



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Texas Insurance Agency Under Legislative Review

Law360, New York (December 02, 2009) -- Texas legislators are busy working behind the scenes in a review process of state agencies that will affect businesses operating in Texas. The 82nd Legislative Session lasts for 140 days, beginning on Jan. 11, 2011 and ending on May 30, 2011.

However, for those interested in the regulatory authority of the Texas Department of Insurance ("TDI") and its Division of Workers' Compensation ("DWC"), the time to monitor the activities of the Texas Sunset Advisory Commission ("commission") and participate in its review of the TDI and DWC is now.

Stakeholders may provide input to the commission on whether the TDI and DWC are performing their functions appropriately or are legislative changes needed to the duties, responsibilities and enforcement authority of these state agencies.

The Texas Sunset Process

Since 1978, the Sunset Advisory Commission has been tasked with the duty of evaluating state agencies, usually every 12 years, to determine if the agency is needed, if it is operating effectively and if state funds are spent appropriately and in accordance with statute.

Based upon the recommendations of the Sunset Advisory Commission, the Texas Legislature will decide whether an agency continues to operate or is eliminated or allowed to sunset.

The commission is governed by a 12-member board composed of five members of the Texas Senate, five members of the House of Representatives, a public member appointed by the Speaker of the House, and a public member appointed by the lieutenant governor.

In very rare instances, the commission has eliminated or sunsetted several agencies from existence, including the predecessor agency to the DWC, the Texas Workers' Compensation Commission, which was eliminated in 2005 and its duties merged into the TDI.

The DWC is currently being evaluated by the commission for the first time since the 2005 legislation was passed. Before 2009, the TDI had not been reviewed by the commission since the early 1990s.

The TDI was reviewed for the 2009 session, but the legislation to continue the agency's existence failed to pass.

The governor was forced to call a special session of the Texas Legislature where a bill was passed that would continue the operations of TDI for another two-year cycle and allow the agency to be reviewed again by the commission for the legislative session in 2011 when the sunset review process, although already completed, begins again.

In addition to the 2009-2010 reviews for TDI and DWC, the Sunset Advisory Commission must conduct 26 additional reviews of agencies, and all of those reviews begin with the agency filing a self-evaluation report ("SER"). Each SER was filed in the late summer of 2009.

The SER provides a starting point for Sunset Advisory Commission staff to begin its review of an agency because it is an opportunity for the agency to self-report agency performance.

The SER also provides an in-depth opportunity to learn a detailed history of the agency, illustrate key legislative changes that have occurred during the agency's history, and recommend legislative changes. The SERs are quite thorough as illustrated by the 188-page SER provided by the DWC and the 412-page SER provided by the TDI.

Upon receipt of the SER, the Sunset Advisory Commission staff begins to evaluate the SER, meet with agency staff regarding any questions that have arisen from the SER, or seek additional information from the agency staff.

In addition to the interaction between the commission and agency staff, the Sunset Advisory Commission also seeks the input from stakeholders, including organizations and individuals, who have an interest in the agencies.

For this reason, it is very important to participate in the sunset process should your business be operating in the state under the jurisdiction of these agencies.

How to Participate in the Sunset Process

The commission recently sent questionnaires to stakeholders seeking input on agency reviews. Anyone is allowed to submit responses to the questionnaires and stakeholders may also submit any other correspondence to the commission for review.

It is important to remember that the correspondence received by the commission is confidential to give stakeholders the opportunity to freely communicate their concerns about an agency.

The Sunset Advisory Commission has requested stakeholders to respond to the questionnaires or submit comments by Jan. 8, 2010, to provide commission staff time to consider the information submitted.

The Sunset Advisory Commission staff reviews the SER and all comments received from stakeholders and ultimately develops a staff report that outlines specific issues that should be examined by the Sunset Advisory Commission and considered by the public and stakeholders at a public hearing.

Based upon the current schedule, the staff report should be released in April 2010, and a public hearing is scheduled for both the TDI and DWC on May 25 and May 26, 2010.

The time period between the release of the staff report and public hearing allows for the agency to review the findings of the Sunset Advisory Commission staff and directly respond to the staff report.

The public hearing will include a presentation by Sunset Advisory Commission staff on its staff report, an opportunity for the agency to respond to the staff report and answer any questions from the Sunset Advisory Commission members, and the receipt of testimony by the public and other interested stakeholders.

All information gathered at the public hearing is considered and developed as a final report of recommendations that will be presented to the Sunset Advisory Commission members for a vote.

The date currently scheduled for final decisions on the DWC and TDI are July 6, 2010.

The final recommendations of the Sunset Advisory Commission are developed as proposed legislation for the 82nd Texas Legislative Session and filed sometime between November 2010 and March 2011.

Additional Public Participation

As with any bills considered by the Legislature, the sunset bill for the TDI and DWC will require consideration and passage by both the House and the Senate.

As a result, there is ample opportunity for businesses and associations to directly impact the legislation and its likelihood of passage.

Historically, the House and Senate do not pass the same legislation resulting in the need for a conference committee to consider differences in the bills and ultimately agree on compromise language of the bill.

For each stage in the legislative process, there is an opportunity to amend the bill and active participants in this process will do so to advance their interests.

The Evolution of the Texas Sunset Process

It should be noted that there have been some differences of opinion between legislators on the “extent” of amending the original draft of sunset legislation during the legislative process.

Although the process was initially conceived as a method to review the operations of a state agency, it has become an opportunity to decide public policy questions and add amendments some view as furthering special interest.

In recent legislative sessions, sunset bills have evolved into all-encompassing bills that include amendments that are generally related to the overall jurisdiction of the affected agencies.

For example, there was an expectation that the TDI sunset bill in 2009 would be amended with tort reform legislation. In fact, hundreds of these and other prefiled amendments unrelated to the functions of the agency were proposed.

It was this possible expansion of the TDI sunset bill in 2009 to matters not directly related to the operations of the TDI that lead to the failure of the legislation in 2009 and the need for an additional sunset review of TDI during the 2011 legislative session.

Current legislative leadership is examining methods to better control the sunset legislative process that would prevent or, at a minimum, curtail the expansion of sunset bills to include matters unrelated to agency governance or other issues.

Getting the Changes You Want

Opportunity exists in the sunset review process during the interim and prior to the commencement of the next regular legislative session to determine a strategy for advancing your interests.

In order to reach your goals, it is important to participate not only during the sunset review process but also during the regular legislative session.

It is imperative to monitor and shepherd the actual legislation through both chambers to assure that your language is preserved. Otherwise, you may have missed an opportunity for change.

Because the Texas sunset process is very complicated, it is highly recommended that you employ Texas lobbyists familiar with your industry, the particular agency under sunset review, and experienced in the Texas sunset and legislative process.

As the sunset process is based on a periodic review of all state agencies, the failure to act on any sunset legislation this sunset cycle could result in legislation that will impact your business operations in the state for many years until either the next legislative session two years in the future or the next sunset review 12 years in the future.

Additional information on the Texas Sunset Commission can be found at its Web site: www.sunset.state.tx.us.

--By Kimberly A. Yelkin and David T. Weber, Gardere Wynne Sewell LLP

Kim Yelkin is a partner with Gardere in the firm's Austin, Texas, office. David Weber is a senior attorney with the firm in the Austin office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.