

PRESENTED AT

37th Annual Nonprofit Organizations Institute

January 23-24, 2020

Austin, Texas

Texas Legislative Update 2019

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TEXAS LEGISLATIVE UPDATE 2019

Issues affecting nonprofit organizations active in the public arena

By Richard W. Meyer

Presented at The University of Texas School of Law

37th Annual Nonprofit Organizations Institute, Austin, Texas, January 24, 2020

INTRODUCTION

The dynamic Texas economy, a growing and diversifying population and shifting political forces make for interesting times and require a keen eye for opportunities, challenges and change. Well-informed leaders in the nonprofit sector must guide nonprofit organizations, state and national associations, advocacy groups, foundations and similar groups into new areas of civic involvement. A changing legal, regulatory and political/legislative environment is a big part of the picture. Begin year 2020 with a 20/20 focus on what lies ahead.

ATTACHED TO THIS PAPER

- Excerpts from *Built for Texas: The Impact and Opportunity of Our Nonprofit Sector* (2019), by the United Ways of Texas, www.uwtexas.org .
- Texas Legislative Summary, end-of-session final report (June 2019) available with updates at www.nonprofitlawandpolicy.com .
- Texas State Comptroller letter summarizing state tax exemptions (November 2018).

20/20 VISION: ISSUES AND OPPORTUNITIES FOR THE NONPROFIT SECTOR

Note: In the following, **HB** refers to a House Bill and **SB** a Senate Bill in the legislative session indicated. Bill numbers are in **BOLD**, and passed bills are **underlined and BOLD** (example: **SB 378**).

1. Tax-exempt status of nonprofits is a growing “cost” to state government revenues

The total value of longstanding exemptions enjoyed by nonprofit entities from the state’s property taxes, business revenue taxes, sales 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 for some. What is the “cost”? The State Comptroller’s 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 due to previously enacted

exemptions, waivers and preferences granted to commercial businesses, nonprofit organizations and quasi-governmental entities. Legislators taking the long view of the state's fiscal health have 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 a beneficiary of these policies:

- In the 2019 session, **HB 3298**, **HB 4482** and **HB 3968** revived the legislative revenue reforms summarized in the earlier bills listed here (see Legislative Summary, attached).
- **HB 1003** (84th Legislature, 2015) would have required the periodic “sunset” or automatic repeal of all state tax exemptions, credits or other exceptions unless re-authorized by the legislature after a review of the costs and benefits to the state. This bill got attention because it was the subject of a hearing by the House Ways and Means Committee, meaning the idea is gaining support.
- **SB 868** and **SJR 38** (84th Legislature, 2015) would have granted the legislature broad authority to review all state and local tax exemptions and preferences. All such breaks in the Tax Code would have had a six-year shelf life unless re-authorized by legislation.
- **HB 3201** (82nd Legislature, 2011) would have granted the Sunset Advisory Commission authority to review periodically all exemptions under the state's tax laws, which would lapse (“sunset”) unless re-authorized by the legislature.
- **HB 440** (83rd Legislature, 2013) would have required a religious organization to file with its local appraisal district a public annual report of its tax-exempt real property holdings, its current use and the income derived from each parcel.
- Counties and school districts can donate their surplus property to nonprofit organizations under certain circumstances. **HB 970** and **HB 1633** (78th Legislature, 2003)
- “PILOT” initiatives by local government entities have diminished in Texas although they continue to rage in other states. “Payment-in-lieu-of-taxes” (PILOT) proposals abound elsewhere and are simply creative ways to tax the property or activities of entities that have tax-exempt status under federal, state or local law. These can include public improvement user fees, public service/safety fees, utility assessments and special assessments that are applied to nonprofits as well as all others, without exemptions. A simple solution for many other state legislatures has been to disown the user fee idea for the state government tax revenues but give local government entities the local option of imposing these kinds of fees on nonprofits. For a snapshot of national developments, see <https://www.lincolnst.edu/publications/policy-briefs/nonprofit-pilots-payments-lieu-taxes>.
- In every session there are numerous bills to expand or clarify nonprofits' property tax exemptions under §11.18, Tex. Tax Code. The regular additions to §11.18 grow longer and longer and are often “local” bills addressing a specific situation or unpopular ruling by a local tax appraisal board or court. At some point this invites a holistic review of the significant tax revenues bypassed by state and local government. It also offers a critical look at the vast real estate holdings of nonprofits and whether they directly advance a charitable purpose. As local taxing authorities face new legislative limitations on tax revenue increases (**SB 2**, 86th Legislature, 2019), local tax appraisal districts and appraisal review boards will take a closer look at exemptions claimed under §11.18 and related provisions of the Tax Code.

2. The economic impact of nonprofits on the state's economy is significant

There have been a number of formal studies in recent years to measure the economic impact of the operations of nonprofits in Texas. The most recent is the attached report, *Built for Texas: The Impact and Opportunity of Our Nonprofit Sector* (2019), with the United Ways of Texas as the lead study sponsor. Some significant findings:

- 1.4 million persons are employed by more than 100,000 nonprofit entities.
- The billions spent by these entities drive the state gross domestic product.
- The number of Texas nonprofits has almost doubled in the past ten years.
- Annual expenditures by nonprofits (now \$200 billion) are expected to increase 50%.
- Local “grassroots” nonprofits (with annual budgets between \$50,000 and \$2 million) are the largest percentage of active service organizations.
- A small number of large, mature nonprofits manage complex programs often dependent on public dollars or revenues earned from operations in the commercial marketplace.

Use the data in the study to communicate the nonprofit sector's robust return on investment for funders, contributors, partners and stakeholders; to engage nonprofits as civic leaders in partnership with private industry and government; and to demonstrate that charitable and public-service missions can be enhanced by the growing capacity of the nonprofit sector.

3. Visibility in public affairs and use of public funds trigger expectations for transparency, disclosure and sound governance by nonprofit entities

Legislators in 2019 succeeded in crafting statutory language that requires disclosure of certain records of businesses, organizations or quasi-public entities that receive or spend public funds or perform governmental functions. Unsuspecting nonprofit organizations will now find some of their records and data subject to disclosure under the Texas Public Information Act (PIA), Chapter 552, Tex.Govt.Code, even if they consider their status merely as a grantee or subcontractor under some government-related program accessing public funds of any kind:

- **SB 943:** 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 (PIA). It retained 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 specified when a requestor (any person, anywhere) must direct the open records request to the government body connected to public funds that the organization possesses, or whether a requestor can direct the open records request directly to the recipient organization or association. The latter scenario in SB 943 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. Now, any organization opposing disclosure and claiming the protection of any of the PIA exceptions must be able to demonstrate with specificity why its interests

would be harmed or why a competitive advantage might be compromised. The *contracting information* provisions of the bill are in the new §552.003(7), Tex.Govt. Code, new §552.0222, the amended §552.110, the new §552.1101, and new §§552.371-374.

- **HB 4345:** A charitable organization has legal immunity under Tex.Civ.Prac.&Rem.Code 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.
- **SB 1969:** 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.Org.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.

4. Nonprofits receiving large contracts or grants for privatized state agency operations enter a competitive commercial environment

About 20 years ago, state government plunged into an era of “privatization”, which involved identification of state government functions that arguably could be performed more efficiently and at lower cost by private or commercial contractors, consultants or nonprofit organizations. Texas nonprofits of all sizes and varieties have benefitted from this trend, with significant state agency functions outsourced under the contracting/procurement process or through periodic agency grants, sometimes specified in the legislative appropriations bill. Often, the legislature authorizes by statute creation of a nonprofit organization to conduct certain off-budget activities to support state programs (CPRIT, OneStar Foundation, Texas Windstorm Association). Successful nonprofits that prosper in this arena can become state vendors of considerable scale and no longer “fly under the radar”. They have entered a competitive marketplace that invites scrutiny and criticism, especially when nonprofits are given a special preference or “first-look” status in competing for a state contract. Competitors in the business community or trade

associations are quick to complain about the unfair competitive advantage of tax-exempt operators. Recent examples:

- **HB 304** (86th Legislature, 2019) clarifies the governance authority of municipal management districts with respect to property assessments within the district.
- **SB 1511** (86th Legislature, 2019) requires the state to contract with a nonprofit organization for the maintenance and operation of the Battleship *Texas*.
- **HB 3859** (85th Legislature, 2017) continued the privatization of the state CPS agency's role in placing children with foster care or adoption agencies while adding accommodations for the religious beliefs of the provider organization or contractor. A related bill, **HB 6**, proposed a transfer of the state's operations of most child protective services, foster care and adoption services, to private contractors through statewide "SSCC" (single-source continuum contractor) vendors.
- A huge free labor pool for qualified Texas nonprofits would have been delivered if **HB 22** (83rd Legislature, 2013) had passed. The bill required every undergraduate student in a state university, college or junior college to provide 20 hours of "mandatory-volunteer" community service, for credit, as a requirement for graduation. Critics responded that this program would be a recordkeeping nightmare and could sour young people to truly voluntary service later in life.
- **HB 2718** (84th Legislature, 2015) permits receipt by persons and families of certain charitable assistance from community and faith-based organizations without jeopardizing their existing public benefit eligibility under TANF, SNAP and other assistance programs. See §531.02482, Tex.Govt.Code.
- The growth of charter schools in Texas and proposed private school vouchers (**SB 3**, 85th Legislature, 2017) reflect a transfer of considerable public funds to these nonprofit organizations.
- An experienced nonprofit operating an immigrant detention center under government contract might find intense public and media scrutiny challenging.
- Nonprofits engaging large-scale disaster relief operations often have an expectation of reimbursement later from federal and state disaster funds.

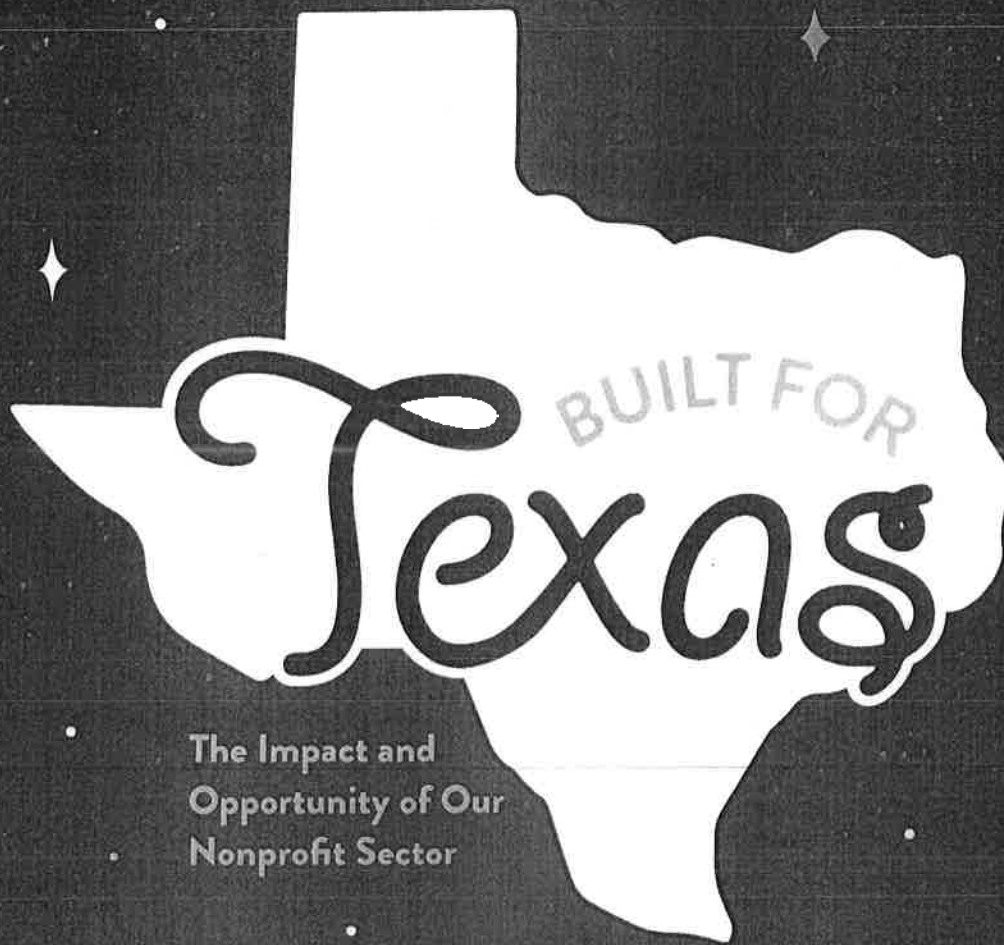
5. Looking ahead to the 2021 legislative session

- Redistricting of congressional and legislative districts by the legislature following receipt of the 2020 U.S. census data will occupy a lot of attention. If not accomplished by the legislature, the Legislative Redistricting Board takes over; or, the issues often have been finally resolved and district maps drawn through court proceedings.
- Opportunities for formalizing the role of nonprofit and faith-based organizations in disaster response activities were authorized in the 2019 session. See **HB 3616**, **HB 2305** and **HB 1294**. A task force managed by the Texas Division of Emergency Management (TDEM) will conduct interim work in anticipation of additional legislation in 2021. Members will be representatives of faith-based organizations with the duty to develop a plan to improve data collection regarding faith-based disaster response activities, develop best practices for communicating and collaborating in disaster scenarios, and identify inefficiencies and opportunities to

address gaps in the state's disaster response capacity. See new §418.251, Tex.Govt. Code.

- House and Senate interim committee charges to be studied during 2020 are available at www.capitol.texas.gov .
- Stay current on developments during the 2021 regular 140-day January-May session at www.nonprofitlawandpolicy.com .
- Review the text of any bill before the legislature, monitor committee deliberations and track the progress of bills of interest at www.capitol.texas.gov .
- The Legislative Budget Board provides a deeper look at the state's budgeting and appropriations process at www.lbb.state.tx.us .
- Briefings and reports on related policy issues before the U.S. Congress and federal agencies can be found at www.councilofnonprofits.org .
- Current state government issues reported at www.texastribune.org .

EXCERPTS FROM "BUILT FOR TEXAS"



Reprinted with permission of United Ways of Texas

Texas is a big state.

Everyone knows that. We have big cities, big farms, big corporations, big personalities, and big hair. We also have big needs. Luckily, we have big hearts responding to those needs.

As the economy changes, that gap is getting wider and harder to fill. In an effort to meet these new challenges a new statewide effort was launched in 2018 to understand the nonprofit sector's capacity and strengthen our collective impact. Nonprofits work at the macro and micro levels, leading communities throughout Texas—from providing school supplies for kids in need to protecting our water quality; from neighborhood associations to professional associations. Some are household names like Big Brothers Big Sisters, Future Farmers of America, and Meals on Wheels, while some are off of most people's radar, such as Groundwork Music, Families in Nature, and Divine Canines. With strong nonprofit leadership and commitment, we build stronger communities; and with stronger communities, we build a stronger Texas.

With

\$1.4 MILLION

EMPLOYEES

in almost **120,000**

nonprofits, we spend

\$217 BILLION

and drive

\$110 BILLION

toward Texas' GDP

serving our residents,

communities, and

resources.

By leveraging

\$4.89 BILLION

government dollars

with investments

from donors, nonprofit

organizations help

bridge the gap for

Texans' needs.

In 2010 a statewide task force issued a set of recommendations to strengthen nonprofit capacity in Texas. Since then, much has changed in our state. This report builds on the 2010 efforts, providing an up to date picture of our nonprofit sector to position our state to leverage and engage the nonprofit sector constructively. In the past decade, our nonprofit sector has more than doubled—the **number of organizations in Texas is growing by almost 10% per year**. The changing landscape and dynamics have presented us with more problems to solve—and more opportunities to make our communities stronger and more vibrant. Luckily, Texans like to solve problems. We see gaps as opportunities. Nonprofits are our communities' response to significant challenges and opportunities to raise up our neighbors.

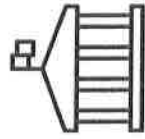
Nonprofits play a critical role in our state—addressing these challenges, creating jobs, leveraging public dollars well, delivering critical services, providing opportunities for communities to support themselves and engage in philanthropy, and partnering across sectors. And we are ready to do more.

We are in this together, and together we have even greater potential with you.



Who are Texas Nonprofits?

When most people think about nonprofits or charities, they are more than likely referring to a 501(c)(3): charitable nonprofits with missions like health, arts, conservation, or education, as defined by the Internal Revenue Service (IRS). Moreover, most people do not know that there are many types of nonprofits or 501(c)(3)s. For example, while Texas' nonprofit sector is mostly made up of charitable organizations in the traditional sense, there are also other types of nonprofits that are significant contributors to our economy, including:



501(c)(4)

organizations like civic leagues
and volunteer fire departments



501(c)(6)

business leagues like
chambers of commerce



501(c)(12)

entities such as
electric utilities



501(c)(14)

entities like
state-chartered credit unions

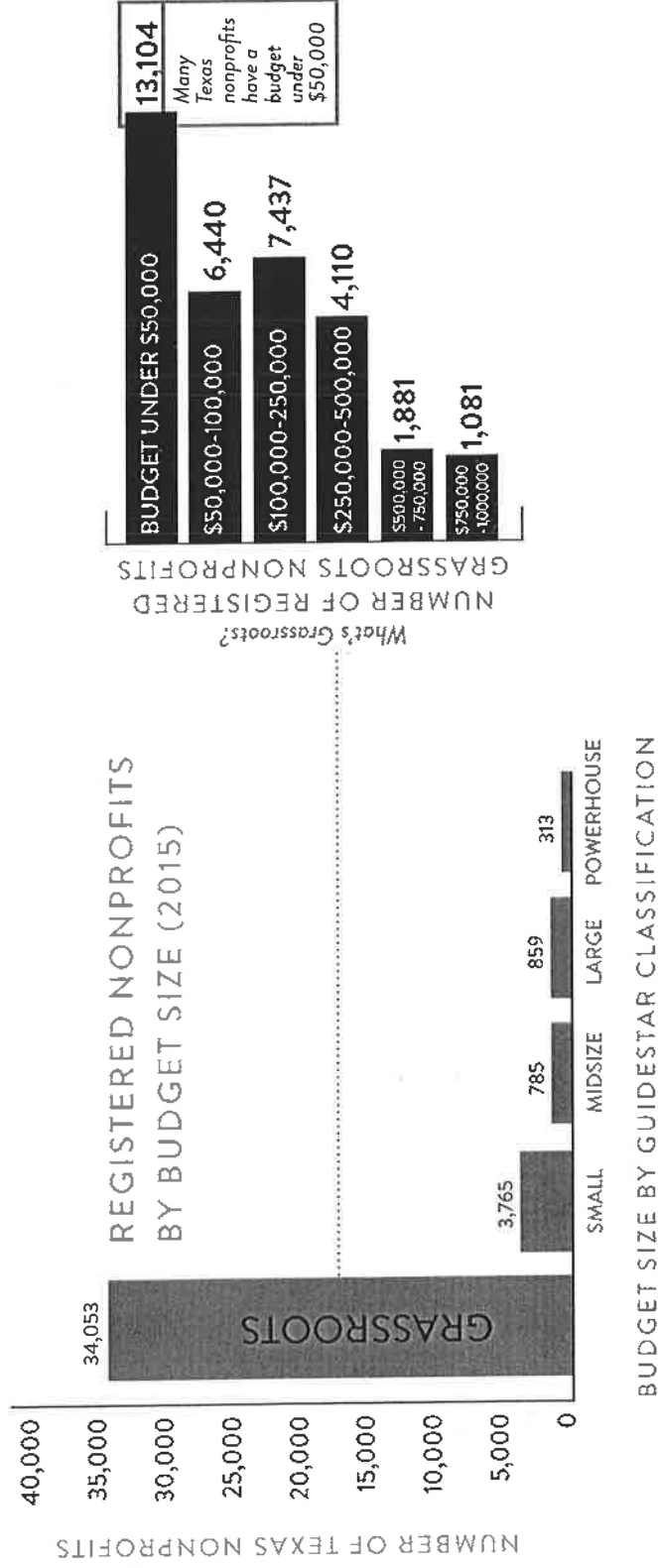
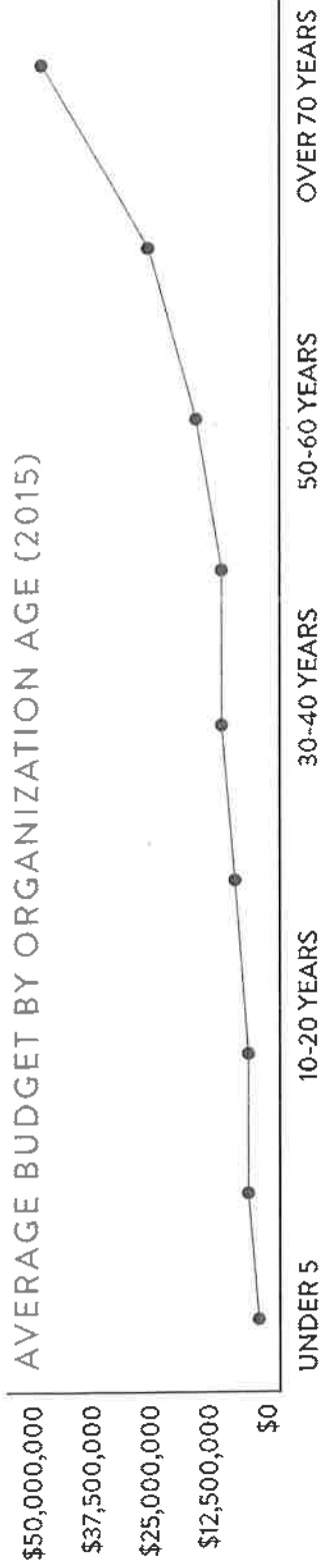
We know that nonprofits impact Texans in a myriad of important, and often unrecognized ways. We encourage you to look around you and see how Texas nonprofits impact your life every day. We work hard alongside you to make Texas strong.

The economic prosperity of Texas and the resiliency of communities across our state relies on strong partnerships between the public sector (government), private sector (business), and nonprofit sector. Much of the work of the private sector is accomplished through nonprofits, whether it's volunteer fire departments providing a safety net in rural counties or the state contracting with nonprofit residential treatment centers so Texas foster children have a safe place to thrive. Likewise, our state's private sector calls on nonprofits when developing innovative solutions to health care, transportation, community and economic development, cultural and eco-tourism, and much more. This symbiotic relationship between nonprofits and the public and private sectors creates a prosperous Texas where we can all live, work, and thrive.

There is No Typical Nonprofit

Nonprofits have unique business models, each with a diverse mix of funding. They are able to leverage funding sources, including individual contributions to also attract corporate and government dollars.

AVERAGE BUDGET BY ORGANIZATION AGE (2015)



A relatively small number of large, complex nonprofits have the capacity to also manage the complicated processes attached to receiving public dollars.

Texas Nonprofits at a Glance

23,515

Religion
Related



23,422

Other

Including: Community/Neighborhood-Based,
Membership Organizations, Local Associations + Institutions,
Military + Veterans, Environment + Animal Causes

106,764
TOTAL NUMBER
OF NONPROFITS

25,015

Human
Services



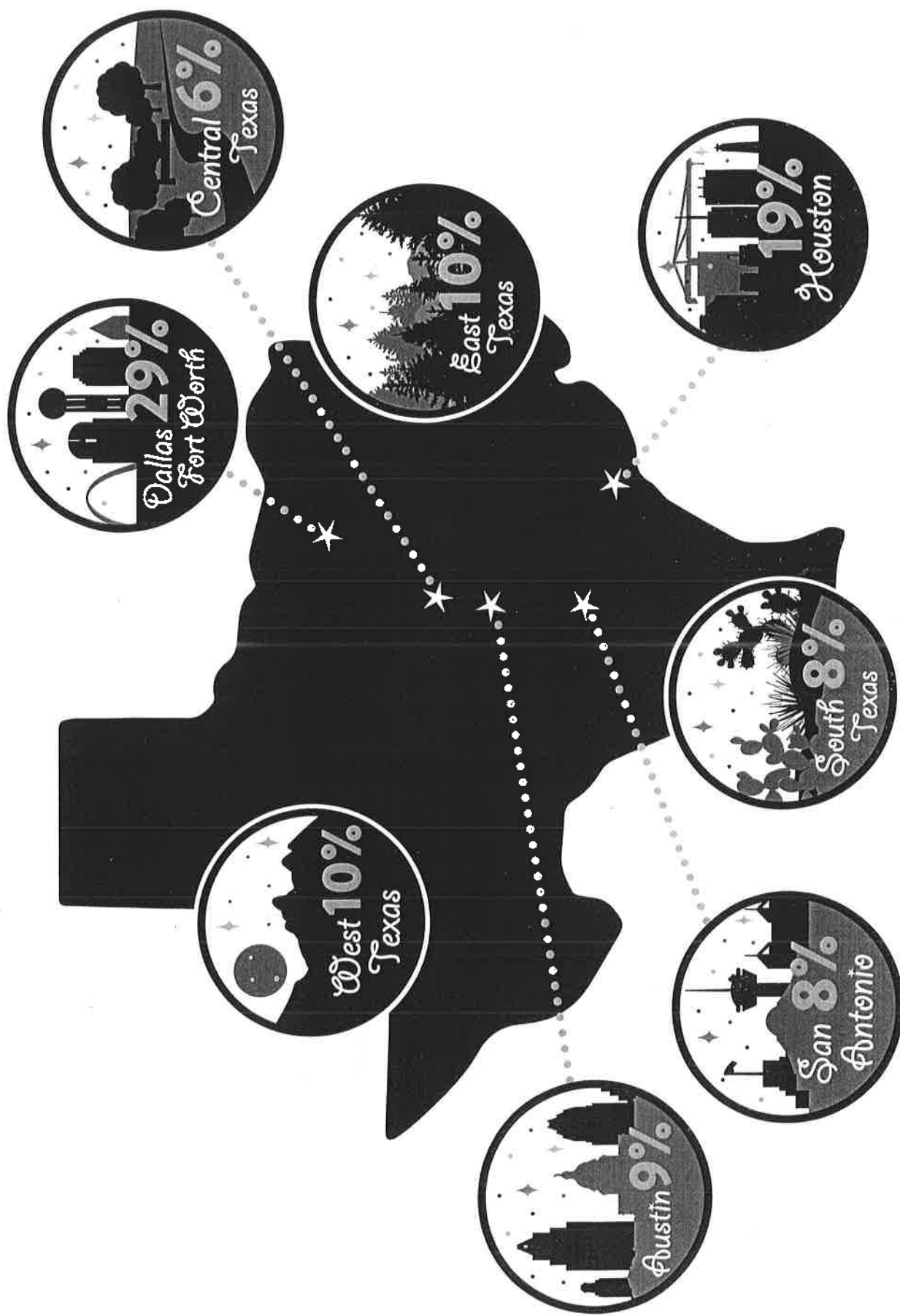
15,448

Health

6,986 Humanities
6,555 Philanthropy
5,223 Education
360 Higher Education
220 Hospitals

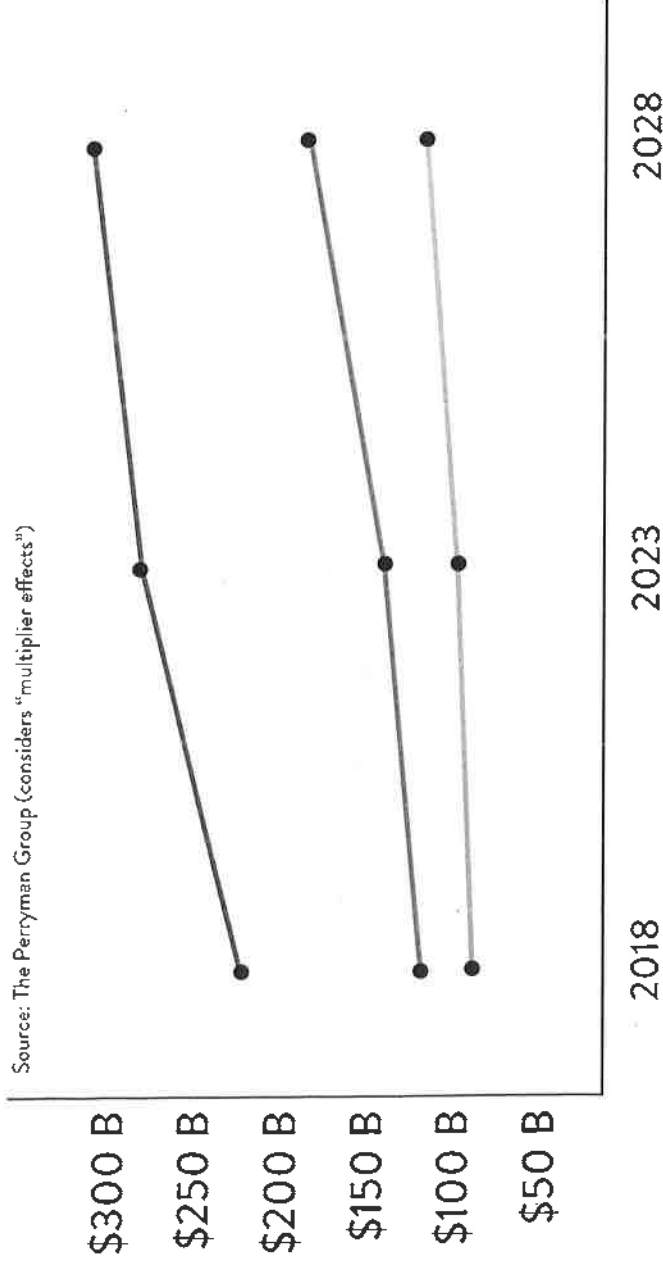
Reference: National Taxonomy of Exempt Entities

Where are Texas Nonprofits?



Current and Projected Economic Benefit of Texas Nonprofits

Source: The Perryman Group (considers "multiplier effects")



In 2028...

+48.8%

TOTAL EXPENDITURES

total spending, or the measure of dollars changing hands as a result of activity

+48.9%

GROSS OUTPUT

production of goods and services that will come about in each area as a result of the activity

+49%

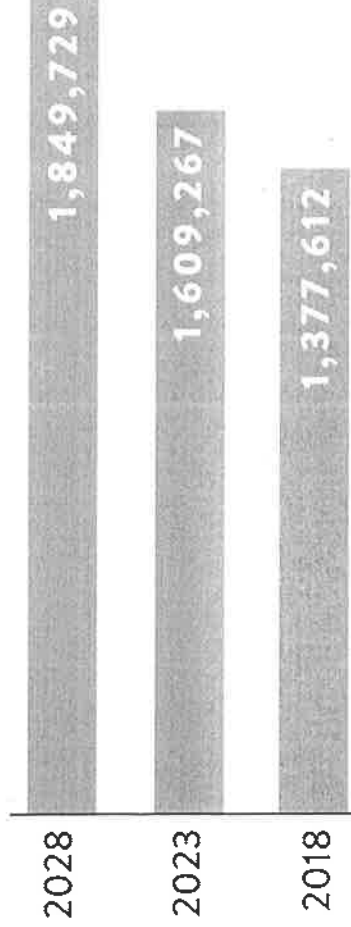
RESULTING INCOME

dollars that end up in the hands of people in the area (earnings, interest payments, rent, etc.)

+39.3%

JOB GAINS

permanent, point-in-time jobs



BUSINESS OR CORPORATE LEADERS

As evidenced by this report, the Texas nonprofit sector plays an integral role in our economy. It is in our best interest as Texans to consider and engage nonprofits when making business decisions, especially given the impact these decisions have on nonprofits themselves and the communities that they serve. Nonprofits can contribute a critical perspective that will aid in the implementation of important business decisions.

We call on Texas business leaders to:

- 1 Use the data in this report to better understand the value of nonprofits to communities and the impact business decisions have on the Texas nonprofit sector.
- 2 Invite the nonprofit sector to be at the table when making business or economic decisions.
- 3 Incorporate the work of nonprofits into economic and workforce development strategies.
- 4 Understand the return on investment of the nonprofit sector, as well as the opportunities for innovation that exist within the sector. At the same time, consider the limitations of the nonprofit sector's business model when looking for ways to partner and think about ways you can support them in building their capacity.

ELECTED OFFICIALS AND POLICYMAKERS

As demonstrated by this report, the nonprofit sector plays a significant role in policy – from the identification of solutions to address community challenges to the implementation of policy in communities.

We call on Texas elected officials and policymakers to:

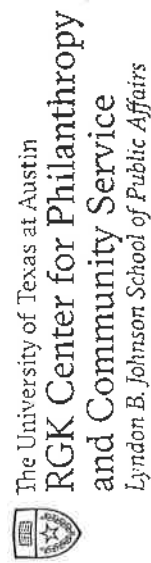
- 1 Use the data in this report to better understand how nonprofits are engaged in policy and how public policy decisions impact their organizations, and consequently, their communities.
- 2 Engage nonprofit leaders in finding solutions to your community's challenges.
- 3 Understand the role that nonprofits play in innovation and encourage these efforts.
- 4 Use your position of influence to support the nonprofit sector as it works to build its capacity, so that it can continue to step up and respond to community needs.
- 5 Engage nonprofits as civic leaders on issues of importance to your voters.

NONPROFIT AND PHILANTHROPIC LEADERS

This report and data presents an opportunity for each of us as a sector to better articulate our strengths as well as the challenges and opportunities that we face.

We call on Texas nonprofit leaders to:

- 1 Convene peer nonprofit and philanthropic leaders in your respective communities to better understand our sector.
- 2 Identify ways to better articulate our sector's role in solving community dilemmas. Form new partnerships, ask to be invited to decision-making tables, and think outside of the box to ensure that our sector is well-represented.



Special thanks to Tara Levy, consultant and writer, and Karli Isiyel, designer.

86th Texas Legislature, 2019 Regular Session

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

Compiled by Richard W. Meyer, Attorney at Law

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.txcommunityassociationsadvocates.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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November 26, 2018

The Honorable Greg Abbott, Governor
The Honorable Dan Patrick, Lieutenant Governor
The Honorable Joe Straus, Speaker of the House
Members of the 85th Legislature

Ladies and Gentlemen:

As required by Section 403.014, Texas Government Code, this report estimates the value of each exemption, exclusion, discount, deduction, special accounting method, credit, refund and special appraisal available to payers of Texas' sales, motor vehicle sales, franchise, oil production and gasoline taxes, as well as property taxes levied by Texas school districts.

Previous versions of this report have typically been released during a legislative session, in the weeks after the release of our *Biennial Revenue Estimate*. Lawmakers, however, may benefit from more time to evaluate the estimates in this report, so we are providing them well in advance of the start of the Regular Session of the 86th Legislature. As a result, the estimates in this report are based on revenue projections derived from the revised *Certification Revenue Estimate* of July 2018.

For fiscal 2019, aggregate exemptions for the revenue sources included in this report will total an estimated \$59.8 billion. Of this amount, the exemptions related to state taxes will account for \$45.6 billion; school property tax exemptions will account for the remaining \$14.2 billion.

I would note, however, that a significant share of total exemptions – nearly \$16 billion of the estimated fiscal 2019 amounts – is accounted for by exemptions to the sales tax for items that are taxable under other law. Included among the items taxed under other law are insurance premiums, motor vehicle sales and motor fuels; their consequent exemptions from the sales tax are estimated to be worth \$7.2 billion, \$4.4 billion and \$3 billion, respectively.

Other exemptions from the sales tax include \$9 billion in raw materials used in manufacturing, \$3.2 billion in food for home consumption (essentially, groceries) and \$1 billion worth of over-the-counter drugs and prescription medicine and devices.

This report also presents the results of the analysis prepared in accordance with Section 403.0141, Texas Government Code, which directs the Comptroller of Public Accounts to report on the incidence of certain taxes and exemptions.

The material in this report is provided for informational purposes only. This report makes no recommendations for retaining, eliminating or amending any provisions of the law.

Sincerely,



Glenn Hegar



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