

The logo for the Texas Sunset Advisory Commission is a semi-circle with a thick black border. Inside the semi-circle, the words "Texas", "Sunset", "Advisory", and "Commission" are stacked vertically in a bold, white, sans-serif font.

**Texas  
Sunset  
Advisory  
Commission**

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STAFF EVALUATION

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*Texas Department  
of Labor and Standards*

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A Staff Report  
to the  
Sunset Advisory Commission

1988

**TEXAS DEPARTMENT OF LABOR AND STANDARDS**

August 1988

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## Summary of Recommendations

The Office of the Commissioner of Labor and Standards, originally created as the Bureau of Labor Statistics, was established in 1909 to collect and report work force data and to administer several newly-created labor laws. Over the years, the agency has retained jurisdiction over a few labor laws even though the primary emphasis of the department today has shifted toward business and professional regulation for the protection of public safety and consumer and industry interests. Currently, the agency administers 15 active diverse laws.

The Department of Labor and Standards is one of only a few state agencies that is guided by a governor-appointed commissioner rather than a policy-making board. In addition, two statutory advisory boards and one policy-making council aid the commissioner. Funding for fiscal year 1987 totaled \$6,318,586, most of which comes from General Revenue. The majority of expenditures, agency-wide, are recovered in fees for licenses and other activities paid for by the regulated industries.

The sunset review of the agency's structure, administration and programs concluded that Texas needs to have one centralized agency which can easily and efficiently assume administration for the variety of regulatory laws which cannot be more appropriately placed elsewhere. Such an "umbrella" structure can provide benefits to consumers and industries and can result in cost savings for the state. Overall, the review indicated that the agency has fulfilled the purpose for which it has been mandated and the benefits of such a "catch-all" agency merit the continuation of the agency.

However, in the same regard, several programs are recommended for transfer to other agencies because administration by those agencies was deemed to be more logical or cost-effective. The cumulative effect of both the recommended program transfers and the direction in which the agency has evolved is to redefine the agency's purpose as that of a business and occupational licensing and regulatory agency. The programs that should remain with the agency fit well within this newly defined role.

The sunset review also determined that, if the department is continued, certain changes should be made to improve the efficiency and effectiveness of its operations. These changes are summarized in the following material.

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## RECOMMENDATIONS

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**THE AGENCY SHOULD BE CONTINUED FOR A 12-YEAR PERIOD WITH THE FOLLOWING CHANGES:**

### **Program Transfer and Deregulation**

#### **Program Transfers**

- 1. Responsibility for administering the Minimum Wage, Child Labor and Pay Day Laws should be transferred to the Texas Employment Commission. (Statutory) (p. 40)**

Functions related to employment and to worker and workplace safety have been vested in several state agencies subsequent to the creation of the Texas Department of Labor and Standards. Two of the three employment laws which remain in TDLS, minimum wage and child labor, are the counterparts of federal laws under the U.S. Department of Labor and, as such, require little activity. The third law, pay day, is not best suited to the evolving role of TDLS. Transfer of all three laws to the TEC would provide a more logical and easily identifiable point of contact for Texas employees and employers and would consolidate wage-related laws under one agency.

- 2. Enforcement provisions should be strengthened for the Pay Day laws by allowing the TEC to hold administrative hearings and assess penalties. (Statutory) (p. 45)**

There is not an adequate state, nor an existing federal, enforcement structure for employees to collect back wages other than prosecution through the courts. This recommendation would update the penalty structure put in place in 1915 and would become effective upon transfer to TEC. The TEC's well-established and extensive investigations and hearings process as well as its computer capability gives the agency the necessary tools to assume responsibility for the pay day laws.

- 3. The regulatory scheme for Health Spas and Membership Camping Resorts should be changed to:**
  - transfer the administration of the Acts to the secretary of state's office; and**

- **improve the consumer protection provisions of the Health Spa Act. (Statutory) (p. 51)**

TDLS has authority to register health spas and camping resorts under the Health Spa Act of 1985 and the Membership Camping Resort Act of 1987. Neither enabling statute allows the agency to reject an application to establish a business nor to enforce its provisions. In order to clarify the role of the various state agencies involved in consumer and industry protection, the review concluded that licensing and enforcement functions should remain within the TDLS and that registration functions of businesses for oversight of financial integrity, without enforcement, should be transferred to the Secretary of State's office. Additionally, consumer protection provisions of the Health Spa Act need to be modified to address problems that have arisen since its enactment.

4. **Responsibility for administering the Tow Truck Act and Vehicle Storage Act should be transferred to the Railroad Commission. (Statutory) (p. 56)**

This recommendation would consolidate all regulation of tow trucks, and of vehicle storage lots, under one agency. Although these laws would be administered jointly with the commercial carriers program currently under the Railroad Commission, the laws would be transferred in their current form and would not adopt the stiffer administrative penalties nor the requirement for commercial carriers to certify public convenience and necessity. These programs would be two separate and distinct programs within the Railroad Commission and the statute would so indicate.

#### Program Deregulation

5. **Professional wrestling regulations should be repealed while retaining the three percent gross receipts tax on the events. (Statutory) (p. 61)**

TDLS currently has responsibility for ensuring the safety and welfare of participants and spectators at professional boxing and wrestling matches. The review found that professional wrestling does not endanger the participants in the same manner as boxing and that the state's inspection was not found to contribute in a significant way to participant or spectator safety and welfare at the matches. This recommendation would leave the responsibility for ensuring the safety of the fighters to the promoters and managers. Protection of the public would be the responsibility of the municipal authorities where the fight is held. Collection of the

three percent (3%) gross receipts tax would shift to the comptroller's office, which already collects the sales tax on wrestling events.

## **Policy-making Structure**

### **Change in Policy-making Authority**

- 6. The agency should be governed by a commission appointed by the governor and confirmed by the senate. (Statutory) (p. 65)**

This recommendation would shift responsibility for policy decisions from a governor-appointed commissioner to a governor-appointed board, with confirmation by the senate. This change would add needed elements of consistency to the guiding of the agency's mission, continuity to the administration of the programs, and increased accountability of agency staff. The board would be composed of public members and industry leaders from the regulated areas.

- 7. The department's operating statutes should establish the powers and duties of the commission and its commissioner. (Statutory) (p. 68 )**

The creation of a policy-making commission for the department will require the adjustment of the laws it operates to clarify the duties and powers of the commission and its executive head or commissioner. The adjustments will basically set out the commission's overall policy-making authority and duties and leave the current authority of the commissioner to administer and enforce the many laws the department administers.

### **Change in Configuration of Advisory Committees**

- 8. The statutory directives for the agency's two advisory boards and one policy-making council should be changed to make the level of authority, selection system, terms of membership, size and composition more workable. (Statutory) (p. 70)**

The agency actively uses two advisory boards and one policy-making council to aid in rule-making in the more technical programs. However, the statutory configuration of the committees is inconsistent which can cause confusion and inefficiency. This recommendation would make the responsibilities and operations of the three committees consistent, where reasonable, and would correct existing constraints to good management.

### Re-wording of Agency's Mission

9. **The agency's duties should be revised in statute to reflect its current responsibilities.** (Statutory) (p. 73)

This recommendation would update the agency's general statutes, Articles 5144 through 5151c, V.T.C.S., to more accurately reflect the current, and revised, mission and duties of the Department of Labor and Standards.

## **Overall Administration**

### Fee-Setting Process

10. **The agency should set its fees by rule in amounts to recover the costs of administering assigned programs.**
  - **Statutory fees or limits should be abolished.**
  - **The agency should develop cost management procedures that enable it to determine the cost to the agency, within a reasonable degree of accuracy, for each licensing and inspection function.** (Statutory) (p. 78)

Some fees are set in statute while others are set in rules; often, various fees under the same program are split between statute and rules. All of the fees should be set in rule to give the agency appropriate flexibility to change the fees as costs and circumstances change without having to request changes in its statutes. However, as a prerequisite to the responsible, accurate setting of fees, the agency should develop cost management procedures to determine, within a reasonable degree of accuracy, the cost to the agency of administering each function.

### Authority for Administrative Sanctions Broadened

11. **The agency's range of administrative sanctions should be broadened in specific areas and should be centralized in the general provisions of the agency's Act to apply to all statutes administered by the agency.** (Statutory) (p.81)

In many cases, the range of administrative sanctions provided the agency in statute is not adequate to effectively enforce some or all of the provisions of the law or is inappropriate to the severity of the infraction. This recommendation would authorize the agency to employ a range of sanctions, unless otherwise designated, consistent with its regulatory functions by establishing a centralized enforcement scheme, which follows the Administrative Procedure Act, in the agency's general administrative statutes, Articles 5144 through 5151c, V.T.C.S.

### **Boiler Law Violations Changed to a Class B Misdemeanor**

- 12. The misdemeanor classification in the boiler inspection act should be increased to a Class B Misdemeanor. (Statutory) (p. 87)**

The Texas Boiler Law provides for the rough equivalent of a Class C Misdemeanor for failure of owners to register boilers operating in the state. The consequences of violating the boiler law can result in injury, property damage and loss of life and, therefore, the misdemeanor classification should be raised to align with the potential consequences of the infraction.

## **Evaluation of Programs**

### **Increased Flexibility and Sharing of Role as Inspection Authority**

- 13. The department should petition the federal Department of Housing and Urban Development (HUD) to amend its rules to allow each state the flexibility to choose which manufacturers it will inspect and which manufacturers it will authorize to use third party inspection agencies. (Management Improvement - non-statutory) (p. 91)**

The current regulation scheme set up by HUD does not allow the states flexibility in their regulation of the manufactured housing industry. The scheme requires a state to designate a state agency to inspect all manufactured housing operations or to allow the manufactured housing industry to choose between state or private, third party inspections. This approach leaves Texas, and other states, in an awkward position in terms of staffing demands that shift due to fluctuations in the industry and with a regulatory structure that is potentially ineffective. Although the department can't change the federal regulatory scheme, it can ask HUD to modify its requirements and allow Texas, and other states, to use a more logical approach to the regulation of the manufactured housing industry. This approach would allow TDLS to choose which manufacturers it will inspect and which manufacturers it will allow to use a private, third party inspection agency.

- 14. The Texas Manufactured Housing Standards Act (TMHSA) should be amended to require the agency to contact all municipalities biennially to make them aware of the program for contracting installation inspections. (Statutory) (p. 95)**

The Manufactured Housing Standards Act allows TDLS to contract with municipalities to conduct the installation inspections of manufactured housing in

lieu of the state inspection. Many municipalities already conduct installation inspections to protect homeowners and the community. However, many municipalities are not aware of the TDLS installation inspection program. This recommendation would require the agency to initiate contact with municipalities in an effort to share the responsibility for these inspections and, thereby, to reduce the duplication that currently exists.

**Sale of Used Manufactured Homes**

- 15. The TMHSA should be amended regarding the sale of used manufactured houses as follows:**
- **The requirements for the department to inspect for and make determinations about the habitability of used homes should be eliminated.**
  - **Any person selling more than one unit during a 12-month period, beginning with the sale of the second unit, should be required to complete, for the buyer, a disclosure statement prescribed by the department.**
  - **Requirements for lien holders to be licensed as retailers should be eliminated from the law and they should be covered as any other person that sells more than one unit in any 12-month period. (Statutory) (p.98)**

TDLS inspectors inspect used manufactured housing on retailer lots to determine habitability of the homes. In practice, habitability inspections are ineffective and do not protect consumers because of the volume of sales and inconsistent use of standards. Instead, a disclosure statement provided to the consumer which affirms the safe, operational condition of the home should be adopted. Lending institutions would no longer be required to register with the department if they sell more than three used (usually repossessed) units in a 12 month period, but would also have to provide the disclosure statement if they sell more than one in any 12-month period.

**Pass-Through Function Under IHB Eliminated**

- 16. The Industrialized Housing and Buildings Act should be amended to eliminate the requirement for manufacturers to pass payments to third party inspection agencies through the department. (Statutory) (p.104)**

Under the IHB program, third party inspection agencies inspect buildings which are under construction outside the state but which will be permanently located in Texas. The statute currently requires that payment for services by the manufacturer to the third party agency pass through TDLS. Since the agency does not get involved in the negotiation for fees or the inspection itself, the pass-through function serves no purpose and TDLS, in practice, simply forwards the check to the third-party agency. The requirement should, therefore, be eliminated.

#### **Reciprocity with Other States for IHB**

- 17. The Texas Industrialized Housing and Buildings Act should be amended to permit reciprocity inspection agreements with other states that are willing to inspect according to Texas code requirements. (Statutory) (p. 105)**

Currently, Texas law allows out-of-state manufacturers to contract with third party inspectors to monitor the construction of industrialized housing and buildings for adherence to Texas standards. Equivalent monitoring could be done by the manufacturing state's inspectors under a reciprocity agreement with TDLS. Since the state inspection fees are generally lower than third party agency fees, this would result in cost savings for the manufacturer and, likewise, the consumer.

#### **Cooperation with Agencies for Reporting of Boilers**

- 18. The agency should develop a formal agreement for the reporting of boilers with:**
  - the state fire marshal;
  - local fire marshals;
  - the Occupational Safety and Health division under the Texas Department of Health. (Statutory) (p. 112)

Weak enforcement authority under the Texas Boiler Law has hampered the registration and inspection of boilers in the state and efforts to find the unregistered boilers have been labor intensive and largely unsuccessful. State and local fire marshals, during routine building inspections, and TDH/OSHA inspectors, during inspections for asbestos in schools, regularly come across boilers in public buildings. In an effort to identify the location of all boilers subject to the law, these inspectors should report to TDLS any unregistered operating boilers they find for subsequent registration and TDLS inspection.

### **Continuation of the Air Conditioning Contractors Law**

- 19. The Air Conditioning and Refrigeration Contractors law should be continued and the separate sunset date should be repealed.**  
(Statutory) (p. 118)

The Air Conditioning and Refrigeration Contractors law was placed under the Department of Labor and Standards but was given a separate sunset date of September 1, 1989. The purpose and provisions of the law were found to be generally satisfactory. This recommendation would continue the law under TDLS and would remove the separate sunset date so subsequent sunset reviews of the agency would automatically incorporate the air conditioning law.

### **Other Changes Needed in Agency's Statute**

- 20. Minor clean-up changes should be made in the agency's statute.**  
(Statutory) (p.123)

Certain non-substantive changes should be made in the agency's statute. A description of these clean-up changes in the statute are found in the "Minor Modifications of Agency's Statute" section of the report.

- 21. The relevant across-the-board recommendations of the Sunset Commission should be applied to the agency.** (Statutory) (p. 131)

Through the review of many agencies, the Sunset Commission has developed a series of recommendations that address problems commonly found in state agencies. The "across-the-board" recommendations are applied to each agency and a description of the provisions and their application to the Department of Labor and Standards are found in the "Across-the-Board Recommendations" section of the report.



## **Background**



## Creation and Powers

The Office of the Commissioner of Labor and Standards was originally created as the Bureau of Labor Statistics in 1909 to collect and analyze workforce data and to administer labor laws. Although the Department of Labor and Standards has retained jurisdiction over a few labor issues, the agency's primary emphasis today has shifted toward business and professional regulation for public safety, consumer and industry protection purposes.

During an economic downturn in Texas in the early 1900's, the state's workforce shifted from a predominantly agricultural base to an industrial base. The Bureau of Labor Statistics was created to gather statistics on labor in Texas. The bureau was also given responsibility for enforcing existing labor laws in the areas of safety and health, such as the inspection of employment establishments, and for publicizing the state's natural resources to encourage expansion of Texas industry. For example, the bureau played a role in getting the "Buy-It-Made-In-Texas" program started during a time of high unemployment, focusing attention on tapping the state's own abundant natural resources in order to re-open factories and increase employment.

During the first two decades of the century, the bureau was given new labor laws to administer, such as the Semi-Monthly Pay Day Law of 1915 and the Emigrant Agency Law passed in 1929 to control movement of laborers out of the state. In the post-Depression years of the late 1930's and early 1940's, the bureau became the local administrator for the National Recovery Act which involved setting wages and hours for industries.

In the 1930's, the original charge of gathering statistics was reduced as these functions were given to other state agencies, and new regulatory functions were given to the agency. As the Boxing and Wrestling (1933) and Texas Boiler Laws (1937) were added to its jurisdiction, the current organizational structure of the agency began to take shape. Four divisions were defined: labor, boiler, boxing and wrestling, and oil and gas enforcement. In 1973, the name was changed from the Bureau of Labor Statistics to the Texas Department of Labor and Standards. With the passage of the Texas Manufactured Housing Standards Act of 1969, the 1977 amendment to the Boiler Law, and the transfer of oil and gas enforcement to the Railroad Commission, the agency's current structure solidified. In 1979, the labor, licensing and enforcement (L,L&E) Division was formed to assume administration

for the remaining diverse group of laws for which the agency was given jurisdiction, including the labor laws and the boxing and wrestling regulation.

### **Policy-making Structure**

The Texas Department of Labor and Standards is one of four state agencies in Texas that is operated by a direct appointee of the governor. The agency is administered by a commissioner who is appointed to a two-year term by the governor. Two advisory boards function as advisors to the commissioner: the Board of Boiler Rules and the Air Conditioning and Refrigeration Contractors Advisory Board. The Texas Industrialized Building Code Council functions as a policy-making body.

The Texas Industrialized Building Code Council (IBCC) was created in 1985 to assure that industrialized housing and buildings in the state meet the mandatory state construction codes. The decisions of the IBCC are binding on the agency. The council was given the responsibility to: set criteria for engineering designs; certify third party design review agencies, inspection agencies, and inspectors; serve as a liaison with local building officials in the interpretation of state building codes and with manufacturers in questions of code equivalency; and, establish inspection procedures.

The Board of Boiler Rules was included in the Texas Boiler Law in 1977 to act in an advisory capacity to the commissioner in formulating definitions, rules and regulations for the safe construction, installation, inspection, operation, alteration, and repair of boilers. Most topics handled by the board are technical in nature and are assigned to task forces appointed by the chairman which include other members of the industry recruited for their particular expertise. Recommendations from the task forces are voted on by the full board and, if passed, become recommendations to the commissioner who has final approval authority.

The Air Conditioning and Refrigeration Contractors Advisory Board was established by the 70th Legislature to advise the commissioner in adopting rules, setting fees, and enforcing and administering the act. Members represent the major segments of the industry and provide for geographical diversity.

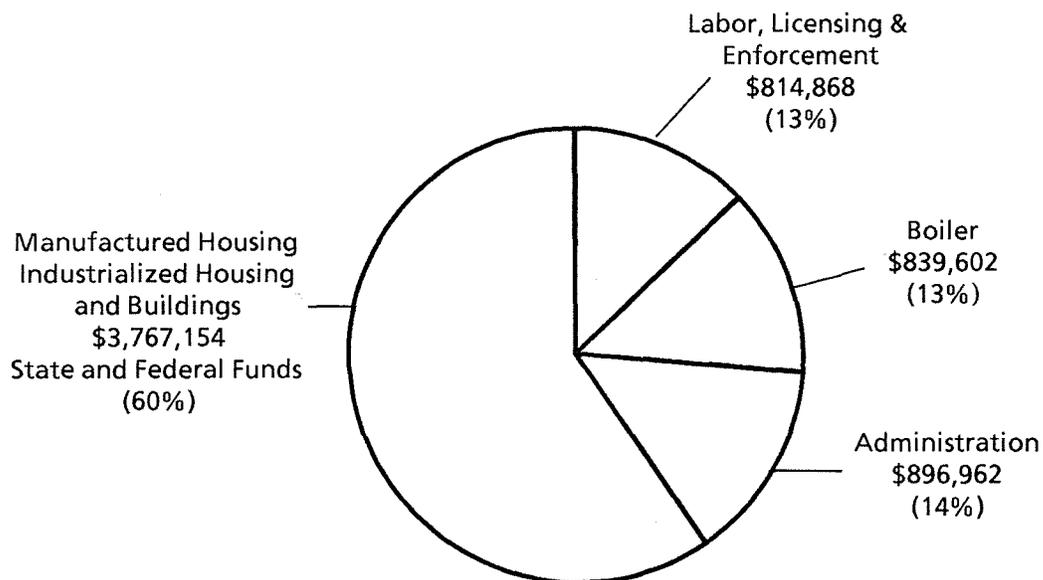
### **Funding and Organization**

The Texas Department of Labor and Standards is headquartered in Austin. Its ten field offices are located in Arlington, Corpus Christi, Edinburg, El Paso, Houston,

Lubbock, San Antonio, Tyler, Waco and Wichita Falls, and are staffed by inspectors from one or more divisions. Some field offices have clerical staff, the expense of which is shared across divisions. The department employs 210 persons in the following programs: administration division, 36; manufactured housing division, 108; boiler division, 35; and, labor, licensing and enforcement division, 31 employees.

Funding for fiscal year 1987 totaling \$6,318,586, came from the following sources: \$5,848,427 from general revenue, \$330,656 in reappropriated revenue (from license fees), \$136,031 in federal funds (from the U.S. Department of Housing and Urban Development under the manufactured housing program) and \$3,472 in interagency contracts. Revenue from license fees is reappropriated back to four operating programs within the agency -- vehicle storage, tow trucks, health spas, and membership campgrounds -- in accordance with appropriation act provisions. The agency recovered 85 percent of its costs through fees in fiscal year 1987 and projects this to increase to 93 percent in fiscal year 1988. Exhibit 1 shows the distribution of funds by division.

Exhibit 1  
Texas Department of Labor and Standards  
Funding by Division



## **Programs and Functions**

Because the agency administers 15 disparate laws, four operating divisions have been formed to reflect categories of activities: administration; manufactured housing; boiler; and labor, licensing and enforcement (L,L&E). Currently, each division is administered separately and is described as follows.

### **Administration Division**

#### **Accounting**

The accounting staff prepare the agency's budget, maintain budget reports for the divisions, keep the general ledger and process travel, payroll and purchase vouchers. In fiscal year 1987, the staff processed 3,131 vouchers.

#### **Data Processing**

The department is in the process of automating all of its programs. Three functions, accounting, payroll and employee time systems, are automated through the State Purchasing and General Services Commission and ten systems have been implemented on the agency's in-house computer. Program automation is only partially completed for each division at the current time. The data processing staff, however, is in the process of writing a comprehensive licensing and registration program which will incorporate all of the programs and functions under the L, L&E division and will, in time, encompass the functions of the boiler and manufactured housing divisions as well. Each division has a staff person assigned as liaison to the data processing group to assist in prioritizing projects for that division.

#### **Personnel and Administrative Services**

The personnel and administrative services staff carry out a wide variety of duties, including keeping employee records, staff training, handling grievances, and coordinating all supply needs and building concerns in Austin and in the field offices. Employee training, until recently, has primarily consisted of technical instruction conducted by the divisions for new inspection staff. The personnel and administrative services staff have developed a new agency personnel manual and have hired a training coordinator to provide new employee orientation. In 1987, the agency underwent a job reclassification effort in order to assess the appropriate classification and pay schedule for each position within the department.

#### **Legal Services**

The legal services staff includes the general counsel, two staff attorneys and one paralegal, which serve as legal advisors for the agency. The staff's principal duties are to interpret the agency's statutes for agency personnel, for the general

public, and for other state agencies; assist in writing the agency's rules; participate in investigator training programs; and coordinate the administrative hearings process. In fiscal year 1987, 562 legal documents and legal opinions were produced and 63 hearings were held across all divisions.

The functions of the legal staff are varied because of the divergent authorities provided by each statute the agency administers. Some of the agency's programs, such as the Texas Membership Camping Act, provide the agency with no enforcement authority while others, such as the Texas Manufactured Housing Standards Act, give the agency authority to levy a full range of sanctions for violations of the statute. The general legal process can be characterized in two ways. First, for the statutes that give the agency enforcement authority, each division seeks to resolve problems with violations of the law and secure compliance through field investigators or Austin personnel. If this process is unsuccessful, the legal staff will initiate administrative hearings where the statute allows. The general counsel acts as legal advisor to the commissioner during the hearings process. Second, since several statutes do not provide the agency with enforcement responsibilities, the complaints must be referred to the Attorney General's (A.G.) Office. In these cases, the general counsel will act as the liaison with the A.G.'s office and in the small percentage of agency cases that go on to court, TDLS legal staff will help prepare the casework.

### **Manufactured Housing Division**

The Manufactured Housing Division administers two separate acts, the Texas Manufactured Housing Standards Act (TMHSA) and the Industrialized Housing and Buildings Act (IHB). The type of products regulated under these acts are similar in that they are built in a manufacturing plant apart from the location where they will be used and are transported to the property for installation. The regulations under both Acts are similar in that they exist for protection of the persons who will be occupying the units, as well as for general public safety, and both pose unique inspection requirements. Unlike site-built homes, manufactured and industrialized homes are constructed at a plant and, consequently, must be inspected at the plant to ensure all systems are properly installed before initially moving the unit.

### **Manufactured Homes**

Mobile homes, or "manufactured homes" as they are now called in Texas, are unique in that they are capable of being moved by the owner. Manufactured housing is a large industry in Texas; it is estimated by the TDLS that one-quarter of

all housing in the state is built off-site and that Texas is home to the largest number of units of any state in the country. In 1969, Texas began setting the standards and monitoring the construction of mobile homes. The initial state law focused on requiring manufacturers to comply with national construction codes related to electrical, plumbing, and heating systems. However, all state regulation of construction standards was pre-empted in 1974 when Congress passed the Mobile Home Construction and Safety Standards Act. Congress intervened because of the rapid rise in the number of new manufactured homes and the growing concern about the quality and safety of these homes. Inconsistent state regulation was burdensome on interstate relocation of the homes and some states did not have any standards or regulations at all. Since 1976, the construction of these types of homes must follow codes established by the U.S. Department of Housing and Urban Development (HUD).

The federal act provides for a joint federal/state regulatory relationship. When the federal act was passed, its stated intent was one of public and consumer protection. HUD is responsible for the development of construction standards and, through its agents, monitors manufacturers. However, the federal law makes provisions for states to participate with HUD. States can choose their level of involvement in the federal program from virtually no participation to serving as the sole regulator of manufactured housing in the state. A state can elect to be an exclusive in-plant inspection agency (IPIA) in its state, where it monitors the quality control inspections in manufacturing plants and can become a state administrative agency (SAA). This latter role is one in which the state handles the resolution of consumer complaints, oversees manufacturer's notifications to owners of defective homes, assures the repair of these homes as required by HUD in event of a class action by HUD, and conducts administrative hearings related to the manufacturer's compliance with the regulations. Texas has chosen to participate as extensively as possible in the federal program and acts as the sole IPIA in the state and is the SAA.

HUD regulations further "urge" states to provide additional public protection by: "... monitoring of dealer's lots for transit damage, (HUD) seal tampering, and dealer performance generally..."; approving all alterations by dealers and assuring that the alterations do not cause the unit to be out of compliance with the code; monitoring the installation to assure units are properly installed; providing for the inspection of used homes to ensure they meet a minimal level of safety and durability at the time of sale; and providing for the regulation of the transportation over the road. Through enactment of the TMHSA in 1975 as the state's companion

law to the federal act, the state enacted the full range of protections suggested by the HUD regulations. Since the initial passage of the act, numerous amendments have been made to enhance the clarity of the regulation and extend the areas of state regulation.

The department's main functions under the manufactured housing program are described as follows. First, the division registers manufacturers, retailers, brokers and installers. In addition, a bond of \$100,000 is required of manufacturers, \$30,000 for retailers, \$20,000 for brokers and \$10,000 for installers.

Second, the state is extensively involved in the inspection process under this program. The department certifies plants to produce manufactured homes in Texas, based on the plant's capability to build safe homes according to the federal construction, electrical, plumbing, and heating, ventilating and air conditioning (HVAC) codes and based on the manufacturer's adherence to a sound quality assurance program. In choosing the exclusive IPIA role, the department has undertaken the burden of doing all plant inspections, whereby agency personnel inspect the manufacturer's quality assurance inspectors during the building of all homes at each stage of production. Depending on production schedules, state inspectors are in a given plant several days per week. In fiscal year 1987, the department's personnel conducted 1,777 plant inspections. The department also inspects retailer locations to ensure that homes on the lot have the proper HUD seal attached at the plant, which signifies that the homes are built according to HUD standards, and to ensure that the seal has not been tampered with since leaving the plant. Inspectors examine used homes on the lot for any visible damage or conditions that would make them uninhabitable. They also spot-check the retailer's paperwork to make sure they are registered and bonded under the law and have notified consumers of certain provisions, such as the health notice required to be posted in each manufactured home. In fiscal year 1987, agency personnel conducted 27,779 retailer inspections. When the home has been purchased and moved to its residential lot, the state inspects the integrity of the installation, or tie-down, to ensure installation was in accordance with the manufacturer's instructions or state installation standards. Proper installation is critical to the satisfactory performance of any manufactured home. Likewise, installation inspections are an important safety factor, particularly in hurricane or high wind zones. In fiscal year 1987, agency inspectors performed 28,366 installation inspections.

Third, the department issues titles for all new and used manufactured homes and distributes HUD seals to approved manufacturers to put on new homes. In fiscal

year 1987, 23,616 labels and seals were issued and 204,386 title documents were processed. If all documentation is in order, the turnaround time is one day to issue a title.

Fourth, enforcement of the TMHSA provides for the department to revoke or suspend a license for a violation of the Act. Department personnel can investigate and, in some cases, mediate consumer complaints. The general nature of most consumer complaint investigations concerns the failure of the manufacturer and/or the retailer to fulfill obligations under new home warranties. In fiscal year 1987, 286 consumer complaint inspections were conducted. The department's enforcement authority under the law includes preventing release of new homes off a manufacturer's assembly line if the inspector finds construction problems and applying a variety of administrative sanctions for violations of the law. The statute provides for due process through the agency's administrative hearings process, and after a hearing, the commissioner is authorized to impose civil penalties on a manufacturer of up to \$1,000 per violation with an aggregate total not to exceed \$50,000. In fiscal year 1987, 18 hearings were held for manufactured housing and \$2,500 was assessed in penalties.

#### Industrialized Housing and Buildings

Industrialized housing and buildings are units that are also built in a manufacturing plant. This form of construction, whether the unit is designed to be used for a residence or commercial use, is distinguished from manufactured housing in that it is constructed to be placed on a permanent site. Even though these units may be manufactured in one state and located in another, their construction is not addressed by any federal legislation. While this industry has become significant only in recent years, most states currently have some form of regulatory control over the standards by which units must be constructed. Thirty-eight states have standards for industrialized housing and 34 states have them for buildings. In 1986, Texas began regulating this type of construction.

The functions under the IHB program differ to a certain extent from those under the manufactured housing program. First, registration in the program is more limited since there are no retailers in industrialized housing and the installer is generally the manufacturer. The department certifies the manufacturer and third party inspectors who perform plant inspections. Second, since industrialized buildings are individual units built according to unique designs, the department has to approve each design for its adherence to the code requirements of the localities

to which the units are to be shipped; whereas in manufactured housing, each manufacturer builds only a limited number of previously approved designs. Third, the inspection procedures for the IHB program are similar to those used for manufactured housing although the scope is more limited. The agency conducts an initial plant inspection to ensure the manufacturer has adopted the appropriate building standards and quality control procedures. For in-state manufacturers, department staff perform one inspection during construction of all units that will be installed in Texas. For out-of-state manufacturers, department staff perform the initial inspection of the plant as part of the manufacturer's certification process and then allow department-approved third party inspection agencies to perform the ongoing inspections of construction. In fiscal year 1987, agency inspectors conducted 312 plant inspections in Texas and 10 out of state.

Proper installation is as important for industrialized buildings as it is for conventionally built structures. Although the modular units are fabricated off-site, they are installed as real estate on permanent foundations, and are generally used by the public for commercial purposes. For these reasons, cities take responsibility for the installation inspections, as they would for inspections of site-built homes and buildings. Approximately 95 percent of all IHB installations are located in incorporated areas. The agency inspects only IHB installations for buildings outside the municipalities. In fiscal year 1987, agency personnel did 186 of these inspections. Finally, enforcement authority under the IHB act is similar to that under manufactured housing. The agency can revoke, suspend or deny licenses for violations of the Act. The statute provides for due process through the agency's administrative hearings process. No hearings were held for IHB during fiscal year 1987.

### **Boiler Division**

The Boiler Division administers the Texas Boiler Law, including regulation of nuclear boilers, and the Air Conditioning and Refrigeration Contractors Licensing Law.

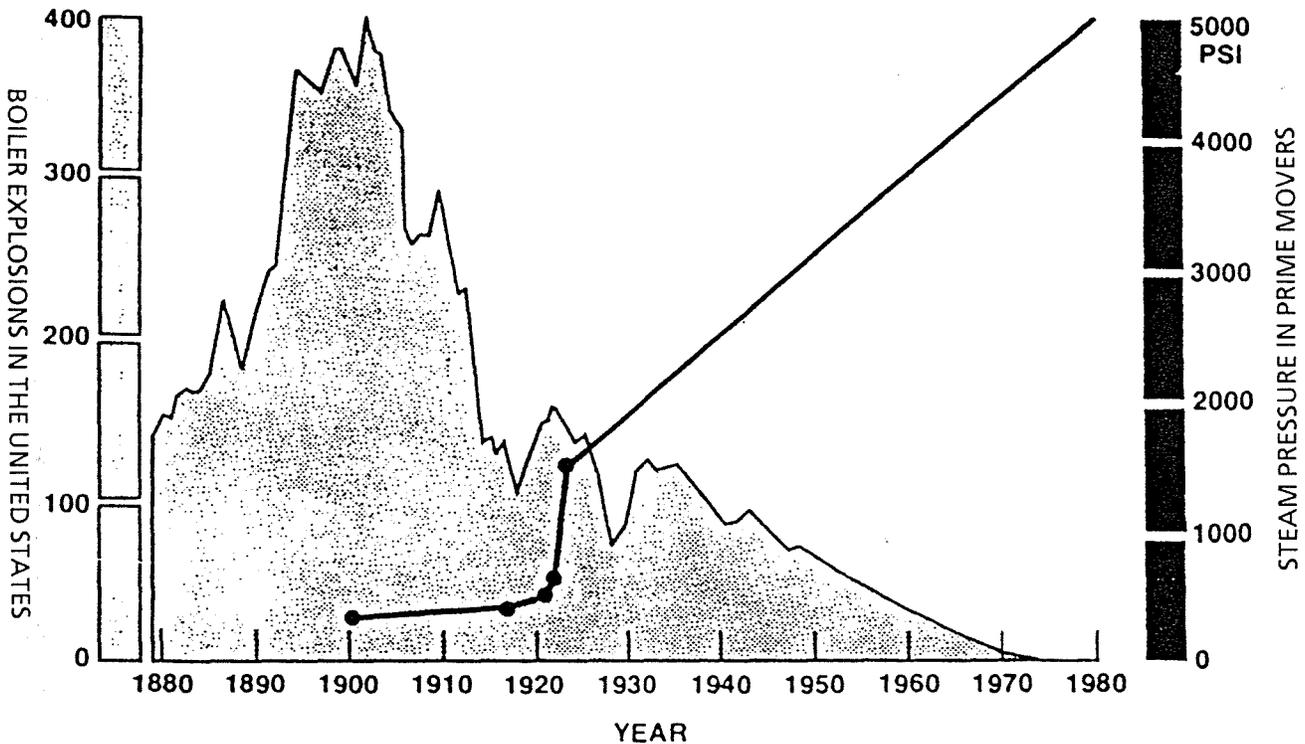
### **Boilers**

The Texas Boiler Law was passed in 1937 as a result of a boiler explosion in New London, Texas in 1934 which killed 196 school children. Forty-eight states have laws regulating boilers, most of which were also adopted during the first half of the century. Exhibit 2 which follows depicts the incidence of boiler explosions nationwide over time as state regulatory programs have been adopted. There are

no federal standards and the internationally accepted American Society of Mechanical Engineers' (ASME) boiler and pressure vessel code for construction and operation of nuclear and non-nuclear boilers serves as the basis for boiler regulations.

Exhibit 2

### Boiler Explosions Nationwide Since State Regulations Have Been Adopted



The purpose of the boiler law is to ensure the public's safety against boiler explosions through the registration and inspection of boilers operating in the state. A boiler is essentially a safe machine, but like any machine in constant use it is subject to wear, tear and corrosion. Usually a boiler fails because of poor maintenance or faulty safety mechanisms. When a boiler does fail, it presents a serious safety hazard since it is a vessel containing hot water and steam under pressure and the risk of explosion is high.

Under the law, a dual track system of inspection exists; that done by the state and that done by agency-authorized insurance company inspectors, a system common among all states. Boilers are often insured against explosion. Insurance companies inspect the boilers as a part of issuing an insurance policy. For boiler

inspections, authorized insurance company inspectors essentially act as agents of the state and their inspections are accepted in lieu of state inspections under the law. Under this scheme, the authorized inspection agencies (A.I.A.s) report to the state the results of the inspections as well as the insurance status of the boilers so the department can serve as a clearinghouse for information on the boiler program. The state, through the TDLS, is responsible for inspecting uninsured boilers, including boilers for which insurance policies are discontinued but which are still operating. The A.I.A.s perform 65 percent of boiler inspections statewide and the state performs the remaining 35 percent.

The department also registers both the state and the insurance company inspectors. Registration requires that both groups of inspectors must pass either the exam developed by the agency or by the National Board of Boiler and Pressure Vessel Inspectors in Columbus, Ohio. These commissions, or licenses, are renewed annually by the division. The number of commission holders has remained fairly constant over time; in fiscal year 1987, there were 326 commissioned inspectors in Texas.

The inspection program has two features. First, as the agent for the ASME, department inspection specialists perform accreditation reviews of plants which fabricate boilers that will be operating in Texas by reviewing the manufacturer's quality control manual and procedures and by verifying for the National Board and the ASME that construction meets ASME code. There are 426 manufacturers in Texas, the largest concentration of manufacturers in any state in the country. In fiscal year 1987, department inspection specialists conducted 166 ASME plant inspections.

Second, department and insurance company inspectors inspect all operative boilers registered in the state. It is the responsibility of the boiler owner to contact the state for registration of a boiler. State or authorized insurance agency inspectors then schedule a certificate inspection and, if found to be in safe working order, the registration, or certificate of operation, is issued and attached to the boiler. There are 70,000 boilers currently registered by the department, although there are an estimated 15,000-20,000 additional unregistered boilers operating in violation of the law.

Inspections are made according to the ASME-recommended schedule: power boilers receive an annual inspection; heating boilers, biennial; and, hot water supply boilers, a triennial inspection. Inspectors check for ASME requirements, giving priority to the safety systems, the safety relief valve and the low water cut-off

valve. Although the agency and each A.I.A. reports and documents repairs differently, 7-30 percent of all certificate inspections generate a repair report, which indicates that inspections are accomplishing their purpose of catching safety hazards. Common repair requirements would be the descaling of piping, stoppage of leaks, and replacement of the pressure relief valve or of the low water safety cut-off valve. When safety violations are spotted, the inspector issues to the owner a repair requirement report detailing the needed repairs. If the repair represents a serious safety hazard, state inspectors will re-inspect the boiler within 30 days. In fiscal year 1987, the agency conducted 9,279 inspections; 6,681 of these were certificate inspections for registration, 464 were follow-up inspections after a repair requirement was issued, 1,670 were out-of-service inspections, and 464 were random location checks. Altogether, division staff processed 28,257 agency and A.I.A. inspection reports.

Enforcement of the boiler law subjects the owner, for failure to report a boiler or fix a repair, to a misdemeanor penalty of not more than \$200 and/or 60 days in county jail. Additionally, if a dangerous condition is found by an inspector, the law gives the agency authority to shut down the unsafe boiler. The law requires the attorney general or a district attorney to seek a temporary restraining order. In practice, agency personnel alert the local fire marshal of an unsafe boiler who, in turn, is able to shut down the boiler. No other enforcement power over any segment of the industry is given in the law.

### Nuclear Boilers

In 1977, the legislature adopted the ASME code for nuclear boilers under the boiler law, including "section III" for construction and "section XI" for in-service inspection with the intent of regulating the reactor and pressure-containing systems at the Comanche Peak Steam Electric Station and the South Texas Project Electric Generating Station.

Because the state and the Nuclear Regulatory Commission (NRC) have both adopted the ASME code for nuclear power plants, the utility hires ASME code-certified contractors to fabricate and construct the plant in accordance with the code. The NRC has jurisdiction over the owner, which is the utility, and all of the inspectors on-site at the plant. Given the magnitude of the regulation, the NRC personnel primarily interface with the utility to approve the construction and operating plans for the power plant. The NRC is responsible for approving the owner's quality assurance plan and the utility employs hundreds of quality control

(QC) inspectors to oversee compliance with that plan. The QC inspectors are monitored by owner-employed authorized nuclear inspectors (ANIs), who are highly trained inspectors from the same agency-approved authorized inspection companies. ANIs are present to monitor whether the plant is being built to code, and to report their findings to the owner and the NRC.

The state is concerned mostly with monitoring the work of the authorized nuclear inspectors; since these inspectors are owner-employed, there is a potential for a conflict of interest and the agency and the NRC believe it is important to monitor their work for compliance with the ASME code. The ASME code also provides the states with a unique role of arbitrator and final authority over any technical or legal area where the code is silent, either where new issues arise or where disputes occur in interpretation.

The state inspectors performing the nuclear function have attained the highest possible certification level for nuclear inspectors from the National Board. The nuclear inspectors performed 43 oversight inspections in fiscal year 1987, recovering 95 percent of the cost of the program.

#### *Air Conditioning*

The Air Conditioning Contractors Licensing Law was passed in 1983 as both an industry and consumer protection measure. Prior to passage of the legislation, many municipalities required air conditioning contractors to obtain a city license to practice in their city. Often, a license was required to bid on a job. For example, some contractors needed 30 different municipal licenses to practice within a 50 mile radius of Houston. Contractors, therefore, wanted a state-wide licensing program that would supersede the requirements for multiple municipal licenses. Amendments added in 1987 included refrigeration in the regulation, established the air conditioning advisory board, clarified exemptions for other crafts which interface with contractors in air conditioning work, and added enforcement authority.

The air conditioning group under the boiler division test and license contractors after obtaining proof of required training, prior experience and three peer recommendations. The exam tests applicants based on principles of the Universal Mechanical Code and the Standard Mechanical Code. Applicants can apply to be tested for one or both of two endorsements, or levels of licensure: "A" licensees are qualified to do all air conditioning systems and "B" licensees are limited to systems of not more than 25 tons cooling capacity or 1.5m Btu/hr. Under

the original law, all practicing contractors were required to take the exam; they were not grandfathered in. In fiscal year 1987, the division issued 1,941 air conditioning contractors' licenses.

The 1987 amendments also provided for the division to establish a program to address consumer complaints and to pursue some enforcement. At present, homeowners are the primary source of the complaints. A total of 386 inquiries and 59 complaints have been received in the air conditioning and refrigeration area since the enforcement provisions went into effect in September 1987. The vast majority of complaints have been logged by licensed contractors against other contractors operating without a license in violation of the law. The statute does not give the agency clear authority to do field inspections in response to complaints; rather, attempts are made to resolve disputes through written and telephone correspondence. This Act has a separate sunset date and, if not continued by the legislature, is abolished on September 1, 1989.

### **Labor, Licensing and Enforcement Division**

As mentioned earlier, the Labor, Licensing and Enforcement (L,L&E) division was created in 1979 to encompass the labor and the remaining regulatory functions over which the agency has jurisdiction. Each activity has different statutory provisions for administration and enforcement. The programs within this division represent a variety of unrelated regulatory activities and responsibilities for new programs have been added gradually over time. The programs have a general theme of industry or consumer protection.

### **Auctioneers**

This section administers the Auctions and Auctioneering Licensing and Regulation Act passed in 1975 by the 64th Legislature (Article 8700, V.T.C.S.). The objective of this law is to provide a measure of consumer protection from fraudulent or deceptive business practices, such as false advertising or misrepresentation of items auctioned, and to ensure that monies are exchanged in a timely and legitimate fashion. The major activities include the administration of examinations for auctioneers, licensing of auctioneers and associate auctioneers, and random inspection of auctions. In fiscal year 1987, 1,843 auctioneer and 112 associate auctioneer licenses were issued.

Random inspections of auctions held in the state can involve examining the financial records of the licensee and observing the actual bid calling and conduct of the auction. Many of the investigations are prompted by consumer complaints,

usually regarding suspected fraud or unfair business practices. If a problem is found, the division will attempt to mediate a resolution between the complainant and the auctioneer. If the matter cannot be resolved, the investigator will forward the case to the agency's legal staff for administrative proceedings. The sanctions available to the department, after administrative hearings, include the denial, suspension, or revocation of the auctioneer's license. Once those avenues are exhausted, the matter is forwarded to the Attorney General's office for mediation. In fiscal year 1987, a total of 22 investigations were conducted and 10 hearings were held by the agency, resulting in three probations, six suspensions and one revocation.

### Boxing and Wrestling

The Texas Department of Labor and Standards is responsible for the regulation of professional boxing, wrestling and kickboxing in the state under the Texas Boxing and Wrestling laws (Article 8501-1, V.T.C.S.) passed in 1933 and revised in 1977. Protection of the health and safety of the contestants is the goal of the regulation of these events. The department issues licenses to promoters, managers, boxers, wrestlers, referees, judges, timekeepers, matchmakers and seconds. In fiscal year 1987, 1,192 boxing and wrestling licenses were issued. A surety bond is also required for boxing and wrestling promoters and the department collects a gross receipts tax on 3 percent of the ticket sales proceeds from boxing and wrestling events.

In the case of boxing, division personnel do background checks on the fighters, which includes previewing a boxer's card and tracking down a boxer's record for the date and outcome of their last fight and suspension status before they will approve a match being held in the state. Before the fight, in the case of both boxing and wrestling, agency investigators inspect the arena and other safety features laid out in the rules, such as construction of the ring and the distance of the ring from the audience. Also, investigators verify that medical exams are conducted by agency-approved physicians to assure the fighter is in good physical health. For boxing matches, since the contest is considered more dangerous, inspections are more stringent and the medical exams are more comprehensive. Department personnel inspect every boxing match and most of the wrestling matches in the state. In fiscal year 1987, about 56 boxing and 722 wrestling matches were held in Texas.

If there is a violation of the Act, the commissioner has the authority to order forfeiture of a portion of the fighter's purse in an amount not to exceed \$1,000

pending further investigation. The agency can also deny a license application and can revoke or suspend the license or permit of any participant for violation of department rules. A total of 11 hearings were held in fiscal year 1987 related to boxing resulting in one purse forfeiture, three contract recessions, four revocations and three license denials.

### Personnel Employment

The administration of the Texas Personnel Employment Regulation law (Article 5221a-7, V.T.C.S.) has undergone several changes since 1969 when it was originally signed into law. The current statute, which evolved from a long-standing immigrant law, created the Texas Private Employment Agency Regulatory Board in 1969. The board was abolished by sunset legislation in 1979.

Division personnel screen applicants for evidence of prior complaints against the firm; issue a certificate of authority to all personnel employment agencies which qualify to operate in the state and pay the required \$5,000 bond; process fees and review bond certificates; and respond to consumer complaints. During fiscal year 1987, 640 agencies were registered in the state.

The objective of the personnel employment act is to protect consumers against deceptive business practices. One of the primary complaints with personnel employment agencies over time has been the charging of up-front fees prior to receiving services. Requiring payment of up-front fees is now prohibited. In 1987, the department was given authority to suspend or revoke a firm's certificate after a hearing is held if it charges the up-front fees and to impose penalties of twice the amount charged for services.

### Career Counseling

The Texas Department of Labor and Standards was given authority in 1987 by the 70th Legislature to administer Article 5221a-8, V.T.C.S., the regulation of career counseling services. While personnel employment firms primarily focus on job finding, career counseling centers, on the other hand, help job-seekers to become more marketable and attractive to employers through counseling. Their target groups are the unemployed or people seeking career changes. Consumer complaints directed toward such firms have centered around false advertising and high up-front fees.

The objective of the law is to provide protection for consumers who utilize the services of career counseling centers from misrepresentation of services. To that end, the primary functions of the division's staff are to issue certificates of authority

to career counseling businesses qualifying to operate in the state; verify the posting of a required \$10,000 bond, plus separate bonds per location; and, respond to consumer complaints. The division also requires the posting of signs in career counseling locations notifying consumers of the department's oversight role if they have complaints; also a consumer complaint resolution program must be adopted by each firm. As of spring 1988, only three career counseling services were registered with the TDLS.

The agency has authority under the statute to suspend or revoke a certificate after a hearing is held and to assess a penalty of up to twice the amount charged the consumer in up-front fees.

### Health Spas

In 1985, the 69th Legislature passed the Health Spa Act (Article 5221.I, V.T.C.S.) in response to problems with misrepresented services, unstable financial conditions and contract violations by health spas. The predominant complaint has involved those health spas that offer long-term memberships for an initial fee, and then go out of business a short time later without refunding money to customers. The legislation requires the department to register health spas after review of registration statements which must contain proof of no litigation against the spas within the past two years as well as the filing of a bond, certificate of deposit, or letter of credit. The department also manages notarized escrow statements filed by registered health spas, showing that an account has been established for prepayments of membership. By the end of fiscal year 1987, the agency had registered a total of 298 health spas in Texas.

The agency acts mainly as a listing agent for the registration of health spas and enforcement of the law is the responsibility of the attorney general. While the department has the authority to investigate consumer complaints and inspect spa owners suspected of violating the Act, actual resolution of the complaints is the responsibility of the attorney general. Violations are punishable as a Class A Misdemeanor and a \$2,000 fine. In 1987, the attorney general filed ten lawsuits and mediated 572 health spa complaints.

### Membership Campgrounds

In 1987, the 70th Legislature passed the Texas Membership Camping Resort Act (Article 8880, V.T.C.S.) in response to complaints concerning misrepresentation of resort services and facilities, high pressure sales and deceptive advertising. Membership campgrounds operate on a time-share basis whereby an individual

may purchase a membership interest or right to use a camping resort periodically during the year. The resorts generally operate by allowing purchasers to hook up recreational vehicles at a particular site and to use any of the amenities on the premises.

The primary objective of the bill is to protect consumers who negotiate a contract with camping resort operators by registering all membership camping resorts operating in Texas as well as all sales persons and contract brokers associated with the resorts. As is the case with health spas, the agency was only given authority to act as a listing agent for the campgrounds. The statute does not provide the agency with authority to reject an application for past litigation or financial insecurity, or to take any enforcement action. It is estimated that there are 25 membership camping locations in the state; as of May, 1988, seventeen resorts have applied for registration.

#### Tow Trucks

In 1987, the 70th Legislature enacted the Texas Tow Truck Law (Article 6687-9b, V.T.C.S.) which regulates the tow truck industry in order to ensure that minimum insurance and safety requirements are followed and in order to provide one valid statewide operating license. Prior to this legislation, it was common for operators to be required to obtain licenses from all municipalities through which they traveled, without regard to the primary location of the towing business. Now, municipalities may only require permits for consent towing businesses located within the city boundaries and for all non-consent towing businesses working within the municipality.

The department screens registration applications based on proof of insurance and processes the registration fees set at \$125 per vehicle. It is estimated that 10,000 vehicles are subject to registration; to date 5,989 tow trucks have been registered by the agency since the law went into effect on February 1, 1988. The agency's enforcement procedure is to investigate complaints and inquiries regarding the proper registration, identification, safety and insurance requirements for tow trucks. The statute gives the agency authority to deny, revoke, or suspend the registration after a hearing.

#### Vehicle Storage Facilities

The Vehicle Storage Facility Law (Article 6687-9a, V.T.C.S.), enacted in 1985 by the 69th Legislature, relates to the licensing and regulation of motor vehicle storage facilities. The objective of the legislation is to protect consumers whose

vehicles are towed to a vehicle storage lot on a non-consent tow and to provide liability protection for the storage lot operators.

Licensure of the storage lots requires payment of a \$100 yearly fee and disclosure of convictions for felonies and certain misdemeanor offenses. Inspections are made of the physical condition and paperwork of the facilities, as well as handling of the vehicles. The storage lots must be maintained in accordance with the statute and rules which include requirements to post signs at the entrance to the facility, have proper lighting at night, place protective fencing around the property, and post the storage lot's operating license on the premises. The statute also requires the lot operator to notify the police of the location of a towed vehicle within two hours and the owner within ten days of the car's arrival on the property in order to help the car owner locate where the car has been towed.

Under the statute, the agency may deny a license if the applicant has submitted false or incomplete information on the application, if the owner has been convicted of a felony or certain misdemeanors, or if the facility for which the license is being sought does not meet the prescribed standards. In fiscal year 1987, the agency held one hearing concerning a vehicle storage lot which resulted in the denial of a license. The agency may also revoke a license after opportunity for a hearing. As of September 1, 1987, violation of the law is considered a Class C Misdemeanor.

### Child Labor

Under the federal Fair Labor Standards Act, children are protected from potentially hazardous or burdensome employment and an extensive set of rules exists for defining what jobs children of various ages are permitted to hold. The Texas Child Labor law (Article 5158.1, V.T.C.S.) enacted in 1925 and amended in 1979 virtually mirrors the federal program and the TDLS is, in essence, the federal government's agent in the administration of the Act. If a clause in the Texas act differs from the federal law, the more restrictive provision prevails. The state agency primarily issues certificates of age to children who intend to be employed, upon proof of the child's age; acts on hardship case requests; investigates complaints; and initiates any enforcement proceedings. The certificate of age verifies the minor's age; it does not authorize any particular employment situation for the child. With the blossoming film industry in Texas, many of the certificates of age are issued to child actors. In fiscal year 1987, 578 certificates of age were issued.

The department's enforcement responsibilities generally begin and end with an on-site investigation and if a violation is found, the investigator refers the case to the attorney general and/or the U.S. Department of Labor. In fiscal year 1987, no child labor complaints were referred for prosecution.

### Minimum Wage

The Texas Minimum Wage Act of 1970 (Article 5159d, V.T.C.S.) applies only to a small segment of the state's population not already covered under the federal minimum wage law. On September 1, 1987, the minimum wage in Texas was raised from \$1.40/hour to the federal minimum wage of \$3.35/hour. Since that time, the agency's primary activity regarding the minimum wage law has been to disseminate information on the state and federal minimum wage level. Most complaints are referred directly to the U.S. Department of Labor which administers the federal minimum wage since the department does not have enforcement authority. However, the division investigates issues presented by persons, such as students under 18 employed full-time, who may be affected by unique provisions of the Texas minimum wage law.

### Pay Day

The pay day laws (Articles 5155-5159, V.T.C.S.) were enacted in 1915 and require employers to pay wages to an employee for work done. There is no federal counterpart to the Texas Pay Day Laws. Under the statute, the division handles a high volume of inquiries and complaints concerning non-payment of wages and makes determinations on possible violations of the law. Although the department was given no enforcement authority under the law, agency policy has been to carry the investigation process as far as possible in an attempt to mediate a settlement.

The agency receives approximately 10,000 unpaid wage inquiries and complaints a month; of those, about 1,000 per month are investigated by the department. For fiscal year 1987, the department estimated that over \$2 million in unpaid wages was returned to Texas workers due to TDLS intervention. Numerous cases are also referred to the Attorney General's Office for enforcement. The pay day laws consume nearly half the resources of the L,L&E division and no revenue is generated by the program.

## **AGENCY EVALUATION**



## Focus of Review

The sunset review of the Texas Department of Labor and Standards covered all aspects of the agency's activities in order to address four general areas of inquiry: 1) whether there is a continuing need for the functions of the agency; 2) whether the programs administered by the agency could be carried out by other state agencies; 3) whether there is a continuing need to regulate all of the areas currently regulated by the TDLS; and 4) whether the agency's level of involvement in the areas regulated is appropriate. A number of activities were undertaken by the staff to gain a better understanding of the agency and to answer the areas of inquiry. These activities included:

- discussions with agency commissioner and staff;
- visits to field offices and discussions with field staff;
- accompanying staff on inspections of boilers, health spas, vehicle storage lots, wrestling matches, manufactured housing retailers and employers allegedly violating pay day laws;
- discussions with the U.S. Nuclear Regulatory Commission, Houston Lighting and Power and the Texas Utilities Electric Company concerning nuclear power boiler regulation;
- phone interviews with other states that have agencies which administer boiler, manufactured housing and licensing laws;
- phone interviews with the U.S. Department of Labor and other states' labor agencies;
- phone discussions with national consumer, industry and interest groups;
- meetings with interest groups in Texas; and
- meetings with nine different state agencies concerning the transfer of various programs out of the TDLS.

Regarding the first area of analysis, the review concluded that the need leading to the creation of the agency no longer exists but has been replaced with a new role. The TDLS (formerly Bureau of Labor Statistics) was created in 1909 to gather and analyze workforce statistics concerning women and children in the workforce and safe and sanitary working conditions. Responsibility for labor laws was added soon after this. Since the agency was originally established, however, other state agencies have been created to assume some of the early TDLS responsibilities including the Texas Employment Commission, Industrial Accident

Board, and the Texas Department of Health, Division of Occupational Safety. Consequently, responsibilities for tracking employment and worker safety data have shifted to other agencies and there is no longer a need for TDLS to be involved in these areas.

While employment and labor responsibilities have diminished within the agency, new licensing and regulatory functions have been added over the years, causing the TDLS to evolve into a licensing agency for miscellaneous activities. The licensing responsibilities of the TDLS are quite diverse and include boilers, manufactured housing, boxing and wrestling, personnel employment services, and auctioneers, among others. Typically, the TDLS has been selected as the recipient of new licensing programs created by the legislature because they do not clearly fit within the purview of other agencies. After contacting other states in an effort to understand if this situation is unique to Texas, the review found that about one half of the states have a centralized licensing agency of some sort such as an "umbrella" licensing agency or a state agency responsible for administering a diversity of licensing functions. The review found the evolving licensing and regulatory functions of the TDLS to be necessary to provide benefits to consumers and industries in Texas. Overall, these benefits merit continuation of the agency.

Concerning the second area of inquiry, the review found that several programs could be transferred out of the agency to other more appropriate state agencies. Because the current TDLS statutes contain an uncommon mixture of outdated, labor-related and regulatory functions, the review effort placed special emphasis on defining an appropriate role for the agency. Early in the review, an analysis was made of licensing and registration programs within the TDLS that appeared to overlap with programs in other agencies. Interviews were held with the staff of nine other state agencies to explore the benefits of transferring related programs out of the TDLS. While not all of the transfers explored yielded benefits, recommendations are made to transfer administration responsibilities for a total of seven laws from the TDLS to other state agencies. These recommendations are covered in the agency reorganization section of the report. The cumulative effect of both the recommended program transfers and the direction in which the agency has evolved is to redefine the agency's purpose as that of a business and occupational licensing and regulatory agency. The programs that should remain with the agency fit well within this newly defined role. Other minor changes are also outlined in the report which coincide with the redefinition of the agency's mission and include repealing outdated labor functions in the statute and removing

the word "labor" from the name of the agency, since these responsibilities are recommended for transfer.

The third area evaluated during the review was whether there is still a need to regulate all of the activities currently administered by the agency. Normally, regulatory schemes are established for activities that could adversely impact the health, safety or welfare of the state's citizens and state regulatory efforts should, therefore, offer a measurable degree of protection from such adverse impact. All of the programs administered by the TDLS were analyzed from this standpoint and, for the most part, a continued need to regulate the various activities was found. The TDLS licensing and enforcement scheme generally provides the public with some protection from injury or fraud. For example, the regulation of boilers helps prevent explosions and the regulation of auctioneers, career counseling firms and health spas provides some protection from consumer fraud or deception.

After reviewing the numbers and kinds of consumer complaints on file with the agency, the Attorney General's Office and the Better Business Bureau, as well as accident reports and hearings held on the various regulatory programs, justification for regulation was found for all but one program. State regulation of professional wrestling should be discontinued since the number of complaints, incidences and hearings in this area has been nominal and state involvement does not appear to have a significant impact on the health, safety or welfare of the sport's participants. This recommendation is outlined in the program deregulation section.

Concerning the fourth area of inquiry addressed by the review, the regulatory scheme for manufactured housing was found to be overly burdensome to both the industry and the state. The review found that less restrictive methods of regulation could be implemented in this area without sacrificing the quality of regulation and recommendations are made accordingly in the body of the report.

Finally, the review took into consideration past and current legislative interest in adding or transferring new licensing and regulatory schemes into the TDLS. Examples of this include past legislative attempts to regulate crane operators, elevators and pressure vessels, placing administrative responsibility with the TDLS. Another example is the direction the Special Committee on the Reorganization of State Agencies (created by HCR 36 during the 70th Legislative Session) is taking whereby occupational licensing functions would be consolidated from numerous independent state agencies into the TDLS. It was determined that if the department's responsibilities are to be expanded over the years, the first step in this process should be to ensure that the department can effectively administer its

various existing programs. Consequently, the review did not consider recommendations to add or transfer new responsibilities into the department.

## Agency Reorganization

The Texas Department of Labor and Standards has been in the midst of significant change since the current commissioner was appointed in 1987. The agency's administrative processes have been aggressively reevaluated by the commissioner and agency staff and have resulted in the establishment of new objectives and timelines for their implementation. Some of these goals have already been met. These changes appear to be putting the agency on a track of increased accountability and operational efficiency.

This internal agency assessment, which coincided with the sunset review, provided an opportunity to rethink the purpose of the agency and resulted in an extensive agency reorganization. Consequently, a new direction and purpose for the agency was needed in order to provide a framework for agency administration and to create some logic concerning the types of programs the legislature should give the TDLS to administer. The designation of the TDLS as a business and occupational licensing and regulatory agency, appears to be warranted. Operational efficiencies can be achieved by housing numerous licensing activities within one agency if a generic licensing system is used to process applications and fees. Similarly, enforcement functions such as inspections, investigations and hearings, can be handled more efficiently by an agency that is staffed with trained investigators who are familiar with a hearings process for disciplinary purposes.

In order to bring the agency's statutes in line with its emerging licensing and regulatory purpose, a number of changes are needed. The recommendations resulting from the sunset review of the TDLS remove certain programs from the agency's administration, reduce the agency's involvement in some regulatory programs, put in place a governing board which has not previously existed, and consequently change the nature of the agency. These recommendations, combined with the agency's own internal review, should better define the focus of the agency and should provide the agency with enforcement latitude and oversight that have been absent in the past. Recommendations in this section detail the most significant changes made to the agency in three categories:

1. Program transfers from the TDLS to other state agencies;
2. Program deregulation; and
3. Policy body creation and related changes.

## **Program Transfers**

The following recommendations transfer responsibility for administration of several programs out of the TDLS and into other state agencies. The program transfers would add new responsibilities to three agencies, the Texas Employment Commission, the Secretary of State and the Railroad Commission, thereby eliminating certain programs from the purview of the TDLS. Transfer recommendations are made where TDLS functions overlap with those of other agencies; where efficiency, public access and cost gains can be attained; or where the activities are considered no longer appropriate for the TDLS. Discussions were held with agencies identified to be the recipients of the TDLS programs to discuss how the new functions would fit within the agencies, the degree of support for the transfer, staffing and funding needs, and impact on services. The following information details the reasons for recommending the transfers and the expected benefits.

### **Responsibility for Administration and Enforcement of Labor Laws Should be Transferred to the Texas Employment Commission**

The Texas Department of Labor and Standards administers three labor-related laws, Minimum Wage, Child Labor and Pay Day laws. Since the time TDLS was given responsibility for administering these laws, the agency's general mandate has evolved away from labor to regulatory areas. The labor laws address a variety of employment-related issues that are more appropriate functions for the Texas Employment Commission since the TEC is the state's job service agency. Additionally, enforcement of the state's pay day laws is weak and can be strengthened if transferred to the TEC. Two recommendations outlined as follows address these issues.

**Responsibility for administering the Minimum Wage, Child Labor and Pay Day laws should be transferred to the Texas Employment Commission.**

As described in the Background section of the report, TDLS responsibilities for administration of the three labor laws vary from one law to the next. The minimum wage act applies only to a small segment of the population, such as agricultural piece rate workers, not covered under the federal Fair Labor Standards Act (FLSA). The 70th Legislature raised the Texas minimum wage to \$3.35 per hour which is the

same as the federal minimum wage. Since that adjustment, the TDLS staff primarily answer inquiries on minimum wage rates and refer complaints to the U.S. Department of Labor which has jurisdiction over most cases. Second, the child labor law is designed to offer some measure of protection to children from hazardous or burdensome work by specifying work hours for children under a certain age. The TDLS staff answer inquiries, refer complaints to the federal Department of Labor and issue certificates of age to children that are at least 14 years of age. Since state laws are very similar to the federal laws for both minimum wage and child labor and the state has limited jurisdiction, the federal Department of Labor has enforcement authority for both areas. On the other hand, for pay day laws which require an employer to pay wages to an employee regularly, there is no federal counterpart. Thus, the state has sole jurisdiction. Administration of this law generates the most activity for the TDLS of the three labor laws. Complaints from employees regarding non-payment of wages are numerous, with an estimated 120,000 inquiries and complaints to the agency per year. Of these, the TDLS staff attempt to determine the validity of complaints and pursue investigations of about 12,000 complaints per year. The agency's enforcement authority for this law is limited and, if settlement cannot be obtained by the TDLS, cases must be referred on to the Attorney General's Office.

There are historical reasons why administration responsibilities for the three labor laws were placed with the TDLS. When the Bureau of Labor Statistics, now the Texas Department of Labor and Standards, was created in 1909, its primary duty was to collect and analyze workforce demographic and safety statistics. A logical progression from the bureau's initial mandate was to take on administration authority for labor laws which also pertain to workforce issues. Consequently, in 1915, the pay day laws were placed within the agency, followed by child labor laws in 1925, and the minimum wage act in 1970. While this was initially appropriate, several agencies or programs have been created since that time to handle the responsibilities originally given to the TDLS in the labor/workforce area.

In 1936, the Texas Employment Commission (TEC) was created as a result of the employment crisis during the Great Depression. The Wagner-Peyser Act and portions of the Social Security Act, both passed by Congress in the mid-1930s, created a federal-state partnership for the TEC to serve as the state's job service agency. The TEC administers the unemployment compensation system and provides basic employment services to workers and employers in Texas.

The Industrial Accident Board (IAB), created in 1917, is the state agency responsible for administering the Texas Workers' Compensation Law and primary responsibilities of the IAB are to process worker compensation claims, monitor actions related to employee injuries and settle claims. Finally, in 1967, the Texas Department of Health's Division of Occupational Safety was given responsibility for administering programs to protect working persons from death and disability due to unsafe working conditions. The division provides for occupational safety and health consultation services to OSHA-regulated employers and collects survey data related to occupational injuries.

In addition to the creation of other agencies which have assumed responsibility for labor and employment functions, responsibilities added to the TDLS since its creation have departed from labor areas. Over the years, the agency has been given two major licensing and enforcement programs to administer, the Texas Boiler Law and the Texas Manufactured Housing Standards Act, as well as smaller programs such as boxing, auctioneers and personnel employment services. The trend in the past two legislative sessions has clearly been to expand TDLS' licensing activities, with the addition of the health spa and vehicle storage facility acts passed in 1985 and the career counseling, membership camping resort and tow truck acts passed in 1987. Consequently, all of the programs administered by the TDLS currently involve a licensing or registration function with the exception of the labor laws.

The sunset review evaluated whether labor law administration could be centralized within the TEC since these responsibilities are more in line with the TEC's current programs and are less similar to the newly emerging functions of the TDLS. There is also some precedent nationwide for the state's job service agencies to handle labor laws. Currently in 23 states, employment services and labor law administration are in the same department or umbrella agency.

Several benefits can be achieved from transferring labor standard laws from TDLS to TEC. First, the TEC is a more identifiable contact point for persons with employment inquiries and complaints. Since the three labor laws cover a variety of employment issues such as wage rates, regulations on hiring children, and non-payment of wages, the TEC is a more logical agency for the public to direct questions to, whereas the public may not necessarily know of the purpose of the TDLS. The TEC is often the first point of contact now for persons with questions on these labor laws. For 1987, the TEC estimated it referred some 360 labor law inquiries to the TDLS.

Second, the shift would eliminate the need to pass information from TEC to TDLS pertaining to minimum wage. The TEC provides to the TDLS, upon request, a certificate stating whether or not a specified employer is liable for payment into the Texas unemployment compensation fund as part of the administration of the minimum wage act. Since the TEC keeps data on employers, it would expedite access to employer data sometimes needed for administration of minimum wage and pay day laws.

Third, public access to labor law information could be improved since the TEC has a much more extensive field office structure due to its size than does the TDLS. The TEC has 130 field offices within a 10 region system staffed by 4,400 full-time regular employees in the field and Austin offices who administer agency programs, provide job services, handle calls and assist with unemployment claim filings. Conversely, the TDLS has 11 field offices with a total of about eight full-time equivalents devoted to labor law administration. Cities around the state are much more likely to have a local TEC office than a local TDLS field office to direct a question to or with which to make an in-person office visit.

Fourth, the TEC has an automation system and centralized database which could more efficiently log labor law inquiries and complaints as well as process about 600 certificates of age yearly as necessitated by the child labor laws. All local offices are automated and connect with the Austin mainframe. While the TDLS is making strides to improve its computer capabilities, it currently uses a manual system for processing certificates of age. The TEC also issues what are known as "I-9" certifications under the Federal Immigration Control and Reform Act of 1986 in order to document legal citizenship of newly hired employees. The number of certifications that will be issued under this new act is estimated to be about one million per year. Compared to this volume, the administrative processes required by the three labor laws could easily be added to the TEC's responsibilities.

Fifth, the TEC governing board composition lends itself well to representation of the labor law interests. The three-member board includes one person each representing labor, employers and the public. Another related benefit is that the TEC already works closely with the U.S. Department of Labor, as does the TDLS, which oversees the TEC's compliance with federal regulations. Since there are federal counterparts to the state's minimum wage and child labor laws that come under the jurisdiction of the Department of Labor, regular communication between the two agencies is important.

Finally, some cost savings could be achieved by transferring responsibility for the labor law programs to the TEC. The TEC estimates it could reduce the yearly costs of administering the program to \$182,340, which includes funding for five investigative and support staff, based on the current TDLS workload. The TDLS now estimates yearly program costs are about \$286,887 for the eight full time equivalents involved in the program.

The transfer of labor programs from TDLS to TEC would have a monetary impact on both agencies by necessitating the addition of funding to the TEC and concurrent reduction in funding for the TDLS. Since the estimated TDLS annual costs of administering the three labor laws is \$286,887, this amount of funding should be reduced from the TDLS appropriations and TEC appropriations should be increased by \$182,340 to cover its estimated costs of hiring new investigators and support staff. An important point that should be mentioned concerning TEC funding concerns the need to delineate state funds for labor law administration from the TEC's federal funds. The majority of the TEC's programs are federally funded, generally from the Federal Unemployment Tax Act, and federal guidelines govern the use of the funds. A time-coding system has been in place within TEC whereby work time is charged to various codes which designate the type of work being done for accounting purposes. This system would be extended to employees that work on minimum wage, pay day and child labor areas in order to ensure work time is charged to the correct category.

Another impact of this recommendation will be the need to change the name of the Texas Department of Labor and Standards since no labor programs or duties will remain within the agency. The Minor Modifications section of this report addresses the name change to the Texas Department of Licensing and Regulation and the related issue of repealing a variety of now defunct labor responsibilities formerly assigned to the TDLS. The combined effect of these changes will be to remove all labor functions from the purview of the TDLS. This represents a significant departure from the early TDLS mandate but better reflects the agency's evolving role and purpose.

In summary, the transfer of programs described above would place administration responsibilities with the most appropriate agency and should benefit the public by creating better access and increased efficiency in processing information and responding to labor law concerns.

**Enforcement provisions should be strengthened for the Pay Day laws by allowing the TEC to hold administrative hearings and assess penalties.**

The Texas Pay Day laws have been in place since 1915 with very little legislative change. A \$50 penalty is all that may be assessed by law against persons that willfully fail or refuse to pay wages to an employee. The attorney general is entitled to receive \$10 in compensation for bringing suit against such employers. While these amounts may have been appropriate when the laws passed in 1915, they are not adequate today. Another weakness of the laws is the limited authority of the TDLS to take actions against violators. Article 5159 V.T.C.S. specifies that the Commissioner of Labor Statistics (outdated agency reference) shall "inquire diligently" for violations of the statute. There is little else the agency may legally do to pursue wage violations. In fact, Attorney General Opinion H-842 issued in 1976 determined that the Commissioner of Labor Statistics is not authorized by statute to collect back wages owed to employees.

There is no federal counterpart to the pay day laws as there are for the two other labor laws recommended for transfer to the TEC, the minimum wage and child labor laws. For minimum wage and child labor complaints, the state administering agency has only limited responsibility, but the U.S. Department of Labor may pursue investigations of alleged violators. This is not the case for pay day law violations. If the state administering agency does not have authority to act, there is little recourse other than through small claims court, the attorney general and district or county attorneys. Small claims courts may offer some relief if the dollar amount is under the \$1,000 to \$2,500 jurisdiction limit of these courts, depending on the size of the county where a claim is filed. Referral of cases to the attorney general is not a cost effective measure since, as stated above, suits pursued through this office may only recover a \$50 fine and \$10 in attorney fees. Bringing suit through county and district court in reality does not occur very often due to the smaller dollar size of wage claims which attorneys must weigh against larger civil or criminal cases. Additionally, an employee that files a complaint for non-payment of wages often does not have the money to hire an attorney to pursue the case.

Despite the limited jurisdiction of the state for enforcing pay day laws, efforts are still made to pursue the high volume of complaints that the TDLS receives in this area. The TDLS estimates it receives about 120,000 complaints and inquiries on pay day laws yearly and pursues about one-tenth of these, or 12,000, as valid complaints on face value. The remaining nine-tenths generally fall into one of several categories: only an inquiry was made; the person does not choose to file a written complaint; the case is referred elsewhere (such as the Texas Commission on Human Rights if it is a discrimination case or the U.S. Department of Labor if it is an overtime issue); or the company policy provides an exemption or exception to the law.

The procedure that has been established at the TDLS to investigate these complaints consists of the following steps. First, a complaint packet is mailed out to persons who call the TDLS field or Austin office with a complaint that an employer has wrongfully withheld wages. The packet contains instructions and the complaint form which must be submitted in writing for the TDLS to further pursue the case. Second, once the complaint is received in the Austin office, it is entered into a computer database and then reviewed. If a case appears to involve an employer in bankruptcy or a contract labor agreement, it is dismissed because it would not fall within TDLS jurisdiction. If the case appears to be valid and within its jurisdiction, the TDLS sends an initial letter to the employer asking them to respond or contact the TDLS within ten days. If there is no response to this letter, a second more forceful letter is sent out giving ten days to respond. Third, the case is then sent out to a field investigator if there is no response from the employer to either letter or if there is a response but more facts are needed. Field investigators attempt to make contact with the employer and try to affect payment for the employee. Cases may be resolved in one of four ways by investigators: payment is made to the employee; the case is dismissed after investigation shows it is not within TDLS jurisdiction (for example, it may not be apparent until the investigation that the employer is in bankruptcy); the case is referred to the attorney general as viable litigation because multiple complaints were found against the same employer; or the case is referred to the attorney general as a single complaint against the employer.

The time-line goal for case resolution set by the TDLS is 45 days, which the agency indicates is generally achieved. Despite its limited authority, the TDLS estimates it closes about 35 percent of the written complaints it receives as paid through the process described above. For fiscal year 1987, about \$2 million in wages were paid to employees through TDLS intervention. For the most part, the

remainder of cases are referred from the TDLS legal division to the attorney general for mediation or suit.

The process of handling wage complaints at the Attorney General's Office has not been expeditious. Due to the high volume of wage payment cases, lack of sufficient documentation on the part of the TDLS, insufficient statutory grounds for defending cases, and the cost ineffectiveness of pursuing cases, resolution of cases by the attorney general has been limited. The TDLS estimates that 663 wage complaints were being held by the attorney general at the start of 1988 and in February 1988, 274 cases were returned to the TDLS for further investigation, with most of these cases having been on file at the Attorney General's Office for one year or more. At the same time, the attorney general closed 378 wage complaints without taking any action but kept the remaining eleven cases to pursue further. As far as the attorney general's staff are aware, no law suit was ever filed on a pay day case from the time the law was enacted in 1915 until 1988. Since January of 1988, three suits have been filed. For a brief period of time, the attorney general's staff mediated pay day complaints, in addition to the TDLS mediation efforts, but this process was discontinued in March of 1988 in order to allow the TDLS to handle the cases to the fullest extent it can under the law.

A key factor in explaining the attorney general's limited success with pay day complaints is that many of the cases that cannot be resolved by the TDLS and are referred to the attorney general involve financial insolvency. While the employer may not have filed for bankruptcy, the company has often "gone under" or is on the verge of doing so, leaving no money to pay employees. These are difficult cases to resolve because the employer often has little money left with which to make a settlement. The Attorney General's Office estimates that about 68 percent of the cases it receives involve insolvency. According to the attorney general's staff which deal with these cases, the typical profile of an employer that violates the law is one that begins a business undercapitalized, is a sole proprietor and has been in business only a short time before running into financial problems. It is not uncommon for employers to close down a business in one location and move to another location under another name or to move out of state, which can make locating the violators difficult. Consequently, actions taken on the part of either agency are more effective with employers that have the money to pay an employee but deliberately choose not to, cases that involve an employer-employee dispute, or instances where a deduction was made from an employee's paycheck for various reasons, such as equipment broken by the employee. From the experience of both agencies

involved in wage payment cases, the most common types of businesses that have violated the laws historically are restaurant owners, construction employers, telemarketing operations and home health care services.

After conducting a review of the pay day laws, the sunset review indicated there is a need to transfer administration authority for the laws to the TEC for reasons outlined in the previous recommendation. Next, the review examined the need for improving the law and strengthening enforcement on the part of the administering agency. The review concluded that despite the difficulty in pursuing employers for payment of wages as described above, more efforts should be made to resolve legitimate claims against employers. The current system, if tested by employers, is too easy to circumvent due to the limited authority on the part of the TDLS, the backlog of cases, weak financial incentive and difficult nature of the cases referred to the attorney general. The pay day laws are antiquated and need to be rewritten in order to provide financial relief to employees that have been wronged. Therefore, the sunset review focused on improving enforcement efforts in a manner which would provide for a fair mediation process representing both employees and employers, quicker resolution of cases, and ability to send a clear message to employers who willfully refuse to pay employees that some kind of punitive action will result.

Administration and enforcement of pay day laws need to fit within the context of the TEC's other existing authorities. The TEC already has the necessary investigation system in place for its unemployment insurance activity. The agency estimates it has 229 staff positions across the state assigned to investigation/adjudication functions. The investigation responsibilities for pay day laws could be administered in a similar fashion within the TEC.

Additionally, the TEC uses a hearings process that is exempt from the Administrative Procedure Act (APA) to handle the very high volume of cases on disputed unemployment benefits cases, as well as for trade readjustment allowance and disaster unemployment assistance cases. In 1987, the TEC estimated it held 106,000 first level appeals hearings generally pertaining to unemployment benefits, with 66 hearings officers statewide handling an average of 28 cases per week. The turnaround time on case resolution is dictated by federal guidelines which require 60 percent of case dispositions to be made within 30 days and 80 percent within 45 days of initial receipt of the claim. This time period provides for receipt and review of the claim, investigation, advance notice of hearings and the conduct of hearings to resolve disputed claims. While the TEC has experienced a backlog of cases due to

the downturn in the economy, it still managed to resolve 65 percent of the cases in 30 days and 79.4 percent in 45 days. In order to make hearings more accessible to the public and to expedite them, 40 percent of the TEC hearings are now conducted by telephone through a conference call system and the remaining 60 percent are held in person either in Austin or field office locations. The Department of Labor monitors the TEC hearings process from a quality control standpoint, as well. For the last four years, the Department of Labor has rated TEC "100" on a scale of 1 to 100 (with 100 being the highest score) on quality compliance measures. The TEC appeals supervisors also monitor hearings on a random sample basis and score hearings referees on compliance with federal and TEC quality standards.

Given the investigation and hearings process already in place at the TEC, this system could easily incorporate the steps necessary for pay day investigation and enforcement. Consequently, the existing process could be expanded as follows to administer enforcement of the pay day laws:

Exhibit 3

<b>Texas Employment Commission Proposed Pay Day Enforcement Procedure</b>
1. Receipt of complaint, initial determination of validity of complaint on face value and notification to employer of complaint and amount due employee.
2. Opportunity for response from employer for resolution.
3. Investigation of complaint if no response or if facts are disputed.
4. Issuance of determination order requiring payment within a certain number of days and notice of hearing which can be requested either by employee or employer to contest determination.
5. For requested hearings, a date is set and the hearing is conducted by a hearings referee with the employer, employee and witnesses in attendance. The hearings should be exempt from the Administrative Procedure Act as are the TEC's other hearings for contested cases in order to process cases more quickly.
6. The hearings officer may affirm, modify or rescind the previous order and may assess a penalty of up to \$1,000 per violation as a final order.
7. Appeals can be made to district court.

Further, other provisions of the pay day laws should be changed to strengthen enforcement abilities including: attachment of a Class B Misdemeanor to violations of the pay day statute; authority for the TEC to enter businesses, make investigations and request, review and take records relating to the matter; and authority for the attorney general to bring suit, enjoin, assess penalties, recover investigation and attorney costs, and recover unpaid wages. Further, revenues from civil penalties should be deposited to the credit of general revenue. These changes parallel the state's general authority in unemployment compensation laws.

The institution of a new pay day enforcement system as outlined will have a fiscal impact on the TEC. For unemployment benefits hearings, the TEC estimates about 14 percent of the initial determinations are appealed by either an employer or employee to an administrative hearing. If this same figure were applied to the 65 percent of the total 12,000 yearly pay day complaints the TDLS is unable to resolve through investigation, a roughly estimated 1,092 pay day hearings per year would be instituted. This would necessitate the addition of two hearings referees at the TEC; funding for investigative staff would merely be transferred as a result of the previous recommendation and is accounted for already. However, the cost of hiring two hearings staff persons would have to be added to the TEC appropriations. The yearly cost of maintaining two TEC hearings referees at the same salary classification levels of their current referees, ranging from group 14 to group 17, would be \$72,936. Since the agency would also be given authority to assess administrative penalties of up to \$1,000 per violation with the proceeds going to general revenue, some of the staffing costs would be recovered. While actual revenue estimates cannot be made at this time, the TEC could recover most of its hearings costs if it were able to successfully collect a small penalty at half of the estimated 1,092 yearly hearings. For example, if as little as \$140 is successfully assessed and collected at 546 hearings, the costs of the two staff attorneys could be recovered by generating revenues of \$76,440. The TEC investigative and hearings staff would also need to train new staff added for pay day enforcement. For hearings officers, a fairly elaborate training procedure using a referees procedural manual already exists. This process would be made simpler if the TEC is also exempted from the APA for contested case hearings for pay day laws since the referees are not APA trained.

The impact of this recommendation on employees that have been wrongfully denied payment of wages should be quicker action on the part of the administering agency since it is anticipated that the TEC can resolve cases, including investigation

and an administrative hearing, within 30 to 45 days. The ultimate result should be fewer employer violations once employers that willfully violate the law realize that the law will be more adequately enforced. For employers, this will provide a fair, balanced means of mediating the case and hearing both sides of the story since there are cases where complaints filed by an employee are not justified. An additional benefit of instituting enforcement proceedings at the TEC is that the process may help the TEC identify some employers that are also not paying unemployment taxes as required by law.

**Adjustments to the Regulatory Scheme for Health Spas and Membership Camping Resorts Should be Made.**

For the 15 different statutes the TDLS is responsible for actively administering, the agency generally has regulatory oversight over the industries it licenses which involves performing inspections and investigations and enforcing the statutes. Enforcement authority normally includes a range of sanctions such as suspending or revoking a license after an administrative hearing. Two of the statutes administered by the TDLS, the Health Spa Act and the Membership Camping Resort Act, depart from the typical licensing and enforcement responsibilities of the agency by requiring a registration function only. These two registration programs appear to be more appropriate functions for the Secretary of State's Office which registers a variety of businesses and corporations. Additionally, deficiencies in the Health Spa Act have become apparent with respect to consumer protection and legislative changes are needed.

**The regulatory scheme for Health Spas and Membership Camping Resorts should be changed to:**

- **transfer the administration of the Acts to the Secretary of State's Office; and**
- **improve the consumer protection provisions of the Health Spa Act.**

Over time, new registration and licensing programs passed by the legislature have been placed within the TDLS if the programs did not clearly fit within the purpose of other agencies or if other state agencies did not wish to take on the new responsibilities. Consequently, the TDLS has served as a depository for new regulatory and licensing programs representing a hodgepodge of unrelated activities. There has not been a clearly defined role for the agency as a result of this

culmination of miscellaneous functions. Further, since the agency's responsibilities for the laws vary from one statute to the next, administration of the activities is made somewhat difficult. Ability to respond to consumer complaints varies since field investigators may be permitted to perform inspections and investigations for some areas, but not for others, and ability to reject a business license application for financial instability or past deceptive activities is present in some statutes but not others. The varied responsibilities for so many unrelated laws creates difficulties in evenly and fairly administering the statutes.

The sunset review evaluated the purpose of the agency from the standpoint of identifying its most appropriate role. The intent of the agency's regulatory functions are primarily to protect consumers from misrepresented services, fraud, or personal injury. This role is appropriate for the agency since it is currently developing a system to efficiently process licenses, investigate complaints through its field structure and to take administrative actions on violators.

The Health Spa Act, passed in 1985, does not involve integrated licensing and enforcement responsibilities as such. The TDLS is only permitted to register the spas and enforcement authority lies with the attorney general since violations of the Act are considered violations of the Deceptive Trade Practices - Consumer Protection Act. This is appropriate because health spas have become a major source of consumer complaints and the attorney general's office has a high degree of visibility as an enforcement agency which is needed to obtain compliance from this industry. The attorney general has actively pursued the numerous complaints filed against health spa owners since the Act passed. For 1986, the attorney general mediated 3,167 health spa complaints and recovered \$360,000 in restitution through mediation efforts. In 1987, 572 complaints were initiated by the attorney general on health spa owners. Even though there has been a decline in complaints initiated and the attorney general's office has been very involved in enforcement, several weaknesses in the act were revealed during the review which serve to impair reasonable and effective consumer protection.

The Membership Camping Resort Act, just passed in 1987, also give the TDLS registration authority only. Membership camping resorts offer for sale a membership interest or membership right to a campsite within a resort facility on a timeshare basis. Buyers are not purchasing a piece of real estate, but are purchasing a right to use a piece of property within the resort at certain times of the year. Resorts generally cater to recreational vehicle owners who use utility hook-ups as part of the membership interest and sometimes offer reciprocal agreements with

other states as part of the contract. Primary activities of the TDLS are to register each camping resort site and all sales persons and contract brokers associated with the camping sites. The statute does not provide the TDLS with any investigation or enforcement responsibility for this program. Violations outlined in the law are also considered violations of the Deceptive Trade Practices-Consumer Protection Act and enforcement would subsequently lie with the attorney general.

Because both of the programs outlined above involve registration functions, they appear to fit with the general responsibilities of the secretary of state. The Statutory Filings Division of the Secretary of State's Office is responsible for registering a variety of activities such as automobile club salesmen and agents, "business opportunities", credit service organizations, athlete agents and notary publics. The intent of the registration process for many of these activities is to provide some degree of state oversight on the financial integrity of the businesses; enforcement is either limited or falls within the jurisdiction of another agency.

The health spa and membership camping resort laws are both administered for purposes of financial oversight as well. For health spas, the TDLS requires completion of a four-page registration form, filing of a bond as a measure of financial solvency, payment of a fee, and submission of sample contracts and an escrow statement for prepayments. For membership camping resorts, an extensive application process is involved which requires applicants to file an application form, pay a fee, and submit numerous other documents including sample contracts, disclosure statements, deeds establishing ownership of the property or leasing restrictions, sample membership certificates, copies of financial statements, a description of the promotional plans to be used, a list of encumbrances on the property and a certificate of good standing from the State Comptroller of Public Accounts.

There is also some overlap in responsibilities of the two agencies in that the secretary of state registers corporations formed in the state. Since most health spas are owned by corporations, they are currently registered with both the secretary of state as a corporation and with the TDLS in compliance with the Health Spa Act. Centralizing health spa registrations within the same agency that registers corporations could allow for cross checking of information on the organizational background of health spa owners if a need for investigation occurred.

In order to more clearly define the roles of the two agencies, the TDLS should be made the recipient of licensing and enforcement programs and the secretary of state should be considered for business registration activities. Administration of

both the Health Spa and Membership Camping Resort Acts should be transferred from the TDLS to the Statutory Filings Division of the Secretary of State's Office accordingly. Several benefits can be achieved with such a transfer. First, registration activities can be handled rapidly and efficiently by the secretary of state since this is a routine activity of the agency. The estimated average turnaround time by the secretary of state for issuance of licenses for automobile clubs, business opportunities, credit service organizations and sports service agents is one to two days, while the current average turnaround time for most licenses issued by the TDLS is three to four days. Second, it would be an advantage to have an attorney review the membership camping applications because of the extensive legal documentation required. Currently, this is handled by a person with paralegal training at the TDLS and if transferred to the secretary of state, would become the responsibility of a three-person staff including an attorney and a certified paralegal.

Third, the secretary of state is familiar with disclosure forms as required in their current registration of automobile clubs, business opportunities and credit service organizations. Disclosure statements concerning advertisements, operation procedures and reciprocal agreements are required in the membership camping resort registration process. Health spa registrations must also disclose either litigation or complaints filed against the spa with the past two years.

Finally, the secretary of state is in the process of expanding its registration processing system through the addition of a large mainframe computer and file network system as part of that office's move to a new building. Even now, the registration process can handle a high volume of work with 65,566 notary public commissions and 2,919 automobile club salesmen and agent registrations processed in fiscal year 1987.

Transfer of these two programs from the TDLS to the secretary of state will necessitate a transfer of funding for the program as well. Currently, the TDLS estimates it uses two staff to administer both membership camping and health spa programs. Funding for the TDLS should be reduced for the two corresponding positions and increased accordingly for the secretary of state. For both programs, a rider in the TDLS appropriations bill reappropriates revenue generated from the license fees back to the agency to cover costs of operation. These riders should be placed in the secretary of state's appropriation pattern to cover its operating costs. It is anticipated that revenues should cover the costs of administering these programs with membership camping resorts generating \$10,600 for the 17 resorts registered thus far and health spas generating \$29,800 in revenue in 1987.

In addition to the transfer, several consumer protection provisions of the Health Spa Act need to be strengthened. In practice, the consumer is not well protected against unscrupulous or insolvent operations. Strengthened registration requirements, increased financial protections and clarification of legal sanctions are required to ensure reasonable and effective consumer protection. Therefore, the following changes should be made to the Act upon its transfer to the secretary of state.

- **Registration of each health spa location.** The existing law does not specifically state that each location is required to be registered. Since there are many health spa business operations that operate more than one location, the law should clearly state that each location should be required to be registered. Registration statements would be required for any location opened after the effective date of this amendment.
- **Surety bond requirements.** The current law requires that a newly registered health spa post a surety bond or other security within 30 days after it opens its facilities to its members. The amount of the surety currently required is 20 percent of the total value of the pre-paid memberships received, but shall not be less than \$20,000 or more than \$50,000. The amount of surety required reduces to \$5,000 after the health spa is in operation for two years. These provisions are ineffective to allow the consumer a source of recovery if the spa fails to open. It is recommended that a \$20,000 surety bond be required to be filed with the agency before the health spa is allowed to open. Further, the \$20,000 surety bond shall be continuously maintained. However, locations operating prior to the effective date of these amendments would be subject to the surety requirements in effect at the time of their registration.
- **Retention of cash of other surety deposits.** The current law specifies that a member of a health spa must bring action under the Act within two years after the violation is discovered or within one year after the date on which the attorney general terminates an action brought under the Act. However, there is no specific requirement that non-surety bonds security requirements are retained for that amount of time. It is recommended that any cash

or other security on file with the agency shall remain on file with the agency two years after the owner ceases business or at such time as the agency may determine that no claims exist against the cash deposit or security.

- **Maintenance of minimum surety amount.** The current law does not specify conditions that require security be restored to the minimum required amount in the event of a claim which is made against the security. It is recommended that in such event, the person posting the security has 20 days in which to post additional security so that the compliance may be secured with the minimum required amount.
- **Adding Travis County as a court of competent jurisdiction.** The existing act does not specifically state that the attorney general may bring suit in Travis County for violations of the Act that may have been committed in another county. It is recommended that such authority be added.

### **Responsibility for Administration of the Tow Truck and Vehicle Storage Laws Should be Transferred to the Railroad Commission**

In 1987, the Tow Truck Act was enacted and was placed under the purview of the TDLS to provide a licensing and framework for the towing industry. The 70th Legislature also provided the Railroad Commission with authority to register all commercial carriers in the state, but the Railroad Commission exempted tow trucks from this provision because of the concurrent enactment of the tow truck licensing law. Since the Railroad Commission, through its Transportation Division, is the state agency responsible for regulating commercial motor carriers from a safety standpoint, the tow truck licensing function and the related vehicle storage facility program should be transferred to this agency.

**Responsibility for administering the Tow Truck Act and Vehicle Storage Act should be transferred to the Railroad Commission.**

The Texas Department of Labor and Standards was given authority for the Vehicle Storage Facility Act in 1985 which pertains to lots which store vehicles towed without an owner's knowledge (non-consent tows). In 1987, the newly

enacted Tow Truck Act also became the responsibility of the TDLS and requires licensing of all tow truck operators in the state. Both laws require yearly license fees, allow the agency to adopt other requirements on the licensee and provide the agency with enforcement authority, including the ability to suspend or revoke licenses for failure to comply with the statute or rules. For vehicle storage lots, the TDLS field inspectors make random inspections of lots to make sure they are maintained in proper physical condition which must include presence of a fence, lights, pavement, and a sign posting the name, hours of operation and license number of the lots. The purpose of the regulations is to protect cars stored on the lot from damage and to protect the lot operators from liability problems. For tow trucks, the TDLS is required by law to set minimum insurance and safety standards for towing operators. The department has established \$300,000 combined single limit liability insurance as the appropriate level for all tow trucks under 26,000 pounds gross vehicle weight. Safety standards address areas such as brake performance, equipment, vehicle hook-up or winching, and wreckage clearance requirements. The statute also requires all tow trucks to be marked on both sides with the name, address and telephone number of the tow-truck owner.

When the vehicle storage and tow truck laws were considered for passage by the 69th and 70th Legislatures, respectively, other state agencies were contacted about the possibility of administering the programs but none indicated interest. Consequently, the TDLS agreed to administer both programs, which are interrelated in that towing operators tow cars to vehicle storage facilities and since ownership of the tow truck operation and the storage facilities is often shared.

The 70th Legislature also passed S.B. 595 which gave the Railroad Commission new responsibility for registering all commercial carriers in the state, with certain exceptions. Tow trucks were exempted from this registration by rule because of the concurrent passage of the Tow Truck Act requiring registration with the TDLS. The purpose of this registration process within the Railroad Commission is to develop a database for collecting safety information on carriers, with the eventual goal being the implementation of safety standards and a related enforcement program. A second bill passed during the same session, H.B. 908, further expanded the commission's responsibilities for commercial carriers by requiring all private and for-hire motor carriers to file proof of public liability and property damage insurance in an amount prescribed by the commission.

The Railroad Commission has also had a regulatory program in place for a number of years which imposes certain safety and insurance requirements on

carriers operating across public highways in Texas. Responsibilities include issuing certifications, rate-setting and enforcement. Certificates of public convenience and necessity are required to operate legally as a for-hire motor carrier in the state. In addition to having to demonstrate a public need for the service to receive a certificate, proof of insurance and registration of vehicles is required. Once certified, rates a carrier can charge are set by the Railroad Commission industry-wide for the particular transportation service provided. Audits of carriers are made by the Railroad Commission staff to monitor rates charged and to investigate complaints. Most tow trucks which operate for compensation or hire and make tows between one incorporated city and the next fall within this regulatory program. Currently, an estimated 200 towing operators have been issued certificates under this program.

Because there are now overlapping interests in tow truck operators between TDLS and Railroad Commission regulations, the sunset review evaluated whether gains in efficiency and increased expertise could be achieved by consolidating activities within one agency. Since the Railroad Commission is the state agency responsible for registering commercial carriers and because of the benefits described below, the functions now carried out by two agencies should be consolidated within this agency. This will necessitate the transfer of both the tow truck and vehicle storage facility programs from the TDLS to the Railroad Commission.

Several benefits can be achieved from this transfer. First, the Railroad Commission can administer the two programs with fewer staff persons than the TDLS now uses, which will result in some cost savings. About five full-time equivalents are devoted to the tow truck and vehicle storage programs at the TDLS, including persons involved in licensing and inspection activities. In fiscal year 1988 the programs are costing about \$300,000 to administer, including the start-up costs for tow trucks. The Railroad Commission estimates it can operate both programs with about six staff persons since their current employees can assume some limited responsibilities in this area. First year costs for the programs, if administered by the Railroad Commission, are estimated to be \$215,000 and would be subsequently reduced after the first year.

Second, the Railroad Commission could efficiently incorporate the tow truck and vehicle storage licensing functions into their process of registering commercial carriers with ease. Of the estimated 300,000 commercial carriers in the state that must be registered under the new program, about 210,000 have been registered as

of this writing. Additional licensing of 1,123 vehicle storage facilities in the state and the roughly estimated 10,000 tow trucks can be easily incorporated into such an extensive licensing system. The Railroad Commission has had an automated registration system for years, which has recently been expanded .

Third, the license renewal fees and insurance requirements for tow trucks would be reviewed by the Railroad Commission with the intent of making them more reasonable and affordable for smaller operators. Instead of the current \$300,000 minimum required liability insurance set by the TDLS for most tow trucks, the Railroad Commission would evaluate a reduction in insurance requirements whereby carriers weighing less than 26,000 pounds total gross vehicle weight would be required to carry the basic minimum insurance requirements established by state law. The yearly license fee per truck and the increased insurance requirements have been a point of contention since the tow truck law was passed and, combined, have created a financial burden for the smaller operators in the industry. These changes would reduce yearly costs for most operators.

Fourth, transferring the authority for the tow truck and vehicle storage facility programs to the Railroad Commission would eliminate one of the agencies with which towing operators must now interact to comply with the various regulations. Currently, three state agencies and many cities have various ordinances that govern towing operations. The TDLS performs the licensing and registration functions for the entire industry; the Railroad Commission certifies long distance, for-hire towing operators; the Texas Department of Highways and Public Transportation issues specially designed tow truck license plates for tow trucks; and municipalities commonly set a variety of ordinances for towing operators and require payment of fees. By taking one agency out of this loop of regulation, the regulatory process would be simplified for towing operators.

Finally, an inspection and hearings process already exists within the Railroad Commission as would be needed for the enforcement efforts on both programs. A field staff of 23 auditors located around the state is already in place to make investigations of carrier records and compliance with commission rules and rates, compared to five estimated staff persons devoted to the tow truck program within the TDLS. Greater field coverage could be obtained with the larger Railroad Commission staff. A hearings procedure is also in place within this agency and 90 cases are in the process of being formulated at present. Hearings are held by a hearings examiner in the legal division if efforts by inspectors to settle complaints with violators are unsuccessful.

The transfer of both programs will necessitate the transfer of funding for the programs. As mentioned, the TDLS currently uses about five employees to administer both programs and funding for the TDLS should be reduced accordingly. The Railroad Commission should be funded at a level to support the operation of the programs. For both programs, there is a rider in the TDLS appropriations bill that reappropriates revenue generated from the license fees back to the agency to cover costs of operation. These riders should be placed in the appropriations pattern for the Railroad Commission to cover this agency's operation costs. It is anticipated that the revenues would cover the operating costs.

It is likely that the transfer will generate considerable discussion. To minimize unnecessary confusion, the following clarifying points are made. Under this recommendation, the tow truck and vehicle storage licensing programs should be transferred to the Railroad Commission in their current form and would not be made a part of the new commercial vehicle registration program just started at the agency since this new registration program may carry with it stiff administrative penalties. This will mean that the current tow truck inspection and enforcement responsibilities, such as revoking and suspending licensees for violations of the statute, would remain in place and the statute would so reflect.

It is also necessary to clarify in statute that the certification process of public convenience and necessity that applies to for-hire carriers would not apply to the transferred tow truck and vehicle storage licensing programs within the agency. There will likely be concerns that if the tow truck licensing program is transferred to the Railroad Commission, proof of public convenience and necessity, rate regulation, and \$10,000 administrative penalties for violations will eventually follow. These programs would be viewed as two separate and distinct programs within the agency and the statute would so indicate.

### **Program Deregulation**

The following recommendation impacts the reorganization of the TDLS by repealing regulations governing professional wrestling and by subsequently eliminating department involvement. The sunset review could not determine that the state's regulatory involvement has had a significant impact on the health, safety or welfare of persons involved with the sport.

Deregulation of this sport will place the responsibility for ensuring that the sport is conducted in a safe fashion with the promoters, wrestlers and municipalities where matches are held. Deregulation will eliminate the involvement of the TDLS

in licensing, inspecting and taking enforcement actions on persons involved with professional wrestling and will transfer responsibility for collection of the current gross receipts tax on each event to the state comptroller.

### **Professional Wrestling Should be Deregulated**

Normally a regulatory scheme is established when there is an identified need to protect the public or an industry from a health, safety or welfare standpoint. The sunset review could not identify a demonstrated need for the state to continue its involvement with professional wrestling regulation since the number and severity of incidences involving this sport have been minor to nonexistent. The following recommendation addresses this issue.

**Professional wrestling regulations should be repealed while retaining the three percent gross receipts tax on the events.**

The Texas Boxing and Wrestling laws passed in 1933 and revised in 1977 were designed to protect participants in both sports from injury by allowing the state to have oversight over the events. The state's responsibility is to establish regulations for both events, license the participants, make inspections, and to take enforcement actions when violations of the statute or rules occur. The sunset review evaluated whether there is a legitimate need for state oversight over both sporting events and whether the state's regulatory activities appeared to be having a measurable impact on protecting the safety and welfare of the participants.

Regulatory oversight over boxing matches appears appropriate for many reasons. While no known deaths have resulted from boxing matches in Texas, injuries and deaths have occurred in other states. The goal of boxing is to strike the body of the opponent and, as such, aggressive action in the ring is rewarded. The ability to knock out or incapacitate an opponent is often awarded with more points and with the title to the bout. Unlike other sporting events such as football, where possibly injurious physical blows are a by-product of the match, such action is the direct intent of a boxing match.

Involvement of the TDLS staff is extensive for boxing and includes: investigating a boxer's fight history, win-loss record, and previous knock-outs; witnessing a pre-match physical examination and weigh-in; checking the ring and proximity of audience seats to the ring; and checking the handwraps of a boxer before the fight. The state's regulation of boxing matches appears to have an

appropriate role in safeguarding the participants in the sport. To terminate regulatory efforts in this area could possibly lead to significant harm or endangerment of the safety and welfare of participants.

For professional wrestling, the sunset evaluation reached a different conclusion. Professional wrestling matches are comparable to professional football where injuries are a by product of the contest. While there could be injuries at wrestling matches as with any other sporting event of this type, physical contact in wrestling shows is largely choreographed and blows are not delivered to the body with the same intent as in boxing. Further, since wrestlers often appear in three to four matches per week, as compared to an average of about six bouts per year in boxing, there is more of a built-in incentive for contestants to stay healthy than in less frequent boxing shows.

As a measure of need for regulation, the sunset review evaluated the number of complaints, incidences and administrative hearings related to professional wrestling over the years. While the department has not kept consistent records in this regard historically, there has been only one known complaint in the last 18 months since record-keeping was instituted. The complaint pertained to a rule violation involving the conduct of a professional wrestling promoter and resulted in a hearing. Prior to record-keeping, the agency knows of only a few minor complaints related to the sport.

The level of inspection on the part of the TDLS field inspectors is much less rigorous at wrestling matches as compared to boxing matches. The agency attempts to send one inspector to each match to ensure that the blood pressure, heart rate and pulse of participants is checked before the match, to monitor the audience during the match and to collect license fees and the gross receipts tax on events after the match ends. Security personnel hired by the auditorium--often off-duty police officers--are generally in attendance at the matches in addition to the TDLS inspector for crowd control purposes.

After reviewing the state's inspection of professional wrestling matches, no demonstrable impact could be found on the safety and welfare of participants as a result of state inspections or oversight which merit continued regulation. At present the state's regulation appears to be more from a revenue-generating standpoint. The industry also appears to be largely self-regulating given the promoters' interest in keeping wrestlers healthy enough to maintain the road show schedule. Further, the sport is not as potentially injurious as is boxing since it is more a staged entertainment event. Finally, the state's regulatory involvement in

this area could not be found to have a measurable impact on the events since, even though inspections are somewhat cursory, complaints are few in number. Consequently, the state should discontinue regulation of professional wrestling.

One result of deregulation will be to eliminate the yearly license fees that must be paid by wrestling promoters and professional wrestlers as well as the requirements outlined in the statute and rules. The revenue generated from license fees, which amounted to \$14,935 in fiscal year 1987, will subsequently be lost but should be partially offset by eliminating the need to send inspectors to the matches, which cost the state approximately \$8,000 the same year.

A three percent gross receipts tax is also in place for wrestling matches, based on ticket sales proceeds and is collected by the TDLS. This tax results in a more significant amount of revenue for the state which would be lost in the event of deregulation. For 1987, the three percent tax on 722 wrestling matches in the state resulted in about \$120,000 in revenue. Taxing entertainment events such as boxing and wrestling matches is a fairly common practice among other states where matches are held. In Texas, the Comptroller of Public Accounts collects a sales tax on amusement events, including a state sales tax and city, county and special taxes. Consequently, both the TDLS and the comptroller currently collect taxes on professional wrestling events. In order to avoid a more significant loss of income for the state as a result of deregulation, the three percent tax should be maintained on the events and should be collected by the comptroller since this office already collects the sales tax. Minor statutory adjustments will be needed to enable the comptroller's office to collect the gross receipts tax on wrestling in the same manner it collects the sales tax on wrestling, allowing the state to retain approximately \$120,000 in revenue per year.

Discontinuing regulation of professional wrestling will place responsibility for conduct at matches with the various localities where the matches are held. It will also eliminate the payment of license fees to the state and the need for promoters and wrestlers to abide by state guidelines for holding matches. Municipalities can continue to require a bond of participants and can establish their own regulations if deemed necessary. Promoters will consequently need to maintain accountability for the sport without state intervention. Since auditorium security personnel generally attend wrestling matches, the level of audience and participant protection can still be maintained without the presence of the TDLS inspectors.



## Policy Body Changes

The following recommendations contribute to the reorganization of the Texas Department of Labor and Standards by: establishing a governing board, which has been absent from the agency over the years; specifying the duties of the commissioner and the commission in statute; changing the nature of the agency's two statutory advisory boards and one policy-making council; and instituting a new policy directive for the agency which replaces outdated provisions. While the information which follows represents a fairly significant departure from the status quo, the changes are necessary to ensure more adequate oversight of agency operations and to bring the agency's statutory mission statement in line with its current duties.

### A Governing Commission Should be Established for the TDLS

Since the TDLS was created in the early 1900s, it has not had a governing board or commission as do most state agencies. When the agency was established, the common practice was to have only person responsible for a governmental function. For example, the origin of the Texas Department of Health was as a one-person state quarantine reporting officer. The TDLS is administered by a governor-appointed commissioner that serves a two-year term. Today, this structure is almost totally unique among Texas state agencies. The absence of such a body has reduced the agency's ability to develop and maintain a comprehensive and consistent policy direction for the areas it regulates. These qualities are essential for a state regulatory agency. The agency should, therefore, be administered by a governing board.

**The agency should be governed by a commission appointed by the governor and confirmed by the senate.**

A fundamental benefit of agency governance by a commission is that it provides consistent and balanced policy direction and oversight of the agency administrator and organization. Texas government has several general oversight bodies. For example, the legislature provides policy direction in law, the state auditor reviews the financial transactions and procedural practices of state agencies, and both the legislative and governor's budget offices review fiscal and programmatic issues. However, these bodies have such general oversight over all

state agencies that they cannot focus their attention on any single agency with respect to its overall management.

Since the TDLS does not have a governing board, agency management is the responsibility of one person. This places a great burden on the administrative capabilities of that person. While many agency commissioners have distinguished themselves by their management abilities and quality leadership, others may have placed disproportionate priorities and attention on a few less significant programs that matched their own interests instead of the broader mission of the agency. In the absence of an oversight body, this tendency can go unchecked. Further, the terms of the TDLS commissioners have changed at least as often as new governors have come into office. Over the past 24 years, there have been nine commissioners and, excluding the current commissioner, the average tenure has been 34 months. However, during this period, three commissioners have had tenures of less than 15 months and only four have exceeded three and one-half years. For comparative purposes, a review of the average tenure of commissioners of eight major state agencies which have governing boards was made. The average terms of commissioners over the past 20+ years was found to be eight and one-half years and the range was from less than two years to over 28 years. The tenure of the TDLS commissioners appears to be shorter than that of agencies with governing boards and frequent changes in leadership have the potential for disruptive and counterproductive changes in policy direction and priorities.

Because the TDLS is unique in that it does not have a governing body and has had consistent turnover in agency commissioners, the sunset review examined the governance structure of other regulatory and non-regulatory agencies in Texas state government. All but three other agencies in the state are governed by a board or commission that provides policy guidance to the agency and continuity during changes in gubernatorial administrations. The three exceptions are the Texas Department of Community Affairs, the Office of State-Federal Relations, and the Office of the Secretary of State.

The review also evaluated the governing structures of agencies in other states as a point of comparison. It appears that Texas state government is generally not structured for direct governor control and direction as are some other states. The direct line of agency executive accountability to the governor is characteristic of a cabinet form of government present in many other states. The states with such a structure provide a reasonable span of control for the governor and have large state agencies with broad programmatic responsibilities. Commissioner-governed

agencies prevalent in other states typically have merged several smaller agencies or activities under one roof, creating an "umbrella" department. Thus far, this has not been the direction the legislature has taken in Texas.

Creation of a TDLS governing commission would add strength to the regulatory role of the department by adding consistency over time in its regulatory policies and programs and would reduce or eliminate the inherent inconsistencies in the current structure. A commission that represents the general public and the major programmatic interests of the department would provide a more balanced perspective in setting overall agency policy and in carrying out its regulatory functions. The authority to execute those policies would still rest with the commissioner, as would the responsibility for administration of the department's operations. The agency's law should therefore be amended to create a nine-member commission appointed by the governor and confirmed by the senate to be the governing body for the agency. The commission should represent the agency's major regulatory areas. Members should serve six-year staggered terms and should represent the following: one registered manufactured housing retailer; one registered manufactured housing manufacturer; one registered manufacturer in the industrialized housing and buildings industry; one representative of the boiler industry; one registered air conditioning contractor; one licensed representative from the boxing industry; and three public members, one of whom should be a licensed attorney specializing in consumer protection. The governor should appoint the chairperson from among the public members.

There are a number of benefits that should result from these changes. First, agency operations and policies should be more consistent. Second, the involvement of the commission members should result in a broader range of perspectives as the department develops and executes state regulatory policy. Third, the commission's oversight should create increased accountability of the commissioner and his staff in executing agency duties and responsibilities.

The creation of a governing commission would result in minor costs to the state to pay for travel and per diem for members to attend commission meetings. Based on four two-day meetings per year and average travel expenses of \$500 per member for each meeting, the estimated annual travel expense would be \$18,000. If the members were to receive a per diem for days spent on commission business as some other agency commission members do, this cost should be added. Based on four two-day meetings per year at a \$30 per diem, the annual cost for per diem would be \$2,160 and the total annual cost is estimated to be \$20,160.

## **The Duties of the Commission and the Department's Commissioner Should be Set Out in Statute**

In conjunction with the previous recommendation, statutory changes will be needed to carve out the duties of the new commissioner in relation to the duties of its executive head or "commissioner." The following recommendation sets out of how the duties should be set up in the numerous laws under which the agency operates.

**The department's operating statutes should establish the powers and duties of the commission and its commissioner.**

As is the case for all agencies which operate under boards or commissions, careful consideration needs to be given to the delineation of the powers and duties of the policy-making body and those of its chief executive. Generally, the board or commission sets policy and the chief executive carries out and implements that policy through the administration of program functions and supervision of staff needed to accomplish the agency's overall purpose. In situations where the agency's overall purpose is broad and its programs diverse, key functions of the policy body and the executive head are generally established in statute. For example, the powers and duties of the Board of Health and the Commissioner of Health are clearly delineated in statute (sections 1.05 and 1.06, Art. 4414b, V.A.C.S.) to ensure that the ground rules for the operation of the agency are understood by the board, its employees and those persons served or regulated by the department. Although smaller in size, the TDLS does operate a number of diverse laws and the duties of its new commission in relation to the long time commissioner position need to be statutorily identified to ensure efficient and effective operation of the department's functions.

To provide this delineation and a workable administrative structure for the agency, it is recommended that new commission have the following powers and duties:

- the employment of the department's commissioner;
- the adoption of rules for its own procedure and those of the programs of the department;
- the supervision of the commissioner's administration of the department; and

- the appointment of members of advisory committees.

In turn, the commissioner's duties should clearly establish his or her powers to administer and enforce the many laws for which the department has responsibility. Specifically, the following powers and duties should be set out for the department's commissioner:

- the employment of staff needed to carry out the department's functions;
- the issuance of all licenses, certifications and registrations;
- the administration and enforcement of the department's laws and regulations; and
- the performance of duties assigned by the commission or state law.

This delineation of duties will provide a framework for the operation of the department. Since the department has not had a policy making board or commission, its many laws will need to be adjusted to reflect the duties of the commission in relation to the commissioner. As noted above, the commissioner retains his current power to administer and enforce the many laws the department operates. It is not intended that the commission serve as an "appellate" body for the commissioner's regulatory decisions to issue, deny, revoke a license or otherwise discipline a person subject to the department's regulatory laws and regulations. As with the Board and Department of Health structures, an appeal of a regulatory decision made by the commissioner would be to a court of competent jurisdiction.

#### **The Composition and Appointment System of the Department's Advisory and Policy-making Boards Should be Improved.**

The Texas Department of Labor and Standards currently has three statutory advisory committees: the Industrialized Building Code Council (IBCC), the Board of Boiler Rules, and the Air Conditioning and Refrigeration Contractors Board. These committees provide technical advice regarding the programs which cannot be provided as comprehensively by agency staff. Each of these advisory committees, however, differs in terms of its authority, selection system, terms of membership, size and composition. While some of the variations are appropriate, others interfere with the effectiveness of the committees and are addressed in the recommendation below. The changes made to the advisory committees also

correlate with the recommendation previously made to establish a governing board for the agency.

**The statutory directives for the agency's two advisory boards and one policy-making council should be changed to make the level of authority, selection system, terms of membership, size and composition more workable.**

The sunset review evaluated the agency's use of its three statutory advisory committees to determine if the committees were beneficial to the agency and if they were structured in a manner to promote efficiency in operation and adequate representation. Since the committees provide management and policy assistance to the board and department, it is important that each committee be structured appropriately. A number of variations were found in the structure of the committees.

First, the Texas Industrialized Building Code Council (IBCC) was created in 1985 to assure that industrialized housing and buildings in the state meet the mandatory state and federal codes. The decisions of the IBCC are binding on the agency. The council is composed of 12 members appointed by the governor for staggered two-year terms and are chosen to represent the major segments of the industry. The commissioner of the Department of Labor and Standards serves as secretary of the council and provides staff services. This committee also has a separate sunset date in the statute, which requires continuation by the legislature or it is abolished.

Second, the Board of Boiler Rules was established in the Texas Boiler Law to act in an advisory capacity to the commissioner in formulating definitions, rules and regulations for the safe construction, installation, inspection, operation, alteration, and repair of boilers. The board is composed of nine members appointed by the commissioner for staggered six-year terms. Board composition is required by statute to include representatives of all major segments of the industry. The director of the boiler division serves as the board's chairman and the commissioner serves in an ex officio capacity.

The third committee, the Air Conditioning and Refrigeration Contractors Advisory Board, was established by the 70th Legislature to advise the commissioner in adopting rules, setting fees, and enforcing and administering the Act. The board consists of six members appointed by the governor and confirmed by the senate for six-year staggered terms. Members represent the major segments of the industry as

well as geographical areas of the state. The chairman is appointed by the governor; the commissioner and director of the boiler division serve as ex officio members.

The exhibit which follows outlines the differences in the structures of the three committees.

Exhibit 4  
Variations in TDLS Advisory Boards

Features/ Board	IBCC	AC/RC Board	Board of Boiler Rules
Term	2 years	6 years	6 years
Number of members	12	6	9
Appointment	Governor	Governor	Commissioner
Decisions	Binding	Non-binding	Non-binding
Chairman selection	Members elect chair	Governor designates chair	Division director is chairman
Agency staff role on board	Commissioner serves as secretary	Commissioner and boiler division director serve as ex officio members	Commissioner is an ex officio member

The evaluation of the usefulness and efficiency of the committees indicated that while the committees were providing useful expertise to the agency, several structural problems were present. First, the two-year term on the IBCC and the governor appointment system on the IBCC and the Air Conditioning Board were found to have an unfavorable impact on the ability of the committees to operate. A short two-year term of membership on the IBCC causes frequent turnover in membership and results in vacancies on the committee pending the governor's appointment. Additionally, a governor-appointed committee membership system places an unnecessary burden on the governor's office that should remain with the agency which has sufficient expertise in the nature of the regulated industries the committees represent. While it is appropriate for the governor to appoint members of an agency's policy-making board, it is not necessary for the governor to make advisory committee appointments since the agency can adequately judge the expertise needed for representation on the committee and can ensure a well-balanced, knowledgeable composition.

Second, while two of the committees are advisory in nature, the decisions of the IBCC are binding on the department. This, in essence, places undue authority

with a committee of representatives from outside the department and limits the department's flexibility and authority in administering the program.

Third, in the case of the Board of Boiler Rules, the boiler division director serves as chairman of the board, which may create a situation where the department can exert too much influence on the board. Additionally, the commissioner serves as an ex officio member of the Board of Boiler Rules and both the commissioner and director of the boiler division serve in ex officio capacities on the Air Conditioning Board. Advisory bodies should be able to discuss rules and problems freely and then make recommendations to the department accordingly. By requiring the commissioner or division director to head the advisory body or to serve in an ex officio capacity, discussions could be inhibited. Additionally, the statute specifies that the Board of Boiler Rules include a professor of mechanical engineering from an accredited school as a member, a position which the board has found difficult to fill. This position has been vacant since May of 1983 and should be replaced with a public member who has expertise in mechanical engineering.

In order to address these concerns, statutory changes should be adopted as follows to provide an effective structure for advisory body operation including:

- the requirement that the agency's governing board, established in the previous recommendation, make all appointments to the three statutory boards, upon recommendation of the commissioner;
- the requirement that the members of all boards select the chair from among the membership;
- the specification that all three boards are to be advisory in nature, with no decisions binding on the department;
- the continuation of the IBCC, but with repeal of the separate sunset review clause to eliminate the need for a separate review;
- the specification that the terms of membership on all boards be six years;
- the removal of agency personnel from serving on or chairing the advisory bodies; and
- the replacement of the professor of mechanical engineering on the Board of Boiler Rules with a public member who has expertise in mechanical engineering.

This approach should ensure that the advisory bodies are of maximum use to the agency and the governing board. Adoption of the above language would

require changes in the three current committees and Exhibit 5 which follows outlines the changes to each.

Exhibit 5

**Changes Which Will Result for Each Advisory Board**

Board	Changes
Industrialized Building Code Council	<ul style="list-style-type: none"> <li>● terms extended to six years, from two years</li> <li>● appointments made by the governing board, instead of the governor</li> <li>● decisions not binding on the board</li> <li>● commissioner removed as secretary</li> <li>● repeal of separate sunset review date</li> </ul>
Air Conditioning and Refrigeration Contractors Board	<ul style="list-style-type: none"> <li>● appointments made by the governing board, instead of the governor</li> <li>● members designate the chair</li> <li>● commissioner and boiler division director removed as ex officio members</li> </ul>
Board of Boiler Rules	<ul style="list-style-type: none"> <li>● members designate the chair</li> <li>● division director removed as chairman</li> <li>● replace professor of mechanical engineering with a public member with expertise in mechanical engineering</li> <li>● commissioner removed as ex officio member</li> </ul>

In order to minimize the disruption these changes will have on the workings of the committees, it is recommended that current members be grandfathered in and that any changes in membership be instituted as vacancies occur.

**Duties of the Agency Outlined in Statute Should be Changed to Reflect its Current Responsibilities**

Many of the responsibilities of the agency which are outlined in the statute are outdated and have remained in the statute since the agency was created in 1909. New duties have arisen over the years to replace old responsibilities, but are not reflected in the statute. The recommendation which follows addresses this problem.

**The agency's duties should be revised in statute to reflect its current responsibilities.**

The agency's general statutes, Articles 5144 through 5151c, V.T.C.S., contain many outdated provisions detailing the duties of the commissioner, reports and records to be kept, and authority of the commissioner as it pertains to factories, mills, mines, and other places of employment. These provisions were placed in the statute in the early 1900s when the agency's primary responsibilities were labor-related. Included in the provisions are duties such as compiling statistical reports on workforce demographics; the commercial, social, educational and sanitary conditions of employees and their families; means of escape from employment dangers; and work hours of women. Responsibilities for these functions either now lie with other agencies such as the Texas Employment Commission, the Industrial Accident Board and the Texas Department of Health or are outdated. The TDLS commissioner is also mandated to perform cooperative activities with the Texas Energy and Natural Resources Advisory Council, which was abolished in 1983. In the Minor Modifications section of the sunset report, recommendations are provided to repeal responsibilities for these duties since they are handled by other state agencies now.

Since much of the agency's general statute would be repealed if the recommendations in the Agency Reorganization section of the report are adopted, new duties which accurately reflect the agency's current functions should be added to the statute. As a result of the sunset reorganization of the TDLS outlined in the previous recommendations, the agency's new focus is being defined as that of a business and occupational regulatory agency whose duties include licensing businesses or activities, making inspections and investigations, and taking enforcement actions. These new duties should be reflected accordingly in the statement of purpose section of the agency's general statute.

## Overall Administration

The evaluation of the administration of the department was designed to determine if the management procedures and reporting activities of the agency were consistent with generally accepted practices for the internal management of time, personnel and funds. The department's budget and planning processes were reviewed along with methods used to implement the commissioner's policies and procedures. The monitoring of the efforts of field staff and the use of and accounting for funds received by the department were also reviewed. Further, audit reports and management letters issued by the state auditor to the department were examined.

A number of concerns were identified regarding the department's administrative procedures. Many of these concerns are already being addressed through an aggressive internal review by the agency's commissioner and have resulted in the development of numerous management by objectives (M.B.O.) goals which are in the process of being implemented. First, the agency's inability to access basic management information was repeatedly observed during the review. For example, the manufactured housing division had only sketchy information on the amount of time which normally elapses between installation of manufactured housing units and the required installation inspection performed by TDLS field staff. Additionally, the proportional allocation of staff time between their various inspection duties is not readily available. Nor was the department able to reliably estimate the number of complaints, violations or administrative hearings held for the various statutes it administers prior to 1987 because, until recently, such information has not been consistently logged until recently. Access to and periodic analysis of such information by the department could help it evaluate staffing needs and workload trends; it can also serve as an indicator of performance effectiveness. The department has recognized the need to maintain better records of its work and has instituted recordkeeping procedures to meet this need.

Second, the agency's automation system appeared to be inadequate for handling the increasing volumes of data related to licensing activities it must process. Numerous licensing activities were only partially automated or were handled manually at the beginning of the sunset review. One example of the problems that can result from inadequate data processing capabilities concerns the boiler division. The computer program cannot develop a report of past-due boiler inspection fees or track completed inspections. The division normally bills in

advance for the required boiler inspection and registration; this billing is done automatically by the computer for the roughly 30,000 boilers which are inspected each year. When the invoice has been paid by the owner, the computer issues a report for that boiler to be sent to the appropriate field office for inspection. If, however, the owner does not pay the invoice, the computer does not issue the report and the inspection is not made. Moreover, the computer cannot track whether a boiler has been inspected according to schedule or not. This means that the agency does not have a method of discovering the existence of those boilers which are not inspected because the invoice was never paid or because completed inspection reports were never returned to the department. Thus, unless such boilers are caught during random checks, they may never get inspected again. This lack of oversight represents a serious safety hazard since boilers are operating that are not receiving needed inspections. Furthermore, the state is losing revenue by not being able to track payment of fees. The agency recently calculated that 4,500 outstanding invoices exist representing an estimated \$75,000 in past-due inspection fees and inspections.

This automation problem is not unique to the boiler division and the department has recognized the need to update data processing capabilities to meet current needs for all divisions. While funding for such an effort has been an obstacle, department staff have begun development of a generic licensing and registration (L&R) system in-house which should vastly improve the department's capabilities. After development, the department's priorities are to convert the labor, licensing and enforcement division programs to the new system first, and the boiler and manufactured housing programs in fiscal year 1989. The implementation of this L&R system should improve the agency's efficiency and should allow the agency to better protect public safety.

Third, the agency's current organizational structure involving the four divisions--administration, boiler, manufactured housing, and labor, licensing and enforcement--was found to lend itself to a duplication of efforts. This is because each division performs its own separate licensing and inspection functions instead of having similar activities grouped together within the agency's structure. Two major initiatives were being developed during the review to address this concern. One is the generic L&R system mentioned above, which will allow the agency to process most licenses, certificates and registrations in a consolidated and efficient manner, and the other is the commissioner's plan to restructure the department along functional lines. The commissioner's restructuring proposal would create

these new programs: administration; legal services; licensing and registration; program management; and field operations. The Legislative Budget Board is considering development of an appropriations bill pattern that would closely parallel this structure. This new structure appears to streamline similar functions and should improve efficiency, especially in licensing activities.

Fourth, the review also found the accountability of field office staff to be weak. The agency currently operates 11 field offices around the state after having consolidated or eliminated four other offices. During the review, a loose system of accounting for the worktime of field staff appeared to exist since inspection reports are generated in Austin and are then sent out to the field for employees to schedule their own work. There did not appear to be an adequate monitoring system to ensure employees kept pace with the workload. The review noted that in the manufactured housing division, home installation inspections were still taking several months after the unit was installed, even though the downturn in the economy has resulted in a significantly reduced workload. Further, boiler division employees do not have direct field supervisors and report to Austin by phone, by mailing in reports, and through periodic field monitoring visits performed by the division director.

The commissioner is in the process of changing field office operations by instituting a pilot program in the San Antonio field office. This program includes cross-training of staff where feasible to better handle the workload and as a salary incentive program. It will also include designating a regional supervisor to be responsible for most field operations within the region and to schedule work across all programs. The successful components of this pilot project are planned for implementation across the state on September 1, 1988 and should improve the loose system of accountability in the field structure.

Overall, the department's current initiatives through its M.B.O. program which is already being implemented should make a significant impact on the agency's administrative effectiveness. The commissioner's actions to correct past agency administrative problems are important if the department wishes to expand its licensing capabilities to other areas, as being explored by the Special Committee on the Reorganization of State Agencies.

Three final concerns noted during the review, including the agency's limited statutory flexibility in setting license fees, inability to adequately determine program operating costs which fees are based on and inadequate statutory

enforcement responsibilities, are addressed in the recommendations which follow and should further improve the administration of the various TDLS statutes.

### **The Agency's Statutory Fees and Fee-setting Processes Should be Changed to Overcome Certain Deficiencies**

The department has numerous fees associated with its regulatory functions. Of the 81 fees administered by the agency, the commissioner has the discretion to set most fee amounts. However, 14 fees are fixed at a set dollar amount in statute and three fees have a maximum amount set in statute. Statutorily set fees are limiting to the agency as costs of program operations change since the agency would have to go through the legislative process to change fees. Further, the fees that the commissioner now has authority to set are not commensurate with the actual cost of administering the program or activities. These issues are discussed as follows.

**The agency should set its fees by rule in amounts to recover the costs of administering assigned programs.**

- **Statutory fees or limits should be abolished.**
- **The agency should develop cost management procedures that enable it to determine the cost to the agency, within a reasonable degree of accuracy, for each licensing and inspection function.**

The licensing, registration, certification and titling functions performed by the agency have expanded over the years as new areas of regulation have been added by the legislature. Most of these regulatory areas involve licensing or registering persons in an industry or activity.

The department currently has authority to charge 81 fees for various licenses, registrations, certificates and inspections. However, several different methods are prescribed in statute for setting the amount of the fee. Fourteen fees are set at a fixed amount in statute such as for boxing, wrestling and auctioneers. For three fees, a maximum dollar amount is set in the statute, which gives the department some discretion in setting the fee as long as it does not exceed the cap. For the remaining 64 fees, the commissioner has total discretion over the amounts, which are set in rules. Under the present system, the department's authority varies widely for setting the fee amounts. Fees that are set in statute require the department to

petition the legislature every time the fees need to be changed and this limits the agency's flexibility in responding to changing operating costs and inflation.

Besides the limited flexibility the department has for setting some fees, the review found that the department's ability to estimate operating costs and to set fees at appropriate levels to recover costs was inadequate. In many cases, the department indicated it could not provide data on the cost of operating its various programs because it does not have adequate cost accounting methods. In some programs where rough estimates were attempted, it was discovered that revenues generated through fees considerably exceeded program costs in a few cases. For example, the manufactured housing installation inspection activity was found to recover an estimated 200 percent of its costs based on direct program operation cost estimates which included staff salaries, fringe benefits, materials, supplies and equipment. While some variations in cost recovery can be expected based on changes in the economy and industries regulated, it is imperative for an agency that licenses and regulates various industries to have a system in place to better identify operating costs and to set fees accordingly. This is especially true if the legislature intends to expand the TDLS licensing functions as has been the trend in the past. Otherwise, fees charged to regulate some industries could substantially subsidize the costs of regulating other industries.

In order to correct the deficiencies identified above, two changes should be made. First, the agency should be given authority to set all fees by rule in an amount appropriate to recover costs and current statutorily set fees or maximum amounts should be eliminated from statute. This approach would provide the governing board, if put in place as a result of an earlier recommendation, the flexibility to increase or lower fees based on industry and economic fluctuations. It would also relieve the legislature of the routine burden of passing legislation to change statutorily set fees. This change would allow the governing board to periodically review the appropriateness of fees and to have oversight over adjustments made. Oversight over the agency's fee setting authority would also continue to exist as a result of the biennial appropriations process the agency must go through to receive funding. This process takes into account anticipated revenues to be generated for the agency through fees. As mentioned previously, fees for some programs allow the department to collect considerably more than the costs of administering the individual program. The governing board should review this situation when approving fee amounts and should make gradual adjustments in

fees where feasible while maintaining the objective of recovering the overall costs of agency operations.

Second, the agency should be required to develop cost accounting procedures to better determine the cost of operating programs or activities for which fees are charged. If the agency is to be given discretion over setting fee amounts by rule as indicated previously, it is essential that the agency be held accountable for setting reasonable fees. The agency has recognized the importance of this effort and has undertaken steps recently to pursue the purchase of an appropriate cost management system.

A cost management system should be designed to provide a reasonable estimate of the cost of the activities required for each program. For example, the agency performs different activities for its regulatory programs which may include testing applicants, issuing licenses, inspecting licensee's activities, investigating complaints and holding hearings. The cost accounting system should take into account these varied activities, as well as the size of the industry regulated and ability of the industry to pay license fees. Such information would allow the department to determine the cost/benefit implications of changing the level of effort in an activity and raising or lowering renewal fees. The cost management system would not necessarily require automation; the information could be compiled and reported manually. However, integrating the system with automated accounting information would enhance its value and usefulness.

While the agency has some basic automation capabilities in this area, there will be additional costs involved in purchasing an effective automated system. The department has purchased and is installing an automated cost accounting system which should help it more accurately estimate program costs, but final selection has not yet been made. The system is estimated to cost \$50,000 and should be operational by September 1, 1988.

### **The Agency's Ability to Enforce its Various Laws and Rules Should be Strengthened by Broadening the Range of Administrative Sanctions and by Aligning Misdemeanor Penalties**

The agency is charged with the administration of numerous regulatory laws, but has inconsistent authority for administrative sanctions which can be applied for violations of the various laws. These inconsistencies prevent it from using a full range of administrative alternatives that are necessary to deter violators and protect the public. For less severe violations, the agency lacks authority in some

statutes to enact less stringent and less time-consuming sanctions whereas for more severe violations, the agency lacks authority in some cases to enact stronger sanctions such as denying a license. Further, misdemeanor penalties should be adjusted in one statute to be more commensurate with the violation of the law. The two recommendations which follow address these enforcement issues.

**The agency's range of administrative sanctions should be broadened in specific areas and should be centralized in the general provisions of the agency's Act to apply to all statutes administered by the agency.**

The TDLS is a regulatory agency which currently licenses 12 different types of occupations and businesses. However, as the various laws have been enacted and assigned to the agency in piecemeal fashion, they have not all included an adequate range of administrative sanctions necessary to allow the agency to effectively carry out its regulatory responsibilities.

Most regulatory agencies have statutory authorization for a range of activities which prevent unqualified or disreputable persons from becoming licensed, and administrative sanctions that allow punitive action to be taken commensurate with the severity of the infraction committed by a licensee. The punitive actions typically used are: warning licensees when infractions are discovered; placing licensees on probation for more significant violations or repeated minor infractions; suspending the license for specific periods where corrective action has not been adequate or where flagrant violations occur; revoking the license if serious and/or intentional disregard for compliance is evident; and denying a license to persons that have had a history of violations or are financially unstable.

The agency does not have this full range of sanctions available in all of the laws it administers. In some cases, the agency has authority only to suspend or revoke the license as the sanction available to it. While these are powerful and effective administrative sanctions, they may be too severe for minor infractions of the law or rules. For example, the industrialized housing and buildings law does not allow the agency to place a manufacturer on probation or to assess an administrative penalty. The agency's choices are to take no formal action, which implies that some infractions will be ignored, or to suspend the manufacturer's operations for some specified time, which causes possibly unwarranted economic hardships on customers and employees, as well as on the manufacturer.

By contrast, there are other areas where the law does not provide sufficient authority for the agency to apply sanctions for more severe offenses. For example, the personnel employment law does not permit the agency to deny a license of applicants that may have had a past history of fraudulent activities, perhaps in the same line of work. Denial of a license is one of the most restrictive sanctions that can be applied since it, in essence, prohibits a person from operating a business in the state.

Exhibit 6 which follows lists the administrative sanctions currently authorized for the agency for the eight remaining programs which should continue to be regulated by the agency, as a result of the recommendations to transfer other programs out of the agency.

Exhibit 6

**Administrative Sanctions Authorized by Current Law**

Program	Warning	Probation	Penalty	Suspend	Revoke	Deny Application
Auctioneers	no	no	no	yes	yes	yes <sup>1</sup>
Boxing	no	no	yes	yes	yes	yes
Personnel Employment Services	yes	no	yes	yes	yes	yes
Career Counselors	yes	no	yes	yes	yes	yes
Boilers boilers inspectors	no no	no no	no no	yes <sup>2</sup> yes	yes <sup>3</sup> yes	n/a yes <sup>1</sup>
Manufactured Housing	no	no	yes	yes	yes	yes
IHB Manfctrs	no	no	no	yes	yes	yes
Air Conditioning Contractors	no	no	no	yes	yes	yes <sup>1</sup>

- 1) Must pass exam
- 2) If needs repair
- 3) If unsafe

As the chart indicates, the areas where the agency is deficient in its authority are in its ability to issue warnings, place licensees on probation, assess administrative

penalties, and deny applicants for licensure. The agency is only authorized to issue warnings to persons registered under two of these laws. In the other six areas, it is confronted with the alternatives of taking no action, suspending or revoking the license. The first option runs the risk of being regarded by the licensee as a weak form of enforcement and may not adequately deter repeat offenses. If either suspension or revocation are the only options that can be used, this can in some cases be too harsh for the severity of the offense such as for first-time offenders. For example, in the boiler inspection program, one manager in the agency indicated there had been five or six cases when informal meetings were held with authorized insurance inspection agency personnel about problems with their inspection agency's adherence to the activities of the program. No formal action was recorded because the only official action the agency could take was to suspend or revoke their licenses to inspect and such a severe action was not warranted under the circumstances.

After warnings, the next more progressive level of administrative sanction is placing a licensee on probation. This is typically used for more significant violations or repeated minor infractions. Probation is for a specified period of time and indicates to the licensee that any further infractions during the probationary period may result in suspension or revocation of the license. None of the activities regulated by the TDLS provides formal authority to use probation as a regulatory sanction. The absence of this authority deprives the agency of the ability to use a sanction that is most suitable for moderately significant infractions or repeated minor infractions.

One of the most effective administrative sanctions is to assess administrative penalties. As Exhibit 6 earlier indicated, four of the agency's laws permit this and four do not. This alternative has been effectively used by the agency where authority exists. For example, during the first six months of fiscal year 1988, the department held 59 formal and informal hearings involving persons or businesses licensed under the manufactured housing act. Of these 59 hearings, 22 resulted in administrative penalties. Most penalties were set at \$250 per violation. These penalties are accepted by the licensee as an admission of the infraction and are often used by regulatory agencies in lieu of revoking a license.

The next two most restrictive sanctions, suspending or revoking a license are authorized for all statutes and are used regularly by the agency. The most restrictive action that may be taken by the agency, ability to deny a license, however, is not authorized for two statutes, personnel employment services and

career counselors. The personnel employment services law states directly that any person desiring to own a personnel employment service shall notify the commissioner of that fact and the "...notice shall be accepted by the commissioner...". The career counselor law is similar in that the commissioner is required by statute to accept the application for the certificate of authority to operate the business. While both laws require the owner to provide bonds and both require some basic data such as the owner's names, address, etc., neither statute allows the agency to prevent persons from being registered to do business. This includes persons who are known to have previously engaged in fraudulent or deceptive activities in the same business for which they are attempting to obtain registration. As a consequence, unethical operators from other states can come into Texas and become registered to do business. This has been a problem in the past with personnel and career counseling agencies in that when tough regulatory laws are enacted in one state, some have relocated their businesses to other less restrictive states, often using different business names.

In order to get a comparative frame of reference of administrative sanctions authorized for other Texas state regulatory agencies, the review included an examination of 11 different licensing agencies and programs to determine if there is a consistent pattern in their administrative sanction authorities. The agencies surveyed were: the Texas Alcoholic Beverage Commission (TABC); the Texas Real Estate Commission (TREC); the State Board of Registration for Professional Engineers; the State Board of Insurance; the Board of Tax Professional Examiners; the Board of Veterinary Medical Examiners; the Board of Licensure for Nursing Home Administrators; the Board of Plumbing Examiners; and three regulatory functions in the Texas Department of Health, including licensure of nursing homes, hospitals, and speech-language pathology and audiology. All of these agencies license the individual or enterprise and all have authority to inspect the licensee, investigate complaints and suspected misconduct, suspend licenses for a determinate period, and revoke licenses.

Ten of the 11 have one or both of the authorities to issue warnings or place licensees on probation. Seven of the 11 have authority to issue formal or informal warnings and six of the 11 can place a licensee on formal probation. While the regulatory authorities for nursing homes and hospitals do not include probation, both permit withholding license renewals until problems are resolved. Five of those surveyed permit assessment of administrative penalties. The TABC is empowered to assess a penalty of not less than \$150 per day of operation in lieu of suspension for

violations. The Board of Veterinary Medical Examiners can assess up to \$2,500 per violation and a nursing home can be assessed up to \$10,000 per day if found operating in violation of the law. The TREC can assess administrative judgments in amounts that are generally equal to the amount paid from the real estate recovery fund to a claimant in response to the licensee's misconduct. The State Board of Insurance can assess companies and agents up to \$10,000 per violation. All have authority to deny applicants for licensure based on some specified criteria or requirements, except the Board of Plumbing Examiners which does not prohibit any person from taking the examination for licensure.

After reviewing the authorities of other regulatory agencies above, the review concluded that it is common for licensing and enforcement agencies to employ a full range of administrative sanctions and that the same should apply to the TDLS. The agency should, therefore, be authorized to employ sanctions consistent with its regulatory functions for all of the statutes it administers in order to overcome deficiencies in the current laws. This should be accomplished by establishing in the agency's general administrative statutes (currently Articles 5144 through 5151c, V.T.C.S.) a centralized enforcement scheme which should apply to all current statutes the agency administers, as well as any future regulatory statutes the agency is charged with administering unless specifically designated otherwise. The statute should require the agency to follow the Administrative Procedure Act (A.P.A.) in its hearings process, as well as contain a description of the range of sanctions the agency can use to pursue violations of all statutes which remain within the agency's purview including: denial of license/registration; warnings; probations; suspension of license/registration; revocation of license/registration and administrative penalties not to exceed \$1,000 per violation. Since the highest level of administrative penalty that may now be assessed by the agency is \$1,000 per violation in the manufactured housing division, this amount should serve as the penalty cap for all programs. Proceeds from administrative penalties should be deposited to the credit of general revenue. Further, the agency should adopt rules on the implementation of the above administrative sanctions so that affected industries can be notified of the various changes. The agency's governing body, if implemented in a previous recommendation, should review and approve the specific rules proposed by the commissioner and should have oversight over the implementation of these sanctions.

By strengthening the agency's authority to enforce its various statutes, a multiple step enforcement process will be in place within the TDLS. The process will

begin with inspections by field staff to detect violations and investigations of complaints. The next step in the process is to conduct hearings where violations of the statute or rules cannot be resolved by division staff. Cases that cannot be resolved at the administrative hearing level can be appealed to district court. Further, most statutes permit referral of cases to the Attorney General's Office or to a county or district attorney. The agency's governing commission, if implemented, should not be involved in the enforcement process.

The specific impact of this change on each program which should remain a part of the TDLS is illustrated in the exhibit which follows.

Exhibit 7

**Impact of Enforcement Enhancement  
on Various Programs**

<b>Program</b>	<b>Sanctions Added</b>
Auctioneers	Warnings Probation Administrative Penalties
Boxing	Warnings Probation
Personnel Employment and Career Counseling Services	Denial of License Application Probation
Boilers	Warnings Probation Administrative Penalties
Manufactured Housing	Warnings Probation
IHB Manufacturers	Warnings Probation Administrative Penalties
Air Conditioning/ Refrigeration Contractors	Warnings Probation Administrative Penalties

The recommendations expanding the use of warnings, adding probation, and expanding the use of administrative penalties and license denials would likely increase the agency's administrative hearing workload. While there is no precise way to determine the impact of the increase, estimates can be projected as follows. During the first six months of fiscal year 1988, the agency held a total of 68 administrative hearings. The cost of the agency's legal staff time for each hearing was estimated by the agency to be \$250 per hearing. On an annual basis, this would amount to about 136 hearings and an annual cost of \$34,000. If the number of hearings were to increase by 25 percent, the projected number would be 170 per year and the associated costs would increase by \$8,500. However, some of the increase in costs would be offset by an increase in the revenue from administrative penalties since new authority to assess penalties would be instituted in some cases. If the agency assessed a \$100 penalty in 85 hearings per year, \$8,500 in revenue would be generated to offset increased costs. It is anticipated that the agency could handle the additional workload without requesting additional staffing since the agency currently has four staff attorney positions authorized, but only three positions are filled. The fourth is scheduled to be filled in September, 1988.

**The misdemeanor classification in the boiler inspection act should be increased to a Class B Misdemeanor.**

In addition to administrative sanctions that the agency is authorized to use, most of the laws administered by the agency have defined violations of the law as a Class A, B or C Misdemeanor offense and six laws specify that violations of the law are violations of the Deceptive Trade Practices-Consumer Protection Act. For example, a violation of the boxing law is a Class A Misdemeanor offense, practicing as an auctioneer without a license is a Class B Misdemeanor, and other violations of the auctioneer law are Class C Misdemeanors. The maximum amount of fine and jail terms vary with the level of misdemeanor conviction. A Class A Misdemeanor represents the most severe penalty and conviction may result in a fine of up to \$2,000 and up to one year in jail. A Class B conviction may result in a fine of up to \$1,000 and up to 180 days in jail. A Class C conviction may result in a fine of up to \$200; no jail term is authorized. While most infractions are effectively and expeditiously handled by administrative sanctions, situations arise that require court involvement. The review determined that in all areas regulated by the

agency, the classification level of the misdemeanor is commensurate with the severity of the offense with one exception. The exception was in the boiler inspection law. Operating an unregistered boiler in the state is illegal, and the law states that such a violation is a misdemeanor offense, which may result in a maximum fine of \$200 and/or 60 days in county jail. This is an antiquated penalty which falls somewhere between a Class C and B misdemeanor in today's Penal Code structure. When compared to violations of other statutes administered by the agency, the penalty level appears low since the consequence of violating the boiler law can result in injury, loss of life and major property damage. For example, in 1983 an unregistered boiler in Lubbock, which had been installed in 1952, exploded resulting in two deaths, seven injuries, and major property damage. Four other explosions in recent years have occurred with unregistered boilers and six explosions have occurred involving boilers with expired registrations resulting in three injuries and in an estimated \$10,000 - \$20,000 in property damage.

It is recommended that violations of the boiler inspection law be changed to a Class B Misdemeanor. This change will increase the jail penalty and substantially raise the maximum fine amount and, thus, will better align the misdemeanor classification with the severity of the offense and should also provide local prosecutors with greater incentive to pursue violations that are discovered by the agency and presented to the local authorities for prosecution.

## Evaluation of Programs

### Manufactured Housing

The Manufactured Housing Division in the TDLS is responsible for administering the Texas Manufactured Housing Standards Act and its responsibilities under the Act are two-fold. First, it has state-elected options under the federal Act. These include the state's role as the State Administrative Agency (SAA) to resolve consumer complaints about warranty issues and as the in-plant inspection agency of units manufactured in Texas to assure that they are constructed in compliance with federal codes established by the Department of Housing and Urban Development (HUD). The second set of responsibilities that the division administers are the state-determined requirements for the regulation of those aspects of the manufactured housing industry not covered by the federal law. These include monitoring manufactured housing retailer lots, regulating the sale of used homes to assure they are habitable, titling all manufactured homes located in Texas, and inspecting all installations of homes located in the state.

The review focused on the statutory requirements of the TMHSA and the manner in which the department has implemented and met those requirements. The review assessed whether the department's level of involvement in regulating the manufactured housing industry was appropriate. This included an evaluation of the state's current role in resolving consumer complaints (SAA) and in performing various inspections.

The review was conducted with a perspective that strongly considered the unique aspects of the manufactured housing industry, as well as the need to assure that the public in general--and the residents of these homes in particular--are properly protected from both a safety and economic perspective. Consequently, the review examined the department's methods for ensuring public protection while doing so in a cost-effective manner to the consumer, the state, and the industry.

Regarding the level of department involvement in the manufactured housing program, the review determined that the agency's role as an SAA to resolve consumer complaints is appropriate. In the past, the industry has had complaints regarding the department's inconsistency in defining retailer and/or manufacturer responsibilities in consumer complaints about warranty issues, as well as delays in resolving these complaints. The 1987 amendment to the TMHSA required the department to assign responsibility for warranty violation correction to the retailer or manufacturer involved. Further, the department has modified its procedures

and initiated staff training to assure appropriate and consistent evaluation of warranty issues; these changes appear to have effectively resolved the past problems. The department's inspection program to certify new home manufacturers also appears adequate. This conclusion was affirmed by HUD's monitoring agency which evaluates states performing this function since it has rated Texas highly in this area.

However, the review found that the department's designation as the sole in-plant inspection agency in the state can have a detrimental impact on staffing needs since more staff must be hired during good economic times when production is high and then reduced when the economy and production slows down. Additionally, the level of involvement of the department in the installation inspection process could be reduced since it was determined that many cities around the state could play a significant role in performing installation inspections. Although the statute encourages the department to develop contracts with local governments to perform these inspections, this effort has been a low priority. The review also indicated that the agency's involvement in regulation of used home sales is having a questionable impact on public safety and protection since most enforcement of habitability conditions has been with the attorney general and through the courts. Further, the industry has become frustrated with the agency's inconsistency and the insignificance of many of the items inspectors claimed were required for habitability. An alternative to sole dependency on the TDLS staff for new home construction inspections was developed as follows, along with other recommendations which address these concerns.

**The TDLS Should Petition HUD to Amend Its Rules to Allow Each State the Flexibility to Choose Which Manufacturers It will Inspect and Which Manufacturers It will Authorize to Use Third Party Inspection Agencies**

The TDLS is the "exclusive" in-plant inspection agency (IPIA) in Texas which means it is the only entity which inspects and verifies the quality control processes for manufactured homes constructed in the state to ensure the unit is constructed to meet or exceed the minimum codes HUD has approved. The option to this total responsibility is for the agency to become a "non-exclusive" IPIA, which allows the manufacturers to choose the state agency or one of several private third party agencies to perform the required inspections. Although there are benefits to using a mixture of the two approaches, existing HUD rules prevent a state agency from choosing which manufacturers it should inspect and which manufacturers should be

inspected by third party agencies. The following recommendation addresses this issue.

**The department should petition the federal Department of Housing and Urban Development (HUD) to amend its rules to allow each state the flexibility to choose which manufacturers it will inspect and which manufacturers it will authorize to use third party inspection agencies.**

When the federal National Mobile Home Act of 1974 became effective in 1976, all plants in the country which built manufactured housing (mobile homes) were required to have in-plant inspections that would be performed by an independent in-plant inspection agency (IPIA). These inspections can be performed by a state agency that administers the manufactured housing law or by third party inspection agencies, which are private firms that specialize in this type of inspection. Either situation requires approval by HUD or its agent. A state agency has the right to choose to be the only organization that performs the in-plant inspection agency (IPIA) function. The department has chosen this "exclusive" IPIA option. Another option is to allow the manufacturer to use the state agency or contract with private, third party inspection agencies to perform the inspections. However, if a state chooses this "non-exclusive" option, it has no control over which manufacturers choose the state as their inspection agency and which choose third party agencies. Since manufacturers are not equally conscientious in their compliance with construction standards and the agency has no control over which plants it inspects if it is not the exclusive IPIA, TDLS is reluctant to change its status.

There are two basic arguments for an exclusive IPIA status. The first is that, overall, state agencies can maintain a more objective, uncompromising posture in their inspections for code adherence than could a private firm that is being paid by- and can be dismissed by-the manufacturer. This argument is supported by the findings of the National Conference of States on Building Codes and Standards, Inc. (NCSBCS), which is HUD's agent to monitor all IPIAs, public or private. This private, non-profit organization makes unannounced monitoring visits to manufacturing plants at least annually. Based on its findings during these inspections, it has found that state agency IPIAs generally rate higher in achieving code compliance than do third party agencies.

The second argument supporting exclusive IPIA status is that the state agency that is performing the inspections and monitoring is the same authority that registers the business to operate in the state and is the one that initiates any punitive action for infractions or non-compliance. This position of authority allows the exclusive IPIA to command immediate remedy to variances when they are discovered.

However, the exclusive IPIA role can also create significant variations in staffing needs for the department, depending on the demand for manufactured homes. The downturn in the Texas economy has resulted in significantly reduced activity in the in-plant inspection function over the past few years. This situation has resulted in reductions in workload for agency staff in this activity. The number of new home construction inspections have dropped from a high in 1984 of 42,310 to 14,951 in 1987, a 65 percent decrease. Division inspection staff levels have dropped 23 percent from 62 inspectors in 1984 to 48 as of May 1988. Since the IPIA function is only one of several division activities, TDLS staff have enhanced efforts in other areas. An example is increased retailer lot monitoring. Even though staff can be utilized in other activities, it is clear that staffing level changes are necessitated by dramatic changes in workload. If the state's manufacturing activity were to increase to 1984 levels, the agency would have to add staff to ensure adequate inspection levels.

As of May 1988, Texas was one of 34 states that had manufactured housing plants in operation. Fourteen states are exclusive IPIAs. Two states are non-exclusive IPIAs wherein manufacturers are free to choose between the state agency and any of the eight third party agencies approved by HUD. The third level is no state involvement in in-plant inspection functions. The HUD still requires manufacturers in those states to be subject to in-plant inspections, but the inspections are performed by one of the HUD-approved third party inspection agencies; the manufacturer selects from HUD's list which third party firm will perform the inspections. At this time, 19 states with manufacturing plants have chosen this option.

Exhibit 8 which follows shows the states where manufactured housing manufacturers exist and those states that are exclusive IPIA, non-exclusive IPIA, and non-participating states. The chart also shows the ranking of the states based on the number of manufactured housing units produced in 1987.

Exhibit 8

**Listing of States with Manufactured Housing Plants and Those That Perform In-Plant Inspection Agency (IPIA) Functions**

State	IPIA	Rank by 1987 Production	1987 Production
Georgia	Yes	1	35,061
Indiana	Yes*	2	29,410
North Carolina	No	3	29,313
Alabama	No	4	22,815
Florida	Yes	5	20,033
Pennsylvania	No	6	15,318
Tennessee	Yes	7	14,330
Texas	Yes	8	12,943
California	Yes*	9	11,896
Oregon	Yes	10	5,449
Arizona	Yes	11	5,038
Mississippi	No	12	4,567
Virginia	No	13	4,257
Ohio	No	14	3,264
Wisconsin	Yes	15	2,872
Idaho	Yes	16	2,547
Nebraska	Yes	17	2,313
Minnesota	No	18	2,122
Kansas	No	19	1,880
Louisiana	Yes	20	1,677
Washington	Yes	21	1,312
New York	No	22	1,169
Arkansas	Yes	23	914
Vermont	No	24	900
Kentucky	No	25	652
Missouri	No	26	613
Maryland	No	27	605
Colorado	Yes	28	576
Maine	No	29	533
Michigan	No	30	377
Oklahoma	No	31	313
South Carolina	No	32	297
South Dakota	No	33	220
West Virginia	No	34	29
Utah	Yes		0

\*Indicates non-exclusive IPIA state.

In order to obtain a national perspective on the position other states have taken regarding the IPIA function, the review made a comparison of the states. Five of the top 10 manufactured home producing states were exclusive IPIAs, two were non-exclusive IPIAs, and three used only third party inspection agencies. Of all the states with manufacturers at this time, 13 (38 percent) are exclusive IPIAs, two (six percent) allow the manufacturer to choose between the state agency or third parties, and 19 (56 percent) use third party agencies exclusively. With respect to percentage of units produced in 1987, 44.6 percent were in exclusive IPIA states, 17.5 percent were in non-exclusive IPIA states, and 37.8 percent were produced in states that used only third party inspection firms.

The sunset review determined that, as a regulatory agency, the department should perform its functions in a manner that achieves adequate performance and, at the same time, does so with the best utilization of staff and other resources. To achieve this goal, the use of third party inspection agencies for in-plant inspections should be permitted. The TMHSA currently allows the use of third party inspection agencies, but as a matter of HUD policy, the department would forfeit its exclusive IPIA role if it chose, or was required, to use third party inspection agencies. The department should, therefore, petition HUD to modify its rules to allow states to have greater discretion and flexibility in the exclusive IPIA function.

The flexibility that is needed is to provide a state the ability to mix the beneficial aspects of the exclusive and non-exclusive IPIA roles. That is, Texas should be able to choose which manufacturers it will inspect and which manufacturers will be authorized to use private, third party inspection agencies. This would allow the state to maintain a stable workforce and to target its regulatory efforts to ensure adequate public protection from potential problems in the manufactured housing industry.

### **The Agency Should Increase Contract Efforts With Municipalities for the Inspection of Installations of Manufactured Houses**

The TMHSA allows the department to contract with local governments to perform required installation inspections of manufactured homes located within city limits. However, the department has not aggressively pursued such contracts. Currently, only 22 cities are performing this role. Most Texas cities have local building inspection programs and most perform some form of inspection of manufactured homes installed in their communities. Since this activity is one of the most time-consuming of the division's inspection functions, contracting with a

greater number of municipalities would reduce staff and department resource requirements. The recommendation which follows addresses this issue.

**The Texas Manufactured Housing Standards Act (TMHSA) should be amended to require the agency to contact all municipalities biennially to make them aware of the program for contracting installation inspections.**

Effective inspection of manufactured housing installations is regarded by most as the single most important consumer and public protection measure for owners of manufactured homes since the inspections involve examination of the manner in which the units are supported and secured to the ground. The federal law requires that retailers install new homes according to the manufacturer's instructions as a measure to protect the buyer's warranty and federal guidelines "urge" states to monitor installations of used homes. Dangers from improperly installed homes include movement due to wind or improper support. In order for inspections to be most effective, they must be done in a timely manner. Several concerns were identified regarding the timeliness of agency inspections. While in the past the department's policy has not been clear on the timeframe within which its staff should perform installation inspections, samples of inspections performed in fiscal year 1987 indicated the time lapse between the installation and the inspection by department staff ranged from 40 days to five months. Further, a sampling of approximately 5,000 installation inspection reports done in fiscal year 1987 revealed that about 19 percent of the homes could not to be properly inspected because the unit had been "skirted" before the TDLS inspector arrived. Skirting is the affixing of underpinning around the unit for insulation and general appearance purposes and, if completed before the inspector's visit, blocks his view of the supports and anchoring techniques used for the installation. Finally, the review found that TDLS and city inspection efforts are somewhat duplicative since many cities already provide some form of inspection for manufactured homes.

The department has not taken an aggressive role in encouraging contracts with municipalities for installation inspections and its staff perform virtually all the inspections. As mentioned above, 22 cities have entered into contracts with the department to perform the inspections. The three largest are Pasadena, Palestine, and New Braunfels; most are small communities (e.g. Navasota, Corinth, Boerne). Department efforts indicate that the potential is high for getting cities to enter into

inspection contracts since the department contacted six cities regarding this last fiscal year and four of the six entered into agreements. Two of these cities were Palestine and New Braunfels, which are among the larger of the cities now under contract.

Eleven large and medium-size cities were contacted by telephone during the review to determine what, if any, inspections they perform relating to manufactured homes located in their communities. All cities surveyed have a building inspection function that includes inspection of utility connections. Ten of the 11 cities perform their inspections within a week from the time the permits for location or utility connections are issued; the eleventh city performed it within two weeks. Four of the 11 cities currently inspect the supporting and anchoring techniques used, inspections that are duplicative of the TDLS installation inspection. Approximately half of the cities contacted were aware of the TDLS contracting program and six indicated they would consider -- or reconsider -- participation in the program. This sample further indicated that the potential for local government participation in the agency's contracting program is relatively high.

Use of contracts with municipalities for installation inspections can achieve multiple benefits. First, inspections could be done in a more timely fashion since the city inspectors would normally be located in the general area of the installation. It frequently takes the TDLS inspectors from an average of 40 days to as long as five months after the installation to perform the inspection, while municipalities normally complete their inspections within one week of installation. Since the inspection could be made sooner by the cities and in most cases before the unit is skirted, it should also be a more complete inspection. Second, travel and per diem costs of TDLS inspectors could be saved since inspectors now travel from field offices to the locality of the inspection. Third, some duplication could be avoided by having localities complete the entire installation inspection since city inspectors are often already performing some form of inspection when a home is newly installed in their jurisdiction anyway. While the city's primary interest is in the connections to local utilities, there is also a concern for public safety and some already inspect the anchoring and supporting systems using the manufacturer's standards as the basis for the inspection. This process could easily be expanded to include performing the full installation inspection. Therefore, the review concluded that benefits should result from the department's more aggressive pursuit of contracts with municipalities.

Other states have demonstrated the effectiveness of joint state/local inspection programs. At least 22 other states have installation standards and state agency involvement in the inspection programs. Of these, many states involve cities in roles similar to the one discussed above. For example, Arizona and California have contractual agreements with local governments and both have participation by cities in excess of 60 percent. Two others, Colorado and Florida, have only local installation inspection. New Jersey uses state inspectors for the inspections only if a local government cannot perform them.

The department can also make the program attractive to municipalities. The department should make appropriate fee distributions to local government units performing inspections provided that the local government is not collecting a local inspection fee. The department receives a \$20 installation inspection fee from retailers for each unit that is installed. Under the municipality contracting program, the department forwards the \$20 fee per unit inspected to the city when it has confirmed that the inspection is completed and that the installation has been done properly. Further, the department trains local building officials and inspectors on how to perform the inspections and the standards to use. The initiation of a program to biennially contact all non-participating cities would make them aware of the program and encourage participation. Notifications should inform the municipalities of the nature of the inspection activity, how it can be made compatible with their current installation inspection program, and the procedures required by the department. There would be some nominal costs biennially for notifying cities of the contracting program. However, the department could retain a portion of the \$20 fee to recover the costs of collecting the inspection fee and administering the reimbursement program.

#### **The Manner of Used Home Regulation Should be Changed and Lien Holders of Repossessed Manufactured Homes Should Not be Required to be Licensed Retailers in Order to Sell Repossessed Units**

The TMHSA regulates the sale of used manufactured homes for the basic purpose of protecting consumers from purchasing unsafe homes. To accomplish this, the current law has three basic elements. It requires that: 1) a used home be habitable and safe when it is sold; 2) the responsibility for its habitability be on the seller; and 3) the manufactured home retailers carry out the requirements with inspection by the department.

The first two elements are appropriate, but the third creates a process that is cumbersome and of questionable value. Through regulation of retailers, the department is authorized to inspect used units on retailer lots. If a unit is found to be uninhabitable, the department can prevent its sale until needed restoration is completed. In practice, however, the determination of "habitability" has proven to be a difficult task and department staff inspect only a small percent of the used units for this. Further, requiring a lender to be registered as a retailer if the lending institution sells more than three units in 12-months time appears to be a cumbersome and ineffective means to control the sale of uninhabitable homes. In fact, few lenders are registered as retailers. The three recommendations which follow address these problems.

**The TMHSA should be amended regarding the sale of used manufactured houses as follows:**

- The requirements for the department to inspect for and make determinations about the habitability of used homes should be eliminated.**
- Any person selling more than one unit during a 12-month period, beginning with the sale of the second unit, should be required to complete, for the buyer, a disclosure statement prescribed by the department.**
- Requirements for lien holders to be licensed as retailers should be eliminated from the law and they should be covered as any other person that sells more than one unit in any 12-month period.**

Prior to legislative amendments in 1987, regulation of the sale of used manufactured homes prohibited the sale, exchange, or lease-purchase of a used home if there was a defect, damage, or deterioration to the home which created a dangerous or unsafe condition. Generally, this was interpreted by most to mean that all basic systems were in sound working order. The 1987 amendments clearly specified these "systems" were to include plumbing, heating and electrical systems and added that the roof, walls and floor were to be free from any substantial openings that were not part of the unit's design and that all exterior doors and windows were to be in place. The changes made by the 70th Legislature were the first substantial revisions to this section of the Act since its enactment in 1975 and represented an attempt to aid state inspectors and retailers in more clearly and consistently defining habitability.

Although the intent of the amendments was to make the law clearer and more effective to enforce, the concept of habitability, from a practical sense, continues to be an illusive one to define. The department's role in used home regulation generally occurs at the retailer level. Department inspectors make the habitability inspections by visiting retailer lots to inspect any used homes offered for sale. Staff attempt to make these visits every two to four months. While this process appears to have merit, it has proven to be ineffective in practice for several reasons. First, the magnitude of the task is sizeable. In fiscal year 1987, Texas manufactured home retailers sold over 41,500 used units and it is not possible for the department to inspect each one. Second, what one consumer may require for habitability may not be what another would require. For example, a buyer may not require at the time of purchase that all interior doors are attached or that all light fixtures are properly installed; however, a department inspector could determine that this makes the unit uninhabitable and could prohibit the unit from being sold until corrections are made. Third, the determination by one inspector as to what is a "structurally unsound condition" may be a cosmetic issue to another inspector. In the past, the difficulties in effective and consistent control in this area caused staff in some districts to give little attention to the inspection process of used homes. Finally, many used homes are bought and sold between inspection visits by the department staff and are subsequently not inspected by the TDLS staff. The effect is that habitability determinations of most used homes are made by retailers without any inspection by the department.

In order to determine how the department's approach to used home regulation compares with that of other states, an examination was made of how other states regulate the sale of used homes and, particularly, how they address the habitability issue. The review examined the laws and practices of 19 other states regarding used home sales. This group included 13 states in the nation with the highest number of manufactured homes. The review found that 16 of the 19 states do not have state laws to regulate used homes. Several of these states merit specific discussion. Florida, second only to Texas in the number of manufactured homes in their state, had previously attempted to regulate these units. Prior to 1982, the state had habitability requirements for used homes and empowered its administering agency to regulate and enforce the law. In 1982, the law was changed to remove the responsible state agency from its direct inspection/enforcement role; instead, it required retailers to use a disclosure statement with the buyer. In 1985, the Florida legislature totally ceased regulation

of used homes. Tennessee and New Mexico have similar histories. Of the 16 states in the survey that have no regulation, none indicated that there is any interest to begin or resume regulating the sale of used homes. Three of the 19 states (California, Alabama, and Kentucky) do regulate used home sales. California has a complex system that includes habitability requirements, state and local inspections, and separate licensing of new and used home retailers. Alabama has a dual system. Retailers in that state must identify any used home to be sold as either a "Class A" home, one that has been certified by the retailer as having all systems in sound operating order, or a "Class B" home, one being sold as is. The system in Kentucky is similar to that of Texas. However, the head of the administering agency in Kentucky indicated dissatisfaction with the effectiveness of their law and is considering a request to their legislature to strengthen it. In summary, most states do not regulate the habitability of used homes and the trend in regulation of used home sales appears to be one of less involvement by states rather than more.

The review also determined that the department's habitability inspection program does not and should not reduce the basic responsibility of any seller to sell a home that is safe. The law clearly states that it is the responsibility of any seller to sell only habitable homes and it places primary responsibility with the retailer for assuring that units sold are basically safe, whether or not they have ever been inspected by the department. Further, the review examined state policy on other major purchases a consumer might make such as used site-built homes and used motor vehicles. The state has not found it necessary and/or practical to regulate the habitability in resale of traditionally built homes. The same appears true for the purchase of used vehicles, except for a disclosure form which dealers must place on any used vehicle offered for sale. Generally, state policy on purchases of such used items provides that if the seller is remiss in meeting obligations in sales because of misrepresentation or failure to honor warranty obligations, a consumer's recourse is through the courts.

Because the habitability inspections of used homes do not provide an adequate or effective means to protect buyers, regulation should be discontinued. Instead, a disclosure statement that makes an affirmation to the consumer that the unit is safe and operational should be required as part of the sales agreement. Any person selling more than one unit during a 12-month period should be required to provide such a disclosure statement to the buyer. To be effective, the statement should specify that all non-visible elements of the basic systems (electrical, plumbing, heating and smoke detectors) are in safe working order. Further, the

statement could include other non-structural or non-system items such as appliances and a statement that the seller's responsibility--or lack thereof--for other items in the home shall be agreed between the retailer and the buyer at the time of the purchase agreement. The retailer would make evident as part of the sales agreement with the buyer what other items would or would not be furnished, corrected or covered under conditional warranties. The sales disclosure statement would achieve the same goal of ensuring consumer protection, but would do so through a more direct and less ambiguous manner. The department's traditional inspection role, which may create a false sense of security for the buyer, would be eliminated.

The department would still perform important functions to ensure used home safety. It would be responsible, in collaboration with the Attorney General's Consumer Protection Division, for developing the disclosure statement. It would monitor the sales records to assure that the disclosure statement is part of the sales agreement and should do spot audits to confirm that disclosure statements are properly completed. The department would also perform the role of being the first administrative step in resolving retailer/buyer conflicts pertaining to the disclosure agreement by mediating consumer complaints about retailers; performing investigations as needed, and conducting administrative hearings where retailer conduct is questionable.

An issue related to the state's regulation of used manufactured homes is the requirement that, under certain circumstances, lending institutions must be registered with the department as manufactured home retailers. The sunset review of the department's used home regulatory program also evaluated whether the current requirements to register and regulate retailers in general, and lending institutions in particular, provided an effective means of public protection from unsafe used homes. This regulatory process begins with the general requirement that any person selling, exchanging or entering into lease-purchase agreements on more than one unit in a 12-month period must be registered with the department as a retailer. However, lending institutions are under a modified version of this requirement. Since they occasionally resell repossessed units, they must be registered as retailers if they sell more than three units per year; if fewer than three units per year are sold, registration is not required. Further, the law allows any lien holder to be exempt from the registration requirement if a used home is sold to or through a licensed retailer or to a person for business (versus residential) use. The basic purpose of these requirements is to allow some freedom between individuals

to buy and sell their personal property and, at the same time, to protect consumers by regulating the sale of used homes at retailer lots. The current law recognizes that lenders with large inventories of repossessed used homes may prefer to resell their inventories themselves. In such cases, the lenders are under the same regulations and restrictions that a traditional registered retailer is under.

This does not appear to be effective as a means of regulating used home sales because in reality few lenders are registered with the department and the requirement affects relatively few transactions. Most financial institutions simply do not register; they either do not finance manufactured homes or they dispose of repossessed units through other registered retailers. In fiscal year 1986, 17 such institutions were licensed as retailers. In fiscal year 1987, only nine were registered. Only one institution registered in 1986 was re-registered in 1987. In 1986, the majority of the 17 registered appeared to be institutions that specialized in manufactured home financing and in 1987, only about one-third were. Most of the attrition was with lenders in manufactured home loan financing that have gone out of business due to the down-turn in the industry. Because few lenders were actually registered as retailers, the review concluded that the law does little to regulate the safety of used homes and the requirement should therefore be discontinued. Instead, it is recommended that lenders be under the same disclosure requirement as any other person who sells more than one unit per 12-month period. Any specific reference to lien holders should also be deleted from law thereby allowing financial institutions to continue to sell any number of units to or through registered retailers.

The major impact of the changes outlined above would be to involve the department in mediating disputes between registered retailers and manufactured home buyers over the condition of units as stated in the sales agreements. This would result in some of the current mediation efforts of the attorney general's staff to shift to the department. However, the overall combined activity may decrease from current levels because a major effort of the attorney general's staff currently involves clarifying habitability definitions. There would be a minor loss of revenue to the department by discontinuing the registration of financial institutions. In fiscal year 1987, only nine financial institutions were licensed as retailers under this provision. The annual retailer's fee is \$125, resulting in a total of \$1,125 per year revenue. This would be offset by reduced staff time and travel costs now spent on inspecting units on the retailer lots. Instead of inspecting actual used units for sale, department staff would confine their inspections to a review of sales files, an

activity inspectors now perform anyway. Inspectors would additionally look over the disclosure form as part of this file review. Paperwork in the central office would also be reduced because of the elimination of monitoring and follow-up of correction orders that result from deficiencies found in the current inspection process of used homes.

### **Industrialized Housing and Buildings**

The Manufactured Housing Division of the TDLS is also responsible for the administration of the Texas Industrialized Housing and Buildings Act (IHB). The basic need for regulation in this area is similar to that of manufactured housing and traditional site-built homes, which is to ensure that the structures are built in compliance with minimum construction codes and standards. These codes relate to electrical, plumbing, heating, and air conditioning systems as well as the structural design and materials used. The department's responsibilities under the Act include certifying manufacturers who intend to produce units that will be located in Texas, performing design review and approval of plans and specifications to be used in the construction of these units, monitoring the actual construction, and inspecting the physical placement of the house on its permanent site.

The review focused on the manner in which the department implemented and met those requirements. As with manufactured housing, the review of the IHB program included an assessment to determine if the department's level of involvement in regulating the IHB industry is appropriate. The review also examined the division's administrative and field operations, utilization of staff, and procedures for reviewing plans and processing documents related to its plant certification and inspection functions. The review determined that the nature and extent of the regulation of this industry as prescribed by the statute and performed by the department is appropriate. In its role of inspecting out-of-state construction, the department must approve third party inspection agencies that perform this function for the department. Based on interviews with numerous agencies in other states, many comments were made that the department's standards and process for approving these agencies are among the highest in the nation.

The review did determine, however, that two aspects of the law should be changed. First, the law includes an unnecessary requirement for manufacturers to pass payments to third party agencies for inspection fees through the department. Second, the law does not allow the agency to enter into reciprocal agreements with

other states which would be a cost saving measure. These changes are outlined as follows.

**The Requirement for IHB Manufacturers to Forward Payments to Third Party Inspection Agencies Through the TDLS Should be Eliminated.**

When the Industrialized Housing and Building Act was passed in 1985, it included a provision that requires payments from manufacturers to third party inspection agencies for services rendered to be sent through the department for review. The department then forwards the check on to the inspection agency. This requirement has proven to be of no value to the department and causes minor, but needless, paperwork and expense to the department and unnecessary delays in the inspection agency receiving its payments. The recommendation which follows eliminates this unnecessary requirement.

**The Industrialized Housing and Buildings Act should be amended to eliminate the requirement for manufacturers to pass payments to third party inspection agencies through the department.**

The state is authorized to contract with private inspection organizations to inspect the construction of industrialized housing and buildings for compliance with the prescribed codes. The department uses this option for the inspection of products manufactured out-of-state that will be located in Texas. Since the payment for the inspection service is incurred by the manufacturer, the transaction is only between the manufacturer and inspecting firm. However, the Industrialized Housing and Buildings Act, passed in 1985, contains a provision that requires manufacturers to send checks for the payment of services to third party inspections through the department which then forwards it to the inspection agency. Originally, this requirement was included in the law as a means of oversight over payments made by manufacturers to inspection agencies. However, since the department is involved in neither the inspection process nor the financial arrangements between the manufacturer and the inspection agency, it does not provide oversight. The department sees no benefit in reviewing the checks and paperwork and does nothing more than mail the check on to the inspector. Consequently, the procedure is of no practical value to the department and causes unnecessary paperwork. The requirement is also an inconvenience to the manufacturer and causes needless delay to the inspection agency in receiving its payments. Approximately 20 other states that use third party inspectors were

surveyed and none of the states had such a pass-through requirement nor saw any value in the practice.

Amending the law to eliminate this requirement would allow the department to discontinue the process. This change would result in minor savings in staff time for both the department and the manufacturer due to reduced paperwork and would eliminate delays in processing payments for the inspection agencies for services rendered.

### **Reciprocity with Other States Should be Authorized for IHB Inspections**

The TDLS is required to assure that the construction of industrialized housing and buildings that will be located in Texas comply with the prescribed building codes. However, units manufactured in another state can be shipped to and permanently located in Texas. The responsibility for construction code compliance is with the state where the unit will be shipped and located, and not with the state where it is manufactured. Consequently, for units built out-of-state and shipped to Texas, the TDLS is responsible for inspecting those units while under construction in the plant for state code compliance. The department must incur the staff travel time and expense to perform these inspections or it may contract with a third party inspection agency for the service. Texas has chosen the latter option. Because most other states have laws and regulatory functions similar to Texas, they have state agencies like the TDLS inspecting units made in their state. While a state agency will only inspect a unit that will be located in its state and has neither the authority nor any incentive to inspect construction destined for another state, many are authorized to enter into reciprocity agreements to perform inspections for other states into which their manufacturers will ship units. Often, reciprocity agreements between state agencies can provide the best solution to the out-of-state inspection need. However, Texas law does not allow the TDLS to enter into such agreements. The following recommendation would remove this obstacle.

**The Texas Industrialized Housing and Buildings Act should be amended to permit reciprocity inspection agreements with other states that are willing to inspect according to Texas code requirements.**

The construction of industrialized housing and buildings has been a growing industry in Texas and across the country, and increasing numbers of units are being manufactured out of state. Since Texas state law requires that any structure that is

to be located in Texas must meet our state's prescribed construction code requirements, detailed inspections must be performed during construction at each plant in any state where units are constructed. The inspections cover items such as the quality of materials used and compliance with specific electrical, plumbing and mechanical codes. The department, or another inspection agency approved by the department, must have staff physically present to examine the manufacturer's quality control process and to assure that construction conforms to those codes. The costs of these inspections are paid by the manufacturer and, therefore, will have an impact on the cost of the product to the consumer.

Inspection of units manufactured out-of-state can be performed in one of three ways. First, the state in which the unit will be located can do the inspection with its own staff. Normally this is not done due to the high amounts of staff time and travel costs involved. Second, the state to which the unit is to be shipped can arrange for a private third party inspection agency to perform the inspections according to its required codes. This is the practice used in Texas. However, it is generally the most expensive to the manufacturer because the third party inspection agencies' fees are generally higher than the fees charged by state inspection agencies. Although this option may be more expensive to the manufacturer, many states like Texas prefer to use it for out-of-state inspections because it requires less state staff and travel costs. The state is still involved, but its role is reduced to that of performing an occasional monitoring review of the third party agency. The third option is for the state in which the construction occurs to perform the inspections under a reciprocity agreement with the receiving state. This approach is generally the least expensive to the manufacturer because local inspectors are already in the manufacturing plant and additional travel expenses are averted. Further, this approach provides the same basic level of inspection as the receiving state could provide. However, the TDLS is not authorized under present law to enter into this type of agreement.

Texas, like many other states, is relatively new to the regulation of this industry. Thirty four states regulate the construction of industrialized buildings and 38 regulate industrialized housing. In most states, construction inspection is performed by a state-operated program similar to that of the TDLS. As of April 1988, there were 32 active manufacturers of industrialized housing and commercial buildings certified by TDLS. Of these manufacturers, 17 were located in Texas and 15 were located in 11 other states. Nine of these other states regulate the construction of industrialized housing and buildings, and six allow reciprocity

inspection agreements and have construction codes identical to or very similar to those used in Texas. Exhibit 9, which follows, lists these states, the number of manufacturers in each state as of April 1988, the compatibility of other states' laws with Texas law and their authority to enter into reciprocity agreements.

Exhibit 9  
**States with Texas Approved IHB Manufacturers  
 (as of April, 1988)**

State	Number of Manufacturers Registered	Has IHB Law Similar to Texas	Has Reciprocity Authority
Alabama	2	Yes	Yes
Colorado	1	Yes	Yes
Georgia	1	Yes	Yes
Illinois	1	Yes	No
Kentucky	1	Yes	No
Louisiana	1	No	No
Ohio	1	Yes	No
Oklahoma	2	No	No
Tennessee	2	Yes	Yes
Virginia	1	Yes	Yes
Wisconsin	2	Yes	Yes
<b>Total</b>	15	9	6

Any manufacturer of IHB units must have two types of inspections performed in order to locate units in Texas. The first is the initial certification inspection in order to become an approved manufacturer. The basic purpose of this inspection is to affirm that the plant is a legitimate manufacturer of IHB units and has adequate quality control processes. In fiscal year 1987, nine such inspections were made. They required between 15 and 20 staff days and incurred travel expenses of approximately \$9,500 for which no reimbursement could be obtained from the manufacturer. The second is the on-going inspection required for any unit constructed for placement in Texas. Accordingly for in-state plants, TDLS staff perform the initial plant certification inspections and the on-going inspections for

all units constructed in-state. For out-of-state plants, TDLS inspectors perform the initial plant certification inspections but, thereafter, use third party inspectors to perform the on-going inspections. While the department has used third party inspection agencies for out-of-state inspections as a measure to control its own travel costs and conserve staff time, reciprocity agreements with other states may often provide a more desirable alternative means of inspection. Through reciprocity with the six other states that have an IHB program similar to Texas, the quality of inspections for monitoring and construction compliance should be equivalent. The reciprocity agreement approach can save additional TDLS staff time because the state's only involvement in the out-of-state plant would be a minimal level of monitoring of that state agency's inspection program. Manufacturers are likely to benefit as well because state inspection fees are generally lower than those of private third party inspection agencies and inspector travel expenses--which the manufacturer normally pays--are kept to a minimum because of the closer proximity of those states' own inspectors.

The law should therefore be amended to allow the department to have reciprocity agreements with similar agencies in other states. This will create two options for the department. First, the TDLS will have the option to use inspectors from the state where units are being constructed and where a reciprocal agreement is developed to perform the on-going quality control inspections instead of being solely dependent upon contracts with third party agencies as it is now. Second, the department will have the option to use inspectors from the state where units will be constructed to perform the initial plant certification inspection instead of using TDLS staff exclusively for this now. While the department may prefer to continue sending TDLS inspectors out-of-state for this purpose, it should be discouraged from making this a routine practice in certain cases. In a state where a reciprocity agreement has been developed and the plant has been in operation for some time, the TDLS should accept that state's approval of the plant's basic capabilities and it should not incur the time and travel expense involved with a certification inspection.

The department would still monitor out-of-state inspection activities for states with which it has reciprocal agreements and of third party inspection agencies in states where it does not. However, in routine situations this monitoring function can be performed in the TDLS office by reviewing documentation of quality control procedures and inspection reports provided by the on-site inspectors and the manufacturer. This approach has been taken exclusively since fiscal year 1986 and

appears to be satisfactory to the TDLS. The department may still make periodic visits to out-of-state plants to perform on-site monitoring inspection if a specific need arises.

## **Boilers**

The Boiler division of the Texas Department of Labor and Standards administers the Texas Boiler Law of 1937 which embodies a long-standing state policy to protect the safety and welfare of Texas citizens through the regulation of boilers operating in the state. The division's activities are to license inspectors and manufacturers and register and inspect non-nuclear and nuclear boilers.

In order to determine whether the department was successfully implementing the boiler program and whether it was utilizing the available resources effectively to ensure public safety against the hazard of boiler explosions, the review focused on five areas: 1) the overall scope of the regulation; 2) the licensing functions; 3) the inspection process; 4) whether the state's involvement in nuclear boiler regulation is appropriate; and, 5) whether there are approaches that could increase the agency's effectiveness through coordination with other state and local agencies.

Numerous members of the boiler industry were contacted for comment on the agency's administration of the boiler law. Further, synopses of all states' boiler statutes were reviewed and thirteen other states were contacted by telephone to obtain comparative information about aspects of their programs. Finally, several national boiler organizations were contacted to solicit their perspective on the management and effectiveness of the boiler program in Texas and to obtain a comparative state-by-state analysis.

First, regarding the overall scope of the regulation, the review concluded that the scope of the boiler regulation is appropriate. The type of boilers under the law and the inspection schedule for each type are in line with the American Society of Mechanical Engineers' (ASME) guidelines, which have been adopted by the state as the foundation for the boiler law. Additionally, the review determined that the department's activities in the regulation of Texas nuclear boilers at the Comanche Peak and South Texas plants is in accordance with ASME and NRC requirements for state involvement during the construction phase of nuclear plants. It should be noted that current state regulations do not embrace the universe of pressurized vessels, such as pressure vessels or hot water heaters which are below the current cut-off of 200,000 BTUs. However, the review concluded that improvements in key

substantive areas within the current scope should be addressed before expanding into new areas of regulation.

Second, the review of the licensing functions determined that the department's procedures for licensing manufacturers are appropriate and efficient. Also found to be appropriate was the process of licensing boiler inspectors. The TDLS follows the national practice of allowing either the National Board of Boiler and Pressure Vessel Inspectors or the state to test inspectors for mechanical engineering principles of construction and operation. Nuclear inspectors must pass the National Board's nuclear exams and qualify for the various levels of endorsement. These endorsements are used nationwide and are accepted and employed by the Nuclear Regulatory Commission.

Third, the review of the inspection function examined the dual track inspection structure whereby the state inspects the uninsured boilers, which represents approximately 35 percent of the total, and authorized inspection agencies (A.I.A.s) inspect all insured boilers. The review considered whether all boiler inspection functions could be shifted to the insurance companies, which would result in a requirement that all boiler owners purchase insurance. This was viewed as an overly burdensome requirement and would not be cost effective. Further, the sunset review determined that both groups of inspectors are equivalently qualified to carry out the inspections necessary to public safety and that the dual structure is an efficient system. The A.I.A.s would conduct the inspections of insured boilers in light of financial risk data anyway and, therefore, it is cost-effective for them to be an agent for the state for those inspections. Since no other third party inspection agencies exist to perform the inspections of uninsured boilers now done by the state, it is appropriate for the state to assume this role as a public protection measure. While gaps do exist in the transfer of information between the agency and the A.I.A.s, increased enforcement authority and improved automation, addressed in Overall Administration section of this report, will assist the department in closing these gaps.

The review also concluded that the in-service inspection of boilers is in accordance with ASME guidelines and thorough enough to catch problems that could cause accidents. Further, it is in the interest of the insurance carriers to inspect according to the code and cover the critical safety features to avoid an accident for which they will have to pay a claim. Explosions do occur, but the review determined that accidents are caused mainly by poor maintenance procedures between inspections or by unregistered boilers or boilers that have expired

registrations. The problem of unregistered boilers is addressed by strengthened enforcement covered in the Overall Administration section of the report.

The fourth area of analysis of the boiler program concerned the nuclear boiler regulation efforts. The review found that a high level of expertise in nuclear mechanical engineering exists within the division and that efforts of the staff have been extensive given the limited manpower in the nuclear area. It is anticipated that the division's in-service activity will require a similar level of involvement as their construction-phase activity. The ASME code provides for the state to act as an arbitrator and final authority when situations arise outside the dictates of the code. When Brown and Root was relieved of its duties as architect/engineer and project manager and subsequently resigned as project constructor for the South Texas Project by Houston Lighting and Power, the state was required to become highly involved in the mediation of the jurisdictional boundaries between the work of Brown and Root and Bechtel, the new architect/engineer and project manager and Ebasco, the new project constructor. The state's role as arbitrator in this situation was effective in that when the NRC licensing hearing was held, the transfer of constructor authority did not surface as an issue or hindrance to licensure. Likewise, the state became more highly involved at Comanche Peak than would normally be necessary under the code due to the technical and legal disputes surrounding the premature request for a NRC licensing hearing by the Texas Utilities Electric Company. Overall, the review concluded that the TDLS provides a needed level of oversight to address safety issues of nuclear power plant operation in this state.

Finally, the major concern identified by the sunset review with the boiler program is that the coverage of inspections within the current parameters is incomplete and, therefore, falls short of the goal of safeguarding the public. Thousands of boilers are operating in the state that have either never been registered or have fallen outside of the inspection cycle. Above and beyond all else, increased enforcement efforts as covered in the Overall Administration section of the report will help solve this problem by encouraging owners to register their boilers at the outset, to pay past-due inspection and registration fees and, to maintain the inspection cycle by re-registering with the TDLS if they drop insurance coverage. Increased TDLS enforcement authority will also encourage the A.I.A.s to inspect all boilers under their jurisdiction on time, which is not necessarily accomplished at present. Furthermore, improved computer capability will significantly impact the department's ability to track these unlawfully operating

boilers and should measurably increase the agency's coverage. This is also covered in the Overall Administration section.

Beyond increased enforcement authority and automation, however, the review found that TDLS does not formally cooperate with other state agencies to assist in locating those boilers which have fallen outside the inspection cycle. Recommendations to address this need are set out below.

**The Agency Should Cooperate with Other State Agencies to Identify the Presence of Unregistered Operating Boilers in the State**

Department personnel conduct "smoke-stacking" inspections periodically in an effort to find boilers which have never been registered or which are operating without a current certificate of operation. These efforts are limited, however, due to normal workload requirements. Shortcomings in the reporting process between the state and insurance companies regarding boiler insurance discontinuations and transfers contribute to this problem. Also, the fact that A.I.A. accident data is proprietary means the department does not have complete information on boiler failures in the state. The review found that steps should be taken to formalize mechanisms that can gain the assistance of state and local fire marshals as well as the occupational safety and health inspectors under the Texas Department of Health.

**The agency should develop a formal agreement for the reporting of boilers with:**

- the state fire marshal;
- local fire marshals; and
- the Occupational Safety and Health division under the Texas Department of Health.

The coverage of the boiler program has two basic shortcomings. First, the review found that there are a substantial number of boilers operating unlawfully in the state which represent a gap in state policy and which pose a safety hazard. Currently, the only method the agency uses to locate such boilers is through periodic "smoke-stacking" trips. As mentioned in the Background section, "smoke-stacking" is when inspectors in a given area conduct random inspections of locations suspected of operating unregistered boilers. These efforts are conducted in an organized manner only about once a year. Inspectors throughout the year

conduct random independent inspections also; in fiscal year 1987, 520 random checks were done and an estimated 104 unregistered boilers were found through this process. With an estimated 3,500-7,500 unlawful boilers operating in any given month, smoke-stacking efforts provide an inefficient means for bringing these boilers into compliance with the law.

Second, the TDLS rules state that the inspection agencies shall report to the TDLS any incidents, such as "serious accidents", involving one of their boilers. "Serious accidents" have been interpreted as accidents which cause serious injury or death. Data on accidents other than serious ones are considered proprietary and the companies are reluctant to divulge even total numbers of boiler failures. Consequently, the agency cannot be an adequate clearinghouse for information on the boiler regulatory program and the Board of Boiler Rules does not have complete information to assess the adequacy of or needed changes to the program.

The review attempted to identify ways to increase the coverage of the boiler program by improving the methods for locating unregistered boilers and means to access failure information without violating the insurance companies' right to hold proprietary data. One method identified to increase the scope of inspections and to improve accident data collection is to solicit assistance from other state and local agencies which are also conducting boiler inspections.

The state fire marshal inspectors employed by the State Board of Insurance (SBI) inspect boilers as part of their routine building inspections, primarily in rural, unincorporated areas which do not have a full-time fire marshal staff. These inspections are external and involve checking for general safety factors such as leaking pipes or corroded parts. As part of the inspection, the state fire marshal's staff look for the boiler's current state certificate of operation. The state fire marshal inspectors investigate approximately 225 buildings and find an estimated 10-12 boilers per month without a current certificate or without any certificate at all. Although it is not part of any formal training or written instructions, the state fire marshal inspectors require the owner to obtain a state certificate before they can issue their certificate. Usually, the inspectors will re-inspect the location to make sure the owner complied. In many cases, the fire marshal's office will also alert the TDLS of these boilers.

Local fire marshals generally follow the same fire prevention inspection codes and, therefore, would also examine the boiler for obvious safety defects. The TDLS inspectors indicated that local fire marshal inspectors sometimes notify the field offices of unregistered boilers the local inspectors encounter. Local fire marshals

have also cooperated in the agency's smoke-stacking efforts. Further, when the TDLS finds a boiler operating in a dangerous condition, the local fire marshals often aid in the enforcement efforts and can shut the boiler down. While these inspection arrangements at both the state and local level have proven beneficial, no mechanism exists to formalize them or to require that data be shared.

The state and many local fire marshal inspectors report into the statewide computer system, the Texas Fire Incident Reports System (TEXFIRS), on the incidence and probable cause of fires by type of premises. This system is used as the primary factor in scheduling the routine fire prevention inspections. The coding of boilers in TEXFIRS for probable cause does not follow the classifications used by ASME and the TDLS boiler division; however, it does indicate the numbers and location of all fires involving a boiler to which the fire marshal was called. This information is relatively new in its statewide coverage and has not been exchanged between the fire marshals and the TDLS.

Another state agency, the Texas Department of Health, employs inspectors in the occupational safety and health administration (OSHA) program as part of a cooperative agreement with the federal Environmental Protection Agency (EPA) to inspect boilers in schools for asbestos safety concerns. The department devotes the time of one and one-half staff persons to inspect approximately 100 school systems each year, chosen by random sample. During these inspections, the OSHA personnel inspect only for federal OSHA standards. They do not currently look for the presence of or the expiration date on the state boiler certificate of operation and do not report any findings to the TDLS staff. To protect the public safety of children in schools is, and should be, of top priority for the department. Requiring OSHA inspectors to make a note of any unregistered boilers would benefit the boiler inspection program by capturing one of the most important targets of the program and would be relatively easy to add to the OSHA inspection process.

The review concluded that formal agreements with state and local fire marshals and state OSHA inspectors would be beneficial to the Texas boiler regulatory program. In discussions with the state fire marshal and the occupational safety and health staff, both indicated a willingness to cooperate with the TDLS by sharing information in an effort to help improve the boiler inspection program and public safety.

An interagency agreement in the form of a memorandum of understanding (MOU) should be established between TDLS and both the SBI and TDH which would provide for the following:

- state fire marshal and OSHA inspectors would look for the glass-encased Texas certificate of operation while on their routine inspections;
- any boilers found with an unreasonably outdated or missing certificate would be noted;
- If no certificate is found, the inspectors would look for and note the National Board registration number;
- a report would be forwarded to the TDLS periodically detailing the owner, address, type of boiler, certificate and National Board numbers, if evident, and the authorized inspection agency, if available.
- in addition, TEXFIRS staff would forward a report to the TDLS periodically on fires involving boilers in the state.
- the details as to report format, the definition of "unreasonably outdated", frequency of reporting and any other details should be arranged by the staff involved.

The TDLS and other agencies should adopt the content of the MOUs in their rules. As expressed in the recommendation, an agreement between the agencies would be required by statute. Similar agreements should also be pursued by the TDLS with local fire marshal offices. Because fire marshal departments are operated by municipal governments, requiring agreements between them and the agency was determined to be difficult to enforce. Nonetheless, the agency should be encouraged to establish agreements similar to the one described above wherever possible.

The anticipated impact of this interagency agreement on the agency is an increase in the agency's administrative and inspection workload due to the extra boilers coming into the database needing state inspection, which could be partially offset by reducing current smoke-stacking efforts. Added costs could be recovered in fees. The total number of new boilers which would be added to the database by these agreements was estimated to be about 260 boilers per year. For boilers with expired certificates, it could be assumed that the 65:35 ratio of insured versus uninsured boilers would remain constant. For those boilers that have never been registered, it is more difficult to draw an assumption on those proportions; however, using the same ratio, the A.I.A.s would assume 169 additional inspections per year and the state, 91. While there would be some nominal costs in notifying the insurance carrier of an insured, expired boiler, some of these costs could be

recovered in additional penalty revenue. For those boilers which the state inspection staff assumes responsibility for, the costs will be recovered in fees as are normal inspections. Therefore, the review concluded that any additional workload generated by this recommendation could be assumed with current staff and recovered by fees, thereby creating little to no fiscal impact.

Likewise, it is estimated that the State Board of Insurance and the Department of Health would be impacted only marginally since the recommendation does not require additional inspections to be made. Inspectors would follow the procedures outlined above as part of their current inspections to document boilers to be reported to the TDLS. That process would only take a few minutes of the inspector's time. Administrative staff would collect these notations and periodically forward a report to the TDLS. Neither agency felt this process would unfavorably impact their inspection or administrative staff nor would it cost enough to require any additional funding. In the case of the TDH, 75 percent of the OSHA staff's funding comes from the U.S. Department of Labor. The boiler inspection program under the cooperative agreement with the EPA is funded through the agency's industrial hygiene program. A letter of concurrence from the federal government will be needed in order to use the OSHA staff's time to gather and forward these data to the TDLS and, therefore, in order to proceed with that portion of this recommendation. The Health Department staff indicated that such concurrence should not be difficult to obtain.

### **Air Conditioning**

The Boiler Division of the Texas Department of Labor and Standards administers the Texas Air Conditioning and Refrigeration Contractors Law in an effort to protect the interests of Texas citizens and contractors through the statewide licensing of contractors. The division's activities in this area can be placed into two functional categories, licensing of contractors and investigation of consumer complaints. The review focused on these categories to examine whether the parameters of the regulation were adequate enough to meet the goals of the legislation.

Regarding the licensing function, the review found the scope of licensing to be adequate. By licensing the contractor, or primary official in the firm, an appropriate degree of confidence is obtained in the ability of that firm to perform competent work without being overly burdensome in the regulation of the industry. The

contractor is subsequently responsible for the quality of the work of the heating, ventilating and air conditioning (HVAC) system installers.

Analysis also revealed that the 1987 repeal of various exemptions provided for under the original 1983 legislation was appropriate. Previously, exemptions from the air conditioning license were given for licensed professional engineers, plumbers and LP gas technicians. Disputes have arisen since the repeal of the exemptions concerning the jurisdictions of the various trades as they interface in the installation of an HVAC system. However, plumbers, professional engineers, and liquefied petroleum gas licensees are not tested as part of their licensing process on the same mechanical principles. None of these licensees are qualified, by licensure in that craft alone, to perform the work of any of the other crafts. The review found that the department has been successful in resolving the jurisdictional disputes through letters of agreement with the various trade groups. None of the industry members contacted indicated that a change in the statute's definitions would better resolve these disputes.

Regarding the consumer complaint function, the review found that the department is in the process of developing a system for responding to and tracking consumer complaints. While this program appears to be sound, it is too early to assess its effectiveness. Likewise, the Air Conditioning Board, created in 1987, is in the process of developing rules and regulations for the program. As the board has only met twice, it is too soon to assess its contribution.

The sunset review concluded the agency's administration of this law is generally effective and that no statutory changes are needed at the current time to improve the program, with one exception. Since the Air Conditioning and Refrigeration Contractor License Law has a separate sunset date, it should be continued by the legislature as an activity within the Texas Department of Labor and Standards. The following recommendation addresses that administrative issue.

**The Sunset Date for the Air Conditioning Law Should be Made Coincident With That of the Agency**

The Air Conditioning and Refrigeration Contractors Law was enacted in 1983 and given a separate sunset date of September 1, 1989. The law is administered under the Texas Department of Labor and Standards and does not need to have a sunset date distinct from the agency.

**The Air Conditioning and Refrigeration Contractors Law should be continued and the separate sunset date should be repealed.**

As mentioned above, research into the Air Conditioning and Refrigeration Contractor License Law indicated the program appears to be effectively addressing industry and consumer problems. Prior to adoption of a statewide contractors license, industry contractors had to obtain numerous municipal licenses, many of which were considered exclusionary. Also, consumer abuses within the industry prompted the testing of the contractor as well as peer recommendations and insurance requirements prior to licensure; these measures appear sufficient and justified.

Therefore, the review concluded the program merits continuation under the administration of the TDLS. As an activity within the agency, the separate sunset date in the statute is unnecessary should be repealed so that future reviews of the air conditioning law are done as a part of the review of the Texas Department of Labor and Standards which administers the program.

### **Labor, Licensing and Enforcement**

The Labor, Licensing and Enforcement (L,L&E) Division regulates the greatest diversity of programs within the agency. The division employs a staff of 31 full-time equivalent employees and had a fiscal year 1987 budget of \$814,868. As indicated earlier in the report, several of the programs within this division were recommended to be transferred to other agencies and one regulatory program was recommended to be eliminated. These changes are outlined in the Agency Reorganization section of the report. The review of the remaining programs within the L,L&E division, including boxing, auctioneers, personnel employment firms and career counseling services, examined the same major areas as for the programs that were recommended for transfer: 1) whether there is a continuing need for the TDLS to regulate the occupations or activities; and 2) whether the TDLS regulatory efforts including licensing, inspections and enforcement are appropriate and effective.

Regarding the first area, the review concluded a need exists to regulate the four activities from a safety protection standpoint for boxing and from a consumer protection standpoint for auctioneers, personnel employment firms and career counseling firms. Concerning boxing, the review found that the TDLS regulatory

efforts are providing numerous safety checks which are necessary in a potentially dangerous sport. A recent report prepared by the Congressional Research Service indicated that professional boxing is regulated, licensed or both by state or city governments in 46 states and the District of Columbia. Only four states reportedly have no state or local government regulations. Texas currently ranks number four among states in terms of the annual number of matches held in the state, with 56 matches in 1987.

The American Medical Association has taken the position that both amateur and professional boxing should be eliminated as a sport because of the high incidence rates of chronic brain damage and other injuries and works with state legislatures to this end. The approach in Texas has not been to prohibit boxing as a sport, but to strictly regulate the sport through licensing, inspection and enforcement activities.

By investigating a boxer's score cards from previous bouts, the TDLS attempts to prevent the occurrence of unequal matches that might endanger less experienced or less capable fighters. The TDLS inspectors try to determine the date of a boxer's last fight, if the boxer is on medical suspension or probation from a previous bout, and the date of the last knock-out. After investigating these matters, the TDLS either approves or disapproves a fight scheduled to occur. While this information is often difficult to track down since boxers may fight in many different states and promoters frequently do not volunteer unfavorable information that could cause a bout to be cancelled, department inspectors attempt to locate the information as a safety protection measure. Applicants for a boxer's license must also pass a comprehensive medical exam and eye exam prior to a contest. In addition, an annual license renewal medical exam is required. State inspectors also witness both a pre-match physical examination given by an agency-approved doctor and the weigh-in before the match to ensure a boxer's weight falls within their designated weight category as a safety measure. Checks are also made of the ring, required medical equipment and seating arrangements before the match begins. Further, agency investigators issue handwraps and gloves to boxers and attempt to monitor their activities before they go into the ring to make sure foreign objects are not placed in the gloves and that extra tape and gauze is not used in the wrap which could give a fighter an unfair advantage.

The state's role in regulating boxing matches appears to be appropriate for safeguarding participants in the sport and because the department can act as an unbiased party in handling the various disputes that have arisen within this sport.

The department has been criticized by various boxing representatives because of the tough stance it has taken on cancelling certain fights and prohibiting TDLS staff ties with boxing sanctioning organizations. However, these steps were necessary for upholding rules of conduct and maintaining the objectivity necessary for an effective regulatory program.

Some groups now want an independent boxing commission to be established for regulating the sport in order to elevate the status of boxing in the state and to gain independence from the current TDLS regulatory control. The review did not concur with this approach because an independent commission would be more costly to operate, could result in a conflict of interest by allowing boxing representatives to regulate themselves, and could be detrimental to the safety of participants if the goals of increasing profits leads to more "flexibility" in enforcing safety standards.

There has been some interest in Congress to establish a national boxing commission to address problems in tracking boxers' movement across state lines and to establish uniform health and safety standards among states. However, legislative attempts to create such a commission have thus far been unsuccessful. The department is currently involved in an effort with boxing commissioners in other states to develop a system of better uniformity among states' boxing rules. Texas is specifically charged with developing uniform rules of conduct for boxing matches and has helped to lead the movement to improve regulatory efforts for the sport. The regulatory efforts of the TDLS should continue for this area.

The need to regulate the other three activities-- auctioneer, personnel employment firms and career counseling services-- was also found to be justified. Because of the large number of auctions held all over the state in any given month (a number is not known, but is estimated to be several hundred) and the exchange of money which occurs for items sold on a consignment basis, the potential is great for mishandling funds and misrepresenting goods to be sold. The most common enforcement problems the department has witnessed with auctioneer activities are commingling of funds, deceptive advertising, fraudulent "bidding up" of prices and failure to remit monies owed individuals. For 1986, the department accepted 27 formal complaints against auctioneers and for 1987, the number was 28. Currently, auctioneers are regulated in about half of the states.

Both personnel and employment and career counseling (private employment) businesses have had numerous complaints filed against them over the years, primarily related to the charging of up-front fees before services were rendered or

misrepresenting employment services. Between 1985 and 1987, the attorney general's office mediated an estimated 1,311 complaints against private employment agencies. Enforcement provisions were just added to the Personnel Services Act in 1987 which prohibit firms from charging up-front fees and the Career Counseling Services Act was just passed in 1987. Consequently, regulations are fairly new but appear to be justified given the high number of complaints. About 42 states currently have some form of regulation over private employment agencies.

Further, the review concluded that the TDLS regulatory efforts, which primarily involve licensing, inspecting and taking enforcement actions, are generally effective. The department has taken recent steps to improve license pendency rates and the average turnaround time for license issuance in the L,L&E Division is now about 3 1/2 days from the initial receipt of the application, if complete. This represents a fairly expeditious process. Agency inspections efforts appear to be extensive where safety risks are high, such as for boxing matches since several inspectors attend each match. For other areas where the risk is more of a financial nature, such as for personnel agencies and auctions, the department generally makes inspections in response to complaints, along with some random inspections. This method is necessary due to the limited staff and funding available for the activities.

Finally, the department's enforcement responsibilities for personnel agencies are new and could not be evaluated at this time. For boxing and auctioneers, the department follows the provisions of the Administrative Procedure Act in the conduct of hearings on alleged violations of the statutes or rules and may revoke, suspend or deny a license. For fiscal year 1987, 11 boxing hearings were held resulting in one purse forfeiture, three contract recessions, four license revocations and three license denials; ten auctioneer hearings were held the same year resulting in six suspensions, three probations and one license revocation. This would indicate that the department's enforcement efforts are resulting in sanctions against violators. A recommendation that should further strengthen the agency's enforcement capabilities as it relates to this division is given in the Overall Administration section of the report and addresses the need to make the agency's enforcement options more uniform across all programs. Overall, the department's efforts for these program areas merit continuation and no recommended changes are made in this section of the report.



## **OTHER CHANGES**



## **Minor Modifications of Agency's Statute**

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Discussions with agency personnel concerning the agency and its statute indicated a need to make minor statutory changes. The changes are non-substantive in nature and are made to comply with federal requirements or to remove out-dated references. A name change for the agency is also recommended to better fit its current responsibilities. The following material provides a description of the needed changes and the rationale for each.

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**Minor Modifications to the  
Texas Department of Labor and Standards**

Change	Reason	Location in Statute
1. Delete language of "spider law" regulating cotton industry machinery.	To remove outdated language since regulated machinery is no longer used in the industry.	Chapter 111 of the Agriculture Code.
2. Repeal reference to labor commissioner's role in investigating of non-profit corporations involved in organized labor.	To remove outdated language. Agency does not perform this function.	Article 1396-2.01, V.T.C.S.
3. Repeal reference to labor commissioner's role regarding issuance of injunctions on corporations.	To remove outdated language. Agency does not perform this function.	Article 1524k, V.T.C.S.
4. Repeal language which requires TDLS to report labor statistics to the governor biennially.	To conform to current practice. Agency no longer collects labor and workforce statistics.	Article 5145, V.T.C.S.
5. Delete requirement that the agency perform functions in conjunction with the Texas Energy and Natural Resources Advisory Council (TENRAC).	To remove outdated language. TENRAC was abolished by the legislature in 1983 and the functions are not performed by TDLS.	Article 5145a, V.T.C.S.
6. Delete requirement that the agency collect and report health and safety statistics.	To conform to current practice. The Texas Department of Health and the Industrial Accident Board now perform those functions originally given to the Bureau of Labor Statistics.	Article 5146, V.T.C.S.
7. Delete language that requires agency to preserve agency records.	To remove outdated language which has been superseded by Chapter 441, Government Code, relating to the preservation of records by state agencies.	Article 5147, V.T.C.S.
8. Delete obsolete language requiring factories, mines, mills, etc. to make reports to the commissioner upon request.	To remove outdated language. Agency no longer performs this function.	Article 5147a, V.T.C.S.

**Minor Modifications to the  
Texas Department of Labor and Standards**

Change	Reason	Location in Statute
9. Delete obsolete language empowering the commissioner to enter factories, mills, mines, etc. and modify statute to retain authority for department personnel to enter businesses for inspections required under the agency's laws.	To remove outdated language while retaining authority to make currently authorized inspections of businesses.	Article 5148 and 5148a, V. T. C. S.
10. Delete obsolete language requiring the commissioner to give written notice to county or district attorneys for violations of workplace laws.	To remove outdated language. Agency no longer enforces violations relating to work safety.	Article 5149, V.T.C.S.
11. Delete language giving the commissioner the power to take testimony.	To remove language that is superseded by and conflicts with the Administrative Procedures Act.	Article 5150, V.T.C.S.
12. Delete language that authorizes a penalty for failure to testify.	To remove language that is superseded by the APA.	Article 5150a, V.T.C.S. and all other statutes administered by the agency.
13. Rename the agency the Texas Department of Licensing and Regulation.	To make the agency's name better reflect its current duties.	Article 5151a, V.T.C.S.
14. Modify provision which allows the agency to withhold names of those under investigation to incorporate all of the agency's inspection activities and also remove criminal penalties.	To update and continue agency's ability to maintain confidentiality of investigations prior to hearings.	Article 5151b, V.T.C.S.
15. Delete obsolete language and modify statute to retain a general prohibition against businesses interfering with the agency's current duties.	To remove outdated language while retaining a prohibition against interference with the agency's duties.	Article 5151c, V.T.C.S.

**Minor Modifications to the  
Texas Department of Labor and Standards**

Change	Reason	Location in Statute
16. Delete obsolete language which makes available to the commissioner any "working agreements", filed with the Secretary of State, between labor unions and employers.	To remove invalid language. Such working agreements were found unconstitutional in <u>American Federation of Labor, et al v. Mann, et al.</u> in 1945 by the Court of Civil Appeals.	Article 5154a, Sec. 6, V.T.C.S.
17. Delete obsolete language requiring the commissioner to collect occupational health and safety statistics.	To conform with current practice. TDLS no longer collects these statistics. Federal law supersedes the clauses and the Texas Department of Health has subsequently been given responsibility to collect similar occupational safety and health data.	Articles 5173-5180, V.T.C.S.
18. Delete language giving commissioner responsibility for providing the Texas Department of Health with labor statistics.	To conform with current practice. TDLS no longer collects labor statistics.	Articles 5182a, Sec. 7(a), V.T.C.S.
19. Delete language pertaining to labor agency law.	To remove invalid language. Statute was amended and repealed in the same session. This clause remained and is no longer valid.	Article 5221a-5, Sec. 7(e), V.T.C.S.
20. Modify language to remove specific reference to the American Society of Mechanical Engineers (ASME) from statute but let the agency adopt the code in the rules.	Statutory reference to a private organization is considered an inappropriate delegation of legislative authority.	Article 5221c, V.T.C.S.
21. Delete statute which requires the commissioner to inspect mines.	To conform to current practice. Federal law supersedes the provisions and the Texas Department of Health has subsequently been given responsibility for the health and safety of mine workers.	Articles 5892-5920a, V.T.C.S.

**Minor Modifications to the  
Texas Department of Labor and Standards**

<b>Change</b>	<b>Reason</b>	<b>Location in Statute</b>
22. Delete language setting commissioner's and other agency personnel salaries.	To remove outdated language which sets the commissioner's salary at \$3,000 per annum and other salaries at or below \$2,000 per annum.	Article 6814, V.T.C.S.

## **Across the Board Recommendations**

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From its inception, the Sunset Commission identified common agency problems. These problems have been addressed through standard statutory provisions incorporated into the legislation developed for agencies undergoing sunset review. Since these provisions are routinely applied to all agencies under review, the specific language is not repeated throughout the reports. The application to particular agencies are denoted in abbreviated chart form.

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## Texas Department of Labor and Standards

Applied	Modified	Not Applied	Across-the-Board Recommendations
			<b>A. GENERAL</b>
X			1. Require public membership on boards and commissions.
X			2. Require specific provisions relating to conflicts of interest.
X			3. Provide that a person registered as a lobbyist under Article 6252-9c, V.A.C.S., may not act as general counsel to the board or serve as a member of the board.
X			4. Require that appointment to the board shall be made without regard to race, color, handicap, sex, religion, age, or national origin of the appointee.
X			5. Specify grounds for removal of a board member.
X			6. Require the board to make annual written reports to the governor, the auditor, and the legislature accounting for all receipts and disbursements made under its statute.
X			7. Require the board to establish skill-oriented career ladders.
X			8. Require a system of merit pay based on documented employee performance.
X			9. Provide that the state auditor shall audit the financial transactions of the board at least once during each biennium.
X			10. Provide for notification and information to the public concerning board activities.
		*	11. Place agency funds in the treasury to ensure legislative review of agency expenditures through the appropriation process.
X			12. Require files to be maintained on complaints.
X			13. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
X			14. (a) Authorize agencies to set fees. (b) Authorize agencies to set fees up to a certain limit.
X			15. Require development of an E.E.O. policy.
	X		16. Require the agency to provide information on standards of conduct to board members and employees.
X			17. Provide for public testimony at agency meetings.
X			18. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.
X			19. Require development of accessibility plan.

\*Already in statute or required.

**Texas Department of Labor and Standards  
(cont.)**

Applied	Modified	Not Applied	Across-the-Board Recommendations
			<b>B. LICENSING</b>
X			1. Require standard time frames for licensees who are delinquent in renewal of licenses.
X			2. Provide for notice to a person taking an examination of the results of the exam within a reasonable time of the testing date.
X			3. Provide an analysis, on request, to individuals failing the examination.
	X		4. Require licensing disqualifications to be: 1) easily determined, and 2) currently existing conditions.
X		X	5. (a) Provide for licensing by endorsement rather than reciprocity. (b) Provide for licensing by reciprocity rather than endorsement.
X			6. Authorize the staggered renewal of licenses.
	X		7. Authorize agencies to use a full range of penalties.
	X		8. Specify board hearing requirements.
	X		9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
X			10. Authorize the board to adopt a system of voluntary continuing education.