

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

1. INTRODUCTION. The Commissioner of Insurance adopts amendments to Subchapter II, 28 TAC §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 Texas Department of Insurance (Department), relating to prepaid funeral services and transactions (also referred to as “prepaid funeral benefits”). Section 3.9001 is adopted without changes the proposed text published in the March 2, 2012, issue of the *Texas Register* (37 TexReg 1465). Section 3.9002 is adopted with nonsubstantive changes.

2. REASONED JUSTIFICATION. The amendments are necessary 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 changes to the JMOU.

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 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 Occupations Code §651.159.

Amendments to §3.9002(b) amend the responsibilities of the Texas Funeral Service Commission, the Texas Department of Banking, and the Department. 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, House Bill 3067, enacted by the 77th Legislature, Regular Session, amended Occupations Code Chapter 651 by adding Subchapter N, regarding crematory services. Amendments to §3.9002(b)(2) update the responsibilities of the Texas Department of Banking. 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 changes to subsection (b)(3).

Section 3.9002(c)(3) is deleted 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. Amendments to §3.9002(d) clarify each agency's procedures for resolving complaints, making § 3.9002(c)(3) unnecessary.

Since the adoption of the current JMOU, 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 previously set out in §3.9002(d) for investigating complaints were no longer relevant. Therefore, 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.

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

Amendments to §3.9002(g) update the provisions related to administrative penalties with language reflecting the agencies' current practices. The 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, so §3.9002(h) is deleted.

Nonsubstantive changes to §3.9001 and §3.9002 replace outdated references to statutory citations.

The Department has also made a nonsubstantive change to proposed 3.9002(b)(3)(B) for a minor editorial correction. Section 3.9002(b)(3)(b) as adopted reads: "regulating any person performing the acts of an insurance agent as defined in

Insurance Code Chapter 4001 and Insurance Code Chapter 101.” The change made to the proposed text does not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

3. HOW THE SECTIONS WILL FUNCTION.

Section 3.9001 describes the requirements under Occupations Code §651.159 for the Department, the Texas Funeral Service Commission, and the Texas Department of Banking to adopt by rule of JMOU of understanding relating to the regulation of prepaid funeral services and transactions.

Section 3.9002 is the JMOU. Subsection 3.9002(a) explains the purpose of the JMOU. Subsection 3.9002(b) describes the responsibilities of each agency. Subsection 3.9002(c) sets forth the procedures used by each agency for exchanging information or referring complaints. Subsection 3.9002(d) provides the complaint procedures used by each agency in investigating a complaint. Subsection 3.9002(e) describes the actions the agencies regard as deceptive trade practices. Subsection 3.9002(f) sets forth the information the agencies will provide consumers and when that information is to be provided. Subsection 3.9002(g) describes the administrative penalties each agency imposes for violations.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Department did not receive any comments on the published proposal.

5. STATUTORY AUTHORITY. The amendments are adopted under Occupations Code §651.159 and Insurance Code §36.001. Occupations Code §651.159 requires the Texas Funeral Service Commission, the Texas Department of Insurance, and the Texas Department of Banking to adopt by rule a JMOU relating to prepaid benefits. 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.

6. TEXT.

§3.9001. Introduction to Joint Memorandum of Understanding.

(a) Occupations Code §651.159 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) Any revisions to the joint memorandum of understanding will be adopted by rule by each agency.

(c) The joint memorandum of understanding entered into by the three agencies is found at §3.9002 of this title (relating to Joint Memorandum of Understanding).

§3.9002. Joint Memorandum of Understanding.

(a) Pursuant to Occupations Code §651.159 the Texas Funeral Service Commission (TFSC), the Texas Department of Insurance (TDI), and the Texas Department of Banking (DOB) adopt the following joint memorandum of understanding (JMOU) relating to prepaid funeral benefits as defined in Finance Code Chapter 154. The TFSC, TDI, and DOB intend this memorandum of understanding 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 accomplish this, where not statutorily prohibited, the three agencies will share information among the agencies that may not be available to the public generally under the Public Information Act, Government Code Chapter 552. Such information will be transmitted among agencies with the understanding 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.

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

(A) licensing funeral directors, embalmers, provisional funeral directors, provisional embalmers, crematory, and funeral establishments. The TFSC may refuse to license a person or establishment that violates Finance Code Chapter 154, under Occupations Code §651.460(b)(3);

(B) taking action under Occupations Code §651.460(b)(3) against any licensee violating Finance Code Chapter 154; 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 by persons directly or indirectly connected to the crematory or funeral establishment.

(2) The Texas Department of Banking is responsible for administering Finance Code Chapter 154 and 7 Texas Administrative Code (TAC) Chapter 25, 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.

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

(A) regulating insurers that issue or propose to issue life insurance policies or annuity contracts that may fund prepaid funeral contracts;

(B) regulating any person performing the acts of an insurance agent as defined in Insurance Code Chapter 4001 and Insurance Code Chapter 101;

(C) regulating insurance policies and annuity contracts that may fund prepaid funeral contracts;

(D) regulating unfair trade practices relating to the insurance policies and annuity contracts that may fund prepaid funeral contracts pursuant to Insurance Code Chapter 542; and

(E) regulating unfair claims settlement practices by insurance companies pursuant to the Insurance Code Chapter 542.

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

(1) Exchanging information. If, upon receipt of a complaint, or during the course of an investigation, an agency (referred to as the receiving agency) receives any information that might be deemed of value to another of the agencies (referred to as the reviewing agency), the receiving agency will contact the reviewing agency and will forward the relevant information to the reviewing agency at its request.

(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 the complainant contact information for the reviewing agency, and encourage the complainant to re-contact the receiving agency concerning the reviewing agency's processing of the complaint.

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

(1) All agencies.

(A) Each agency will develop internal complaint procedures for violations relating to prepaid funeral benefits. The procedures should at a minimum provide for:

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

(ii) 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.

(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.

(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.

(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) Complaints received by the Special Audit Division will be entered into a complaint log and assigned a reference number. If, after agency notice to the subject of the complaint, the complaint is not resolved, the DOB will investigate.

(B) If disciplinary action against a person who violated Finance Code Chapter 154 or 7 TAC Chapter 25 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 will coordinate with those agencies. The DOB will be primarily responsible for enforcing violations of the Finance Code Chapter 154 or 7 TAC Chapter 25.

(D) If 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.

(4) Texas Department of Insurance.

(A) The Consumer Protection Section of the TDI will log in and investigate complaints received, 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 assistance in the investigation of the complaint where appropriate.

(B) If disciplinary or other regulatory action against a licensee of the TDI is 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 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.

(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.

(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 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, other chapters of the Code, and the rules adopted by the TDI to implement those laws.

(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.

(2) The DOB, TDI, and TFSC will maintain their toll-free numbers.

(3) The TFSC, DOB, and TDI, as state agencies, are subject to the Public Information Act, Government Code Chapter 552. Upon written request, the three agencies will provide consumers with public information that 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 Act.

(g) Administrative penalties each agency imposes for violations.

(1) 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. TFSC administrative penalties vary based on the violation; TFSC sanctions are imposed under Occupations Code Chapter 651.

(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 Insurance. TDI administrative penalties vary based on the violation; TDI sanctions are imposed under Insurance Code Chapter 82.

CERTIFICATION. This agency certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on April 23, 2012.



Sara Waitt, General Counsel
Texas Department of Insurance

IT IS THE ORDER of the Commissioner of Insurance that amendments to Subchapter II, 28 TAC §3.9001 and §3.9002 specified herein, concerning the joint memorandum of understanding between the Texas Funeral Service Commission, the Texas Department


12-0420

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 3. Life, Accident and Health Insurance and Annuities

Adopted Sections
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of Banking, and the Department, relating to prepaid funeral services and transactions (also referred to as "prepaid funeral benefits"), are adopted.

AND IT IS SO ORDERED.


ELEANOR KITZMAN
COMMISSIONER OF INSURANCE

Attest:

Sara Waitt, General Counsel
Texas Department of Insurance

COMMISSIONER'S ORDER NO. 12-0420