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## *Major Issues*

### *of the 83rd Legislature, Regular Session and First, Second, and Third Called Sessions*

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During its 2013 regular session, the 83rd Texas Legislature enacted 1,437 bills and adopted 10 joint resolutions after considering more than 6,061 measures filed. It also enacted three bills during the first called session, two bills during the second called session, and one bill during the third called session.

This report includes many of the highlights of the regular session and the three called sessions. 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 2013 sessions include those examining the bills vetoed by the governor and the constitutional amendments on the November 5, 2013, ballot, as well as an upcoming report summarizing the fiscal 2014-15 budget.



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# Bills in the 83rd Legislature

## Regular Session

	Introduced	Enacted*	Percent enacted
<b>House bills</b>	3,950	732	18.5%
<b>Senate bills</b>	1,918	705	36.8%
<b>TOTAL bills</b>	5,868	1,437	24.5%
<b>HJRs</b>	130	6	4.6%
<b>SJRs</b>	63	4	6.3%
<b>TOTAL joint resolutions</b>	193	10	5.2%

\*Includes 26 vetoed bills — 15 House bills and 11 Senate bills

	2011	2013	Percent change
<b>Bills filed</b>	5,796	5,868	1.2%
<b>Bills enacted</b>	1,379	1,437	4.2%
<b>Bills vetoed</b>	24	26	8.3%
<b>Joint resolutions filed</b>	207	193	-6.8%
<b>Joint resolutions adopted</b>	11	10	-9.1%
<b>Legislation sent or transferred to Calendars Committee</b>	1,258	1,325	5.3%
<b>Legislation sent to Local and Consent Calendars Committee</b>	1,284	1,320	2.8%

Source: Texas Legislative Information System, Legislative Reference Library





**Business Regulation  
and Economic Development**

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# Establishing a sunrise review of occupational licensing

HB 86 by Callegari

Effective September 1, 2013

**HB 86** establishes a process for the Sunset Advisory Commission and its staff to review occupational licensing programs during review of an agency and to accept requests from lawmakers to assess in a “sunrise” review those proposed laws that would create or affect occupational licensing programs.

In assessing an agency that licenses an occupation or profession, the commission and its staff will consider whether the licensing program serves a meaningful public interest and provides the least regulation to do so. They also will consider:

- the extent to which the objectives might also be met through market forces, private certification, or other law;
- the effect of licensing criteria on new entrants to the profession, particularly those with moderate or low income; and
- the impact of regulation on competition, consumer choice, and cost of services.

The bill allows lawmakers to request that the Sunset Advisory Commission review proposed licensing legislation. The commission will include an analysis determining whether the unregulated practice serves the public interest, whether the public would benefit from an assurance of professional skill sets or competencies, and whether the public could be better protected by other means. Legislation to be reviewed must be submitted before December 31 of an odd-numbered year. The commission’s chair, with advice from the executive director, may deny a request for review. The commission must submit a report to the Legislature before the start of the next legislative session about its findings on the need for regulation.

## Supporters said

Texas has unusually extensive licensing requirements, with nearly one-third of the Texas work force employed in a business or occupation regulated by the state. HB 86 would pave the way for less regulatory oversight by including new criteria to evaluate a

licensing program during an agency’s Sunset review and by establishing a procedure for “sunrise” review of proposed licensing legislation.

Occupational licensing acts as an obstacle for new entrants with low or moderate incomes because it typically requires significant fees, training, and exams. In many cases, licensing requires ex-offenders to pass a background check before entering a profession, which can impede reintegration into society. These high barriers stifle innovation and social mobility.

Creating barriers to entry through licensing allows license holders to reduce artificially the number of professionals in an industry, enabling them to charge higher prices that are then passed on to the consumer.

The private market could perform many of the functions of regulation. Industry associations themselves frequently provide accreditation. Agencies should not have to keep public records on professionals because in an Internet age consumers have many effective ways of discovering information about the qualifications and experience of professionals they might hire.

HB 86 would allow lawmakers to seek reviews of proposed legislation but would not require it. This would give legislators more resources to make an informed decision, refocusing assessment of licensing programs on metrics that matter to ordinary Texans, consumers, and industry professionals. Lawmakers seeking assessments of prospective legislation would have to submit a request by December 31 of an odd-numbered year but could make a request later with the approval of the Sunset Commission chair.

## Opponents said

The Sunset Advisory Commission already adequately reviews each agency’s occupational licensing programs during the agency’s Sunset review. The state should err on the side of caution on issues involving the public’s welfare and not seek first to

dismantle licensing programs that may provide useful protection. Legislators should approach licensing with a view to strengthening and preserving it.

Licensing provides a trustworthy standard of quality and protects the public in a way unmatched by private sector accreditation. Agencies may enforce violations of regulations with cease-and-desist orders, fines, and other sanctions. They also may conduct comprehensive criminal record searches to detect and prevent dangerous or fraudulent actors from interacting with the public.

Not every industry has a private sector accreditation process. Some have multiple accreditations, forcing the consumer to sort through a patchwork of standards. Licensing simplifies choices for consumers.

Finally, curtailing licensing would unfairly disadvantage those investing time and money to pursue training in a given industry.

## Other opponents said

All proposed occupational licensing programs should be required to go through Sunset Advisory Commission assessment, rather than leaving this optional.

## Notes

The HRO analysis of HB 86 appeared in the April 9 *Daily Floor Report*.

The 83rd Legislature enacted several other bills affecting licensing, accreditation, and registering requirements for certain occupations.

**SB 162** by Van de Putte, et al., effective May 18, 2013, allows a military spouse or a member of the military with special forces training to obtain an expedited occupational license from the state of Texas. It also allows a member of the military to receive credit for military service, training, and education toward licensing requirements.

**HB 2254** by Geren, effective September 1, 2013, allows an applicant with military experience to credit relevant service, training, or education to an apprenticeship requirement for an occupational license. Both SB 162 and HB 2254 passed on the Local, Consent, and Resolutions Calendar and were not analyzed in a *Daily Floor Report*.

**HB 2294** by Kuempel, effective September 1, 2013, exempts technicians installing or repairing thermostats from the licensing requirements for air conditioning and refrigeration contractors. The HRO analysis of HB 2294 appeared in the May 2 *Daily Floor Report*.

**SB 618** by Carona, effective September 1, 2013, exempts ringside physicians at combative sports events who have a license to practice medicine in the state from having to obtain a license or registration from the Texas Department of Licensing and Regulation. The HRO analysis of the House companion bill, HB 1551, appeared in the April 30 *Daily Floor Report*.

**HB 798** by S. Thompson, effective September 1, 2013, prohibits agencies from suspending, revoking, or denying licenses to those guilty only of a Class C misdemeanor unless the person is guilty of domestic violence or the occupation requires the person to carry a firearm. HB 798 passed on the Local, Consent, and Resolutions Calendar and was not analyzed in a *Daily Floor Report*.

# State contracting with veteran-owned businesses

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**HB 194 by Farias**

**Effective September 1, 2013**

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**HB 194** allows service-disabled veterans who have suffered at least a 20 percent service-connected disability to participate in the state's historically underutilized business (HUB) contracting program. The bill requires the state comptroller, for reporting purposes, to add service-disabled veterans as defined by federal statute to the categories of groups included in the program.

The comptroller must adopt rules to provide goals for increasing the contract awards for the purchase of goods or services by the comptroller and other state agencies to a business that qualifies as a HUB because it is owned by a service-disabled veteran. These goals do not reduce the goals set for HUBs established by The State of Texas Disparity Study.

## **Supporters said**

Adding service-disabled veterans to the historically underutilized business contracting program would provide economic opportunities to a highly skilled group of individuals who have honored their country through military service. Their inclusion would strengthen the visibility and sustainability of the HUB program in ways that benefit the state and other contractors.

The bill would grant service-disabled veterans greater access to contracts with the state and other public entities and could help drive down state contracting costs. At the same time, the state would benefit from the excellent training and skills of these veterans.

The program would incentivize entrepreneurship for veterans, who, as a group, have a higher-than-average unemployment rate. HB 194 would allow disabled veterans to be included with others who have sometimes suffered the effects of discriminatory practices. Service-disabled veterans would spur media attention to and boost support for a program some participants say does not receive a sustainable level of contracts.

Nearly 17,000 businesses were classified as Texas-certified HUBs in fiscal 2012, according to a report by the Texas Comptroller of Public Accounts. The U.S. Small Business Administration estimates that about 1,000 businesses are owned by service-disabled veterans in Texas, so adding this group would not greatly impact the HUB program overall.

## **Opponents said**

Widening the definition of what qualifies as a historically underutilized business, as proposed by HB 194, would dilute an important program that ensures that businesses owned by minorities and women have a fair chance of procuring contracts with government agencies and public entities. Lawmakers instead should seek to establish a similar but separate job procurement program tailored to serving businesses owned by service-disabled veterans.

The HUB program in Texas is struggling to meet its goals of increasing the number of contracts available to underutilized businesses and growing the number of jobs provided by those operations. The state's spending with HUBs dropped by \$88.3 million in fiscal 2012, when HUB-related state expenditures made up 13.8 percent of total expenditures, according to a study by the Texas Comptroller of Public Accounts. Enlarging the pool of businesses that could procure contracts through the HUB program would harm businesses for which the program was created.

Much like Veterans Administration hospitals are tailored to provide health care to the military and former service members, a separate program should promote contract procurement in a way that suits service-disabled veterans and honors the commitment they made to their country.

## **Notes**

The HRO analysis of HB 194 appeared in the May 2 *Daily Floor Report*.

# Prohibiting employer access to personal accounts

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## HB 318 by Giddings *Died in Senate Committee*

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**HB 318**, as passed by the House, would have made it an unlawful employment practice for an employer, other than a state or local law enforcement agency, to require or request that an employee or applicant provide a user name, password, or other means of accessing that person's personal account, including personal e-mail and social networking accounts, with an electronic communication device. An "electronic communication device" would have included a computer, telephone, personal digital assistant, or similar device.

Employers would not have been prohibited from:

- maintaining lawful workplace policies for employee use of personal electronic communication devices during working hours or for use of employer-provided devices;
- monitoring employee use of devices or e-mail accounts provided by the employer; or
- obtaining information about an employee or applicant that was in the public domain.

The bill would have applied to employers and employees who had entered into a contract in which the employee agreed to disclose a user name, password, or other means of accessing a personal account. It would not have applied to the personal social media accounts or electronic communication devices of financial services employees who used them to conduct business of an employer governed by the Securities Exchange Act of 1934.

### Supporters said

HB 318 would help safeguard employees' rights to privacy and free speech. Without the legislation, employers could unfairly exploit their power by coercing an employee to hand over a password and user name to an online social media or e-mail account. The bill would give clear direction to employers not to do so and prevent the issue from being decided by the courts.

Employers would be protected as well. Accessing information in private accounts could render employers liable to discrimination lawsuits should they discover

information about an employee's protected status or violate the employee's right to keep health information confidential under the federal Health Insurance Portability and Accountability Act.

The bill as amended would eliminate ambiguity about whether and how an employer could launch an investigation into an employee's personal account on the grounds of suspicion of wrongdoing.

The law would exempt the financial services industry, as those firms have to comply with a different, more stringent standard of communications under federal law. Similarly, law enforcement agencies, also exempted, need access to employee and applicant accounts to discover sensitive information before entrusting these applicants to positions of authority.

### Opponents said

HB 318 would hamper employers' ability to enforce workplace policies, including policies against harassment, and their ability to monitor the leaking of trade secrets or proprietary information by employees. The amended bill no longer would allow employers to conduct investigations of employee wrongdoing through personal accounts.

The bill should not apply to employers and employees who have a contractual agreement to disclose a means of accessing the employee's personal account.

### Other opponents said

The bill would include too many exceptions, exempting law enforcement agencies and financial services workers. Those employees have as much right to protection from an employer invasion of privacy as any other type of employee.

### Notes

The HRO analysis of HB 318 appeared in Part Two of the May 1 *Daily Floor Report*.

# Research and development tax credits

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**HB 800 by Murphy**  
**Effective January 1, 2014**

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**HB 800** allows businesses to use sales tax exemptions or claim franchise tax credits for qualified research and development (R&D) activities. “Qualified research” is research conducted in Texas that meets the definition in the federal Internal Revenue Code.

A business claiming the sales tax exemption on goods used for qualifying research may not also claim a franchise tax credit during the same tax reporting period. In most circumstances, the franchise tax credit is 5 percent of the difference between a business’ qualified research expenses and half of the average amount of qualified research expenses incurred during the three preceding tax periods.

A business that contracts with public or private institutions of higher education for research and development may claim a larger franchise tax credit. This franchise tax credit is 6.25 percent of the difference between a business’ qualified research expenses and half of the average amount of qualified research expenses incurred during the three preceding tax periods, if the business has qualified research expenses in each of the previous three reporting periods.

The amount of the franchise credit may be carried forward. The R&D tax exemptions and credits under HB 800 expire December 31, 2026.

The comptroller must file a report to the Legislature at the beginning of each regular session that measures the impact of R&D exemptions and credits on the Texas economy.

## Supporters said

HB 800 would reduce the tax burden on R&D activities in Texas and encourage new investments in the state. R&D activities create high-paying jobs and new technologies. A report commissioned by Texans for Innovation found that the incentives in HB 800 would lead to about \$5.6 billion in R&D activity and \$13 billion in increased economic activity each year.

Since Texas discontinued its R&D franchise tax credit in 2006, the state’s share of business-funded R&D has declined. Texas is one of four states that does not offer an R&D incentive, putting it at an economic disadvantage. Massachusetts offers a 10 percent credit for qualified research expenses, as well as a sales tax exemption, and its R&D sector has flourished as a result. Even though the Texas economy is three times larger than the Massachusetts economy overall, the states’ R&D economies are the same size. The R&D tax incentives created by HB 800 would boost the Texas economy by encouraging innovation and efficiency in applying new technologies and producing new products.

The bill also would incentivize partnerships between the private sector and higher education institutions, which would expand opportunities for innovation and learning across the state. California offers generous credits to businesses that contract with higher education institutions for R&D. These incentives are effective, as evidenced by California’s 23 percent share of the nation’s R&D activity, compared to Texas’ 5 percent. In addition, with the federal budget sequestration in 2013 reducing the amount of federal research dollars flowing to Texas universities, HB 800 would encourage the private sector to increase the money it directs to higher education.

Allowing companies to choose between the sales tax exemption and franchise tax credit would provide incentives to the greatest number of businesses. Some companies would benefit more from the sales tax credit and others from franchise tax relief. By following the definitions in federal tax law, HB 800 would provide simplicity for these taxpayers.

Texas has never had as much revenue as it does today, and now is the time to give relief to taxpayers in a manner proven to stimulate the economy and advance competitiveness. The fiscal note does not account for the dynamic consequences that would accompany the tax credits and exemptions in HB 800 by enticing businesses to conduct research and development activities here. The bill would lead to follow-on capital being invested in Texas. If a company moved its R&D

activities to the state, other business functions, such as sales and distribution, might follow. Other businesses, such as suppliers to a company moving its R&D operations here, also might follow and relocate to Texas.

## Opponents said

Even in the improved economic climate, Texas cannot afford the cost of the tax breaks and exemptions proposed in the bill. According to the Legislative Budget Board, the cost of the proposed tax credits and exemptions to general revenue would be \$239.2 million in fiscal 2014-15. Texas has more immediate needs.

Texas should take advantage of its improved fiscal situation to restore funding for public education, transportation infrastructure, and other priorities instead of offering more tax breaks to big business. According to estimates from the comptroller's office, corporations with fewer than 100 employees accounted for only about 13 percent of the R&D credits used between 2001 and 2006. Historically, tax credits of the sort proposed by HB 800 have been used primarily by well established companies, not the start-ups and small businesses that create the most new jobs.

Any beneficial effects of the bill probably would not be felt statewide. Under the old franchise R&D tax credit, Dallas and Travis counties accounted for about 60 percent of the total credits taken.

The bill might not lure new R&D dollars to Texas. Texas' national ranking for both total spending and intensity related to research and development remained relatively constant over the last two decades. This occurred before, during, and after availability of the old tax credit. There is no reason to believe the tax breaks created by this bill would be more successful in spurring R&D and associated economic development in Texas. The tax revenue HB 800 would forego would be better spent on investments in workforce training and infrastructure because these are major factors companies of all sizes consider before moving to a state.

## Other opponents said

Under the state's previous research and development tax credit, retail trade food stores and retail trade home furniture companies claimed credits. The bill should be changed to focus on the industries that truly would encourage beneficial R&D investment and activities.

Like the federal research and development tax credit, this bill should include a Sunset date for the proposed tax credits to compel the Legislature to review the data and decide if the tax credit was effective and efficient.

## Notes

The HRO analysis of HB 800 appeared in Part Two of the May 1 *Daily Floor Report*.

# Legal protections for private space ventures

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**HB 1791 by J. Davis/ HB 2623 by Oliveira**  
*Effective September 1, 2013/ Effective May 24, 2013*

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**HB 1791** and **HB 2623** establish legal protections for private companies participating in spaceflights in Texas.

**HB 1791** limits a spaceflight operator's liability for damages resulting from nuisances related to spacecraft testing, launch, reentry, or landing. Under the bill, a person bringing a nuisance action also may not receive injunctive relief to stop spaceflight activities. The bill amends the Penal Code to prevent lawfully conducted spaceflight activities from qualifying as unreasonable noise leading to a disorderly conduct criminal charge.

The bill updates several definitions in state law to reflect modern technology and the developing practices of the spaceflight industry. It adds requirements for businesses seeking money in the spaceport trust fund.

**HB 2623** restricts access to certain beaches during spacecraft launches by allowing a county commissioners court to temporarily close a beach in reasonable proximity to a space launch site on a primary or backup launch date.

The bill applies only to a county bordering the Gulf of Mexico that contains a launch site approved by the Federal Aviation Administration (FAA) following an environmental impact statement (Cameron County). The land office may develop rules for the closure of beaches for spaceflight activities.

A person planning to conduct a launch must submit primary and backup launch dates to the county commissioners court. The commissioners court may not close a beach or beach access points at certain holiday times without approval of the General Land Office.

## Supporters said

These bills would encourage the space industry to create a spaceport in Texas where commercial companies could launch spacecraft with payloads such

as satellites, supplies for the International Space Station, and civilian astronauts. Texas is a leading candidate for a commercial spaceport proposed by Space Exploration Technologies (SpaceX) to be located near Brownsville and Boca Chica Beach. A commercial spaceport would result in significant economic development for the South Texas region from jobs and tourism.

HB 1791 would clarify the limitations on liability for spaceflight entities. Liability protections would cover operators of spaceflights undertaking spaceflight activities in accordance with required FAA licenses and permits. These entities would be protected from the effects of a single person obtaining an injunction to stop what would be an extremely capital-intensive activity to build and operate.

The proposal to build a launch site in South Texas has received overwhelming support from area residents and from local and statewide elected officials. Most believe any negative impacts of the project would be outweighed by the positive benefits to the region and to Texas. Boca Chica Village, which would be most affected by any noise, has a small, mostly transient population. With launches limited to 12 per year, the bill should not have a major impact on the quality of life for nearby residents.

There are no clearly developed rules standardizing the practice of closing beaches for space launches. To make the location at Boca Chica Beach viable as a space launch site, the land commissioner would adopt rules to govern when and how these closures were carried out.

The potential environmental impact on the beaches from the proposed spaceport has been extensively documented in a draft environmental impact statement released by the FAA. The FAA's extensive review process determined that the impact of the project was not overwhelming and could be mitigated by specific measures that are being considered.



## Opponents said

The ability of individuals to file a nuisance claim for damages resulting from certain activities related to spaceflight should not be limited. The proposed launch site would result in significant noise, especially for nearby residents in Boca Chica Village. As a matter of policy precedent, providing commercial space entities protection from nuisance liability could make it harder for the Legislature to refuse to do the same for other companies in other industries in the future.

While enabling beach closures might enhance opportunities for spaceflight activities in the state, it would impose a significant cost in terms of environmental damage to sensitive areas and a negative impact for area residents.

## Notes

The HRO analysis of HB 2623 appeared in the April 24 *Daily Floor Report*. The HRO analysis of HB 1791 appeared in the April 29 *Daily Floor Report*.

The 83rd Texas Legislature also considered other bills related to private space flight and spaceport development. **HB 545** by J. Davis would have allowed a single municipality to create a spaceport development corporation. After passing the House on May 1, it died in the Senate Economic Development Committee. The HRO analysis of HB 545 appeared in the April 30 *Daily Floor Report*.

**HB 2531** by J. Davis would have permitted the spaceport trust fund to be used for programs related to research conducted onboard the International Space Station. The HRO digest of HB 2531, which was placed on the General State Calendar for May 8 but not considered, appeared in the May 8 *Daily Floor Report*.

# Allowing TDI to disapprove insurance rate changes

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## HB 2782 by Smithee *Died in Senate committee*

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**HB 2782**, as passed by the House, would have required the commissioner of insurance to develop a process to review a rate change to certain health benefit plans. The commissioner could have disapproved a change that was excessive, inadequate, or unfairly discriminatory within 60 days of the date the Texas Department of Insurance (TDI) received a complete filing. The bill would have not applied to rates for coverage under the Texas Health Insurance Pool.

HB 2782 would have established criteria to be considered in disapproving a rate change, including definitions for what the department would consider excessive, inadequate, or discriminatory. The commissioner could have disapproved a rate if it had been incompletely filed.

The bill would have required the commissioner to create a method for a health benefit plan issuer to dispute a rate change disapproval. If a rate had been disapproved, the health benefit plan issuer could have continued using the disapproved rate pending its appeal. The commissioner would have had to adopt rules for reimbursing a premium if an excess rate finally had been disapproved or if a plan issuer had used a disapproved rate while an appeal was pending.

HB 2782 would have required the commissioner to seek federal funding to cover the department's costs related to reviewing rates and resolving rate disputes.

### Supporters said

HB 2782 would protect consumers and employers from excessive health insurance rate increases. TDI currently has the authority to review certain health benefit plan rate increases for reasonableness but cannot disapprove a rate it finds unreasonable. At the same time, TDI has the authority to deny excessive rate increases for other types of insurance. Extending this authority to health insurance, one of the largest expenses for individuals and employers, would ensure that companies' rates were actuarially sound.

Studies show that states with the authority to deny excessive rate increases are better positioned to negotiate reductions in filed rates and save consumers money. HB 2782 would save TDI money by directing the agency to apply for federal funds instead of using funds from its operating budget to review health insurance rates.

### Opponents said

HB 2782 would create uncertainty in the health insurance market and hurt health benefit plan issuers by allowing the commissioner to disapprove rates already in place.

### Notes

The HRO analysis of HB 2782 appeared in Part One of the May 3 *Daily Floor Report*.

# Extending and revising the Economic Development Act

**HB 3390 by Hilderbran**

**Effective January 1, 2014**

**HB 3390** revises provisions governing the Texas Economic Development Act (Tax Code, ch. 313) and extends its expiration date from December 31, 2014, to December 31, 2022. It extends the time period during which a project may qualify for a reduction in appraised value through the Economic Development Act from eight years to 10 years after the application's approval. Deferral of a qualifying time period may not exceed six years.

The bill repeals chapter 313, subchapter D, which governs school tax credits. It also removes a requirement that a school district board conduct a public hearing and receive a vote of at least two-thirds before approving an application.

**Qualifying jobs.** A "qualifying job" for the purpose of determining whether a project meets the requirements of the Economic Development Act is defined as a permanent, full-time job that pays at least 110 percent of the county average weekly wage for manufacturing jobs in the county where the job is located. A job that pays at least 110 percent of the county average weekly wage for all jobs in the county where the job is located if the property owner creates more than 1,000 jobs in the county no longer falls under the definition.

Operations, services, and related jobs created in connection with the project may satisfy the minimum qualifying jobs requirement for the project if the Texas Workforce Commission determines that the cumulative economic benefits of these jobs is at least as great as that associated with the minimum number of jobs required under the law. New qualifying jobs created under an agreement between a property owner and another school district may be included in the total number of new qualifying jobs if the Texas Economic Development and Tourism Office determines that the projects constitute a single unified project.

**Certificate of limitation.** The comptroller may not issue a certificate for a limitation on appraised value without determining that:

- the project proposed by the applicant would likely generate tax revenue within 25 years in an amount sufficient to offset the school district maintenance and operations (M&O) property tax revenue lost as a result of the agreement; and
- the limitation on appraised value is a determining factor in the applicant's decision to invest capital and construct the project in this state.

The comptroller also may issue the certificate upon making a qualitative determination that other considerations associated with the project would result in a net positive benefit to the state.

The bill instructs the comptroller to strictly interpret the criteria and selection guidelines and to issue certificates for limitation on appraised value only for those applications for property tax benefit that create high-paying jobs, provide a net benefit to the state over the long term, and advance the state's economic development goals.

**Texas Priority Project.** A Texas Priority Project is eligible for a limitation on appraised value under chapter 313. A Texas Priority Project is defined as a project on which the applicant has committed to spend or to which it has committed to allocate a qualified investment of more than \$1 billion.

**Economic impact evaluation.** The bill removes requirements for the comptroller to include specific factors in an economic impact evaluation. Instead, the comptroller must include any information deemed necessary or helpful to determining whether to approve an application.

**Enforcement.** The state auditor is required annually to review at least three major agreements to determine whether they accomplish goals and adhere to terms in state law. As part of the review, the auditor must make recommendations for increasing the effectiveness and efficiency of the administration of the Economic Development Act.

The comptroller must conduct an annual review and issue a determination as to whether a party to an agreement satisfied Economic Development Act provisions for the required number of qualifying jobs. The comptroller must notify the party of any corrective measures necessary. A party who fails to meet the requirements after a year must submit a plan for remediation. A party who does not implement a plan and who receives an adverse determination the following year is subject to a penalty.

**Strategic investment area.** The bill broadens provisions that apply to certain rural school districts to also apply to strategic investment areas. It defines a “strategic investment area” as:

- a county with unemployment above the state average and per capita income below the state average;
- an area that is a federally designated urban enterprise community or an urban enhanced enterprise community; or
- a designated defense economic readjustment zone.

The comptroller will determine each year the areas that qualify as strategic investment areas and publish a list and map of the designated areas.

## Supporters said

HB 3390 would extend and improve the Texas Economic Development Act (chapter 313), which authorizes school districts to negotiate reductions on the appraised value of property for M&O taxation in exchange for a company locating a manufacturing, research and development, or renewable energy electric generation facility in the district. The local tax revenue that school districts forgo as a result of chapter 313 projects has been more than offset by economic contributions that have resulted from the credit.

Chapter 313 has proven a powerful engine of economic development for Texas, and the bill would secure this valuable program for the near future through an eight-year extension in its Sunset clause. By extending the qualifying benefit period from eight years to 10 years, HB 3390 would increase the maximum potential benefit of the incentives. The bill also contains measures that would ensure the incentives

were ultimately a good deal for Texans by requiring the comptroller to make a judgment that the value of each project would exceed its cost.

According to the comptroller, owners of chapter 313 projects have invested about \$42.2 billion in Texas through 2011, and the value of these investments is estimated to reach about \$62.4 billion over the lifetime of the project agreements. Of this estimated total, 57 percent of the investments are in manufacturing and 26 percent are in renewable energy. The remaining 17 percent are in research and development, clean coal, advanced clean energy, electric power generation, and nuclear electric power generation.

The Texas Economic Development Act has been a significant factor in the state’s ability to induce industry leaders in renewable energy and other sectors to locate in Texas. There is stiff competition nationally and internationally to lure industries that make investments and create jobs of the sort facilitated by chapter 313. The economic development tax abatements, along with other incentives, allow Texas to remain competitive in attracting businesses to relocate and invest.

## Opponents said

HB 3390 would extend and expand chapter 313 without requiring a significant increase in oversight. Existing abatement agreements established under Texas Economic Development Act will cost the state an estimated \$4.2 billion in lost property taxes and tax credits over the life of these agreements.

The proposed expansions would reduce significantly the property taxes paid by companies to school districts over the course of newly authorized agreements, thereby increasing the state’s cost to fund school-finance formulas. According to the Legislative Budget Board, Texas would incur significant costs under the Foundation School Program to compensate districts for the loss in M&O revenue. The projected cost is \$82.6 million by fiscal 2018 and \$304.6 million by fiscal 2023.

Extending the program for eight years beginning January 1, 2014, as the bill proposes, would be dangerous to the state’s fiscal health. Since the inception of the act in 2001, chapter 313 has never been extended for more than six years at a time. Most recently, the Legislature in 2009 set the program’s expiration date

for 2014, which is a more sensible length of time considering the negative impact its extension could have on state revenue.

## **Notes**

The HRO analysis of HB 3390 appeared in Part One of the *May 3 Daily Floor Report*.

# Drug screening program for unemployment benefits

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## SB 21 by Williams

*Effective September 1, 2013*

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**SB 21** requires the Texas Workforce Commission (TWC) to adopt a drug-screening and testing program for certain applicants for unemployment benefits. A person seeking work in an occupation that requires preemployment drug testing must submit to a drug-screening assessment adopted by the TWC when filing an initial claim for unemployment benefits.

The assessment will include a written questionnaire designed to determine the reasonable likelihood that a person is using a substance regulated by the Texas Controlled Substances Act. If a reasonable likelihood of drug use is found, the applicant must pass a drug test to be eligible for unemployment benefits. An individual who failed a drug test may reapply after four weeks for unemployment benefits and take another test.

An individual who is undergoing or who promptly begins drug treatment after receiving initial notice of a failed drug test cannot be denied benefits. An exception is also provided for someone who fails a drug test because the person used a substance prescribed by a doctor for medical reasons.

### Supporters said

SB 21 would allow the state to take an important step in ensuring certain recipients of unemployment benefits were drug free, on a path to self-sufficiency, and ready to work. Under current law, the fact that someone can fail a drug test and still receive unemployment benefits sends the wrong message.

Drug screening and testing for those applying for unemployment benefits would apply only to individuals seeking employment in professions that already require drug testing, such as aviation, trucking, and logistics. The law would be narrowly tailored and consistent with laws in other states that have cleared benchmarks in the courts. Courts have had issues only with broadly worded laws, such as the one in Florida applying to all public welfare recipients.

The exemptions, including the ability to reapply after four weeks, would protect those who need help the most, while also protecting the interests of taxpayers. Even if statistics do not point specifically to drug use among those in need of government assistance, a significant amount of drug abuse exists in society generally. This law would provide a way to help combat this problem.

### Opponents said

The requirement to drug-test Texans who have lost their jobs through no fault of their own would be unnecessary and add insult to injury for these individuals. By definition, Texans are ineligible for unemployment benefits if they have lost their jobs because of illegal drug use or any other bad behavior that causes termination. Requiring people to prove to the state that they are drug-free would not be a fair constraint on their ability to receive benefits.

This legislation is in search of a problem that does not exist, as there is no trend of increased drug use among those receiving unemployment benefits. In addition, no data are available to suggest that people in need of government assistance are more likely to be drug users.

An alternative approach should be adopted. For example, if a person failed a drug test that was required for a job, perhaps at that point it would be acceptable to cut unemployment benefits.

### Notes

The HRO analysis of SB 21 appeared in Part One of the May 20 *Daily Floor Report*.

**SB 11** by Nelson would have required applicants for financial assistance benefits under the Temporary Assistance for Needy Families program to submit to a drug screening assessment and would have denied benefits to those who failed a drug test. The bill died in the House on May 21.

# Additional points of sale for small breweries

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**SB 515, SB 516, SB 517, and SB 518 by Eltife; SB 639 by Carona**  
*Effective June 14, 2013*

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**SB 515** raises the total malt liquor, ale, or beer production limit for a brewpub license holder from 5,000 barrels to 10,000 barrels annually and removes the requirement that those brewpubs be established, operated, or maintained by a Texas-based license holder.

The bill allows a brewpub license holder to sell malt and vinous liquors to a holder of a class B wholesaler's permit and beer to a holder of a general, local, or branch distributor's license. SB 515 also allows brewpub license holders to make sales to the same retailers or qualified persons to which a general class B permit holder or a general distributor's license holder may sell. Brewpubs are subject to the same authority and requirements as holders of a general class B wholesaler's permit or general distributor's license.

Under the bill, each licensed brewpub may sell no more than 1,000 barrels annually of malt liquor, ale, and beer to retailers, and all brewpubs operated by the same license holder may not exceed 2,500 barrels annually. Brewpubs may sell to holders of local, class B wholesaler's permits. Brewpub license holders are subject to Alcoholic Beverage Code laws governing territorial restriction agreements.

**SB 516** creates a brewer's self-distribution permit, which enables a licensed brewer whose annual production of ale — together with other on-site production of beer under a different license — does not exceed 125,000 barrels to sell to the same entities to which the holder of a general class B wholesaler's permit may sell.

Such a brewer has the same authority and is subject to the same requirements as a general class B wholesaler's permit holder. The combined sale of ale and beer produced on-site under a different license for self-distribution may not exceed 40,000 barrels annually for a holder of a brewer's self-distribution permit.

**SB 517** creates a manufacturer's self-distribution license. The license allows a brewer whose annual production of beer — together with other on-site

production of ale under a different permit — does not exceed 125,000 barrels to sell beer to the same entities to which a holder of a general distributor's license may sell.

The manufacturer has the same authority and is subject to the same requirements as a general distributor's license holder. The combined sale of beer, along with ale produced on-site under a different permit for self-distribution, may not exceed 40,000 barrels annually for a holder of a brewer's self-distribution permit.

**SB 518** allows a holder of a brewer's permit or a manufacturer's license, whose combined annual production of ale and beer does not exceed 225,000 barrels, to sell ale or beer to a consumer for responsible consumption on the premises. The combined amount of ale and beer sold directly to consumers may not exceed 5,000 barrels annually.

Beer, ale, or malt liquor may be consumed on the premises of such a permit or license holder from 8 a.m. to midnight on any day but Sunday, when such beverages may be consumed from 10 a.m. to midnight.

**SB 639** prohibits beer manufacturers from adjusting the price at which beer is sold to a distributor based on the price at which the distributor resells the beer to a retailer. Manufacturers are free to adjust price if the adjustment is based on factors other than an increase in the distributor's resale price. The bill also prohibits manufacturers from accepting payment for territorial rights agreements.

Statutory prohibitions on certain practices do not prevent manufacturers or distributors from entering into ordinary business contracts, including agreements about allowances, rebates, refunds, services, capacity, advertising funds, promotional funds, or sports marketing funds. Nothing in the code prohibits contractual agreements between members of the same tier with the same licenses and permits.

## Supporters said

This package of craft brewer legislation would allow small producers to grow and eventually compete fully in the three-tiered system through which Texas regulates the production and sale of alcoholic beverages. Encouraging the growth of small producers would create new jobs and expand the variety and quality of beer, malt liquor, and ale available to Texas consumers.

These bills recognize the importance of the three-tiered system – which regulates the interaction among producers, distributors and wholesalers, and retailers – and would preserve it. The bills would lift the requirements of the three-tiered system only for a very small portion of the overall alcoholic beverage market, which would further the state’s interest in providing avenues for economic development and fostering business competition.

By erasing many distinctions between in-state and out-of-state permit holders, these bills also would help bring the state into compliance with the decision in *Granholm v. Heald*, which holds that states may not discriminate against out-of-state producers of alcoholic beverages or favor in-state producers of alcoholic beverages under the interstate Commerce Clause of the U.S. Constitution.

SB 515 would create an avenue for the growth of brewpubs in Texas. While brewpubs may currently sell their product to consumers on premises, they may not sell to distributors, wholesalers, or retailers, which prevents brewpubs from distributing their products more widely. The bill would eliminate barriers to brewpub growth in two key ways — first, by raising the cap of annual production for a brewpub license holder from 5,000 barrels to 10,000; and second, by allowing brewpubs to sell their products to distributors, wholesalers, and retailers.

SB 516 would give small breweries more production flexibility by raising the cap on production from 75,000 to 125,000 barrels and provide a wider potential client base for their products. This would create more opportunities for brewers to develop and grow, allowing more to become successful, large-scale producers and fully competitive in the three-tiered system.

SB 517 would ensure manufacturers had enough room to grow once they began producing more than 75,000 barrels of beer annually, which is the current

limit for self-distributing manufacturers. The bill would not have the effect of lowering the amount manufacturers may self-distribute today because none of these manufacturers currently produces — let alone self-distributes — 40,000 barrels of beer.

SB 518 would allow small breweries and manufacturers to sell directly to consumers for on-premises consumption, giving these companies an opportunity to provide a more enjoyable experience for their customers. Far from encouraging irresponsible consumption, this would cater to discerning consumers interested in sampling a variety of quality Texas beer, ale, or malt liquor. Current law allows brewers to dispense only samples for onsite consumption, and brewers may not charge for it.

Only brewers and manufacturers who produced fewer than 225,000 barrels a year could sell directly to consumers, and the bill would allow the direct sale of only 5,000 barrels. This would keep direct sale to consumers from becoming the primary focus of larger breweries but would provide vital business for fledgling operations.

SB 639 would prohibit the practice of reach-back pricing, in which a manufacturer charges the distributor more for a product in response to changes in the prices distributors charge to retailers. This unfair practice has been prohibited by rule by the Texas Alcoholic Beverage Commission. Distributors cannot maintain the independence necessary to uphold the three-tier system of alcohol regulation if they come under pressure from manufacturers in this manner. The bill also would protect the independence of distributors by prohibiting manufacturers from selling off their territorial rights.

SB 639 would not prohibit practices that are part of the ordinary functioning of the alcoholic beverage industry. The bill would allow manufacturers and distributors to enter into contracts on a number of common interests — for example, an agreement on how a product should be advertised and how much each party would pay.

## Opponents said

These bills would erode the state’s three-tier system for regulating alcoholic beverages. The three-tier system formally separates the producers of alcoholic beverages, the intermediate distributors and wholesalers who resell



the beverages, and the retailers who sell them to the ultimate consumer. Maintaining this system is important for regulatory oversight of the alcoholic beverage industry and allows the state to collect taxes and exert control over a consumer product with important social consequences.

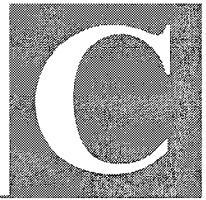
SB 639 effectively would coerce manufacturers into giving away territorial rights – an extremely valuable commodity – for free to distributors, who then would be at liberty to sell these rights to other distributors at a profit. Manufacturers have a justified interest in how their products are marketed to the general public and ought to have some way to provide input on pricing. This bill would take away an important tool used by manufacturers to create promotional price agreements with retailers.

The bill would remove an important check in the three-tier system. It would allow distributors to increase profit margins and pass on the price increase to retailers, who in turn would have to raise prices for consumers. Retailers no longer could bargain directly with the manufacturer about pricing and would be subject to the distributors alone.

## **Notes**

The HRO analyses of SB 515, SB 516, SB 517, SB 518, and SB 639 appeared in Part One of the May 17 *Daily Floor Report*.





# Criminal Justice and Judiciary

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# Increased penalties for prostitution and other offenses

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**HB 8 by S. Thompson**

*Effective September 1, 2013*

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**HB 8** makes several changes to statutes dealing with prostitution, trafficking of persons, and other crimes, including increasing the penalties for several offenses related to prostitution.

**Prostitution.** HB 8 expands the current second-degree felony punishment (two to 20 years in prison and an optional fine of up to \$10,000) for soliciting children younger than 14 years old to include soliciting children younger than 18 years old. The second-degree punishment applies regardless of whether the defendant knew the age of the person being solicited. The bill eliminates the third-degree felony punishment (two to 10 years in prison and an optional fine of up to \$10,000) for soliciting a person age 14 to 17 years old.

**Promotion of prostitution.** The bill raises the penalties for promoting prostitution, all of which were Class A misdemeanors. HB 8 makes it a second-degree felony if the prostitute being promoted is younger than 18 years old, regardless of whether the defendant knows the person's age, and it makes a second offense of promoting prostitution a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000).

The punishment for aggravated promotion of prostitution is increased from a third-degree felony to a first-degree felony if the prostitution ring used those under 18 years old as prostitutes, regardless of whether the person knew the age of the prostitute.

**Obscenity.** HB 8 increases the punishment for obscenity offenses related to obscene material involving children younger than 18. The punishment for those acting as wholesale promoters of obscene materials or devices is increased from a third-degree to a second-degree felony. An offense for promoting or possessing with intent to promote obscene materials or devices or for involvement in an obscene performance is increased from a state-jail felony to a second-degree felony.

**Engaging in criminal activity.** The bill adds the offense of continuous sexual abuse of a young child and solicitation of a minor to the list of crimes that when committed under certain circumstances can constitute the offense of engaging in organized criminal activity.

**Possession or promotion of child pornography.** The bill expands the offense of possession or promotion of child pornography to include knowingly or intentionally accessing illegal materials with the intent to view them.

**Jury probation, parole eligibility for compelling prostitution and trafficking.** The bill adds compelling prostitution and trafficking of persons to the list offenses that are ineligible for jury-recommended probation. These offenses also are added to the list of crimes for which offenders are not eligible for release on parole, without consideration of good conduct time, until their actual calendar time served equals half of their sentences or 30 years, whichever is less, with a minimum of two years.

Other provisions include:

- requiring the Board of Pardons and Paroles to develop educational materials for those convicted of or placed on deferred adjudication for offenses committed solely as a victim of human trafficking, including information on how to request a gubernatorial pardon;
- eliminating one of the two sets of Penal Code provisions adopted by the 82nd Legislature in 2011 that established penalties for employment harmful to children, retaining provisions making the offense a second-degree felony or, if the child was younger than 14, a first-degree felony;
- merging provisions dealing with protective orders for victims of human trafficking and protective orders for certain victims of trafficking, sexual assault, and stalking; and
- allowing victims of trafficking to receive certain assistance payments from the crime victims' compensation fund and to participate in a state address confidentiality program.

## Supporters said

HB 8 would help to continue the state's efforts to combat the horrific crime of human trafficking and especially the sex trafficking of children. Texas has been identified as a hub for international human trafficking. In response, the state enacted numerous laws to combat these crimes, including those that punish traffickers, protect victims, and establish the state's Human Trafficking Prevention Task Force. HB 8 would continue these efforts by focusing on crimes related to the sex trafficking and exploitation of children.

The serious impact of these crimes on individual children warrants increased penalties and justifies the use of state resources to deal with them. HB 8 would not result in a significant impact on state resources, according to the bill's criminal justice impact statement.

**Prostitution.** Texas law should protect all children equally from the crime of prostitution. HB 8 would do so by making soliciting prostitution of all children under 18 years old a second-degree felony, instead of imposing different penalties for those younger than 14 years old and those 14 to 17 years old. The bill would put this crime on par with sex trafficking of a child and compelling prostitution of a child by imposing the punishment regardless of whether the defendant knew the age of the person solicited. All of these offenses should be treated similarly because they exploit children, who are the most vulnerable to these horrible crimes.

**Promotion of prostitution.** HB 8 would increase penalties for the promotion and aggravated promotion of prostitution of children because of the devastating effect these crimes have on children. Increasing these penalties would better reflect the role of this crime in human trafficking. While some other offenses that carry stiff penalties, such as compelling prostitution and human trafficking, could cover some situations involving promoting prostitution, they may not cover all of them.

**Obscenity.** HB 8 would align penalties for promoting and possessing with the intent to promote obscene materials or devices with the second-degree felony punishments imposed for promotion of child pornography. These offenses are similar and should carry the same penalty.

**Engaging in criminal activity.** Because most human trafficking crimes are by definition organized crime, HB 8 would add the continuous sexual abuse of a young child and solicitation of a minor to the organized crime laws. This would give prosecutors another tool to combat these offenses.

**Jury probation, parole eligibility for compelling prostitution and trafficking.** HB 8 would place compelling prostitution and human trafficking in the same category as other serious offenses for which juries cannot recommend community supervision. These offenses already are in the list of those that cannot receive judge-ordered community supervision. The bill also would allow the Board of Pardons and Paroles to consider parole from prison for those convicted of these crimes only after they had served an appropriate portion of their sentence. Given the nature of these crimes, it would be proper for offenders to serve at least half their sentences or 30 years, instead of the default that allows parole consideration much earlier.

## Opponents said

Current law works adequately and fairly to address the numerous crimes that can be related to human trafficking. It provides the needed flexibility for prosecutors to build cases to fit individual crimes and for courts to hand out appropriate punishments.

Enhancing penalties for the offenses addressed in HB 8 — especially from a misdemeanor to a felony — would be an unnecessary leap in punishments for broad categories of offenses that are adequately handled under current law.

Other offenses, some with serious punishments, can be used if appropriate in trafficking and prostitution cases involving children. For example, compelling prostitution and human trafficking of a child, regardless of whether the offender knows the age of the child, are first-degree felonies. The current structure allows punishments to vary for different crimes and allows state resources to be allocated accordingly.

**Jury probation, parole eligibility for compelling prostitution and trafficking.** Restricting jury probation for compelling prostitution and trafficking would reduce the options for juries in handling these cases. Requiring a longer minimum time served before parole

eligibility could keep some offenders in prison longer than appropriate. Current law, which could allow offenders to be considered for parole earlier than under HB 8, does not mean that offenders are released on their review date, only that the Board of Pardons and Paroles considers the case.

## Notes

The 83rd Legislature enacted several other bills dealing with human trafficking.

**HB 3241** by S. Thompson, et al., authorizes the attorney general to bring civil lawsuits against persons or enterprises for racketeering related to human trafficking and allows the attorney general to seek civil penalties, costs, attorney's fees, and injunctive relief. Persons and enterprises commit racketeering if, for financial gain, they commit a human trafficking offense under Penal Code, ch. 20A, and the offense or any element of it occurred in more than one Texas county or was facilitated by U.S. mail, e-mail, telephone, facsimile or wireless communication from one Texas county to another.

**HB 1272** by S. Thompson, et al., continues the Human Trafficking Prevention Task Force, which was set to expire in 2013, until September 1, 2015

**SB 92** by Van de Putte establishes proceedings and programs for youths involved in the juvenile justice system who are victims of human trafficking.

The HRO analysis of HB 8 appeared in the April 16 *Daily Floor Report*. The analysis of HB 3241 appeared in the May 3 *Daily Floor Report*. HB 1272 and SB 92 were considered on the House Local and Consent Calendar and not analyzed in a *Daily Floor Report*.

# Creating an exoneration commission

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## HB 166 by McClendon *Died in Senate Committee*

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**HB 166**, as passed by the House, would have created the Timothy Cole Exoneration Review Commission to review or investigate each case in which an innocent person was convicted and exonerated. The reviews would have been designed to: identify the causes of wrongful convictions; determine errors and defects in laws, rules, proof, and procedures used to prosecute a case; identify errors and defects in the criminal justice process and develop solutions to correct them; and identify procedures, programs, and training opportunities to minimize the causes of and to prevent wrongful convictions and resulting executions.

The commission also would have been required to review thoroughly each application for a writ of habeas corpus made to the Texas Court of Criminal Appeals if the court had issued a final ruling. The review would have been to identify and study ethical violations or misconduct by attorneys or judges revealed during the habeas review.

Findings and recommendations in official reports could have been used as evidence in subsequent civil or criminal proceedings, according to the procedural and evidentiary rules that applied to that proceeding.

The commission could have entered into contracts for research and services to facilitate its work or to investigate a case in which there had been an exoneration or final disposition of a writ of habeas corpus, including forensic testing and autopsies.

The University of Texas at Austin and the Legislative Budget Board would have been required to assist the commission. Other state agencies and officers would have had to assist if requested.

The governor would have appointed the commission's nine members, who would have served staggered, six-year terms. The commission would have been subject to the Sunset Act and would have expired September 1, 2017.

## Supporters said

HB 166 would help to address the state's problem of wrongful criminal convictions. The wrongful conviction and imprisonment of an innocent person is a miscarriage of justice that carries a moral obligation to prevent additional miscarriages of justice. The bill would be the next step after 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, there have been at least 119 exonerations after wrongful convictions, according to the National Registry of Exonerations. Many of these inmates served decades in prison before being exonerated through DNA evidence or on other grounds. A wrongful conviction may mean that a guilty person remains unpunished, endangering the public and eroding confidence in the criminal justice system.

Wrongful convictions are costly to the state not only in the approximately \$60 million the state has paid in compensation to the innocent but also for the public funds wasted on prosecuting and incarcerating innocent people.

HB 166 would establish a body to investigate wrongful convictions, identify what went wrong and why, examine the criminal justice system as a whole, and recommend changes. The commission would not work to obtain exonerations but would examine only cases that already had reached their final outcome.

The Legislature needs to create a state entity to examine exonerations and recommend systemic changes because there currently is no adequate mechanism for doing so. The need for an innocence commission is not eliminated because certain facets of the criminal justice system, such as indigent defense and post-conviction DNA testing procedures, have been reformed in recent years. These efforts do not necessarily identify systemic failures remaining in the criminal justice system.

Fears about the commission overreaching its authority are unfounded because HB 166 would outline clearly the commission's powers and duties and would limit them to those needed to investigate exonerations. The commission's authorization to contract for services, including forensic testing and autopsies, would allow it to investigate cases adequately and would be limited to cases involving exonerations or final adjudications of habeas corpus. The commission's charge relating to examining writs of habeas corpus would allow only for referrals to entities such as the State Bar of Texas or the State Commission on Judicial Conduct.

Findings in the commission's reports would be admissible in a court only according to procedural and evidentiary rules to ensure that any use of the commission's findings was proper.

Fears that an innocence commission would erode support for the death penalty are unfounded. The death penalty itself is not a cause of wrongful convictions, which is what the commission would be charged with examining.

The commission's appointed members, limited mission, and legislative oversight would help ensure that it did not become an unwieldy bureaucracy. HB 166 contains a Sunset date of 2017, and the Legislature could review, change, or eliminate the commission at any time.

The commission would not cost the taxpayers. The fiscal note estimated no fiscal implications for the state. The bill would allow the commission to accept grants and gifts that could be used to fund its work, and it would be assisted by the Legislative Budget Board, UT-Austin, and, as needed, other state agencies.

## Opponents said

It is unnecessary to create an exoneration commission in Texas to prevent errors in the criminal justice system. The state's criminal justice and legislative systems have checks and balances that work to achieve justice and to identify and address problems.

The Legislature should focus on the front end of the criminal justice system and allow the court and clemency systems to handle individual cases of alleged innocence. 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 166 would invest an innocence commission with inappropriate, overly broad authority. The commission would have to investigate post-conviction exonerations, which are undefined. The authority would not be limited to cases involving a pardon or other specific criteria. Examining the approximately 4,300 writs of habeas corpus finalized by the court of criminal appeals in fiscal 2012 could be especially challenging for a commission with no staff.

The bill also appears to give the commission quasi-judicial powers that could fall outside the traditional jurisprudence system. For example, it 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. In addition, 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 a relatively small number 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 HRO analysis of HB 166 appeared in the April 23 *Daily Floor Report*. The bill passed the House on April 24 but died in the Senate Criminal Justice Committee.



# Regulating the capture of images by unmanned aircraft

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**HB 912 by Gooden**  
*Effective September 1, 2013*

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**HB 912** makes it a class C misdemeanor to use an unmanned aircraft to capture or possess an image of an individual or privately owned real property in Texas with the intent to conduct surveillance on the individual or property captured in the image.

It is a class B misdemeanor to disclose, display, distribute, or otherwise use such an image. It is a defense to prosecution if a person destroyed an image or stopped disclosing, displaying, distributing, or otherwise using it as soon as the person had knowledge that it was captured in violation of the bill.

**Exceptions.** The bill does not apply to the manufacture, assembly, distribution, or sale of unmanned aircraft, and it enumerates several situations in which use of an unmanned aircraft is lawful. The bill makes exceptions for images captured:

- for professional or scholarly research for an institution of higher education;
- for certain federal uses, including use by the Federal Aviation Administration and U. S. military;
- by satellites for purposes of mapping;
- for certain electric or natural gas utility purposes;
- for certain law enforcement purposes;
- with the consent of the individual who owns or lawfully occupies the property captured;
- for certain emergency purposes, including hazardous materials spills, wildfire suppression, and to rescue a person in imminent danger;
- by a licensed real estate broker for business purposes if no individual is identifiable;
- within 25 miles of the U.S. border;
- from a height no more than eight feet above the ground in certain circumstances;
- of public property or a person on that property;
- by the owner or operator of a pipeline for certain purposes; or
- in connection with port authority surveillance and security.

Images captured in violation of the bill or incidentally to the lawful capture of images cannot be used as evidence in legal proceedings, except to prove a violation of the bill. Such images also are not subject to disclosure under the Public Information Act nor to discovery, subpoena, or any other legal compulsion for their release.

**Civil action.** A person who was the subject of an image or who owned or legally occupied real property that was the subject of an image captured in violation of the bill may bring a civil action to:

- enjoin a violation or imminent violation of the bill;
- recover a civil penalty; or
- recover actual damages if the image was disclosed, displayed, or distributed with malice by the person who captured it.

The civil penalty is \$5,000 for all images captured in a single episode or \$10,000 for disclosure, display, distribution, or other use of images captured in a single episode in violation of the bill. Court costs and reasonable fees will be awarded to the prevailing party. The statute of limitations is two years starting from the date the image was captured or initially disclosed, displayed, distributed, or otherwise used in violation of the bill.

**Law enforcement use.** The Texas Department of Public Safety (DPS) must adopt rules and guidelines for use of unmanned aircraft by law enforcement in Texas. Certain law enforcement agencies must submit in each odd-numbered year a written report to the governor, lieutenant governor, and each member of the Legislature if they used unmanned aircraft in the previous 24 months. The report must include certain information and data about how the law enforcement agency used the unmanned aircraft, how often they were used, the type of information acquired, and costs. The report must be available for public viewing

## Supporters said

HB 912 would update the law to ensure that privacy was protected as technology improves and the cost of surveillance decreases. The use of unmanned aerial vehicles, or “drones,” is on the rise in the United States. These vehicles are designed to be small, quiet, and clandestine and are able to take high-resolution photographs and video, as well as record sound and detect infrared or ultraviolet light. The bill would ensure that rules were established for the use of these vehicles before they became more prevalent and privacy violations became commonplace.

The bill would address photography only by drones. The difference between drones and helicopters is significant. Drones can fly low, are quiet, and can be nearly impossible to see unless a person is looking for them. Helicopters and airplanes are noisy and difficult to miss, so a person over whom a helicopter flies would hear it and be on notice that someone could be surveilling or photographing them.

**Speech, press, and legitimate business use.** HB 912 would uphold the Bill of Rights. It would ensure the protection of innocent civilians against illegal surveillance and would protect Fourth Amendment rights against illegal searches and the implied right to privacy. The bill would provide a defense for a person who realized that the photographs taken were illegal and immediately destroyed them or stopped using them illegally.

By establishing prohibitions on the use of these vehicles for surveillance and monitoring, the bill would strike a balance between the right to privacy and the rights to free speech and a free press. Journalists, filmmakers, photographers, those who use satellites, and others would be criminally or civilly liable under this law only if they were taking photographs for the purpose of surveillance. Other uses would continue to be legal.

**Prosecution and law enforcement.** The bill would not unduly prevent law enforcement from carrying out its duties. The law enforcement exceptions are narrowly carved out in order to allow for legitimate law enforcement purposes while protecting the civil rights of the general public

## Opponents said

HB 912 could violate the Bill of Rights and impact free speech, free press, law enforcement, prosecutors, and many legitimate businesses.

It would criminalize a certain method of photography, while the kinds of photographs outlawed by this bill still could be taken, more expensively, in a helicopter or aircraft or from the top of a building. There is no way to tell the difference between a photograph taken by an unmanned aircraft and one taken from a manned aircraft, so the bill needlessly would outlaw a cost-effective tool for taking aerial photographs.

**Speech and press.** The bill would hinder free speech and a free press. Drones are becoming an increasingly practical and inexpensive way to take aerial photographs for newsgathering purposes. HB 912 would make it illegal for newspapers and media websites to collect these photos and to post or disseminate them. Currently, when taking aerial photographs from a helicopter, press photographers take hundreds of photos on each helicopter pass. The bill would make each of those images if captured by an unmanned vehicle an individual offense, creating stiff criminal penalties for protected press activities.

Public photography is a protected speech exercise. Not only would this bill restrict photography, it could effectively criminalize certain photographs based on their content, depending on whether they contained images of certain property or people. Content-based restrictions are constitutional only under the highest level of scrutiny. This bill would not meet that standard and would infringe on an important First Amendment right.

**Legitimate business use.** HB 912 would hurt businesses. Several industries use unmanned vehicles for legitimate photography purposes that would be outlawed by this bill. For example, filmmakers use unmanned vehicles to take aerial video of a city’s skyline or of the crowds at a festival, such as South By Southwest in Austin. HB 912 would have a chilling effect on these activities and discourage businesses, such as the film industry, from operating in Texas. At worst, the bill could criminalize innocent business people using the most efficient means to conduct their business.

**Prosecution and law enforcement.** Law enforcement employees would be forced to endanger themselves unnecessarily and spend more taxpayer money. In certain circumstances law enforcement might have to send up manned aircraft to take the same pictures they now may take using an unmanned vehicle. This would be more costly and could place peace officers in harm's way when an unmanned vehicle could perform the same job and capture the same images more efficiently and cost-effectively

### **Other opponents said**

HB 912 should provide for only civil liability for improper use of unmanned vehicles. Criminal penalties are too extreme and civil liability would provide sufficient relief to those who had been wronged.

### **Notes**

The HRO analysis of HB 912 appeared in Part Two of the *May 7 Daily Floor Report*.

# Life without parole for certain sex offenders

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**HB 1302 by Clardy**

*Effective September 1, 2013*

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**HB 1302** expands the pool of serious sex offenses that can result in an automatic sentence of life without parole for repeat offenders. The bill institutes life without parole for second convictions of sexually violent offenses if committed by a person at least 18 years old and with a victim younger than 14 years old.

Sexually violent offenses are those listed in Code of Criminal Procedure, art. 62.001(6), including continuous sexual abuse of a young child, second-degree felony indecency with a child involving sexual contact, sexual assault, aggravated sexual assault, sexual performance by a child, aggravated kidnapping with sexual intent, and burglary of a habitation with intent to commit certain felony sex offenses.

The bill also prohibits a person convicted of a sexually violent offense and required to register as a sex offender from working as a bus driver, provider of taxi or limousine services, amusement ride operator, or unsupervised provider of services in another person's home.

## Supporters said

HB 1302 would impose life without parole on certain repeat violent sex offenders with young victims to make the punishment more appropriately fit the crime. Placing employment restrictions on violent sex offenders would better protect Texas children.

People who repeatedly commit violent sex crimes against society's most vulnerable members deserve the most serious punishment available — life without parole. HB 1302 would ensure that these offenders, who already have shown that they will reoffend, never leave prison to victimize anyone else. By punishing second offenses of violent sex crimes against young children with life without parole, HB 1302 would align these crimes with other crimes, such as repeat convictions for continuous sexual abuse of a child, that currently receive this punishment. While under current law these sex offenders may receive long sentences and face restrictions on consideration for parole, any possibility

that they might receive parole is unacceptable.

Prosecutors would retain discretion to handle these cases appropriately. They could use plea agreements when advisable. They could prosecute these crimes as standard offenses without enhancements that carried life without parole if that appeared to be the best course of action in a particular case.

By barring violent sex offenders from certain types of employment, HB 1302 would help protect children by limiting repeat sex offenders' access to children in the places where children are most vulnerable. The list of prohibited occupations is narrowly drawn, and many other jobs would remain open to sex offenders.

HB 1302 might have prevented a tragedy like the one that occurred when a 12-year old boy named Justin was abducted, killed, and left in a swamp by a taxi cab driver who previously had committed a sex crime against a child. This bill would be named Justin's Law in his honor and has been enacted unanimously by the state legislatures in Oklahoma and Louisiana.

## Opponents said

Current laws appropriately punish the sex offenders addressed by the bill with long sentences and restrictions or prohibitions on parole. Adding more offenses to those that are eligible for life without parole could distort the relationship among different offenses that carry the same punishment.

With mandatory life without parole, it could be difficult to get a defendant to agree to a plea of guilty in cases in which the prosecutor thought a plea agreement was advisable or in which a traumatized victim wished to avoid a trial.

The employment prohibitions in the bill would go too far in placing restrictions on a broad category of sex offenders without adequately assessing the risk posed by individual registrants. In addition, HB 1302 could exacerbate the serious difficulties convicted

sex offenders often have in finding employment. Holding a job is an important aspect of a sex offender's reintegration into society. The employment restrictions in the bill could create a ripple effect that harms the families of registered sex offenders by interfering with the offenders' ability to earn a living.

## Notes

The HRO analysis of HB 1302 appeared in Part Two of the May 6 *Daily Floor Report*.

The 83rd Legislature enacted other bills dealing with sex offenses, including **SB 12** by Huffman, effective September 1, 2013, which allows evidence that a person committed certain previous sexual offenses with any child victim to be admitted into trials for the same offenses. The evidence can be admitted for its bearing on relevant matters, including the character of the defendant and acts performed in conformity with the defendant's character.

This applies to trials for attempts and conspiracy to commit:

- certain sex and labor trafficking offenses against children;
- continuous sexual abuse of a young child;
- indecency with a child;
- sexual assault of a child;
- aggravated sexual assault of a child;
- online solicitation of a minor;
- sexual performance by a child; and
- possession or promotion of child pornography.

The HRO analysis of SB 12 appeared in the May 16 *Daily Floor Report*.

# Search warrants for certain electronic data

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**HB 2268 by Frullo**  
*Effective June 14, 2013*

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**HB 2268** allows search warrants for certain electronic data to be issued in Texas and executed in other states.

**Stored customer data or communications.** The bill allows a search warrant to be issued for electronic customer data held in electronic storage, including contents of and other information related to a wire communication or electronic communication held in electronic storage.

It adds provisions governing the issuance of warrants for stored customer data or communications. A district judge may issue a search warrant for electronic customer data held in electronic storage, whether the customer data is held at a location in Texas or in another state. The warrant may be served only on an electronic communications provider or a remote computing service provider that is a domestic entity or doing business in Texas under a contract or a terms-of-service agreement with a Texas resident if any part of the contract or agreement is performed in Texas. The warrant must be executed within 11 days of being issued, with certain exceptions. An entity upon which such a warrant is served must comply within 15 business days after it is served, with certain exceptions.

The service provider receiving the warrant must produce all electronic customer data, contents of communications, and other information sought, regardless of where the information is held. Any officer, director, or owner of an entity who is responsible for the failure of the entity to comply with the warrant can be held in contempt of court. Failure of an entity to timely deliver the information sought will not affect the admissibility of the evidence in a criminal proceeding.

If a peace officer serving the warrant provides an affidavit form and notifies the entity that an executed affidavit is required, the service provider must verify the authenticity of the information produced by including an affidavit given by a person qualified to attest to its authenticity. The affidavit must state that the information was stored in the course of the provider's

regularly conducted business and specify whether it was the regular practice of the provider to store that information.

A motion to quash filed by a service provider must be heard and decided by the judge issuing the warrant within five business days of the motion being filed. The hearing may be conducted by teleconference.

**Uniformity within ch. 18.** The bill conforms to major provisions for the mechanics and execution of search warrants in Code of Criminal Procedure, ch. 18, including the sworn affidavit required under art. 18.01(b) for a warrant, which must establish probable cause.

**Reciprocity.** A domestic entity that provides electronic communications services or remote computing services must comply with a warrant issued in another state in a manner equivalent to the requirements under the bill.

## Supporters said

HB 2268 would simplify a needlessly complex warrant process and keep Texas law enforcement in charge of Texas prosecutions. Currently, if an officer needs a search warrant for electronic data such as e-mails from a California company for someone in Texas, the officer must go through California law enforcement and judges to obtain the data. This could be simplified by allowing Texas judges and law enforcement to issue and execute warrants for certain electronic information held in other states. HB 2268 would give Texas prosecutors the tools they need for successful and timely prosecution of Texas crimes. It also would alleviate the burden on courts in other states and simplify the process for the entities receiving these warrants.

The bill would allow Texas law enforcement to successfully investigate and prosecute criminals who engage in heinous crimes such as human trafficking and child sex exploitation. The Internet is the primary

venue for traffickers to buy and sell women and children in the United States. The bulk of criminal activity and evidence in these crimes takes place online, and the evidence may be held on a server or by a company housed in another state. The bill would streamline these search warrants, allowing the state to be more successful in investigating and punishing trafficking crimes.

The bill would allow reciprocity only to the extent necessary for the bill to be effective. For Texas judges and law enforcement to use the tools provided by this bill, it would be necessary to grant the same to judges and law enforcement in other states. The reciprocity would apply only to warrants equivalent to those defined under the bill.

## Opponents said

HB 2268 would allow judges who should have no jurisdiction in Texas to exercise judicial power within the state. The bill would allow for state reciprocity of warrants, meaning that Texas entities would have to comply with warrants issued in another state. The judges whose warrants would be honored under this bill were not elected by Texans and should not have jurisdiction to issue warrants and enforce compliance in the state.

## Notes

The HRO analysis of HB 2268 appeared in the *May 4 Daily Floor Report*.

**HB 1608** by Hughes, which died in the House, would have required search warrants for cell phone geolocation data. The HRO analysis of HB 1608 appeared in the *May 9 Daily Floor Report*.

**HB 3164** by Stickland was offered as a floor amendment to HB 2268 and adopted. It repeals provisions allowing compelled disclosure of communications stored for more than 180 days.

# Life in prison for a capital murder by a 17-year-old

**SB 2 by Huffman, Second Called Session**  
*Effective July 22, 2013*

**SB 2** imposes a sentence of life in prison, with the possibility of parole, for a person convicted of a capital murder committed when the person was 17 years old. Capital murder is defined by Penal Code, sec. 19.03 as murder in a specific situation or of a specific type of person.

The bill applies to cases pending, on appeal, or begun on or after the bill's effective date, regardless of whether the offense was committed before, on, or after that date. It does not affect final convictions existing on the bill's effective date.

## Supporters said

SB 2 would bring Texas into compliance with a recent U.S. Supreme Court ruling that forbids a mandatory life-without-parole sentence for those who were younger than 18 years old when they committed capital murder. The ruling left Texas with no available punishment for a person convicted of committing capital murder at age 17.

Under Texas statutes, 17-year-olds convicted of capital murder fall under the adult criminal justice system, which makes them eligible either for the death penalty or for a sentence of life without parole. However, the death penalty was eliminated as an option in 2005 when the U.S. Supreme Court ruled in *Roper v. Simmons* that the Eighth and Fourteenth amendments to the U.S. Constitution forbid the imposition of the death penalty for offenders who were younger than 18 when their crimes were committed. This left life without parole as the only punishment option for 17-year-olds convicted of capital murder in Texas.

In 2012, the Supreme Court issued another decision affecting the Texas sentencing laws when the court ruled in *Miller v. Alabama* that the Eighth Amendment forbids a sentencing scheme that mandates life without parole for juvenile homicide offenders. The Supreme Court defines a juvenile as a person younger than 18 years old, which means that 17-year-olds in Texas are included in

that prohibition. The decision resulted in no punishment being available for 17-year-olds convicted in Texas of capital murder.

Since the *Miller* decision, dozens of cases involving 17-year-olds charged with capital murder have been placed on hold. In the meantime, capital murder prosecutions have proceeded for adults and for 14-, 15-, and 16-year-olds certified to stand trial as adults.

In some cases of capital murder with a 17-year-old defendant, prosecutors have tried the crimes as lesser offenses, such as murder or aggravated robbery, which can carry punishments ranging from five to 99 years to life in prison. This can result in inadequate punishment for someone who committed the horrible crime of capital murder. These punishments are unfair, given that these offenses are serious enough to warrant the death penalty if committed by someone at least 18 years old and a life sentence if committed by a youth tried as an adult. In addition, if convicted of a lesser offense, a 17-year-old would become eligible for parole much sooner than a younger teen convicted as an adult of capital murder, who must serve 40 years before becoming parole eligible.

Under the bill, the imposition of a sentence of life in prison for 17-year-olds convicted of capital murder would be consistent with the penalty for younger teens tried as adults for this crime. Enacting a punishment consistent with current law, rather than developing a unique sentence for 17-year-olds, would be the most logical course of action and avoid drawing an unfair distinction in punishment for one narrow group of offenders.

SB 2 would meet the requirements of the Supreme Court ruling in *Miller*, which was narrowly drawn and said that a person younger than 18 years old who is convicted of capital murder cannot be given a mandatory sentence of life without parole. The decision does not restrict a state from applying another mandatory punishment and does not require the use of a specific sentencing process with the type of punishment that would be imposed by SB 2.



SB 2 also would be in line with the court's decision by allowing 17-year-old offenders the same meaningful opportunity for release currently given to younger teen offenders through parole eligibility after serving 40 years in prison. For many years Texas courts have been successfully issuing life sentences requiring 40 years before parole eligibility to younger teens, and extending this sentence to those who were 17 at the time of a capital murder would withstand legal challenges.

The bill would respect Texas' current sentencing laws and its tradition of punishing capital murder with the most severe sentence available, rather than within a punishment range. All capital murders — which involve murder enhanced by another factor, such as the murder of a peace officer or multiple victims — are serious enough to warrant a mandatory life sentence. By imposing a life sentence, rather than providing the options of life or life without parole, the bill would impose the lower end of the acceptable punishment range, with no need for another proceeding to hear additional, mitigating information.

SB 2 would not change the current ability of courts to decide guilt or innocence and to make distinctions among defendants with different levels of involvement in a crime. Judges and juries that decided a defendant was not guilty of capital murder could convict the defendant of a lesser, but included, charge. For example, a defendant tried for capital murder that involved aggravated robbery could be convicted of the aggravated robbery rather than the capital felony.

The state still could punish appropriately those rare cases in which 17-year-olds committed offenses such as multiple or mass killings. In those cases, separate trials could be held for individual victims and sentences served consecutively so that an offender effectively received life without parole.

Instituting a new punishment scheme for juveniles or a unique punishment for 17-year-olds who commit capital murder would be outside the scope of the governor's call for the second called session. If the Legislature wishes to address the bigger picture of the punishment of youths convicted of capital murder, it would be best to study the issue during the interim and propose changes in the future.

## Opponents said

The state should not respond to the *Miller* decision by instituting a mandatory life sentence for 17-year-olds convicted of capital murder. Replacing one mandatory sentence with another mandatory sentence that is the maximum allowed for these offenders would not address the need for individualized sentencing discussed in the *Miller* decision and would extend a flawed sentencing scheme used for younger offenders. The underlying message of *Miller* is that the state should not continue to impose mandatorily the harshest sentence available on a set of juvenile homicide offenders.

Instead, the state should institute a punishment scheme that uses individualized sentencing for those who are 17 years old and convicted of capital murder, as well as for 14-, 15-, and 16-year-olds tried as adults for capital murder. This would allow for the recognition by juries and judges of the unique characteristics of young offenders, such as maturity level, sense of responsibility, vulnerability to influence and pressure, and the possibility for rehabilitation. While all capital murders are heinous crimes that deserve serious punishment, individualized punishments should be considered because all cases and offenders may not be equal.

Under an individualized sentencing structure, the Legislature could establish the appropriate sentencing range for youths convicted of capital murder and judges and juries could assess penalties within the range so that justice was served. Sentences could include a minimum punishment up to 99 years in prison, life in prison, or life without parole and could require that a minimum number of years be served before parole eligibility. Judges and juries could hear the facts of a case and consider mitigating factors, and offenders could be punished in a manner commensurate with the nature of their crimes.

SB 2 would not meet the need for a punishment system that allowed for mitigating information, such as maturity level, about a 17-year-old who committed capital murder to be heard by a court and placed in the record where it could be considered at a later parole hearing. Under current law, such information can come to light when a 14-, 15-, or 16-year-old is certified to stand trial as an adult, but SB 2 would provide no opportunity for the court to consider particular circumstances in a case involving an accused 17-year-old while witnesses were available and memories fresh.

SB 2 and the current Texas sentencing structure also are out of step with the *Miller* decision because a life sentence could effectively function as life without parole. Under a life sentence, parole is considered only after 40 years in prison and, given the low life expectancy for prisoners, a life sentence could equal life without parole and deny the offender a meaningful opportunity for release. A minimum term before parole eligibility could be instituted, such as 25 to 30 years, would provide an appropriately harsh punishment while meeting the requirements of *Miller*.

## Other opponents said

The state should not abandon the punishment of life without parole for 17-year-olds convicted of capital murder. A sentencing structure allowing life without parole, as well as life in prison, would both recognize that some of these crimes are so heinous that they merit life without parole and meet constitutional requirements that life without parole not be imposed mandatorily.

## Notes

During the 83rd Legislature's regular session, the Senate passed an identical bill, **SB 187** by Huffman. It was placed on the May 21 House General State Calendar but never considered.

During the 83rd Legislature's first called session, the Senate approved an identical bill, **SB 23** by Huffman. The House amended the bill on second reading to impose a punishment of either life in prison with the possibility of parole or life without parole for those convicted of capital murder committed when they were 17 years old. SB 23 died in the Senate.

The HRO analysis of HB 4 by Kolkhorst, the companion bill to SB 2, appeared in the July 11 *Daily Floor Report*.

# Continuing the Texas Department of Criminal Justice

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**SB 213 by Whitmire**  
*Effective September 1, 2013*

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**SB 213** continues the Texas Department of Criminal Justice (TDCJ) and the Board of Criminal Justice until September 1, 2021. It also revises laws dealing with the Correctional Managed Health Care Committee, the Board of Pardons and Paroles, and the Windham School District.

**TDCJ.** Revisions to laws governing TDCJ include:

- expanding the components of the offender reentry plan, requiring TDCJ to adopt the plan, and adding members to the existing reentry task force;
- requiring TDCJ to adopt a standardized risk and needs assessment instrument for offenders in state facilities and on probation;
- requiring TDCJ to establish case management committees to assess inmates and to ensure they receive appropriate services and programs;
- requiring the agency's Community Justice Assistance Division to establish a standard grantmaking process for probation funding and to study the feasibility of performance-based grants;
- establishing requirements for individual treatment plans for inmates, including providing a record of progress and participation in programs, results of assessments, and treatment and program needs; and
- revising the procedures for handling victim impact statements.

**Correctional managed health care.** The Correctional Managed Health Care Committee (CMHCC) is expanded from five to nine voting members. Two must be physicians employed by a medical school other than The University of Texas Medical Branch at Galveston or the Texas Tech University Health Science Center and two must be licensed mental health professionals.

SB 213 revises the duties of the CMHCC and transfers some of its duties to TDCJ. It revises TDCJ's current authority to contract to implement the managed

health care plan and allows TDCJ to enter into a contract with any entity to provide offender health care. TDCJ is required to submit quarterly reports to the Legislative Budget Board and the governor on inmate health care expenditures and utilization.

**Board of Pardons and Paroles.** When granting or denying an inmate's release on parole or denying a release on mandatory supervision, parole panels must provide a clear and understandable written explanation of the decision and the reasons for it that relate specifically to the inmate.

The parole board must establish and maintain a range of recommended parole approval rates for each category or score within current guidelines. It must review and discuss the parole approval rates annually when it reviews the guidelines.

**Windham School District.** SB 213 requires the Windham School District to evaluate the effectiveness of its programs. It must compile and analyze information about each program, including performance-based information and data on academic, vocational training, and life skills programs. The information must include, for each person who participated in Windham programs, an evaluation of:

- disciplinary violations while incarcerated;
- subsequent arrests, convictions, or confinements;
- costs of confinement; and
- educational achievements.

Windham must use the information to evaluate whether its programs meet their goals and make any necessary changes.

SB 213 makes the Windham School District subject to Sunset review and requires that it be reviewed when TDCJ is reviewed.

## Supporters said

TDCJ should be continued for another eight years because no other entity can perform the agency's jobs of confining offenders, providing educational and rehabilitation programs to inmates, managing parolees, assisting local probation departments, and contracting for inmate health care.

While SB 213 would continue the TDCJ for eight years, rather than the standard 12 years, the agency's size and complexity and the changes to treatment and diversion programs in recent years warrant a more frequent review than required under the standard Sunset recommendation. In addition, by requiring the Windham School District to be reviewed at the same time as TDCJ — along with the Correctional Managed Health Care Committee (CMHCC) and the Board of Pardons and Paroles — the bill would allow the entire adult system to be reviewed comprehensively in eight years. A review performed sooner might be less useful because the changes in SB 213 might not have had enough time to be fully implemented and evaluated.

**TDCJ.** SB 213 would address a lack of focus and coordination in TDCJ's efforts to aid the reintegration into society of about 75,000 offenders released each year. In 2009, the Legislature required TDCJ to develop a comprehensive reentry plan and established a reentry task force to examine the challenges of reentry. SB 213 would flesh out those laws by requiring TDCJ to adopt a formal plan and by establishing specific requirements, including that it be evaluated and updated regularly. SB 213 would improve reentry services for individual inmates by requiring TDCJ to identify transition services for offenders, coordinate services through state and volunteer programs, and collect data relating to reentry.

SB 213 would require TDCJ to adopt and use one consistent risk and needs assessment tool from probation through parole, which would address the current duplication of agency efforts involved with performing several fragmented offender assessments at different times.

The bill's requirement to establish case management committees would be a natural extension of the current unit classification committees and would help ensure that offenders were placed in appropriate education and rehabilitation programs.

SB 213 would provide a statutory framework for TDCJ's probation grant system by requiring the agency to implement standard grant processes. It also would move the grant process toward performance-based funding by requiring TDCJ to study its feasibility.

**Correctional managed health care.** SB 213 would expand the CMHCC so that representatives from the state's medical schools could rotate through committee seats and would ensure that the mental health community was represented adequately.

SB 213 would clarify and formalize the current system of providing inmate health care by charging the CMHCC with developing the managed health care plan, while requiring TDCJ to contract with providers. The bill would clarify that TDCJ could contract with any entity to provide the care and would transfer to TDCJ other committee duties that dovetailed with contracting.

Retaining the committee, rather than giving all its duties to TDCJ, would ensure that the state continued to deliver inmate health care in a way that met its duty to maintain a constitutional prison health care system and that avoided costly litigation.

**Board of Pardons and Paroles.** SB 213 would give more information to offenders who are denied parole so they might better understand how to improve their rehabilitation and their chance of parole approval in the future. In many cases, the information currently received by inmates is too vague to help them know why their parole was denied. SB 213 would require the board to provide clear and understandable written explanations of its decision, including reasons that apply directly to the offender.

SB 213 would increase the reliability, validity, and effectiveness of the parole decision-making process. For example, the bill would require the board to establish and maintain a range of recommended parole approval rates for each parole guideline. This would give the board a tool to examine parole voting to identify whether the guidelines were applied consistently and whether the guidelines or recommended approval rates should be reexamined. These changes would not limit the discretion of the parole board or commissioners, establish any right to parole, or require approval based on recommended rates. Parole voting patterns would be examined retrospectively to ensure they did not influence a decision in an individual case.

**Windham School District.** Currently, Windham School District does not consistently evaluate its programs and services, making it difficult to know whether it is achieving its goals. SB 213 would require Windham to examine its programs and to collect performance-based data. This would allow the Legislature to make an informed decision about whether Windham should continue to provide educational services for inmates or whether another model should be instituted. Changing this structure now would be premature.

## Opponents said

TDCJ should undergo Sunset review again in 2025, according to the standard 12-year review cycle. The agency is running well, and the shortened interval between Sunset reviews could distract the agency from its core mission.

**Correctional managed health care.** The CMHCC should be restructured as a committee of the Texas Board of Criminal Justice instead of remaining an independent entity. Since TDCJ took over the task of contracting with offender health care providers, an independent entity is not needed to perform the few remaining duties of the committee. TDCJ easily could absorb the communication, monitoring, reporting, and other duties performed by the committee. This could save the state some of the about \$673,000 it spends annually on committee staff.

**Board of Pardons and Paroles.** The board currently gives offenders denied parole adequate and useful information about why they were rejected. The board's system provides information efficiently and uniformly and revises the system when necessary. It considers about 100,000 cases annually, and providing individualized information to offenders could strain its resources.

Requiring the board to establish and maintain recommended approval rates would be inappropriate. Parole guidelines are just one of many tools used by board members and parole commissioners to make decisions. Case summaries, court information, and victim input also are often considered. SB 213 could result in expectations about parole decisions being based solely on the guidelines and the approval rates being viewed as a type of quota. The parole board's function is to act in a purely discretionary manner.

## Other opponents said

TDCJ and the other criminal justice entities should be reviewed every four to six years. The complexity of the criminal justice system and the importance of its mission warrant more frequent evaluations of these entities than is provided for in SB 213.

## Notes

The HRO analysis of the House companion bill, HB 2289 by Price, appeared in Part One of the May 4 *Daily Floor Report*.

# Habeas corpus writs for certain types of new evidence

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## SB 344 by Whitmire

*Effective September 1, 2013*

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**SB 344** authorizes courts to grant relief on certain writs of habeas corpus, which are challenges to felony convictions that typically center on constitutional rights and may be filed in state or federal court.

Under the bill, courts may grant relief on an application for a writ of habeas corpus if the writ is filed under procedures in current law and:

- it raises relevant scientific evidence that was not available at the time of a trial because the evidence was not ascertainable through reasonable diligence by the convicted person before or during the trial;
- the evidence is admissible under the Texas Rules of Evidence at a trial held on the date the application for relief was filed; and
- the court finds that, had the scientific evidence been presented at trial, the person would not have been convicted, based on the preponderance of the evidence.

Claims could be presented in writs under the bill if they were not presented in an original or previous application because they are based on relevant scientific evidence that was not ascertainable through reasonable diligence by the convicted person.

### Supporters said

SB 344 would create a legal avenue for defendants convicted of crimes based on false and discredited scientific evidence to seek relief under Texas' habeas corpus statute. The question of how to deal with convictions based on false and discredited forensic testimony has arisen more frequently in recent years as the forensic sciences have undergone extensive review, resulting in updates in various fields and sometimes discrediting certain forms of forensic testimony. SB 344 would fill this gap in habeas corpus law by providing a path for relief where false and discredited forensics may have caused the wrongful conviction of an innocent person.

In general, defendants are limited to one application for a writ of habeas corpus per conviction unless specific conditions are met for a subsequent writ. While there is a procedure for offenders to request DNA testing after a conviction, there is no such provision for other types of scientific evidence. This can result in those who have filed the allowable writ of habeas corpus being unable to bring new, non-DNA scientific evidence before a court. SB 344 would establish a single standard for when this scenario arises, rather than establish individual provisions for arson investigations, dog-scent lineups, and every other discredited forensic method.

Judicial opinions have identified weaknesses in the current habeas corpus statutes, raising issues that include the absence of grounds upon which to grant relief and the speed of changing science that serves as the foundation of a conviction. There is no agreed-upon theory on granting relief in these situations.

SB 244 would create a dedicated procedure allowing those with claims to be heard but without opening all convictions to scrutiny. It would help address situations in which scientific understanding had changed with respect to something that experts sincerely thought was true at the time they testified. The bill would include well defined criteria to be met for a court to grant relief.

### Opponents said

SB 344 could open the door for many unfounded applications for writ of habeas corpus relief that would overwhelm the courts with appeals every time a new scientific advancement was made.

The current system for filing and considering writs of habeas corpus is well established. It might be better to consider establishing a procedure for new scientific evidence similar to the one used for DNA evidence in Code of Criminal Procedure, ch. 64. This chapter allows convicted persons to submit motions to the court

requesting DNA testing under certain circumstances.  
This evidence then can be submitted in a writ if it meets  
certain criteria.

## **Notes**

The HRO analysis of SB 344 appeared in the May  
15 *Daily Floor Report*.

# Disciplinary process for certain disclosure violations

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**SB 825 by Whitmire**  
*Effective September 1, 2013*

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**SB 825** requires the Texas Supreme Court to establish standards to prohibit State Bar of Texas grievance committees from giving private reprimands for violations of certain disciplinary rules relating to evidence disclosure. This applies to rules requiring prosecutors to disclose to the defense all evidence and information that tends to negate the guilt of the accused or mitigate the offense, including Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct.

The Supreme Court must ensure that the four-year statute of limitations that applies to a grievance filed against a prosecutor alleging a violation of the disclosure rule does not begin to run until the date on which a wrongfully imprisoned person is released.

## Supporters said

SB 825 would strengthen the process used by the State Bar to hold prosecutors accountable when it was alleged that they did not disclose required information in a case in which a person was wrongfully convicted. Questions about this process came to light with the case of Michael Morton, who was exonerated after being convicted of murdering his wife and spending nearly 25 years in prison.

Currently, allegations of attorney misconduct must be filed with the State Bar's grievance system within four years of the date the conduct occurred. An exception to this allows the limit in cases involving fraud and concealment to begin four years after the misconduct was discovered or should have been discovered. SB 825 would make a reasonable, fair exception to these deadlines by allowing the wrongfully convicted to file grievances for four years after release from prison. An exoneree should have a full four years to pursue a grievance in free society, where he or she would have access to resources and assistance. Such a person should not have to overcome the barrier of proving fraud or concealment to file a grievance under the current exception to the deadline.

The bill also would increase accountability in the current system by requiring reprimands in these cases to be public. Currently, when a State Bar panel rules on

a grievance, in most cases it decides whether to make a reprimand public or private. In a case involving a prosecutor's violation of the disclosure rule that resulted in a wrongful conviction, a private reprimand would be inappropriate because the case involves a public official acting in his or her public capacity.

SB 825 would not infringe on the discretion of grievance committees to make decisions in these cases. The bill would apply only to the type of reprimand, not whether one should be given. The seriousness of all violations of the disclosure rule in cases in which someone was wrongfully convicted warrants a consistent policy for these types of reprimands.

## Opponents said

Requiring reprimands in these cases to be public would decrease the discretion of grievance committees. For instance, a grievance committee might want to issue a private reprimand if it thought certain misconduct was of a lower level and that a public reprimand was inappropriate. If a private reprimand were unavailable, this could lead to some cases being dismissed.

Changing when the statute of limitations begins could be unnecessary because the current rules allow for the deadline in cases involving fraud and concealment to begin when the conduct was discovered or should have been discovered. Most cases described by the bill could fall under this exception, allowing time to file a grievance.

## Notes

The HRO analysis of SB 825 appeared in the May 13 *Daily Floor Report*.

A related bill, **SB 1611** by Ellis, known as the Michael Morton Act, changes discovery procedures and requires the disclosure of certain information in a criminal case. The HRO analysis of SB 1611 appears on page 49 of this report.



# Pre-trial DNA testing in death penalty cases

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**SB 1292 by Ellis**

*Effective September 1, 2013*

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**SB 1292** institutes a process of pre-trial DNA testing of evidence in death penalty cases. Before a death penalty trial, the state must require either the Department of Public Safety (DPS) or another accredited lab to perform DNA testing on biological evidence collected during a crime investigation and in possession of the state.

The bill establishes a process to determine what evidence falls under this requirement. As soon as practicable after a defendant is charged with a capital offense, or on motion of the defense or prosecutor, if the state has not waived the death penalty, courts must order defendants and prosecutors to confer about which biological materials will be tested.

If there is agreement, the testing may proceed. If there is disagreement, the defendant or the prosecutor may request a court hearing to decide the issue. The court must hold hearings at which there is a rebuttable presumption that evidence a defendant wants tested must be tested. The labs must pay for the testing. The state may test any evidence in its possession.

A defendant's exclusive remedy for testing not done as required by the bill is to ask for a writ of mandamus from the Court of Criminal Appeals to order testing. This writ would have to be submitted on or before the due date in current law for the filing of a writ of habeas corpus. A defendant is entitled to one application for a writ of mandamus. A defendant may file one additional application for forensic testing under existing provisions for post-conviction testing in Code of Criminal Procedure, ch. 64.

## **Supporters said**

SB 1292 would increase certainty in convictions in death penalty cases and reduce post-conviction, late-stage appeals. While the level of testing described by SB 1292 already is being performed in some cases, the state should establish a uniform policy for all cases to help ensure that only the guilty face execution.

Currently, many challenges to death penalty cases center on DNA testing of evidence, sometimes because not all evidence was tested. Requests for testing sometimes occur years after a conviction and are used as delay tactics. Having crime scene evidence tested early in the process would address this problem and help convict the guilty and protect the innocent.

While the bill could result in more overall testing of evidence, any short delay in the start of a trial because of more testing would be offset by reduced requests for testing and appeals later in the process.

SB 1292 would be narrowly drawn, applying only to death penalty trials. Testing would be limited to evidence collected as part of an investigation and in possession of the state.

Judges would act as gatekeepers to ensure the bill's provisions were not used as an unreasonable delay tactic. A presumption that testing must be done would be rebuttable by the prosecution.

SB 1292 would balance and protect the rights of defendants and the state in death penalty cases. Under the writ of mandamus authorized by the bill, defendants could ask a higher court to order testing that had not been done as required by the bill. Current law allowing defendants to ask for post-conviction testing under some circumstances would remain.

Decisions about collecting evidence or pursuing the death penalty should not be affected by the bill. Law enforcement officers collecting evidence follow protocols that focus on solving the crime, not on later testing decisions.

While the Code of Criminal Procedure, ch. 64 allows for some post-conviction testing, SB 1292 would implement pre-trial testing to reduce requests later in the process and to prevent wrongful convictions.

Any costs associated with SB 1292 could be offset by reducing or eliminating other costs, such as those for litigating appeals, housing offenders during appeals, and

testing ordered as part of an appeal. The most important cost that could be eliminated with the bill is the human cost of a wrongful conviction. The Legislative Budget Board estimates no significant fiscal impact to the state due to the bill. The Department of Public Safety and other labs could handle any increase in testing.

## **Opponents said**

SB 1292 could result in unnecessary DNA testing being used as a delay tactic in death penalty trials. The bill would be a response to problems that center mainly on older cases tried when DNA testing was not as prevalent as it is now. In current cases, evidence is tested routinely and procedures are available for requesting additional testing.

With SB 1292 testing could be requested of numerous — in some cases hundreds — of items or samples. These items, while gathered from the crime scene, may have nothing to do with the identity of the criminal and the results of the testing might not yield any relevant results. This could delay trials and increase costs, without adding information about the crime.

The potential for this unlimited testing could have other consequences. It could lead to reductions in evidence being collected from crime scenes and could have a chilling effect on the use of the death penalty.

Texas has a post-conviction testing law in Code of Criminal Procedure, art. 64, to ensure fair testing of evidence not tested during a trial. Under this chapter, a person may submit to the court a motion for DNA testing of evidence that was not previously tested or that was tested with outdated techniques if it meets appropriate requirements.

## **Other opponents said**

It could be difficult for crime labs to absorb the additional testing required by SB 1292 with existing resources.

## **Notes**

The HRO analysis of SB 1292 appeared in Part Two of the May 20 *Daily Floor Report*.

# Disclosure of certain information in a criminal case

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**SB 1611 by Ellis**

*Effective January 1, 2014*

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**SB 1611**, known as the Michael Morton Act, changes discovery procedures and requires the disclosure of certain information in a criminal case.

**Discovery.** In a criminal case, the state must permit the electronic duplication of offense reports and recorded statements of witnesses, including those by law enforcement officers, that contain evidence material to a matter involved in the action and that are in the possession, custody, or control of the state or under a state contract. This excludes privileged work product. The bill does not authorize the removal of documents, items, or information from the state's possession.

The state must electronically record or document information provided to the defendant under the bill. Before trial or before accepting a guilty or no contest plea, both the prosecution and the defense must officially acknowledge the disclosure, receipt, and list of all information provided to the defendant. If the state discovers additional information, it must disclose it to the defendant or the court.

**Non-disclosure.** The state is required to produce only the portions of information subject to discovery and may redact or withhold the other parts but must inform the defendant of the non-disclosure. The defendant may request a hearing to determine whether the non-disclosure was legally justified.

**Third-party disclosure.** The defendant, the defendant's attorney, or an agent of the defendant or attorney may not disclose to a third party any documents, evidence, materials, or witness statements received from the state. Disclosure is allowed for good cause after a hearing in which the court considers the security and privacy interests of victims and witnesses or if the information already has been publicly disclosed. The defendant's attorney or an agent of the attorney may allow a defendant, witness, or prospective witness to view the information obtained through discovery. The defendant, witness, or prospective witness may not have copies of the information unless

it is of their own witness statement. Any personal information must be redacted before allowing another person to view the information. For the purposes of these rules, the defendant cannot be considered an agent of the attorney.

**Other evidence.** The state must disclose to the defendant any exculpatory, impeachment, or mitigating information within the state's control that could negate the defendant's guilt or reduce the punishment.

**Pro se defendants.** If a court orders the state to produce and permit the inspection of information by a *pro se* defendant, the state must comply but may deny electronic duplication of the information.

## Supporters said

SB 1611 would modernize the state's discovery process and align it with recommendations from the American Bar Association. The new process ultimately could prevent the conviction of innocent people. Questions about Texas' discovery process came to light with the case of Michael Morton, who was exonerated after spending nearly 25 years in prison for the murder of his wife. Although the U.S. Supreme Court has ruled that prosecutors must disclose to the defense any potentially exculpatory evidence, this still puts the defense at a disadvantage. To ensure fairness and justice, the defense should have access to all items of evidence. By requiring the disclosure of any information relevant to the case, the bill would protect due process owed to all defendants and help ensure that innocent individuals were not convicted and imprisoned.

Although most offices already follow open-file policies, a statutory mandate would codify the right to any relevant information. This would promote uniformity and give the defense a legal basis for complaints about noncompliance.

## Opponents said

SB 1611 would put significant procedural burdens on prosecutors, creating a multitude of opportunities for unintentional and innocuous rule violations. Defense attorneys could exploit these technical violations to force dismissal of a case or even the acquittal of a guilty defendant. The bill's requirements would tip the balance too far in favor of the defense.

The bill would be unnecessary because most prosecutors have robust open-file policies that allow defendants and defense attorneys to have quick and easy access to information. Moreover, this bill would not protect against other instances of prosecutorial misconduct, including a bad actor who willfully decided to conceal evidence.

## Other opponents said

SB 1611 should go further to penalize prosecutors who fail to disclose evidence in accordance with the bill's requirements by establishing sanctions for violations. It also should strengthen provisions related to victim and witness protection and clarify provisions related to third-party disclosure.

The bill should require both the defense and the prosecution to turn over their evidence to the other party. A mandatory mutual discovery rule would be the best way to balance fairness with justice.

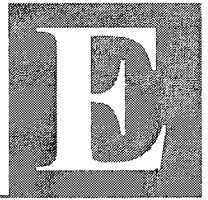
## Notes

The HRO analysis of [SB 1611](#) appeared in the May 13 *Daily Floor Report*.

A related bill, **SB 825** by Whitmire, requires the Supreme Court to:

- set standards prohibiting State Bar of Texas grievance committees from giving private reprimands for violations of certain disciplinary rules relating to evidence disclosure; and
- ensure that the statute of limitations applying to a disclosure-related grievance filed against a prosecutor does not begin to run until the date of the wrongfully imprisoned person's release.

The HRO analysis of SB 825 appears on page 46 of this report.



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# Energy and Environment

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# Creating an infrastructure bank to finance water projects

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## HB 4 by Ritter

*Generally effective September 1, 2013*

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**HB 4** creates the State Water Implementation Fund for Texas (SWIFT) and State Water Implementation Revenue Fund for Texas (SWIRFT) for use by the Texas Water Development Board (TWDB) to establish a revolving loan program to finance projects in the State Water Plan.

**Financing state water plan projects.** The bill creates the SWIFT and the SWIRFT as special funds inside the state treasury, but outside the general revenue fund, for use by the TWDB without further legislative appropriation to provide financial assistance to local and regional entities to implement the state water plan. Money in the funds is available to provide support for low-interest loans, longer repayment terms for loans, deferral of loan payments, and incremental repurchase terms for projects in which the state owns an interest. The TWDB is authorized to make loans for up to 30 years at an interest rate not less than 50 percent of the rate of interest available to the board.

Following the approval by Texas voters of a constitutional amendment (Prop. 6) at the November 5 election, the funds consist of any money provided by law, including \$2 billion out of the Economic Stabilization Fund (“rainy day fund”).

HB 4 provides a prioritization funding system on the regional and state levels, including a percentage of funding that should be allocated to rural, conservation, and reuse projects. The bill also creates an advisory committee to make recommendations to the TWDB on rulemaking for prioritizing projects. The committee must evaluate and may make recommendations to TWDB on the overall operation and structure of the funds and the feasibility of the state owning, constructing, and operating water supply projects.

An applicant may not receive financial assistance until the applicant has submitted or implemented a water conservation plan. Applicants must acknowledge their legal obligation to comply with federal and state laws for contracting with disadvantaged business enterprises and historically underutilized businesses.

**TWDB membership.** HB 4 changes the composition of the governor-appointed TWDB from a part-time, six-member board to a full-time, three-member board that reflects the geographic and population diversity of the state. One member must have expertise in engineering, one in finance, and one in law or business.

## Supporters said

**Financing state water plan projects.** HB 4 is needed to ensure that meaningful financial assistance is available to provide an adequate water supply for the state’s future, especially in times of drought.

The bill would create the SWIFT to serve as a water infrastructure bank to enhance the financing capabilities of the TWDB. The fund would provide a source of revenue or security and a revolving cash flow mechanism that recycled money back to the fund to protect the corpus. Money in the fund would be available immediately to provide support for low-interest loans, longer loan repayment terms, incremental repurchase terms for projects in which the state owned an interest, and deferral of loan payments. HB 4 also would create the SWIRFT to manage revenue bonds issued by the TWDB and supported by the SWIFT.

According to the TWDB, critical water shortages will increase over the next 50 years, requiring a long-term, reliable funding source to finance water and wastewater projects. The state water plan has identified projects intended to help avoid catastrophic conditions during a drought, but rising costs for local water providers, the capital-intensive investment required to implement large-scale projects, and the financial constraints on some communities necessitate a dedicated source of funding to help develop those projects. The capital cost to design, build, or implement the recommended strategies and projects between now and 2060 is estimated at \$53 billion. Municipal water providers are expected to need nearly \$27 billion in state financial assistance to implement these strategies. A

delay in funding would put long-term planning of water projects in jeopardy and increase the overall cost to customers.

Unless the state fully implements its state water plan, 50 percent of Texans by 2060 will lack an adequate supply of water during times of drought. Without an adequate supply of clean, affordable water, the state's economy and public health would be harmed irrevocably. Water shortages during drought conditions cost Texas business and workers billions of dollars in lost income every year. If Texas does not implement the state water plan, those losses could grow to \$116 billion annually. Until the state establishes a permanent source of revenue to pay for the infrastructure projects in the state water plan, the future of the state's water supply will be in jeopardy.

HB 4 would provide a comprehensive approach to manage water resources wisely for future generations. Multiple provisions would ensure that the fund was handled appropriately and equitably, emphasizing water conservation and rural projects. Projects to receive state financial assistance would have to be prioritized at the regional and state levels. The bill would provide checks and balances to protect the integrity and management of the funds, including creating an advisory committee to oversee their operation, requiring rules for prioritizing projects, and requiring TWDB to report on use of the funds.

The rainy day fund would provide an ideal source of funding for initial capitalization of the SWIFT. If the proposed constitutional amendment authorizing this is approved by voters at the November 5 election, the investment would seed a revolving fund that could grow with limited need for further state allocations. A one-time, \$2 billion capitalization of the SWIFT would be used in conjunction with the TWDB's existing \$6 billion evergreen bonding authorization to provide a meaningful funding solution for larger Texas water projects and financing for many of Texas' smaller communities.

The bill would require that 20 percent of projects funded be for water conservation or reuse and that 10 percent serve rural areas or agricultural water conservation. While the state water plan calls for 34 percent of future water needs to come from conservation and water reuse projects, such projects account for only 11 percent of the financial assistance requested.

Overall conservation efforts, including the prevention of water loss, are considered in the state's prioritization of strategies. An applicant could not receive financial assistance until a water conservation plan had been submitted and implemented and the regional water-planning group had complied.

While some say the bill should do more to protect the environment, any project considered for financial assistance already would have been through the permitting process at the Texas Commission on Environmental Quality, which considers stream flows and environmental impact.

**TWDB membership.** HB 4 would ensure that the agency tasked with overseeing the investment of \$2 billion of new state money for water projects was properly structured to manage this responsibility. While the current system has worked well, managing another \$2 billion would be a substantial increase in workload for volunteer board members. Professionalizing the board with full-time, salaried members would ensure that the board knew its business and was more involved in fulfilling its duties. Board members would be on the job every day, making staff more accountable and improving relations with lawmakers.

## Opponents said

**Financing state water plan projects.** HB 4 envisions the initial capitalization of the SWIFT as a one-time, \$2 billion transfer from the rainy day fund, contingent on voter approval of Prop. 6 at the November 5 election. The rainy day fund would not be an appropriate source of funding for such an enterprise, even if constitutionally dedicating the money in the funds would preserve the spending cap. Taking \$2 billion out of the rainy day fund likely would lead to a downgrade of the state's superior credit rating and limit the state's ability to deal with a revenue shortfall, a natural disaster, or a school finance court decision that required more state spending on public education.

Funding another water lending program would be an unnecessary and inefficient use of rainy day funds because entities needing water infrastructure funding already have tremendous access to capital. TWDB has several lending programs for water infrastructure through bonding programs that use the state's credit rating to guarantee water debt, enabling the TWDB to offer inexpensive financing on a long-term basis. The

TWDB also recently received approval for ongoing general obligation bond authority not to exceed \$6 billion at any time.

**TWDB membership.** The TWDB has a successful track record managing a multi-billion dollar loan portfolio. Changing its governance would only compromise objectivity by politicizing a board that traditionally has been overseen by businessmen, bank presidents, and engineers from all regions of the state. Although the current board is appointed by the governor, a full-time, professional board would be subject to political interference in a way that a part-time board is not because part-time, volunteer board members are not beholden to the governor for their employment.

## Notes

The HRO analysis of HB 4 appeared in the March 27 *Daily Floor Report*.

HB 4 is the enabling legislation for **SJR 1** by Williams, a proposed constitutional amendment (Prop. 6) — approved by voters at the November 5 constitutional amendments election — that creates the SWIFT and the SWIRFT for use by the TWDB to finance projects included in the state water plan. The supplemental appropriations bill, **HB 1025** by Pitts, provides \$2 billion from the rainy day fund to capitalize the SWIFT, following voter approval of Prop. 6.

The HRO analysis of SJR 1 appeared in Part One of the May 20 *Daily Floor Report*. The analysis of HB 1025 appeared in the April 26 *Daily Floor Report*.



# Permits for greenhouse gas emissions

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**HB 788 by Smith**  
*Effective June 14, 2013*

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**HB 788** allows the Texas Commission on Environmental Quality (TCEQ) to issue permits to facilities to emit “greenhouse gases” — i.e., carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, and certain other chemicals. TCEQ must adopt rules to implement a greenhouse gas permitting program, including procedures to transition to the TCEQ any applications pending with the U.S. Environmental Protection Agency (EPA). TCEQ also must prepare and submit to the EPA for approval appropriate program revisions reflecting the state’s greenhouse gas permitting program. A greenhouse gas permit is not subject to contested case hearing requirements.

TCEQ may impose fees to pay for greenhouse gas permitting only as necessary to cover additional reasonably necessary direct costs associated with issuing the permits. If authorization to emit greenhouse gases is no longer required under federal law, the TCEQ must repeal any rules adopted under the bill.

## **Supporters said**

HB 788 would end the inefficient and costly dual processes that facilities must go through when seeking permits to generate greenhouse gases and other air emissions. The current process forces companies to go to EPA’s Region 6 office in Dallas for a greenhouse gas permit while simultaneously pursuing a permit from the TCEQ for all other major sources of federally regulated air pollutants. This process creates delay and adds to the costs for permits.

The EPA began regulating the emission of greenhouse gases nationally under the Clean Air Act in January 2011, and it has authorized states to manage the permitting of greenhouse gas emissions. The TCEQ, which has issued permits for federally regulated air pollution since 1992, has maintained that it does not have the authority to regulate greenhouse gases under current law. HB 788 would clarify that the TCEQ has authority to do so.

TCEQ issues many permits related to the emissions of air pollution, with most issued in less than 12 months. In contrast, the EPA’s time frame for processing greenhouse gas permits has increased to well more than a year. The EPA’s Region 6 office in Dallas has a backlog of more than 50 greenhouse gas permit applications from Texas companies and more are expected. HB 788 would ensure that business was not lost to adjacent states, all of which issue greenhouse gas permits as part of their state air emissions permitting programs.

Once TCEQ began permitting emissions of greenhouse gases, these reviews could be handled more efficiently and incorporated into the TCEQ’s existing air permitting process. The TCEQ also could avoid many of the reviews that take place at the EPA, such as coordinating the issuance of its federal greenhouse gas permits with other federal agencies and conducting endangered species and cultural assessments. These assessments are not required at the state level and further delay processing and issuing permits for emitting greenhouse gas.

HB 788 would limit delays in permitting by disallowing contested case hearings involving greenhouse gases. The EPA does not allow contested case hearings as part of its permitting process, and there is no reason for the state to do so. Greenhouse gases associated with a particular permit do not have a localized effect, and there is no need to expose the businesses to needless delays associated with contested case hearings when there is no local affected party.

The bill would protect the state by requiring the TCEQ to abolish its greenhouse gas permitting program if the federal government ruled it no longer would regulate greenhouse gas emissions. HB 788 would keep permitting fees reasonable by limiting the fees TCEQ could charge to the amount necessary and reasonable to cover the direct costs associated with permitting greenhouse gases.

## **Opponents said**

By eliminating the contested case hearings for greenhouse gases, HB 788 would deprive the public of an important venue for comment and the opportunity to suggest permit enhancements. Contested case hearings ensure adequate public notice, a public opportunity to review the draft permit, and the right to seek redress in Texas instead of at the federal level. Contested case hearings offer a vehicle for the public to push for innovative technologies and address unintended consequences of a facility.

## **Notes**

The HRO analysis of HB 788 appeared in the April 18 *Daily Floor Report*.

# Continuing the Public Utility Commission

HB 1600 by Cook

Effective September 1, 2013

**HB 1600** continues the Public Utilities Commission (PUC) until September 1, 2023. The bill:

- changes membership qualifications for PUC commissioners;
- transfers regulation of water and wastewater rates from the Texas Commission on Environmental Quality (TCEQ) to the PUC;
- establishes a rate classification system for water and wastewater utilities;
- grants the Office of Public Utility Counsel (OPUC) authority to conduct public interest advocacy for water utility rate matters;
- requires the PUC to provide additional oversight of the Electric Reliability Council of Texas (ERCOT) and its system administration fee;
- allows the PUC to issue emergency cease-and-desist orders;
- prohibits a former PUC commissioner from being employed by ERCOT for two years after leaving office;
- requires the PUC to establish by rule a prohibition on the sale or transfer of information gathered by smart meters to third parties;
- requires the PUC to establish a mechanism for renewing certificates for the competitive local exchange carriers; and
- eliminates certain statutorily required reports.

**Commissioner qualifications.** HB 1600 adds qualifications for commissioners, requiring that they be well informed and qualified in the field of public utilities and utility regulation and that they have at least five years of experience in the administration of business and government or as a practicing attorney or public accountant.

**Transfer water and wastewater rate regulation.** Starting September 1, 2014, the PUC will assume responsibility from the TCEQ for rate-making and other economic regulation, such as issuing certificates of convenience and necessity (CCN), for water and wastewater utility service. The agencies must establish rules to implement HB 1600 and enter into a

memorandum of understanding (MOU) on the powers and duties transferred under the bill and establishing a plan to transfer resources from the TCEQ to the PUC.

The TCEQ may continue regulating water and sewer utilities to ensure safe drinking water and environmental protection. The TCEQ and the PUC will establish a transition team for transfer of the ratemaking and CCN functions and to establish guidelines for agency cooperation in meeting federal drinking water standards, maintaining adequate water supplies, meeting established design criteria for wastewater treatment plants, demonstrating the economic feasibility of regionalization, and serving economically distressed communities.

**Water utility classification.** The bill establishes certain classes of investor-owned utilities (IOUs) based on the number of connections and provides time lines within each to update the rate-making process.

**OPUC.** HB 1600 allows the Office of Public Utility Counsel (OPUC) to intervene and represent the interests of residential and small commercial consumers regarding water and wastewater rates and services beginning September 1, 2013.

**ERCOT oversight.** HB 1600 requires ERCOT to submit for PUC's review, approval, and possible modification its annual budget, proposed performance measures, and proposals for debt financing. After approving ERCOT's budget, the PUC will set the range for the system administration fee, which is assessed to wholesale electricity buyers and sellers to fund ERCOT's operations. The PUC is required to ensure that the revenue raised by the fee closely matches ERCOT's expenditures and does not create a surplus or deficit at the end of ERCOT's fiscal year. HB 1600 prohibits a former PUC commissioner from serving on the ERCOT board for two years after leaving office.

**Cease-and-desist orders.** HB 1600 requires the PUC to adopt rules for issuing cease-and-desist orders, which the agency may issue with a hearing if practicable or without a hearing, and if it determines that an action by an electric utility or related entity:

- poses a threat to continuous and adequate electric service;
- is hazardous;
- creates an immediate danger to the public safety; or
- is causing or could be expected to cause an immediate injury to an electric customer that could not be repaired or rectified by monetary compensation.

The PUC may conduct a hearing before issuing a cease-and-desist order. The bill also establishes a process for affected parties to request a hearing if a cease-and-desist order is issued without one.

**Limitation on information from smart meters.** HB 1600 instructs the PUC, by rule, to prohibit an electric utility or transmission and distribution utility from selling, sharing, or disclosing information generated by smart meters to a third party unless the information is used to provide electric service to customers.

**Telecommunications provisions.** HB 1600 requires the PUC to develop rules as soon as practicable for a mechanism for renewing certificates for competitive local exchange carriers.

**Eliminating reports.** HB 1600 eliminates requirements for the PUC to publish a report promoting consumer awareness of changes in the telecommunications market and for a report to the Electric Utility Restructuring Legislative Oversight Committee.

## Supporters said

**Transfer of water and wastewater rate regulation to PUC.** Water and wastewater utility rate regulation could be transferred seamlessly to the PUC, which already regulates the state's electric and telecommunications utilities, implements related legislation, and assists customers in resolving complaints. The transfer would take advantage of the PUC's regulatory focus and processes while allowing the TCEQ to focus on its core mission of ensuring environmental quality.

While the ownership of some of the state's largest investor-owned utilities has changed and the financial structures and accounting have grown increasingly complex, the laws and TCEQ's staff and resources have not kept pace. TCEQ's mission is to protect the state's

public health and natural resources, while the PUC's structure and expertise are focused on fair and efficient rate-related regulation. The PUC's mission is to protect customers, foster competition, and promote high-quality infrastructure.

The intent of HB 1600 is not to raise costs. If the implementation of this bill resulted in higher costs for rate cases, those issues could be addressed in the future with the addition of streamlined mechanisms for all utility classes. While cases before the PUC could require more upfront paperwork, they would be resolved more quickly than at TCEQ, ultimately resulting in savings.

**Water utility classification.** HB 1600 would modernize the rate-setting process and move away from the one-size-fits-all approach used by TCEQ. Current law and the TCEQ's rules were designed for small, stand-alone systems, but throughout the past decade an increasing number of small, privately owned public water and wastewater utility systems have been acquired by national corporations and investment funds. While water utility ownership has evolved, the state's role in regulating the rates customers pay has not.

The bill would update the rate-making process by distinguishing between classes of IOUs based on the number of connections and providing time lines for each. This would provide more certainty regarding how long it would take to obtain a final rate determination and would give the smallest IOUs a mechanism to keep up with rising costs without going through a costly rate proceeding.

Because of the lengthy contested rate cases at the TCEQ, IOUs currently may begin charging customers increased rates within 60 days of providing notice to consumers. This has harmed consumers who lack the resources needed to disprove a utility's request for a larger-than-justified increase. HB 1600 would correct this by generally no longer allowing utilities to charge a proposed rate increase until the increase had been finally approved.

**OPUC.** The bill would give OPUC authority to intervene and represent residential and small commercial customers in water rate cases, resulting in a fair and balanced process for water and sewer utilities and their customers.

Many IOUs are located in rural, unincorporated areas and it has become more common for the largest to seek annual rate increases and charge double

or triple the rates of a nearby member-owned or municipally owned system. This pattern of recurring and dramatically escalating rate increases has led to many dissatisfied customers and negatively impacted property values.

A fully litigated rate case can take several years to resolve. Customers face the prospect of paying through a surcharge on their bill their own costs plus costs the utility incurred during the case. OPUC's participation on behalf of individuals and small businesses would ensure that ratepayers of all classes were represented adequately.

**ERCOT oversight.** The bill would give the PUC greater oversight authority over ERCOT's budget, debt financing, and fees. It would make the powerful electricity system operator more accountable by requiring ERCOT to develop PUC-approved performance measures, which would curb the agency's ability to pass the cost for expensive and wasteful projects to the state's electric customers. Under the bill, the revenue collected by ERCOT under the system administration fee effectively would be equal to ERCOT's expenditures, preventing ERCOT from generating surpluses at consumers' expense.

**Cease-and-desist orders.** The bill, in allowing the PUC to issue emergency cease-and-desist orders, would give it power to stop electric providers and others from taking actions that could threaten the state's electric supply or harm individuals or businesses. Cease-and-desist orders are critically important, for example, when quick action is needed to prevent rolling blackouts when the state's electric grid is operating near capacity. Nothing in HB 1600 would give the PUC authority to disconnect utility customers. The PUC should have the same emergency cease-and-desist authority to address harmful activities that is available to other regulatory agencies, including the Department of Insurance, the Department of Licensing and Regulation, and the Securities Board.

**Limitation on smart meter information.** The bill would protect the privacy of individuals by prohibiting the selling or sharing with unaffiliated third parties of information gathered by smart meters.

**Telecommunications.** HB 1600 would implement a Sunset recommendation requiring competitive local exchange carriers (CLECs) to renew their certificates with the PUC. This simple registration process would

provide an up-to-date list of the entities the PUC regulates and would not impose a burden on the regulatory community.

**Eliminating reports.** Two reports that would be eliminated by HB 1600 are redundant or no longer necessary. Utilities Code, sec. 17.003 already requires the PUC to inform consumers about changes in the telecommunications market, and the Electric Utility Restructuring Legislative Oversight Committee was abolished in 2011.

**PUC governance.** HB 1600, by requiring a commissioner to be experienced in regulatory matters, would ensure that appointed commissioners were qualified in utility regulation.

## Opponents said

**Transfer of water rate regulation.** Moving water utility regulation to the PUC from the TCEQ would not result in cost savings, better governance, or relief to ratepayers. In fact, because the economic aspects of regulation cannot be separated clearly from the environmental aspects, HB 1600 would complicate the regulation of water and sewage service.

Rate setting in water utility matters is highly prescriptive, with many issues — including cost recovery — stipulated in state law. Moving to the PUC the economic regulation of the state's retail water utilities, most of which are substantially smaller than large telecommunications and electric utilities, would not address consumer concerns about water rates.

The PUC rate application filing requirements are more extensive than at the TCEQ and would require a greater expense at the outset because the PUC requires expert written testimony submitted with the application. At the TCEQ, written testimony is deferred until hearing dates are scheduled at the State Office of Administrative Hearings (SOAH). Since most cases settle before a hearing, the expense of providing written testimony is not often realized. HB 1600 would result in an upfront cost that would have been incurred only in the event of a contested case hearing. Rate case expenses could be significantly higher than what is seen today.

Also, while the PUC offers a shorter time frame for a final rate determination, its discovery rules allow for unlimited levels of discovery, the costs of which could be significant.

**Water utility classification.** The classification system under HB 1600 would place a more intense and expensive rate case process on the largest water utilities that have typically invested the most capital in the state. This could create a disincentive for utilities to continue investing in infrastructure needed to serve their customers and provide adequate service. It could increase the cost of buying water systems, making it less likely that under-performing systems would be purchased and brought up to standard.

**Cease-and-desist orders.** By allowing the PUC to issue cease-and-desist orders with or without a hearing, HB 1600 inappropriately would give a potentially dangerous tool to the agency to attack problems that should be solved by the marketplace or, as a last resort, the courts. Giving the PUC such authority would be a clear case of regulatory overreach and have a chilling effect on the marketplace. It could create regulatory uncertainty and reduce the willingness of utilities to invest in Texas, thus depriving the state of much-needed generation capacity. Only one case in the last five years has required a cease-and-desist order and that was obtained through a court.

**Limitation on smart meter information.** HB 1600 does nothing to protect the public from the health and safety concerns associated with smart meters. Consumers should be able to opt out of participating in smart metering at the utility's expense.

**ERCOT oversight.** Current law gives the PUC broad oversight authority over ERCOT, and the added authority granted by HB 1600 would be unnecessary and duplicative. The PUC has previously adopted rules for budgets and debts under current law and could adopt more rules, if necessary, under existing statutes without further legislative action.

**PUC governance.** The PUC, as it is currently composed, is ineffective in protecting the interests of most ratepayers. It should be headed by elected officials, who would be more responsive to the needs of the general public.

## Other opponents said

HB 1600 would protect industry at the expense of consumers experiencing market abuse and fraud. The bill should have included fraud as one of the allowable circumstances under which the PUC could issue a cease-and-desist order. Also, the bill should raise from

\$25,000 to \$100,000 the fine for violating ERCOT's reliability protocols or the PUC's wholesale reliability rules. A \$25,000 fine is insignificant to large utilities and sends a message that they can conduct business as usual without fear of substantial penalty. Both provisions were included in the PUC Sunset bill from the 82nd Legislature (SB 661) but do not appear in HB 1600.

## Notes

The HRO analysis of HB 1600 appeared in the March 20 *Daily Floor Report*.

**SB 567** by Watson, effective September 1, 2013, also transfers water and wastewater utility regulation from TCEQ to the PUC. The provisions related to water transfer in SB 567 are generally the same as those provided in HB 1600.

The HRO analysis of HB 1307 by Geren, the House companion to SB 567, appeared in the May 2 *Daily Floor Report*.

# Ownership of fluid waste from oil and gas exploration

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**HB 2767 by P. King**  
*Effective September 1, 2013*

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**HB 2767** grants ownership of fluid oil and gas waste (waste fluid) to a person to whom it was transferred for the purpose of treatment for subsequent use. Waste fluid is waste containing salt or other mineralized substances, brine, hydraulic fracturing fluid, flowback water, produced water, or other fluid incidental to oil and gas drilling. It is considered to be the property of the person who possesses it until it is transferred to another person for disposal or use, unless otherwise provided in writing. Treated waste fluid or byproduct from the treatment process then becomes the property of the person to whom it is transferred for disposal or beneficial use.

A person who takes waste fluid for treatment, produces a treated product suitable for use in oil and gas drilling, then transfers the treated product to another person with the contractual understanding that it will be used in connection with oil and gas drilling, is not liable in tort for a consequence of the subsequent use of the treated product by the person to whom it is transferred or by another person. This does not affect the liability of a person who treats waste fluid for beneficial use in an action brought by a person for damages for personal injury, death, or property damage arising from exposure to the waste fluid or a treated product.

The bill requires the Railroad Commission to adopt rules governing the treatment and beneficial use of oil and gas waste.

## Supporters said

HB 2767 would remove barriers to recycling water resulting from oil and gas exploration, encourage responsible water use, and ensure that liability for waste fluid was properly assigned by clarifying the ownership and tort liability throughout the process of treating hydraulic fracturing water.

Currently, because of murky ownership laws, drillers that produce waste fluid are wary of releasing it to recyclers, and recyclers are similarly reticent when selling recycled water. These parties fear that an end user could improperly use or irresponsibly

dispose of treated water and the producer or recycler held responsible for that person's behavior. As a result, most waste fluid produced from hydraulic fracturing is disposed of in injection wells, removing it from the water cycle. Clarifying that ownership transfers with the sale would clear the way for more water recycling.

HB 2767 would help foster new technology and business innovation to conserve water as hydraulic fracturing grows and water remains scarce.

## Opponents said

While HB 2767 would remove the liability barrier to recycling water resulting from oil and gas exploration, the economic barrier to recycling the waste fluid would remain. It is less expensive to dispose of the waste fluid in an injection well than to have it recycled. Until economic changes drive down the cost of recycling the water, most waste fluid produced from hydraulic fracturing will continue to be disposed of in injection wells.

## Notes

The HRO analysis of HB 2767 appeared in Part Three of the May 6 *Daily Floor Report*.

# Disposal of low-level radioactive waste

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## SB 347 by Seliger

Effective September 1, 2013

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**SB 347** changes the requirements under which a waste disposal facility licensed in accordance with the Texas Low-Level Radioactive Waste Disposal Compact (TLLRWDC) may accept low-level radioactive waste from states that are not party to the agreement between Texas and Vermont. Beginning September 1, 2015, such a facility may collect a surcharge to accept low-level waste from a non-party state if the waste has been volume-reduced by at least a factor of three, unless such volume reduction would place the waste in a category more hazardous than low-level (i.e., higher than class C).

SB 347 prohibits the waste disposal facility from accepting class A, low-level waste from nonparty states unless the waste has been containerized. The bill raises the limit on the radioactive level of non-party waste the facility may accept *in a fiscal year* from 120,000 curies to 275,000 curies. The radioactive level of non-party waste the facility may accept *in total* may not exceed the greater of:

- an amount equal to 30 percent of the initial licensed radioactive capacity of the facility; or
- 1.167 million curies.

By December 1, 2016, the Texas Commission on Environmental Quality (TCEQ) is required to study and report to the Legislature the facility's available volume and radioactivity capacity for disposal of waste from compact states and non-party states. The Legislature may revise the waste-disposal limits described above after considering the results of the study.

SB 347 also establishes the environmental radiation and perpetual care account in the general revenue fund to support the activities of the Texas Low-Level Radioactive Waste Disposal Compact Commission, other than its normal operating expenses. Money in the new account includes licensing and registration fees paid to the commission, as well as surcharge fees for the disposal of non-party waste.

The commission may use money in the new account only for the decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance,

control, storage, and disposal of radioactive substances for the protection of the environment and public health and safety. As part of this effort, the commission may use the account to pay for measures to prevent or mitigate the adverse effects of abandonment of radioactive substances or to remedy any inability of the waste-disposal contractor to meet requirements of the compact or state law.

Under the bill, appropriations for the commission to support its normal operations are transferred from the existing Low-Level Radioactive Waste Fund (account no. 88) to the existing Low-Level Radioactive Waste Disposal Compact Commission account (account no. 5151).

## Supporters said

SB 347 would help ensure that Texas had the capacity to meet its low-level radioactive waste-disposal needs by statutorily limiting the amount of waste the disposal facility could accept from states outside the Texas Low-Level Radioactive Waste Disposal Compact Commission. A recent report produced by the TCEQ on the capacity of the Waste Control Specialists (WCS) facility in Andrews County demonstrates the need to modify disposal operations at the facility to accommodate future demand.

State law currently limits the amount of non-party waste the licensed facility may accept to 30 percent of its licensed capacity, reserving 70 percent for low-level radioactive waste generated by the two compact states, Texas and Vermont. While SB 347 would allow the non-party waste disposed of in the facility to carry a higher level of radioactivity in any one year, the total radioactive level of non-party waste that could be accepted for disposal would not change from the current limit of 1.167 million curies, which is equivalent to 30 percent of the licensed disposal amount. SB 347 merely could allow the overall limit of radioactivity to be reached sooner.



In addition, the bill would require the TCEQ to conduct another capacity study on WCS and would allow the agency to adjust the limit, if necessary. This would help ensure that the facility remained operational until it was needed to decommission Texas' two nuclear power plants at Comanche Peak and Bay City.

The bill also would streamline the funding mechanism for the compact commission by establishing the new environmental radiation and perpetual care account to support the activities of the commission, while directing the commission's appropriations into the Low-Level Radioactive Waste Disposal Compact Commission account no. 5151. This would allow the commission to support its operating expenses using funds under its control while ensuring that other funds, including fees, were dedicated to the purposes for which they were collected.

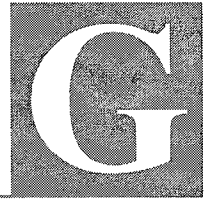
## **Opponents said**

SB 347 would allow WCS to accept non-party waste with a dramatically higher level of radioactivity into the Andrews County disposal facility. While the bill would increase capacity for low-level waste collected under the terms of the compact, it would encourage the diversion of bulkier, less radioactive class A waste to other states, leaving capacity in Texas for the more radioactive class B and class C waste. Thus, a site that originally was designed primarily for the disposal of class A waste would fill rapidly with an increasing volume of class B and class C waste that could continue to be radioactive well beyond the 500-year design of the facility.

## **Notes**

The HRO analysis of SB 347 appeared in Part Three of the May 20 *Daily Floor Report*.





# General Government and Elections

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# Illegal posting of “no carry” signs

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## HB 508 by Guillen *Died in the House*

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**HB 508**, as approved by the House, would have prohibited state agencies and the state’s political subdivisions from posting unauthorized “no carry” signs prohibiting concealed handgun licensees from carrying their handguns on the premises of a governmental entity.

The bill would have created a civil penalty for violating the prohibition and would have allowed the attorney general, after investigating a complaint, to sue to collect the penalty, upon request of a Texas citizen or a person with a Texas concealed handgun license. If the attorney general had determined that legal action was warranted, the attorney general would have been required to notify the state agency or political subdivision of the violation, at which point the agency or subdivision would have had 15 days to avoid the penalty by removing the sign.

HB 508 would have waived the sovereign immunity of the state agency or political subdivision from liability in a suit brought under the bill.

### Supporters said

HB 508 would ensure that governmental entities did not post “no carry” signs unless carrying a concealed handgun in the location with the sign was prohibited by statute. Currently, some governmental entities post “no carry” signs erroneously in places in which it is legal to carry a concealed handgun. This is confusing and could subject concealed handgun license holders to a criminal penalty.

The bill would address this problem by creating a civil penalty for the wrongful placement of these signs and creating a 15-day period during which the governmental entity could cure the violation. Allowing the attorney general to file a suit to recover the penalty would ensure that a mechanism was available to address violations of the bill.

It would be appropriate to waive sovereign immunity in these narrowly drawn circumstances to ensure that state agencies and political subdivisions follow the state’s concealed carry laws.

### Opponents said

The state should be cautious about waiving the sovereign immunity of state agencies and political subdivisions, even for the limited circumstances contained in the bill. Such action should be reserved only for situations in which no other appropriate remedy is available.

### Notes

The HRO analysis of HB 508 appeared in Part One of the May 4 *Daily Floor Report*.

An amendment in the conference committee report for HB 508 would have allowed certain elected, statewide, judicial, and law enforcement officials who are licensed to carry concealed handguns to carry their guns anywhere without being subject to certain Penal Code restrictions on places where weapons are prohibited. The authorization to carry concealed handguns statewide would have applied to holders of statewide office, members of the Texas House of Representatives and Senate, members of the U.S. Congress, and certain law enforcement authorities. HB 508 died when the House failed to adopt the conference committee report.

**HB 48** by Flynn, effective September 1, 2013, eliminates a requirement that a concealed handgun licensee complete a continuing education course in handgun proficiency to renew the license and allows licenses to be renewed over the Internet. The HRO analysis of HB 48 appeared in Part One of the May 4 *Daily Floor Report*.

**HB 485** by S. Davis, effective September 1, 2013, reduces concealed handgun license fees for certain veterans, correctional officers, and members of the Texas military forces. The HRO analysis of HB 485 appeared in Part One of the May 4 *Daily Floor Report*.

**HB 698** by Springer, effective September 1, 2013, requires the Department of Public Safety (DPS) to establish procedures for the submission of fingerprints by a concealed handgun license applicant who lives in a county of 46,000 or fewer that is not within 25 miles of a facility that processes digital or electronic fingerprints. The HRO analysis of HB 698 appeared in Part One of the May 4 *Daily Floor Report*.

**HB 1349** by Larson, effective January 1, 2014, prohibits DPS from requiring applicants for concealed handgun licensees to submit their Social Security numbers when applying for or renewing a license. The HRO analysis of HB 1349 appeared in Part One of the May 4 *Daily Floor Report*.

# Continuing self-directed semi-independent agencies

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**HB 1685 by Price/HB 1717 by Price/SB 204 by Nichols**  
*Effective September 1, 2013*

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**HB 1685** discontinues Sunset review of the Self-Directed Semi-Independent (SDSI) Agency Project Act and establishes review of the SDSI status of the Texas State Board of Public Accountancy, the Texas Board of Professional Engineers, and the Texas Board of Architectural Examiners as part of these agencies' periodic Sunset reviews. Each agency must pay for its own Sunset review process.

Under the bill, agencies' accounts must use the comptroller's uniform statewide accounting system (USAS) to make payments, other than those from the agency's account to the Texas Treasury Safekeeping Trust Co. The bill makes SDSI agencies subject to laws that apply to state agencies on purchasing requirements, interagency transfer vouchers, prompt payment compliance, and travel expense reimbursement rates. The agencies must remit all collected administrative penalties to the general revenue fund, rather than retaining some of those funds.

HB 1685 requires each agency to submit additional information to the Legislature and governor in its annual report. The bill removes a requirement for an agency to remit to the state a \$10 annual scholarship fee provided in an agency's enabling legislation and collected from license holders.

**HB 1717** continues the Texas Board of Architectural Examiners until 2025. It requires all registered interior designers who have not passed the National Council for Interior Design Qualification Exam or equivalent to meet the examination requirements by September 1, 2017, in order to renew their registration. HB 1717 changes or increases many of the administrative fees and fines charged by the board and requires criminal background checks for all applicants seeking certification as an architect, landscape architect, or registered interior designer. Applicants for renewed certification who have not already submitted to a background check must do so before their certification can be renewed.

**SB 204** continues the Texas Board of Professional Engineers until 2025. Under the bill, the board may suspend a license, certificate, or registration without a

hearing if it simultaneously initiates a hearing with the State Office of Administrative Hearings (SOAH) and the SOAH hearing is held as soon as practicable.

The board may issue a cease-and-desist order to a person not licensed, certified, or registered by the board who violates a statute or rule relating to the practice of engineering. Criminal background checks are required for initial licensure by the board and for license renewals for applicants who have not already submitted to a background check.

## Supporters said

HB 1685 would finally and appropriately move the Board of Public Accountancy, the Board of Professional Engineers, and the Board of Architectural Examiners from the pilot project phase and clarify their permanent SDSI status. Sunset Advisory Commission staff would review the SDSI status of these agencies at the same time it reviews the operations of the agencies, enabling a more holistic evaluation process.

The SDSI pilot project has worked as intended, giving regulatory agencies flexibility and allowing them to operate outside the appropriations process. Establishing the governing law for the SDSI agencies in the Government Code would further solidify their SDSI status.

HB 1685 would increase these agencies' accountability and enable the state to better oversee their activities through additional reporting requirements. The bill would set out best practices and create a uniform approach to SDSI agencies, mirroring the rules in place for other state agencies.

Requiring SDSI agencies to remit administrative penalties to general revenue would avoid any appearance that an agency might improperly be leveraging penalties to support the costs of its operations. The bill also would close a loophole that allows SDSI agencies to keep outside accounts, which would strengthen the state's oversight of the agencies and improve transparency.

HB 1717 would allow the board to continue to regulate interior design to protect public safety and welfare, as recommended by the Sunset Advisory Commission. A private industry qualification is not a substitute for official licensing, which ensures that licensees undergo continuing education and a background check.

SB 204 would authorize the Board of Professional Engineers to continue as an independent agency until 2025. It would bring the board in line with other state agencies by requiring applicants for licensure to submit fingerprints for background checks and by allowing the board to issue cease-and-desist orders or temporarily suspend licenses.

## Opponents said

HB 1685 would perpetuate the potential for inadequate oversight of the public accountancy, professional engineers, and architectural examiners boards resulting from their operating as part of the SDSI pilot project. SDSI status should be discontinued and the governance of these agencies reverted back to the state.

Taking these agencies out of the appropriations process has undermined an important tool the Legislature should use to hold them accountable. Even with increased reporting requirements, adequate state oversight would be difficult.

The state's approach to SDSI agencies is disjointed. While the public accountancy, professional engineers, and architectural examiners boards would be subject to the new reporting requirements and rules in HB 1685, other SDSI agencies would not. Separate statutes for different SDSI agencies create incoherence and inconsistency.

HB 1717 should not allow the board to maintain official licensing for interior designers because the state does not have a clear interest in the program. State registration improperly limits entry to the interior design field.

SB 204 inappropriately would continue the Board of Professional Engineers as an independent agency, when it should be absorbed into the Texas Department of Licensing and Regulation. Requiring applicants for licensure to submit fingerprints for background checks

burdens engineers who might not have access to a local fingerprinting office. The board should not have the authority to suspend a license without first conducting a hearing.

## Other opponents said

These agencies should not be required to remit their administrative penalties to the state's general revenue fund. These amounts – less than \$500,000 in fiscal 2014-15, according to the Legislative Budget Board – are relatively small and volatile and go to useful agency purposes. In addition, the appearance of impropriety could remain even if the agencies remitted the penalty fees to general revenue.

## Notes

The HRO analyses of HB 1685 and HB 1717 appeared in the April 22 *Daily Floor Report*. The HRO analysis of SB 204 appeared in the May 14 *Daily Floor Report*.

# Continuing the Texas Lottery Commission

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## HB 2197 by Anchia

*Effective September 1, 2013*

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**HB 2197** continues the Texas Lottery Commission until September 1, 2025, increases the size of the commission from three members to five, and makes certain other changes to the commission and the lottery. The bill requires the commission to review and approve all major procurements and to establish procedures to determine what would be considered a major procurement based on the value of the contract and other factors.

The commission is required to develop a comprehensive business plan. The plan must include agency goals and an evaluation of specified items, such as agency performance and the effectiveness of programs and initiatives.

Among other changes to the lottery, the bill requires unclaimed prize money that is not appropriated for other purposes to be deposited in the Foundation School Fund, rather than the general revenue fund, and requires certain license hearings to be conducted by the State Office of Administrative Hearings.

HB 2197 creates the Legislative Committee to Review the Texas Lottery and Texas Lottery Commission. This 10-member body will include five members of the Senate appointed by the lieutenant governor and five members of the House of Representatives appointed by the speaker of the House. It will study the elimination of the state lottery, including a proposed schedule for phasing it out, the consequences of phasing it out, and the impact on the state budget of eliminating the lottery. The committee also will examine charitable bingo, including the distribution of bingo revenue. The committee must make an initial report by December 1, 2014, and the Lottery Commission is required, to the extent practicable, to make every effort to implement the recommendations of the legislative review committee.

HB 2197 also makes changes to the laws governing charitable bingo licensing practices and fees, registration fees, inspections, and auditing.

The bill removes statutory license fees for manufacturers and distributors and instead requires the commission to set the fees in amounts reasonable to defray administrative costs. The commission may set a fee for applications for bingo worker registry.

HB 2197 requires the commission to prioritize bingo inspections based on risk factors, including the amount of money derived from bingo, the compliance history of the premises, and the time since the last inspection. The commission must use risk analysis to identify which licensees would be at risk of violating the law or commission rules and to develop a plan to audit those licensees.

HB 2197 amends laws governing the commission's bingo-licensing practices, including requiring it to adopt rules for the license renewal process. The State Office of Administrative Hearings must conduct hearings on the denial, revocation, or suspension of bingo licenses and hearings related to administrative penalties.

The commission must by rule adopt a schedule of sanctions for violations of the Bingo Act to ensure that the sanctions are appropriate to the violation.

## **Supporters said**

The Lottery Commission should be continued because it has been successful in accomplishing its mission to generate revenue for the state, with more than \$13.6 billion going to the Foundation School Fund, \$5.3 billion to the general revenue fund, \$160 million to teaching hospitals that support indigent health care, and \$16 million to the Texas Veterans Commission. The lottery commission is the best entity to continue to operate the state lottery and to oversee charitable bingo.

It is appropriate to renew the agency for the standard 12-year period and place the agency under Sunset review at that time. The Sunset process examines agencies' operations and efficiencies, something that does not need to be repeated in the near future. The Legislature could do away the lottery or the commission at any time and would not need a Sunset bill to do so.



The lottery is a voluntary source of entertainment with broad appeal, as illustrated by a 2012 study showing lottery players do not have lower incomes than non-lottery players. Texans have weighed concerns about the lottery with respect to social welfare, gambling, and other issues but show their support for the game by continuing to play it. Eliminating the lottery would deny Texans the opportunity to raise funds for education through this voluntary form of entertainment.

The size of the commission should be expanded because operating the lottery and regulating charitable bingo are hampered by having only three members. The commission's small size makes it difficult to use subcommittees to divide its workload and to develop expertise. In the absence of one commissioner, the other two cannot informally discuss the work of the agency without potentially violating the state's open meetings laws.

HB 2197 would increase the accountability of the lottery commission by requiring it to approve major contracts. Currently, contracting authority rests solely with the executive director, which reduces the commission's responsibility in a critical area that includes some of the largest business decisions in state government.

By requiring the commission to formally implement a business plan — something it has been doing informally — HB 1297 would ensure that the agency had an ongoing, statutory requirement to evaluate its performance, operations, and efficiency.

HB 2197 would address concerns about whether the state should continue to operate the lottery by creating a legislative committee to review both the lottery and the commission. The committee would identify a process for phasing out the lottery and the consequences of doing so, including the effect on the budget. The study would allow the next legislature to make an informed decision about whether the state should continue to operate the lottery and possibly how to go about eliminating it appropriately. The committee also would take a needed look at bingo in the state to examine whether the games are providing an appropriate amount of funds for charitable purposes.

Currently, the bingo licensing fees charged by the commission are inflexibly set in statute, resulting in fees that do not cover the cost of regulation. HB 2197 would remove the statutory fees and allow the

commission to set them to cover costs. Fees would be set through the commission's rule process and include numerous opportunities for input from the public and the bingo industry. Legislative oversight would ensure that fees remained reasonable.

HB 2197 would increase the effectiveness and efficiency of the commission's bingo inspections and audits by requiring them to be based on risk analysis. Currently, the commission does not have a targeted approach, which means that scarce resources may not be used where they are the most needed.

## Opponents said

Texas should abolish the lottery and the Lottery Commission and end the state's involvement in running and promoting gambling. The lottery is a predatory gambling business that results in a regressive tax often paid by the poorest and least educated. The state funds the lottery has raised do not outweigh its negative impact on social welfare or the fact that it has failed to provide a real increase in education funding. The state's public schools should be funded in other ways.

If the commission is to be expanded, it would be better to have at least some slots designated for commissioners with certain types of expertise. For example, it could be required that members have extensive lottery-playing experience or that they represent low-income people or lottery retailers. Other state oversight boards often have specific requirements for membership.

HB 2197 could increase fees on those involved charitable bingo. Removing the fixed, statutory license fees could allow the commission to increase fees to burdensome levels. For example, the fiscal note reports that the fee to amend a license would be expected to increase from \$10 to \$25. The bill also would authorize a new fee, estimated at \$25 by the fiscal note, for initial bingo worker registration. Organizations involved in charitable bingo often are small, local groups that should not be subject to high licensing fees, which could result in less money for charitable purposes.

## Other opponents said

The lottery and the Lottery Commission should be continued for only a short period of time, such as four years instead of 12, to ensure that the issue of the

state continuing to run the lottery comes before the Legislature in the near future. While HB 2197 would create a commission to study the lottery, it would not ensure that the lottery will come up for a vote until 2025, the Sunset date in the bill. The Legislature should be forced to make a decision about abolishing or continuing the lottery by imposing a Sunset review or an agency expiration date in four years.

## **Notes**

The HRO Analysis of HB 2197 appeared in the April 23 *Daily Floor Report*.

# Continuing TDHCA

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## HB 3361 by Dutton *Effective September 1, 2013*

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**HB 3361** continues the Texas Department of Housing and Community Affairs until September 1, 2025.

**Housing tax credits.** HB 3361 decreases the emphasis on written statements from neighborhood organizations and state elected officials in applications for low-income housing tax credits. Written statements from neighborhood organizations are moved to tenth, rather than second, in priority. The item second in priority is adopted resolutions from local city councils or commissioners courts. The department must prioritize written statements from state representatives last, rather than sixth. Written statements from state senators are eliminated as a scoring item.

The bill allows the department to consider applications for emergency housing tax credits or related federal funding outside the usual application cycle.

**Private activity bonds.** Before the TDHCA board may approve an application for housing tax credits for developments financed through the private activity bond program, the applicant must submit a certified copy of a resolution from a municipality or commissioners court.

**Fingerprinting.** HB 3361 requires those licensed as manufactured housing manufacturers, retailers, brokers, or installers to undergo a fingerprint-based criminal history background check.

**Cease-and-desist authority.** HB 3361 allows the director of the Manufactured Housing Division to issue cease-and-desist orders to unlicensed, not just licensed, manufactured home sellers, builders, and installers who violate a law, rule, or written agreement related to manufactured homes regulated by TDHCA.

**Appeals and complaint dismissal.** The bill transfers the department's penalty appeals hearings to the State Office of Administrative Hearings and requires judicial review to be based on substantial evidence. It allows the Manufactured Housing Division to administratively dismiss complaints found not to have occurred or to be outside the division's jurisdiction and to order direct

refunds to customers. The division must develop a policy to encourage the use of negotiated rulemaking and alternative dispute resolution procedures.

**Debarment.** The bill allows the department to debar repeat violators in all programs it administers.

**Licensing, fees, and reporting.** The bill discontinues issuance of manufactured housing rebuilder licenses and licenses to operate more than one retail location. Under the bill, the department may charge a fee to reprint a license. The TDHCA no longer is required to issue certain reports on the Contract for Deeds Conversion Program and on transfers of funds, personnel, or in-kind contributions to the Texas State Affordable Housing Corporation.

## Supporters said

**Housing tax credits.** HB 3361 would ensure the low-income housing tax credit application process fairly represented the level of community support for a development. Written statements from neighborhood organizations and state elected officials are not always representative of the community as a whole and are regularly contested. Giving more weight to adopted resolutions from a local city council or commissioners court would encourage more equitable community input.

The bill also would ensure TDHCA could act quickly in future emergency circumstances by allowing the department to allocate federal emergency housing tax credits as needed outside the regular application cycle.

**Private activity bonds.** HB 3361 would enhance community input in the housing tax credit process by requiring a city or municipality to be notified about a proposed development and to hold a public hearing where residents could comment.

**Fingerprinting.** Using fingerprint-based background checks would help protect the public from entering into an expensive financial transaction with a criminal.

**Cease-and-desist authority.** Extending the division's existing cease-and-desist authority to include unlicensed operators would encourage all operators to follow the law.

**Appeals and complaint dismissal.** HB 3361 would ensure that appeal hearings were unbiased and that judicial reviews were based on the established record rather than on a completely new trial.

**Debarment.** The bill would improve safety and protect consumers by barring bad actors who misappropriated funds, constructed unsafe homes, or repeatedly failed to comply with department policy from participating in TDHCA programs. Those facing debarment would have the right to cure their violations and to appeal decisions.

**Licensing, fees, and reporting.** The bill would improve department efficiency and cost savings by eliminating obsolete reports and licenses and allowing the department to charge for a reprinted license.

## Opponents said

**Housing tax credits.** HB 3361 would limit community input in the housing tax credit process. The department should continue to highly rank input from local community organizations and both state senators and representatives because they represent constituents affected by affordable housing developments.

While it is important to respond quickly to emergencies, changing the application cycle for federal emergency housing funds could make it more difficult for stakeholders to express their concerns.

**Private activity bonds.** The bill's additional notification requirements for developments funded by private activity bonds would overregulate housing production. Those who want to give input already have that opportunity through existing notice requirements.

**Fingerprinting.** The bill would erode privacy and create a barrier to entry for operators in the Manufactured Housing Division by requiring fingerprint-based background checks that would not provide much more information than a name check.

**Cease-and-desist authority.** Giving TDHCA expanded authority to issue cease-and-desist orders would risk regulatory overreach. These problems should be solved by the marketplace or, as a last resort, by the courts.

**Debarment.** The housing industry and the marketplace are already effective at identifying and punishing bad actors. HB 3361 could unnecessarily push out operators for minor violations.

## Notes

The HRO analysis of HB 3361 appeared in the April 24 *Daily Floor Report*.

# Adopting electoral district maps

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## SB 2, SB 3, SB 4 by Seliger, First Called Session

*SB 2 effective June 26, 2013; SB 3 and SB 4 effective September 24, 2013*

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**SB 2** and **SB 4** adopt electoral districts for the Texas Senate and Texas congressional districts for the U.S. House of Representatives as drawn by a federal district court in San Antonio. The court found, following legal challenges to the maps adopted by the Legislature after the 2010 Census, that interim maps were necessary to allow timely elections in 2012. SB 2 adopts the federal court-drawn map (Plan S172) for the Texas Senate, and SB 4 adopts the federal court-drawn map (Plan C235) for U.S. congressional districts.

**SB 3** adopts Plan H358, which makes changes to 14 House districts in the interim map drawn by the federal district court in San Antonio. The altered districts are in Dallas, Harris, Tarrant, and Webb counties.

The bills repeal electoral district maps as enacted in 2011 by the 82nd Legislature.

### Supporters said

By adopting federal court-drawn maps, these bills would diminish the expense of ongoing litigation over legislative redistricting after legal challenges to the maps adopted by the Legislature in 2011. Adopting the court-drawn maps would avoid disruption of the upcoming election cycle and provide certainty and continuity to citizens with regard to districts used to elect members of the Texas House, Texas Senate, and the U.S. House of Representatives.

### Opponents said

Instead of adopting maps that were meant to be temporary, the Legislature should allow legal challenges to existing maps to be fully litigated in the courts. Adopting temporary maps would only cloud the legal issues and increase the amount and length of litigation. The court-drawn maps also did not remedy all voting rights issues identified by federal courts and therefore would be inappropriate choices for permanent adoption.

### Notes

The HRO digests of SB 2, SB 3, and SB 4 appeared in the June 20 *Daily Floor Report*.

Legislative redistricting in 2011 was followed by legal challenges to the newly drawn maps, which are ongoing in federal district court in San Antonio. In August 2012, a separate federal district court in Washington, D.C. denied preclearance of the maps under sec. 5 of the federal Voting Rights Act. Finding that interim maps were necessary to allow timely elections, the federal district court in San Antonio redrew electoral district maps for the Texas Senate, Texas House, and Texas congressional delegation for use in 2012.

On June 25, 2013, the U.S. Supreme Court, in *Shelby County v. Holder*, overturned sec. 4 of the Voting Rights Act, which provided the formula for determining which jurisdictions were subject to preclearance under sec. 5 for changes to voting laws based on previous histories of discrimination in voting. Preclearance enforcement actions under sec. 5 were halted following the Court's decision.

# Texas Ethics Commission Sunset

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## SB 219 by Huffman *Vetoed by the governor*

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**SB 219** would have changed Texas Ethics Commission (TEC) procedures and requirements primarily in four areas: investigation and enforcement, personal financial reporting, campaign finance reporting, and lobbying.

The bill would have revised required procedures for investigating complaints — called “inquiries” under the bill — that had been filed with the commission, including procedures for preliminary review and resolution of an inquiry. The commission would have been allowed to hold formal hearings as it currently does or to delegate them to the State Office of Administrative Hearings. The commission would have had to adopt guidelines to follow when civil penalties were assessed.

The bill also would have revised what was considered confidential and to what the public had access. This would have included allowing a notice of dismissal or a decision that no violation had occurred to be made available on the Internet if requested by a respondent.

SB 219 would have required filing by electronic transfer for personal financial statements filed with the commission by a state officer, a candidate for an office as an elected officer, and a state party chair. Filings would have been made using computer software that met the commission’s specifications or that was provided by the agency.

The bill would have required an annual fee from each candidate, office holder, and political action committee filing documents under Election Code, Title 15, which regulates political funds and campaigns. The requirement would not have applied to candidates, officeholders, or specific-purpose committees that file reports with an authority other than the commission or to candidates or officeholders who filed petitions in lieu of filing fees with applications for places on the ballot. The commission would have determined the amount of the fee, which could not have exceeded \$100.

SB 219 would have amended provisions relating to lobby registration and lobbyist expenditure reports. It also would have restricted for two years certain types of political contributions and expenditures from officeholders who became lobbyists.

The bill would have required a member of the Texas Railroad Commission who became a candidate for another office to resign from the commission.

SB 219 would have limited the current privilege under the Civil Practices and Remedies Code that prevents journalists from being compelled to testify about certain information and their sources by judicial, legislative, administrative, or other bodies. Under the bill, this privilege could have been limited if the journalist had made certain types of political expenditures.

Other changes would have included:

- expanding disclosure requirements for radio, television, and Internet political advertising;
- prohibiting the name of a political action committee from including the name of a candidate supported by the committee if the candidate had not consented; and
- requiring the Texas Ethics Commission to study whether the Travis County Public Integrity Unit’s law enforcement authority should be transferred to another entity.

## Supporters said

SB 219 would help correct current inefficiencies in the Texas Ethics Commission’s operations.

**Review procedures.** Updated review procedures for potential violations would alleviate some uncertainties and conflicts in the review and enforcement process. The three-tier system for identifying potential violations and the updated options for resolving them would help the public and the parties involved distinguish between minor infractions and more serious violations and would help to mitigate abuse of the review process.

**Lobbyist registration trigger.** Changes in lobbyist oversight would clarify existing rules and better notify registrants whether they needed to register and what they needed to report. Requiring persons to register only if they spend more than 26 hours in a calendar quarter lobbying would be consistent with the current rule exempting from registration a person who spends less than 5 percent of a normal full-time work schedule in a quarter lobbying. Shifting to a trigger based on compensation or to some other rule would be a policy change and more appropriate to address in a stand-alone bill.

**Resign-to-run.** By requiring a member of the Texas Railroad Commission who became a candidate for another office to resign from the commission, the bill would help ensure that commissioners focused on their important duties at the RRC. Otherwise, commissioners could be placed in a position of continuing to make decisions concerning the oil and gas industry while potentially collecting campaign donations from the industry.

**E-filing.** By providing for e-filing, the bill would bring the commission's reporting statutes into the 21st century, reducing postage costs and making reporting easier and more efficient for the parties reporting and the entities receiving reports. The user fee that TEC may charge for certain e-filers would help TEC maintain its software without requiring constant budget appropriations.

**Annual fee.** The annual fee that SB 219 would require of candidates, elected officials, and political committees filing disclosure reports with the commission would help support agency operations. The fee would be in line with requirements of other state agencies to collect fees to cover services. SB 219 would track the current practice of the secretary of state, who does not charge filing fees to those who use the petition process to get on the ballot, as the bill would exempt this same group from the fee in SB 219.

**Other provisions.** The Sunset process is intended only to improve the operation and efficiency of an agency, in this case TEC. Issues such as disclosure of certain political contributions, audit requirements, and public judicial campaign funding, among other ideas should be addressed more directly through the legislative process in stand-alone bills, rather than being inappropriately rolled into the Sunset process.

## Opponents said

**Lobbyist registration trigger.** The bill would impose an ineffective and unenforceable 26-hours-a-quarter trigger to require registration as a lobbyist. This would allow a person who wanted to lobby without registering to circumvent the registration process. Proving how time was spent and whether it qualified under the language in the bill would be more difficult than relying on a compensation or earnings trigger, which could be investigated more easily.

**Resign-to-run.** The resign-to-run requirement for members of the Railroad Commission inappropriately would change the structure of a constitutional agency without presenting it for a vote of the people. It would be unfair to enact this requirement on only one statewide office.

**Annual fee.** SB 219 should not allow the Ethics Commission to set an annual fee for candidates and groups who file campaign finance reports. The secretary of state already imposes a filing fee for certain offices, and another state entity should not raise funds by charging candidates a fee for participating in the election process.

**Other provisions.** SB 219 should do more to help the TEC accomplish its intended constitutional purposes. Stronger changes are needed to ensure that the commission has the power and the directive to enforce Texas campaign finance and ethics rules. The bill should require TEC to perform random, in-depth audits of financial reports to ensure compliance and incentivize more careful reporting. It also should require political contributions by certain non-profit organizations to be publicly disclosed. It should provide for public financing for judicial campaigns. Judges should not need to rely on their ability to raise funds to effectively run for office. These funds could be raised through a surcharge on State Bar of Texas dues.

## Notes

The HRO analysis of SB 219 appeared in Part One of the May 20 *Daily Floor Report*. An analysis of the bill also appeared in HRO Focus Report No. 83-6, *Vetoed of Legislation: 83rd Legislature*, August 21, 2013.

# ERS contributions and benefits

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## SB 1459 by Duncan

*Effective September 1, 2013; certain changes effective September 1, 2014*

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**SB 1459** raises the contribution rates for members of the Employees Retirement System of Texas (ERS) and requires a new contribution from state agencies. The bill also increases the retirement age and calculation of final average salary for employees hired after September 1, 2013. It implements tiered retirement health insurance premium contributions for employees not vested as of August 31, 2014.

The bill separates the accounting and actuarial functions of ERS and the Law Enforcement and Custodial Officers Supplemental Retirement Fund (LECOSRF).

**Contribution rates.** SB 1459 phases in increases in contribution rates for ERS members from 6.5 percent of the member's annual compensation to 6.6 percent in fiscal 2014, 6.9 percent in fiscal 2015, 7.2 percent in fiscal 2016, and 7.5 percent in fiscal 2017. Contribution rates for judges in Judicial Retirement System Plan 2 would increase from 6.6 percent in fiscal 2014 to 7.5 percent in fiscal 2017. After September 1, 2017, the contribution rates for ERS members and judges would drop by one-tenth of 1 percent to correspond with each one-tenth of 1 percent decrease in the state's contribution rate below the level established for fiscal 2015 (set at 6.8 percent in the general appropriations act).

Beginning September 1, 2013, state agencies make contributions equal to 0.5 percent of their total payroll.

**Pension benefit structure.** For employees hired after September 1, 2013, the bill:

- bases retirement annuity on the 60 highest months of compensation, rather than the 48- or 36-month calculations used for existing employees, depending on when they were hired;
- sets age 62 for civilian employees and age 57 for law enforcement employees as the threshold below which a retiree's annuity would be subject to a reduction of 5 percent for each year of age below the threshold; and

- eliminates unused sick leave for retirement eligibility and eliminates use of paid annual leave to increase annuity if paid in lump sum upon retirement.

**Retiree health care.** SB 1459 implements tiered health insurance premium contributions for some future retirees. Employees with five years of eligible service credit as of August 31, 2014 would be exempted. Instead of covering 100 percent of the premium costs of employees who retire with 10 years of service, which is required under current law, the bill requires the state to pay 100 percent of premium costs for retirees with 20 years of service; 75 percent for those with 15 years of service; and 50 percent for those with 10 years of service.

**Other provisions.** The bill authorizes up to a 3 percent cost-of-living increase for those who have been retired for 20 years if certain actuarial conditions are met.

It decreases from 5 percent to 2 percent the annual interest on money in each member's individual account that is used to compute the amount paid when an employee withdraws accumulated funds in lieu of receiving a retirement annuity. The provision applies only to interest accrued after January 1, 2014.

The bill makes a new employee eligible to participate in the group benefits program no later than the 90th day after the employee's first work date, rather than on the first day of the calendar month that begins after the 90th day.

SB 1459 decreases from 40 to 30 the minimum number of hours per week an employee must work to be considered full time.



## Supporters said

SB 1459 would put ERS back on the path to long-term solvency while allowing state employees to keep the benefits they have earned. This would help correct course before pension costs become unsustainable.

All current employees would be grandfathered into the changes in retirement age and pension benefit structure and most would be grandfathered into the changes in retiree health benefits.

Separating the books for ERS and LECOSRF would provide an immediate actuarial benefit to the main ERS fund and a longer-term benefit to LECOSRF in the form of enhanced flexibility and faster growth.

**Contributions and benefits.** The bill would gradually increase employee contributions from 6.5 percent to 7.5 percent over the next four years so that state workers were not burdened by a sharp increase. With the addition of the 0.5 percent state agency contribution, the total employer contributions in the fiscal 2014-15 budget would be 8 percent in fiscal 2015.

The proposed changes in minimum retirement ages for employees hired after September 1, 2013, are reasonable. Retirees are living longer, and the fund will be unsustainable without an increase in the retirement age. Law enforcement officers have physically demanding jobs and legitimately need to retire earlier than average civilian employees, and age 57 would be a good compromise.

Currently, employees who retire with at least 10 years of service receive 100 percent state-paid health insurance premiums. SB 1459 would make adjustments so that employees who spent only part of their careers with the state would share this cost in retirement.

## Opponents said

SB 1459 would not adequately address the real problem of chronic state underfunding of ERS. For 18 of the past 20 years, the Legislature has failed to contribute at levels that could have made the fund actuarially sound.

**Contributions and benefits.** The bill would lower the take-home pay of state employees, who already are paid less than their counterparts in the private sector. The increased ERS contributions would hurt the lowest-paid state workers the most.

Some current employees would not be grandfathered into changes in the retirement health care program. The bill would end a longstanding benefit of no-cost health insurance premiums for employees who retire after working at least 10 years.

The changes to minimum retirement age, pension calculations, and retiree health care could make it more difficult for the state to recruit employees.

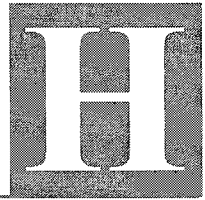
## Other opponents said

SB 1459 represents a failed opportunity to make more significant changes that would improve the stability of ERS and LECOSRF. The inclusion of a cost-of-living increase for the state's oldest retirees is meaningless because it could not be paid until the fund became actuarially sound.

## Notes

The HRO analysis of SB 1459 appeared in Part One of the May 20 *Daily Floor Report*.





# Health and Human Services

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# Regulating abortion procedures, providers, and facilities

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**HB 2 by Laubenberg, Second Called Session**  
*Effective October 29, 2013*

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**HB 2** adds new requirements to state laws governing abortion, the facilities where abortions are performed or induced, and the distribution of abortion-inducing drugs.

**Twenty-week ban.** HB 2 adds the Preborn Pain Act to the Health and Safety Code. It requires a physician, before performing an abortion, to determine a probable “post-fertilization age,” which is defined as the age of the unborn child calculated from the fusion of a human spermatozoon with a human ovum. An abortion cannot be performed or induced if a physician determines that the probable post-fertilization age of the unborn child is 20 or more weeks. The ban does not apply to an abortion required to save a woman’s life or to prevent her from suffering an irreversible physical impairment of a major bodily function, other than a psychological condition. The prohibition also does not apply to an abortion performed on an unborn child who has a severe fetal abnormality, defined as a life-threatening physical condition that, in reasonable medical judgment, is incompatible with life outside the womb.

**Physician and facility requirements.** Physicians performing or inducing abortions must have active admitting privileges at a hospital that provides obstetrical or gynecological health care services and that is located within 30 miles of the abortion facility.

Beginning September 1, 2014, the minimum standards for an abortion facility must be equivalent to those for an ambulatory surgical center. The executive commissioner of the Health and Human Services Commission will be required to adopt the new standards for abortion facilities by January 1, 2014.

**Drug-induced abortions.** The bill prohibits anyone other than a physician from giving, selling, dispensing, administering, providing, or prescribing to a pregnant woman an abortion-inducing drug, such as the Mifeprex regimen, also known as RU-486. Physicians must follow the protocol tested and authorized by the U.S. Food and Drug Administration as outlined in the final

printed label of the drug, except they may administer the dosage amount prescribed by the clinical management guidelines defined by the American Congress of Obstetricians and Gynecologists Practice Bulletin as those guidelines existed on January 1, 2013.

## Supporters said

**Twenty-week ban.** HB 2 would recognize the state’s compelling interest in protecting an unborn child from pain. Scientific evidence suggests that a preborn child is capable of feeling pain at 20 weeks post-fertilization because neuroreceptors are functioning. The bill would not affect the ability of a woman who became pregnant due to rape or incest from having an abortion before the 20th week of pregnancy.

**Physician and facility requirements.** The bill would ensure a higher level of care by requiring all abortions to be performed in ambulatory surgical centers. Compared to ordinary abortion facilities, these surgical centers hire more highly qualified professionals and implement more rigorous quality-assurance programs. While improving standards would come at a cost, abortion facility operators should be willing to invest some of their profits to ensure the highest level of care for their patients. Abortion facilities that provide other health services could continue to provide those services under HB 2.

**Drug-induced abortions.** The bill would ensure the safety of women using RU-486 to induce an abortion by requiring physicians to administer the medication in the manner approved by the FDA, which says the drugs should be taken on two different days at a facility under a doctor’s supervision. Some abortion facilities are sending women home to take the second dosage alone without giving them information about what to do if complications arise.

## Opponents said

**Twenty-week ban.** The U.S. Supreme Court legalized abortion nationwide in 1973 and allowed states to place restrictions on the procedure from the time of viability. HB 2 would be unconstitutional because it would ban abortions of fetuses before they were viable outside the womb based on an unproven claim that a 20-week-old fetus can feel pain. The bill would not allow for an exception after 20 weeks based on the pregnant woman's mental health status or for pregnancies resulting from rape or incest.

**Physician and facility requirements.** Early abortions are safer and simpler procedures than those procedures commonly performed in ambulatory surgical centers. Texas women are adequately protected under current law, which requires only those who have been pregnant for 16 weeks or longer to receive abortions in ambulatory surgical centers. HB 2 could result in the closure of clinics and increases in patient charges for abortions, forcing women into choosing unsafe options. The current surgical centers performing abortions are located in the state's major metropolitan areas. If abortion clinics in other parts of the state closed, women could be forced to travel long distances and incur additional costs to exercise their constitutional right to an abortion.

**Drug-induced abortions.** Women should not be required to go to an ambulatory surgical center to take abortion-inducing drugs that are currently being safely administered in abortion facilities. The current protocol of having the patient take the first dose of RU-486 in the clinic and take the second dose at home later has proved safe. The bill would require an additional, unnecessary visit to a facility so a physician could observe the woman taking the second dose.

## Other opponents said

The bill should not include an exception from the 20-week ban for severe fetal abnormalities because such a provision would discriminate against unborn children with such disabilities. These children sometimes survive despite a physician's expectations. Their lives should be equally valued and not denied the protection of the Preborn Pain Act.

## Notes

The HRO analysis of HB 2 appeared in the July 9 *Daily Floor Report*.

HB 2 is the subject of ongoing litigation in federal court following legal challenges to certain provisions of the legislation.

# Giving psychotropic medications to foster children

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**HB 915 by Kolkhorst**  
*Effective September 1, 2013*

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**HB 915** changes the requirements for prescribing a psychotropic medication to a foster child and modifies the legal and medical oversight of a foster child's medical care.

**Definition.** The bill defines a psychotropic medication as one prescribed to treat symptoms of psychosis or another mental, emotional, or behavioral disorder by affecting the central nervous system to change behavior, cognition, or affective state. This definition includes:

- psychomotor stimulants;
- antidepressants;
- antipsychotics or neuroleptics;
- agents for control of mania or depression;
- anti-anxiety agents; and
- sedatives, hypnotics, or other sleep-promoting medications.

**Informed consent.** Consent by a foster parent or other person authorized to give consent is valid only if given voluntarily and without undue influence and if the person authorized to give consent has received certain verbal or written information about the condition and the treatment. The foster child's authorized consentor must ensure that the child has an office visit with the prescribing physician, physician assistant, or advanced practice nurse at least every 90 days to allow the health care professional to monitor side effects, determine whether the medication is helping achieve treatment goals, and decide if continued use of the medication is appropriate.

**Medication review.** Attorneys ad litem and guardians ad litem are required to review a child's medical care and attempt to determine, in a developmentally appropriate way, the child's opinion on that care. If the child is at least 16 years of age, an attorney ad litem is required to advise the child of the right to seek the court's authorization to consent to medical care.

At each hearing for a foster child who is prescribed a psychotropic medication, the court must be updated on non-pharmacological options provided to the child and

the dates of office visits with the prescribing physician, physician assistant, or advanced practice nurse since the last hearing. At a permanency or placement review hearing, the court must review the child's medical care and determine whether the child was provided an appropriate opportunity to express an opinion on that medical care. For a child receiving psychotropic medication, the court must determine whether the child was provided with non-pharmacological options and has seen the prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days.

**Training.** The Department of Family and Protective Services (DFPS) must train individuals seeking to become authorized consenters on informed consent for psychotropic medications and include medical care information in a child's transition plan.

**Data collection.** The Health and Human Services Commission (HHSC) must monitor the use of psychotropic medications for foster children dually eligible for Medicaid and Medicare or under Department of Family and Protective Services supervision through an interstate agreement.

## Supporters said

HB 915 would help protect foster children prescribed psychotropic medications by improving oversight and accountability, establishing informed consent procedures, and enhancing training requirements.

Some Texas foster children are being over-medicated. Psychotropic medications are powerful drugs with significant side effects, and the number of foster children being prescribed these medications raises concerns about possible abuse and long-term consequences. A 2011 study by the U.S. Government Accountability Office found that 32 percent of Texas foster children were on psychotropic medications, compared with only 7 percent of non-foster children. The number of very young foster children on these medications, as well as the number of foster children with multiple prescriptions, is also alarming.

HB 915 would increase medical and legal oversight, ensuring that these medications were prescribed only when medically necessary, that non-pharmacological options were considered, and that all individuals, including children, were adequately informed. For example, the bill would require a foster child to have an office visit with the prescribing physician, physician assistant, or advanced practice nurse at least once every 90 days, enabling the medical professionals to better evaluate the necessity of the medication and any negative side effects. It also would require the court and court-appointed representatives to seek the child's opinion on the medical care and involve the child in the treatment process.

### **Opponents said**

HB 915 would be unnecessary because recent reforms are moving Texas in the right direction with respect to children prescribed psychotropic medications. A recent study by the HHSC found the percentage of foster children on psychotropic medications has dropped to 32 percent from 42 percent in 2004, even as the number of foster children has increased. And although Texas has made progress limiting these medications to medically necessary situations, foster children probably always will have a higher rate of psychotropic medication prescriptions because they often come from traumatic situations involving serious abuse and neglect.

### **Notes**

The HRO analysis of HB 915 appeared in the April 18 *Daily Floor Report*.

# Expanding Medicaid

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## HB 3376 by Sylvester Turner *Died in House committee*

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**HB 3376** would have required the Texas Health and Human Services Commission (HHSC) to expand Medicaid eligibility to cover those at a certain income level – effectively 138 percent of the federal poverty level – as allowed under the federal Patient Protection and Affordable Care Act (ACA). HHSC would not have been authorized under the bill to provide Medicaid to undocumented immigrants. It would have had to seek federal authorization to require those newly eligible for Medicaid to share the costs of coverage through copayments, deductibles, or other strategies the commission deemed necessary.

Under the ACA, states that choose to expand Medicaid will receive 100 percent federal funding during 2014-16 to pay for the expansion, with federal funding decreasing gradually to no less than 90 percent by 2020. HB 3376 would have required HHSC to discontinue expanded coverage if federal funds for Medicaid expansion ever dropped below these levels.

### Supporters said

HB 3376 would improve access to care for Texans who cannot afford health insurance, including people with chronic conditions that are treated more effectively and less expensively through preventive care. Studies show that improving access to health coverage improves health outcomes, while encouraging delivery of care in the most appropriate and cost-effective setting.

HB 3376 would make Texas eligible to receive federal funds to provide uninsured Texans with health insurance. If Texas does not expand Medicaid, the federal government will spend these sorely needed funds in another state instead. Texas has a large and growing uninsured population that burdens taxpayers with the expense of uncompensated care and mental-health-related costs. As these costs continue to rise, the state can ill afford not to accept federal funds that would accompany Medicaid expansion.

The bill would minimize the state's financial commitment to Medicaid. Under the ACA, the federal government would cover the state's Medicaid expansion

costs for the first three years, after which the state would contribute only 10 percent, which is less than the state contributes to support the current Medicaid population. In addition to terminating the state's Medicaid expansion if the federal government further reduced its contribution to the program, HB 3376 also would require new enrollees under the expansion to share costs to the extent allowed under federal law.

Medical emergencies can bankrupt uninsured Texans, especially those on fixed incomes. Extending Medicaid to newly eligible enrollees would help ensure they were healthy enough to contribute productively to society and the workforce and to care for their children. The bill would create jobs, stimulate the health care economy, and allow local health providers to deliver better services using money that otherwise would have been spent providing uncompensated care.

### Opponents said

HB 3376 would cost the state more money to expand an already flawed system. Studies show that patients on Medicaid have health outcomes that are no better than those who have no health insurance. The bill would not address the problem of the shortage of providers and specialists for Medicaid patients. Adding more people to wait lists could keep those already on Medicaid from receiving care when they need it.

Medicaid already consumes a large portion of the state's budget. The state should not commit more funds to a program that is vulnerable to fraud, waste, and abuse and that may not provide the highest quality of care. Even if the federal government footed the entire cost of the expansion for three years, the state still would have to spend millions of dollars in implementation costs.

### Notes

HB 3376 died in House committee and was not analyzed in a *Daily Floor Report*.



# Using Medicaid matching funds to provide insurance

HB 3791 by Zerwas

*Died in House Calendars*

**HB 3791**, as reported by the House Appropriations subcommittee on Budget Transparency and Reform, would have created two paths for expanding health insurance coverage in Texas. One path would have allowed the Texas Health and Human Services Commission (HHSC) to use federal block grant funds, if they became available, to provide benefits under a risk-based Medicaid managed care model. Another would have allowed the state to use federal Medicaid matching funds to connect low-income Texans with private health insurance.

**Block grant funding for Medicaid.** Under the bill, if the federal government approved a block grant funding system, HB 3791 would have allowed an individual to be eligible to receive acute-care benefits under a risk-based Medicaid managed-care model if the individual:

- had a household income at or below 100 percent of the federal poverty level;
- was younger than age 19 and either receiving Supplemental Security Income or in residential care under the conservatorship of the Department of Family and Protective Services; or
- met the eligibility requirements in effect on September 1, 2013.

To receive benefits under the state's current Medicaid program, an adult who is younger than age 65 and does not have a disability or who is not pregnant must be the parent or caretaker of a child and have a household income below the Temporary Assistance for Needy Families limit.

Under HB 3791, a person eligible for the block grant state Medicaid program could have received a sliding-scale subsidy to purchase a plan from an authorized health benefit issuer and might have qualified for another subsidy, based on income, for copayments and other cost-sharing requirements. The recipient could have deposited any part of the premium subsidy that exceeded the premium costs of a health plan into

a health savings account and otherwise would have been responsible for copayments and other cost-sharing requirements exceeding the amount of the subsidy.

HHSC would have been required to refer those ineligible for Medicaid to another resource, including a program using federal matching funds to connect low-income Texans with private health insurance.

An authorized health benefit issuer that met minimum coverage requirements could have offered plans under the state Medicaid program. HHSC, in consultation with the commissioner of insurance, would have been required to study a reinsurance program to reinsure participating health benefit plan issuers. The commission also would have had to develop a comprehensive plan to reform the delivery of long-term services and supports that met certain objectives, including encouraging cost sharing and reducing reliance on institutional settings.

**Federal matching funds for private health coverage.** The bill would have allowed HHSC and the Texas Department of Insurance to seek federal authorization to use federal matching funds to develop a cost-neutral health insurance premium assistance program for low-income Texans, including those eligible for Medicaid. Such an agreement would have had to create a cost-neutral program by leveraging premium tax revenues and achieving cost savings with offsets to general revenue or other mechanisms. The program would have had to:

- provide benefits tailored to enrollees;
- provide customized levels of coverage;
- include pay-for-performance initiatives for private plan issuers;
- use technology to maximize efficiency;
- require cost sharing and wellness incentives;
- encourage eligible individuals to enroll in other private or employer-sponsored health plan coverage, if available;
- encourage use of health-care services in the most appropriate low-cost settings; and
- establish health savings accounts for enrollees.

Those eligible to enroll in the program would have:

- been younger than age 65;
- had a household income up to 133 percent of the federal poverty level; and
- not otherwise been eligible to receive benefits under Medicaid, including through a block grant Medicaid program or a waiver.

Any agreement reached with the federal government to provide the program could have been limited in duration and contingent on continued federal funding.

**Customized benefits and demonstration project.** HHSC would have been required to develop customized benefits packages based on individualized needs assessments for individuals receiving home- and community-based services and supports instead of institutional long-term services and supports. It would have required the establishment of a demonstration project to allow certain individuals eligible for both Medicaid and Medicare to receive long-term services and supports through a single managed-care plan.

**Fee-for-service.** HHSC would have been required to establish a program requiring the parent or legal guardian of a child receiving institutional long-term services and supports or home- and community-based services and supports under Medicaid to pay a fee according to a sliding scale.

**Housing.** HHSC would have been required to provide housing payment assistance for Medicaid recipients receiving home- and community-based services and supports.

**Task force and studies.** The bill would have required HHSC to establish a Medicaid Reform Task Force to advise HHSC on designing a state Medicaid plan. It also would have required HHSC to conduct studies on the estate recovery program and on imposing alternative income and asset limits for determining eligibility for long-term services and supports under Medicaid.

## Supporters said

HB 3791 would increase Texans' access to health care while improving the long-term viability of Texas Medicaid. It would increase the supply of providers by enabling more patients to pay for their care using private

insurance. It would lower local property taxes and improve local economies by reducing uncompensated care costs and stimulating the private health care market.

HB 3791 would save money by allowing the state to introduce cost sharing, health savings accounts, and other reforms for the new Medicaid population, thus increasing Medicaid efficiency and promoting personal responsibility. Under the Patient Protection and Affordable Care Act (ACA), states that choose to make Medicaid available to adults at a certain income level – effectively 138 percent of poverty – will receive 100 percent federal funding during 2014-16 to help pay for the expansion. Federal funding will gradually decrease to no less than 90 percent from 2020 onward.

The bill would make it easier for Texas businesses to avoid penalties assessed under the ACA, which requires businesses with at least 50 full-time equivalent employees to offer affordable health care coverage with a premium below 9.5 percent of an employee's income. Without HB 3791, Texas businesses may have to pay a penalty for certain low-income employees who receive a federal subsidy to buy health coverage through an exchange. Under the bill, businesses generally would not pay a penalty because their low-income employees could enroll in Medicaid instead of using a subsidy to buy coverage.

HB 3791 would help the state provide a more efficient and cost-effective program without jeopardizing other priorities. It also would improve local control over federal programs the state is required to offer Texans by laying the framework for a block grant and establishing the Medicaid Reform Task Force. The bill would provide a private-sector solution to offer private insurance to more Texans, rather than expanding Medicaid.

The bill would help make health coverage affordable for adults who make less than 100 percent of poverty, or \$23,550 annually, for a family of four. Before the U.S. Supreme Court ruled in 2012 that the federal government could not require states to expand Medicaid, Congress assumed in drafting the ACA that low-income adults would be covered by such an expansion. Consequently, adults making less than 100 percent of poverty are not eligible for premium subsidies to buy affordable health coverage on a health care exchange and will not be eligible for Medicaid if Texas does not expand eligibility for the program.

The bill also would increase worker productivity by improving access to preventive care and reducing the number of individuals who needed to take sick days or days off to care for sick family members.

## **Opponents said**

HB 3791 would invest more money into the broken Medicaid system without increasing Texans' access to health care or the quality of health care. Few Texas providers accept Medicaid and the bill would not increase the number of providers. Other states have not seen a decrease in uninsured rates after enacting similar policies because many individuals in those states chose not to buy insurance.

The bill would cost the state too much money in the long run. Even with 100 percent federal funding, the state still would have to spend millions in startup costs to implement an expansion and could not easily cease providing coverage to the expansion population if federal funding ever declined.

Committing to expanding the Medicaid population also would crowd out funds for the state's other core responsibilities, such as education and transportation. A block grant would not effectively fund Medicaid in the long term because block grants do not adjust for population growth. Moreover, private health insurance may not provide the same comprehensive coverage as the current Medicaid system.

## **Notes**

HB 3791 died in House Calendars and did not appear in a *Daily Floor Report*.

# Redesigning Medicaid delivery for those with disabilities

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**SB 7 by Nelson**

**Generally effective September 1, 2013**

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**SB 7** redesigns the Medicaid delivery system for individuals with intellectual and developmental disabilities (IDD) who need acute care and long-term services and supports. Among its provisions, the bill:

- expands Medicaid STAR+PLUS managed care coverage of individuals with IDD;
- allows development, implementation, and evaluation of capitated managed care pilot programs;
- allows the development of additional housing supports for individuals with IDD;
- expands quality-based payment initiatives and quality incentives; and
- provides new opportunities for stakeholder input.

## **Managed care coverage of individuals with IDD.**

SB 7 expands managed care coverage of acute care and long-term services and supports for individuals with disabilities in two stages.

In stage one, the Texas Health and Human Services Commission (HHSC) must provide acute-care Medicaid benefits to individuals with IDD through managed care, using the most cost-effective option. HHSC and the Texas Department of Aging and Disability Services (DADS) may implement and evaluate capitated Medicaid managed care pilot programs to deliver long-term services and supports for those with IDD.

In stage two, individuals with IDD who receive long-term services and supports under waiver programs will transition to STAR+PLUS or the most appropriate capitated managed care program for those services. Individual Medicaid waiver programs will continue only under certain conditions, if necessary.

STAR+PLUS will expand to all areas of the state to serve individuals eligible for acute-care and long-term services and supports. The bill includes nursing facilities within STAR+PLUS, requires STAR+PLUS to cover attendant and habilitation services for individuals with IDD, and establishes a STAR Kids capitated managed care program for children with disabilities.

**Housing supports.** DADS must coordinate with other state and local agencies to increase opportunities for those with IDD to obtain accessible, affordable, and integrated housing.

**Quality incentives.** SB 7 expands quality-based payment initiatives and creates programs to increase quality of care, reduce potentially preventable events, and incentivize efficiency. HHSC must share data with other health and human services agencies to facilitate patient care coordination, quality improvement, and cost savings in Medicaid and other health and human services programs. The bill requires reports and studies on certain issues related to the bill.

**Stakeholder input.** SB 7 expands membership of the Medicaid managed care advisory committee while creating new advisory committees and a quality council to advise on the bill's implementation. DADS must develop a process to receive and evaluate statewide and regional stakeholder input in the managed care pilot program.

## **Supporters said**

SB 7 would improve acute-care and long-term services and supports to individuals who are intellectually or developmentally disabled, while eventually saving the state more than \$100 million per fiscal year by expanding STAR+PLUS statewide. Bringing nursing facilities, which still operate on a fee-for-service basis, into a managed care model would save on costs for a population that receives a disproportionately large portion of state Medicaid dollars.

Integrating care would free administrative resources to provide an increased level of services. In the short term, SB 7 would provide attendant and habilitation services to thousands of disabled Texans currently on waiting lists or not receiving services. Over time, growing numbers of disabled, aged, and chronically ill Medicaid recipients would receive managed care in their communities, reducing their reliance on costlier care in the emergency room setting.

The statewide expansion would increase competition among providers brought into the network, increasing quality and lowering costs. Texas' experiment with Medicaid managed care is approaching its 20th year, and the results have been reduced fraud, more efficient service, and lower costs to taxpayers. SB 7 also would increase opportunities for stakeholder input.

The bill would begin a long-term process of integrating a fragmented managed care system based on outdated waiver and eligibility categories into a more efficient system tailored to each recipient's needs.

## **Opponents said**

SB 7 would unnecessarily disrupt the Medicaid program without delivering savings or increasing quality. Providers in Texas are independent and would be reluctant to coordinate more closely. To realize the bill's projected cost savings, providers would need to be highly integrated already.

Existing Medicaid managed care patients already have trouble finding specialists. Expanding this model to cover patients who most need specialized care would raise costs and further burden patients and caretakers.

The bill's expansion of managed care would result in lower-quality care because managed care organizations would have incentives to cut costs at the expense of outcomes. Moreover, expanding Medicaid managed care would exacerbate the lack of providers willing to accept Medicaid.

## **Notes**

The HRO analysis of SB 7 appeared in Part Two of the May 20 *Daily Floor Report*.

# Preventing fraud and abuse in Medicaid

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**SB 8 by Nelson**

**Effective September 1, 2013**

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**SB 8** implements fraud detection measures in Medicaid and the Children's Health Insurance Program (CHIP), changes how providers may market their plans, implements a managed transportation delivery model, and regulates emergency medical transportation providers. It also establishes legislative intent for Health and Human Services Commission (HHSC) rules on the Medicaid program.

**Data analysis unit.** SB 8 establishes a data analysis unit within HHSC to improve contract management and detect trends and anomalies related to service utilization, providers, payment methodologies, and compliance with Medicaid and CHIP contracts. HHSC must periodically review the Medicaid prior authorization and utilization review processes to reduce authorizations of unnecessary services and inappropriate use of services. HHSC also must work with other agencies to recommend legislative changes to reduce fraud, waste, and abuse.

**Role of the OIG.** The bill specifies that the HHSC's Office of Inspector General (OIG) is responsible for the detection, investigation, and prevention of fraud, waste, and abuse in the provision and delivery of all health and human services in the state. The OIG must employ and commission up to five peace officers to assist with Medicaid fraud, waste, and abuse investigations.

**Marketing.** Providers may not engage in marketing activity or disseminate information that involves unsolicited personal contact that is directed to clients solely because of their enrollment in Medicaid or CHIP and that is intended to influence a client's choice of provider.

Providers may market plans at certain events and through general dissemination of information and may provide information that is educational or related to care, such as appointment reminders. HHSC must establish a process and adopt rules to review Medicaid and CHIP providers' proposed marketing activities.

**Medical transportation.** SB 8 allows HHSC to obtain vehicle registration and driver's license

information for providers of medical transportation services. State-contracted providers may use the information to ensure that subcontractors meet requirements under the law.

The bill requires HHSC to use a regional, managed transportation delivery model to deliver transportation services under the Medicaid medical transportation program. HHSC must use a competitive bidding process for each managed transportation region to procure managed transportation organizations (MTOs) to contract with providers that meet minimum quality and efficiency measures. MTOs must have a capitated rate system, use a call center and fixed routes, and assume full financial risk.

**Emergency medical services.** SB 8 expands the criteria for licensure as an emergency medical services (EMS) provider. Non-government-operated EMS providers also must provide assurances of financial responsibility. The Department of State Health Services may not issue new EMS provider licenses between September 1, 2013, and August 31, 2014, except to:

- volunteer provider organizations;
- a Texas municipality, county, emergency services district, hospital; or
- those in rural areas applying to provide services in response to 9-1-1 calls.

The HHSC executive commissioner may suspend, revoke, or deny a license to a non-governmental EMS provider for certain criminal offenses or involvement in Medicare or Medicaid fraud.

SB 8 requires an administrator of record for a licensed emergency medical services provider to meet new requirements, including a criminal background check. The new requirements do not apply to emergency medical services providers licensed by September 1, 2013, whose administrator of record had at least eight years of experience providing emergency medical services.

**Participation in Medicaid.** The HHSC executive commissioner must revoke a medical provider's participation in the Medicaid program if the provider has been excluded from a state or federally funded health care program for financial misconduct or certain criminal convictions. HHSC may reinstate the enrollment for good cause.

**Adult presence and legislative intent.** The bill states that a rule or policy adopted by HHSC to require the presence of a parent, guardian, or authorized adult during certain Medicaid-funded services is a valid exercise of HHSC's authority. It states that the Legislature did not intend to create a hardship for families, compromise a child's access to medically necessary services, risk a parent or guardian's employment, or jeopardize the safety of other children in the household by allowing HHSC to require an adult's presence during the provision of Medicaid services to a child. This does not apply to a rule that was void or that violated state or federal law at the time it was decided or that violated a federal law or waiver. The Legislature finds that HHSC should give special consideration to and accommodate the circumstances of certain children.

**Prior authorization.** Within two years after national standards for electronic prior authorization are adopted, HHSC must require Medicaid plan issuers to allow electronic prior authorization requests. HHSC must study the feasibility of a single standard prescription drug prior authorization request form for Medicaid providers who cannot initiate an online request.

**Outpatient pharmacy program.** The bill extends until August 31, 2018, certain requirements for a managed care organization contracting with HHSC in developing, implementing, and maintaining an outpatient pharmacy benefit plan.

**SNAP.** The OIG must review how it investigates fraud, waste, and abuse in the Supplemental Nutrition Assistance (SNAP) program and submit a report to the Legislature on strategies for addressing it.

## Supporters said

SB 8 would save state taxpayers millions of dollars by detecting Medicaid fraud, waste, and abuse and by improving the efficiency of its medical transportation program. According to the Legislative Budget Board,

these activities would save the state about \$14.4 million in fiscal 2014-15. The bill would better ensure that Medicaid tax dollars were used only to pay for legitimate services without impeding providers' ability to operate. By preventing fraud, waste, and abuse, more of the state's limited resources would be available for the people who truly needed them.

By limiting marketing, SB 8 would prevent improper soliciting of children and parents for Medicaid services and remove the incentive for providing unnecessary services. The bill further would ensure that bad actors ineligible to participate in Medicaid and to receive taxpayer reimbursement in other states remained ineligible in Texas.

Allowing unaccompanied children to use Medicaid transportation and health care services has been linked to unnecessary treatments, overzealous solicitation, and fraud. SB 8 would provide a clear statement to the courts that the Legislature endorses HHSC's policy. The bill would clarify when HHSC should make exceptions to its rule on parental accompaniment.

SB 8 would properly regulate EMS providers to ensure their financial integrity and decrease the use of emergency services for nonemergency needs. The bill's capitated managed transportation delivery model using MTOs would be more cost effective, efficient, and better coordinated than the existing model.

## Opponents said

The amount of waste in the Medicaid system has been overstated. The expansion of managed care already has substantially reduced the standard for the definition of excess treatment. SB 8 would continue the practice of investigating and harassing providers for minor errors, exacerbating the shortage of providers willing to accept Medicaid. In the long run, the deficit of quality health care services would be far more expensive than any marginal savings this bill could provide.

The marketing limitations proposed in the bill are onerous and would prevent legitimate distribution of educational material to communities. By allowing the state to use MTOs, SB 8 also would decrease the quality and safety of medical transportation services.

Through its statement of legislative intent, SB 8 would allow HHSC to deny payments to providers and discontinue transportation services to unaccompanied

children. This could result in thousands of children being denied immediate medical care, thus increasing their need for medical services in the future.

## **Notes**

The HRO analysis of SB 8 appeared in Part One of the May 17 *Daily Floor Report*.



# Drug screening for financial assistance benefits

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## SB 11 by Nelson *Died in the House*

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**SB 11**, as reported by the House Committee on Human Services, would have required a person applying for financial assistance benefits under the Temporary Assistance for Needy Families (TANF) program to submit to a marijuana and controlled substance use screening assessment.

If the screening assessment had indicated good cause to suspect the person had used marijuana or a controlled substance, the person would have had to submit to a drug test. The first time a person's drug test came back positive for drugs not prescribed by a health care practitioner, the person would have been ineligible for financial assistance benefits for six months. The second time, the person would have been ineligible for 12 months and could have reapplied six months after the date the period of ineligibility began if the person completed or enrolled in a substance abuse treatment program. The third time, the person would have been permanently ineligible.

The provisions would have applied to adult applicants, including those who were applying solely on behalf of a child, and minor parents who were heads of households. The bill would have applied to a first application for benefits or an application for continuation of benefits. The denial of eligibility for financial assistance benefits to a person would not have affected the eligibility of the person's family for those benefits. If a parent or caretaker relative of a dependent child became ineligible for benefits because of the results of a drug test, the bill would have required the Health and Human Services Commission (HHSC) to designate a protective payee to receive financial assistance benefits on behalf of the child.

HHSC would have been required to pay the cost of the screening assessments and drug tests using funds from the federal TANF block grant. HHSC would have had to report positive drug test results to the Department of Family and Protective Services to use in investigations of child abuse and neglect.

### Supporters said

Texas statute currently requires TANF recipients to sign a personal responsibility agreement not to use, possess, or sell marijuana or a controlled substance, but there are few safeguards within the program to ensure that the money is spent on its intended purposes, such as food, clothing, housing, transportation, laundry, and other basic needs. SB 11 would create a sensible path between complete non-enforcement of the personal responsibility agreement and testing for all recipients.

The bill would ensure that the TANF program used public funds responsibly and would put recipients on a path toward self-sufficiency. Drug use tears apart families, hurts children, and prevents individuals from living healthy, productive lives. The bill would ensure that children received the assistance they needed by allowing them to continue receiving benefits through a protective payee. The bill also would encourage parents whose drug tests came back positive a second time to enter treatment.

In implementing the bill, HHSC would adopt rules to improve access to drug testing facilities and local, state, and nonprofit substance abuse treatment programs.

### Opponents said

Data are lacking to suggest people in need of government assistance are more likely than those in other socioeconomic groups to use drugs. Struggling parents should not be treated like criminals for reaching out for help in desperate times. By requiring drug screening for all recipients, the bill would set a precedent of requiring innocent Texans to prove they did not commit a crime.

According to the Legislative Budget Board, the requirements of the bill would cost about \$1.2 million in general revenue related funds in fiscal 2014-15. It is

likely the state would spend more money on drug testing and screening than it would have lost to the very small percentage of TANF recipients violating the personal responsibility agreement.

Texas has an extreme shortage of substance abuse treatment beds. By not providing funding for treatment, the bill could permanently suspend a parent's eligibility for TANF benefits while the person waited to enroll in a program. People with drug problems who receive TANF benefits typically do not have the money to gain access to private treatment programs.

## Notes

The HRO analysis of SB 11 appeared in Part One of the May 21 *Daily Floor Report*. It died in the House.

**SB 21** by Williams, effective September 1, 2013, requires the Texas Workforce Commission to adopt a drug-screening and testing program for certain applicants for unemployment benefits. The HRO analysis of SB 21 appeared in Part One of the May 20 *Daily Floor Report*.

# Consent to receive psychoactive medications

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**SB 34 by Zaffirini**  
*Effective September 1, 2013*

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**SB 34** establishes provisions for the right to refuse psychoactive medications, creates informed consent procedures, and provides due process medication hearings for clients receiving residential care services from the Department of Aging and Disability Services (DADS).

**Right to refuse.** SB 34 gives clients receiving voluntary or involuntary residential care services the right to refuse psychoactive medications. If a client refuses a psychoactive medication, the bill prohibits the administration of the medication unless:

- the client is having a medication-related emergency;
- an authorized consenter has given permission;
- a court authorized the medication after a hearing; or
- the medication was authorized by an order under the Code of Criminal Procedure.

**Consent.** The bill establishes requirements for administering psychoactive medications to clients receiving residential care services. It requires a superintendent or director to gain consent for the administration of all psychoactive medications unless the client falls under one of the exceptions.

Consent for a psychoactive medication has to be given by the client or his or her consenter voluntarily and without coercive or undue influence. The treating physician (or designee) would have to provide specific information about the condition to be treated, medication, potential beneficial effects, side effects, risks, and possible alternatives to the medication.

**Administering psychoactive medications.** The bill requires a physician, when prescribing a psychoactive medication, to prescribe an effective medication with the fewest side effects or the least potential for adverse side effects and to administer the smallest possible dosage for the client's condition.

**Application for a court order.** A physician may seek court authorization to administer a psychoactive medication if the physician believes the client lacks the

capacity to make a medication decision, determines the medication was the proper course of treatment, and the client has been committed to a residential care facility (or a commitment application has been filed).

**Court order.** To order a psychoactive medication, the court needs clear and convincing evidence that the client lacked the capacity to make a medication decision and the medication was in the client's best interest. A court order also can be issued for a client awaiting a criminal trial if the client is committed to a residential treatment facility within six months of the medication hearing. If the client is criminally committed to a residential treatment facility or is confined in a correctional facility, a court may authorize a medication if, by clear and convincing evidence, the court determines the medication is in the client's best interest and the client is dangerous to the client or to others.

**Effect of a court order.** A court order allows the administration of a psychoactive medication to a client, even if the client refuses. Conversely, a client with a court order cannot consent to a psychoactive medication, but the order would not be a determination of mental incompetency or limit a client's rights. A party may petition for reauthorization or modification (change of medication class) of a court order, and a client may appeal an order. All orders remain in effect until a court makes a final decision on the petition or appeal.

**Additional hearings.** If a client who was found incompetent to stand trial does not meet the criteria for court-ordered psychoactive medication under this bill, a state attorney may file a motion to compel medication under the Code of Criminal Procedure.

## Supporters said

SB 34 would define how clients receiving residential care services, including residents of state-supported living centers, could be given psychoactive medications. The bill would help residential care facilities protect clients by ensuring informed consent and due process, improving the continuity of care, and promoting uniformity within current law. There are

currently no statutes outlining the requirements for administering these powerful medications to residents of state-supported living centers.

Currently, if a client does not have a guardian and has capacity to consent but refuses psychoactive medication, the Department of Aging and Disability Services (DADS) must seek a state hospital admission so the person can receive a due process hearing. These unnecessary hospital admissions disrupt continuity of care and are not in the client's best interest. The bill would extend to residents of state-supported living centers the same requirements and rights provided under the state Mental Health Code for those in state hospitals and nursing homes.

### **Opponents said**

By increasing informed consent requirements, SB 34 could place additional administrative burdens on doctors and staff of state-supported living centers. Similarly, new due process procedures could increase probate court caseloads. It is unclear how many individuals would be affected by this bill, so it is difficult to determine the extent of the potential impact on doctors and courts.

### **Notes**

The HRO analysis of SB 34 appeared in the May 17 *Daily Floor Report*.

The HRO analysis of the House companion bill, HB 1739 by Naishtat, appeared in the April 25 *Daily Floor Report*. It passed the House on April 26 but died in the Senate Health and Human Services Committee.

# Reorganizing CPRIT

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**SB 149 by Nelson**  
**Effective June 14, 2013**

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**SB 149** makes changes to the Cancer Prevention and Research Institute of Texas (CPRIT) following a moratorium on new grants amid concerns about how the agency was awarding them. The bill restructures the agency's leadership, establishes conflict-of-interest and disclosure provisions, and changes grant award and compliance procedures.

**Institute restructuring.** The bill requires the appointment of a new oversight committee and removes the comptroller and attorney general from the committee. The governor, lieutenant governor, and House speaker each appoint three members to a nine-member oversight committee and must include some individuals with extensive oncology or public health experience.

The oversight committee must replace the executive director with a new chief executive officer (CEO), who hires additional officers. The oversight committee annually sets priorities for each grant program and establishes a research and prevention programs committee to score grant applications.

SB 149 establishes the program integration committee to make funding recommendations to the oversight committee based on the list of applications scored by the research and prevention programs committee. The CEO serves as presiding officer of the program integration committee.

The bill prohibits a salary supplement for the CEO and requires that salary supplements for the chief scientific officer come from appropriations or bond proceeds. CPRIT cannot supplement any employee's salary with gifts or grants given to the institute.

**Conflict of interest and disclosure.** The oversight committee must adopt conflict-of-interest rules and a code of conduct to govern institute committees and employees.

The code of conduct must prohibit CPRIT employees, oversight committee members, and program integration committee members from making

investments or having a financial interest that could create a conflict with official duties. The institute must maintain records of principal investors of grant recipients under institute rules.

The bill defines the circumstances under which institute employees, leadership, and committee members must recuse themselves from grant funding decisions in which the person or a family member has a professional or financial interest. The oversight committee must adopt rules for waiving conflict-of-interest provisions in exceptional circumstances.

The institute must post online records of any gift, grant, or other consideration given to CPRIT, committee members, or employees. It also must post a report of its activities, grant awards, grants in progress, research accomplishments, and future program direction. The bill prohibits applicants that make gifts or grants to CPRIT or a nonprofit established to support the institute, such as the CPRIT Foundation, from receiving grants.

All oversight committee members must disclose to CPRIT each political contribution to a candidate for state or federal office of more than \$1,000 made within five years before their appointment and each year after, until the member's term expires. CPRIT must post a report of members' political contributions on its website and post a link to the report on the oversight committee's main web page.

The institute may establish procedures, such as a telephone hotline, to allow private access to the compliance office and to preserve the confidentiality of people and communications involved in the process of making a report or participating in an investigation.

**Grant awards and compliance.** Before awarding a grant, the oversight committee must establish a written contract with the recipient. CPRIT may require grantees to repay their funding plus interest to CPRIT if they are out of compliance. Grant recipients must provide matching funds equal to half the grant award.

CPRIT must employ a chief compliance officer to ensure proposals are in compliance before being submitted to the oversight committee for approval and to attend meetings of the program integration committee to ensure compliance.

The program integration committee must address the goals of the Texas Cancer Plan and prioritize proposals that expedite innovation and product development, instead of commercialization. Grants must be approved by a two-thirds vote of the oversight committee.

SB 149 requires the CEO to submit a written affidavit for each grant application that includes information specified in the bill.

**Funding.** The bill modifies the institute's funding mechanisms and establishes that certain records are public information. It establishes the cancer prevention and research interest and sinking fund as a general revenue dedicated account. The fund consists of patent, royalty, and license fees; earned interest on investments of fund money; and other income received from grant contracts. The fund may be used only to pay for debt service on bonds.

**Effective dates.** By December 1, 2013, the oversight committee must employ a CEO and chief compliance officer. By January 1, 2014, the committee members and employees must comply with the bill's qualification requirements.

## Supporters said

SB 149 would enable CPRIT to continue its mission ethically and effectively by restructuring the leadership and peer review process, requiring matching funds from grant recipients, establishing a compliance program, and strengthening conflict-of-interest provisions.

In 2007, Texas voters approved a constitutional amendment to establish CPRIT and authorize the issuance of \$3 billion in bonds to fund cancer research and prevention programs and services. In 2012, allegations arose about potentially improper grants, conflicts of interest, and favoritism, prompting criminal investigations and legislative inquiries. A January 2013 report from the state auditor noted that CPRIT's inadequate transparency and accountability of grant management processes reduced its ability properly to

award and effectively monitor its grants. The report revealed that three grants — totaling \$56 million — were approved without proper peer review. One of the recipients, a start-up company, received \$11 million without adequate reviews of its business or scientific plans.

Despite the controversy, the institute serves a worthy mission. In part because of the creation of CPRIT, Texas provides more cancer research funds than any other state. These funds have enabled health care providers and researchers to conduct groundbreaking studies, recruit and train new physicians and scientists, and diagnose and treat more cancer patients. One organization estimates that a CPRIT grant allowed it to increase mammogram screenings by 400 percent.

CPRIT is enabling important cancer research and helping increase access to services, and the bill would allow the institute to continue to fulfill its mission in a transparent, responsible manner. It would ensure that grants were awarded to established companies well prepared to conduct cancer research or offer services by requiring grant recipients to provide substantial matching funds. It also would establish stricter peer review procedures for grant applications and more thorough reporting requirements for grant recipients.

In addition, the bill would implement a system of checks and balances designed to prevent bias and favoritism. The bill would strengthen the oversight committee, add a code of conduct, and establish stricter conflict-of-interest rules that would prevent and deter impropriety by committee members and employees.

## Opponents said

SB 149 should not extend the life of CPRIT. Although the bill could prevent some impropriety, it would not entirely stop abuse of the system. Texas should dismantle the institute to prevent further abuse of public funds.

## Notes

The HRO analysis of SB 149 appeared in Part Two of the May 17 *Daily Floor Report*.

# Regulating health insurance exchange navigators

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**SB 1795 by Watson**

*Effective September 1, 2013*

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**SB 1795** requires the Texas Department of Insurance (TDI) to set standards for regulating “navigators,” which are established under the federal Patient Protection and Affordable Care Act of 2010 (ACA) to assist consumers and small businesses as they examine health coverage options through the ACA’s federal online health insurance exchange.

The bill requires the commissioner of insurance to adopt rules so that navigators operating in Texas meet minimum federal requirements. If the commissioner finds that the ACA regulations are insufficient to ensure that navigators can perform certain required duties, the commissioner must make a good faith effort to cooperate with the U.S. Department of Health and Human Services to propose improvements. If the commissioner determines that the standards remain insufficient, the commissioner must establish standards and qualifications to ensure that navigators can perform the required duties.

At a minimum, standards established by rule must require that a navigator has not:

- had a professional license suspended or revoked;
- been the subject of any other disciplinary action by a financial or insurance regulator; or
- been convicted of a felony.

Regulations pertaining to navigators do not apply to licensed life, accident, and health insurance agents or licensed life and health insurance counselors or companies. Navigators are not required to hold a state license to operate.

Navigators may not advertise their professional superiority or use phrases such as “insurance advisor,” “insurance agent,” or “insurance consultant” in their name or materials. They may not receive compensation for their services or duties from a health benefit plan issuer.

Navigators who are not licensed agents may not:

- endorse, sell, solicit, or negotiate coverage under a health benefit plan or group of plans;
- provide or offer information or services on insurance products outside the exchange;
- advise consumers about which exchange health plan is preferable;
- accept compensation dependent on a person choosing a particular plan; or
- when acting as a navigator, engage in electioneering or finance or otherwise support the candidacy of a person in the legislative, executive, or judicial branch of local, state, or federal government.

The commissioner must obtain from the health benefit exchange a list of all navigators providing assistance in Texas, including the name of an individual navigator’s employer or organization. The commissioner may establish a state registration system for navigators to allow TDI to collect this information and to ensure that navigators meet the state’s standards. To ensure compliance with any changes in state or federal law, the commissioner must authorize additional training for navigators.

The provisions of SB 1795 expire September 1, 2017.

## **Supporters said**

SB 1795 would provide TDI with the capacity to oversee the navigator program as part of the state’s effort to prevent increased federal encroachment that might accompany ACA implementation. TDI’s new rulemaking authority would be a common-sense extension of its current responsibilities. The bill would maintain the navigator program’s capacity without duplicating federal requirements or impeding existing health care access programs. It would impose no increased costs and would be the most efficient way to manage the new federal program.

SB 1795 would protect consumers in health benefit exchanges while preserving the navigator program's ability to expand access to health care. It would ensure navigators were qualified, properly trained, and impartial by establishing essential consumer safeguards regardless of the outcome of federal rulemaking. It also would authorize TDI to evaluate and, if necessary, enforce quality standards.

## Notes

The HRO analysis of SB 1795 appeared in Part Two of the May 20 *Daily Floor Report*.

The companion bill, HB 459 by Guillen, died in the House. It would not have restricted a navigator's participation in electioneering.

## Opponents said

SB 1795 would be an unnecessary expansion of government. The bill would create a new program at the state level and empower TDI with broad new rulemaking authority. By enabling the navigator program, the bill would increase citizens' reliance on governmental programs that stress the federal budget.

The bill would be a premature reaction to an evolving federal mandate. It is impossible to estimate the cost of regulating navigators. Any statutory change now would be likely to require new regulation at a later date. It would be more prudent to legislate after certainty about the program is established.



# OIG investigations of Medicaid provider fraud

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**SB 1803 by Huffman**  
*Effective September 1, 2013*

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**SB 1803** specifies procedures for investigations of fraud or abuse in the Medicaid system by the Office of Inspector General (OIG) within the Health and Human Services Commission (HHSC). It also establishes processes for provider appeals after determinations of credible allegations of fraud.

**Criteria for an investigation.** The OIG, acting through the HHSC, must adopt rules establishing criteria for:

- initiating and conducting a full-scale fraud or abuse investigation;
- collecting evidence;
- approving a provider's request to post a bond in lieu of a payment hold; and
- establishing minimum training requirements for Medicaid provider fraud or abuse investigators.

**Preliminary investigation.** SB 1803 requires the OIG to conduct a preliminary investigation for any complaint or allegation of Medicaid fraud or abuse within 30 days of receiving the complaint or allegation. The office must review the complaint or allegation and the related facts and evidence to determine whether it warrants a full investigation. The commission must maintain a confidential record of allegations of fraud and abuse against a provider, including the date and source of the allegation, if available.

**Payment holds.** SB 1803 requires the OIG to place a payment hold on a provider's claims for reimbursement under the Medicaid program if it determines a credible allegation of fraud exists.

**Notice.** The OIG must notify a provider of a payment hold. Notice must include:

- the specific basis for the hold, including claims supporting the allegation and a representative sample of documents forming the basis for the hold; and
- a description of administrative and judicial due process remedies, including the provider's right to seek an informal resolution, a formal administrative appeal hearing, or both.

**Expert review.** The OIG must employ a medical director and a dental director – preferably with significant knowledge of the Medicaid program – to ensure that investigative findings based on necessity or quality of medical care have been reviewed by a qualified expert before the OIG imposes a payment hold or seeks to recoup overpayment, damages, or penalties.

**Continuation of payment hold.** If the state's Medicaid fraud control unit or other law enforcement agency accepts a fraud referral from the OIG, a payment hold based on a credible allegation of fraud may continue until the investigation and enforcement proceedings are complete or the state's Medicaid fraud control unit, another law enforcement agency, or other prosecuting authorities determine there is insufficient evidence of fraud by the provider. If these entities do not accept a fraud referral, a payment hold based on a credible allegation of fraud must end unless the OIG makes a referral to another law enforcement agency or the commission has alternative federal or state authority to impose a hold. The OIG must request on a quarterly basis the unit's or law enforcement agency's certification that the credible allegation of fraud continues to be investigated and warrants a payment hold.

**Recoupments.** The OIG must notify a provider in writing of any proposed recoupment of overpayment or debt and any related damages or penalties arising from a fraud or abuse investigation. The notice must include specific information about the basis for the proposed recoupment and the administrative and judicial due process remedies available to the provider.

**Administrative hearings.** A provider may appeal a determination of recoupment of overpayment or debt with the State Office of Administrative Hearings (SOAH) or with the HHSC appeals division, as requested by the provider. A provider may appeal a final administrative order by filing a petition for judicial review in a district court in Travis County.

The state and the provider must share the costs of an administrative hearing. The HHSC executive commissioner and SOAH must jointly adopt rules

requiring a provider to advance security for anticipated costs before an administrative hearing.

**Informal resolution.** The executive commissioner of HHSC must adopt rules allowing a provider under a payment hold, other than a hold requested by the state's Medicaid fraud control unit, to seek an informal resolution meeting. A provider may request a second meeting within 20 days of the first and must have an opportunity to provide additional information before a second informal resolution meeting for consideration by the OIG.

HHSC must allow an informal resolution meeting to be recorded at no cost to the provider and the recording to be made available to the provider.

**Monitoring.** The House Committee on Public Health, the House Committee on Human Services, and the Senate Committee on Health and Human Services must periodically request and review information from the Health and Human Services Commission and the OIG to monitor the enforcement of the bill and to recommend additional changes in law.

## Supporters said

SB 1803 would create transparency and improve due process rights in the OIG's Medicaid fraud investigations and enforcement activities.

The bill would offer providers a safeguard against losing their livelihoods following minor errors and encourage participation in the Medicaid program by requiring that providers receive notice outlining the specific basis and supporting evidence for any payment hold or attempt to recoup an overpayment, as well as available administrative and judicial remedies. SB 1803 would shorten the investigation process by establishing clear and definitive timelines for the OIG's enforcement proceedings. Requiring providers to share costs of administrative hearings would reduce the cost to the state of improving due process.

The bill includes a clear definition of a credible allegation of fraud and would require the OIG to review each allegation on a case-by-case basis. It also would require medical expert review of allegations to ensure their validity. SB 1803 also would establish clear appeal rights, making available to providers an informal resolution process, administrative hearing through SOAH or HHSC, or judicial review.

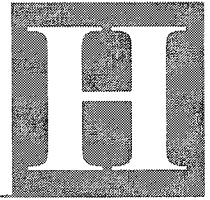
## Opponents said

SB 1803 would limit the independence of the OIG by requiring it to act through HHSC. The bill also would substantially weaken the office by hampering its ability efficiently to investigate and stop Medicaid fraud.

By making it more difficult to impose provider payment holds, SB 1803 could cost the state millions of dollars in lost federal Medicaid payments. Changing the payment hold and recoupment appeals process could lengthen fraud cases by years, allowing bad actors to continue billing Medicaid in the meantime. If such providers were found liable, the state would be required to reimburse the federal government for Medicaid payments made during the appeals process.

## Notes

The HRO analysis of SB 1803 appeared in the May 16 *Daily Floor Report*.



# Higher Education

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# Success-based funding in higher education

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## HB 25 by Branch *Died in the House*

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HB 25, as reported by the House Committee on Higher Education, would have required that at least 15 percent of the total fiscal 2016-17 general revenue appropriations of base funds for institutions of higher education other than public state colleges be based on student success measures recommended by the Texas Higher Education Coordinating Board. This would have increased to 25 percent beginning in fiscal 2018-19.

HB 25 would have directed the Legislative Budget Board to consider the coordinating board's student success-based funding recommendations for institutions of higher education when preparing the general appropriations bill.

### Supporters said

HB 25 would incentivize higher graduation rates and other positive student outcomes in tying more of the state appropriations for higher education to the coordinating board's funding recommendations. The current system of funding higher education focuses excessively on student enrollment numbers. HB 25 would encourage institutions to pay more attention to graduation and other measures of student success that can be neglected under the current funding formulas.

Other states have successfully implemented success-based funding for higher education, and the time is right for Texas to join this trend. The state's five university systems and all four of its independent institutions have documented their support for the use of student success metrics in determining funding for higher education.

The bill would not encourage institutions to lower academic standards in order to graduate more students because institutions still would have to comply with the standards imposed by their accrediting bodies. If an institution's academic rigor began to slip, accrediting bodies would notice and take action. Institutions would not risk their national rankings and reputations by allowing their academic standards to slip.

HB 25 would not encourage institutions to deny admission to students who were academically at risk. The coordinating board's funding recommendations encourage the graduation of students who are academically at risk, as well as those who face barriers to achieving their educational goals.

HB 25 would not unduly skew institutional finances. The notion that some institutions would lose funding permanently is predicated on the assumption that they would not respond proactively to funding losses by changing their practices to improve student success.

### Opponents said

HB 25 could create perverse incentives for higher education institutions to lower academic standards or deny admission to certain applicants in order to graduate more students and improve student performance. While some who are admitted to institutions never graduate, the current system at least provides the opportunity for students to determine if higher education is appropriate for them. Under a system based too heavily on achieving certain outcome-based metrics, such students might never get the chance to prove themselves.

Some institutions could lose existing funding under HB 25, especially those whose lower graduation rates stem from what they view as their mission to admit at-risk students. These students deserve the opportunity to pursue higher education, and the Legislature should not penalize schools that routinely admit them.

### Notes

HB 25 appeared on the May 9 General State Calendar but was not considered. It was not analyzed in a *Daily Floor Report*.

# Allowing concealed firearms on college campuses

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## HB 972 by Fletcher *Died in the Senate*

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**HB 972**, as reported by the Senate Committee on Criminal Justice, would have allowed the holder of a concealed handgun license to carry a concealed firearm onto the campus of an institution of higher education that had not adopted rules prohibiting the carrying of concealed handguns on campus.

The bill would have allowed the president of an institution of higher education, after consulting with law enforcement, students, staff, and faculty, to adopt rules prohibiting license holders from carrying concealed handguns on any ground or building owned or leased by the institution on which an activity sponsored by the institution was being conducted or on the institution's passenger transportation vehicles. Such rules would have been effective for a year and could have been renewed after further consultation between the president and students, staff, and faculty.

No institution of higher education could have adopted rules preventing an enrolled student who held a concealed handgun license from transporting or storing a licensed handgun in the student's locked motor vehicle located on campus:

- on a street or driveway; or
- in a parking lot, parking garage, or other parking area.

An institution of higher education that did not adopt a policy prohibiting concealed-carry would have been required to adopt rules concerning:

- the storage of handguns in dormitories or other residential facilities owned or leased and operated by the university; and
- the carrying of concealed handguns by license holders at collegiate sporting events or other mass gatherings on the grounds or buildings owned or leased and operated by the institution.

HB 972 would have prohibited anyone from carrying a concealed handgun on the premises of a national biocontainment laboratory, hospital, preschool, elementary, or secondary school maintained by an

institution of higher education if the institution had posted appropriate notice in compliance with Penal Code, sec. 30.06.

An institution of higher education, including its officers and employees, could not have been held liable for damages caused by a license holder or applicant after receipt or denial of a license or by an action or failure to perform a duty imposed by applicable concealed handgun license statutes. A cause of action could not have been brought against the above parties for damages caused by the actions of an applicant or license holder. These protections would not have applied if the act or failure to act had been capricious or arbitrary.

HB 972 would have amended Penal Code, sec. 46.03 to create a class A misdemeanor offense (up to one year in jail and/or a maximum fine of \$4,000) for a license holder who intentionally, knowingly, or recklessly carried a handgun onto the campus of an institution of higher education that had adopted rules prohibiting concealed carry. Certain exceptions would have been made for peace officers.

## Supporters said

HB 972 would allow concealed handgun license holders to carry firearms on the premises of institutions of higher education to protect the right of self-defense and to deter shooters or even stop them altogether.

People need the ability to protect themselves in public because government authorities are not always able to do so. Too often people have died waiting for official response to arrive. If civilians were able to defend themselves, they could stop a shooter and save lives.

It is important that law-abiding citizens who have trained for and earned their concealed handgun permits have access to their firearms for self-defense because laws alone do not stop criminals or the disturbed from committing violent crimes. Current laws that prevent civilians from bringing firearms on campus make

colleges and universities notoriously vulnerable targets. The possibility of encountering armed students, faculty, and staff, in addition to police, could deter a shooter from targeting a campus.

Concealed-carry on campus has proven successful in many other states. Texas requires an applicant to meet high standards before receiving a concealed handgun permit, which helps ensure that permit holders are responsible and trustworthy with their weapons.

HB 972 would allow colleges and universities to adopt concealed-carry policies as they deemed appropriate. Allowing this local control would respect the ability of institutions of higher education to make the most appropriate choices for their communities.

While it may be desirable for society to be free of guns and violence, such a perfect world does not exist. HB 972 would acknowledge this reality by strengthening the right of individuals to protect themselves, along with their fellow students and coworkers, from those in society who would do them harm.

## **Opponents said**

By allowing concealed firearms to be carried on campus, HB 972 would contribute to a more dangerous environment and a culture of fear at Texas' colleges and universities.

Public awareness of campus safety has increased, and campus police and other public safety authorities are better trained than ever to respond to a shooting attack at a college or university. However, officers responding to a shooting might have difficulty differentiating between an attacker and armed citizens trying to defend themselves. Even with the training and education that comes with a license, shooting calmly and with precision is extremely difficult, even for people with military experience, and this can contribute to casualties from cross-fire with the inability to tell friend from foe.

An increase in guns would be likely to lead to an increase in gun violence. Studies from Europe and elsewhere in the developed world where firearms are tightly restricted or banned show negligible levels of gun violence. On the other hand, countries like the United States and South Africa, with high levels of guns and gun ownership, display shocking and tragic levels of gun violence and gun-related death. Adding to the places in Texas where guns could legally be carried only would spread violence to more corners of society.

Mental health officials worry about the correlation between guns and suicide. Suicide is a leading cause of death among college and university students, and increasing access to an effective means of impulsively taking one's own life could lead to more suicides.

The increased prevalence of lethal weapons on campus would detract from an environment designed to foster learning and academic debate. More guns on campus only would reinforce a siege mentality and a generalized feeling that people are under assault. Studies show that the increased presence of firearms in an environment causes people to have more violent thoughts.

## **Other opponents said**

Rather than allowing guns on college campuses for self-defense, the state should focus more on ways to keep firearms out of the hands of criminals and the mentally ill, including background checks, limits on high-capacity magazines, and better availability of mental health programs.

## **Notes**

The HRO analysis of HB 972 appeared in Part One of the May 4 *Daily Floor Report*.

# Reimbursing institutions for the Hazlewood Act benefit

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**HB 1025 by Pitts/HB 690 by Lewis**

*Effective June 16, 2013/Died in Senate committee*

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**HB 1025**, the supplemental appropriations act, which was sent to the comptroller on May 28, 2013, provides a partial reimbursement to public institutions of higher education for their proportionate share of the cost in fiscal 2012 of providing certain family members of veterans with an exemption from tuition under the state's Hazlewood Act. The bill appropriates \$30 million in general revenue for fiscal 2014-15 spending directly to general academic and health-related institutions, junior colleges, and community colleges that exempted certain family members of veterans from tuition and fees in 2012.

**HB 690**, as passed by the House, would have required the Texas Higher Educating Coordinating Board annually to reimburse a public higher education institution for all or part of its costs in providing tuition and fee reimbursements to certain military personnel and their dependents as provided in the Hazlewood Act if money were appropriated for that purpose. If the coordinating board had been unable to cover the total costs with the appropriated funds, it would have been required to reimburse participating institutions based on their proportionate costs for the exemptions.

The coordinating board would have been required to establish procedures for an institution to request and submit data for reimbursements, which would have applied beginning with exemptions granted for the 2013 fall semester.

## Supporters said

The one-time, \$30 million appropriation in HB 1025 would address an expansion of the Hazlewood Act enacted by the 81st Legislature that allows veterans to pass on to certain children their exemption from tuition and fees at higher education institutions. Providing the benefit cost institutions about \$110 million in fiscal 2012, mostly due to revenue losses from providing the Hazlewood Legacy Act benefit. The appropriation would be distributed to each participating institution and

would be based on the proportionate cost each reported in 2012. At \$3.6 million, Texas A&M University would receive the largest appropriation for providing the benefit to students in 2012, while Midland College would draw the smallest appropriation at \$889.

Supporters of both bills said that although the Hazlewood Act benefit is an important legacy that honors the state's veterans, the well-meaning expansion of Hazlewood during the 81st Legislature has yielded an unfunded mandate that has grown beyond the best projections of public policy experts and lawmakers. Some institutions, particularly those near military installations, have been hit hard by the requirement to provide the benefit and have scrambled to compensate for the losses in revenue. In some cases, critical services have been reduced, and fee and tuition hikes have been imposed on all students.

Supporters of HB 690 said that if full reimbursements to institutions were not possible, the bill would provide a flexible and fair way to distribute partial reimbursements to universities and colleges based on their proportionate costs from providing the exemptions.

While more should be done to ensure that the state's public universities and colleges are adequately funded across the board, the bill would create an equitable solution to a problem that will only become more serious as a new wave of Texas veterans who fought in the wars in Iraq and Afghanistan seeks higher education.

## Opponents said

A one-time appropriation in HB 1025 to reimburse higher-education institutions for a portion of the cost of providing the benefit that allows Texas veterans and their children access to higher education would lead to similar unnecessary appropriations and would not address the core problem of inadequate funding for higher education institutions.

Opponents of HB 690 said the state cannot afford to reimburse universities for providing the Hazlewood Act benefit because doing so would expend revenues that are desperately needed to restore funding for other state priorities. According to the Legislative Budget Board, reimbursing 100 percent of the cost of the exemptions to higher education institutions through fiscal 2014-15 would cost the state about \$364 million. Even a fraction of the amount necessary to reimburse colleges and universities could cost tens or even hundreds of millions of dollars.

## **Notes**

The HRO analysis of HB 690 appeared in Part One of the May 8 *Daily Floor Report*.

The HRO analysis of HB 1025 appeared in the April 26 *Daily Floor Report*.



# Administration of higher education institutions

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## SB 15 by Seliger

*Vetoed by the governor*

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SB 15 would have revised the duties of boards of regents of institutions of higher education and would have expanded the training requirements of individual regents.

Under SB 15, to the extent practicable, communication between the board of regents of a university system or members of the board and the employees of an institution under its governance would have been conducted through the university system.

The governing board of a university system could have terminated the employment of an institution's president only after receiving a recommendation from the system administration but would not have been required to act on such a recommendation. SB 15 would have removed the board's responsibility to evaluate the chief executive officer of each component institution and to assist the officer in the achievement of performance goals. This oversight would have transferred to the system administration.

Governing boards would have been required to preserve institutional independence and defend each institution's right to manage its own affairs through its chosen administrators and employees.

The bill would have required that each report, recommendation, or vote of the governing board or of a committee, subcommittee, task force, or similar entity reporting to the governing board have been made available to the public on the board's website by the end of the next business day after the date of the report, recommendation, or vote.

SB 15 would have required individual board members to receive training before voting on issues before the board and would have imposed further rules against conflicts of interest.

## Supporters said

SB 15 would create a more formal structure for university governance, with authority and accountability more clearly delineated. As Texas' university systems grow, disagreements on protocols, command structure, and reporting duties are affecting the University of Texas at Austin (UT-Austin) and several other institutions.

The bill would provide needed clarity by requiring that communications between various parts of a university system be formalized in an institutional chain of command. Communication by boards of regents to constituent institutions would be conducted through system administrators and vice versa, creating better systems of communication, coordination, and accountability.

Regents would not lose power under SB 15, which would not change the actors involved in governing institutions but would apply accepted management practices to that governance. The bill simply would require that the system administration conduct an inquiry if a regent had questions about a constituent institution.

The bill would help establish a management hierarchy that allowed the regents to exercise their oversight authority in a way that did not interrupt daily operations of the systems and their component schools. Governing boards could fire the presidents of constituent institutions on the recommendation of the system's administration and would maintain authority to oversee system administrators, ensuring continued accountability. This would allow regents, appointed by the elected governor and confirmed by the Senate, to continue to represent the public interest.

SB 15 would improve training for regents. Current law requires the Texas Higher Education Coordinating Board to provide training to newly appointed regents. The bill would improve this program by requiring that it include training on ethics and federal laws on student privacy, such as the Family Educational Rights and Privacy Act of 1974.

The bill also would help newly appointed regents cast educated votes by preventing them from voting on matters in front of the board before they had completed required training. The training would provide regents with needed tools to examine budgets, interpret statutes, understand audits and other investigations, and lend independent and effective oversight. The requirement would encourage regents to complete training quickly.

## Opponents said

The fix proposed by SB 15 is overly broad and not proportional to the problems it purports to solve. In attempting to address conflicts between the UT system regents and the president and administration of UT-Austin, the bill would change the governance of all Texas institutions of higher education, including those where no conflict exists.

By requiring governing boards to channel their communications to component systems through the system administration, the bill would reduce the investigatory powers of these boards. This would make them less effective at oversight, the primary charge of a governing board.

The bill also would further remove universities and colleges from oversight by elected officials. Regents are selected by the governor and confirmed by the Senate. Requiring regents to go through system officials, rather than straight to component universities and colleges, would reduce the need for institutions to be accountable to voters.

SB 15 would create two classes of regents. One class would be able to vote on issues before the board, while the other could not until they had completed mandatory training. There is no need for this voting restriction. The traditional vetting of regents — appointment of able candidates by the governor followed by a Senate confirmation process — is sufficient to ensure the placement of high-quality board members.

## Notes

The HRO analysis of SB 15 appeared in the May 13 *Daily Floor Report*. An analysis of the bill also appeared in HRO Focus Report No. 83-6, *Vetoes of Legislation: 83rd Legislature*, August 21, 2013.

# Tuition revenue bonds for higher education institutions

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## SB 16 by Zaffirini *Died in the House*

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**SB 16**, as approved by the House, would have authorized the issuance of \$2.7 billion in tuition revenue bonds (TRBs) for institutions of higher education to finance construction and improvement of infrastructure and related facilities.

The bill would have authorized the issuance of TRBs in the following total amounts:

- University of Texas System (\$928.7 billion);
- Texas A&M System (\$622.4 million);
- University of Houston System (\$252.8 million);
- Texas State University System (\$213.6 million);
- University of North Texas System (\$252.2 million);
- Texas Tech University System (\$215.4 million);
- Texas Woman's University (\$38 million);
- Midwestern State University (\$24 million);
- Stephen F. Austin State University (\$40 million);
- Texas Southern University (\$52.8 million); and
- Texas State Technical College System (\$43.6 million).

The bonds would have been payable from pledged revenue and tuition and, if a board of regents had not had sufficient funds to meet its obligations, funds could have been transferred among institutions, branches, and entities within each system or university.

### Supporters said

By authorizing TRBs, SB 16 would support a wide range of critical facilities projects at higher education institutions throughout the state that play an important role in enhancing opportunities for a quality education. Renovations, repairs, upkeep, and new facilities are essential to the state's ability to provide a high-quality and competitive postsecondary education to Texas students. The proposed projects are designed to improve facilities in high-demand fields, such as mathematics, science, technology, and engineering, which are essential to the cultivation of a modern workforce.

Higher education institutions depend on state support for maintenance and expansion to keep pace with the exploding growth in student enrollment and to maintain and enhance the quality of education these students receive. A highly skilled and well educated workforce is vital to remaining economically competitive in a global marketplace. Texas has devoted considerable resources to creating a strong environment for business. Training and developing a world-class workforce is a key part of this effort.

TRBs are the most cost-effective means for financing construction or improvements of durable capital infrastructure and for building facilities that can be used while the debt is being paid off. The bonds would be pledged against university revenues and thus would pose little financial risk to the state. Interest rates on recent bond issuances have been secured at remarkably low levels. As has been the practice in recent years, the institutions have agreed to match at least 20 percent of each project's cost from their own funds.

State appropriations for TRB authorizations have declined in recent years. According to the Legislative Budget Board (LBB), total appropriations for TRBs declined to \$593.1 million during fiscal 2012-13 from \$642.2 million during fiscal 2010-11 and \$672.3 million during fiscal 2008-09. Low interest rates and reductions in appropriations for debt service make this an opportune time for additional authorizations.

### Opponents said

While many of the facilities proposed in SB 16 may be worthy and justifiable, authorizing this amount of debt conveys risk to both taxpayers and institutions of higher education. Any amount of additional debt that an institution could not cover with tuition increases would either be conveyed to another institution within that system or absorbed by taxpayers.

TRBs have become popular because they allow lawmakers to support more projects by paying only a small portion of the cost and leaving the remaining

financial commitments for future legislatures and taxpayers. The bill would commit future legislatures to hundreds of millions of dollars in bond payments for the foreseeable future. According to the LBB, issuing the TRBs would cost the state about \$230 million in fiscal 2015 alone.

The Legislature should commit to TRBs only for emergency projects, which is not the standard of selection under this bill. Institutions should have to include bond debt as part of their overall operating budgets to ensure that the obligation of repaying the debt is not, in effect, transferred to taxpayers.

Due to unpredictable economic and fiscal conditions, committing the state to paying debt service for the foreseeable future would entail certain risks that are not worth taking. Capital needs at institutions of higher education can be satisfied without committing taxpayers to paying bond debt for up to 20 years.

As demands on state government compete for limited resources, higher education institutions and future legislatures must be creative and proactive in funding capital projects. Current state appropriations, carefully deployed, are sufficient to cover the needs of higher education institutions.

## Notes

The HRO analysis of SB 16 appeared in Part One of the *May 20 Daily Floor Report*.

After refusing to concur with the House-approved version of SB 16, the Senate requested a conference committee and appointed conferees. The bill died when the House took no further action.

A similar bill, **HB 5** by Branch, which also would have authorized TRBs, was placed on the Major State Calendar during the second called session but not considered on the House floor. The HRO analysis of HB 5 appeared in the *July 29 Daily Floor Report*. Another similar bill, HB 10 by Branch, was introduced during the first called session but not considered.

# Creating a new university in South Texas

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## SB 24 by Hinojosa

*Effective June 14, 2013*

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**SB 24** creates a new university in South Texas as a general academic teaching institution within the University of Texas (UT) system under the governance of the UT board of regents. The new university is eligible for appropriations from the Permanent University Fund (PUF). The UT board of regents will name the new university and will equitably allocate the primary facilities and operations of the university among Cameron, Hidalgo, and Starr counties.

The new university will include:

- an academic campus in Cameron County;
- an academic campus in Hidalgo County;
- an academic center in Starr County;
- the facilities currently operated by the Lower Rio Grande Valley Regional Academic Health Center;
- the medical school and other programs authorized for a University of Texas Health Science Center-South Texas by SB 98 by Lucio (81st Legislature);
- a Center for Border Economic and Enterprise Development to perform economic development planning and research for the border region; and
- a Texas Academy for Mathematics and Science, a math- and science-focused high school that will offer college credit to gifted juniors and seniors.

SB 24 abolishes the University of Texas-Pan American and the University of Texas at Brownsville and requires the UT system to merge their components as the basis for the new university. The new university will hire as many of the faculty and staff of the abolished schools as practical. A student already admitted to or enrolled in one of the abolished schools is entitled admission to the new university.

## Supporters said

SB 24 would consolidate UT-Brownsville, UT-Pan American, and the Regional Academic Health Center into a single university, making the new institution

eligible for a superior method of funding and attaching a new medical school. This would create efficiencies and bring new educational and economic opportunities to the Rio Grande Valley. A new comprehensive research university would address the needs of the rapidly growing Valley population, which is already educationally and medically underserved.

The new university would be an economic engine in its own right and, by training students, lay the groundwork for other businesses and industries to flourish. It would give residents of South Texas much-needed educational opportunities to create and fill the high-paying jobs of tomorrow. The medical school would attract additional health care providers to a medically underserved region.

If passed by a two-thirds vote in each chamber, SB 24 would make the new university eligible for PUF support and reduce its reliance on state general revenue. The PUF is an endowment fund that supports certain universities in the UT and Texas A&M University systems through investments made with state oil and gas royalties. Moving support for the university to the PUF from the general revenue-funded Higher Education Fund (HEF) would free tens of millions dollars for other HEF-supported institutions. Universities already supported by the PUF have not objected to the new university being added.

The new university's increased size and budget would bring it closer to emerging research university status, eventually allowing it to compete for additional UT system and state matching funds. The university initially would have about 28,000 students, research expenditures of more than \$11 million, and an endowment of \$70.5 million.

SB 24 would lead to savings on overhead and administration that could be spent on expansion, research, or new programs. Initial studies suggest that consolidating the existing universities could save \$6 million in administrative costs. According to the Legislative Budget Board, SB 24 would not have a significant fiscal impact on the state budget.

The medical school attached to the new university would not disrupt the medical education system in Texas. The medical school already is authorized by statute and would be developed even without SB 24. The Texas Higher Education Coordinating Board already has accounted for and incorporated the medical school into its state higher education plan.

Sufficient residency slots would be available for graduates of the medical school. At least 150 new residency slots are expected to be created in the Rio Grande Valley region as a result of local efforts and existing demand.

While Texas Southmost College District currently has a partnership agreement with UT-Brownsville to transition students to the university, SB 24 should not stipulate a relationship between the new university and the district beyond current agreements. This would allow the relationship between the new university and the college district to develop as the not yet-appointed leaders of the university prefer.

## Opponents said

There is no need to create a new, comprehensive, four-year university in the Rio Grande Valley. With UT-Pan American, UT-Brownsville, Texas A&M Kingsville, Texas Southmost College, and Texas State Technical College Harlingen, ample opportunities already exist for higher education in the region.

SB 24 would not adequately address the shortage of doctors in Texas. The bill would not statutorily require the creation of new residency slots that its medical school graduates would need, and a lack of such opportunities could encourage recent graduates to study in other states. About 70 percent of doctors practice medicine where they completed their residency, so Texas could spend money educating doctors only to have them leave Texas for their medical residencies and end up practicing elsewhere.

The bill should require the new university to cooperate more fully with Texas Southmost College in much the same way that the University of Texas at Austin and Austin Community College cooperate, which would allow easy transfer of credits and agreements on degree plans, among other things. This would provide Rio Grande Valley-area residents the most efficient use of their local higher-education opportunities.

## Notes

The HRO analysis of SB 24 appeared in Part One of the May 17 *Daily Floor Report*.

# Continuing the Higher Education Coordinating Board

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**SB 215 by Birdwell**

**Effective September 1, 2013**

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**SB 215** continues the Texas Higher Education Coordinating Board until 2025. The bill removes certain powers of the coordinating board and modifies several of the student financial aid programs it administers.

**Board powers and responsibilities.** SB 215 limits the powers of the coordinating board to those expressly granted by law and reserves other powers and decision-making authority to institutions of higher education and their regents.

It allows public higher education institutions to proceed with construction and repair projects of buildings and facilities without seeking the coordinating board's review and approval. It eliminates certain grant programs and reports administered by the coordinating board.

The bill requires the coordinating board to engage in negotiated rulemaking for certain contested rules, such as admissions and credit-transfer policies. The coordinating board may recommend the consolidation or elimination of degree or certificate programs but no longer may order such action.

**Student financial aid.** SB 215 makes changes to certain student financial aid programs overseen by the coordinating board and makes cosigners of student loans liable for defaulted loans.

Under SB 215, if sufficient funds are unavailable to provide loans under the B-On-Time loan program in the amount determined by the coordinating board, funds will be allocated to institutions in proportion to each institution's dedicated tuition set-asides for the loan program instead of awarding funds based on enrollment. It also requires each institution to determine the amount of an individual B-On-Time loan under such circumstances.

Under the bill, two-year institutions are no longer eligible to participate in the B-On-Time program or the TEXAS grant program. SB 215 also expands the eligibility criteria under which transfer students may receive TEXAS grants.

The bill converts the Texas Guaranteed Student Loan Corporation from a public nonprofit state-chartered corporation to a private, nonprofit corporation.

**Associate's degree credit hours.** SB 215 caps the number of hours required for an associate's degree unless the higher education institution has a compelling academic reason for requiring the completion of additional credits.

## Supporters said

In continuing the Texas Higher Education Coordinating Board for another 12 years, SB 215 would make needed changes to its rule-making authority and oversight powers, while also eliminating unnecessary and unfunded programs and reports.

**Negotiated rulemaking.** SB 215 would require negotiated rulemaking when appropriate. The vast majority of the board's rulemaking still would be done through normal procedures and the bill would not hamper the board's ability to make rules in a timely manner.

**Program review and approval.** SB 215 would preserve local control while safeguarding taxpayer and institutional resources by removing the board's ability to order the closure of low-performing degree programs. It still would review them and advise an institution's governing board if the board felt a program should be closed.

**Texas Guaranteed Student Loan Corporation.** SB 215 would give the student loan corporation new purpose. The student loan corporation, which previously administered the state's portion of the Federal Education Loan Program, has been adrift since the U.S. government ended the federal program. Converting the corporation into a private, nonprofit entity would allow it to pursue additional contracts and become a regional, if not nationwide, entity providing higher-education financial aid and other assistance. The bill would preserve the corporation's status as the guarantor agency for the state under the federal Higher Education Act.

Converting the corporation into a private nonprofit also would allow it to make a one-time gift to the state of \$250 million to be used for higher education purposes, such as a foundation to reimburse higher-education institutions for their Hazlewood tuition exemption costs.

**Student financial aid.** Public two-year institutions do not use the B-On-Time program enough to justify the administrative burden of continuing their eligibility. Two-year students should be directed to Texas Equal Opportunity Grants, which are better designed to meet the needs of such students by allowing them to enroll part time.

**Board membership.** While an earlier version of SB 215 would have required that one third of the members of the governing board have higher-education experience, it would be inappropriate to limit the governor's options when appointing members to the board. Artificial restraints could inappropriately block truly talented and uniquely qualified appointees, and SB 215 would give the governor full discretion to nominate the best possible candidates.

## Opponents said

SB 215 would not do enough to protect local control and promote competition between institutions of higher education.

**Negotiated rulemaking.** SB 215 should follow the Senate engrossed version of the bill by requiring the board to engage institutions of higher education in negotiated rulemaking whenever it is required to consult or cooperate with institutions in the development of a policy, procedure, or rule. The board has strayed from its role as a data-gathering and advisory agency to become a regulatory body. The Senate version of the bill, by requiring negotiated rulemaking, would ensure institutions of higher education had sufficient input into the rules that regulate them.

**Program review and approval.** SB 215 would grant the board too much power over the programs institutions of higher education offer or would hope to offer. Institutions should be allowed to decide on their own which programs they offer. Market competition for students, top faculty, and research funding would naturally direct administrations to create productive programs and shutter those that under-perform.

**Board membership.** SB 215 should require that one third of the members of the agency's governing board have experience with higher education to allow the board to better direct policy. Currently, due to a lack of prior experience, the board is heavily reliant on agency staff as its source of expertise. The bill should count prior service on an institution's governing board as qualifying in order to expand the pool beyond individuals who have worked in academia. The governor still would have wide discretion to appoint the remaining two-thirds of the board.

## Notes

The HRO analysis of SB 215 appeared in the March 15 *Daily Floor Report*.



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# Accountability and graduation program changes

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## HB 5 by Aycock *Effective June 10, 2013*

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**HB 5** institutes a new standard course of study for high school students and reduces the number of end-of-course (EOC) exams students must pass in order to graduate. The bill also establishes a new accountability ratings system evaluating schools on academic performance, financial stability, and community and student engagement.

**Student assessment.** Beginning with the 2013-14 school year, and first applying to students who entered 9th grade in the 2011-12 school year, required EOC exams will be reduced from 15 to five: Algebra I, English I and II, biology, and U.S. history. Reading and writing will be combined into one exam for both English I and II. School districts may use the Algebra II and English III exams for diagnostic purposes to measure college readiness.

The bill eliminates the requirement that EOC exam scores count for 15 percent of a student's overall grade and allows districts to adopt local policies for factoring test scores into final course grades. Student performance on an EOC exam may not be used for class ranking.

Accelerated instruction must be provided to students who fail exams and may take place after regular school hours and during the summer break. A district may not pull a student out of class without parental consent for test preparation or remedial instruction for more than 10 percent of the school days during which the class is offered.

A district may not administer more than two benchmark tests to a student in preparation for a required assessment. The Texas Education Agency (TEA) must ensure that test procedures minimize disruptions to the classroom environment and school operations. TEA also must notify districts and campuses of the results of each test no later than 21 days after the test was administered.

**Graduation plans.** HB 5 replaces the minimum, recommended, and advanced high school program with a foundation graduation plan consisting of four credits in English; three credits each in math, science,

and social studies; two credits in foreign language or computer programming; one credit in fine arts; one credit in physical education; and five elective credits.

Students who take additional or specific courses may earn endorsements in STEM (science, technology, engineering, and mathematics), business and industry, public services, arts and humanities, or multidisciplinary studies. Students must take four math and four science courses to earn most endorsements. Each student entering 9th grade must select an endorsement but may change it at any time. A student may graduate without an endorsement only with a parent's written permission.

Students may earn a distinguished level of achievement designation by completing the requirements of the foundation program and at least one endorsement, while also earning four credits of science and four credits of mathematics, including Algebra II. School counselors must explain the advantage of endorsements and the distinguished level of achievement. The distinguished level of achievement replaces the recommended or advanced levels as a minimum requirement for automatic state college admissions under the top 10 percent law.

By September 1, 2014, the SBOE must approve at least six advanced career and technology education or technology applications courses, including personal financial literacy, to satisfy the fourth math credit. A district may offer courses or apprenticeships for credit without SBOE approval if the programs are approved by the local board of trustees and:

- are developed in partnership with an institution of higher education and local businesses, labor, and community leaders; and
- prepare students for certain postsecondary training and education.

The commissioner of education will adopt a transition plan to implement HB 5 beginning with the 2014-15 school year. A student who entered 9th grade before the 2014-15 school year will be permitted to choose between the new foundation program or one of the three programs being replaced.

**Accountability.** HB 5 establishes a new rating system evaluating schools on academic performance, financial performance, and community and student engagement.

The bill requires TEA to develop an A through F accountability rating system for school districts beginning with the 2016-17 school year. An A, B, or C rating will reflect acceptable performance and a D or F rating will reflect unacceptable performance. The existing ratings of exemplary, recognized, acceptable, and unacceptable are retained for campus ratings. The bill adds accountability indicators for the number of students earning endorsements or distinguished achievement and creates some exceptions relating to dropouts who reenroll.

Beginning with the 2013-14 school year, each district must evaluate its performance and the performance of each campus using locally developed criteria to indicate community and student engagement.

Changes to district financial ratings begin in the 2014-15 school year. Before assigning a final financial rating, the commissioner will assign a preliminary rating and consider additional information submitted by a district or charter school relating to any unsatisfactory indicators identified. Those assigned the lowest rating under the financial accountability system must submit a corrective action plan.

## Supporters said

HB 5 would bring needed balance to excessive state-mandated testing and make changes to the high school curriculum that maintain rigor while providing students flexibility to pursue college or career interests. The bill would help meet the growing need of Texas employers for skilled workers ready to enter technical trades and would broaden the accountability system to lessen reliance on test scores and provide a better understanding of overall student performance.

**Student assessment.** Reducing the number of high-stakes EOC exams from 15 to five would bring Texas more in line with other states. Fewer exams would mean more time for classroom discussions and hands-on projects, which would spark students' curiosity and enrich their learning experiences. By ending the requirement that end-of-course (EOC) exam scores

count for 15 percent of a student's grade, the bill would give districts local control over how to incorporate EOC scores into course grades.

HB 5 would save millions of dollars in testing costs. According to the Legislative Budget Board's fiscal note, the bill would save \$11.4 million through fiscal 2014-15.

**Graduation plans.** The bill would place all students on one foundation plan for graduation while allowing multiple pathways for students to pursue their career interests. Students could choose to take more challenging courses and earn endorsements in any of five areas, including multidisciplinary studies. HB 5 would allow school districts to partner with community colleges and local businesses to develop local courses that meet area workforce needs.

**Accountability.** HB 5 would broaden accountability criteria to paint a fairer, more comprehensive picture of campus and district performance while reducing the emphasis on testing. The new rating categories of financial accountability and community and student engagement would give the public a better overall understanding of how schools and districts were performing. The bill would strengthen public investment in the system by involving local groups of parents and community and business leaders in decisions about what criteria should be used to evaluate schools.

## Opponents said

HB 5 would reduce academic rigor and lower expectations for students. The state's commitment to school accountability has raised academic performance and narrowed achievement gaps among student groups. By watering down the 4x4 curriculum and EOC assessments designed to measure college readiness, the bill would take a step in the wrong direction.

**Student assessment.** Testing under the new State of Texas Assessments of Academic Readiness (STAAR) program is designed to measure higher-level critical thinking, and it is too soon to retreat from the exams simply because they are more difficult. The EOC exams are being phased in, and teachers are using the results to better prepare students for future tests. HB 5 would limit EOC exams to freshman- and sophomore-level courses and would eliminate the requirement for Algebra II and English III exams, which measure college readiness.

**Graduation plans.** Rigorous graduation requirements are critical to helping more students enter and succeed in college and career. Challenging coursework in high school is the best predictor of student success at the community college and university levels. Loosening graduation standards to allow students to pursue more career training could lead to minority students being steered disproportionately into the career option and away from the college track. Many jobs of the future will require high-level mathematics skills, and now is not the time to undo the requirement that students take four years of math.

**Accountability.** The existing accountability system is designed to ensure that public schools are fulfilling their core mission of teaching the state-mandated curriculum. A dual system that used letter grades for districts and the exemplary, recognized, acceptable, and unacceptable labels for campuses would be confusing.

## Notes

The HRO analysis of HB 5 appeared in the March 26 *Daily Floor Report*.

The Legislature also enacted **HB 866** by Huberty, addressing testing in elementary and middle school. The bill directs TEA to seek a waiver from federal testing requirements to allow certain state assessments to be optional for students in grades 4, 6, and 7 who achieve a score equal to or greater than the minimum satisfactory adjusted scale score for that assessment in the same subject in grades 3, 5, and 6.

HB 866 takes effect on any date not later than September 1, 2015, on which the commissioner of education obtains a specified waiver from the application of federal law or regulation or receives written notification from the U.S. Department of Education that a waiver is not required. According to TEA, the USDE notified the agency in September that it will not grant a waiver for provisions of the federal No Child Left Behind Act as they relate to HB 866.

The HRO analysis of HB 866 appeared in Part Two of the May 1 *Daily Floor Report*.

# Designating school employees as school marshals

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**HB 1009 by Villalba**  
**Effective June 14, 2013**

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**HB 1009**, the Protection of Texas Children Act, authorizes school districts and charter schools to appoint up to one employee per 400 students on a campus as a school marshal. A school marshal must hold a concealed handgun license (CHL) and be certified by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE). The commission must establish a training program by January 1, 2014, and charge a fee for the training.

A marshal will be licensed to carry a handgun on school premises, in accordance with written school board policies, after completing 80 hours of training and a psychological exam. A school marshal's license expires after two years, and the Department of Public Safety must notify TCLEOSE if a school marshal's CHL is suspended or revoked.

Marshals in regular contact with students may not carry concealed handguns but may keep them in a locked location within reach on school premises. The district's written regulations must require that a handgun carried by or within access of a school marshal be loaded only with frangible ammunition designed to disintegrate on impact.

The identity of the marshal is confidential, and a marshal may act only as necessary to prevent offenses that threaten serious bodily injury or death of students and others on campus. A marshal may access a handgun only under circumstances of self-defense or defense of a third person that would justify the use of deadly force under Penal Code, secs. 9.32 or 9.33.

A marshal is not entitled to state benefits provided to peace officers.

## Supporters said

HB 1009 would provide an option for school districts to protect Texas students and school staff from shootings on campus, such as the recent tragedy in which 20 students and six adults were killed by a gunman at Sandy Hook Elementary School in

Connecticut. Lives could be saved by having an armed and trained school marshal able to respond in the minutes before police arrive on the scene.

Texas law already allows school boards to adopt policies allowing educators with CHL licenses to carry their weapons on school property. The bill would take the law a step further by providing designated school marshals with training designed specifically to respond to a school shooting. The presence of trained marshals would be an affordable alternative for the many districts that cannot afford to employ law enforcement officers at their campuses full time.

## Opponents said

HB 1009 would allow school districts only to appear to address school safety, rather than truly providing the resources needed to make schools safer. Only fully certified law enforcement personnel should be dealing with weapons on campus. Confrontations with active shooters are challenging even for these highly trained professionals. More guns in schools outside the hands of true law enforcement officers would invite more accidents.

It is inevitable that word would leak out at each school about the identity of the school marshal. At that point, the lack of anonymity could compromise the marshal's ability to be effective.

## Notes

The HRO analysis of HB 1009 appeared in Part One of the May 4 *Daily Floor Report*.

The governor vetoed a related bill, **SB 17** by Patrick, which would have created a safety training program for school employees licensed to carry concealed handguns. The bill would have allowed authorized and trained employees to carry concealed weapons at schools and certain interscholastic events. The HRO analysis of SB 17 appeared in Part One of the May 20 *Daily Floor Report*.

# Expanding electronic course options in public schools

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**HB 1926 by K. King**  
*Effective June 14, 2013*

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**HB 1926** expands online and distance-learning courses available to public school students. It allows nonprofit organizations and private entities to provide courses if they comply with applicable federal and state anti-discrimination laws, show evidence of past success in offering online courses, and demonstrate financial solvency. Providers may offer electronic courses approved by the Texas Education Agency (TEA) through the Texas Virtual School Network (VSN). The VSN may enter into an agreement with another state to facilitate expedited course approval.

An entity other than a school district or open-enrollment charter school is prohibited from awarding course credit or a diploma for courses taken through the VSN.

The education commissioner will negotiate an agreement with each eligible course provider governing the costs of each course, which may not exceed current statutory limits of \$400 per course or \$4,800 for a full-time student.

Districts may decline to pay for more than three year-long electronic courses per student, although students may pay to take additional courses. Districts have discretion in selecting course providers for their students. Districts and charters must send written information to parents about online courses at least once a year.

The bill eliminates statutory language allowing a district to deny the request of a student or parent to enroll in an online course if the district can demonstrate that the course is not as rigorous as the same classroom course or if it might negatively affect the student's performance on a state standardized test. A district may deny enrollment in an online course if it is inconsistent with requirements for college admission or industry certification or if the district or school offers a substantially similar course.

The bill requires TEA to make information about electronic courses developed by school districts and charter schools available on the agency website.

## Supporters said

HB 1926, by allowing more opportunities for students to take courses electronically, would help to provide equal educational opportunities and increased flexibility to schoolchildren across the state. In smaller school districts, course offerings in the classroom setting can sometimes be limited, and HB 1926 would provide more options for students in these districts. Expanded online courses also would allow students to work more quickly and give them flexibility to take courses during times outside the traditional school day. Districts and charter schools would have expanded opportunities to develop online and distance learning courses and to offer those options to students in other parts of Texas. HB 1926 would respond to changes in technology and learning that have the potential to transform public education.

## Opponents said

While HB 1926 would expand opportunities for students to take online courses, the classroom setting still offers the best opportunities for student learning. In addition, the bill would allow for-profit entities – including those from outside Texas – to make money using tax dollars that otherwise would go to local classrooms. Texas must make sure that electronic courses are used to supplement, and not to replace, teacher-led classrooms.

## Notes

The HRO analysis of HB 1926 appeared in Part One of the May 3 *Daily Floor Report*.

# Charter school expansion and accountability

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## SB 2 by Patrick

*Effective September 1, 2013*

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**SB 2** increases the cap on open-enrollment charter schools in annual increments from 215 to 305 by September 1, 2019. The cap does not apply to:

- entities operating charters in other states that meet certain performance requirements;
- charters designated as dropout recovery programs;
- certain district charters; or
- up to five charters for schools primarily serving students with disabilities.

The bill changes the charter authorizer from the State Board of Education (SBOE) to the commissioner of education in coordination with a designated member of the SBOE and gives the SBOE veto power. Charter holders that meet certain requirements may open new campuses without commissioner approval.

The bill revises requirements for reviewing charter applicants, for accountability measures, and for renewing and revoking charters. It allows expedited renewals for high-performing and financially stable schools. The commissioner must revoke the charter of schools that are academically or financially unacceptable for three consecutive years.

A district that intends to sell or lease unused facilities must give local charter schools the first opportunity to purchase, lease, or use the facility. A district does not have to accept a charter school's offer.

School boards that receive petitions signed by the parents of a majority of students and by a majority of teachers to convert a traditional public school to a campus charter must take a public vote of the board to grant or deny the request.

The bill also:

- requires that charter school teachers and principals hold at least a bachelor's degree;
- requires that a majority of members of a charter school governing board be qualified voters;

- applies nepotism laws to all charter schools, with grandfathering provisions for current employees;
- requires charter schools to post on their websites the salaries of their chief executive officers and school financial statements;
- requires the commissioner of education to develop and use performance frameworks, in addition to regular public school accountability measures, to measure charter schools; and
- requires charter schools to adopt policies requiring the recitation of the pledges to the United States and Texas flags, followed by one minute of silence.

## Supporters said

SB 2 would strike an important balance between encouraging the growth of high-quality charter schools and ensuring that the commissioner of education had the tools needed to provide effective quality control and oversight.

Texas is home to many outstanding charter schools that successfully provide a range of options for students, from college prep to dropout recovery. Outdated and ineffective state laws governing charters, however, allow poor-performing schools to remain open while preventing new, high-quality schools from forming. This has left more than 100,000 students on charter school waiting lists.

SB 2 would promote efficient use of public resources and help charter schools improve their facilities by allowing them first refusal of mothballed school district facilities. This type of facility sharing would encourage cooperation between school districts and charter schools, which are at a distinct disadvantage compared to traditional public schools with regard to facilities funding.

The bill would raise standards to address serious regulatory flaws identified during Sunset review of the Texas Education Agency (TEA). It would require the

commissioner to revoke the charter of a school that experienced three consecutive years of any combination of failing academic or financial ratings. It would restructure the renewal process by establishing objective financial and academic criteria that constitute high performers and low performers. High-quality charters would be rewarded with a simple automatic renewal, and the charters of low performers would expire automatically if they did not meet the new standards.

## **Opponents said**

The charter expansion in SB 2 would put quantity before quality. The state should wait for quality control measures to take effect before raising the cap on the number of charters allowed to operate in Texas.

SB 2 would not adequately address the funding and regulatory discrepancies between public school and charter schools. In some districts, public schools receive less funding per student than charter schools statewide receive on average. Public schools also must follow more rules and state regulations than charters. Until the playing field is leveled and school funding addressed, there should not be any further expansion of charter schools.

Three years of poor academic or financial performance would be too long to allow bad charter schools to keep operating.

While the bill would increase oversight of charter schools, that oversight would cost about \$1 million per fiscal year to pay for new TEA employees required under SB 2, according to the Legislative Budget Board.

## **Notes**

The HRO analysis of SB 2 appeared in the May 16 *Daily Floor Report*.



# Student discipline, ticketing for class C misdemeanors

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**SB 393 by West**

**Effective September 1, 2013**

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**SB 393** prohibits peace officers from issuing tickets to school children at least 10 years old but younger than 17 for school offenses – defined as fine-only, class C misdemeanors other than traffic offenses – that are committed on school property. It does not prohibit children from being taken into custody by law enforcement for these offenses.

Law enforcement officials retain the ability to file criminal complaints for these offenses when committed by certain students on school grounds. SB 393 requires that the complaints contain a statement of probable cause, whether the student is eligible for a special education program, and any graduated sanctions imposed before the complaint. Prosecutors may adopt rules to determine if there is probable cause to believe that the child committed the alleged offense, to review the allegations in the complaint for legal sufficiency, and to see that justice is done.

The bill allows judges to dismiss a complaint upon a finding that a child defendant, including a child with a mental illness or developmental disability, lacks capacity to understand the criminal court proceedings or to appreciate the wrongfulness of the child's own conduct.

SB 393 allows a judge to permit a child defendant, who is at least 10 years old and younger than 17, to discharge fines and court costs associated with a class C misdemeanor conviction by electing to perform community service or receive tutoring. It also permits a court to waive fines or court costs if the child defaulted on the payment and if discharging the costs through community service or tutoring would impose an undue hardship on the defendant.

**Age of responsibility.** The bill bans prosecution of children younger than age 10 for a class C misdemeanor, including a county or municipal penal ordinance. SB 393 limits the application of the offenses of disruption of class, disruption of transportation, and certain types of disorderly conduct to children at least 12 years of age.

The bill creates a presumption that students who are at least 10 years old and younger than age 15 are incapable of committing fine-only, class C misdemeanors such as disruption of class, disruption of transportation, and most disorderly conduct offenses. The presumption may be refuted if the prosecution proves to the court by a preponderance of evidence that the child had sufficient capacity to understand that the conduct was wrong at the time the child engaged in it.

**Graduated sanctions.** If a school district commissions its own peace officers, it may impose a system of graduated sanctions, including warning letters, behavior contracts, school-based community service, or referral to counseling before filing a complaint for a school offense stipulated in the bill.

**Confidential records.** The bill extends records confidentiality previously given to certain children convicted of and having satisfied the judgment for fine-only misdemeanors other than traffic offenses to the records of children whose cases were dismissed after successful completion of deferred disposition. This applies to the disclosure of a record on file on or after September 1, 2013, whether the offense was committed before, on, or after that date.

**Other provisions.** The provisions of SB 393 control over any other law applied to a school offense alleged to have been committed by a child. The bill also:

- allows juvenile case managers to provide prevention services to a child considered at risk of entering the juvenile justice system and to provide intervention services to juveniles engaged in misconduct prior to cases being filed, excluding traffic cases; and
- requires a court to dismiss a failure to attend school complaint or referral made by a school district that did not follow truancy prevention measures.

## Supporters said

SB 393 would address the problem of law enforcement officers issuing tickets to young students for common or immature behaviors that would be handled better by other means, while leaving in place the necessary tools to address more serious criminal behavior. A uniform, statewide policy is needed to standardize ticketing practices, which vary across school districts.

By prohibiting the issuance of class C misdemeanor tickets to students for low-level infractions on school property, SB 393 would reduce the number of juveniles entering the criminal justice system for behaviors that first should be dealt with through a school's disciplinary system. Issuing tickets for noncriminal conduct such as sleeping in class, throwing a paper airplane, or other minor infractions is counterproductive because it often does not improve behavior and inappropriately places these young children into the criminal justice system. Studies have found a correlation between a child entering the adult criminal justice system through tickets issued at school and the likelihood of that child having long-term interactions with the justice system, otherwise known as the "school-to-prison pipeline."

The bill appropriately would allow law enforcement officers to focus on criminal behavior while schools took care of discipline issues. Peace officers would retain authority to handle criminal behavior on school property through the filing of criminal complaints. SB 393 would establish criteria for these complaints to ensure they were used in appropriate situations to deal with criminal behavior, rather than childish behavior.

SB 393, through the availability of graduated sanctions, would encourage school officials to provide services to at-risk children before they commit an act that could result in a criminal record.

The bill would protect a greater number of children adjudicated in municipal and justice courts from having their criminal cases subject to public disclosure by extending confidentiality of records to children who had avoided a guilty verdict by successfully completing some form of probation.

## Opponents said

By limiting who could receive tickets and for what they could be issued, SB 393 would reduce the flexibility of school districts to deal with students who continuously misbehave. Schools need all available tools to maintain an appropriate atmosphere for student learning. Tickets and the involvement of the courts can be effective tools when other methods of addressing this behavior do not work. Judges and court personnel often can find community resources to address the underlying problems that contribute to a student's acting out in class.

## Notes

**SB 1114** by Whitmire, effective September 1, 2013, also limits the issuance to children of school-related tickets and criminal complaints for class C misdemeanors, other than traffic offenses. The bill prohibits law enforcement officers from issuing tickets or filing complaints for conduct by children younger than 12 years old that allegedly occurred on school property or on a vehicle owned or operated by a school district.

Under SB 1114, the Education Code offenses of disruption of class and disruption of transportation no longer apply to primary and secondary grade students enrolled in the school where the offense occurred. It expands the Penal Code offense of disorderly conduct so that public school campuses and school grounds are considered public places where the offense can occur. SB 1114 also prohibits the issuance of an arrest warrant for a person with a class C misdemeanor under the Education Code for an offense committed when the person was younger than 17 years old.

SB 1114 allows children accused of any class C misdemeanor, other than a traffic offense, to be referred to a first-offender program before a complaint is filed with a criminal court. The cases of children who successfully complete first-offender programs for class C misdemeanors may not be referred to a court if certain conditions are met.

SB 393 passed on the Local, Consent, and Resolutions Calendar and was not analyzed in a *Daily Floor Report*. The HRO analysis of SB 1114 appeared in Part 2 of the May 17 *Daily Floor Report*.

# State Board of Education oversight of CSCOPE

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**SB 1406 by Patrick**  
*Effective June 14, 2013*

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**SB 1406** requires instructional materials developed by a regional Education Service Center (ESC), acting alone or in collaboration with other ESCs, to be subject to the same State Board of Education (SBOE) review-and-adoption process required for instructional materials governed by Education Code, ch. 31.

## Supporters said

SB 1406 would provide much-needed SBOE review of CSCOPE, an online curriculum management system that was developed by the regional ESCs with no oversight, transparency, or accountability.

CSCOPE content was developed without parental input. It has supplied lesson plans that are incorrect and that have raised concerns about promoting socialist, anti-American, and anti-Christian values. Some teachers say they are required to use it verbatim in ways that limit their flexibility and creativity.

Parents have struggled to learn the content of CSCOPE because teachers initially were required to sign a contract not to disclose the content. This conflicts with Education Code, sec. 26.006, which assures parents the right to review teaching materials, instructional materials, and other teaching aids.

In addition, the ESC collaborative used public funds to develop a product that it then sold to Texas schools, which means Texans' tax dollars were spent twice for CSCOPE.

The bill would apply to these materials the transparent process and public hearings that are part of SBOE review in adopting all instructional materials. In the past, the process has prevented textbook publishers from removing lessons about religious holidays, such as Christmas and Rosh Hashanah, and about famous Americans, such as Neil Armstrong and Gen. George S. Patton.

## Opponents said

Decisions regarding instructional lessons and curriculum management systems should remain at the discretion of local elected school boards and not be subject to SBOE review. While parents have a right to raise concerns about how lessons are being taught, those matters should be brought before local school boards and district officials. The bill would establish two classes of school districts, allowing those that can afford to develop their own lesson plans to be free from SBOE review.

It is inappropriate to review CSCOPE to see whether it supports or conflicts with specific political ideologies or religious beliefs. Students should be given the tools to evaluate the vast array of information and viewpoints that they will encounter in life. While supporters of SB 1406 have criticized CSCOPE as pro-Islam, state education standards require students to study the central ideas of the world's major religions. The SBOE has come under scrutiny in the past for its partisan debates over textbook language on topics such as evolution, environmental regulation, social studies, and sex education. The bill could result in the loss of an important online tool that helps hundreds of smaller school districts faced with shrinking financial resources in their efforts to improve student performance while meeting the expectations of ever-changing curriculum standards and a more rigorous state testing and accountability system.

## Notes

The HRO analysis of SB 1406 appeared in the May 20 *Daily Floor Report*.

The Legislature also enacted **SB 1474** by Duncan, which took effect June 14. The bill establishes a process for school districts to follow before adopting a major curriculum initiative, including the use of a curriculum management system. SB 1474 passed the House on the Local, Consent, and Resolutions Calendar and was not analyzed in a *Daily Floor Report*.

# TRS contributions and benefits

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## SB 1458 by Duncan

*Generally effective September 1, 2014*

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**SB 1458** raises the contribution rates for Teacher Retirement System (TRS) members and requires a new contribution rate from most school districts. It increases the minimum retirement age to 62 for teachers who are not vested in TRS as of September 1, 2014. It authorizes a 3 percent cost-of-living increase for certain current retirees, effective September 1, 2013, and changes benefits related to health insurance plans for some future retirees.

**Contribution rates.** SB 1458 phases in increases in contribution rates for TRS members from 6.4 percent of the member's annual compensation to 6.7 percent in fiscal 2015, 7.2 percent in fiscal 2016, and 7.7 percent in fiscal 2017. After September 1, 2017, the member contribution rate would drop by one-tenth of 1 percent for each one-tenth of 1 percent that the state contribution rate for the fiscal year to which the service relates is less than the state's contribution rate for fiscal 2015 (set at 6.8 percent in the general appropriations act).

Beginning with fiscal 2015, school districts that do not contribute to Social Security for their employees will make monthly TRS contributions equal to 1.5 percent of members' compensation. The district contribution would be reduced proportionately if the state compensation dropped.

The bill decreases from 5 percent to 2 percent the annual interest on money in each member's individual account that is used to compute the amount paid when an employee withdraws accumulated funds in lieu of receiving a retirement annuity. The provision applies only to interest accrued after September 1, 2014.

**Pension benefit structure.** For those not vested or hired as of September 1, 2014, the bill adjusts the minimum age to retire with full benefits from 60 to 62 if the sum of the member's age and service credit in TRS equals 80. Those who retire before age 62 will receive an annuity decreased by 5 percent for each year of age under 62 years.

The bill authorizes a 3 percent cost-of-living adjustment (COLA) beginning in fiscal 2014 for TRS members who retired on or before August 31, 2004. The adjustment cannot exceed \$100 per month.

**Retiree health care.** Under SB 1458, a TRS member must retire at or after age 62 to be eligible for the second and third TRS-Care levels of coverage, which provide more comprehensive coverage and lower deductibles than the first level. These changes do not apply to members whose age and service credit equals 70 or who have 25 years of service as of August 31, 2014.

## Supporters said

SB 1458 would make revisions to TRS contributions and benefits to ensure the long-term soundness of the pension plan and to provide nearly 200,000 retirees with their first COLA since 2001. The bill would shift the TRS retirement fund from possible future insolvency to a system that could pay off its liabilities within 30 years, which would meet the statutory bar of being actuarially sound.

**Contribution rates.** The bill would create a new revenue source from a 1.5 percent contribution from school districts that do not pay Social Security taxes for their employees. The combined state and district contribution would bring the total employer contribution to 8.3 percent, which would exceed employee contribution rates. The bill also would provide an incentive for the state to maintain appropriate contribution levels by linking state, member, and school district rates so that if the state rate were reduced, the member and district rates would shrink equivalently.

Many teachers understand that the pension fund must be strengthened to ensure its ability to meet future obligations, and they are willing to contribute more to maintain a defined-benefit plan.

**Pension benefit structure.** The bill would maintain current retirement eligibility for members vested as of September 1, 2014. Those not vested would have to work only two years more, to age 62, to receive full benefits.

**Retiree health care.** Because early retirement is a major factor in rising health costs, SB 1458 would make necessary changes to TRS-Care for retirees to help stabilize the health care fund. TRS-Care 1, the catastrophic plan, still would be available to those who retired before age 62.

## Opponents said

SB 1458 would cut pension and health care benefits for teachers and other employees working in schools today. The bill should grandfather in all current employees to ensure no one loses benefits they have already earned.

The Legislature has underfunded TRS for years and should be putting substantially more money into the pension system now.

**Contribution rates.** SB 1458 would place the largest burden on active members, who would see contributions increase by an estimated \$189.8 million just in fiscal 2015, according to the Legislative Budget Board. Texas teachers already are paid below the national average, and the increased bite out of their take-home pay would hurt the lowest-paid educators the most.

**Retiree health care.** The bill would create a hardship for certain employees who retire early by restricting them to a health plan that carries high deductibles for medical and prescription drug expenses. If retired teachers cannot afford to visit the doctor and buy their prescription drugs, their health could be affected.

## Notes

The HRO analysis of SB 1458 appeared in Part One of the May 17 *Daily Floor Report*.

# Establishing the Texas Achievement School District

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## SB 1718 by West *Died in the House*

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**SB 1718**, as reported by the House Committee on Public Education, would have created the Texas Achievement School District (ASD) to operate certain low-performing campuses transferred from school districts with at least 20,000 enrolled students. The ASD would have been limited to 10 campuses and subject to a Sunset date of September 1, 2025, after which the district would have been abolished if not continued by the Legislature.

**Criteria.** The bill would have authorized the commissioner of education to determine whether a campus identified as unacceptable for two consecutive school years had instituted meaningful change, including reconstituting the staff or leadership. If there had been progress toward change, the commissioner could have reevaluated the campus at the end of the subsequent school year before taking action. If there had not been meaningful change, the commissioner could have:

- ordered the reconstitution of the campus;
- approved a plan by the school board to operate the campus as an open-enrollment charter school for up to two school years, after which it would have been transferred to the ASD if still rated unacceptable;
- required the district to contract for appropriate technical assistance; or
- ordered the removal of the campus to the ASD.

SB 1718 would have allowed the return of a campus to its former school district on recommendation of the ASD superintendent and commissioner after the campus had achieved an acceptable level of performance. If a school operated by the ASD had failed to achieve acceptable performance after three years – or two years if the commissioner determined that the campus had not made meaningful progress during that period – the commissioner would have been required to return the school to its former district or to close it.

**Operations and funding.** The bill would have authorized the commissioner to select the ASD superintendent and employ Texas Education Agency

employees as ASD central administrative staff. The ASD could have operated each campus directly or contracted with certain high-performing charter school operators.

State education funding would have followed each student from the former district to the ASD. The ASD would have been allowed to use any school buildings and facilities used by the campus before it was transferred. It could have required the former district to provide student or school support services – including food, transportation, and student assessment for special education eligibility services – in exchange for reimbursement from the ASD.

**Teachers.** The ASD superintendent could have decided which teachers to retain, although certified teachers who had held comparable positions in the prior system would have received priority. The bill would have prevented a teacher employed by the ASD from teaching a subject outside his or her area of certification. A teacher could have chosen to remain for reassignment within the former district consistent with contractual obligations.

## Supporters said

SB 1718 would give the commissioner of education another way to deal with failing schools, while providing a chance for the students trapped in them to receive a high-quality education. Many low-performing schools are located in predominantly minority and economically distressed neighborhoods, and such schools can exacerbate the dropout rate for African-American and Hispanic students.

The ASD would provide one more tool the commissioner could use to turn around low-performing schools. Recovery school districts such as the one proposed by SB 1718 have shown the promise of providing improvement in other states, and this model should be implemented in Texas.

The bill would offer a choice to students in failing schools that did not involve the use of vouchers. These students could opt to attend the campus under ASD governance or to attend another school within their regular districts. State money would follow the student, but the former district would keep local tax dollars.

## **Opponents said**

SB 1718 would authorize a state takeover of neighborhood schools with no inquiry into the reasons for the schools' low ratings or whether the campuses had received the funding and support necessary for academic success. This could deprive students, teachers, and parents of the safeguards of educational quality and fair treatment they now enjoy under the Education Code.

The notion that neighborhood schools would be improved by eliminating state standards such as class size limits, teacher contract rights, and policies against grade inflation is wrong. Rather than lower state quality standards, legislators should provide funding for smaller class sizes and other resources to help students succeed.

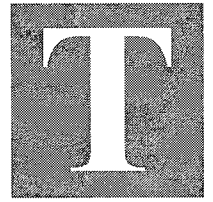
Handing off local schools to private charter operators would not guarantee success. The record in Texas shows that charter schools perform about the same as, and in some cases worse than, regular public schools. The nation's highest-profile "recovery district," located in New Orleans, has a mixed record of success.

## **Notes**

SB 1718 died on the House floor after being considered on the May 21 Major State Calendar. The HRO analysis of SB 1718 appeared in Part One of the May 21 *Daily Floor Report*.







# Exation and Revenue

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# Revisions to general revenue dedicated funds

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## HB 7 by Darby

*Generally effective June 14, 2013*

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**HB 7** modifies provisions governing general revenue dedicated funds, including fees, eligible uses of funds, and procedures.

**System Benefit Fund.** The bill adds a Sunset date of September 1, 2016, for the System Benefit Fund, after which its statutory authority will expire. For fiscal 2014-15, the Public Utility Commission (PUC) is required to set the System Benefit Fund fee at zero cents per megawatt hour.

Money in the System Benefit Fund must be used:

- to assist low-income electric customers during fiscal 2014 by providing a reduced rate for certain months at a rate of up to 82 percent;
- to assist low-income electric customers during fiscal 2015 and 2016 by providing a reduced rate for certain months at a rate of up to 15 percent; and
- to fund customer education programs and administrative expenses incurred by the PUC in implementing and administering electric utility statutes.

In addition, the bill makes an appropriation of \$500 million from the System Benefit Fund to the PUC to finance the reduced rate for low-income electric customers through fiscal 2014.

**Interest transfer.** With a few exceptions, all interest and other earnings that accrued on general revenue dedicated funds — any part of which may be counted toward budget certification — are available for any general governmental purpose and must be deposited into the General Revenue Fund.

**Change in eligible fund use.** Money in the trauma facility and emergency medical services account may be appropriated to the Texas Higher Education Coordinating Board for graduate-level medical or nursing education programs.

Emergency services telecommunications fees may be appropriated to the Texas A&M Forest Service for providing assistance to volunteer fire departments under certain circumstances.

Money in the Hazardous and Solid Waste Remediation Fees Account from the sale of batteries may be used through September 30, 2014, for environmental remediation at the site of a closed battery-recycling facility that meets certain conditions.

**Fee reductions.** Effective fiscal 2016, HB 7 eliminates a requirement that each institution of higher education set aside two dollars for each doctoral degree program student for the doctoral incentive loan repayment program. It abolishes the alternative fuels research and education fund and directs any remaining balance in that fund into the undedicated portion of the general revenue fund.

HB 7 reduces fees for the disposal of solid waste by about 25 percent, while exempting materials processed at a composting and mulch-processing facility from this fee. The bill increases by one-third (from 50 percent to 66.7 percent) the share of solid waste disposal revenue dedicated to various solid waste permitting and enforcement programs. There is a corresponding decrease in the share of revenue dedicated to local and regional solid waste projects consistent with approved regional plans.

**Specialty license plates.** No later than September 30, 2013, the comptroller must eliminate all dedicated accounts established for specialty license plates and set aside the balances of those accounts so they may be appropriated only for the purposes provided by the dedications. The fee for the dedicated accounts must be paid instead to the credit of an account in a trust fund the comptroller creates outside the General Revenue Fund. The comptroller administers the trust fund and may allocate the principal and interest on the accounts only in accord with the dedications.

**LBB recommendations.** HB 7 charges the Legislative Budget Board (LBB) with developing and implementing a process to review new legislative enactments that create dedicated revenue, as well as the appropriation and accumulation of dedicated revenue. The LBB must develop specific and detailed recommendations on actions the Legislature reasonably could take to reduce reliance on dedicated revenue for certification. These recommendations must be incorporated into the LBB's budget recommendations.

**Other provisions.** The bill modifies fees assessed against insurers to be the lesser of \$30 million per fiscal year or the amount necessary to collect enough revenue to cover general revenue appropriations from the volunteer fire department assistance fund for that fiscal year.

Revenue collected from the sale, storage, or use of sporting goods must be transferred to the Parks and Wildlife Department in sufficient amount to cover state contributions for certain employee benefits.

The bill adds to the oil and gas regulation cleanup fund fees collected by the Railroad Commission for processing certain letters of determination. The Railroad Commission is charged with using the oil and gas regulation and cleanup fund to pay for activities relating to the use of alternative fuels.

The bill requires the Texas Commission on Environmental Quality to prepare an annual report on leaking underground tanks. The report must include an investigation of the amount of fees necessary to cover the costs of concluding programs and activities related to the tanks before September 1, 2021.

## Supporters said

HB 7 would take key steps toward reducing reliance on general revenue dedicated funds for budget certification. Many of these changes came either directly or indirectly from recommendations in the LBB's January 2013 report on the issue.

While the Legislature has not spent dedicated funds for unintended purposes, it has been applying them toward budget certification for more than two decades. The comptroller recently estimated that about \$4.8 billion in general revenue dedicated funds would be available for appropriation in fiscal 2014-

15. Eliminating this balance through fee cuts, refunds, appropriations, and other measures will take time. HB 7, along with measures in the general appropriations act, would make significant progress in reducing the state's long-term reliance on unspent general revenue dedicated funds.

**System Benefit Fund.** The comptroller estimated the balance of the System Benefit Fund to be about \$810 million at the end of fiscal 2013. HB 7 would help eliminate unspent general revenue dedicated balances in the fund by:

- eliminating the System Benefit Fund fee on utility ratepayers;
- appropriating the majority of the funds in the account for fiscal 2014;
- continuing to appropriate unspent balances for fiscal 2015 and 2016; and
- sunsetting the System Benefit Fund at the beginning of fiscal 2017.

The bill would affirm the intent of the 83rd Legislature to phase out the long-standing practice of charging fees that are not ultimately spent for their stated purposes. Appropriating the balance of the state's largest general revenue dedicated account would send a clear message to the public and future legislatures that it is important to spend fees on the purposes for which they were collected.

**Change in eligible fund use and other procedures.** HB 7 would change the eligible uses of some funds and modify processes governing others. Increasing the range of eligible uses related to the funds' original purposes would enhance opportunities for the Legislature to spend the funds. State priorities change over time, and funding eligibility should be flexible enough to change with them. Adding to the eligible uses of these funds would provide flexibility without clouding the original purpose to which the funds were dedicated. For instance, adding graduate medical education to the eligible uses of the trauma facility and emergency medical services account would help fund an expense that is clearly related to the account's purpose but that now must be funded through general revenue or other means.

**Specialty license plates.** HB 7 would not have a substantive impact on specialty license plate funds but would free them, at long last, to be spent on their intended purposes. Moving the specialty license plate

funds outside of the treasury would eliminate more than 30 general revenue dedicated accounts and prevent their balances from being used for certification. This would remove the obstacles to spending the funds for their intended purposes.

## Opponents said

HB 7 would modify the purposes for which some key funds could be spent and would make potentially detrimental changes in some processes for others. Expanding the permissible purposes for which funds may be spent can be problematic when the original purposes still have significant unmet needs. For example, adding graduate medical education to the permissible uses of the trauma and EMS account could divert funds from the pressing needs that the account originally was established to address.

**System Benefit Fund.** The bill would eliminate the System Benefit Fund fee, which originally was designed to help offset increases on electric fees for low-income utility customers. Discontinuing the fee would make it impossible for the state to provide future assistance to low-income customers financially strapped by rising utility costs. The population of low-income and senior citizens that benefit from the electricity discount program funded by the fee will continue to be in need after the phase-out of the discounts is complete.

The state has other options to retain the fee and yet eliminate incentives to retain unspent money in the System Benefit Fund. For example, the Legislature could enact a law moving the System Benefit Fund outside of the state treasury, where it would not count as revenue for certification purposes. Keeping balances in the System Benefit Fund from being counted toward certification would allow the Legislature to continue collecting fees and appropriating them for their intended purpose.

## Notes

The HRO analysis of HB 7 appeared in Part One of the May 1 *Daily Floor Report*.

# Revisions to state franchise tax

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## HB 500 by Hilderbran

*Generally effective January 1, 2014*

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**HB 500** makes a variety of changes to the state franchise tax. It expands the types of businesses that qualify for a reduced tax rate for retail trade, and it grants a temporary reduction in the tax rate for fiscal 2014 and fiscal 2015. It also excludes a number of expenses from being counted as revenue and revises costs-of-goods-sold deductions available to certain businesses.

**Temporary franchise tax rate reductions.** HB 500 provides a temporary franchise tax rate reduction for fiscal 2014 and fiscal 2015. It reduces the taxable margin of an E-Z tax filer — a taxable entity whose total revenue from its entire business is not more than \$10 million — by 2.5 percent in fiscal 2014 and by 5 percent in fiscal 2015. It reduces the taxable margin of businesses engaged in retail or wholesale trade, which are taxed at half the rate of other businesses, by 1.25 percent in fiscal 2014 and 2.5 percent in fiscal 2015. For the tax reductions to take effect, the comptroller must certify that revenue is estimated to exceed projections, adjusted for expenses, in the Biennial Revenue Estimate for fiscal 2014-15.

**Total revenue exemption of \$1 million for the franchise tax.** HB 500 makes permanent the \$1 million small business franchise tax exemption, which otherwise would have expired December 31, 2013.

**Retail trade businesses.** HB 500 expands the types of businesses that are defined under the Tax Code as retail trade operations and therefore subject to a reduced margins tax. The types of businesses that fall under this expanded definition include:

- rental-purchase agreement activities regulated by Business and Commerce Code, ch. 92;
- various types of automotive repair shops; and
- businesses involved in renting or leasing various goods.

**Exclusions from revenue.** The bill also allows a number of businesses to exclude certain income from the taxable margin calculation. Under the bill:

- an entity providing a pharmacy network must exclude contractual reimbursements for payments to pharmacies within the network;
- an entity primarily engaged in transporting aggregates must exclude from total revenue subcontracting payments to independent contractors for the performance of delivery services on behalf of the taxable entity;
- an entity primarily engaged in transporting barite must exclude subcontracting payments to independent contractors for the performance of transportation services on the entity's behalf;
- an entity primarily engaged in performing landman services must exclude subcontracting payments to nonemployees for landman services on behalf of the taxable entity;
- any taxable entity must exclude the actual cost it paid for a vaccine;
- an entity engaged primarily in transporting commodities by waterways that does not subtract cost of goods sold must exclude the cost of providing inbound or outbound transportation services by waterways; and
- an entity registered as a motor carrier must exclude flow-through money derived from taxes and fees.

**Apportionment of costs.** HB 500 changes how various costs and receipts are apportioned for a business that has a presence in multiple states. It provides that a receipt from Internet hosting described by Tax Code, sec. 151.108 is a receipt from business done in the state only if the customer was located in Texas. In addition, it allows entities relocating to Texas from another state to deduct from taxable apportioned margin certain costs incurred for relocation.

**Rehabilitation of historic structures.** The bill creates a tax credit of up to 25 percent of eligible expenses incurred for the rehabilitation of certified historic structures. The credit may not exceed the amount of franchise tax an entity owed for a year and must be for eligible expenses for a certified historic structure placed in service on or after September 1, 2013.

**Costs of goods sold deductions.** HB 500 allows a pipeline entity to deduct as a cost of goods sold those costs incurred for operating and maintaining a pipeline it does not own.

## Supporters said

HB 500 would remedy a number of ills with the franchise or “margins” tax that have been plaguing businesses for years. The bill would address equity issues with the tax that are well known but have been allowed to continue because addressing them would be costly.

While enacting HB 500 would involve significant initial cost, the state would gain in the long term by ensuring that taxes were reasonable and predictable and by enhancing fairness and equity in the assessment of business taxes. These issues must be addressed now because they put Texas businesses at a competitive disadvantage and disrupt the state’s equitable and supportive business climate.

While some advocate for greater changes to the structure of the franchise tax and some favor its gradual elimination, changes of this magnitude appear to be politically impossible right now. The Legislature should not allow the perfect to be the enemy of the good. HB 500 would be a clear improvement over current law and practice.

**One million dollar tax exemption.** HB 500 indefinitely would extend the \$1 million franchise tax exemption to small businesses that would be significantly impacted by a tax hike. The 81st Legislature in 2009 adopted the temporary \$1 million exemption limit, which it raised from \$300,000. The 82nd Legislature in 2011 extended the \$1 million limit through fiscal 2012-13. With the state in a fiscally stable position, now is the time to finally end the ad hoc extensions of the small business tax exemption and set the \$1 million limit permanently in statute.

Failure to extend the \$1 million exemption would be dangerous and counterproductive. Small business growth has been and continues to be a vital component of economic recovery, primarily through the generation of jobs. Small businesses also contribute directly to state coffers by paying property and sales taxes. Failing to extend the exemption would deal a major blow to small businesses still emerging from the recession economy.

Subjecting small businesses to a higher burden would be counterproductive to goals of low unemployment, diverse economic growth, and widespread opportunity.

**Retail businesses.** Retail trade businesses have a lower proportional burden under the franchise tax. Many businesses that truly are retail enterprises, however, are classified as non-retail enterprises under current law or by an administrative interpretation. This misclassification puts these businesses at a competitive disadvantage with competing businesses granted the reduced retail tax rate.

HB 500 would correct well known instances of similar businesses being taxed at different rates due to a retail trade misclassification. For example, independent automotive repair shops are taxed at a higher rate (1 percent) than automotive repair shops attached to auto dealers (0.5 percent). Similarly, the rent-to-own business model is fundamentally based on selling products through a trial renting period. The primary difference lies in how the customer pays for the products. Independent equipment rental businesses directly compete with other retail businesses with rental components, such as Home Depot and Lowe’s, but have to pay a higher tax rate because they do not meet the 50 percent minimum requirement for retail trade.

In such cases, the current application of the franchise tax creates an uneven playing field for businesses with similar pursuits. Taxes must be equal and uniform, and making these changes now would represent a healthy stride in that direction.

**Exclusions from revenue.** Another arena in which the franchise tax falls short is in taxing businesses on expenses that should be exempt. Some businesses receive a large number of payments that are simply “passed through” to contractors, subcontractors, and to other entities working for that business. It is important to construct tax law to ensure that pass-through revenue is taxed only once and at its final destination.

HB 500 would help ensure that businesses were not taxed on pass-through revenue and that businesses in unique situations were not unduly burdened by tax rules. Providing for businesses in these unique situations, which are disproportionately impacted by the tax, would increase the overall equity and fairness of the franchise tax.

## Opponents said

According to the Legislative Budget Board, HB 500 would have a negative impact of almost \$715 million to the state in fiscal 2014-15. This would have a significant, indirect impact on general revenue funds by reducing franchise tax dollars flowing to the Property Tax Relief Fund, which was established by the Legislature in 2006 to offset reductions of school property taxes. Because revenue in the Property Tax Relief Fund is dedicated to public education, any reduction of revenue in the fund must be offset with general revenue funds. The Legislature should not contemplate measures that drain funds available for public education and other state priorities unless absolutely necessary.

## Other opponents said

HB 500, along with many proposed amendments, presents strong evidence that the franchise tax is deeply flawed and in desperate need of reform. Under the current tax, businesses are taxed on expenses that should be exempt, others pay unequal rates for similar activities, and still others must pay taxes for years in which they actually report a net loss of income.

HB 500 would put a dozen bandages on a patient without addressing the underlying ailment. Instead, the Legislature should look toward enduring solutions to the numerous problems that have plagued the tax.

One proposal for comprehensive reform would add a wind-down provision to the franchise tax. HB 509 by Murphy and HB 607 by Scott Turner, for instance, would reduce the rate of the franchise tax each year from fiscal 2014 to 2016 and finally eliminate the tax in fiscal 2017. While this would have a significant short-term negative impact to general revenue, the long-term net gain to the state from fostering an attractive business environment would be overwhelmingly positive.

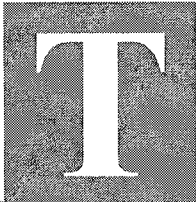
Another proposal would be to eliminate the current franchise tax and replace it with a business profits tax. The Texas Supreme Court recently confirmed that a tax on business profits would not violate the so-called "Bullock Amendment," which restricts taxes on a person's share of partnership and unincorporated association income. A tax on business profits, or net income, could simplify the franchise tax and end various problems and inequities created by the differential tax structure in current law.

## Notes

The HRO analysis of HB 500 appeared in Part One of the *May 7 Daily Floor Report*.







# Transportation

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# Banning texting while driving

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## HB 63 by Craddick *Died in Senate committee*

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**HB 63**, as passed by the House, would have made it a misdemeanor offense for a driver to use a handheld wireless communication device to read, write, or send a text message, instant message, e-mail, or other electronic message while operating a vehicle unless the vehicle was stopped. The Texas Department of Transportation would have had to post signs where interstate or federal highways entered the state informing drivers about the ban.

It would have been a defense to prosecution if a driver had been looking up a phone number or a name to dial a phone number; using voice operation, push-to-talk, a hands-free device, or a global positioning system; reporting illegal activity; summoning emergency help; reading information about an emergency; or relaying information as part of the driver's job. The bill would have exempted drivers of authorized emergency or law enforcement vehicles who were acting in an official capacity or drivers licensed by the Federal Communications Commission who were operating a radio frequency device.

A peace officer would have been prohibited from inspecting or taking possession of a wireless communication device involved in a violation. A telecommunications provider would have been allowed to provide records related to an alleged offense under the bill if a search warrant required it.

The bill would have preempted all local ordinances relating to using a wireless communication device while operating a motor vehicle that were adopted after September 1, 2011.

### Supporters said

HB 63 would improve public safety, save lives and send a clear, easily enforceable message that texting while driving is dangerous, costly, and affects everyone on the road. Studies show texting is more dangerous than intoxicated driving and increases the risk of a crash.

A texting ban would be similar to laws requiring drivers to wear a seat belt, hold a license, and have proof of automobile insurance. It would make roads safer for vulnerable people, including children, bicyclists, and those with disabilities. Texting while driving bans are widely supported nationwide.

The bill would be easily enforceable because law enforcement officers can visually identify texting drivers. A ban on texting while driving would be more effective than education alone. Statistics on seat belt laws show that Texans will do what the law asks. A uniform statewide law on texting while driving would make it easier for Texans to comply.

The bill would allow texting while driving to be the sole reason for a traffic stop because that is the only way an officer can prevent texting-related accidents before they happen. Otherwise, an officer would have to wait until a driver broke another law before the officer could stop dangerous behavior. Similarly, drunk driving laws work because they make intoxicated driving a primary offense.

The bill would allow the state to apply for federal MAP-21 grant funding to support enforcement of the law.

### Opponents said

HB 63 unnecessarily would micromanage the behavior of adults. More information and education about the dangers of texting while driving would be a better solution than criminalizing the behavior. Texas already has laws prohibiting teens from texting while driving. HB 63 would single out texting from among many types of potential distractions and unnecessarily increase government intervention.

While well intentioned, HB 63 could detrimentally affect public safety. One study found auto insurance claims increased in some states after a texting ban because drivers lowered cell phones to their laps to hide their texting, increasing driver distraction.

A texting ban would be difficult to enforce because law enforcement could not identify the difference between a texting driver and a driver using a phone for another purpose.

The bill also could increase opportunities for racial profiling by making texting while driving the sole reason for a traffic stop. More racial and ethnic minorities could be ticketed simply because an officer made an allegation that they were texting.

## Notes

The HRO analysis of HB 63 appeared in the April 17 *Daily Floor Report*.

HB 63 passed the House on April 18 but died in the Senate Transportation Committee. The Senate companion bill, **SB 28** by Zaffirini, died in the Senate Transportation Committee.

**HB 27** by Martinez Fischer, **HB 41** by Menendez, **HB 69** by Lucio, and **HB 108** by Harless also would have banned texting while driving under certain circumstances, but each bill died in House committee.

**HB 347** by Cook, which prohibits use of a wireless communication device in a school crossing zone or while operating a school bus with a minor passenger, passed the House on May 20 and takes effect September 1, 2013. The HRO analysis of HB 347 appeared in the April 22 *Daily Floor Report*.

# Increasing vehicle registration fees

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## HB 3664 by Darby *Died in the House*

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**HB 3664**, as reported by the House Appropriations subcommittee on Budget Transparency and Reform, would have raised by \$30 the fee for registration of certain vehicles. Annual motor vehicle registration fees would have increased:

- from \$30 to \$60 for a motorcycle or moped;
- from \$50.75 to \$80.75 for a vehicle with a gross weight of 6,000 pounds or less; and
- from \$45 to \$75 for a trailer, travel trailer, or semitrailer with a gross weight of 6,000 pounds or less.

The bill also would have increased from \$54 to \$108 the fees for vehicles from 6,000 to 10,000 pounds. Fees for various categories of vehicles heavier than 10,000 pounds each would have increased by \$60.

Proceeds from increased registration fees would have been deposited to the State Highway Fund (Fund 6), where one-third of the amount would have been dedicated to paying voter-authorized, transportation-related state debt as of September 1, 2013, until that debt was retired. The remainder could have been used only for acquiring rights-of-way and for planning, designing, and constructing non-tolled improvements to the state highway system.

When entering contracts using funds from the increased fees, TxDOT would have had to adhere to rules requiring that contract proposals include a historically underutilized business subcontracting plan.

Expenditures could not have been made from Fund 6 or the Texas Mobility Fund during a fiscal year to pay costs under comprehensive development agreements unless the Texas Department of Transportation (TxDOT) had a plan to:

- contract for TxDOT projects with the private sector in the fiscal year in a minimum amount of \$4 billion;
- spend at least \$400 million in the fiscal year for private sector engineering services to advance projects to be let directly by the department; and

- spend a minimum of \$250 million in the fiscal year in right-of-way acquisition for projects to be let directly by the department.

## Supporters said

HB 3664 would take a major step toward financing infrastructure investments needed to maintain a competitive business environment and superior quality of life in Texas, while reducing highway debt. The bill would not authorize a tax increase; instead, in keeping with the 90-year “pay-as-you-go” tradition of funding roads, it would increase user fees, such as motor fuels taxes, registration fees, title fees, and license fees.

The vehicle registration fee has not been meaningfully raised for more than 35 years, and the gasoline and diesel fuel tax has been set at a fixed rate of 20 cents per gallon for more than 20 years. The Legislature in 2009 did enact a fee simplification bill that raised fees on some older vehicles and reduced them on newer vehicles. It was designed to increase administrative efficiency and not to increase vehicle registration revenue.

HB 3664 would be a welcome departure from relying on debt and toll roads as primary mechanisms to fund highways. As of 2013, TxDOT has used a total of \$13 billion in bond authorization, with \$4.9 billion in authorized bonds yet to be used. Issuing these bonds will cost the state \$32.5 billion in total debt service. The agency’s main bond programs — State Highway Fund bonds, Texas Mobility Fund bonds, and general obligation highway bonds — are, for all intents and purposes, exhausted.

The ongoing crisis in highway funding in Texas has been delayed several years — first by the federal American Revitalization Act funds, and second by a \$5 billion general obligation bond appropriation made in fiscal 2009 and 2011. These infusions may have helped put off the transportation funding crisis a few years, but one-time measures are no remedy for terminal ills.

Other proposals to increase transportation revenue would either postpone the inevitable or create problems in other parts of the budget. Appropriating rainy day funds for critical highway projects simply would be another cash infusion designed to stave off hard decisions. One-time infusions do little to instill confidence that the Legislature is willing and able to make tough policy decisions to provide the infrastructure necessary for vibrant business activity, national and international trade, and a superior quality of life.

Appropriating motor vehicle sales taxes for transportation projects would divert funds from general purpose spending, about 80 percent of which goes to fund public education and health care. Moving funds away from these purposes would require the state to raise taxes or fees to make up the difference or significantly cut spending in key areas.

### **Opponents said**

HB 3664 would bring about a significant increase in user fees, which are no different in effect than taxes, on nearly all Texans without a clear and pressing reason for the increase. The amount of revenue flowing into Fund 6 has steadily increased every year for the past decade, and the 81st Legislature in 2009 enacted a measure that increased registration fees on most vehicles registered in Texas. The measure increased fees for vehicles older than six years and resulted in a significant net revenue gain to the state.

A primary problem with increasing vehicle registration fees is that they are regressive — that is, the burden of paying them falls proportionally heaviest on those who can least afford to pay more. The vast majority of Texans rely on motor vehicles as their primary source of transportation, and going without a vehicle is simply not an option for most. Registration fees fall heavily on working-class families, and those who cannot pay are forced to make difficult decisions.

There are better options. One proposal would dedicate some portion of motor vehicle sales tax receipts to fund highways, which would make sense in light of the source of the funds and would represent a potentially large and ongoing source of revenue for highways.

Another option would be to appropriate rainy day funds for highway projects, which is the goal of several bills considered by the 83rd Legislature. Rainy day funds could be appropriated without increasing the registration fee burden on nearly all Texans.

### **Notes**

The HRO analysis of HB 3664 appeared in Part One of the *May 9 Daily Floor Report*.

# Increased revenue for transportation

**SJR 1 by Nichols / HB 1 by Pickett, Third Called Session**  
*Effective upon voter approval at November 4, 2014 election*

**SJR 1** directs the comptroller to allocate to the State Highway Fund (Fund 6) one-half of the general revenue currently transferred to the Economic Stabilization (rainy day) Fund. The Legislature must, by statute, create a procedure whereby the amount allocated to the rainy day fund may be greater than one-half. Revenue transferred to Fund 6 under the bill may be used only for developing public roadways other than toll roads.

SJR 1 would apply to transfers the comptroller made after September 1, 2014.

**HB 1** is the enabling legislation for SJR 1, and it requires any amount transferred to Fund 6 under SJR 1 to be allocated throughout the state by the Texas Department of Transportation (TxDOT) consistent with existing formulas adopted by the Texas Transportation Commission.

**Sufficient balance.** HB 1 requires the comptroller to reduce or withhold allocations to Fund 6 as necessary to maintain a sufficient balance in the rainy day fund. The sufficient balance is to be determined by a select committee of members appointed by the speaker of the House and the lieutenant governor, with committees being appointed by September 1 of each even-numbered year. Under the bill, the sufficient balance requirement will expire at the end of 2024.

The committee will include five members each from the House and the Senate appointed by the speaker and lieutenant governor, respectively. It will be tasked with determining a sufficient balance based on:

- the history of fund balances;
- the history of transfers to the fund;
- estimated fund balances for the fiscal biennium;
- estimated transfers to the fund to occur during the fiscal biennium;
- information available to the committee on state highway congestion and funding demands; and
- any other information requested by the committee regarding the state's financial condition.

The committee's recommendation for a sufficient balance will be presented to each house in the form of a concurrent resolution during the legislative session following a sufficient balance recommendation. A majority in each chamber must approve, and potentially amend, the resolution by the 45th day of each regular legislative session.

**TxDOT efficiency savings.** HB 1 requires TxDOT to identify and implement \$100 million in savings and efficiencies in funds appropriated for fiscal 2014-15. The amount saved by the department is appropriated for fiscal 2015 for paying off State Highway Fund (Prop. 14) bond debt. TxDOT may use savings realized through operational efficiencies, cost reductions, or cost savings, but may not reduce the amount of funding available for transportation projects.

**Transportation committees.** The bill requires the speaker of the House and the lieutenant governor each to appoint a nine-member select committee on transportation funding. The two committees are charged with reviewing and evaluating topics specified in the bill and making joint recommendations to be presented in a report to the Legislature by November 1, 2014.

## Supporters said

SJR 1, in combination with its enabling legislation, HB 1, would take a key step toward securing critical funding for transportation projects in Texas. While far from providing a cure-all, the proposed resolution would present a politically viable means to secure a portion of the funding Texas needs to maintain roadway congestion at current levels, given population and economic growth. Although many options for highway funding have been discussed in the past three regular legislative sessions, these have not proved politically feasible.

SJR 1 would generate an estimated \$879 million for public highways in fiscal 2015, increasing to \$1.1 billion in fiscal 2018. This steady revenue stream would

send a message to citizens, crediting bureaus, and businesses that Texas is serious about financing critical transportation infrastructure.

**Dedicated funding stream for public roads.** SJR 1 would dedicate an additional, much-needed funding stream for the construction and maintenance of public, non-tolled roads. If approved, the amendment would represent a sharp departure from relying on debt and toll roads as primary mechanisms for funding highways. The amendment would make use of expected increases in oil and gas production tax remissions to increase funding for highways while retaining a solid reserve.

Texas since 2001 has relied on enhanced authority to issue bonds, borrowing from public and private interests, and concessions payments from private comprehensive development agreements (CDAs) to build and maintain toll roads. As of fiscal 2013, TxDOT's main bond programs — State Highway Fund bonds, Texas Mobility Fund bonds, and general obligation highway bonds — are, for all intents and purposes, exhausted.

The Legislature should take decisive action to instill confidence that it is willing and able to make tough policy decisions necessary to provide infrastructure for vibrant business activity, national and international trade, and a superior quality of life. SJR 1 would enable voters to show they were serious about increasing funding for critical infrastructure.

**Sufficient balance.** While SJR 1 would authorize a dedicated funding stream for transportation projects, it also would give the Legislature the means to ensure the availability of a minimum balance in the rainy day fund to respond to natural disasters and fiscal emergencies. HB 1, the amendment's enabling legislation, would call for the appointment of a committee of legislators to determine a sufficient balance for the rainy day fund, and the comptroller would reduce or withhold allocations to Fund 6 as necessary to maintain that balance.

The sufficient balance provision authorized by SJR 1 would strike a compromise between an automatic Fund 6 transfer, irrespective of the status of the Rainy Day Fund, and a constitutionally established floor under which no transfer would be made. Without a floor of any kind, a combination of unforeseen events could leave the Legislature with insufficient funds to finance emergency spending needs. A constitutionally

designated floor, on the other hand, might not provide the Legislature sufficient flexibility to meet varying needs each session.

SJR 1, in combination with HB 1, would provide an assurance that a sufficient balance remained in the rainy day fund while granting each Legislature license to address the needs of the time. In addition, HB 1, which would enable the Legislature to adjust a sufficient balance determination within the first 60 days of a regular session, would ensure proper legislative oversight in determining what the state should maintain as a reserve fund.

**Credit rating.** Contrary to claims otherwise, dedicating a revenue stream for key transportation infrastructure would help the state retain its strong credit rating. Instead of looking at a particular number or percentage in reserve, credit rating bureaus look for a balance between maintaining a healthy amount in reserve for unexpected events and using reserve funds for critical needs such as infrastructure and water. SJR 1 would strike this balance by appropriating funds for transportation only when there was a legislatively determined substantial balance in reserve for emergencies.

**Public approval.** If SJR 1 were enacted by the Legislature, it still would need to be approved by a majority of Texas voters in November 2014. This would provide a valuable opportunity to educate the public about the conditions of the state's roads and the need for enhanced funding for transportation infrastructure. Those promoting the initiative would be supporters of transportation funding who had a vested interest in ensuring that the public did not get the false impression that the measure would wholly satisfy the state's transportation funding needs.

## Opponents said

SJR 1 would not provide a solution to the state's serious, ongoing highway funding shortage and would not adequately safeguard emergency reserves in the rainy day fund.

**No additional revenue.** Because the proposed amendment would not authorize the collection of any additional revenue, in effect it would take money out of one fiscal pocket and move it to another. While this might not cause problems in times of plenty, it could

create some difficult choices in trying fiscal times. There was strong resistance during the 83rd Legislature's regular session to allowing the rainy day fund to drop below a certain amount, generally perceived to be about \$6 billion. Reluctance to drain the account below this level, coupled with the 50 percent dedication to highways proposed in SJR 1, could leave the Legislature with effectively little to spend for emergency purposes.

**Inadequate safeguard.** SJR 1 would provide no guarantee of a minimum balance in the rainy day fund before authorizing a transfer of funds to Fund 6. The amendment relegates this authority to each legislature, which is inevitably subject to the whims and political vagaries of any given legislative session. The rainy day fund transfer is designated in the Constitution in part to provide a well-protected reserve and to ensure continuity and stability. A constitutionally protected reserve is important for the state's ability to weather economic calamities and for its credit rating.

Failing to provide a constitutionally designated floor under which no transfer to Fund 6 would be made — such as has been considered and approved in previous versions of this legislation — would open the door to decisions that could leave future legislatures with shortfalls in revenue and a shallow reserve pool from which to draw.

**Prioritizing transportation.** The amendment would dedicate funds to transportation that are now available for general purpose spending, including core priorities such as public education. The state has needs in many areas of priority, and dedicating funds only to transportation would have the effect of elevating transportation above all other needs. This preference would become salient in the event the state experienced another fiscal downturn and lawmakers were forced to choose to fund other priorities with less in reserve.

In addition, the dedication to transportation would reduce the likelihood of the state reaching the rainy day fund ceiling of 10 percent of the total amount of general revenue deposited during the preceding biennium, after which that revenue would otherwise be made available for general- purpose spending.

**Credit rating.** A strong balance in the rainy day fund has been a great asset to the state, helping it retain a strong credit rating through the recession. Any measure that reduced the state's savings account could directly or indirectly harm its credit rating in the future by leaving less revenue in reserve for emergencies. Credit rating agencies do indeed look at the percentage of general funds that states keep in reserve for emergency spending. Allowing this reserve to fall below a well established threshold could jeopardize the state's rating, which significantly would increase the cost of borrowing and have other negative repercussions.

**False impressions.** SJR 1, which would have to be approved by voters, could create the impression among the general public that this measure was a remedy for the state's transportation funding woes. Because the measure would require a statewide vote, there likely would be a lot of campaigning about the need to fund transportation. It would be difficult to campaign to achieve success for the measure at the polls without also spreading the false notion that this measure would cure transportation funding ills. If SJR 1 were to pass, it would risk creating the same false expectations for transportation funding that the Texas Lottery did for funding public education.

## Notes

The HRO analysis of HB 1 appeared in the August 5 *Daily Floor Report* during the 83rd Legislature's third called session. The HRO analysis of HJR 1 by Pickett, the House companion to SJR 1, appears in the same floor report.



# Enhancing penalties for drivers at accident scenes

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**SB 275 by Watson/HB 3668 by Naishtat**  
*Effective September 1, 2013*

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**SB 275** increases from 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) the penalty for failing to stop and provide reasonable assistance in an accident resulting in the death of a person.

**HB 3668** requires a driver involved in an accident that results in or is reasonably likely to result in injury or death to determine immediately whether another person is involved in the accident and, if so, whether that person requires aid.

## **Supporters said:**

SB 275 and HB 3668 would help save the lives of people seriously injured in vehicle accidents. The bills would close loopholes in Texas' stop-and-render law that create incentives for drunk drivers to leave the scene of a collision.

Currently, drunk driving offenses resulting in death carry heavier penalties than the law against fleeing the scene of an accident. SB 275 would make the punishment for failing to stop and render aid in the event of a death equivalent to the penalty for intoxication manslaughter. This would eliminate incentives for drivers to flee the scene of an accident, only to sober up and claim later that they thought they had only struck an animal or that the accident was not serious.

By requiring drivers to determine the circumstances of an accident and to provide any necessary assistance, these bills would help injured people receive medical help more quickly. Under current law, the state must prove that a driver who left the scene of an accident did so knowing that another person was involved. HB 3668 would close this loophole by requiring a driver in an accident to determine whether another person was involved and whether that person was injured.

## **Opponents said:**

Penalty enhancement would not deter a person from fleeing the scene of an accident, particularly someone whose judgment was clouded by alcohol. The choice to flee an accident is usually spurred by panic rather than a cost-benefit analysis of the different penalties that could result. Even offenders capable of weighing the consequences still might flee in hopes of avoiding detection.

Enhancing the penalty for a crime that already is punished severely could be costly for Texas if it sent more people to prison for longer periods of time. HB 3668 also would place the driver in an unfair position of having to evaluate the potential for injury or death during a moment of crisis. Even in a case in which a driver met all of the requirements in the bill, the driver's actions and account of the events could be impugned without a proper witness.

## **Notes**

The House companion to SB 275 was HB 72 by Fletcher. The HRO analysis of HB 72 appeared in the May 3 *Daily Floor Report*. The HRO analysis of HB 3668 appeared in the May 4 *Daily Floor Report*.

# County energy transportation reinvestment zones

**SB 1747 by Uresti/ HB 2300 by Keffer**  
**Effective September 1, 2013**

**SB 1747** amends the Transportation Code to establish the transportation infrastructure fund (TIF) and a program to make grants to counties for transportation infrastructure projects in areas of the state affected by increased oil and gas production. The bill provides for grants to be allocated among counties and establishes requirements for matching funds, the application process, and the establishment of a county energy transportation reinvestment zone (CETRZ) in an area affected by oil and gas exploration and production activities. It establishes procedures for creating such a zone, including the establishment of a property tax increment account for the zone and provisions for its termination or extension.

SB 1747 requires that a county create an energy transportation reinvestment zone advisory board to be eligible for a transportation infrastructure project grant. It provides for alternative formation of a road utility district with the same boundaries as a CETRZ to help the county develop a transportation infrastructure project.

**Transportation infrastructure fund and grant program.** SB 1747 establishes a state TIF to administer a grant program for a CETRZ to alleviate degradation to roads, bridges, and other infrastructure caused by oil and gas exploration. The fund is dedicated in the state treasury and consists of federal grants, state matching funds, money appropriated by the Legislature, gifts and grants, fees paid into the fund, and investment earnings on the money deposited in the fund.

The Texas Department of Transportation (TxDOT) must develop procedures and may adopt rules to implement and administer the grant program. Grants distributed each fiscal year are allocated among counties as follows:

- 20 percent according to weight tolerance permits;
- 20 percent according to oil and gas production taxes;
- 50 percent according to well completions; and
- 10 percent according to the volume of oil and gas waste injected.

A county may apply for a grant by submitting to TxDOT a resolution creating the CETRZ and a plan that describes the scope of the county's projects and provides for matching funds. The county must provide at least 20 percent in matching funds for a project unless TxDOT determines that the county is economically disadvantaged, in which case it must provide 10 percent.

**County energy transportation reinvestment zones.** SB 1747 allows a county to designate an area as a CETRZ and to promote one or more infrastructure projects in the area. The order designating an area as a CETRZ must describe the zone's boundaries, take immediate effect, and establish a property tax increment account for the zone.

The amount of a county's tax increment for a particular year is the amount of property taxes levied and collected by the county for that year on the captured appraised value of real property in the reinvestment zone. The captured appraised value is the total appraised value taxable by the county – less the tax increment base – of real property located in the reinvestment zone. The tax increment base of a county is the total appraised value of all real property taxable by the county and located in a transportation reinvestment zone for the year in which the zone was designated.

The commissioners court must pledge all the captured appraised value of the property in the CETRZ to infrastructure projects and comply with TxDOT regulations on CETRZ funding. The county must hold a public hearing at which interested parties may speak for or against the CETRZ.

The CETRZ ends after 10 years unless it is extended by the county commissioners for up to five more years. Any money remaining from the tax increment after the life of the CETRZ would be transferred to a road-and-bridge fund for the county.

**CETRZ advisory boards.** Each county must create an advisory board for its CETRZ to be eligible to apply for TIF money. The advisory board must include up to three local oil and gas company representatives and two

public members, none of whom may be compensated for their participation. Jointly administered zones are advised by a single joint board.

## Supporters said

SB 1747 would address transportation infrastructure and resulting safety needs in areas of the state in which roads have been directly damaged from oil and gas traffic. Along with the economic benefits that have accompanied the state's increased oil and gas exploration, some areas have experienced a severe, negative impact on transportation infrastructure. Many affected counties are struggling to maintain damaged roads and address safety concerns. The bill would address these issues in a financially responsible way, providing immediate relief to affected counties, while also creating a long-term tool for county governments to repair their roads.

The bill would not appropriate new funds but would establish a state fund for the purpose of distributing grants to counties. The supplemental appropriations bill, HB 1025 by Pitts, contains \$225 million for the capitalization of the TIF. The funding mechanism in SB 1747 would allow counties to capture the appraised value of real property above their tax increment base to finance the debt that pays for the project.

By requiring TxDOT to consider weight tolerance permits, oil and gas production taxes, well completions, and the volume of oil and gas waste injected when making decisions about distributing grants to counties, SB 1747 would ensure that the grants were proportional to their oil-and-gas-related activities.

## Opponents said

According to the Legislative Budget Board, the bill would cost the state \$2 million per fiscal biennium to capitalize the TIF. In addition, allowing local governments to commit a portion of property taxes to transportation projects would commit resources that otherwise would be available for schools, police, fire protection, parks, and other important priorities.

Establishing additional transportation reinvestment zones represents a potential expansion of the troublesome practice of using local property taxes to fund transportation projects that the state should be

contributing more to implement. Oil and gas exploration has buoyed the entire state economy, and severance taxes have filled the rainy day fund while counties have been stuck with the check for fixing damaged roads.

## Other opponents said

The increased funding resulting from tax increment financing would be insufficient to pay for repairs to damaged county roads that were not intended to bear the sort of traffic that comes with oil and gas exploration. A larger appropriation from the rainy day fund would be necessary to meet infrastructure needs that will only grow.

Energy companies should be expected to pay more directly for the roads they are degrading. The Legislature should consider implementing some sort of cost-sharing arrangement that would appropriately distribute the burden between local government and the oil and gas companies causing the damage.

## Notes

The HRO analysis of SB 1747 appeared in Part Three of the May 20 *Daily Floor Report*.

The 83rd Legislature enacted a related bill, **HB 2300** by Keffer, which allows a county to finance transportation infrastructure projects by establishing a CETRZ but does not contain the provisions in SB 1747 establishing the TIF and the grant program. HB 2300 passed on the House Local, Consent, and Resolutions Calendar and was not analyzed in a *Daily Floor Report*.

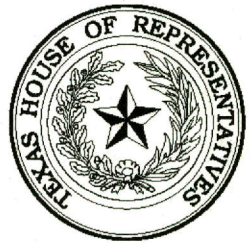


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John H. Reagan Building  
Room 420  
P.O. Box 2910  
Austin, Texas 78768-2910  
(512) 463-0752

[www.hro.house.state.tx.us](http://www.hro.house.state.tx.us)

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