

CHAPTER 808

H.B. No. 2499

AN ACT

relating to prepaid funeral services or merchandise.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Chapter 512, Acts of the 54th Legislature, Regular Session, 1955 (Article 548b, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 1. *PURPOSE; DEFINITIONS; PERMITS.* (a) *This Act provides limits on the manner in which a person is permitted to accept funds in prepayment of funeral services to be performed in the future. The purpose of this Act is to:*

(1) *provide a regulatory framework so that members of the public have an opportunity to arrange and pay for funerals for themselves and their families in advance of need; and*

(2) *provide all safeguards to protect the prepaid funds and to assure that the prepaid funds will be available to pay for the prearranged funeral services.*

(b) *In this Act:*

(1) "Affiliate" means a person or entity directly or indirectly controlling, controlled by, or under common control with a permit holder or the funeral provider.

(2) "Commissioner" means the Banking Commissioner of Texas.

(3) "Department" means the Banking Department of Texas.

(4) "Earnings" means the amount in an account in excess of the amount paid by the purchaser of a prepaid funeral benefits contract and deposited or placed in the account as provided by Section 5(a)(2) of this Act. The term includes accrued interest, accrued income, and enhanced or increased value.

(5) "Funeral provider" means the funeral home designated in a prepaid funeral benefits contract that has agreed and obligated itself to provide the specified prepaid funeral benefits.

(6) "Insurance policy" means a life insurance policy or annuity contract.

(7) "Permit holder" means a person having a valid permit to sell prepaid funeral benefits.

(8) "Person" means any individual, firm, partnership, corporation, or association.

(9) "Prepaid funeral benefits" means prearranged or prepaid funeral or cemetery services or funeral merchandise, including caskets, grave vaults, and all other articles of merchandise incidental to a funeral service. The term does not include a grave lot, grave space, grave marker, monument, tombstone, crypt, niche, or mausoleum unless it is sold in contemplation of trade or barter for services and merchandise to which this Act applies.

(10) "Seller" means a person selling, accepting funds or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or policies of insurance to fund prepaid funeral benefits in this state.

(11) "Trustee" means the person named as trustee in the instruments creating a prepaid funeral trust.

(c) Unless a person holds a permit issued under this Act, the person may not:

(1) sell prepaid funeral benefits, or accept funds for prepaid funeral benefits, in this state under any contract; or

(2) solicit the designations by an individual of the prepaid funeral benefits to be provided out of any fund, investment, security, or contract, including contracts or policies of insurance authorized, and sold under a license issued, by the State Board of Insurance, to be created or purchased by that individual at the suggestion or solicitation of the seller.

(d) A seller who violates Subsection (c) of this section is not entitled to enforce a prepaid funeral benefits contract but the purchaser or the purchaser's heirs or legal representative is entitled to recover:

(1) all amounts paid to the seller under that contract; and

(2) all amounts paid to any fund or for any investment, security, or contract, including contracts or policies of insurance authorized by the State Board of Insurance.

(e) Delivery of funeral merchandise before death is not performance or fulfillment, in whole or in part, of a prepaid funeral benefits contract entered into after the effective date of this Act.

(f) A seller may not increase the sales price of an item not covered by this Act for the purpose of allocating a lesser sales price to an item that is covered by this Act.

(g) All funds received in exchange for prepaid funeral benefits shall be administered as prescribed by:

(1) Section 1A of this Act governing insurance-funded prepaid funeral benefits; or

(2) Section 5 of this Act governing trust-funded prepaid funeral benefits.

(h) Without the prior written consent of the Commissioner, a holder of prepaid funeral funds designated under Section 5(a)(2) of this Act may not use those funds to purchase, lease, or otherwise invest in an asset owned by the seller or funeral provider or an affiliate of the seller or funeral provider.

(i) ~~The Commissioner by order may disapprove a transaction described by Subsection (h) of this section on the ground that it would materially adversely affect the interests of the purchasers of prepaid funeral benefits contracts. The Commissioner shall approve or disapprove the transaction within 30 days after the date of the receipt of written notification by the permit holder. Failure to act within that period constitutes approval of the transaction. Unless the permit holder requests a hearing within 10 days after the date of the order of disapproval, the order shall become effective as proposed. If the permit holder requests a hearing within the 10-day period, it shall be conducted in accordance with the procedures for a contested case hearing under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) and its subsequent amendments. [Any individual, firm, partnership, corporation, or association (hereinafter called "organization" or "seller") desiring to sell prearranged or prepaid funeral services or funeral merchandise (including caskets, grave vaults, and all other articles of merchandise incidental to a funeral service, but excluding grave lots, grave spaces, grave markers, monuments, tombstones, crypts, niches, and mausoleums), or accepting funds for such services or merchandise, in this state, under any contract, expressed or implied, providing for prepaid burial or funeral benefits or merchandise (hereinafter called "prepaid funeral benefits"), or who shall solicit the designations by an individual of the items of funeral merchandise or services which he desires to be provided out of any fund, investment, security, or contract to be created or purchased by such individual at the suggestion or solicitation of the organization shall obtain a permit from the State Banking Department (hereinafter called Department) of this state authorizing the transaction of this type of business, before conducting such business. Seller shall not be entitled to enforce a contract made in violation of this Act, but the purchaser or his heirs, or legal representative, shall be entitled to recover all amounts paid to the seller under any contract made in violation thereof, and all amounts paid whether or not paid seller, to any fund or for any investment, security, or contract where the seller has violated the provisions of this Act. Delivery of funeral merchandise prior to death shall not constitute performance or fulfillment, either wholly or in part, of any prepaid funeral benefits contract entered into after the effective date of this amendatory Act.~~

~~[Provided, however, that grave lots, grave spaces, grave markers, monuments, tombstones, crypts, niches, and mausoleums shall not be excluded from the provisions of this Section when these items and articles are sold in contemplation of trade or barter for services and articles designated as included by the provisions of this Section.]~~

Sec. 1A [1a]. **INSURANCE FUNDED PREPAID FUNERAL BENEFITS.** (a) No seller [organization] covered by this Act shall solicit by any means whatsoever the designation by an individual of prepaid funeral benefits [funeral services or merchandise which he desires] to be provided to be paid out of any fund, investment, security, or contract, including insurance policies, to be created or purchased by or for such an individual at the suggestion or solicitation of the seller [organization], unless such a fund is to be created by a life insurance policy or an annuity contract approved by the Board of Insurance and issued by [with] an insurance company licensed by the Board of Insurance or except as provided for trust-funded prepaid funeral benefits by Section 5 of this Act [in Texas], or unless such fund, investment, security, or contract shall have been approved by the Department as safeguarding the right and interests of the individual, his heirs and assigns, to substantially the same or greater degree as is provided with respect to funds regulated by Section 5 hereof. An insurance-funded prepaid funeral benefits contract must be executed in conjunction with the application for the issuance of the insurance policy.

(b) The [Provided, however, that the] Department may require evidence of payment of premiums on any life insurance policy, or an annuity contract used to create a fund to guarantee prepaid funeral benefits. Any seller failing to provide such evidence to the Department after being so requested by written notice shall be subject to cancellation of its permit under the provisions of Section 4 of this Act. A seller shall remit all premiums collected for insurance policies or annuity contracts funding prepaid funeral benefits to the insurance company within 30 days after the date of collection.

(c) On the death of a beneficiary named in an insurance-funded prepaid funeral benefits contract, the seller or funeral provider, after completion of the funeral service and presentation to the insurance company of proper affidavits signed and sworn to by an officer or designated agent of the seller on forms prescribed by the Department, together with a

certified copy of the death certificate, may withdraw the benefits payable under that policy. The seller shall maintain copies of those affidavits and death certificate for examination by the Department.

(d) A conversion from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits must be approved by the Department as safeguarding the rights and interests of the individual who purchases the prepaid funeral benefits contract. Each contract holder shall be notified in writing of the terms of the proposed conversion and of the holder's right to decline the conversion. Applications for approval of conversions from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits must be filed with the Department on forms prescribed by the Department and accompanied by conversion application fees established by the Department under Section 2 of this Act.

(e) The cancellation of an insurance-funded prepaid funeral benefits contract shall be handled as provided by Section 5(b) of this Act.

Sec. 2. **ADMINISTRATION OF ACT; CONTRACTS.** This law shall be administered by the [State Banking] Department. The Department is authorized to prescribe reasonable rules and regulations concerning [application] fees to defray the cost of administering this Act, but may not maintain unnecessary fund balances, and fee amounts shall be set in accordance with this requirement, the keeping and inspection of records relating to the sale of prepaid funeral benefits, the filing of contracts and reports, changes in management or control of an organization, and all other matters incidental to the enforcement and orderly administration of this law; and the Department shall [may] approve forms for sales contracts for prepaid funeral benefits before their use. All such contracts must be in writing and no contract form shall be used without prior approval of the Department. All such contracts shall state the name of the funeral home or other person [organization] primarily responsible for providing the prepaid funeral benefits [funeral services or merchandise] specified in such contracts. In the event the seller is not the funeral home designated to provide the specified prepaid funeral benefits [funeral services or merchandise], such contract shall not be valid unless the funeral home so designated is a party to the contract and therein agrees and obligates itself to provide such specified prepaid funeral benefits [funeral services or merchandise]. It is further provided, that all [prearranged or] prepaid funeral benefits contracts shall set forth the particulars of the funeral merchandise, including a description and specifications of the material used in the caskets or grave vaults to be furnished, and such contracts shall set forth the particulars of the prepaid funeral benefits [professional services to be performed and the funeral home facilities and automotive equipment] to be provided.

Sec. 3. **PERMIT.** Each person [organization] desiring to sell or to continue to sell prepaid funeral benefits shall file an application for a one-year permit with the Department on a form prescribed by the Department. The applicant [and] shall pay a filing fee in an amount set by the Department under Section 2 of this Act and extraordinary expenses required for out of state investigation of the applicant, if applicable [of \$250]. The Commissioner may conduct an investigation of the applicant for the initial permit, and if the Commissioner finds that the business ability, experience, character, financial condition, and general fitness of the applicant warrants the confidence of the public, the Commissioner shall approve [grant] the application and issue a permit to the applicant. If the Commissioner finds otherwise, the Commissioner shall notify the applicant, who is entitled to a hearing on the application, on request, within 60 days after the date of the request, to be conducted in accordance with the procedures for a contested case hearing under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) and its subsequent amendments. The Department by rule may adopt a system under which permits expire on various dates during the year. The Commissioner may refuse to renew a permit if the applicant has committed one or more of the acts described by Section 4(a) of this Act and has not corrected the violation within 30 days after the date of written notice from the Commissioner. The fee for renewal shall be set by the Department under Section 2 of this Act [is \$60].

Sec. 4. **ENFORCEMENT.** (a) The Commissioner may issue an order to cancel, suspend, or refuse to renew a permit issued to a person under this Act to sell prepaid funeral benefits if the Commissioner finds, by examination or other credible evidence, that the person:

(1) has violated this Act or another law of this state, including a final order or rule of the Commissioner or the Department, relating to the sale of prepaid funeral benefits;

(2) has misrepresented or concealed a material fact in the application for the permit; or

(3) has obtained, or attempted to obtain, the permit by misrepresentation, concealment, or fraud.

(b) In addition to other penalties that may be imposed under this Act, the Commissioner may bring a civil action in a district court in Travis County to enjoin a violation or threatened violation of this Act or a final order or rule of the Commissioner or the Department.

(c) The Commissioner may issue an order to cease and desist if the Commissioner finds, by examination or other credible evidence, that a person has violated this Act or another law of this state, including a final order or rule of the Commissioner or the Department, relating to the sale of prepaid funeral benefits.

(d) An order proposed under Subsection (a) or (c) of this section shall be served on the person named and shall state the grounds for the proposed order with reasonable certainty and the proposed effective date, which may not be before the 16th day after the date of its mailing by certified mail, return receipt requested, to the person's last known address. Unless the person named in the order requests a hearing within 15 days after that mailing, the order becomes effective as proposed. If the person named requests a hearing, it shall be conducted in accordance with the procedures for a contested case hearing under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) and its subsequent amendments.

(e) Following cancellation of or failure to renew a permit under Subsection (a) of this section or on notice to a person required to obtain a permit under this Act, the Commissioner may issue an order to seize all prepaid funeral funds, including earnings, wherever those funds are held and may issue an order to seize any or all records that relate to the sale of prepaid funeral benefits, if the Commissioner finds, by examination or other credible evidence, that the person:

(1) has failed to deposit or remit funds in accordance with Section 1A or 5 of this Act;

(2) has misappropriated, converted, or illegally withheld or failed or refused to pay on proper demand any money entrusted to the person belonging to the beneficiary under a prepaid funeral benefits contract;

(3) has refused to submit to examination by the Department;

(4) has been the subject of an order to cancel, suspend, or refuse to renew a permit; or

(5) does not hold a valid permit or has transferred the ownership of its business to an acquiror that does not hold a valid permit and that:

(A) has not applied for a new permit within 30 days after the date of the consummation of the transfer; or

(B) has been denied a new permit.

(f) An order under Subsection (e) is effective instanter if the Commissioner finds that immediate and irreparable harm is threatened to a beneficiary under a prepaid funeral benefits contract. If such a threat does not exist, the order shall state the proposed effective date, which may not be before the 16th day after the date of mailing by certified mail, return receipt requested, to the person's last known address. Unless the person named in the order requests a hearing within 15 days after that mailing, the order becomes effective as proposed. If the person named requests a hearing, it shall be conducted in accordance with the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) and its subsequent amendments.

(g) Within 30 days after the date of a seizure of funds, the Commissioner may notify all known parties who purchased prepaid funeral benefits contract obligations from the person whose permit was cancelled. The notice shall include an explanation of the procedures under this Act for cancelling the contracts and claiming funds that may be due to the parties if they elect to cancel. The notice shall instruct those parties how to continue making payments due under the contracts if they elect to keep the contracts in force. The notice

shall instruct those parties that if they elect to keep the contracts in force the Commissioner will transfer responsibility to perform the contracts to a responsible successor permit holder selected by the Commissioner or transfer the seized funds to the guaranty fund, subject to the claims process prescribed by rule under Section 8A of this Act. A successor permit holder to whom a contract is transferred by the Commissioner assumes responsibility to perform the contract and is entitled to retain all funds that would have been due the person whose permit was cancelled, including any funds seized by the Commissioner. The Department shall adopt rules governing selection of a successor permit holder. Any premium received through the selection process that exceeds the claims against the prior permit holder shall be paid into the guaranty fund.

(h) The Commissioner may issue an order to a person requiring restitution if, after notice and opportunity for hearing held in accordance with the procedures for a contested case hearing under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) and its subsequent amendments, the Commissioner finds that the person:

(1) has failed to deposit funds in accordance with Section 5 of this Act; or

(2) has misappropriated, converted, or illegally withheld or failed or refused to pay on proper demand any money entrusted to the person belonging to the beneficiary under any prepaid funeral benefits contract.

(i) In addition to any other penalties that may be imposed under this Act, a person who violates this Act or a final order or rule of the Commissioner or Department is subject to a civil penalty unless within 30 days after the date of receiving written notice from the Department of the violation, the person corrects the violation by performing the required duty or act. A civil penalty may not exceed \$1,000 per violation for each day that the violation persists.

(j) A civil penalty may be imposed by the Commissioner after notice and opportunity for hearing in accordance with the procedures for a contested case hearing under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) and its subsequent amendments. In determining the amount of the penalty, the Commissioner shall consider the seriousness of the violation and the good faith of the person charged in attempting to comply with this Act. The amount of the penalty may be collected by the Commissioner in the same manner that money judgements are enforced in the district courts of this state.

(k) After an order issued by the Commissioner to seize funds or records under Subsection (e) of this section has become final and not subject to appeal, the Commissioner may petition the district court in the county of residence of a person required to hold a permit under this Act, requesting the issuance of an order to show cause why the business and affairs of that person should not be liquidated and a receiver appointed by the court to accomplish that purpose if the person has committed one or more of the following acts and has failed or refused to correct the violations within 30 days after the date on which the person received written notice from the Commissioner:

(1) failed to deposit funds in accordance with Section 5 of this Act;

(2) misappropriated, converted, or illegally withheld or failed or refused to pay over upon proper demand any money entrusted to that person belonging to the beneficiary under any prepaid funeral benefits contract; or

(3) allowed the person's permit to lapse or has had the permit revoked under this Act and has not made adequate provision for the administration of all funds deposited with the person for prepaid funeral benefits contracts in accordance with the terms of the contracts and applicable law, including regulations [~~The Department may cancel a permit or refuse to renew a permit for failure to comply with any provision of this Act or any valid rule or regulation which the Department has prescribed, after reasonable notice to the permittee and after a hearing if the permittee requests a hearing.~~

[~~No organization shall be entitled to a new permit for a period of one year after cancellation or refusal by the Department to renew its permit, but shall thereafter be entitled to a new permit upon satisfactory proof of compliance with this law.~~

Sec. 4A. TRANSFER OF BUSINESS OWNERSHIP. (a) A permit issued under this Act is not transferable.

(b) If a permit holder transfers the ownership of its business, the permit holder shall notify the Department and the depository of the funds held under Section 5 of this Act by registered mail within seven days after the date the transfer is consummated. If the transfer is to a person who is not a permit holder, the person shall file, within 30 days after the date of the consummation of the transfer, an application for a permit with the Department in accordance with Section 3 of this Act. If the application is not filed within that period, or if the person does not meet the requirements for issuance of a permit under this Act, the Commissioner shall follow the procedures set forth in Section 4 of this Act for denying the permit application and for seizing the funds or records.

(c) Any person aggrieved by the final action of the Department may appeal therefrom to a District Court in Travis County, Texas.

Sec. 5. TRUST FUNDED PREPAID FUNERAL BENEFITS. (a) All sums heretofore or hereafter paid or collected on contracts for prepaid funeral benefits entered into prior to the effective date of this Act shall be handled in accordance with the manner in which they have heretofore been handled. All sums paid or collected on such contracts entered into after the effective date of this Act (with the exception of those paid where a contract of insurance previously is created or approved by the Department) shall be handled in the following manner:

(1) The seller of a trust-funded prepaid funeral benefits contract [~~funeral home (or other entity collecting said funds)]~~ may retain as its own money, for the purpose of covering its selling expenses, servicing costs, and general overhead, an amount not to exceed one-half of all funds so collected or paid until it has received for its use and benefit an amount not to exceed ten percent of the total amount agreed to be paid by the purchaser of said prepaid funeral benefits as such total amount is reflected in the contract. [~~No charges or assessments, except premiums collected on an insurance policy guaranteeing the payments on a prepaid funeral contract or the unpaid balance thereof, shall be collected from the purchaser other than those included in the total amount of said contract.~~]

(2) All amounts paid or collected, with the exception of those permitted to be retained as set forth above, shall, within 30 [~~thirty~~] days after such collection, be (a) deposited in a savings and loan association in this state in an interest-bearing account insured by the federal government, or (b) deposited in a state or national bank in this state in an interest-bearing account insured by the federal government, or (c) placed with the trust department in a state or national bank in this state, or in a trust company authorized to do business in this state, to be invested by such trust department or company in accordance with the terms and provisions of this Act [~~the Texas Trust Code (Subtitle B, Title 9, Property Code)~~]. Such deposits or trust accounts shall be carried in the name of the funeral provider [~~home~~] or other entity to whom the purchaser makes payment, but accounting records shall be maintained by the seller showing the amount deposited or invested with respect to any particular purchaser's contract.

(3) On the death of a beneficiary named in a prepaid funeral benefits contract, the seller, after completion of the funeral service and presentation to the depository of proper affidavits signed and sworn to by an officer or authorized agent of the seller on forms prescribed by the Department and a certified copy of the death certificate, may withdraw the amount equal to the original contract amount paid in by the purchaser less amounts retained under Subsection (a)(1) of this section, plus all earnings attributable to that contract. The seller shall maintain the copies of the affidavits and death certificate for examination by the Department. [~~The date of death of the purchaser of such contract (or other individual who may be designated in the contract as the person for whose funeral such funds may be used) shall be the maturity date of the contract, and as soon as conveniently practicable after such maturity date and upon presentation of a certified copy of the death certificate of such person together with proper affidavits as may be required by the Department, such funds shall be released in fulfillment of the contract, and the funeral home (or other entity to the contract which has collected the funds) shall, if the amount so withdrawn does not equal one hundred percent of the total amount paid by the purchaser, make up the difference so that the amount available for funeral benefits shall~~]

~~equal one hundred percent of the total amount paid by the purchaser. Any amounts accumulated at maturity on any particular contract in excess of one hundred percent of the amount deposited or placed by the seller shall be available to the funeral home (or other entity collecting said funds) in making up the difference on any particular contract which at maturity did not have funds available equal to one hundred percent of the amount paid by the purchaser.]~~

(4)(A) ~~The seller may withdraw [at any time] funds out of earnings [accrued interest or income] on the accounts for the purpose of paying reasonable and necessary trustee's fees or depository fees. With prior approval of the Department, the seller may withdraw funds out of earnings on the accounts [charges made by a savings and loan association, or bank, or trust department of a bank, or trust company, and trustee's fees made by a savings and loan association, or bank, or trust department of a bank, or trust company, with respect to such accounts,] for the purpose of paying any taxes, [with prior approval of the Department,] caused or created by reason of the existence of such deposit accounts or trust accounts or for the purpose of paying an assessment under Section 8A of this Act, [or for the purpose of paying any assessment under this Act or ordered by the Department for funding a fund to guarantee performance of prepaid funeral contracts].~~

(B) ~~The seller may also withdraw funds from the earnings [accrued interest or income] on the [deposit] accounts for the purpose of paying the examination fee for one examination by the Department each calendar year, or for the preparation of financial statements required by the Department, including financial statements required in lieu of an examination by the Department.~~

(C) ~~Upon the maturity date of a trust-funded contract as above provided and only after the funeral provider [home] has fully performed its obligations under said contract with the purchaser, or at the time of cancellation prior to maturity as provided in Subsection (b)[(5)] herein, the seller may [additionally] withdraw from said [deposit] account all earnings attributable to [(whether a trust or other funded account) any enhanced value, accrued interest, or accrued income on] said contract. Such withdrawal shall be the proportionate part of the earnings [total enhanced value, accrued interest or accrued income,] that the amount deposited under said contract bears to the total amount deposited from all unmatured contracts, less any withdrawals of excess earnings made in accordance with this section, or, if the Commissioner has affirmatively determined that the records of the permit holder are adequate to allow this method to be exercised in an accurate manner, the withdrawals may be equal to the actual earnings on individual matured contracts, minus any properly allocated expenses permitted by this section, less any withdrawals of excess earnings made in accordance with this section [subsection].~~

(D) ~~On approval by the Commissioner, a [application, the Commissioner may, after notice and hearing conducted pursuant to the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), authorize the] seller of prepaid funeral benefits may [preneed services to] withdraw excess earnings from the seller's trust accounts [deposits]. For the purposes of this section, "excess earnings" means funds in the trust accounts, including all realized and unrealized gains and losses, [deposit] that exceed 110 [107] percent of all sums paid by purchasers on the contracts. [of the seller's obligations on each contract for which deposits have been made after the date the contracts are entered into. The Commissioner may grant the authorization if in the Commissioner's opinion, the evidence shows that the seller's ability to deliver the contracted services and merchandise is not diminished by the withdrawal. The Commissioner by rule may set out factors that may be considered in evaluating each application. The Commissioner's decision on whether to grant the withdrawal is not limited to those factors. A withdrawal of excess earnings made after an initial withdrawal as provided by this subsection may not be approved for more than 93 percent of the funds remaining in the accounts after the withdrawal that are in excess of the 107 percent to be maintained in satisfaction of the seller's contractual obligations.]~~

(i) ~~A seller must apply to the Commissioner for approval to withdraw excess earnings from the seller's trust accounts under this subsection. An application must be in writing and must include a sworn statement by an agent of the seller designated under Section 6 of this Act that:~~

(I) specifies the amount eligible for withdrawal based on the market value of the trust assets as of a date not more than 45 days prior to the date of the application; and

(II) affirms that the requested withdrawal constitutes excess earnings.

(ii) An application by a seller to withdraw excess earnings from the seller's trust accounts must be accompanied by:

(I) a statement from the trustee of the trust accounts verifying the market and book values of the assets in the accounts as of a date not more than 45 days prior to the date of the application;

(II) the seller's most recent audited or unaudited financial statements dated not more than 18 months prior to the date the application is filed with the Commissioner. In the event of the filing of a consolidated application on behalf of affiliated sellers, audited financial statements of the parent company may be submitted in lieu of those of the sellers. Such audited statements shall be accompanied by an unqualified opinion by a certified public accountant. In the event the seller provides unaudited financial statements or audited financial statements with a qualified opinion pursuant to this subsection, the Commissioner may approve the application if the application is accompanied by a surety bond from a company acceptable to the Commissioner, in favor of the Commissioner, in an amount equal to the amount of the requested withdrawal. Such bond shall be reduced on an annual basis by an amount equal to 10 percent per year;

(III) the seller's quarterly audited or unaudited profit and loss statements covering the two years immediately preceding the year covered by the financial statements required in Subsection (a)(4)(D)(ii)(II) of this section. If the seller has not been in operation for three (3) years, the profit and loss statements shall cover the period of time that the seller has been operating;

(IV) financial records or reports reflecting the total amount of the seller's contracts and the total amount of payments made by purchasers with respect to the seller's contracts; and

(V) In the event an application is submitted by a seller that is not the funeral home designated in the contracts that is obligated to provide the specified prepaid funeral benefits, in addition to all information required under Subsections (a)(4)(D)(ii)(I) through (IV) of this section, such application shall be accompanied by:

(-a-) copies of agreements with all funeral homes that will deliver the funeral services and merchandise, including amounts agreed to be paid to such funeral homes by the seller; and

(-b-) an affidavit from each funeral home stating that the withdrawal of excess earnings in the amount requested will not affect its contractual obligation to deliver the contracted funeral services and merchandise.

(iii) The Commissioner shall approve a completed application to withdraw excess earnings unless the Commissioner determines that the seller's ability to deliver the contracted services and merchandise would be materially jeopardized by the withdrawal due to:

(I) the seller's failure, after written notice from the Commissioner, to substantially comply with any law or rule applicable to the sale of prepaid funeral benefits in this state;

(II) the seller's willful commission of any felony or fraudulent act in the conduct of the seller's prepaid funeral business that threatens the seller's solvency;

(III) the seller's refusal to submit to an examination of the seller's trust accounts under Section 8 of this Act;

(IV) the cancellation or involuntary non-renewal of the seller's permit to sell prepaid funeral benefits;

(V) the seller's knowing withdrawal from the trust accounts of amounts that are not authorized under this Act or the seller's refusal to correct the unauthorized withdrawal after the receipt of written notice from the Commissioner;

(VI) the seller's failure to deposit or remit funds in accordance with this section or the seller's refusal to make the required deposit or remittance after the receipt of written notice from the Commissioner;

(VII) the amount of the requested withdrawal exceeding the net worth of the seller, or if the seller is an affiliate of a consolidated entity, the net worth of the parent corporation. In the event the requested withdrawal exceeds the net worth of the seller or, if applicable, the parent corporation, the Commissioner may approve the withdrawal if the seller provides a surety bond from a company acceptable to the Commissioner, in favor of the Commissioner, in the amount of the withdrawal in excess of the net worth of the seller or its parent. Such bond shall be reduced on an annual basis by an amount equal to 20 percent per year;

(VIII) the seller (or the parent, if a consolidated application is filed) having experienced a net loss from operations in any of the last three years. In the event of such a loss, the Commissioner may approve the withdrawal if the seller provides a surety bond from a company acceptable to the Commissioner, in favor of the Commissioner, in an amount equal to the requested withdrawal. Such bond shall be reduced on an annual basis by an amount equal to 10 percent per year;

(IX) the contingent liabilities other than commitments disclosed on the face of seller's (or parent's if a consolidated application is filed) audited consolidated or unconsolidated balance sheet exceeding seller's (or parent's if a consolidated application is filed) net worth as of the date of the financial statement. In such event, the Commissioner may approve the withdrawal if the seller provides a surety bond from a company acceptable to the Commissioner, in favor of the Commissioner, in an amount equal to the requested withdrawal. Such bond shall be reduced on an annual basis by an amount equal to 10 percent per year; or

(X) the withdrawal causing the investments in the trust accounts to be in violation of Section 5A(d) of this Act.

(iv) In connection with the Commissioner's review of a seller's application to withdraw excess earnings from the trust accounts under this subsection, the Commissioner may conduct an examination or audit of the seller's prepaid funeral benefits records under Section 8 of this Act.

(v) The Commissioner shall issue a written notice within 10 days of receipt of an application informing the seller either that the application is complete and accepted for filing, or that the application is deficient and that specific additional information is required within 30 days. If the requested information is not received within 30 days, the application is deemed denied unless good cause exists for failure to provide the information timely. The Commissioner shall approve or deny an application under this subsection within 90 days of the date of filing of a completed application. If a completed application to withdraw excess earnings under this subsection is not denied by the Commissioner within 90 days after it is accepted by the Commissioner as complete, the application shall be deemed approved by the Commissioner and the requested withdrawal shall be deemed authorized without further action by the Commissioner. The Commissioner may extend this time period for an additional 90 days for good cause and upon notice to the seller. If the Commissioner denies the application for withdrawal, the seller will be entitled to a hearing conducted pursuant to the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes). Judicial review of a final decision by the Commissioner shall be by trial de novo in a district court of Travis County.

(vi) Within 60 days following the approval of an application under this subsection, the seller shall provide the Commissioner with a verified statement indicating that the withdrawn funds were used in the ordinary course of the seller's business.

(vii) In the event a material error in an application is discovered or the seller fails or refuses to comply with or fulfill any undertaking assumed by the seller in

connection with the withdrawal of excess earnings from the seller's trust accounts, the seller, after notice from the Commissioner and a hearing, must return the disputed funds to the trust accounts or the seller's permit will be subject to cancellation.

(viii) To the extent that additional federal income taxes or other taxes are due as a result of a withdrawal of excess earnings from a seller's trust accounts, such taxes shall be paid by the seller and shall not be withdrawn from the trust accounts.

(ix) Applications for withdrawal of excess earnings under this subsection shall be filed with the Department on forms acceptable to the Commissioner. Each application shall be accompanied by a nonrefundable fee of \$1,000 per permit, or a fee not to exceed \$5,000 for consolidated applications, made payable to the Department, in order to cover the costs of processing the application.

(x) This Subsection (D) shall be repealed on December 31, 1993. Such repeal shall not affect those applications to withdraw excess earnings filed prior to December 31, 1993, or that may be supplemented after December 31, 1993, all of which applications shall be handled in accordance with the provisions of this Subsection (D).

(b)(1) [(5)]In the event a purchaser under a trust-funded contract should desire to cancel the contract prior to maturity, such cancellation may be accomplished by the purchaser [seller] giving to the seller written [fifteen days] notice of cancellation on forms prescribed by the Department [in writing to the Department, signed by the purchaser], and thereafter, the [upon written authorization from the Department, such] seller within 30 days after the date of the cancellation notice shall [may] withdraw and pay to the purchaser the funds in such depository being held for the purchaser's use and benefit; provided, however, such purchaser shall be entitled to receive only the actual amounts paid in by him less the amounts permitted to be retained as provided in Subsection (a)(1) hereof. The seller shall maintain copies of the cancellation forms for examination by the Department. Purchaser or seller may make no partial cancellations or withdrawals.

(2) A purchaser of a trust-funded contract who elects to cancel the contract during the first year of the contract when payments required under the contract are current is entitled to receive 90 percent of the actual amounts paid in by the purchaser or the amounts deposited in trust with respect to the purchaser's contract, whichever is greater, regardless of the amount held in trust. A purchaser of an insurance-funded contract who elects to cancel the contract during the first year of the contract when payments required under the contract are current is entitled to receive the cash surrender value of the policy.

(3) If the purchaser cancels the contract on the solicitation of the seller, the purchaser is entitled to withdraw all funds paid to the seller and all earnings [enhanced value] attributable to the funds. If the funds are used to purchase a new prepaid [preneed] funeral contract pursuant to a solicitation by the seller, the new contract must, as determined by the Department, protect the purchaser to an extent equal to or greater than that provided by the original contract, and the purchaser's cost of the same or substantially the same services and merchandise may not be increased above that contained in the canceled contract.

(4) The purchaser of a prepaid funeral benefits contract may irrevocably waive and renounce the purchaser's right to cancel the contract under Subsection (b) of this section. The waiver and renunciation may be included as a provision of the contract or be made in a separate writing signed by the purchaser and the seller. The waiver and renunciation of a purchaser's right to cancel the purchaser's prepaid funeral benefits contract do not affect:

(A) a right the purchaser has under the contract to change the beneficiary of the contract;

(B) the purchaser's right to cancel the contract under Section 4(g) of this Act upon any seizure of the seller's prepaid funeral funds by the Commissioner; or

(C) any abandonment of the funds paid by the purchaser under the contract in accordance with Section 5B of this Act.

(c) Notwithstanding any other provision of law, the purchaser of an insurance-funded prepaid funeral benefits contract may irrevocably assign the purchaser's ownership of and rights to benefits under the insurance policy or annuity contract to the seller, the funeral provider, the trustee or other person.

(d) A seller may enter into a written agreement with a purchaser of a prepaid funeral benefits contract providing for the payment of a finance charge in accordance with Chapter 6, Title 79, Revised Statutes (Article 5069–6.01 et seq., Vernon's Texas Civil Statutes), on any amount due and owing to the seller on the prepaid funeral benefits contract.

Sec. 5A. INVESTMENT OF TRUST FUNDS. (a) A permit holder or trustee, if the permit holder elects to deposit prepaid funeral funds with a bank trust department or a trust company shall:

(1) adopt a written investment plan consistent with this section that specifies the quality, maturity, and diversification of investments; and

(2) at least annually, review the adequacy and the implementation of the investment plan.

(b) A permit holder and the trustee, if any, shall maintain the investment plan in their principal offices. The permit holder shall provide the investment plan to the Department with the filing of the permit holder's annual report. The permit holder or trustee, if any, shall maintain investment records covering each transaction.

(c) A trustee, in acquiring, investing, reinvesting, exchanging, retaining, selling, supervising, and managing property held in a prepaid funeral benefits trust shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income from as well as the probable increase in value and the safety of their capital, taking into consideration the investment of all the assets of the trust over which the trustee has management and control, rather than a consideration as to the prudence of a single investment of the trust.

(d) Within the limitations of the standard set out in Subsection (c) of this section, investments of a prepaid funeral benefits trust are limited to the following:

(1) demand deposits, savings accounts, certificates of deposit, and all other accounts that are issued by banks and savings and loan associations organized under the laws of the United States or a state, provided that the amounts deposited in such an account shall at all times be maintained so as to be fully covered by federal deposit insurance;

(2) bonds, evidences of indebtedness, or obligations of the United States, or guaranteed as to principal and interest by the full faith and credit of the United States;

(3) bonds, evidences of indebtedness, or obligations of agencies and instrumentalities of the government of the United States;

(4) bonds of any state or local government that have been given federal income tax exempt status by the United States government and that are rated:

(A) "Aa" or better by Moody's bond rating service; or

(B) "AA" or better by Standard and Poor's bond rating service;

(5) bonds, evidences of indebtedness, or obligations of corporations organized under the laws of the United States or a state, provided that the bonds, evidences of indebtedness, or obligations are rated:

(A) "A" or better by Moody's bond rating service; or

(B) "A" or better by Standard and Poor's bond rating service;

(6) notes, evidences of indebtedness, or participation in notes or evidences of indebtedness, secured by a valid first lien on real property located in the United States, the amount of which obligations may not exceed 90 percent of the value of the respective parcels of real property securing them;

(7) common stock of a corporation organized under the laws of the United States or a state, provided that the corporation has at least \$1 million of net worth or will have at least \$1 million of net worth after completion of a securities offering to which the trust is subscribing;

(8) preferred stock of a corporation organized under the laws of the United States or a state, provided that the stock is rated;

(A) "BAA" or better by Moody's bond rating service; or

(B) "BBB" or better by Standard and Poor's bond rating service;

(9) real estate, oil and gas interests, limited partnerships, and any other investments not covered by this section;

(10) mutual funds, collective investment funds, or similar participative investment funds, the assets of which are invested solely in investments permitted under this section and that, if aggregated with other investments, meet the percentage limitations specified by this section; and

(11) any other investment approved in writing by the Department.

(e) At no time may more than 70 percent of the prepaid funeral benefits trust funds related to a single permit holder be invested in:

(1) bonds, evidences of indebtedness, obligations, notes, and participation described by Subsection (d)(5) or (6) of this section; or

(2) common or preferred stock described by Subsection (d)(7) or (8) of this section.

(f) At no time may more than 10 percent of the prepaid funeral benefits trust funds related to a single permit holder be invested in real estate, oil and gas interests, limited partnerships, and other investments described by Subsection (d)(9) of this section.

(g) At no time may more than 20 percent of the prepaid funeral benefits trust funds related to a single permit holder be invested in a single issue of any investment, with the exception of insured deposits and government securities.

(h) This section applies to investments that are made on or after the effective date of this Act. Before September 1, 1996, a permit holder or trustee shall dispose of all investments made before the effective date of this Act that are not in compliance with this section in respect to the type of investment or the percentage of trust funds that may be invested in certain types of investments. The Commissioner may grant an extension of time for a period of one year or more for disposing of a nonconforming investment if, in the Commissioner's opinion, the permit holder or trustee has made a good faith effort to dispose of the nonconforming investment or the disposal of the nonconforming investment would be materially detrimental to the best interests of the purchasers of prepaid funeral benefit contracts.

Sec. 5B. ABANDONED CONTRACTS. (a) Funds paid by a purchaser of a prepaid funeral benefits contract are personal property subject to presumption of abandonment and delivery to the state treasurer [escheat] under Title 6, Property Code. In the event of a conflict between the provisions of that title and this section, this section controls.

(b) Funds paid by a purchaser of a prepaid funeral benefits contract and held in the name of the seller at a depository [institution] under Section 5 of this Act are presumed abandoned if [a claim of ownership to the funds or the contract is not asserted and]:

(1) all amounts due to the seller from the purchaser under the terms of the contract have been collected and [the conditions under both Paragraphs (A) and (B) of this subsection have occurred]:

(A) at least three consecutive years have elapsed since the existence and location of the purchaser or the beneficiary of the contract was known to the seller;

(B) at least three consecutive years have elapsed since, according to the knowledge and records of the seller, a claim to or act of ownership of the funds or the contract has been asserted or exercised;

(C) at least 60 years have elapsed since the date of execution by the purchaser of the contract; and

(D) [(B)] at least 90 years have elapsed since the date of birth of the beneficiary of [individual designated in] the contract [as the person for whose funeral the funds may be used]; or

(2) all amounts due to the seller from the purchaser under the terms of the contract have not been paid to the seller and[,] at least three consecutive years have elapsed since:

(A) the most recent date on which the purchaser made a payment to the seller under the contract;

(B) the existence and location of the purchaser or the beneficiary of the contract was known to the seller; and

(C) according to the knowledge and records of the seller, a claim to or act of ownership of the funds or the contract has been asserted or exercised, ~~and under the terms of the contract the seller is not obligated to refund the amount received~~.

(c) For purposes of Title 6, Property Code, the seller of the *prepaid funeral benefits* contract for which funds are presumed abandoned under Subsection (b) of this section is the holder of the funds, and the purchaser or the beneficiary of the contract is the owner of the ~~[principal] funds [paid on the contract]~~.

(d) Any amount retained by the seller as its own money for the purpose of covering its selling expenses, servicing costs, and general overhead, as provided by Section 5(a)(1) of this Act, and any earnings attributable to the funds paid by a purchaser of a prepaid funeral benefits contract, are not subject to the presumption of abandonment as provided by Subsection (b) of this section.

(e)(1) Each seller that on June 30 holds funds that are presumed abandoned under Subsection (b) of this section shall furnish the Commissioner with an acknowledged written notice of the abandoned funds not later than the following October 1. The seller's notice shall, for each abandoned contract, include the name and address, if known, of each person who appears to be the purchaser or the beneficiary of the contract; the identification number, if any, of the contract; the total amount paid on the contract; the amount paid on the contract and held at the depository; and the earnings of the contract. The notice shall also contain a statement by the seller recognizing the seller's obligation and intent to deliver the abandoned funds to the state treasurer in accordance with this section.

(2) The Commissioner shall, within 15 days after the date of the receipt of the seller's notice, authorize in writing the seller to withdraw the funds specified in the seller's notice that are presumed abandoned under Subsection (b) of this section, and subject to Subdivision (3) of this subsection, to withdraw and retain the funds specified in the seller's notice that represent the earnings attributable to the abandoned funds. The seller shall deliver to the state treasurer not later than the following November 1 the abandoned funds and the report required to be filed under Chapter 74, Property Code.

(3) The Commissioner may refuse to authorize the withdrawal of the funds representing the earnings attributable to the abandoned funds only if:

(A) the seller's permit to sell prepaid funeral benefits has been cancelled or not renewed by the Department;

(B) the seller is the subject of a pending proceeding brought by the Department under Section 13, Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), and its subsequent amendments, to cancel the seller's permit to sell prepaid funeral benefits; or

(C) the Department has determined from an examination of the seller's records that the seller has made withdrawals from accounts maintained by the seller that were not authorized under this Act, and has previously given written notice to the seller of that determination.

(4) If the Commissioner does not authorize the seller to withdraw the funds representing the earnings attributable to the abandoned funds because of the existence of a condition described by Subdivision (3) of this subsection, the Commissioner shall, not later than the 15th day after the date of the receipt of the seller's notice to the Commissioner under Subdivision (1) of this subsection, give written notice to the seller that states the condition that exists. If the Commissioner notifies the seller that the Commissioner does not authorize the seller's withdrawal of earnings on the basis of Subdivision (3)(B) of this subsection and if the Department or a court of competent jurisdiction subsequently determines that the seller's permit should not be cancelled, the seller is entitled to withdraw and retain all of the earnings attributable to the abandoned funds. If the Commissioner notifies the seller that the Commissioner does not authorize the seller's withdrawal of earnings on the basis of Subdivision (3)(C) of this subsection, the seller,

upon depositing in the accounts the amount of the unauthorized withdrawals, is entitled to withdraw and retain all of the earnings attributable to the abandoned funds.

(f) [(d)] A seller [of a prepaid funeral services contract] who [in good faith] reports and delivers funds to the state treasurer under this section [Chapter 74, Property Code,] is relieved of all obligations and liabilities under the prepaid funeral benefits [services] contract. *The prepaid funeral benefits contract is considered to be cancelled by the purchaser of the contract and all obligations and liabilities of and claims against the seller and any funeral home obligated to provide prepaid funeral benefits under the contract are discharged and released.*

(g) *A seller who delivers funds to the state treasurer under this section shall be indemnified under Section 74.304, Property Code, for any claim that may be made with respect to the property [if all amounts due to the seller under the terms of a contract abandoned under this section have been paid, the seller shall report and deliver to the state treasurer the principal amount paid by the purchaser of such contract].*

(h) [(e)] The state treasurer is not liable to the purchaser or beneficiary of a prepaid funeral benefits [services] contract presumed abandoned under this section except to the extent of funds attributable to the contract that are delivered to the state treasurer. The state treasurer is not obligated to perform the seller's duties under an abandoned prepaid funeral benefits [services] contract. A purchaser's or beneficiary's sole recourse after a seller has reported and delivered funds to the state treasurer is to file a claim with the state treasurer as provided by Chapter 74, Property Code.

Sec. 6. AGENT; DEPOSIT OF FUNDS. (a) Each seller [organization] subject to this Act shall designate an agent or agents, either by names of the individuals or by titles of their offices or positions, who shall be considered as fiduciaries under Section 32.45, Penal Code, and who are responsible for deposit of funds collected under contracts for prepaid funeral benefits. The seller [organization] shall notify the Department of such designation within 10 days after it becomes subject to this Act, and shall also notify the Department of any change in such designation within 10 days before such change occurs.

(b) If the seller or any other person acting on behalf of the seller collects any money under such a contract and fails to deliver it, within 30 days after collection, to a designated agent, or if any designated agent fails to deposit the money within 30 days after he receives it, he commits an offense under Section 32.45, Penal Code.

(c) *It is an exception to the application of Subsection (b) of this section that the failure to make a deposit is inadvertent and is corrected within 10 days after the date on which the discovery of the failure is made by the seller.*

Sec. 7. ANNUAL REPORT. The Department may require an annual report from any permit holder in such form as the Department may require. Any seller who [organization which] has discontinued the sale of prepaid funeral benefits but [which] still has outstanding contracts shall [not] be required to obtain a renewal of its permit, and [but] the Department shall [may] require annual reports of said seller [organization] until all such contracts have been fully discharged. If any officer of a seller [any organization] fails or refuses to file an annual report or to cause it to be filed within 30 days after he has been notified of the requirement by the Department, he shall be guilty of a misdemeanor and a violation of this Act and shall be punished by those means prescribed in Section 9 of this Act.

Sec. 8. RECORDS; EXAMINATION. (a) Each seller who [organization which] has outstanding contracts for prepaid funeral benefits shall maintain within this state such records as the Department may require to enable it to determine whether the seller [organization] is complying with the provisions of this Act. Such records shall be subject to annual examination by the Department or its agent and to such additional examinations as it deems necessary. The seller [organization] shall pay for the cost of examination, including the salary and travel [traveling] expenses for Department employees, including travel [paid to the person making the examination during the time spent in making the examination and in traveling] to and [returning] from the point where the records are kept, and all other expenses necessarily incurred in the examination. The [Banking] Commissioner or the Commissioner's [his] agent shall assess and collect a fee in connection with each examination, based on the seller's [organization's] total outstanding contracts, covering the cost of such examination, the equitable or proportionate cost of maintenance and operation of the

~~[Banking] Department, and the enforcement of the provisions of this Act[; but the cost to the organization shall not be more than a total cost of \$3,000 for each examination]. The Department shall set the amount of those fees under Section 2 of this Act.~~

~~(b) [Following cancellation of a permit, the Commissioner may seize all records of the prior permit holder and may seize all prepaid funeral funds, including earnings, of the prior permit holder, place them under the sole control of the Commissioner with a state bank, the state treasury, a state-chartered trust company, or an insurance company licensed and domiciled in this state and approved by the Commissioner, and cause the funds to be maintained under that arrangement for the benefit of the purchasers. The Commissioner shall notify each purchaser of the Commissioner's action and direct the purchaser to forward payments on contracts directly to the depository designated by the Commissioner. The Department may adopt reasonable rules for the enforcement and orderly administration of this subsection.~~

~~[(c) Those organizations with less than 50 contracts outstanding shall be assessed an examination fee of \$50 plus one fourth of one percent of the dollar amount of the organization's outstanding contract funds on deposit, in trust, or vested in any other program subject to this Act. Those organizations with 50 or more contracts outstanding shall be assessed an examination fee of \$100 plus one fourth of one percent of the dollar amount of the organization's outstanding contract funds on deposit, in trust, or vested in any other program subject to this Act.~~

~~[(d) As part of the examination, the Department is entitled to access to the records relating to prepaid funeral benefits of any entity holding deposits or premiums for annuity contracts or policies of insurance under the account and to other records necessary to protect the interests of the beneficiaries. The Department may conduct an examination or audit of records pertaining to prepaid funeral benefits at any place and in any manner the Department considers necessary to protect the interests of the purchasers or beneficiaries.~~

~~(c) All information obtained, either directly or indirectly, by the Department relative to the financial condition of any seller whether obtained through examination or otherwise, except published statements, and all files and records of the Department relative thereto shall be confidential, provided that the Commissioner may, if deemed necessary or proper to the enforcement of the laws of this State, another state, or the United States, and in the best interest of the public, divulge such information to any other department of this State, another state, or the National Government, or any agency or instrumentality thereof.~~

Sec. 8A. GUARANTY FUND; ASSESSMENT. (a) The Department by rule shall create and maintain a fund to guarantee performance by sellers of prepaid funeral benefits contracts of their obligations to purchasers under the provisions of this Act governing prepaid funeral trusts. The Department shall assess and collect from sellers an assessment of not more than \$1 for each of the unmaturing prepaid funeral benefits contracts sold during each calendar year beginning with 1993 [existing on January 1, 1988. The Department shall also assess and collect an assessment of not more than \$1 for each prepaid funeral contract sold during 1988 by a permittee first receiving a permit in 1988]. The Department shall place the assessments in the fund. The Department shall stop assessing the amounts required by this subsection when the amount in the fund first reaches \$1 million.

(b) The fund may be deposited with the state treasurer, a state or national bank in this state, or a savings and loan association in this state, or placed with the trust department in a state or national bank in this state or in a trust company authorized to do business in this state. If the fund is deposited with the state treasurer, the [The] state treasurer shall manage the fund as trustee of funds outside the treasury. The Department may use any earnings from the fund for the expenses of operating and maintaining the fund. [An actuarial study shall be made before April 1, 1988, to determine the total amount needed to maintain a sound and responsible fund. The Department may make any additional assessments on unmaturing contracts to maintain the funds at the amount found to be actuarially sound.]

(c) The operation and maintenance of the fund shall be supervised by an advisory council composed of the Commissioner and Attorney General or their representatives, [and] one representative of the funeral industry appointed by the Finance Commission of Texas, and one consumer representative appointed by the Finance Commission of Texas [Banking Commissioner]. The funeral industry representative and the consumer representative serve [serves a] two-year terms [term] and may not serve more than two terms [one term]. The

Commissioner shall cast the deciding vote if there is a tie vote by members of the advisory council.

(d) *The advisory council may make assessments against all permit holders, based upon their proportionate share of the purchasers' deposits on all outstanding prepaid funeral benefits contracts, in order to pay claims against the fund when the balance of the fund is not sufficient to pay those claims. Assessed funds shall be placed in the fund established under Subsection (a) of this section and administered by the Department and the advisory council in accordance with rules adopted by the Department. The assessments under this subsection are in addition to those provided for by Subsection (a) of this section.*

(e) *Notwithstanding any other law, the Department may assert a claim against a seller or [trust] depository that commits a violation of this Act that could result in a claim against the fund.*

Sec. 9. *OFFENSES.* (a) A permit holder may not represent that a *prepaid [preneed]* funeral vendor is approved or otherwise chosen by the Department except with the following language: "The Texas Banking Department regulates the sale of prearranged funeral contracts" and "The form of this contract has been approved by the Department."

(b) Except as provided by Subsection (c) of this section, any officer, director, agent, or employee of any *seller [organization]* subject to the terms of this Act who makes or attempts to make any contract in violation of this Act, or who refuses to allow an inspection of the *seller's [organization's]* records *relating to the sale of prepaid funeral benefits*, or who violates any other provision of this Act, or who is guilty of fraud, deception, misrepresentation or any other dishonest practice in sale of any contract subject to this Act, shall be punished by a fine of not less than \$100 and not more than \$500, or by imprisonment in the county jail for not less than one month and not more than six months, or by both such fine and imprisonment. Each violation of any provision of this Act shall be deemed a separate offense and prosecuted individually.

(c) Any failure to deposit funds in compliance with this Act, or any withdrawal of funds in a manner inconsistent with the provisions of this Act, is an offense under Section 32.45, Penal Code.

(d) A depository or holder of funds designated under Section 5 of this Act shall be held to the standard of duty of a fiduciary in holding, investing, and disbursing the funds.

(e) The Department may bring each such violation of this Act to the attention of the Attorney General of this state and it shall be the duty of the Attorney General to institute suit in the name of the State of Texas against such violator in any county in this state where such violation might occur.

(f) In addition to the penalties prescribed above, the Attorney General shall have the power and authority to institute quo warranto proceedings in a District Court of Travis County, Texas to forfeit the charter and right to do business of a corporation whose officer, director, agent or employee refuses or fails to correct a violation of this Act after such violation has been called to the attention of said officer, director, agent or employee by the Department or the Attorney General. A period of 30 days shall be considered sufficient time to correct such violation after notice from the Department or Attorney General.

Sec. 10. *COLLECTION AND DISPOSITION OF MONEY.* (a) *Except as provided by this section, all [All] fees, penalties, and revenues collected by the Department [department]* shall be paid to the State Treasury, placed in the prepaid funeral account fund, and shall be expended as authorized by legislative appropriation.

(b) *The Department shall pay funds received under an order of restitution to the injured party as ordered.*

(c) *Seized funds and premiums received on the disposition of related contracts shall be handled as provided by Section 4(g) of this Act.*

Sec. 10A [10a]. *APPLICABILITY TO INSURANCE CODE.* Nothing in this Act shall alter or affect any provisions of the Insurance Code of the State of Texas; provided however, that purchasers of contracts for prepaid funeral benefits from the same seller of such contracts shall constitute a lawful group for the issuance of a group contract of decreasing term life insurance by a life insurance company authorized to do a life insurance business in

the State of Texas. The amount of insurance relative to any particular purchaser shall at all times approximate the future unpaid balance of such contract for prepaid funeral benefits. The seller of prepaid funeral *benefits* [benefit] contracts shall have an insurable interest in the life of any purchaser of such contract to the extent of any unpaid balance thereof, and the proceeds of any life insurance policy received by a seller of a prepaid funeral *benefits* [benefit] contract on the life of a purchaser of such contract shall be applied to the reduction or elimination of any unpaid balance thereof. This section shall not be construed as having any effect on the funding of prepaid funeral benefits by other contracts of insurance as provided for in Section 1A [1a] of this Act.

SECTION 2. Subsections (b) and (e), Article 6.01, Title 79, Revised Statutes (Article 5069–6.01, Vernon's Texas Civil Statutes), are amended to read as follows:

(b) "Services" means work, labor, or services of any kind when purchased primarily for personal, family or household use and not for commercial or business use, and includes a maintenance or service contract or agreement or warranty, but does not include (i) the services, *other than prepaid funeral benefits regulated by Article 548b, Vernon's Texas Civil Statutes*, of a professional person licensed by the State except when those services are rendered in connection with the purchase of goods; or (ii) services for which the cost is by law fixed or approved by, or filed with or subject to approval or disapproval by the United States or the State of Texas, or any agency, instrumentality or subdivision thereof; or (iii) educational services provided by an accredited college or university or a primary or secondary school providing education required by the State of Texas or services of a kindergarten or nursery school; or (iv) any services which are authorized to be and are included in a contract subject to Chapter 7 of this Subtitle; or (v) any medical or legal services.

(e) "Retail installment transaction" means any transaction in which a retail buyer purchases goods or services from a retail seller pursuant to a retail installment contract or retail charge agreement, as defined in this Article, which provides for a time price differential, as defined in this Article, and under which the buyer agrees to pay the unpaid balance in one or more installments, together with a time price differential. The term includes transactions made pursuant to a retail credit card arrangement as defined in this Article. *The term also includes the sale of prepaid funeral benefits regulated by Article 548b, Vernon's Texas Civil Statutes.*

SECTION 3. Chapter 6, Title 79, Revised Statutes (Article 5069–6.01 et seq., Vernon's Texas Civil Statutes), is amended by adding Article 6.12 to read as follows:

Art. 6.12. RATES FOR PREPAID FUNERAL BENEFITS REGULATED BY ARTICLE 548b, VERNON'S TEXAS CIVIL STATUTES. Prepaid funeral benefits regulated by Article 548b, Vernon's Texas Civil Statutes, may be financed only at rates authorized by Article 1.04 of this title.

SECTION 4. (a) A fund, investment, security, or contract included in a plan approved before the effective date of this Act by the Banking Department of Texas under Section 1a, Chapter 512, Acts of the 54th Legislature, 1955 (Article 548b, Vernon's Texas Civil Statutes), may continue in effect. Any funds paid pursuant to such a plan under a contract entered into before, on, or after the effective date of this Act shall continue to be handled in accordance with that approved plan, except that those funds may be invested in accordance with Section 5A, Chapter 512, Acts of the 54th Legislature, Regular Session, 1955 (Article 548b, Vernon's Texas Civil Statutes), as amended by this Act.

(b) Sections 1(h) and (i), Chapter 512, Acts of the 54th Legislature, Regular Session, 1955 (Article 548b, Vernon's Texas Civil Statutes), as added by this Act, do not apply to a plan approved before the effective date of this Act, by the Banking Department of Texas under Section 1a, Chapter 512, Acts of the 54th Legislature, Regular Session, 1955 (Article 548b, Vernon's Texas Civil Statutes).

SECTION 5. This Act takes effect September 1, 1993.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on April 19, 1993, by a non-record vote; the House concurred in Senate amendments to H.B. No. 2499 on May 26, 1993, by a non-record vote; passed by the Senate, with amendments, on May 19, 1993, by a viva-voce vote.

Approved June 18, 1993.

Effective Sept. 1, 1993.