



TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY  
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August 15, 2018

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The Honorable Chris Paddie  
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The Honorable Dawn Buckingham  
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Emily Pataki  
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Ronald G. Steinhart  
Public Member  
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P.O. Box 13066  
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Dear Senators Birdwell, Buckingham, Hall, Nichols and Watson and Representatives Paddie, Flynn, Lambert, Nevárez and Thompson, and Ms. Pataki and Mr. Steinhart:

I want to thank you for the opportunity afforded to us to provide comments on the Staff Report that was provided to this agency on August 2, 2018 and to express our appreciation for the courtesies and professionalism the Sunset Advisory Commission staff extended to this agency during the review of our operations. We also want to recognize the many hours of hard work the Sunset Advisory Commission Staff put into obtaining an understanding of the operations and

responsibilities of this agency. We support and agree with many of the recommendations and findings. We will make every effort to implement them as appropriate.

There are some findings and recommendations we believe need to be corrected or modified and they are contained in the attached response. We hope that you will find them helpful in your review of this agency's responsibilities to assure that this agency continues to provide the highest level of services possible to its stakeholders.

Please let me know if there is any way that I may assist you in your consideration of the continuation of the important work of this agency.

Sincerely,

A handwritten signature in black ink, appearing to read 'Manny' followed by a stylized flourish.

Manuel "Manny" Cavazos IV, Esq., CPA  
Presiding Officer

Enclosure

xc: Ken Levine  
Director  
Sunset Advisory Commission  
Robert E. Johnson Bldg., 6<sup>th</sup> Floor  
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Texas State Board of Public Accountancy Members

## TSBPA Response to Staff Report

- **Lack of a formal needs analysis for outside accountancy expertise.**  
(Pg. 10, paragraph 3)

**Staff Recommendation:** *An agency should contract when it has a need that it cannot fill with existing staff and it has the funds to do so...The Board has 10 CPAs with substantial expertise, as well as the ability to add CPAs to its working committees, so the Board should carefully examine its existing capacity before contracting for additional outside CPA expertise.*

**Response:** The Board does have 10 CPAs with substantial expertise and it has the ability to add additional advisory committee members.

Neither the current Board nor its advisory committee members have the expertise needed to serve as consultant/expert witnesses for many of the Board's contested case proceedings. Neither do unpaid Board and committee members have the time to devote to a proceeding that would require weeks of analysis, preparation, discovery and testimony necessary for a contested case hearing at the State Office of Administrative Hearings (SOAH).

It should be noted however that another section of the Staff Report recommends the elimination of 30 per cent of the Board's current CPAs along with their expertise in order to address the issue raised in a recent US Supreme Court decision.

### **Needs analysis**

The enforcement committees do conduct a needs analysis on each and every case they investigate. The enforcement committee meetings that investigate complaints are required pursuant to state law to be confidential. The needs analysis that occurs during these meetings is an integral part of the confidential complaint investigation and of the litigation strategy that should not be made public. The fact that the Sunset staff does not have a document to review to evidence the needs assessment does not mean that it does not occur. Oversight of the attorney client privilege, as suggested in the Staff Report of the Board's litigation efforts and complaint investigation, is not needed and could be detrimental to the Board effectively pursuing litigation and its goal of public protection.

## **Successful prosecution**

The Board has a 98 per cent success rate at the SOAH. This should be evidence that the needs assessment has been effective. In addition, most of the expenditures incurred in the prosecution of complaints are reimbursed to the state either in administrative penalties or administrative costs. Over the past 10 years, the Board has expended \$4,821,484 for consultant/expert witnesses and attorney fees. During the same period, the Board has collected \$4,312,077 in administrative penalties and administrative costs. This demonstrates that the enforcement program has been cost effective.

## **Cost effective-attorney fees**

One reason the program has been cost effective is that it has been able to recover its administrative costs when litigating cases before SOAH. A revision to the Public Accountancy Act (Act) to allow the Board to include attorney fees as a part of its costs in cases where the licensee has been found to have violated the Act or Board rules would further enhance the cost effectiveness of the program. The Board believes the disciplined licensee should shoulder a greater portion of the costs of litigation as opposed to the costs being subsidized by all licensees. Consideration should be given to revising the Act to permit the Board to include attorney fees in its administrative costs.

## **Peer Review Oversight**

*(Pg. 10, paragraph 4)*

**Staff Recommendation:** *The Board should analyze the full scope of its monitoring and oversight needs for this program before deciding if outsourcing is best for the state.*

**Response:** Peer review oversight can only be conducted by CPAs with peer review experience and who are knowledgeable in Generally Accepted Auditing Standards, Generally Accepted Accounting Principles and other professional standards. It would not be cost effective or as efficient to attempt to maintain that expertise with Board staff.

### **Continuing Education Reviewers**

(Pg. 11, paragraph 1)

**Staff Recommendation:** Board staff sends materials from continuing education course providers to contracted CPAs to evaluate the coursework some of which work does not require the expertise of a CPA. The work that could be performed by non-CPAs should be performed in house.

**Response:** The Staff Report fails to acknowledge that a needs assessment was conducted at the end of FY 2017 which resulted in a reduction of the number of CPAs on contract from 22 to 13. Additionally, a targeted approach was developed for course review with Board staff conducting the routine tasks.

### **Enforcement reviewers and expert witnesses.**

(Pg. 11, paragraph 2)

**Staff Recommendation:** The Board should employ a CPA on staff to screen the complaint investigations or take on investigation elements that do not require specific subject matter expertise.

**Response:** The Staff Report is concerned that the Board is outsourcing the initial screening and analysis of its complaints to outside consultants. That is not the Board's process. When complaints are received they are examined, screened, information is collected and an analysis performed by two attorney/investigators. Once this analysis is completed a report is prepared and presented to the appropriate enforcement committee for its review. The enforcement committees which consist of Board members and appointed advisory committee members, along with one of the two attorney/investigators, then complete the needs analysis. The enforcement committee members perform this needs assessment function at no expense to the Board other than travel and per diem. Therefore much of the work that the Staff Report suggests being performed with the addition of a CPA is currently performed by one of the two attorney/investigators and the enforcement committees.

### **Enforcement Committee caseload**

The following chart represents the number of new complaints involving the Rules of Professional Conduct opened versus the number of complaints dismissed and the number of complaints resolved by Agreed Consent Order. Not included are the complaints involving licensing and CPE deficiencies which are handled

administratively or those involving the unauthorized practice of public accountancy.

Disciplinary Actions involving the Rules of Professional Conduct	FY 15	FY 16	FY 17
Number of new complaints opened*	193	175	159
Number of complaints dismissed for a lack of violation of the Act or Board rule	81	84	95
Number of complaints resolved by Agreed Consent Order at the Board level	64	94	59

\*These numbers are approximate and will vary from past reports as their status changes. They also do not include temporary files that do not result in the opening of a formal complaint nor do they include routine inquiries or other activities performed by the staff in resolving problems.

The Board sees no benefit to the added expense of one CPA on staff with little or no specialty expertise replacing a committee of CPAs with substantial experience and expertise. The profession does not produce a CPA that would be qualified in all areas of accounting expertise any more than a doctor/lawyer would be expected to specialize in all areas. The enforcement committee does not take the use of an outside consultant lightly and only utilizes that expertise after thoroughly assessing the need for one.

### **Staff Report Graph Comparing Board with two other agencies**

To bolster its point, the Staff Report contains a graph which attempts to compare the Board's expert witness costs with the Texas Medical Board and Texas State Board of Pharmacy. The graph, although technically correct, is misleading. The graph only references a narrow perspective of the costs of operating the enforcement function and of the costs to operate the entire agency. When you compare all the costs of litigation between the agencies the Board's enforcement costs are a fraction of the other two agencies. The Board's enforcement costs per licensee are seven per cent of the costs of the Board of Pharmacy and 12 per cent of the costs of the Texas Medical Board. This is in spite of the fact that the Board regulates and issues more licenses than the Texas Medical Board and Texas State Board of Pharmacy combined.

	<u>Texas Medical Board*</u>	<u>Board of Pharmacy*</u>	<u>Board of Public Accountancy</u>
FY 2018 Budget			
Appropriations	\$ 13,854,082	\$ 8,371,680	N/A
SDSI Self-Funding			\$ 4,757,895
Other Direct and Indirect Costs			
Appropriated	4,391,015	2,270,403	N/A
Indirect Costs			1,311,557
Total FY 2018 Budget	<u>\$ 18,245,097</u>	<u>\$ 10,642,083</u>	<u>\$ 6,069,452</u>
Enforcement Budget	\$ 8,005,398	\$ 5,955,495	\$ 1,504,453
Enforcement as a percent of Total Budget	44%	56%	25%
Number of Licensees	58,166	25,700	86,672
Total Enforcement Cost per Licensee	\$ 138	\$ 232	\$ 17
Total Agency Cost per Licensee	\$ 314	\$ 414	\$ 70

\* Source: General Appropriations Act, 85<sup>th</sup> Legislature (2017)

### **Enforcement case reviewers**

(Pg. 12, paragraph 1)

**Staff Recommendation:** *The Board should seek a Request for Qualifications more frequently. Eighty per cent of contracted expenditures for a three-year period have gone to one firm. The Staff Report points out that the Board had average annual contracts with one CPA firm for \$208,700.00 and one litigation attorney for \$178,700.00 during FY 2014 to 2017.*

**Response:** The Board believes there is value in more frequently seeking a Request for Qualifications and will do so. It should be noted, however, that the Board has employed a large number of outside consultants to assist it in its review and prosecution of complaint investigations. Over the last 10 years there have been 26 different CPA outside consultants employed to assist the Board in its investigations. This has enabled the Board to evaluate and select consultants most effective in providing the Board's enforcement committees their expertise.

## **Quality of representation should be the criteria**

It should be emphasized, however, that the selection of a firm to provide expert witness and consulting services should not be based upon the frequency of its use but on the expertise and the quality of the service it provides. The fact that one firm is used more than another represents that the Board has confidence in its work. The respondent's attorney will continue to use experts that perform well for the respondent. To require the Board to do otherwise would put the Board at a disadvantage in enforcing its laws and protecting the public.

## **Staff Report graph is not relevant**

(Pg. 11)

As previously mentioned, the Staff Report uses a graph to compare the Board's expert witness expenses with two other agencies. This graph is not relevant because the average annual expenditures for the litigation attorney and the CPA firm during the years reported were not the norm. The Board had one case in particular that was substantially more litigious than in previous reporting periods that skewed the numbers. In addition, as stated previously the Board has a 98 per cent success rate in its litigation at SOAH. The two agencies it is compared with have not been as successful.

## **The Board's contracting for attorneys lacks effective oversight.**

(Pg. 13, paragraph 4)

**Staff Recommendation:** *Even though the Office of Attorney General (OAG) does not require approval for outside counsel representation at SOAH, OAG approval for the Board's use of this representation would plug a gap in the state's oversight of outside counsel usage. The Staff Report represents that the Board has never sought formal OAG approval for outside counsel representation at SOAH.*

**Response:** We acknowledge that the OAG approval is not required for outside counsel representation at SOAH. The Staff Report states, however, that the Board has never sought formal OAG approval for outside counsel representation for either legal services or representation at SOAH. This is not relevant since the Staff Report recognizes that OAG approval is not required for outside legal representation at SOAH. Regardless, the fact is the Board did obtain approval from the OAG for it to employ outside counsel for representation at SOAH in 2008. The Staff Report ignores that approval and dismisses the February 10,



2015 email that corroborates the OAG's approval. The Staff Report also misinterprets the same February 10, 2015 email which advises the Board that it has the authority to contract for legal services without OAG approval.

### **Sunset Commission Staff and other state auditors found no issue with Board's Contracting process**

It bears noting the Sunset Commission Staff conducted a review of the Board in 2012/2013 and had no finding of a problem with the Board's contracts. The Board also underwent operational audits by the State Auditor's Office (SAO) in 2009 and in 2017 and a post payment audit by the Comptroller of Public Accounts in 2014 which included a review of the Board's contracting practices. The Board's contracting practices were the same then as they are now and no audit report has contained a finding of contracting issues. The Board has had no reason to believe that its contracting methods are not in compliance with state standards.

### **The Board correctly sought OAG approval**

The Staff Report also states that the Board had posed the question to the wrong person at the OAG. The Staff Report states that the Board did not seek the advice from the OAG division responsible for approving outside counsel contracts. This is also not correct. The Board was advised by the OAG to address questions to the OAG division assigned to the Board. This the Board did. If the OAG division believed they were the wrong division then they would have so advised the Board.

### **Staff Report incorrectly reads February 10, 2015 email**

The Staff Report does acknowledge that the Board inquired in writing of the OAG as to the need for OAG approval for outside legal counsel but the question was not for approval of outside legal counsel before SOAH. It was for outside consulting services for legal research.

The Board's written inquiry made the affirmative statement that the OAG had already advised the Board that OAG approval for outside legal counsel before SOAH was not needed. The question asked was whether the Board needed OAG approval for outside legal counsel for legal research. The OAG representative providing the response understood the question and advised that OAG approval was not needed.

## **Outside legal counsel is cost effective**

It should also be noted that the Board's cost benefits analysis of outside legal counsel determined that the use of outside legal counsel for these services is more cost effective than hiring employees to provide the service. This determination is based in part on the SAO findings that a state employee's fringe benefits add a 55.36% value to a state employee's pay. The Board is using the SAO's most recent analysis in 2017.

### **Fiscal Implication**

*(Pg. 16, paragraph 4)*

*The Staff Report finds that there would be no fiscal impact to the state relating to professional services contracts.*

**Response:** Even though the Board is a SDSI agency, increased expenses to the agency are passed on to the Board's 86,672 licensees. In addition, the agency and the OAG would expend time and resources in seeking OAG approval for legal contracts which the OAG doesn't require. The Staff Report recommends additional Board staff and additional Board resources would be expended in the required analyses proposed in this report. The Board believes that no cost savings would result from the Staff Report's recommendations regarding the Board's contracting for outside counsel services.

### **Direct the Board to accept online submission of exam applications**

*(Pg. 26, paragraph 2.8)*

**Staff Recommendation:** *The Board would be directed in its statute to enable applicants to take the CPA exam applications online as well as associated fees.*

**Response:** The largest volume area, which is the eligibility process, is already online. [This recommendation has been in the Board's planning and based upon resources and management priorities will be implemented before any legislation could be enacted.]

### **Direct the Board to amend its peer review rules to account for risk posed to the public.**

*(Pg. 26, paragraph 2.10)*

**Staff Recommendation:** *The Staff Report, on page 22, paragraph one, states that the Board defines attest services in rule to include a broader set of activities*

*than some other states and concludes that the Board should develop rules that allow CPA firms that perform lower-risk work or a low volume of work to be less regulated.*

**Response:** The Staff Report's finding that the Board defines attest service in rule to include a broader set of activities than some other states is not correct. The Texas Legislature defined attest service in the Act, not the Board. See Section 901.002(a) of the Act. The Board's rule, §501.52(4), merely repeats the definition of attest service as contained in the Act for the public's reference. The Board therefore cannot change the definition of attest service. In addition, 41 of the states and five US jurisdictions include compilation services under peer review requirements. A revision to the definition of attest service should not be taken lightly.

### **Preparation services are not subject to peer review**

The Staff Report fails to recognize that preparation services are not attest services and as such are not subject to peer review. The preparation service Standard was adopted by the American Institute of Certified Public Accountants aka AICPA and incorporated into its Standards for Accounting and Review Services in 2016. The preparation service is the lower-risk work that the Staff Report is attempting to address.

The Board believes that this issue has already been addressed. This is evidenced by the substantial decrease in the number of firms enrolled in peer review since 2016. Small to medium sized firms that formerly performed only tax and compilation services may now be exempt from peer review electing to perform preparation services, which is not subject to peer review. In the first full fiscal year of the creation of preparation services, the peer review firm count decreased from 4,942 to 3,583 by the end of FY 2017. This is a 27 per cent decrease in just the first year.

- **Track and report non-jurisdictional complaints**  
(Page 27, paragraph 2.11, bullet 4)

**Staff recommendation:** *This would require the Board to track complaints the Board lacks jurisdiction to review such as fee disputes.*

**Response:** The Texas Legislative Budget Board eliminated this performance standard in 1998 believing it served little purpose.

**Direct the Board to develop rules on administrative costs assessed on respondents.**

*(Page 27, paragraph 2.12)*

**Staff Recommendation:** *This would require the Board to provide additional standards to its rules on administrative costs that would create the formulas it uses in calculating its costs.*

**Response:** The Board has a rule that clearly identifies what is included in administrative costs. Current Board rule 519.2(8) reads as follows:

Direct Administrative Costs- means those costs actually incurred by the board through payment to outside vendors and the resources expended by the board in the investigation and prosecution of a matter within the board's jurisdiction, including but not limited to, staff salary, payroll taxes and benefits and other non-salary related expenses, expert fees and expenses, witness fees and expenses, filing fees and expenses of the support staff of the Office of the Attorney General, filing fees, SOAH utilization fees, court reporting fees, copying fees, delivery fees, case management fees, costs of exhibit creation, technical fees, travel costs and any other cost or fee that can reasonably be attributed to the matter;

If the Board is not able to prove up to the court how those costs were calculated, the court has the ability to not accept them. The court already serves as the arbiter on this issue and any effort to further define the methodology of the costs will only add to the issues before the court and the costs to all parties. We don't believe that this is currently an issue and do not know the unintended consequences of additional rules other than additional issues in litigation and the resulting costs.

**Adjust the Board's composition to consist of eight public members and seven certified public accountants.**

*(Page 34, paragraph 3.2)*

**Staff Recommendation:** *Staff Report recommends replacing three of the certified public accountant positions on the Board with three public members. This is an effort to reduce the number of "active market participants" serving on the Board to less than a majority with the intent of reducing the Board's exposure to it anti-competitive actions being subject to anti-trust law violation.*

**Response:** The reduction in the number of CPAs on the Board would have little or no effect on the Board's actions being subject to anti-trust law issues. The criterion is not a majority of "active market participants" but the issue is the level of "control" by "active market participants".

Further, this agency would lose a great deal of expertise and would not be as effective in areas including enforcement actions, rulemaking and continuing professional education oversight. The loss of expertise would require Board to hire additional CPA consultants. This would lead to more outsourcing and additional costs to the Board.