

86th Texas Legislature, 2019 Regular Session

**SUMMARY OF ISSUES AFFECTING NONPROFIT ORGANIZATIONS
AND STATE ASSOCIATIONS
As of June 17, 2019**

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Final End-of-Session Report:

Every session of the Texas Legislature features scores of bills and controversies that affect the interests of nonprofit organizations, state associations, foundations and other tax-exempt quasi-public entities that engage in charitable or public service activities, receive state funding or grants for their programs, or are otherwise regulated in some manner by various state statutes and agencies. The 2019 regular session that ended May 27 was seen by most as a relatively quiet and productive session, with major accomplishments and compromises in the areas of education funding, teacher pay increases, property tax reform and disaster relief planning.

There were almost 7,300 bills and resolutions filed depending on how you count them, and about 20 percent were passed in some form, with 58 bills vetoed by the governor. For the nonprofit sector, helpful bills that passed involve nonprofit corporation governance issues, defining the extent of transparency and disclosure requirements for organizations receiving and expending public funds, and further clarification of the legal liabilities of volunteers and disaster relief responders. In this summary, passed bills are **underscored in bold** and usually are effective September 1, 2019 unless otherwise specified at the end of the bill.

Crusty veterans of the legislative process say that bills fall into three categories: **the good, the bad and the ugly**. Good bills address a concern that attracts general positive agreement and makes almost everyone feel good about supporting it, voting for it and declaring it to be an example of good government or bi-partisanship. A bad bill can be on any topic or of any variety but generally is...the bill you and your supporters oppose. An ugly bill—also known as a “BOB”, or *bad ol’ bill*—is one that most members wish would just go away without a public hearing before a committee or much media attention.

Access the text of any proposed House bill (HB) or Senate bill (SB) at www.capitol.texas.gov. Use other tracking and analysis tools available on this very useful legislative website. Follow committee agenda postings and track the progress of any bill, including its final fate as one of the 80 percent of bills that died. Bills that did not pass are included in this summary because any issue generating any significant following or attention will likely return in the next legislative session, or the issue may return well hidden in another larger bill on a related subject.

Note on **appropriations**: This summary does not contain tracking or notations regarding legislative appropriations or riders for any of the issues or bills referenced. The regular session general appropriations bills in the House and Senate and the adopted two-year state budget can be monitored through the Legislative Budget Board, www.lbb.state.tx.us.

Analysis and commentary below focus on **protecting your right to do good works** through participation in state associations, nonprofit organizations, faith-based groups or local voluntary associations.

End-of-session review of passed and proposed legislation:

The following bills were considered in the 2019 legislature and affect nonprofits, state associations and foundations in the following areas:*

Disclosure, transparency and open records issues:

SB 943 PASSED: Labeled the “contracting transparency bill”, SB 943 was the return version of SB 408, which failed to pass the House in 2017 after extensive debates and bill revisions. The bill creates a classification of *contracting information* and requires any entity receiving or expending certain public funds to comply with the Texas Public Information Act, Chapter 552, Government Code (PIA). Retained are PIA exceptions for proprietary business information and trade secrets, but the bill excludes from those exceptions a list of information or data related to the public funds held or received by the responding party in some contracting or funding relationship. The issue of concern with the initial drafts of the bill, for nonprofit membership groups and trade associations, were provisions in the bill that specify whether a requestor (any person on the planet) must direct the open records request to the government body that relates to public funds to the organization possessing contracting information, or whether a requestor can direct the open records request directly to the recipient organization or association. The latter scenario would have increased compliance costs for unsuspecting organizations in responding—or objecting—to requests, or by increasing the risk of inadvertent non-compliance with the strict disclosure procedures and timelines in the PIA. Any organization opposing disclosure and claiming the protection of any of the exceptions must be able to demonstrate with specificity why its interests would be harmed or why a competitive advantage would be compromised. The *contracting information* provisions of the bill are in the new §552.003(7), Tex.Gov.Code, new §552.0222, the amended §552.110, the new §552.1101, and new §§552.371-374.

SB 988 PASSED: Clarifies how an award of attorney’s fees is assessed in a suit against an entity not complying with the proposed records disclosure mandates.

Related: **SB 944 PASSED:** Attorney’s fees and costs may not be assessed unless the court finds that the action or defense of the action was groundless in fact or law.

Fundraising activities of nonprofit organizations:

HB 3044 PASSED: This bill continues a trend of permitting the combination of a political fundraising event with an attached charitable contribution sweetener for the attendee. The bill

would permit a registered general-purpose committee (PAC) to solicit contributions to the PAC by also offering a type of matching contribution to a designated charitable organization. See §253.100(b), Tex.Election Code.

HB 3483: The bill would facilitate donations of alcoholic beverages from a manufacturer or wholesaler directly to a charitable organization for use at a fundraising event on the premises of a permitted retailer. There is a \$5000 donation limit per event, and a permitted retailer participating may host no more than 12 such charitable events per year.

HB 4244: Previous legislation authorized a defendant receiving community supervision (as part of probation or a deferred adjudication) to make a donation to specified charities in lieu of community service hours at the discretion of the sentencing judge. This bill would broaden the eligible recipient charities to include a charitable organization primarily engaged in performing charitable functions in the community in which the defendant resides *for defendants under community supervision or for veterans*. See Art. 42A.304(f), Tex.Code Crim.Proc.

Texas Non-Profit Corporation Law, Chapter 22, Bus. Orgs. Code; tax-exempt entities:

SB 1969 PASSED: This helpful bill presents solutions to a common problem encountered by organizations: the discovery later of transactions, board actions or elections that occurred without formal or completed authorization as required by statute or the corporation's governing documents. The bill adds §§22.501-516 to the Chapter 22, Tex.Bus.Orgs.Code. Two kinds of *defective corporate acts* are defined: (1) election or appointment of directors that is void or voidable due to a failure of authorization, or (2) any act or transaction that would have been within the power of the corporation but is void or voidable due to a failure of authorization. The paths to ratification of a defective corporate act are by the ratification process in accordance with the subchapter, or in a district court proceeding under §22.512. There are separate provisions for the ratification process if conducted by the board of directors (where there or no members) or by the membership in a member-governed corporation. Adoption of the validating resolutions in the form prescribed are retroactive to the time of the defective corporate act. A certificate of validation can be filed with the Secretary of State. In hearing such a proceeding, the district court can determine the validity of the ratification of the defective act under §22.512 and order the parties to undertake additional activities, meet additional conditions, or provide notices to members or others. A court proceeding involving a charitable entity requires notice to the Texas Attorney General under Chapter 123, Tex.Prop.Code.

SB 1971 PASSED: Another common wrinkle in nonprofit governance is covered by this bill: defining the differences between a properly elected and sitting *director*, versus an *ex-officio director* or an *honorary director*. Under the new §22.001(3-a), the term *director* will not include a person designated as an ex-officio, honorary or other type of director. The bill also streamlines the option to conduct board or committee meetings by teleconference, video conference or group internet connection; and it also clarifies that a person given the right to receive notice of or attend board of director meetings does not have the authority and liability of a director and is not a governing person of the corporation.

SB 1463: The original versions of this proposal were intended clarify the nonprofit corporation public disclosure requirements in §22.353, Tex.Bus.Orgs.Code, by specifying that an organization’s public disclosure of its latest audited financial statements would generally comply with the language in §22.353. The intention was to simplify the disclosure compliance process and avoid repeated or harassing disclosure requests. However, the Senate-passed committee substitute version of the bill provided a longer list of disclosure requirements: any document listed by the IRS as subject to disclosure; documents containing salary and compensation of each employee receiving more than \$75,000 annually; other “annual reports produced by the corporation”; and the auditor’s management representation letter generated in connection with an audit. These additions to the bill generated grassroots resistance from a variety of large and small nonprofits, and the bill died without House action late in the session.

Limiting legal liability and amendments to Texas charitable immunity statutes:

HB 4345 PASSED: A charitable organization will have legal immunity from Tex.Civ.Prac.&Rem.Code liability resulting from its report to a subsequent or prospective employer of an employee’s or volunteer’s alleged acts of sexual assault, misconduct, sexual harassment or public indecency. New §84.0066, Tex.Civ.Prac.&Rem.Code, also preserves good faith reporting of such improper or illegal conduct; however, the person reporting these offenses cannot obtain immunity by reporting his or her own conduct.

HB 3365 PASSED: The bill further clarifies that a person or charitable organization engaged in disaster incident response is immune from liability under Chapter 84 and Chapter 79, Tex.Civ.Prac.&Rem.Code.

SB 752 PASSED: A volunteer health care provider or voluntary healthcare institution is immune from liability relating to non-compensated service in disaster relief operations under new §79.0031, Tex.Civ.Prac.&Rem.Code.

HB 1035: The “Free to Believe Act” would prevent any Texas government entity from enacting any policy or program, or withholding any state benefit program, affecting a religious organization that is contrary to *sincerely held religious beliefs or moral convictions*. *Religious organization* is broadly defined to include not only organized, recognized religious groups but also “...a religious group, corporation, association, school or educational institution, ministry, order, society or similar entity, regardless of whether the entity is integrated or affiliated with a church or other house of worship...”. Sovereign immunity of an affected government entity is waived for a person seeking legal redress under the act.

State tax exemptions granted to nonprofit entities:

The total value of longstanding exemptions enjoyed by nonprofit entities from the state’s property taxes, business revenues taxes, sales taxes and other fees continues to increase. To state budget analysts, legislators and critics, these uncollected taxes are a “cost” to state government in that they represent revenues that could be collected if taxing schemes were applied without exemptions or waivers. What is this “cost”? The Texas Comptroller of Public Accounts most recent report, entitled *Tax Exemptions and Tax Incidence* (November 2018), reported to

legislators that approximately \$59.8 billion in potential state tax revenue is bypassed in fiscal year 2019 due to previously enacted exemptions, waivers and preferences granted to commercial businesses, nonprofit organizations and quasi-governmental entities. Charitable, tax-exempt entities represent a lesser but significant portion of the unpaid revenues the state would otherwise collect. As in the past, legislators taking the long view of the state's fiscal health filed the following bills to examine and evaluate tax exemptions and the policies behind them—all of which should be of concern to the nonprofit sector as beneficiaries of these policies:

HB 3298 (=HJR 106): A broad-based appointed select commission would review all exemptions, credits, exclusions, abatements, and similar preferences in the Texas Tax Code and local codes to establish the need for these tax policies and the justification for continuing them. Every state tax preference and each type of local tax preference would be reviewed once during each six-year period. Tax preferences found not to accomplish the intended purpose could expire unless re-authorized by the legislature.

HB 4482: The Sunset Advisory Commission would undertake a periodic review of all state tax preferences and similar waivers in the Texas Tax Code and recommend the elimination, amendment or retention of such policies.

HB 3968: The Comptroller would undertake a state and local tax preference review of each preference once every six years along with the Legislative Budget Board. They would recommend the continuation or elimination of each. Any new tax preference enacted would carry a provision giving it a six-year shelf life.

State property tax exemptions granted to §501(c) entities and other organizations:

In this legislative session, as before, there were a number of bills to modify the state tax exemptions granted to nonprofits, particularly with respect to real property taxes and the numerous exemptions enacted over the years under §11.18, Tex. Tax Code. These bills are often “local” bills addressed to a particular situation or place and can be reviewed at www.capitol.texas.gov. Simply search under “Texas Tax Code 11.18” for the 86th legislative session. Following are examples of bills that moved during the session but did not pass:

HB 2646: Would grant a specific ad valorem tax exemption for unimproved property under a land bank program.

SB 335: Specifies appraisal procedures for tax exemptions for land in a community land trust.

HB 3844: Would extend the period real property acquired by a charitable organization for low-income housing could be exempt from ad valorem taxes from five to ten years.

Public advocacy and lobbying issues:

HB 2730 PASSED: The bill amends certain procedural terms in the current “anti-SLAPP” statute (Chapter 27, Tex. Civ. Prac. & Rem. Code) by redefining the circumstances in which a person seeking protection of the statute could seek dismissal of a suit that allegedly is without merit, is brought for the purpose of silencing an opponent in a public controversy, and infringes

on constitutional rights. The long list of persons, organizations and media outlets that appeared before House and Senate committees to testify on the bill is evidence of the acute interest in advocacy and expression in public controversies free of possible civil liability. (Similar: **HB 3547**).

SB 82: A political subdivision or private entity that receives state funds may not pay lobbying expenses or pay funds to a person engaged in lobbying activities. The bill does not carry the usual language clarifying that only the public funds may not be used for such lobbying.

SB 490: A former member of the legislature may not engage in lobbying activities for a two-year period after leaving office, unless lobbying for certain charitable organizations and without compensation.

HB 1035: See listing above.

Nonprofit social service organizations:

SB 1000: The bill would limit the ability of municipalities to regulate the conditions and uses of religious organization properties in serving the homeless population.

HB 1017: Public schools would be permitted to donate surplus food to an organization that would direct it to students in need.

HB 3389: The office of *nonprofit agency services coordinator* could be created in the Department of Family and Protective Services. This would continue a trend in prior legislation that required designation of a senior-level staff position in major state agencies as the active liaison to charitable, faith-based and community volunteer organizations.

HB 1758: Would authorize creation of a *recovery community organization* to address substance abuse and additional issues with supporting programs from a number of state agencies.

SB 574 (=HB 605): Would authorize franchise tax credits for a business or entity that establishes a *healthy corner store* in a *food desert* where public food assistance programs are heavily used.

Homeowner and property owner associations and quasi-public entities:

The hundreds of Texas nonprofit homeowner associations (HOAs) and property owner associations (POAs) affect the daily lives of millions and perform quasi-governmental functions such as neighborhood maintenance, refuse collection, recreational programs, road maintenance and safety. Well-intentioned volunteers serve on their boards. When enforcement activities lead to disputes, these organizations appear in court or before the legislature to resolve issues relating to their authority. See www.txcommunityassociationadvocates.org or www.txlandlaw.com/blog. They are regulated generally under Chapters 82 and 89, Tex.Prop.Code, and function in a realm separate from other nonprofits although they are often created and governed under the Texas nonprofit corporation law in Chapter 22, Tex.Bus.Orgs.Code. In every legislative session

problems identified by POA/HOA residents and critics beg for legislative or regulatory solutions, resulting in well-intentioned bills that inadvertently may also extend to charities and other nonprofit groups.

HB 1025 PASSED: The so-called “pillow talk” bill will link POA board membership qualifications in new §209.00591(a-3), Tex.Prop.Code, to the cohabitation practices of persons serving on such boards by disqualifying from board service a person who “...cohabits at the same primary residence with another board member of the association.”

Other bills:

HB 234 PASSED: This bill qualifies for the *nothing-is-ever-simple* hall of fame. HB 234 was intended to resolve a simple but longstanding law enforcement dilemma by forbidding any local government entity from adopting or enforcing any law, order or policy that prohibits an individual younger than 18 years of age from temporarily selling lemonade or other non-alcoholic beverages from a stand on private property. However, POA and HOA interests became concerned that outside entrepreneurs could freely invade the confines of gated or restricted communities governed by POAs. The statute, as passed, includes the compromise provision that such lemonade stand sales can occur in a POA-governed community if the young entrepreneur has the permission of a property owner in the subdivision. See new §202.020, Tex.Prop.Code and new §250.009, Tex.Loc.Gov.Code.

Numerous bills to increase the state minimum wage above the federal minimum wage: Of potential impact on social services groups and small businesses are scores of bills (not listed here) proposing to increase the state minimum wage beyond the current federal minimum wage in several steps and over time to \$15 per hour. This would have significant impact on social service agencies engaged in employing or training entry-level students, utilizing interns, or employing ex-offenders or persons with disabilities participating in temporary rehabilitation outplacements.

Bills and issues from past sessions absent from this 2019 session:

- Bills to regulate “dark money” and **activist §501(c)(4) advocacy organizations** by compelling disclosure of their contributions, funding, advocacy expenditures or membership and contributor lists, or legislative proposals characterizing them as a *political committee* (PAC) because of certain activities or expenditures.
- **“PILOT” legislation**, to expand or limit the trend by local government authorities to apply various assessments, user fees, public service fees, or property-related assessments on nonprofit or charitable organizations traditionally exempted from such costs.
- Legislation to revise bingo operations by nonprofits or to permit or limit innovative, high-dollar raffles, contests or **gambling-type fundraising events**.
- Proposals to address and clarify the legal and employment status and rights of **unpaid interns** working in nonprofits, schools and businesses.

Above list does **not include bills introduced relating to the following:
Nonprofit hospitals, health care or nursing institutions and plans; credit unions; electric or agricultural cooperatives; private and charter schools and colleges; community development corporations; cemetery corporations; public housing entities.*

***Many bills have an identical “companion” bill in the other house, bearing a different bill number. Access bills, background information, and current status at Texas Legislature Online, www.capitol.texas.gov.*

What to look for in proposed legislation:

The bills listed here include filed bills of interest and concern to leaders in the nonprofit sector in Texas. In examining proposed legislation, always consider the following factors:

Whether a proposed bill strengthens nonprofit organizations’ viability under Texas law or unduly burdens or threatens their status; whether the legal liability of nonprofit board members, officers, staff or volunteers is increased; whether current “charitable immunity” and “good faith” legal protections remain in place; whether laws governing nonprofits are necessary, understandable and based on reasonable public policy concerns; whether nonprofit advocacy is protected; whether ongoing nonprofit organization operations and finances are complicated by new governmental regulations, and; whether nonprofit organization reporting, disclosure and accountability requirements remain reasonable and balanced.

Lessons learned:

Monitoring the Texas Legislature for more than 25 years yields a perspective about the legislative process and government regulation of nonprofit organizations, state associations and foundations. Some observations:

**Many legislative and regulatory proposals have unintended consequences for nonprofit organizations. Legislators and their staffs are generally uninformed about the real operations of nonprofits and how they differ from business entities or government agencies.*

**Most “reform” proposals mean more reporting, compliance and governance time and administrative expense for nonprofits, which are then judged harshly if administrative/operations expenses consume too large a percentage of their total budget.*

**Volunteer board members and other good people must not be discouraged by lengthy or confusing governmental regulations that make service risky and enhance their personal legal liability. Criminal penalties attached to reform legislation can frighten informed and qualified leaders who otherwise might have served on a board.*

*One size does *not* fit all. Many “reform” proposals are intended to cure mis-steps and excesses of large nonprofits or national associations. Sadly, reforms often land hard on good people doing beneficial work in their communities.

*A proposal that seems obscure may be a “local bill” (intended to affect only a small area, group of people, or limited subject) or may reflect a particular beef some legislator or constituent had with another party. It’s not good policy to clutter the Texas codes and statutes with minutiae, and these enactments eventually represent a lot of dead ink in the law books.

*The evolving social enterprise movement is composed of innovators and risk-takers who are investing in new ideas, new markets and new forms of nonprofit operations based on a business model and revenue-based sustainability. These leaders should be given breathing room by government regulations.

*Complex governmental regulations will discourage start-ups and the efforts of good people with good ideas who seek to advance our society and their communities. Every beneficial and acclaimed cause, movement, charitable institution or nonprofit organization probably started with one person, one group, with one idea, in one community. It then grew and grew with hard work and now serves the common good. **Government policies that affect the nonprofit sector and voluntary associations should preserve an environment that encourages good works by concerned citizens in their communities.**

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