

SUNSET ADVISORY COMMISSION

Texas State Board of Public
Accountancy

Texas Board of Architectural
Examiners

Texas Board of
Professional Engineers

Licensing Agency Pilot Project



Staff Report
October 2002

SUNSET ADVISORY COMMISSION

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In 1977, the Texas Legislature created the Sunset Advisory Commission to identify and eliminate waste, duplication, and inefficiency in government agencies. The 10-member Commission is a legislative body that reviews the policies and programs of more than 150 government agencies every 12 years. The Commission questions the need for each agency, looks for potential duplication of other public services or programs, and considers new and innovative changes to improve each agency's operations and activities. The Commission seeks public input through hearings on every agency under Sunset review and recommends actions on each agency to the full Legislature. In most cases, agencies under Sunset review are automatically abolished unless legislation is enacted to continue them.

**TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY
TEXAS BOARD OF ARCHITECTURAL EXAMINERS
TEXAS BOARD OF PROFESSIONAL ENGINEERS
LICENSING AGENCY PILOT PROJECT**

SUNSET STAFF REPORTS

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TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

SUNSET STAFF REPORT

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SUMMARY



Summary

Sunset Staff Report

Texas State Board of Public Accountancy

The Sunset staff review of the Texas State Board of Public Accountancy began during a period of crisis in the accounting profession. Reports of scandals and crises of confidence in the actions of public accountants stimulated a spirit of reform on the state and federal levels. Against this backdrop, the Sunset review assessed the ability of the Board to take strong enforcement action against the individuals and firms that it licenses. The review also examined the history of self-regulation by the accountancy industry and the close ties between the state agency and accountancy professional associations with an eye towards determining whether these ties affected efforts to enforce the Public Accountancy Act.

While the Board demonstrated that it has a strong, effective enforcement function, the review concluded that it needs additional tools to assist in its work. These tools include enhanced criminal penalties, an increase in the maximum administrative penalty, and the ability to share information with other law enforcement agencies to improve joint investigations.

The examination of the relationship between the Board and the regulated profession revealed a web of interconnections. One concern is the ability of employees and officers of major accounting trade associations to hold positions of authority on Board committees even though these same individuals are not permitted to sit as a member of the Board. This design also permits these individuals to have input on cases where they may have a personal interest without disclosing that interest to others.

The look at the ties between the accounting profession and the Board also raised questions about the way the Board carries out its major program to ensure the quality of accounting reports – the peer review program. Peer review, which is performed largely by the accounting trade associations, is a process where accountants check each other's work. As a part of federal accounting reforms, peer review for accounting firms that audit nationally traded corporations is being replaced by an inspection process. While the Sunset review did not reveal evidence of major problems within the state-level peer review program, and has no recommendations in this area, the program should continue to be monitored.

*The Sunset review
assessed the ability of
the Board to take
strong, effective
enforcement actions.*

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online at
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The review also looked at simplifying and streamlining some of the Board's processes and suggested applying several of the provisions of the Sunset

Issue 3 Key Elements of the Public Accountancy Act Do Not Conform to Commonly Applied Occupational Licensing Practices.**Key Recommendations**

- Require the Board to define which misdemeanor convictions disqualify an applicant from certification in the standard manner defined in the Occupations Code.
- Authorize the Board to delegate the collection of Uniform CPA Examination fees.
- Require Board members to recuse themselves from voting on disciplinary actions when they serve on the respective enforcement committees.
- Require the Board to make detailed information about disciplinary actions available to the public.

Issue 4 Texas Has a Continuing Need for the Texas State Board of Public Accountancy.**Key Recommendation**

- Continue the Texas State Board of Public Accountancy for 12 years.

Fiscal Implication Summary _____

These recommendations will not result in a fiscal impact to the State. The Board is a participant in the Self-Directed, Semi-Independent Licensing Agency Pilot Project, which tests the ability of certain agencies to effectively operate outside the legislative appropriations process. Because the Board has been removed from the appropriations process, any gains or losses implicated in these recommendations would not be reflected in the General Revenue Fund.

ISSUES / RECOMMENDATIONS

Issue 1

The Public Accountancy Act Lacks Key Provisions Needed to Protect the Public.

Summary

Key Recommendations

- Expand the range of criminal penalties in the Public Accountancy Act.
- Increase administrative penalties to a maximum of \$10,000.
- Authorize the Board to order licensees to pay restitution to consumers as a part of enforcement actions.
- Authorize the Board to issue summary suspension orders.
- Grant the Board authority to issue subpoena orders.
- Grant the Board the authority to share confidential information with governmental agencies and law enforcement officials.

Key Findings

- The Board of Public Accountancy regulates the accounting industry by enforcing the Public Accountancy Act and taking enforcement actions against violators.
- The current range of criminal and administrative penalties allowed by the Act is an insufficient deterrent to the types of violations occurring in today's business environment.
- The Board does not have the authority to order licensees to pay restitution to victims.
- The Board's enforcement efforts are hampered by confidentiality provisions in the Act, lack of subpoena power, and summary suspension authority.

Conclusion

The Texas State Board of Public Accountancy seeks to protect the public through its enforcement of the Accountancy Act. In light of recent accounting scandals, the Sunset review assessed whether the Act contains the full range of enforcement tools necessary to adequately deter and redress violations. Sunset staff found that the Board needs additional authority to be able to bring more significant criminal and administrative penalties, order licensees to pay restitution to victims, and compel the production of witnesses and records in investigations. In addition, the Board lacks the authority to share information with other regulatory agencies, which hampers multijurisdictional investigations.

fiscal year, the majority of cases are administrative violations. In FY 2001, the Board took an average 4.5 months to resolve administrative violations and 5.9 months to close disciplinary violations.

| Complaint Activity - FY 1997 - 2001 | | | | | |
|--|--------------|--------------|--------------|--------------|--------------|
| | FY 97 | FY 98 | FY 99 | FY 00 | FY 01 |
| Complaints Received | | | | | |
| From the public | 170 | 121 | 156 | 146 | 122 |
| State/Federal agencies | 4 | 1 | 5 | 20 | 5 |
| Initiated by the Board | 3,415 | 3,926 | 4,524 | 4,533 | 4,279 |
| Total | 3,589 | 4,048 | 4,685 | 4,699 | 4,406 |
| Complaints Resolved | | | | | |
| Dismissed | 234 | 288 | 369 | 436 | 258 |
| Dismissed - voluntary compliance | 411 | 582 | 562 | 651 | 788 |
| Dismissed - continuing education/other | 2,149 | 1,867 | 2,005 | 2,930 | 2,407 |
| Resulted in sanctions | 45 | 56 | 41 | 22 | 31 |
| License suspension/revocation | 611 | 933 | 1,022 | 1,360 | 927 |
| Voluntary surrenders - disciplinary | 2 | 2 | 3 | 7 | 5 |
| Total | 3,452 | 3,728 | 4,002 | 5,406 | 4,416 |

The statute lacks the full range of enforcement tools needed to oversee the practice of accountancy.

- The Board does not have the authority to impose a broad range of penalties against license holders or non-licensees who violate the Public Accountancy Act. This results in a direct impact upon individuals and firms who rely on the financial information prepared by CPAs, use the services of CPAs, or employ CPAs. The current range of penalties limits the Board's ability to tailor the punishment to the seriousness of the violation and thus lessens its ability to protect the public. The following material details the most significant deficiencies in the Board's criminal and administrative enforcement authority.
- ***Criminal Penalties.*** The current range of criminal penalties available to the Board is an insufficient deterrent to violations of the Act. Violations of the Act are class B misdemeanors, punishable by a fine not to exceed \$2,000, and up to 180 days in jail. Some cases that come before the Board may warrant stiffer penalties, especially cases of a major nature or those that involve significant monetary losses.

The provision authorizing the Board to impose criminal penalties for violations of the Accountancy Act was placed in statute in 1979, during a very different era in the business environment. The past decade has brought unprecedented change both to the global economy and capital markets. As a result, accountants who were

The current range of penalties limits the ability of the Board to tailor the punishment to the seriousness of the violation.

Restitution. The Board cannot order licensees to pay restitution to their victims, and this lessens its effectiveness as a regulatory agency. Because the Public Accountancy Act does not authorize the Board to recover restitution for victims, when CPAs commit fraudulent acts or perform services incompetently, victims not only lose the money paid for services, but may also incur additional expenses seeking redress in the courts. Although a disciplinary order issued by the Board may help a victim obtain a judgment in a civil case, granting the Board the authority to recover monetary losses for victims would allow victims to avoid the additional expense of civil litigation.

Summary Suspension. The Board is limited in its ability to protect the public from incompetent or dishonest CPAs. Although the Board may suspend or revoke practice privileges after proper notice and hearing, the Board lacks the authority to issue a summary suspension order. Because the average disciplinary case takes more than five months to resolve, even licensees with serious allegations against them may continue practicing and offering services to unsuspecting individuals and business owners.

Subpoena Power. Because the Public Accountancy Act does not authorize the Board to issue subpoenas or summons, the Board is unable to compel the attendance of witnesses or the production of documents.⁶ Instead, the Board relies on the cooperation of individuals being investigated and the threat of further disciplinary action. The Board, by rule, requires licensees to respond to any communication from the Board and furnish requested documentation; however, because the rule lacks a clear statutory basis, Board staff have encountered difficulty enforcing it. In one case, a committee of the Board was unable to compel the license holder to produce documents in a timely manner. As a result, the informal hearing was delayed by several months.

Other states' Accountancy Boards have a broader range of enforcement authority.

- Other states have harsher criminal penalties than Texas, including Alabama, Alaska, Arkansas, Connecticut, Florida, Kansas, Kentucky, Louisiana, Michigan, and West Virginia. These states have penalties of up to one year in jail. Additionally, in New York, the practice of accountancy without a license is a felony offense. Also, Oklahoma holds CPAs accountable for filing false reports or financial statements, punishable by a felony charge and a fine not to exceed \$25,000.
- Other states' Accountancy Boards have the authority to impose higher administrative penalties. Penalties range from \$2,000 to \$10,000. For example, New York, Oklahoma, and Washington may impose penalties of \$10,000; Florida and Maryland, \$5,000;

Without summary suspension authority the Board is powerless to stop a CPA, who is the subject of serious allegations, from continuing to practice.

Other states can use harsher administrative and criminal penalties against CPAs.

affirmations, examine witnesses and receive evidence, provided that the information is treated confidentially by the Commission and is not disclosed to the public except by court order. Similarly, both the Texas Department of Banking and Texas Department of Insurance have authority to issue subpoenas to compel the testimony of witnesses if required in the course of an investigation.

Confidentiality provisions in the Public Accountancy Act prevent the Board from being able to pursue enforcement actions with other authorities, unlike other state agencies.

- The Act contains a very strong confidentiality provision that restricts the Board from releasing information without the written consent of the licensee, unless the Board has issued a final order in a disciplinary proceeding or a formal public hearing has been held. Although the Board may learn during an investigation that a criminal act has been, is being, or is about to be committed, the confidentiality provision prevents it from collaborating with other regulatory agencies or reporting such information to appropriate law enforcement authorities.
- Both the State Securities Board and the Department of Banking may disclose confidential information to any Board-approved governmental or regulatory authority. Further, the Finance Code authorizes the Banking Commissioner to disclose confidential information in the interest of law enforcement, and allows the Commissioner to establish information sharing exchange programs with other regulatory agencies with whom it has overlapping regulatory jurisdiction. The Texas Department of Insurance can also share investigatory information with law enforcement authorities and other governmental agencies.

The Act's strong confidentiality provision prevents the Board from collaborating with other regulatory and law enforcement agencies.

Recommendation

Change in Statute

1.1 Expand the range of criminal penalties in the Public Accountancy Act.

This recommendation would increase the penalty for violating the Public Accountancy Act to a felony offense. The class of felony would depend upon the amount of monetary loss: less than \$10,000, the maximum penalty would be two to 10 years of imprisonment; if the offense involved between \$10,000 and \$99,999, the maximum penalty would be two to 20 years; \$100,000 or more, the penalty would be five to 99 years. This would allow the district attorneys to pursue criminal penalties that directly relate to the severity of the offense. Having strong criminal penalties within the Public Accountancy Act emphasizes the importance of pursuing prosecutions of criminal behavior by licensees and allows prosecutions for violations of the Act. These prosecutions would be brought by local district attorneys, while the Board's role would be to conduct investigations and assist in prosecutions. The Board would model its involvement after that of the State Securities Board in similar prosecutions.

Impact

Each of the recommended changes to the Board's enforcement authority would enable it to respond more appropriately to violations of the Public Accountancy Act, add further deterrence to violations, and further the agency's mission of protecting the public. The recommendation to increase the criminal penalty in the Act would subject licensees to a more appropriate penalty for major violations of the public trust than is currently in the Act. Increasing the maximum administrative penalty amount will allow the Board to match penalties to the degree of harm created by violations. Authorizing the Board to order licensees to pay restitution will allow consumers to more easily recoup their losses from accountants who do not fulfill the terms of their contracts. The recommendation to allow the Board to issue summary suspension orders is designed to quickly stop licensees from harming the public, while permitting an adequate appeals process. Clarifying the Board's subpoena authority will improve its ability to collect needed investigatory information. The recommendation to permit the Board to share investigatory information will assist the Board with multijurisdictional investigations.

Fiscal Implication

These recommendations will not have a fiscal impact to the State. The Board may incur some costs as a result of increased enforcement efforts. However, these costs can be recovered by the Board through its flexibility as part of the Self-Directed, Semi-Independent Licensing Agency Pilot Project.

¹ Texas State Board of Public Accountancy, "Annual Financial Report" (Austin, Texas, November 21, 1997), pp. 36-37; Texas State Board of Public Accountancy, "Annual Financial Report" (Austin, Texas, November 20, 1998), p. 40; Texas State Board of Public Accountancy, "Annual Financial Report" (Austin, Texas, November 20, 1999), p. 38; Texas State Board of Public Accountancy, "Annual Financial Report" (Austin, Texas, November 20, 2000), p. 38; Texas State Board of Public Accountancy, "Annual Financial Report" (Austin, Texas, November 20, 2001), p. 29.

² "Corporate Confidence Crisis, Primer: Enron's Downfall," *Washingtonpost.com* (July 10, 2002). Online. Available: www.washingtonpost.com/wp-dyn/business/specials/energy/enron/ Accessed: September 10, 2002.

³ "Arthur Andersen's license revoked in Texas," Texas State Board of Public Accountancy, August 16, 2002 (press release).

⁴ "WorldCom: Why it matters," *BBC News World Edition* (June 26, 2002). Online. Available: news.bbc.co.uk/2/hi/business/2066959.stm Accessed: September 10, 2002.

⁵ "WorldCom Announces Additional Changes to Reported Income for Prior Periods," WorldCom, August 8, 2002 (press release). Online. Available: www1.worldcom.com/us/news/ Accessed: September 10, 2002.

⁶ The Public Accountancy Act formerly contained a provision authorizing the Board to issue subpoenas. According to Legislative Council staff, the provision was removed when the Act was recodified in 1999, because it was duplicative of Chapter 2001, Government Code, relating to procedures to be used by a state agency in taking disciplinary action against a license holder. Although recodification was not intended to make any substantive changes to the Accountancy Act, it provided subpoena authority only in contested cases.

Issue 2

The Board Benefits From the Service of Non-Board Members on Its Committees, but This Practice Is Not Authorized.

Summary

Key Recommendations

- Authorize the appointment of non-Board members to Board enforcement committees.
- Require non-Board members appointed to Board committees to meet the statutory qualifications of Board members and to file financial disclosure statements.
- Prohibit the Board from appointing non-Board members to Board policymaking committees.

Key Findings

- Although the Board has benefitted from the use of non-Board members in working committees, the statute does not specifically allow this practice for enforcement committees.
- Non-Board members serving on working committees may have undisclosed interests in matters before the committees.
- The Board's Rules committee represents an inappropriate delegation of policymaking authority to non-Board members.

Conclusion

The Board has created 11 Board committees to assist in administering the Public Accountancy Act. These committees can be divided into two categories: working committees that carry out the functions of the Board, such as considering enforcement actions or overseeing the peer review process, and policymaking committees that set the direction of the Board and write rules. Because the committees are composed of both Board members and industry representatives, they are neither true advisory committees nor Board committees.

The Sunset review assessed whether the Board has inappropriately delegated its authority to non-Board members. The review found that the Board's committee structure allows the Board to access needed technical assistance in its working committees, but that the statute does not authorize the Board to use non-Board members in enforcement committees. In addition, this technical expertise may be provided by individuals who may have an undisclosed interest in matters coming before them because of their close ties to the accounting profession. The review also found that the Board has delegated policymaking authority to nonmembers serving on the Rules committee in a way that the Legislature has generally acted to avoid. The review concluded that the Board should be permitted to use nonmembers in its enforcement committees, all non-Board members of committees should disclose their financial interests and meet the same qualifications test as Board members, and the Board should not have nonmembers on its policymaking committees.

| Texas State Board of Public Accountancy Committees | | |
|---|---|---|
| Committee | Composition | Function |
| Behavioral Enforcement | 9 Members: 3 Board CPAs 2 Board Public Members 4 Non-Board CPAs | Reviews complaints for violations by licensees, recommends dispositions, and follows up on Board orders to licensees. |
| Continuing Professional Education | 7 Members: 2 Board CPAs 2 Board Public Members 3 Non-Board CPAs | Makes recommendations on continuing professional education program; investigates sponsor compliance with agreements; and evaluates facilities, course content, and presenters. |
| Executive | 5 Members: 4 Board CPAs 1 Board Public Member | Makes recommendations concerning litigation, changes in rules of professional conduct, and statutory amendments. Composed of all Board officers, committee may act on behalf of the full Board in emergencies. |
| Licensing | 5 Members: 1 Board CPA 3 Board Public Members 1 Non-Board Public Member | Makes recommendations on applications for certification, registration, licensure, and reinstatement. |
| Major Case Enforcement | 9 Members: 4 Board CPAs 1 Board Public Member 4 Non-Board CPAs | Makes recommendations regarding litigation and major cases. Committee may act on the Board's behalf when disclosure of facts to the Board could jeopardize the Board's objectivity. |
| Peer Assistance Oversight | 4 Members: 1 Board CPA 3 Non-Board CPAs | Oversees peer assistance program administered by the Texas Society of Certified Public Accountants. Makes recommendations to Board and TSCPA, and refers cases to other Board committees for disciplinary or remedial action. |
| Qualifications | 6 Members: 2 Board CPAs 2 Board Public Members 2 Non-Board CPAs | Makes recommendations on educational and work experience qualifications of applicants; administration and security of the Uniform Certified Public Accountant Examination; and professional competency of applicants for reciprocal CPA certificates. |
| Peer Review | 8 Members: 2 Board CPAs 2 Board Public Members 4 Non-Board CPAs | Reviews public reports filed with the State by firms engaged in the practice of public accountancy, and refers substandard reports to the Technical Standards Review committee. |
| Regulatory Compliance | 5 Members: 5 Board CPAs | Represents Board to legislative committees and makes recommendations on legislative oversight of budgets and performance measures, and changes in legislation. |
| Rules | 9 Members: 4 Board CPAs 1 Board Public Member 4 Non-Board CPAs | Makes recommendations regarding Board rules. |
| Technical Standards Review | 8 Members: 4 Board CPAs 1 Board Public Member 3 Non-Board CPAs | Studies complaints involving violations of technical standards, recommends dispositions, and follows up on Board orders to ensure compliance. |

committees. Attorney General opinions have concluded that committees whose recommendations are rubber-stamped by their boards are, in fact, exercising the power of the board.²

The Board's Rules committee represents an inappropriate delegation of policymaking authority to non-Board members.

- The Board committee structure places non-Board members in the position of exercising policymaking authority that is usually reserved for appointed Board members. Three of the Board's 11 committees are policymaking committees: Executive, Regulatory Compliance, and Rules. The Board itself has recognized that non-Board members should not sit on two of these committees, although it has made outside appointments to the Rules committee. The Rules committee drafts rules for adoption by the Board, even though rulemaking is an authority that the Legislature has assigned only to policymaking bodies.

In addition to the service of non-Board industry members on the Rules committee, the Board recently undertook a process that further increased the opportunity for industry input while weakening the input of appointed Board members and the public. Following the recodification of the Public Accountancy Act in 2001, the Board began a major revision of its rules. The Board was assisted in this process by a joint committee between the Board and the Texas Society of CPAs. This joint committee did not have any public members and constituted a quorum of the Board's Rules committee, which later recommended that the Board adopt the revised rules, as it did in September 2001.

- In the past, the Legislature has acted to remove the undue influence of industry representatives from the Board's policymaking decisions. For example, in 1979, the Legislature moved to ensure that the Board has the sole power to promulgate rules by abolishing the Board's practice of permitting licensees to vote on changes in Rules of Professional Conduct.³ The Legislature has also acted twice to increase public representation on the Board. In 1989, the Legislature added three public members to the, then, 12-member board to create a 15-member board. In 1991, the Legislature increased the public membership to five of the 15 members.

Non-Board members of committees exercise policymaking authority usually reserved for appointed Board members.

Fiscal Implication

These recommendations would not have a fiscal impact to the State. Costs associated with any additional workload for Board members would be paid by the Board from its operating funds. As a pilot project agency, the Board maintains its funds outside the Treasury, not subject to the appropriations process.

¹ Letter from Texas State Board of Public Accountancy General Counsel, Amanda G. Birrell, to Sunset Commission Director, Joey Longley, October 8, 2002.

² Op. Tex. Att'y Gen JC-0060, LO 97-017, JM-1072.

³ Texas State Board of Public Accountancy, Self Evaluation Report to the Sunset Commission, September, 2001, p. 7. The change was also a result of questions raised by the U.S. Department of Justice.

Issue 3

Key Elements of the Public Accountancy Act Do Not Conform to Commonly Applied Occupational Licensing Practices.

Summary

Key Recommendations

- Require the Board to define which misdemeanor convictions disqualify an applicant from certification in the standard manner defined in the Occupations Code.
- Authorize the Board to delegate the collection of Uniform CPA Examination fees.
- Require Board members to recuse themselves from voting on disciplinary actions when they serve on the respective enforcement committees.
- Require the Board to make detailed information about disciplinary actions available to the public.

Key Findings

- Licensing provisions of the Board's statute do not follow model licensing practices and could negatively affect the fair treatment of licensees and consumer protection.
- Nonstandard enforcement provisions of the Board's statute could reduce the agency's effectiveness in protecting consumers.
- Certain administrative practices could reduce the Board's protection of the public or its ability to adapt to major change.

Conclusion

Various licensing and enforcement processes set up in the Board's statute and in its management practices do not match model licensing standards that Sunset staff has developed from experience gained through more than 70 occupational licensing reviews in 25 years. The Sunset review identified these recommendations by comparing the Board's programs and statutes against these licensing standards to identify unwarranted variations and to recommend changes to bring them in line with the model standards. In some cases, statutory vagueness could mislead certificate applicants or fail to prevent a conflict of interest in processing disciplinary actions. Other problems could prevent the proper allocation of exam fees, or inhibit the public's ability to learn more about disciplinary actions or the accountancy profession in general.

- In reviewing licensing programs, the Sunset staff has documented themes and trends to guide reviews of occupational licensing agencies. These observations are not intended for blanket application to all licensing agencies but provide a model framework for evaluating a licensing program. Although the Board participates in the Pilot Project, its licensing and enforcement functions should still follow these standard procedures. The following material describes how making the Board's statutes conform with these standards would help the agency.

Although the Board participates in the Pilot Project, its licensing and enforcement functions should still follow standard procedures.

Licensing provisions of the Board's statute do not follow model licensing practices and could negatively affect the fair treatment of licensees and consumer protection.

- *Criminal convictions.* State law provides a general standard to guide licensing agencies in determining which crimes should affect licensure in a given profession. This law, Chapter 53 of the Occupations Code, "Consequences of Criminal Conviction," takes effect when individual licensing statutes are silent on the relationship of crime to licensure. Basically, it provides that a criminal conviction, including one for misdemeanors, affects qualifications for licensure when the crime is related to the profession, according to guidelines developed by the agency and published in the Texas Register. By following these guidelines, an agency may disqualify a person from receiving a license or deny the opportunity to take a licensing exam.

Texas' Public Accountancy Act and Board rules do not adequately specify the crimes that would disqualify a person from entering the accounting profession. The Act says that an applicant must be of "good moral character as demonstrated by a lack of history of dishonest or felonious acts." In addition, the Board may deny an individual's application to take the CPA exam because of a conviction or deferred adjudication for a felony offense. In practice, the Board does not advance the application of an individual who has committed a felony offense, subject to a hearing at the State Office of Administrative Hearings. The Board also looks at applicants who have misdemeanor convictions on a case-by-case basis, but has not produced a list of misdemeanors that relate directly to the practice of accountancy. Although the Board has an extended precertification process, the lack of clarity in the statute and rules could lead applicants with criminal convictions to expend a lot of time and energy futilely trying to qualify for a certificate.

Neither the statute nor Board rules list the crimes that would disqualify a person from entering the accounting profession.

- *Test administration.* Agencies conducting examinations should maintain clear guidelines, procedures, and rules governing the entire testing process – from the security at test sites to the manner in which the Board administers test fees.

The Board maintains a Web site that offers a range of information for CPAs, such as application forms, press releases, and online versions of its newsletters. Most of the information, however, is not geared toward the general public but to CPAs. The site does not easily provide a way for consumers to get information about past disciplinary actions against licensees. In addition, the Board does not maintain descriptive outcome data differentiating administrative acts from disciplinary actions, which would better illustrate the level of serious accountant misconduct in Texas.

The Board's Web site does not easily provide a way for consumers to get information about past disciplinary actions against licensees.

Recommendation

Change in Statute

3.1 Require the Board to define which misdemeanor convictions disqualify an applicant from certification in the standard manner defined in the Occupations Code.

This recommendation would require the Board to apply the process in Occupations Code, Chapter 53, to define which criminal convictions disqualify an applicant from licensure as a public accountant. Current statutory provisions on good moral character demonstrated by a lack of dishonest or felonious acts would be replaced with a reference to Chapter 53 and a clear statement excluding felons from licensure. Based on the process required in this Chapter, the Board would create a list of misdemeanors with explanations on how a particular crime relates to the CPA license. The resulting list of crimes would be published in rule so that interested individuals would be able to determine their ability to become a CPA before beginning a period of study for the profession. In addition, the Board would publish a statement explaining the process it would use to determine which misdemeanors committed in other states would prevent licensing in Texas.

3.2 Authorize the Board to delegate the collection of Uniform CPA Examination fees.

Under this recommendation, the current statutory language requiring the Board to collect examination fees would be modified to include specific authority allowing third parties to collect exam fees on behalf of the Board.

3.3 Require Board members to recuse themselves from voting on disciplinary actions when they serve on the respective enforcement committees.

This recommendation would create a clear separation between the Board's investigative and final disciplinary action functions. Board members would be required to clearly announce their recusal from specific votes. Requiring the Board to adopt ethical rules and ex parte communications rules would ensure that future boards continue to abide by these policies.

| Benefits of Recommendations | | | | |
|--|--|-----------------------------------|-----------------------------|-------------------------------|
| Recommendation | Benefit | | | |
| | Efficiency from Standardization | Administrative Flexibility | Fairness to Licensee | Protection of Consumer |
| Statutory | | | | |
| 3.1 Define which misdemeanors disqualify CPA candidates. | ✓ | | ✓ | ✓ |
| 3.2 Authorize Board to delegate collection of exam fees. | ✓ | ✓ | | |
| 3.3 Adopt rules on recusal. | | | ✓ | ✓ |
| Management | | | | |
| 3.4 Post more information on disciplinary actions. | ✓ | | ✓ | ✓ |

Fiscal Implication

These recommendations would not have a significant fiscal impact to the State. Because the Board participates in the Self-Directed, Semi-Independent Licensing Agency Pilot Project and its funds are not part of the appropriations process, any fiscal savings or cost would not accrue to the General Revenue Fund. These recommendations would also not have a significant fiscal affect on the Board because they do not require the Board to expend additional resources. The Board may need to devote more staff time to improving its Web site, but this should be only a short-term investment. Permitting licensees to pay the national testing service for examinations directly will not result in a loss of funds to the Board because any loss of interest income will be offset by decreased administrative expense.

Issue 4

Texas Has a Continuing Need for the Texas State Board of Public Accountancy.

Summary

Key Recommendation

- Continue the Texas State Board of Public Accountancy for 12 years.

Key Findings

- Texas has a continuing interest in regulating the practice of public accountancy.
- The Board functions effectively in its role of regulating public accountancy.
- No benefit would result from changing the agency structure or having any other federal or state agency perform the Board's functions.
- Most other states use a separate licensing agency to oversee the practice of public accountancy.

Conclusion

The Board licenses individual Certified Public Accountants and accounting firms. While the accounting standards by which CPAs and firms must operate are established by national accounting organizations, the Board acts to license CPAs and firms and enforce the Public Accountancy Act in Texas. Because the practice of accountancy affects the business climate in the state, and members of the public are unable to independently determine the competency of an accountant, the Board's regulatory functions continue to be needed.

The Sunset review assessed the overall need for a separate Board to regulate accountancy in Texas. The review determined that the Board is functioning well as a stand-alone agency and should continue as currently organized. Although the Board needs improvements that are discussed elsewhere in this report, the Board has shown itself to be an effective regulator and should be continued for the standard 12 years.

examination system. The new system, developed through efforts of the Board, the American Institute of Certified Public Accountants, the National Association of State Boards of Accountancy, and a private testing firm, will allow candidates to take the exam at 20 sites throughout the state. Test candidates will receive results within three weeks, as compared to the current 13 weeks, and will have greater flexibility on which days to take the test.

- The Board oversees a large number of licensees – 67,500 considering both firms and individuals. In maintaining this base of licenses, the Board has effectively automated many of its functions. The Board uses an annual license renewal system that is based on the licensee's birthday. At the time of renewal, licensing staff ensure compliance with Board rules on continuing education and previous enforcement actions. Many firms are also subject to the Board's rules regarding peer review. This process is intended to ensure that firms are complying with professional accounting standards and requires that firms, performing auditing services, be reviewed by another accounting firm every three years.
- While this report contains recommendations to improve the Board's enforcement of the Act, the Board has been generally effective in this regard. In fiscal year 2001, the Board received or initiated 4,406 complaints. Although the majority of the complaints concerned violations of the Act or rules related to minimum licensing qualifications, such as failure to complete continuing education requirements, 387 of the complaints involved serious violations, such as incompetence or discreditable acts. The Board resolves these complaints relatively quickly; the average processing time for licensing violations was 4.5 months, while the more serious disciplinary cases took an average of 5.9 months.

No benefit would result from changing the agency structure or having any other federal or state agency perform the Board's functions.

- The regulation of public accountancy is largely performed by the states. However, in recent years, the federal government has become more involved in overseeing the large accounting firms that audit nationally traded corporations. This effort has been assigned to the federal Securities and Exchange Commission and was recently modified by the accounting reform and investor protection act, known as the Sarbanes-Oxley Act. While this legislation dramatically changes how CPA firms that provide financial services to publicly held companies perform their duties, it will not greatly affect the majority of CPAs or firms operating in Texas. Although, through this bill, the federal government is

The Board licenses 67,500 CPAs and accounting firms.

Public accountancy is primarily regulated by the states, although the federal government is becoming more involved in overseeing large accountancy firms that audit publicly traded corporations.

Recommendation

Change in Statute

4.1 Continue the Texas State Board of Public Accountancy for 12 years.

Impact

This recommendation would continue the Board for the standard 12-year period.

Fiscal Implication

Because the Board currently participates in the Self-Directed, Semi-Independent Licensing Agency Pilot Project and lies outside the appropriations process, continuing the Board will have no fiscal impact to the State. Similarly, should the Board be brought back under the legislative appropriations process, the Board would be supported by licensing fees paid into the General Revenue Fund, and therefore have a revenue-neutral impact to the State.

ACROSS-THE-BOARD RECOMMENDATIONS

| Texas State Board of Public Accountancy | |
|--|---|
| Recommendations | Across-the-Board Provisions |
| | A. GENERAL |
| Already in Statute | 1. Require at least one-third public membership on state agency policymaking bodies. |
| Update | 2. Require specific provisions relating to conflicts of interest. |
| Already in Statute | 3. Require that appointment to the policymaking body be made without regard to the appointee's race, color, disability, sex, religion, age, or national origin. |
| Already in Statute | 4. Provide for the Governor to designate the presiding officer of a state agency's policymaking body. |
| Update | 5. Specify grounds for removal of a member of the policymaking body. |
| Already in Statute | 6. Require that information on standards of conduct be provided to members of policymaking bodies and agency employees. |
| Apply | 7. Require training for members of policymaking bodies. |
| Update | 8. Require the agency's policymaking body to develop and implement policies that clearly separate the functions of the policymaking body and the agency staff. |
| Already in Statute | 9. Provide for public testimony at meetings of the policymaking body. |
| Update | 10. Require information to be maintained on complaints. |
| Update | 11. Require development of an equal employment opportunity policy. |
| Apply | 12. Require information and training on the State Employee Incentive Program. |

AGENCY INFORMATION

Agency Information

Agency at a Glance

The Texas State Board of Public Accountancy (Board) regulates the accounting profession in an effort to provide competent, objective accountants and auditors for Texas' financial markets, banking systems, and businesses. The Board's major functions include:

- administering the Uniform Certified Public Accountant (CPA) Examination;
- certifying and licensing accountants who have passed the Exam and met all requirements;
- registering firms engaged in the practice of public accountancy; and
- enforcing provisions of the Public Accountancy Act, and taking disciplinary action when necessary.

Key Facts

- **Funding.** In Fiscal Year 2001 (FY 2001), the Board operated with an annual budget of about \$2.7 million, all of which was derived from examination and licensing fees collected from the accounting profession.
- **Staffing.** The Board has 43 full-time equivalent (FTEs) positions, all based in Austin.
- **Licensing.** The Board regulates about 57,400 CPAs and 10,000 accounting firms. In FY 2001, about 5,700 applicants took the CPA exam and about 1,400 passed the exam and were eligible to apply for a license.
- **Enforcement.** The Board opened 4,406 complaints in FY 2001. In that same year, the Board closed 4,416 complaints with an average processing time of 4.7 months.
- **Self-Directed, Semi-Independent Licensing Agency Status.** The Legislature included the Board, along with the Texas Board of Professional Engineers and the Texas Board of Architectural Examiners, in the Self-Directed, Semi-Independent Licensing Agency Pilot Project (Pilot Project). Beginning in September 2001, as part of the Pilot Project, the Board was removed from the legislative appropriations process. The Board now collects its

Texas State Board of Public Accountancy on the Internet
Information about the Board, including its statutes, rules, newsletters, and administrative actions taken against licensees, is available on the Internet at www.tsbpa.state.tx.us.

| Texas State Board of Public Accountancy | | | |
|---|-----------------|------------|---------------|
| Name | Residence | Expiration | Qualification |
| K. Michael Conaway, CPA (Presiding Officer) | Midland | 2001 | CPA |
| Billy M. Atkinson, CPA | Sugarland | 2005 | CPA |
| Marcela E. Donadio, CPA | Houston | 2007 | CPA |
| Kimberly M. Dryden | Amarillo | 2005 | Public Member |
| April L. Eyeington, CPA | College Station | 2005 | CPA |
| Edwardo B. Franco | Houston | 2005 | Public Member |
| Gwen B. Gilbert, CPA | Dallas | 2003 | CPA |
| Rebecca B. Junker, CPA | Richmond | 2003 | CPA |
| Carlos Madrid, Jr. | San Antonio | 2007 | Public Member |
| Robert C. Mann, CPA | Fort Worth | 2005 | CPA |
| Reagan S. McCoy, Esq. | San Antonio | 2003 | Public Member |
| Catherine J. Rodewald | Frisco | 2007 | Public Member |
| Edward L. Summers, Ph.D., CPA | Austin | 2003 | CPA |
| Melanie G. Thompson, CPA | Canyon Lake | 2007 | CPA |
| Vacancy | | 2003 | CPA |

by the Presiding Officer, and contain both Board members and non-members. The committees do not have binding authority, but make recommendations to the full Board. The textbox, *Texas State Board of Public Accountancy Committees*, lists the committees.

Staff

At the end of FY 2001, the agency had a staff of 39 employees. The Executive Director oversees the agency's operations, and the chart, *Texas State Board of Public Accountancy Organizational Chart*, depicts the organization of the agency.

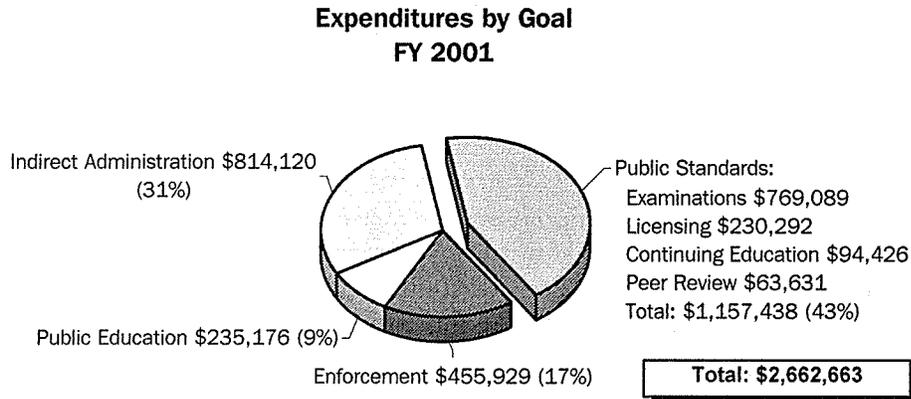
A comparison of the agency's workforce composition to the minority civilian labor force over the past four years is shown in Appendix A, *Equal Employment Opportunity Statistics – Fiscal Years 1998-2001*. The Board has generally met the civilian labor force guidelines for most job categories.

Texas State Board of Public Accountancy Committees

Behavioral Enforcement
 Continuing Professional Education
 Executive
 Licensing
 Major Case Enforcement
 Peer Assistance Oversight
 Qualifications
 Peer Review
 Regulatory Compliance
 Rules
 Technical Standards Review

Expenditures

The pie chart, *Expenditures by Goal*, reflects the Board's expenditures for FY 2001, approximately \$2.7 million. The Board spent 43 percent, or more than \$1.1 million of its total budget on licensing and examination costs, including continuing education and peer review costs. The next highest expenditure was indirect administrative costs.



In addition to the expenditures shown above, the Legislature has directed the Board, and other licensing agencies that pay the costs of regulatory programs with fees imposed upon licensees, to cover direct and indirect costs appropriated to other agencies for services provided. Examples of these costs include rent and utilities paid by the State Building and Procurement Commission, security provided by the Department of Public Safety, and accounting services provided by the Comptroller of Public Accounts. For FY 2001, these costs totaled \$663,289. In FY 2002, due to the Board's participation in the Pilot Project, these funds will no longer be appropriated. The Board must pay the fees directly to the agency providing the services.

The Board's projected expenditures for FY 2002 are estimated at \$3.3 million, approximately \$630,000 more than FY 2001 expenditures. The budget increase is mainly due to increased spending in the public standards and enforcement goals. The Board estimates spending \$265,000 more for the licensing and examination program and \$260,000 more for enforcement than it did in FY 2001. The increase is due to anticipated increases in the examination grading fee, number of exam candidates, and major case enforcement activity. In addition to the above expenditures, beginning in FY 2002, the Legislature required the Board to submit an annual lump-sum payment to the General Revenue Fund. Because licensing agencies typically collect more funds than they expend, the Legislature required an annual payment from each agency participating in the Pilot Project in order to avoid a loss of funds to the State Treasury. The amount of the payment varies by agency. For the Board of Accountancy, that amount is \$500,000.

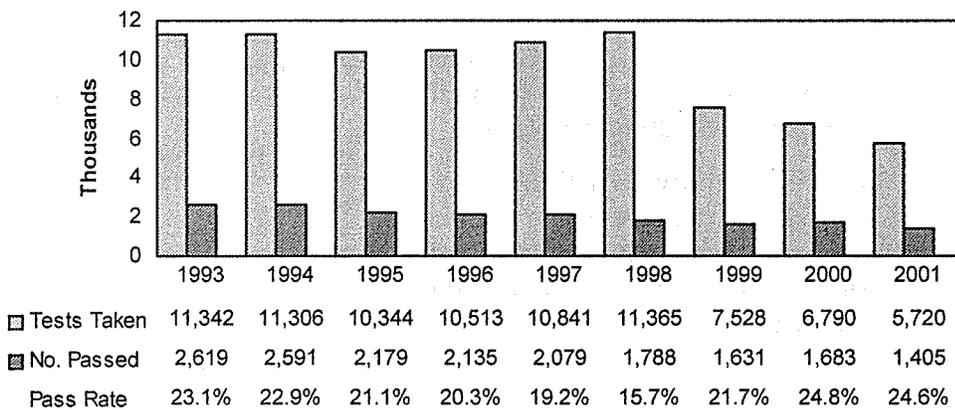
As of FY 2002, the Board operates outside the state budget process.

One of the program’s main duties is administering the Uniform CPA Examination. The AICPA, a national organization, writes and grades the two-day test, while the Board is responsible for managing the testing site. Staff administer the exam in May and November in six cities: Austin, El Paso, Fort Worth, Houston, Lubbock, and San Antonio. Board members proctor each test site to assist with security and address any irregularities that might occur. The exam cost \$354,609 to administer in FY 2001. The Board also paid AICPA \$414,480 to grade the exams. These costs were recovered by fees charged to applicants.

About 6,000 applicants take the CPA exam each year, with an average pass rate of 25 percent for all four parts.

The Board disseminates information about the four-part Exam through a newsletter, *Candidate Chronicle*. Since 1999, an average of 6,000 applicants have taken the exam each year, with an average pass rate of 25 percent for all four parts. The chart, *Exam Candidates by Fiscal Year*, shows how many candidates have attempted the exam since 1993, and how many passed. The Board believes that the drop in the number of candidates for 1999 was due to the increase in the education requirement qualification from 120 to 150 college credit hours. This increased qualification for CPA candidates also had the effect of increasing exam pass rates by nine percent since the change became effective.

Exam Candidates by Fiscal Year



In May 2004, the examination process will change from a paper-based format to a computerized system. The AICPA, the National Association of State Boards of Accountancy (NASBA) and Prometric, a private testing firm, have entered into an agreement to provide the Uniform Exam electronically at private testing centers, including about 20 sites in Texas. Computer-based testing permits AICPA to grade the tests within three weeks, as opposed to 13 weeks in the current system. Test candidates also will have more freedom on which days to take the test. AICPA will continue writing and grading the test, but the Board will no longer manage the test locations or security.

In 2004, the Board will convert its paper CPA test to a computerized examination system.

if they are based out of state and temporarily practicing in Texas. Firms, however, face other requirements. Most importantly, they must have a peer review every three years if they conduct attest, accounting, or auditing services. The textbox, *Qualifying Services*, describes the types of services requiring peer review. Board staff monitor the reviews and collect data on firms' performance, but the Texas Society of Certified Public Accountants (TSCPA), the AICPA Division for CPA Firms Securities and Exchange Commission Practice Section (SECPS), or the National Conference of CPA Practitioners (NCCPAP) handles the logistics and field work of a peer review. To keep firms abreast of peer review rules, procedures and other issues, the TSCPA produces a quarterly newsletter, *Checkpoint*, and provides information on its Web site for firms being reviewed and those conducting reviews.²

Qualifying Services

Licensed firms must undergo peer review if they perform:

- audits
- reviews
- compilations
- forecasts
- projections
- other special reports

The Board's staff offers one-on-one guidance on licensing and peer review processes and publishes the *Texas State Board Report*, which contains information about Board rules, summaries of disciplinary actions, and other information of interest to Texas CPAs.³

Enforcement

The Board enforces the Act by investigating and prosecuting complaints filed against licensees and non-licensees. The enforcement staff has authority to open a case, but only the Board has authority to dismiss a case or impose sanctions. The Board takes enforcement actions against persons who commit violations such as fraud, dishonesty, or gross negligence while performing accountancy services. For a list of possible violations, see the textbox *Grounds for Disciplinary Action*.

Grounds for Disciplinary Action

- Use of fraud or deceit in obtaining a certificate or license
- Failure to obtain or renew a license
- Violating rules of professional conduct, professional standards, the Public Accountancy Act, or a Board order
- Disciplinary action by another state or federal agency
- Conviction of a felony or any offense involving fraud or dishonesty
- Conduct indicating lack of fitness to serve the public
- Fraud, dishonesty, or gross negligence in the performance of services
- Use of the CPA title without a license

The enforcement staff separates violations into two general categories – administrative and disciplinary. Administrative violations are generally initiated by the Board against licensees who fail to comply with licensing requirements, such as failure to pay the annual license fee, obtain CPE, or participate in peer review. If a licensee does not respond to the Board's request for information or fails to address the deficiency, the case is forwarded to the State Office of Administrative Hearings (SOAH) for a hearing before an administrative law judge. The results of the hearing are returned to the Board, which may then vote to accept, modify, or remand the decision.

Disciplinary violations are generally initiated by members of the public, other CPAs, or other state or federal agencies for alleged violations of the Rules of Professional Conduct. The enforcement staff conducts an initial investigation of the complaint and then forwards a summary of the information and relevant material to a Board

Because most of the complaints are administrative violations and later result in some form of dismissal, only a small percentage of cases require enforcement committee review. Of the cases closed in FY 2001, the majority of cases were dismissed because the licensee provided proof of CPE. Nevertheless, if the case resulted in a Board order, the Board imposes a \$100 penalty for the untimely filing of CPE. Also, consistent with the Public Accountancy Act, the Board imposes late fees upon CPAs who fail to timely renew their licenses. The table, *Complaint Dispositions*, provides a picture of the closed cases and the manner in which they were resolved. The average processing time for administrative complaints was 4.5 months; disciplinary cases took an average of 5.9 months.

The majority of complaints handled by the Board are for administrative violations, such as failure to report continuing education hours.

| Complaint Dispositions - FY 2001 | |
|---|-------------------|
| Disposition | Complaints Closed |
| Dismissed: | |
| Dismissed | 258 |
| Dismissed upon voluntary compliance | 788 |
| Dismissed with CPE | 2,356 |
| Dismissed - Other | 51 |
| Probation: | |
| Probation | 10 |
| Reprimand: | |
| Reprimand | 11 |
| Reprimand plus quality review, CPE, limitation on scope of practice, suspension, or probation | 6 |
| Limitations on Scope of Practice | 4 |
| Suspension ⁴ | 188 |
| Revocation ⁵ | 739 |
| Voluntary Surrenders - disciplinary | 5 |
| TOTAL⁶ | 4,416 |

¹ The total number of firms does not equal the number of practice units because some firms have more than one practice unit.

² TSCPA's Web site can be accessed at www.tscpa.org.

³ The Board has provided a limited number of *Texas State Board Report* issues on its Web site (www.tsbpa.state.tx.us).

⁴ A license suspension by the Board restricts the licensee from performing any services related to the practice of accountancy, including bookkeeping and tax preparation services, for up to five years.

⁵ License revocation restricts individuals from using the CPA designation or performing accountancy services which require a license, but allows them to perform services such as bookkeeping and tax preparation. The former licensee must file an application with the Board for consideration of license reinstatement.

⁶ The number of complaints closed in FY 2001 is greater than the number opened because some of the complaints were opened in previous years.

APPENDICES

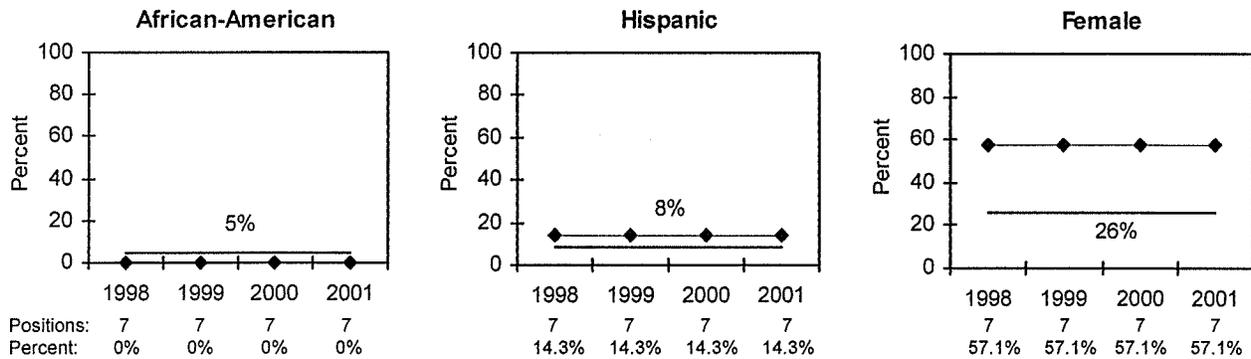
Appendix A

Equal Employment Opportunity Statistics

1998 to 2001

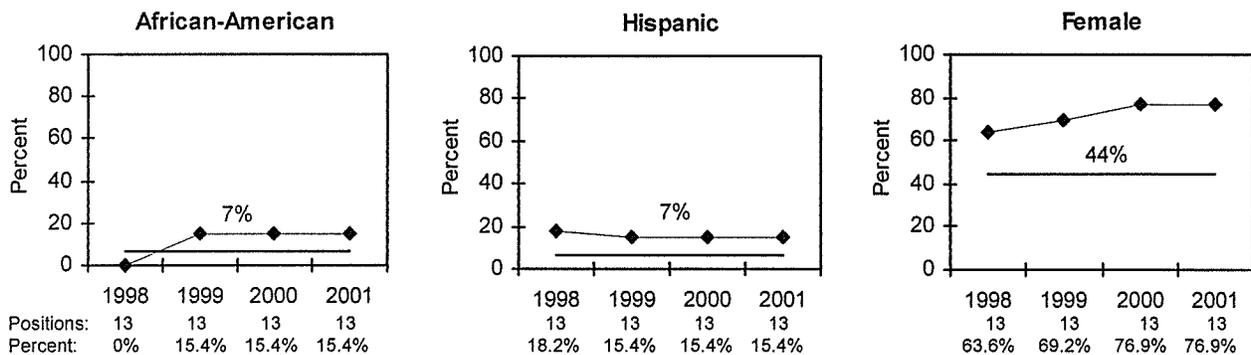
In accordance with the requirements of the Sunset Act, the following material shows trend information for the agency's employment of minorities and females in all applicable categories of the labor force.¹ The agency maintains and reports this information under guidelines established by the Texas Commission on Human Rights.² In the charts, the flat lines represent the percentages of the statewide civilian labor force for African-Americans, Hispanics, and Females. These percentages provide a yardstick for measuring agencies' performance in employing persons in each of these groups. The dashed lines represent the agency's actual employment percentages in each job category from 1998 to 2001. The agency does not employ persons in some job categories – protective services, skilled craft, and service/maintenance.

State Agency Administration



The agency has exceeded the state's civilian labor force guidelines for Hispanics and Female employment, but has lagged behind these guidelines for African-Americans.

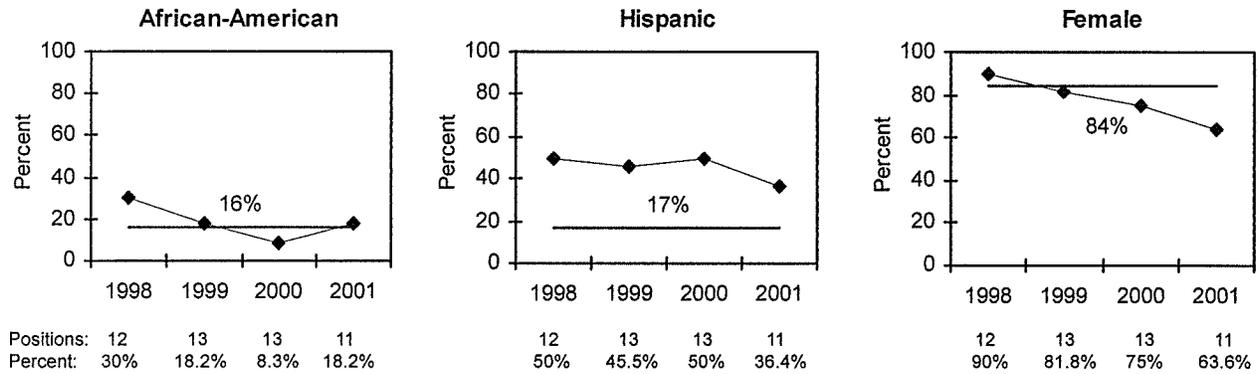
Professional



The agency has generally met or exceeded expectations for employment in the professional category.

Appendix A

Administrative Support



The agency greatly exceeded the State’s goal for Hispanic employment and generally met the goal for African-Americans. However, the agency has experienced difficulty in meeting hiring guidelines for Females in the administrative support category.

¹ Texas Government Code, sec. 325.011(9)(A).

² Texas Labor Code, ch. 21, sec. 21.501.

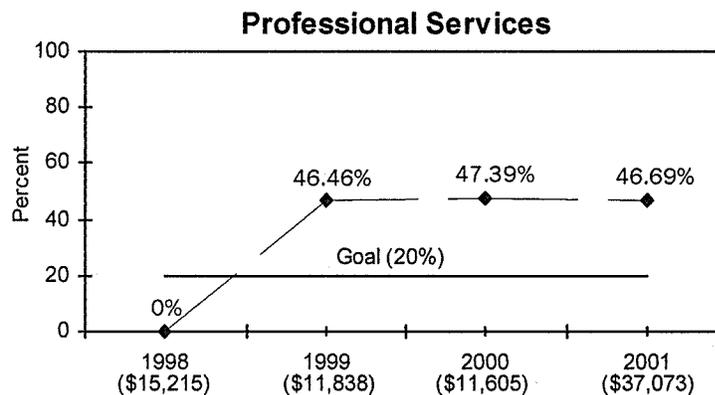
Appendix B

Historically Underutilized Businesses Statistics

1998 to 2001

The Legislature has encouraged state agencies to increase their use of Historically Underutilized Businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. The Legislature also requires the Sunset Commission to consider agencies' compliance with laws and rules regarding HUB use in its reviews.¹ The review of the Texas State Board of Public Accountancy revealed that the agency is not complying with all state requirements concerning HUB purchasing. Specifically, the agency has not adopted HUB rules, although the Board has published a HUB policy statement.

The following material shows trend information for the Texas State Board of Public Accountancy's use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in the Texas Building and Procurement Commission's statute.² In the charts, the flat lines represent the goal for HUB purchasing in each category, as established by the Texas Building and Procurement Commission. The dashed lines represent the percentage of agency spending with HUBs in each purchasing category from 1998 to 2001. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category. In each category, the Board has had some difficulty meeting the HUB purchasing goals.



The Board exceeded the state goal in three of the past four years.

Appendix C

Staff Review Activities

The Sunset staff engaged in the following activities during the review of the Texas State Board of Public Accountancy.

- Worked extensively with agency staff.
- Attended Board meetings and committee meetings. Interviewed and received written comments from past and current Board and non-Board members of Board committees.
- Met with, and received written comments from, professional associations representing accountancy and other interested parties.
- Met with, or received written comments from, university accounting professors, certified public accountants, and the public, regarding their ideas and opinions about the Board.
- Conducted phone interviews with representatives from professional liability insurance companies regarding claims against accounting firms.
- Met with, and visited the offices of, the Texas Society of Certified Public Accountants in Dallas to obtain information on the peer review program, and observe a Peer Review Report Committee meeting.
- Reviewed reports by the State Auditor's Office and General Accounting Office, and listened to an audio recording of a House Appropriations Committee meeting.
- Met with, or interviewed by phone, staff from the Legislative Budget Board, State Securities Board, Office of the Attorney General, Speaker's Office, State Auditor's Office, Texas Higher Education Coordinating Board, and Comptroller's Office.
- Reviewed Board documents including meeting minutes, press releases, agency contracts, reports, legislative reports, previous legislation and budgetary information.
- Reviewed statutes of Texas and other states, federal information, and Attorney General opinions.
- Researched and held phone interviews with other professional licensing agencies regarding the structure and requirements of programs with similar functions.
- Performed background and comparative research using the Internet, and reviewed literature on accountancy issues. Researched the functions of accountancy boards in other states and conducted phone interviews with agency representatives.

**SUNSET REVIEW OF THE
TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY**

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TEXAS BOARD OF ARCHITECTURAL EXAMINERS

SUNSET STAFF REPORT

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SUMMARY



Summary

Sunset Staff Report

Texas Board of Architectural Examiners

The responsibilities of the Texas Board of Architectural Examiners have grown significantly since the Legislature established the Board in 1937 to regulate the practice of architecture. The Legislature has added the regulation of landscape architects and interior designers to the Board's duties, and has increased the scope of the Board's regulatory authority over the three professions.

Today, the Board faces the challenge of effectively enforcing the Architecture, Landscape Architecture, and Interior Design Acts to meet its legislative mandate of protecting the public. While the Board has focused attention on enforcement, the program continues to be hampered by insufficient resources, a backlog of enforcement cases, and inconsistent application of penalties. In addition, the agency's efforts to register design firms provide little enforcement value and deplete the agency's limited resources. The Sunset review considered the Board's challenges with enforcement and is recommending a series of actions to improve the Board's efforts.

The Sunset staff review also considered the Board's special demands of enforcing three statutes, and determined that increased uniformity across the statutes would ease enforcement and administration.

Finally, Sunset staff considered whether the current stand-alone agency structure remains appropriate. Two previous Sunset reviews discussed combining the Board with other licensing agencies, but found no significant benefit to such action. Yet, crossover among the professions regulated by the Board and the practice of engineering, along with unclear statutes, may cause confusion over which professionals may work on certain projects. While no significant problems exist that would be solved by changing the agency structure, coordination with the Texas Board of Professional Engineers would better protect the public by resolving overlapping enforcement issues between the two Boards.

*The Sunset review
sought ways to help the
Board with its
enforcement challenges.*

A summary of the recommendations in this report is provided in the following material.

*For more information,
contact Amy Frost, (512)
463-1300. Sunset staff
reports are available online
at www.sunset.state.tx.us.*

action; conforming the statute with procedures of the State Office of Administrative Hearings; and ensuring that all disciplinary actions are made public.

- Change administrative aspects of the Board's activities by eliminating statutory fee caps, creating uniform consumer notifications procedures, and standardizing the powers, duties, and processes of the Board.

Issue 4 Texas Has a Continuing Need for the Texas Board of Architectural Examiners, but Could Benefit From Greater Coordination With the Texas Board of Professional Engineers.

Key Recommendations

- Continue the Texas Board of Architectural Examiners for 12 years.
- Require the Board to form a joint practice committee with the Texas Board of Professional Engineers.

Fiscal Implication Summary _____

These recommendations will not result in a fiscal impact to the State. The Board is a participant in the Self-Directed, Semi-Independent Licensing Agency Pilot Project, which tests the ability of certain agencies to effectively operate outside the legislative appropriations process. Because the Board has been removed from the appropriations process, any gains or losses implicated in these recommendations would not be reflected in the General Revenue Fund.

ISSUES / RECOMMENDATIONS

Issue 1

The Board's Enforcement Process Does Not Adequately Protect the Public.

Summary

Key Recommendations

- Increase the Board's enforcement authority by authorizing the issuance of cease and desist orders; increased administrative penalties; inclusion of fine amounts in the Board's penalty matrix; and the ability to require restitution as part of Board orders.
- Increase the Board's enforcement efforts by requiring the Board to direct additional resources toward enforcement activities; establish time lines for enforcement processes; consult with design professionals in complaint investigations; and develop a system of compliance checks of Board disciplinary orders.
- Improve the Board's ability to gain compliance with statutes by requiring the Board to increase outreach to licensees, the public, and individuals; provide an enforcement grace period after the establishment of new rules and laws; improve coordination with building officials; and provide information about state and federal accessibility laws on the Board's Web site.

Key Findings

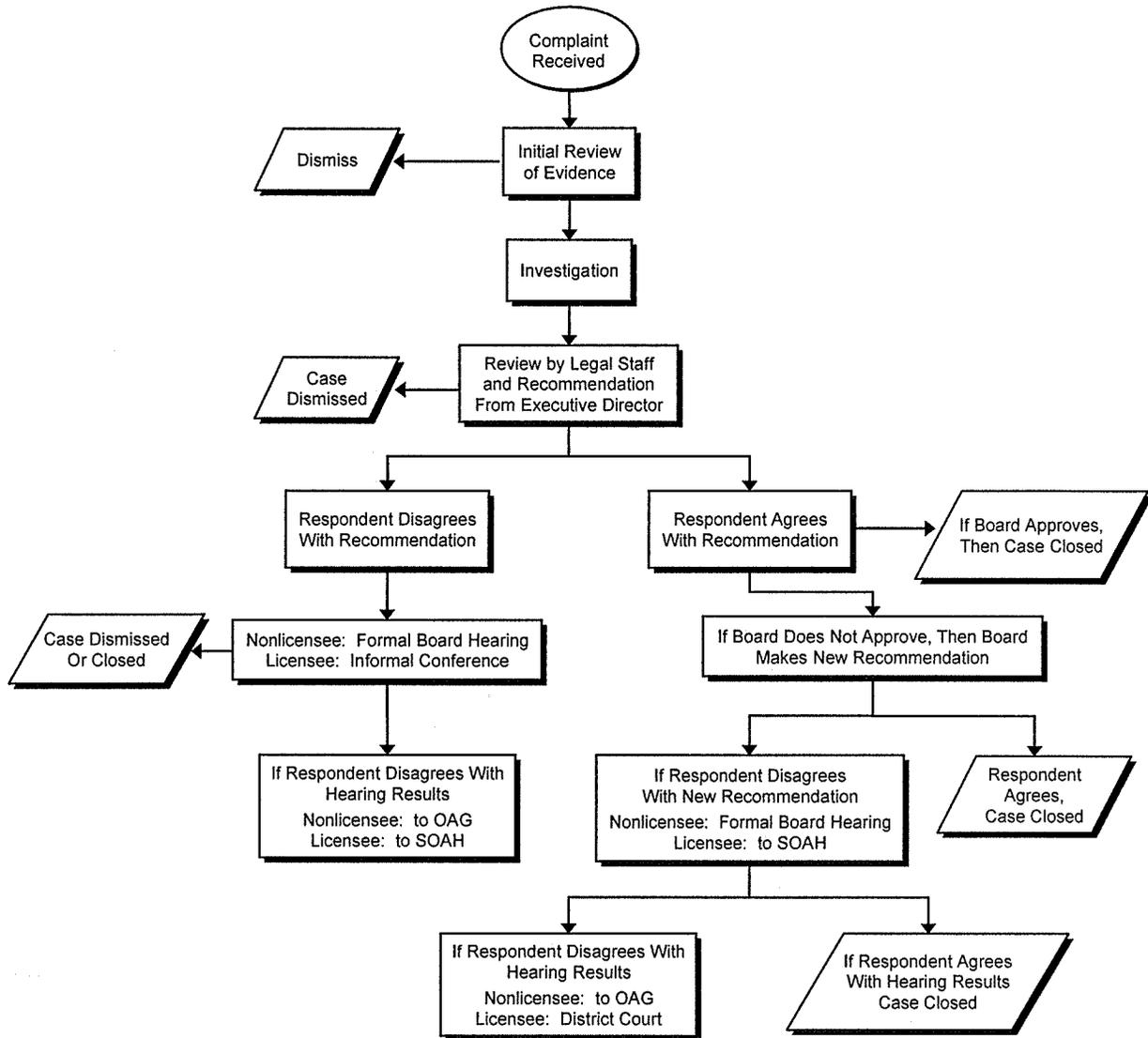
- The Board lacks the tools necessary to enforce the laws under its jurisdiction.
- The Board's current use of its resources limits the effectiveness of enforcement efforts and results in a backlog of cases.
- The Board has had difficulty determining penalties and sanctions.
- The Board fails to take advantage of opportunities to augment its enforcement program.

Conclusion

The enforcement of the Architecture, Landscape Architecture, and Interior Design Acts is a significant responsibility of the Board. Sunset staff evaluated the effectiveness of the Board's enforcement activities and concluded that the agency does not adequately enforce its laws and rules. Factors supporting this conclusion include a backlog of cases, a focus on minor infractions of law and rule, lack of follow-up activity to disciplinary actions, inconsistent application of administrative penalties and sanctions, and limited informational outreach to licensees and the public. The Board's lack of attention to these activities potentially erodes the overall strength of the enforcement program and sends a message that disciplinary action lacks importance.

Staff recommendations would strengthen the Board's enforcement authority, redirect resources to enforcement efforts, speed up the enforcement process, and increase outreach to licensees and other affected parties.

Complaint Process Texas Board of Architectural Examiners



- The Board does not direct adequate resources to its enforcement effort. In FY 2001, the agency spent \$251,763, about 16 percent of its \$1.6 million budget, on its enforcement program. The Board spent more than twice that amount on its examinations program, and three times that amount on its registration and renewal program. Of the agency's 21 full-time employees, only three are assigned to enforcement. The agency is in the process of a reorganization to better align staff with program needs. However, the agency needs to continue redirecting resources towards enforcement.
- No procedural time lines exist for the agency's enforcement process, contributing to lengthy investigations and lack of case prioritization. Currently, staff spend as much time as deemed necessary on each step of the enforcement process.⁵ Staff indicate that the investigation process and legal proceedings are quite time-consuming, but no specific guidelines are in place to reduce the time necessary to complete these steps. Board staff believe that current staffing levels prevent them from adopting and following time lines.⁶
- The Board appears to focus its enforcement efforts on minor infractions and title violations. Out of 216 cases in fiscal year 2001, 73 were for minor violations and 100 for title violations – more than three-fourths of all cases. Minor violations included filing incomplete renewal forms and failure to display license numbers in advertisements. The Board generally resolved these minor cases in one to three months. In addition, the Board spends significant time investigating simple cases of title violation that do not allege an actual practice violation. Industry representatives believe the agency focuses on these cases because they are easily and inexpensively prosecuted.⁷ The chart, *Enforcement Cases*, details the types of complaints the Board investigated during the past fiscal year.

In contrast, technically complex cases against practicing licensees and nonlicensees languish in the enforcement process. Eighteen such cases – opened in fiscal year 2001 and now more than one year old – remain unresolved. Agency staff cite a lack of enforcement staff and expert help of design professionals in investigations as key reasons for slow

The Board spends about 16 percent of its budget on enforcement.

| Enforcement Cases - FY 2001 | | | |
|-----------------------------|---|-----------------|--------|
| Violations | | Number of Cases | Totals |
| Serious | Aiding/Abetting Unlicensed Persons | 3 | 40 |
| | Negligent Practice | 1 | |
| | Unauthorized Practice | 16 | |
| | Unprofessional Conduct | 6 | |
| | Seal Violations | 12 | |
| | Submitting Incomplete Plans | 2 | |
| Moderate | Unauthorized Use of Title | 100 | 100 |
| Minor | Late Filing of Architectural Barrier Plans | 39 | 73 |
| | Failure to Display License Number in Advertisements | 6 | |
| | Incomplete Renewal Form | 23 | |
| | Other | 5 | |
| | Nonjurisdictional Complaints | 3 | 3 |
| Grand Total | | | 216 |

enforcement case outcomes. In citing these situations, Sunset staff is not substituting its judgment for that of the Board. However, the apparent inconsistencies do call the administrative fine determination process into question.

Sunset staff found an unusual disciplinary procedure against licensees who violated a new law. In fiscal year 2001, the agency initiated, and then dismissed, cases against 37 licensees who failed to submit architectural barrier plans to the Texas Department of Licensing and Regulation (TDLR) within a newly established five-day statutory period. Because licensees were confused about the new law, the Board allowed licensees to enter a no-contest plea and pay \$300 to defray the costs of investigation.¹⁰ In addition, the Board decided to dismiss the cases if a licensee did not violate the law within the next year. The Board's records now indicate that the cases were dismissed, even though some licensees were assessed a \$300 penalty.

The Board used an unusual disciplinary procedure against licensees who violated a confusing new law.

The Board fails to take advantage of opportunities to augment its enforcement program.

- The Board does not have an adequate outreach program for individuals who must follow the laws and rules enforced by the agency. All licensees still receive an annual newsletter, but the agency no longer includes a detailed explanation of new rules. The Board also discontinued its practice of notifying licensees of rule changes throughout the year, citing mailing expense. The agency does not use an e-mail network for inexpensive and timely distribution of information. Instead, the Board directs licensees to the agency Web site. Unfortunately, information can be difficult to find on the Web site, and unless the agency actively promotes the site, licensees may not use the site to keep informed. The agency's outreach problems are compounded by an outdated database system incapable of efficiently storing and distributing information.
- The Board believes that building officials need more information about Board rules and statutes, to prevent the approval of unsafe buildings and use of unauthorized plans. The textbox, *What Do Building Officials Do?*, describes building officials' jobs. Interviews with building officials throughout the state indicate that officials have little to no contact with the Board.¹¹ Not all officials interviewed receive the agency's annual newsletter. In addition, several officials state that industry organizations and city lobbyists provide more frequent updates of design profession policies. Most said that other state agencies they work with do a better job informing officials through the use of frequent mailings or e-mail notices. All officials interviewed hoped for more frequent rule and policy updates from the Board.

What Do Building Officials Do?

Building officials enforce municipal building codes. Duties include reviewing architectural plans, issuing building permits, and conducting building inspections. Building code organizations estimate that Texas has between 400 and 1,000 building officials.

licensees. Any restitution order would not include an estimation of other damages or harm. The restitution may be in lieu of, or in addition to, a separate Board order assessing an administrative penalty.

Management Action

1.5 Require the Board to direct additional resources toward enforcement activities.

This recommendation would help the Board improve its enforcement efforts without incurring extra costs. Directing more resources to enforcement could be accomplished as follows.

- Review enforcement staff tasks to determine which tasks would be more effectively performed by other agency staff. The discontinuation of the firm registration program, as described in Issue 2 of this report, would free up additional resources for enforcement activities.
- Prioritize travel for enforcement purposes.
- Continue efforts to redirect more of the agency's budget and full-time equivalents to benefit the agency's enforcement arm.

1.6 Require the Board to establish time lines for enforcement processes and a plan to resolve older cases.

This recommendation would direct the Board to resolve enforcement cases more quickly. Determining time limits for each step in the enforcement process – with the exception of the legal process – will help streamline the process and encourage better prioritization of cases. Inability of the Board to meet adopted time lines would not require case dismissal, but would indicate a need to redirect more resources to enforcement, as required in Recommendation 1.5. The Board would also be required to devise a plan to resolve all cases older than one year by January 1, 2004.

1.7 Require the Board to consult with design professionals in technically complex complaint investigations.

The Board should consult with architects, landscape architects, and interior designers when conducting investigations of technically complex enforcement cases. To develop a pool of consultants, the agency would recruit licensees in good standing with the Board. Recruitment would be accomplished through notices placed in the annual newsletter and recruitment-specific mailings, on the Board's Web site, and through use of an e-mail network. Any candidate chosen would be screened to ensure professional knowledge, lack of agency disciplinary actions, and a clean background check. The Board would direct staff to ensure that consultants would not assist in cases where they had a conflict of interest. Consultants would be immune from lawsuits and liability for services rendered to the Board in good faith. The consultants would be given continuing education credits as reimbursement for their efforts.

Impact

These recommended changes would strengthen the Board's enforcement process and increase protection of the public. Authorizing the Executive Director to issue cease and desist orders to individuals practicing without a license protects the public from poorly designed, and potentially dangerous, buildings. Increasing the maximum administrative penalty and including fine amounts in the Board's penalty matrix would discourage violation of statute and rules, while ensuring the consistent application of penalties and sanctions to all respondents. Checking compliance with Board orders, adopting a grace period after the establishment of new rules and laws, and improving outreach to individuals needing agency information would improve compliance with rules and laws, potentially reducing the number of enforcement cases. Other recommendations would streamline the Board's enforcement process and help resolve the case backlog.

Fiscal Implication

These recommendations will not result in a fiscal impact to the State. The Board is a participant in the Self-Directed, Semi-Independent Licensing Agency Pilot Project, which tests the ability of certain agencies to effectively operate outside the legislative appropriations process. Because the Board has been removed from the appropriations process, any gains or losses implicated in these recommendations would not be reflected in the General Revenue Fund.

The statutory recommendation to give the Executive Director cease and desist authority will result in some costs to the agency. However, costs cannot be estimated for this report, as the number of cases for which the Executive Director will choose to exercise this authority cannot be predicted. The recommendation to increase the maximum administrative penalty would have a positive impact for the agency, although expected revenue cannot be estimated. The number of cases, types of violations, and penalties assessed per violation cannot be predicted.

Directing more resources toward enforcement activities would not have a fiscal impact, as the recommendation proposes to redistribute existing resources, rather than add additional resources to enforcement functions. Additionally, discontinuing the firm registration program will direct an additional \$16,500 toward enforcement activities, as discussed in Issue 2.

Requiring the Board to establish enforcement time lines and provide for an enforcement grace period would have no fiscal impact to the agency or the State and could be accomplished with existing resources. Use of design professionals as consultants for enforcement investigations would have some costs. Costs cannot be estimated for this report, as costs would depend on the degree of effort and number of cases, but considerations would include reimbursement of travel, agency staff time, and materials necessary for performance of investigations. Performing compliance checks would cost the agency an estimated \$5,000 annually.

The recommendations to increase informational outreach to licensees, the public, and building officials would have some costs associated with the development of an e-mail network and improvement to the Board's Web site.

Issue 2

The Board's Registration of Firms Is Not the Best Use of Limited Agency Resources.

Summary

Key Recommendations

- Clarify that the Board does not have authority to require firms to register.
- Direct the Board to reallocate firm registration resources to actual enforcement tasks.

Key Findings

- The Board lacks clear statutory authority to register firms.
- Firm registration is not a valuable enforcement tool for the Board.
- Pursuing firm registration wastes the Board's limited enforcement resources.
- No national consensus exists on the value of firm registration for design firms.

Conclusion

As a part of its enforcement program, the Board currently registers about 1,200 architecture, landscape architecture, and interior design firms. While the Board believes it has authority to require these firms to register, it has taken no disciplinary action when firms fail to register.

The Sunset review evaluated the Board's firm registration program to determine its value and the degree to which the program takes resources away from enforcement programs. Sunset staff found that the program provides little enforcement value, unnecessarily burdens design firms, and diverts the agency's limited resources away from important enforcement issues.

Accountants within firms – because accounting firms, not individuals, verify financial statements. Since multiple licensees collaborate on tasks, firm registration helps enforcement by providing accountability.

- Firm registration is not as valuable a regulatory tool for professions in which licensed individuals, not firms, directly take action. For example, Texas does not require the registration of law firms and medical clinics because work products such as legal briefs or medical treatments are directly attributable to individual licensees. Also, because licensing boards can concentrate enforcement action against licensees, firm registration is unnecessary for regulating these professionals, such as plumbers or veterinarians.
- Although multiple licensees often collaborate on design projects, all design and construction plans are individually sealed by a licensed architect, landscape architect, or interior designer who has legal responsibility for the content. In addition, architects, landscape architects, and interior designers often work within firms, but individuals – not firms – in all three professions have strict and direct accountability for their work.
- Advocates of firm registration argue that it allows the Board to take action against companies that perform services without using a licensee. However, the Board may take action for professional practice by nonlicensees even without having firm registration authority.

Advocates also argue that firm registration allows the Board to keep current records of where licensees are employed, thus enabling the Board to determine whether firms are legally providing design services. In practice, however, the Board's firm registration program requires only one licensee at each firm be designated the licensee of record. The agency does not have a renewal system for firm registration and updates records only when the licensee of record leaves the firm. Firm registration, therefore, provides little additional information to the Board regarding the majority of a firm's actual employees.

Pursuing firm registration wastes the Board's limited enforcement resources.

- The Board's enforcement staff spend approximately 10 to 15 hours a week registering firms. Since the enforcement division had only three full-time employees in FY 2001, firm registration consumed, on average, more than 10 percent of the Board's enforcement staff resources, or about \$16,500 per year.² Since the agency does not charge fees for firm registration, registering firms resulted in a significant loss of the agency's limited resources.

Firm registration is not as valuable a regulatory tool for professions in which licensed individuals, not firms, directly take action.

The Board can take action for professional practice by nonlicensees without firm registration authority.

Recommendation

Change in Statute

2.1 Clarify that the Board does not have authority to require firms to register.

This recommendation would remove questions about the Board's authority to register firms by explicitly stating that the Board cannot require firms to register. This clarification would not limit the Board's current enforcement authority because the Board would still be able to pursue enforcement efforts against licensees who are responsible for sealing project plans, and nonlicensees who violate Board statutes.

Management Action

2.2 Direct the Board to reallocate firm registration resources to actual enforcement tasks.

This recommendation would ensure that the Board used its enforcement resources on actual enforcement, rather than on firm registration tasks. These resources currently total 10 percent of the Board's enforcement efforts, or about \$16,500 per year.

Impact

These recommendations would require the agency to discontinue its firm registration program, and target its limited resources to more important enforcement issues. The resources saved from the elimination of firm registration would allow the Board to continue to improve its enforcement functions. The recommendations would also remove an unnecessary requirement the Board has placed on businesses.

Fiscal Implication

Since the Board currently participates in the Self-Directed, Semi-Independent Licensing Agency Pilot Project and lies outside the appropriations process, these recommendations would have no fiscal impact to the State. While these recommendations would save the agency about \$16,500 annually, the funds would be reallocated to other enforcement efforts.

¹ Texas Occupations Code, sec. 1051.301 (b).

² This cost was estimated by taking 10 percent of the cost of salaries and benefits that the agency devoted to complaint investigation in FY 2001. It does not include other associated expenses, such as office supplies and other operating costs consumed by firm registration.

Issue 3

Key Elements of the Board's Licensing and Regulatory Functions Do Not Conform to Commonly Applied Licensing Practices.

Summary

Key Recommendations

- Standardize the Board's licensing functions by requiring the Board to address felony and misdemeanor convictions, exam accessibility, and examination fee refunds; and streamline the process used for exam administration.
- Revise the Board's enforcement activities by requiring common licensing model elements, such as standards of conduct and rules for the complaint process; standardizing Board statutes regarding grounds for disciplinary action; conforming the statute with procedures of the State Office of Administrative Hearings; and ensuring that all disciplinary actions are made public.
- Change administrative aspects of the Board's activities by eliminating statutory fee caps, creating uniform consumer notifications procedures, and standardizing the powers, duties, and processes of the Board.

Key Findings

- Licensing provisions of the Board's statute do not follow model licensing practices and could potentially affect the fair treatment of licensees and consumer protection.
- Nonstandard enforcement provisions of the Board's statute could reduce the agency's effectiveness in protecting consumers.
- Certain administrative provisions of the Board's statute could reduce the Board's efficiency and flexibility to adapt to changing circumstances.

Conclusion

Various licensing, enforcement, and administrative processes in the statutes of the Texas Board of Architectural Examiners do not match model licensing standards that Sunset staff have developed from experience gained through more than 70 occupational licensing reviews. The Sunset review identified these recommendations by comparing the Board's statutes, rules, and practice against these model licensing standards to identify variations from the model and to recommend changes to bring them in line with other licensing agencies.

Licensing provisions of the Board's statute do not follow model licensing practices and could potentially affect the fair treatment of licensees and consumer protection.

- *Criminal convictions.* State law provides a general standard to guide agencies in determining which crimes should affect licensure in a given profession. This law, Chapter 53 of the Texas Occupations Code, "Consequences of Criminal Conviction," takes effect when individual licensing statutes are silent on the relationship of crime to licensure. The statute provides that a criminal conviction affects qualifications for licensure when the crime is related to the profession, according to guidelines developed by the agency and published in the Texas Register. Following these guidelines, an agency may then choose to suspend or revoke a license, disqualify a person from receiving a license, or deny the opportunity to take a licensing exam because of specific criminal activity.

None of the Board's statutes addresses the issue of criminal convictions. The Board's rules currently set out such guidelines, but referencing Chapter 53 in the statutes would clarify the Board's authority to create rules governing how criminal convictions affect an individual's application for licensure.

- *Disability access to examinations.* Exams should not exclude individuals because of a disability, as long as those individuals qualify to sit for the testing procedure. This procedure should follow all applicable legal guidelines related to equal opportunity and access. Title II of the Americans with Disabilities Act requires that state agencies must make their programs and services accessible to disabled persons.

The Board appears to have made good efforts to ensure that examinations are accessible to qualified applicants, regardless of disability. However, current Board statutes do not require the Board to adopt rules pertaining to exam accessibility. Referencing the Americans with Disabilities Act in the Board's statutes would clarify the Board's responsibility to set accessibility policies in rule, and ensure that the Board's future actions continue to ensure accessibility for applicants with disabilities.

The Board appears to have made good efforts to ensure that examinations are accessible to qualified applicants, regardless of disability.

- *Testing fees.* Fees for both initial exams and retakes of exams should only be refundable in certain limited circumstances that are clearly outlined by the Board. Since the agency incurs a cost for procedures such as processing applications and notifying national exam providers of an applicant's intent to take the exam, the Board's refund policy should require the agency to keep a portion of the testing fee in an amount sufficient to cover the administrative costs incurred on the applicant's behalf.

application is correct. In addition, this notarization requirement is unnecessary because state law already prohibits a person from knowingly making a false entry in a government record.²

- *Licensing renewal dates.* The date for license renewals should be scheduled to avoid bottleneck periods. A staggered renewal system leads to greater staff efficiency and more timely processing of renewals, thereby improving agency service to licensees. The Legislature has agreed with this model standard, giving the Board the statutory authority to set staggered renewal dates in rule.

The Board has set six renewal periods staggered throughout the year. However, since the Board regulates three professions, each profession only has two renewal dates. Architects have significantly more licensees than the other two professions, meaning the staff must process a disproportionately high number of renewals on architect renewal dates. The Board could achieve greater staff efficiency and better service to licensees by switching to a continuous renewal cycle in which licenses expire on the licensee's birthday. Continuous renewal would spread the workload evenly throughout the year and be more convenient to licensees, who frequently forget the renewal dates under the current system. Current statutory provisions already state that during any transition period to new renewal schedules the Board must prorate fees on a monthly basis.

Shifting to continuous license renewal would spread staffs' workload evenly throughout the year.

Nonstandard enforcement provisions of the Board's statute could reduce the agency's effectiveness in protecting consumers.

- *Standards of conduct.* A licensing agency should be required by statute to have clear standards of conduct to provide a sound basis for acting on consumer complaints. This ensures that consumers are protected adequately and that standards are applied to licensees in a fair and consistent manner. The Board may adopt these standards in either its rules or in a separate Code of Ethics.

By rule, the Board has adopted standards of conduct for all three professions. However, statute requires the Board to do this for only one profession – interior design. Standardizing the statutes so that this requirement applies to all three professions will ensure adequate consumer protection and fairness to licensees.

- *Complaint processes.* Agencies should adopt rules that clearly lay out policies for all phases of the complaint process. These rules should include complaint intake, preliminary evaluation, investigation, adjudication, resulting sanctions, and disclosure to the public. Having such rules that clearly explain the complaint process protects consumers, increases administrative efficiency, and ensures procedural fairness for licensees.

The statutes under which the Board operates include outdated language in reference to the SOAH hearing process. Currently, each of the Board's three statutes has a section that states that licensees are entitled to a hearing if the Board intends to suspend or revoke their license, and that the Board must either make the final decision or hear appeals in such matters. State law requires the Board to handle contested cases through SOAH. Additionally, the APA states that the Board may allow a SOAH administrative law judge to render the final decision in contested cases. Under the Board's statutes, the Board would then be required to hear appeals. However, the APA states that to appeal, affected persons must seek judicial review by filing suit in District Court. The Board's current statutes are needlessly confusing for both Board staff and licensees. Statutory conflicts with the APA and the SOAH enabling statute reduce Board flexibility and hinder its ability to perform its public protection duties.

The Board's statutes conflict with the Administrative Procedure Act and SOAH's enabling statute.

- ***Public information on complaints.*** Agencies should make all enforcement information, such as final disciplinary orders and sanctions, available to the public in an easily accessible format. This helps to protect consumers and ensures procedural fairness to all licensees.

The Board does not make enforcement decisions easily accessible to the public. While the Board publishes a yearly newsletter that contains most disciplinary orders and sanctions, some licensees negotiate settlements in which the Board does not publish the final order. Consumers who wish to check the particular disciplinary history of a licensee must either read through old newsletters or call Board staff. The public cannot easily access this information through other means such as a searchable database on the agency's Web site.

The Board's enforcement decisions are not easily accessible to the public.

- ***Probation procedures.*** Licensing agencies should have a probation procedure that provides for imposing appropriate conditions, notifying probationers of those conditions and actions they need to take, and tracking probationers' progress. Such standard procedures create administrative efficiency, ensure the fair treatment of licensees, and help protect consumers.

The Board has adopted an administrative penalty matrix that delineates when the suspension of a license is an appropriate punishment. However, the matrix does not distinguish between active and probated suspensions. This could result in the inequitable use of probation as a punishment. In addition, the Board does not have clear guidelines regarding the duties and obligations of persons placed on probation. Board staff negotiates these conditions on a case-by-case basis.

referral guides to increase administrative efficiency and provide for greater consumer protection.

Certain administrative provisions of the Board's statute could reduce the Board's efficiency and flexibility to adapt to changing circumstances.

- *Flexible fees.* A licensing agency should have the authority to set its fees. This allows for greater administrative flexibility and reduces the need for the Legislature to continually update agency statutes to accurately reflect the costs of providing basic services. Additionally, flexible fees ensure that the agency continues to provide basic services between legislative sessions.

The Board currently has two statutory caps that limit its ability to set fees: a \$10 cap on the fee used to pay for an Architectural Registration Examination (ARE) scholarship, and a \$300 cap on the cost of the ARE. An outside national organization develops and administers the ARE. The entire exam currently costs \$981. Because of the statutory \$300 cap, the Board must request a legislative appropriations rider each legislative session to charge the full price of the exam. When the price of the ARE rose significantly in 1997, because the test was transferred from a pencil-and-paper format to an electronic format, the Board was unable to offer the architecture exam for five months until the Legislature gave the Board a new appropriations rider. Since the agency is now in the Self-Directed, Semi-Independent Licensing Agency Pilot Project, the Appropriations Act can no longer give the agency this authority.

- *Public information.* A licensing agency should have the means to notify consumers of its jurisdiction over its regulated professions. Usually, this notification is achieved by requiring licensees to post certificates in their businesses or by printing a statement of Board jurisdiction in all licensee contracts. This makes the complaint process more accessible to consumers and leads to greater consumer protection.

The Board's statutes have inconsistent standards regarding consumer notification of the Board's jurisdiction. The architecture statute allows the Board to choose from various notification options. The landscape architecture statute requires licensees to print a statement of jurisdiction in all contracts. The interior design statute does not comment on this matter at all, implying that the Board lacks the authority to develop rules on this topic. This statutory inconsistency reduces Board flexibility, leads to administrative inefficiency, and compromises the Board's authority to protect consumers.

Fee caps limit the Board's ability to set adequate architecture scholarship and exam fees.

Recommendation

Licensing

Change in Statute

3.1 Clarify that the Board must address felony and misdemeanor convictions in the standard manner defined in the Occupations Code.

This recommendation would clarify the Board's authority to adopt rules that follow the general guidelines in Chapter 53 of the Texas Occupations Code for dealing with criminal convictions by specifically referencing Chapter 53 in the Board's enabling statutes. The Board would not need to adopt new rules defining which crimes relate to its regulated professions because its current rules meet the standard of this statute.

3.2 Require the Board to adopt rules to ensure that its exams are accessible to persons with disabilities in accordance with the Americans with Disabilities Act.

The Board's statutes would reference the Americans with Disabilities Act. The Board would need to adopt new rules regarding accessibility accommodations, but could model the rules after current policies which meet the standard of the Americans with Disabilities Act.

3.3 Require the Board to adopt, by rule, comprehensive refund policies for its examinations.

This recommendation would ensure that the agency treats all applicants fairly and that the agency is able to cover the costs associated with its examinations. The comprehensive policy should include a list of acceptable excuses, the required documentation to support such excuses, refund request deadlines, and the specific fee portion (in percentage or dollar-value terms) that the agency should retain to cover administrative costs.

3.4 Eliminate the requirement that the Board must collect all examination fees.

This recommendation would streamline the exam process by eliminating the Board's complex payment system and allowing applicants to pay the national testing providers directly. Direct payment would create better service for applicants and would give the agency greater flexibility and efficiency.

Management Action

3.5 Eliminate the application notarization requirement on individuals who apply for licensure with the Board.

This recommendation would eliminate the Board's requirement that applicants notarize applications. Current provisions of the Texas Penal Code that make falsifying a government record a crime would continue to apply to license applications.

3.10 Conform the Board statutes concerning hearings and appeals to the Administrative Procedure Act and the enabling statute of the State Office of Administrative Hearings.

This recommendation would rewrite the sections of Board statutes dealing with hearing and appeals processes. The new language should clearly state that the procedures for contested cases are to be conducted in accordance with the Administrative Procedure Act and the enabling statute and rules of the State Office of Administrative Hearings.

3.11 Require the Board to make public all disciplinary orders and sanctions.

The Board would be required under this recommendation to pass rules ensuring that all disciplinary orders and sanctions are treated in the same manner. Licensees would no longer be able to negotiate unpublished settlements. This would ensure procedural fairness to licensees and greater protection to consumers.

Management Action

3.12 Direct the Board to make available all disciplinary orders and sanctions on the Board Web site in a format that consumers may access easily.

Under this recommendation consumers would have easy access to disciplinary information. Increasing accessibility could include creating a searchable database of disciplinary information or making an up-to-date listing of all enforcement orders and sanctions arranged alphabetically by licensee name. This would reduce the amount of time that staff must dedicate to handling consumer inquiries.

3.13 Direct the Board to clearly delineate standards of probation.

This recommendation would require the Board to include in its administrative penalty matrix when probation is an appropriate punishment, and develop guidelines for the duties and obligations of probationers. While these standards should not be strictly binding for the agency, they should be a safeguard to ensure that the agency imposes and conducts probation in a fair and consistent manner.

3.14 Eliminate the complaint notarization requirement on individuals who file complaints with the Board.

This recommendation would eliminate the Board's onerous requirement that complainants must notarize complaints. Current provisions of the Texas Penal Code that make falsifying a government record a crime would continue to apply to filed complaints.

3.15 Direct the Board to develop a system for complaint trend analysis.

The Board would need to develop a system for analyzing the sources and types of complaints. Such a system should lead to stronger enforcement and greater administrative efficiency.

3.16 Direct the Board to develop a system for tracking nonjurisdictional complaints.

This recommendation would direct the Board to keep track of complaints it receives that fall outside of its jurisdiction. This will give the agency and the Legislature a fuller picture of the public's problems and concerns in this regulatory area.

Impact

The application of these recommendations to the Board would result in efficiency and consistency from fairer processes for the licensees, additional protection to consumers, administrative flexibility, and standardization of Board processes. The chart, *Benefits of Recommendations*, categorizes the recommendations according to their greatest benefits.

| Benefits of Recommendations | | | | |
|---|---------------------------------|----------------------------|----------------------|------------------------|
| Recommendation | Benefits | | | |
| | Efficiency from Standardization | Administrative Flexibility | Fairness to Licensee | Protection of Consumer |
| Licensing | | | | |
| 3.1 Clarify that the Board must address felony and misdemeanor convictions in the standard manner defined in the Occupations Code. | ✓ | | ✓ | ✓ |
| 3.2 Require the Board to adopt rules to ensure that its exams are accessible to persons with disabilities in accordance with the Americans with Disabilities Act. | ✓ | | ✓ | |
| 3.3 Require the Board to adopt, by rule, comprehensive refund policies for its examinations. | ✓ | | ✓ | |
| 3.4 Eliminate the requirement that the Board must collect all examination fees. | ✓ | ✓ | ✓ | |
| 3.5 Eliminate the application notarization requirement for individuals who apply for licensure with the Board. | | | ✓ | |
| 3.6 Direct the Board to consider switching to a continuous license renewal system. | ✓ | | | |
| Enforcement | | | | |
| 3.7 Require the Board to adopt clear standards of conduct for all of the professions that it regulates. | ✓ | | ✓ | ✓ |
| 3.8 Require the Board to adopt comprehensive rules outlining all phases of the complaint process. | ✓ | | ✓ | ✓ |
| 3.9 Standardize statutory grounds for disciplinary action in the Board's three statutes. | ✓ | ✓ | ✓ | ✓ |

Fiscal Implication

These recommendations would not have a fiscal impact to the State. The agency is currently in the Self-Directed, Semi-Independent Licensing Agency Pilot Project, which means it is removed from the appropriations process and its funds are maintained outside the Treasury. Most recommendations change procedures in ways that do not require additional resources. Some savings may result from increased efficiencies, but this amount cannot be estimated and, the savings would be used to meet the Board's other needs. Reducing the statutory fee caps would not result in additional revenue as the Board would be directed to set fees only as high as necessary to recover costs.

¹ Sunset staff meeting with agency staff (Austin, Texas, July 10, 2002).

² Ibid.

³ Texas Penal Code, sec. 37.10.

⁴ Such an exemption is not necessary for interior designers since they have a title act, not a practice act.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

Issue 4

Texas Has a Continuing Need for the Texas Board of Architectural Examiners, but Could Benefit From Greater Coordination With the Texas Board of Professional Engineers.

Summary

Key Recommendations

- Continue the Texas Board of Architectural Examiners for 12 years.
- Require the Board to form a joint practice committee with the Texas Board of Professional Engineers.

Key Findings

- Texas has a continuing interest in licensing and regulating architects, landscape architects, and interior designers.
- No significant benefit would result from changing the agency structure or having any other state or federal agency perform the Board's functions.
- Although no significant benefit would result from consolidation, coordination with the Texas Board of Professional Engineers could achieve greater operational efficiency.
- While organizational structures vary, most other states regulate architects and landscape architects, and many regulate interior designers.

Conclusion

The Texas Board of Architectural Examiners regulates architects, landscape architects and interior designers through its licensing and enforcement programs. Its regulatory functions are needed to protect the public by ensuring that only qualified individuals become licensed design professionals, and the Board generally performs its functions well.

The Sunset review assessed the overall need for an independent agency to regulate architects, landscape architects, and interior designers. The review also evaluated whether the Board's functions could be successfully transferred to another agency and looked at how other states perform these functions. Sunset staff concluded that the Board performs an important mission, and should be continued for 12 years.

processes to accommodate some of those demands. For example, the agency has one licensing division for all three regulated professions, and currently takes an average of just one day to issue a license. The agency conducted virtually no enforcement before the Board hired its current Executive Director in 1994. While the enforcement program continues to face challenges, the agency has taken strides to enforce its statutes and rules.

No significant benefit would result from changing the agency structure or having any other state or federal agency perform the Board's functions.

- The Texas Department of Licensing and Regulation (TDLR) has a structure for licensure, examination, and investigation in place. However, if the Legislature consolidated the Board into TDLR, then TDLR would need to add staff who understand the technical nature of architecture, landscape architecture, and interior design. No significant gain in efficiency would result by transferring the Board's functions to TDLR.
- Two previous Sunset reports of the agency considered combining it with the Texas Board of Professional Engineers. The 1978 review concluded that the consolidation potential could not be clearly established. The 1991 review concluded that investigators at the Engineers Board lacked the necessary technical expertise in architecture and landscape architecture, so merging the agencies would not significantly improve the enforcement process.
- While national boards that examine design professionals exist, they do not issue licenses and could not perform the enforcement function of the Board. No federal agency regulates design professionals.
- The Board recovers all costs through fees collected from licensees; therefore, no cost savings would result if the Board was abolished. Also, as part of the Self-Directed, Semi-Independent Licensing Agency Pilot Project, the Board is outside of the legislative appropriations process. Under terms of the Pilot Project Act, the Board contributes \$700,000 to the General Revenue Fund that would be lost if the agency was discontinued. In addition, architect licensees contribute almost \$2 million in professional licensing fees to General Revenue that would be lost if the architecture license was not continued.

No significant gains would result by transferring the Board's functions to TDLR.

Although no significant benefit would result from consolidation, coordination with the Texas Board of Professional Engineers could achieve greater operational efficiency.

- Unclear statutes and overlap between certain types of engineering and architecture have caused some enforcement difficulties for the

Recommendation

Change in Statute

4.1 Continue the Texas Board of Architectural Examiners for 12 years.

This recommendation would continue the Texas Board of Architectural Examiners as an independent agency responsible for overseeing architects, landscape architects, and interior designers for the standard 12-year period.

4.2 Require the Board to form a joint practice committee with the Texas Board of Professional Engineers.

Although the Professional Engineers and Architectural Examiners Boards have voluntarily formed a joint committee, this recommendation would ensure that the Boards continue to work together. The committee's guiding principle should be to improve the agencies' protection of the public, and this principle should take precedence over the interests of each Board. The committee should work to resolve issues stemming from the overlap among the professions overseen by the agencies. The committee should issue advisory opinions to both Boards regarding matters such as specific enforcement cases, the definitions of architecture and engineering, and requirements relating to the need for professionals licensed by the two Boards on specific projects. In addition, each Board would be responsible for reporting back to the committee the final action or outcome on the specific issue considered by the committee. The committee would thus develop a body of information that can help resolve future issues and further clarify the respective practice of these professions. The committee should consist of three members from each Board, and should meet at least twice a year. Both Boards should adopt resolutions regarding the committee, its composition, and its purpose.

Impact

These recommendations would continue the Texas Board of Architectural Examiners as a stand-alone agency responsible for regulating design professionals, in addition to making coordination with the Texas Board of Professional Engineers a statutory requirement.

Fiscal Implication

Because the Board currently participates in the Self-Directed, Semi-Independent Licensing Agency Pilot Project and lies outside the appropriations process, continuing the Board will have no fiscal impact to the State.

In addition, because of the agency's status as a project agency, the joint practice committee with the Texas Board of Professional Engineers would not have a fiscal impact to the State, but would cost the agency approximately \$600 annually for travel reimbursement.

ACROSS-THE-BOARD RECOMMENDATIONS

| Texas Board of Architectural Examiners | |
|---|---|
| Recommendations | Across-the-Board Provisions |
| | A. GENERAL |
| Already in Statute | 1. Require at least one-third public membership on state agency policymaking bodies. |
| Update | 2. Require specific provisions relating to conflicts of interest. |
| Already in Statute | 3. Require that appointment to the policymaking body be made without regard to the appointee's race, color, disability, sex, religion, age, or national origin. |
| Already in Statute | 4. Provide for the Governor to designate the presiding officer of a state agency's policymaking body. |
| Update | 5. Specify grounds for removal of a member of the policymaking body. |
| Update | 6. Require that information on standards of conduct be provided to members of policymaking bodies and agency employees. |
| Apply | 7. Require training for members of policymaking bodies. |
| Update | 8. Require the agency's policymaking body to develop and implement policies that clearly separate the functions of the policymaking body and the agency staff. |
| Update | 9. Provide for public testimony at meetings of the policymaking body. |
| Modify | 10. Require information to be maintained on complaints. |
| Update | 11. Require development of an equal employment opportunity policy. |
| Apply | 12. Require information and training on the State Employee Incentive Program. |

AGENCY INFORMATION

Agency Information

Agency at a Glance

The Texas Board of Architectural Examiners (the Board) protects the public by regulating architects, landscape architects, and interior designers. The Board traces its beginning to 1937, when the Legislature recognized the need to regulate architects after a catastrophic school fire claimed hundreds of lives. In 1969, the Legislature began the regulation of landscape architects and, ten years later, gave this responsibility to the Board. In 1991, the Legislature added interior designers to the list of design professionals regulated by the Board.

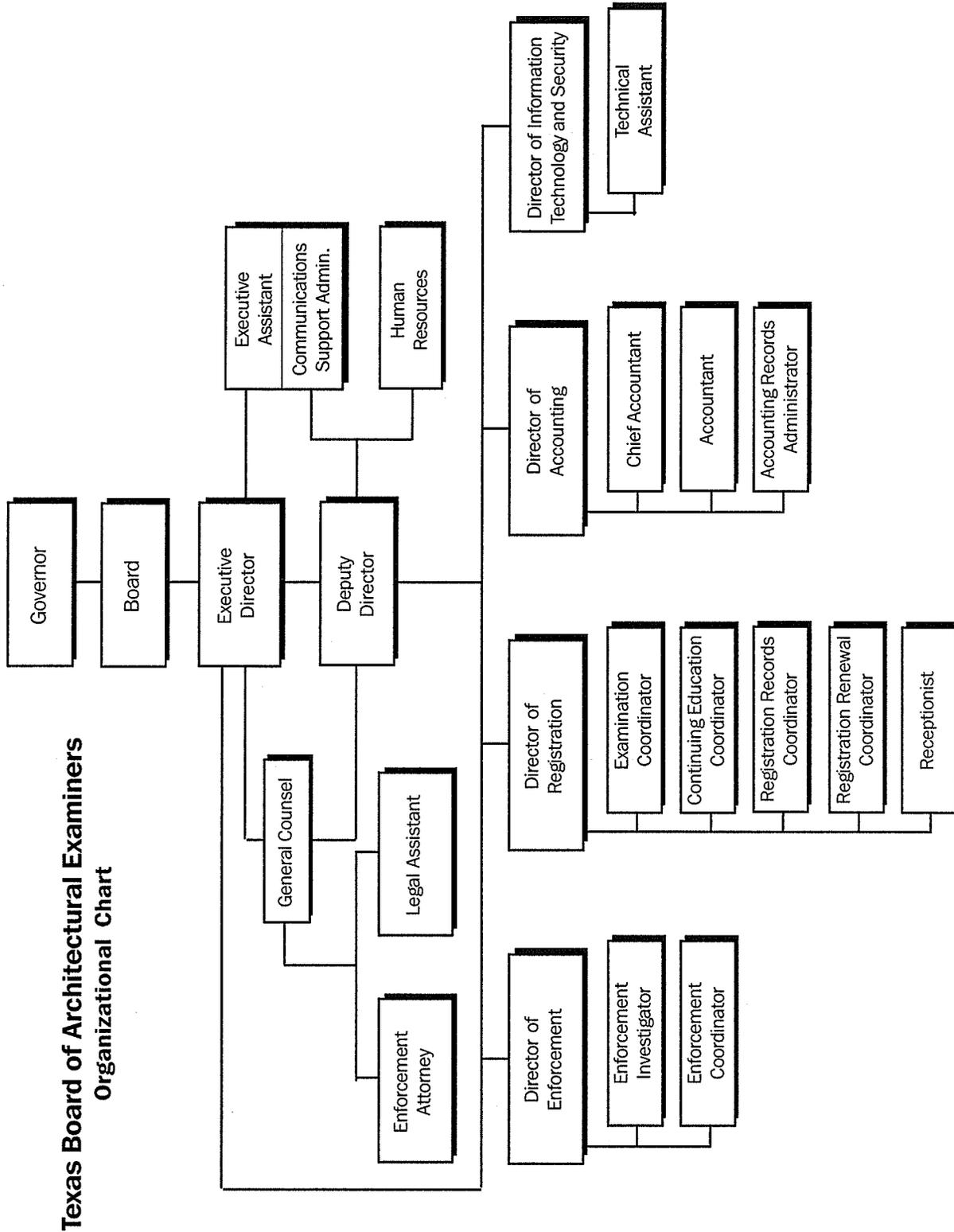
To accomplish its mission, the Board:

- licenses qualified architectural, landscape architectural, and interior designer applicants;
- ensures compliance with the Architecture, Landscape Architecture, and Interior Design Acts and Board rules by investigating and resolving complaints against persons or businesses; and
- provides information to licensees and the public.

*On the Internet
Information about the
Board is available at
www.tbae.state.tx.us*

Key Facts

- **Funding.** The Board operates with an annual budget of \$1.6 million, all of which comes from licensing fees.
- **Staffing.** The Board has 20 full-time equivalent positions, all based in Austin.
- **Registration and Examinations.** In fiscal year 2001, the Board regulated about 19,000 design professionals – 10,000 architects, 1,200 landscape architects, and 7,500 interior designers. That year, the Board processed 18,054 license renewals, and helped administer 2,590 exam sections.
- **Enforcement.** The Board received 216 complaints in fiscal year 2001. The Board resolved 223 complaints, referred 16 cases to the Office of the Attorney General and the State Office of Administrative Hearings, and issued 118 orders.
- **Public Information.** The Board annually provides information regarding agency programs to more than 25,000 entities, including licensees, applicants, building officials, schools of architecture, landscape architecture, and interior design, and the general public.



**Texas Board of Architectural Examiners
Organizational Chart**

Although the agency fell well behind the statewide goal for other services in FY 2001, its HUB spending on commodities was above the goal. The Board must use sole source providers for purchasing and grading national exams, and this sole source acquisition represented 77 percent of the total amount expended for other services in FY 2001.

Agency Operations

The Board protects the public by enforcing title acts for its three regulated professions, and practice acts for architects and landscape architects. The chart, *Board Professional Licenses*, describes some of the activities these professionals perform. As explained in the following sections, the Board accomplishes its goal through three core functions: registration, enforcement, and public education.

Registration

The Board's registration staff provides five key services to its licensees: licensure, renewal, national examinations, continuing education, and examination scholarship program.

Licensure. The Board processes applications for its three regulated professions. While specific requirements vary among the three professions, all applicants must meet education and experience requirements, pass a national examination, and have a clear professional disciplinary record to be approved for registration in Texas. Additionally, staff checks applicants to determine if they have a disqualifying criminal history. The chart, *License Fees*, shows the number of licensed professionals and the fees they pay.

Renewal. Staff members oversee the annual registration renewal process for the three regulated professions. Before the renewal date, the Board mails notices to licensees. Licensees must send a renewal fee and a form verifying that they have finished continuing education requirements, and that they have had no criminal convictions in the last year. The Board has the authority to revoke a

| Board Professional Licenses | |
|-----------------------------|---|
| Profession | Functions |
| Architect | Designs buildings and structures intended for human occupancy. Architects consider many factors in building design, such as structural systems, building codes, life-safety systems, accessibility standards, wind and seismic forces, mechanical and electrical systems, and building materials and methods. Architects also oversee building construction and manage building projects. |
| Landscape Architect | Designs urban and natural environments. Design considerations include drainage and irrigation systems, storm water management, erosion and sediment controls, landscape design, and fire and flood prevention. Examples of design projects include recreational facilities, housing developments, and urban plazas. |
| Interior Designer | Designs non-load bearing features in commercial and residential spaces. Design projects consider building codes, acoustics, ergonomics, lighting, fire prevention, furnishings, fixtures, and space planning. Examples of design projects include hotels, office and government buildings, and private residences. |

| License Fees - FY 01 | | | |
|-------------------------|-------------|--------|-------------|
| Profession | | Number | License Fee |
| Architects ¹ | Resident | 6,657 | \$82 |
| | Nonresident | 3,194 | \$125 |
| Landscape Architects | Resident | 936 | \$82 |
| | Nonresident | 337 | \$125 |
| Interior Designer | Resident | 6,614 | \$82 |
| | Nonresident | 637 | \$125 |

from the public must be in writing and notarized, but the agency may also open complaints received by telephone or electronic mail. After receiving a complaint, enforcement staff assesses the merits of a complaint and evidence. After setting up a complaint file and sending preliminary correspondence, the Enforcement Director assigns the complaint file to an investigator. The chart, *Complaint Activity*, describes the number and type of complaints the agency receives.

Staff investigators conduct investigations, including collecting supporting documents and interviewing those involved in the case, and prepare investigative reports. If staff cannot obtain evidence to substantiate allegations, the complaint may be dismissed.

In cases requiring disciplinary action, the agency sends a settlement proposal, approved by the Executive Director, to the individual under investigation. If the individual agrees with the proposal, the terms are finalized and presented to the Board at one of its meetings. If the individual and the agency cannot agree upon settlement terms, and the agency wants to impose an administrative penalty or take other action, the case is referred to the State Office of Administrative Hearings (SOAH). The agency may refer cases involving unlicensed persons to the Office of the Attorney General (OAG) for civil or criminal action.

In fiscal year 2001, the agency received 216 complaints. The agency took an average of 107 days to resolve a complaint. As of July 2002, the agency had 82 unresolved cases more than six months old.

In fiscal year 2001, the agency took an average of 107 days to resolve a complaint.

| Complaint Activity FY 01 ³ | | | | | | | |
|---------------------------------------|------------|--------------|----------------------|--------------|--------------------|--------------|------------|
| | Architects | | Landscape Architects | | Interior Designers | | TOTAL |
| | Licensees | Nonlicensees | Licensees | Nonlicensees | Licensees | Nonlicensees | |
| Complaints Received | | | | | | | |
| from public | 39 | 7 | 1 | 0 | 5 | 5 | 57 |
| from licensees | 5 | 0 | 0 | 0 | 0 | 0 | 5 |
| initiated by Board | 29 | 62 | 4 | 8 | 17 | 34 | 154 |
| TOTAL | 73 | 69 | 5 | 8 | 22 | 39 | 216 |
| Complaints Resolved | | | | | | | |
| dismissed/no merit | 46 | 14 | 3 | 1 | 19 | 6 | 89 |
| resulted in sanctions | 31 | 49 | 2 | 5 | 1 | 30 | 118 |
| referred to SOAH | 8 | 0 | 0 | 0 | 0 | 0 | 8 |
| referred to OAG | 0 | 6 | 0 | 0 | 0 | 2 | 8 |
| TOTAL | 85 | 69 | 5 | 6 | 20 | 38 | 223 |

APPENDICES

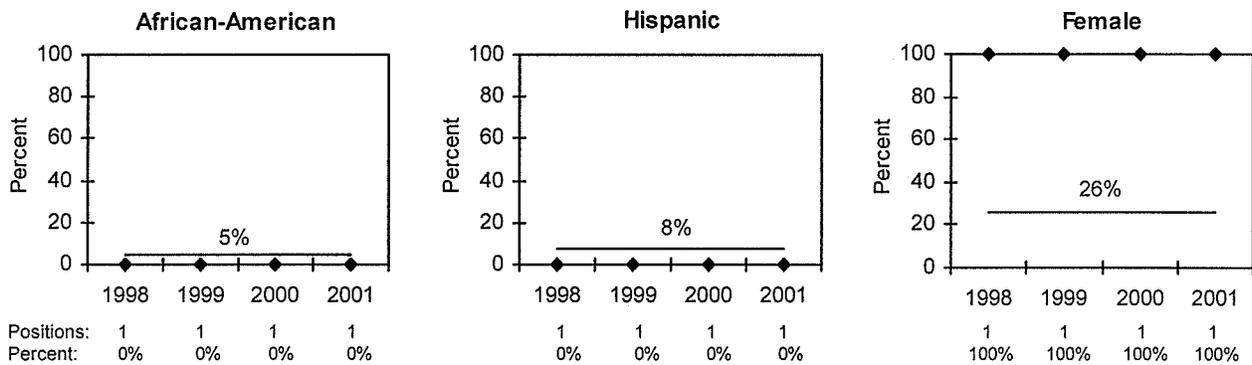
Appendix A

Equal Employment Opportunity Statistics

1998 to 2001

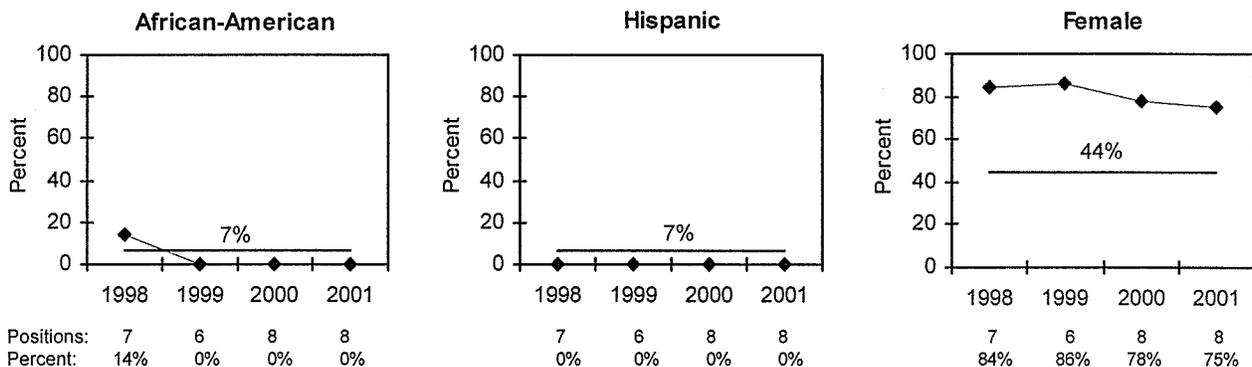
In accordance with the requirements of the Sunset Act, the following material shows trend information for the agency's employment of minorities and females in all applicable categories of the labor force.¹ The agency maintains and reports this information under guidelines established by the Texas Commission on Human Rights.² In the charts, the flat lines represent the percentages of the statewide civilian labor force for African-Americans, Hispanics, and Females in each job category. These percentages provide a yardstick for measuring agencies' performance in employing persons in each of these groups. The dashed lines represent the agency's actual employment percentages in each job category from 1998 to 2001.

State Agency Administration



The Board exceeded the state goal for Female employment every year, but fell short of the goals for Hispanics and African-Americans each year.

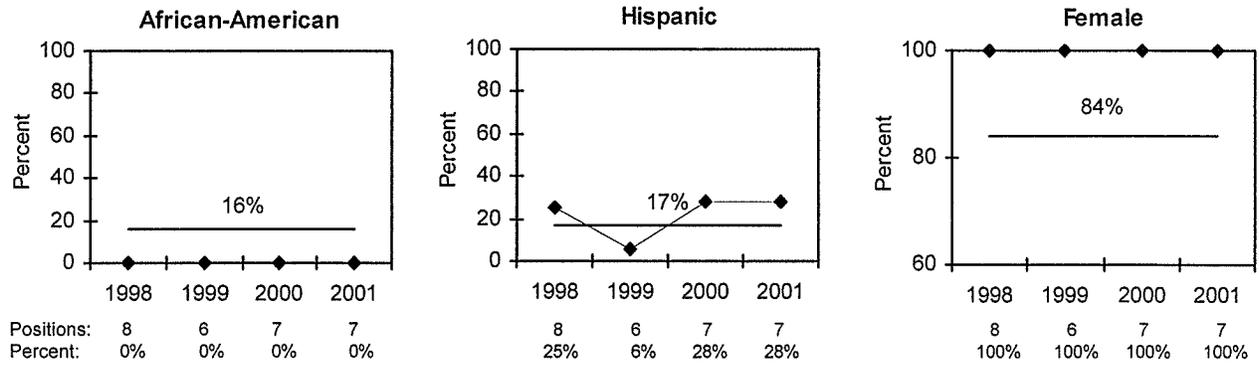
Professional



While the Board exceeded the goal for Female employment, it generally fell short of the goals for Hispanic and African-American employment during this period.

Appendix A

Administrative Support



The Board generally exceeded goals for Female and Hispanic employment, but had no African-Americans in this category.

¹ Texas Government Code, sec. 325.011(9)(A).

² Texas Labor Code, sec. 21.501

Appendix B

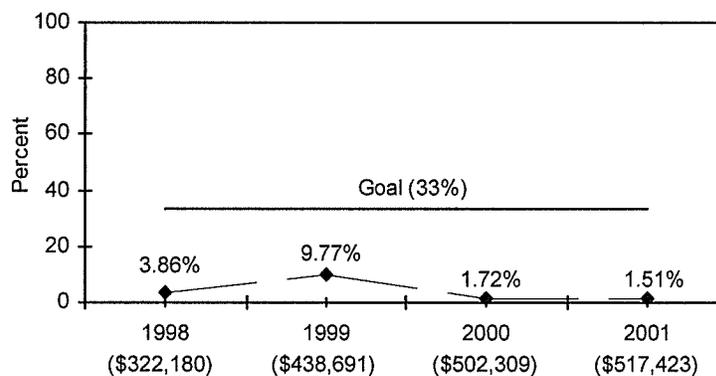
Historically Underutilized Businesses Statistics

1998 to 2001

The Legislature has encouraged state agencies to increase their use of Historically Underutilized Businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. The Legislature also requires the Sunset Commission to consider agencies' compliance with laws and rules regarding HUB use in its reviews.¹ The review of the Texas Board of Architectural Examiners revealed that the agency is not complying with all state requirements concerning HUB purchasing. Specifically, The agency has not adopted HUB rules, though the Texas Building and Procurement Commission's rules are reflected in the agency's procedures.

The following material shows trend information for the Texas Board of Architectural Examiners use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in the Texas Building and Procurement Commission's statute.² In the charts, the flat lines represent the goal for HUB purchasing in each category, as established by the Texas Building and Procurement Commission. The dashed lines represent the percentage of agency spending with HUBs in each purchasing category from 1998 to 2001. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category. While the agency has fallen short of the State's goal for Other Services, it has generally met the goal for Commodities.

Other Services



The Board fell well below the statewide goal in Other Services. The Board must use sole source providers for the majority of its expenses in this category.

Appendix C

Staff Review Activities

The Sunset staff engaged in the following activities during the review of the Texas Board of Architectural Examiners.

- Worked extensively with agency staff.
- Attended Board meetings, reviewed audiotapes and minutes of Board meetings, and interviewed Board members.
- Attended a joint meeting of the Board and Texas Board of Professional Engineers.
- Met with in person, or interviewed over the phone, staff from the Texas Department of Licensing and Regulation, Texas Board of Professional Engineers, Texas State Board of Public Accountancy, Texas Department of Insurance, Legislative Budget Board, and the State Auditor's Office.
- Conducted interviews and solicited written comments from national, state, and local interest groups.
- Conducted interviews with licensees.
- Conducted interviews with representatives from professional design associations.
- Met with in person, or interviewed over the phone, building officials from College Station, Corpus Christi, Dallas, El Paso, Georgetown, Harlingen, and Midland.
- Researched the functions of architecture, landscape architecture, and interior design regulatory agencies in other states.
- Observed administration of the Landscape Architect Registration Exam.
- Reviewed agency documents and reports, state statutes, legislative reports, previous legislation, and literature on architecture, landscape architecture, and interior design issues.
- Performed background and comparative research using the Internet.

**SUNSET REVIEW OF THE
TEXAS BOARD OF ARCHITECTURAL EXAMINERS**

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TEXAS BOARD OF PROFESSIONAL ENGINEERS

SUNSET STAFF REPORT

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SUMMARY



Sunset Staff Report

Texas Board of Professional Engineers

Summary

Texas began regulating engineers in 1937, after a natural gas explosion at the school in the East Texas town of New London killed 300 students and teachers. In creating the Texas Board of Professional Engineers, the Legislature noted “the vital impact ... the practice of engineering is having upon the lives, property, economy, and security of our people.”

Because engineering can have a significant impact on Texans, the Board regulates the practice of engineering to ensure that only qualified individuals provide engineering services to the public. The Board accomplishes this task by licensing Professional Engineers, registering engineering firms, and enforcing the Texas Engineering Practice Act.

The Board directs much of its attention to minor issues, possibly at the expense of more significant engineering concerns.

The Sunset review examined the Board’s policies and practices for licensing engineers and regulating the practice of engineering in Texas, seeking to improve the Board’s effectiveness in protecting the public. The review also assessed whether a separate agency is needed to accomplish this task.

The review found that although the Board meets its mission, the Board directs much of its attention to minor issues, possibly at the expense of more significant engineering concerns, particularly in the Board’s enforcement efforts. Improvements to the way the Board receives and processes complaints would help the Board focus its enforcement activities on major infractions, improve the Board’s accountability, and provide better public access to the Board’s enforcement process.

While the review noted that the Board should continue as a stand-alone agency, Sunset staff found that increased coordination with the Texas Board of Architectural Examiners would help the two Boards resolve overlapping issues, and ultimately provide better public protection.

A summary of the recommendations in this report is provided in the following material.

*For more information,
contact Meredith Whitten,
(512) 463-1300. Sunset
staff reports are available
online at
www.sunset.state.tx.us.*

Issue 3 Texas Has a Continuing Need for the Texas Board of Professional Engineers, but Could Benefit From Greater Coordination With the Texas Board of Architectural Examiners.

Key Recommendations

- Continue the Texas Board of Professional Engineers for 12 years.
- Require the Board to form a joint practice committee with the Texas Board of Architectural Examiners.

Fiscal Implication Summary _____

These recommendations will not result in a fiscal impact to the State. The Board is a participant in the Self-Directed, Semi-Independent Licensing Agency Pilot Project, which tests the ability of certain agencies to effectively operate outside the legislative appropriations process. Because the Board has been removed from the appropriations process, any gains or losses implicated in these recommendations would not be reflected in the General Revenue Fund.

ISSUES / RECOMMENDATIONS

Issue 1

The Board's Enforcement Activities Create a Burden on Complainants, Focus on Minor Infractions, and Provide Little Tracking Capabilities.

Summary

Key Recommendations

- Require the Board to establish a simple, accessible process for accepting, opening, and investigating complaints, defined in rules, and available on its Web site.
- Require the Board to prioritize complaints and focus its efforts on those complaints that could harm the public.
- Authorize the Board to employ advisors and consultants to provide technical assistance on enforcement cases.
- Require the Board to track complaint information and report this information annually.
- Authorize the Board to establish a 30-day grace period for firms to register with the Board.

Key Findings

- The Board processes, investigates, and prosecutes complaints filed against both licensed engineers and nonlicensed individuals.
- The Board's process for filing a complaint creates a burden on the complainant and may limit public access.
- The Board cannot adequately address technical issues that arise during the enforcement process.
- The Board appears to focus its enforcement efforts on minor violations of the Act.
- The Board does not have a reliable system to track complaints.

Conclusion

The Sunset review evaluated the Texas Board of Professional Engineering's enforcement efforts to identify ways to better protect the public. Sunset staff found that the current enforcement process hinders the public's ability to conveniently file complaints with the Board. As a result, the majority of complaints prosecuted by the Board are initiated by staff and focus on minor infractions of the Texas Engineering Practice Act. Also, because engineering disciplines vary greatly, the Board lacks needed expertise to adequately address complaints that relate to technical engineering issues. Finally, poor tracking capabilities limit the Board's ability to provide reliable data on its enforcement process.

The recommendations should afford the public more convenient access to the Board's enforcement process, focus the Board on significant violations of the Act, facilitate the Board's access to industry experts, and enhance the Board's accountability.

basis, for informal conferences, although in technical cases one of the Professional Engineer members of the Board serves on the committee.

- The informal conference committee can either dismiss the case or issue an agreed order, which must be approved by the full Board. If the informal conference does not result in a resolution, the case is referred to the State Office of Administrative Hearings (SOAH). Respondents can opt to bypass the informal conference step and instead request that the case go straight to an administrative hearing before SOAH.
- Staff-initiated complaints and referrals from other agencies receive little to no preliminary investigation because they usually involve a simple fact situation or merely require acceptance of another agency's findings. Most staff-initiated complaints concern use of the title "engineer" or firm registration, and are discovered by staff investigators conducting phone book or Internet searches. The flow chart, *Engineers Board Enforcement Process*, on the next page, further outlines the Board's enforcement activities.

The Board's process for filing a complaint creates a burden on the complainant and may limit public access.

- Individuals wanting to file a complaint with the Board typically have to call the Board to receive information describing the complaint process and to request a complaint form. This information cannot be obtained any other way, such as through the Board's Web site.¹ Potential complainants' calls to the Board are routed to staff investigators, who interview them about the nature of their complaints, determine if the Board has jurisdiction, and recommend whether the caller should submit a complaint.
- Confusion about how to file a complaint may deter individuals from getting their complaints into the Board's enforcement process. Individuals who contact the Board about filing a complaint are sent a complaint form. The complaint form is lengthy and may not be easy to use by the general public.² In addition, the Board's *Consumer Information Pamphlet* says that a sworn affidavit is preferred when a licensee is the subject of the complaint, even though neither the Act nor Board rules requires complaints to be notarized.³ However, the Board will proceed with complaints filed without a complaint form, as long as the complaint is in writing and includes a description of the violation, supporting information and factual evidence, names and addresses of witnesses, sources of other pertinent information, and what section of the Act or Board rules have been violated.⁴
- The Board requires complainants to perform much of the investigatory work before the Board will open a complaint. In fact,

Complaints must be written and accompanied by factual evidence, names of witnesses, and the section of law that was violated.

Board rules maintain that it is not responsible for proving the basis of a complaint.⁵ Complaints must be accompanied by sufficient information and factual evidence for the Executive Director to determine if probable cause exists.⁶ Complainants provide evidence such as documents, engineering designs and plans, and expert witness testimony. The complainant also must specify the section of the Act or Board rule allegedly violated, show that a violation of law or rules likely has occurred, and demonstrate that the Board has jurisdiction and that some action should be considered.⁷ The Board returns complaints that do not meet these criteria for completion.

The Board maintains that it is not responsible for proving the basis of a complaint.

The Board also encourages complainants to contact an attorney when preparing to file a complaint, noting that, "Legal counsel and considerations may prove beneficial in preparing a complaint as administrative hearings closely parallel those of a court action with regard to evidence, timely and proper submission of motions, subpoenaed witnesses, and the like."⁸

- The Board does not consider a complaint filed with the Board to actually be a "complaint" until the complainant provides enough evidence to warrant finding a violation. Files are opened in the complainant's, not the respondent's, name until the Board is satisfied that evidence exists that shows a violation likely occurred. Some cases take months to be deemed complaints, while other cases are never opened as complaints. The Board's enforcement manual defines "complaint" as an allegation of misconduct by a Texas licensed Professional Engineer that could result in a disciplinary action by the Board; or in the case of an unlicensed individual, prosecution in a court of competent jurisdiction.⁹ Therefore, the Board claims to receive no nonjurisdictional complaints.

Complaints are only viewed as such after the Board is satisfied with the evidence.

The Board does not have a process to refer written complaints outside of its jurisdiction to the appropriate entity, such as another state agency or local District Attorney. As a result, the Board does not maintain information about such complaints. This prevents the Board, and the Legislature, from having valuable information about problems that may need to be addressed in the engineering industry, as well as in areas of the profession that overlap with other, similar professions.

The Board cannot adequately address technical issues that arise during the enforcement process.

- The Board does not have the in-house resources to address technical issues that arise during investigations and enforcement procedures, such as informal conference committees. The Board recognizes 27 engineering disciplines, such as civil engineering and structural engineering. The Act requires six Board members to be licensed

amount of time it takes to close a staff-initiated case, both licensees and nonlicensees have expressed concern about the amount of time the Board spends on such investigations.¹⁰

For example, when staff investigators discover engineering firms that have not registered with the Board, staff opens a complaint against the business and notifies the firm that it has not complied with registration requirements. However, when made aware of the need to register, most firms comply quickly. Of 50 firm registration violations examined by Sunset staff, 44 of the engineering firms complied with the registration requirements upon first contact from the Board. Yet, the Board still goes through the process of opening a case and pursuing an enforcement action against such firms, possibly at the expense of more serious engineering violations that require greater investigative resources.

- The Board does not devote adequate attention to cases involving technical engineering issues. Such disciplinary cases tend to be those that could most likely harm the public, such as gross negligence or incompetent practice cases. Instead, the cases the Board is most likely to see through include minor infractions, such as the illegal use of the title “engineer” or failure to register as a firm. For example, out of the cases involving licensees received in fiscal year 2001, the Board has dismissed half, while out of cases opened against firms and nonlicensees – most of which include minor violations – 75 percent have resulted in a sanction or an agreement of voluntary compliance.

The Board is most likely to see through complaints that involve minor infractions.

The Board does not have a reliable system to track complaints.

- During the Sunset review, the Board had difficulty providing accurate, consistent statistics on complaint activity, such as the number of cases dismissed, the number of nonjurisdictional complaints received, and the number and types of sanctions issued. Without a tracking system that follows complaints from initial receipt to final disposition, the Board cannot ensure that all complaints are addressed and that information reported by the Board is accurate, and thus it cannot evaluate the quality of its enforcement program.
- The Board assigns multiple case numbers for the same complaint, making tracking difficult, cumbersome, and prone to confusion. Also, the Board does not accurately account for the time it takes to close a case. Staff does not start tracking the time a case is open until staff has performed preliminary investigatory work and determined that a violation of the Act or Board rules likely occurred. For example, if a complaint is filed with the Board on June 1, but staff takes until September 1 to determine that a violation likely occurred, staff would not begin counting the time the case is open

Board's application of administrative penalties, the Board revised its penalty matrices in rule and began using a penalty worksheet to determine penalty amounts.

- The Legislature has granted confidentiality and immunity from suit to committees and individuals who provide technical expert testimony and assistance to other occupational licensing agencies, such as the Texas Board of Medical Examiners, the State Board of Dental Examiners, and the Texas State Board of Podiatric Medical Examiners. Such immunity has allowed other agencies to more easily receive technical input on enforcement matters.

For example, the Texas State Board of Podiatric Medical Examiners has authority to use licensed podiatrists as investigators for complaint investigation and disposition. Statute grants these investigators used by the Board immunity from suit and liability for providing testimony and opinions in an enforcement case, as well as for investigating a complaint and participating in an informal conference to determine the facts of the complaint.¹³ Also, the Texas Board of Medical Examiners uses paid and voluntary physicians who serve as consultants to the Board in enforcement cases. The Medical Board's statute allows the Medical Board to offer these consultants immunity from liability in exchange for their technical expertise. Medical Board staff indicated that without the ability to offer consultants immunity, the Medical Board would not be able to recruit experts to assist the Board and as a result, the Medical Board's enforcement efforts would be greatly hampered.¹⁴

The ability to offer immunity from suit to technical experts has allowed other agencies to more easily receive technical input on enforcement matters.

Recommendation

Change in Statute

1.1 Require the Board to establish a simple, accessible process for accepting, opening, and investigating complaints.

This recommendation would streamline the Board's complaint process by requiring the Board to open an enforcement action upon receipt of a complaint from the public or licensee, or a referral from another agency. The Board would consider any written grievance, including those that fall outside of the Board's jurisdiction, as a complaint. The Board would discontinue its current practice of waiting until it is possible to make a determination on disciplinary action before opening an official complaint case. Classifying all grievances as actual complaints also would allow the Board to maintain confidentiality from the time the complaint is initially filed with the Board until formal charges have been filed. This recommendation also would clarify that complainants should be required only to provide enough information for the Board to determine jurisdiction, and that Board staff is responsible for conducting all phases of investigations, including gathering needed evidence.

- The average time to resolve the case from the date the Board initially received the complaint.
- The outcome of the cases, including the number of cases dismissed and the reason for the dismissal, and the number of cases resulting in disciplinary action and the action taken.
- The cases resulting in enforcement action should also show how the action is imposed, such as by consent order, agreed order approved by the Board, or Board order resulting from a contested case.
- The number of complaints received that fall outside of the Board's jurisdiction, the nature of the complaint, and the action taken.
- The agency should also provide the number, type, and age of all open cases as of the end of each fiscal year and any other information required by the Texas Engineering Practice Act relating to statistical analysis of complaints.

The Board should ensure appropriate documentation on all complaint files, including from the investigative process and from the informal conference. The Board should assign one case number to a complaint, allowing for easier tracking capability and reducing the chance that a case will get overlooked.

1.6 Authorize the Board to establish a 30-day grace period for firms to register with the Board.

Under this grace period, firms registering with the Board for the first time would be granted 30 days after specific, written notification from the Board to comply with registration requirements. Such notification of the need to register would not be considered opening of an enforcement case, but instead a means of bringing otherwise legal firms into compliance. Firms that comply within the 30-day period would have no record of enforcement action taken against them. If firms do not register within the 30-day period, the Board would open a complaint case and begin enforcement action. The 30-day grace period would apply only to firms registering for the first time; firms that fail to renew their registration would be subject to enforcement action when their registration expires. This recommendation would allow the Board to use its professional discretion in determining whether a firm should receive the 30-day grace period.

Management Action

1.7 Provide formal training for all investigative staff.

Investigators should be initially trained to ensure that they understand investigative techniques, the Texas Engineering Practice Act, and other engineering issues. While investigators should not be expected to have the knowledge of an engineer, formal training should lead to higher quality investigations and cases that can be resolved more quickly.

Impact

These recommendations are intended to improve the public's access to the Board's enforcement process, prioritize the Board's attention on major engineering infractions, and make the Board more accountable for providing accurate information about its enforcement activities. Requiring

Issue 2

Key Elements of the Board's Licensing and Regulatory Functions Do Not Conform to Commonly Applied Licensing Practices.

Summary

Key Recommendations

- Revise elements of the agency's licensing authority to reflect standard practices in the way the Board accepts applications for licensure, makes exams accessible to individuals with disabilities, addresses applicants' criminal history, and processes renewals.
- Update elements of the agency's enforcement activities to improve the way the Board makes decisions on complaints, require staff to update the Board about administratively dismissed complaints, adopt a probation guide, and provide restitution as an option during informal conferences.
- Eliminate fees set or capped in statute and encourage the Board to increase coordination with other state agencies that have overlapping responsibilities.

Key Findings

- Licensing provisions of the Board's statute do not follow model licensing practices and could potentially affect the fair treatment of licensees and consumer protection.
- Nonstandard enforcement provisions of the Board's statute could reduce the agency's effectiveness in protecting the consumer.
- Certain administrative provisions of the Board's statute could reduce the Board's efficiency and flexibility to adapt to changing circumstances.

Conclusion

Various licensing, enforcement, and administrative processes in the Texas Engineering Practice Act do not match model licensing standards developed by Sunset staff from experience gained through more than 70 occupational licensing reviews over the last 25 years. For example, some licensing requirements are unclear or overburdensome, such as application notarization and separate character references. The Sunset review compared the Board's statute, rules, and practices against the model licensing standards to identify variations. Based on these variations, staff identified the recommendations needed to bring the Board in line with the model standards.

regulatory practices differ from model standards. Although the Board participates in the Self-Directed, Semi-Independent Licensing Agency Pilot Project, its licensing, enforcement, and administrative programs should still follow standard practices, as bringing those aspects into conformity with licensing standard practices could benefit the Board.

Licensing provisions of the Board's statute do not follow model licensing practices and could potentially affect the fair treatment of licensees and consumer protection.

- *Licensing qualifications.* Qualifications for licensure should be easily determined and should relate to the practice of the profession. Otherwise, they introduce a level of subjectivity to the licensing process that has little or no bearing on protecting the public and may disqualify suitable applicants from licensure.

Applicants for licensure as a Professional Engineer must submit at least five references that address the applicant's character, reputation, and general suitability for licensure. Three of the references must come from a licensed Professional Engineer who attests to both the applicant's engineering experience and suitability for licensure. The additional two references dealing solely with the applicant's character are not needed to provide the valid, objective verification of experience required to protect the public.

References dealing solely with an applicant's character are not needed to protect the public.

- *Application notarization.* The process for applying for licensure should not overburden applicants or unreasonably restrict entry into the profession. Currently, individuals seeking licensure must submit notarized applications to the Board to ensure that education and experience information on the application is correct. However, by rule the Board requires that the applicant include formal education information through certified transcripts which ensures that education information on the application is correct. Additionally, this notarization requirement is unnecessary as state law prohibits a person from knowingly making a false entry in a government record.¹
- *Criminal convictions.* Chapter 53 of the Occupations Code provides a general standard to guide licensing agencies in determining what crimes should affect licensure for that agency. This law provides that a criminal conviction affects qualification for licensure when a crime is related to the profession, according to guidelines developed by the agency and published in the Texas Register. These guidelines allow an agency to suspend or revoke a license, disqualify a person from receiving a license, or deny the opportunity to take a licensing exam because of specific criminal activity. The Board's rules currently set out such guidelines, but referencing Chapter 53 in the Act would clarify the Board's authority over criminal convictions.

authority to dismiss complaints; however, staff does not report these dismissals to the Board. Requiring staff to inform the Board of administratively dismissed complaints would keep the Board aware of staff actions without requiring Board members to invest time in each complaint case.

- **Probation procedure.** Probation of a license allows licensees found in violation of regulatory requirements to continue practicing while they take corrective action to address the agency's concerns. Probation procedures should provide for imposing appropriate conditions, notifying probationers in writing of those conditions and actions they need to take, and tracking probationers' progress to ensure compliance with the terms of probations. The Board currently uses probation as an enforcement sanction to correct violations of the Act or rules, but has no formal guide to structure the terms of a licensee's probation or track compliance with the probation.
- **Restitution authority.** The goal of restitution is to return a complainant to some or all of the condition that existed before the act that caused the complaint. Restitution can be granted when a member of the public has been defrauded or subjected to a loss that can be quantified. The Board's enforcement tools are designed to correct licensee behavior, but do not allow for compensation to the aggrieved party.

Certain administrative provisions of the Board's statute could reduce the Board's efficiency and flexibility to adapt to changing circumstances.

- **Flexible fees.** The Legislature has established a practice in many programs of eliminating set or capped fee amounts in statute and authorizing agencies to set fees by rule. Allowing an agency to set its own fees provides greater administrative flexibility and reduces the need for the Legislature to continually update agency statutes to accurately reflect the costs of regulation. Because agencies are required to set fees in rule, the public can comment on all proposed fees.

The Board's statute caps fees, including a \$200 limit on the examination fee. A national testing organization develops and administers the Board's exams. Currently, the Board purchases two of these exams, Structural Engineering II and Structural Engineering III, at a cost of \$200 each. The Board charges examinees \$200 for the morning session of the exam and \$200 for the afternoon session, yet at the current statutory fee level, the agency cannot recover its administrative costs. Allowing the Board to set examination fees would alleviate this problem and ensure that the Board can adapt quickly to future fee changes made by the national testing organization. The chart, *Board Fees Capped in Statute*, outlines the statutory limit and current level of the Board's fees.

At the current exam fee level, the Board cannot recover its administrative costs.

2.3 Clarify that the Board must address felony and misdemeanor convictions in the standard manner defined in the Occupations Code.

This recommendation would clarify the Board's authority to adopt rules that follow general guidelines in Chapter 53 of the Occupations Code for dealing with criminal convictions by specifically referencing the chapter in the Board's enabling statute.

2.4 Require the Board to adopt rules to ensure that its exams are accessible to persons with disabilities in accordance with the Americans with Disabilities Act.

Under this recommendation, the Board's statute would be amended to ensure that testing accommodations for the Fundamentals of Engineering and Principles and Practice of Engineering exams are in accordance with the Americans with Disabilities Act. The Board would need to adopt rules regarding accessibility accommodations and work with the national testing organization the Board uses to ensure that these rules are followed.

Management Action

2.5 The Board should explore switching to a continuous license renewal system.

This recommendation would encourage the Board to create a continuous license renewal system in which licenses expire on a licensee's birthday. This would eliminate quarterly backlogs, result in greater administrative efficiency, and provide more convenient service to licensees. Should the Board opt to use a continuous license renewal system, the Board should prorate fees on a monthly basis during any transition period.

Enforcement

Change in Statute

2.6 Require Board members to recuse themselves from voting on disciplinary actions in cases in which they participated in investigations or informal hearings.

This recommendation would require Board members to recuse themselves from voting on disciplinary actions in cases in which they played a role at the investigatory or informal hearing level. Recusing Board members who have a prior interest in a case would promote objective decision making and ensure that the respondent receives a fair hearing.

2.7 Require agency staff to report administratively dismissed complaints to the Board.

Staff would regularly report administratively dismissed complaints to Board members under this recommendation. When reporting dismissals, staff should include the complainant, respondent, nature of the complaint, and reason for the dismissal.

2.8 Require the Board to adopt a probation guide.

This recommendation would require the Board to adopt guidelines in rule for probating license suspensions and to develop a system for tracking compliance with probation, thus ensuring that the Board uses the probation sanction consistently and that licensees meet the terms of probation.

| Benefits of Recommendations | | | | |
|--|---------------------------------|----------------------------|----------------------|------------------------|
| Recommendation | Benefits | | | |
| | Efficiency from Standardization | Administrative Flexibility | Fairness to Licensee | Protection of Consumer |
| Licensing | | | | |
| 2.1 Eliminate the requirement that applicants must submit separate character references as a qualification for licensure. | | | ✓ | |
| 2.2 Eliminate the application notarization requirement on individuals who apply for licensure with the Board. | | | ✓ | |
| 2.3 Clarify that the Board must address felony and misdemeanor convictions in the standard manner defined in the Occupations Code. | ✓ | ✓ | ✓ | ✓ |
| 2.4 Require the Board to adopt rules to ensure that its exams are accessible to persons with disabilities in accordance with the Americans with Disabilities Act. | | | ✓ | |
| 2.5 The Board should explore switching to a continuous license renewal system. | ✓ | ✓ | | |
| Enforcement | | | | |
| 2.6 Require the Board members to recuse themselves from voting on disciplinary actions in cases in which they participated in investigations or informal hearings. | | | ✓ | ✓ |
| 2.7 Require agency staff to report administratively dismissed complaints to the Board. | | ✓ | | ✓ |
| 2.8 Require the Board to adopt a probation guide. | | | ✓ | ✓ |
| 2.9 Authorize the Board to require restitution as part of the settlement conference process. | | ✓ | | ✓ |
| Administration | | | | |
| 2.10 Eliminate the statutory language that sets and caps fees. | ✓ | ✓ | | |
| 2.11 The Board should increase coordination efforts with other state agencies to address overlapping responsibilities and interests. | | | ✓ | ✓ |

Issue 3

Texas Has a Continuing Need for the Texas Board of Professional Engineers, but Could Benefit From Greater Coordination With the Texas Board of Architectural Examiners.

Summary

Key Recommendations

- Continue the Texas Board of Professional Engineers for 12 years.
- Require the Board to form a joint practice committee with the Texas Board of Architectural Examiners.

Key Findings

- The Texas Board of Professional Engineers protects the public by ensuring that only qualified engineers offer services to the public.
- The State has a continuing interest in regulating engineers to protect the safety of Texans.
- While organizational structures vary, all 50 states regulate the engineering industry at the state level.
- No significant benefit would result from changing the agency structure or having any other state agency perform the Board's functions.
- Although no significant benefit would result from consolidation, greater coordination with the Texas Board of Architectural Examiners could achieve operational efficiency.

Conclusion

The Sunset review evaluated the continuing need for licensing and regulation of Professional Engineers in Texas, as well as the need for the Texas Board of Professional Engineers to provide these functions. Sunset staff examined whether the Board's functions could be successfully transferred to another agency and studied how other states regulate engineers. Staff concluded that regulation of Professional Engineers is needed to protect public safety and welfare, and that the Board should be continued for 12 years. However, staff also concluded that establishing a joint practice committee of the Board and the Texas Board of Architectural Examiners would ensure coordination between the agencies to resolve ambiguities among the professions overseen by the two agencies.

- The Board licenses individuals to ensure their competence to practice engineering and provide engineering services to the public. The Board also develops and implements rules and regulations to ensure that licensees engage in safe and ethical practices. The Texas Engineering Practice Act is designed to protect consumers and give them rights and recourse if laws are violated. Further, the public needs an agency that can receive and investigate complaints about the practice of engineering and, if necessary, discipline those who violate the law.

While organizational structures vary, all 50 states regulate the engineering industry at the state level.

- The chart, *State Engineering Regulatory Agencies*, describes the structure of engineering agencies in the United States. Few states use a separate, stand-alone agency to regulate engineers as Texas does. Most states combine regulation of engineering with other professions, such as land surveying and architecture, although the organization of such agencies varies.

| State Engineering Regulatory Agencies ¹ | | | |
|--|--|------------------|---|
| Structure | Profession | Number of States | States |
| Separate agency | Engineering | 5 | Texas, Delaware, Florida, Maine, West Virginia |
| | Engineering & Land Surveying | 15 | Alabama, Arkansas, Kentucky, Idaho, Louisiana, Mississippi, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Wyoming |
| | Engineering & Architecture | 1 | Nebraska |
| | Engineering, Land Surveying, Architecture & Others | 4 | Arizona, Kansas, Minnesota, New Hampshire |
| Umbrella agency | Engineering | 6 | Illinois, Indiana, Maryland, Michigan, Vermont, Wisconsin |
| | Engineering & Land Surveying | 12 | California, Colorado, Connecticut, Georgia, Iowa, Massachusetts, Montana, New Jersey, New York, South Carolina, Utah, Washington |
| | Engineering & Architecture | 1 | Tennessee |
| | Engineering, Land Surveying, Architecture & Others | 6 | Alaska, Hawaii, Missouri, Rhode Island, South Dakota, Virginia |

Merging the Board

Over the past 25 years, a number of reports have examined the potential of combining the Board with other professional licensing agencies. These reports and their conclusions follow.

- *Sunset review, Architectural Examiners Board, 1978* – Consolidation among the Engineers, Architectural Examiners, and Land Surveying boards cannot clearly be established.
- *Sunset review, Engineers Board, 1980* – Combining Engineers and Surveyors “could improve the overall efficiency of the operations.”
- *Sunset review, Architectural Examiners Board, 1991* – Investigators at the Engineers Board lack necessary expertise in architecture and landscape architecture, so merging the agencies would not significantly improve enforcement efforts.
- *Comptroller of Public Accounts, Texas Performance Review, 1991* – Consolidate the Engineers, Architects, and Land Surveying boards to achieve greater administrative efficiency.

- The Texas Board of Professional Land Surveying has ties to the Board. Until 1979, Professional Engineers could offer surveying services without holding a land surveyor license. However, as surveying became more technical, fewer engineers took courses and gained experience in surveying. As a result, the Legislature decided that engineers must pass an exam on land surveying and become licensed as a surveyor to perform surveying work in Texas. Also, the National Council of Examiners for Engineering and Surveying (NCEES) serves as the national coordinating body for engineering and surveying boards in the United States, including Texas. Both boards use NCEES’ model law and require applicants to pass NCEES’ national exam.

Despite the similarities in the two professions, combining the boards would not result in any significant cost-savings or increased operational efficiencies, and would not enhance the regulation of either profession. The Engineers Board should address issues relating to its enforcement process, as addressed elsewhere in this report, before serious consideration can be given to adding the regulation of land surveying to its responsibilities. In this way, the Legislature may also be assured that the Land Surveying Board’s enforcement efforts are not harmed through such a consolidation.

- The Texas Department of Licensing and Regulation (TDLR) has a structure for licensure, examination, and investigation in place. In addition, TDLR has shown itself to be able to assume responsibility for an ever-widening array of regulatory programs. However, it does not have the expertise to take on the regulation of engineering. Thus, the in-house expertise of the Board would need to be replicated at TDLR, leaving the primary benefit of transfer as one of small administrative efficiency. This advantage alone was not significant enough for staff to recommend such a transfer.

The Board should address its enforcement issues before considering adding regulation of land surveying to its duties.

Recommendation

Change in Statute

3.1 Continue the Texas Board of Professional Engineers for 12 years.

This recommendation would continue the Engineers Board as an independent agency responsible for overseeing professional engineering in Texas for the standard 12-year period.

3.2 Require the Board to form a joint practice committee with the Texas Board of Architectural Examiners.

Although the Professional Engineers and Architectural Examiners Boards have voluntarily formed a joint committee, this recommendation would ensure that the Boards continue to work together. The committee's guiding principle should be to improve the agencies' protection of the public, and this principle should take precedence over the interests of each Board. The committee should work to resolve issues stemming from the overlap among the professions overseen by the agencies. The committee would issue advisory opinions to both Boards regarding matters such as specific enforcement cases, the definitions of architecture and engineering, and requirements relating to the need for professionals licensed by the two Boards on specific projects. In addition, each Board would be responsible for reporting back to the committee the final action or outcome on the specific issue considered by the committee. The committee would thus develop a body of information that could help resolve future issues and further clarify the respective practice of the professions. The committee should consist of three members from each Board, and should meet at least twice a year. Both Boards should adopt resolutions regarding the committee, its composition, and its purpose.

Impact

These recommendations would continue the Board as a stand-alone agency responsible for regulating Professional Engineers and enforcing the Texas Engineering Practice Act. They would also make coordination with the Texas Board of Architectural Examiners a statutory requirement.

Fiscal Implication

Because the Board currently is part of the Self-Directed, Semi-Independent Licensing Agency Pilot Project and is outside of the appropriations process, continuing the Board will have no fiscal impact to the State. Making the current joint practice committee between the Board and the Texas Board of Architectural Examiners a statutory requirement would cost the agency approximately \$1,100 annually for travel reimbursement.

¹ Engineers in Delaware are self-regulating and are licensed by the Delaware Association of Professional Engineers. The Florida Board of Professional Engineers is operated by the Florida Engineer Management Company, a nonprofit. Maine's engineering board is semi-independent. Illinois has a separate board for structural engineers. Pennsylvania regulates engineers, surveyors, and geologists under one board. Boards in Arizona, Kansas, Minnesota, and New Hampshire include other professions, such as geologists.

ACROSS-THE-BOARD RECOMMENDATIONS

| Texas Board of Professional Engineers | |
|--|---|
| Recommendations | Across-the-Board Provisions |
| | A. GENERAL |
| Update | 1. Require at least one-third public membership on state agency policymaking bodies. |
| Update | 2. Require specific provisions relating to conflicts of interest. |
| Update | 3. Require that appointment to the policymaking body be made without regard to the appointee's race, color, disability, sex, religion, age, or national origin. |
| Apply | 4. Provide for the Governor to designate the presiding officer of a state agency's policymaking body. |
| Update | 5. Specify grounds for removal of a member of the policymaking body. |
| Apply | 6. Require that information on standards of conduct be provided to members of policymaking bodies and agency employees. |
| Apply | 7. Require training for members of policymaking bodies. |
| Apply | 8. Require the agency's policymaking body to develop and implement policies that clearly separate the functions of the policymaking body and the agency staff. |
| Apply | 9. Provide for public testimony at meetings of the policymaking body. |
| Update | 10. Require information to be maintained on complaints. |
| Apply | 11. Require development of an equal employment opportunity policy. |
| Apply | 12. Require information and training on the State Employee Incentive Program. |

AGENCY INFORMATION

Agency Information

Agency at a Glance

The Texas Board of Professional Engineers protects public health, safety, and welfare by ensuring that only qualified individuals provide engineering services to the public in Texas. The Board traces its roots to 1937, when the Legislature created the State Board of Registration for Professional Engineers in the aftermath of the New London School explosion, which killed nearly 300 students and teachers.

To accomplish its goal, the Board licenses engineers, and regulates their activities through enforcement. The Board's main functions include:

- licensing Professional Engineers and certifying Engineers-in-Training;
- registering engineering firms, sole proprietorships, partnerships, corporations, and joint stock associations;
- investigating and resolving complaints alleging illegal or incompetent practice of engineering by both licensed and unlicensed persons; and
- enforcing the Texas Engineering Practice Act and taking disciplinary action when necessary.

Information about the Board is available at www.tbpe.state.tx.us.

Key Facts

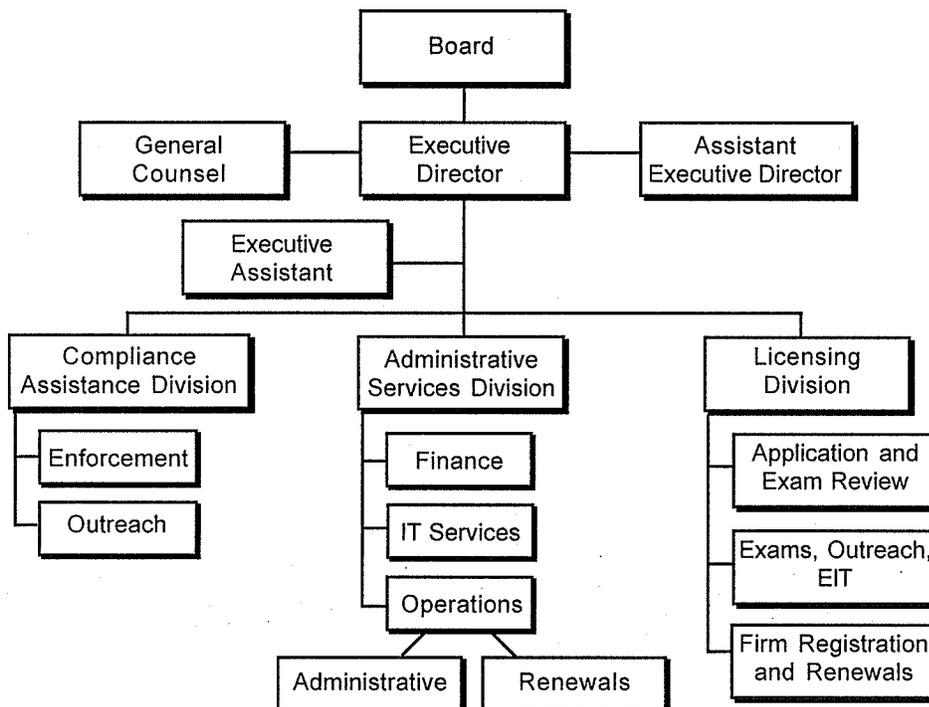
- **Funding.** In fiscal year 2001, the Board operated with a budget of about \$1.5 million. All costs are covered by licensing fees collected from the industry.
- **Staffing.** The Board has 25 full-time equivalent positions, based in Austin.
- **Licensing.** The Board regulates 48,322 Professional Engineers. In fiscal year 2001, the Board issued 1,623 new licenses.
- **Firm Registration.** Since 2000, the Board has registered engineering firms, including sole proprietorships. Currently, 5,449 firms are registered.
- **Enforcement.** In fiscal year 2001, the Board received 442 complaints from the public. That same year, Board staff also initiated 545 complaints. Of the 1,018 complaints resolved in fiscal year 2001, 72 resulted in sanctions against a licensee.

Staff

The Board has 25 full-time equivalent positions, all based in Austin. Employees work in three divisions – Licensing, Compliance Assistance, and Administrative Services. The Executive Director, under the direction of the Board, manages the agency’s day-to-day operations and implements Board policy. The *Texas Board of Professional Engineers Organizational Chart* shows the agency’s structure.

Appendix A compares the agency’s workforce composition to the minority civilian labor force. The Board has generally met the civilian labor force guidelines for most job categories.

Texas Board of Professional Engineers Organizational Chart



Funding

Revenues

The Board received an appropriation of \$1,503,273 in fiscal year 2001. As a licensing agency, the Board generates revenue through licensing, registration, and examination fees that exceed its administrative costs. These licensing and examination fees totaled about \$2 million in fiscal year 2001, and were deposited directly into the State’s General Revenue Fund. In fiscal year 2001, the Board collected about \$50,000 more than overall appropriations made to cover its direct and indirect costs.

The Board's expenditures for fiscal year 2002 were \$2,038,996, which is about \$440,000 more than fiscal year 2001 expenditures. In addition to these costs, beginning in fiscal year 2002, the Legislature is requiring the Board to submit an annual lump-sum payment to the General Revenue Fund as a condition of participating in the Self-Directed, Semi-Independent Licensing Agency Pilot Project. Because licensing agencies typically collect more funds than they expend, the Legislature requires an annual payment from each agency participating in the pilot project in order to avoid a loss of funds to the State Treasury. The amount of the payment varies by agency. For the Board, this amount is \$50,000.

Appendix B describes the Board's use of Historically Underutilized Businesses (HUBs) in purchasing goods and services for fiscal years 1998 to 2001. Although the agency fell well short of the State's goal for the category of other services, its HUB spending in the commodities category surpassed the goal by a large margin. The Board must use a sole-source provider for purchasing and grading national exams, and this sole-source acquisition represented 54 percent of the total amount spent for other services in fiscal year 2001.

Agency Operations

To ensure that qualified individuals practice engineering in Texas and to regulate the practice of professional engineering in the state, the Board performs two core functions: licensing and examination, and enforcement.

Licensing and Examination

Professional Engineers

Under the Texas Engineering Practice Act, only licensed Professional Engineers may provide engineering services, including planning, design, or analysis in connection with – among other things – utilities, structures, buildings, and machines, to the public. Also, all public works, such as roads and bridges, must be designed and constructed under the direct supervision of a licensed Professional Engineer.

In 1965, the Legislature amended the Act to exempt individuals who practice engineering for a private manufacturer from needing a Professional Engineer license. About 80 percent of individuals in the engineering profession fall under the industry exemption. As a result, the Board licenses only a segment of individuals in the engineering profession.

Because of industry exemptions, the Board licenses only about 20 percent of individuals in the engineering profession.

In fiscal year 2002, the Board issued 1,666 new Professional Engineer licenses, bringing the total number of licensees to 48,793.

Continuing Education. The Board does not require continuing education for Professional Engineers. In 1995, the Board began a voluntary Continuing Professional Competency program to gauge licensees' interest in continuing education. The program's trial period ended in June 2001. During the six-year period, about 10 percent of licensees participated in the program.

Engineers-in-Training

Becoming an Engineers-in-Training (EIT) is not a mandatory part of the Board's licensing process. EITs, who are certified by the Board for an eight-year period, work as apprentices while gaining the experience needed to apply for a Professional Engineer license. EITs must meet certain education requirements and pass the Fundamentals of Engineering exam. The Board certified 1,331 Engineers-in-Training in fiscal year 2002.

Firm Registration

In 2000, the Board began its firm registration program. All engineering firms, including sole proprietorships, that offer engineering services to the public must annually register with the Board. Out-of-state firms that offer engineering services in Texas must register as well. In addition, all engineering services provided by a firm must either be performed by or under the direct supervision of a licensed Professional Engineer who is a regular full-time employee of the firm. In fiscal year 2002, the Board had 5,449 registered firms.

*The Board began
registering engineering
firms in 2000.*

Enforcement

The Board regulates the engineering profession by enforcing the Texas Engineering Practice Act, and by investigating and resolving complaints against both licensed and unlicensed individuals. Complaints are received from the public or licensees. Also, the Board opens cases in its name when staff learns of unlicensed individuals or unregistered firms providing engineering services to the public. Staff investigators discover many of these cases while conducting phone book or Internet searches.

When a complaint is received, Compliance Assistance Division staff solicits supporting information from the complainant. If enough evidence exists to substantiate the complaint, staff opens a disciplinary case, notifies the respondent, and proceeds with an investigation.

After staff completes an investigation, the Executive Director can either dismiss the case or offer the respondent a consent order. If the respondent agrees to the consent order, the matter must then be approved by the full Board. If the respondent does not agree to a consent

APPENDICES

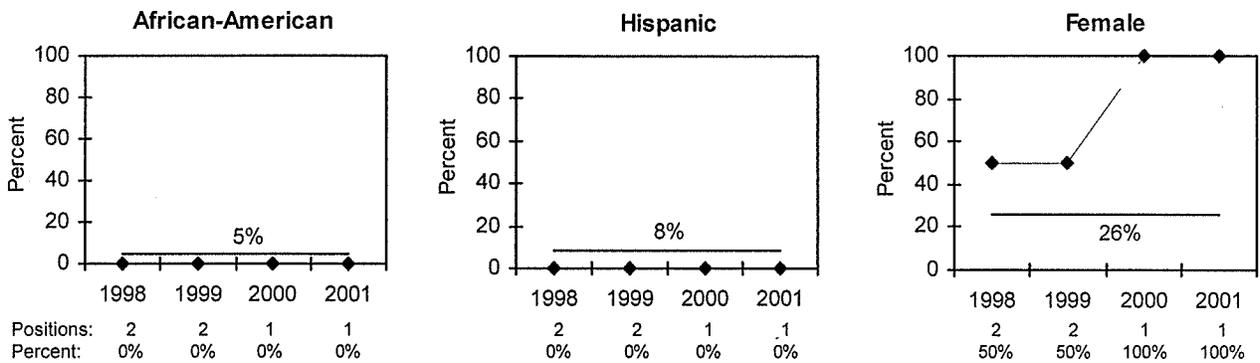
Appendix A

Equal Employment Opportunity Statistics

1998 to 2001

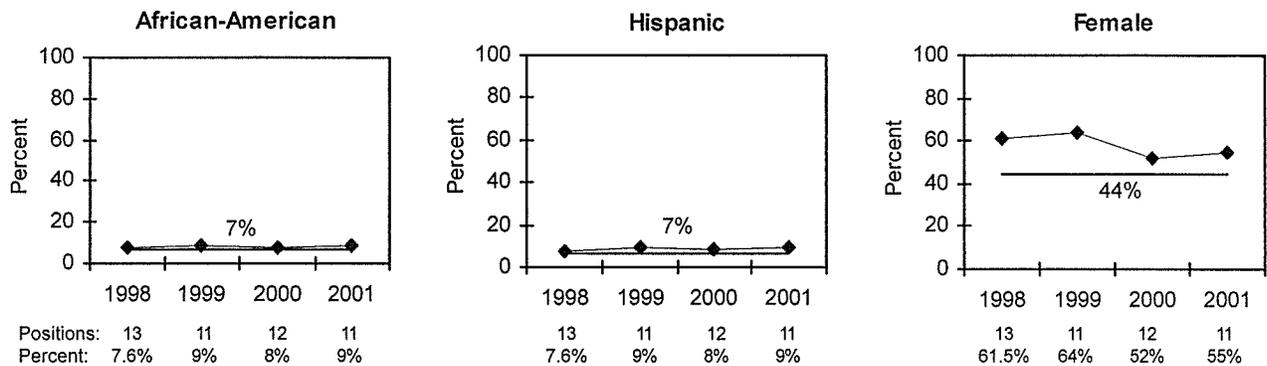
In accordance with the requirements of the Sunset Act, the following material shows trend information for the Texas Board of Professional Engineers employment of minorities and females in all applicable categories.¹ The agency maintains and reports this information under guidelines established by the Texas Commission on Human Rights.² In the charts, the flat lines represent the percentages of the statewide civilian labor force for African-Americans, Hispanics, and females in each job category. These percentages provide a yardstick for measuring agencies' performance in employing persons in each of these groups. The dashed lines represent the agency's actual employment percentages in each job category from 1998 to 2001. The agency does not employ persons in some job categories – technical, protective services, skilled craft, and service/maintenance.

State Agency Administration



The Board exceeded the State goal for Female employment every year, but fell short of the goals for Hispanics and African-Americans each year.

Professional



The Board exceeded the goal for African-Americans, Hispanics, and Females each year.

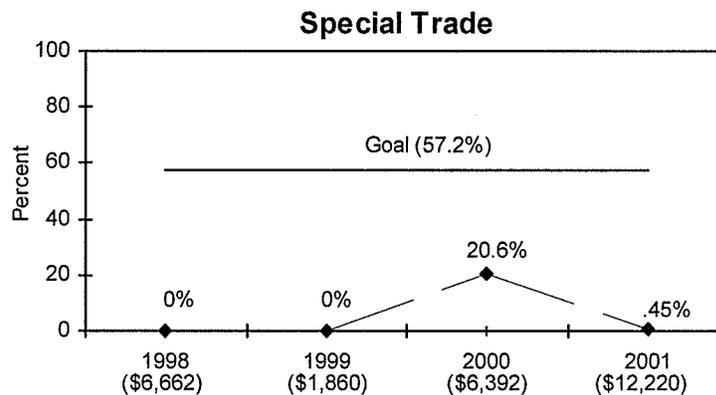
Appendix B

Historically Underutilized Businesses Statistics

1998 to 2001

The Legislature has encouraged state agencies to increase their use of Historically Underutilized Businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. The Legislature also requires the Sunset Commission to consider agencies' compliance with laws and rules regarding HUB use in its reviews.¹ The review of the Texas Board of Professional Engineers revealed that the agency is not complying with all requirements concerning HUB purchasing. Specifically, the agency has not adopted HUB rules, although the Board does have procedures to address the sole-source acquisition used in the other services category.

The following material shows trend information for the Texas Board of Professional Engineers use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in the Texas Building and Procurement Commission's statute.² In the charts, the flat lines represent the goal for HUB purchasing in each category, as established by the Texas Building and Procurement Commission. The dashed lines represent the percentage of each spending with HUBs in each purchasing category from 1998 to 2001. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category. In the area of greatest spending, other services, the Board has fallen well short of the State's goal of 33 percent. However, the agency has consistently surpassed the goal for commodities spending.



The Board has fallen short of the State's goal in this category.

Appendix C

Complaint Process Survey Results

As part of the review of the Texas Board of Professional Engineers, Sunset staff designed a survey to obtain input from individuals who have been involved with the Board's complaint process. Using the most recent cases closed by the Board, Sunset staff sent the survey to 50 people who filed a complaint (complainants) and 50 people who had a complaint filed against them (respondents). Sunset staff conducted the survey in July 2002. Sunset staff received a total of 31 responses, including 20 responses, or 38 percent, from complainants and 11 responses, or 22 percent, from respondents. The chart below summarizes the responses and shows selected comments made by survey respondents. Sunset staff did not attempt to verify the comments and does not present them as fact.

| Survey Responses | | |
|--|--|---|
| Question | Complainants | Respondents |
| How well did the Board make information about the agency and its complaint process available? | <p>Most complainants said information about the complaint process was easily available.</p> <p>"They did a good job of informing me of the process for filing a complaint."</p> <p>"Once I located the Board, they were helpful."</p> | <p>About half of respondents said information about the process was available. The remaining half felt information was either not available or inadequate.</p> <p>"I received notification of the complaint, but received no information about the complaint process or any actions I could take."</p> <p>"They were very clear."</p> |
| <p>Complainants: How convenient and accessible was the process of filing a complaint with the Board?</p> <p>Respondents: How did the Board solicit your participation in the process once the investigation was initiated?</p> | <p>Most complainants found the complaint process convenient and accessible. About one-fourth found accessing the process difficult.</p> <p>"Difficult and unclear."</p> <p>"Once I determined who I needed to speak with to file a complaint, the process was easy."</p> | <p>More than half of respondents noted that the Board asked for information. One-third believed that the Board never read or considered the requested information.</p> <p>"The Board only asked for information, but did not go any further in regards to my participation."</p> <p>"I had an opportunity to present my defense. I did it by letter."</p> |
| Does the Board handle your complaint in a timely manner? | <p>More than half of complainants felt the Board resolved their cases in a timely manner. One-third said the Board took too long.</p> <p>"The complaints I filed were taken seriously and seem to have been responded to quickly."</p> <p>"Not at all. It took long enough for the complaint to be ignored."</p> | <p>The majority of respondents said their cases received timely resolution. One-fourth felt their cases were not handled timely.</p> <p>"Though I do wish my innocence would have been proven sooner, I do feel the Board handled the matter in a professional and timely fashion with its available resources."</p> |
| How well did the Board keep you informed of the status of your complaint? | <p>More than half of complainants said they were kept informed. The rest felt they were not kept informed or received inadequate information.</p> <p>"I received regular notices of progress."</p> <p>"I was kept in the dark."</p> | <p>Half of respondents said they were kept informed; half said they were not.</p> <p>"Fair to poor."</p> <p>"Each step of the process was made known to us in a timely manner."</p> |

Appendix C

| Survey Responses | | |
|---|--|---|
| Question | Complainants | Respondents |
| <p>How can the Board improve its complaint process?</p> | <p>“Education is one of the most important services the Board can provide. I believe that most engineers do not understand when they have to apply a signature and seal to a set of drawings or a report.”</p> <p>“Have access to peer review by engineers who can advise the Board on technical matters in a case and not be liable for their actions.”</p> | <p>“Work with TSPE chapters.”</p> <p>“Disband it.”</p> <p>“I was treated fairly. I can’t think of anything they can do.”</p> |
| <p>Please add any other comments about the Texas Board of Professional Engineers.</p> | <p>“The Texas Board of Professional Engineers is at the forefront of the process — they are quick and effective. It is not broke, do not try to fix it.”</p> <p>“My opinion is the Board hands out different disciplinary actions to different PEs who might have committed similar unethical practices.”</p> <p>“I am convinced that the Board is not an effective enforcement agency. They may well serve the role of licensing engineers and developing professional standards for the state, but enforcement requires a level of detachment and objectivity that appears to me to be missing from the TBPE.”</p> | <p>“It would certainly be nice to simplify the manual, reducing the legal jargon, eliminating the contradictions and exceptions, etc. In doing so, I believe all rules would be better understood.”</p> <p>“Until my experience with my complaint last year, I was proud to be registered in Texas. Now, I am not.”</p> |

Appendix D

Staff Review Activities

The Sunset staff engaged in the following activities during the review of the Texas Board of Professional Engineers (the Board).

- Worked extensively with agency staff.
- Attended Board meetings and Board committee meetings and interviewed Board members.
- Attended meetings of the Special Issues Joint Committee of the Texas Board of Professional Engineers and the Texas Board of Architectural Examiners.
- Conducted a written survey of complainants and respondents involved in the Board's complaint process, and reviewed Board enforcement files.
- Met with in person or interviewed over the telephone staff from the Texas Department of Transportation, Texas Department of Criminal Justice, Texas Department of Insurance, and Texas Board of Professional Land Surveying.
- Conducted interviews and solicited written comments from national, state, and local associations representing engineering and related interests.
- Met with in person or interviewed over the telephone Professional Engineers licensed by the Board, engineering students, and city officials who work with licensed engineers.
- Worked with the State Auditor's Office, Legislative Budget Board, legislative committees, and legislators' staffs.
- Reviewed reports by the State Auditor's Office, Management Advisory Services, Legislative Budget Board, National Society of Professional Engineers, American Council of Engineering Companies, and the National Council of Examiners for Engineering and Surveying.
- Researched the functions of professional engineering agencies in other states.
- Reviewed Board documents and reports, state statutes, legislative reports, previous legislation, audio recordings of legislative hearings, and literature on engineering issues.
- Performed background and comparative research using the Internet.

**SUNSET REVIEW OF THE
TEXAS BOARD OF PROFESSIONAL ENGINEERS**

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LICENSING AGENCY PILOT PROJECT

SUNSET STAFF REPORT

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SUMMARY



Summary

Sunset Staff Report

Licensing Agency Pilot Project

The Self-Directed, Semi-Independent Licensing Agency Pilot Project is designed to be a test of the effectiveness of allowing agencies to make financial decisions outside of the appropriations process. The Sunset review of the Pilot Project sought to assess whether the flexibility offered to project agencies to operate without legislative scrutiny of their finances outweighed the risks to the State.

This analysis was hampered by the fact that the Pilot Project had only been in existence for a single year at the time of the review. Because of the limited information on which to test the Pilot Project, the Sunset review concluded that the test should run an additional four years and that the Pilot Project Act should be amended to clearly state the basis for which its success or failure should be judged.

Despite the recommendation to continue the Pilot Project, the review did find examples of practices by the project agencies that could result in harm to the reputation of the State that and should be modified during the test period. For example, project agencies are permitted keep all funds raised through enforcement efforts – a process that may result in questions about whether agencies are more concerned with pursuing revenue or protecting the public. In a similar manner, project agencies may keep and spend donations from any source without full disclosure. The review resulted in recommending limitations to these practices.

For example, project agencies are permitted keep all funds raised through enforcement efforts – a process that may result in questions about whether agencies are more concerned with pursuing revenue or protecting the public. In a similar manner, project agencies may keep and spend donations from any source without full disclosure. The review resulted in recommending limitations to these practices.

The Sunset review of the Pilot Project sought to assess whether the benefits of additional flexibility outweigh the risks posed to the State.

Issues / Recommendations

Issue 1 The Self-Directed, Semi-Independent Licensing Agency Pilot Project Should Be Continued for Four Years.

Key Recommendations

- Continue the Self-Directed, Semi-Independent Licensing Agency Pilot Project for four years.
- Establish standards by which to judge the success or failure of the Pilot Project.

For more information, contact Steve Hopson, (512) 463-1300. Sunset staff reports are available online at www.sunset.state.tx.us.

ISSUES / RECOMMENDATIONS

Issue 1

The Self-Directed, Semi-Independent Licensing Agency Pilot Project Should Be Continued for Four Years.

Summary

Key Recommendations

- Continue the Self-Directed, Semi-Independent Licensing Agency Pilot Project for four years.
- Establish standards by which to judge the success or failure of the Pilot Project.

Key Findings

- The Pilot Project has not had adequate time to test its effectiveness.
- Although the Pilot Project was designed to be a test, the statute does not provide guidance on the standards with which to judge the success or failure of the project.
- Because the Pilot Project allows agencies to operate outside the normal legislative oversight process, performance of the Pilot Project agencies should be carefully monitored.

Conclusion

The Legislature created the Self-Directed, Semi-Independent Licensing Agency Pilot Project Act to test whether certain agencies could operate effectively outside of the normal legislative appropriations process. Based on the limited time the Act has been in effect, Sunset staff had difficulty assessing the need for and effectiveness of the Act. However, staff determined that the Act should provide guidance on the standards by which its success or failure should be judged, and that long-term operation of the project agencies without close oversight could pose dangers to the State. The review concluded that the Pilot Project should be continued, for a limited period of time, to complete the test and to ensure adequate oversight. In addition, the review recommended that the Act include objective standards to guide the future Sunset review.

keep their funds in the Texas Safekeeping Trust Company, outside of the Treasury.

- Although the original bill envisioned the Pilot Project as a four-year test, no change was made in the Sunset date to accommodate the fact that the project did not effectively start until September 1, 2001. As a result, the Pilot Project will have had only one full year of operation before the 78th Legislature convenes to decide on its continuation.

In addition, due to the uncertain continuation of the Pilot Project, agencies are not able to take full advantage of the anticipated benefits of the Act. For example, all three project agencies have prepared legislative appropriations requests for the next fiscal year – although freedom from the appropriations process was a key benefit of the Pilot Project. Each agency has directed its spending in ways that are different from their last appropriation, although, in general, the project agencies are voluntarily abiding by the limitations in the appropriations process on salaries, number of employees, and travel spending.

*The Pilot Project Act
does not provide
guidance on how its
success or failure should
be measured.*

Although the Pilot Project was designed as a test, the statute does not provide guidance on the standards with which to judge the success or failure of the project.

- Advocates of the Pilot Project envisioned the project as a test of whether the project would be appropriate to apply to a broader number of other licensing agencies.¹
- The Pilot Project Act contains no objective standards concerning how the success or failure of the project should be evaluated, which limits the assessment of project agency performance. While advocates argued that the Pilot Project would be a test of the practicality and efficiency of self-directed status, the Act does not define the type of efficiency to be measured or what is meant by practicality. For example, an agency could achieve a high level of cost efficiency by minimizing efforts to enforce its statute.
- In addition, because the project agencies had not been recently evaluated by either the Sunset Commission or State Auditor's Office before passage of the legislation, information on the overall performance of the agencies is not available.

Because the Pilot Project allows agencies to operate outside the normal legislative oversight process, the performance of Pilot Project agencies should be carefully monitored.

- While the Pilot Project is currently limited to three agencies, the ability of the agencies to operate without close oversight creates risk to the State. Although the project agencies seek to be semi-independent, their authority to collect fees, enforce their acts, and

Recommendation

Change in Statute

1.1 Continue the Self-Directed, Semi-Independent Licensing Agency Pilot Project for four years.

This recommendation would continue the Pilot Project to test its value, but with a shortened Sunset review date.

1.2 Establish standards by which to judge the success or failure of the Pilot Project.

This recommendation would guide the future Sunset review of the Pilot Project by establishing standards for the review. These standards would include the effectiveness of the agencies' enforcement efforts, degree to which the agencies' regulation has benefitted the public or the industry, proper administration of licensing and other fees, appropriate results on audits by the State Auditor's Office, quality of financial and other information reported to the Legislature, and responsiveness of the agencies to legislative requests for information and testimony.

Impact

The recommendation creating a shortened Sunset date would allow the Pilot Project adequate time to show its worth, yet protect the State's interests in the event that the Pilot Project proves to allow the three agencies too much freedom. With the establishment of objective standards to judge the success of the Pilot Project, the future Sunset review would focus on the most appropriate information. Creating such standards would also clearly state to the agencies the attributes that the Legislature considers to be important. The future Sunset review would also benefit from the baseline information on the agencies' performance on enforcement and budgeting that was established during this Sunset review.

Fiscal Implication

Because the agencies in the Pilot Project operate outside of the appropriations process and do not receive funds from the General Revenue Fund, continuing the Pilot Project will not have a fiscal impact on the State.

¹ K. Michael Conaway, Presiding Officer, Texas State Board of Public Accountancy, testimony before Senate Finance Committee on SB 736 (Austin, Texas, March 26, 2001).

Issue 2

Provisions of the Pilot Project Act Do Not Provide Needed Public Safeguards for the Use of Revenue From Fines and Gifts.

Summary

Key Recommendations

- Permit agencies operating under the Pilot Project Act to retain a percentage of administrative fines, penalties, contributions, and other enforcement revenue for use in enforcement programs.
- Prohibit agencies operating under the Pilot Project Act from accepting gifts, grants, and donations from parties to enforcement actions, or to pursue specific enforcement cases.
- Require agencies operating under the Pilot Project Act to report all fines, settlements, gifts, grants, and donations received, and the purpose for which such funds are used.

Key Findings

- The Pilot Project Act permits participating agencies to keep and spend revenue from penalties and gifts without needing specific appropriations authority.
- The ability to keep and spend fine revenue creates the perception that agency enforcement actions may be performed to raise revenue, not to protect the public.
- The aggressive pursuit of fines by Pilot Project agencies has raised questions concerning the agencies' use of penalties to generate revenue.
- Terms of the Pilot Project Act allow project agencies to accept and spend gifts, grants, or donations without needed accountability.

Conclusion

The Legislature created the Self-Directed, Semi-Independent Licensing Agency Pilot Project as a test of the effectiveness of allowing some state licensing agencies to raise and spend money outside of the appropriations process. Agencies covered under the Pilot Project Act can keep and spend revenue from enforcement actions, administrative fines, gifts, and donations without needing approval through the legislative appropriations process. However, the ability to raise and spend fine revenue creates the impression that regulatory agencies are more concerned with raising revenue than with protecting the public. In addition, the power to erect and benefit from regulatory speed traps violates long-standing principles established by the Legislature to ensure that regulatory processes act independently of funding questions. Since joining the Pilot Project, two of the project agencies have aggressively pursued fines and, thereby, have raised questions about their motivation.

In a similar fashion, the ability of regulatory agencies to accept and expend gifts without proper oversight and full disclosure may tempt project agencies to solicit funds from interest groups and

The Pilot Project Act, however, does not include restrictions related to the spending of gift funds. While current statutory provisions controlling the acceptance of gifts still apply, project agencies may spend all legally accepted donations without additional appropriations authority. Of the three project agencies, the Texas Board of Professional Engineers does not have statutory authority to any accept gifts, grants, or donations; the Texas Board of Architectural Examiners has authority to accept gifts only under the Interior Design Act, but not under the Architecture and Landscape Architecture Acts; and the Texas State Board of Public Accountancy has authority to solicit and accept money from any source.

The ability to keep and spend fine revenue creates the perception that agency enforcement actions may be performed to raise revenue, not to protect the public.

- Funding regulatory agencies through the collection of fine revenue weakens the integrity of enforcement programs because the public may perceive enforcement actions as a tool for revenue generation, not as a means to protect the public. The Legislature created regulatory agencies and authorized them to pursue administrative fines, agreed consent orders, civil judgments, and other enforcement actions as a means of protecting the public by deterring or punishing violations of statutes and rules.
- To keep agencies objective in the oversight of professions and prevent abuse of the authority to fine, the Legislature has acted to ensure that agencies do not use fines as a source of revenue. For example, a section of the Government Code that applies broadly to all state agencies requires agencies to deposit all fines and penalties to the credit of the General Revenue Fund.¹ While the Legislature has appropriated a portion of fine revenues to a few agencies, these appropriations are made for specific purposes – not as a general funding mechanism.

The Legislature has also acted to prevent political subdivisions from financing their governmental operations through fines, thereby ensuring the integrity of local enforcement actions. For example, to stop the use of speed traps, state law has long prohibited small municipalities from financing more than 30 percent of their budgets through traffic citations. The law also requires fine revenue of large municipalities to be spent on traffic law enforcement or road building. In 1999, because of changes due to the law's recodification in a previous session, the Legislature renewed and broadened the application of this speed-trap rule.²

The unfettered collection and spending of fine revenue may lead to the public perception that enforcement actions are taken to generate revenue.

The Legislature has acted to ensure that regulatory agencies and political subdivisions do not abuse their fine authority.

- This lack of accountability is highlighted by a practice that the Board of Public Accountancy employed even before joining the pilot project. The Board usually considers settlements received from its major enforcement cases to be contributions for the “betterment of the accounting profession,” and accepts these fines through its gift authority. Since joining the Pilot Project, the Board has received two contributions greater than \$100,000 each. While the Ethics Code prohibits agencies from accepting gifts from parties to contested cases until 30 days after the decision becomes final, this provision does not prohibit the Board from accepting gifts from parties to most of its enforcement cases because the Board typically disposes of most cases through agreed consent orders.

The Texas State Board of Public Accountancy also accepts gifts without clear disclosure and without having adopted statutorily required rules governing the process of accepting such gifts. For example, the Board received a series of three gifts, totaling \$95,000, in 1996 and 1997 from the Texas Society of CPAs and did not clearly disclose the gifts in its annual financial reports.⁷ These gifts were for the purpose of pursuing a specific enforcement case – the prosecution of American Express Tax and Business Services Inc. for the unlicensed practice of public accountancy.⁸ The Board accepted the gifts despite a general principle of state government that enforcement agencies should not accept gifts to pursue particular cases because an interested party could influence the outcome of specific cases through donations.⁹

Even before the Pilot Project, the Board of Public Accountancy accepted contributions in lieu of fines for enforcement cases, and took donations without clear disclosure or required ethics rules.

Recommendation

Change in Statute

2.1 Permit agencies operating under the Pilot Project Act to retain a percentage of administrative fines, penalties, contributions, and other enforcement revenue for use in enforcement programs.

This recommendation would remove the automatic ability of project agencies to keep and spend all fine revenue without an appropriation. In place of the current authority, project agencies would be permitted to retain enforcement revenue up to 5 percent of the agency’s previous fiscal year expenditures. The retained enforcement funds would be directed for use only in the agency’s enforcement program. Excess funds would be deposited to the credit of the General Revenue Fund. To offset the cost of individual years with extraordinary enforcement efforts, project agencies would be permitted to retain an additional 10 percent of enforcement revenue received in excess of the baseline amount. To ensure full public disclosure of these revenues, project agencies would be required to report these amounts as separate items in their required annual reports and current provisions permitting the State Auditor’s Office to audit these records would be retained.

Fiscal Implication

These recommendations would result in a positive fiscal impact to the State, but this impact cannot be estimated for this report. The recommendation requiring the bulk of enforcement revenue to be deposited in the General Revenue Fund would result in additional funds being remitted to the State but these funds vary greatly from year to year. The other recommendations would not have a fiscal impact to either the State or the project agencies.

¹ Texas Government Code, sec. 404.094.

² House Research Organization, Bill Analysis HB 352 (April 22, 1999).

³ Texas Board of Architectural Examiners Board meeting (Austin, Texas, May 14, 2002) (audio tape).

⁴ Texas Board of Public Accountancy response to Sunset Staff information request, September 2002. Total includes penalties, administrative fines, agreed consent orders, and major case fines, settlements, and contributions.

⁵ The Legislature appropriates these funds to OAG as a method of finance to reimburse the agency for court costs, attorney fees, and investigative costs. This legislative appropriation is capped in the General Appropriations Act.

⁶ Letter from Texas State Board of Public Accountancy Executive Director William Treacy to First Assistant Attorney General Howard Baldwin, February 20, 2002.

⁷ The agency's annual financial reports for fiscal years 1996 and 1997 do not separate the gift, grant, and donation revenue either in the tables or the endnotes. The balances for the category "other revenues" do show an increase, but the reason for this increase is not explained. The annual financial report for fiscal year 1999 shows a negative balance for "other revenues" and the endnote explains that the amount includes the refund of a grant.

⁸ Memorandum from Texas State Board of Public Accountancy Executive Director William Treacy to Texas Sunset Commission (September 6, 2002).

⁹ For example, Texas Government Code sec. 402.005 (a) forbids the Attorney General from accepting money intended for specific investigations or prosecutions.

Issue 3

Provisions of the Pilot Project Act Conflict With the Enabling Statute for the Texas Safekeeping Trust Company.

Summary

Key Recommendation

- Clarify that the Pilot Project agencies' contract with the Texas Treasury Safekeeping Trust Company shall be under the same terms as other state agencies.

Key Findings

- The Pilot Project Act requires pilot project agencies to deposit funds in the Texas Treasury Safekeeping Trust Company.
- Terms of the Pilot Project Act conflict with provisions of the Trust Company statute.

Conclusion

The Legislature created the Self-Directed, Semi-Independent Licensing Agency Pilot Project to test the effectiveness of permitting certain, self-funded state agencies to operate outside of the General Appropriations Act. To enable the project agencies to operate free from spending constraints placed on appropriated funds and ensure the safekeeping of the agencies' assets, the Pilot Project Act provided that agencies must deposit all funds into the Texas Treasury Safekeeping Trust Company. The Trust Company is administered by the State Comptroller, and safeguards some \$30 billion in assets of the State and its political subdivisions. A provision of the Pilot Project Act that requires the Trust Company to contract with the project agencies under terms comparable to a commercial bank violates the Trust Company's statute, and may potentially make the Trust Company subject to federal banking laws and liable for investment losses.

The Sunset review assessed the appropriateness of the current statutory contractual requirement on the Trust Company. The review noted that the Trust Company properly negotiated a contract that protects its interests and does not violate its enabling statute. The review also noted that other statutory provisions concerning state agencies depositing funds with the Trust Company do not contain similar requirements. The review concluded that provisions of the Pilot Project Act concerning the project agencies' contracts with the Trust Company should be clarified to ensure compliance with the Trust Company's statute.

between the Trust Company and each of the project agencies does not make the Trust Company liable for losses, but imposes a prudent investment standard of care on the Trust Company.

- The Texas Safekeeping Trust Company acts as a fiduciary when other state agencies use it to manage investment funds. The role of a fiduciary does not create a guarantee of the return of any of the deposit, only a promise to manage the funds as a prudent investor. In no other instance does state law prescribe the terms by which the Trust Company must contract with a state agency.

For other state agencies, the Trust Company acts as a fiduciary that manages funds in a prudent manner.

Recommendation

Change in Statute

- 3.1 Clarify that the Pilot Project agencies' contract with the Texas Treasury Safekeeping Trust Company shall be under the same terms as other state agencies.**

Impact

This recommendation would ensure that the contract between the Trust Company and the project agencies continues to comply with terms of the Trust Company's statute. The recommendation would remove language from the Pilot Project Act that requires the contract to be under terms comparable to that between a commercial bank and its customers and, instead, direct the Trust Company to act as a fiduciary, investment advisor, and safekeeping custodian for Pilot Project agencies. In this role, the Trust Company would not be liable for investment losses related to the Pilot Project agency funds, but would be guided by an appropriate body of fiduciary law, such as the Uniform Prudent Investor Act.

Fiscal Implication

This recommendation would not result in a fiscal impact to the State. The statutory change would ensure that the current contract between the Trust Company and the project agencies would continue. In the event of any losses of project agency assets, under terms of the Pilot Project Act, these losses would accrue to the project agencies, and not to the State.

¹ State Auditor's Office, A Review of State Entity Compliance with the Public Funds Investment Act (Austin, Texas, May 2002), p. 10.

PILOT PROJECT INFORMATION

Pilot Project Information

Pilot Project at a Glance

In 1999, the Legislature established the Self-Directed, Semi-Independent Licensing Agency Pilot Project Act to test whether certain agencies could effectively operate outside of the legislative appropriations process. Three agencies were selected to participate in the Pilot Project – Texas State Board of Public Accountancy, Texas Board of Architectural Examiners, and Texas Board of Professional Engineers.

Under terms of the Act, Pilot Project agencies are not required to participate in the legislative budgeting process or adhere to the spending limits and General Appropriations Act provisions that affect most other state agencies. The semi-independent agency status is intended to allow the agencies greater budget flexibility to raise and spend their own funds.

Because the 1999 Pilot Project bill did not provide for agency funds to be held outside the State Treasury, agencies were still bound by appropriations limits and the project did not fully take effect. In 2001, the Legislature provided that Pilot Project funds were to be deposited into the Texas Treasury Safekeeping Trust Company, clearing the way for the three agencies to commence participation in the Pilot Project.

The Pilot Project Act allows the Boards of Public Accountancy, Architectural Examiners, and Professional Engineers to “get out” of the appropriations process.

Key Facts

- **Revenue and Expenses.** Each project agency must raise its own revenue to support agency functions and pay other agencies that provide services, such as rent and utilities provided by the Texas Building and Procurement Commission and employee health and retirement benefits provided by the Employees Retirement System. Licensing fees and other agency funds are deposited into the Texas Treasury Safekeeping Trust Company.
- **Appropriations Act Riders.** Pilot Project agencies are not required to adhere to provisions in the General Appropriations Act that limit state agencies’ travel spending, control the number of employees, and provide other limitations. In addition, funds remaining at the end of each fiscal year are available for use in future years.
- **Administrative Fines.** Like licensing fees, the Pilot Project Act permits each project agency to receive and control any administrative fine it collects.

into the Texas Treasury Safekeeping Trust Company, a special investment fund administered by the State Comptroller. Agencies may keep and use any accrued interest from their accounts. Additionally, the agencies may keep for future use any funds not expended for agency operations, rather than having those funds lapse to the State.

The table, *Funds Generated by Pilot Project Agencies*, details each agency's revenue for the fiscal years before and after the Act took effect. Agencies may adjust licensing and other fees to ensure that enough funds are raised to operate all agency programs and functions. Although legislative approval is not needed, project agencies must receive board approval to change fee rates, which are still, in some cases, capped by statute.

Project agencies must keep their funds in the Safekeeping Trust Company, but are free to keep their interest earned and all unexpended balances.

| Funds Generated by Pilot Project Agencies Fiscal Years 2001 and 2002 | | | |
|---|--------------------------------|----------------|----------------|
| Agency | Revenue Type | FY 2001 | FY 2002 |
| Public Accountancy | Licensing and Examination Fees | \$3,624,743 | \$4,195,968 |
| | Administrative Fines | \$782,269 | \$822,860 |
| | Professional Fee | \$11,021,463 | \$10,810,460 |
| | Scholarship Fee | \$573,918 | \$557,598 |
| | TOTAL | \$16,002,393 | \$16,386,886 |
| Architectural Examiners | Licensing and Examination Fees | \$2,372,962 | \$2,334,339 |
| | Administrative Fines | \$27,164 | \$13,511 |
| | Professional Fee | \$1,904,048 | \$1,849,085 |
| | Scholarship Fees | \$99,270 | \$97,240 |
| | TOTAL | \$4,403,444 | \$4,294,175 |
| Professional Engineers | Licensing and Examination Fees | \$1,775,811 | \$2,509,967 |
| | Administrative Fines | \$68,900 | \$66,990 |
| | Professional Fee | \$6,500,000 | \$6,513,000 |
| | TOTAL | \$8,344,711 | \$9,089,957 |

In addition to licensing fees and fines, each agency collects the annual \$200 professional licensing fee which is paid by most licensed professionals. These fees are deposited in the State Treasury and are not available for project agency use. Each licensing group in the three

APPENDIX

Appendix A

Staff Review Activities

The Sunset staff engaged in the following activities during the review of the Self-Directed, Semi-Independent Licensing Agency Pilot Project.

- Worked extensively with staff from each project agency.
- Attended project agency board meetings, reviewed audiotapes and minutes of project agency board meetings, and interviewed project agency board members.
- Attended a meeting of the Executive Directors and Board presiding officers of each project agency.
- Met with in person, or interviewed over the phone, staff from Office of the Attorney General, State Office of Risk Management, Legislative Budget Board, State Auditor's Office, Texas Treasury Safekeeping Trust Company, Department of Information Resources, Ethics Commission, Department of Public Safety, Texas Building and Procurement Commission, and the Comptroller of Public Accounts.
- Met with staff from the House Speaker's Office and House Appropriations Committee, and staff of Texas Senators and Representatives.
- Conducted telephone interviews with staff from self-directed, semi-independent licensing boards in Oregon, Florida, and North Carolina.
- Attended legislative budget hearings for each project agency.
- Met with and conducted telephone interviews with professional associations involved in the fields regulated by the project agencies.
- Reviewed project agency documents and reports, state statutes, legislative reports, and previous legislation.
- Received assistance from staff of the State Auditor's Office in analyzing the revenues and expenditures of each project agency.
- Performed background and comparative research using the Internet.

**SUNSET REVIEW OF THE
LICENSING AGENCY PILOT PROJECT**

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*Special thanks to the State Auditor's Office
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