

**SUBCHAPTER II. INSURANCE SOLD IN CONNECTION WITH PREPAID FUNERAL  
CONTRACTS  
28 TAC §3.9001 and §3.9002**

**1. INTRODUCTION.** The Texas Department of Insurance (Department) proposes amendments to Subchapter II, §3.9001 and §3.9002, concerning the joint memorandum of understanding (JMOU) between the Texas Funeral Service Commission, the Texas Department of Banking, and the Department, relating to prepaid funeral services and transactions (also referred to as “prepaid funeral benefits”). These amendments are proposed to update the JMOU to reflect current practices and make the rule consistent with the rules of the Texas Funeral Service Commission and the Texas Department of Banking, which have recently adopted these changes to the JMOU.

The Occupations Code §651.159 requires the Texas Funeral Service Commission, the Texas Department of Banking, and the Department to adopt a JMOU by rule. The purpose of the JMOU is to outline the respective responsibilities of each agency, establish procedures regarding complaint handling, coordinate identification of deceptive trade practices and distribution of customer information, and coordinate the setting of administrative penalties. The Texas Department of Banking adopted revisions to the JMOU on September 8, 2011, and the Texas Funeral Service Commission adopted revisions on October 6, 2011.

The proposed amendments to §3.9001 and §3.9002 update and clarify the language throughout the JMOU. These amendments are necessary to reflect changes in the procedures among the agencies and to comply with the Occupations Code §651.159.

Proposed amendments to §3.9002(b) amend the responsibilities of the Texas Funeral Service Commission, the Texas Department of Banking, and the Department. Proposed amendments to §3.9002(b)(1) update the section to reflect the current responsibilities of the Texas Funeral Service Commission. Since the JMOU's adoption, legislation amended Occupations Code Chapter 651 by adding Subchapter N, regarding crematories. Proposed amendments to §3.9002(b)(2) update the responsibilities of the Texas Department of Banking. Proposed changes to subsection (b)(2) simplify and clarify the description of the Texas Department of Banking's responsibilities by stating that all actions under Chapter 154 of the Finance Code and related agency rules are the department's responsibility. The Department's responsibilities are clarified in proposed changes to subsection (b)(3).

Section 3.9002(c)(3) is proposed for deletion because each agency has developed procedures for resolving complaints, and it is no longer necessary for the agencies to coordinate the establishment of such procedures. Proposed amendments to §3.9002(d) clarify each agency's procedures for resolving complaints. Section 3.9002(c)(3) is therefore unnecessary.

Since the adoption of the current memorandum of understanding, each agency that is party to the memorandum has developed and adopted internal complaint procedures for violations related to prepaid funeral benefits. The agencies have developed procedures for investigating, sharing, and referring complaints. With the passage of time, these procedures have evolved and the detailed requirements and timeline previously set out in §3.9002(d) for investigating complaints was no longer relevant. Therefore, proposed amendments to subsection (d) delete outdated and

unnecessary requirements and add language that updates and reflects the current policies and practices regarding investigation of complaints.

Proposed amendments to §3.9002(f) update the provisions related to providing information to consumers by including language referring to websites and toll-free numbers.

Proposed amendments to §3.9002(g) update the provisions related to administrative penalties with language reflecting the agencies' current practices. The proposed amendments also delete the working group on enforcement recommendations. Improved interagency communication has made a formal working group unnecessary.

Section 3.9002(h) describes mandatory meetings held to develop cooperative regulation. Over time, the agencies have developed procedures which adequately coordinate each agency's responsibilities in regulating prepaid funeral benefits. Communications are ongoing and continuous. Therefore, §3.9002(h) is proposed to be deleted.

Non-substantive changes are proposed to §3.9001 and §3.9002 to replace outdated references to statutory citations.

**2. FISCAL NOTE.** Judy Wooten, Project Manager for Regulatory Matters, Life, Accident and Health Section, has determined that for each year of the first five years the proposed amended sections will be in effect, there will be no measurable fiscal impact to state or local governments as a result of the enforcement or administration of the

proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

**3. PUBLIC BENEFIT/COST NOTE.** Ms. Wooten also has determined that for each of the first five years the proposed amendments are in effect, the expected public benefits will be updated information regarding the coordination of responsibilities related to the regulation of prepaid funeral benefits. The proposed amendments will not result in costs to persons required to comply with the proposed amendments, including small and micro businesses.

**4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** In accordance with the Government Code §2006.002(c), the Department has determined that the proposed amendments concerning the JMOU will not have an adverse economic effect on small businesses or micro businesses because the proposed amendments do not impose any requirements or costs on small businesses or micro businesses. In accordance with the Government Code §2006.002(c), the Department has therefore determined that a regulatory flexibility analysis is not required because the proposed amendments will not have an adverse impact on small or micro businesses.

**5. TAKINGS IMPACT ASSESSMENT.** The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence

of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

**6. REQUEST FOR PUBLIC COMMENT.** To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on April 2, 2012, to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Judy Wooten, Project Manager for Regulatory Matters, Life, Accident and Health Section, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

**7. STATUTORY AUTHORITY.** The amendments are proposed under the Occupations Code §651.159 and the Insurance Code §36.001. The Occupations Code §651.159 requires the Funeral Service Commission, the Department of Insurance, and the Department of Banking to adopt by rule a JMOU relating to prepaid benefits. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

**8. CROSS REFERENCE TO STATUTE.** The following statute is affected by this proposal: Occupations Code §651.159.

**9. TEXT.**

**§3.9001. Introduction to Joint Memorandum of Understanding.**

(a) Occupations Code §651.159 [~~Texas Civil Statutes, Article 4582(b), §4(l)~~], mandates the Texas Department of Insurance, the Texas Funeral Service Commission, and the Texas Department of Banking to adopt by rule a joint memorandum of understanding relating to prepaid funeral services and transactions that:

(1) outlines the responsibilities of each agency in regulating these services and transactions;

(2) establishes procedures to be used by each agency in referring complaints to one of the other agencies;

(3) establishes procedures to be used by each agency in investigating complaints;

(4) establishes procedures to be used by each agency in notifying the other agencies of a complaint or of the investigation of a complaint;

(5) describes actions the agencies regard as deceptive trade practices;

(6) specifies the information the agencies provide consumers and when that information is to be provided; and

(7) sets the administrative penalties each agency imposes for violations.

(b)-(c) (No change.)

**§3.9002. Joint Memorandum of Understanding.**

(a) Pursuant to Occupations Code §651.159 [~~Texas Civil Statutes, Article 4582b, §4(1)~~], the Texas Funeral Service Commission ([~~herein referred to as the "TFSC"~~]), the Texas Department of Insurance ([~~herein referred to as the "TDI"~~]), and the Texas Department of Banking ([~~herein referred to as the "DOB"~~]) [hereby] adopt the following joint memorandum of understanding (JMOU) relating to prepaid funeral benefits as defined in Finance Code Chapter 154 [~~services and transactions~~]. The TFSC, TDI, and DOB intend this memorandum of understanding to [~~serve as a vehicle to~~] assist the three agencies in their regulatory activities, and to make it as easy as possible for a consumer with a complaint to have the complaint acted upon by all three agencies, where appropriate. To [~~In order to~~] accomplish this [~~end~~], where not statutorily prohibited, the three agencies will share information among [~~between~~] the agencies that [~~which~~] may not be available to the public generally under the Public Information [~~Open Records~~] Act, Government Code Chapter 552 [~~Texas Civil Statutes, Article 6252-17a~~]. Such information will be transmitted among [~~between~~] agencies with the understanding [~~notation on the information~~] that it is considered confidential, is being furnished to the other agencies in furtherance of their joint responsibilities as state agencies in enforcing their respective statutes, and that it may not be disseminated to others except as required.

(b) Responsibilities of each agency in regulating prepaid funeral benefits [~~services and transactions~~].

(1) The Texas Funeral Service Commission is responsible for the following:

(A) licensing funeral directors, ~~[and]~~ embalmers, provisional ~~[apprentice]~~ funeral directors, provisional ~~[and apprentice]~~ embalmers crematory, ~~[(Texas Civil Statutes, Article 4582b, §3)],~~ and funeral establishments ~~[(Texas Civil Statutes, Article 4582b, §4(A))].~~ The TFSC may refuse to license a person or establishment that ~~[which]~~ violates Finance Code Chapter 154, under Occupations Code §651.460(b)(3) ~~[Texas Civil Statutes, Article 548b, under Texas Civil Statutes, Article 4582b, §3(H)(10)]~~;

(B) taking action under Occupations Code §651.460(b)(3) against any licensee violating Finance Code Chapter 154 ~~[Article 548b, under Texas Civil Statutes, Article 4582b, §3(H)(10)]~~; and

(C) taking action under Occupations Code §651.460(b)(3) against any funeral director in charge, crematory owner, and/or funeral establishment owner for violations of Finance Code Chapter 154 ~~[Article 548b,]~~ by persons directly or indirectly connected to the crematory or funeral establishment, ~~[under Texas Civil Statutes, Article 4582b, §4(D)(1)(f) and §4(E)].~~

(2) The Texas Department of Banking is responsible for administering Finance Code Chapter 154 and 7 Texas Administrative Code (TAC) Chapter 25 ~~[Texas Civil Statutes, Article 548b]~~, including, but not limited to, the following:

(A) bringing enforcement actions against any person, including licensees of TFSC and TDI, who violates Finance Code Chapter 154 and/or 7 TAC Chapter 25; and

(B) all other actions authorized by Finance Code Chapter 154 and 7 TAC Chapter 25.

~~[(A) issuing permits to sell prepaid funeral services or funeral merchandise pursuant to Texas Civil Statutes, Article 548b, §1 and §3;]~~

~~[(B) approving forms for sales contracts pursuant to Texas Civil Statutes, Article 548b, §2;]~~

~~[(C) canceling or refusing to renew permits pursuant to Texas Civil Statutes, Article 548b, §4; and providing notice of alleged violations to the attorney general of Texas and to sellers pursuant to Texas Civil Statutes, Article 548b, §9(e) and (f);]~~

~~[(D) approving the release or withdrawal of funds under certain circumstances or for certain purposes, pursuant to Texas Civil Statutes, Article 548b, §5(3), (4), and (5);]~~

~~[(E) providing for reporting requirements and performing examinations under Texas Civil Statutes, Article 548b, §7 and §8(a); and]~~

~~[(F) maintaining a guaranty fund with respect to prepaid funeral benefits funded by trusts, pursuant to Texas Civil Statutes, Article 548b, §8A.]~~

(3) The Texas Department of Insurance is responsible for the following:

(A) regulating ~~[licensed]~~ insurers that issue or propose to issue life insurance policies or annuity ~~[insurance/annuity]~~ contracts that ~~[which]~~ may fund prepaid funeral contracts;

(B) regulating any person ~~[individuals/entities]~~ that performs ~~[perform]~~ the acts of an insurance agent ~~[agent(s)]~~ as defined in ~~[the]~~ Insurance Code Chapter 4001 and Insurance Code Chapter 101 ~~[, Articles 21.02 and 1.14-1];~~

(C) regulating insurance policies and annuity ~~[insurance/annuity]~~ contracts that may fund prepaid funeral contracts;

(D) regulating unfair trade practices relating to the insurance policies and annuity ~~[insurance/annuity]~~ contracts that ~~[which]~~ may fund prepaid funeral contracts pursuant to ~~[the]~~ Insurance Code Chapter 542 ~~[, Article 21.21];~~ and

(E) regulating unfair claims settlement practices by insurance companies pursuant to the Insurance Code Chapter 542 ~~[, Article 21.21-2].~~

(c) Procedures used by each agency in exchanging information with or referring complaints to one of the other agencies.

(1) (No change.)

(2) Referral of complaints for handling. When an agency receiving a complaint refers the complaint to another agency for handling, the receiving agency will contact the complainant in writing informing him or her of the referral, provide ~~[and providing]~~ the complainant contact information for ~~[on]~~ the reviewing agency, and encourage ~~[encouraging]~~ the complainant to re-contact the receiving agency concerning ~~[if she or he has any problem with]~~ the reviewing agency's processing of the complaint.

~~[(3) Complaint procedures. The three agencies will work together to establish procedures to ensure consumer complaints will be fully resolved by the reviewing agency.]~~

(d) Procedures to be used by each agency in investigating a complaint.

(1) All agencies.

(A) Each agency will develop ~~[an]~~ internal complaint procedures ~~[manual]~~ for violations relating to prepaid funeral benefits ~~[services and/or transactions].~~

The procedures ~~[manual]~~ should at a minimum provide for:

~~[(i) cross-checking the other two agencies' list of licensees against the investigating agency's list;]~~

~~[(ii) background checks on disciplinary proceedings and license eligibility--including background checks into the two other agencies' complaints, disciplinary proceedings, and licensing process involving the same licensee if any, where not prohibited by law;]~~

~~[(iii) outlining of relevant law for each agency with checkpoint steps to ensure all relevant information has been obtained from complainant and referenced to applicable legal provisions;]~~

(i) ~~[(iv)]~~ identification of necessary data and documents to be obtained from the complainant; and

(ii) ~~[(v)]~~ such other steps deemed necessary for the agency to perform an adequate and appropriate investigation.

(B) Each agency may assist either of the other agencies with investigations relating to prepaid funeral benefits.

~~[(B) Each agency will maintain its centralized complaint resolution process with a long-term goal of integrating the complaint resolution process, which includes the complaint tracking system, with the other agencies in the most effective, cost-efficient manner.]~~

~~[(C) Within four months from the final adoption of the JMOU by rulemaking, the DOB, TFSC, and TDI will develop one or more complaint and referral forms that are substantially similar in content and format to be used by each agency in processing complaints relating to prepaid funeral services and/or transactions.]~~

~~[(D) Each reviewing agency will provide periodic status reports, no less than quarterly, on the complaint investigation to the receiving agency or agencies. In addition, the reviewing agency will contact the complainant to inform him or her of the status of the investigation.]~~

~~[(E) Each agency will develop with the other agency, or other two agencies, a written plan for conducting joint investigations where appropriate which, at a minimum, establishes a case manager for the investigation, establishes the divisions of duties among the agencies, and establishes a time-line for completion of the investigation.]~~

~~[(F) As soon as possible following the final adoption of the JMOU by rulemaking the DOB, TFSC, and TDI will each ensure its complaint resolution procedure is accessible to the public by reviewing its procedures, forms, brochures, and letters to determine what steps, if any, are needed to remedy problems of accessibility. The DOB, TFSC, and TDI will implement the needed steps as soon as possible thereafter.]~~

~~[(G) The TDI, DOB, and TFSC commit to a long-term goal with a five-year planning horizon to develop an efficient and cost-effective way to ensure that the three agencies can readily exchange information and that there is effective and easy access by each of the three agencies to the information and data held by the other~~

~~agencies relating to complaints and information regarding licensees in the prepaid funeral services area.]~~

(2) The Texas Funeral Service Commission.

(A) The TFSC will log in and investigate complaints received as required under Occupations Code Chapter 651. A complaint about violations of Finance Code Chapter 154 and/or 7 TAC Chapter 25, will be referred to the DOB. ~~[The TFSC, in accordance with Texas Civil Statutes, Article 4582b, §4D(2)(b), will investigate violations of prepaid funeral services only if the investigation does not interfere with or duplicate an investigation conducted by the DOB.]~~

(B) If disciplinary action against a licensee of the TFSC is appropriate, the matter will be referred to the Administrator of Consumer Affairs and Compliance Division of TFSC. ~~[The TFSC will, upon request, assist the DOB and/or the TDI with investigations.]~~

(C) If the complaint involves a matter handled by either the DOB or TDI, as well as a violation of the TFSC statutes or regulations, it will be referred to the appropriate agency for further action. The DOB will be primarily responsible for enforcing violations of Finance Code Chapter 154 or 7 TAC Chapter 25. The agencies will coordinate their investigations to avoid duplication of effort.

(D) If the TFSC issues an order against a person or entity that also sells or provides prepaid funeral benefits or is a licensee under the jurisdiction of TDI, the TFSC will send the DOB and the TDI a copy of the order.

(3) Texas Department of Banking.

(A) (No change.)

(B) If disciplinary action against a person who violated Finance Code Chapter 154 or 7 TAC Chapter 25 [DOB permittee] is appropriate, the matter will be referred to the agency's legal staff.

(C) If the complaint involves a matter handled by either the TDI or TFSC, as well as a violation of the Finance Code Chapter 154 or 7 TAC Chapter 25 [the DOB statutes or regulations], the DOB will coordinate [the investigation] with those [either or both of these] agencies[, as appropriate]. The DOB will be primarily responsible for enforcing violations of the Finance Code Chapter 154 or 7 TAC Chapter 25. ~~[The DOB will, upon request, assist the TFSC and/or TDI with investigations.]~~

(D) ~~If [In the event that]~~ the DOB issues an order against a person or entity that is a licensee under the jurisdiction of the TFSC or the TDI, the DOB will send the TFSC and the TDI a copy of the order. ~~[a licensee under the TFSC's jurisdiction is found, after hearing, to have violated one or more provisions of Texas Civil Statutes, Article 548b, the DOB will inform the TFSC of the violation(s) in writing and provide documentation supporting the occurrence of the violation(s).]~~

(4) Texas Department of Insurance.

(A) ~~The [Complaints received by the]~~ Consumer Protection Section [Services area] of the TDI will log in and investigate complaints received [be logged in and investigated], except that if a complaint is solely about violations of Finance Code Chapter 154 and/or 7 TAC Chapter 25, the complaint will be referred to the DOB. Other areas of the TDI may provide [agency can be called upon for] assistance in the investigation of the complaint where appropriate.

(B) If disciplinary or other regulatory action against a licensee of the TDI is ~~[found to be]~~ appropriate, the matter will be referred to the Compliance Intake Unit of TDI.

(C) If the complaint involves a matter handled by either the DOB or TFSC, as well as a violation of the TDI statutes or regulations, it [the investigation] will be referred to the appropriate agency for further action. The DOB will be primarily responsible for enforcing violations of the Finance Code Chapter 154 or 7 TAC Chapter 25. The agencies will coordinate their investigations to avoid duplication of effort. ~~[coordinated with either or both of those agencies.]~~

(D) If the commissioner issues an order against a person that also sells, funds, or provides prepaid funeral benefits, or is subject to the jurisdiction of the DOB or the TFSC, the TDI will send the DOB and the TFSC a copy of the order. ~~[TDI will, upon request, assist the TFSC and/or DOB with investigations.]~~

(e) Actions the agencies regard as deceptive trade practices.

(1) The TFSC, the DOB, and the TDI regard as deceptive trade practices those actions found under the [Texas] Business and Commerce Code[;] §17.46.

(2) With respect to trade practices within the business of insurance, the TDI regards as deceptive trade practices those actions found under Insurance Code Chapter 541, [Article 21.21, and] other chapters [articles] of the Code, and the rules adopted by the TDI to implement those laws ~~[regulations promulgated by the TDI thereunder].~~

(f) Information the agencies will provide consumers and when that information is to be provided.

(1) The TFSC, DOB, and TDI will continue to provide consumers with the brochure entitled "Facts About Funerals" developed by TFSC (in Spanish and in English). The DOB will continue to provide consumers with information on its website in accordance with Finance Code §154.132, including the informational brochure developed in accordance with Finance Code §154.131. ~~[As soon as possible after the final adoption of the JMOU by rulemaking, the agencies will update the brochure to provide information about insolvency, the guaranty funds, and consumer complaints, and make the brochure accessible under the terms of the Americans with Disabilities Act. The agencies will provide other relevant consumer brochures to each other.]~~

(2) The DOB, TDI, and TFSC will maintain their toll-free numbers. ~~[TDI will maintain its toll-free number, and TFSC and DOB will each work towards consumer access via a toll-free number. Each agency will include its toll-free number as a prepaid funeral consumer protection resource in the respective agencies' consumer information materials. DOB, TFSC, and TDI will routinely inform consumers of options within the agency's knowledge available to them to resolve the complaint.]~~

(3) The TFSC, DOB, and TDI, as state agencies, are subject to the Public Information [Open Records] Act, Government Code Chapter 552 [Texas Civil Statutes, Article 6252-17a]. Upon written request, the three agencies will provide consumers with public information that [which] is not exempt from disclosure under that Act. As noted in the preamble to this JMOU, the agencies may, where not statutorily prohibited, exchange information necessary to fulfill their statutory responsibilities among each other, without making such information public information under the Public Information [Open Records] Act.

(g) Administrative penalties each agency imposes for violations.

~~[(1) All agencies.]~~

~~[(A) DOB, TDI, and TFSC will create a working group to develop recommendations concerning the three agencies working together on enforcement actions using the resources of the attorney general and/or prosecutorial or investigative agencies, where appropriate.]~~

~~[(B) DOB, TDI, and TFSC will refer DTPA and other such violations to the Federal Trade Commission and/or the attorney general whenever appropriate.]~~

(1) [(2)] Texas Funeral Service Commission. The TFSC may impose an administrative penalty, issue a reprimand, or revoke, suspend, or place on probation any licensee who violates Finance Code Chapter 154 ~~[Texas Civil Statutes, Article 548b].~~ TFSC administrative penalties vary based on the violation; TFSC sanctions are imposed under Occupations Code Chapter 651. ~~[The recommended range of administrative penalty for a violation of Article 548b is \$500 to \$5,000. Also a funeral establishment may be assessed an administrative penalty of \$250 to \$5,000 for each violation of Article 548b by a person directly or indirectly connected to the funeral establishment, under 22 TAC §201.11(a)(6) and (25) concerning Disciplinary Guidelines).]~~

(2) Texas Department of Banking. DOB administrative penalties vary based on the violation; DOB sanctions are imposed under the Finance Code Chapter 154.

~~[(3) Texas Department of Banking. The DOB may impose the following administrative penalties:]~~

~~[(A) cancel a permit or refuse to renew a permit pursuant to Texas Civil Statutes, Article 548b, §4; and]~~

~~[(B) seize prepaid funeral funds and records of a prior permit holder pursuant to Texas Civil Statutes, Article 548b, §8(b).]~~

~~(3) [(4)] Texas Department of Insurance. TDI administrative penalties vary based on the violation; TDI sanctions are imposed under Insurance Code Chapter 82 [; Article 1.10].~~

~~[(h) Meetings for developing cooperative efforts in regulation.]~~

~~[(1) DOB and TDI will develop an insolvency alert among themselves to minimize the drain of trust funds and premiums consistent with their respective statutory provisions. They will also clarify each agency's responsibility to access the respective guaranty fund vis-a-vis the other agency.]~~

~~[(2) DOB, TDI, and TFSC will develop methods to coordinate the efforts of the agencies to articulate the funeral providers' responsibility in the event of seller and/or insurance company insolvency.]~~

~~[(3) Each agency should seek input from the other agencies on any proposed agency regulations relating to prepaid funeral services and/or transactions; and, where appropriate, legislative recommendations concerning prepaid funeral services and/or transactions.]~~

~~[(4) The three agencies will provide lists of their key contact personnel and their telephone numbers to each other.]~~

~~[(5) In order to better accomplish the exchange of information and coordination of regulation described in this memorandum of understanding, the~~

~~appropriate staff of the TFSC, DOB, and TDI shall meet, at a minimum, once a year to discuss matters of mutual regulatory concern and share updates of the regulations promulgated by the respective agencies.]~~