HOUSE RESEARCH ORGANIZATION

special legislative report

MAJOR ISSUES OF THE 74th LEGISLATURE REGULAR SESSION

October 18, 1995

Number 194
October 18, 1995

MAJOR ISSUES OF THE 74th LEGISLATURE, REGULAR SESSION

The 74th Texas Legislature enacted 1,088 bills and adopted 14 joint resolutions during its regular session, after considering over 5,100 measures filed. This special legislative report provides an overview of some of the session’s significant legislation, summarizing both proposals that were enacted and some that were not. Also included is a brief review of the arguments offered for and against each measure.

The list of measures reviewed is a sampling and is not intended to be comprehensive. Some legislation has been summarized in greater detail in other reports recently published by the House Research Organization:


- Special Legislative Report Number 193, Vetoes of Legislation, 74th Legislature, June 28, 1995, summarizes the governor’s veto messages and includes responses from the authors and sponsors of vetoed bills;

- Session Focus Report Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes changes in tort law;

- Session Focus Report Number 74-14, "New Code Governs Public Schools," August 3, 1995, reviews SB 1 by Ratliff (Sadler), revising the Education Code provisions affecting public schools;

- Session Focus Number 74-15, Fourteen Amendments on November Ballot, September 25, 1995, analyzes the 14 proposed amendments on the November 7, 1995, ballot.

Steering Committee:
Henry Cuellar, Chairman
Carolyn Park, Vice Chairman

Tom Craddick
Renato Cuellar
Dianne White Delisi
Robert Duncan
Harold Dutton
Roberto Gutierrez
Peggy Hamric
John Hirschi
Robert Junell
Mike Krusee
Al Price
Leticia Van de Putte
Steve Wolens
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<th>Percent Enacted</th>
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<td>3,237</td>
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<td><strong>Senate bills</strong></td>
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<td><strong>HJRss</strong></td>
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<td><strong>SJRs</strong></td>
<td>56</td>
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<tr>
<td><strong>TOTAL joint resolutions</strong></td>
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<td>14</td>
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*Includes vetoed bills — 14 House bills and ten Senate bills

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Source: Legislative Information System (LIS)

House Research Organization
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Establishing a DNA database

HB 40 by McCall, Van de Putte, Oakley et al.
Effective September 1, 1995

HB 40 requires the Department of Public Safety (DPS) to establish and maintain a computerized database to classify, match and store results of analyses of deoxyribonucleic acid (DNA), genetic material that can be used to identify an individual from fluids such as blood or semen. The database is to contain records of adults and juveniles convicted of certain crimes, deceased crime victims, specimens from crime investigations and records of unidentified missing persons, close relatives of missing persons and of persons at risk of being lost, such as children or mentally incapacitated persons, if required by a court or consented to by a parent or guardian.

The database can be used for criminal investigations or prosecutions into sex-related offenses or other offenses, recovering or identifying human remains from a disaster or for humanitarian purposes, identifying missing persons and establishing population statistics. The database cannot be used to obtain information about physical traits or predisposition for disease unless this information is related to another purpose of the system. Database records can be released only in specified ways. Database records are confidential and not subject to disclosure under the open records law. DPS is required to establish standards and regulations for DNA analysis by DNA laboratories. The database must be compatible with the national DNA identification index system.

Supporters said HB 40 would help in fighting crime and locating missing persons. Sex offenders often repeat their crimes, and establishing a database would let law enforcement officers compare database DNA from across the state and in the federal database against DNA from physical evidence gathered after a crime. Approximately 25 other states and the federal government are authorized to keep DNA records. DNA databases pose no more threat to privacy rights than the statewide fingerprint database, and the bill contains numerous safeguards to prevent potential abuse.

Opponents said a DNA database could infringe on the right to privacy, vastly increasing the amount of information the government has on file about citizens. DNA technology is not foolproof, and a database could cause law enforcement officers to unreasonably focus only on those in the database when looking for suspects and cause courts to overestimate the reliability of the data. A DNA database could be misused by those outside of law enforcement.

The HRO analysis appeared in the April 18 Daily Floor Report.
Preventing negligent gun storage

HB 44 by Edwards, Greenberg, J. Jones et al.
Effective September 1, 1995

HB 44 establishes penalties for the illegal storage of guns and requires gun dealers to post a warning regarding the offense. A person commits a Class C misdemeanor, with a maximum fine of $500, if a child age 16 or younger gains access to the person’s readily dischargeable gun and the person with criminal negligence had failed to secure the gun or left the gun where the owner knew or should have known that a child would gain access. A person has an affirmative defense to prosecution if the child’s access to the gun was supervised by an adult for hunting, sporting or other lawful purpose; involved the lawful defense of people or property; was gained by unlawful entry of property; or occurred when the actor was engaged in an agricultural enterprise. If a child discharges a firearm and causes bodily harm to self or others, the offense is a Class A misdemeanor, with a maximum penalty of one year in jail and a $4,000 fine.

HB 44 also requires gun dealers to post conspicuously on their premises a sign in one-inch block letters stating, "It is unlawful to store, transport, or abandon an unsecured firearm in a place where children are likely to be and can obtain access to the firearm." School districts are encouraged to conduct gun safety programs; however, a school district may not require a student to participate in a firearms safety program if a parent sends written notice to the district exempting the student from the program.

Supporters said the bill would force gun owners to recognize and address the inherent danger of having firearms available around children. HB 44 would provide an effective incentive for gun owners to store their guns safely away from children.

Opponents said most Texas gun owners store their weapons safely out of the reach of children. Moreover, any gun owners who improperly store guns would not be deterred by a misdemeanor penalty. Rather than inhibiting the right of Texans to keep guns in their own homes, the state should make gun-safety education mandatory.

The HRO analysis appeared in the March 29 Daily Floor Report.
Justified use of deadly force

HB 94 by Kamel et al.
Effective September 1, 1995

HB 94 creates a justification for a person to use deadly force in self defense against someone who at the time deadly force is used is committing unlawful entry into the person’s home and eliminates a requirement that the person prove that a reasonable person would not have retreated. The bill also provides an affirmative defense in a civil suit for personal injury or death if the defendant was justified in using deadly force against a person committing unlawful entry into the defendant’s home.

Supporters said a peculiarity of Texas law has created several situations in which persons who have defended themselves against intruders in their homes have been found guilty of homicide, faced civil liability or both. Persons who are at home and use force to defend their lives against an intruder are considered justified in using deadly force only upon a finding that a "reasonable person" in the same situation would not have retreated. Eliminating the retreat requirement would still leave ample safeguards against the unwarranted use of force and require that other justifications for the use of deadly force be met. The bill would not broaden the no-retreat provision beyond a person’s immediate residence and would not cover areas such as garages.

The bill would not eliminate the right to sue for personal injury or prevent the survivor of a person allegedly killed by the justified use of deadly force from bringing a wrongful death action. It would merely provide an affirmative defense to avoid civil liability. A court could still find that a person’s use of deadly force was not justified and impose liability.

Opponents said it is unnecessary to use deadly force if there is a reasonable way to avoid a confrontation, as the retreat requirement specifies. HB 94 would encourage people to engage in frontier-style justice, allowing them to shoot first and ask questions later. The retreat requirement is an easy way to distinguish between defendants who really had no choice but to use deadly force and those who could have reasonably retreated. This bill would make it more difficult to prosecute false claims of the justified use of deadly force. The retreat requirement is a clear and easy way for prosecutors to defeat a false claim that deadly force was justified.

The HRO analysis appeared in the March 28 Daily Floor Report.
HB 327 makes numerous changes in the juvenile justice system, including:

- lowering from 15 to 14 years old the age at which juveniles can be tried as adults for some serious crimes;
- adding new offenses to those that allow juveniles under determinate sentencing to be sent for specified terms to the Texas Youth Commission with a possible transfer to the adult system and setting minimum terms that must be served before these offenders can be paroled without court approval;
- requiring decisions about prosecuting some juveniles to be made by prosecutors;
- outlining a progressive sanction model that local juvenile boards can adopt to impose incrementally more serious sanctions on offenders as the seriousness of the offenses increases;
- establishing a statewide juvenile justice information system and loosening restrictions on the photographing and fingerprinting of juveniles;
- requiring parental attendance at juvenile hearings; and
- authorizing the establishment of intermediate sanction facilities.

Intervention and prevention provisions require the Department of Protective and Regulatory Service (PRS), subject to the availability of funds, to award community grants to alleviate conditions that lead to juvenile crime and outline a PRS program for early intervention efforts for at-risk youth.

HB 327 allows persons age 14 or older to be tried as adults for capital murder, aggravated controlled substance felonies or first-degree felonies. Juveniles age 15 or older can also be tried as adults for second-degree, third-degree and state jail felonies. Juveniles who have previously been certified as adults and found guilty of an offense will automatically be certified for trial as adults for subsequent felony charges.

HB 327 adds nine offenses, including sexual assault, aggravated robbery, aggravated assault and criminal attempt to commit certain serious offenses, to those that can result in a determinate sentence of a specified number of years in the Texas Youth Commission (TYC) and subsequent transfer to the adult prison system and also allows juveniles convicted of habitual felony conduct to receive determinate sentences.

HB 327 outlines a progressive sanctions model that local juvenile boards can adopt for determining sanctions to be imposed on juvenile offenders. The model has seven sanction levels for the disposition of juvenile cases. The sanctions become incrementally more stringent as the offenses become more serious and include minimum probation terms, required restitution or community service, required participation of juveniles and parents in court-designated programs, restrictions on the
child's activities, requirements for the child's behavior, monitoring by probation officers, commitment to residential programs, commitment to TYC and parole restrictions.

**Supporters** said the juvenile justice system was designed to deal with truants, runaways and offenders who commit petty crimes, not the often-violent offenders of today. The system must be reformed to address the surge in juvenile crime, ensure meaningful consequences for juvenile offenders and help protect public safety. Younger juveniles are committing serious violent crimes, and more of them, including 14-year-olds, should be processed through the adult criminal system. Expanding determinate sentencing would assure juveniles of harsh punishment for violent offenses, yet allow for a second chance since juveniles could be sent to the adult system or remain in the youth system. The minimum and maximum terms established in HB 327 would ensure that violent offenders are dealt with appropriately through confinement and require TYC to keep juveniles long enough to ensure meaningful rehabilitation. The progressive sanctions model outlined in HB 327 would establish uniform guidelines for graduated, incrementally more serious sanctions against juvenile offenders. This would let juvenile offenders know there are more severe consequences for each offense and help reduce repeat offenses.

**Opponents** said many proposals in the bill would make the system more like the adult criminal system and replace the county-based system with a statewide system. Lowering the age for trying juveniles as adults would erode the separation between the juvenile and adult justice systems. Most children who break the law should be dealt with in the juvenile system, and only the most violent and serious offenders should be treated like adults. Expanding determinate sentencing would result in more juveniles being moved into the adult prison system where their chances of being rehabilitated are small. The progressive sanctions model could be the first step leading to mandatory sentencing and reducing the discretion of juvenile courts.

**Other opponents** said HB 327 would not go far enough and should mandate that local juvenile boards adopt the progressive sanctions model so that all offenses would be dealt with swiftly and appropriately. The progressive sanctions model is meaningless unless fully funded by the state.

The **HRO analysis** of HB 327 appeared in the March 22 *Daily Floor Report* and a summary of the conference report appeared on May 28.
HB 466 allows a criminal justice agency to compile criminal information into a system by computer or otherwise to investigate or prosecute the criminal activities of criminal combinations (three or more persons who collaborate in criminal activities, i.e. gangs). A criminal justice agency may release criminal information on request to another criminal justice agency, a court or an adult defendant entitled to the information. Criminal information relating to a child associated with a combination may be released to a criminal justice agency or court regardless of the age of the child. A criminal justice agency may release information to an attorney representing a child if it is material to the proceeding and not privileged under law.

A local criminal justice agency may not send to a statewide database information compiled under the bill. A person who knowingly uses the criminal information for an unauthorized purpose or who releases the information to an unauthorized person or agency commits a Class A misdemeanor, with a maximum penalty of one year in jail and a $4,000 fine. Information must be destroyed after two years if the individual has not been charged with criminal activity.

Supporters said the prohibition against sharing criminal gang information about youths thwarts police attempts to apprehend gang criminals and track particular gang members' movements around the state. The information allowed to be shared under HB 466 could only be used as an investigatory tool by the law enforcement officers. A prosecutor would still have to prove beyond a reasonable doubt that an individual committed a crime even if that individual was included in a gang-related crimes system.

In addition, only criminal information relating to a child associated with a gang could be entered into the computer system to be shared among law enforcement agencies. The mere fact that a person was a friend of a gang member would not qualify that person for entry into the gang information compilation system.

Opponents said HB 466 would effectively authorize police to routinely "round up the usual suspects." No particular probable cause or reasonable suspicion would be needed, and any gang member would be vulnerable to arrest. First Amendment rights to freedom of association might suffer, as a juvenile might be suspect merely because he regularly played basketball with gang members.
Notes. The original bill was amended to provide that criminal information may only be released on request, to prohibit creation of a statewide database system of the criminal information and to add the provision about destruction of information after two years.

The HRO analysis appeared in the April 24 Daily Floor Report.
Restricting release on mandatory supervision

HB 1433 by Hamric, Place, Talton, Gallego, Culberson
Effective September 1, 1996

**HB 1433** prohibits release on mandatory supervision of persons previously convicted of one of the offenses for which mandatory supervision is denied or for a felony for which a deadly-weapon finding was made by the court. Other persons may not be released on mandatory supervision if a parole panel finds that their good conduct time inaccurately reflects their potential for rehabilitation and that their release would endanger the public. The panel’s decision is not subject to administrative or judicial review. If release is denied, the parole panel must reconsider the person for release on mandatory supervision at least twice in the two years after the initial decision.

**Supporters** said HB 1433 would ensure that the most dangerous felons are not eligible for automatic release when their calendar time served plus good conduct time equals their sentence. Prohibiting persons who have a *previous* conviction for an offense that is ineligible for mandatory supervision from being released on mandatory supervision, whatever their current offense, would close the door on early release for potentially dangerous repeat offenders. Parole panels should have discretion over the process so offenders are not automatically set free with no consideration of their records and potential threat to the public. Prison beds and state resources should be used to keep these serious, repeat offenders off the streets.

**Opponents** said denying eligibility for release on mandatory supervision to persons on the basis of their previous offenses would be unfair. Changing mandatory supervision release from a requirement that persons be released to a requirement that parole panels not release persons if certain conditions are met could give offenders a "liberty interest" in the panel’s decision, forcing the state to provide a higher level of due process. The bill could increase demand for prison capacity, which could mean additional costs. Any available criminal justice resources would be better spent on funding juvenile justice efforts.

The **HRO analysis** appeared in the May 11 *Daily Floor Report.*
**Prison, parole and probation revisions**

**HB 2162 by Hightower**

*Generally effective September 1, 1995*

**HB 2162** amends the statutes governing the Texas Department of Criminal Justice (TDCJ) and those affecting prisons, probation and parole.

**State jails and transfer facilities.** HB 2162 eliminates a prohibition against using state jails as transfer facilities (lock-ups for persons awaiting transfer to state prisons for whom all processing has been completed) that would have begun September 1, 1997, and prohibits the placement in state jails of inmates who are eligible to be in transfer facilities and who are violent, assaultive or would increase the likelihood of harm to the public. The maximum time inmates can be confined in transfer facilities is changed from 12 months to the maximum term that can be served by state jail felons (currently 24 months). HB 2162 authorizes the community justice assistance division and the state jail division jointly to develop state jail programs. TDCJ may use state jail felons for any institutional division work or community service program and use institutional division inmates in any work or community service program of the state jail division.

**Substance abuse felony program.** HB 2162 reduces the minimum number of beds that TDCJ must provide for the Substance Abuse Felony Program (SAFP) from 12,000 to 5,200 and reduces the minimum number of beds for the in-prison therapeutic communities (IPTC) program from 1,700 for male inmates and 300 for female inmates for fiscal 1995 and beyond to 800 beds for all participants. The minimum sentence to a SAFP facility as a condition of community supervision is lowered from six months to 90 days. SAFP facilities may be used for persons in the IPTC program, and persons in the SAFP and the IPTC program may be commingled. TDCJ must project at least every two years whether more beds are needed for the programs. The bill also eliminates a requirement that TDCJ contract through the Texas Commission on Alcohol and Drug Abuse for the services. The bill adds *attempted* sex crimes to the offenses making an offender ineligible for SAFP placement.

**Other provisions.** TDCJ may transfer correctional facilities to other state agencies, and the TDCJ board may sell real property, following guidelines established in the Natural Resources Code, and sell directly to local governments property to be used for a correctional facility.

HB 2162 delays the scheduled review of TDCJ under the Texas Sunset Act from 1997 to 1999 and requires that the Board of Pardons and Paroles be reviewed under the Sunset Act before the 1997 legislative session, but does not abolish the board.
The bill repeals a requirement that TDCJ admissions be governed by a policy that allocates admissions to counties based on seven factors; TDCJ is instead required to adopt an admission policy that allows the institutional division to accept inmates within 45 days of the completion of processing paperwork. HB 2162 also changes the calculation of formula funding for state aid for local community supervision (probation) departments, basing it on the percentage of the state’s population in the counties served by the department and the department’s portion of all felony probationers and allows the TDCJ board to limit the department’s benefit or loss due to the new formula.

Other provisions of the bill include:

• eliminating TDCJ’s authority to grant furloughs from prison for reasons "determined appropriate," requiring inmates released for the newly-named emergency absences, such as for medical treatment or to attend a funeral, to be under physical guard and allowing for furloughs from state jails;

• prohibiting use of inmates to train attack dogs without the inmate’s permission;

• repealing a provision that allows time served in jail as a part of probation for intoxication offenses to count toward a jail term later imposed if probation is revoked;

• allowing the pardons and parole division to assume custody of persons for preparole transfer facilities up to one year, instead of 180 days, before their presumptive parole date and extending this authority to persons being released on mandatory supervision; and

• eliminating a requirement that the Texas Commission on Alcohol and Drug Abuse establish a treatment alternative to incarceration programs in certain large counties, allowing local community supervision and corrections departments to establish the programs and authorizing TDCJ’s community justice assistance division to adopt standards for the programs.

Supporters said the bill would help ensure efficient operation of the criminal justice system. Allowing offenders to stay in transfer facilities longer than one year is necessary for the state to meet its statutory duty to accept from county jails inmates sentenced to TDCJ within 45 days of the completion of processing paperwork and would be an efficient use of empty state jail beds. HB 2162 would ensure that state jails serving as transfer facilities hold only lower-risk offenders by prohibiting the placement of inmates who are violent, assaultive or a danger to the public in the facilities. Having the state jail division and the community justice assistance division share responsibilities for programs in the state jails would ensure use of broad expertise and that the jails emphasize community corrections.
The original mandates for 12,000 SAFP beds and 1,700 IPTC beds have no scientific or empirical basis, and the demand for the programs could be handled with fewer beds. Reducing the mandated number of SAFP beds would free funds for other programs.

Repealing the current TDCJ admissions formula is necessary to ensure that the state complies with the statutory duty to accept inmates. HB 2162 would also create a fairer system of state aid for local probation departments by replacing an outdated formula with a fair, dependable one that balances rural and urban interests.

**Opponents** said extending the maximum length of stay in transfer facilities would move the facilities one step closer to being prisons. These facilities were not designed to be long-term lock-ups; they lack some of the programs and work industries in prisons. The public was promised that state jails would not be allowed to be used as transfer facilities after September 1, 1997, yet HB 2162 would eliminate that safeguard. HB 2162 should give clear authority for all state jails and their programs to one entity — the state jail division — to ensure that policies and standards are consistent.

Reducing the required number of SAFP beds to 5,200 and reducing the number of IPTC beds could result in a backlog of persons waiting to get into the programs and would be a retreat from the state’s commitment to deal with substance abuse as a root cause of crime and to reduce recidivism.

The **HRO analysis** appeared in the April 24 *Daily Floor Report*. 
SB 15 enhances punishment for repeat state jail felonies and makes numerous other changes to the Penal Code and other statutes governing offenses and procedures in the criminal justice system. Persons convicted of a state jail felony who have received a final conviction for two previous state jail felonies must be punished for a third-degree felony, and persons convicted of a state jail felony who have received two final convictions for two previous felonies (one occurring after the other) must be punished for a second-degree felony. For a person previously convicted of a felony, judges may suspend a state jail sentence and order community supervision or order that the sentence be executed, instead of having to suspend all state jail felony sentences. Judges are authorized to extend the maximum period of community supervision for a state jail felony from five years to 10 years. SB 15 increases the "up front" county or state jail time that can be imposed on state jail felons and allows state jail terms as a part of deferred adjudication given for a state jail felony.

SB 15 adds sexual assault of a child to the offenses listed in the Code of Criminal Procedure art. 42.12, sec. 3g that preclude judge-ordered probation and make offenders ineligible for parole until their time served, without consideration of good conduct time, equals one-half of their maximum sentence or 30 years, whichever is less, but at least two years. The bill adds two circumstances to the factors that can define non-consent in sexual assault cases: mental health services providers who cause patients or former patients to submit by exploiting the patients' emotional dependency and members of the clergy who exploit a person's emotional dependency on them. SB 15 makes sexual assault an aggravated offense if a victim is over 64 years old.

Assault that causes bodily injury is raised from a Class A misdemeanor to a third-degree felony if it is committed against someone the offender knew was a public servant who was lawfully discharging duties or in retaliation for those duties. Assault that involves threats of bodily injury or physical contact is raised from a Class C misdemeanor to a Class A misdemeanor when committed against an elderly or disabled person.

SB 15 also amends statutes on driving, boating and flying while intoxicated, by:

- increasing the minimum term of confinement from 15 days to 30 days for second offenses;
- eliminating a provision that gave offenders credit for jail time served as a condition of community supervision if the probation was revoked and another jail term imposed;
- requiring in some cases that a breath-analysis mechanism be installed on the cars of persons charged with certain intoxication offenses and lowering the number of previous convictions for some offenses that require that a mechanism be installed; and
• requiring judges to suspend for 90 days the driver’s license of persons younger than 21 years old who are convicted of certain intoxication offenses and placed on probation.

The bill also allows metropolitan and regional transit authorities and city transit departments to prohibit alcohol consumption on their property.

Other provisions of SB 15 include:

• allowing evidence of other crimes or acts committed by a defendant against an alleged child victim of certain sex crimes to be admitted as evidence in a court;
• changing the enhancements for offenses committed in drug free zones so that an offense punishable as a state jail felony is punished as a second-degree felony and an offense punishable as a second-degree felony is punished as a first-degree felony;
• removing a qualification in the hate crimes statute that made the law applicable in cases in which victims were selected primarily because of the offender’s bias or prejudice against a person, leaving a qualification that makes the law applicable when bias or prejudice against a group is found;
• amending statutes governing the carrying of weapons to specify that peace officers are allowed to carry weapons while off-duty;
• changing the penalties for theft of livestock;
• creating a Penal Code definition of a criminal street gang;
• creating offenses for preventing execution of civil process, stealing cable television service and, under the cruelty to animals offense, tripping a horse;
• limiting to 500 inmates a work program involving the employment of Texas Department of Criminal Justice (TDCJ) inmates by private industry;
• changing statutory references to the capacity at which the prison system can operate and references to when the population may be over that capacity; and
• amending statutes governing courts of inquiry and adding to the rights of witnesses called before a court of inquiry.

Supporters said SB 15 would fine-tune the state jail felony sentencing system and get tough on repeat offenders within the fiscal constraints of the state budget. By enhancing the penalties for state jail felons who have previously committed felonies, SB 15 would allow repeat felons to "graduate" to the prison system and increase flexibility in the punishment of repeat state jail felons by giving judges the option of suspending state jail sentences or ordering them executed.

The state should ensure that persons who sexually assault children spend at least half of their sentences or 30 years and a minimum of two years in prison. Sex offenders tend to be repeat offenders who prey on the most vulnerable members of society. The bill would also get tough on persons who drive while intoxicated by increasing the minimum confinement term for repeat offenders. The law on admissibility of evidence in child sex abuse cases was changed by a 1992 court ruling and should be restored.

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Opponents said it is too soon to make major changes in the state jail punishments and enhancements that have only been in operation since September 1994. One of the original concepts behind state jails was that persons who commit nonviolent, low-level offenses should be judged on those offenses and stay in the state jail system instead of displacing a violent felon in prison.

Lengthening the list of "3g" offenses by adding sexual assault of a child would disturb the balance of penalties created when the Penal Code was revised in 1993 and could leave prosecutors unable to craft a plea bargain down to sexual assault when persons are accused of aggravated sexual assault or indecency with a child, already "3g" offenses. Overturning the recent court decision relating to the admissibility of evidence in child sexual abuse cases that involve a family member is unnecessary because modern juries readily believe that family sexual assault occurs and because evidence of extraneous acts is admissible in more appropriate ways. The statutory changes relating to prison capacity would not make any significant difference in the daily operation of the Texas prison system because capacity is governed by other statutes and findings and the inmate population already is generally about 98 percent to 99 percent of capacity.

Other opponents said SB 15 does not go far enough in making needed changes to the state felony punishment system. The requirement that state jail sentences automatically be suspended and the offender placed on community supervision should be eliminated so that judges and juries have greater discretion. The punishment range for state jail felons should be increased to allow longer sentences.

Notes. Changes from the House-passed version included: changing the punishment enhancements for repeat state jail felonies and the up-front jail time guidelines; eliminating provisions that would have lowered the definition of intoxication from .10 percent to .08 percent blood alcohol, prohibited open containers of alcohol in cars and raised intoxication manslaughter from a second-degree to a first-degree felony if more than one person were killed; eliminating punishment enhancements for assault or intoxicated assault against pregnant women; eliminating a defense for horse tripping in connection with an ongoing rodeo event or in practice for the event; and eliminating provisions that would have made sexual assault of an adult a "3g" offense if the offender had a previous conviction for certain sex crimes, required a two-thirds vote of the entire membership of the board of pardons and paroles to grant parole to certain sex offenders, and enhanced penalties for certain repeat sex offenders.

The HRO analysis appeared in the May 22 Daily Floor Report.
Voluntary castration of certain sex offenders

SB 40 by Bivins, Sims
Died in the House

SB 40 would have allowed Texas Department of Criminal Justice (TDCJ) inmates who met specified criteria and were convicted of certain sex crimes against children to volunteer for an orchietomy. (Orchietomy, also called castration, is the surgical removal of one or both testicles.) TDCJ physicians could have performed an orchietomy on an inmate who had been convicted of indecency with a child, sexual assault of a child or aggravated sexual assault of a child and had a previous conviction for one of the same offenses; who had volunteered for the procedure and given informed consent; who was at least 21 years old; who had been evaluated and counseled before the procedure by a psychiatrist and a psychologist; and who had consulted with a monitor appointed to assist the inmate with the decision. Defendants and prosecutors would have been prohibited from offering evidence before sentencing that the defendant planned to undergo an orchietomy. Judges and parole panels could not have required a person to undergo an orchietomy as a condition of community supervision (probation) or parole.

Supporters said castration would be a medical treatment option to help child sex offenders control their sexual compulsion. The state should do all it can to help protect children from sex offenders, who tend to repeat their crimes. Several European countries have used castration to treat sex offenders and have reduced recidivism rates. Safeguards such as only allowing volunteers to be castrated, requiring screening, counseling and the appointment of an outside monitor and prohibiting any reduction in punishment or the use of the procedure as a condition of probation or parole would ensure the procedure would not be abused.

Opponents said castration is a primitive, inhumane method of treating sex offenders that would be more a punishment than a treatment. Allowing voluntary castration could lead to its use as a punishment or a prerequisite to sentencing or lead inmates to mistakenly believe that they would have their punishments reduced if they volunteered for the procedure. The effects of castration are unclear, and the state should not sanction an unproven, irreversible procedure that is tantamount to mutilation. Many sex crimes are crimes of violence that would continue despite orchietomy. The effects of castration can be at least partially undone by testosterone supplements and implants, and some offenders remain dangerous despite castration.

Notes. SB 40 was reported favorably by the House Corrections Committee but was set on the calendar too late for consideration.

Prohibiting restoration of good conduct time

SB 44 by Shapiro
Effective September 1, 1995

SB 44 prohibits the Texas Department of Criminal Justice (TDCJ) from restoring good conduct time forfeited when an inmate in the institutional division or a transfer facility commits an offense or violates a rule or when an offender's parole or mandatory supervision is revoked.

TDCJ must award county jail prisoners who are transferred to TDCJ good conduct time in amounts set for entry level in TDCJ. Inmates in transfer facilities are to earn good conduct time and be subject to good conduct time rules as if they were in the institutional division. SB 44 eliminates the requirement that TDCJ's classification of inmates consider the inmate's criminal history, making the classification dependent on the inmate's conduct, obedience and industry.

Supporters said SB 44 would codify current TDCJ board policy to ensure that good conduct time that is forfeited — no matter what the reason — is not restored to inmates. Some of the current liberal good time polices were adopted to help deal with an overcrowded prison system. With the recent expansion in prison capacity good conduct time should be restored to its use as a reward for good behavior and hard work. Other changes would ensure that persons transferred to TDCJ from county jails are awarded entry-level good conduct time instead of a higher amount; SB 44 would require that classification of inmates be based on inmates’ behavior in TDCJ itself.

Opponents said SB 44 could infringe on the TDCJ board’s authority to set good time policy. The board should retain authority over good-time policy so it can quickly and flexibly respond to changing circumstances.

The HRO analysis appeared in the May 22 Daily Floor Report.
**Life in prison for repeat sex offenders**

**SB 45** requires a sentence of life in prison for persons convicted of specified sex crimes who have been convicted of two previous felonies, one of which was a sex crime specified by the bill. SB 45 applies to persons convicted of aggravated sexual assault; aggravated kidnapping with intent to violate or abuse the victim sexually and first-degree burglary committed with intent to commit aggravated sexual assault, aggravated kidnapping with sexual intent, indecency with a child or sexual assault.

Persons serving life sentences under SB 45 are not eligible for parole until they have served, without good conduct time, at least 35 years and can be released on parole only on a two-thirds vote of the entire membership of the 18-member Board of Pardons and Paroles. SB 45 applies to offenses committed on or after September 1, 1995. The bill also requires that persons convicted of indecency with a child involving sexual contact or aggravated sexual assault receive a two-thirds vote of the entire membership of the Board of Pardons and Paroles to be released on parole, and applies this requirement to offenses committed before, on or after September 1, 1995. Before board members can vote on the parole release of any person requiring a two-thirds vote of the board, including capital felons, they must first receive a written report from the Texas Department of Criminal Justice on the probability that the inmate will reoffend.

**Supporters** said SB 45 would ensure that repeat, violent sex offenders receive life sentences that require at least 35 years in prison. Currently, offenders who commit the heinous crimes enumerated by SB 45 may serve only one-fourth to one-half of their sentences. SB 45 could help prevent tragedies like the death of 7-year-old Ashley Estell of Dallas, who was killed by a convicted sex offender on parole after serving only 18 months of a 10-year sentence. The gravity of the crimes and the importance of decisions about parole in these cases dictate that members of the Board of Pardons and Paroles receive a report about the offender and that any decisions in favor of parole be considered by the entire board and approved by a two-thirds vote.

**Opponents** said SB 45 would unwisely curtail courts’ sentencing discretion by mandating life sentences for certain offenders. SB 45 would erode 1993 Penal Code reforms that established punishment ranges rather than sentencing mandates. Persons with the repetitive, violent criminal history described by SB 45 are already being dealt with harshly and most likely are receiving long prison sentences. Also, a two-thirds vote of the Board of Pardons and Paroles before paroling a person should be used only in the case of capital felonies. Statutorily requiring a psychiatrist report before a vote can be taken by the board could raise due process issues and procedural delays.

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

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SB 46 requires the Texas Department of Criminal Justice (TDCJ) to immediately make a reasonable attempt to notify a crime victim, the victim’s guardian, or, if the victim is deceased, the victim’s close relative if the person who committed the offense against the victim escapes from a TDCJ institutional division facility, if the victim has registered with TDCJ. Victims, guardians or close relatives must request notification of an escape and must keep TDCJ informed of any address change. An attempt by TDCJ to notify the victim, guardian or close relative at the last known telephone number or address in the department’s records is considered a reasonable attempt.

Supporters said SB 46 would enhance crime victims’ rights and ensure that victims who want to be informed if an offender escapes from prison are notified by TDCJ. Victims deserve to be kept apprised of important events concerning their case and aware of a potentially dangerous situation.

SB 46 would codify a current policy under which TDCJ notifies persons registered in a victim notification database if an offender escapes. SB 46 would require victims to supply current information to TDCJ and ensure that the department would only be responsible for notifying a victim at the latest address in its files.

No apparent opposition.

The HRO analysis appeared in the May 22 Daily Floor Report.
Victim notification of offender probation conditions

SB 47 by Shapiro et al.
Effective September 1, 1995

SB 47 requires local community supervision and corrections departments to make a reasonable effort to notify crime victims, victims' guardians or, if victims are deceased, a close relative, if the offender who committed the crime against the victim is placed on community supervision (probation), of the conditions of community supervision and of the date, time and location of any hearing at which the conditions of community supervision may be modified or probation revoked or terminated. An attempt by a department to give notice to a victim, guardian or close relative at the last known telephone number or address in the department's records is considered a reasonable attempt.

Supporters said SB 47 would enhance crime victims' rights and ensure they are notified when important decisions are made concerning their cases. Crime victims deserve to be fully informed of the criminal justice process and important events concerning their cases, especially if an offender is being given probation and the victim could be subject to a potentially dangerous situation.

SB 47 would not be a burden for probation departments, which often have automated case filing systems and already have to handle victim inquiries about probation. The bill would establish a uniform statewide policy for informing victims and would require only that authorities notify the victim, or make a reasonable attempt, using the last known telephone or address in their files.

Opponents said SB 47 could be a burden on local probation departments. Some handle a large volume of cases, and others have small staffs. Notifying victims of hearings to modify or revoke probation could be particularly burdensome since one probationer may have numerous hearings, and the hearings are often set and reset more than once. Probation officers often have large caseloads, and the requirements in this bill could add to their work. While some local probation departments have automated case files, others do not or are only partially automated.

The HRO analysis appeared in the May 22 Daily Floor Report.
**Victim appearance before parole panel**

**SB 48 by Shapiro et al.**

*Effective September 1, 1995*

**SB 48** requires parole panels when considering granting parole to an offender to allow crime victims, their legal guardians or close relatives of deceased victims to appear in person before board members and present a statement about the offense, the offender and the effect of the offense on the victim. If more than one person is entitled to appear before the board, only the person chosen by all of those entitled to appear as a representative may appear. Prosecutors are required to give crime victims written notice of their right to appear before members of the Board of Pardons and Paroles.

**Supporters** said SB 48 would ensure that crime victims have direct input into parole decisions. Although persons can currently send written statements to parole board members, victims deserve the right to appear in person and offer their stories and opinions.

This bill would codify a current practice of allowing victims to request an appearance before parole panel members. Judging from current requests, the parole board members would not be overwhelmed with requests for such face-to-face meetings, and the criminal justice policy impact statement on the bill estimates no significant impact of the workload of state agencies. In addition, the bill would allow only one victim, guardian, close relative of deceased victims or a representative of all those entitled to appear to meet with board members. It would be inappropriate for the state to dictate how a representative would be chosen.

**Opponents** said parole board members might be overwhelmed with requests to meet with victims, and the bill would leave unclear how a representative of persons entitled to appear would be chosen.

The **HRO analysis** appeared in the May 19 *Daily Floor Report.*
License to carry concealed handgun

SB 60 by Patterson et al.
Effective September 1, 1995

SB 60 allows persons to be licensed by the Department of Public Safety (DPS) to carry a concealed handgun in certain public places, sets eligibility requirements for licenses and establishes application procedures. Licenses will take effect starting January 1, 1996. The licensing eligibility requirements include being at least 21 years old and a Texas resident for at least six months, having a clean criminal record, not chemically dependent or of unsound mind, not delinquent on taxes or child support payments administered or collected by the attorney general, not in default on a student loan and not under a court protective order or restraining order affecting a spousal relationship.

Licensees must obtain a handgun proficiency certificate by taking a DPS-developed course and exam from a licensed handgun instructor. The course must include classroom and range instruction, a safety and proficiency demonstration by the applicant and 10 to 15 hours of instruction on weapons laws and the use of deadly force; handgun use, proficiency and safety; nonviolent dispute resolution; and proper gun storage. Application fees are $140, and licenses will be good for four years. SB 60 makes it an offense to carry a handgun and intentionally fail to conceal it and prohibits licensees from carrying handguns, concealed or not, in certain places, including: correctional facilities; some businesses with alcoholic beverage licenses and permits; the premises of high school, collegiate or professional sporting events; hospitals; certain amusement parks; the premises of a church, synagogue or other place of religious worship; and government meetings. It is a Class A misdemeanor, with a maximum penalty of one year in jail and a $4,000 fine, for license holders to carry a handgun, concealed or not, while intoxicated. Public and private employers may prohibit licensees from carrying a concealed handgun on their premises.

Supporters said properly trained citizens with clean criminal records should be able to carry handguns away from home to protect themselves and to deter crime. Allowing Texans to carry concealed handguns would force criminals to think twice before victimizing citizens. Recent surveys indicate that guns help deter crime. In other states violence has decreased after approval of right-to-carry legislation, yet only about 1 percent to 4 percent of a state’s population typically obtains concealed handgun permits. At least 22 states allow most citizens to carry concealed handguns.

Most firearm accidents, suicides, domestic violence and crimes of passion occur in the home, where Texans already can legally carry handguns. Most police officers and some police organizations support concealed-carry proposals that allow properly trained, law-abiding citizens to protect themselves when the police cannot. Licensing safeguards would ensure that only law-abiding, mentally competent and properly trained people get handgun licenses. Ten to 15 hours of training would ensure that
licensees know about guns and gun safety. The bill would allow handguns to be carried in most public places but prohibit them from the places that might present unique circumstances such as bars or sporting events.

State legislators are elected to represent the people of Texans and to make decisions about state law, and no referendum on the bill is necessary.

Opponents said allowing Texans to carry handguns in public would not deter crime or decrease violence but would instead result in more random violence, deaths, accidents, crimes of passion, domestic violence and suicides. Carrying a handgun is a poor means of personal protection and may create a false sense of security. Experience in other states has shown that increasing the number of legal gun users does not necessarily reduce crime. Gun violence is increasing, and putting more guns on the streets would only increase it further. Controlling criminals is the job of law enforcement, the courts and the penal system, not average citizens.

Increasing the number of handguns and handgun users would result in increases in gun-related accidents, domestic violence, crimes of passion and suicides. Allowing Texans to carry concealed weapons would further endanger police officers. Background checks would have to rely on insufficient criminal records, medical records and self-disclosure. The 10 to 15 hours of instruction is inadequate to prepare licensees to make proper decisions about using a gun. No law can ensure that handguns will be used safely and legally. The bill would not sufficiently restrict where concealed handguns can be carried.

Texans should be allowed to vote on this important issue, especially because most polls in recent years show Texans about evenly split on the question.

Notes. The final version of the bill omitted House-passed requirements for a nonbinding referendum on the gun law and that licensees have 15 to 30 hours of instruction on specific topics.

Prohibiting sex offenders from specified areas, programs

SB 111 by Shapiro et al.
Effective September 1, 1995

SB 111 requires judges who assign community supervision (probation) and parole panels granting parole to persons convicted of certain sexual offenses against children to require as a condition of probation or parole that offenders stay out of established "child safety zones."

Offenders must be prohibited from supervising or participating in athletic, civic or cultural programs that involve persons 17 years old or younger and from going in, on or within a specified distance, to be determined by the judge or parole panel, of premises where children commonly gather, including day-care facilities, playgrounds, youth centers, public swimming pools and video arcades. Probation and parole officers can allow offenders to enter child safety zones on an event-by-event basis if certain conditions are met. Offenders can ask a court or a parole panel to modify the child safety zone if it interferes with the offender's ability to attend school or hold a job and creates an undue hardship or because the zone is broader than necessary to protect the public, given the nature and circumstances of the offense.

Offenders also must be ordered to attend psychological counseling sessions with an individual or organization, specified by the judge or probation or parole officer, that provides sex offender treatment or counseling. Probation and parole officers are required to monitor an offender's attendance at treatment sessions.

The requirements apply to offenders who commit crimes against children and are placed on community supervision for, or are paroled after serving a sentence for: sexual performance by a child; possession or promotion of child pornography; indecent exposure; indecency with a child; sexual assault; aggravated sexual assault; prohibited sexual conduct (incest); aggravated kidnapping with the intent to violate or abuse the victim sexually; or first-degree felony burglary with the intent to commit felony indecency with a child, sexual assault, aggravated sexual assault, prohibited sexual conduct or aggravated kidnapping with sexual intent.

The bill also requires terms of between five and 10 years for judge-ordered community supervision for an offender guilty of a felony listed in the bill. Community supervision terms given as a part of deferred adjudication cannot be less than five years for felonies listed in the bill and for indecency with a child, sexual assault and aggravated sexual assault, regardless of the age of the victim. In deferred adjudication cases, judges may dismiss the proceedings and discharge the person only if the person has served at least two-thirds of the community supervision term.
Supporters said child safety zones would help keep known child sex offenders who are on probation or parole away from children. These offenders are often repeat offenders, and for some, even casual contact with children can lead to another crime. Any inconvenience to offenders would be minimal when weighed against the possible harm to children of allowing these offenders to move freely among them. Statewide standards for child safety zones are needed because probation and parole conditions vary.

The bill recognizes that offenders need to reintegrate with their families and society and would allow offenders to be around children under controlled conditions. Offenders could ask for a modification of a zone under certain circumstances. SB 111 would also require that offenders be ordered to participate in a treatment program as a condition of probation or parole and that their attendance in the program be monitored. Judges and probation and parole officers should be allowed the discretion to choose individuals or organizations to provide treatment to offenders.

Opponents said it is unnecessary to have a statewide law specifying conditions for probationers and parolees convicted of certain sex crimes. Judges and parole panels have broad authority to place appropriate conditions on probationers and parolees. Mandating certain parole and probation conditions would reduce judges’ and parole panels’ flexibility.

Child safety zones could unreasonably restrict sex offenders from certain areas and could make it difficult for them to reintegrate into work and family. Other laws and city ordinances could be used to deter persons from committing an offense.

Other opponents said the bill should specify that probationers and parolees must receive treatment from providers who are registered with the state Council on Sex Offender Treatment.

The HRO analysis appeared in the May 22 Daily Floor Report.
Stalking definition, victim notification, civil liability

SB 126 and SB 124 by Moncrief et al., HB 43 by McCall et al.
Effective June 14, 1995

SB 126 eliminates a requirement in the definition of harassment, including stalking, that at least one occasion of the harassment have taken place after the victim had reported the offense to a law enforcement agency. The bill also moved the portion of the harassment offense dealing with stalking to a new section of the Penal Code specifically governing stalking.

Supporters said SB 126 would close a loophole that give stalkers "one free stalk," which endangered victims because they had to notify police at least once before an offense took place. SB 126 would help protect victims by allowing a suspect to be arrested when law enforcement authorities are called the first time. Because a pattern of behavior and a threat of injury would still have to be present, this bill would not affect behavior other than the criminal offense of stalking.

Opponents said the requirement that at least one previous stalking incident be reported to law enforcement authorities was designed to limit abuses and false reports. Eliminating this requirement could increase the chance that an alleged stalking victim could have an innocent suspect arrested.

SB 124 requires that before a person who has been arrested for stalking is released on bail, the law enforcement agency holding the person must make a reasonable attempt to notify the alleged victim or a representative of the victim. An attempt by the law enforcement agency to notify the victim at the last known telephone number or address in its records is considered a reasonable attempt.

Supporters said requiring jail officials to make reasonable attempts to notify stalking victims before a person accused of stalking is released on bail would allow victims to make necessary arrangements for safety. Stalkers often return to harm or threaten their victims, who should be given every opportunity to protect themselves. Having the law enforcement agency notify the victim would cut down on daily, or even hourly, calls to the authorities, reducing the burden on both the victim and the agency. SB 124 would not be a burden for law enforcement agencies because it would apply only to stalking offenses, and the agencies would only have to notify the victim or make a reasonable attempt, by using the last known telephone number or address.

Opponents said the notification requirement could be a burden on law enforcement agencies, especially small ones without jail staff. Victims of other crimes — such as domestic violence, sexual assault or hate crimes — may ask for similar notification.
HB 43 creates a civil cause of action by stalking victims to sue stalkers for damages and recover actual and exemplary damages. HB 43 outlines specific criteria that victims must show to prove the harassing behavior that defines stalking. Harassing behavior is defined as conduct directed specifically toward a person, including following them, that is reasonably likely to harass, annoy, alarm, abuse, torment or embarrass the person. Proof of the harassing behavior must include evidence other than the claimant’s own perceptions and beliefs. In most cases the stalking behavior must be reported to the police in order to prove stalking.

Supporters said HB 43 would make stalkers financially liable for their actions and act as an additional deterrent. The civil action created by HB 43 might be the only remedy for victims in cases in which stalking is prosecuted as or plea bargained to a lesser offense or not taken seriously by law enforcement authorities. Victims would be able to recover for damages such as slashed tires or broken windows and for expenses for such as moving, therapy or bodyguards and to recover additional money to punish and deter the stalker. HB 43 would guard against suits over innocent behavior by establishing reasonable threshold conditions that must be met to prove harassing behavior and requiring proof beyond a victim’s own perceptions.

Opponents said allowing victims to recover damages from accused stalkers could distort the criminal justice system by leading victims to pursue criminal charges more zealously because a criminal conviction would make it easier to recover civil damages. HB 43 could clog the court systems by resulting in two trials, one civil and one criminal, for the same behavior.

Spouse's testimony privilege in family violence cases

SB 128 by Moncrief, et al.
Effective September 1, 1995

SB 128 directs that the spousal adverse testimony privilege, allowing persons to choose whether or not to testify against their spouse, does not apply in a proceeding in which the accused is charged with committing a crime against the spouse, a minor child or a member of the household of either spouse.

A summons issued to a person accused of domestic violence must state that it is an offense to intentionally influence or coerce a witness to testify falsely, withhold testimony or harm or threaten a prospective witness.

Trial courts must give preference to hearings and trials of criminal actions involving family violence over other criminal actions except those against defendants who are detained in jail pending trial.

Rule 504(2)(b)(1) of the Texas Rules of Criminal Evidence, providing for the spousal testimony privilege, is repealed. Also, the Court of Criminal Appeals is required, by January 1, 1996, to adopt rules regarding the training of prosecuting attorneys relating to family violence cases.

Supporters said the spousal adverse testimony privilege has created situations in which an abusive spouse can threaten, coerce or physically harm the abused spouse in order to keep that spouse from testifying. In non-spouse abuse cases, once the accused knows the victim may be compelled to testify, 90 percent of such cases are successfully prosecuted through negotiated pleas. But when spouses are involved, nearly 50 percent of such cases are dismissed because of the spousal privilege rule. The spousal privilege does not protect family harmony because the domestic violence has already shattered that harmony.

Opponents said SB 128 would not help to empower abused spouses, but would instead strip them of an essential right. Forcing spouses to testify against each other would inflame already tense situations, which would only further unsteady an already difficult relationship and create explosive consequences. Abused women who do not wish to testify for fear of further harming their relationship would be placed in the unenviable situation of either perjuring themselves or being held in contempt of court for not testifying. Such extreme penalties for simply trying to avoid further trouble could have the undesired consequence of causing more women to avoid reporting abuse.

The HRO analysis of HB 35 by Greenberg, the companion to SB 128, appeared in the April 12 Daily Floor Report.
SB 141 would have amended Code of Criminal Procedure art. 42.014 to require that if a court determined beyond a reasonable doubt in the punishment phase of a trial that the defendant intentionally selected the victim or property damaged because of the race, color, disability, religion, national origin or ancestry, or sexual orientation of the victim or owner of the property, the court would have to make an affirmative finding of that fact in the judgment to enhance the penalty.

Applicability of the section would have been limited to the punishment phase of trials brought under Penal Code secs. 28.02, 28.03 and Title 5, which address arson, criminal mischief and offenses against a person, including assault.

SB 141 would have amended Penal Code sec. 12.47 so that an enhanced punishment would not apply to a Class A misdemeanor, but if the offense was a Class A misdemeanor, the minimum term of confinement would be 180 days. This section would not have applied to the trial of an injury offense to a disabled individual under Penal Code sec. 22.04 if the court's affirmative finding showed that the defendant intentionally selected the victim because the victim was disabled.

Supporters said the bill would have given effect to the hate crime legislation enacted last session by conforming current law to language approved by the U.S. Supreme Court in 1993. The current law is not used because of the likelihood that it is unconstitutionally vague. Crimes that are committed because of a person's prejudice are morally reprehensible and should be punished more severely.

Opponents said increasing protection for certain groups would subvert Texas law that holds that human life has the same value, regardless of race, sex, or religion, by stipulating that punishment can vary according to characteristics of the person injured. The state should protect all of its citizens equally. Including the term "sexual orientation" would have legitimized and condoned homosexuality and might have lead to protected class status for homosexuals.

Notes. SB 141 was reported favorably by the House Criminal Jurisprudence Committee but was tabled by the House. SB 15 by Whitmire, which make numerous revisions to the Penal Code and the Code of Criminal Procedures, changed the hate crimes statute to provide a court finding that a victim was selected primarily because of bias or prejudice against a person is no longer enough for an affirmative finding.
in a case brought under the statute. Now a finding must be made that a victim was selected primarily because of bias or prejudice against a group in order to enhance the penalty for a hate crime.

The HRO analysis appeared in the May 19 Daily Floor Report.
SB 267 expands the list of offenses that require sex offenders to register with local law enforcement authorities, who must forward the information to the Department of Public Safety (DPS), and requires public notification of the whereabouts of freed prisoners convicted of certain sex crimes against children. The bill applies the registration requirements to persons convicted of or receiving deferred adjudication for aggravated kidnapping if it is done with intent to violate or abuse the victim sexually and first-degree felony burglary if it is committed with the intent to commit certain sex offenses. The requirements apply to convictions (but not deferred adjudication) for the second, instead of the fourth, offenses for indecent exposure and to convictions for attempts to commit the applicable offenses.

SB 267 requires local law enforcement authorities, upon receiving a registration form, to verify the age of the victim, and, if the victim is younger than 17 years old, to immediately publish in a local newspaper the following information: the offender’s age and gender; a description of the offense; and the city, street name and zip code of the registrant. Notice also must be provided to the public school superintendent in the area. Persons can petition courts for an injunction to stop a newspaper notice from being published. Courts may grant any injunctive relief, including stopping the publication, if the person proves that the publication would place the person’s health and well-being in immediate danger.

DPS is required to maintain a computerized central database with only the sex offender registration information. Some of the information in the database, along with similar information on sex offenders from local law enforcement authorities and penal institutions, is considered public information and may be released upon request.

SB 267 also amends prerelease notification and change-of-address procedures to require that the written judgment of a court state the age of the victim and that registration is required.

Supporters said that communities need to know certain sex offenders have moved into an area so they can protect themselves and their children and that the right to know overrides any privacy interests of the offender. SB 267 would allow persons to request information about sex offenders from DPS and local law enforcement authorities. SB 267 contains safeguards to prevent vigilantism and harassment of sex offenders and would allow offenders to ask a court to stop a newspaper notice if the person would be put in danger. Other provisions of the bill would revise the current sex offender registration system to include more offenders, to make sure that offenders are aware of the requirements and to ensure registration information is passed among
the prison system, probation and parole officers, the courts and law enforcement authorities.

**Opponents** said community notification of a sex offender’s offense and address would infringe on the constitutional right to privacy, impede rehabilitation of those who have paid their debt to society and imply a lack of trust. Community notification after persons are released from prison or while persons are on probation is constitutionally questionable and in some cases would amount to punishment *after* offenders have finished their sentence and an increase in the penalty for certain offenses. Public notification in other states has led to vigilantism. Public notification would not protect society from sex offenders but would promote a false sense of security. SB 267 does nothing to increase the treatment needs of ex-offenders.

**Notes.** In HB 1379 by Allen, Greenberg et al., the 74th Legislature extended the length of time during which registration is required. For persons convicted of indecency with a child involving sexual contact, aggravated sexual assault or sexual performance by a child, there is no expiration of the duty to register. For persons convicted of offenses other than indecency with a child involving sexual contact, aggravated sexual assault or sexual performance by a child, the duty to register with local law enforcement authorities lasts until the 10th anniversary of the date the offender is released from prison, probation or parole, whichever is later, and for persons given deferred adjudication, until 10 years after criminal proceedings are dismissed or, if the case is finally adjudicated, the date the person is released from the Texas Department of Criminal Justice (TDCJ) or discharged from probation or parole. For persons who commit offenses while juveniles, the duty to register lasts until the 10th anniversary of the date the person is released from Texas Youth Commission (TYC) supervision, the date the offender was discharged from TYC or TDCJ if the offender was given a determinate sentence or, if the person was not committed to TYC, the date the disposition is made or the person completes the disposition, whichever is later.

HB 1379 requires courts to inform an offender who is subject to the registration requirements about them upon sentencing and to complete the registration form and send it to the DPS and to a prison or local law enforcement authorities.

The **HRO analysis** of SB 267 appeared in the May 15 *Daily Floor Report* and the analysis of HB 1379 in the May 9 *Daily Floor Report*. 

House Research Organization

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Death sentence appeals and appointed counsel for indigents

SB 440 by Montford et al.
Effective September 1, 1995

SB 440 requires the appointment and compensation of counsel in applications for writs of habeas corpus in death penalty cases, establishes time lines for the filing of applications and sets up a system for appointing counsel in trials, direct appeals and appeals to the U.S. Supreme Court. (Habeas corpus appeals challenge convictions on grounds of violations of constitutional rights and may be pursued only after a conviction and death sentence have been affirmed by the Texas Court of Criminal Appeals on direct appeal.)

Applications for writs of habeas corpus must be filed within 45 days after the state’s original brief is filed on direct appeal. Writs may be filed after the deadline if good cause is shown or under certain circumstances, including if the factual or legal basis for a claim was unavailable or if, except for a U.S. constitutional violation, no rational juror would have found the person guilty or given the death sentence. The bill establishes deadlines for state responses to the writ application and other filings.

The Court of Criminal Appeals must appoint attorneys for all indigent inmates sentenced to death after September 1, 1995, who want counsel to file a writ of habeas corpus. The court is to appoint the counsel immediately after the final judgment under rules and standards it adopts. The bill also makes provisions for appointment of counsel to file a writ of habeas corpus for some inmates sentenced to death before September 1, 1995. The court is required to reasonably compensate from state funds attorneys appointed for habeas corpus applications and may reimburse attorneys for expenses to investigate habeas claims.

The administrative judge in each of the state’s nine administrative judicial regions is to appoint a selection committee to adopt qualifications for attorneys appointed for trial, direct appeal and federal review in death penalty cases. The presiding judge of the district court in which a capital murder case is filed is required to appoint a lead trial attorney from a list of attorneys who meet the standards. Attorneys appointed for trial and direct appeal are to be paid by the counties.

SB 440 also sets guidelines for setting execution dates, changes execution times from any time before sunrise on the execution day to any time after 6 p.m. on the execution day, and limits court consideration of subsequent applications for a writ of habeas corpus in non-death penalty cases.

Supporters said SB 440 would help ensure fair, thorough and timely litigation of death sentence appeals and restore public confidence in the death penalty. The automatic, timely appointment of legal representation would expedite habeas corpus appeals, promote justice and increase efficiency. Fairness demands that defendants
be provided with competent, adequately paid attorneys instead of having to rely on volunteers. Minimum standards for lawyers for trial and direct appeal would help ensure that defendants have competent counsel in these stages.

SB 440 would set a realistic schedule for the full and fair resolution of habeas corpus claims and would help prevent death row inmates from delaying their executions indefinitely. Deadlines for habeas corpus proceedings would be similar to those in other legal proceedings. Requiring that habeas corpus appeals be filed while the direct appeal is ongoing would still give defendants ample time for discovery and investigation. The habeas appeal petition would not be due until after the state had filed its brief on direct appeal, so no conflict between attorneys on a case would result. Issues can be raised after the deadlines under some circumstances, including claims involving the miscarriage of justice. SB 440 would apply the same standards for considering subsequent applications for habeas corpus appeals in non-capital cases to ensure all claims are litigated promptly.

Opponents said allowing the Court of Criminal Appeals to set compensation standards for attorneys would not assure fair compensation. The bill should allow another entity to appoint the attorneys.

Dovetailing direct and habeas corpus appeals could unconstitutionally fuse two different constitutional practices. The two types of appeals should be pursued consecutively, not concurrently, to ensure that all issues can be identified and raised. Work on habeas appeals would be wasted if the direct appeal results in a sentence being overturned. The client-attorney relationship would suffer because two attorneys would be working on the case separately. Habeas corpus appeals should not be limited, especially since Texas has had to release persons on death row after new evidence came to light. Applying the restriction on subsequent applications used to non-capital cases is unnecessary.

Notes. SB 440 could take effect only if the Legislature appropriated $2 million to the Court of Criminal Appeals to compensate attorneys and pay expenses for habeas corpus applications for indigents; HB 1, the general appropriations act for fiscal 1996-97, included the appropriation.

The HRO analysis appeared in the May 18 Daily Floor Report.
Penalties for weapons violations near schools

SB 840 by Brown et al.
Effective September 1, 1995

SB 840 increases the punishment for certain Penal Code weapons offenses to the punishment for the next highest category of offense if the offense is committed within 300 feet of a school’s premises, or on premises where an official school function or a University Interscholastic League event is taking place. SB 840 does not apply to the Penal Code offenses of carrying a firearm or other prohibited weapon on the premises of a school or on a school bus. SB 840 authorizes municipal or county engineers to produce maps delineating boundaries of weapons-free zones.

Supporters said increasing penalties for violations of weapons laws near schools and school functions would give law enforcement officers a strong tool to regain control over areas that have trouble with gangs, drugs and guns. The bill would not affect the legal carrying of weapons such as hunting rifles or the licensed carrying of concealed handguns. It is especially important that the state create these zones since the U.S. Supreme Court has struck down a federal law that created gun-free zones near schools. Keeping schools safe is a state and local responsibility, and the Legislature should provide the tools needed to separate children and weapons.

Opponents said the punishment for weapons violations should not be increased merely because of where they occur. It is already illegal to carry a firearm on school premises. Since the zones would be unmarked, enforcement would be difficult and possibly selective.

Notes. The House version would have enhanced penalties for offenses that occurred within 100 feet of a school’s premises or an institution of higher education, on a school bus or on the premises of a school function, university interscholastic league event or a school-sponsored extracurricular activity.

The HRO analysis appeared in the May 19 Daily Floor Report.
Economic Development and Finance

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Prohibiting interstate branch banking

HB 889 by Marchant et al.
Effective August 28, 1995

HB 889 prohibits a Texas-chartered bank or a national bank with its main office in Texas from merging with a national bank with its main office outside Texas or a bank chartered in another state. The bill prohibits an out-of-state bank from establishing a branch bank in Texas and a Texas bank from establishing a branch bank in another state. The bill expires on September 2, 1999.

Supporters said the bill would prevent federal law from superseding Texas state law on interstate branch banking, which would have allowed banks headquartered outside of Texas to establish branches without local boards of directors aware of the financial needs of the community. Texas should opt-out of interstate branch banking to maintain local control and accountability of the banking community, keep Texas deposits from being siphoned off to other regions, assure that small business and agriculture received needed loans and keep the state's independent and community banks alive. The Riegle-Neal federal interstate banking act could lead to consolidation of control of the nation's financial system in too few hands. The opt-out provision would expire on September 2, 1999, allowing the Legislature meeting in 1999 to determine whether the state should opt-in to the interstate branch banking law.

Opponents said the federal Riegle-Neal Act provides an important step toward modernizing the nation's antiquated banking system. The act received nearly unanimous approval in both houses of Congress, and gives states new opportunities to influence the operation of interstate banking companies, which Texas would lose by opting out. Interstate branching would allow banks to be more efficient and ultimately make them more competitive, making their products more attractive to consumers. The bill would prohibit interstate branch banking only until September 2, 1999, at which time the state would automatically opt-in to branch banking.

The HRO analysis appeared in the March 15 Daily Floor Report.
$10 late-payment fee on retail credit loans

HB 1094 by Heflin
Effective August 28, 1995

HB 1094 increases to $10 the maximum late fee retailers may charge on credit installment payments that are more than 21 days delinquent.

Supporters said the bill would allow retailers in Texas to recoup the costs associated with servicing the accounts of retail credit customers who fail to pay their bills in a timely manner. The current $5 or 5 percent restriction in the law is inadequate. Without an increase retailers may have to recoup these business costs by increasing the price of merchandise, which would be unfair to good credit and cash customers.

Opponents said the bill would increase by 600 percent the late fee on the average monthly retail credit balance of $30. This would be too much, especially since the late fee would be in addition to the accrued interest, which may run 21 percent or more.

The HRO analysis appeared in the March 13 Daily Floor Report.
Investment of public funds

HB 2459 by Marchant, Junell, Greenberg
Effective September 1, 1995

HB 2459 amends the Public Funds Investment Act to require governmental entities in Texas to have a written investment policy, prohibits funds invested outside the state treasury from being invested in four types of "derivative" securities, establishes reporting requirements and requires investment pools to establish advisory boards and have at least a AAA rating. The act applies to public funds invested outside the state treasury by a state agency, local government or an investment pool acting on behalf of two or more governmental entities. It does not apply to funds invested by public retirement systems, the state treasury, Veterans' Land Board and institutions of higher education with a book value endowment of at least $95 million on May 1, 1995.

Supporters said the bill would tighten regulation of investment of public funds outside the state treasury by imposing investing, reporting, disclosure and safety requirements on entities investing public funds and on the people who sell those investments to assure that the public funds are safe. The bill would not apply to the public retirement system funds, the state treasury, the Veterans' Land Board or endowments for large universities such as the University of Texas or Texas A&M University because they invest for the long term according to well established guidelines using the prudent person rule.

Opponents said that while the purpose of the bill — to protect public funds — is admirable, the various provisions could make it less desirable for governmental entities to take advantage of the benefits of investment pools and could discourage brokerage firms from doing business with public entities in Texas.

The HRO analysis appeared in the May 2 Daily Floor Report.
State tax refunds for reinvestment zone businesses, creating county development districts

SB 345 by Brown, Patterson
Effective September 1, 1995

SB 345 extends the Property Development and Tax Abatement Act from September 1, 1995, to September 1, 2001. The bill also requires the comptroller to refund state sales and franchise taxes on property located in a city and county tax abatement reinvestment zone under certain conditions. To receive a refund the business must have established a new business or modernized an existing business and increased the business’s payroll by $3 million or increased the appraised value of the business’s property by $4 million since an initial base year beginning on or after January 1, 1996. State tax refunds are limited to $10 million a year. If the total amount of requested refunds exceeds $10 million, the refund amount each business may receive is prorated accordingly. The refund is limited to the net amount of state franchise and sales taxes paid to the state or the total school property tax paid that year. No refund can be made if the business makes a payment instead of taxes to the city or county during the tax-abatement period. The refund is limited to five years or to the term of the abatement, whichever is less.

The bill also permits the creation of county development districts for public improvements in small and medium-sized Texas counties to promote tourism and economic development and create jobs. After the county commissioners approve a petition for a election, a majority of the voters in a district must approve the district’s creation and levy of a sales tax. The sales tax cannot be more than one-half cent, and the total combined local sales taxes, including the district tax, cannot be more than 2 percent. The district can issue bonds and has powers of eminent domain. The bill allows districts to be dissolved. The bill also allows a county commissioners court in a county with a population of less than 400,000 to levy a hotel occupancy tax of not more than 7 percent in a county development district, but not in a city located in the district.

Supporters said the bill would extend until 2001 the ability of cities and counties to offer tax abatements to support economic development in their communities. It would also allow qualifying businesses to receive a state franchise and sales tax credit beginning in 1999. The state-tax refund would allow an offset of school district taxes, which can no longer be abated under the school finance law without jeopardizing state aid. Tax abatements are important in attracting and retaining business and the economic activity they bring to the community.

Opponents said the Texas economy is growing and expanding at a level not seen in more than a decade, and tax abatements are now only taxpayer-subsidized icing on the cake for corporations. Most public finance experts agree that state and local taxes have little or no effect on business location decisions because they are a small
percentage of total business costs. State tax dollars are better invested in improving Texas' capacity for long-term growth, such as through better education or infrastructure.

Notes. The House eliminated the Senate provision for state tax rebates and added the provision creating the county development districts. The conference committee restored the state tax rebates but limited the total to $10 million a year.

The HRO analysis appeared in the May 22 Daily Floor Report.
Tenant rights and landlord obligations

SB 1334 by Barrientos et al.

Generally effective January 1, 1996

SB 1334 amends Texas Property Code provisions governing the rights and obligations of residential tenants and landlords. In residences where electrical service is in the landlord’s name and is not separately metered — usually an "all bills paid" lease agreement — a landlord may cut off a tenant’s electrical service for nonpayment of rent only when the tenant is at least seven days late in paying. The landlord must first give the tenant five days’ written notice stating the earliest intended interruption date, the amount the tenant must pay to avoid interruption and the location where delinquent rent may be paid during normal business hours. Water, wastewater and gas service may not be cut off under any circumstances. A landlord must restore interrupted electric service within two hours of the time the tenant pays the delinquent electric bill or rent.

A landlord must give a tenant at least five days’ written notice by mail or three days’ hand-delivered or posted notice before changing a tenant’s coor locks for non-payment of rent. If locks are changed the landlord must post a notice on the tenant’s front door stating an on-site location where the tenant may go 24 hours a day to obtain a new key, or a telephone number answered 24 hours a day that the tenant may call to have a key delivered within two hours. The notice must inform tenants of their right to obtain a new key at any hour, regardless of whether the tenant pays any of the delinquent rent. Tenants whose electrical service is improperly interrupted or who are improperly locked out of their dwellings by the landlord may recover damages and penalties from the landlord.

SB 1334 prohibits landlord retaliation against a tenant for exercising in good faith a right granted by lease or by local, state, or federal law, for requesting repairs to the property or for complaining to a governmental authority, a public utility, or a civic or nonprofit agency about housing or building code violations or public utility problems. If the tenant is found to have sued a landlord in bad faith for retaliation, the landlord may recover damages and penalties from the tenant.

The bill requires landlords to test the residence’s smoke detector at the beginning of a tenant’s period of possession. A tenant’s guest or invitee who is damaged because of a missing or malfunctioning smoke detector may recover damages from the landlord. A tenant may be liable to the landlord if the tenant knowingly disables a smoke detector. A tenant’s guest or invitee who suffers damage because the tenant disabled a detector may recover damages from the tenant.

SB 1334 authorizes the Texas Real Estate Commission to adopt regulations and establish standards relating to permissible forms of advertising by licensed "residential
rental locators" who offer, for compensation, to locate residential property for lease to prospective tenants.

A landlord must disclose the name and address of the property owner and off-site management company to any government official or employee acting in an official capacity within seven days after a written request for the information is made. If the landlord refuses to disclose the information, the requesting governmental entity may obtain a court order directing the landlord to make the disclosure and may recover $500 plus costs and attorney’s fees.

The landlord’s managing or leasing agent is considered the landlord’s agent for purposes of service of process and other communications from governmental entities relating to violations of health, sanitation, safety or nuisance laws on the property. If the landlord has not provided the tenants or the governmental entity with a name and business address in Texas, the person who collects rent from tenants is to be considered the landlord’s authorized agent.

SB 1334 excludes from the Property Code’s security-device requirements those temporary leases created by a sales contract where the buyer occupies the property before closing or the seller occupies the property after closing. Additionally, a keyless dead-bolt lock is not required if a tenant or occupant is age 55 or older or has a physical or mental disability and requests in writing, separate from the lease agreement, that the landlord deactivate or not install a keyless lock.

**Supporters** said the utility interruption and lock-out provisions would curb the most egregious landlord abuses. Making tenants liable for disabling smoke detectors would help prevent property damage and save lives. New rules from the Texas Real Estate Commission regarding the advertising practices of residential rental locators would curb bait-and-switch tactics by locators.

**Opponents** said the bill would not go far enough to make Texas tenants’ rights law conform to the law in most other states. Utility interruptions and tenant lock-outs for nonpayment of rent should be prohibited, since landlords have available the remedy of judicial eviction.

**Notes.** SB 1334 generally takes effect on January 1, 1996, but the sections relating to smoke detectors took effect on September 1, 1995.

The **HRO analysis** appeared in the May 23 *Daily Floor Report*. 
State financing of sports facilities

SB 1346 would have created 10 sports facility enterprise zones to construct or renovate sports facility projects. The authorities would have been eligible for rebates of certain state and local taxes for up to 30 years. The projects would have received the increased local property, sales, mixed beverage, and hotel occupancy taxes attributable to activity at the sports facility and in a two-mile zone surrounding the facility. In addition, the sports authority would have been entitled to receive state rebates, refunds or payments on tax proceeds for sales and mixed beverage taxes from businesses located at the sports facility and the incremental increase on mixed beverage, hotel occupancy taxes and sales taxes on food service at restaurants at businesses located in the sports zone outside the facility. A sports authority could not have received a state rebate, refund or payment before September 1, 1998. The bill would have also authorized a parking tax of up to $2.50 per car and an admission tax of up to $2 per person to pay for bonds or notes to construct or renovate a sports facility.

Six projects would have been reserved for the teams of the National Football League, the National Basketball Association, the National Hockey League and a motor speedway. The remaining four projects would have included the Will Rogers Coliseum in Fort Worth and three projects selected by the Texas Department of Commerce on the basis of their anticipated economic impact.

Supporters said the bill would help professional sports teams build or renovate sports facilities to assure that the teams remain in Texas and continue to provide economic benefits to the community and the state. Teams would be required to pay their share of the financing, even if they move to another city. The financial aid paid by local communities and the state would be repaid many times over through increased economic activity that sports franchises provide. Texas has eight professional sports teams that generated about $860 million and attracted more than 6.5 million paying fans in 1993. Winning sports teams stimulate tourism and are a consideration in business relocation decisions.

Opponents said the bill is special-benefit legislation that would ask the taxpayers to subsidize professional sports teams by dedicating substantial amounts of tax money to build and renovate facilities. Profitable businesses are asking the government for millions of dollars in corporate welfare at a time when tax-supported services for far needier people and agencies are being slashed. Ten corporations would be entitled to receive between $31 million and $42 million a year from 1999 to 2003. The state cannot afford this drain on the state treasury.
Notes. The Senate-passed version of the bill would have entitled sports authorities to receive state rebates, refunds of 80 percent of sales and mixed beverages taxes collected at the sports facility and 80 percent of the incremental increase in state sales and mixed beverage taxes paid by businesses in the sports authority zone after the zone is created. The maximum total amount of state money that a sports authority would have been entitled to receive in a fiscal year would have been limited to 35 percent of the average annual debt service for bonds or the tax ratio used by the commerce department in approving the project. SB 1346 died in the House when a point of order was sustained against the bill.

The HRO analysis appeared in the May 23 Daily Floor Report.
Authorizing home equity loans

SJR 25 by Patterson
Died in House committee

SJR 25 would have amended the Constitution to allow the forced sale of homesteads used as collateral for home equity loans. A homestead could have secured only one home equity loan at a time, and all indebtedness secured by the homestead could not have exceeded 90 percent of the homestead’s value. A home equity loan could not have been in the form of an open-ended account with a credit card to debit the account, nor been secured by homestead property designated for agricultural use tax valuation under the property tax statutes. SJR 25 also would have restricted lenders from accelerating the remaining payments of an equity loan or demanding payment of the loan in full except under specific circumstances. Lenders could have sought recourse against assets other than those securing the equity loan.

Supporters said the state should not limit the freedom to borrow against homesteads, the most valuable asset most people have. The Constitution’s homestead provisions are paternalistic and outdated. Texans are allowed to use their homes to secure a loan for a home improvement such as building a swimming pool but not to send a child to college. Home-equity loan defaults in other states are rare, and fears that large numbers of borrowers would lose their homes as a result of defaults are unfounded. Unsecured credit would not dry up if home equity loans became available in Texas because lenders would continue to offer all types of credit to satisfy all types of borrowers. Home equity borrowing would free hundreds of millions of dollars in equity now tied up in Texans’ homes, boosting economic development.

Opponents said the state should not dilute its long-standing protection for homeowners just because of a fad for pledging homes to back substantial consumer debt. The need to protect the homestead has not diminished, and Texans should not risk losing their homes because they default on a loan for purposes unrelated to the homestead. Homeowners should not be tempted to take on long-term debt backed by their homestead to fund routine consumption spending. If lenders are allowed to secure loans with a homestead, they will stop making unsecured personal loans. The best stimulant to a strong economy is home ownership and increasing home equity. An economic downturn could result in mass foreclosures, which could devastate the state economy.

Notes. The Senate eliminated a prohibition against making equity loans, other than reverse mortgages, to borrowers 65 years old or older, then approved SJR 25 by 21-10. SJR 25 was left pending in the House Financial Institutions Committee.

Additional information on the home equity issue is found in HRO Session Focus Number 74-6, "Should Texas Allow Home Equity Lending?," February 27, 1995.
# Environment and Property Rights

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Environmental audit immunity and confidentiality

HB 2473, the Environmental, Health and Safety Audit Privilege Act, grants limited immunity from administrative, civil or criminal penalties for violations of environmental, health and safety laws that are voluntarily disclosed to an appropriate regulatory agency. The disclosure must have to arisen from an environmental health or safety audit, and the facility must have informed the appropriate regulatory agency that an audit is being conducted. The violation may not have been independently detected by an enforcement agency, and no immunity is allowed if the person claiming immunity intentionally, knowingly or recklessly committed a violation or if the person repeatedly committed serious violations and does not attempt to bring the facility into compliance.

HB 2473 also creates a privilege against disclosure of reports produced from voluntary environmental or health and safety audits of regulated facilities. Privileged documents are exempted from public information requirements under the Texas Open Records Act and are not admissible as evidence or subject to discovery in a civil, criminal or administrative proceeding except in certain situations. To establish privilege for an audit, a facility must disclose when an audit will be conducted and complete it within six months, unless an extension is granted.

Supporters said HB 2473 would encourage compliance with environmental and health and safety laws by protecting those citizens who, through purely voluntary audits, are trying to comply with a complex web of state and federal environmental laws. The bill would also encourage disclosure of problems that would never have been found by regulatory agencies on their own.

Opponents said the immunity and privileges proposed by the bill would allow polluters to escape being held accountable when they violate environmental health and safety laws and provide for an unprecedented privilege against discovery. Polluters should be held liable for damages no matter how the problem is uncovered.

The HRO analysis appeared in Part One of the April 25 Daily Floor Report.
Standardizing TNRCC permitting procedures

HB 2491 by Yost
Died in the Senate

HB 2491 would have standardized permitting processes for air, water and waste permits issued by the Texas Natural Resource Conservation Commission (TNRCC). Applications to issue, renew, or amend a permit for which public notice and hearings would be required would have been affected. TNRCC would have had to provide for permits-by-rule to the greatest extent possible and would have had to identify, by rule, categories of applications related to permits for which notice or public hearings were not required. TNRCC would have had to exempt from notice and public hearing requirements certain applications that would not significantly increase air emissions, fluid discharges or quantities of waste or cause a deterioration of water or air quality.

When a permit application was complete, TNRCC’s executive director would have been required to issue a draft permit or notice of intent to deny the permit that would have included the reasons for the intended denial. Public notice and a 30-day public comment period would have been required for a draft permit or a notice of intent to deny a permit. A public hearing on a ruling on a permit issuance or denial would have been required if the executive director determined it necessary. For certain hazardous waste permits, a public hearing would have been required. On request of an affected person, the permit applicant for a new hazardous waste management facility would have been required to furnish a bond to pay for the nonlegal costs of a person providing information to TNRCC regarding the permit. The director would have decided if such costs could be reimbursed. The director’s final permit decision could have been, upon petition of the applicant, reviewed by TNRCC. A person affected by a final decision could have petitioned for judicial review.

Supporters said the bill would streamline the permitting process at TNRCC without precluding the opportunity for public hearings on relevant issues. There is no need for a hearing if no significant change in discharge or emissions is being made. Permit-by-rule would simplify the permitting process and eliminate duplicative permitting requirements.

Opponents said the bill would eliminate the vast majority of opportunities for hearings and effective public participation in TNRCC’s permitting process, severely limiting the public’s ability to participate in agency decisions. Permit-by-rule would allow almost automatic permit approval with no public participation if the applicant met certain criteria.

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

House Research Organization

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Barring TNRCC rules stricter than federal regulations

HB 2843 by R. Lewis

Died in the Senate

HB 2843 would have prohibited the Texas Natural Resource Conservation Commission (TNRCC) from adopting a new rule or amending an existing one that would regulate more stringently than federal regulation. The restriction would not have applied if the stricter state regulation was necessary to address an environmental condition unique to the state or the applicable federal rule was inadequate to provide necessary protection to the state’s environment. A Senate amendment would have required that TNRCC would, if it proposed a rule or amendment more stringent than a federal regulation, have had to publish a statement of the grounds for the determination that the more stringent rule was necessary and a cost-benefit analysis of the proposed rule. The cost-benefit analysis would have had to include, if applicable, reasonable alternative methods considered by the agency and the reason for their rejection. A House amendment would have prevented TNRCC from adopting any rule pertaining to a water system serving 50 or fewer connections except to comply with federal requirements or to protect the public health. Standards for certain composting facilities would have been required.

Supporters said HB 2843 would make federal and state regulations more consistent and help prevent unnecessary and often duplicative state requirements. Businesses and cities in Texas would no longer have to spend money and time obtaining two sets of permits. Cost benefit analyses would ensure a sound basis for new regulations.

Opponents said the bill would unwisely tie the hands of state agencies responsible for protecting the environment and public health and safety. Arbitrarily forbidding rules stricter than national standards would curtail the state’s ability to respond to local problems and cost-benefit analyses, would be expensive and time-consuming for state agencies to perform and would yield few positive benefits.

Notes. The Senate adopted several amendments to HB 2843, including one incorporating SB 298, setting new water quality standards requirements for certain streams, which was deleted by the conference committee. The House adopted the conference committee report, but the Senate took no action.

The HRO analysis appeared in Part One of the May 8 Daily Floor Report.
Changing dates of the Edwards Aquifer management plan

HB 2890 by R. Lewis

Died in the House

HB 2890 would have delayed by two years many of the dates in Chapter 626, Acts of the 73rd Legislature (SB 1477 by Armbister), enacted to establish a new Edwards Aquifer Authority to regulate groundwater use. HB 2890 would also have provided for exemptions for nondiscretionary use of water by the U.S. Department of Defense, have provided for the transfer of $2.5 million from the Edwards Underground Water District (EUWD) to the Edwards Aquifer Authority, and would have prevented the abolition of the EUWD. HB 2890 also laid out rules concerning the relationship between the EUWD and the Edwards Aquifer Authority and would have provided that the district would be subject to sunset review under certain circumstances. HB 2890 would have narrowed the scope of the South Texas Advisory Committee’s right of appeal to the Texas Natural Resource Conservation Commission (TNRCC) about actions the committee determined to be prejudicial to downstream interests, and would have allowed the advisory committee to bring an action in district court to compel the board of the authority to comply with a TNRCC recommendation.

Supporters said HB 2890 is needed to postpone by two years the effective dates for regulating pumping of groundwater from the Edwards Aquifer in SB 1477, which has been in legal limbo since its enactment in 1993. New provisions exempting military bases from water use restrictions could help prevent the closure of bases in the San Antonio area.

Opponents said SB 1477 should never have been enacted since tampering with landowners’ ability to use the groundwater beneath their property violates their private property rights. If SB 1477’s provisions remain in abeyance, there is no need to make exemptions from water use reductions for the U.S. Department of Defense.

Notes. The status of the Edwards Aquifer Authority created by SB 1477 was left uncertain due to U.S. Justice Department objections under the federal Voting Rights Act concerning the method of selecting the authority board. HB 3189, which changed the method of selecting the board from appointed to elected, was precleared by the Justice Department on August 8.

The HRO analysis appeared in Part One of the May 9 Daily Floor Report.
Solid waste fee shift to local and regional governments

HB 3072 by Gallego
Effective June 16, 1995

HB 3072 requires that half of the revenue the Texas Natural Resource Conservation Commission (TNRCC) collects from solid waste fee revenue, known as "tipping fees," be dedicated to local and regional solid waste projects consistent with regional plans approved by the TNRCC. The revenues will be allocated to municipal solid waste planning regions for use by local governments and regional planning commissions. TNRCC is to allocate the funds according to a formula that takes into account population, area, solid waste fee generation and public health needs. Each planning region must issue a biennial report to the Legislature detailing how the revenue is spent. A project or service funded by the solid waste fee revenue must promote cooperation between public and private entities and may not create a competitive advantage over private industry providing recycling or solid waste services.

Supporters said the solid waste tipping fee was originally imposed to expedite TNRCC's permitting process and ensure that financial assistance was available to help local governments manage solid waste. It is fair that 50 percent of the tipping fee revenues be returned to local governments since approximately 50 percent of the fees are collected from cities. The funds could not be used to create a competitive advantage over a private industry providing recycling or solid waste services.

Opponents said the bill would reduce TNRCC's ability to comply with statutory mandates by reducing funds available for TNRCC solid waste programs. Loss of tipping fee revenues would hinder TNRCC's ability to monitor, inspect and take enforcement actions regarding landfills, address citizen complaints and prolong permit applications. The formula used to allocate funds, which takes population into account, would leave rural areas with too little money to provide for their solid waste programs.

The HRO analysis appeared in Part Three of the April 28 Daily Floor Report.
Edwards Aquifer Authority board expansion

HB 3189 by Puente et al.
Effective August 28, 1995

HB 3189 repeals the 1993 provision (in SB 1477, 73rd Legislature) establishing a nine-member appointed board for the Edwards Aquifer Authority and instead establishes a temporary board to be replaced by a 17-member board, with 15 voting members elected from single-member districts serving staggered four-year terms and two non-voting appointed directors. The two appointed members may participate and comment but not vote. One non-voting member will be appointed by majority vote of the South Central Texas Water Advisory Committee and the other by the commissioners court of Medina or Uvalde County, in alternation. The temporary board, including 15 members named in the bill and two members appointed in the same manner as the two non-voting members, must order a board election in November 1996 and may exercise all powers of the authority until the elected board members take office.

Supporters said HB 3189 would satisfy the U.S. Justice Department’s objections to SB 1477, enacted in 1993, and allow a groundwater management plan to go into effect to stave off a federal court takeover of the Edwards Aquifer. The proposed single-member district plan also ensures minority voters of a chance to participate in electing the board, removing the main impediment to Justice Department approval.

Opponents said the plan proposed by HB 3189 would not necessarily satisfy Justice Department requirements. If the Justice Department refused to pre-clear the bill the state would be without a management plan for the aquifer just as a federal court is threatening to take over. Other opponents said the management plan proposed in 1993 would undermine private property rights in the Edwards Aquifer region.

Notes. On August 8 the U.S. Justice Department announced that it would raise no objection to the system established by HB 3189 for selecting members of the Edwards Aquifer Authority, but other legal actions to block implementation of the aquifer management plan are pending.

The HRO analysis appeared in Part One of the May 9 Daily Floor Report.
HB 3193 creates the Southwest Travis County Water District, encompassing the Circle C development near Austin and including four Circle C municipal utility districts. The district may annex a limited amount of additional territory located in the Bear Creek, Slaughter Creek and Williamson Creek watersheds that is not located in the corporate limits of a city. Total district territory may not exceed 8,000 acres.

The district is governed by a nine-member board of gubernatorial appointees, at least seven of whom must reside in the district. The district, which is subject to certain Texas Natural Resource Conservation Commission (TNRCC) standards, has exclusive authority, superseding local government authority except an existing groundwater conservation district, to control and abate water pollution within its boundaries, approve platting of subdivisions, zoning and land use and manage endangered species located within the district or affected by activities of the district. The district may also issue revenue bonds and assess civil penalties between $50 and $100 for violation of its rules, permits and orders. The district’s water pollution control program must comply with state water quality standards as of January 1, 1995.

Supporters said the Southwest Travis County Water District would be similar to many water districts created across the state, with analogous powers and functions. The district would come under all TNRCC water quality rules, standards and regulations, as well as other applicable state regulations and laws. The majority of Circle C ranch residents want local control returned to the residents and Circle C released from arbitrary and inconsistent regulations imposed by the City of Austin.

Opponents said the power granted to the Southwest Travis County Water District would be unprecedented and would allow one developer to circumvent local water, wastewater and drainage regulations in thousands of acres in Travis County. The district would be free of regulation from most units of local government, making regional planning in the area difficult if not impossible. The district would be granted powers, like zoning, that are unusual for a water district, and would be governed by appointees accountable only to the governor, not the local residents.

The HRO analysis appeared in Part Six of the May 9 Daily Floor Report.
HB 3226 increases the membership of the Coastal Coordination Council (CCC) from seven to 11 members, narrows the scope of the CCC’s authority to review agency and subdivision actions and eliminates CCC authority to directly reverse a proposed agency action. If an agency or subdivision does not modify a proposed action to be consistent with the policy and goals of the coastal management program, the CCC is required to request an opinion from the attorney general on the consistency of the proposed action, and the CCC may file suit in district court to seek injunctive relief. The council is also required to adopt procedural rules for the review of federal actions and outer continental shelf plans that incorporate federal revisions governing those reviews. The council may not develop special area management plans for specific regions. The CCC is subject to sunset review and unless continued by the Legislature will be abolished on September 1, 1999. The bill also establishes boundaries for the coastal management program that are similar to the boundaries delineated in the state Oil Spill Prevention and Response Act.

Supporters said the coastal management plan is the result of five years of hard work, numerous public hearings and input by a variety of parties. Texas needs the plan to coordinate state agency efforts to address major coastal issues on a regional basis, gain federal approval of the plan so that Texans can manage their own resources, and ensure that the coast retains its economic vitality and environmental quality. HB 3226 is a compromise measure intended to allay concerns that the CCC may create another layer of regulatory bureaucracy.

Opponents said the coastal management plan is unnecessary and would create yet another layer of bureaucracy to the permitting process. The bill would cause unnecessary additional review of agency actions, stifle economic development in the coastal region and interfere with the private property rights of coastal landowners.

The HRO analysis appeared in Part One of the May 10 Daily Floor Report.
SB 14 creates a new cause of action for the statutory "taking" of private real property by the actions of a political subdivision or state agency. State agencies and other political subdivisions may be sued for compensation for an action proposed on or after September 1, 1995, that reduces the market value of real property by 25 percent or more. If it is determined that a taking occurred, the governmental agency is to be ordered to rescind the action that resulted in the taking. Sovereign immunity to suit and liability is waived to the extent of liability created by SB 14. Sovereign immunity against liability for compensation is waived to the extent that a governmental entity elects to pay compensation.

The attorney general is required to prepare guidelines to help identify actions that constitute a taking. State and local agencies must perform written assessments of proposed governmental actions that may result in a taking, including a description of reasonable alternatives that could accomplish the purpose of the action, starting January 1, 1996. A number of governmental actions are exempted from the requirements of SB 14, including actions taken by a county before September 1, 1997, most actions taken by cities, as well as actions taken to fulfill obligations mandated by federal law.

Supporters said SB 14 would deter the promulgation of government laws and regulations that strip private property of its economic value, preventing the "taking" of private property without compensation being paid to the property’s owner. Restrictions on the use of private property inhibit economic development and cost Texas jobs. Takings impact assessments would save the state money by preventing actions requiring compensation.

Opponents said the bill would create a new cause of action for practically any governmental regulatory initiative that could be argued as affecting property values, and taxpayer money would have to be used to fend off the lawsuits that would result. Takings impact assessments would be prohibitively expensive and time-consuming for state agencies and create a new layer of bureaucracy.

Suspension of the vehicle emissions inspection program

SB 19 by Whitmire
Effective January 31, 1995

SB 19 suspended for 90 days the state vehicle emissions inspection and maintenance program, as of January 31, 1995. The bill appropriated $8.8 million from the Clean Air Fund to go to the managing contractors and subcontractors responsible for implementing the state vehicle emissions inspection and maintenance program if they could prove to the Texas Natural Resource Conservation Commission (TNRCC) and the attorney general that they had incurred losses because of the delay. The contractors and subcontractors agreed to repay the state, without interest, by August 31, 1997, and the contractors released the state from liability resulting from the 90-day delay. SB 19 also directs TNRCC to work with the U.S. Environmental Protection Agency to develop reasonable alternatives to the vehicle emissions inspection and maintenance program.

Supporters said the Legislature should delay a cumbersome, ill-conceived emissions testing program for three months and devise a more rational approach to pollution control. The old testing program would not significantly improve air quality, but it would greatly inconvenience motorists.

Opponents said the state should not back away from a legitimate, carefully planned testing program devised to save lives and reduce disease that was to be implemented by a private company under a contract with the state. Postponing the program and handing millions of dollars from the Clean Air Fund to the testing company is a waste of money and could eventually force the state to face a barrage of expensive liability lawsuits.

Notes. SB 178 by Whitmire, enacted later in the session, repealed the 90-day suspension required by SB 19 and requires the managing contractor to repay the state, by September 1, 1995, the money appropriated by SB 19; SB 178 took effect May 1, 1995.

Prohibiting canned hunts, regulating wild animals

SB 97 by Moncrief
Effective September 1, 1995

SB 97 prohibits "canned hunts" — killing or attempting to injure a dangerous wild animal that is in captivity, held under control, kept caged or penned or released from captivity for the purpose of being killed. It also prohibits conducting, promoting, assisting or advertising canned hunts, selling or transporting a dangerous wild animal for use in a canned hunt or selling a part or product of an animal killed in a canned hunt. Peace officers may seize live dangerous wild animals used in, or a carcass, hide or other product from an animal killed in, a canned hunt. A violation is a Parks and Wildlife class A misdemeanor, with repeat offenses a Parks and Wildlife felony. Local officials who injure or kill an animal to prevent danger to the public and licensed veterinarians and zoo employees who euthanize an animal are exempt. Dangerous wild animals under the bill include lions, tigers, bears, leopards, cheetahs, hyenas, elephants, wolves, rhinoceroses and any species, subspecies or hybrid of those animals.

SB 97 also allows counties of any size to prohibit or regulate keeping wild animals. The bill repeals, as of September 1, 1997, the requirement of a Parks and Wildlife Department permit to possess wild animals for breeding, exhibition or personal use.

Supporters said the bill would ban canned or controlled hunts, a barbaric activity in which so-called hunters are allowed to take a trophy by killing an animal contained in a pen or cage. Hunting involves lawful and sportsmanlike pursuit of a free-ranging animal; giving an unfair advantage to the hunter is simply slaughter. The bill would not apply to mountain lions, coyotes and other native predators that must be controlled.

Opponents said the definition of a hybrid animal could cause potential problems for ranchers who kill hybrid predators that may come under the law. Other opponents said canned hunts should be banned for all types of animals, not just the dangerous wild animals listed in the bill.

The HRO analysis for the House companion bill, HB 239 by Goodman, appeared in Part One of the April 5 Daily Floor Report.
Revamping the vehicle emissions inspection program

SB 178 by Whitmire
Effective May 1, 1995

SB 178 repeals the 90-day suspension of the state’s vehicle emission program enacted by SB 19 earlier in the session and calls for the Texas Natural Resource Conservation Commission (TNRCC) to implement a new vehicle emissions program beginning June 1, 1995, and continuing until a gubernatorial executive order establishes a final program. The governor's order may specify the testing technologies to be used, fees to be charged and the exemption or inclusion of various counties from the vehicle emissions inspection program. The interim program applies to vehicles in the following ozone non-attainment areas: Dallas-Fort Worth, El Paso and Houston-Galveston. Various areas included in the original program are exempted from the new program.

Vehicles more than two years old in the affected areas must be tested annually at decentralized test-only or test-and-repair facilities. TNRCC is to prescribe the kinds of tests to be used at testing facilities. Such vehicles may not be issued a safety inspection permit unless they pass the required vehicle emissions inspection. The TNRCC and the Department of Public Safety are required to implement the program. Managing contractors who received state funds appropriated by SB 19 must repay those funds without interest by September 1, 1995, or they may not provide any services related to the vehicle emissions program.

Supporters said SB 178 would create a convenient vehicle emission program that would help Texas comply with the federal Clean Air Act, and thus avoid federal sanctions. The bill would give the governor time to create the most flexible, efficient, economical system to test vehicle emissions without completely terminating the state’s earlier contract with certain testing companies.

Opponents said the state should not implement any kind of vehicle emissions program until the federal government decides what to require of state emissions programs. The EPA rarely imposes sanctions. Dramatically changing the state’s contract agreement with the testing companies might force the state to appropriate more money to Tejas Testing, the main program contractor.

The HRO analysis of SB 178 appeared in Part One of the April 26 Daily Floor Report.

House Research Organization
Revising alternative fuels fleet conversion program

SB 200 by Armbrister
Effective September 1, 1995

SB 200 revises state requirements that certain motor vehicles in fleets be converted to run on alternative (cleaner-burning) fuels. The current definition of alternative fuels, which specifies the use of natural gas and propane in most circumstances, instead includes any fuel/vehicle combination that satisfies federal low emission (LEV) and clean vehicle standards. The definition applies to fleet conversions of certain mass transit agencies, local governments and private fleets. SB 200 also changes program compliance schedules for government fleets of more than 15 vehicles and private fleets of more than 25 vehicles in non-attainment areas in Texas.

The Texas Natural Resource Conservation Commission (TNRCC) is authorized to waive fleet conversion requirements for local government, private and mass transit fleets under certain circumstances. Fleet owners may meet required fleet-conversion requirements by acquiring TNRCC program-compliance credits by, among other methods, purchasing vehicles that meet emission controls more stringent than federal LEV standards. Two separate emission credit-trading programs are created: the Texas Mobile Emissions Credit Program, which complies with federal Environmental Protection Agency requirements, and a separate system of compliance credits. Both kinds of credits may be acquired by operators of mass transit authority, school district, state agency, local government and private fleets.

Supporters said the state’s narrow fuel-based standards for alternative fuels unfairly favor the natural gas industry and should be replaced by more flexible emission-based standards allowing any fuel/vehicle combination — including vehicles that run on reformulated gasoline and low-sulphur diesel — that meets federal emission standards. Businesses and consumers would both save money if fleet operators could choose the most efficient vehicle/fuel combination to meet LEV standards and avoid the high initial costs of converting fleets to natural gas or propane.

Opponents said both natural gas and propane, currently the key alternative fuels, burn more cleanly than diesel or reformulated gas, both of which could be allowed under the new definition. The use of natural gas and other truly clean-burning fuels is essential to solve Texas’ growing clean air problems, which could eventually result in federal sanctions against the state and threaten public health. SB 200 would also delay overall reductions in vehicle emissions by slowing down fleet conversion schedules.

The HRO analysis appeared in the March 29 Daily Floor Report.
New water quality standard requirements for certain streams

SB 298 by Ratliff

Died in the House Calendars Committee

SB 298 would have prohibited the Texas Natural Resource Conservation Commission (TNRCC) from establishing a dissolved-oxygen criterion greater than 3.0 milligrams per liter for any perennial unclassified stream in Texas unless TNRCC determined that a higher level would be attained in the natural environment in combination with conditions not regulated under state or federal law. In adopting water quality standards, TNRCC would have had to designate uses of water and water quality criteria for dissolved oxygen no more stringent than necessary to maintain conditions in the natural environment combined with conditions not regulated under state or federal law. In any notice of proposed rulemaking for a new water quality standard TNRCC would have been required to include a statement of the technical basis of each element of the proposal and make the technical information that supported the proposal available to the public.

Supporters said TNRCC water quality criteria should be consistent with conditions in the natural environment. The bill would promote a sound technical basis for water quality decisions. The current presumption that "unclassified streams" have extremely high quality water creates an unreasonable standard for city wastewater discharges.

Opponents said the bill would lower the state’s water quality standards for "unclassified streams," which constitute most of the streams in Texas, endangering public health and safety. Passage of the bill would have resulted in the federal government denying delegation of the National Pollutant Discharge Elimination System Program (NPDES) to the state.

Notes. The House Natural Resources Committee added amendments concerning drinking water quality standards, barring TNRCC from adopting water quality policies regulating certain building and construction practices and prohibiting TNRCC from adopting nonpoint source water pollution and wet weather water quality standards that exceed federal standards. The Senate adopted an amendment adding the provisions of SB 298 to HB 2843, a bill barring TNRCC rules more stringent than federal standards, but the conference committee report on HB 2843, which was adopted by the House but not the Senate, did not include the Senate amendment.
Requiring cost-benefit analyses of environmental rules

SB 978 by Sims, Brown
Died in House committee

SB 978 would have required the General Land Office, Department of Agriculture, the Texas Natural Resource Conservation Commission, the Railroad Commission and the Texas Department of Health to prepare impact statements estimating the cost and net benefits that proposed major environmental rules could have on the state. Impact statements would have been required for rules that exceeded standards set by federal law, requirements of state law or state-federal program requirements.

The impact statement would have had to include reasonable alternative methods for achieving the purpose of the rule and reasons why the agency rejected those alternatives and the methodology used in making the cost-benefit estimates. It would have had to note the opportunity for public comment on the draft statement and that any comments would be incorporated into the final cost-benefit analysis. When a rule was finally adopted, the agency would have been required to revise the impact statement into a final analysis incorporating comments received and state the reason the agency disagreed with any comment. The bill expressed the intent of the Legislature that agencies spend no more in drafting or adopting the required rules than they would have otherwise spent.

Supporters said a state agency should carefully analyze the costs and risks that its proposed rules may have on the public and on government. Some far-reaching environmental rules have poorly protected the health and safety of the public or the environment due to expensive and cumbersome compliance requirements. Agencies could easily prepare cost-benefit statements just as they already prepare a fiscal note for proposed rules.

Opponents said it would be immensely expensive and time-consuming for state agencies to prepare cost-benefit analyses of proposed rules. The added red tape and bureaucracy would waste taxpayer money and slow down agency permitting processes. The bill is a thinly veiled attempt by the regulated community to impede making of new rules that protect the environment and the health and safety of the public.
Affected persons in TNRCC contested case hearings

SB 1546 by Bivins

Effective September 1, 1995

SB 1546 narrows the Water Code definition of an affected person to include someone who has a justiciable interest related to a legal right, duty, privilege or power or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest. The Texas Natural Resource Conservation Commission (TNRCC) is not required to hold a hearing if TNRCC determines that the basis of a person’s request for a hearing as an affected person is not reasonable or is not supported by competent evidence. TNRCC is required to adopt rules specifying factors to be considered in determining whether a person is an affected person in any contested case arising under the air, waste or water programs within TNRCC’s jurisdiction and whether an affected association is entitled to standing in contested case hearings.

Supporters said it is important to clearly define who is an "affected person" with standing in certain contested case hearings before TNRCC. Both TNRCC and the public would benefit from a more specific standard for determining who has standing in these hearings since "affected person" has been so broadly interpreted that just about anyone can now participate in a hearing, including those who may have a political agenda having nothing to do with the specifics of a particular case. This is time consuming and counterproductive for both the agency and the other parties in a contested case.

Opponents said the new definition of an "affected person" would substantially limit who could seek a TNRCC contested case hearing and would direct the agency to take an overly restrictive view as to who could have standing in a hearing. This would restrict citizen participation in the hearing process and limit TNRCC knowledge of potential health and safety concerns. Permit applications are rarely contested, and applicants with sound applications have nothing to fear from a hearing.

The HRO analysis appeared in Part Two of the May 18 Daily Floor Report.
SB 1660 provides that the Texas Natural Resource Conservation Commission (TNRCC) is not required to make findings of fact or conclusions of law, other than an uncontested finding that TNRCC has jurisdiction, in an agreed order compromising or settling an alleged violation. An agreed order can include a reservation that the order is not a violation, that the occurrence of the violation is in dispute or that the order is not intended to become a part of a party’s or a facility’s compliance history. An agreed administrative order issued by TNRCC is not admissible against a party to that order in a civil proceeding unless the proceeding is brought by the Attorney General’s Office to enforce the terms of the order or pursue statutory violations.

Supporters said some TNRCC attorneys insist that agreed orders must contain findings of fact and conclusions of law beyond merely jurisdictional findings, although no such statutory requirements exist. Other state agencies settle disputed matters without including findings of fact and conclusions of law adverse to the defendant, or include exculpatory language routinely as part of agreed orders. SB 1660 would allow TNRCC to include exculpatory language in orders and clarify that the agency is not required to make findings of fact or conclusions of law regarding the violation (which can leave parties open to lawsuits) in an agreed order.

Opponents said omitting findings of fact and conclusions of law from agreed orders would limit attempts by the public to find out about a compliance problem in their neighborhood or to substantiate an individual suit for damages. An agreed order may contain the only direct evidence of a problem or violation in which someone has been injured or a natural resource has been harmed. Decisions about permit review are sometimes based on compliance history, and agreed orders may be the only place to find a record of that history. A flagrant violator of state law should not be protected from third party actions by the state.

The HRO analysis appeared in Part Two in the May 18 Daily Floor Report.
SB 1697 would have authorized the Texas Natural Resource Conservation Commission (TNRCC) to issue a radioactive waste disposal license for the disposal of mixed waste to a certain private sector entity. (A hazardous waste company, Waste Control Specialists, Inc., which currently holds a state permit to build a commercial waste landfill in Andrews County in West Texas, would have fit the bill's description of a private entity.) A person accepting low-level waste or mixed waste for storage or treatment would have been required to pay the planning and implementation fee required of those who are licensed to possess or use radioactive material. A person who delivered mixed waste for disposal would have been required to pay the waste disposal fee required of those who deliver low-level radioactive waste.

SB 1697 would also have repealed an authorization for TNRCC to prohibit, by rule, a licensed radioactive waste processor from accepting low-level radioactive waste generated out of state. A license holder who accepted low-level waste for processing, storage or treatment could have stored the waste until either one year after the date the Low-Level Radioactive Waste Authority began accepting low-level waste for disposal, or one year after the date the license holder accepted the waste, whichever was later.

Supporters said mixed waste, a combination of hazardous and low-level radioactive waste, could be managed more effectively at a permitted facility in an isolated area like Andrews County, rather that in metropolitan areas surrounded by residential neighborhoods, where much mixed waste is currently stored. Radioactive materials are currently stored at universities, hospitals, utilities and other sites across Texas. Andrews County would welcome the economic development and new jobs a commercial waste processing facility would bring to the area.

Opponents said any radioactive waste disposal or processing site in Texas should be operated by the state Low-Level Radioactive Waste Authority, not a private sector company. Licensing a private company to process mixed waste would be unwise. Private companies have a poor record for safe operation of nuclear waste dumps, and several states have had to spend millions of taxpayer dollars to clean them up. Texas could become a dumping ground for nuclear waste from all over the country since few mixed-waste facilities exist.

Notes. SB 1697 died in the House when a point of order was sustained against the bill.

The HRO analysis appeared in Part Three of the May 23 Daily Floor Report.
SB 1704 specifies that preliminary plans and subdivision plats, site plans and all other permits be considered collectively as one series of permits by state and local permitting agencies. The provisions apply only to projects in progress on or commenced after September 1, 1987, and stipulate that the requirements in effect when the original application was filed are the ones applicable to the project. If a series of permits is required for a project, the rules, dates and other requirements in effect at the time the original application was filed are the ones applicable to the project. Once an application is filed, a regulatory agency is prohibited from shortening the duration of any permit required for the project. A permit holder, however, retains the right to take advantage of procedural changes to the laws, rules, ordinances and regulations of a regulatory agency that would lengthen the life of the permit or otherwise enhance or protect the project. The permitting requirements do not apply to permits issued under uniform building codes, certain city zoning regulations or regulations for annexation or those taken to prevent destruction of property or injury to persons.

Supporters said developers need a predictable regulatory framework in which to work. Cities should be prevented from retroactively applying new, more stringent, regulations after original permits are filed, often after a developer has spent enormous amounts of time and money complying with previous requirements. Retroactive standards are often punitive in nature and impede economic development. Government rules should be predictable so developers can plan to comply with regulations that affect how development is to take place.

Opponents said the state should not limit the power of home rule cities to control land use, which would erase distinctions between different steps in development and meld them into a single project for which all standards are frozen. A permit applicant could lock in years-old development regulations for certain projects. Local governments need the ability to improve ordinances to protect public health and safety during development of new areas. Stipulating that the measure would apply to projects in progress or commenced after 1987 would violate constitutional provisions on retroactive laws.

The HRO analysis appeared in Part Two of the May 22 Daily Floor Report.
Family and Welfare

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Changes in family violence protective order laws

HB 418 by Goodman et al.
Effective on September 1, 1995

HB 418 revises laws affecting family violence protective orders. A court must issue a protective order upon a finding that family violence has occurred and that family violence is likely to occur again and may order a batterer to complete batterers’ treatment and counseling by a licensed therapist. The bill sets out criteria for courts to follow when entering a protective order against one party or two separate orders against both parties, makes changes to the warning section of the protective order to reflect changes made in last year’s Penal Code revisions and revises the provisions for serving protective orders.

The bill adds provisions relating to the Department of Protective and Regulatory Services (PRS) seeking protective orders on behalf of children abused by members of their family or household and notice requirements to nonabusive parents or adult members of the child’s household. The bill clarifies that the county attorney or the criminal district attorney is designated as the prosecuting attorney responsible for filing protective order applications unless the district attorney has assumed the responsibility and has given notice to the county attorney. The bill prohibits clerks from charging fees associated with administering and executing protective order fees. Non-indigent respondents may be assessed a fee of $16 plus standard fees assessed by the court. Respondents not paying the necessary fees may be held in contempt by the court. In addition, the court may assess attorney’s fees against the party who is found to have committed family violence. The bill adds "sexual assault" to the definition of family violence, expands the definition of "family" to conform with definitions in the Government Code to include individuals related to a person’s spouse (in-laws) and adds that a member of a household includes a "person who previously lived in the household."

The bill prohibits a court from dismissing an application for a protective order solely because a divorce petition has been filed in another court. However, if the court hearing a divorce has itself issued or denied a temporary order, including a temporary protective order, the other court may deny an application. An applicant denied a protective order filed as a motion in a divorce suit may not apply to another court for a protective order based on the same facts.

Supporters said HB 418 would make important changes to laws affecting family violence and the issuance of protective orders. For example, courts routinely dismiss applications for protective orders solely because a divorce petition had been filed in another court. Often initial hearings on divorce petitions take months to be heard, which creates a potentially dangerous loophole in the system for many of those needing protective orders.
The bill would also clarify which prosecutor is responsible for family violence applications. Often the current structure creates confusion about which state or county level prosecuting attorney handles applications for protective orders. The bill would provide for courts to order defendants to participate in batterers’ counseling and would make important definitional changes and make the law on protective orders conform to 1993 Penal Code revisions.

No apparent opposition.

The HRO analysis appeared in the May 2 Daily Floor Report.
Family Code revisions

HB 433 by Goodman et al
Effective September 1, 1995

HB 433 revises Family Code provisions on the parent-child relationship, child support, paternity and the reporting of abuse or neglect.

Major changes include: adding a rebuttable presumption that the appointment of parents of a child as joint managing conservators is in the best interest of the child; changing the standard for modifying sole managing conservatorship; providing for the suspension or revocation of professional, occupational, business, motor vehicle, hunting or fishing licenses or other recreational permits or licenses of persons whose overdue child support payments equal or exceed the total support due for 90 days; ensuring the confidentiality of those reporting abuse or neglect of a child; limiting liability for the good-faith reporting of abuse or neglect while authorizing liability for the bad-faith or malicious reporting of abuse or neglect; authorizing the Department of Protective and Regulatory Services (PRS) to investigate a report of abuse in a facility operated by, regulated by, or under a contract with the Texas Department of Mental Health and Mental Retardation (TxMHMR), under rules developed jointly between PRS and TxMHMR; prohibiting a party from demanding a jury trial in a suit in which an adoption is sought and revising provisions for appointment of an attorney and guardian ad litem, relating to the voluntary and involuntary termination of the parent-child relationship and relating to the establishment of paternity.

Supporters said that while the state’s Family Code has been amended often, it has not been substantively revised in its entirety since its codification by the 61st, 63rd and 66th Legislatures. Several recent reports have urged the Legislature to clarify the code and make its often-confusing provisions consistent. Many of the provisions in HB 433 were recommended by the Texas Performance Review’s 1994 report Gaining Ground, A Partnership for Independence, issued by the Comptroller’s Office, and A Comprehensive Review of the Texas Family Code, issued by the Joint Interim Committee on the Family Code.

Opponents said certain provisions of HB 433 would affect many parents adversely and add many more cases to an already burdened court system. Adding the presumption for joint managing conservatorship is a major policy shift in Texas law that should have been more carefully analyzed. Parents could be denied their driver’s professional and/or occupational licenses for failure to pay child support, making them less able to pay.

The HRO analysis appeared in the May 9 Daily Floor Report.
AFDC benefits, workforce development, child and spousal support

HB 1863 by Hilderbran et al.
Effective September 1, 1995

HB 1863 restructures the eligibility requirements for individuals receiving Aid to Families with Dependant Children (AFDC). The bill prohibits receiving AFDC benefits for five years after benefits originally expire and limits financial assistance for most recipients to 12, 24 or 36 months plus 12 months of transitional benefits, depending on a recipient's education and work experience. The Department of Human Services (DHS) is authorized to develop rules for exceptions to the time limits in cases when severe personal hardship or community economic factors prevent the recipient from obtaining employment or the state is unable to provide support services.

An applicant and the state must execute a responsibility agreement that defines the responsibilities of the state and the recipient. The state, within available resources, must agree to provide certain assistance to help recipients attain certain goals, and in turn the recipient must agree to adhere to standards such as not using, selling or possessing alcohol or illegal drugs, ensuring that dependent children attend school regularly and helping the state attorney general to establish paternity for establishment or enforcement of child support orders.

DHS, in conjunction with other state agencies, must develop certain employment and education programs to help recipients get education and job-training skills. During any one-month period in which an adult receives AFDC assistance, the recipient must work at least 30 hours a week or participate for at least 20 hours a week in a federal JOBS training program. An exemption covers recipients with a child under 5 years old (lowered to under 4 years old effective September 1, 1997) or with a child who is physically or mentally disabled.

Existing workforce development workforce development programs are consolidated into a new agency called the Texas Workforce Commission, replacing the Texas Employment Commission (TEC). The new commission consolidates more than 20 education and job training programs administered by eight different state agencies, plus the unemployment compensation program now under TEC.

HB 1863 gives the attorney general new child support enforcement tools, including suspension of the professional, occupational, business, motor vehicle, hunting or fishing license or other recreational permits or licenses of persons whose overdue child support payments equal or exceed the total support due for 90 days. A license suspension order may be issued only after the debtor has failed to pay under an agreed or court-ordered repayment schedule.
HB 1863 establishes spousal support (alimony) in Texas for divorced spouses who meet specific criteria. Support is limited to the lesser of $2,500 or 20 percent of the payor’s average monthly gross income, with certain exclusions, for up to three years. Recipients must meet various criteria regarding length of the marriage and limitations on the ability to be self-supporting. In general, marriages must have lasted 10 years and spouses seeking maintenance must lack earning ability to provide for their reasonable needs, be disabled or be the custodian of a disabled child. Maintenance may also be awarded from a spouse who had a criminal conviction involving family violence within two years of the divorce filing or during the suit, with no restrictions on the length of marriage.

The attorney general must report to appropriate law enforcement officials suspected instances of statutory rape involving teenage AFDC recipients, and DHS, in coordination with other state entities, must develop a parenting-skills training program for recipients. The bill creates a task force to explore ways to promote the efficient and effective delivery of AFDC benefits while eliminating fraud, establishes various pilot programs designed to promote self-sufficiency among those receiving AFDC benefits and calls for certain coordinated efforts among state agencies and the identification of certain clients eligible for participation in certain federal programs.

Supporters said HB 1863 would be a major step in reforming the state’s welfare system. The bill would establish a comprehensive approach to get AFDC recipients off welfare by encouraging recipients to get job training and education. Benefits would be time-limited so that AFDC would be only a temporary helping hand. These and other components in the bill would ensure that recipients would be able to leave welfare and attain permanent self-sufficiency. Texas AFDC payments already are low, and this bill would be a model for other low-grant states. The prospect of having state licenses suspended would be a powerful disincentive against falling behind on child support payments.

Consolidation of state job training and employment programs would help eliminate duplication of effort and allow more efficient and effective administration. Spousal support payments, or alimony, would be a transitional measure in limited cases in which spouses need help to reenter the work force.

Opponents said the five-year "freeze-out" period for reapplying for benefits would be harsh and unfairly burden persons who once received welfare, found jobs and then lost them. Time-limited benefits should first be tested in a pilot program. Requiring recipients to sign a responsibility agreement linking AFDC eligibility to behavior would be arbitrary, ineffectual and too costly; it is unfair to imply that all those who receive welfare benefits need to modify their personal behavior. Suspending a parent’s professional or driver’s license would make little sense if the goal is to make the parent pay support. Texas does not need alimony — it has a community property system providing that, upon divorce, the court will divide equally between the spouses all the...
money and property acquired during the marriage, and courts have the discretion to make an equitable division of the community to take economic need of one spouse into account.

Other opponents said the bill did not go far enough and should ban increased welfare payments for children born after adult recipients begin receiving aid. It should also permanently ban recipients from receiving benefits once their original eligibility has expired.

Licensing standards for child-care facilities

SB 1226 by West, Sims, Montford
(Incorporated into HB 1662, effective September 1, 1995)

SB 1226, the provisions of which were incorporated in HB 1662, prohibit the Department of Protective and Regulatory Services (PRS) from enforcing minimum standards adopted by the PRS board that are more stringent than the standards imposed by the board on September 1, 1985. This prohibition specifically applies to child-care facility staffing ratios, changes in allowable group sizes and increases in square footage requirements. Any minimum standards applicable to child-care facilities that relate to staff-child ratios, group sizes or square footage and that conflict with the standards of September 1, 1985, were repealed as of September 1, 1995. The prohibition against new standards expires on September 1, 1997.

In setting standards for child-care centers caring for children for periods of less than 24 hours at any one time, PRS must conduct a comprehensive cost-benefit analysis and economic impact study that includes costs as they relate to families and licensed child-care providers. At least 60 days before the PRS board adopts new minimum standards, the board must present the revisions for review and comment to the appropriate legislative oversight committees that have jurisdiction over child-care facilities. The composition of the State Advisory Committee on Child-Care Administrators and Facilities was changed to 12 members appointed by the board with two members who are operators of for profit child-care facilities.

Supporters said the costs associated with implementing the new minimum child-care facility standards would disproportionately affect low and middle income working parents. These families now spend on average $61.23 per child per week on child care. State agency studies estimate that charges at Texas day care centers could increase an average of $4.32 per week per child if the recommended changes took effect, while studies by the child care industry estimate that these changes could add $10 to $15 per child per week to costs. Many families would be unable to pay any additional increase and would have to choose less safe and less desirable forms of child care.

Opponents said the minimum standards proposed by the board should stand. The Legislature should not circumvent board authority to adopt standards that were carefully developed over a long period, would protect children and would bring the state closer to the level of care required in other states. Even with the new standards Texas would still rank in the bottom third of states, and even the proposed standards would fall short of those recommended by such groups as the American Academy of Pediatrics.
Notes. SB 1226 died after being placed on the House calendar too late to be considered. The Senate incorporated the provisions of SB 1226 into HB 1662 by Hilderbran, relating to revisions of statutes affecting PRS, which took effect on September 1, 1995.

The HRO analysis of SB 1226 appeared in the May 22 Daily Floor Report.
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HB 2 prohibits legislative caucuses from accepting contributions from nonmembers 30 days before and during a regular session and requires caucuses to file financial disclosure reports with the Texas Ethics Commission twice a year — January 15 and July 15. The bill makes it a Class A misdemeanor for a nonmember to make to a caucus, or for a caucus to accept, a contribution during the prohibited period. Violators are liable to the state for three times the amount of the unlawful contribution.

Supporters said the bill would bring legislative caucuses under the same contribution and expenditure reporting requirements as legislators, including the prohibition against contributions during legislative sessions. It would eliminate the appearance of a double standard for legislative caucuses and individual legislators. The public has a right to know who is funding caucuses that play key roles in legislative deliberations, especially since caucuses derive much of their funding from private sources.

Opponents said this bill is unnecessary because the House already requires caucuses to report contributions and expenditures to the chief clerk. The House has many ways to sanction members who fail to comply with House rules. Since caucuses are not political action committees and do not contribute to or promote candidates for public office, they should not be required to file with the Texas Ethics Commission.

The HRO analysis appeared in the March 6 Daily Floor Report.
Requiring approval by ETJ residents of Austin annexations

HB 564 by Combs, Krusee
Died in Senate committee

HB 564 would have prevented the City of Austin from annexing any area with 50 or more inhabitants without prior approval by a majority of the voters in the area in an election. If the voters rejected annexation, the city could not have initiated new annexation proceedings in any part of the area for five years. The ballot proposition, election order and election notice description would have used commonly understood points of reference to provide voters with a reasonable understanding of the area to be annexed. HB 564 would have applied only if the first hearing notice of a proposed annexation was published on or after August 28, 1995.

Supporters said voters in unincorporated areas should have the right to decide whether or not they want to be annexed by the city. Annexation without voter approval amounts to a form of taxation without representation and erodes local control in unincorporated areas. HB 564 would have fostered useful negotiation between Austin and areas that the city has targeted for annexation. Commercial areas without residents could be annexed without voter approval.

Opponents said the bill would lead to deterioration of the City of Austin. The ability to annex and expand its tax base, critical to a city’s health, would often be thwarted if voter approval of the annexed area were required. Limits on growth and development would lead to urban decay in Austin, and the bill’s provisions could set a precedent for other Texas cities.

The HRO analysis appeared in the March 20 Daily Floor Report.
Revision of open records laws

HB 1718 by S. Turner
Effective September 1, 1995

HB 1718 renames the Open Records Act as the Public Information Act and redefines public information to include information stored or produced through electronic means. A governmental body may charge reasonable fees, set by General Service Commission (GSC), for programming, manipulating and processing records as well and for cost of transferring or storing material.

The GSC is directed to develop rules regarding the cost of providing information to the public, including reasonable charges for personnel and overhead. All state agencies are subject to the GSC rules unless they petition for and receive an exemption. Governmental bodies other than state agencies may deviate up to 25 percent from the charges without requesting a waiver.

Supporters said now that almost every record that a governmental body has is kept in some form on electronic media, the Open Records Act should be updated to conform to these changes. Persons seeking information held by several different governmental bodies may be forced to pay widely differing costs depending on where the information is located. HB 1718 establishes a standard set of cost guidelines for all governmental agencies to follow in charging for public information, with local governments allowed sufficient flexibility to deal with local circumstances.

Opponents said counties and cities should not be subjected to the same rules adopted by the GSC for state agencies regarding the costs of open records. These rules should be only guidelines, not mandatory, for non-state governmental bodies. The costs of creating such records, especially computer records, varies greatly from one governmental body to another.

Notes. The Senate added the provision allowing for a 25 percent derivation from GSC rules for non-state agencies; the House-passed version would have allowed a 50 percent variance.

The HRO analysis appeared in Part One of the May 8 Daily Floor Report.
HR 1242 expresses the desire of the Texas House of Representatives to settle *Thomas et al. v. Bush et al.*, a lawsuit alleging that portions of the House and Senate redistricting plans are racially gerrymandered. (The suit challenges 13 of the 31 Senate districts and House districts in Bexar, Dallas, El Paso, Fort Bend, Harris, Orange and Smith counties.) The resolution notes that an agreement has been reached that addresses the concerns of the plaintiffs in the lawsuit without adversely affecting the voting rights of any other citizen.

HR 1242 directs the state's attorneys "to seek a judgment from the court that resolves that litigation as it relates to state representative districts by allowing for the use of the state representative districts described in Plan H738, the current redistricting plan for the House of Representatives, with the modifications provided by Plan H846, as contained in the Redistricting Application Computer operated by the Texas Legislative Council, in the general election to be held in November 1996." HR 1242 also allows the staff of the Texas Legislative Council, with the approval of the affected state representatives, to make technical changes to the plan to eliminate voting precincts containing few or no residents.

**Notes.** The Senate took no formal action but informally approved proposed changes in certain Senate districts as part of a proposed settlement agreement concerning the *Thomas v. Bush* lawsuit. On September 15, 1995, the three-judge federal court panel hearing the lawsuit ordered a modified version of the settlement plan in effect for the 1996 elections. For further information see HRO *Focus* Number 74-16, "State, Congressional Redistrictu. n Update," October 6, 1995.
Abolishing the office of state treasurer

SB 20/SJR 1 will abolish the office of state treasurer and transfer its duties to the state comptroller, subject to voter approval of SJR 1, a proposed constitutional amendment on the November 7, 1995 ballot. Among the state treasurer’s duties to be transferred would be protecting, managing and investing state cash and securities, paying state warrants, administering the state’s unclaimed property laws and administering and enforcing the state’s cigarette and tobacco products laws. The comptroller could contract with a private entity to perform a transferred activity. The transfer of the office would become effective on September 1, 1996.

Supporters said the office of the state treasurer is unnecessary and the functions provided by the office could be handled by other state agencies, particularly the comptroller of public accounts, at a substantial savings to the state. The treasury has outgrown its usefulness as many of its operations have been automated. The personnel who have expertise at performing the few unique functions of the treasury could be transferred to other agencies.

Opponents said the state treasurer holds a constitutionally created office that provides necessary checks and balances for the operation of the finances of state government. It is sound financial practice to have the person who collects the revenue be separate from the person who does the accounting. Abolishing the state treasurer’s office would not necessarily save money. Indeed, additional money might be needed to move the functions of the office, train new employees and correct unforeseen problems caused by the move.

Judicial campaign finance revisions

SB 94 by Ellis
Effective September 1, 1995

SB 94, the Judicial Campaign Fairness Act, sets mandatory limits on campaign contributions and voluntary limits on campaign expenditures for candidates for judicial positions on the Supreme Court, Court of Criminal Appeals, appeals courts and district, statutory county and statutory probate courts.

Contributions. A judicial candidate is prohibited from knowingly accepting contributions until 210 days before the filing deadline and may accept contributions only until 120 days after the general election for opposed candidates or 120 days after the primary election for unopposed candidates. Aggregate individual campaign contributions are limited to $5,000 for a statewide judicial office and districts of more than 1 million people; $2,500 for districts of 250,000 to one million people; and $1,000 for districts of less than 250,000. A candidate may not accept a contribution over $50 from a member of a law firm if the aggregate amount of contributions from other members of the law firm or the firm’s general-purpose committee exceeds six times the applicable contribution limit. Contributions to a candidate from general-purpose committees cannot exceed 15 percent of the applicable voluntary limits on expenditures. A candidate may not be reimbursed from political funds for personal expenditures or loans totaling more than $100,000 for statewide candidates and five times the contribution limits for local races. Candidates violating the limits are subject to civil penalties of not more than three times the amount exceeding the limits.

Expenditures. Candidates are subject to voluntary spending limits of $2 million for a statewide judicial office. Court of appeals judges are limited to spending $500,000 if their district contains more than one million persons or $350,000 if it contains fewer. All other judicial candidates are limited to $350,000 for districts greater than one million, $200,000 for districts of 250,000 to one million people, or $100,000 for districts with fewer than 250,000 people.

Candidates must file either a sworn declaration of compliance or make a written declaration of intent to exceed the spending limits. If a candidate declares compliance and subsequently exceeds the campaign expenditure limits, that candidate may be assessed a civil penalty of up to three times the amount of expenditure above the limits for that candidate’s office. Candidates are allowed to state their compliance on any political advertisement, but noncomplying candidates must state on any political advertisement that they have "rejected the voluntary limits of the Judicial Campaign Fairness Act."
If an opposing candidate declares intent not to comply with the spending limits or is a complying candidate and exceeds the limits, a complying candidate will be released from the spending limits and the limits on reimbursement for personal expenditures or loans.

A judicial campaign fairness fund, consisting of civil penalties and gifts and grants, will be used to prepare a voter’s guide listing judicial candidates and their backgrounds, except candidates not complying with the spending limits may have only their names listed and an indication that they do not comply.

Supporters said the current Texas judicial campaign finance system has undermined public respect for the judiciary and created an appearance of impropriety and conflict of interest. While it may be ideal to eliminate campaign contributions entirely, they will remain necessary so long as judges are chosen by partisan election. Accepting that candidates must advertise in order to get the name recognition to be elected and that lawyers and law firms are the primary contributors to judicial campaigns, SB 94 seeks to minimize the appearance of impropriety resulting from attorney contributions and help level the playing field for judicial contests. Limiting the time in which campaign contributions can be received to a 21-month election season would help curb the power of lawyers to influence judges outside of the context of judicial campaigns.

The U.S. Supreme Court has ruled that expenditure limits must be voluntary, as this bill specifies. Yet the bill would create strong incentives to comply with the voluntary limits and discourage spending over those limits.

Opponents said SB 94 would overly limit the ability of many legitimate candidates to compete for judicial seats. Grassroots candidates with limited resources must start fundraising months before the filing deadline in order to obtain sufficient contributions to campaign effectively, especially against incumbents who can more easily raise funds in a short period of time. Also, some independently wealthy candidates are able to fund their own campaigns rather than rely on contributions and will have too great an advantage.

Other opponents said SB 94 would not sufficiently limit the damaging influence that campaign contributions have on the Texas judicial system. The limits proposed still represent a substantial amount of money that could be used to persuade a judge to rule for one side over another. As long as there are partisan elections for judges in Texas, campaign contributions will still have an undue influence on the Texas judicial system.

The HRO analysis appeared in Part One of the May 19 Daily Floor Report.
Including briefing sessions under the Open Meetings Act

SB 246 by Wentworth
Died in the House

SB 246 would have changed the definition of "meeting" in the Open Meetings Act to include a gathering of a quorum of members of a governmental body with four or more members at which the members solicit information from, give information to, ask questions of, or solicit questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

Supporters said subjecting so-called briefing sessions to the Open Meetings Act would close a loophole in the act that allows government officials to reach agreements in closed session, then vote in open session without discussing the issue. Briefing sessions too often become public policy deliberations among members of a governmental body. The public should have the right to be notified and present during the governmental processes that lead to formation of public policy.

Opponents said that the bill would discourage governmental bodies from holding informal briefing sessions, which can be a valuable means of educating public officials about public policy issues without having to follow the cumbersome posting requirements of the Open Meetings Act. In addition, the bill was overly vague about when the Open Meeting Act applies and could result in prosecution for discussions touching on public policy that happen to involve a quorum of a governmental body.

Notes. SB 245 passed the Senate on March 16 and was reported favorably, as substituted, by the House State Affairs Committee on May 9; no further action was taken.
Term limits for legislators and elected state executive officials

SJR 4 by Bivins et al.
Died in the House

SJR 4 would have prohibited election to the Texas House of Representatives or the Texas Senate of a person who had served in that legislative body for all or part of six regular sessions (12 years). Statewide elected officials, except judges, and members of state boards, commissions or governing boards elected in statewide or in electoral districts (such as the Railroad Commission, State Board of Education) could not hold office if they had served in that office more than any part of 12 calendar years. The amendment would have applied to elected service after January 1, 1997.

Supporters said limiting terms would make lawmakers and statewide elected officials more responsive to their constituents, eliminate problems caused by entrenched careerist politicians and increase electoral competition and turnover, all of which would breathe fresh air into the state political system.

Opponents said term limits are unnecessary and undemocratic, thwarting the ability of voters to reelect experienced incumbents. The average tenure of Texas legislators is only about four years, so there is no need for term limits. The turnover of statewide elected officials, especially the governor, is also relatively rapid in Texas. Voters should be trusted to oust incumbents who have served past their time and retain those whose experience and expertise enhances their ability to serve effectively. Other opponents said term limits should apply retroactively to currently serving officials; if longevity in office is a problem, the voters should not have to wait until 2009, 12 years after the limit took effect in 1997, to start solving it.

Notes. SJR 4 was adopted by the Senate by 24 to 6 on March 14 and died in the House State Affairs Committee, which reported a companion measure, HJR 1 by Marchant et al., on May 8. HJR 1 as substituted was similar to SJR 4 except it would have included members of the U.S. House and Senate and would have taken effect immediately, counting prior service in applying term limits. The House took no action on HJR 1.
SJR 26, as adopted by the Senate, would have required the justices of the Texas Supreme Court, the Court of Criminal Appeals and the 14 courts of appeals be appointed by the governor and retained or rejected by the voters, beginning with the general election in November 1996. Those retained would have held office for six years, and any rejected by the voters would have been replaced by the governor through appointment until the next election. The governor in making judicial appointments, and the Senate in determining whether to confirm them, would have been required to fairly reflect the geographic distribution and ethnic and racial composition of the population of the state or district served. The initial term of appointment would have ended on January 1 of the first odd-numbered year that began more than 18 months after the justice took office.

The Legislature would have had to provide for the nonpartisan election and subsequent retention or rejection of district judges. Judges for districts composed entirely of the most populous counties, as determined by the Legislature, would have been elected by nonpartisan ballot from commissioners court precincts within the county, but for a subsequent term incumbent judges would have been retained or rejected by voters countywide. District judges would have had to be residents of the county, but not necessarily of the precinct, that they served. Under the implementing legislation, SB 313 by Ellis, counties of one million or more population would have initially elected district judges by nonpartisan election by county commissioner precinct (first term), with incumbents retained or rejected by countywide vote (second term). If they sought a third term, incumbent judges would again have had to be elected in a nonpartisan contest at the precinct level.

The Legislature could have altered the terms of offices as necessary by changing the election date, restructuring the judicial system or staggering terms of office.

Supporters said initially selecting appellate court judges by gubernatorial appointment and district judges by nonpartisan election, with subsequent retention or rejection of incumbents by the voters, would take partisan politics out of most judicial elections and promote informed voting based on merit. Recent judicial elections have shown the need for reforming the judicial selection process, and the judicial selection system in SJR 26 would focus on the quality and ability of judges rather than forcing voters to choose among contending candidates on a political or partisan basis. Having the governor, with the consent of the Senate, appoint appellate court judges would help ensure that judges are chosen on merit and are more broadly representative of the electorate.
**Opponents** said the current partisan system of electing judges at all levels guarantees that judges remain accountable and have support of the people. Party identity provides voters with important information about a judge’s political and social values. When appeals court judges make policy, as they often do, they should reflect the policy preferences of the voters. The governor would likely appoint only members of the legal establishment as appellate court justices, closing the door to outsiders seeking a seat on the bench.

**Notes.** The House Judicial Affairs Committee version of SJR 26 would have required that justices of the Texas Supreme Court, Court of Criminal Appeals and courts of appeals be elected from single-member districts. The governor could have filled vacancies between elections. The Legislature could have created election subdistricts for district judges. The implementing legislation, SB 313 by Ellis et al., also died in the House.
Initiative and referendum

SJR 34 would have allowed voters to enact laws through initiative and referendum (I&R). Through a petition process, voters could have proposed statutory or constitutional measures to the Legislature and voted on proposals that the Legislature did not approve (initiative) or repealed bills enacted by the Legislature (referendum).

For initiatives, a proposed measure would first have had to be reviewed by the attorney general, who could have rewritten it to eliminate any constitutionality concerns, and by the comptroller, for preparation of a fiscal note. An initiative petition would have had to be signed by registered voters equaling at least 8 percent of the total number of votes received by all candidates for governor in the most recent gubernatorial election, both statewide and in each of at least half of the congressional districts. The petition would have had to have been filed with the secretary of state for signature verification no later than 180 days after the date approved petition copies were issued and not later than 60 days before the start of a regular legislative session. If the initiated proposal presented to the Legislature was not enacted during the next regular session, it would have been placed on the November ballot after the session. The Legislature could have included on the ballot alternatives to the initiative, with the proposal receiving the highest number of affirmative votes being adopted. A four-fifths vote of the membership of each house would have been required to amend or repeal a statutory initiative within five years after its taking effect. No more than five proposals could have been voted on in a single election.

The procedures for placing a referendum on the ballot to repeal a statute enacted by the Legislature during a regular or special session would have been similar to those for an initiative, except that the petition would have had to have been signed by 4 percent of the total number of votes received by all candidates for governor in the most recent gubernatorial election in each of at least half of the congressional districts as well as statewide. Only an entire bill, not just a part, could be considered in a referendum.

Supporters said I&R would give the people a direct voice in government to counter the influence of special interests on the Legislature. The initiative is a way of informing legislators of what the people want. Sufficient safeguards would be in place to determine if initiatives were unconstitutional or extremely expensive, and the Legislature would have the opportunity to present alternatives on the ballot should it decide not to approve the initiative proposal. A referendum procedure would act as a check and balance on the Legislature by allowing the voters to decide whether certain measures should be repealed.
**Opponents** said I&R has proved unwieldy and counter-productive in other states where special interests and demagogues have dominated the process. In a representative democracy, the voters elect legislators to screen proposed legislation and render an informed judgment on its merits; those legislators who fail to reflect majority opinion are held accountable at the polls.

**Notes.** SJR 34 was reported favorably, with amendments, by the Senate State Affairs Committee on April 20; no further action was taken.
Prohibiting discrimination, preferential treatment by the state

SJR 45 by Sibley

Died in the Senate

SJR 45 would have amended the Texas Constitution to prohibit the state, an agent of the state or a political subdivision from discriminating against or granting preferential treatment to a person because of the person's race, sex, sexual orientation, color, ethnicity or national origin in employment, education or public contracting, beginning January 1, 1996.

Supporters said government should not discriminate either for or against its citizens, yet the state discriminates in the name of stamping out discrimination. Under certain affirmative action programs special preference is given on the basis of gender, race or ethnicity in hiring, contracting, university admissions and other areas. Quotas and set-asides constitute reverse discrimination as much as the old practices of segregation and "old boy network" preferences; any discrimination is wrong and should be prohibited.

Opponents said the bill would set back the clock on the advances made to bring minorities and women to a position of equality and remove the vestiges of years of deliberate discrimination. Affirmative action and historically underutilized business (HUB) programs are in place to remedy past discrimination against minorities and women. The state should have special programs to level the playing field in jobs, education, and state contracts. This proposal would ignore existing discrimination and prevent effective counter-measures.

Notes. SJR 45 was referred to the Senate State Affairs Committee, which took no action.
Government Employees

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Limiting damages for government whistleblowers

HB 175 by Hirschi
Effective August 28, 1995

HB 175 prohibits the award of exemplary (punitive) damages to state or local governmental employees subjected to an adverse personnel action — such as being fired — for reporting an unlawful act by their employer to a law enforcement agency. Damages for future pecuniary losses and for nonpecuniary losses such as mental anguish and emotional pain and suffering are limited to $10,000 to $250,000, depending on the number of persons employed by the governmental entity.

Whistleblowers are entitled to be reinstated to their former positions or equivalent positions. The bill increases from $1,000 to $15,000 the maximum civil penalty that may be imposed on a supervisor who makes an adverse personnel decision regarding a whistleblowing public employee. The supervisor, not the agency, is personally liable for paying the civil penalty but cannot be assessed additional damages.

A governmental entity’s sovereign immunity is waived and abolished for whistleblowing suits. However, the governmental entity has an affirmative defense in a whistleblowing suit if it shows that it took an action against an employee based solely on information that is not related to the fact that the employee reported government wrongdoing to a law enforcement agency.

The attorney general is required to supply the Legislative Audit Committee with a brief memorandum describing cases in which a state governmental entity is required to pay $10,000 or more in a whistleblower case. The state auditor may audit or investigate the state governmental entity to determine if any changes are necessary to correct the problems that gave rise to the whistleblower suit.

Supporters said HB 175 would amend the Whistleblower Act to lessen its punitive impact on the taxpayers while maintaining adequate incentives to report wrongdoing and punish those who retaliate against whistleblowers. The current whistleblower act, instead of punishing public officials for retaliating against whistleblowers, forces the taxpayers to pick up the tab for excessive litigation costs and high jury awards associated with whistleblower lawsuits. In one such suit the Legislature had been asked to appropriate nearly $13 million dollars, plus interest, to one whistleblower. HB 175 would eliminate punitive damages against governmental entities, since the only ones being "punished" are the taxpayers.

Opponents said HB 175 would take the teeth out of the state’s whistleblower law by removing the authority of a jury to award punitive damages to public employees who prove that they were fired for reporting government corruption. The elimination of punitive damages would not only discourage public employees from reporting corruption but also remove the authority of a jury to penalize a state agency for firing
a whistleblower. Although in one whistleblower case a large punitive damage award was made, the award resulted from careful deliberation by a jury and provides an insufficient reason to restrict the whistleblower law.

The HRO analysis appeared in the May 11 Daily Floor Report.
Teacher Retirement System (TRS) revisions

SB 9 by Armbrister et al.
Effective September 1, 1995

SB 9 requires the Legislature to appropriate funds for the administration of TRS and requires the system to undergo sunset review in 2007. It increases benefits for TRS retirees beginning September 1, 1995, through either (1) an ad hoc increase to the current benefit based on 33 percent of the difference between the retiree’s annuity and what it would have been had the annuity kept up with inflation; (2) a recalculation of benefits based on the current retirement formula plus ad hoc increases and a 33.3 percent inflation ad hoc increase; or (3) a minimum benefit calculated on the minimum starting teacher salary as set in the Education Code. It eliminates the $10 annual membership fee for TRS members. It allows members to retire at age 50 with 30 years service, increases the ceiling on lump-sum death benefit options from $60,000 to $80,000 and raises the minimum monthly disability payment from $50 a month to $150 a month.

SB 9 requires the governor to appoint two of the members of the TRS board of trustees from a list of nominees submitted by the State Board of Education (SBOE) instead of the two members being directly appointed by the SBOE. It forbids TRS employees from advocating an increase in benefits or influencing the Legislature. It requires TRS to comply with state space allocation standards and with the State Purchasing and General Services Act regarding historically underutilized businesses. The bill requires the Legislative Audit Committee to choose an independent auditor to evaluate the system’s investment practices and performance and to file annual financial reports with legislative committees and the Legislative Budget Office. The bill also establishes a group health insurance program for active employees of public independent school districts funded by contributions from the school district and employees.

Supporters said the bill would implement recommendations of the Sunset Advisory Commission and increase state oversight and accountability of the TRS. It also would provide current and future retirees with needed benefit increases.

Opponents said the bill would infringe on the fiduciary responsibility of the TRS board of trustees. The management and governance of the agency should rest with the trustees, and the Texas Constitution makes the TRS board responsible for administering the retirement system.

The HRO analysis appeared in the April 26 Daily Floor Report.
Eliminating state payment of employee share of Social Security tax

SB 102 by Bivins

Generally effective September 1, 1995

SB 102 eliminates state payment of the employee share of federal Social Security taxes for state employees, beginning January 1, 1996. State employees and judges on the payroll August 31, 1995, will receive supplemental pay equal to the amount the state had paid toward the employee share of Social Security taxes plus an amount equal to the increased employee retirement contribution resulting from the pay increase. The amount of Social Security taxes paid may not exceed $965.25 a year. Employees and judges who leave state employment after August 31, 1995, for 12 consecutive months are not entitled to the supplemental pay if they return to state employment. New employees hired beginning September 1, 1995, are not eligible for the pay increase. The bill was made contingent on the state comptroller determining that the General Appropriations Act for fiscal 1996-97 includes benefit replacement pay for employees and judges affected by the bill.

Supporters said the state needs additional funds for other priority programs, and eliminating the state-paid portion of the employee and judicial share of Social Security taxes for employees hired after August 31, 1995, would save the state $26.3 million in fiscal 1996-97 alone. The savings would continue to increase as employees quit and retire and are replaced by new employees. Employees and judges on the payroll on August 31, 1995, would receive supplemental salary payments to offset any loss resulting from having to pay the employee share of the taxes.

Opponents said the bill would reduce salaries of future state employees by an average of almost $1,000 a year and create a two-tier state employee pay scale: one for those employed before September 1, 1995, and another for those employed later. The state-paid portion of employee Social Security taxes was originally meant to increase compensation, yet newly hired employees would start at a lower base. Current state employees have no guarantee that the Legislature would continue to offset the $1,000 a year loss in pay after fiscal 1996-97.

The HRO analysis appeared in the May 19 Daily Floor Report.
Employee Retirement System revisions, benefit increases

SB 1231 by Armbrister
Effective August 28, 1995

SB 1231 increases retirement and death benefits by 12.5 percent for members of ERS who retired or survivors of members who died before September 1, 1995. The increase does not apply to persons who retired under the retirement incentive program instituted previously. The 12.5 percent increase will be made the first month after the ERS actuary certifies that the increase will not affect the actuarial soundness of the system. The bill also allows ERS trustees to increase retirement and death benefits by up to 12.5 percent for members who retire or die between September 1, 1995, and August 31, 1996. The decision may not be made before September 1, 1996, and will be contingent upon the ERS actuary certifying that the increase will not violate the 31-year funding limit. The bill also requires ERS trustees to provide all ERS retirees or their survivors with one supplemental payment (13th check) in fiscal 1997. The "13th check" could be given again if it does not violate the 31-year funding limit.

SB 1231 also allows ERS members to use accumulated unused sick leave to satisfy length-of-service requirements to retire, adjusts the ERS/TRS credit transfer program, changes the method of computing supplemental retirement program annuities for state law enforcement and custodial officers (LECOSRF), requires the Texas Department of Criminal Justice (TDCJ) to set standards for eligibility to be a custodial officer and requires administrative personnel to have at least 50 percent contact with inmates to be considered custodial officers for retirement purposes. The bill also requires JRS I to suspend annuity payments to judges who retire under JRS I and resume regular service.

Supporters said that since retirees do not receive automatic cost-of-living benefit increases to allow for inflation, the benefit increase provided by the bill is needed and would not jeopardize the actuarial soundness of the system.

Opponents said the ERS benefit increases proposed by the bill would reduce the ERS overfunded actuarial accrued liability and could affect the actuarial soundness of the system if the proposed state contribution rate of 6 percent was reduced permanently.

The HRO analysis of the bill appeared in the May 15 Daily Floor Report.
# Health and Health Insurance

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Small employer health insurance amendments

HB 369 amends the Small Employer Health Insurance Availability Act (Insurance Code Chapter 26) to remove employer contribution requirements, reduce employee participation requirements, replace three statutory health insurance plans with two plans developed by the commissioner of insurance, exempt certain individual plans from the act, amend preexisting condition provisions, prohibit small employer carriers from establishing a separate class of business under certain circumstances and to expand health maintenance organizations’ ratemaking allowances under certain circumstances.

HB 369 also adds filing requirements for private purchasing cooperatives and exempts their board members and the Texas Health Reinsurance System from liability for good faith actions performed in the line of work. It also requires most converted health insurance policies to cover similar, instead of identical, coverages and benefits.

Starting June 1, 1996, small employer carriers (such as insurers and HMOs) must offer two plans developed by the commissioner of insurance: a catastrophic care benefit plan and a basic coverage benefit plan. An HMO may offer a plan developed by the department or a point-of-service contract in addition to a state-approved HMO plan already allowed.

HB 369 removes the employer-contribution requirement of 75 percent of insurance premium costs but allows small employer carriers to require an employer contribution if the carrier applies the mandate uniformly to each small employer offered or issued coverage in Texas.

At least 75 percent, instead of 90 percent, of eligible employees must participate in order for coverage to be obtained under a small employer health benefit plan. A small employer carrier may offer small employer health benefit plans at participation rates under 75 percent if the carrier allows a similar participation rate for each small employer benefit plan offered in Texas. The definition of "eligible employee" is changed to specifically exclude employees who are covered by Medicaid, Medicare or CHAMPUS and elect not to be covered under the employer.

Supporters said HB 369 would improve the availability and accessibility of small employer health insurance coverage, reflecting experience gained from a year of implementing the Small Employer Health Insurance Act.

HB 369 would eliminate requirements for plans that were found to be unaffordable or unwanted by employers and employees. Required benefits in the standard benefit

House Research Organization
plan did not result in lower cost health insurance, and the in-hospital and preventive/primary care plans were too limited to attract purchasers.

HB 369 would increase flexibility for employers and carriers. Employers would be required to cover only 75 percent, instead of 90 percent, of their eligible employees, so that a few employees who elect not to enroll in health benefits could not prevent the entire business from obtaining benefits. Changes in the definition of "eligible employee" also would help businesses meet the 75-percent requirement by allowing them to exclude employees covered under federal health programs.

Elimination of the 75-percent employer contribution requirement would help those businesses that cannot afford to pay the premium and have employees who are willing to pay a larger share of the costs.

Opponents said HB 369 would not provide small employers sufficient flexibility in benefit coverage. Some businesses want to provide coverage to just a portion of their employees, such as management staff. A 75-percent participation requirement would essentially require many small employers to pay for most, if not all, of premium costs in order for low wage employees to participate.

The HRO analysis appeared in the April 18 Daily Floor Report.
Creating a health data council

HB 1048 by Maxey
Effective September 1, 1995

HB 1048 creates an 18-member Health Care Information Council to develop a statewide system to collect data on health care charges, utilization, provider quality and outcome of care. The Texas Department of Health (TDH) will contract with the council to collect data and provide administrative assistance. All health care facilities, health maintenance organizations and physicians are required to submit data required by the council, with exceptions for rural providers, individual physicians and certain physician groups.

The council may not duplicate or conflict with other required data collection activities, and must work with appropriate agencies and organizations and make recommendations to consolidate other data collection programs.

TDH is required to promptly respond to data requests and to prepare reports, subject to confidentiality and provider data restrictions. Physician and patient information is confidential and may not be released if an individual cited in the information can be identified. The council also must establish a methodology that measures quality of care and adopt procedures to verify the accuracy of data before a report is released. A person who knowingly or negligently releases data in violation of the act, or who fails to supply available data to the council, is liable for civil penalties.

Supporters said the bill would help create a more competitive, financially efficient and accountable health care system by giving consumers, workers, employers and state policymakers access to data that could identify service utilization, costs and expenditures, quality of care, gaps in services, population needs and fraud and abuse.

A council could centralize, coordinate and facilitate existing disjointed or sporadic data collection efforts and follow a trend adopted by many states and recommended by, among others, the Texas Performance Review. Coordinated, centralized data collection would help the state spend tax dollars wisely and plan better.

HB 1048 would represent an important first step in obtaining and disseminating quality-of-care data, which is probably the most important data used by employers and consumers of health services.

Opponents said HB 1048 would create an expensive data collection system that may not reduce costs. Overall statewide health care costs may not be significantly reduced because many expenditures and costs are driven by factors outside of negotiated charges or utilization controls, such as medical technology development costs and the chronic medical problems of an aging Texas population.
Unless carefully presented, collected data could unduly alarm patients, erode public trust and reduce or dictate provider practices. The state should not evaluate quality of care, which is an especially difficult measurement, for which scientific measurement methodologies are still evolving.

Other opponents said HB 1048 should phase in data submission requirements from rural hospitals, insurers, individual physicians, physician groups, dentists, chiropractors and other health care providers.

The HRO analysis appeared in the April 25 Daily Floor Report.
Regulating orthotists and prosthetists

HB 1193 by Berlanga
Died in the House

HB 1193 would have established the Texas Board of Orthotics and Prosthetics and would have prohibited unlicensed individuals from practicing orthotics or prosthetics or acting as assistants. HB 1193 would have also provided for licensing facilities that are not already licensed under the Health and Safety Code.

Licensing exemptions were included for podiatrists, pedorthists, chiropractors, persons licensed by another state agency who practice within that agency’s licensure laws and individuals who hold a credential issued by the National Association of Retail Druggists (NARD) and who work within the scope of practice as defined by the Texas Rehabilitation Commission payment schedule. Orthotics or prosthetics practitioners could have sought a licensing exemption if they had practiced for at least three years in Texas or 15 years out of state.

The board would have been authorized to issue provisional and temporary licenses and student registration certificates, to establish continuing education requirements, to revoke, suspend or refuse to renew a license and to impose civil penalties.

Supporters said HB 1193 would provide needed regulatory standards for an important profession that is currently unregulated. Appropriate fitting and servicing of an orthosis or prosthesis can make the difference between a productive life and one that is disabling and painful. Devices are becoming more sophisticated and expensive, creating opportunities for fraudulent or negligent practices. Accreditation by professional private organizations does not sufficiently ensure quality patient care.

Exempting most experienced practitioners from licensing would protect them from loss of livelihood. Exemptions for orthotists who work in drugstores are narrowly written to reflect their training and usual scope of practice. Otherwise, inadequately trained and educated individuals could avoid licensure simply by working through drugstores.

Opponents said no public outcry for regulation has been heard, and it is unclear that more regulation is needed. The bill is an attempt by some practitioners to enhance the status of their profession and exclude others from practice. NARD-credentialed orthotists receive the same training and education as orthotists certified by the two other professional organizations, and they should be similarly exempted or "grandfathered" from licensure requirements. Other opponents said the training and educational requirements are too low and too many people would be exempted from licensure.
Notes. The Senate adopted the conference committee report on HB 1193, but it was tabled by the House.

The HRO analysis appeared in the April 26 HRO Daily Floor Report.
Tobacco product sales and distribution to minors

HB 2460 by Seidlis
Vetoed by the governor

HB 2460 would have added tobacco-sale restrictions to the Health and Safety Code prohibiting the distribution of tobacco products to minors under age 18, restricted placement of vending machines to certain public places, prohibited the sale of tobacco products in opened packages, revised tobacco warning sign requirements and allowed random, unannounced enforcement visits that could use persons under age 18 as decoys.

HB 2460 would have preempted local ordinances or rules for distributing tobacco products to minors and would have made it a criminal offense for persons younger than age 18 to possess, purchase or accept tobacco products or to falsely represent to be age 18 or older for the purpose of purchasing tobacco products.

HB 2460 also would have amended the Tax Code to require cigarette and other tobacco retailers to pay a permit fee of $50 and to direct the use of fee revenue to be used for enforcement and the Texas DARE Institute, a tobacco education and awareness grant program of Southwest Texas State University.

Sale, distribution, signage and vending machine offenses would have been Class C misdemeanors, with a maximum penalty of a $500 fine. If required by federal law, an administrative penalty could have been assessed against a person who holds a tobacco product permit for violations.

Supporters said HB 2460 offered a reasonable and uniform approach to preventing children’s access to tobacco products and would promote health, reduce smoking and curb state health expenditures for smoking-related illnesses. The bill also would help Texas meet upcoming federal requirements to tighten enforcement of tobacco-sale restrictions. Permit fee revenue would cover any additional enforcement costs. A Texas Department of Health study in 1993 found that teenagers could buy cigarettes at about 61 percent of the stores surveyed. Uniformity in state tobacco product vending laws involving minors is needed to protect competing businesses.

Opponents said the statewide uniformity standard in HB 2460 should be removed and other provisions made more restrictive. The minimal statewide restrictions in the bill should not preempt more restrictive local ordinances. Devoting scarce law enforcement to offenses like tobacco sales and purchases of tobacco by minors would clog up the criminal justice system and would do little to deter smoking among the

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young. Youngsters will experiment with tobacco regardless of the consequences, and businesses should not be forced to regulate social behavior.

HB 2766, the Patient Protection Act, would have added Insurance Code requirements for managed care health plans. Such plans would have had to provide prospective enrollees a written description of the plan and adequate access to services, including access to least one cancer center certified as a "Comprehensive Cancer Center" (M.D. Anderson Cancer Center) by the National Cancer Institute. Primary care doctors and dentists in a capitated plan would have had to be located within a reasonable travel distance from the enrollee’s residence or place of employment.

Managed care entities would have had to provide the commissioner of insurance an explanation of their targeted provider networks, including geographic distribution of providers by specialty. Other requirements would have governed provider credentialing and termination processes, consultation from physicians and dentists on the plan’s medical or dental policy, prohibition against the excluding of providers solely on the basis of anticipated patient characteristics, paying for emergency services, the timing of prior authorizations, utilization review and mandatory offering of point-of-service plans. Kaiser-Permanente, Scott and White and Harris-Methodist Health System managed care plans would have been exempt from provider participation, credentialing and termination provisions.

Supporters said HB 2766 would provide the additional regulation needed in a growing market of managed care organizations and enrollees. Patients should be guaranteed access to appropriate care, physician-patient relationships should be safeguarded, and consumers provided sufficient information to choose an HMO. HB 2766 would not force HMOs to contract with "any willing provider" or significantly increase care costs.

Opponents said that HB 2766 would increase costs, its contract protection provisions are unprecedented and prior-authorization provisions could invite doctor abuse of the system. Disclosure requirements, contract-processing requirements and provider-participation requirements would increase a managed care plan’s administrative costs. Disclosure requirements would also increase administrative costs for large businesses that offer several plans and develop their own employee information manuals.

SB 10 requires the Health and Human Services Commission to restructure Medicaid delivery if the commission obtains a waiver or necessary federal authorization. The system must use a managed care, primary care case management or a capitated system, utilize local governmental spending and resources to draw additional federal matching dollars and allow the establishment of nonprofit entities called intergovernmental initiatives (IGIs). The commission must submit applications for federal waivers or other authorizations by August 31, 1995. Under certain circumstances the application submission can be postponed or waived.

The system must expand Medicaid eligibility under existing appropriations, federal funds or family contributions, enable the use of different types of health care delivery systems, allow, if cost-neutral, a buy-in program for low-income people above the poverty level and simplify and streamline eligibility criteria and processes.

The system also must ensure that both private and public health care providers and managed care organizations can participate, but health care providers who traditionally provide care to Medicaid and charity patients must be included in each IGI and managed care organization for at least three years.

Publicly supported hospitals are required to make available resources for matching funds. Counties with indigent care programs are required to participate if directed by their commissioners court. Other governmental agencies are required to make available matching resources if the system expands Medicaid eligibility to include all or some of their clients who did not meet Medicaid eligibility before.

The amount of resources an entity may be required to make available will be based on specific considerations. An entity may agree to provide additional resources or funds, but the funds that entity receives must at least equal the amount made available for federal match. The system must make special payments to rural hospitals that are sole community providers and to hospitals that provide at least 14,000 low-income patient days.

An IGI may be formed as a nonprofit corporation to operate a health care system for a geographical area. Participating entities may make required resources available for matching through the IGI. An IGI may cover more than one county, but a county may not be served by more than one IGI. The commission must implement a health care delivery system in areas not covered by an IGI.

Each IGI is to be governed by an executive committee composed of representatives from each of the entities forming the initiative and a governing board composed of the
executive committee and its appointees representing health care providers, managed care organizations and consumers. An IGI is required to the extent possible to use managed care to lower the costs of Medicaid services.

Supporters said the bill would help the state attract more federal Medicaid funds by appropriately crediting local public expenditures toward the state's Medicaid funding match. It would also facilitate conversion to a managed care system and thereby help contain state expenditures. Both steps are critical in a time of potential federal Medicaid cutbacks, such as a potential loss of $900 million if the federal government eliminates the disproportionate share program.

The Texas system of providing indigent care through medical schools, counties, public hospitals, federal, state and local clinics, multiple funding sources and programs is uncoordinated, inefficient and bureaucratic. Expanded Medicaid eligibility would benefit local taxpayers by allowing federal Medicaid dollars to help pay for indigent care services now being provided by public hospitals and counties.

SB 10 would use current expenditures more efficiently. The bill would specifically prohibit the spending of new general revenue for newly eligible Medicaid clients. Managed care is expected to result in better health for money spent and to save the state $12 million in general revenue during fiscal 1996-97 and $82 million in general revenue in fiscal 1998-99.

SB 10 would provide local control and public input in the design of the Medicaid program waiver, in the formation and governance of intergovernmental initiatives and in the operation of health care delivery systems.

Opponents said managed care is unlikely to save money as it has in the private market because the Medicaid program pays lower provider rates. Also, the administrative savings that private managed care organizations can obtain would be offset by bureaucratic costs in a public program. IGIs would be complicated and bureaucratic. The health care providers that would govern them would also make available matching funds and compete for Medicaid contracts with the IGI; conflicts of interest could result.

Eligibility expansion would increase the number of people with an entitlement to health care benefits and increase future funding requirements. Savings to the state might be achieved by shifting Medicaid payments to the local level. SB 10 should have included other cost-savings measures, such as copayments, buy-in options for low-income families and dental managed care.

The HRO analysis appeared in the May 16 Daily Floor Report.
Reestablishing the state dental board

SB 18 by Moncrief et al.
Effective February 6, 1995

SB 18 reestablished the State Board of Dental Examiners until September 1, 2005, and appropriated $206,168 to the board for fiscal 1995. All rules, decisions and orders made before the board was abolished were reestablished along with the board itself.

SB 18 also included provisions on composition of the board, dentistry clinical exams, the Dental Hygiene Advisory Committee, the employment of dentists by some nonprofit clinics and standard Sunset Commission provisions for health care licensing boards. The board was enlarged from 15 members to 18 by increasing the number of public members from three to six. SB 18 also requires that the board president be elected by the board and be a dentist.

The Dental Hygiene Advisory Committee, formerly eight hygienists appointed by the board, instead includes three hygienists appointed by the governor, two public members appointed by the governor and one dentist appointed by the board. The advisory committee recommends rules to the board to establish licensure qualification and educational requirements for dental hygienists. The board must approve the proposed rules or explain any disapproval or ask the committee for further development.

Supporters said SB 18 would reestablish a key regulatory agency by enacting recommendations from the 73rd Legislature’s sunset review and the agreement subsequently reached between the dentists and the dental hygienists, whose differences led to the board’s demise when the Legislature did not continue the board in 1993. The compromise provides dental hygienists some of the regulatory independence they sought by establishing direct governor appointments to the dental hygiene advisory committee and a specified role in the promulgation of certain rules. Dentists retain majority board membership and final authority over all rule adoptions.

Opponents said SB 18 would not entirely satisfy valid and reasonable concerns raised last session. Since dental hygienists work solely under dentist supervision, they should have no independent regulatory authority. Alternatively, dental hygienists should have more autonomy since many other health professionals, such as nurses, have a stronger voice in the promulgation of rules or are regulated by an independent agency.

The HRO analysis appeared in the January 19 HRO Daily Floor Report; additional background information can be found in HRO Session Focus Number 74-2, "Court Sets Deadline for Dental Board Law," January 10, 1995.
Parental notification before a minor's abortion

SB 83 by Shapiro
Died in Senate

SB 83 would have required physicians to give at least 48 hours notice to a pregnant minor's parents or guardians of their intent to perform an abortion for the minor, unless the physician certified to the Texas Department of Health that a medical emergency existed with insufficient time to give notice. If a parent could not be notified after a reasonable effort, a physician could perform the abortion if the physician sent notice, 48 hours in advance, by certified mail to the last known address. A violation of notification requirements would have been a Class A misdemeanor punishable by a maximum penalty of one year in jail and a $4,000 fine.

A minor seeking an abortion without parental notification could have filed an application in a county or probate court. The court would have been required to determine whether the minor was sufficiently mature and well-informed to make the decision to have an abortion without parental notification and to issue its findings not later than two business days after the application was filed. A denied application could have been appealed to a district court.

Supporters said the bill would assure that parents knew what medical treatment their children were undergoing. Parents should have the opportunity to counsel their children about abortion to the same degree they would in other medical or surgery decisions. SB 83 would not require parental consent and would not prohibit any abortions but would help protect children from inappropriate medical treatment and immature decisions. Studies in other states with parental consent or notification laws show that teenage pregnancy rates as well as abortion rates drop after such laws go into effect. Recent polls indicate that an overwhelming majority of Texans support parental notification.

Opponents said SB 83 would result in unwarranted government intrusion into medical and family matters and would result in teenagers seeking illegal and unsafe abortion services. Not all children come from loving or supportive families, and even those who do may fear shaming or disappointing their families if they reveal an unwanted pregnancy. SB 83 would excessively punish doctors who commit a technical infraction of the law. The judicial appeals process could burden the courts or go unused because teens would lack courage and know-how to use the process. Reducing access to abortion could cost the state millions of dollars in treatment for complicated pregnancies, premature births and illnesses and disabilities from bungled abortion attempts.

Notes. SB 83 was reported favorably as substituted by the Senate Health and Human Services Committee on April 27, but was not considered by the Senate.
Administration of M.D. Anderson Cancer Center

SB 192 by Henderson
Effective March 30, 1995

SB 192 allows M.D. Anderson Cancer Center to bill counties, hospital districts and public hospitals for services to indigent residents and limits financial liability in most cases to the ceilings in the Indigent Health Care and Treatment Act. The bill also exempts M.D. Anderson from many state purchasing laws, allows patients to apply for admission to M.D. Anderson without a written request from an attending physician and allows the center to offer employee retirement incentives.

Supporters said SB 192 would help M.D. Anderson Cancer Center counter a potential deficit of $773 million caused by rising indigent care costs and the growing number of managed care plans that limit paying patient referrals to hospitals outside of their networks. Allowing patients to apply for admission to M.D. Anderson without a statement from a referring physician would allow them to obtain expert cancer treatment when their physicians are hindered from referring them under a managed care network.

In the competitive and rapidly changing healthcare marketplace M.D. Anderson needs the flexibility that most large hospitals have to respond to price reductions, new suppliers, new treatment modalities and special inventory controls. State purchasing rules can be slow and overly burden the purchase of drugs and other supplies, adding to costs. An early retirement incentive would allow the hospital to restructure its staff while also offering a benefit to faithful, long-term employees.

Opponents said the state should not shirk its stated financial responsibility and pass costs for indigent care on local taxpayers by allowing M.D. Anderson to charge or contract with counties and public hospitals. SB 192 would burden counties across the state when the problem is really the excessively high volume of indigent patients from Harris County.

SB 192 also would enact a sweeping special exemption from state purchasing laws and rules for M.D. Anderson, a flexibility denied to other state institutions. The state purchasing laws were designed to give the state the greatest negotiating leverage for price discounts, to ensure that certain public policies are enacted and to monitor and enforce appropriate and ethical state purchasing practices.

The HRO analysis appeared in the March 1 Daily Floor Report.
Medicaid managed care standards

SB 600 and SB 601 by Zaffirini
Effective on June 16 and September 1, 1995

**SB 600** requires the Texas Department of Health (TDH) to develop standards and measurements covering Medicaid managed care organization performance, operation, quality of care, marketing, finances and children’s access to care. With the assistance of the Texas Department of Insurance, TDH is also required to establish fiscal solvency standards and complaint system guidelines. SB 600 took effect September 1, 1995.

**SB 601** requires the Health and Human Services Commission to set guidelines for education programs for Medicaid providers and clients and requires managed care organizations to provide the programs. A provider program has to include information on Medicaid policies, eligibility standards and benefits, specific problems of Medicaid clients and other elements. A client program has to include information on how to access health care and complaint procedures, Medicaid policies and eligibility standards, the importance of prevention and other information. SB 601 also requires the commission to adopt a bill of rights and a bill of responsibilities for Medicaid clients. SB 601 took effect June 16, 1995.

**Supporters** said the bills would enhance the effectiveness of a Medicaid managed care system by clearly informing providers and clients about how the system works and of their rights and responsibilities. The bills also would provide a means of establishing and monitoring quality of rendered care and to identify and address problems or barriers to care.

Enhancing the effectiveness of managed care would maximize state savings and minimize expenditures on inappropriate care or expensive treatments that could have been avoided through primary or preventive care. The bills would also prevent taxpayer money from being spent on low-quality or fly-by-night managed care organizations that have plagued other states that converted their Medicaid programs to managed care.

**Opponents** said the bills would establish a higher standard of regulation and oversight in Medicaid managed care plans than over those available to most privately paid managed care enrollees and providers.

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

House Research Organization
Omnibus health care bill

SB 673 by Madla
Effective June 16, 1995

SB 673 establishes a health professions clearinghouse, authorizes rural public hospitals to operate elderly care facilities under certain circumstances, authorizes physician assistants and registered nurses to declare death and to sign or complete prescriptions under certain circumstances, authorizes an interagency study of rural health clinics and requires criminal justice managed care plans to accept Medicare certification for hospitals.

The bill also authorizes terminally ill persons to execute out-of-hospital do-not-resuscitate (DNR) orders, revises the regulation of the practice of chiropractors, licensed professional counselors, psychologists and podiatrists, amends the Medical Practice Act to define "doctor of osteopathy" and "the practice of osteopathic medicine" and to authorize hospitals to enter into independent contractor agreements with physicians, requires reports of lead poisoning incidences, requires health maintenance organizations (HMOs) to accept certain accreditations of hospitals and other facilities and requires the Department of Human Services to accept providers licensed by the Department of Health or certified by Medicare as qualified program providers.

Provisions on podiatry and licensed professional counselor licensure took effect September 1, 1995.

Supporters said SB 673 would make needed changes in rural health care to ensure that existing health resources meet the needs of the rural populations. The bill would build upon landmark rural health care measures enacted in 1989 in HB 18 by McKinney and would initiate an interagency study of the effectiveness of the 200 rural health clinics that formed as a result of that bill.

Opponents said giving physician assistants and registered nurses broadened authority to sign prescriptions would move them closer to their overall professional goal of practicing independently of physician supervision.

Notes. The House added provisions relating to out-of-hospital DNR orders, licensed professional counselors and psychologists that are analyzed in the May 22 HRO Daily Floor Report analyses for SB 1161 by Rosson, SB 71 by Barrientos and SB 1478 by Madla, respectively.

The HRO analysis of SB 673 appeared in the May 22 Daily Floor Report.
Smoking in public places

SB 1237 by Armbrister

_Died in House Calendars Committee_

SB 1237 would have prohibited or restricted smoking in certain public areas and workplaces, enacted penalties for violations and preempted and superseded local regulations enacted after the effective date of the act. The bill also would have made it a criminal offense for a minor under 18 years of age to possess or use a tobacco product in a public place.

Individuals would have been prohibited from smoking in a public place or place of employment except in a designated smoking area. Designated smoking areas could not have been located in areas such as hospitals, elevators or day care centers. Employers would not have been required to allow smoking on a premises. State buildings could have designated areas only until September 1, 1996, after which smoking would have been prohibited entirely.

Smoking prohibitions would not have applied to places used for private or adult functions, such as bars, pool halls, taxis and homes, or in other areas such as outdoor areas and restaurants with less than 50-person seating capacities. Restaurants with indoor seating capacity over 50 could have permitted smoking in a designated area that did not comprise more than 40 percent of the seating capacity. No expenditures or structural changes to create nonsmoking areas would have been required.

Supporters said SB 1237 would establish a uniform, consistent smoking policy for statewide application. Smoking is hazardous not only to smokers and but also to nonsmokers who inhale another person's smoke. The state already regulates many other personal activities that affect health and safety, such as where alcohol may be sold and consumed. Numerous Texas cities have adopted smoking policies, creating a crazy-quilt of smoking regulations. Law-abiding citizens cannot keep track of varying local penalties, and businesses find it hard to compete with establishments in neighboring communities that attract customers because of more lenient smoking policies.

Opponents said the state should impose more rigorous standards than SB 1237 or set a statewide minimum standard because tobacco use is so dangerous. Tobacco use is the leading cause of illness and death in the nation. Second-hand smoke has been classified as a Class A carcinogen, the same as arsenic, asbestos and radon. Children are particularly vulnerable. Preventing local communities from adopting more restrictive ordinances would be state interference with local matters. The penalties are virtually unenforceable, and the restaurant restrictions are just windowdressing because ventilation modifications would not be required.
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HB 420 would have allowed certain colleges and universities to be exempt from the remedial education requirements of the Texas Academic Skills Program (the TASP test). The bill would have exempted students who meet or exceed admissions standards at general academic teaching institutions (generally state universities with four-year undergraduate and graduate programs) whose boards have set admission standards at a level sufficient to ensure that at least 90 percent of the students admitted are prepared to do college-level work when admitted.

The bill also would have imposed new standards on university boards of regents and individual board members by limiting regents to one six-year term and to one three-year term as board chair, prohibiting university and junior college regents from naming buildings and facilities after a regent or close relative and prohibiting former regents from being hired in any administrative position or contracting with an institution in the system until at least four years after leaving the board.

Supporters said HB 420 would be a starting point for an overhaul of the state higher education system by setting strict standards for university governing boards and encouraging state universities to raise admission standards to redirect students in need of remedial education to junior and community colleges. The bill’s standards for governing boards are appropriate and reasonable and would help restore damaged credibility at certain schools. Term limits would allow more people to serve as regents.

Opponents said encouraging regents to raise admission standards to assure that 90 percent of the students can do college-level work could too greatly restrict the opportunity for a university education. The purpose of the TASP test requirement and remedial courses is to identify and help those students who graduate from high school but are not fully prepared for advanced college-level work. The term-limit provision for regents would remove some of the most experienced and dedicated members of university boards; reappointment should be at the discretion of the governor, with advice and consent of the Senate.

The HRO analysis appeared in the April 18 Daily Floor Report.
HB 1214 by Kamel, Raymond

Effective September 1, 1995

HB 1214 creates the Prepaid Higher Education Tuition Program, to be administered by a seven-member volunteer Prepaid Higher Education Tuition Board in the Comptroller’s Office. The purchaser may enter into a contract with the board to prepay, by lump sum or installments, the tuition and fees of the purchaser’s beneficiary to attend a public or private institution of higher education. Contract terms will be based on an actuarial analysis of tuition and required fees (private or public institutions), expected investment returns, estimated administrative costs and the term of the contract. Beneficiaries must be under age 18, and they or their parents must be Texas residents when the contract is initiated. The beneficiary may be changed if the new beneficiary meets the necessary requirements.

The four prepaid tuition plans are: junior college, senior college, junior-senior college and private college. The purchaser may convert from one plan to another. A public institution plan will pay the tuition and fees of the beneficiary. A private institution plan will pay the statewide average cost of tuition and fees at private institutions: if the cost is higher than average, the beneficiary pays the difference; if the cost is lower, the beneficiary receives the difference. The prepaid tuition program does not promise or guarantee admission to any institution of higher education. The Legislature may appropriate funds to pay tuition and fees at higher education institutions if necessary. The board may award prepaid tuition scholarships to financially needy students, if funds are available through private gifts and grants. The Texas Tomorrow Fund, the prepaid tuition fund, is outside the state treasury and must be invested according to the Public Funds Investment Act.

Supporters said the bill would permit Texans to invest today to pay for their children’s future education and insure against rising tuition and fee rates. Investment return on prepaid tuition will offset rising costs, allowing parents and others to "lock in" current rates. The program has been successful in other states in encouraging investment in the future educational needs of students. A scholarship program would help those who cannot afford to take advantage of the prepaid program.

Opponents said the prepaid tuition program would be geared toward middle-income and affluent families who can afford the investment. The state should aim its help at lower-income families. If tuition and fees rise markedly, the prepaid tuition program would be jeopardized, and the Legislature might have to appropriate funds to support it. This type of insurance-investment program is better left to the private sector.

The HRO analysis appeared in the May 9 Daily Floor Report.
HB 1479 creates the Early High School Graduation Scholarship Program, which provides Texas resident students who graduate from high school in three years a $1,000 tuition credit at Texas public or private institutions of higher education. (Private institutions are required to match the state credit.) The tuition credit is financed through the Foundation School Program by reducing the total amount of foundation school fund payments made to a school district based on a formula that includes the number of students who graduate early from high school in that school district. The program is administered by the Texas Higher Education Coordinating Board and applies to tuition and fees for the fall 1995 semester.

The bill also provides a one-year state college tuition and fee exemption for high school graduates who are dependent children receiving Aid to Families with Dependent Children (AFDC) in their senior year of high school, who are under age 22 and who enroll in college within one year of graduation. An institution of higher education may fund the exemptions from local funds or appropriated funds, but is not required to provide tuition exemptions beyond appropriations made for that purpose. An AFDC student’s tuition and fees may also be funded through Foundation School Fund savings generated from the Early High School Graduation Scholarship Program.

Supporters said the state would save money by providing an incentive for students to graduate in three years because it costs more to educate a senior in high school — an average of $4,500 — compared to the $1,000 tuition credit. Paying the first year of college tuition and fees for certain AFDC beneficiaries would help students from poor families attend college and help break the welfare cycle.

No apparent opposition.

The HRO analysis appeared in the May 2 Daily Floor Report.
Increasing tuition at public institutions of higher education

HB 1792 by Junell
Effective August 28, 1995

HB 1792 increases tuition at Texas public colleges and universities. Resident tuition will continue to increase between 1997-98 and 2000-01 at the rate of $2-per semester credit hour (SCH), culminating at $40 SCH. In fall 1995 nonresident undergraduate tuition will equal the average undergraduate tuition charged nonresidents at public universities in the five most populous states besides Texas, unless otherwise stipulated by law. Law school tuition increases in fall 1995: from $60 per SCH to $75 per SCH for residents and from $150 per SCH to $200 per SCH for nonresidents. A university governing board is allowed to set tuition rates for an optometry program at up to three times the regular tuition rate and at up to two times the regular amount for a pharmacy program. Resident tuition for each semester for 12-week summer session increases from $100 to $120 and from $50 to $60 for a six-week summer term. Financially needy foreign students attending Texas A&M University-Kingsville may pay in-state tuition. The Texas Higher Education Coordinating Board may set nonresident tuition below the statutory amount at colleges or universities within 100 miles of the state borders if it is in the best interest of the institution and does not harm other institutions. The bill raises from $200 to $1,000 the minimum competitive scholarship needed for nonresident students to qualify for resident rates, but in 1995-96 competitive scholarships of $500 or more will entitle students to the lower tuition. The bill sets up a tuition, fee, and partial room and board exemption program for up to 150 students in ROTC programs per year if they accept a commission in the Texas National Guard upon graduation and serve at least four years as commissioned officers.

Supporters said tuition is quite low compared to other states. Slow, steady increases would guarantee access to higher education. The bill would raise tuition for law school, pharmacy and optometry programs to meet the cost of providing those programs. Nonresident students attending schools near the state border should get a tuition break to draw them here.

Opponents said increased tuition would reduce access to education. The jump in nonresident tuition and the increase in the competitive scholarship tuition waiver cap would reduce the number of non-Texas students attending Texas schools.

Notes. HB 1792 combines features of HB 1792 by Junell and HB 2467 by Coleman.

HB 2309 would have made the Texas Academic Skills Program (TASP) test an assessment procedure for determining whether students should take enrichment courses in public higher education institutions rather than a mandatory testing instrument that determines a need for remedial courses and bars enrollment in upper-division courses until the student has passed the test. A student who failed part of the assessment procedure could have enrolled in upper-division courses, but would have had to pass the assessment procedure before completing 90 credit hours. Enrichment courses would have been defined as non-traditional offerings that provide in-depth problem-solving and critical thinking skills and knowledge to enable success in the student’s chosen instructional program. Also, high school students who achieved a certain score or above on the Texas Assessment of Academic Skills (TAAS) test would have been exempt from taking the TASP test for five years rather than three.

Supporters said the TASP test takes on too much importance in a student’s academic life since those who fail a portion of the test must take remedial courses and continue to take the TASP test until they pass. The focus of the TASP should be shifted to assessment and evaluation of student needs. It now serves as a punitive measure blocking student advancement. The bill would destigmatize remediation and concentrate instead on individual student needs.

Opponents said the TASP test has proved that students’ success in college is enhanced by remedial assistance in basic subjects. Remediation courses prepare students for college work and bolster students who are not fully prepared by their high schools for college work. The bill would lower standards and offer only hazy goals and an amorphous curriculum for students who need real help.

The HRO analysis appeared in the April 27 Daily Floor Report.
HB 2313 abolishes the Lamar University System and transfers all authority, appropriations and contracts of Lamar University-Beaumont, Lamar University-Orange, Lamar University-Port Arthur and Lamar University Institute of Technology to the Texas State University System (TSUS). The board of regents will be expanded from nine members to 12, with each member appointed for a six-year term. Any student fee increases will require student approval.

Supporters said joining the long-established Texas State University System (TSUS), which already governs such schools as Sam Houston and Southwest Texas state universities, would give Lamar University and all its campuses a statewide, rather than a regional, presence, help boost student enrollment and provide a more cost-effective administrative structure. A savings of more than $1 million annually in administrative salaries resulting from the consolidation would free funds for important projects. Furthermore, evidence of poor management in the Lamar University system has been brought to light by objective studies, including a State Auditor’s Office report in 1993.

Opponents said the Lamar system was established in response to the needs of Southeast Texans; merging the system with the TSUS would dilute the influence of Southeast Texans and result in a loss of local control and federal money. A change of this magnitude, with so much at stake, requires more deliberation. A two-year study should be undertaken and the current officials of the system given a chance to be correct the problems cited in past reports.

The HRO analysis apd in the April 10 Daily Floor Report.
Transferring Texas A&M International University to UT System

SB 11 by Zaffirini

Died in House committee

SB 11 would have transferred all authority, appropriations and contracts of Texas A&M International University (TAMIU) in Laredo from the Texas A&M University System to the University of Texas System. A graduate school of international trade and a center for border economic and enterprise development would have been established at the renamed University of Texas International (UTI), upon approval of the Texas Higher Education Coordinating Board.

Supporters said transferring TAMIU to the UT System would enhance the relationship between UT-Brownsville, UT-Pan American and UT-El Paso, enabling a regional higher education plan for the border area and several cooperative programs with the University of Texas Health Science Center at San Antonio. Furthermore, TAMIU would benefit as part of the UT system with instant credibility from the Legislature regarding appropriations and access to quality programs. TAMIU would also benefit from the resources the UT system can offer.

Opponents said TAMIU is an asset to the Texas A&M system, and the proposed transfer is based on political considerations, not educational benefits. TAMIU became part of the Texas A&M system in 1989 and has benefited the students and communities of South Texas and the Rio Grande Valley. No serious educational benefits were demonstrated as potential results of the change.
HB 773

Smithee

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No insurance discount and ticket purge for driver safety

HB 1089

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Flexible band rating, rollback of certain insurance rates
Limiting use of driver safety course for insurance discount and ticket

HB 773 by Smithee
Died in Senate committee

HB 773, as passed by the House, would have prohibited courts from accepting from a traffic-law defendant a duplicate certificate of completion of a driver safety course unless it was accompanied by an affidavit stating that the person submitting the duplicate certificate had not submitted the same certificate to a motor vehicle insurer for a premium discount. The insurance commissioner would have been permitted to adopt rules allowing a vehicle insurance premium discount for individuals who completed a driver safety course approved by the Central Education Agency. HB 773 would also have allowed a person submitting a written request postmarked within 30 days from the answer date on the citation for a misdemeanor traffic offense to take a driver safety course. The bill would have applied to courses completed after January 1, 1996.

Supporters said the current system rewards drivers who violate the law by allowing them to reap double advantages for taking a driver safety class. Drivers are often allowed not only to have their have tickets dismissed after completing a safety class but also to have their insurance premiums discounted. The bill would end the dual use of a single certificate for getting a ticket dismissal and a discount.

Opponents said the bill would reduce enrollment in driver safety courses, which help to prevent accidents, by prohibiting drivers from using the courses for both ticket dismissal and lower premiums. The current system gives a break only to someone who gets no more than one ticket a year, and habitual violators pay higher insurance premiums.

The HRO analysis appeared in the April 19 Daily Floor Report.
Continuing workers' compensation agencies

HB 1089, HB 1090, HB 1091 by Brimer et al.
Effective August 30 and September 1, 1995

HB 1089 continues the Texas Workers' Compensation Commission (TWCC) until September 1, 2007, and enacts provisions relating to investigations, exclusion of certain businesses from the extra-hazardous business program, reporting requirements, ombudsman training and responsibilities, state agency risk management, designated doctor qualifications and responsibilities, participation of self-insured employers, transfer administrative cases to the State Office of Administrative Hearings and calculate eligibility for benefits for occupational diseases. HB 1089 took effect September 1, 1995.

HB 1090 continues the Texas Workers' Compensation Insurance Fund until September 1, 2007, and amends requirements for audits, reports, investigations, application, information, service charges, board membership and staff administration. HB 1090 took effect September 1, 1995.

HB 1091 allows the Texas Workers' Compensation Research Center to expire September 1, 1995, and creates the Research and Oversight Council on Workers' Compensation as an advisory agency to TWCC. HB 1091 took effect August 30, 1995, when the research center's records, property and employees were transferred to the council. The council is subject to the Texas Sunset Act and will be abolished on September 1, 2007, unless continued by the Legislature. The Legislative Oversight Committee on Workers' Compensation was abolished.

Supporters said HB 1089 would continue the Texas Workers' Compensation Commission with a few adjustments to the current system, which is operating well overall. It would also save the state money by requiring state agencies to assume risk management and workers' compensation claim responsibilities. Ombudsman qualifications would be strengthened, and businesses that experience worker deaths not related to employment would not be unfairly placed in the extra-hazardous program. Use of the American Medical Association guidelines to determine impairment, though imperfect, would be continued to avoid the cost and confusion in retraining physicians under new guidelines.

HB 1090 would continue and further improve the workers' compensation insurance fund by imposing more stringent oversight provisions. The insurance fund was created to stabilize the workers' compensation insurance market, and data show that the financial soundness and success of the fund has contributed to increased competition, affordability and availability.
HB 1091 would consolidate the Texas Worker’s Compensation Research Center and the Legislative Oversight Committee into a new Research and Oversight Council to ensure that needed research and monitoring of the worker’s compensation system continues without duplication.

**Opponents** said HB 1089 would not go far enough in improving the workers’ compensation system. Ombudsman qualifications should be more stringent, and workers should have improved rights and access to legal advice and representation. The commission would have too much flexibility in determining whether employers should participate in the extra-hazardous program, and penalties for infractions of the law should be higher. AMA guidelines for determining impairment are outdated and should be replaced.

The fund has been working so well in lowering rates that the state could be left with only the riskiest companies as most employers buy insurance from competitively priced private insurers. The state should consider moving toward a completely state-run version of the present workers’ compensation system.

Consolidation of the Texas Worker’s Compensation Research Center with the Legislative Oversight Committee for Worker’s Compensation would reduce the effectiveness of the center as an independent source of information. The committee’s role is primarily to make policy recommendations, while the center’s role is to provide independent research.

The **HRO analysis** of the three bills appeared in the March 8 *Daily Floor Report.*
HB 1367 repeals current anti-discrimination articles in the Insurance Code — arts. 21.21-3, 21.21 sec. 4(7)(c) and 21.21-5 — and replaces them with new prohibitions on unfair discrimination by insurers. The bill prohibits a health insurer from using an underwriting guideline based on the ability of an insured or applicant to speak English fluently or be literate in the English language. The bill also allows group property and auto insurance, and establishes programs to help areas designated as underserved.

The new anti-discrimination provisions, Insurance Code art. 21.21.6, prohibit various types of insurance companies, organizations and agents from engaging in any practice of unfair discrimination, which means refusing to insure, refusing to continue to insure, limiting the amount, extent or kind of coverage available, or charging an individual a different rate for the same coverage solely because of race, color, religion, national origin, age, gender, marital status, geographic location of the individual, or disability or partial disability. Exceptions to the general rule are specified. Violators are subject to art. 1.10 sanctions, including administrative penalties up to $25,000 and cease-and-desist procedures.

The state insurance commissioner may designate areas as underserved for residential property insurance for the purpose of establishing a property protection program. After designation of an area as underserved, the commissioner must adopt underserved-area policy forms to include a basic policy covering fire and allied lines perils, excluding windstorm and hail coverage, with endorsements providing additional coverages at the option of the insured. The rates are subject to the applicable statutory provisions relating to the respective insurers.

The bill also authorizes all insurers who write private passenger auto insurance or residential property insurance in this state to write such insurance on a group basis in areas designated by the commissioner as underserved. The rates are subject to the applicable statutory provisions relating to the respective insurers.

The bill requires the commissioner to establish a market assistance program (MAP), in which the insurers may participate voluntarily to assist Texans in obtaining residential property insurance coverage, excluding windstorm and hail coverage, in areas designated as underserved. Each insurer has the right to individually evaluate the risk and apply the appropriate rates. The plan of operation must contain criteria under which the commissioner may make insurer participation in the program mandatory.
If residential property insurance is not reasonably available in the voluntary market to a substantial number of insurable risks in all or any part of the state, and at least 50 percent of applicants to the MAP cannot be placed in the previous 12 months, the commissioner may establish a fair access to insurance requirements (FAIR) plan. Each insurer providing residential property insurance would be required to participate. The plan would establish a FAIR Plan Association to issue residential property insurance, excluding hail and windstorm coverage, in the association’s name and to distribute the losses and expenses in the writing of such insurance. The participating insurers would be liable to the association for the expenses and liabilities incurred by the association.

The commissioner may establish a task force to study the feasibility of instituting various other property insurance initiatives in this state. Under a voluntary inspection program plan a person could present a certificate to an insurer showing that property met minimum standards. An insurer receiving such a certificate could not refuse to issue or renew residential property insurance based on condition of property.

The bill provides an affirmative defense and exceptions to unfair discrimination violations and civil causes of action established in HB 668 by Junell, which was effective on September 1, 1995.

Supporters said "redlining" refers to a practice that results in certain geographic areas being treated differently for reasons unrelated to risk. This happens in all forms of insurance, including auto and homeowners insurance. HB 1367 would clearly prohibit unfair discrimination in all areas of insurance and mandate the availability of residential property insurance (through a MAP or FAIR plan) if insurers do not willingly offer to insure residents in underserved areas.

Opponents said HB 1367 would replace the current unfair-discrimination prohibition with a weaker one, encourage the use of substandard policies, unfairly provide tax breaks to the companies that write substandard polices and provide only tenuous guidelines for implementing the FAIR program, which should be implemented immediately. Victims of redlining and other practices that discriminate unfairly would only end up with substandard insurance at higher prices.

The HRO analysis appeared in the May 8 Daily Floor Report.
HB 1988 sets the state’s flexible band rating for auto and residential property insurance (including homeowners insurance) premium rates at 30 percent above or below the benchmark rate set by the insurance commissioner. Individual parties involved in a benchmark rate case are prohibited from providing discovery regarding their premiums, losses, expenses, profits, or rate of return experiences or operations, except to the extent that the party presents evidence, relies on, or provides to another party its insurer data at the benchmark rate hearing. The prohibition cannot deny or restrict any party’s right to produce or rely on relevant information concerning an individual insurer as evidence in a benchmark rate hearing. The bill allows any party in a benchmark rate hearing to present evidence regarding adjustments or amendments to the statistical reporting rules and statistical plans to be presented at future hearings. The commissioner may contract with a qualified organization to serve as the statistical agent for the commissioner to gather data for a line or sub-line of insurance.

The bill establishes procedures for the insurance commissioner to roll back insurance rates to reflect the reduced insurance industry costs expected to result from changes in tort law enacted by the 74th Legislature. The commissioner is to determine annually the savings resulting from the tort law changes and make across-the-board insurance rate reductions, based on evidence presented at a rulemaking hearing, as of September 1 of each year. For the first year, the commissioner must issue rules no later than October 1, 1995, mandating appropriate rate reductions. If an order rolling back insurance rates is not issued by the commissioner before January 1, 1996, HB 1988 will automatically reduce rates from 5 to 30 percent. Rollback rates will apply to most types of insurance, including professional and commercial, automobile, homeowner’s, fault, ranch and renter’s insurance. An insurance company may be exempted from the rollback provisions if it proves by clear and convincing evidence that the insurer will be financially unable to continue writing a particular line of insurance or if the rate reduction would place the insurer in a hazardous financial condition. The rate rollbacks must remain in effect until January 1, 2001.

Supporters said the bill would appropriately set in statute the flexible band rate of 30 percent above or 30 percent below the benchmark rate set by the insurance commissioner. The bill would also assure that consumers would realize the savings to the insurance industry that would result from new tort laws.

Opponents said the flexibility band should not be set in statute, but should be left to the discretion of the insurance commissioner. Insurance rates should not be rolled back based only on speculation about how the tort law changes may affect the future profits of insurance companies. Insurance data for determining rates should be
generated by the Department of Insurance, not outside entities that may have a conflict of interest.

**Notes.** The House added the rollback rate provisions, and the Senate added the permission for the insurance commissioner to contract with statistical agents.

Public Education
Revising the Education Code

SB 1 by Ratliff
Effective May 30, 1995

SB 1 revises the Education Code to allow establishment of home rule school districts and charter schools, to permit student transfers through public school vouchers, to revise the no pass-no play policy and provisions governing school prayer, student discipline and parental rights and to increase minimum teacher salaries and funding for school facilities.

Home rule districts. Local voters may authorize an independent school district to operate as a home-rule district, subject only to the requirements of its charter, federal law and court orders and those portions of the Education Code specifically applicable. A home-rule district will be created if a majority of a school district’s voters approve a home-rule charter. The charter, which will specify the district’s powers, will be written by a charter commission appointed by the local school board.

Charter schools. SB 1 will permit a local school or school district to grant a charter to a group of parents and teachers who want to create either an educational program in an existing public school campus (program charter) or change an existing public school into charter school (campus charter). Charter schools and programs will be exempt from school board rules and policies specified in the charter. Also, the State Board of Education (SBOE) may grant up to 20 charters to create charter schools operating outside of a school district facility (open-enrollment charter schools). The SBOE may grant a charter for an open-enrollment charter school upon receipt of an application from an "eligible entity," which includes a public or private college or university, certain tax-exempt organizations and governmental entities.

Public school vouchers. The new code establishes the Public Education Grant Program of public school vouchers, which will allow a student attending a low-performing school to transfer to another public school in the student’s district or any other district chosen by the student’s parent. A low-performing school is one that in the past three years either has been identified as such by the education commissioner or has had 50 percent or more of its students performing unsatisfactorily on a state assessment test.

Receiving schools may accept or reject a student’s application. The student’s home district will count the departing student in its average daily attendance for school finance purposes. The student’s public education grant will be the total state and local funding per student for the home district. Home districts will provide transportation to and from the school the student would otherwise attend; the student would then be responsible for transportation to the receiving school.

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No pass-no play. The prior no pass-no play policy, generally requiring suspension of most students from extracurricular activities for six weeks for failing any course, is replaced by a three-week suspension period for students not passing an academic course. A review will take place every three weeks until academic course grades are above passing. Suspended students may practice and rehearse, but not compete or perform. Advance placement and honors students are exempted from the no pass-no play policy.

School prayer. The new code specifies that a public student has "an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school." No one may require, encourage or coerce a student to engage in or refrain from such prayer or meditation during any school activity. A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate.

School discipline. A teacher may remove from class a student who has been documented as repeatedly interfering with the teacher’s ability to teach or other students’ ability to learn. A teacher may also remove students who commit an offense for which they may be suspended or expelled.

A principal may place a student into another classroom, into in-school suspension or into an alternative education program. A student once removed may be returned to a teacher’s classroom only if the teacher consents or if the teacher’s refusal is overridden by a three-member placement review committee composed of two teachers elected by the faculty and one member of the professional staff chosen by the principal.

Parental rights. Parents are granted certain rights in order to encourage parental participation in schools. Parents will have the right to request certain classes and teachers for their child and may request that their child be permitted to graduate early. Parents are entitled to review all teaching materials, textbooks, teaching aids and school records concerning their child. Parents are also entitled to review all tests, including state assessment tests, after they are administered.

A school district employee must receive a parent’s written consent to conduct a psychological examination, test or treatment, except when the district is investigating child abuse. A parent’s written consent is also required to authorize the making of a videotape or voice recording of a child, except when the videotape or recording is used only for purposes related to safety, regular classroom instruction or a cocurricular or extracurricular activity.

Parents are entitled to remove their child temporarily from a class or school activity that conflicts with the parent’s religious or moral beliefs, but their child may not be exempted from having to satisfy the grade-level and graduation requirements of the
district and the TEA. Parents are not entitled to remove their children from a class or other school activity to avoid a test or to prevent their children from taking a subject for an entire semester.

**Teacher salaries and certification.** The minimum 10-month salary for classroom teachers and full-time librarians in 1996 is raised from $17,000 to $18,500 for first-year teachers and from $28,400 to $32,080 for teachers with 20 years experience. In 1997 minimum salaries will increase to $19,950 for first-year teachers and to $35,510 for teachers with 20 years experience. The salary increases will be based on a 20-step salary schedule. The minimum salary required at each step will automatically adjust and increase as state spending per student increases.

A new 15-member State Board for Educator Certification will regulate and oversee all aspects of teacher certification. The board may make rules, subject to rejection or modification by the SBOE by a two-thirds vote, on the qualifications and terms of educator certification.

**Facilities funding.** State assistance for instructional facilities is provided to low-property-wealth districts and high-growth districts. To qualify for state assistance a district must have a property wealth level below approximately $276,000 per student in average daily attendance and a total effective tax rate of at least $1.30 or an effective debt service tax rate of at least $0.20. The maximum district project cost is limited to $500,000 or $266 per student, whichever is greater. Districts with fewer than about 1,900 students are eligible for supplemental assistance.

**Supporters** said SB 1 would make sweeping reforms to the Texas public education system by decreasing state oversight of local schools, increasing community control and enhancing student learning. Texas students would benefit from more community oriented schools that stress educational basics. Texas teachers would benefit with higher minimum salaries, more control over discipline in their classroom and streamlined hearing procedures for contract disputes. School districts would benefit — through home rule and other reforms — and gain more authority to determine the best interest of their schools.

**Opponents** said SB 1 would do little to improve facilities and fails to create a long-term plan to equalize the quality of facilities for rich and poor school districts. SB 1 would lead to higher local taxes because it would mandate minimum teacher salaries and alternative education programs that would be inadequately funded by the state. Home-rule school districts could adversely affect students and teachers since such districts would be allowed to eliminate the beneficial maximum class size of 22 students in elementary grades and eliminate needed guarantees that teachers will receive minimum salaries, sick leave, personal leave, contract rights and health care.
Other opponents said low-income families should be granted vouchers, redeemable at public or private schools, so that they can obtain the best education for their children and to provide a competitive incentive for public schools to improve.

The HRO analysis appeared in the May 4 and May 29 Daily Floor Reports. HRO Session Focus Number 74-14, "New Code Governs Public Schools," August 3, 1995, summarizes the final version of SB 1.
Rural Affairs

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Enhancing prosecution authority over colonia developers

HB 1001 by H. Cuellar
Effective June 17, 1995

HB 1001 defines and authorizes state regulation of economically distressed areas (EDAs), commonly called colonias. EDAs are residential subdivisions usually found in unincorporated areas of counties along the Texas-Mexico border. HB 1001 authorizes the attorney general to regulate EDAs by enforcing new civil and criminal penalties for failure to comply with existing Model Subdivision Rules (MSRs) as well as with new and more stringent standards for colonia utilities and roads. The model rules impose platting, replatting and service requirements on persons selling land in EDAs. Violations by builders and developers may be punished by civil fines of $10,000 to $15,000 per lot, and criminal offenses may be either a state jail felony, maximum of two years state jail time and a $10,000 fine, or a Class A misdemeanor, maximum of one year state jail time and a $4,000 fine. Class A misdemeanor penalties are also provided in cases of conflicts of interest by members of county commissioners courts regulating colonias.

The MSRs require builders to file a plat and to provide adequate water, sewer, wastewater, electric or gas services and roadways before they can receive financial aid from the EDA program or the colonia plumbing loan program. Developers of proposed and existing subdivisions must plat or replat their land in order to ensure that MSRs and the new standards are being enforced. HB 1001 establishes guidelines for county commissioners courts to regulate actions by subdivisions concerning colonia water and sewer services, and counties may operate a water or sewer utility in the same manner as a city. EDA residents who purchase lots after July 1, 1995, may bring suit against a subdivider if required water and sewer services are not being provided and may recover the purchase price as well as the market value of permanent improvements, court costs and attorney’s fees.

Supporters said HB 1001 would assure residents of EDAs of basic amenities and provide them with legal protection from unscrupulous developers. Proposed and current subdivisions would be assured of water and sewage service through enforcement of new standards backed up by financial penalties. The severity of these penalties would minimize the possibility of county-level abuse and corruption, and assure compliance. Existing subdivisions would have to replat land and file with their commissioners court in order to ensure that older EDAs have adequate services.

Opponents said the civil and criminal penalties for not complying with MSRs were too harsh (up to $15,000 per lot) and could drive developers out of business. Preparing the proper forms and making all necessary improvements to conform to the

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new rules would be onerous. In some cases it would be impossible to bring currently legal lots into compliance. Persons seeking housing would be harmed if lots became too costly or unavailable.

The **HRO analysis** appeared in Part 2 of the March 25 *Daily Floor Report*. 
Pesticide regulation, agricultural worker protection

HB 2479 by B. Turner
Died in the House

HB 2479 would have revised pesticide regulation by allowing pesticide registration and pesticide dealer licensing to be biennial instead of annual, moving the licensing of health-related pesticide applicators from the Department of Health to the Structural Pest Control Board, changing insurance requirements for commercial pesticide applicators, changing the way pesticides are added to the state-limited-use list, requiring the Texas Department of Agriculture (TDA) to cooperate with the Texas Groundwater Protection Committee on the development and implementation of a state management plan for pesticides in groundwater and moving provisions governing herbicides into the chapter on pesticides. The bill also would have repealed the Agricultural Hazard Communication Act that establishes guidelines and rules for employers of agricultural workers to provide information about certain chemicals to some workers, some emergency service organizations and TDA. TDA would have been required to adopt worker protection standards for pesticides if the federal worker protection standard was not adopted or was under consideration for adoption. TDA would have been able to adopt rules for the protection of the health, safety and welfare of farm workers and pesticide handlers.

Supporters said HB 2479 would consolidate the state’s agriculture pesticide laws, streamline regulatory requirements and make pesticide regulation more efficient. The bill would merge the state’s agricultural right-to-know laws with the pesticide laws and make the federal worker protection standards apply statewide so that workers and producers could easily identify the applicable laws. This would eliminate confusion that arises because only a small portion of agriculture producers are covered by the state laws while all are covered by the federal laws. Some state provisions, such as some maintenance of records and notification of emergency personal, would remain.

Opponents said HB 2479 would hurt worker protection, eliminate an important role of the Texas Natural Resource Conservation Commission in pesticide regulation and unwisely loosen some requirements for pesticide registration. Repealing the state farm worker right-to-know law would remove important farm worker protections. The federal worker protection standards are less comprehensive than those under state law. The state right-to-know law complements federal law and does not conflict with it. The right-to-know law may cover a small percentage of employers, but these are large producers who employ a majority of seasonal workers.

Notes. On a point of order the House returned HB 2479 to the Environmental Regulation Committee, where no further action was taken. SB 372 by Armbrister, continuing the Texas Department of Agriculture, allows pesticide registration to be biennial instead of annual and exempts from registration pesticides that are exempt
from registration with the federal Environmental Protection Agency. SB 372's effective date is September 1, 1995.

Contract-for-deed disclosure in colonia contracts

SB 336 by Rosson
Effective September 1, 1995

SB 336 amends the laws regarding executory contracts for residential deeds in certain low-income border counties that contain the residential subdivisions known as colonias. The bill applies in counties within 200 miles of the Texas-Mexico border that have, in the most recent three consecutive years, a per capita income that averages 25 percent below the state average and an unemployment rate that averages 25 percent above the state average. A purchaser of land must receive, as part of the contract-for-deed, a list of the building and land conditions, financing terms stating the total price, interest rate and principal charged, as well as a cancellation request form explaining how to legally cancel a contract, without cause, within two weeks after signing. A purchaser will have the right to pledge any interest in the property as security to obtain a loan to make utility, water, sewer, structural and fire protection improvements. The seller of land must transfer the title back to the purchaser within 30 days of when the final payment is posted, as well as send an annual accounting statement informing the purchaser of how many payments the purchaser has made and the remaining amount owed. SB 336 also requires the seller of a property, in the case of default by a purchaser who has paid at least 40 percent of the amount due, to follow certain guidelines in disposing of the property. The Texas Department of Housing and Community Affairs is also required to develop a program to educate consumers on contract transactions for conveyance of real property.

Supporters said SB 336 would resolve some problems buyers have faced with land sales in colonias. The bill would require specific disclosures by a seller under a contract-for-deed concerning availability of water, wastewater, electric service and flood plain status. This would give buyers a better chance to decide about the land before committing to a purchase. All contracts-for-deed would be recorded with the county clerk to ensure that a record is available in case a prosecutor decides to prosecute an unscrupulous developer.

Opponents said the two-week cooling off period for a purchaser to be able to cancel a contract would be unreasonable and unfair to the seller. Provisions touted as providing protection for low-income buyers might actually work to their detriment by creating excessive red tape.

The HRO analysis appeared in the May 19 Daily Floor Report.
Establishment of colonia self-help centers

SB 1509 by Zaffirini
Effective September 1, 1995

SB 1509 requires the Texas Department of Housing and Community Affairs (TDHCA) to establish colonia self-help centers in El Paso, Hidalgo, Starr, Webb and Cameron counties. A colonia is defined as a geographic area in a county that is within 150 miles of the state’s international border and has a majority population of low-income individuals and families or has the physical and economic characteristics of a colonia as determined by TDHCA. The agency is to designate the geographic area for the services provided by each self-help center and choose five colonias in each service area to receive concentrated attention from the center.

TDHCA must appoint at least five colonia residents to serve on an advisory committee for each center. Appointees are selected from lists of candidates submitted by non-profit organizations and the commissioners court of the county where the center is to be located. The committees will advise the agency regarding colonia residents’ needs and the operation of the self-help centers. Appropriate agency staff are to assist the centers in obtaining funding to carry out each center’s programs. Self-help centers are to assist low-income colonia residents to construct, obtain or maintain a safe home in the colonia and help improve living conditions for colonia residents. Their services would include assistance in obtaining loans or grants to obtain homes and helping to improve the service or utility infrastructure designed to service colonia residents. TDHCA is required to establish a colonia set-aside fund to assist colonias and money from the fund can used for operation and the self-help centers.

Supporters said nonprofit self-help centers promote decent housing by assisting colonia residents in obtaining construction or repair loans, teaching building skills, loaning tools, assisting with infrastructure improvements and identifying alternative housing outside colonia areas. However, only three such self-help centers exist, and they jointly have helped build fewer than 100 units a year. Establishing five additional self-help centers would raise the number of housing units covered to 1,000 a year and help enable more colonia residents to enjoy a decent standard of living.

Opponents said existing self-help centers are adequately funded by charities, churches and other private sources. SB 1509 would involve the government unnecessarily in an area that the private sector is already handling well.

Notes. The House had reduced a mandatory annual allocation of Community Development Block Grants funds for the colonia set-aside fund from at least 12.5 percent to no more than 10 percent. The conference committee deleted the block grant allocation provision altogether.

The HRO analysis appeared in Part Two of the May 19 Daily Floor Report.

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Limiting tort liability of public servants

HB 383 by Junell
Effective September 1, 1995

HB 383 limits to $100,000 the liability of public servants for any personal injury or any damage to property if they are covered for the first $100,000 by state or local government indemnification or state or local government liability or errors and omissions insurance. The limit applies to all elected or appointed officials and all government employees and volunteers, except independent contractors and health care providers.

HB 383 also relieves the City of Houston from liability under the Texas Tort Claims Act during the time when the city acquires land for foreclosure sale until the land is conveyed to another party. During this period the city may not be held liable for actions arising from a condition of the land, a premises defect on the land or an act committed by any person, other than an agent or employee of the city, on the land.

HB 383 applies to claims that accrue after September 1, 1995, or claims against Houston on foreclosed property that are filed after that date.

Supporters said public servants are subject to suits for actions that occur in the performance of their duties. The governmental body they work for has limits on its liability, but the individual worker does not. The liability of public servants is limited only by their assets, which for most workers total less than $100,000. HB 383 would provide a balance of interests, allowing a successful claim against a public servant to be compensated by up to $100,000.

Health care professionals would specifically be excluded from the liability limits provided by HB 383 because their actions are not governmental.

The City of Houston holds a number of foreclosed properties it hopes to sell to offset taxes owed, and the proceeds from the sales would also be distributed to the county, school district and other taxing units for unpaid taxes. Limiting the city’s liability on foreclosed property would help facilitate sale of this property.

Opponents said the bill would limit the rights of injured parties to receive compensation for harm. The liability limit on damages caused by public employees would not likely reduce the number of suits filed against public servants, nor help streamline the tort system; it would only limit the recovery of bona fide injured parties.

The bill’s specific exclusions for health care providers were inserted to counter arguments that different liability standards for health care professionals at public and private hospitals would lower the quality of health care. However, these exclusions...
are arbitrary and unjustified. Such distinctions are not based on the performance of the individual's job nor how much training they receive.

The City of Houston should not be shielded from any liability arising between foreclosure and sale of the land. This would allow the city to completely ignore its responsibilities for conditions that might present a clear danger to the public.

**Notes.** The House-passed version of HB 383 only excluded physicians licensed by the State Board of Medical Examiners from the liability limits; the Senate added a list of health care providers. The provision relating to Houston was added by the Senate and also passed the House separately as HB 741 by Farrar.

The **HRO analysis** of HB 383 appeared in Part One of the April 5 *Daily Floor Report*; the analysis of HB 741 appeared in Part Two of the May 1 *Daily Floor Report*. **HRO Session Focus** Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes the major tort law changes.
Revising the Deceptive Trade Practices Act (DTPA)

HB 668 by Junell

Effective September 1, 1995

HB 668 specifies that only a consumer who has relied on a false, misleading or deceptive act may recover under the Deceptive Trade Practices Act (DTPA) or Insurance Code art. 21.21. Under the DTPA a consumer is entitled to the amount of economic damages for any violation. If the consumer proves that the seller acted knowingly, the consumer may receive additional damages for mental anguish and up to three times the economic damage award. If the trier of fact finds the act was done intentionally, the consumer may recover up to three times the amount of damages for mental anguish and economic damages. When computing additional damages, the court may not consider attorney’s fees, costs or prejudgment interest. Moreover, a court cannot award any prejudgment interest for future losses or additional damages.

HB 668 makes the award of trebled damages under art. 21.21 discretionary with the court. Art. 21.21 makes no distinction between economic and noneconomic damages.

HB 668 allows a consumer to waive the provisions of the DTPA if the waiver is in writing, the consumer is not in a significantly disparate bargaining position and the consumer has legal representation who was not directly or indirectly suggested by the defendant. The waiver must be in a form prescribed by the statute.

HB 668 excludes from the DTPA any transaction involving a total consideration of more than $500,000. It also excludes from the DTPA a claim based on a written contract if the consideration exceeds $100,000, the consumer is represented by counsel and the transaction does not involve the consumer’s residence.

A court must compel mediation for DTPA claims upon the motion of a party, but in the case of claims under $15,000 mediation is required only if the party requesting the mediation agrees to pay all costs of the mediation.

The bill makes uniform the provisions for notice and a plea in abatement in the DTPA, Property Code Chapter 27 and Insurance Code art. 21.21. Provisions regarding the offer of settlement and requiring mediation in the DTPA and art. 21.21 are made identical.

HB 668 adds unfair settlement practices and other misrepresentations to the list of unfair and deceptive practices under Insurance Code art. 21.21.

HB 668 creates a cause of action for the practice commonly referred to as insurance redlining — a form of unfair discrimination in which persons in essentially the same hazard class are treated differently in their premiums or policies. A claim that a person was unfairly discriminated against must be brought in a Travis County court
within 12 months after the action occurred. A successful claimant may recover economic damages, court costs and attorney's fees. If the act was committed knowingly, the court may award punitive damages up to $25,000 per claimant.

**Supporters** said the bill would restore statutes protecting the consumer, stop sophisticated consumers from using these statutes as a hammer against sellers of goods and services, force consumers to more closely examine offers of settlement, allow sophisticated consumers to waive the protections of the DTPA and make related statutes uniform.

**Opponents** said HB 668 would allow defendants to delay proceedings, exclude more transactions from the protection of the DTPA and reinstitute one of the most troublesome common law defenses, the defense of reliance.

The **HRO analysis** appeared in Part Two of the May 3 *Daily Floor Report*. HRO *Session Focus* Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes the major tort law changes.
HB 971 requires a plaintiff, within 90 days of filing a suit, to either post a $5,000 bond or file an expert medical report for each defendant named in the suit. If such requirements are not met, the plaintiff must file a $7,500 bond in order to continue the suit. Additionally, within 180 days of filing suit, the plaintiff must file an expert medical report certifying the claim and supply the defendant with information regarding the expert who created the report. If a plaintiff fails to file the expert report by the 181st day, the defendant may seek sanctions against the plaintiff, including attorney's fees, forfeiture of any bonds filed and dismissal of the action with prejudice (barring the plaintiff from refiling the claim). The court or the parties may by agreement extend these time periods. Additionally, a court may grant a 30-day grace period if it finds that the failure to meet a deadline was not the result of conscious indifference but of mere accident or mistake.

HB 971 requires that an expert witness be qualified on the basis of training or experience in order to offer an expert opinion. In determining whether a witness is qualified, the court may consider whether the witness is board certified or has other substantial experience in the area of medical practice relevant to the claim and is actively practicing in rendering medical care services relevant to the claim. A court may deviate from these criteria if it finds good reason to do so.

HB 971 prohibits adding any prejudgment interest to an award if a claim is settled before the 181st day after the suit is filed. If the claim is not settled within 181 days, only prejudgment interest on future damages (incurred after settlement or judgment), not past damages, is restricted.

The provisions regarding the filing of expert medical reports and new bond posting requirements apply to all causes of action filed after September 1, 1995. The provisions relating to prejudgment interest apply only to claims that accrue after the effective date.

Supporters said HB 971 is a reasonable compromise that would help focus judicial resources on legitimate claims while protecting the rights of plaintiffs to sue when they are injured. Reducing the number of frivolous lawsuits filed against doctors and other health care professionals and making the malpractice litigation system more efficient would allow doctors to spend less time in the courtroom and more time treating patients. Eventually, cutting down on malpractice claims could lower insurance premiums and help curb rising health care costs.
The Texas experience during the last 10 years has sharply contrasted with national patterns. While the number of claims fell nationally between 1985 and 1992 by nearly 20 percent, claims in Texas during that period rose 118 percent. In 1992 Texas recorded an average of 19 liability claims per 100 physicians compared to a national average of 8.2 claims per 100 physicians.

**Opponents** said HB 971 would limit the right to bring meritorious claims to court. Plaintiff’s attorneys would be less likely to financially support a claim on a contingency fee basis when it would cost more up-front to post a bond.

Medical malpractice insurance and liability claims are such a small portion of total health care costs that the bill would have no real impact on reducing medical costs.

The confusing timetable and bond requirements would create a trap even for the most conscientious attorney. One slip could cost thousands of dollars in bonds and even result in dismissals for failure to keep up with a series of strict deadlines.

The **HRO analysis** appeared in the April 12 *Daily Floor Report*. HRO Session Focus Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes major tort law changes.
Restricting inmate lawsuits

HB 1343 by Hightower
Effective June 8, 1995

HB 1343 establishes procedures for courts and the Texas Department of Criminal Justice (TDCJ) to limit court claims brought by Texas jail and prison inmates and requires TDCJ to create a grievance system to deal with such claims out of court and through administrative remedies.

A court may dismiss all or part of a claim of an inmate in a facility operated by or for TDCJ upon finding the claim frivolous, malicious or containing a false declaration of poverty. The provision applies in district, county, justice of the peace and small claims courts. The court may consider whether the claim has a realistic chance of success, has no arguable basis in law or is substantially similar to a previous claim by the inmate.

An inmate’s good conduct time is forfeited the second time the inmate brings a frivolous lawsuit. The loss of good time credit increases with each finding of a frivolous suit filing, up to 180 days. Before trial the inmate is required to file an affidavit stating the results of previous lawsuits, including whether the suits were dismissed as frivolous or malicious.

An inmate’s monetary award from the state may be reduced by the amount the state spent on the inmate’s incarceration and any money the inmate owed the court for costs from previous lawsuits, except in cases involving damage or injury from a negligent act or omission or in cases involving a constitutional violation.

The Supreme Court must, by rule, adopt a system under which a court may refer an inmate suit to a magistrate for review and recommendation. The system may be funded from an appropriation or interagency contracts.

TDCJ must notify inmates of the provisions in the bill, which apply only to actions that accrue on or after the bill’s effective date.

Supporters said HB 1343 would make it easier for courts to dismiss frivolous claims by prison inmates. Inmate lawsuits, often focused on trivial, imagined or trumped up grievances, clog the court system and waste the time and resources of state and local government. In 1993 the Attorney General’s Office opened 659 inmate cases; in 1994 that number escalated to 994, resulting in 1,718 pending cases. The 16 most prolific inmate litigators in Texas alone have filed 498 cases. The minimum cost in lawyer time for the state is $1,600 for a one-day bench trial, $3,000 for a one-day jury trial, and another $500 for the inevitable appeal. Allowing courts to deduct money out of the inmate’s trust accounts to pay court fees and other costs would discourage
frivolous suits. TDCJ could also forfeit some of an inmate’s good conduct time for repeatedly abusing the court system.

Opponents said HB 1343 could have a chilling effect on the right of a prisoner to a day in court for grievances that may arise during confinement. The bill would keep the state from addressing the problems in prisons through nonviolent means.

Inmates who do not have the benefit of counsel often cannot accurately judge for themselves if a claim will be considered frivolous or malicious, and errors could easily arise. HB 1343 would allow the state to penalize them, in addition to rejecting their claim. Instead the state should provide inmates with legal assistance in determining whether their claims have merit.

The HRO analysis appeared in the April 5 Daily Floor Report.
Limiting exemplary (punitive) damages

SB 25 by Sibley et al.
Effective September 1, 1995

SB 25 raises the level of culpability required for a defendant to be held liable for punitive damages. Punitive damages are possible only in cases of fraud or malice rather than in cases of gross negligence, the previous standard.

Replacing a cap of four times the award on gross negligence and fraud, and no cap on malicious acts, SB 25 in most cases caps damages at two times the award of economic damages, plus an amount equal to any non-economic damages, up to $750,000, or a total award of $200,000, whichever is greater. Exemptions from the new limits are created for cases arising from felony offenses that require the criminal act to be either intentional or knowing. If the requisite state of mind is proven, punitive damages are uncapped.

SB 25 modifies the level of proof required in punitive damage cases. A plaintiff proving a case on negligence and actual damages may still be held to the preponderance-of-evidence burden. However, in seeking punitive damages, the plaintiff’s burden of proof is by clear and convincing evidence.

The bill also creates a bifurcated trial system to allow the jury to hear and determine evidence relating to a punitive damage award separately from evidence relating to a compensatory award; defines considerations in making awards; sets out specific provisions to be given to the jury in their instructions; requires court of appeals decisions either upholding or overturning punitive damage awards to be written and state clear reasons for the determination; and creates a list of evidence that may be considered when determining the amount of punitive damages to be awarded. A jury may consider the net worth of the defendant when making an award.

When harm results from the criminal act of another, the defendant may only be subjected to punitive damages if that defendant committed the criminal act; the criminal act was committed by an employee or agent of the defendant and the act was authorized or ratified by the defendant or committed by an employee whom the defendant acted with malice in employing; the criminal act occurred at a location that the defendant maintained where there was a common nuisance that the defendant had made no effort to correct; or the criminal act was a result of a landlord’s intentional or knowing violation of a statutory duty to take certain security measures (i.e. rekeying locks, etc.).

SB 25 applies to causes of action that accrue after September 1, 1995.
Supporters said SB 25 would help curb abuses of the Texas tort system, under which filing a lawsuit has become the first action contemplated when a harm is done rather than a last resort. Awards of exemplary or punitive damages, which often bear no relationship to the amount of real harm done, are soaring.

Businesses and professionals must divert considerable portions of their resources to avoiding lawsuits, spending money to defend them and paying huge insurance premiums. The threat of large punitive damage awards is so great that many prudent business owners agree to settle a case that they would rather take to court. Appeals from punitive damage awards usually are substantially lower the total awards, but that is often of little consequence to the business owners who may still lose the backing of creditors and bankers.

Opponents said claims of excessive punitive damage awards are overblown and are being used to shift the civil justice system to give defendants who cause harm an even greater advantage.

Texas actually ranks only 46th in the nation in civil lawsuit filings per capita. During the past four years, the percentage of punitive damages claims paid by insurance companies decreased by 50 percent, while the number of punitive damage claims filed decreased by 39 percent. Only 6.9 percent of all claims dollars paid in 1989 were for punitive damages; that number dropped to 5.7 percent in 1992. The median punitive damage awards in the three largest counties would fall below the caps set by SB 25.

A possible alternative would be to create a sliding scale of punitive damage caps that would take into account the financial status of the defendant and would set the punitive damage cap at a percentage of that wealth. Such a sliding scale would ensure that small businesses are not decimated by a single large punitive award, while large businesses would be able to be properly punished for their misdeeds.

The HRO analysis appeared in Part One of the April 5 Daily Floor Report. HRO Session Focus Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes major tort law changes.
Revising joint and several liability law

SB 28 by Sibley
Effective September 1, 1995

SB 28 raises the threshold at which a defendant may be found jointly liable from greater than 10 percent to greater than 50 percent. In toxic tort cases (environmental harms) or harms done by hazardous substances, the threshold standard would be raised from 1 percent to 15 percent.

A defendant found to have committed a criminal act listed in the bill with specific intent — defined as conscious effort or desire to engage in such conduct for the purpose of doing substantial harm to others — is subject to joint liability without regard to the percentage of fault assigned by the jury.

SB 28 requires the jury to determine the percentage of responsibility for each responsible third party joined into the suit at the same time it determines the responsibility for each plaintiff, each defendant and each settling party. SB 28 allows a defendant the same right as the plaintiff to bring additional parties into a suit and have them assigned percentages of responsibility.

SB 28 also adds Chapter 95 to the Civil Practices and Remedies Code governing a property owner’s liability for acts of independent contractors. A property owner may not be held liable for personal injury, death or property damage to a contractor, subcontractor or an employee of either unless the property owner exercised or retained control over the way in which the work was performed or the owner had actual knowledge of the danger or condition resulting in the injury.

SB 28 applies only to a cause of action or claim that accrues on or after September 1, 1995; however, the provisions relating to owner’s liability to independent contractors only apply to actions accruing on or after September 1, 1996.

Supporters said SB 28 would bring needed fairness to joint and several liability law by establishing a new system of proportionate responsibility that would determine who should be responsible for what proportion of compensation, if any, in a tort action. Joint and several liability law before SB 28 could require a defendant to compensate the plaintiff at a rate exceeding the defendant’s percentage of responsibility.

Under SB 28 a defendant could be held liable for an entire damage award only if the defendant were at least 51 percent at fault. When there are only two parties to an action, a defendant is not required to pay the plaintiff’s award if the plaintiff is more liable than the defendant; that rule should be no different when there are more than two parties to a case.
A defendant in environmental torts would have to be at least 16 percent liable in order to be jointly and severally liable. It is clear that environmental harms should be punished and polluters should face stiff penalties, but a 1-percent threshold is much too low. A defendant could receive 1 percent of the liability simply for being named in the suit. SB 28 would also make it easier for defendants to bring other responsible parties into a lawsuit so that they can be assigned a percentage of fault along with the defendant.

**Opponents** said SB 28 would make it more difficult for plaintiffs with legitimate injuries to recover and would allow financially able defendants to duck paying their fair share. Under a 15 percent bar on environmental torts, having seven equally culpable defendants could negate the plaintiff's award. It is not unusual to have as many as 20 different polluters to a particular area, each polluting with the same toxic material.

**Other opponents** said joint and several liability should be abolished. Persons should be held responsible only for the percentage of fault they cause, and not have to cover the liability of another just because that defendant is insolvent.

The **HRO analysis** appeared in Part Two of the May 3 *Daily Floor Report*. HRO *Session Focus* Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes major tort law changes.
Sanctions for frivolous civil lawsuits

SB 31 by Lucio et al.
Effective September 1, 1995

SB 31 incorporates into Texas law Rule 11 of the federal Rules of Civil Procedure governing sanctions for frivolous suits. SB 31 requires the signer of a pleading or motion to certify that, to the signer's best knowledge, the pleading is not being presented for an improper purpose, including harassment, delay, or to increase the cost of litigation; each claim, defense or other contention is warranted by current law or a non-frivolous argument for the extension of current law; each allegation is likely to have evidentiary support and each denial is warranted on the evidence or based on a lack of information.

SB 31 allows any party, or the court on its own initiative, to move for sanctions. If a court determines that a violation has occurred, it may impose sanctions on the signer and/or a person represented by the signer. The sanctions, which must do no more than deter repetition or equal the normal sanction for such actions, include a direct order by the court, a fine and an order to pay the expenses incurred by the other party including reasonable attorney's fees.

The Supreme Court may not override the bill's provisions by rule, and the bill applies to all suits commenced after its effective date.

Supporters said SB 31 would establish a more workable mechanism for imposing court-ordered sanctions to deter frivolous or harassing lawsuits that take up court time and harm those against whom the suits are filed. One of the most often-cited reasons why Rule 13, the current Texas rule against frivolous lawsuits, does not curb the filing of frivolous lawsuits is that judges are reluctant to risk impairing a litigant's due process rights. However, reprimands are rarely a strong enough deterrent, and monetary sanctions do not cover attorney's fees, which are usually the most expensive cost of defending a frivolous suit. SB 31 would solve this problem by allowing a court to impose sanctions for attorney's fees.

Opponents said the final version of SB 31 was not strong enough because it only governs the signing of documents, not the actions of the litigants in pursuing the lawsuit. As passed by the Senate, SB 31 was not based on signing documents and gave more flexibility to judges.

The HRO analysis appeared in Part Two of the May 3 Daily Floor Report. HRO Session Focus Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes major tort law changes.
Venue for civil actions

SB 32 by Montford et al.
Effective August 28, 1995

SB 32 establishes a new general venue rule for where lawsuits may be filed. Proper venue is defined as the county where all or a substantial part of the events or omissions giving rise to the claim occurred; or, if the defendant is a natural person, where the defendant resided at the time the action accrued; or, if the defendant is a corporation or other entity, where the principal office, defined as the place where the decision makers for the organization conduct the daily affairs of the organization, is located; or, only if the first three choices are not possible, where the plaintiff resided when the action accrued.

Once the plaintiff chooses venue, the defendant may challenge that venue or may make a motion that for the convenience of witnesses and the parties and in the interest of justice, the court should transfer venue to another county. The court may grant such a motion if it finds that no injustice to any party would be done and a balance of interests warrants the transfer.

Each plaintiff who intervenes in a suit in progress must first establish whether venue is proper for that plaintiff. If the attempt fails, the plaintiff may still join the suit by showing that joinder or intervention was proper under the Texas Rules of Civil Procedure, maintaining that venue would not unfairly prejudice another party in the suit, there was an essential need to have the intervening plaintiff’s claim tried in the pending suit, and the county was a fair and convenient location for the intervening plaintiff and the defendant.

SB 32 retains the current rule that if venue is proper against one defendant it is proper as to all other defendants for claims arising out of the same transaction or occurrence. However, the bill does not allow one defendant to waive venue objections of other defendants.

SB 32 establishes mandatory venues: for landlord-tenant disputes, the county where the property is located; for Federal Employee Liability Act (FELA) and federal Jones Act cases, general venue rule; and for damage to property, where the property is located.

SB 32 applies to all cases commenced on or after its effective date, except that the sections applying to FELA and Jones Act cases take effect January 1, 1996.

Supporters said SB 32 would make complicated venue rules more certain and eliminate many loopholes and legal strategies that promote forum shopping and allow persons to choose the most favorable county despite a tenuous connection to the case. The general venue rule created by SB 32 would provide the flexibility of three

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choices, determinable before a suit was actually brought. Under current law it is almost impossible for a defendant to know where a lawsuit might be brought. Unpredictability has arisen because venue can be based on where "all or part of" a cause of action accrued. Suits against a corporation or other entity could be brought in the county where the plaintiff resided when part of the action accrued and in which the defendant has an agency or representative, or the county nearest to the plaintiff's county in which the defendant has an agency or representative. Essentially this rule allows a plaintiff to find any county where the defendant might have some connection, no matter whether the defendant's connection to a county has any connection to the suit, and sue the defendant in that county.

Multiple defendants also pose venue problems. A plaintiff can sue one defendant merely to establish venue in the county desired by the plaintiff. Once venue is established, the plaintiff can then join into the suit other defendants who are unable to object to venue unless they have a claim of mandatory venue that was unavailable to the first defendant. SB 32 would simply allow each defendant brought into a suit to challenge venue no matter what the other defendants have done regarding venue. This simple, commonsense change would drastically alter the ability of plaintiffs to drag defendants into counties to which they have absolutely no connection.

Opponents said strictly limiting venue choices would prevent consolidation of cases and cause more suits to be tried in several separate counties simultaneously.

The provisions dealing with multiple plaintiffs would make it virtually impossible to consolidate cases. For example, if defendants throughout the state were defrauded by an out-of-state company with no office in Texas, each case could only be brought only in a county where a plaintiff resided, leading to the possibility of suits in all 254 Texas counties over the same problem.

The HRO analysis appeared in Part Two of the May 3 Daily Floor Report. HRO Session Focus Number 74-13, "74th Legislature Overhauls Tort Law," June 30, 1995, summarizes major tort law changes.
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Trucking deregulation

SB 3 by Bivins
Effective September 1, 1995

SB 3 repeals the Texas Motor Carrier Act and transfers regulatory authority over registration and safety of intrastate motor carriers from the Texas Railroad Commission to the Texas Department of Transportation (TxDOT) and the Department of Public Safety (DPS). Money formerly appropriated to the Railroad Commission for the administration of activities and laws that are repealed by SB 3 would be transferred to TxDOT and DPS. TxDOT may not regulate prices, routes or services provided by a motor carrier. Motor carriers and tow trucks must register with TxDOT and show proof of insurance. Motor carriers must maintain liability insurance, but the state may not require an amount that would exceed the amount required for a motor carrier under federal regulations. A requirement for surety bonds for certain overweight and oversize vehicles was also removed. TxDOT may impose administrative penalties of up to $5,000 per violation against a carrier, and up to $30,000 for multiple violations.

The bill exempts household goods motor carriers or any collective association of carriers or agents from prohibitions against collectively setting rates, although agreements must be submitted to TxDOT for approval. A person may not act as a transportation broker without providing a bond to TxDOT. TxDOT is required to adopt rules to protect those who use movers of household goods with trucks that weigh more than 26,000 pounds and may issue licenses to operate vehicle storage facilities.

Cities may regulate tow trucks to the extent permitted by federal law. A city may require the registration of a truck that performs a non-consent tow, whether or not the tow truck owner has a place of business in the city. By January 1, 1996, TxDOT and the DPS must have reviewed all rules adopted to enforce SB 3, and by January 1, 1996, all state agencies must review existing regulations that affect motor carriers.

Supporters said federal preemption of state-regulated trucking effectively ended economic regulation of intrastate trucking. SB 3 would bring state law into compliance with the new federal deregulation standards and implement safety and consumer protections to protect the public in the new era of deregulated trucking.

Opponents said the regulations regarding household goods movers should apply to all trucks and trucking firms, not just those with trucks with a weight rating of more than 26,000 pounds. Motor carriers should not be exempted from bonding requirements that protect counties from damage done by overweight trucks.

The HRO analysis appeared in Part One of the May 18 Daily Floor Report.
Prohibiting carrying children in open-bed vehicles

SB 445 by Luna
Died in the House

SB 445 would have prohibited drivers from carrying persons under age 18 in an open-bed pickup, open-flatbed truck or open-flatbed trailer while being towed or traveling at any speed.

Supporters said 31 children died in Texas in 1994 because drivers failed to realize that truck beds are meant to carry cargo, not children. Current law prohibits carrying children in open truckbeds only at speeds of 35 mph or more and applies only to children younger than 12. The Texas Department of Public Safety reported that an average of 452 injuries and 14 deaths occurred annually between 1988 and 1993 involving pickup bed passengers. Children deserve minimal safety protections, regardless of their parents’ income level or mode of transportation. One head-injury patient can cost up to $1 million or up to $50,000 a day to treat in a hospital, and treatment can take up to four years, in cases when recovery is possible.

Opponents said SB 445 would negatively affect farm and migrant farmworkers in rural areas who use pickups as their sole means of transport. Their ability to make a living and to transport their children would be severely limited. While camper shells could be a solution for some families, they cost over $200 and some families might have a hard time affording them.

The HRO analysis appeared in the May 22 Daily Floor Report.
SB 1445 requires a licensed dealer of a motor vehicle titled and registered in Texas to add the amount of the tax to the sales price of the automobile and remit it to the tax assessor-collector. The amount of the added tax is considered a debt of the purchaser to the seller until paid. If unpaid, it is recoverable in the same manner as the original sales price.

A licensed dealer is required to apply for the registration of and Texas certificate of title in the name of the purchaser of the vehicle and file the necessary documents to ensure transfer of the title and register the vehicle. The Texas Department of Transportation (TxDOT) may issue a certified copy of a certificate of title to the vehicle’s owner or lienholder after four days if the applicant submits personal identification. The department may design a written notice of transfer to be part of the certificate of title for the vehicle to allow an individual seller, rather than a licensed dealer, to voluntarily complete a form to notify TxDOT that a vehicle has been sold, even if the purchaser has not transferred the title. If the comptroller finds in an audit of a dealer that the documents to title and registration of a vehicle in the name of the purchaser are not delivered to the tax assessor-collector with tax due, the dealer is liable for the tax, plus penalty and interest.

Supporters said the bill would properly shift the responsibility for the transfer of title and payment of sales tax from the buyer of a motor vehicle to the licensed dealer to conform to sales tax collection policies for almost all other products. The current system provides little incentive for the buyer to remit the tax or transfer the title, and as a result sellers often continue to receive fines from traffic violations committed by a vehicle’s new owner.

Opponents said the bill should apply not only to licensed dealers but to all individuals engaged in selling a motor vehicle. This would increase the state’s revenue from collection of motor vehicle sales taxes.

Notes. The Senate version of the bill would have made the seller responsible for sales tax and title transfers in all motor vehicle sales, not just those by dealers.

Utilities and Energy

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HB 176 redefines the way the state determines rates for gas utilities that are affiliated with companies under the same parent corporation and file consolidated tax returns with those affiliates. Such a utility’s rates are determined using only the revenues and expenses that make up the net income of the utility operation. The expenses of an affiliate of the utility, including any tax deductions of the affiliate, are not considered as part of the utility’s net income in rate calculations.

Affiliate expenses are used as a component of a utility’s net income for transactions within the parent corporation if the regulator finds it reasonable to include them as a component and if an affiliate sells something to a utility at a price not higher than the prices it charges to other affiliates or to entities not affiliated to the corporation.

Tax deductions that a utility gets for its disallowed expenses — those expenses not allowed to be used in the calculation of utility rates — may not be used in the calculation of utility rates.

HB 176 applies to rate proceedings for which the statement of intent to change rates is filed on or after HB 176’s effective date. Appeals of rate decisions to the Texas Railroad Commission are affected only if the statement of intent for the original rate hearing was filed on or after the bill’s effective date.

HB 176 states the Legislature’s intent not to increase gas utility rates to the customer not caused by utility service and that utility rates should include only expenses caused by utility service.

Supporters said HB 176 eliminates an unfair method of calculating gas utility rates by establishing a tested method that is fair to both consumers and a utility’s corporate shareholders. The methods of calculation provided for in HB 176 have already been adopted by regulatory bodies in 46 other states and by the Federal Energy Regulatory Commission.

HB 176 provides for a "stand alone" method of rate calculation, in which a utility’s income and operating expenses are calculated separately from any income, expenses or tax deductions incurred by its affiliates. This means regulators will look only at the amount of federal income taxes the utility pays and not whether the utility’s tax burden is lowered due to the tax deductions of the affiliates.

Such practices are fair and justified because shareholders paid the cost and assumed the risks associated with the affiliate’s tax deductions. This practice matches the risks that the shareholders take with their tax benefits, rather than arbitrarily extracting those
tax benefits from shareholders and giving them to ratepayers who have not assumed the risks or paid the expenses and associated taxes that gave rise to the income tax deduction.

**Opponents** said under HB 176 ratepayers would pay more than what they owe in gas rates. The bill is contrary to the underlying ratemaking principle in Texas law: that ratepayers pay only actual and reasonable expenses of the utility. By requiring ratepayers to pay for a hypothetical or "phantom" tax expense — that is, an expense that fails to take into account the utility’s tax deductions — HB 176 actually would increase profits to shareholders in excess of the profit granted by regulators.

Gas utilities would gain an unfair amount of leverage in negotiating with cities over utility rates. Most municipal rate cases are never appealed to the railroad commission for review because the gas utility and the municipality settle. The settlements are based on the assumption that the utility recovers its actual tax expense, not an amount greater than its actual expense. The bill would make it more difficult for municipalities and gas utilities to settle rate cases, leading to more appeals.

The **HRO analysis** appeared in the April 12 *Daily Floor Report.*
Extending tax exemption for high-cost gas

HB 398 by Craddick
Effective September 1, 1995

HB 398 reduces taxes on "high cost gas wells" spudded or completed between September 1, 1996, and September 1, 2002, extending a previous tax break for such wells. The wells are entitled to a reduced production tax for the first 120 consecutive months of production or until the cumulative value of the tax reduction equals 50 percent of the well drilling and completion costs. (The maximum tax rate is about 7.5 percent.) Wells spudded or completed between September 1, 1996, and August 31, 1997, are subject to the standard tax rate, but eligible producers can request a refund of any excess taxes paid, beginning September 1, 1997. The bill requires the state comptroller to calculate and publish as soon as practicable after March 1 of each year, beginning in 1997, the median drilling and completion cost for all high cost gas wells.

Supporters said during the last decade the state has experienced depressed oil and gas prices, reduced exploration and drilling and falling production. Since 1982 more than 135,000 Texas jobs in the oil and gas sector have been lost. HB 398 would continue, but reduce somewhat, the incentives to produce high-cost gas, commonly known as "tight sands" gas, which is inherently expensive to drill and produce.

Opponents said that the current exemption has not increased gas production and that claims that economic development generally would be stimulated were exaggerated. The tax break would take needed revenue from state programs and would last until 2012 for producers who apply for reduced taxes by 2002, which may be too long.

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

HB 2128 by Seidits
Effective September 1, 1995

HB 2128 continues the Public Utility Commission (PUC) and Office of Public Utility Counsel (OPUC) until September 1, 2001, and makes major changes in telecommunications utility regulation.

Incentive regulation. The bill reduces regulation of local exchange companies (LECs) on September 1, 1995, in exchange for certain infrastructure commitments and a four-year basic service price freeze based on June 1, 1995, prices. (The PUC must approve any basic rate increases after the four-year freeze.)

Infrastructure commitment. The bill sets out a six-year infrastructure investment plan for LECs opting for rate-of-return regulation. Those LECs electing incentive regulation are required to provide customers in their territory with digital connection by January 1, 2000. It requires digital switches in all new central offices beginning September 1, 1995, or at least ISDN switching capability beginning September 2, 1997. The LECs’ public switched network backbone inter-office facilities must be able to deliver a video signal at quality levels comparable to a television broadcast signal by January 1, 2000. The bill requires Southwestern Bell to install Common Channel Signaling 7 capability in all central offices and to connect all of its serving central offices to their respective LATA tandem central offices with optical fiber or equivalent facilities by January 1, 2000. GTE must provide digital switching central offices in all exchanges, including those serving less than 20,000 access lines, by December 31, 1998.

The bill requires LECs electing incentive regulation to provide broadband, digital services for voice, video and data interconnection upon request to all educational institutions, libraries, nonprofit telemedicine centers, public or non-profit hospitals and projects funded by the Telecommunications Infrastructure Fund. The bill provides preferential costs, based on 105 percent of the long run incremental cost, including installation, for services to these entities. The PUC can waive the infrastructure commitment for LECs other than Southwestern Bell or GTE.

Telecommunications Infrastructure Fund (TIF). The bill creates the TIF, to be administered by a nine-member board. Funding for TIF will come from assessments on telecommunication utilities and commercial mobile service providers. The comptroller is required to collect $150 million each year for 10 years, beginning September 1, 1995 — $75 million from telecommunications utilities and $75 million from mobile service providers. The TIF board is to award grants and loans for equipment and wiring for public schools from the telecommunications utility fund. Money from the mobile provider fund is to be used for equipment, wiring, material,
program development, training, installation costs or any statewide telecommunications network for distance learning, telemedicine and information sharing of libraries.

Alternative entry into local exchange. The bill permits companies to provide local telephone service in established service areas by acquiring either a Certificate of Operating Authority (COA), which requires building network facilities, or a Service Provider Certificate of Operating Authority (SPCOA), which allows companies other than the three largest long-distance companies (AT&T, MCI and Sprint) to resell telephone service through the existing network. COAs must build infrastructure in a 27-square mile area within six years. No more than 40 percent of the COA's service can be service resold from the incumbent LEC’s facilities. COA build-out requirements will be eliminated in areas serviced by Southwestern Bell when Southwestern Bell is allowed into the long-distance market. Companies with SPCOAs have no build-out requirements and can resell 100 percent from the LEC. The bill also prohibits cities from providing local telephone service.

Minimum service. The bill requires LECs and COA companies to provide certain minimum services by December 31, 2000, including single-party service, touch-tone dialing, equal access for long-distance carriers and digital switching upon request.

IntraLATA 1+ access. Existing LECs, including COA and SPCOA companies, are designated as the automatic default carrier for intraLATA 1+ (local long distance) calls until the federal government allows LECs to enter the long-distance market.

Competitive safeguards. The bill establishes certain requirements regarding competition, such as resale tariffs, telephone number portability and interconnection. It requires the PUC to adopt a pricing rule by April 1, 1997, that ensures that prices for monopoly services remain affordable, that competitive prices not be subsidized by noncompetitive services and that each service cost include all costs used to provide the service.

Broadcaster safeguards and electronic publishing. The bill prohibits Southwestern Bell from engaging in electronic publishing, except through separate affiliates or joint ventures, until June 30, 2001. It also makes Southwestern Bell and GTE submit to certain conditions regarding broadcasting audio and video programming.

Partial deregulation of small LECs and telephone co-ops. The bill reduces regulation for small telephone companies and telephone cooperatives.

Private pay telephones. The bill allows the PUC to set charges for coin-paid local telephone calls and also to set rates on other pay telephone calls. It requires all non-LEC pay phone providers to register with the PUC.

Caller ID. The bill requires the PUC to establish a Caller ID Consumer Education Panel to insure safe use and privacy related to the use of caller ID services.
Interexchange services. The bill allows for up to five toll-free boundary areas and a fee of $1.50 per line for exchanges over five.

Universal Service Fund (USF). The bill authorizes the PUC to expand the use of the USF to maintain reasonable basic local telephone rates. The PUC is to make rules allowing the USF to reimburse all LECs, except Southwestern Bell, for revenue loss or increased costs resulting from a PUC or FCC regulatory change in long-distance access charges or intraLATA 1+ access.

Rural and urban scholarship funds. Beginning September 1, 1995, the bill allows an LEC to deposit unclaimed property money that otherwise would have been deposited in the state treasury beginning September 1, 1995, into a rural or urban scholarship fund to help needy rural and urban students attend college or technical school. There is a $400,000 per fiscal year limit on the amount of funds that can be transferred to each fund.

Supporters said the bill would provide the regulatory framework to move from a regulated telecommunications market to a fully competitive market. It would recognize the rapid technological changes in telecommunications and allow for competition while assuring continued affordable rates and quality service. It would allow local exchange companies to go to price regulation, instead of cost of service regulation, and in exchange the LECs would have to make certain infrastructure commitments in the next five to six years that would benefit schools, libraries and public hospitals, and make the telecommunications system in Texas among the most advanced in the world.

Opponents said the bill purported to provide a framework for Texas to make the transition from local telephone service monopoly to a competitive market, but really would give Southwestern Bell, GTE and other local phone companies an unfair competitive advantage. Consumers would have no adequate mechanism to require local exchange companies to lower prices when the cost of providing service falls. LECs would be freed from regulation immediately while the development of competition could be restricted for years to come. The build-out requirements would make it economically unfeasible for companies, other than possibly cable companies, to get into the local exchange business as competitors.

Notes. The House version would have created a Regulatory Transition Fund for existing LECs to be reimbursed through surcharges imposed on certain services in exchange for reducing access charges and LECs intraLATA toll rates. Also, in exchange for reduced regulation, Southwestern Bell and GTE would have been required invest a total of $1.4 billion in telecommunications infrastructure over six years.

The HRO analysis of HB 2128 appeared in the April 18 Daily Floor Report.

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Continuing the PUC, regulation of electric utilities

SB 373 by Armbrister
Effective September 1, 1995

SB 373 continues the Public Utility Commission and Office of Public Utility Counsel until September 1, 2001, and revises Article 1, administrative procedures, and Article 2, electric utility regulation, of the Public Utility Regulatory Act (PURPA).

Administrative issues. The bill transfers the PUC hearings division to the State Office of Administrative Hearings, strengthens conflict-of-interest provisions, removes PUC authority to adjust the gross receipts assessment, removes the mandatory 10-year management audit provision, allows the PUC to assess administrative penalties and revises settlement and hearings procedures to streamline hearings.

Electric utility regulation issues. SB 373 requires the PUC to develop an Integrated Resource Planning (IRP) process by which a utility chooses which resources to use to supply electricity to provide reliable energy service at the lowest reasonable system cost. It encourages the use of Demand Side Management (DSM) by allowing a utility to receive a cost recovery incentive for promoting DSM. Public utilities are required to report only information relating to transactions between themselves and their affiliates and only when those transactions are subject to the jurisdiction of the commission.

Deregulating the wholesale electric market, SB 373 allows Exempt Wholesale Generators (EWGs) and power marketers to operate. Wholesale power producers and marketers are required to register with the PUC or show proof of federal registration. An affiliate of a regulated electric utility may be an EWG or a power marketer, and such an affiliate may sell electricity to the utility so long as such sales are made in accordance with IRP requirements. The PUC must require a utility, including a municipal owned utility, to provide access to its transmission capabilities at wholesale cost to any other utility, co-generator, EWG or power marketer. A utility that purchases power may add a mark-up, in an amount set by the PUC, to the actual cost of purchasing the power to compensate the utility for any financial risks and the value added by the utility in making the purchased power available to its customers. An electric cooperative may be exempted from rate regulation if the members of the co-op approve.

Supporters said the administrative changes included in this bill stem from recommendations of the Sunset Advisory Commission and the Joint Interim Committee on the Public Utility Commission. The implementation of these recommendations would help the PUC to run more smoothly, create a greater independence for the hearing examiners and hearing division, and allow the process of hearings to be conducted more efficiently.
The electric utility industry in Texas is ripe for competition. Wholesale competition is the logical first step because it allows some competition but would not radically alter the consumer side of the industry. The safeguards in the bill would ensure that a competitive environment is maintained without being overly restrictive. The IRP process would help to ensure that the wholesale market is utilized and that utilities make resource choices that are cost effective and environmentally sound and conserve energy.

**Opponents** said regulation of affiliates and affiliate transaction must be strengthened to ensure that regulated utilities do not use affiliates to gain a competitive advantage. Mark-ups are not an incentive for energy conservation measures but merely allow a regulated utility to gain a greater profit for either purchasing power (perhaps from its own affiliate) or conserving energy, which utilities should do anyway.

**Other opponents** said deregulation should go further to allow competition in the retail sale of electric power.

**Notes.** The House removed a provision allowing a pilot retail competition program.

HB 2128 by Seidlits also continued the PUC, but dealt mainly with telecommunications regulation.

The **HRO analysis** of SB 373 appeared in Part Two of the May 23 Daily Floor Report.
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