

- SUBJECT:** Revising processes related to fiscal accountability in government
- COMMITTEE:** State Affairs — committee substitute recommended
- VOTE:** 14 ayes — Solomons, Menendez, Cook, Craddick, Farabee, Gallego, Geren, Harless, Hilderbran, Jones, Lucio, Maldonado, Swinford, S. Turner
- 0 nays
- 1 absent — Oliveira
- WITNESSES:** For — Bee Moorhead, Texas Impact (*Registered, but did not testify*); Noelita Lugo, Texans Care for Children; Tom “Smitty” Smith, Public Citizen; Brynne Vanhettinga, ACLU of Texas)
- Against — None
- On — Joey Longley, Sunset Commission (*Registered, but did not testify*); Mary Camp, Legislative Reference Library)
- BACKGROUND:** Government Code, Title 3, subtitle C establishes legislative agencies and oversight committees, outlines the Sunset review process, and provides for coordination among the agencies established. Ch. 321 establishes the Legislative Audit Committee, which is charged with appointing a state auditor to investigate all custodians of state funds, disbursing parties, and department personnel. The chapter establishes the powers and duties of the state auditor and requires the auditor to recommend an audit plan for the state for each year to the Legislative Audit Committee.
- On February 17, 2009, President Obama signed into law H.R. 1, the American Recovery and Reinvestment Act of 2009. The act contains appropriations and tax cuts totaling an estimated \$787 billion, approximately \$16.6 billion of which may be available to Texas. The act also contains appropriations for competitive grant programs for which the state may apply.
- DIGEST:** CSHB 2942, the proposed Texas Government Accountability and Transparency Act of 2009, would make revisions to the State Auditor’s Office, which would be renamed the State Accountability Office, and the

inspector general divisions, move performance assessment duties from the Legislative Budget Board (LBB) to the State Accountability Office, create the Federal Recovery Act Accountability Board, and bring legislative agencies under limited Sunset review concerning their oversight of Recovery Act funds.

State Accountability Office. CSHB 2942 would change the name of the State Auditor's Office to the State Accountability Office and would establish that office as an independent agency of the Legislature. The jurisdiction of the Accountability Office would extend to certain entities including:

- the Electric Reliability Council of Texas (ERCOT);
- a regional mobility authority;
- the Texas Economic Development Corporation;
- a nonprofit organization established by a state officer or department that solicits gifts, grants, and other donations for the Texas Enterprise Fund, or for any other purpose; and
- any public or private person or entity receiving funds through the American Recovery and Reinvestment Act of 2009.

The bill would change the name of the Legislative Audit Committee to the Legislative Audit Board. The composition of the legislative audit board would include the previous membership of the committee, with three additional members of the Senate appointed by the lieutenant governor and three additional members of the House appointed by the speaker. The board would meet at least once a month to hear testimony regarding funds received as part of federal stabilization initiatives.

The bill would require that the auditor complete specific tasks regarding investigations and consequent referrals to appropriate enforcement authorities. The auditor could employ up to 20 special agents to assist in the detection, investigation, and prevention of fraud, waste, and abuse. Special agents would have the power of search and seizure related to felony offenses, but would not be considered peace officers in other respects. The state auditor would appoint a counselor, a chief clerk, and other personnel as necessary, and could contract with professional experts to perform the office's functions as desired.

The bill would declare the independence of the state auditor and office personnel from partisan politics and would create a class A misdemeanor

(up to one year in jail and/or a maximum fine of \$4,000) offense if any member of the Legislature or an employee of the state recommended that the auditor appoint a person to a position in the office.

CSHB 2942 would increase the penalty for the offense of interfering with an investigation, as defined in existing law, to a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) if the investigation was related to funds provided under the federal Recovery Act. The auditor could serve requests for information or inspection that identified and described the requested items. An officer or employee who did not honor the request within 25 hours would be liable for a civil penalty of \$1,000 for each day the request was not honored, or \$5,000 for each day if the investigation was related to federal Recovery Act funds.

The state auditor also would make recommendations for ways by which to reduce fraud and abuse. The bill would allow the auditor to prepare an audit plan without seeking approval of the plan from the board. The auditor could conduct direct investigations as necessary, issue subpoenas, and could refer matters for further civil, criminal, and administrative action to appropriate authorities. The auditor would issue a final report with findings, to which an agency would have to respond with an implementation plan or other response within 60 days. The auditor's office would establish a toll-free phone line for informational purposes and to report an alleged violation.

Existing internal auditors would provide reports and other documents to the state auditor as necessary. Information collected by the state auditor as part of a review would be confidential and not subject to open records.

The bill would transfer from the LBB to the State Accountability Office all duties and employees involved in performing or supporting performance reviews, including reviews of school districts, higher education, efficiency reviews, and records management. The transfer would include corresponding funds appropriated to the LBB for performance review purposes.

Inspector general offices. The bill would move the offices of inspector general for the Health and Human Services Commission, the Texas Education Agency, and the Texas Department of Transportation under the State Accountability Office. The state auditor would appoint an inspector general, who could in turn designate deputy inspectors general. The

inspector general would investigate fraud, waste, and abuse in the provision of funds or services.

The inspector general would adopt objectives and performance standards for the inspector general division that emphasized specific goals contained in state law. The inspector general division would investigate fraud, waste, and abuse in funding for health or human services, determine and report regarding whether there was adequate enforcement of state law relating to the provision of those services, and alert the appropriate law enforcement authorities to enable the authorities to prevent and detect crime relating to the provision of those services. The division would have general authority to evaluate activities related to its mission.

The inspector general division also would conduct an integrity review to determine if a full investigation on a complaint of fraud, waste, or abuse of funds in the state Medicaid program. If the division found reason to believe an incident of fraud may have occurred, the division would either refer the case to the state's Medicaid fraud control unit or could itself conduct a full investigation, as appropriate.

The division could recommend that the comptroller impose a hold on claims payment for a reimbursement submitted by a health or human services provider to assist in obtaining records related to participating in the state Medicaid program or on request of the Medicaid fraud control unit. The comptroller would establish guidelines for implementing a hold on payment. A provider subject to a hold on payment would be entitled to a hearing on the subject. The bill would establish processes for hearings and provide for an informal resolution to a hold on payment.

Each agency that had an inspector general or a similar division would enter into a memorandum of understanding (MOU) with the State Accountability Office that defined clearly the responsibilities of the inspector general involving the execution of laws and those concerning only auditing and investigation. The MOU would specify that the responsibilities of the inspector general involving execution of laws would remain under the agency's authority, and those that involved only auditing and investigation would be transferred to the auditor's office.

Federal Recovery Act Accountability Board. CSHB 2942 would establish the Recovery Act Accountability Board (RAAB), and would include as voting members:

- the lieutenant governor;
- the speaker of the House of Representatives;
- one Senate member selected by the lieutenant governor and one House member selected by the speaker each from the Legislative Audit Board, LBB, TLC, Sunset Advisory Commission, and the Legislative Library Board;
- the chair and vice chair of the House Select Committee on Federal Economic Stabilization Funding;
- four other members of the Senate, selected by the lieutenant governor;
- four other members of the House, designated by the speaker;
- two public members appointed by the lieutenant governor; and
- two public members appointed by the speaker.

The voting members would have to include the chairs of the Senate Finance Committee and the House Appropriations Committee among the members appointed. The RAAB also would include nonvoting members, including four members of the Texas delegation to the United States Congress — two members selected by each party required to hold a primary — and the chief administrative officer of each legislative agency, except the State Accountability Office. Board members would be entitled to reimbursement for expenses necessary to perform duties. The board and associated provisions would expire December 31, 2013.

The board would meet at least once a month to take testimony related to Recovery Act funds. The board would coordinate reviews of Recovery Act funds expenditures that were conducted by a legislative agency to ensure that duplication and overlap of legislative agency work was avoided and to ensure the public had access to vital information related to the funds. The board also could prescribe additional performance measures, make recommendations regarding interagency coordination, and appoint advisory committees as necessary.

The board could conduct hearings and investigations of the uses of Recovery Act funds, enlist the assistance of individuals connected with the state, and issue subpoenas as necessary. Meetings would adhere to practices that govern other legislative committees.

Governmental entities receiving Recovery Act funds would submit quarterly reports to the RAAB that included:

- the amount of funding distributed by the agency, and under what provision;
- any outstanding requirements or unmet deadlines for applying for the funds;
- any changes in any requirements associated with the funds, including spending limitations, state match or cost-share requirements, percentage limitations, and timeframes;
- the date on which funding discussed in the report was anticipated to end;
- whether any additional authority was necessary to spend the funds;
- the number of additional state employees actually employed or projected to be needed to oversee or administer the funds;
- current plans for addressing how each agency would conduct its operations when the funds end;
- a detailed list and status of all projects or activities for which funds were expended or obligated;
- an assessment of the performance of all funds expended or obligated relating to specific performance measures included in law; and
- an impact statement detailing the impact, if any, of Recovery Act funds on access to renewable energy, carbon emissions, and any reductions in per capita electric use.

Revisions to legislative agencies. The bill would revise appointments to the Legislative Budget Board (LBB), the Texas Legislative Council (TLC), and the Legislative Reference Library (LRL) to include two additional members of the Senate, appointed by the lieutenant governor, and two additional members of the House, appointed by the speaker. The LBB would meet at least once bi-monthly to take testimony related to funds from the federal Recovery Act. TLC would make legislative information related to the federal Recovery Act available to the public on the Internet. The LRL would serve as the central depository for all federal Recovery Act publications submitted by public and private entities and would make records available online to the extent possible.

The bill would subject to a limited Sunset review additional offices and agencies, including:

- State Accountability Office;
- Legislative Audit Board;

- Legislative Budget Board;
- Texas Legislative Council; and
- Legislative Reference Library

Sunset reviews of the agencies would not include the possibility of abolition, and would commence in 2013 and every 12th year thereafter. The initial review of a legislative agency or office only would include a review of the extent to which the agency had discharged its responsibilities related to federal Recovery Act funds under the bill and other applicable laws.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009.

**SUPPORTERS
SAY:**

CSHB 2942 would provide critical accountability over the way in which federal Recovery Act funds would be spent and also would make lasting improvements to accountability and oversight functions in the state. The bill would offer necessary provisions establishing a board to oversee and advise on the way in which Recovery Act funds were spent and would allow Texas to take a more proactive role in ensuring that these funds were spent efficiently and with maximum benefit.

Other states have taken active measures to establish private-public advisory bodies and regulatory bodies to advise on and oversee implementation of the federal Recovery Act funds. Without CSHB 2942, the state would have no such mechanisms. Current review by the federal government and the state comptroller is valuable, but is also passive in reporting only on the final destination of funding without providing any method for input into the way in which these funds are spent. The bill would allow for an evaluation of the use of the funds and advisement based on criteria unique to Texas.

CSHB 2942 also would provide transparency into the way in which Recovery Act funds would be spent by requiring that legislative agencies collect and make accessible this information. The bill would ensure that the agencies upheld their duties in providing transparency by subjecting to Sunset review in 2013 the legislative functions associated with Recovery Act funds. After the initial review, the Legislature could consider whether to retain or discard the future Sunset review schedule based on the results of the initial review. There may be future disbursements of federal

stabilization funds that could be captured by future Sunset reviews, and the initial review in 2013 would give legislative agencies a good incentive to carry out the responsibilities identified in the bill.

The bill would make important structural adjustments to the state's oversight framework by preserving independence for the offices of inspector general, codifying powers and duties of the state auditor and the renamed and expanded State Accountability Office, and consolidating in the state auditor's office agency performance review responsibilities. The auditor's office would have the option of allowing inspectors general to remain in their physical locations in the agency building, which would not create physical distance and would not result in any loss of access to persons with expertise. Further, issues with federal compliance with mandates associated with Health and Human Services funding have been exaggerated. The bill would not impede the regulatory framework of the inspector general and would therefore not run afoul of federal requirements mandating an inspector general at these agencies.

Consolidating review functions under the auditor would promote coherence and coordination of these related functions. Auditors already may take on a variety of audits, some of which resemble closely the performance review functions currently housed at LBB. Bringing these functions together under the state auditor would increase efficiency greatly, would reduce the number legislative bodies reviewing agencies, and would provide an excellent opportunity to cultivate expertise in a centralized office and location.

**OPPONENTS
SAY:**

CSHB 2942 would make significant changes to state auditing functions and management that possibly could compromise the focus of the state auditor and would not necessarily enhance oversight and accountability. The bill would make a number of changes to the auditor's office, such as moving to it the performance review team currently housed at the LBB and moving existing offices of inspector general that would increase management functions under the auditor. Increasing management functions at the accountability office would be problematic, since it would shift the auditor's primary focus from auditing state agencies and other offices to managing those with related review roles over agencies. The auditor's office would not provide any clear advantage for overseeing performance reviews, and these functions should remain with LBB.

Moving offices of inspectors general (OIGs) under the State Accountability Office could cause more complications and potential issues than it would resolve. OIGs are charged with both investigatory and enforcement duties, and some divisions devote as much as two-thirds of their staff time to enforcement of various provisions associated with their duties. Retaining enforcement through an MOU and relocating auditing and investigatory functions to the auditor's office would pose communication and coordination issues, which would be compounded by allowing the comptroller to decide whether to place a hold on payments.

Inspectors general need to be able to act quickly and without restraint to address situations that often are unfolding at the time of action. Creating communication barriers and increasing the administrative distance between the OIGs and the substance of their investigations could reduce their overall effectiveness. Further, relocating OIGs to the State Accountability Office would remove inspectors general from the expertise housed in agencies and could reduce their effectiveness in investigating technical violations that are complicated in nature or can change quickly. This particularly could be problematic if a new deputy OIG for a large, complicated agency such as Health and Human Services did not have separate staff specializing in issues germane to the agency.

Further, housing agency OIGs in the State Accountability Office could result in a violation of certain federal provisions that require an inspector general for certain agencies. Moving the OIGs from those agencies to a legislative agency could put the state out of compliance with these federal regulations.

The bill would also make some questionable changes to long-standing practices at the Sunset Commission by allowing for the review of legislative agencies. The bill would blur the lines between the state auditor and the Sunset Commission, the latter of which is distinguished by its role in a legislatively established process based on a periodic review of the need for an agency. Using the Sunset Commission for limited, specific reviews that do not necessarily bear on the normal operations of the agency could result in clouding Sunset's core mission in the future. Further, the review would contrast with Sunset's usual method of analysis, which is to review current practices and recommend changes to be made in the future accordingly. Since the Recovery Act funds will be spent completely by 2013, it would not make sense for the commission to make recommendations for future duties associated with the funds.

NOTES:

The Legislative Budget Board (LBB) estimates that the bill would have a cost of \$587,684 to general revenue for fiscal 2010-11. The LBB estimates the expenses would come from additional expenses associated with meetings of the Federal Recovery Act Accountability Board and an additional full time position to maintain the depository of Recovery Act reports and records.