Texas Sunset Advisory Commission

STAFF EVALUATION

Texas Funeral Service Commission

A Staff Report
to the
Sunset Advisory Commission

1991

B176

Texas Funeral Service Commission

December 1989

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BACKGROUND

Creation and Powers

The Texas Funeral Service Commission was established as the State Board of Embalmers in 1903 to license and regulate embalmers. The law was amended in 1938 to include the regulation of funeral directors. The State Board of Embalming became the State Board of Morticians in 1953 and was renamed the Texas Funeral Service Commission in 1983. The agency's main responsibilities are to prescribe and maintain standards for persons practicing as funeral directors or embalmers and to issue licenses to qualified persons and funeral establishments. The commission also supervises the course of instruction taken by apprentice embalmers or funeral directors. Complaints related to funeral directing and embalming are investigated and processed by the commission. The commission prepares and disseminates information to the public which explains funeral-related matters and describes the commission's procedures for handling complaints. Finally, the commission examines and supervises the activities of accredited schools or colleges of mortuary science to ensure that requirements of the commission are met.

Policy-making Body

The commission has nine members appointed by the governor and confirmed by the senate. Five commissioners must be licensed funeral directors and/or embalmers and must have five consecutive years of experience immediately preceding their appointment. At least three of these five members must hold an active embalmer's license. The remaining four commissioners are public members who are not regulated by the agency. The chair of the commission is selected by the commission members.

The duties of the commission are to:

- prescribe and maintain standards for practicing funeral directors and embalmers;
- conduct hearings and impose sanctions for violations of the agency's statute;
- administer license examinations and serve as examiners for the embalming practical exam given to prospective embalmer licensees; and
- participate in supervisory site visits to the mortuary schools in Texas.

The part-time commission is required by statute to meet at least twice a year. It has met six times in 1987 and five times in 1988. Meetings are generally held in Austin; however, due to the relatively large number of licensees and prospective licensees in Houston, the commission has held a meeting there once a year from 1986 through 1988.

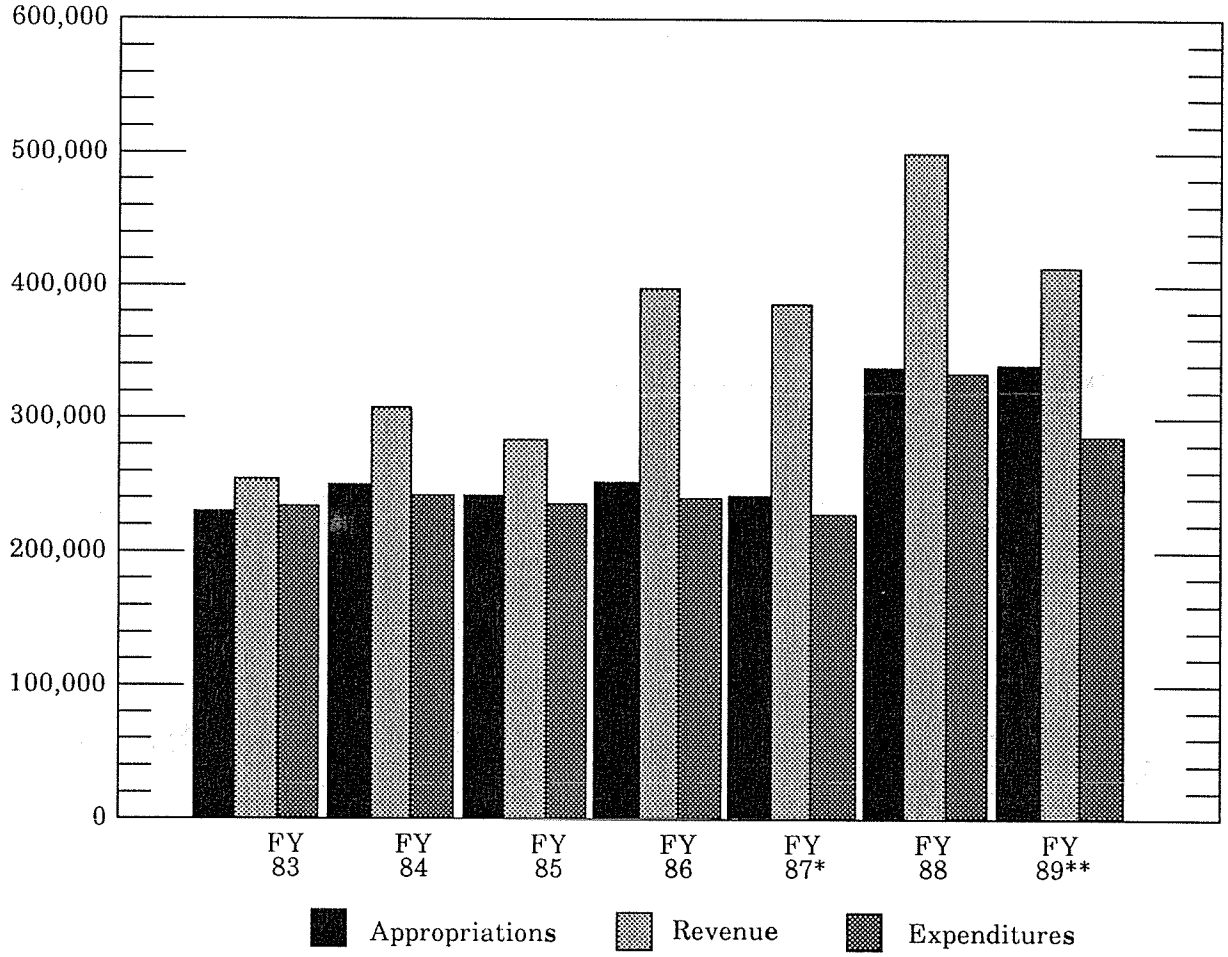
Funding and Organization

In fiscal year 1989 the agency was appropriated about $320,000 from the General Revenue Fund. The fees and penalties collected by the agency are deposited to the General Revenue Fund. Exhibit 1 shows agency appropriations, expenditures and revenues for fiscal years 1983 through June 30, 1989. As the exhibit demonstrates, agency revenues have consistently exceeded appropriations and in fiscal year 1988, exceeded appropriations by more than $170,000.

Exhibit 1

Revenues and Expenditures

Fiscal Years 1983 - 1989 YTD



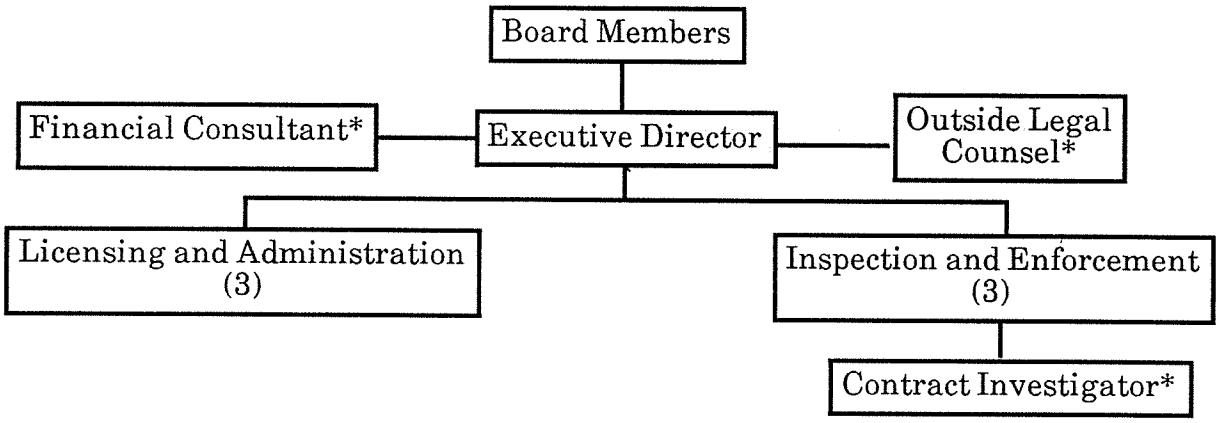
*Revenue figures include reappropriated revenue from the sale of state law books. Maximum revenue from such sales was $9,681 in 1983.

**Fiscal year 1989 figures are as of June 30, 1989.

The commission employs a staff of seven and contracts for the part-time services of three others. Five of the seven permanent staff members are employed in the agency's Austin headquarters with the two remaining staff residing in metropolitan areas within their respective territories. Exhibit 2 shows the organizational structure of the agency.

Exhibit 2

Texas Funeral Service Commission
Plan of Organization



Numbers in parentheses indicate the number of employees.
*Contract services.

Programs and Functions

Licensing and Administration

The Licensing and Administration section of the agency is responsible for the initial and renewal licensing of funeral professionals and establishments. In order to be licensed as either a funeral director or embalmer an individual must be at least 18 years of age, a resident of the state of Texas, graduate from an accredited high school or obtained G.E.D. equivalency, graduate from an accredited mortuary college, pass licensing examination and complete the requirements of a one year apprenticeship. The licensing and administration staff screens all applicants to ensure that the requirements have been met and proper fees have been collected.

Individual licenses are issued biennially on a staggered basis. There are currently over 4,000 persons licensed as a funeral director, embalmer or both. Renewal notices are mailed to the licensees at least 30 days prior to the expiration date of the license. If the license is not renewed by the due date, a late penalty equal in amount to the licensing fee is assessed and the delinquent licensee is notified that the license is suspended. If the fee and penalty is not paid within 90 days, the license is cancelled and the commission may require the applicant to retake the licensing examinations. Any license that has been cancelled, lapsed or suspended for more than five years may only be reinstated after the applicant has taken and passed all required written and practical licensing examinations.

The written exam that applicants must pass to be licensed is prepared and administered by the board. The staff is responsible for scoring the exam. Applicants pay $165 to take the exam which is comprised of a Texas law portion and a portion related to funeral practice.

The commission is authorized by statute to accept licenses from other states, countries or territories having substantially equivalent licensing standards. In practice, the commission licenses by endorsement any licensee, in good standing, from a state that has equivalent licensing requirements. Each reciprocal licensee is required to take a 50-question state law examination and be interviewed by a commissioner who will grade the examination at the same time. When the Licensing and Administration staff is notified that the examination has been successfully completed and a favorable recommendation has been made by the interviewing commissioner, the applicant is issued a one year probationary license and is required to submit a simple report form each month. Upon completion of the probationary period, a permanent license is issued.

The commission also administers the apprenticeship program required by statute. Each prospective licensee must serve a one year apprenticeship in funeral directing and/or embalming. A funeral director apprenticeship may be served before or after mortuary school but the more technical embalmer apprenticeship can only be served after graduation from mortuary school and successful completion of the embalmer licensing examination. Each apprenticeship must be served in a licensed funeral establishment under the personal supervision of a licensed funeral director and/or embalmer. Apprentices are required to report for 12 consecutive months and on a minimum of 60 cases. An apprenticeship must be completed within five years.

The commission must also license funeral homes and commercial embalming establishments. A commercial embalming establishment works as a subcontractor to provide embalming services for licensed funeral homes. It need only have an operational embalming preparation room. A funeral home must have a physical plant that contains a chapel, casket display room and embalming preparation room and is not located on tax exempt or cemetery property. Every new funeral establishment must provide proof that local fire and health codes have been met and must pass an inspection conducted by the Inspections and Enforcement section of the agency.

Establishment licenses are issued annually with each license expiring on September 30th. Renewal notices are mailed by the Licensing and Administration section at least 30 days prior to the license expiration date. Delinquent licensees must pay a penalty equal to the licensing fee and if the delinquency is more than 30 days, the establishment is closed and must go through the same process required for new establishments. Approximately 1,100 establishments are licensed in Texas each year.

Inspections and Enforcement

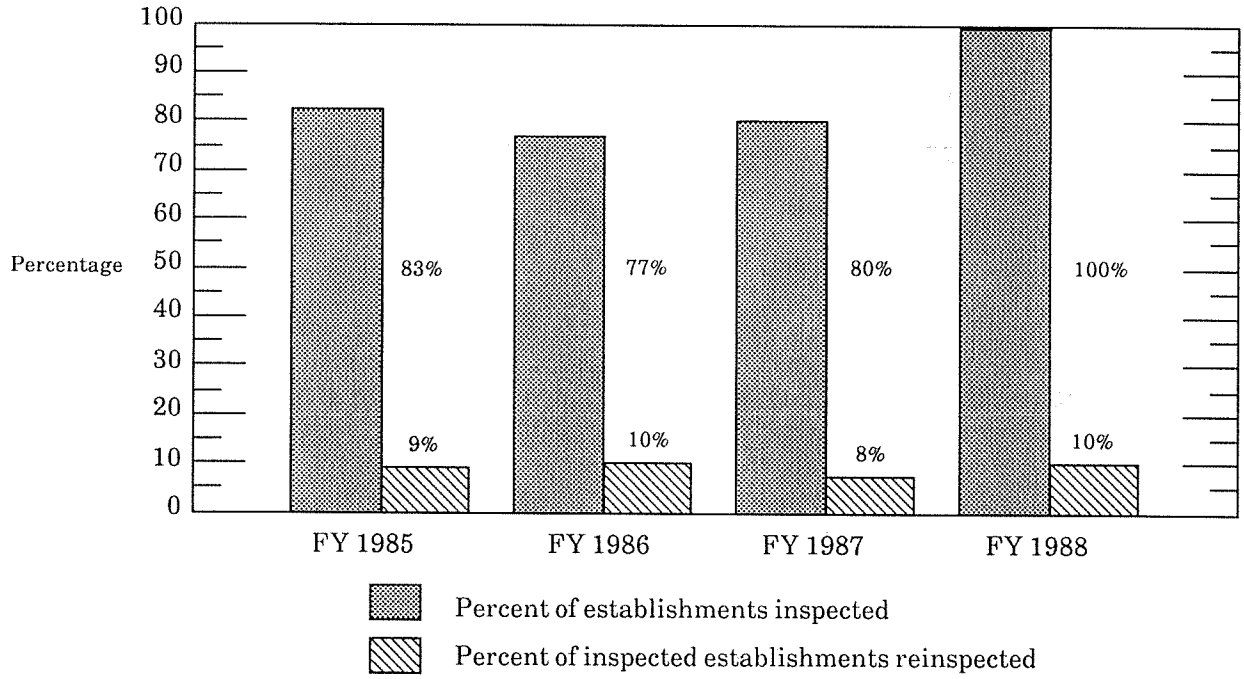
The TFSC statute requires the annual inspection of every funeral establishment in the state. The visits are unannounced and are conducted by two full-time inspectors, the chief investigator or a contract investigator. The routine inspections seek to determine if establishments are complying with the requirements set out in the law. To that end, the inspectors survey the condition of the physical plant and premises, verify the number of licensed and unlicensed

employees, and check that certain consumer protection provisions are included in the funeral contract and price list. They also verify that the establishment places the agency's consumer brochure in a visible location. If a deficiency is noted during the routine inspection, the funeral director-in-charge (FDIC) is alerted and advised that the problem should be corrected.

Over time, the commission has made improvement in the agency's goal of inspecting all licensed funeral homes annually, as shown in Exhibit 3. In fiscal year 1988, annual inspections were made mandatory by statute.

Exhibit 3

Trends in Agency Inspections



The chief investigator and executive director review every inspection report. The more serious problems and repeat discrepancies prompt the scheduling of a reinspection to verify that the problem was fixed. In fiscal year 1988, 120 follow-up inspections or about 10 percent of completed inspections were conducted. As Exhibit 3 shows, this percentage has remained relatively stable over the past few years.

Complaints

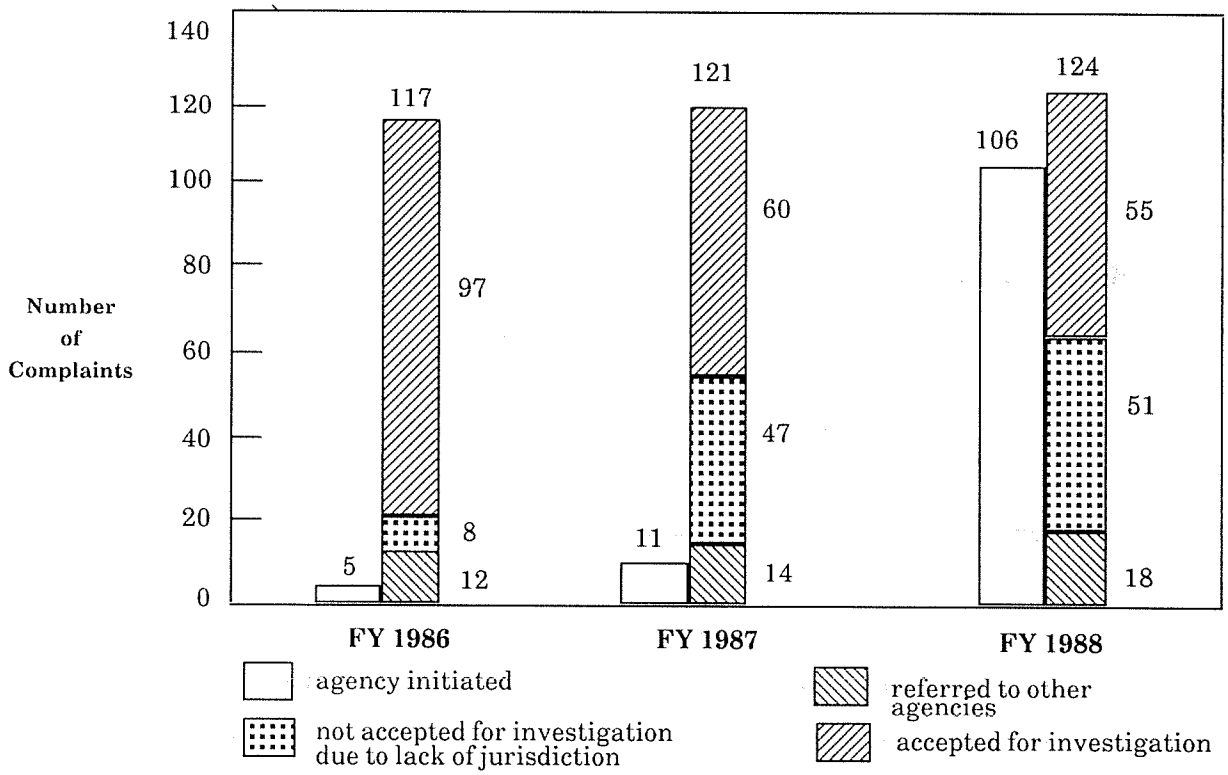
Consumers, other licensees and the agency itself may initiate a complaint against a funeral home, funeral director or embalmer for an alleged violation of the agency's statute. Consumer complaints are generally requested to be in writing; however, emergencies can be handled by telephone. In fiscal years 1986, 1987 and 1988, the number of complaints handled by the agency has remained relatively stable at about 120 per year. Each complaint is reviewed by the executive director and chief investigator. Sometimes consumer complaints do not appear to involve a violation of the law. In such cases, a letter to that effect is sent to the complainant for review along with a copy of the agency's law. If the complainant can cite a

particular violation, the complaint may be re-submitted; otherwise, the complaint is dismissed. In fiscal year 1988, 51 complaints of this type were dismissed. The number of cases dismissed at this stage has increased in recent years, as shown in Exhibit 4. In cases where the complaint pertains to violations of another agency's statute, it is forwarded to the state agency that has jurisdiction over the area. Eighteen such complaints were referred in fiscal year 1988, as Exhibit 4 shows.

Valid consumer complaints are assigned a case number and an investigation is begun by either the chief or the contract investigator. These investigations may include telephone inquiries, interviews of the witnesses and review of any relevant documents. There were 47 consumer complaints and eight complaints made by other licensees accepted for investigation in fiscal year 1988.

Exhibit 4

Trends in Origination and Disposition of Complaints



Source: 1988 data is based on the Federal Exemption petition submitted by the agency to the FTC. Additional information was provided by the agency.

A second category of complaints filed against licensees are those initiated by the commission after a discrepancy is found during an inspection. No further investigation is carried out on the agency-initiated complaints. However, agency policy is to initiate disciplinary sanctions only after two of the same violation in a row are found. Once initiated, disciplinary proceedings on agency complaints are handled in the same manner as consumer complaints. As shown in Exhibit 4, 106 complaints were initiated by the commission against licensees in fiscal year 1988. This number represents a dramatic increase over previous years and is due to the

agency's authority to assess administrative penalties. Prior to the penalty authority, the agency rarely brought formal complaints against licensees for minor violations.

Hearings and Enforcement

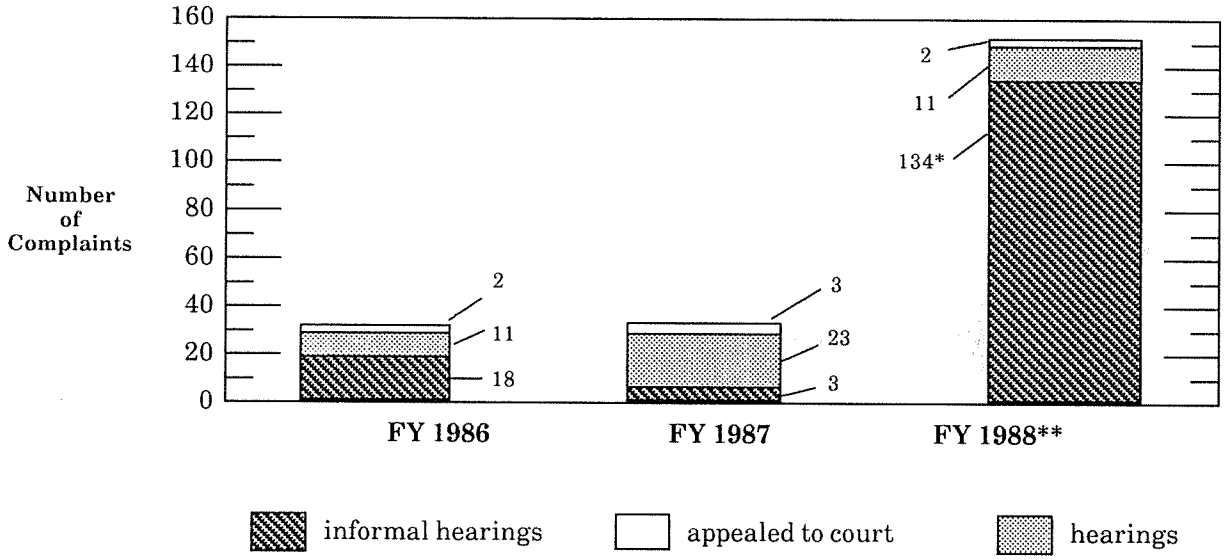
The purpose of annual and follow-up inspections as well as consumer complaint investigations is to determine if the licensees are in compliance with the law. If they are found to be noncompliant by commission staff, disciplinary action may be initiated against the license. The commission is authorized to apply a full range of sanctions, after due process, including administrative penalties, probation, suspension and revocation. The commission has adopted by rule penalties ranging from $100 to $5,000 depending on the violation. Disciplinary guidelines in rule are followed for imposing such penalties. Also, a person who acts or holds himself out as a funeral director, embalmer or apprentice without being properly licensed or who engages in a funeral practice that is grounds for suspension or revocation of the license commits a Class B misdemeanor. Moreover, the commission is authorized to seek injunctive relief to enjoin an unlicensed individual from the practice of funeral directing or embalming.

Once an investigation is completed, the facts are presented to the Complaint Review Committee, composed of the chairman, the executive director, the chief investigator and the outside legal counsel. The committee reviews the case and recommends to the full board that the case either be closed for lack of evidence, an administrative penalty be assessed or formal charges be filed and a hearing scheduled. At the next scheduled meeting, the full board votes to accept or reject the recommendation of the committee. The licensee is then notified of the commission's decision and, if an administrative penalty is assessed or other charges brought, the licensee may request a formal hearing, in accordance with the Administrative Procedures and Texas Register Act (APTRA).

Agency-initiated complaints arising from an inspection are usually resolved without further action. Licensees are notified by mail of the penalty assessed. In most instances, the licensee pays the penalty, no informal or formal hearing initiated and the case is closed. In fiscal year 1988, 99 inspection violation penalties were handled through written correspondence in this manner. In the case of the more serious inspection violations and consumer complaints the Complaint Review Committee will usually recommend sanctions stronger than administrative penalties. These cases will be scheduled for an informal hearing prior to a formal hearing before the full board. This gives agency staff, the licensee and legal counsel an opportunity to discuss the circumstances surrounding the case. In fiscal year 1988, 29 informal hearings were held. Sometimes agreement cannot be reached during the informal proceeding and the case is set for a formal hearing. In the majority of instances, though, agreements are reached in these informal hearings and agreed orders are negotiated. As in a formal hearing, the agreed order sets out in writing the violation and the negotiated sanction. The full board must vote to accept or reject the agreed orders. Twenty agreed orders were issued in fiscal year 1988.

Exhibit 5

Trends in Level of Complaint Resolution
Stage of Process Where Complaints are Resolved



*Includes 99 inspection violations resulting in the assessment of an administrative penalty, resolved through written correspondence, 29 informal hearings involving inspection and consumer complaints and six cases resolved through arbitration. Twelve cases were left pending at the end of the fiscal year.

** Source: Federal Exemption Petition submitted to the FTC by the agency.

Formal hearings are conducted after due notice has been given to all parties. The chairman presides at the hearing and is advised on his rulings by the assistant attorney general assigned to the commission. The commission's contract legal counsel prosecutes the case. All witnesses and evidence produced are subject to cross-examination. Board members may ask questions of the witnesses and examine any introduced evidence. At the conclusion of the hearing, written findings of fact and conclusions of law are provided each member, in accordance with APTRA, and a vote is taken on each item contained therein. Deliberation of the sanction to be assessed follows immediately in the public hearing. Fifteen formal hearings were held in fiscal year 1988, as shown in Exhibit 5. A summary of the enforcement action taken by the board for fiscal years 1986 through 1988 is shown in Exhibit 6. The vast majority of administrative fines issued by the board were for violations found by commission staff during routine inspections. Failure to place cards which identify available colors on all caskets and failure to reflect the TFSC's current address on the funeral contract were the most common inspection violations resulting in a fine. The average penalty amount for inspection violations of this kind was $264. In six instances, an administrative penalty was issued along with the suspension or revocation of a license after an informal or formal hearing. In four of these cases, the penalty amount was reduced with the remaining amount treated as a probated sentence. For these more serious violations, the average penalty amount issued was $2,250 in fiscal year 1988.

Exhibit 6

Trends in Disciplinary Actions Taken

Sanction Assessed	FY 1986	FY 1987	FY 1988
Administrative Penalties*	0	0	126
Probations	12	6	11
Individuals	6	3	7
Establishments	6	3	4
Suspensions	7	8	2
Individuals	7	6	2
Establishments	0	2	0
Revocations	1	3	5
Individuals	1	1	3
Establishments	0	2	2

*The agency was given authority to assess administrative penalties beginning September 1, 1987. The 126 penalties issued represent 101 separate cases. Approximately one-third of the penalties were issued for failure to display color cards on caskets.

As provided in APTRA, a licensee may request a rehearing and if the request is denied, file an appeal in the district court of Travis County. Judicial review of the hearing is subject to the substantial evidence rule and is also governed by the Administrative Procedures Act. As shown in Exhibit 5, two licensees appealed the board's judgment to court in fiscal year 1988. Both cases are open at this writing. In fiscal year 1987, three cases were appealed. Each ruling was upheld in court.

In addition, consumers may file suit against a funeral director under the Texas Deceptive Trade Practices Act (DTPA) if they believe they have suffered actual damages from an unfair or deceptive act or practice committed by the licensee. Commission staff are aware of only one case brought by the attorney general's office under the DTPA in recent years. The consumer may also seek remedies through contract, tort, equity, or criminal sanctions.

RESULTS OF REVIEW

Overall Approach to the Review

Overall Approach to the Review

Prior Sunset Review

As part of the overall review of the Texas Funeral Service Commission, the staff report to the Sunset Advisory Commission prepared for the sunset review in 1979 was examined. In addition, the recommendations adopted by the Sunset Commission were examined and compared to the current activities of the agency.

The initial sunset review determined that the commission's activities were minimally focused on the agency's original purpose, which was protecting the public health by preventing the spread of contagious disease. After consultation with the Texas Department of Health, the review concluded that embalming does not have a public health significance and that there is no known contemporary record of disease being transmitted in this country by unembalmed human remains. To date, the Department of Health has not changed its original conclusion that the embalming of a body or the quality of embalming should have no effect on public health.

The review also concluded that the agency's enforcement activities did not resolve complaints that originated from consumers nor were the enforcement activities adequate to ensure that licensees were carrying out their professional responsibilities.

In effect, then, the review determined that state regulation did not serve to protect the health, safety or welfare of the public, nor did it provide any benefits that would justify the effort of inspecting funeral homes and examining and issuing licenses to embalmers, directors and establishments.

The sunset staff recommended in that because of overlapping target populations, the major administrative operations of the agency could be consolidated with the Texas Department of Health (TDH) and the attorney general's office could work with TDH to resolve consumer complaints. Both the Texas Department of Health and the agency performed administrative, licensing, examination and enforcement activities, as is currently the case. The consolidation of those functions was expected to reduce areas of overlapping program responsibilities in the state and to free up additional resources for addressing agency problems.

Other operational changes recommended by the sunset staff included:

- the placement of agency funds in the State Treasury;
- the development of written procedures for the maintenance of records, the release of information to the public, the handling of employee grievances and other areas;
- the modification of the reporting requirements for apprentices to reduce the degree of record maintenance and other paperwork; and
- the modification of the definition of solicitation to clearly indicate the methods of practices allowed.

The Sunset Commission concurred with the staff that the agency should be abolished and the major administrative operations of the agency transferred to the Texas Department of Health. The commission also recommended the following:

- creation of an advisory board to the Texas Department of Health comprised of three licensed funeral professionals and three members of the general public;
- addition of conflict of interest provisions which would apply to advisory board members and employees;
- elimination of apprenticeships and the licensure of funeral directors with substitution of one-time registration contingent upon an exam;
- reduction of the embalmer apprenticeship to one year, with the number of bodies to be embalmed reduced to 25;
- removal of all requirements relating to age, citizenship, residency, moral character and high school completion;
- replacement of reciprocal licensure with licensure by endorsement;
- elimination of the funeral establishment license; and
- revision of complaint processing procedures to provide standard and timely disposition of complaints.

The sunset bill finally passed by the 66th Legislature did not adopt all of the recommendations made by the Sunset Commission, however, the agency funds were placed in the State Treasury, public members were added to the board, reciprocal licensing was replaced with licensure by endorsement and complaint procedures were specified in statute. In addition, other sunset across-the-board provisions were added to the statute. These provisions require standard time frames for licensees who are delinquent in renewal of licenses, provide for an analysis of the licensing exam to those who fail the exam; specify board hearing requirements among other changes.

Approach to Current Review

As part of the analysis of the agency's effectiveness and efficiency, the sunset review examined both the current operations of the agency and the findings and recommendations of the sunset staff and sunset commission which resulted from the review conducted in 1979.

In accordance with the Sunset Act the review included an assessment of the need to continue the regulating functions performed by the agency; whether benefits could be gained by performing the function through another agency; and finally if the function is continued, whether changes are needed to improve the efficiency and effectiveness of the agency.

To make the assessment of these general areas a number of efforts were undertaken. These included:

- review of previous sunset staff recommendations;
- review of documents developed by the department, legislative reports, other states and federal reports and books containing background resource material;
- interviews with department staff in the Austin office;
- visits to two funeral establishments and one commercial embalming establishment;
- attendance at quarterly board meetings;
- interviews with other state agency personnel that interact with the department;
- phone interviews with other states and Federal Trade Commission officials; and
- meetings with interest groups and individuals affected by the commission.

The results of the assessment of each of these areas is contained in the following material.

Assessment of Need to Regulate

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ISSUE 1: The Texas Funeral Service Commission's statute should be repealed. However, the agency's statutory consumer protection language should remain in law for enforcement through the courts. In addition, the agency's statutory oversight of the four mortuary schools in Texas should be transferred to the Texas Education Agency and the Higher Education Coordinating Board for regulation in the same manner as that for other proprietary schools in the state.

BACKGROUND

In order for the regulation of an occupation through licensure to be justified as a valid state effort, several conditions must be present. First, the unlicensed practice of the occupation should pose a serious risk to the health, safety or welfare of the public. Second, the benefits to the public should clearly outweigh any potential harmful effects, such as a decrease in the availability of practitioners. Finally, the duties of the occupation should be of a complexity that consumers cannot properly evaluate the appropriateness of the service or the qualifications of the practitioners.

To assess whether the above conditions exist to an extent that would justify the agency's continuation, the staff report prepared in 1978 for the Sunset Advisory Commission was reviewed and the agency's current functions were evaluated.

The Texas Funeral Service Commission was originally established as the State Board of Embalming in 1903 at a time when safeguarding the public health was a major focus for regulation. The agency's original legislation was designed to regulate only those functions which, if not performed properly, could adversely affect community health. Since that time, medical advances have diminished the need for the agency. The primary focus of the commission's activities today is the protection of the public from deceptive, unqualified or insensitive embalmers or funeral directors. The commission's activities now are more focused on the qualifications of funeral professionals and apprentices and the equipment and facilities of a funeral establishment.

In 1978, the initial sunset review determined that the commission's activities were minimally focused on the agency's original purpose, which was protecting the public health by preventing the spread of contagious disease. After consultation with the Texas Department of Health, the 1978 review concluded that embalming does not have a public health significance and that there is no known contemporary record of disease being transmitted in this country by unembalmed human remains. To date, the Department of Health has not changed its original conclusion that the embalming of a body or the quality of embalming should have no effect on public health.

The 1978 review also concluded that the agency's enforcement activities did not resolve complaints that originated from consumers nor were the enforcement activities adequate to ensure that licensees were carrying out their professional responsibilities.

In effect, then, the 1978 review determined that state regulation did not serve to protect the health, safety or welfare of the public, nor did it provide any benefits that would justify the effort of inspecting funeral homes and examining and issuing licenses to embalmers, directors and establishments.

The current sunset review found that a number of changes have occurred in the regulation of the funeral industry in the 12 years since the first review. The agency currently maintains complete complaint files and processes complaints in a timely manner. The agency also complies with requirements to post timely notification of its meetings in the Texas Register and attempts to encourage public participation by sending notification to consumer groups of times and locations of meetings. The nature of complaints handled by the agency has also changed. In 1978, complaints from licensees accounted for 88 percent of the cases acted on; in 1988 this category had dropped to less than five percent of the cases acted on. Sixty-six percent of the cases handled in 1988 were initiated by the agency as a result of inspections and of the 161 total complaints accepted for investigation by the agency, only 29 percent, or 47 cases, originated from consumers. The agency no longer maintains the position it held 12 years ago that cases alleging mishandling of money or misunderstanding about the services delivered are outside of its jurisdiction and now attempts to resolve cases of this nature when it can determine that a violation of statute or rule has occurred.

The evaluation of the need to continue the agency indicated the following:

- There still is no public health reason to regulate the funeral industry because no serious risk to the life or health of the public exists. The Texas Department of Health (TDH) reports that since 1978 there has been one case of AIDS in Texas in which the infected person claimed his only possible source of exposure was during embalming procedures. However, the individual also reported that routine infection control measures were not followed and that gloves were not worn. TDH reported that there should be no effect on public health from the failure to embalm a body or the improper embalming of a body. Furthermore, of the 47 consumer complaints filed with the agency in 1988, only one, an allegation of improper embalming, was of a nature which might be considered related to the public health.

- The types of complaints handled by the agency are not the type that pose a serious risk to the safety or welfare of the public.

  -- The complaints identified by the agency through the inspection process have been of a limited magnitude. Forty-seven percent of agency-initiated complaints in 1988 were exclusively for the minor violation of failure to post information on each casket in the display room and/or failure to include the agency's address on forms used by the funeral establishment. The requirement to post information was removed from the statute in 1989 because it was believed to be of limited benefit in protecting the public. This will greatly reduce

the volume of agency-initiated complaints in the future unless the agency changes its current approach with regard to identifying violations.

- -- Eighty-three percent of the complaints submitted by consumers in 1988 have been the type that occur between buyers and sellers in any business. These include such allegations as overcharging, failure to deliver an item in the contract, withholding of insurance refunds and failure to provide a price list. These types of complaints are not the sort which constitute a serious risk to public safety or welfare. Only one consumer complaint alleged embalming without permission. A second complaint alleged improper embalming.

- The actions taken by the board to resolve the complaints it receives are minimal and ineffective.

  - -- Of the 47 consumer complaints accepted for investigation in 1988, the commission took no action on 30 cases due to insufficient evidence or withdrawal of the complaint. Only six cases resulted in a fine against a licensee and one license revocation occurred. Five cases were resolved through simple arbitration without a fine. Five other cases were identified where the commission determined that a violation occurred and the license was suspended. In all of these five cases, the entire suspension was probated without other sanctions being taken against a licensee.

  - -- Although the regulatory process may occasionally provide the consumer with satisfaction that a licensee has been punished, the regulatory process does not provide for restitution or damages to be awarded to the customer. In a few cases in 1988, the licensee voluntarily returned funds to a customer but repayment cannot be mandated by the commission.

- The duties of the embalmer and funeral director are not so complex as to preclude the customer from assessing whether the services provided were appropriate. The majority of complaints that came from consumers involved matters which are simple in nature, such as whether funds were refunded appropriately or certain items were delivered. Consumers can deal with such problems on their own without having to depend on a regulatory agency.

- Other avenues exist for consumers to recover damages which result from the wrong doing of a funeral practitioner. Anyone injured in any way by another may seek to recover damages through civil court procedures. This method is relatively inexpensive for the injured person. The attorney general (AG) is responsible for administering the Deceptive Trade Practices Act which enables the office to investigate and file suit to stop activities which are deceptive. The office can formally pursue any case that it determines affects the public interest and, in some cases, can obtain restitution for the aggrieved person. The AG also attempts to informally mediate all complaints it receives. The office uses six regional locations to handle over 20,000 various complaints per year.

- The federal government also plays a role in regulating the funeral industry. The Federal Trade Commission (FTC), through its funeral rule, has authority to enforce a wide range of practices aimed at protecting the consumer. For example, the funeral rule requires that customers be provided with an itemized price list and be informed of any fees which the funeral establishment charges for ordering items such as flowers. The rule requires that all contracts for services disclose that embalming is not required, and that caskets are not necessary for cremation. The FTC has received 11 written complaints and 13 oral complaints pertaining to Texas funeral establishments between January and June of 1989. As a result of the enforcement of the funeral rule, punitive actions have been taken against four funeral establishments in Texas since 1987, resulting in fines ranging from $10,000 to $30,000 per establishment. At least two other Texas cases remain in litigation. This level of enforcement appears to serve as a significant deterrent against deceptive practices. The agency is seeking to obtain an exemption from the federal funeral rule on the basis that Texas law and agency activity provide a level of oversight equal to or greater than that of the FTC.

- One state, Colorado, has not licensed or regulated the funeral industry since 1982. Representatives of the state's Department of Regulatory Agencies report that a minimal number of complaints are received which all pertain to contract-related issues. These cases are referred to the local district attorney for resolution. The agency reports that there have been no adverse effects on consumers from deregulation of the industry in the state.

PROBLEM

The number, type and magnitude of problems that have occurred in the occupation are not of the severity that would justify the state's involvement. Using an independent board and agency to manage the limited number of consumer complaints is unnecessarily costly, especially when other avenues exist to resolve these complaints.

RECOMMENDATION

- **The Texas Funeral Service Commission's statute should be repealed, however, the agency's statutory consumer protection language should remain in law for enforcement through the courts. In addition, the agency's statutory oversight of the four mortuary schools in Texas should be transferred to the Texas Education Agency and the Higher Education Coordinating Board for regulation in the same manner as that for other proprietary schools in the state.**

The activities conducted by the commission do not serve to protect the public from significant danger to their health, safety or welfare. The volume and magnitude of cases that originate from consumers do not justify the full-scale regulation of

the funeral industry by a separate regulatory agency. Other avenues exist to resolve the limited complaints that occur without the necessity of or need for operating a state agency. The evaluation concluded that the agency could be abolished without adverse effects to the public.

If the agency is abolished, however, the statute includes a range of consumer-protection language that should remain in law for enforcement through the courts. For example, the statute makes it an offense for a person to take custody of or embalm a body without the permission of a person authorized to make arrangements for the deceased, or to fail to provide retail price lists to customers. The statute forbids deceptive advertising and requires records of transactions to be maintained for two years. In addition, the board with encouragement from the FTC, consumers groups and the office of the attorney general has adopted consumer protection rules which should be incorporated into law. These rules require the disclosure of price information by telephone, set out items that a retail price list must include and prohibit representation that any state or local law requires embalming, among other requirements. Much of the consumer protection language in rules was adopted from the Federal Trade Commission's funeral rule and serves to clarify federal requirements funeral providers must meet regardless of whether or not they are enforced at the state level.

In addition, if the agency is abolished, an alternative method for regulating the three proprietary and one public mortuary schools in Texas is needed. The review determined that the Texas Education Agency (TEA) would be well suited to regulate the proprietary schools. Also, the TEA and the Higher Education Coordinating Board (HECB) would each have a role in regulating degree programs offered by the schools. Schools offering associate degrees would be subject to regulation by the HECB while degrees with titles such as "applied technology", "occupational studies" or other similar titles would be regulated by TEA. This would be consistent with the way the two agencies currently regulate degree programs offered by other proprietary schools in the state.

The review recognized that the sunset commission may desire to continue regulation of the funeral industry rather than rely on other existing avenues for protecting the public. If the commission does determine that continued regulation is necessary, a recommendation involving regulation through the Texas Department of Health is developed in another section of the report.

FISCAL IMPACT

If the agency is abolished, there will be a reduction in revenue deposited to the General Revenue Fund. The agency has typically had more revenue than the amount appropriated for agency operations. In fiscal year 1988, for example, over $170,000 in revenue above the appropriation was placed in the fund. The review did not attempt to estimate the costs of the services which other state agencies provide to the TFSC, although some savings would result from the cessation of such services to the agency. (For example, the services provided by the Legislative Budget Board, Comptroller and State Auditor would be reduced.)

Assessment of Organizational Alternatives

Organizational Alternatives

ISSUE 2: If the agency is not abolished, its functions should be transferred to the Texas Department of Health where a centralized licensing operation is currently in place to regulate such professions as medication aides, respiratory therapists and professional counselors and its oversight of the four mortuary schools in Texas should be transferred to the Texas Education Agency and the Higher Education Coordinating Board.

BACKGROUND

The issue of whether licensing services should be centralized is heavily debated. The regulated occupations and their affiliated trade associations usually favor the use of an independent, free-standing board. They assert that matters related to their occupation require the specialized expertise of one who practices in the field and indicate that centralization could lead to control by persons who know very little about the occupation. Proponents of centralized licensing claim that considerable duplication occurs through the licensure of many professions using free-standing boards and agencies. Centralization is promoted on the basis that many routine tasks performed in licensing can be done by a single agency at less cost and with greater consistency, making comparisons of data and other management efforts possible. The structure often lends itself to the development of uniform policies and procedures. The regulatory function is believed to be more accountable to the public under a centralized agency structure.

Centralization received considerable attention by the legislature in 1988. A Special Committee on the Organization of State Agencies reported to the governor and the 71st Legislature on the possibility of consolidating certain state agencies. The report recommended the consolidation of 12 licensing agencies including the TFSC into a centralized licensing agency. The report proposed the continuation of separate boards or commissions to set policy and standards and make disciplinary determinations for their respective professions while the consolidated agency would handle all administrative matters and provide staff services to the board. The committee indicated that cost savings in the area of investigation, legal counsel, accounting, data processing and other staff functions could be expected from consolidation. The staff of the Legislative Budget Board estimated that a net savings of over $200,000, or eight percent of the total budgets of the consolidated agencies, could be achieved in one biennium.

State regulatory functions tend to be most effective and efficient when the following conditions are present:

- A blend of experts in the field and persons concerned with the protection of the public sets standards for the profession and determines competency;

- The board's policies are coordinated with other agencies and reflect a statewide regulatory philosophy;
- The board is effectively monitored by the legislative and executive branches of the government and held accountable for the system used to finance regulatory activities;
- Board and staff functions are adequately separated to ensure that the board provides procedural due process for its licensees;
- The board restricts itself to promulgating rules and regulations necessary to fulfill the stated legislative purpose based on standards provided by the legislature; and
- The board takes punitive action against its licensees when appropriate.

Centralization is usually proposed as a way to accomplish the criteria outlined above.

Any process of centralization that is adopted should provide the regulated group with a degree of control over three major elements: control of the educational requirements for licensees; control of the requirements for professional conduct; and control of the means to punish violators. The central agency should have responsibility for such housekeeping activities as providing space for the administrative activities of the board, answering inquiries, collecting fees, processing license renewals and performing other routine duties.

The activities conducted by the Texas Funeral Service Commission were examined to determine if the criteria discussed above is currently being met and if alternative regulatory structures exist which would better facilitate compliance with the criteria. The review indicated the following:

- The commission's activities do not necessarily reflect a general statewide regulatory policy. The autonomous structure of the commission results in the commission developing rules and policies without the benefit of statewide regulatory guidelines or policy direction from a broader regulatory agency. In contrast, the Texas Board of Health has the ability to review and approve all proposed rules promulgated by the regulatory boards attached to the Texas Department of Health (TDH). This provides the Board of Health with the opportunity to achieve consistency and a statewide policy direction for its individual regulatory boards. In addition, TDH also achieves general consistency in rulemaking by having the same attorney assist boards in rule development. Finally, the centralized structure allows similar deficiencies within separate boards to be addressed from a broad policy perspective rather than on a case-by-case basis.
- The commission's autonomous organizational and fiscal structure has limited the amount of legislative and executive oversight it receives. The Texas Department of Health has a structure that provides organizational and fiscal oversight. Because staff hiring, major equipment purchases and identification of space needs are conducted by TDH administrators, the needs of all boards can be taken into

consideration and the individual board is accountable for the expenditures it makes. This is likely to result in additional fiscal control. This could also result in an overall reduction in licensing fees and therefore a savings to the licensees. A 1978 Sunset Commission staff comparison of costs per license for various independent boards and centralized licensing agencies indicated that lower costs per license can be achieved with a centralized structure due to the consolidation of mailing, recordkeeping, enforcement and purchasing activities of boards.

- Under the agency's current structure, the commission and staff functions are not adequately separated. The commission chairman is actively involved in the staff informal hearing process. Although the chairman does not vote, he does participate in formal hearings. This could create the appearance of an unfair process because the licensee may believe the chairman formed an opinion at the informal hearing and influenced other commission members during the process. The agency's executive director also serves at the pleasure of the commission and is not insulated in those situations where complaints involve board members. In contrast, having an administrative staff hired by the central agency insulates staff from board influence and helps ensure that a full investigative process takes place with all pertinent findings presented to the board. TDH has a structure that provides this separation. TDH also uses hearing officers to review findings and make recommendations to the board.

- The funeral industry is regulated under a centralized licensing structure in at least 14 other states. These states include California, Florida, Georgia, Michigan, Washington, Wisconsin and New York.

- The Texas Department of Health already has responsibility for the oversight of some funeral-related activities. Through its Vital Statistics Law it establishes a time frame for the submission of death certificates to the department. TDH also has requirements for the transit of bodies across county lines. Finally, it specifies standards and procedures for sanitation and the disposal of solid waste at funeral establishments.

- A recent survey of members of boards attached to TDH indicated that, in general, the boards have adequate access to TDH staff and having such support helps the boards achieve consistency with the licensing practices of other agencies. Seventy-six percent of the board members surveyed reported that TDH staff responds to inquiries within one week of receiving them. The majority of respondents (88%) also responded that access to TDH staff results in the board having more resources and expertise available than if the board were totally autonomous. Ninety-four percent of the members responded that the board has complete freedom to determine the qualifications and fitness of licensees and potential licensees within statutory constraints. As a result of this survey and interviews with the staff of TDH, it was determined that separate regulatory licensing boards in Texas do operate effectively under a centralized agency structure.

PROBLEM

The activities conducted by the TFSC are duplicative in a number of ways with the regulatory functions of the Texas Department of Health. The current approach to regulating these professions does not reflect a statewide regulatory philosophy, does not provide the best mechanism for fiscal accountability and does not adequately separate board and staff functions.

RECOMMENDATION

- **If the agency is not abolished, its functions should be transferred to the Texas Department of Health where a centralized licensing operation is currently in place to regulate such professions as medication aides, respiratory therapists and professional counselors and its oversight of the four mortuary schools in Texas should be transferred to the Texas Education Agency and the Higher Education Coordinating Board.**

The transfer of the agency's functions should result in a more standardized approach to licensure, better separation of board and staff functions, additional fiscal controls and potentially an overall reduction in licensing fees for the licensees.

The transfer would result in the consolidation of administrative services such as mailing, record-keeping, and issuance of licensees. Staff of the Texas Department of Health would perform inspections. A policy-making body appointed by the governor would continue to set licensure requirements, develop standards of practice and promulgate rules for funeral professionals. Rules would be subject to the approval of the Board of Health, but the funeral service board would retain full control over disciplinary action against a licensee.

FISCAL IMPACT

The transfer of the agency will result in approximately $108,750 per year in administrative savings. The savings will result from the elimination of three positions, financial consulting costs and other duplicative administrative costs. The Texas Department of Health reports that the TFSC's remaining five staff could not be immediately moved to the central office location. The costs of leasing space, therefore, would not be eliminated through the transfer.

Recommendations if Agency is Continued

Summary of Recommendations

The recommendations which follow are generally consistent with the findings and recommendations that resulted from the sunset process 12 years ago. They reflect a general conclusion that licensing requirements and regulation of occupations should not be unnecessarily restrictive to those wishing to enter the profession and should be structured in such a way that licensees are treated fairly and equitably and the cost of licensing is not unduly shifted to consumers. Whether the regulation of the funeral industry is continued by the Texas Funeral Service Commission or by another agency, the changes recommended below are expected to improve the effectiveness and efficiency of the regulation.

The current sunset review found that a number of changes have occurred in the regulation of the funeral industry in the 12 years since the first review. The agency currently maintains complete complaint files and processes complaints in a timely manner. The agency also complies with requirements to post timely notification of its meetings in the Texas Register and attempts to encourage public participation by sending notification to consumer groups of times and locations of meetings. The nature of complaints handled by the agency has also changed. In 1978, complaints from licensees accounted for 88 percent of the cases acted on; in 1988 this category had dropped to less than five percent of the cases acted on. Sixty-six percent of the cases handled in 1988 were initiated by the agency as a result of inspections and of the 161 total complaints accepted for investigation by the agency, only 29 percent, or 47 cases, originated from consumers. The agency no longer maintains the position it held 12 years ago that cases alleging mishandling of money or misunderstanding about the services delivered are outside of its jurisdiction and now attempts to resolve cases of this nature when it can determine that a violation of statute or rule has occurred.

Policy-making Body

As a standard part of the sunset review the agency's policy-making body was examined. The review determined that since the primary purpose of the agency is the protection of public welfare, the agency's purpose could be better served by having a majority of public members on the commission. Other recommendations in the report reduce the need for industry expertise on the commission.

A second recommendation related to policy-making is designed to better separate the staff's investigatory function from the board's adjudicatory function. Currently, the board chairman participates in the informal hearings along with the executive director and the agency's chief inspector. The chair then attends, but does not participate in any subsequent formal hearing process. This does not afford a clear separation of the two processes and could give the appearance of an unfair process. The review concluded that both consumers and licensees would be better served by having the staff, without board involvement, conduct the initial informal hearings and make a recommendation to the full boards. The potential for ex parte situations would be considerably reduced by such a process. A final recommendation affecting the policy-making body provides for the governor to designate the chair of the commission as is currently the case in many other agencies.

Overall Administration

The review of the administrative operations of the agency did not indicate that changes were needed to improve the current activities carried out through this function.

Programs

Licensing

A second area of inquiry related to the licensing powers and procedures of the agency. The review of this area focused on the necessity and relevance of the current requirements for licensure. The review identified several licensure requirements that are unnecessary or exceptionally restrictive. These include the requirements that prospective licensees take an embalming practical exam, that all licensees be residents of Texas, that reciprocal applicants must complete a one-year probationary period prior to full licensure, and that apprentices must complete at least 60 cases before they can be licensed. Suggestions for removing or changing these requirements are in the report.

Another license requirement is the successful completion of a written exam developed by the agency. The review determined that using the agency-prepared exam could place the state in jeopardy with regard to possible lawsuits claiming the test is invalid or that questions are unrelated to the practice of funeral directing or embalming. A recommendation that the agency use a national exam and eliminate its practical exam is made later in the report.

Enforcement

A third area of inquiry related to the inspection and enforcement powers and procedures of the commission. The review of this area focused on several activities of the commission.

First, the commission conducts annual inspections to enforce the laws it administers. In addition, the commission conducts follow-up inspections as time and circumstance permit. The review indicated that the annual requirement and a lack of inspection targeting reduces the department's ability to concentrate enforcement efforts where needed to ensure compliance.

Second, the commission has the authority to apply disciplinary sanctions against licenses for violations of the law. The commission suspends and probates licenses but does not oversee the licensees during the probationary period.

One concern identified during the review of the agency's enforcement practices was language establishing actions offensive to community standards as a ground for the commission to take action against a licensee. This language was determined to be vague and impossible to define in rules and its removal is recommended. Recommendations to address these findings are included in the report.

Coordination with Other Agencies

A fourth area of inquiry was the extent to which the agency's activities duplicated or overlapped those of other state agencies. The Texas Department of Health, for example, administers laws which affect funeral practice, such as the vital statistics statute and laws relating to the disposal of solid waste. The review determined that there is no overlap between TDH responsibilities and those of the agency, but additional compliance with TDH laws would likely occur if the agency had authority to sanction licensees for violations of those laws.

It was also determined that greater compliance with solid waste laws would be likely if the TFSC inspectors checked solid waste requirements during their routine inspections of funeral establishments. Recommendations regarding these areas appear in the report.

The Texas Department of Banking also performs activities related to funeral practice, specifically with regard to preneed funeral contracts. It was determined that the department needs to work closely with TFSC to ensure that purchasers of preneed funeral services are provided the same information as that which must be given to persons arranging services which are immediately needed. The review found that several improvements could be made in the "preneed" area.

Recommendations pertaining to the establishment of a complaint log by the banking department and the placement of certain disclosure statements in preneed funeral contracts are found in the report.

The State Board of Insurance (SBI), through its advertising division, also has a role in the preneed business. Advertisements of preneed contracts are reviewed by SBI to be sure they are not deceptive to the public. Because insurance funded preneed contracts represent an increasing share of the preneed market, the SBI's involvement is expected to remain strong.

One recommendation in the report provides for the TFSC, banking department and SBI to enter into a Memorandum of Understanding to make sure that each agency receives information when needed and that enforcement of the law is not duplicative or inequitable.

The majority of recommendations contained in this section of the report would not have a significant fiscal impact. One recommendation which would eliminate the agency's preparation of the licensing exam, however, would result in a loss of income to the General Revenue Fund of about $30,000 per year.

ISSUE 3: The statutory composition of the board should be changed so that a majority of the members are public members.

BACKGROUND

The Funeral Service Commission currently consists of nine members. Five members, a majority, must be licensed embalmers or funeral directors. At least three of the five licensed commissioners must be embalmers. Four members must be representatives of the general public who are not regulated under the agency's statute.

Licensed funeral directors and embalmers have stressed that licensure of funeral professionals is essential to ensure that consumers are properly protected in a time of emotional loss and trauma. Although consumer protection is held to be a primary purpose of the commission, and of most regulatory boards, many boards which set and enforce requirements tend to include a majority of licensed professionals.

The expertise of licensed professionals is often needed on boards when the decisions made by the boards are of a highly technical nature. The Board of Medical Examiners, for example, must have a sufficient number of doctors on the board to assess whether the licensed physicians it regulates properly practice the technical aspects of medicine. Such technical expertise is necessary to ensure that incompetent doctors do not adversely affect the health of patients. Also, having licensed professionals on a board assures licensees that the technical aspects of their work are assessed by the persons best qualified to judge the work -- their own peers. In addition, public members can serve an important function in bringing attention to problems of public concern that a professional group might prefer remain within its ranks.

It is generally accepted that consumers do not have the training and expertise to evaluate whether highly technical professionals, such as physicians, have properly diagnosed and treated a patient. Non-licensed consumers however, do have the ability to protect the public's interest in matters where the function or service being assessed is non-technical in nature. For example, consumers can generally determine from evidence presented whether a licensed person in a profession actually delivered a service or complied with a law governing the occupation.

The majority of the duties of the board and the nature of funeral practices are not so technical as to be outside public member decision making ability. For example, board members have had to assess allegations as to whether funeral establishments included cards designating available colors on their casket display, whether price lists were provided to customers, whether goods and services ordered and paid for were substituted with less expensive items, and whether an insurance refund was withheld. Assessing these types of problems does not require any special training as a funeral director or embalmer.

A review of the board's current responsibilities, practices in other states and literature on the significance of public members on boards indicated the following:

- Many states now require some public representation on licensing boards. Wisconsin law requires at least one public member on each licensing board, while California has required a majority of public members on its boards since 1976, with the exception of the Board of Accountancy and certain health agencies. As a result of sunset legislation and other legislative initiatives, public representation on Texas boards has also increased considerably in the last 12 years.

- Of the 161 cases considered by the commission in fiscal year 1988, 157 were determined by the review to be of a straight forward nature that could be resolved by unlicensed persons. Ninety-seven of these cases involved simple findings by an agency inspector that an establishment either failed to include the agency's address on its forms or failed to display caskets or cards specifying available casket colors as required. Only one case of improper embalming was considered by the commission in 1988 and required the expertise of licensed members. The other three cases which may have been technical in nature, related to the professional behavior of a licensee.
- Other recommendations in this report, if adopted, will reduce the amount of time currently required by licensed commission members to supervise embalming practical exams and develop and oversee the licensing test. Even if these functions are not eliminated, however, it is expected that the two licensed embalmers on the board and the two licensed staff persons would be adequate to oversee 144 embalming practical exams per year. If test development is still required, other expertise can be obtained from advisory groups. These activities constitute a relatively small portion of the board's current duties and functions.

- Public groups have been effective in changing even complex and technical law. By forming study groups and reading and researching technical topics, members of the public have changed such areas as water quality utility regulation and nursing home legislation.

- Literature on licensing practices indicates that having boards comprised primarily of licensed persons has resulted in ever increasing requirements for entry into the profession. This is referred to by economists as the "Cadillac effect," where consumers may desire to buy a lower quality service for less money but such a service is not available. In some occupations, the consumer can forego the service, but few consumers elect to forego the services of funeral professionals when death of a family member occurs.

- In his 1977 report on the funeral rule, the presiding officer of the FTC hearings strongly encouraged increasing the number of public members on funeral boards. In his report to the FTC he said, "While it would be relatively difficult to regulate any industry without the advice of practitioners, it is asking for a largeness of view and spirit not generally prevalent to hope that practitioners would act in the public

interest on a long-term basis. The states would be well advised to have a minority of funeral director members with the balance being public members of one sort or another."

- The 71st Legislature passed a law in 1989 which established an all public member board to set policy and oversee the regulation of occupations such as the manufactured housing industry, boxers, the boiler industry and air conditioning contractors among others. This law renamed the Texas Department of Labor and Standards as the Department of Licensing and Regulation and created the board to provide a broader policy direction which would protect the public interest. It was the consensus of the legislature that adequate expertise was available through the use of advisory committees and the rulemaking process to ensure that technical matters needing board judgment could be satisfactorily resolved. The legislature essentially determined that the duties of the board were not overly technical in nature and therefore could be handled by public members.

PROBLEM

Having a majority of licensed professionals on the board does not provide the best mechanism for meeting the agency's consumer protection responsibilities and could have the effect of unnecessarily increasing requirements for the professional. Additional safeguards are needed to ensure that the non-technical consumer-protection duties of the commission are carried out by persons who are representative of the general public.

RECOMMENDATION

- **The statutory composition of the commission should be changed to include five public members and four members who are licensed embalmers or funeral directors. At least three of the licensed members should be embalmers, as is currently the case.**

Public members, if properly appointed, have adequate ability to contribute to a board's work. The effectiveness of a board's ability to protect the public may be linked to the number of public members in relation to the number of industry representatives and the extent to which they join together in the public interest. Strong pressure within a board for a more consumer-oriented approach can encourage public-minded decisions, but such pressure is much more difficult to effect if only a small minority of members are representative of the public. The background, motivation, context and experience of board members strongly influences their activities on the board.

Members who perceive their role to be that of representing the public, in addition to that of protecting the public, could logically be expected to make decisions without undue influence as to how the industry itself would be affected. On the other hand, industry representatives on the board would be expected to take their professional obligations into consideration when making decisions.

The two influences, public and industry, need to exist in a carefully structured balance. For a board with a mandate to oversee non-technical, consumer-oriented laws and regulations, that balance should clearly tip in favor of the consuming public.

FISCAL IMPACT

No fiscal impact is anticipated as a result of this recommendation.

ISSUE 4: The statute should require that the governor designate the chairman of the commission.

BACKGROUND

The chairman of the commission is currently elected by the members of the commission and serves as chair for one year. The Sunset Commission has routinely recommended that the governor appoint the chair on the basis of improving accountability to the chief executive. Except in unusual circumstances, this provision has been included in the statutes of agencies reviewed as a result of sunset recommendations. The governor selects the chair in many other state agencies, such as the Board of Pardons and Parole, the Texas Department of Mental Health and Mental Retardation, the Texas Air Control Board, the Texas Water Commission, the Texas Department of Corrections and the Texas Department of Human Services. The majority of the agencies reviewed for the 71st Legislature had this provision in their statutes. Where it was not in statute, it was added as a result of sunset action.

PROBLEM

The election of the chairman by the commission members each year does not provide the most direct method of ensuring a continuity of policy or accountability to the state's chief executive officer.

RECOMMENDATION

- **The statute should be changed so the governor designates the chair of the Texas Funeral Service Commission.**

The person appointed as chair would continue in that position at the pleasure of the governor. This would promote accountability between the commission and governor.

FISCAL IMPACT

No fiscal impact would occur as a result of the recommendation.

ISSUE 5: The statute should prohibit participation by a commission member in the informal hearing process.

BACKGROUND

The Texas Sunset Commission has adopted standard across-the-board provisions which are generally placed in the statutes of each agency subject to sunset review. One of these provisions requires that the policy body of an agency develop and implement policies which clearly separate board and staff functions. It has been adopted for numerous agencies since its inception. The provision is based on the premise that a clear separation of powers is needed to ensure that those who set agency policy are not managing or conducting the agency's day to day activities. This language is not currently in the TFC statute.

One area of state licensing agency operations that could be significantly affected by this provision involves hearings and enforcement. When a state agency with disciplinary or enforcement authority receives a complaint or discovers a violation of its statute through inspection or investigation, it is required to follow specific administrative procedures set out in law and rules. Regardless of the agency's size, these administrative procedures generally involve two stages. The first stage is investigative in nature to determine whether a violation of a rule or statute occurred. Much of this work takes place in an informal manner where some combination of agency staff, legal counsel, the respondent, and others affected by the case attempt to reach an agreement on how it should be handled. It is not uncommon for a member of an agency's board to actively participate in these informal hearings.

Although agreement may be reached in the informal hearing as to how a case should be settled, the final decision and enforcement action is usually left to an agency's board or commission. This second stage of the administrative process, where the board rules on the case, is adjudicatory in nature and the board may vote to accept or reject the agreement.

The Texas Administrative Procedures Act sets out certain protections to ensure that the two stages are adequately separated so that the board members making a final decision on the case hear only admissible evidence and are not unduly influenced by anyone affected by the case. One provision that offers such protection is that which prohibits "ex parte" communication. Under this provision a board member who has prior knowledge of a case may not vote on that case.

The Texas Funeral Service Commission uses a process similar to the one described above. A Complaint Review Committee, comprised of the commission chairman, the executive director, the chief investigator and the outside legal counsel reviews the findings of an agency investigation, considers the licensee's explanation of the case and recommends action which the full board may accept or reject. The chairman abstains from voting on any case where he participated

in the informal hearing. The chairman does sit in on hearings and may be asked to overrule or sustain objections from the attorneys.

A review of the commission's practices regarding the informal and formal hearing process indicated the following:

- The commission chairman properly abstains from voting on cases in which he participated at the informal level. Having the chairman involved at the informal level, however, has the effect of the chair being unable to vote on significant cases that go to a full hearing.

- Having the chairman sit in on the formal hearing after participation in the informal hearing is not illegal. The agency indicates that the chairman's participation allows for input from the commission at the earliest hearing stage. However, the process could have the appearance of being unfair. The licensee affected by the hearing may believe that the chair has the ability to share information with fellow commission members that could change the outcome of the decision, even if this does not happen in practice.

- A U.S. Supreme Court case, Withrow v. Larkin, found that although combining investigative and adjudicative functions was not in itself a violation of a person's due process rights, there is a potential problem with such combinations. Courts would not be precluded from determining in a particular case that the risk of unfairness is intolerably high and cases have been brought to court on the ground that such a combination occurred.

PROBLEM

Having the commission chairman participate in the informal hearing process does not provide a clear separation of board and staff functions, prevents the chair from voting on important matters and could result in the appearance of an unfair administrative process.

RECOMMENDATION

- **The statute should prohibit members of the commission from participating in the agency's informal hearing process.**

This would result in a clear separation of board and staff functions with regard to the agency's hearing process and would free the full board to participate in important decisions relating to the enforcement of agency laws and rules. Having a full board available with no prior knowledge of the case being discussed helps to ensure the appearance of fairness which is essential for maintaining a high level of public confidence in governmental processes.

FISCAL IMPACT

This recommendation will not result in a fiscal impact.

ISSUE 6: The statutory requirement that a funeral director or embalmer be a resident of the state of Texas should be repealed.

BACKGROUND

In recent years, consumer groups and occupational licensing experts have stressed the importance of licensing boards adopting only those entrance requirements necessary to ensure minimum competence. Requirements that do not clearly involve protection of the public generally serve only to exclude persons from a profession. The requirement that a person must be a resident of the state to be licensed in that state is not related to the protection of the public and therefore is unnecessarily restrictive.

The statute requires that, to be licensed as a funeral director or embalmer in Texas, a person must be a resident of the state. The effect of the requirement is that funeral directors residing in other states cannot be licensed in Texas and therefore cannot pick up bodies on "first call" and transport them across state lines for funerals or burials. To address this problem the TFSC has informally granted reciprocal licenses to funeral directors and embalmers living close to the Texas border so that they may pick up bodies and offer funeral services when so requested by customers.

A review of the agency's current practices and a review of licensing requirements in other states indicated the following:

- The agency does not prioritize the enforcement of this requirement. In fact, no attempt is made to verify residency of potential or current applicants.
- The agency permits a person with a valid Texas license who moves to another state to keep the license current. This policy is consistent with that of most licensing agencies.
- At least 8 states of 10 surveyed had no requirement that a licensee be a resident of the licensing state. These states include Michigan, Oregon, New York, Wisconsin, Virginia, Arkansas, California and Florida.

PROBLEM

Requiring a person to be a resident of the state does not serve the purpose of protecting the public health or welfare. The requirement is overly restrictive and irrelevant to competent and honest practice. Residency requirements prevent funeral directors and embalmers from being able to practice their craft in Texas because they reside in another state, not because they are unqualified or incompetent.

RECOMMENDATION

- **The requirement that a funeral director or embalmer be a resident of the state of Texas should be removed from statute.**

This recommendation would remove unnecessarily restrictive requirements and allow any person who meets Texas licensure requirements to become licensed in Texas regardless of the state of residence. It would also formalize the arrangements currently being made for licensees living in Texas border states. Since the agency does not attempt to verify residency, this recommendation would remove a requirement that does not appear vital to agency operations.

FISCAL IMPACT

No significant fiscal impact is anticipated. The recommendation could slightly raise agency revenue by allowing out-of-state licensees easier access to Texas licensure.

ISSUE 7: The statute should be changed to reduce the number of cases required for an apprenticeship, and a clear definition of what constitutes a "case" should be adopted by rule.

BACKGROUND

One of the requirements for licensure as a funeral director or embalmer in Texas is the completion of an apprenticeship program. Embalmer apprentices must first graduate from a school of mortuary science while funeral director apprenticeships may be served before or after enrolling in mortuary school. Apprenticeships are intended to provide potential licensees with direct experience in their profession that cannot be obtained in a classroom setting. The apprenticeship should enable a person to obtain proficiency under the supervision of a qualified licensee so that he can eventually practice independently. Apprenticeship programs must not only be of a reasonable length, but must also provide meaningful opportunities for obtaining proficiency. This is usually accomplished by starting an apprentice on basic tasks and increasing duties and responsibilities over time. A common criticism of apprenticeship programs is that they may be made more difficult or lengthy than is necessary to ensure competence. If these programs are unnecessarily restrictive or excessive, it arbitrarily and inappropriately delays entry into the profession.

Forty-nine states have an apprenticeship program for either funeral directors, or embalmers, or both. In most states, there is a specific requirement for a number of "cases" to be completed during the apprenticeship term. In order to get credit for a "case," an apprentice must either assist with the embalming of a body or assist with the arranging of a funeral, depending on the license. Unlike Texas, some states have defined by rule what actually constitutes a "case." Arkansas, for example, requires that funeral director apprentices make the arrangements with the family, including the selection of merchandise, and direct the family at the funeral and cemetery. The apprentice must carry out these responsibilities in at least ten services. Arkansas further defines the number of cases that must involve arranging for flowers, instructing pallbearers and other services.

The apprenticeship for embalmers also require a number of "cases" to be performed. A compilation of state board licensing rules and regulations prepared in 1983 indicated that 43 out of 50 states had a requirement that a specific number of bodies must be embalmed before a license could be issued. The national average for the number of bodies needing to be embalmed before a license could be issued was 36.

Experience in embalming bodies is generally gained during the apprenticeship period. In Texas both funeral directors and embalmers are required by law to serve a 12-month apprenticeship and complete 60 "cases" during this term. The apprentices submit monthly reports of their completed cases to the TFSC. The commission has further adopted rules specifying that an embalmer apprentice must assist in embalming six autopsy cases. The 71st Legislature, in H.B. 1344, required the commission to define by rule the terms of employment of an

apprentice, including the services which the apprentice must perform. The change does not specifically require the agency to define what would comprise an acceptable case.

A review of the agency's requirements and apprenticeship requirements in other states indicated the following:

- Some apprentices, particularly funeral director apprentices, indicate that they are not given adequate responsibility early enough in their term. Under the current program, very simple duties can count as "cases." For example, picking up a body from the hospital on "first call" constitutes a case for a funeral director apprentice. Consequently, Texas apprentices have to assist on many cases but are not necessarily given much responsibility in these cases.

- A phone survey of eight states confirmed that none of the states contacted had apprenticeship requirements as high as Texas. These states were Wisconsin, Michigan, New York, Louisiana, Oregon, Oklahoma, Arkansas and Florida. Based on this survey, the average number of cases an embalmer apprentice had to assist on was 39 and the average number of cases a funeral director apprentice had to assist on was 25.

- There are many funeral homes in small Texas towns that do not handle 60 cases per year. Apprentices in these funeral homes must either travel to another funeral home to get cases or take longer than one year to finish their apprenticeships. The agency reports that a considerable number of apprentices need to go to more than one home to get cases, although the exact number was not readily obtainable.

- Neither statute nor agency rules define a case. One apprentice could perform 60 complete cases which all include making arrangements, setting up the church, directing the family, and organizing the funeral procession and service while another apprentice may only perform a single activity per case in fulfillment of his cases.

PROBLEM

The requirement for completing 60 cases during an apprenticeship is well above the national average of 36 and overly restricts entrance into the profession. In addition, the current apprenticeship requirements do not set any standard that allows the agency to fairly measure the work performed by all apprentices in a consistent way.

RECOMMENDATION

- **The statutory requirement for number of cases for both funeral director and embalmer apprentices should be lowered from 60 to 40.**
- **The statute should require the agency to define clearly in rules what constitutes a "case."**

The agency rules should require apprentice supervisors to gradually grant apprentices more responsibility during the course of their terms, and the rules should require a sufficient number of "complete" cases for both embalmer and funeral director apprentices. A complete case would include all the activities which an embalmer or funeral director must perform from picking up the body on "first call" to the interment.

These recommendations will bring apprenticeship case requirements more in line with those of other states and reduce the burden on some apprentices who must now leave their funeral establishments to obtain additional experience. Clarifying the types of duties which constitute a case will help ensure that apprentices obtain meaningful training and will give apprentices a consistent standard to be judged on.

FISCAL IMPACT

No fiscal impact is expected to occur as a result of this recommendation.

ISSUE 8: The agency statute should be changed to require the use of a national licensure exam and the statutory requirement for an embalming practical exam should be repealed.

BACKGROUND

Occupational licensing tests have come under increased scrutiny in recent years. Certain professional and legal standards have evolved for exams which are used to assess their fairness and validity. For example licensure examinations must be job-related and based upon an empirically conducted job analysis; they must accurately measure the domains relevant to the profession and they must have a point at which individuals pass or fail. This point, known as the cut score, should be established by objective criteria determined prior to the administration of the exam. To incorporate these validation points, a trend among regulatory agencies in the U.S. is to develop in-house testing expertise, use national exams or contract with professional testing companies such as the Educational Testing Service.

The TFSC, however, develops its own funeral director and embalmer licensing exams with the assistance of representatives of two mortuary schools. An applicant must pass a 200-question exam that includes 50-questions on Texas laws related to funeral practice. Applicants pay $165 to take the exam and are given their test scores on the same day it is taken. The agency maintains a bank of about 1,000 questions from which 250 are selected. Commission members generally set aside one extra day immediately preceding or following a board meeting to participate in the administration of the exam, and the exams are given two times per year. The agency's current activities of preparing, administering, proctoring and scoring the exam require about three days of board participation and represent a cost of approximately $1,500 - $1,800 per year for the agency.

A national licensing exam for funeral directors and/or embalmers is also available for use by state boards. The Texas mortuary schools currently provide for the national exam to be administered at least twice per year at the schools. The exam is offered so that students wishing to be licensed in other states will be able to satisfy any licensing requirement for passing the national exam. Students taking this exam are not exempt from taking the TFSC exam if they want to be licensed in Texas.

The TFSC also requires that persons desiring to be licensed as embalmers in Texas pass an embalming practical exam. These exams are given twice a year in Houston. The commission makes arrangements with three or four Houston funeral establishments plus one commercial embalming establishment to provide cases for the applicants. Agency board members who are licensed embalmers travel to Houston to observe and grade the applicants. In addition, agency inspectors, who are also licensed embalmers, may make the trip depending on the number of applicants taking the exam. Board members, staff members, and licensure applicants wait in a hotel room for funeral establishments to call when

bodies become available. The entire process takes from two to three days for all applicants to be tested, depending on the number of applicants. Agency personnel have to stay overnight in the hotel during this period but TFSC staff make an effort to schedule licensure applicants so that they do not have to stay overnight in Houston.

A review of the current examination practices of the agency and other states as well as research regarding testing practices for licensure boards indicated the following:

- The TFSC does not have access to a centralized testing office in the state staffed by exam specialists , nor does it contract with independent exam specialists or testing consultants in the development of its test. In addition, the TFSC has not used established criteria in the setting of a passing score for the exam although the passing score of 70 is set in statute. The agency indicates that it used a committee comprised of two mortuary school presidents and the licensed members of the board to review the test bank questions submitted by schools and identified questions which most appropriately related to funeral directing and embalming. This process required roughly six hours according to the executive director of the agency.

- The Conference of Funeral Service Examining Boards prepares a licensure exam that was used by 19 states in 1988. In addition, 45 states will accept the results of a national board exam as meeting their licensing qualifications. Only four states besides Texas do not accept the results of the national exam in lieu of taking a state-prepared exam. These states are California, Hawaii, Kansas, and Wisconsin. At least two of these states, California and Wisconsin, have central testing offices staffed by exam specialists and therefore have more assurance that they can produce a valid and reliable test. These findings suggest that at least 45 states have determined that the national exam satisfactorily measures a person's ability to practice in the funeral profession. Some states, such as Missouri, do not use a conference-prepared exam but contract with the conference to validate the state-prepared exam.

- The test validation procedures used at the national level surpass those used in Texas. The national conference recently spent $75,000 to ensure the tests' validity and updates the test every six months to reflect changes that mortuary schools may make to curricula. Both testing experts and a nationwide panel of funeral professionals are involved in this process. The conference also has an established, documented procedure for determining the cut-score.

- The TFSC will accept the results of the national exam for out-of-state licensees reciprocating into Texas. However, they will not accept the national exam as meeting licensing requirements for first-time Texas licensees.

- The commission has not formally adopted performance criteria with which to rate applicants on the practical exam so there is no guarantee that applicants will be rated in a standardized manner.

- Other means of checking a person's ability to embalm exist besides the embalming practical exam. The mortuary schools require students to assist on 12 embalming cases. Six of these cases must involve complete embalming which means that the student embalms unassisted but with supervision. Four cases must be autopsy cases because these cases require special handling. In addition, the funeral establishments that provide embalming apprenticeships have a strong incentive to oversee the apprentice and ensure that the embalming cases completed are done properly. Finally, the establishment that hires the embalmer has the ultimate responsibility for ensuring the competence of the embalmer.

- The practical exam has not served as a significant mechanism for weeding out unqualified applicants. Since 1986, of 502 applicants tested, only five persons failed, representing a 99 percent pass rate.

- The Conference of Funeral Service Examining Boards has indicated that of the 50 states, only Texas requires applicants to pass an embalming practical exam.

PROBLEM

In using a state constructed exam,the TFSC is taking some degree of legal risk because the exam is not formally validated by testing experts. Also, no formal procedures exist for arriving at a passing score for the exam. The construction of the test ties up hours of board time and the agency incurs an unnecessary annual cost. Finally, the requirement that students who have taken a national exam also must take the state exam is unnecessarily costly and burdensome for the student.

The practical exam also reflects a problem because it has the potential to be inherently subjective because the agency has not adopted written performance criteria. Personal interaction could affect exam scores. In addition, the exam may impose an unnecessary hardship on licensees who must travel to Houston and pay for a hotel room while awaiting notification that a test administrator is available to give them the exam.

RECOMMENDATION

- **The agency should be statutorily required to use the national exam prepared by the Conference of Funeral Service Examining Boards.**

- **The statute should specify that the agency should continue to give a state law portion of the licensing exam. The agency would be authorized to contract for the development of the state law portion of the exam.**

- **The statutory requirement for an embalming practical exam should be repealed.**

The use of a national exam will help to make the licensure test legally defensible in court if it is ever tested in court. The agency will have access to greater technical knowledge about testing and will save the cost of developing, administering, proctoring and scoring the tests. Texas mortuary school graduates would be able to take the test at their schools rather than travel to Austin and could save the expense of taking the commission-prepared exam. The conference would handle the tasks of processing exam applications, administering and scoring the exam. The commission would have the authority to determine whether the state law portion of the exam would be prepared by the agency or the conference. This would require the agency to cooperate with the conference in identifying the most critical aspects of its statute and ensuring that the exam appropriately reflects these provisions. Finally, using the national exam will be beneficial to licensees who later seek licensure in other states.

Eliminating the requirement for an embalming practical exam would place the responsibility for ensuring the competence of embalmers on mortuary schools, embalmer apprentice supervisors and the establishment that hires the licensee. Commission members would therefore be able to devote more time to industry policy-making issues. In addition, applicants would not have to travel to an exam site and pay the expense associated with the exam.

FISCAL IMPACT

The agency generates about $4,320 per year through the embalming practical exam and $33,000 per year through the written licensure exams. The combined costs to administer the two types of exams exceeds $6,000 per year. In addition, the agency prepares a new written exam about every two years at an estimated cost of $500. The agency would lose the revenue from exam fees but would no longer incur the costs of developing and administering the exam.

The cost to prospective licensees would not change considerably. An applicant currently pays $165 to take a TFSC - prepared exam compared to the conference's current cost to the student of $160. If the conference prepares the state law portion of the exam as well, it is estimated that this cost could increase by about $25 per student. A number of mortuary students, however, are paying $325 to take both the national and commission exams. To these students, the new process would represent a significant cost savings.

ISSUE 9: The statute and agency procedures should be changed to eliminate the one-year probationary period and personal interviews by a board member for reciprocal licensees.

BACKGROUND

The agency's statute provides that persons licensed by another state will be issued a Texas funeral director or embalmer license, provided the standards used by the other state are equivalent to Texas standards. The process of issuing reciprocal licenses is used in 40 other states beside Texas and is based on the assumption that if the qualifications in the initial licensing state are equivalent to those of the state considering the application, there is no need to require an applicant to repeat the process. Most states determine the equivalency by checking the educational and examination requirements and determining that the applicant's license in the other state is current and in good standing.

To get a reciprocal license in Texas requires the payment of a $75 licensing fee; proof of required schooling; evidence that the license from the other state is current and in good standing; and proof that the person has no criminal history. In addition to these, Texas has two other requirements not usually found in the reciprocal licensing processes of other states: an applicant is granted a one-year temporary permit rather than a license and is required to be personally interviewed by at least one TFSC board member.

The review of the agency's reciprocal licensing requirements and those used by other agencies in Texas and similar agencies in other states indicated the following:

- The agency issues about 30 reciprocal licenses each year. A review of the license files indicated that the general requirements are met and that the two additional requirements of the temporary license and personal interviews are consistently applied.

- The agency requires a person who is granted a reciprocal license to submit monthly reports to the commission notifying them of the location of his business. A review of these reports indicated that they did not result in any additional oversight on the part of the commission.

- The agency has never denied a person a permanent license nor required additional oversight of a reciprocal licensee.

- Thirty-two of the 40 states providing for reciprocal licensing only require a check of qualifications. Only eight states provide for additional requirements that are not based strictly on qualifications. None of the eight states are in geographical proximity to Texas nor do they compare in number of licensee population or reciprocal licenses granted.

- Fifteen Texas licensing agencies of comparable size and duties were contacted during the review and none of these agencies issued reciprocal licenses on a temporary basis or required a personal interview with the applicants.

PROBLEM

The TFSC reciprocal licensing process contains requirements that appear to be designed to create obstacles for out-of-state licensees rather than ensuring competence in the occupation. The review of other states and comparable state agencies indicate that these requirements are not necessary to protect the public.

RECOMMENDATION

- **The requirement that qualified reciprocal licensees must be issued temporary permits should be removed from statute.**
- **As a management recommendation, the agency should eliminate its requirement for monthly reports from and personal interviews with reciprocal license applicants.**

The changes above would help ensure that reciprocal license applicants are treated in the same manner as persons being licensed for the first time. The statute would reflect that reciprocal applicants would receive permanent licenses which are renewable in the same manner as all other individual licenses.

FISCAL IMPACT

No fiscal impact is anticipated from this recommendation.

ISSUE 10: The statute should clarify that the TFSC has authority to take action against licensees for violation of its law on "preneed" as well as "at need" transactions. In addition, the statute should require the Texas Department of Banking to adopt by rule the same disclosure requirements for those it regulates that exist for licensed funeral professionals and set administrative penalties for violations of these requirements. Finally, the statute should require the State Board of Insurance, TFSC and the Texas Department of Banking to enter into a memorandum of understanding to coordinate regulation of preneed funeral transactions.

BACKGROUND

Funeral goods and services are sold under two different conditions. First, they are sold at the time of a person's death. This is often referred to as an "at need" arrangement. Second, the goods and services can be arranged in advance of need, usually through a contract with a representative of a funeral establishment. This is known as a "preneed" sale.

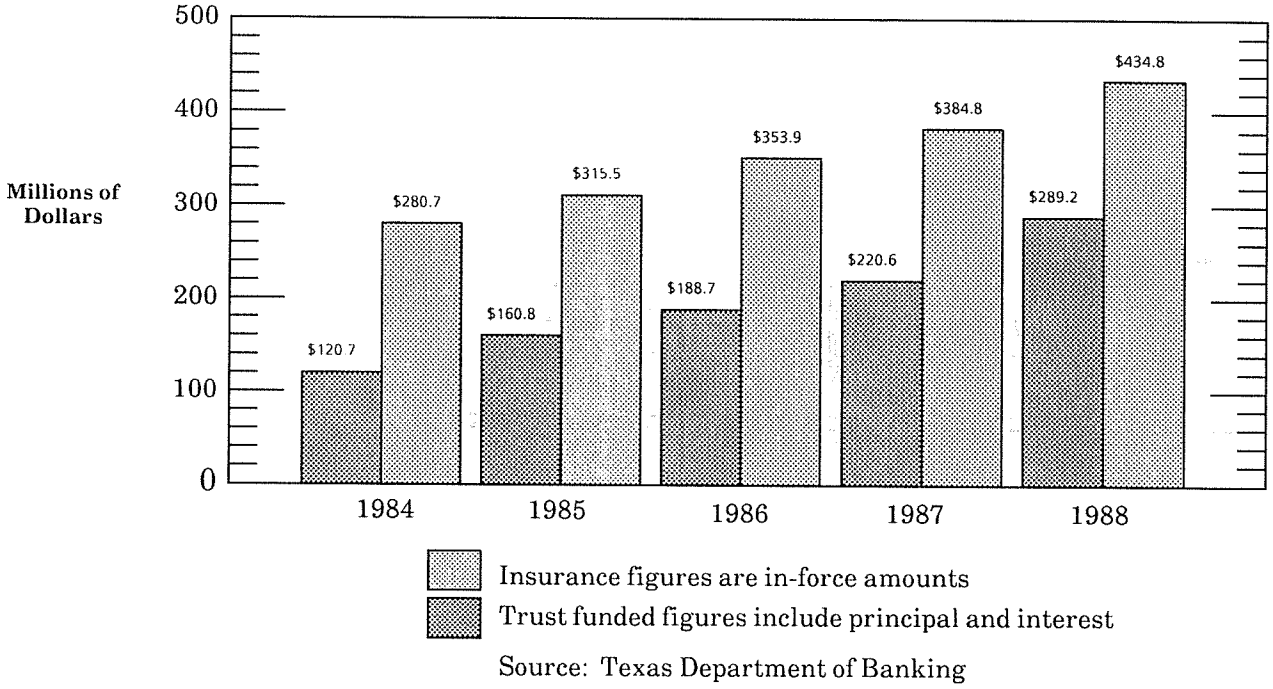
In the past decade, preneed sales have increased considerably nationwide. More than 700,000 contracts were sold in 1987 and that number is expected to reach two million by the year 2000. Preneed contracts are funded using two mechanisms: trusts or insurance policies. Trust-funded contracts currently comprise the majority of preneed investment funds as shown in Exhibit 7.

Trust-funded contracts represent sales in which a person pays an established amount of money, either in a lump sum or installments, for future goods and services. The seller retains ten percent of the contract amount to cover general overhead costs and is required by law to place all remaining funds in a trust fund. Generally, the funds may not be withdrawn until the person designated in the contract dies and the agreed-upon goods and services are delivered. Insurance funded contracts represent the majority of new preneed business and involve lump sum or installment payments by the purchaser of the contract to the preneed seller. The seller then purchases a life insurance policy on the preneed purchaser's life which will be used to fund the funeral at the time of death.

Both the insurance-funded and trust-funded contracts are required by law to guarantee delivery of the items listed in the contract, as long as the purchaser paid the full contract amount. In 1989, there was an increase from 1988 of 24,767 new insurance contracts compared to an increase of only 16,362 new trust-funded contracts as shown in Exhibit 8. The Texas Department of Banking (TDOB) has indicated that insurance funded sales are expected to considerably surpass trust funded sales in the next decade.

Exhibit 7

Active Prepaid Funeral Contracts in Texas

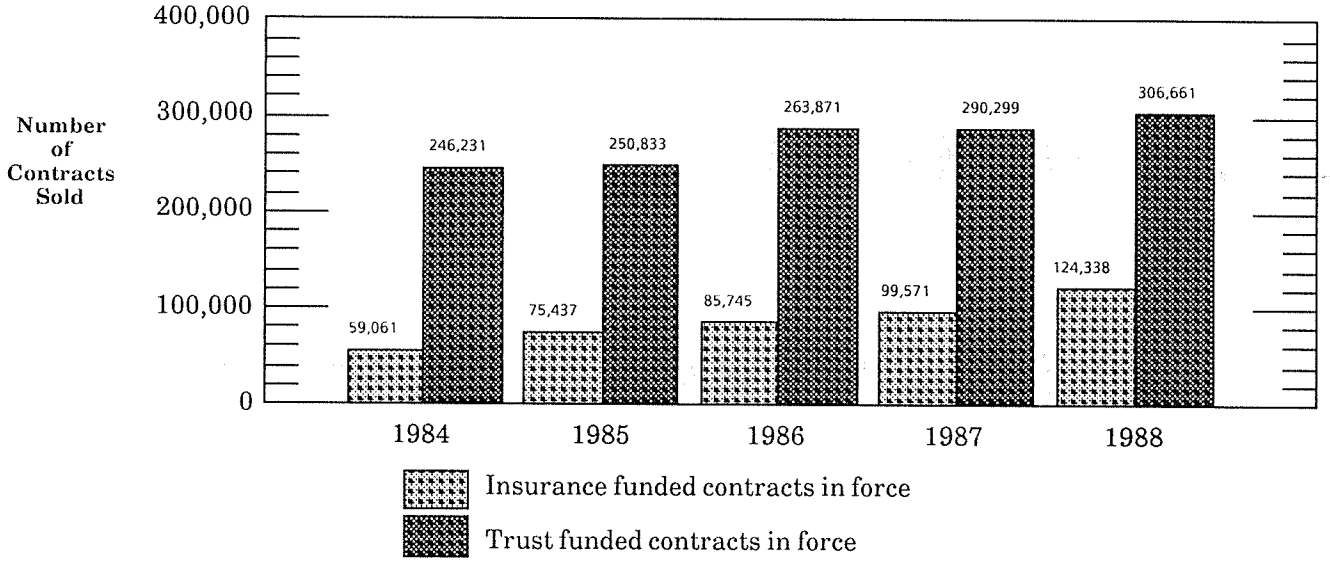


Source: Texas Department of Banking

Exhibit 8

Prepaid Funeral Contracts in Texas

Number of Active Contracts



Source: Texas Department of Banking

Sales made on an "at need" basis are regulated solely by the Texas Funeral Service Commission (TFSC) because these services exclusively involve individuals and establishments licensed by the commission. The TFSC has traditionally limited its actions to "at need" cases and refers complaints it receives regarding preneed matters to the Texas Department of Banking for resolution. As a result of legislation passed during the 71st Session, the TFSC was given limited authority to take action against any of its licensees who misappropriated preneed trust funds regulated by the TDOB.

"Preneed" sales, on the other hand, are regulated in differing ways by three separate state agencies. The Texas Department of Banking (TDOB) has statutory responsibility for issuing permits to preneed establishments, approving preneed contracts and overseeing about $435 million that has been placed in trust for the future delivery of funeral goods and services. The State Board of Insurance (SBI) has responsibilities with regard to the insurance funded preneed contracts. In addition to its authority to approve life insurance policies and practices in general, the SBI specifically reviews advertisements that are used to sell insurance-funded preneed contracts to verify that they clearly meet the agency's advertising standards. The TFSC is the third agency which has been involved with prened complaints.

In addition to the involvement of three state agencies, one federal agency also has regulatory authority over preneed matters. The Federal Trade Commission (FTC) enforces the federal funeral rule in Texas, which generally requires certain information to be disclosed to buyers and forbids misrepresenting information to a buyer. For example, sellers may not claim that a casket is required for cremation or that outer burial containers are required by cemeteries when such is not the case.

An evaluation of the "preneed" activities of the TFSC, Texas Department of Banking, and the State Board of Insurance and a review of these activities in other states indicated the following:

- A comprehensive set of requirements and penalties exists in law and rules for TFSC licensees selling funeral goods and services on an "at need" basis. According to law, any person arranging for funeral services or merchandise commits an offense if he fails to provide retail price lists for the customer to keep. The person must itemize the prices and maintain records for a certain period of time. The law also makes it an offense to use fraudulent or deceptive conduct related to the funeral business. By rule, funeral directors are required to tell persons who ask about funeral arrangements by telephone that price information is available over the phone rather than requiring a prospective customer to go to the establishment for prices. Information that must be itemized in a retail price list is set out. For example, a funeral director must list any item that will be obtained from a third party and paid for by the funeral provider on the purchaser's behalf, such as flowers.

- The TFSC rules also specify acts that constitute deceptive practice. Licensed persons may not claim that the law requires embalming, that a casket is required for cremation or that outer burial containers are required by cemeteries when such is not the case. To prevent such representations from taking place the licensee must disclose specific

statements in writing to the customers. The above requirements have not been applied to "preneed" cases. In fact, the Office of the Attorney General has advised that the commission does not currently have the authority to discipline a licensee who injures a consumer in the sale or management of preneed funerals, because preneed activities are subject to a statute administered by the Texas Department of Banking (TDOB).

- Although the TDOB administers a statute pertaining to preneed funeral contracts, its authority is limited to issuing permits, approving preneed contracts and overseeing trust funds. The TDOB statute does not require those it regulates to disclose the same types of information that the TFSC statute requires of licensees selling on an "at need" basis. It also has no authority to impose administrative sanctions on the preneed sellers it regulates. The TDOB's enforcement authority is limited in that it may only refer cases where trust funds are misappropriated to district court. This differs considerably from the authority TFSC has to impose fines or suspend or revoke the license of those selling funeral items on an "at need" basis.

- The State Board of Insurance, TDOB and TFSC share a common responsibility to protect consumers from deceptive advertising and fraudulent practices. However, the agencies do not have adequate authority or a reliable method for coordinating their activities to ensure that both sellers and buyers are treated equitably.

PROBLEM

The state's regulation of the sale of funeral goods and services is incomplete and inconsistent. State law does not clearly require the same practices for "at need" and "preneed" sellers. In addition, the state does not have a consistent statutory framework for penalizing sellers of funeral goods and services who fail to meet existing requirements. The TFSC lacks clear authority to enforce its statute with its licensees making preneed sales. The Texas Department of Banking also lacks authority to require those preneed sellers it regulates to disclose the same type of information that licensed funeral directors must provide when selling goods and services on an "at need" basis. Finally, the TDOB has no ability to impose administrative sanctions on preneed permit holders who violate its statute or rules.

RECOMMENDATION

- **The TFSC statute should clarify that the Funeral Service Commission has authority to take action against a licensee who fails to meet the same requirements for preneed sales as are required in statute and rules for "at need" sales.**

- **The Texas Department of Banking should be required by statute to adopt rules which require all persons selling prepaid funeral services or merchandise regulated by the department's statute to disclose the same information to prospective customers that licensed funeral professionals must provide to customers making a**

purchase at the time of need. Violation of the rule would constitute a ground for imposing administrative penalties or revoking an establishment's permit.

- **The Texas Department of Banking should have statutory authority to set administrative penalties consistent with those established by the TFSC for violation of the new requirements.**

- **The statute should require the Texas Department of Banking, the Texas Funeral Service Commission and the State Board of Insurance to enter into and adopt by rule a Memorandum of Understanding that clarifies each agency's role in enforcing the above requirements.**

The above recommendations give the TFSC authority to take action against a licensee with regard to preneed funeral sales practices, and allow the Department of Banking to penalize any permitted establishment whose agent or employee failed to comply. The statute should clarify that the Banking Department is solely responsible for investigating complaints related to items that should be on the preneed contract, as is currently the case. In addition, the banking department would be required to investigate complaints pertaining to sellers of preneed contracts who are not licensed by the Funeral Service Commission.

The TFSC statute should also clarify that the Funeral Service Commission may use any investigative authority already available to it to determine if a licensee is in violation of the requirements, provided, however, that it does not undertake activities which the Texas Department of Banking is required to perform. To avoid duplicative investigations, the TFSC and TDOB would jointly need to determine under which conditions the TFSC would investigate its own licensees and when the TDOB would be involved. The TFSC would be authorized in statute to adopt rules for taking action against a licensee in addition to any administrative action taken by the Texas Department of Banking. The memorandum of understanding would specify the manner in which complaints would be referred and investigated and the conditions under which each agency would notify the other of violations identified. In addition, the MOU should set out how the agencies would coordinate with one another regarding the adoption of rules pertaining to the disclosure of information and acts that constitute deceptive practices relating to preneed sales.

The State Board of Insurance would not need new enforcement authority as a result of this recommendation. However, due to their role in overseeing the advertising practices of insurance funded preneed sales, procedures should be established in the MOU which set out how the agency would be informed of any questionable practices identified by either TFSC or TDOB.

FISCAL IMPACT

No fiscal impact is anticipated from this recommendation. The Texas Department of Banking has been handling approximately 100 to 150 preneed complaints per year, and enforcing the additional disclosure requirements should not have a significant impact on the agency's workload. Complaints received by

the department are generally resolved informally and therefore, it is not anticipated that additional funds would be required for hearings. Some staff time would be required on the part of all three of the involved agencies to discuss and execute a memorandum of understanding, but this should not be substantial.

ISSUE 11: As a management recommendation, the Texas Department of Banking should change the way it handles complaints on preneed funeral contracts so that information on complaints is readily available.

BACKGROUND

Standard language that requires files to be maintained on complaints appears in the statutes of a majority of agencies subject to sunset review. This language, referred to as a sunset across-the-board provision, is based on the concept that failure to maintain adequate records on complaints could increase the time it takes to resolve a complaint and limit the agency's ability to protect the public.

Complaint records can be useful to the agency and to the public. First, they help the agency to be aware of and document the date a complaint was received, and whether it was quickly resolved. Second, the agency can determine by analyzing the complaints whether it has adequate statutory authority or staffing to resolve the complaints in a satisfactory manner. Using complaint records to identify and document trends in the types of problems that occur helps agencies to focus resources and promulgate relevant rules to correct significant problems.

The standard sunset language appears in the Texas Department of Banking's statute in Article 342-212, V.T.C.S. The department is specifically required to keep an information file about each complaint relating to any entity it regulates. The department must notify the parties to the complaint at least quarterly of the complaint's status. The agency has not kept an information file about each complaint it receives on preneed sellers. Instead, a complaint is filed in the individual record of the preneed seller. Therefore, it cannot be easily determined how many total complaints existed or if parties are consistently notified as required. The Texas Department of Banking estimates that it processes between 100 to 150 preneed complaints per year, but precise information is not available.

The review of the Texas Department of Banking's complaint-handling procedures indicated the following:

- The department does not keep an information file about each complaint it receives and is not in compliance with its statute. There is no centralized file for complaints and no log maintained as to the status or disposition of the complaints. The number or types of complaints received, or the appropriateness of the actions that were taken cannot be analyzed without going through every seller's file to determine how many complaints actually existed.

RECOMMENDATION

- **As a management recommendation, the Texas Department of Banking should, as the statute requires, develop a system for maintaining complaint records.**

This recommendation will result in the agency being able to document and analyze the complaints it receives. The agency's system should provide for a method of documenting the number of complaints, type of complaint, dates on which parties to the complaint were notified, and final disposition of the complaint.

FISCAL IMPACT

No significant fiscal impact should occur from this recommendation. A few hours of staff time may be required to initially set up the system, but maintaining the records would require minimal effort.

ISSUE 12: As a management recommendation, the Texas Department of Banking should incorporate into its prepaid funeral contract approval requirements the disclosure requirements established by the National Association of Insurance Commissioners.

BACKGROUND

When a buyer purchases funeral goods and services that will be delivered at an unknown future date, the primary document used to set out the terms of the purchase is the prepaid contract. It is especially important for this type of contract to clearly disclose the arrangement in detail, including any restrictions and refund policies because consumers have been confused in the past about how such contracts work. Often, the contracted goods and sevices are not delivered until the purchaser dies, at which time the contract is immediately needed. An improperly drafted contract could result in the sudden discovery by the deceased's family members that funds are not available to pay for a complete funeral or that the services cannot be provided in the funeral home the family has chosen. In some cases, the family may learn that the funeral establishment named in the contract is no longer in business or under new ownership. For the protection of the purchaser, the contract should clearly establish what would happen in the event the purchaser died in another location, how interest that had accrued in excess of the cost of the funeral would be allocated, what portion of a person's payments constituted service charges or commissions and other information.

The National Association of Insurance Commissioners (NAIC) recognized the need to disclose certain information and published model preneed contract disclosure requirements in 1988 for optional use by states. These model requirements are summarized in Exhibit 9.

The Texas Department of Banking is responsible for approving the standard contracts used by preneed sellers in Texas. The department has adopted rules that set out elements each contract must include.

A review of the rules adopted by the Texas Department of Banking and the requirements proposed by the NAIC as well as other research on preneed funeral transactions indicated the following:

- Although a majority of the NAIC model disclosure requirements are already present in some manner in the Texas Department of Banking's rules, three of the requirements are not in rule. The requirement for the contract to disclose any geographic restrictions and whether a sales commission or other form of compensation is being paid are not in rule. A third requirement that the contract disclose any penalties to be incurred by the policyholder as a result of failure to make payments or as a result of cancellation of the life insurance policy or annuity is also not in rule.

Exhibit 9

Information Which Should Be Disclosed Before An Application Is Made For a Preneed Funeral Contract

1. The fact that a life insurance policy or an annuity is involved or being used to fund the contract.

2. The nature of the relationships among the soliciting agent, the provider of the goods and/or services, the person assisting with the prearrangement and the insurer.

3. The relationship of the life insurance policy or annuity to the funding of the prearrangement and the nature and existence of any guarantees relating to the prearrangement.

4. A description of what happens to the prearrangement if there are changes in the life insurance policy or annuity including, but not limited to changes in the assignment, beneficiary designation or use of the proceeds.

5. Any penalties to be incurred by the policyholder as a result of failure to make premium payments and any penalties to be incurred or monies to be received as a result of cancellation or surrender of the life insurance policy or annuity.

6. A list of the merchandise and services that are contracted for and their prices, including an indication that the price is guaranteed at the time of purchase.

7. An explanation of what occurs if there is a difference between the proceeds of the life insurance policy and annuity and the amount actually needed to fund the prearrangement.

8. Any geographic restrictions or other restrictions that apply to the contract.

9. A description of what happens if the provider is unable to deliver the merchandise, services or guarantee.

10. The fact that a sales commission or other form of compensation is being paid and if so, the person or entity to whom it is paid.

Source: National Association of Insurance Commissioners, 1988.

- Although some standard contract provisions are already required in Texas, contracts may vary considerably. For example, some contracts provide coverage over a large geographic area so that a funeral may be delivered in any number of cities or funeral homes, while other contracts are limited to only one home. This aspect of the contract, referred to as portability of benefits, can pose problems if a person purchases a contract in one city and moves to a faraway location.

- The American Association of Retired Persons (AARP), in its written testimony to the Federal Trade Commission dated August 30, 1988, supported the adoption of minimum standards on preneed funeral contracts in federal rules. The AARP asserted that lack of clear disclosures about the portability and revocability of contracts have caused financial hardship and engendered uncertainty in the typically elderly persons who purchase these contracts.

PROBLEM

The Texas Department of Banking's rules do not include all of the disclosure requirements that have been determined by the NAIC to be necessary for the protection of consumers. Failure to disclose certain information on preneed funeral contracts could result in confusion or financial hardship for persons purchasing such contracts.

RECOMMENDATION

- **As a management recommendation, the Texas Department of Banking should incorporate into its prepaid funeral contract approval requirements the disclosure requirements established by the National Association of Insurance Commissioners.**

Having a full range of disclosures required in the preneed funeral contract should result in the buyer's improved ability to select the most appropriate plan for his needs, improve the buyer's understanding of basic features of the arrangement, and improve the ability of the buyer to evaluate relative costs of similar plans.

FISCAL IMPACT

There would be no significant fiscal impact resulting from this recommendation. Some staff time would be required for the Texas Department of Banking to review the National Association of Insurance Commissioners' model requirements, identify those which should be placed in rule and finally adopt the requirements.

ISSUE 13: The statute should be changed to prevent the agency from revoking a license on the ground that the licensee has acted in a way that is offensive to the common conscience and moral standards of the community.

BACKGROUND

One of the primary purposes of licensing laws is to set reasonable standards and requirements for persons practicing an occupation. In order for these requirements to be valid, the language used in law must be clear and must have a substantial relationship to the functions and responsibilities of the occupation being licensed.

The agency's statute sets out a number of requirements that funeral establishments must comply with. For example, each establishment must have a preparation room containing an operating table, sewer facilities and hot and cold running water. If an establishment fails to meet a requirement, the commission may take action against the licensee.

The requirements set out in this section of the statute are generally straightforward and have not required further interpretation in rules. When a requirement has needed further clarification, the commission has adopted rules to guide both staff and licensees in enforcing the statute. For example, the statute requires establishments to have sufficient licensed personnel available to operate the facility. Agency rules define what constitutes sufficient personnel.

A review of the requirements and commission action to define the violations indicated the following:

- In all cases except one, the requirements that a licensee must follow are clear on their face or the agency has provided a clear definition in rules.

- The one requirement that is not clear and has not been defined prohibits a licensee from conducting or operating a funeral home in a manner that is "offensive to the common conscience and moral standards of the community where the funeral establishment is licensed or where such offensive conduct occurred."

- The commission has used this undefined language as a ground for taking action against a funeral home in most of its enforcement activities against the establishments. However, when it has been used, the commission has also been able to rely on some other violation of the agency's law as a ground for taking action against the licensed establishment.

- Commission members from one area of the state have said in commission meetings they cannot discern what community standards in another area of the state might be.

- A survey of other states indicates that the number of licensing laws using undefined standards for licensure or vague language pertaining to an offense has decreased in recent years, partially due to the potential for legal action against boards. A study done for the state of Oregon in 1987, indicated the removal of undefined language such as "good moral character" from seven licensing laws in a nine- year period.

PROBLEM

The vague statutory language could result in the violation of a person's due process rights. Without a clear definition of the action, a licensee could lose the right to operate a business and the means of economic support as a result of an arbitrary decision. In addition, the language does not have a substantial relationship to the functions and responsibilities of the licensed occupation.

RECOMMENDATION

- **Statutory language that makes actions found to be offensive to the common conscience and moral standards of the community a ground for the commission to act against a licensee should be repealed.**

Removal of the language will protect the commission from legal action on the basis that neither statutes, rules nor regulations can define what appropriate community standards are. Without defining under what condition an establishment would be penalized, the potential for arbitrary sanctions for reasons unrelated to the protection of the public exists.

FISCAL IMPACT

No fiscal impact would occur as a result of this recommendation.

ISSUE 14: The statute should be changed to require the agency to inspect licensees and facilities on a two-year basis rather than every year.

BACKGROUND

The Funeral Service Commission, like most licensing agencies, has a standard statutory requirement to do annual inspections. The requirement was developed for several reasons: to ensure that licensees are complying with statutory directives; to provide an incentive to correct violations before the annual renewal of licenses; and to provide a means for targeting reinspections of facilities that do not meet legal requirements. The performance of inspections on an annual basis requires adequate staffing to perform the inspections. With adequate staffing an inspector would not only be able to conduct an annual inspection of each establishment but also reinspect when required to ensure that the establishment corrects its problems. When staffing is limited, the inspector is forced to concentrate on the geographic proximity of the establishments and the demand that each facility be inspected annually as a main priority. The need to follow up on more serious violations through reinspection then becomes a secondary concern. The result is that some establishments are inspected in less than one year to accommodate scheduling, even though no problem may exist to justify the more frequent visits.

The TFSC employs two inspectors to visit the approximately 1,100 funeral homes in the state to determine if they are meeting the requirements in the law. These inspections involve examining the physical plant, verifying current personnel licenses, and randomly checking case files for the required embalming case reports, the permission to embalm forms and the funeral price lists. The inspectors record their findings on an inspection report form in a checklist format.

As an adjunct to the annual inspection process, the agency has developed an informal policy that requires a follow-up inspection when a serious violation is found during the annual inspection. The follow-up inspections are intended to target establishments that need extra attention.

The inspection activity was reviewed to determine whether the statutory directives were being met, whether the policies were adequate and consistently applied, and whether the policies provided a way to ensure that discrepancies were in fact corrected.

The review of the agency's inspection program indicated the following:

- Until 1987, agency policy was to visit a minimum of 80 percent of licensed establishments annually. According to agency staff, 52 to 83 percent of establishments actually received annual inspections in the period of 1980 to 1987. In 1988, in accordance with a new statutory directive, all licensed establishments were inspected, according to

agency staff. Field inspectors attempt to complete routine inspections in ten months to dedicate the remaining two months to follow-up inspections.

- The statutory requirement for annual inspections and the informal policy regarding follow-up visits were generally adhered to, but actual implementation was inconsistent. For example:

  -- A survey of 534 inspection reports covering the period from 1983 to 1989 indicated that 60 percent of the inspections occurred within 10 to 14 months of the last visit. Of the remaining 40 percent, half of the inspections occurred earlier than 10 months after the previous visit and half occurred later than 14 months after the previous visit.

  -- One establishment was inspected twice in four months although no discrepancies were noted.

  -- One establishment had not had a citation since 1985 yet was inspected six times in four years.

- The agency is in the process of computerizing the tracking of inspection reports. Efforts have been made to streamline the manual process to identify repeat offenders of the law. The agency's inspection form allows the field inspectors to indicate the establishment's prior history and whether a violation was found during the last routine visit. Each inspection report is reviewed by the executive director and/or the chief investigator and this notation helps prompt them to schedule a follow-up inspection or initiate sanctions where warranted.

  -- About half of the 500 inspection reports reviewed should have showed a prior violation. However, only one-quarter were marked and, of those, nearly three-fourths were marked incorrectly.

  -- Numerous establishments were cited for more severe and/or multiple discrepancies but were not inspected in more than 14 months.

PROBLEM

With the limited staff available, the annual inspection requirement cannot be carried out in a consistent manner and reinspections cannot be targeted towards repeat or severe violations in a way that ensures compliance with the law.

RECOMMENDATION

The commission's statute should be modified to:

- **replace the annual with a biennial inspection requirement;**
- **allow the commission to conduct inspections to the extent necessary to ensure compliance; and**

- **require the commission to develop a reinspection process in rules.**

Substituting a biennial inspection requirement for the current annual requirement will give the commission flexibility and eliminate the need to add additional inspectors in the future. It can be developed so there is no danger to the public as a result of the longer inspection time.

In implementing these changes, the commission should adopt in rules a policy for routine and follow-up inspections clearly informing licensees of the probable frequency of inspections based on prior inspection performance and other circumstances (such as a change in management or ownership). These rules should not restrict the agency in conducting its affairs but should serve to inform all licensees and guide the staff in scheduling reinspections based on the seriousness and extent of problems found at an establishment. This type of procedure is already used by the agency, adopted in Rule 201.11(a), for determining the administrative penalty to be assessed for each violation.

To implement this recommendation, the agency will need to develop and use tracking procedures that will clearly indicate which establishments require reinspection and a time frame for such inspections.

FISCAL IMPACT

No fiscal impact is anticipated from this recommendation. This recommendation would shift existing resources to areas in need of greater attention; it would not increase the workload of the two field inspectors; and it will delay the need for hiring additional inspectors.

ISSUE 15: The statute should be changed to give the agency more power to correct violations by licensees.

BACKGROUND

The statute authorizes the commission to impose a range of sanctions on funeral establishments and individual licensees, including denial of a license, refusal to admit a person to an exam, revocation, suspension, reprimand, probation of a license and/or assessment of an administrative penalty. The commission employs the full range in disciplining licensees found in violation of the law. Before any of these sanctions are invoked, the licensee is entitled to an administrative hearing before the commission, in accordance with the Administrative Procedure and Texas Register Act (Article 6252-13a).

These sanctions are useful when the violations are critical in nature and require immediate action to stop the unlawful conduct. Otherwise, for less serious violations which do not represent an immediate threat to public safety and therefore do not require immediate action, the licensing agency should have a standard approach for alerting the licensee to the problem and substantiating compliance. This approach should incorporate timely notification that a problem exists as well as adequate instruction on how to correct it and come into compliance with the law. In order to consistently and fairly apply sanctions upon continued violation, a method for tracking violations from one inspection period to another must be used. If, after reasonable warning, the violation has continued, the appropriate sanction should be applied. Many state agencies have developed and use some variation of this type of tracking and warning system. An approach of this nature is particularly important for a small agency with a limited inspection staff like the Funeral Service Commission because it can increase the impact of regulation with minimal expense.

In the case of TFSC, the agency uses warning letters for violations but does not require any documentation showing that the violation cited in the warning letter was corrected. Also, although agency policy is to initiate sanctions only after two violations in a row, there is no formal tracking system that identifies violations that occur from one inspection period to another.

A review of the agency's use of warning notices and violation tracking procedures indicated the following:

- Warning letters are written only occasionally in response to inspection violations. Of the 534 inspection reports reviewed over a six-year period, approximately half cited a violation. However, there was evidence in the files of only 26 warning letters being sent by the commission during the same period.

- The commission's use of warning letters was found to be inconsistent. For example:

- -- One funeral home had six violations in 1987, two in 1986, and one in 1985. No warning letter was found in the file.

- -- Another funeral home had a violation noted every year since 1983. No warning letters were found in the file.

- -- Several establishments had only one minor violation in the six years surveyed but were sent a letter warning of the consequences of the problem continuing.

- Interviews with funeral directors during the review indicated that they were not always made aware, during an inspection, that a discrepancy found was a violation of the law and therefore must be corrected. Since it is commission policy to initiate disciplinary action only after two of the same violations in a row, no other communication with the commission occurred until the next inspection when the same problem was found again. These licensees were then assessed an administrative penalty for the repeat violation even though they were not told to correct the problem on the earlier visit nor were given a written warning.

- The agency does not require a licensee to document that any corrective action has been taken to prevent violations from recurring.

- Although the agency is in the process of computerizing the tracking of violations resulting from inspections, the inspection reports do not consistently note a violation when it occurred. A review of 500 inspection reports showed that about half should have had the box on the form marked that alerts agency staff in Austin to a prior violation. However, only one-quarter of these boxes were marked and, of those, nearly three-quarters were marked incorrectly.

- Other state licensing agencies routinely write warning letters to licensees. During the review, one agency was contacted that has a particularly strong policy in this area. The Texas Board of Pharmacy incorporates its warning notice into the copy of the inspection form which is signed by and left with the licensee. A statement at the bottom of the form clearly and directly states that any problems that were found must be fixed. It further states that if the licensee does not correct the problem, disciplinary proceedings may be initiated. This appears to be a direct, consistent and fair approach.

PROBLEM

The agency currently uses a system to correct minor violations that is incomplete and is used inconsistently. Licensees are often unaware that violations have occurred and the agency staff in Austin cannot determine from the field inspection reports if a warning letter is necessary. This slows down the inspection process, reduces the effectiveness of the small inspection staff and results in licensees being fined for violations they may not have been aware of.

RECOMMENDATION

The commission's statute should be changed to:

- **require warning letters be given to licensees when violations are discovered during inspections;**
- **require that licensees document and report corrective actions within a certain time; and**
- **require that the agency use past reports on violations during the inspection process.**

These changes would use the limited inspection staff more effectively and would require licensees to take actions that could cut down on repeat violations. Finally, it would prevent a licensee from being fined for a violation he was not aware needed correcting.

FISCAL IMPACT

The anticipated fiscal impact of this recommendation is minimal. If the agency incorporates warning notices in the inspection form, there would be costs associated with printing new forms. This expense, however, would be offset with the reduced postage costs of sending the current letters.

ISSUE 16: The agency should be required by statute to track licensees that are on probation to make sure the conditions of probation are met.

BACKGROUND

The commission has statutory authority to apply a full range of sanctions against a licensee who violates the agency's statute or a rule or regulation adopted under that law. This includes placing any licensed funeral director, embalmer, apprentice or funeral establishment on probation.

Probation is a punitive measure which does not involve a fine or require the licensee to cease business. It is an intermediate step typically used by licensing agencies to reprimand a licensee for an action, while granting a period of time for reform. A repeat violation during the probation generally will result in suspension or revocation of a license. During probation, the licensing agency should be monitoring the licensee's behavior more closely than normal to assure itself that the illegal action is not continuing. Often, the agency directs the licensee to take steps that are designed to prevent future violations. To that end, probationary orders are often issued requiring continuing education courses or, in the case of some medical professions, supervision by another licensee. These conditions of probation should be clearly described in writing for the licensee at the outset of the probation.

Next to administrative fines, probation is the most common disciplinary order issued by the commission. It has been the commission's general practice to use probation in conjunction with a suspension. In other words, the commission generally suspends a license and then commutes most or all of the suspension period to probation.

The statute and agency rules are silent on the procedures the agency should use in carrying out its probation authority. In practice, the agency does not track licensees on probation either by increasing the frequency of inspections or by requiring any special behavior of the licensee during the probationary period that could indicate whether the former practices had changed. The only direction given the licensees is a verbal warning at the conclusion of the hearing to obey all the relevant funeral laws of the state, followed by a copy of the formal order.

The agency's approach to probation was analyzed to determine whether the problems that led to the sanction were corrected and whether clear direction about the agency's expectations was given to the licensee. A review of agency files indicated the following:

- Nine individual and seven establishment licenses were suspended in 1987 with all or most of the time probated. The commission took the same action against six individual and five establishment licenses in 1988. These involved a variety of violations including improper

embalming, failure to provide color cards, practicing funeral directing without a license, and failure to provide consumers with the required price lists or other documentation.

- Prior to 1983, licensees were routinely issued probationary orders. Usually, the orders required the licensee to report monthly to the commission, either simply verifying their business location or, less often, detailing the funerals conducted or embalmings completed. This practice was abolished because the orders were not being used to supervise the progress of the licensees. Since 1983, two probationary orders have been issued. One clearly stated what the licensee must do to comply with the law and required monthly follow-up inspections during the period of probation.

PROBLEM

The commission does not track licensees on probation to determine if the conditions of probation are met. The agency does not clearly indicate in writing what the licensee should do to correct the unlawful practice.

RECOMMENDATION

The commission's statute should be modified to:

- **require the commission to track the progress of licensees on probation; and**
- **require that licensees be notified in writing of the probation and of the actions that need to be taken by the licensee during the period of probation.**

This change will require the agency to adopt a policy to track more closely the business practices of those licensees who are on probation. Since probation is a severe penalty and is only a step away from loss of a license it is important that it be handled in a clear and precise manner. To clarify what is expected, the commission should issue written probationary orders to all licensees at the start of their probation detailing the steps they must take to assure the commission they are no longer acting illegally.

FISCAL IMPACT

There is no fiscal impact anticipated from this recommendation.

ISSUE 17: The statute should give the agency power to act when TFSC licensees violate TDH vital statistics laws and solid waste laws.

BACKGROUND

The Texas Department of Health administers three laws that impact the funeral occupations regulated by the commission. First, the Vital Statistics Law requires funeral directors to submit a death certificate within ten days on every burial performed in the state. This is the document necessary for the state to maintain accurate records of all deaths in the state. This law also requires funeral directors to submit to local registrars a burial transit permit for any body shipped out of the county where the death occurred. The registrar uses the permit and the Record of Death document, filed immediately after a death, to keep track of all deceased persons until the death certificate is submitted.

Second, the Solid Waste Disposal Act and the Texas Sanitation and Health Protection Act specify standards and procedures for sanitation in public buildings and for the disposal of solid waste. For funeral establishments, these regulations primarily address the plumbing of the water and waste water, overall sanitation of the facility, and the proper containment and disposal of human body fluids and solid remains.

It is common for businesses to meet with regulation from several state and federal agencies, each concerned with different aspects of a business' operation. No agency's activities should extend beyond the jurisdiction defined in the law to the point of duplicating or conflicting with agencies involved with other aspects of regulation. However, sometimes several agencies adopt rules and regulations on the same subject or area of a business' operation even though the purpose of the rules may be different.

This overlap is often found with occupational licensing agencies that must certify the competence of applicants and verify, on an on-going basis, that the practices of their licensees adhere to the standards and rules of the profession. The right to hold the license should rest not only on the licensee's adherence to the rules of the licensing agency but also on his obeyance of the other laws in the state pertaining to his occupation. To that end, it can be helpful for the agencies to share information, enforcement activities or other functions in order to help both achieve their own goals in a more effective manner.

In the case of funeral directors and establishments, the vital statistics and solid waste laws that TDH administers require certain actions and standards of funeral directors and establishments yet the TFSC neither verifies compliance nor has authority to enforce the TDH laws as they relate to TFSC's licensees. This enforcement authority does exist, however, in another area of joint jurisdiction. The TFSC may take disciplinary action against a licensee who misappropriates preneed funeral trust funds in violation of the Texas Department of Banking's statutes.

A review of the laws administered by TDH relating to funeral directing and embalming as well as the enforcement and inspection authority of each agency found the following:

Vital Statistics

- Investigations in cases of suspected non-compliance do not involve on-site inspections. If the death certificate or burial transit permit was not received by the local registrar or by the TDH staff in the Austin office, written or telephone contact by TDH staff with the funeral director generally clarifies and solves the problem.

- TFSC staff indicate that local registrars, particularly in Houston, contact the commission periodically for help in encouraging a funeral director to file a death certificate or burial transit permit. Based on these and other contacts, it is estimated that there would be between 80 and 100 violations referred to TFSC on a yearly basis from local registrars.

Solid Waste

- By TFSC rule, funeral establishments must request an inspection by the local health department before initial licensing. These inspections usually check for general sanitation and the water and waste water system. The staff estimates, however, that 25 percent, or 275, of the 1,100 licensed establishments are outside the jurisdiction of any local health department and have not received this inspection.

- The local health departments do not return to the funeral establishments on a routine basis to assess sanitation or the maintenance of the water and waste water system.

- In contrast to the vital statistics activities, compliance with the solid waste program can only be determined through on-site inspections. Because of a lack of resources, TDH solid waste inspectors do not inspect funeral homes except in response to consumer or other state agency complaints.

- TFSC inspectors routinely inspect licensed funeral establishments. Elements of this inspection include an assessment of the general sanitation of the facility, including the preparation room. They do not, however, check that solid waste is properly contained or water is properly plumbed.

PROBLEM

Several areas of the vital statistics and solid waste laws administered by TDH overlap with the jurisdiction that TFSC has over its licensees. Because TFSC does not have clear authority to enforce those laws as they relate to their licensees the state loses an opportunity to increase its enforcement capabilities with little or no additional cost. Also, funeral establishments are not currently inspected for compliance with certain solid waste disposal requirements.

RECOMMENDATION

The commission's statute should be modified to:

- **authorize the agency to take disciplinary action against a licensee for violation of the relevant laws and rules under TDH;**
- **provide for the adoption of joint rules between TFSC and TDH, where appropriate, to ensure coordinated inspection and enforcement efforts;**
- **require the agency to incorporate solid waste disposal into their routine inspections of funeral establishments; and**
- **authorize the agency to require an outside inspection for waste disposal and sanitation for those facilities not covered by local health departments.**

This change would eliminate a gap that currently exists in the enforcement of the vital statistics and solid waste laws administered by TDH. This change would also eliminate the existing gap in the inspection of proper solid waste disposal techniques by funeral establishments. It would require TFSC and TDH to adopt joint rules specifying a clear division of labor for investigations and the handling of complaint files. To the extent possible, the TFSC should likewise enter into agreements with local registrars specifying procedures for enforcing the filing of death certificates and burial transit permits.

With minimal training, TFSC inspectors can close the gap that now exists in the inspection of funeral homes by incorporating TDH's solid waste disposal elements into their existing inspection routine. The solid waste division of TDH gives training as needed to state agencies on inspecting for proper waste disposal. In the case of funeral establishments this training would show how to determine that the plumbing system is in working order and is not cross-plumbed; that liquid waste is draining properly; and that the solid waste is properly disposed of and the receptacles are properly covered or sealed.
This recommendation would not replace, rescind or alter the jurisdiction of the federal Occupational Health and Safety Agency (OSHA) regarding certain health-related regulations funeral homes must meet under federal law.

FISCAL IMPACT

There would be minimal anticipated fiscal impact from this recommendation. Some additional investigations may be required in the enforcement of the vital statistics law; however, it is anticipated that all or most of the documenting evidence would be submitted by TDH and/or the local registrar. Also, although the estimated number of possible violators is comparatively high, the additional resources required to pursue enforcement of these cases is anticipated to be minimal since most would involve an administrative penalty only and, therefore, would usually be resolved without a full hearing.

Across the Board Recommendations

From its inception, the Sunset Commission identified common agency problems. These problems have been addressed through standard statutory provisions incorporated into the legislation developed for agencies undergoing sunset review. Since these provisions are routinely applied to all agencies under review, the specific language is not repeated throughout the reports. The application to particular agencies are denoted in abbreviated chart form.

Texas Funeral Service Commission			
Applied	**Modified**	**Not Applied**	**Across-the-Board Recommendations**
			A. GENERAL
X			1. Require public membership on boards and commissions.
X			2. Require specific provisions relating to conflicts of interest.
X			3. Provide that a person registered as a lobbyist under Article 6252-9c, V.A.C.S., may not act as general counsel to the board or serve as a member of the board.
X			4. Require that appointment to the board shall be made without regard to race, color, handicap, sex, religion, age, or national origin of the appointee.
X			5. Specify grounds for removal of a board member.
		*	6. Require the board to make annual written reports to the governor, the auditor, and the legislature accounting for all receipts and disbursements made under its statute.
X			7. Require the board to establish skill-oriented career ladders.
X			8. Require a system of merit pay based on documented employee performance.
X			9. Provide for notification and information to the public concerning board activities.
		*	10. Place agency funds in the treasury to ensure legislative review of agency expenditures through the appropriation process.
		*	11. Require files to be maintained on complaints.
X			12. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
X			13. Require development of an E.E.O. policy.
X			14. Require the agency to provide information on standards of conduct to board members and employees.
X			15. Provide for public testimony at agency meetings.
X			16. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.
X			17. Require development of accessibility plan.

*Already in law.

Texas Funeral Service Commission (cont.)			
Applied	**Modified**	**Not Applied**	**Across-the-Board Recommendations**
			B. LICENSING
X			1. Require standard time frames for licensees who are delinquent in renewal of licenses.
X			2. Provide for notice to a person taking an examination of the results of the exam within a reasonable time of the testing date.
X			3. Provide an analysis, on request, to individuals failing the examination.
X			4. Require licensing disqualifications to be: 1) easily determined, and 2) relate to currently existing conditions.
		*	5. (a) Provide for licensing by endorsement rather than reciprocity. (b) Provide for licensing by reciprocity rather than endorsement.
X			6. Authorize the staggered renewal of licenses.
X			7. Authorize agencies to use a full range of penalties.
X			8. Specify board hearing requirements.
X			9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
		X	10. Authorize the board to adopt a system of voluntary continuing education.

*Already in law.

Minor Statutory Modifications

Discussions with agency personnel concerning the agency and its statute indicated a need to make minor statutory changes. The changes are non-substantive in nature and are made to comply with federal requirements or to remove out-dated references. The following material provides a description of the needed changes and the rationale for each.

Minor Modifications to the Texas Funeral Service Commission Statute

Change	Reason	Location in Statute
Changes language about removal of a board member who is not present for at least one-half of board meetings. This should be grounds for, not a cause for automatic, removal.	To reflect current sunset across-the-board recommendations language.	Section 2(A)(8)
Delete provision for the secretary of the board to receive a salary for and assume the duties of the executive director in his absence. Add language authorizing the board to appoint an acting executive director in the absence of the executive director.	To replace outdated language.	Section 2(I) and (D)
Substitute "Chapter 325, Government Code" for "Article 5429k, Vernon's Texas Civil Statutes".	To reflect the correct statutory citation for the Texas Sunset Act following recent codification.	Section 2(N)
Delete authorization for committees of the legislature to overrule adoption of a commission rule.	To delete language that is believed to be unconstitutional.	Section 2(P)
Remove "created after the effective date of this Act" from the provision requiring funeral establishments to be licensed.	To remove outdated language.	Section 4(A)
Add language stating all rules adopted by the commission are subject to the Administrative Procedures and Texas Register Act.	To clarify existing statutory language regarding rule-making authority.	Section 5
Remove the sentences beginning with "[a]ny person who practices..." from the criminal penalty provision.	To remove contradictory and outdated criminal penalty authority.	Section 7(b)
Delete transitional provisions.	To remove outdated language.	Section 9 and Section 10 (paragraphs 2-7)

Texas Funeral Service Commission

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