

**DEVELOPMENTS AFFECTING NONPROFITS
IN THE 2017 TEXAS LEGISLATURE**

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CHAPTER 4

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As the former public policy advisor and past board chair for the Texas Association of Nonprofit Organizations (TANO), he monitored pending legislation involving the interests of nonprofit entities in the Texas Legislature and U.S. Congress and has been the Texas liaison to the National Council of Nonprofits (NCN) in Washington, D.C. Rick serves as counsel for a network of nonprofit enterprises that contract with government entities for goods and services, and he advises boards on regulatory, legislative and compliance matters. He represented state agencies in federal courts across the nation while with the Law Enforcement Division of the Texas Attorney General's Office (1981-85) and served as a special prosecutor and investigator of nonprofit organization misconduct. Always involved in cultural and historic preservation efforts, he was counsel for the Texas Historical Commission (1981-85), was the first counsel for the State Preservation Board (which restored and enlarged the State Capitol), was the first counsel for the highly-successful Texas Main Street Program, was a founder of Preservation Texas (a statewide advocacy organization), and served as chair of the Austin City Historic Landmark Commission for six years and vice chair of the Austin Downtown Commission. He has founded and served on the boards of numerous nonprofit and faith-based organizations, has lectured and written articles for nonprofit managers and for legal and accounting continuing education seminars, and was an advisor in the M.B.A. program at St. Edward's University of Austin for graduate student consulting projects. He practiced in Los Angeles from 1975 to 1981.

Rick is a graduate of The University of Texas School of Architecture (1970) and the School of Law (1974), and is a lifelong supporter of UT Austin including active participation in the Texas Exes, Chancellor's Council, Friar Society, various fundraising initiatives, Friends of the University PAC and annual Orange/Maroon legislative lobbying day. He is licensed in Texas and California, a commercial arbitrator, and is a Texas registered lobbyist.

PRESENTATIONS (Partial List):

Legislative Action Day, presenter for Association of Fundraising Professionals, State Capitol, Austin, Texas, March 30, 2017

"Federal-State Regulatory Update", for State Use Programs Association, Savannah, Georgia, January 25, 2017

"Avoiding Violations of State Law Regulation of Lobbying, Campaign and Advocacy Activities", for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 25-26, 2016

"Texas State Legislative and Regulatory Update", for the University of Texas School of Law/Philanthropy Southwest Nonprofit Organizations Institute, January 14-15, 2016, Austin, Texas

"Developments Affecting Nonprofits in the Texas Legislature", for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 13-14, 2015

"Expanding the Nonprofit Purpose", for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 22, 2014

"Developments Affecting Nonprofits in the 2013 Texas Legislature", for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 22, 2013

“Public Policy Update: Nonprofit Organizations”, for State Use Program Association, New York, N.Y., June 25, 2013, *one hour*

30th Annual Nonprofit Organizations Institute, for The University of Texas School of Law/Conference of Southwest Foundations, January 16, 2013, *seminar presiding officer, four hours; seminar planning committee*

“Public Policy, Regulatory and Legislative Issues on the Horizon”, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 23, 2012, *50 minutes*

29th Annual Nonprofit Organizations Institute, for The University of Texas School of Law / Conference of Southwest Foundations, January 19, 2012, *seminar moderator/presiding officer, four hours; seminar planning committee member since 2007*

“What Policies Does My Organization Need?”, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 18, 2011, *50 minutes*

“Legislative Update 2011”, for Nonprofit Texas 2011 Seminar, Texas Association of Nonprofit Organizations - Constant Contact, Houston, Texas, June 22, 2011, *45 minutes*

“Legislative and Regulatory Surprises Coming Our Way”, for Planned Giving Council of Texas, Austin, Texas, August 23, 2010, *75 minutes*

“Public Policy, Legal and Regulatory Issues Facing Nonprofit Organizations”, for the Texas Association of Museums annual conference, College Station, Texas, March 18, 2010, *90 minutes*

“Public Policy and Nonprofits: Emerging Issues”, for the Governor’s Nonprofit Leadership Conference, Dallas, Texas, December 9, 2009, *90 minutes*

“Federal and State Public Policy, Legislative and Regulatory Issues Affecting Nonprofit Organizations”, for the Texas Society of Certified Public Accountants conference, Dallas, Texas, May 18, 2009, *one hour*

26th Annual Nonprofit Organizations Institute, “Public Policy, Legislative and Regulatory Issues Affecting Nonprofit Organizations”, for The University of Texas School of Law/Conference of Southwest Foundations, Austin, Texas, January 16, 2009, *one hour*

“Public Policy and Legislative Issues Affecting Nonprofit Organizations”, for State Use Programs Association Conference, Las Vegas, Nevada, February 12, 2009, *two hours*

“Influencing Public Policy Through Advocacy”, for Nonprofit Leadership Management Institute at Austin Community College, January 24, 2009, *two hours*

“Transforming a Nonprofit to Social Enterprise: Legal and Public Policy Issues”, for OneStar Foundation and Nonprofit Resource Center Workshop, San Antonio, Texas, August 22, 2008, *one hour*

25th Annual Nonprofit Organizations Institute, January 17-18, 2008, for The University of Texas School of Law and Conference of Southwest Foundations, *seminar and continuing education, served as presiding officer/moderator, four hours*

“State and Federal Regulatory Issues Affecting Nonprofits”, December 14, 2007, for 17th Annual NPRC Legal & Accounting Institute, *continuing education for attorneys, CPAs and nonprofit managers*, San Antonio, Texas, *one hour*

“Understanding the Nonprofit Sector”, September 29, 2007, for Nonprofit Leadership and Management Institute, Austin Community College, *90 minutes*

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DEVELOPMENTS AFFECTING NONPROFITS IN THE 2017 TEXAS LEGISLATURE

I. INTRODUCTION

Nonprofit organizations of all sizes and varieties play an important role in public life and are a significant force in the economy. With the growth of the nonprofit sector, government officials, regulators and elected officials increasingly thrust the activities of nonprofits into the public arena. Leaders and stakeholders in the nonprofit sector must identify issues that affect their welfare and sustainability and be prepared to take stands as opportunities or challenges are presented.

An array of participants in the state legislative process strive to identify, articulate and protect the interests of the Texas nonprofit sector before the Texas Legislature and regulatory agencies. Unfortunately, the policy and lobby presence of the Texas nonprofit community is diverse, disconnected and often passive.

The Texas Legislature ended its 85th Regular Session on May 29, 2017, and numerous bills were presented as listed here that directly or indirectly affect the interests of nonprofit organizations and state associations. APPENDIX 2 is the final end-of-session summary that lists bills and issues that should be of concern to leaders in the nonprofit sector in Texas and is regularly updated at www.nonprofitlawandpolicy.com.

Of the almost 6,700 bills filed, about 1,200 were passed and sent to the governor, who vetoed only 50. This indicates a slim chance of passage in the 2017 session, although the substantive elements of non-moving or dead bills were often inserted into other bills in committee or by House or Senate floor amendment. The state's budget, property tax reform, limits on local government regulations, education funding and agency reorganization occupied much of the legislators' time during the 140-day Regular Session and left several unfinished items to trigger a special session beginning in July.

In this summary, "**HB**" refers to a House Bill, and "**SB**" refers to a Senate Bill.

Bills that passed are underlined in bold and are effective September 1, 2017, unless otherwise noted.

This summary references only the issues and content of the 85th Regular Session bills included and does not reflect tracking of appropriations bill deliberations or state funding requested or received relating to issues, parties or organizations discussed. Comprehensive state budget data can be obtained from the Legislative Budget Board, www.lbb.state.tx.us.

The text of any bill, the bill's legislative history, and end-of-session status can be reviewed at Texas Legislature Online, www.capitol.state.tx.us, or find

background from other sources in APPENDIX 1, *Resources and Information*.

II. BILLS AND ISSUES IN THE 2017 TEXAS LEGISLATURE AFFECTING NONPROFITS

A. 2017 Regular Legislative Session

The Texas Legislature ended its 85th Regular Session on May 29, and numerous bills were presented that deserve attention whether or not they passed. Bills that managed to pass one house or received considerable public attention before committees tend to return the next time. Overall, this session presented few threats or unwelcome challenges to the interests of the Texas nonprofit sector.

Texas Nonprofit Corporation Law, which appears in Chapter 22, Texas Business Organizations Code, had only minor changes: **SB 1518** contains these amendments to Chapter 22: (1) The merger provisions in §10.010 and §10.108, Bus.Org.Code, that apply to nonprofit corporations also apply to Chapter 252 unincorporated nonprofit associations—meaning that a merger cannot result in the loss of the entity's charitable status or conversion to a for-profit entity; (2) like a dissent, a director's *abstention* from a board vote must be recorded in the minutes or sent in writing to the board secretary within a reasonable time after the meeting; and (3) a quorum must be present at a board meeting at the time of a vote of directors and not merely at the beginning of the meeting. In **SB 617**, there were minor changes to trust provisions in Chapter 112, Property Code, and to the notice to the Attorney General regarding charitable trusts under §112.074.

Benefit corporations come to Texas with the passage of HB 3488, which attracted very little attention but could represent a new vehicle for public-benefit-minded individuals and organizations. The bill follows up on initial legislation from the 2015 session that permitted designation of certain *public benefit corporation* goals. A full-blown enabling statute is now in place beginning at §21.951, Bus.Org.Code. The purpose of a "B-Corp" is to produce public benefit and to operate in a responsible and sustainable way, balancing shareholders' pecuniary interests with the benefits declared by the corporation, and in the best interests of the persons materially affected by the corporation's conduct. *Public benefit* means "...a positive effect, or a reduction of a negative effect, on one or more categories of persons, entities, communities or interest, other than shareholders in their capacities as shareholders of the corporation, including effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature." (§21.952) The provision further defines directors' duties and the required reports to shareholders on the assessment of the corporation's success in meeting the public benefits sought. For more

information on the national B-corp movement, see www.bcorporation.net.

HB 3125 extends special fundraising privileges for more organizations that have friends in the legislature and will be embedded in the Texas Constitution if voters approve **HJR 100** in November. *Background:* HB 975 passed in 2015 provided a special status for fundraising by major league sports teams and created an entirely new chapter in the Occupations Code for professional sports clubs—such as the NFL, NBA, MLB, MLS—that maintain §501(c)(3) tax-exempt charitable foundations. After the voters approved the accompanying constitutional amendment in HJR 73 in November, 2015, these clubs are now permitted to conduct raffles at every home game in their venues to benefit their charitable causes, an exception to the limitations on raffles elsewhere in the law. Also called “jackpot raffles”, the winner is permitted to keep half the event’s raffle ticket sales. (See “Cowboys score big with raffle”, *Dallas Morning News*, January 27, 2017; “Texas Motor Speedway, more sports teams want in on 50-50 raffles”, *Fort Worth Star-Telegram*, March 24, 2017.) HB 3125 adds these additional professional sports associations to the privileged list under §2004.002(2), Occupations Code, if the voters approve it in the November election: professional soccer, hockey, minor league baseball, NASCAR and IndyCar. It is rare to see the specific names of companies or brands recited in a piece of legislation that becomes part of the Texas codes. Along similar lines, **HB 518 (=SB 275)** would have broken new ground by permitting the State Comptroller to rebate sales taxes collected by a workforce training organization with annual sales of at least \$1 million from donated goods that provides a variety of job training and placement services to persons with a disability. After passing the House, the bill died when a legislative fiscal analysis note calculated the total of the proposed rebated sales taxes as a cost against state revenues. As a creative idea for sure-fire success in fundraising, **HB 1100** would have permitted issuance by the Texas Parks and Wildlife Department of a special charitable hunt permit to benefit a designated nonprofit organization if occurring within two weeks of the close of open hunting season. Finally, **HB 4042** breaks new ground in that the Texas Alcoholic Beverage Commission will be able to issue a temporary charitable auction permit to an organized political campaign registered under Chapter 254, Elections Code (hardly managed by a “charity” but supposedly benefitting a charitable cause).

[What’s the problem with these well-intentioned bills? When enacted, these laws would put certain groups ahead of others in the competition for the public’s donation dollars and signal that the state is giving certain groups a preference, to the exclusion of other charitable groups or causes. With the passage of these bills, expect to see other groups with friends in the

legislature asking for their own fundraising exceptions to the current Tax Code or State Comptroller-regulated limits on raffles, auctions and tax-free sales events.]

Privatizing state government functions by transferring them to faith-based nonprofits remains problematic. What passed: Although **HB 3859** advances the privatization of the state CPS agency’s role in placing children with foster care or adoption agencies, strong opinions on both sides of the issue remain. By giving a receiving agency the right to deny such services on “sincerely held religious beliefs”, the bill recognizes attention to the organization’s direct tie to religious beliefs or policies—issues that others feel have no place in an equation involving state agency social services funded with public dollars. What didn’t pass: The 52 pages of **HB 6** represented a proposed transfer of the state’s traditional mandate to operate all child protective services, foster care and adoption services. Two House committee hearings attracted hundreds of witnesses, many in favor of privatization of programs statewide through private, nonprofit “SSCC” (single source continuum contractor) vendors. Opponents argued that paid contractors would not represent the child’s best interests in every situation. In the middle of the mix were faith-based vendors determined to protect their immunity against claims of discrimination. Three House floor debates consuming many hours late in the session produced a stalemate, and the bill was killed by parliamentary rules. **HB 4** and **HB 5** carried similar issues relating to privatization or alternate funding for adult and child protective services and only highlighted disagreements on these issues, producing no legislative outcome.

HB 2779 reopened an unfinished discussion regarding the extent to which exemptions and exceptions can be inserted into the law at various places to isolate religious believers from state regulation or liability. The Texas “religious freedom act” in Chapter 110, Civil Practices & Remedies Code, has been around since 1999 and forecast similar controversies that have recently reached the U.S. Supreme Court. HB 2779 would have prevented any Texas government entity from enacting any policy or program, or withholding any state benefit program, that is contrary to the beliefs of a religious organization. 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 covered government entities is waived for a person seeking legal redress under the act. A score of similar bills was proposed and is listed at www.texasvalues.org. For contra arguments, see www.equalitytexas.org or www.texasimpact.org. There is no doubt that this type

of proposal will always burn a considerable portion of the 140-day legislative time clock and is a likely candidate for a constitutional challenge in federal court if passed. **SB 24** provides that a governmental unit is not able to compel the production or disclosure of any record of a sermon delivered during religious worship, or compel a religious leader to testify regarding a sermon, in any civil or administrative proceeding.

B. Texas Issues to Watch

Open records law expansion encountered unexpected opposition from varied interest groups.

The somewhat obscure language of **SB 408** would have required thousands of nonprofits and associations to comply with “open records” disclosure under the Texas Public Information Act to any requestor by declaring them a *government body* because the organization (1) receives or spends public funds, unless the funds are received through an arms-length contract for services, (2) uses real or personal property owned or leased by the state or a political subdivision that is not generally available to the public under an agreement that provides for no or nominal consideration, or (3) receives or spends public funds under an agreement to provide services traditionally provided by a government body. The goal of the bill was to reverse the effects of the Texas Supreme Court’s ruling in the *Greater Houston Partnership v. Paxton*, 468 S.W. 3d 51 (Tex.2015) as preceded by a similar case, *Kneeland v. National Collegiate Athletic Assn.*, 850 F.2d 224 (5th Cir.1988). It is unclear how thousands of small Texas nonprofits without full-time or professional staff and counsel could or would comply with the strict mandates, timelines and penalties for failure to comply with an open records request under the Texas Public Information Act. The affected organizations also felt uncomfortable being labeled a *government body*. **SB 408** was pushed by associations representing broadcast and print media and advocacy groups. With widespread media coverage, it passed the Senate but received no House committee vote because of the opposition of a broad coalition of large and small groups and interests. The compromised contents of **SB 408** then were deftly attached to **HB 2328**, which was moving in the Senate late in the session, only to die on the House calendar without action due to parliamentary deadlines. The Senate sponsor promised formation of a new more-inclusive coalition to study this issue in the interim and return for another try in the 2019 session. For a true wake-up call, **HB 2674** represented an unfriendlier approach to records disclosure that some favor for Texas nonprofits. The bill would have required a tax-exempt nonprofit corporation that receives 25 percent or more of its income from state funding to file an annual report listing the salaries of each of its employees and officers and post it on a new Secretary of State website. (See “Shifting more state functions to nonprofits raises

transparency questions”, *Houston Chronicle*, May 23, 2017.). For required disclosure of another flavor, consider **HB 2641**, which would have required boards of community development corporations to broadcast their meetings live on the internet. As internet streaming of events becomes simpler, expect to see more types of public meetings online, though they seldom keep any viewer’s attention very long.

Volunteers get exemptions and privileges added in various statutes as in years past. **HB 1978** waives the normal supervision and delegation requirements relating to physician assistants when volunteering for a charitable organization’s public event or sporting event. **HB 2007** permits special licensing provisions for military dentists and dental assistants who provide voluntary care. **HB 2933** provides for a special military limited volunteer license to practice optometry when treating indigent patients for no compensation. However, a proposal that caught attention was **HB 786**, which would have provided employment discrimination, termination or suspension protection due to an absence from employment while corresponding to a public emergency if the absence did not last more than 14 days in one year. There were no bills this session adding to the liability exemptions or limitations found in **Chapter 84, Civil Practices and Remedies Code**, the state’s Charitable Immunity and Liability Act of 1987. Reading Chapter 84 reveals the long list of persons, entities and circumstances that have been given protection from liability or immunity by the legislature.

Ad hoc alliances during the 2017 session explain something of the outcome of bills referenced above that passed, caused hard feelings, further separated various interest groups or died. The “nonprofit sector” has no representation through a formal, focused coalition or statewide association. At best, it finds its voice only when frightened by some bill or issue or when it tags along in supporting some opportunity. Given these limitations, leaders and volunteers might consider some time-tested tips for surviving on the food chain in the Capitol:

- Be the cause you represent and establish a good reputation
- Look for alliances and friends in unexpected places
- Don’t make promises to your members or stakeholders you can’t keep
- Accurate messaging will advance your cause
- Nonprofits and associations have competitors and rivals who get angry
- Don’t make enemies who will return for the next round
- *No* is not the same as *never*
- Craft messaging and communications you won’t regret later

- You're not liked just because you represent a noble cause
- Investigative reporters don't give nonprofits and charities special treatment
- Feeling good about your efforts and intentions is different from moving the needle
- Statewide organizations benefit from a "footprint" in local communities for effective grass-roots advocacy
- Return again and again

III. RECURRING ISSUES FOR THE 2019 LEGISLATIVE SESSION AND 2017-18 INTERIM ACTIVITIES

"Dark money" bills did not appear this year but are sure to return. Legislative scrutiny and attempts to define the limits of advocacy, lobbying activities and fundraising by tax-exempt §501(c)(4) organizations burned up a lot of time and goodwill in prior sessions but were quiet recently as the players awaited rulemaking by the Texas Ethics Commission to define restrictions and guidelines that also must withstand constitutional challenges. The Texas Supreme Court passed up an opportunity to bring closure to some issues when it declined to rule at this time on what activities by a group constitute a "political committee" under §251.002(12), Election Code, and whether the current definition, as applied, is constitutional. *King Street Patriots et al. v. Texas Democratic Party et al.*, __ S.W. 3d __ (Tex. 2017) (No. 15-0320, June 30, 2017 opinion). Those who support or vehemently oppose more specifically-defined disclosure of political and advocacy activities will eventually see their differences settled by a mix of new legislative enactments, Ethics Commission rulemaking, or judicial decisions.

The legal status of unpaid interns received deserved attention in **SB 1140**, which proposed expanding the definition of unpaid intern passed in the 2015 session and now found at §21.065, Labor Code. The common and widespread use of unpaid interns to provide considerable staffing support for nonprofits deserves a closer look and would have been given extended statutory coverage in SB 1140.

Supporting veterans with programs, privileges and exceptions was evidenced in scores of bills, most of which did not pass this session. The link between established charitable veterans organizations existing and state/federal veterans programs is not always what it should be. An example is a provision buried on page 323 of the 355-page **SB 1488**, the standard "clean-up bill" to tidy up statutory cross-references and dead ink in Texas statutes. It provides that in lieu of performing community service hours, a probationer could be offered the choice of making a contribution to a charitable organization primarily engaged in serving veterans in the community. In an urban area, this could

accrue quite a large fund, at the discretion of the sentencing judge to direct the funds.

"Right to believe" bills will likely return in 2019 as nearly 20 were filed in this session. These proposals are often called "state RFRA" bills and are intended to expand to specific persons and circumstances the Texas freedom of religion act of 1999 found in Chapter 110, Civil Practices and Remedies.

Property tax exemptions available to nonprofit entities are found generally in §11.18, *et seq.*, Tax Code. Unlike previous sessions, only one §11.18 amendment bill passed. **SB 1345** provides exemption from ad valorem property taxes owed by a charitable organization if used to provide tax return preparation services without regard to the ability to pay. Over time, there have been so many exemptions expressly written into §11.18 that the original property tax exemption policy expressed is becoming muddled and bottom-heavy with numerous specific and local exemptions. Nonprofit property tax exemptions granted or denied by local appraisal districts and decisions rendered by appraisal review boards are nowhere near uniform across the state. At some point this issue will generate a thorough review and legislative reform proposals.

Comprehensive tax exemption review and reform bills did not appear, unlike former sessions. Several bills filed in years past represented a trend nationwide to initiate periodic top-to-bottom reviews of the tax structure of state government and, in particular, to question any tax credit, preference, incentive, exemption or other tax benefit conferred under state law. This approach not only impacts the state tax laws relating to private interests, industry and business groups, but it also puts into question the tax exemptions traditionally enjoyed by nonprofit charitable organizations. In Texas, the exemptions are from property taxes, sales and use taxes, and the business (franchise) tax. Under this legislative analysis, *all tax exemptions are viewed as a "cost" to state government* in that they represent tax revenues not received but that may be available to tap in times of tight government budgets. Charitable tax exemptions are seen as the same, and some critics are unhappy with the "cost" of these lost revenues that are not collected from tax-exempt entities and their properties.

[Note: In the 2015 session, it was calculated that more than \$44 billion in potential state tax revenue was by-passed due to current tax exemptions and preferences granted to businesses, property owners, products and services, with tax-exempt entities taking a large share of the tax breaks. See Texas Comptroller of Public Accounts, Tax Exemptions and Tax Incidence, March 2015. The figure was calculated at \$53 billion for the current biennium and provides a large target for future revenue needs of the state. Legislative budget writers are aware of this number.]

Dogs that didn't bark represent issues in the 2017 session that did not surface but that have burned up a good deal of legislative time and paperwork in the past, including:

- Bingo, fishing tournament and poker runs and **innovative fundraising activities** did not challenge legislators' patience. Customized and unique fundraising promotions by nonprofits that involve a lot of money with rich prizes continue to vex regulators.
- **Mandatory disclosure of financials by nonprofits** brought only one bill this session, **SB 2180**, which drew little attention. It provided that public disclosure of an organization's latest audited financial statements would satisfy the financial records disclosure obligations under §22,353, Bus.Org.Code. Disclosure of financial records by nonprofits was at the heart of SB 408, referenced above.
- **The "anti-slap suit" statute** in Chapter 27, Civil Practices and Remedies Code, did not see any amendments. Advocacy groups and activists who seek a shield from frivolous or harassing suits secured these protections years ago through legislation.
- **"PILOT" means payments-in-lieu-of-taxes** and reflects a growing trend by state and local governments nationwide to impose various kinds of taxes, assessments and user fees on properties owned by tax-exempt charitable organizations—without calling them taxes. The end result would be to tax the assets of tax-exempt entities, an illogical result (nonprofit advocates argue) because it directly diminishes the resources and the public benefit provided by charitable organizations. In the 2011 session, Texas legislators filed numerous bills to clarify which tax-exempt properties or owners were to be free of locally-imposed PILOT fees, such as the Houston area drainage fees that raised such vocal opposition from charities, private schools, faith-based organizations and universities. There was no "PILOT" activity in the 2017 legislative session, unlike what is occurring in other states. For trends and policy issues regarding PILOT controversies elsewhere, see www.councilofnonprofits.org.
- **Property owner associations always attract heat from critics.** Controversy and criticism of one group often spills over and affects the interests of others. This is a valid concern, as yet another legislative session featured bills, hearings and unpleasant media coverage regarding the operations of the thousands of Texas property owner associations (POAs), also called home owner associations (HOAs), and condominium

owner associations (COAs). Hundreds of thousands of Texans pay monthly fees to these nonprofit community associations as a condition of their ownership of a residential property. The POAs are not IRS §501(c)(3) charitable nonprofits but are organized under the same Texas Nonprofit Corporation Law usually with IRS §501(c)(4) tax-exempt status. There were a score of POA-specific bills pending in this legislative session, with many others affecting COAs and timeshare associations. No bill of any significance passed. A summary of legislative developments relating to POAs and COAs can be found at www.txlandlaw.com/blog or www.txcommunityassociationadvocates.org.

These POAs and COAs are the first cousins of nonprofit charitable organizations and are regulated under Titles 7 and 11, Texas Property Code. If future legislative "reform" continues to regulate and pressure COAs and POAs, it is reasonable to speculate that these concerns could be a pretext also to further regulate *all* Texas nonprofit organizations in the future. The problems identified by POA/COA residents and critics constantly beg for legislative or regulatory solutions, and these discussions could have unintended consequences for §501(c)(3) organizations in Texas.

The 18-month interim period before the next legislative session is not a time to abandon the watch because much special-interest planning, stakeholder activity and formal committee deliberation occurs, providing legislative agendas prepackaged for 2019. In addition, the **special session** added to the 85th Regular Session in July 2017 promises a forum for developments on a broad range of issues.

IV. LESSONS LEARNED

***Many legislative and regulatory proposals have unintended consequences for nonprofit organizations.** Legislators and their staffs are generally uninformed about the operations and real interests of nonprofits.

***Most "reform" proposals mean more reporting, compliance and governance time and administrative expense for nonprofits.** Nonprofits are 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, confusing or threatening governmental regulations that make service risky.** Criminal penalties attached to reform legislation scare away 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 missteps by large nonprofits or national associations. But reforms often land hard on good people doing good work in local communities across America.**

***The burgeoning *social enterprise* sector is comprised of innovators and risk-takers who are investing in new ideas, new markets, and new forms of nonprofit operations based on a hybrid business model. 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. True, there may be redundancies and duplications of nonprofit efforts in any community, but every successful and acclaimed nonprofit organization probably started with one person with one idea...and it grew and grew...and now serves the common good. All our efforts should be to that end.**

APPENDIX 1

Resources and Information

Texas Legislature Online

www.capitol.state.tx.us

Legislative Budget Board

www.lbb.state.tx.us

Nonprofit Law and Policy Blog

www.nonprofitlawandpolicy.com

Texas Association of Nonprofit Organizations

www.tano.org

Texas Tribune

www.texastribune.org

Texas Impact

www.texasimpact.org

Texas C-Bar

www.texasobar.org

National Council of Nonprofits

www.councilofnonprofits.org

The Urban Institute

www.urban.org

Board Source

www.boardsource.org

Council on Foundations

www.cof.org

Nonprofit Risk Management Center

www.nonprofitrisk.org

Independent Sector

www.independentsector.org

Internal Revenue Service

www.irs.gov

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APPENDIX 2

www.NonprofitLawandPolicy.com

85th Texas Legislature, 2017 Regular Session

SUMMARY OF ISSUES AFFECTING NONPROFIT ORGANIZATIONS
As of June 17, 2017

Compiled by Richard W. Meyer, Attorney at Law

End-of-session final summary:

The 85th Texas Legislature Regular Session ended on May 29, 2017, featuring more than 6,700 bills and resolutions in both houses that occupied the attention of lawmakers and affected citizens and groups. Compared to controversies and issues in the past, this was a quiet and relatively challenge-free session for the charities, state associations, foundations and other nonprofits that comprise the Texas nonprofit sector. The following summary list of bills and issues includes these highlights:

- **Applying the Texas “open records” laws to certain nonprofits** again received extensive attention and news coverage because of proposals in SB 408 and SB 407, which were championed by media organizations and advocacy groups but shunned or opposed by the thousands of nonprofit organizations that might have been required to comply with the laws. Disappointed sponsors and advocates promise a return to this issue in 2019.
- **Privatizing state government functions to transfer them to nonprofits or vendors** again proved troublesome when human services programs are being “reformed.” HB 6 concerned proposed privatization of state foster care services and burned up an enormous amount of emotional House debate time, only to produce no consensus or final outcome.
- **Special fundraising privileges for powerful sports clubs** were again extended from the opening given in the 2015 session. HB 3125 extends “super-raffle” rights to more professional sports club charities if the voters approve the proposition in November.
- **“B-Corps” come to Texas** through HB 3488, which follows the lead from a score of states that have enacted enabling legislation to permit the formation of for-profit entities that include a commitment to stated public benefits as well as profits for investors.
- **There were only minor amendments to the Texas nonprofit corporation laws** found in Chapter 22, Business Organizations Code. SB 1518 addressed issues relating to Chapter 252 unincorporated nonprofit associations, quorum requirements at board meetings and written demands for an annual meeting

Successful bills that will become law are marked **PASSED** (bold and underlined), with the effective date noted. The final status of bills in the legislative process that did not pass is noted in *italics*. Access the text of any proposed House bill (HB) or Senate bill (SB) at

www.capitol.state.tx.us and use other tracking and analysis tools available on the state's useful legislative website.

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 \$217 billion 2018-19 general appropriations bill (**SB 1**) is voluminous and can be reviewed through the Legislative Budget Board, www.lbb.state.tx.us.

Analysis and commentary below focus on **protecting your right to do good works** through community service in nonprofit organizations or voluntary associations.

End-of-session review of proposed legislation:*

The following bills were considered in the 2017 legislature and affect nonprofits, state associations and foundations in the subject areas listed.

Open meetings / open records issues:

SB 408 (=HB 793):** The somewhat obscure language of SB 408 would have required thousands of nonprofits and associations to comply with “open records” disclosure under the Texas Public Information Act to any requestor by declaring them a *government body* because the organization (1) receives or spends public funds, unless the funds are received through an arms-length contract for services, (2) uses real or personal property owned or leased by the state or a political subdivision that is not generally available to the public under an agreement that provides for no or nominal consideration, or (3) receives or spends public funds under an agreement to provide services traditionally provided by a government body. The goal of the bill was to reverse the Texas Supreme Court’s ruling in the *Greater Houston Partnership v. Paxton* case. It is unclear how thousands of small Texas nonprofits without full-time or professional staff and counsel could or would comply with the strict mandates, timelines and penalties for failure to comply with an open records request under the Texas Public Information Act. The affected organizations should also feel uncomfortable being labeled a *government body*.

Passed Senate; no House committee hearing. The contents of SB 408 were attached to HB 2328 late in the session but failed to get a vote as the calendar clock tolled.

HB 2674: A tax-exempt nonprofit corporation that receives 25 percent or more of its income from state funding would be required to prepare a report listing the salaries of each of its employees and officers and have it posted regularly on its website and a website maintained by the Secretary of State.

Heard in House committee, left pending

HB 4144: Would establish a process to determine if an entity receiving an open records request is a *government body* within the meaning of the Texas Public Information Act and thereby subject to disclosure requests from the public.

Heard in House committee, left pending

Fundraising activities of nonprofit organizations:

HB 3125 PASSED (=SB 1337 - HB 1405): This bill adds more professional sports associations (soccer, hockey, minor league baseball, NASCAR, IndyCar) to the current list of parties with a special exemption from state charitable raffle limitations. Occupations Code §2004.002(2) already provides a special status for fundraising by major league sports teams and permits professional sports clubs—from the NFL, NBA, MLB, MLS—that maintain §501(c)(3) tax-exempt charitable foundations to conduct raffles at every home game in their venues to benefit their charitable purposes through a captive foundation. Related: **HJR 100 PASSED**, the constitutional amendment that voters will have to approve to enact these provisions.

On the November statewide ballot and becomes effective if voters approve it

HB 115: The maximum value of a residence used as a charitable raffle prize would be increased from \$250,000 to \$2 million.

Passed House; no Senate committee action

HB 4042 PASSED: Would extend TABC permits for a temporary charitable auction permit to include the registered campaigns of persons seeking or holding public office that report activities and fundraising under Chapter 254, Elections Code.

Effective September 1, 2017

HB 1100: A charity hunt permit could be obtained from the Texas Parks and Wildlife Department to conduct a charity hunt on private property to benefit a designated nonprofit organization if occurring within two weeks after the end of the open hunting season.

No House committee action

HB 3344 (=SB 1832): A temporary charitable festival permit could be issued by the Texas Alcoholic Beverage Commission (TABC) for on-premises or off-premises alcohol consumption at an auction that is part of a festival, subject to existing local option elections regarding the sale of alcoholic beverages.

No House committee action

SB 1974: Would add raffles to the existing temporary charitable auction permit regulations as granted by TABC under Chapter 53, Alcoholic Beverage Code.

No Senate committee action

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

SB 1518 PASSED: Amends the Bus. Org. Code (BOC) to expressly tie Chapter 252 *unincorporated nonprofit associations* into the merger and conversion procedures of BOC Chapter 10. The bill also amends BOC §22.227 to require that a director's *abstention* from an official action must be entered into the corporation's official records just like an affirmation or dissent and that a quorum must be present at a board meeting at the time of a vote of directors and not merely at the beginning of the meeting.

Effective September 1, 2017

Related: **HB 3488 PASSED:** A for-profit corporation could elect to convert to a *public benefit corporation (PBC)*, which is a for-profit enterprise but one that balances (1) the shareholders' pecuniary interests, (2) the best interests of those persons materially affected by the corporation's conduct, and (3) the public benefit specified in its certificate of formation. Duties of the directors align with these three interests. Note: "PBC" corporations, already common in other states, can evolve to appear similar to nonprofit, charitable enterprises.

Effective September 1, 2017

SB 2180: Disclosure of a nonprofit organization's latest formal audit would satisfy the financial records disclosure obligations under §22.353, BOC.

No Senate committee action

Regulatory oversight of nonprofit organizations:

SB 24 PASSED: A governmental unit would not be able to compel the production or disclosure of any record of a sermon delivered during religious worship, or compel a religious leader to testify regarding the sermon, in any civil or administrative proceeding.

Effective May 19, 2017

Limiting legal liability and amendments to Texas charitable immunity statutes:

HB 3859 PASSED: Privatization of the state's child protective services agency and its role in placing children for foster care or adoption advances with this bill, although the receiving agency is granted the option to deny such services on "sincerely held religious beliefs". The bill recognizes an agency's possible ties to a religious institution or religious beliefs as a factor in providing services—issues that others feel have no place where state agency services are to be provided to all with public dollars.

Effective September 1, 2017

HB 2779: The "Free to Believe Act" would prevent any Texas government entity from enacting any policy or program, or withholding any state benefit program, that is contrary to the beliefs of religious organization. *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 covered government entities is waived for a person seeking legal redress under the act.

No House committee action

HB 4250: Would expand the definition of foods that are covered by the food donation immunity provisions of Chapter 76, Civil Practices and Remedies Code.

No House committee action

State tax exemptions granted to nonprofit entities:

HB 518 (=SB 275): A workforce training organization with annual sales of at least \$1 million from donated goods that provides a variety of job training and placement services to persons

with a disability may receive from the state comptroller a substantial rebate of its sales taxes collected to fund its approved job training and placement programs.

Passed House; bill faltered in the Senate because of a fiscal note attached indicating yearly loss in revenue to state

SB 1345 PASSED: Would add nonprofit organizations that provide free tax return preparation services to the public an exemption from state ad valorem taxes under Tax Code §11.18(d).

Effective January 1, 2018

Nonprofit board governance, officer, employee and volunteer issues:

HB 1978 PASSED: Normal supervision and delegation requirements relating to physician assistants would be waived when volunteering for a charitable organization's public event, religious event, sporting event or community event.

Effective September 1, 2017

HB 421: Would exempt volunteers who provide security at churches or religious facilities from needing occupational guard licenses.

Passed House committee, no House vote

HB 2933 PASSED: A special military limited volunteer license to practice optometry could be granted to persons who treat indigent patients for no compensation.

Effective September 1, 2017

HB 2007 PASSED: Permits special licensing provisions for military dentists and dental assistants who provide voluntary care.

Effective September 1, 2017

HB 786: Volunteer emergency responders would be protected from employment discrimination, termination or suspension based on an absence from employment while responding to an emergency, provided that no more than 14 work days a year are affected by such volunteering.

Failed to pass House on third reading

SB 1140: Would assign a new heading and Labor Code §21.143 to the definition of *unpaid intern*, with respect to existing sexual harassment protections for employees. Become familiar with the definition that was passed in the 2015 session, now at §21.065, Texas Labor Code.

No Senate committee hearing

Public advocacy / Ethics Commission (lobbying) issues:

SB 24 PASSED: The contents of a sermon of a religious leader during religious worship in a religious organization could not be the subject of compelled discovery in any civil action or administrative proceeding in which a governmental entity is a party.

Effective May 19, 2017

Nonprofit social service organizations:

HB 6: Would represent a transition from state agency management and operation of child foster care programs to a community-based model that would involve contracting out these public services to nonprofit organizations and other service providers or vendors.

No final House floor vote because of extensive debates, procedural tie-ups, and lack of consensus (see HB 1805 below); no companion Senate bill surfaced

HB 1805: A government entity that contracts with a private or nonprofit child welfare service provider may not discriminate or take any adverse action against the provider on the basis that the provider has declined to provide any service that conflicts with the provider's sincerely held religious beliefs.

No House committee action (see HB 6 and HB 3859 above)

SB 725 PASSED: School districts could elect to donate surplus food to a nonprofit organization directly affiliated with the campus as well as sponsor food donations to be distributed by the school's representatives or volunteers.

Effective June 9, 2017

SB 1488 PASSED: In lieu of performing community service hours, a probationer could be offered the choice of making a contribution to a charitable organization or one engaged primarily in performing charitable functions for veterans in the community. Note: This provision appears on page 323 of this 355-page "clean-up" bill.

Effective September 1, 2017

SB 723 (=HB 1047): Would permit a *healthy corner store* to be established in a *food desert* funded through a community development financial institution loan and other public financing methods. (Similar: **HB 3299** would give substantial tax credits to an organization operating such a store.)

No committee action

Quasi-public entities; homeowner and property owner associations:

Note regarding homeowner associations and property owner associations (HOAs and POAs): The proliferation of legislation regulating these associations has taken on a life of its own in Chapters 82, 202 and 209, Texas Property Code, and as a parallel universe to the primary nonprofit organization laws. Governance and regulatory issues affecting these associations often overflow into subjects otherwise covered in BOC Chapter 22, the Texas nonprofit corporation law. For a summary of current legislation affecting these associations, see www.txlandlaw.com/blog.

HB 3452: A *homestead land trust* could operate as a nonprofit enterprise to own residential properties in a given zone for the purpose of preserving longtime homeowners and maintaining affordability of housing.

No House committee action

HB 906 - HJR 54: Would exempt from ad valorem taxation property owned by or leased to a *university research technology corporation*, which is a special-purpose corporation that develops and commercializes technologies that are owned by universities or medical schools.

No House committee action

SB 1889 (=HB 4031): Would authorize *educational assistance organizations* to channel certain funds to public and charter schools for scholarships and other assistance.

No House committee action

SB 1931 (=HB 3447): A nonprofit organization qualifying as a community land trust could utilize a wholly-owned limited partnership or LLC in covered transactions and still qualify as a trust.

Passed Senate; no House committee action

Other bills:

SCR 8: If passed, this proposal would disappoint some by declaring the cannon the official state gun of Texas.

Passed Senate; awaiting House vote

HCR 32: Probably less controversial, this proposal would declare the Bowie knife the official knife of Texas.

Passed House; awaits Senate vote

HB 3535 PASSED: Permits the hunting of feral hogs or coyotes from a hot-air balloon with a state permit.

Effective September 1, 2017

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.state.tx.us*

What to look for in proposed legislation:

The bills listed here during the session will include currently 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:

More than 25 years of observing the legislature and participating in policy and advocacy have yielded the following perspective:

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

*Most “reform” proposals mean more reporting, compliance and governance time and administrative expense for nonprofits, which are 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, confusing or threatening 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 good work in local communities across America.

*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 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 regulators.

*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, 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 ordinary people in their communities.**