

SUBJECT: Imposing a fee based on admissions to certain sexually oriented businesses

COMMITTEE: Ways and Means — committee substitute recommended

VOTE: 8 ayes — Oliveira, Otto, Bohac, C. Howard, P. King, Paxton, Peña,
Villarreal

0 nays

2 present not voting — Hilderbran, Taylor

1 absent — Hartnett

WITNESSES: (*On original version:*)

For — Torie Camp, Texas Association Against Sexual Assault; Randall Chapman, Texas Legal Services Center; Julia Raney, Texas Rio Grande Legal Aid, Incorporated; (*Registered, but did not testify:* Jennifer Brown, SafePlace; Jennifer Cutrer, Parkland Health & Hospital Systems; Jim Grace, Houston Area Women's Center); (*On substitute:*) (*Registered, but did not testify:* Michele Mosbacher)

Against — John Faltynski; Steven Swander, Stewart Whitehead, Texas Entertainment Association

On — Bruce Kellison, University of Texas Bureau of Business Research; (*Registered, but did not testify:* Noel Busch-Armendariz, University of Texas Institute on Domestic Violence & Sexual Assault); (*On substitute:*) James Ho, Office of the Attorney General

BACKGROUND: HB 1751 by Cohen, enacted by the 80th Legislature during the 2007 regular session (Business and Commerce Code, ch. 47, subch. B), requires that a fee of \$5 be charged per customer admitted to a sexually oriented business providing live nude entertainment or performances and authorizing consumption of alcohol on the premises. The first \$25 million collected is allocated to the Sexual Assault Program Fund and the remaining fees are allocated to the Texas Health Opportunity Pool.

In March 2008, a state district court in Austin held that this provision violates the First Amendment of the U.S. Constitution and therefore is

invalid. The fee was found to be a content-based tax aimed at restricting the protected speech of nude performance, and the statute was not found to be tailored narrowly to serve a compelling state interest. In addition, the court found that even if the fee was content-neutral, an insufficient nexus exists between nude performance and sexual assault or inadequate healthcare. The state has appealed this decision to the Third Court of Appeals in Austin. The fee still is being collected, but the funds are being held by the Comptroller's Office while the court's opinion is pending.

“Sexually oriented business” is defined as a nightclub, bar, restaurant, or similar commercial enterprise that provides for an audience of two or more individuals live nude entertainment or live nude performances, and authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption is under a license or permit issued under the Alcoholic Beverages Code.

DIGEST:

CSHB 2070 would reduce the sexually oriented business entry fee from \$5 to \$3 and would require the comptroller to deposit all revenue received from the fee to the Sexual Assault Program Fund. The bill would repeal the provision allocating fees collected over \$25 million to the Texas Health Opportunity Pool.

For the purposes of Tax Code, sec. 151.007, the amount of a fee imposed would not be considered part of the sales price of the service for which the sales tax is otherwise imposed or part of the receipts of a sexually oriented business.

The comptroller would be required to submit quarterly reports to the chairs of the Senate Finance and House Appropriations Committees regarding the fee, including the amounts collected during the preceding quarter, and any other information the comptroller considered appropriate. The comptroller could require a sexually oriented business to provide information as necessary for compliance with the quarterly report requirement.

The bill also would add representatives from the Texas Alcoholic Beverage Commission (TABC) to the Sexual Assault Advisory Council, and include in their functions the duties to:

- report biennially to the Legislature on the cost of sexual assault to Texas and major local jurisdictions;

- develop a statewide, multiyear strategy for eradication of sexual assault in Texas; and
- make recommendations regarding the improvement of public safety in and around adult cabarets, particularly regarding sex and drug infractions.

The attorney general, through the Sexual Assault Advisory Council, no later than November 1, 2010, would be required to conduct studies relating to sexually oriented businesses, perpetrators of sexual assault, female entertainers and the incidence of underage dancing, and revenue for and costs of sexual assault to be included in a report to the 82nd Legislature.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009, and apply only to fees imposed on or after this effective date.

**SUPPORTERS
SAY:**

CSHB 2070 would eliminate the constitutional concerns currently facing HB 1751. In a challenge to HB 1751, a state district court in Austin found that persuasive evidence exists linking nude performance and the secondary effects addressed by the Sexual Assault Program Fund, but an insufficient nexus exists between nude performance and inadequate healthcare. By allocating all collected fees to the Sexual Assault Program Fund and removing the allocation to the Texas Health Opportunity Pool, CSHB 2070 would eliminate this concern.

The bill would not apply a discriminatory tax on protected expression. The bill imposes a fee, rather than a tax, and would be applied only to sexually oriented businesses that also authorized the consumption of alcohol on the premises. The U.S. Supreme Court has held that states have the right to ban the combination of nude performance and consumption of alcohol. Therefore, the state can discourage the combination by imposing a fee. The bill is content neutral, as it seeks to regulate negative, secondary effects associated with sexually oriented businesses that combine live nude entertainment and serving alcohol.

By providing a dedicated source of revenue, CSHB 2070 would support essential sexual abuse prevention and survivor support programs. The bill would allow the state to devote approximately \$16.5 million annually to

aid the survivors of sexual assault and support training and prevention programs to reduce future incidents of sexual assault.

Enforcement of the fee should not be problematic, as the vast majority of these entities sell alcohol and already are licensed, regulated, and audited by TABC. The Comptroller's Office could partner with TABC to ensure enforcement of this program and easily could handle the auditing duties of the few entities that do not sell alcohol.

Imposing a fee on an activity does not mean condoning it. Texas assesses a variety of "sin taxes" on tobacco, alcohol, and other activities that many Texans may not condone, in addition to sales and property taxes that business may have to pay. Because a certain segment of the population will visit strip clubs regardless of cost, the state is perfectly justified in imposing a fee on that activity and funding other state requirements with the proceeds.

OPPONENTS
SAY:

Lowering the fee and allocating all the funds to the Sexual Assault Program Fund would not cure the constitutional challenges currently facing HB 1751. CSHB 2070 still would impose a tax on constitutionally protected speech. The U.S. Supreme Court has ruled that erotic expression is protected speech under the First Amendment, and that taxation of protected speech is unconstitutional. The state of Texas already has incurred significant legal expenses due to court challenges to HB 1751. The enactment of CSHB 2070 would not quell the legal challenges, but add to the legal expenses.

The fee imposed under CSHB 2070 could prove difficult to implement for the Comptroller's Office, which would have to audit and ensure that the amount of money collected was accurate. Some businesses do not collect door charges. Other businesses may collect door charges but keep the count of customers low in order to inappropriately divert the money to their own coffers.

The state should not use behavior that many Texans find objectionable and offensive to fund important state priorities. To do so would be hypocritical and could send a message that this type of behavior somehow is encouraged.

OTHER
OPPONENTS
SAY:

While the \$3 fee in CSHB 2070 would support a worthy cause, the fee instituted on patrons of strip clubs is unrelated to this goal. No link exists between strip clubs and sexual assault, meaning that the bill would institute unfair tax profiling on individuals who visit legally these establishments. Sexual assault prevention and treatment certainly deserve financial support from the state of Texas, but they should not be paid for by a discriminatory tax unrelated to the problem that those programs are trying to address.

NOTES:

The companion bill, SB 1289 by West, has been referred to the Senate Criminal Justice Committee.

A related bill, HB 982 by Thompson, would repeal Business and Commerce Code, ch. 47, subch. B in its entirety and levy a 10-percent tax on admissions fees charged by sexually oriented businesses. One-fourth of the revenue collected from the tax would be allocated to the Foundation School Fund and three-fourths to the General Revenue Fund, which the comptroller would transfer to the Sexual Assault Program Fund. HB 982 passed the House by 141-1 on April 30 and was reported favorably, without amendment, by the Senate Criminal Justice Committee on May 6.