to enter into a plan with an owner who failed to honor the terms

of a plan within the past two years. An owner has a right to a payment plan even if an association fails to file the required guidelines.

Priority of payments. HB 1228 also requires a payment an association received from an owner to be applied toward the owner's debt in the following order of priority:

- any delinquent assessment;
- any current assessment;
- attorney's fees or third-party collection costs incurred by the association;
- fines assessed by the association; and
- any other amount owed to the association.

Restrictions on HOA covenants. Under **HB 1821**, a restrictive covenant has no effect until filed with the appropriate county.

Solar energy devices. An association is prohibited under **HB 362** from adopting a restrictive covenant that prohibits or restricts a property owner from installing a solar energy device. An association may prohibit a solar energy device that:

- threatens public health or safety or violates a law;
- is located on property owned or maintained by the association;
- is located on property owned in common by the association's members;
- is located anywhere on the owner's property other than the roof or a fenced yard or patio;
- if mounted on the roof, is higher than the roofline or does not conform to certain other standards;
- if in a fenced yard or patio, is taller than the fence;
- as installed, voids material warranties; or
- is installed without the HOA's approval.

An association may not withhold approval for a solar device unless it determines that the device substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of

ordinary sensibilities. The written approval of adjoining property owners is considered sufficient for making this determination.

Roofing materials. HB 362 also prohibits an association from adopting a covenant that prohibits or restricts a property owner from installing shingles that are designed to be wind and hail resistant, resemble other shingles in the subdivision, and match the aesthetics of surrounding property.

Procedures for amending a declaration. Under **SB 472**, a restrictive covenant and other declarations may be amended only by a vote of 67 percent of the total votes allocated to property owners, in addition to any required government approval. If the association's declaration specifies a lower percentage, then it controls. An association bylaw may not be amended to conflict with the declaration.

Voting requirements. Under SB 472, any vote cast in an election by an association member must be in writing and signed, a requirement satisfied by an electronic ballot. Written and signed ballots are not required for uncontested races. Any restrictive covenant that disqualifies a property owner from voting in an association election is considered void, as is any restrictive covenant that restricts an owner's right to run for a position on an association board. The bill bars anyone convicted of a felony or crime involving moral turpitude from serving on a board.

Association records. Procedures governing access to the books and records of certain associations established since 1974 are expanded and revised under **HB 2761**. If an association is unable to produce requested records within 10 days of receiving a request, it must give the requestor a date within 15 business days by which the information will be available.

An association board must adopt a policy to determine how much the association will charge for records. Charges may not exceed costs specified for corresponding records in the Texas Administrative Code. An association may not charge for records production without first recording the policy.

An association with more than 14 lots must adopt and comply with a document retention policy. An owner who is denied access to records may file a petition with the appropriate justice of the peace. If the HOA prevails in the suit, it is entitled to attorney's fees.

Association board meetings. Under HB 2761, board meetings must be open to property owners, subject to the board's right to reconvene in executive session to consider certain actions. This does not apply to associations subject to state open meetings laws.

Any decision made in an executive session must be summarized orally and placed in the meeting minutes. The association's board must keep a record of each meeting. Association members must be given notice of meetings according to specific timelines and conditions. The association board also must call an annual meeting of all members.

Resale certificates. HOAs are required under **HB 1821** to provide owners with written notice of their right to receive resale certificates. A buyer must pay fees for a resale certificate to the association unless the buyer and seller agree otherwise. The association may not process a payment for a certificate until it is available for delivery and may not charge a fee if the certificate is not provided within a certain timeline.

Supporters said

Revising HOA practices as proposed would resolve many HOA-related issues that have arisen repeatedly in personal stories, news reports, lawsuits, legislative committee hearings, and other forums. Lack of necessary state legislation restricting association practices has allowed some bad actors to run roughshod over the rights of a minority of unfortunate owners. After many legislative sessions of attempting to adopt meaningful reform, the need to enact legislation implementing reforms is more pressing than ever.

The proposed legislation would present a compromise that addressed abuses without adversely affecting most associations. It would include meaningful restrictions on associations' powers of foreclosure, establish the order for processing payments from owners, strengthen provisions on open records and open meetings, and prohibit an association from adopting unreasonable restrictions on solar panels and other devices.

Foreclosure. The proposals would bring greater balance to the relationship between HOAs and homeowners. In Texas, an association may execute either judicial or nonjudicial foreclosure, depending on its declaration. In a judicial foreclosure, the association files a lawsuit and tries to get a judgment

against a property owner. In a nonjudicial foreclosure, an association must provide notice to a homeowner through certified mail, and if the homeowner does not pay the assessments owed, the association may auction the house for the amount of outstanding assessments, without an order from a judge. As such, many associations currently have powers of nonjudicial foreclosure that are unavailable even to government entities to collect delinquent property taxes. Removing the ability to foreclose without a court order would help address some of the most conspicuous abuses without preventing legitimate foreclosures.

Payments to associations. Requiring associations to offer payment plans and to apply payments received in a prescribed order would address abuses of irresponsible associations who use current loopholes to force homeowners to pay fines first and would not interfere in legitimate practices.

Restrictions on solar energy devices. The proposals would help protect private homeowners' rights by keeping HOAs from arbitrarily prohibiting solar panels and would serve a larger public purpose in promoting energy conservation and efficiency. Homeowners should be encouraged to generate more of the electricity that they use and should be able to sell excess power back to the electricity grid. Solar panels are part of a larger energy program to develop new fuel mixtures and smart metering. The legislation would create a fair and reasonable standard to allow a homeowner to install solar energy devices or wind- and hail-resistant shingles.

Voting practices. The proposed legislation would address issues related to secret ballots. Secret voting practices in some HOAs have caused problems with forgery and other types of voting manipulation. Disallowing secret ballots would add accountability to each vote and allow associations to better enforce voting practices.

The legislation would address abuses by some associations that have adopted covenants to restrict property owners who owe fines or assessments from voting in elections or serving on an HOA board. Some associations have even prevented certain property owners from participating by fining them before an election.

These practices would be banned by voiding any covenant that barred a homeowner from voting or serving on an HOA board, except a convicted felon.

Associations are abundantly equipped to collect assessments; they can even foreclose on an owner for outstanding assessments. Unfair sanctions, such as barring an owner from voting, are unnecessary.

Opponents said

The proposed legislation is a troubling attempt to modify the relationship between a property owner and an HOA with state legislation. When an owner purchases property within an association, he or she enters into a voluntary contract to abide by the association's restrictive covenants. Defining these covenants should be left to association boards and bylaws, and any disputes over the covenants should be resolved through existing processes — specifically, through the right to file action in court. Legislative interference, even if well intended, is likely to hinder the great majority of associations that have amicable relationships with property owners to target the small minority with problems.

Foreclosure. The proposed legislation would impose upon associations administrative burdens that could lead to additional expenses for homeowners. While notice requirements appear simple on paper, they rarely are in practice. Some properties have multiple lien holders — for instance, mechanics' liens and liens for home improvements — that can be challenging to track down. The additional time required to track down this information increases the period during which an association is unable to collect assessments from a delinquent homeowner.

Restrictions on solar energy devices. HOAs have a vested interest in preserving the quality of life and property values in their neighborhoods. While some associations have made what appear to be arbitrary decisions, most are willing to allow property owners to install solar energy devices and other improvements as long as they meet standards set in the deed restrictions. Such choices are more properly made locally, and the Legislature should not interfere.

Voting practices. The proposed legislation would ban secret ballots in HOA elections, which could have many unfortunate consequences. Secret ballots are used in all major government elections and most private surveys, and they are particularly important in smaller elections, where the participants may know each other personally. Removing anonymity could unduly influence the vote of a person who knew his or her ballot would

be identifiable and available for retrieval in association records. Removing anonymity could generate fear of retribution for a vote.

Notes

SB 142 by West was analyzed in Part One of the May 24 *Daily Floor Report*.

HB 362 by Solomons was analyzed in the April 8 *Daily Floor Report* and was effective June 17, 2011.

HB 1228 by Dutton was analyzed in Part Two of the May 6 *Daily Floor Report* and is generally effective January 1, 2012.

HB 1821 by R. Anderson was analyzed in Part Two of the May 4 *Daily Floor Report* and is effective January 1, 2012.

HB 2761 by Garza was analyzed in Part Three of the May 2 *Daily Floor Report* and is effective January 1, 2012.

SB 101 by Van de Putte passed the House on the Local and Consent Calendar on May 19 and was not analyzed in a *Daily Floor Report*. It was effective September 1, 2011.

SB 472 by West was analyzed in Part Two of the May 24 *Daily Floor Report* and was effective September 1, 2011.



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Requiring a sonogram before an abortion

HB 15 by S. Miller
Effective September 1, 2011

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HB 15 requires each abortion provider to perform a sonogram on a woman seeking an abortion. The sonogram must be performed at least 24 hours before the abortion, or at least two hours beforehand if the woman certifies that she lives at least 100 miles from the nearest abortion facility. The physician must provide verbal explanations of the images and the heart auscultation, which must be made visible and audible to the woman.

The woman may choose not to view the sonogram images or hear the heart auscultation. She may choose not to receive the verbal explanation of the images if she certifies that she is a victim of rape or incest or a minor receiving a judicial bypass for parental notification or if the fetus has an irreversible medical condition or abnormality.

The Texas Medical Board must take appropriate disciplinary action against a physician who violates these provisions, and must refuse to issue or renew a license to any physician in violation.

Supporters said

HB 15 would help to ensure that a woman considering abortion had access to all of the medical information that could influence her decision. The bill would provide women seeking abortions with the same kind of medically accurate information applicable to any surgical procedure, including risks and benefits. HB 15 would protect women's health, ensuring that women made informed decisions. A woman could choose not to view the sonogram image if she desired.

Women should be able to change their minds before having an abortion. Clinics often conduct only perfunctory counseling sessions before abortions and rush women through the process without ensuring that they understand all of the information. Some women say they would not have had abortions 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 could reduce the number of abortions because it would demonstrate

more graphically the unborn child's development and humanity.

Sonograms and fetal heart auscultations are educational aides that make it easier to understand the abortion procedure. They can transcend language barriers and potential educational and cultural differences between a patient and physician, providing an invaluable resource for the pregnant woman in making a decision about abortion.

Performing a sonogram already is the standard of care before an abortion procedure, and this bill would only formalize that standard. It would create uniformity so that all women could opt to view the sonogram. Sonograms and fetal heart detection procedures are very common diagnostic tools that have been proven safe and effective.

HB 15 would be constitutionally sound. Under its 1992 *Planned Parenthood v. Casey* decision, the U.S. Supreme Court said that because of the state's profound interest in potential life, it may take measures to ensure that a woman's choice is informed. Measures designed to advance that interest are not invalid if their purpose is to persuade women to choose childbirth over abortion.

Despite arguments that the bill could infringe on the patient's First Amendment rights, the bill would allow the woman to leave at any time she chose, so she would not be a "captive audience." In instances where a physician's First Amendment rights could be inhibited, deference is given to the health and safety of the woman.

Opponents said

HB 15 is unnecessary because informed consent already is required for all surgical procedures, including abortion. This bill is based on the erroneous assumption that women are making uninformed choices about this profound medical decision. Most women already have sonograms before abortions and can view the images. The doctor, in consultation with the patient, should determine whether the sonogram is necessary. The

procedure should be based on medical need, not a state-imposed mandate intended to discourage women from exercising their constitutionally protected rights. The bill could result in unnecessary or repeat sonograms.

Requiring a woman to have a sonogram before an abortion would emotionalize a woman's decision inappropriately. Electing to end a pregnancy is a difficult choice. This bill seeks to shame the woman for her choice, not help her make an informed decision.

Requiring a woman to submit to a potentially unwanted sonogram in order to receive another medical procedure would create an undue burden on the exercise of a liberty consistently affirmed by the U.S. Supreme Court over nearly four decades as constitutionally protected. Furthermore, the bill could violate the free speech rights of patients and physicians by making the patient a compelled listener and the doctor a compelled speaker. Under the "captive audience" doctrine, the listener cannot be forced to listen to speech in a private setting. Physicians would become compelled speakers if required to offer the verbal explanations.

Women could opt out of receiving the verbal description of the sonogram images only if they qualified for one of three exceptions. All women should be able to opt out of the verbal description, not just those who qualify under the limited exceptions.

Notes

The **HRO analysis** of HB 15 appeared in the March 3 *Daily Floor Report*.

Banning smoking in certain public spaces

HB 670 by Crownover
Died in the House

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HB 670 would have prohibited smoking in certain public spaces, workplaces, and outdoor events and would have superseded any local ordinance or rule unless the local provision was more restrictive.

The bill would have prohibited smoking in areas such as restaurants, bars, shopping malls, and other enclosed retail or service establishments; theaters, convention facilities, sports arenas, and seating areas at outdoor events; enclosed places of employment; government buildings; public transportation facilities, including ticketing and boarding areas; health care facilities and licensed child and adult care providers; and other common areas, including public restrooms, lobbies, hallways, elevators, and reception areas.

Exemptions from the smoking ban would have included: a private residence, except when used as a child care, adult day care, or health care facility; a nursing home or long-term care facility; a patio or outdoor seating area of a bar or restaurant; a tobacco shop or bar; a tobacco convention; a tobacco-related business where the product was subject to manufacturer testing; a private club that had no employees, was not used for public functions, and was not established to avoid compliance; and certain hotel or motel rooms designated as smoking rooms.

Owners, operators, and managers would have had to post conspicuous “no smoking” signs. The Department of State Health Services (DSHS) would have had to provide a continuing education program to explain the smoking ban to employers, owners, operators, and managers.

The bill would have required DSHS to enforce the ban and would have authorized the department or any other state agency or political subdivision to inspect an establishment for compliance. A person who violated the smoking ban would have committed a class C misdemeanor, punishable by a maximum \$50 fine. An owner, manager, operator, or employer in violation would have committed a class C misdemeanor punishable by a maximum \$100 fine or a maximum \$200 fine for a repeat offense within the past year.

Supporters said

HB 670 would improve public health and lower health care costs in Texas. Tobacco use is the leading cause of preventable deaths in the state, killing up to 25,000 Texans each year.

The bill would protect nonsmoking Texans from the dangers of secondhand smoke. Secondhand smoke kills about 53,000 nonsmoking Americans every year, illustrating that smokers are not the only people affected by tobacco use. All exposed individuals are more likely to develop cancer and heart and lung disease. People who work in bars and restaurants are exposed to secondhand smoke at even higher levels than those who work in offices. Individuals working at restaurants where smoking is permitted are more likely than other workers to die of lung cancer. Every Texan has a right to be protected from toxic hazards at work, and HB 670 would help to ensure that workers in this state had access to safe working conditions.

Most Texans working in bars and restaurants are uninsured and receive lower wages, which makes it difficult for them to access health care. They often wait until the illness becomes more advanced and then seek care in more expensive settings, such as emergency rooms or hospitals, which shifts the costs to taxpayers or to the insured through higher premiums. HB 670 would save the state millions of dollars in health care costs by preventing exposure to secondhand smoke.

HB 670 also could help businesses achieve significant cost savings. Independent studies have shown that the hospitality industry in cities with comprehensive smoking bans has not been negatively impacted. Studies conducted in Houston and El Paso determined that the smoking ban had no adverse impact on bars, restaurants, or tourism. Businesses also could experience reduced health care costs and cleaning costs.

HB 670 would not infringe upon the liberty of others because it would not prohibit individuals from smoking. It simply would ask them to step outside to avoid harming the health of others.

Opponents said

HB 670 would expand government excessively and set a dangerous precedent for banning legal activity in public. Tobacco is a legal product that millions of Americans choose to enjoy. The bill would violate the rights of individuals and business property owners.

The bill would harm small businesses, particularly restaurant and bar owners. Some businesses have noted significant drops in business after smoking ordinances were implemented. This economic burden also impacts the staff of restaurants and bars, who rely heavily on tips. In addition, many bars and restaurants have spent large amounts of money to install air filtration systems as a response to restrictive smoking ordinances. These systems are expensive, and their costs cannot be recovered.

HB 670 also would reduce the charitable revenue generated through bingo parlors. Surveys conducted in bingo halls have revealed that most players are smokers. The implementation of local smoking ordinances in Dallas closed several bingo parlors, and the charitable organizations never recovered.

Notes

HB 670 was placed on the General State Calendar for May 10, but died in the House when no action was taken. The smoking ban was added on the House floor as an amendment by Rep. Crownover to SB 1811 by Duncan, which passed the House on May 21. The conference committee report for SB 1811, which the House adopted on May 29 but which died in the Senate when no vote was taken, did not include the Crownover amendment.

The **HRO analysis** of HB 670 appeared in the May 10 *Daily Floor Report*.

Medicaid managed care, other health care changes

SB 7 by Nelson, First Called Session
Effective September 28, 2011

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SB 7 makes numerous changes to laws governing the administration of health care in Texas. The bill contains measures designed to expand the managed care model for Medicaid and establishes a statutory framework for health care collaboratives. It implements vaccine immunization policies for certain workers, specifies a structure for distributing state family planning funding, limits provider participation in the Women's Health Program, abolishes the State Kids Insurance Program (SKIP), and establishes a grant program for emergency and trauma care education.

Medicaid managed care and cost containment. SB 7 repeals a prohibition against health maintenance organizations (HMOs) providing Medicaid services in certain South Texas counties. It also outlines requirements for contracts between managed care organizations and the Health and Human Services Commission (HHSC) and for contractual agreements involving pharmacy benefit managers.

The bill directs HHSC to adopt Medicaid copayments to encourage personal accountability, provide incentives to physicians to reduce Medicaid recipients' use of hospital emergency rooms for nonurgent conditions if it is determined to be cost effective, use technology to suppress Medicaid fraud, and develop a process for objectively assessing Medicaid recipients' needs for acute nursing services. SB 7 also creates the Medicaid and CHIP Quality-Based Payment Advisory Committee to make recommendations to HHSC about cost-savings initiatives, including quality-based payment systems.

HHSC must seek a waiver from the federal government to implement changes to the state's administration of Medicaid. For an analysis of the Medicaid reform waiver, see page 101.

Restrictions for immigrants. SB 7 allows hospitals to recover health care costs from the sponsors of legal permanent residents and requires HHSC to verify the immigration status of applicants for public benefits programs. HHSC may seek reimbursement from the applicants' sponsors to the extent allowed by federal law, if it is cost effective.

Family planning funding. SB 7 establishes a tiered structure for distributing state funding to family planning providers, so that providers offering solely family planning services without comprehensive primary care services are last in line to receive funding. Money spent for the Women's Health Program also may not be used to contract with entities or affiliates of entities that perform abortions. The bill eliminates state funding for hospital districts that use tax revenue for abortions. For an analysis of family planning funding issues during the 82nd Legislature, see page 99.

Health care collaboratives; quality and efficiency measures. SB 7 creates the Texas Institute of Health Care Quality and Efficiency to make recommendations to the Legislature on how to improve health care quality and data reporting and to support collaborative payment and delivery systems.

The bill establishes rules to govern health care collaboratives, which it defines as organizations of physicians and other health care providers legally structured to receive and distribute payments to participating providers. Health care collaboratives, which must be certified by the Texas Department of Insurance (TDI), may contract with insurers. Each collaborative has all the powers of a partnership, association, corporation, or limited liability company.

Immunization policies for health care facilities. SB 7 requires health care facilities to enact mandatory immunization policies for workers with exposure to patients. Each policy must require certain health care workers to receive vaccines for certain diseases but may grant exemptions for religious reasons. Exemptions for certain medical conditions identified as contraindications must be allowed.

New grant program. The bill establishes the Texas Emergency and Trauma Care Education Partnership Program to provide grants to partnerships between hospitals and graduate nursing or medical education programs seeking to increase training opportunities in emergency and trauma care. The Texas Higher Education Coordinating Board will administer the program.

Interstate Health Care Compact. SB 7 directs Texas to join the Interstate Health Care Compact, which would become operational only after achieving a two-state membership and approval from the U.S. Congress. For an analysis of the compact, see page 97.

Other provisions. The bill prohibits health insurers from denying payment for chiropractic services if the services are covered by the insurance policy and within the scope of the chiropractor's license. It also requires the HHSC executive commissioner to establish eligibility criteria for creating and operating an autologous adult stem cell bank if it is deemed cost effective.

Supporters said

SB 7 would significantly cut Medicaid costs by expanding the managed care model. The fee-for-service model is costlier than managed care, but its health outcomes are not always better. Managed care has been proven to increase quality efficiently by coordinating care through HMOs and providing patients with access to contracted provider networks. The bill would require managed care organizations to demonstrate network adequacy, thereby guaranteeing access to providers and continued fulfillment of patients' health care needs. HHSC estimates that expanding the areas covered by managed care would save millions in general revenue for fiscal 2012-13.

The bill also would provide incentives to providers to discourage clients from going to the emergency room for nonurgent visits, which is considerably more expensive. SB 7 would further permit HHSC to experiment with cost-saving pilot programs that improve health outcomes.

By allowing HHSC to recoup the costs of care from the sponsors of legal permanent residents, the bill would enforce the sponsor agreement. Agreeing to act as a sponsor implies a willingness to assume financial responsibility for the legal resident. While some legal permanent residents may meet the low income eligibility criteria for public benefit programs, their sponsors may have the income and resources to pay for care.

The bill's provisions related to health care collaboratives would improve health outcomes and reduce costs. Currently, physicians and hospitals cannot

receive payment as a group without fear of violating state and federal antitrust regulations. SB 7 would allow health care providers to organize within a certified collaborative and thereby accept alternative payments. The bill also would establish a state action doctrine to allow Texas to overcome federal antitrust barriers. There is bipartisan consensus among state leaders that the bill contains sufficient safeguards to prevent anticompetitive behavior. The bill would give providers flexibility to work together to improve health care outcomes and reduce costs. It would not mandate any particular model of health care.

In requiring health care facilities to adopt vaccine policies, the bill would mandate exemptions for workers with contraindications and would allow exemptions for religious beliefs. Facilities could create their own policies, rather than having specific restrictions imposed on them by the state.

Opponents said

This bill would require more Medicaid recipients to be placed at the mercy of managed care organizations (MCOs), which restrict access to providers and limit patients' ability to choose providers that meet their individual health needs. The bill could harm provider participation by allowing MCOs to set provider rates. Low Medicaid provider rates already have reduced the number of physicians serving Medicaid clients. Forcing physicians into MCOs could jeopardize low-income individuals' access to care, contribute to poor health outcomes for this population, and increase costs to the state.

The bill's immigrant-related provisions would reduce the enrollment of people who genuinely qualified for public benefit programs because they would be intimidated and confused by the process while dealing with their own ill health. This would discourage people from seeking care early, forcing them to wait until a medical condition became critical and to seek care in more expensive settings, such as emergency rooms, with the costs passed on to the local community.

SB 7 would unnecessarily expand government and not necessarily reduce costs. In fact, it could raise costs if, despite government oversight, health care collaboratives fostered higher payments for health care providers. The bill could deprive consumers of the benefits of competition by immunizing these

collaboratives from antitrust laws. The bill should include more prescriptive provisions on the antitrust oversight authority of TDI and the attorney general.

SB 7 would force certain health care workers into taking invasive vaccines, potentially against their will. Workers would have to choose between their jobs and these injections. By allowing, but not requiring, exemptions for religious reasons, the bill would not go far enough. Individuals should not be forced out of their jobs because of their religious beliefs. Finally, the list of contraindications warranting exemption is limited and could force a vaccine on someone despite health concerns.

Notes

The **HRO analysis** of SB 7 appeared in the June 8 *Daily Floor Report*.

Adopting the Interstate Health Care Compact

SB 7 by Nelson, First Called Session/HB 5 by Kolkhorst, First Called Session
Effective September 28, 2011

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SB 7, the omnibus health care act, adopts the Interstate Health Care Compact and directs Texas to join the compact with other states to secure from the federal government primary responsibility to regulate health care and improve health care policy. The compact becomes effective when joined by at least two states and approved by the U.S. Congress.

Texas, as a member state, will be able to suspend by legislation the operation of all federal laws, rules, and regulations that are inconsistent with the state's health care laws and regulations under the compact. Federal laws and regulations will remain in effect unless suspended, and Texas will have to fund any federal health care law or rule remaining in effect. Texas will have the right to federal money up to an amount equal to its federally funded mandatory health care spending in fiscal 2010 and adjusted to account for changes in population and inflation.

The Interstate Advisory Health Care Commission will collect information to assist member states in health care regulation and to share with the member states' legislatures. Its membership will be determined by each member state and funded as agreed to by the member states. As a member state, Texas will be unable to appoint more than two members. The state will be allowed to withdraw membership at any time.

Member states by unanimous agreement will be able to amend the compact. The withdrawal of any state will not take effect until six months after the governor of the state has informed the other member states.

Supporters said

Federal health care requirements are driving unsustainable state expenditures that are "breaking the bank" of Texas and other states. Medicaid spending has grown by more than 170 percent over the last decade. State spending will grow exponentially when federal health care reform takes effect and another 2.1 million Texans become eligible for Medicaid by 2019. Medical inflation is outpacing population growth. Texas must wrest control of health care spending and chart its own

course to better respond to its unique demographic, geographic, and economic characteristics. A health care compact between Texas and at least one other state would allow this.

The U.S. Constitution authorizes interstate compacts, and more than 200 now help states address issues such as transportation, supervision of former prisoners, and low-level radioactive waste disposal. Although Congress would have to enact a law to consent to the compact, no other legislation would be needed. Approval of the Washington Metropolitan Area Transit Authority compact shows precedent for approving a compact that allows suspension of certain federal laws.

An interstate compact would preserve federalism by allowing each member state to create a health care system aligned with its needs, and Texas could withdraw from the compact at any time. Federal Medicaid requirements are a "one-size-fits-all" approach with little room for innovation. Texas could choose which federal programs to suspend and could keep popular programs, such as Medicare, if it were warranted. While seniors have paid into Medicare through payroll taxes, it also is funded by other tax revenue, and the compact would allow Texas to ensure that all Medicare spending was appropriate and in Texans' best interests. Options would include contracting with the federal agency that now administers Medicare to assure program continuity.

The bill would ensure adequate federal funding to meet changing capacity and service needs because the compact would calibrate Texas' share of federal funding to account for population growth and inflation. With 2010 as a baseline year, federal funding would be pegged to the year when Texas enjoyed its highest federal matching rate for Medicaid due to federal stimulus funding.

Congress is too distant and gridlocked to regulate issues as personal as health care. These issues should be handled by Texans, for Texans. The continually soaring U.S. deficit calls into question the reliability of any future federal funding and the wisdom of relying on the federal government for health care spending or solutions.

Fears that the compact would reduce access to safe, quality health care in Texas compared to other states are unwarranted. Member states would pledge to improve health care policy within their jurisdictions. The bill also would require states' federal funding to be audited by the U.S. Government Accountability Office.

Congress would have trouble saying no to a compact enacted by several states. Legislatures in many more states are considering participation in the compact. Georgia, Oklahoma, and Missouri already have adopted it. At the very least, enactment of this bill by Texas and other states would require Congress to better address states' demands for more control. State demands were critical in reforming welfare programs in the 1990s.

Opponents said

Rising state health care expenditures are largely related to population growth, health status, aging, and emerging new technologies and therapies. Increased health spending is nothing new and typically has outpaced economic growth since the 1960s. The interstate compact would not slow these trends. Texas has continually implemented reforms to contain Medicaid costs, so participation in the compact simply would kick low-income people out of much-needed, federally supported health care programs.

The bill would not require Texas to build capacity to meet population needs and would not guarantee that Texas had a better health care system or maintained eligibility standards. Medicaid eligibility in Texas is among the lowest in the country, and at least 6 million Texans lack health insurance.

Under the compact's funding scheme, Texas would lack the financial resources to improve services or keep eligibility levels. It would lock Texas' federal funds at a 2010 level, adjusting only for growth and inflation, so any increased capacity would be financed solely by state dollars. Texas' current Medicaid expenditures fall far below the national average, so it would receive less initial funding relative to other states. The funding formula would cause Texas to lose about \$120 billion in new federal funds related to health care reform.

This bill also could jeopardize Medicare, a crucial health care support for seniors of all income levels. Texas should not tamper with Medicare coverage, which people earn during their working years. Keeping Medicare a federally run program will help seniors

maintain a similar quality of care regardless of where they move within the country.

The governor of Arizona wisely vetoed that state's compact bill, citing a likelihood that the state's citizens, especially seniors, would suffer as a result of it. The governor of Montana vetoed a bill seeking to adopt the compact, stating that it was "a frivolous measure that does nothing at best, and at worst puts seniors, Montanans with disabilities, and children at risk."

Interstate compacts do not replace or nullify federal law, but are designed to facilitate states' interactions in common regulatory activities. An interstate compact has never been used for health care. It is unclear whether Congress could consent to this compact without passing legislation authorizing states to suspend federal law and whether Texas could withdraw unilaterally from a congressionally approved compact without congressional approval.

Suspending federal health care laws could endanger public health and lower health care standards in Texas compared to other states. Federal regulations provide equal access to health care for all U.S. citizens and often are needed to check lapses in state regulation or enforcement.

This bill is more a political and symbolic exercise against recent federal actions than a realistic way of addressing our health care expenditures. Congress is unlikely to approve a compact that would require it to give money to states without directing its spending. The Legislature directs all spending of state tax dollars because it is the prudent and fiscally responsible way to manage money, and Congress should be expected to act similarly. There is no reason to believe that state lawmakers would be more fiscally responsible than members of the U.S. House or Senate.

Notes

The health care compact was introduced as **HB 5** by Kolkhorst, which passed the House during the 82nd Legislature's first called session but died in the Senate. Provisions establishing the compact were added as an amendment by Rep. Kolkhorst to SB 7 on the House floor and included in the final version. During the regular session, the House also approved the compact by passing HB 5 by Kolkhorst, which died in the Senate.

The **HRO analysis** of HB 5 appeared in the June 15 *Daily Floor Report*.

Family planning funding; Women's Health Program

SB 7 by Nelson, First Called Session/HB 1 by Pitts/SB 1854 by Deuell
Effective September 28, 2011/Effective September 1, 2011/Died in the Senate

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The appropriate use of state funding for family planning services formed the basis for numerous bills and amendments to bills during the regular and first called sessions. The 82nd Legislature continued the Women's Health Program (WHP), which provides state funding for family planning, and kept intact the prohibition against using WHP funds for entities or affiliates of entities that perform abortions. The Legislature also prescribed a method of distribution for Department of State Health Services (DSHS) family planning funding that places providers who focus solely on family planning last in line for any appropriation. State funding for hospital districts that use tax revenue to finance abortions also was prohibited.

SB 1854 would have continued the WHP, which was scheduled to expire on September 1, 2011. The WHP provides physical examinations, health screenings, and contraceptives and family planning services to women whose income and family size places them at 185 percent of federal poverty guidelines (the level at which they would be eligible for Medicaid if they were pregnant).

The bill would have continued the WHP until September 1, 2016, with the same eligibility requirements and services. It would have retained prohibitions against WHP funds being used to perform abortions and against the Health and Human Services Commission (HHSC) contracting under the program with entities or affiliates of entities that performed abortions. HHSC would have had to stop operating the program if a court struck down the program's restrictions on the use of funds for abortion providers. The bill would have prohibited a state employee from refusing to comply with abortion-related restrictions if the employee believed they were unconstitutional.

HB 1, the general appropriations act, includes rider 62 in the HHSC section, which requires the commission to continue providing services under the WHP, effectively continuing the program.

SB 7, the omnibus health care act, requires HHSC to ensure that state money spent for the WHP or a successor program not be used to contract with entities

that perform or promote abortions or with affiliates of entities that do so, as under current law.

SB 7 requires money appropriated to DSHS for family planning services to be awarded in order of priority first to public entities that provide family planning services, including community clinics and federally qualified health centers. Funding must be awarded second to nonpublic entities providing comprehensive primary and preventive care services along with family planning services, and last to nonpublic entities providing family planning services without comprehensive primary and preventive care services. DSHS must ensure that family planning funding is distributed in a way that does not severely impair access to services in any region. Like the WHP, DSHS programs provide low-income people with basic health screenings, prescription contraception, and treatment for sexually transmitted diseases. The primary difference between the WHP and the DSHS family planning programs is that WHP requires recipients to be U.S. citizens, while the DSHS programs do not.

SB 7 also prohibits state funding for hospital districts that use tax revenue to finance abortions. An exception is permitted for medical emergencies. The board of Central Health in Travis County, the only hospital district in Texas that used tax revenue to finance abortions, has since voted to discontinue this practice. Central Health used a small portion of its budget to provide abortions for low-income women.

Supporters said

SB 1854 would deliver critical health services to women within parameters appropriate for the state. The WHP would continue to provide health screenings and family planning services to improve the overall health of low-income women by preventing unwanted pregnancies, halting the spread of sexually transmitted diseases, and providing early detection of breast and cervical cancers.

The program would save taxpayer money because the federal government would provide a nine-to-one

funding match for the program, ensuring that Texas did not leave any “money on the table.” Allowing the program to expire would raise costs for the state because the low-income women losing access to its family planning services would experience more unplanned pregnancies that would be eligible for Medicaid coverage. Medicaid already pays for about half of the pregnancies in the state. At the same time, the bill would enforce and strengthen current requirements that prohibit taxpayer money from supporting abortion providers or their affiliates.

The tiered funding structure for family planning services prescribed by SB 7 would ensure that state funds were distributed most fairly to the most qualified providers. The bill would keep the funding structure consistent with the one prescribed by the general appropriations act and would ensure that clients received access to the most comprehensive care possible.

SB 7 would ensure that any funds for the WHP or a similar program could not be used to support entities that affiliated with abortion providers, as under current law. The bill would further sever any remaining relationship between public funds and abortion by halting state funding to hospital districts that use tax revenue for abortions.

Opponents said

The WHP is vitally important to the health and well-being of low-income women and their children. However, continuing the abortion-related restrictions would limit the number of providers under the program and thereby limit access and enrollment. This would effectively increase the rate of unwanted pregnancies and abortions. Keeping these restrictions would ensure that otherwise qualified family planning providers who happened to affiliate with abortion providers could not participate in this valuable program.

The tiered funding structure for family planning services would make it more difficult for nonpublic entities that primarily performed family planning services, such as Planned Parenthood, to obtain state funding and continue to serve family planning clients. Patients who depend on such services through certain providers could lose access to needed services. The tiered structure would base funding not on capacity to serve clients, but on type of provider, which would only ensure that fewer clients received services.

The ban on state funding for hospital districts that perform abortions would deny the legally protected right to choose abortion to low-income women in Travis County. Each district should be able to exercise local control and decide how best to spend its tax revenue.

Notes

SB 1854 was reported favorably, as substituted, by the Senate Health and Human Services Committee, but died in the Senate after being placed on the Intent Calendar for May 19.

The **HRO analysis** of HB 1 appeared in State Finance Report 82-4, *CSHB 1: The House Appropriations Committee's Proposed Budget for Fiscal 2012-13*, March 31, 2011. The **HRO analysis** of SB 7 appeared in the June 8 *Daily Floor Report*.

Obtaining a Medicaid reform waiver

SB 7 by Nelson, First Called Session/HB 13 by Kolkhorst, First Called Session
Effective September 28, 2011

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SB 7, the omnibus health care bill, requires the Texas Health and Human Services Commission (HHSC) to seek a waiver from federal Medicaid requirements and modifications in the federal funding formula. The objectives of the waiver are to:

- provide flexibility in income eligibility and benefit design;
- encourage the use of private versus public health benefits;
- create a culture of shared financial responsibility by establishing copayments for eligible people and by promoting health savings accounts and vouchers;
- consolidate related federal funding streams, including funds from the disproportionate share hospitals and the upper payment limit supplemental payment programs;
- allow flexibility in using state funds to draw federal matching funds;
- empower uninsured people to purchase health coverage by promoting cost-effective models using a sliding scale and fees for service; and
- allow the redesign of long-term care services and supports to increase access to patient-centered care.

In pursuing federal funding modifications, HHSC must work with the Texas delegation to the U.S. Congress and the Centers for Medicare and Medicaid Services (CMS) and other federal agencies to achieve a federal match formula accounting for population size and growth and the percentage of people below the federal poverty level. HHSC also must try to obtain additional federal Medicaid funding for services for illegal immigrants.

An eight-member Medicaid Reform Waiver Legislative Oversight Committee will facilitate the waiver design and the transition from the current system to a new one. The committee must submit a report to the lieutenant governor and the speaker by November 15, 2012, identifying issues related to the transition and the effectiveness and impact of recommended Medicaid changes.

The committee and the requirements to seek federal funding modifications will be abolished on September 1, 2013.

Supporters said

SB 7 would help maintain health care coverage for needy Texans by requiring the state to request a federal waiver to allow Medicaid funds to be used more efficiently and comprehensively. Medicaid is the fastest-growing item in the state budget. If it is not fixed, the state will have to impose a significant tax hike or make deeper cuts to provider rates to compensate for escalating costs. Many states, including Rhode Island, Vermont, and Washington state, have requested waivers to deliver care in ways that best fit their states' needs. SB 7 would allow Texas to join their ranks.

The bill would direct HHSC to apply for a federal waiver giving the state five years to demonstrate a successful transition to a block grant system that allowed more flexibility in the Texas Medicaid program. The waiver would give the state more control over program design and encourage the uninsured to seek coverage in the private market through subsidies. It would improve Medicaid and prevent waste by introducing copayments and creating a culture of personal responsibility and accountability.

SB 7 would encourage greater provider participation for low-income Texans because more people would be served in the private health insurance market. The state currently lacks enough doctors willing to accept patients under Medicaid because the reimbursement rate for providers is too low. Reimbursement rates would be higher in the private market, and this should increase the number of participating physicians. Many Texans are enrolled in Medicaid because of low income, not because of chronic illness, and they could be better served in the private market. By transitioning individuals to a private health insurance model, recipients would have greater access to care and experience better health outcomes.

The language of the bill is deliberately broad to give the state congressional delegation greater negotiating power with the federal government and ensure that Texas receives the best deal possible. Fears that the state could deny coverage or reduce the income threshold are baseless because the federal guidelines for eligibility and maintenance of effort still would apply to any waiver negotiated.

Opponents said

SB 7 contains overly general language that would not guarantee the level of care provided to low-income and chronically ill Texans. If the Texas Medicaid program received the necessary federal waiver, the state would receive a fixed amount of funding for five years that would not increase based on inflation or population growth. Texas would not be assured additional funds to cover increased caseloads if an economic downturn or natural disaster occurred.

The Medicaid waiver in SB 7 could dramatically reduce the populations covered under Texas Medicaid. Because the federal government does not currently require a waiver for Texas to change the eligibility criteria to increase coverage for the state's more than 6 million uninsured people, it can only be assumed that any waiver would seek to lower the income threshold and deny coverage to Texans for some programs and services.

SB 7 would burden poor families and the chronically ill with additional health care expenses, delay treatment, and increase costs. Medicaid and the Children's Health Insurance Program (CHIP) serve children and very low-income people who often have other medical conditions, including pregnant women, the elderly, and the disabled. The federal government established guidelines to prevent denial of coverage or imposition of copayments for enrollees below the poverty threshold (\$22,350 per year for a family of four). This ensures access to care to prevent major illnesses and high health care expenditures. The bill could discourage these recipients from seeking care until it was urgently needed.

SB 7 would place chronically ill and very low-income Texans at the mercy of the unregulated individual insurance market. The costs of health coverage and treatment are escalating faster in the private market than in Medicaid. Premiums for individual insurance plans typically are costlier than employer-based coverage, and customers commonly

experience sharp rate hikes each year. Pushing Medicaid recipients into a voucher system would not guarantee purchase of the coverage or the ability of the private insurance plan to meet their health care needs. Given that most Texas Medicaid recipients receive care through a managed care organization, which is effectively a private health insurance model, this provision seems unnecessary and redundant.

Notes

Requirements to seek a waiver from federal Medicaid requirements and modifications in the federal funding formula also were included in **HB 13** by Kolkhorst during the 82nd Legislature's first called session. HB 13 passed the House on June 14 but died in the Senate. The provisions of HB 13 were added as an amendment to SB 7 on the House floor.

The **HRO analysis** of HB 13 appeared in the June 9 *Daily Floor Report*.



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Performance-based funding for higher education

HB 9 by Branch
Effective June 17, 2011

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HB 9 requires the Texas Higher Education Coordinating Board, in devising and establishing base formula funding recommendations for public institutions of higher education, to incorporate the goals identified in the long-range statewide plan into the agency's funding recommendations to the Legislature. The coordinating board must evaluate certain student success measures, such as degree completion rates, and align student outcomes with the state's educational goals.

For general academic teaching institutions other than a public state college, the success measures may include the number of bachelor's degrees awarded in general and in critical fields, the number of bachelor's degrees awarded to at-risk students, and the six-year graduation rate of undergraduate students who initially enrolled in the fall semester immediately following high school graduation as compared to the six-year graduation rate predicted for those students based on the composition of the institution's student body.

For junior colleges, state colleges, and technical institutes, the success measures may include such academic progress measures as the successful completion of developmental mathematics and English courses, the number of associate's and bachelor's degrees awarded, and the number of certificates awarded for various programs.

No more than 10 percent of the total general revenue appropriations of base funds to general academic teaching institutions for undergraduate education may be based on the success measures. The coordinating board must make recommendations for incorporating the success measures into the distribution of performance incentive funds to general academic teaching institutions. The coordinating board also must compare the effects on funding of applying the success measures within the base funding formula to applying the measures as a separate formula.

The coordinating board must submit to the Joint Oversight Committee on Higher Education Governance, Excellence, and Transparency a report that reviews best practices on improving student success outcomes

and other higher education administrative issues by September 30, 2011, and subsequently by July 1, 2012.

Supporters said

HB 9 would use state fiscal policy to promote college completion. With state resources limited, it is more important than ever to demand more value from tax dollars invested in higher education. It makes sense to distribute formula funding in ways that recognize gains in both outcomes and enrollment. Higher education funding formulas essentially have rewarded colleges and universities for credit-hour enrollment, with little accountability for results. The current funding model for public higher education is not aligned with state needs and goals. The state has increased annual degree production since 2000, but too many students are falling through the cracks at too high a cost.

According to the coordinating board, two-thirds of enrollees in post-secondary education in 2003 failed to graduate in 2009. Texas ranks third in state resources spent on first-year dropouts — \$470.5 million over a five-year period. The latest progress report says that Texas must produce about 46,000 more degrees each year to reach the 2015 goal for success. The state needs to make the most progress among at-risk students and to graduate more students in critical fields, such as science, technology, engineering, and math.

Because two-year institutions have different challenges, the bill would contemplate a separate set of metrics, commonly called "momentum points," to measure successful outcomes. Instead of focusing only on graduations, academic progress measures also would be recognized. Other states are moving toward this model, including Washington, Indiana, and Ohio.

Claims that outcomes-based funding would create an incentive to close college doors to certain students who might be an academic gamble are unfounded. HB 9 would provide institutions an additional opportunity to gain funding by introducing student success measures into the formula. One metric specifically would require the coordinating board to include in its formula

recommendations the graduation of at-risk students. This would incentivize schools to accept and graduate students who had great barriers to achieving their educational goals.

Opponents said

While the state should promote student success, now is not the time to incorporate outcomes-based funding as part of higher education funding, when institutions already are experiencing shrinking state support. Any portion of funding dedicated to outcomes-based funding should be in addition to base-level funding and not carved out of existing funding levels. Dedicating a portion of an already decreased level of state appropriations to outcomes-based funding could cause institutions to lose state support. Institutions could not sustain any hold-back of state appropriations for the use of performance-based funding. This would be especially true for the state's community colleges. Other states, like Washington, use a similar approach to funding community colleges, but the funding model is used as incentive funding over and above base formula funding and does not supplant state funding.

Outcomes-based funding could produce unintended consequences, such as an institution's closing the doors to certain students who could be an academic gamble, which would reduce access, or giving grades to students they had not earned because of the financial pressure to meet the benchmarks.

Notes

The **HRO analysis** of HB 9 appears in the May 12 *Daily Floor Report*.

Academic standards priority for TEXAS grants

SB 28 by Zaffirini
Effective September 1, 2011

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SB 28 establishes new standards for awarding TEXAS grants to first-time entering students and requires institutions to give first-priority consideration to students who meet some combination of the new requirements. Beginning with the 2013-14 academic year, in determining who should receive an initial award, general academic teaching institutions must give highest priority to students who have the lowest expected family contribution and meet the new criteria. Institutions with funds remaining after the priority awards must give TEXAS grants to other students who meet the minimum requirements, including having the greatest financial need.

The Texas Higher Education Coordinating Board must ensure that an institution's share of funds for TEXAS grants does not change due to the new priority criteria. The bill prohibits the board from setting an estimated family contribution cap for initial eligibility higher than 60 percent of the average statewide tuition and fees at general academic teaching institutions.

To receive highest priority in the selection of initial award recipients, a student graduating on or after May 1, 2013, will be eligible if he or she completes the recommended high school program or its equivalent and accomplishes at least any two of the following four criteria:

- graduates under the advanced high school program or its equivalent, successfully completes course requirements of the international baccalaureate diploma program, or earns at least 12 college credits;
- meets the Texas Success Initiative (TSI) college-readiness thresholds or qualifies for a TSI exemption;
- graduates in the top one-third of the student's graduating class or with at least a 3.0 GPA on a four-point scale; or
- completes a high school advanced math course beyond Algebra II or at least one advanced career and technical course.

Students who do not meet any two of the above four criteria must have an associate's degree or, if sufficient funding is available, meet the minimum initial eligibility

requirements of graduating high school with the recommended high school program. All TEXAS grant recipients must have financial need.

Eligible students entering military service may retain TEXAS grant eligibility for the year after their honorable discharge if they enroll for at least a three-fourths course load. The bill establishes ongoing eligibility for students whose initial year of eligibility coincides with a year when the Legislature funds less than 10 percent of initial TEXAS grants. These students will retain eligibility for an initial award through attainment of their undergraduate degree.

The coordinating board must provide the TEXAS Grant Legislative Oversight Committee with annual reports with program statistics on awards allocated, including by race and ethnicity and expected family contribution; students meeting eligibility criteria; and graduation rates of grant recipients.

Supporters said

SB 28 would prioritize TEXAS grant awards to students who have proven readiness to handle college-level work. TEXAS grants would continue to reach the state's neediest students, and institutions' TEXAS grant allocations would be unaffected. SB 28 would change only how universities disburse the grant funds. The bill would apply to general academic teaching institutions, leaving disbursement of awards to community and technical colleges unchanged.

Implementing the TEXAS grant priority model would be a powerful incentive to prepare students for college. It would increase minority graduation rates and the productivity of degree completion without spending extra funds. The current six-year graduation rate for TEXAS grant recipients is about 47 percent. With the targeting of better-prepared students, graduation outcomes would increase significantly.

Ideally, the TEXAS grant program would be fully funded for all eligible students. But state budget constraints mandate efficiency with limited state dollars and allocation of the grants to the financially needy

high school students whose academic preparation has prepared them well to complete their college degrees.

The current allocation model is based mostly on financial need and provides no preference for students who have earned academic distinction in high school, aside from graduating under the recommended high school program and not having a felony or drug conviction. The grants are awarded on a first-come, first-served basis.

The bill's provisions would not hurt low-income or minority students. TEXAS grants still would be focused on the most financially needy students, namely those with an expected family contribution of \$4,000 or less, which is a family income of about \$45,000 a year.

Claims that adding a college-readiness component to eligibility requirements would negatively impact minority students are unfounded. The college-readiness criteria would be available statewide. State law requires all school districts to offer students an opportunity to earn at least 12 hours of college credit. The most recent data from the Texas Education Agency for the 2009-10 academic year indicate that at least 85 percent of Texas high schools surveyed offered the opportunity for earning college credit. All students attending a Texas high school have the ability to earn a B average or be in the top one-third of their class. Additionally, students who do not meet the metric for the SAT or ACT can take other exams that test college readiness.

All students attending state public high schools have had to comply with the TSI since 2003 in order to enroll in higher education. And more than 70 percent of fall 2009 first-time college students who were TEXAS grant eligible and enrolled in Texas universities were deemed college ready per the TSI.

Opponents said

If SB 28 were implemented, the pool of TEXAS grant recipients would be less diverse. The number of low-income students eligible for priority consideration for a grant would be seriously impacted. Moving from a financial-need model to a more merit-based one could divert funds from students who have performed well in high school and are equally deserving of financial assistance but simply have lacked the advantages that other students enjoy.

Students who are not high achievers because of work demands or certain family situations, but who

otherwise are good students, would be overlooked by the priority model. These are the students that the state needs to push into the pipeline in order to close the gaps in higher education.

It is unknown how SB 28 would affect various communities around the state, especially ones with high concentrations of low-income and minority students. Not all public high schools in Texas are on a level playing field because not all of the metrics that the bill would require are offered at every high school. Only about 85 percent offer opportunities to earn college-level courses through dual credit and other similar programs, so students in some parts of the state would not have this opportunity.

The bill should require students to meet only one of the four pathways for priority consideration instead of two. If a student was missing the TSI evaluations for college readiness, he or she might be excluded despite meeting the GPA requirements.

Notes

The **HRO analysis** of the House companion bill, HB 10 by Branch appeared in the April 6 *Daily Floor Report*.

Allowing guns on college campuses with license

SB 354 by Wentworth
Died in the Senate

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SB 354 would have amended Penal Code, sec. 46.03 to create an exception to the prohibition against carrying a weapon at a public or private university or college if the person held a concealed handgun license issued under Government Code, ch. 411.

The bill would have amended Government Code, ch. 411 to allow a concealed handgun license holder to carry a gun while on the campus of a higher education institution. The bill also would have prohibited a college or university from adopting rules to prohibit concealed handgun license holders from carrying their guns, except to regulate the storage of handguns in dormitories.

The bill would not have permitted a concealed handgun license holder to carry a gun on the premises of a hospital maintained or operated by a college or university.

The bill also would have granted immunity to state colleges and universities and their officers and employees for the actions of a concealed handgun license holder.

Supporters said

SB 354 would end an arbitrary line drawn around college buildings prohibiting law-abiding concealed handgun license holders from carrying weapons for personal safety purposes. Despite its controversy, this measure would make only a limited change to allow weapons within campus buildings.

The change would not encourage heroic responses to incidents such as the 2007 Virginia Tech massacre. The provision would help provide security and a sense of well-being in less dramatic situations than campus shootings. Concealed handgun license holders might want their weapons for personal protection when leaving campus at night or traveling home. College campuses should not be treated any differently than other public places, such as office buildings, movie theaters, grocery stores, shopping malls, and restaurants, where concealed

handguns can be carried legally. Violent criminals are not deterred by these restrictions. Simply removing a geographic barrier would not cause concealed handgun license holders to act less responsibly or become less law abiding.

This change would affect only adult students, faculty, staff, and parent visitors and would not arm large numbers of undergraduates. Concealed handgun license holders must be at least 21, pass background checks, and complete appropriate training. According to Department of Public Safety (DPS) records, only a small percentage of the concealed handgun licenses issued in 2010 were granted to those 25 years of age or younger. DPS also is authorized to take prompt action to deny, suspend, or revoke concealed handgun licenses and usually does so for administrative reasons unrelated to safety violations or criminal activities.

SB 354 would not interfere with the ability of colleges and universities to establish reasonable restrictions on storing handguns in dormitories and other residential housing owned by the schools. The bill also would grant immunity to colleges and universities for acts by concealed handgun license holders.

Prevention of violence and preparedness are not mutually exclusive. In a perfect system, the two safety approaches complement each other. Preventive measures could include teaching students and faculty to watch for the warning signs of mental illness and providing counseling to disturbed students.

Opponents said

This bill would not make college campuses any safer and actually could increase the risk of more violence. The bill would solve a phantom problem. Statistically, campuses are much safer than their surrounding cities. According to a U.S. Department of Justice study, 93 percent of crimes committed against college students from 1995 to 2002 occurred off campus. In fact, there may be a counterintuitive relationship between personal safety and carrying a weapon. A Harvard School of

Public Health study on guns and gun threats at college concluded that owning a gun for protection was a predictor for being threatened with a gun.

While those under 25 years of age constitute only a small percentage of people with concealed handgun licenses, they represent a disproportionate number of those who have their licenses denied, suspended, or revoked.

Allowing concealed weapons on campus could inhibit the free exchange of ideas and undermine the basic educational mission of universities and colleges. Unfortunately, conflicts can arise in classes, and professors could be afraid to challenge students or grade them poorly if they feared that students were armed. Angry words in dormitories or student centers could escalate into deadly encounters.

Current restrictions would not necessarily keep potential campus killers from obtaining firearms or even qualifying for concealed handgun licenses. Both Seung-Hui Cho, the Virginia Tech shooter, and Charles Whitman, the University of Texas tower gunman, were older than 21 years and bought their weapons legally.

Other opponents said

Measures such as SB 354 would provide only a symbolic response to a real problem on college campuses caused by cutbacks in student mental health services. Both Seung-Hui Cho, the Virginia Tech shooter, and Jared Lee Loughner, accused of shooting U.S. Rep. Gabrielle Giffords, had mental health issues that caught the attention of higher education institution mental health service providers. However, they slipped through the cracks and failed to receive adequate treatment before the incidents occurred. The Legislature should focus on adequately funding mental health services to address this problem.

Notes

SB 354 died when the Senate did not suspend the regular order to consider the bill by the necessary two-thirds vote. The Senate added an amendment with language substantially similar to SB 354 to SB 5 by Zaffirini, a bill to revise higher education administration procedures, but the amendment was removed after further consideration of SB 5 was postponed.

The Senate added a similar amendment to allow concealed handgun license holders to carry their weapons on college campuses to SB 1581 by Ogden, the education fiscal matters bill. When the House considered SB 1581, the speaker sustained a point of order against the amendment on the grounds that it caused the bill to violate the constitutional rule requiring each bill to pertain to only one subject. The bill was sent back to the Senate, where the campus gun amendment was removed.

The **HRO analysis** of SB 1581, including the guns on campus amendment, appeared in the May 18 *Daily Floor Report*.

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Allowing parents to prohibit corporal punishment

HB 359 by Allen
Effective September 1, 2011

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HB 359 allows parents to prohibit a school district from using corporal punishment on their children. Corporal punishment is defined as the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline. It does not include physical pain caused by physical activity associated with athletic training, competition, or physical education or the use of restraint as permitted by current law. To prohibit the use of corporal punishment on their children, parents must provide written notice to the school each school year. Parents may revoke this statement and opt back into the use of corporal punishment by providing written notice any time during the school year.

School districts must report electronically to the Texas Education Agency information involving peace officers who use restraint on students on school property or during school-related activities.

HB 359 also exempts students in the sixth grade and below from being prosecuted for the class C misdemeanor offenses of intentionally disrupting classes, school activities, or student transportation. Students in the sixth grade and below are further exempt from being prosecuted for certain disorderly conduct constituting a class C misdemeanor if the conduct occurred at a public school during regular school hours.

The bill applies beginning with the 2011-12 school year.

Supporters said

HB 359 would preserve local control, protect parental rights, and codify a definition of corporal punishment. The bill no longer would permit a school district's code of conduct to supersede a parent's right to disallow the use of corporal punishment on his or her child. Parental rights always should trump the rights and decisions of a school district, especially when it relates to corporal punishment.

The bill would preserve local control by permitting a school district to include corporal punishment as a means of discipline. School districts that permit corporal

punishment choose the disciplinary measure as a last resort.

A codified definition of corporal punishment, as defined in HB 359, would afford a uniform understanding of what the disciplinary measure could include and what would constitute "going too far."

Opponents said

HB 359 would require parents to indicate each year if they disapprove of corporal punishment, which is unnecessary and impractical. The parent's statement should not have to be verified annually. A school district should retain the discretion to require the annual statement or not.

HB 359 includes too many prescriptive mandates for school districts. State law should not require the school district to submit reports pertaining to corporal punishment.

Other opponents said

HB 359 should ban the use of corporal punishment by school districts. Hitting is not punishment; it is abuse. Allowing corporal punishment violates Title 9 of the Penal Code, which prohibits disorderly conduct, public indecency, and harassment. Corporal punishment is used disproportionately on minorities and has negative effects on a student's psyche, such as spurring aggressive behavior or the desire to drop out of school.

Notes

The House committee version would have allowed schools to use corporal punishment only on students whose parents had provided written consent. The bill was amended on the House floor to require parents who wished to disallow the practice to submit written statements of disapproval.

The **HRO analysis** of HB 359 appeared in Part Three of the May 6 *Daily Floor Report*.

End-of-course exams, graduation requirements

HB 500 by Eissler
Died in Senate Committee

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HB 500 would have phased in new requirements for earning a high school diploma according to a specified transition plan. The bill would have reduced the number of end-of-course exams that students had to pass.

Minimum graduation plan requirements. In order to graduate under the minimum high school graduation plan, a student would have had to meet or exceed the score determined by the commissioner of education on the end-of-course exams for English III; Algebra I; biology, chemistry, or physics; and world geography, world history, or U.S. history.

Recommended graduation plan requirements. In order to graduate under the recommended high school graduation plan, a student would have had to meet or exceed the score determined by the commissioner on the end-of-course exams for English III; Algebra II; biology, chemistry, or physics; and world geography, world history, or U.S. history.

Advanced graduation plan requirements. In order to graduate under the advanced high school graduation plan, a student would have had to meet or exceed college readiness standards as defined by the commissioner on the end-of-course exams for English III and Algebra II, and the score determined by the commissioner on end-of-course exams for biology, chemistry, or physics and world geography, world history, or U.S. history.

Inclusion in the final grade for the course. The bill would have removed the requirement that a high school student's grade on an end-of-course exam comprise 15 percent of his or her final course grade. School districts would have had to adopt a policy addressing whether or not a student's end-of-course exam score would be used to determine the student's final course grade and, if so, how it would do so. Policies developed by school districts would have applied beginning with the 2011-12 school year.

The bill would have exempted a student in the fifth or eighth grade from a grade-specific state assessment if he or she was enrolled in a high school course for which an end-of-course assessment would be given in the same

subject. A student's promotion to the next grade level could not have been denied based on failure to perform satisfactorily on the end-of-course assessment.

Retesting requirements. The bill would have eliminated the requirement that a student retake an end-of-course exam for which he or she did not meet the minimum score, instead making it optional. A student who failed to perform satisfactorily under the college readiness performance standard in Algebra II or English III could have retaken the exam, but a student no longer would have been allowed to retake an end-of-course exam for any reason.

Reduced Assessment Requirements Pilot Program. The bill would have established a pilot program to reduce the assessment requirements for students in grades three through eight on at least 20 campuses during the 2012-13 and 2013-14 school years. The commissioner would have had to provide a report evaluating the program's success to the Legislature by September 1, 2014.

Supporters said

HB 500 would reduce from 12 to four the number of end-of-course exams a student had to pass to earn a high school diploma. This would reduce the number of high-stakes tests taken by students and decrease the financial burden that state assessments place on school districts. The bill instead would focus testing on English III and Algebra II, which are the only two courses that consistently correlate with college readiness.

School district accountability. Since school districts are held accountable for student performance, they would continue to have an incentive not to allow students to ignore the importance of end-of-course exams.

Inclusion in the final course grade. The bill would allow local school districts to use their discretion to determine whether or not a student's end-of-course exam score would be included in the student's final course grade. Rather than imposing a rigid one-size-fits-

all system, HB 500 would give districts the flexibility to adapt their local policies to local needs in determining how to count the end-of-course exam toward a student's final course grade. The transition period included in the bill would give school districts the opportunity to gather data to align their curricula with the end-of-course exams.

Notes

The **HRO analysis** of HB 500 appeared in the April 6 *Daily Floor Report*.

Opponents said

HB 500 would abdicate the state's commitment to ensuring that all students graduate college or career ready. By reducing the state's expectations of public school students, the changes in end-of-course exams made by this bill would decrease the quality and value of their education.

Students need the incentive that end-of-course exams provide. It is rational to expect that all lessons will culminate in comprehensive tests. The expectations of foreign countries far exceed Texas' expectations for its students. Texas students deserve to be held to a standard that will allow them to be competitive internationally.

School district accountability. The state has only just begun to implement the provisions of HB 3 by Eissler, enacted by the 81st Legislature in 2009, which is considered a national model regarding high expectations for student performance and school district accountability. Current law already provides enough transition and flexibility. The state should wait at least four years to implement the provisions of HB 3 and examine how well it works before considering major revisions.

Inclusion in the final course grade. The bill would not ensure that all high school grade point averages were comparable. Unless each school district excluded the end-of-course exam scores in final course grades, then overall grade point averages would be impossible to compare. If all grade point averages were not comparable, the fairness of the state's top 10 percent law — allowing students who graduate in the top 10 percent of their high school class to be admitted automatically to any public higher education institution in Texas — would be called into question.

Requiring bullying policies in public schools

HB 1942 by Patrick/**HB 1386 by Coleman**
Effective June 17, 2011

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HB 1942 requires school districts to develop policies on bullying. It adds preventing, identifying, responding to, and reporting incidents of bullying to the list of possible topics at staff development trainings.

Bullying is defined as engaging in activity on school property, at a school-related activity, or in a district-operated vehicle that physically harms the student, damages the student's property, or places the student in reasonable fear of such personal harm or damage. Behavior is bullying if it is severe, persistent, and pervasive enough to create an intimidating, threatening, or abusive educational environment for the student, exploit an imbalance of power between the perpetrator and the victim, and interfere with a student's education or substantially disrupt the operation of a school.

Each school board must adopt a policy that prohibits bullying and that:

- prohibits retaliation against anyone who provides information on an incident of bullying, including a victim or witness;
- establishes a procedure to notify a parent of the victim and the bully within a reasonable time after the incident;
- establishes how a student can obtain assistance in response to bullying;
- sets out the available counseling options for a student who experiences or witnesses bullying or who engages in bullying;
- establishes procedures for reporting an incident of bullying, investigating an incident, and determining whether the incident occurred;
- prohibits the discipline of students who use reasonable self-defense to respond to bullying; and
- requires that discipline for bullying of a disabled student complies with applicable federal requirements.

Under certain conditions, a school board may transfer a student engaging in bullying to another classroom or campus. The essential knowledge and

skills for the health curriculum also must include evidence-based practices that effectively address awareness, prevention, identification, and resolution of and intervention in bullying and harassment cases.

HB 1386 establishes certain early intervention mental health and suicide prevention programs in public schools. The Department of State Health Services (DSHS) and the Texas Education Agency (TEA) must provide and update annually a list of recommended best practice-based programs. Each school district may select programs from the list for implementation.

The programs on the list must include components on training counselors, teachers, nurses, administrators, law enforcement officers, and social workers who interact regularly with students to:

- recognize students at risk of committing suicide;
- recognize victims and perpetrators of bullying;
- recognize students displaying early warning signs of mental health issues; and
- intervene effectively with the student or provide notice to parents.

Each school board may adopt a policy that:

- establishes a procedure to provide notice to parents;
- establishes that the district may develop a reporting mechanism and designate a district liaison for identifying troubled students; and
- describes for parents the optional counseling alternatives available for the child.

The policy must prohibit any medical screening of a student without prior parental consent. The policies and procedures must be included in the annual student handbook and submitted to the TEA.

Supporters said

Bullying negatively impacts the environment in which students learn and prevents them from developing healthy behaviors and self-esteem. The state should be involved in crafting the approach taken by public schools to bullying and suicide prevention because of the seriousness of the issues.

HB 1942 would take an effective, preventive approach to combating bullying. Research shows that most bullying behavior is learned from the student's environment. The bill would include the key elements found in effective bullying policies, such as methods to improve peer relations, provide meaningful intervention, develop clear rules to stop bullying, and support and protect victims.

This approach ensures that students engaging in bullying receive the counseling necessary to improve their well-being and become productive and engaged adults. The preventive approach would help decrease the number of students entering the criminal justice system because it would reduce the number of students who learn and embark upon criminal behavior.

HB 1942 would afford a reasonable amount of local discretion, while specifying the state's expectations for student behavior. To prevent bullying, state policy must encourage an antibullying culture in Texas public schools.

HB 1942 need not prescribe a specific time frame for parents to be notified of bullying, since such a provision would be inflexible and difficult to enforce. The bill's requirement of a "reasonable amount of time" would allow each local school district to determine the best procedures for that district.

HB 1942 would provide guidance to local school districts to include antibullying topics in staff development training. However, mandating specific antibullying training for teachers and other school personnel would impose a costly unfunded mandate on school districts.

School districts should not and cannot be responsible for student activity that occurs off or near campus. The line between on- and off-campus is blurred in the case of text messages or electronic communications sent from or received by a device owned by the school district, whether or not the device was located on the

district's physical property at the time. HB 1942 would afford a school district the discretion to classify these incidents within or outside of the school district's jurisdiction.

The premise behind a preventive approach is that school culture drives student actions. By teaching students about bullying, including its characteristics and appropriate responses, students become empowered to self-correct and to correct their peers.

The short- and long-term effects of bullying on both the bully and the victim are well documented. The most serious effect is the increasing rate of youth suicide, caused by the intense devaluation of self. HB 1386 would help protect the emotional well-being of all students by assisting in the identification of early indicators of mental illness and suicidal thoughts.

Opponents said

Because of the short- and long-term effects of bullying on the educational environment and students, and to prevent youth suicide, HB 1942 and HB 1386 should have included accountability measures to ensure enforcement of the law.

The focus on early indicators of mental illness could steer more kids toward medication. Students do not necessarily need to be medicated. Antidepressants can cause homicidal and suicidal thoughts in young children, even some adults.

HB 1942 should include a specific time frame for parental notification because the bill's requirement that a parent be notified within a "reasonable amount of time" is vague and would not ensure parental notification.

HB 1942 should mandate staff development training on bullying. A policy for handling and preventing bullying will be wholly ineffective if school personnel do not understand and feel comfortable with the policy and with how to intervene when they recognize bullying behavior.

HB 1942 should have included off-campus activity in the jurisdiction of a school district. School districts should be responsible for and aware of student activity that occurs near campus or directly affects the educational environment.

Other opponents said

Despite problems with bullying, mental illness, and suicide in schools, decisions regarding how to handle these problems should remain at the local level. The state should not determine a school district's approach to bullying behavior and suicide prevention.

School districts determine the expectations for student behavior through the district's code of conduct, which could include specific antibullying policies. Through its code of conduct, the district can choose to include a preventative approach to bullying behavior and influence the educational culture. School boards should be held accountable by local voters if they fail to uphold and enforce existing antibullying laws and policies.

Notes

The **HRO analysis** of HB 1942 appeared in Part Two of the May 2 *Daily Floor Report*. The **HRO analysis** of HB 1386 appeared in Part Two of the May 11 *Daily Floor Report*.

Revising financing of public schools

SB 1 by Duncan, First Called Session
Generally effective September 28, 2011

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The public school finance articles of **SB 1** alter the formulas used to determine the funding to which each school district and charter school is entitled. The bill also changes the method for proration of Foundation School Program (FSP) payments, changes the calculation of the minimum monthly salary for teachers, and requires a joint committee to study public school finance, among other provisions.

State aid for tax relief. SB 1 reduces the amount of additional state aid for school district property tax relief intended to hold school districts harmless at a “target revenue” amount. The amount is reduced in the 2012-13 school year to 92.35 percent of its previous guaranteed amount. For subsequent school years, the Legislature by appropriation must establish the applicable percentage reduction.

On September 1, 2017, target revenue hold-harmless funding will be eliminated. At that point, if the state compression percentage, which reduces a district’s 2006 property tax rate, is not established by the Legislature in the appropriations act for a school year, the education commissioner must determine the percentage.

SB 1 also states the intent of the Legislature that target revenue continue to be reduced between fiscal 2014 and fiscal 2018 and that the basic allotment be increased.

School finance formula changes. From the 2011-12 school year until September 1, 2015, each school district’s and open enrollment charter school’s regular program allotment (RPA) will be differentiated from the basic allotment. The RPA will be calculated by multiplying the number of students in average daily attendance (ADA), excluding time spent in special education programs, by the district’s adjusted basic allotment (AA) and a regular program adjustment factor (RPAF). The RPAF is 0.9239 for the 2011-12 school year and 0.98 for 2012-13. For 2013-14 and 2014-15, the RPAF is between 0.98 and 1.0, as established by the Legislature in the appropriations act.

$$\text{RPA} = \text{ADA} \times \text{AA} \times \text{RPAF}$$

For a school district that does not receive target revenue hold-harmless funding for 2011-12, the commissioner may set the RPAF at 0.95195 for 2011-12 and 2012-13 if the district demonstrates that funding cuts resulting from SB 1’s adjustments to the RPA will cause hardship for the district in 2011-12. In these cases, the commissioner must ensure that the total amount of state and local revenue in the combined 2011-12 and 2012-13 school years does not differ from the amount the district would have received if its RPAF had not been adjusted. The commissioner’s determination is final and cannot be appealed.

According to the Legislative Budget Board, the changes to the FSP formulas will mean about \$4 billion less in state aid sent to school districts during fiscal 2012-13, a \$2 billion reduction in each fiscal year. In fiscal 2012, the \$2 billion reduction will be achieved through the RPAF. For the \$2 billion reduction in fiscal 2013, 25 percent will be achieved through the RPAF and 75 percent through the reduction to target revenue (an overall target revenue reduction of 7.65 percent).

The RPAF will be repealed on September 1, 2015, and so will not apply starting in fiscal 2016 and beyond. Beginning September 1, 2015, the formula reverts to former law, wherein a school district is entitled to a basic allotment per student in ADA of the lesser of:

- \$4,765; or
- \$4,765 multiplied by the district’s compressed tax rate divided by the state maximum compressed tax rate (\$4,765 X DCR/MCR).

Wealth per student. A school district that had a 2010 maintenance and operations tax at the maximum allowable rate may not have a wealth per student that exceeds \$339,500 for its maintenance and operations tax effort beyond the first 6 cents above the district’s compression rate. This provision expires September 1, 2012, when the maximum allowable wealth per student returns to \$319,500.

Guaranteed yield. For a school district whose 2010 maintenance and operations tax rate was at the maximum allowable rate, the guaranteed level of state

and local funds per weighted student per cent of tax effort is \$33.95. This provision expires September 1, 2012, when the guaranteed yield returns to \$31.95.

Indirect cost allotments. Beginning with the 2011-12 school year, the State Board of Education (SBOE) must increase allotments for indirect costs for special education, career and technology courses, bilingual education, and the juvenile justice and disciplinary alternative education programs in proportion to the average percentage reduction in total state and local maintenance and operations revenue provided to public schools for the 2011-12 school year.

Proration. The bill changes the method by which the commissioner prorates Foundation School Program (FSP) payments to school districts and open-enrollment charter schools if the amount appropriated to the FSP for the second year of a fiscal biennium is less than the amount to which they otherwise are entitled for that year. The commissioner must adjust the total amount for each district and charter school to comply with wealth-per-student provisions by the same percentage to achieve the necessary overall adjustment.

Minimum salary schedule. SB 1 changes the calculation of the minimum monthly salary for each classroom teacher, full-time librarian, full-time counselor, and full-time nurse, decreasing the factor that represents years of experience in the formula. The minimum monthly salary is the product of the applicable salary factor and the amount determined by the commissioner based on the basic allotment for a school district with a maintenance and operations tax rate at least equal to the state maximum compressed tax rate. Each employee must receive the amount determined by the minimum monthly salary formula or by the specified monthly amount listed on the minimum salary schedule corresponding to an employee's years of service, whichever is greater.

The bill suspends the requirement that if the minimum monthly salary for a particular level of experience is less than that of the preceding year, it must equal the minimum salary for the previous year, and it reinstates this provision on September 1, 2017. (*Note:* SB 8 by Shapiro, enacted during the 82nd Legislature's first called session, repealed the requirement that an employee's minimum salary be at least equal to the employee's 2010-11 school year salary.)

The commissioner must submit a report evaluating and making recommendations on the salary schedule to

the governor, the lieutenant governor, the speaker, and appropriate legislative standing committees by January 1, 2013.

Over-allocation to school districts. The Texas Education Agency (TEA) may recover an over-allocation of state funds for a period up to the five subsequent school years if the commissioner determines that the over-allocation resulted from exceptional circumstances reasonably caused by statutory changes.

District retention of certain FSP payments. The bill restores language removed by HB 3646, enacted by the 81st Legislature in 2009, that if a school district adopts a maintenance and operations tax rate below that equal to the state compression percentage multiplied by the district's 2005 maintenance and operations tax rate, the commissioner must reduce the district's entitlement to additional state aid for tax relief proportionally. The provision applies beginning with maintenance and operations tax rates adopted for the 2009 tax year.

School districts that received state aid for 2009-10 and 2010-11 based on the target revenue hold-harmless amount to which they were entitled in January 2009 will not have their aid reduced if their maintenance and operations tax rate is below their 2005 tax rate. This exemption expires September 1, 2013.

Notice on interest and sinking tax rates. If a school district's interest and sinking tax rate decreases after the publication of a required meeting notice, the president of the board of trustees is not required to publish another notice or call another meeting to discuss and adopt the budget and the proposed lower tax rate.

School districts receiving federal impact aid. The commissioner may ensure that certain school districts receiving federal impact aid due to a military installation or high concentration of military students do not receive more than an 8 percent reduction if the federal government reduces appropriations.

Transportation funding. SB 1 permits a school district to charge a fee for the transportation of a student to and from school if it does not receive funds through the transportation allotment or the county transportation system allotment.

Interim committee. The speaker and the lieutenant governor must establish a joint legislative interim committee to study the public school finance system

in Texas and make recommendations to the 83rd Legislature by January 15, 2013.

Tax increment financing payments. SB 1 ensures that school districts required to pay taxes into a tax increment fund for a reinvestment zone, which aims to make land more attractive to economic development, receive additional state aid to meet their obligations.

In addition, the commissioner must decrease by one-half the reductions in entitlement amounts computed to account for taxes deposited into a tax increment fund for certain school districts. This applies only to a school district notified by the commissioner before May 1, 2011, of a reduction in state funding for school years 2004-05 through 2008-09 based on its reported payments into a tax increment fund. These provisions expire September 1, 2013.

Supporters said

SB 1 would make statutory changes in the school finance formulas to account for the need to reduce state formula funding by \$4 billion in fiscal 2012-13 due to the reduction in state revenue caused by the economic recession. The changes to the public school finance system made by SB 1 would distribute the impact of the state budget crisis across public schools. During the first year, the regular program adjustment factor (RPAF) would reduce regular Foundation School Program funding under the formulas. In the second year, one quarter of the state aid reduction would be made through the formulas and three-quarters through a reduction in target revenue, with the goal of phasing out target revenue by 2017. Those benefiting the most from target revenue funding would lose more, while those in the formula funding system would lose less. As the state made the transition back to a formula-driven system for distributing state aid to school districts, the system would become more equitable.

While some say these changes would not allow for increased funding due to enrollment growth, that criticism assumes that the cost to educate new and existing students is the same. It actually costs less to educate an existing student. When assessing the total shortfall in public education spending, student costs should be viewed in terms of starting a business. The initial investment may be more expensive, but the costs eventually decrease.

District retention of certain FSP payments. The bill would correct a problem caused by an inadvertent repeal of a provision in 2009 that resulted in a school district that adopted a maintenance and operations tax rate lower than its compressed rate not receiving state aid. TEA, based on letters from lawmakers stating that it was not the Legislature's intent to make that change, has not enforced the provision, allowing several school districts to receive state aid despite a maintenance and operations tax rate lower than their compressed tax rate. If the Legislature did not enact the bill's provisions and if these school districts were unable to adopt a higher tax rate, the districts would not receive state funding. The bill would reinstate the previous statutory language and allow the affected districts to retain funding that the state has paid to them in anticipation of this correction.

Tax increment financing payments. The bill would ensure that 34 school districts could fulfill their tax obligations for the benefit of land zoned to enhance the areas' attractiveness to new businesses. When the Legislature compressed local property tax rates in 2006, these school districts lacked funds to pay their obligations. The bill would require districts to receive state aid for this purpose.

Opponents said

The statutory changes to the school finance formulas made by SB 1 would implement a \$4 billion reduction in state aid to public education. For the first time since the Foundation School Program was established in 1949, these formula changes would mean a permanent reduction in state aid to the public schools. School districts no longer could count on increased funding for enrollment growth because funding would be driven not by statutory formula guarantees but by the whim of the Legislature during the appropriations process. These changes allowing reduced state funding could cripple public schools.

The declining value per student within the formula would be particularly damaging, with school districts facing decreased funding in the context of rising standards and increasing educational challenges. The bill would decrease public school funding to the point where the system was unable to fulfill its constitutional obligations. The bill fails to produce a set of funding formulas based on cost estimates of legislative expectations for educational outcomes.

State funding to school districts for public education is and should remain an entitlement according to the Texas Constitution and current law. The proposed changes would codify the sentiment that public education funding no longer was an entitlement, but should be based only on available revenue, not the school finance formulas on which school districts depend.

Target revenue hold-harmless. The budget crisis and the school finance system would be best served by eliminating target revenue entirely, rather than merely phasing it out. The target revenue hold-harmless provision is unrelated to the cost of education. It is arbitrary, inefficient, and inequitable and should be eliminated before decreasing funding to school districts that receive their funding through the formulas.

Regular program allotment. The bill states the Legislature's intent to raise the basic allotment between 2014 and 2018, but intent is not a guarantee. If the Legislature chose to increase the regular program allotment (RPA) without raising the basic allotment, then every weight and adjustment that accounts for the cost of educating different types of students would be frozen and useless. As the RPA increases, the formula-based percentage of total revenue to districts would decrease, and the state would continue to fail to fund the high cost of educating certain students.

Structural deficit. It is unacceptable to decrease funding to school districts to compensate for the Legislature's inability to fulfill its promise to buy down property taxes. Any legislation to fix the school finance system is futile if the structural deficit created by chronically insufficient business tax revenue, intended to replace local revenue reduced by compressed property tax rates, is unaddressed. Until additional revenue is created to support the compression of local property tax rates, there will be a gap between state revenue and the state's obligation to fund the school finance system adequately.

Proration. The existing proration procedure should not be changed. The current proration procedure is driven by wealth, which ensures that each school district experiences the same decrease in wealth per penny. Since school districts set their budgets in July, the bill's proration terms would leave school districts high and dry without a method to cope with the lost funding.

The proposed language does not specify whether the percentage decrease would be taken from a school

district's state revenue or total net revenue. If the intention is to apply the percentage to a district's state revenue, proration would affect poorer school districts disproportionately.

The proposals would return the proration statutes to the problematic system of the 1980s and would take financial predictability and security away from school districts. In the 1980s, school districts were forced to guess their net revenue for each school year, which caused them to increase tax rates in anticipation of possible proration. The method proposed could cut money from school districts after it already has been committed or spent.

Tax increment financing payments. The decision to enter into a tax increment program is a local one made by a school board to entice businesses to that community. The state should not use public education dollars to fund this local decision because it does not benefit public education.

Other opponents said

The school finance cuts should include a cap on the percentage of state aid reduction a school district could face. The Rainy Day Fund was created to prevent public education cuts during tough economic times. The fund should be used as intended to provide the remaining money necessary to fund public education adequately.

The bill would remove the most recent hold-harmless provision but not other similar provisions in current law, which should be removed as well.

Notes

The **HRO analysis** of SB 1 appeared in the June 9 *Daily Floor Report*.

Adopting and funding instructional materials

SB 6 by Shapiro, First Called Session
Effective July 19, 2011

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SB 6 repeals the Technology Allotment and the system by which textbooks and instructional materials had been purchased for school districts and establishes the Instructional Materials Allotment. The bill also replaces references to “textbook” with “instructional material” throughout the Education Code and expands the definition of that term.

The bill moves the economics course requirement to the foundation curriculum from the enrichment curriculum to allow it to fulfill the social studies component of the high school graduation requirements.

Instructional materials allotment. The commissioner of education must maintain an instructional materials account for each school district and transfer an allotment annually to each school district’s account from the State Instructional Materials Fund, which is funded from the annual distribution from the Permanent School Fund to the Available School Fund. The commissioner must determine the per-student allotment based on the amount of money in the State Instructional Materials Fund.

Open-enrollment charter schools are entitled to an annual allotment in the same manner as school districts. A juvenile justice alternative education program is entitled to an amount determined by the commissioner, which is final.

Permanent School Fund distribution. The State Board of Education (SBOE) must set aside 50 percent of the annual distribution from the Permanent School Fund to the Available School Fund to fund the Instructional Materials Allotment and expenses related to instructional materials, as well as the School for the Blind and Visually Impaired, the School for the Deaf, and the Texas Youth Commission.

For fiscal 2012-13, the SBOE annually must set aside 40 percent of the annual distribution from the Permanent School Fund to the Available School Fund for the State Instructional Materials Fund.

Per-student allotment amount. A school district’s annual allotment entitlement is determined by the

number of enrolled students during the preceding school year and the per-student allotment amount determined by the commissioner, who can adjust the district’s number of students for accuracy. The school district can request an adjustment by May 31 of each school year if its enrollment is expected to change. The commissioner must establish a procedure for identifying high-enrollment-growth districts and adjust their allotments accordingly.

Use of the allotment. The allotment can be used to buy technological equipment, materials on the commissioner’s list, and instructional (including open-source), bilingual, consumable (such as workbooks), and supplemental materials. The allotment may be used to train certain personnel and employ support staff for technological equipment directly involved in student learning.

At the end of each year, the school district must certify to the commissioner that its allotment was used for permitted expenses. A school district with an unused account balance may carry over those funds and must certify annually to the SBOE and the commissioner that it provided each student with sufficient materials to cover every essential knowledge and skills element.

The bill transfers responsibility for buying bilingual materials from the SBOE to the district and authority for purchasing special instructional materials for the blind and visually impaired from the SBOE to the commissioner.

Online requisition. The commissioner must maintain an online purchase request system for school districts to request materials to be purchased with the allotment.

Instructional materials adoption. The SBOE no longer will set a maximum price for instructional materials and is not required to review and adopt instructional materials for all grade levels in a single year. The SBOE must prioritize materials for foundation curriculum subjects for which the essential knowledge and skills have been substantially revised above those for enrichment curricula.

The time between review of materials for foundation curriculum subjects is extended to eight years. No more than one-fourth of foundation curriculum instructional materials may be reviewed each biennium. The bill reduces the number of months before the school year that the SBOE must notify the public about a new review and adoption cycle from 24 to 12.

Instructional materials list. Instead of assigning material to conforming or nonconforming lists, the SBOE must adopt one list of instructional materials. The SBOE must identify the percentage of essential knowledge and skills of the subject and grade level covered by each instructional material submitted, and the material must cover at least half of the essential knowledge and skills for the subject and relevant grade level.

Within 90 days after the submission of open-source instructional material, the SBOE may review it. The SBOE must post, as a part of the instructional materials list, all comments made by the board.

Commissioner's list. The commissioner must adopt a list of electronic instructional materials, science materials for kindergarten through grade five, and personal financial literacy materials for kindergarten through grade eight. The SBOE must be given the chance to comment on the listed material and may require the commissioner to remove it.

Instructional material ownership. Instructional materials bought by a school district or charter school are considered the property of that district or school, which must determine how to dispose of discontinued instructional materials and notify the commissioner when choosing to do so. Material may be sold upon discontinuation, but proceeds must be used to buy instructional materials.

The bill repealed the requirement that copies of discontinued nonelectronic textbooks be available for use in libraries, Texas Department of Criminal Justice facilities, or state agencies.

Technology Lending Pilot Program. The commissioner may use up to \$10 million from the State Instructional Materials Fund to award grants to school districts and charter schools to loan students equipment necessary to access electronic instructional materials. Applicants must be considered based on the availability of existing equipment and other funding available to the applicant. The pilot program expires on September 1, 2015.

The bill also repealed the computer lending pilot program, which provided computers to participating public schools for use by students and parents.

Supporters said

SB 6 would change the role of the state from distributing textbooks and technological equipment to distributing money to school districts to purchase these items. The SBOE would retain its authority to review and adopt instructional materials. The state should move away from conforming and nonconforming lists and instead rely on a list of materials reviewed by the SBOE, with identification of the percentage of essential knowledge and skills covered in each.

Maintaining control of content. It is appropriate for the state to maintain control over the content used in classrooms. Technology already is being used in classrooms, either by students with “smart phones” or by school districts that can afford the equipment. SB 6 would allow the state to regulate the content of these materials to ensure they met the rigor and curriculum standards adopted by the SBOE.

Flexibility to school districts. Districts would have maximum flexibility to buy the instructional materials that suited each class. Requiring the SBOE to identify the percentage of essential knowledge and skills covered in the instructional materials would ensure that materials chosen by a school district or charter school covered each of the essential knowledge and skills elements.

The new allotment would allow school districts to level the playing field across student populations by providing access to current technology and information for low-income students who might otherwise lack access to the material.

Increased relevance. The bill would increase the relevance of instructional materials' content because online and open-source materials can be updated more quickly and frequently, at lower cost, than printed materials. The current system has resulted in too many schools using out-of-date materials, which hinders students' ability to learn.

Teachers work hard to provide relevant lessons but, because of the way the state funds technology, they often lack the right resources. Great teachers use various instructional resources, and SB 6 would increase the resources available. The bill would allow the allotment

to be spent to train educators to use this technology for students' benefit.

Providing students with the ability to use technology would better prepare them for higher learning and the workforce. It also would allow teachers to teach students how to discern the appropriateness of information sources on the Internet.

Opponents said

While the bill would increase flexibility for school districts, it could hold school districts to the same per-student allotment for many years without adjustments for inflation. Other allotments for school districts, such as the transportation allotment, have not been increased on a per-student basis since their inception. School districts could experience a decrease in instructional materials funding long term.

Other opponents said

SB 6 should require the implementation of the technology lending pilot program, which would provide a mechanism for low property-wealth school districts to buy technological devices that other districts already have in order to increase equity.

Notes

The **HRO analysis** of SB 6 appeared in the June 16 *Daily Floor Report*.

Public school employee contracts, management

SB 8 by Shapiro, First Called Session
Effective September 28, 2011

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SB 8 revises various provisions governing school district employee contracts and salaries, including making changes to the minimum salary schedule and to requirements for giving notice when a contract will not be renewed. It allows school districts to make declarations of financial exigency and to implement furlough programs under certain circumstances.

Minimum salary schedule. SB 8 removes the requirement that the salary of each classroom teacher, full-time librarian, full-time counselor, and full-time nurse be at least equal to the salary the employee received for the 2010-11 school year.

Nonrenewal or termination of certain school district employee contracts. The bill changes the deadline for a school district to notify classroom teachers and full-time librarians, counselors, and school nurses employed under a probationary contract or whose contract is about to expire that a contract will not be renewed. The deadline for notice is 10 days, rather than 45 days, before the last day of instruction.

This notice must be hand delivered to the teacher on campus. If the teacher is not present for a hand delivery, then the notice must be mailed by prepaid certified mail or delivered by express delivery to the teacher and postmarked on or before the 10th day before the last day of instruction. To determine the 15-day period in which an employee may request a hearing, the 15th day is the 15th day after the teacher received the notice by hand delivery or by mail.

A school district no longer must terminate teachers on continuing contracts according to the reverse order of seniority. Reductions must be based primarily on teacher appraisals in specific teaching fields and other criteria determined by the State Board for Educator Certification.

Financial exigency. The board of trustees of a school district may declare financial exigency for the district if financial conditions set by the commissioner are met. The declaration expires at the end of the fiscal year unless the board continues it by resolution before that time. The school board is not limited in the number

of times it may continue financial exigency and may terminate it whenever it considers it appropriate. It must notify the commissioner each time a resolution is adopted.

For a school year in which a school district reduces teacher salaries based on district financial conditions, rather than teacher performance, the district must reduce the annual salary paid to each district administrator or other professional employee by a percent or fraction of a percent equal to the average reduction of teacher salaries.

When financial exigency requires a reduction in personnel, the board of trustees may amend the terms of a superintendent's term contract. A superintendent, by providing reasonable notice, may resign without penalty and may continue employment during the notice period under the prior contract.

Hearings. If an employee protests a personnel reduction based on financial exigency, the employee is entitled to a hearing before the board or before a hearing examiner, as determined by the board. A school district with an enrollment of at least 5,000 students may designate an attorney to hold the hearing on behalf of the school board, create a hearing record for the board's consideration and action, and recommend an action to the board. The attorney may not be employed by a school district and may not represent a school district, a teacher in a dispute between a teacher and a district, or an organization of school employees, administrators, or boards of trustees.

Within 15 days after the hearing, the board's designee must provide to the board a record of the hearing and recommend either contract renewal or nonrenewal. The board must consider the record of the hearing and the recommendation at the next possible board meeting. At the meeting, the board must hear oral arguments from each party. It may place time limits on oral arguments, but must give equal time to each party. The board may obtain external legal advice before accepting, rejecting, or modifying the designee's recommendation. The board must notify the teacher in writing of its decision by 15 days after the meeting.

A determination by the hearing examiner on good cause for the suspension of a teacher without pay or the termination of a probationary, continuing, or term contract is a conclusion of law and may be adopted, rejected, or changed by the board of trustees or its subcommittee as provided by law.

Employee furloughs. If the commissioner certifies that the school district will be provided with less state and local funding for a certain year than was provided to the district for the 2010-11 school year, then the board of trustees of a school district may implement a furlough program according to district policy and may reduce by no more than six the number of days of service otherwise required during a school year. A decision by the board of trustees of a school district to implement a furlough program will be final, not subject to appeal, and not create a cause of action or require collective bargaining. If a school board of trustees adopts a furlough program after the date on which a teacher must give notice of resignation, the teacher may resign without consequence.

To develop a furlough or other salary reduction program, the board of trustees of a school district must include the district professional staff in the development process and hold a public meeting during which district employees and the public may express opinions. At the public meeting, the board and school district administrators are to present information about program options and the proposed program.

The school district must subject all contract personnel to the same number of furlough days. An educator may not be furloughed on an instruction day, and a furlough may not result in an increased number of required educator workdays. An educator may not use personal, sick, or any other paid leave while on furlough. A furlough imposed by the school district will not constitute a break in service for the purposes of the Teacher Retirement System of Texas and will not count as a day of service.

The school district may reduce the salary of a furloughed employee in proportion to the number of days the employee is furloughed. Any reduction in the salary of a furloughed employee must be equally distributed over the course of the employee's current contract with the school district.

Supporters said

SB 8 would provide increased local control and necessary relief from mandates for school districts, whose elected boards of trustees and administrators are best equipped to make decisions to benefit their students. It would help school districts save teacher jobs, help districts balance their budgets efficiently, and mitigate the impact of budget cuts.

Employee compensation. Current law does not allow a salary decrease from 2010-11 school year levels. Under current law, instead of reducing everyone's salaries a small amount, the district's only option is to eliminate positions, which could lead to larger class sizes in secondary grades or reduced services to students. Certain school districts report that the ability to reduce employee salaries by 1 percent would preserve 100 teaching positions.

Notice of nonrenewal. By changing requirements for notifying teachers about contract renewals, the bill would increase the time a school district had to develop its budget, which could save jobs. The current requirement to notify employees about contract renewals 45 days before the end of the school year forces school districts to determine their budgets before knowing the state appropriation for the upcoming school year, which does not equip the district to adapt to changing fiscal climates. During tough economic times, employees may be laid off before it is necessary. Under the bill, school districts no longer would be forced to rush their decision-making process.

Extending the time before notification is required would allow teachers to remain focused and engaged for the entire school year. Current notifications can cause teachers to use paid time off to remain out of the classroom for the remaining 45 days in the school year. State assessments occur near the end of the year, and it is detrimental not to have the teacher present for these preparations.

Teacher evaluations are not complete until about 15 days before the end of the year. SB 8 would allow districts to more accurately assess teachers, students, and projected student enrollment when making decisions about teacher contracts.

Financial exigency. A school district should have explicit authority to declare financial exigency so that it can act to prevent a financial disaster, such as by reducing the number of certain employees, changing food contracts, or amending existing contracts. Current law only implies authority for a school district to declare financial exigency in relation to terminating term-contract employees for a necessary personnel reduction.

The bill would not violate the legal terms of continuing contracts because such contract terms do not continue in effect once the employee leaves voluntarily, is terminated for good cause, or is released as part of a necessary reduction in personnel justified by a financial exigency.

Opponents said

SB 8 would undermine state salary and contract safeguards for teachers and could lead to increased class sizes. It would invite the Legislature to pass on responsibility for dealing with severe budget reductions to school districts by claiming that the districts had tools, such as furloughs, that gave them more flexibility to make cuts. Districts already have laid off teachers, and the bill would not take into account reductions that already have been made. While some claim the bill would save teacher jobs, there is no guarantee its provisions would be used to accomplish this.

The bill would not save school districts money or help them mitigate the effects of the budget crisis. Any possible savings would not be realized until the next biennium at the earliest because teacher contracts already have been executed for the next school year and cannot be materially changed. A school district that sought to use the bill's provisions to save money during the current school year would end up in costly litigation.

Seniority. Removing the requirement for termination in reverse order of seniority would leave veteran teachers vulnerable when a school district sought to alleviate budget constraints because veteran teachers have the highest salaries. Eliminating this requirement would make a material change to the terms of an existing contract, violating precedent set by *Central Education Agency v. George West I.S.D.*, 783 S.W.2d 200 (Tex. 1989), which held that material terms of a contract cannot be abrogated during the term of the contract. These employees have the protections of the existing continuing contract provisions because the

district has determined that their performance warrants being placed on a continuing contract.

Notice of nonrenewal. Receiving notice on the 10th day before the last day of school that an employee's contract will not be renewed would not provide proper notice to the employee. The current 45-day rule allows teachers an opportunity to search for a new job. Job fairs occur in the spring semester, and teachers need to know at that time whether they should be looking for a job. The bill would result in more teachers choosing to contest a proposed nonrenewal since they would not have any other viable employment options. The bill likely would cause a nonrenewal hearing to take place over the summer and conclude well after other districts already had completed their hiring for the following school year. Current law provides the proper balance between the teachers' and the districts' interests.

The contention that teachers choose to take vacation days or slack off from work upon notice of a nonrenewal is untrue and offensive. Teachers care about their students and want them to succeed, and they have a vested interest in excelling on the job to facilitate being hired by another district.

Financial exigency. SB 8 would make it easier for school districts to lay off employees during the term of their contracts by declaring financial exigency. The bill would encourage a school district to make these decisions mid-year instead of in the spring. School districts have demonstrated poor planning by claiming a need to reduce staff and terminate teachers mid-year, and state law should not make it easier for the school districts to do this.

Hearings. The bill would allow the school district or its designee, rather than an independent party, to judge the school district's action, which would be a clear conflict of interest. Hearings to protest personnel reductions should occur in front of an independent hearing examiner to preserve fairness in determining if a school district has appropriately followed protocol.

Other opponents said

The drastic changes proposed in SB 8 should be temporary during the budget crisis and examined more closely in more prosperous times.

Financial exigency. The bill's provisions permitting school districts to declare financial exigency are

unnecessary, as they already may do this under current law.

Hearings. If school districts are granted the leeway provided by SB 8, then teachers should be able to terminate their contracts mid-contract to pursue higher-paying job offers. Under current law, a teacher can lose a teaching certificate for abrogating a contract. SB 8 would represent an imbalance of power between school districts and teachers.

Notes

The **HRO analysis** of SB 8 appeared in the June 16 *Daily Floor Report*. Similar provisions were included in HB 17 by Callegari, HB 19 by Aycock, HB 20 by Huberty, and HB 21 by Shelton, all in the first called session. The HRO analyses for HB 17 and HB 19 appeared in the June 16 *Daily Floor Report*, and the analyses for HB 20 and HB 21 appeared in the June 9 *Daily Floor Report*.

Parent, school board input on school sanctions

SB 738 by Shapiro
Effective June 17, 2011

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SB 738 enables the parents of students and the school board of a public school campus for which repurposing, alternative management, or closure is required under state accountability standards to provide input on which of the three actions the education commissioner orders. If the parents of a majority of a campus's students petition the commissioner to order a specific action, the commissioner must order that action. If the district board of trustees requests the commissioner to order a different action and provides an explanation of the request, the commissioner may order the action requested by the board of trustees instead.

Supporters said

SB 738 would give parents a voice in the required sanctioning of a failing school by allowing them to petition the commissioner for the sanction they believed should be ordered. By requiring a majority of the students' parents to sign on to a written petition for a particular choice, the new law would encourage parents to communicate, collaborate, and reach agreement on the future of their children's education. Under current law, the choices of ordering repurposing, alternative management, or closure are left entirely up to the education commissioner. SB 738 would give parents a seat at the table, enabling them to provide local, informed input on a decision that critically affects the lives of their children.

SB 738 also would enable the school district's board of trustees to give the education commissioner formal input on the choice of sanction. This would ensure that the commissioner could order a sanction other than one selected by the parents if the board and the commissioner both believed a particular alternative sanction was more prudent for reasons provided in a written explanation from the school board, such as undue influence by charter schools on the parents' request. Keeping the voices of the parents and the school board distinct would allow all perspectives on the school sanctioning to be heard.

Opponents said

SB 738 would create a mechanism for well financed charter schools to try to gain control of traditional public schools by campaigning for worried parents to petition for alternative management. While the new law commendably would give parents a voice in an important decision on the future of their children's education, the bill would make that voice so powerful and potentially final that parents could become the targets of manipulation. The bill instead should encourage parents to collaborate with their school boards to provide a unified request to the commissioner, rather than potentially dividing the community and pitting the voices of parents against that of the school board.

Other opponents said

While SB 738 would take a step in the right direction of giving parents more control over their schools and their children's educations, the bill as filed contained a stronger and wider range of tools for parents to use. The original bill would have given districts and campuses opportunities to choose to convert into home-rule charter districts and in-district charter schools, which enjoy increased local control and greater freedom from bureaucratic red tape. Conversion into an in-district charter school should be included as a fourth campus sanction option for parents, school boards, and the education commissioner to consider. In-district charter schools are an innovative option for school restructuring in which the parents, campus staff, and district officials work together to arrange a charter contract. This kind of restructuring preserves neighborhood schools, which are vital to the fabric of communities.

Notes

The **HRO analysis** of SB 738 appeared in the May 21 *Daily Floor Report*.

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Banning texting while driving

HB 242 by Craddick
Vetoed by the governor

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HB 242 would have prohibited a driver from reading, writing, or sending a text-based communication while operating a vehicle unless the vehicle was stopped. Text-based communication would have included a text message, instant message, or e-mail. Exemptions would have applied to drivers dialing a phone number, using a hands-free or global positioning system device, or relaying information as part of their jobs.

Supporters said

Texting may not be the only distraction while driving, but it is one of the most dangerous, and this common-sense safety bill would help deter this dangerous behavior. A growing body of research resoundingly concludes that texting while driving distracts drivers and increases response times to sudden traffic incidents. Like drunk driving, driving while texting has injured and killed drivers, passengers, and innocent bystanders.

Simply adding texting while driving to offenses punishable with a maximum \$200 fine would help deter the activity. This bill is like other sensible safety laws, such as mandatory seat belts, and would help educate Texans about the dangers of texting while driving.

To address the dangers of texting while driving, many municipalities have adopted ordinances prohibiting this behavior. While commendable, different local approaches to the problem can create confusion because the local ordinances may not be well-publicized and may vary among cities. A uniform statewide prohibition would create consistent, well-publicized standards barring texting while driving statewide.

In addition to saving lives and preventing car accidents, the bill would ease traffic congestion on Texas roads by eliminating a major distraction for drivers.

Opponents said

While well-intentioned, this bill actually would detrimentally affect public safety. Drivers trying to hide their wireless devices while texting to avoid notice by a public safety officer could become more distracted and cause an even greater hazard. Texans should be trusted to monitor their own behavior in the privacy of their vehicles. Reading a text message, like looking at the radio, can take a driver milliseconds and may not distract them from watching the road.

HB 242 is a government effort to micromanage the behavior of adults. While current law already prohibits drivers under the age of 18 from texting or using a cell phone while driving, there is a distinction between the overreach of this bill and the government's legitimate role in establishing laws for teenage drivers who are more easily distracted and laws providing further protection to children in school zones.

The keys to dissuading drivers of all ages from texting while driving are information and education, including driving safety and driver's education courses and public service ads and announcements. Instead of implementing an ineffective government ban on texting, a more successful initiative would involve encouraging insurance companies to prevent drivers from texting while driving by instituting harsher penalties for policyholders who were texting during an accident or traffic violation.

Other opponents said

HB 242 would single out texting among the numerous distractions that can cause dangerous driving. Drivers are distracted by radios, various electronic controls, passengers, and many other activities that decrease awareness and distract from safe driving. This bill would not address other distracting uses of a wireless device, including using the Internet or manually dialing a phone number.

Banning texting would not address the core issue of distracted driving. The state should focus on improving driver education and ensuring that driver education courses fully cover the topic of distracted driving, including possible consequences.

Since it would be difficult to determine if an individual was texting, enforcing this bill would be very difficult. HB 243 essentially would give police the ability to pull over any driver with a cell phone in his or her hand, which would be especially problematic in a state with a well-documented history of racial profiling. The bill should be revised to make texting while driving a secondary offense that could be enforced only while pursuing a driver for a primary offense, such as speeding or reckless driving.

Notes

The bill's ban on texting while driving was added as a Senate floor amendment to HB 242. The amendment contained language similar to **HB 243** by Craddick, which passed the House but was left pending in the Senate Transportation and Homeland Security Committee. Gov. Perry vetoed HB 242 on June 17, citing the texting-while-driving prohibition.

HB 242 also would have allowed certain retired peace officers to be eligible for concealed handgun licenses and would have outlined certain services that the special rangers and Texas Rangers could perform.

The **HRO analysis** of HB 243 appeared in the April 7 *Daily Floor Report*.

The **HRO analysis** of HB 242 appeared in the May 7 *Daily Floor Report*. For further discussion of HB 242, see House Research Organization Focus Report No. 82-5, *Vetoed of Legislation: 82nd Legislature*, June 30, 2011.

Raising statewide speed limits

HB 1353 by Elkins/HB 1201 by Kolkhorst
Effective September 1, 2011/Effective June 17, 2011

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HB 1353 allows the Texas Transportation Commission to set a speed limit of 75 mph on sections of highways upon determining that doing so is reasonable and safe.

The bill also eliminates the speed limit distinction between day and night and between cars and trucks. Outside of urban districts, the speed limit will be 70 mph on a numbered highway and 60 mph on a non-numbered highway. As soon as practicable, the Texas Department of Transportation (TxDOT) must conceal or remove any old speed limit signs and install updated ones.

HB 1201 allows the commission to establish speed limits up to 85 mph on a part of the state highway system designed to accommodate travel at that speed if, after an engineering and traffic investigation, it determines that the speed limit is reasonable and safe.

Supporters said

HB 1353 would update speed limit laws in Texas and improve mobility without compromising safety. The bill also would eliminate the outdated distinction between day and night driving. Texas is the only state that has retained a nighttime speed reduction. Reducing night speed limits by 5 mph once served an important purpose when headlights were not suited to higher speeds. Updated headlight technology on modern cars and trucks, however, makes 70 or 75 mph a suitable and safe nighttime travel speed. Safe driving at night requires keen focus at any speed. Similarly, the currently reduced speed for trucks does not improve safety on the state's roads.

The most dangerous traffic situations are not those involving the highest speeds but those with greater speed differentials. Under HB 1353, TxDOT would specifically identify highways that could support a 75-mph speed limit after the commission studied engineering and traffic conditions.

Under HB 1201, only in specific circumstances, and after extensive consideration, would the commission

opt to authorize an 85-mph speed limit on a highway. A highway that could support an 85-mph speed limit would have to be specifically designed to minimize other traffic hazards.

Opponents said

HB 1353 could make Texas highways more dangerous for motorists. HB 1201 would go too far by authorizing the nation's highest posted speed of 85 mph.

Allowing the Texas Transportation Commission to increase the speed limit to 75 mph on state highways could lead to dangerous driving situations. While the commission would study the issue before increasing the speed of a section of highway, it is not always possible to predict the impact of higher speeds on safety. Many vehicles travel 5 or 10 mph over the speed limit. While the rate of collisions may not necessarily increase at higher average speeds, the average severity of accidents certainly does.

Eliminating the reduced night driving speed also could lead to more dangerous driving conditions. Drivers are more likely to override their headlights at higher speeds at night, creating potential hazards. Higher speeds amplify dangers associated with tired driving, which is more common at night, as drivers have less time to respond to unexpected incidents on the road.

HB 1353 would create further risks by eliminating the reduced speed for trucks. Only Utah currently allows trucks to travel at 80 mph. Not enough data from actual road observations exist to be confident that trucks can safely travel in real traffic conditions at these speeds.

The authority in HB 1201 to allow an 85-mph speed limit could be a boon for a private toll road in central Texas — SH 130, the only highway in Texas currently engineered to support a speed of 85 mph. SH 130 segments 5 and 6 near Lockhart are privately operated tollways developed by Cintra. A provision in the concessions agreement between TxDOT and Cintra to develop portions of SH 130 states that if TxDOT authorizes an 85-mph speed limit within a certain

timeframe, the agency will be entitled to an additional payment or a greater share of toll revenue.

Notes

The **HRO analysis** of HB 1353 appeared in the April 15 *Daily Floor Report*. The **HRO analysis** of HB 1201 appeared in the April 6 *Daily Floor Report*.

Continuing the Texas Department of Transportation

SB 1420 by Hinojosa
Generally effective September 1, 2011

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SB 1420 extends the Sunset date for the Texas Department of Transportation (TxDOT) by four years, to September 1, 2015. It revises provisions governing TxDOT administration, transfers permitting for oversize and overweight vehicles from TxDOT to the Department of Motor Vehicles (TxDMV), revises environmental review for highways, authorizes TxDOT to enter into comprehensive agreements for certain projects, establishes requirements for a statewide transportation plan, adds reporting requirements, allows design-build contracts, adds a compliance office to TxDOT, restricts lobbying of the Legislature, and adopts standard Sunset recommendations, among other changes.

TxDOT administration. SB 1420 prohibits a member of the Texas Transportation Commission from accepting a campaign contribution for elected office. Doing so would be tantamount to resigning, and the office immediately would become vacant. One commissioner must be a registered voter of a county with a population of less than 150,000.

The commission must establish a compliance office responsible for detecting and preventing breaches of departmental policy, fraud, waste, and abuse of office and for investigating and overseeing certain functions specified in the bill.

Oversize and overweight vehicles. SB 1420 transfers responsibilities for regulating oversize and overweight vehicles under Transportation Code, chs. 621, 622, and 623 to TxDMV from TxDOT no later than January 1, 2012. The agencies may adopt a memorandum of understanding to implement the transition. TxDMV will determine routes for the vehicles based on information from TxDOT. Documents issued by TxDOT before the transfer remain in effect.

Environmental review process. The commission must establish standards, based on certain criteria, for processing an environmental review document for a highway project. The standards must increase efficiency, minimize delays, and encourage collaboration between TxDOT and local governments.

TxDOT, a county, a regional tollway authority, or a regional mobility authority may enter into an agreement to provide funds to a state or federal agency to expedite an environmental review for a transportation project, including a project a metropolitan planning organization designates in its long-range transportation plan.

Comprehensive development agreements. The bill extends TxDOT's authority to enter into comprehensive development agreements (CDAs) for 11 specific projects from August 2011 to August 2015. It establishes requirements and timetables for the authorized CDAs. A committee consisting of representatives of certain public entities must determine the distribution of risk, method of financing, and tolling methodology for projects receiving certain forms of public assistance.

Transportation plan. The bill requires TxDOT to develop a statewide transportation plan extending 24 years, to be updated at least every four years. The plan must include measurable targets for long-term goals, identify priority projects or areas, and include a plan for obtaining formal input from government entities and the public. The department must coordinate with metropolitan planning organizations (MPOs) to develop assumptions for long-range federal and state funding forecasts to guide the plan.

Project development and fund allocation. The bill places in statute requirements that TxDOT's existing Unified Transportation Program (UTP) identify target funding levels yearly and list all projects that TxDOT intends to develop or begin during the required 10-year program period. The commission must adopt rules specifying criteria for selecting the projects for the program and defining funding categories and each phase of a major project.

Each TxDOT district must develop a work program based on the UTP that contains all projects the district proposes for a period of four years. The program must contain information on the progress of major projects and a summary of others. TxDOT must use the program to monitor district performance and evaluate district employees. It must make the work program available online.

For each funding category, the commission must specify formulas for allocating funds to districts and MPOs for certain types of projects. Funds TxDOT receives for highways must be allocated through the adopted formulas to department districts.

Reporting requirements. TxDOT must establish a transportation project information reporting system and an expenditure reporting system on its website. It must publish an annual report on the status of transportation goals that includes information about progress toward meeting long-term goals, the status of major projects, a summary of implementation benchmarks, and information about the accuracy of previous financial forecasts.

Design-build contracts. TxDOT may enter into a design-build contract for a highway project with a cost estimate greater than \$50 million, but until August 2015 may enter into only three such contracts per year. The bill defines a design-build contract as an agreement with a single entity for the design and construction of a highway project. The contract may not allow a private entity to operate or retain revenue from the operation of a toll road. The bill establishes procedures for evaluating and awarding design-build contracts.

Outdoor advertising. The bill establishes licensing and bonding requirements for displaying outdoor advertising on rural roads and adopts procedures for suspending licenses. It transfers highway beautification fees from the Highway Beautification Fund Account to the State Highway Fund (Fund 6). Money from fees and penalties for outdoor advertising on rural roads also will go to Fund 6.

The bill allows the commission to impose an administrative penalty for a violation of an outdoor advertising provision in lieu of a suit to collect a civil penalty. The commission must adopt rules for accepting and resolving written complaints related to outdoor advertising along rural roads.

Executive and employee conduct. The bill prohibits TxDOT from spending money to hire a person required to register as a lobbyist unless allowed to do so by another law. A commissioner or TxDOT employee may not use department funds to engage in activity to influence legislation, and doing so would be grounds for dismissal. A commissioner or employee may use state resources to provide public information or communicate with federal employees in the pursuit of federal appropriations.

The bill requires the commission or TxDOT, as appropriate, to consider whether an employee with unsatisfactory performance at the level of district engineer or higher should be terminated. Evaluations must include the extent to which the employee is professional, diligent, and responsive to directives and requests from the commission and the Legislature.

General provisions. The bill deletes a current requirement that notice of bids for a transportation project be published in a newspaper in the county in which the project is proposed. The commission must determine the most effective method for providing required notice of bids.

The bill requires TxDOT to manage a system of changeable message signs to provide current information to the traveling public, including information about traffic incidents, weather conditions, road construction, and alternative routes.

Supporters said

SB 1420, the TxDOT Sunset bill, would implement Sunset recommendations to promote transparency, accountability, and efficiency of operations. It would extend the agency four years, until 2015, so that the Sunset Advisory Commission had another chance in the near future to review how adopted changes were being implemented and to make further recommendations as appropriate.

Texas Transportation Commission. The bill would retain the current structure of the five-member commission appointed by the governor with Senate confirmation. Making major structural changes to the commission would not address core issues with transportation management in the state — the need to make organizational, leadership, and cultural changes within TxDOT. Trying to resolve issues with the agency by extensive restructuring would be ineffective and could have unanticipated consequences.

While some restructuring proposals may have merit, many have associated weaknesses that eclipse their promise. A single appointed transportation commissioner or single elected commissioner, for instance, might be more directly accountable, but could leave large areas of the state with no representation on the commission. Further, adding elected officials to the commission could politicize the selection of transportation projects in the state and result in decisions

made for political expediency and not the state's best interests.

Comprehensive development agreements. The bill would extend the state's ability to enter into CDAs with private entities to develop and operate specific toll roads. Private financiers, in some cases, can bring abundant resources to toll projects that may be unavailable to the public sector. Many private toll road developers have international asset and capital bases they may leverage to finance the initial acquisition and construction of toll facilities. Private toll road development agreements may bring the state more initial income in the form of concession agreements, give the state a portion of ongoing revenue collections, and relieve the state from the responsibility of building or maintaining the road.

By leasing the rights to develop and operate toll projects to private entities for the specific projects in the bill, the state would shield itself from the unavoidable risks associated with those projects. Leasing toll projects to private developers eliminates such risks for the state and provides revenue in the form of concession fees and other contractually specified returns.

Bids and contracts. The bill would implement a Sunset recommendation to authorize design-build contracts for nontolled transportation projects. Design-build contracts can be highly efficient in select circumstances because they allow for the integration of engineering and construction aspects of a contract. Authorizing a narrow universe of these contracts would minimize potential error and misuse, while allowing TxDOT to tap into the efficiency and savings these contracts can offer.

Oversize and overweight vehicles. SB 1420 would improve efficiency by consolidating the permitting of oversize and overweight vehicles within TxDMV. That department, which was established in 2009 to oversee vehicle titling and registration and other related functions, has been structured as an effective customer service agency. The focus on customer service, as opposed to transportation system design, construction, and maintenance, has allowed TxDMV to increase efficiency in the regulation of motor vehicles.

Opponents said

SB 1420 would miss an important opportunity to restructure TxDOT in ways that promoted the long-term interests of the state.

Texas Transportation Commission. SB 1420 should change the structure of the commission. The Sunset Advisory Commission found a pervasive atmosphere of distrust surrounding TxDOT and recommended decisive action. The Sunset Commission argued that a single commissioner would help restore accountability, trust, and responsiveness to the department. Retaining the five-member commission would not adequately reflect current discontent with TxDOT operations. The state needs significant change in the way transportation projects are planned and implemented that the bill would not realize.

The commission should be restructured to include a single appointed or elected transportation commissioner or multiple, elected commissioners. A change of this magnitude would send a strong message to TxDOT and fundamentally alter the commission, making its policymaking functions responsive to the public and its representatives.

Comprehensive development agreements. The bill would continue the flawed practice of turning over valued public assets to the private sector. The value of the transportation assets the state loses by leasing out development rights for toll roads usually exceeds any benefits it might enjoy as a result of ceding such rights. The capacity of private financing to minimize the risks inherent in developing a toll road is overstated. Private developers are not likely to gamble with toll roads that they do not expect to yield significant net profits over their lifetime, and it is unlikely that the state could deny credibly financial or contractual assistance to a private interest operating a failing tollway. Successful public toll roads become future engines of transportation funding, while privately funded toll roads export revenue to shareholders internationally.

Bids and contracts. The bill would apply a very specific method of project delivery, design-build contracts, to standard contracts that should be procured

with standard processes. Expanding the use of design-build contracting would not make sense because only a fraction of highway projects are suited for procurement through specialized forms of contract. This expansion would have few benefits and could present a number of risks based on how these contracts were structured.

Oversize and overweight vehicles. Moving permitting of oversize and overweight vehicles to TxDMV from TxDOT could reduce the efficiency of permit processing. Under the bill, TxDOT still would be responsible for determining routes for oversize and overweight vehicles, which is a necessary part of the permitting process. Moving these functions could forfeit an economy of location by requiring TxDMV to await a response from TxDOT in order to process a permit.

Notes

The **HRO analysis** of the House companion bill, HB 2675 by Harper-Brown, appeared in the April 29 *Daily Floor Report*.

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