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H.B. No. 1538

A BILL TO BE ENTITLED

1 AN ACT

2 relating to the continuation and functions of the Texas Funeral
3 Service Commission, including certain functions transferred to the
4 commission from the Texas Department of Health, and the powers and
5 duties of the Texas Finance Commission and the banking commissioner
6 of Texas regarding cemeteries; providing administrative and civil
7 penalties.

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

9 SECTION 1. Section 651.001, Occupations Code, is amended by
10 adding Subdivision (12-a) to read as follows:

11 (12-a) "Perpetual care cemetery" means a cemetery
12 regulated under Chapter 712, Health and Safety Code.

13 SECTION 2. Section 651.002, Occupations Code, is amended to
14 read as follows:

15 Sec. 651.002. APPLICATION OF SUNSET ACT. The Texas Funeral
16 Service Commission is subject to Chapter 325, Government Code
17 (Texas Sunset Act). Unless continued in existence as provided by
18 that chapter, the commission is abolished and this chapter expires
19 September 1, 2015 [~~2003~~].

20 SECTION 3. Section 651.003(a), Occupations Code, is amended
21 to read as follows:

22 (a) This chapter does not affect the authority of the Texas
23 Department of Banking to enforce Chapter 154, Finance Code, or to
24 regulate perpetual care cemeteries.

1 SECTION 4. Subchapter A, Chapter 651, Occupations Code, is
2 amended by adding Section 651.004 to read as follows:

3 Sec. 651.004. REGULATION OF CEMETERY AND CREMATORY
4 SERVICES. (a) The commission shall regulate cemetery and
5 crematory services as provided by this chapter and Chapter 716,
6 Health and Safety Code.

7 (b) The commission may not regulate cemetery or crematory
8 services that occur after burial or inurnment unless the services
9 relate to the care and treatment of the remains in an urn, casket,
10 or outer enclosure.

11 SECTION 5. Sections 651.057(a) and (b), Occupations Code,
12 are amended to read as follows:

13 (a) The governor shall designate one [~~public~~] member of the
14 commission as the presiding officer of the commission to serve in
15 that capacity at the pleasure of the governor.

16 (b) After 30 days' written notice is given to the
17 commissioners, the commission shall elect from its [~~public~~] members
18 an assistant presiding officer. The assistant presiding officer
19 serves in that capacity for one year.

20 SECTION 6. Section 651.151(a), Occupations Code, is amended
21 to read as follows:

22 (a) The commission shall establish proficiency,
23 professionalism, ethics, and qualification standards for
24 individuals issued a license under this chapter [~~funeral directors~~
25 ~~and embalmers~~].

26 SECTION 7. Section 651.152, Occupations Code, is amended to
27 read as follows:

1 Sec. 651.152. RULES; PROCEDURES; FORMS. The commission
2 shall [~~may~~] adopt rules, establish procedures, and prescribe forms
3 necessary to administer and enforce this chapter and Chapters 714
4 and 715, Health and Safety Code.

5 SECTION 8. Subchapter D, Chapter 651, Occupations Code, is
6 amended by adding Section 651.1525 to read as follows:

7 Sec. 651.1525. EARLY PARTICIPATION IN RULEMAKING PROCESS;
8 GUIDELINES. (a) Before publishing a proposed rule for public
9 comment, the commission shall seek advice and opinions from persons
10 who will be most affected by the rule. At a minimum, those persons
11 must include consumer groups and trade associations that represent
12 persons from each group regulated by the commission, including
13 funeral directors and cemetery and crematory operators.

14 (b) The commission shall develop guidelines to implement
15 this section. The guidelines must establish a method to determine
16 who will be most affected by a proposed rule.

17 SECTION 9. Section 651.154, Occupations Code, is amended by
18 amending Subsection (a) and adding Subsection (c) to read as
19 follows:

20 (a) The commission shall set the following fees in amounts
21 reasonable and necessary to administer this chapter:

22 (1) the funeral director's and embalmer's application
23 fee, license fee, duplicate license fee, and reciprocal license
24 fee; and

25 (2) the cemetery or funeral establishment license fee,
26 renewal fee, and late renewal penalty.

27 (c) The commission may not charge a fee to a perpetual care

1 cemetery, including a fee for issuing or renewing a license issued
2 under this chapter.

3 SECTION 10. Section 651.157, Occupations Code, is amended
4 to read as follows:

5 Sec. 651.157. INSPECTION OF CEMETERY, CREMATORY, OR FUNERAL
6 ESTABLISHMENT. (a) Except as provided by Subsection (b), a
7 licensed cemetery, crematory, or funeral establishment shall be
8 inspected at least once every two years by an agent of the
9 commission or by an agent of the state or a political subdivision
10 authorized by the commission to make inspections on its behalf.

11 (b) If the commission finds a violation of this chapter or
12 of Chapter 193, ~~[or]~~ 361, 711, 714, 715, or 716, Health and Safety
13 Code, the commission shall inspect the cemetery, crematory, or
14 funeral establishment annually until the commission determines
15 that the establishment is free of violations.

16 (c) A report of each inspection made under this section
17 shall be filed with the commission.

18 (d) The commission by rule shall establish:

19 (1) procedures for the inspection of a cemetery,
20 crematory, or funeral establishment required by this section; and

21 (2) criteria, including consideration of the
22 establishment's inspection and complaint history, regarding when
23 the commission should inspect an establishment based on the risk of
24 a violation at an establishment.

25 (e) A premises on which funeral directing, interment,
26 cremation, or embalming is practiced shall be open at all times to
27 inspection for any violation of this chapter or of Chapter 193, ~~[or]~~

1 361, or 716, Health and Safety Code, by:

- 2 (1) an agent of the commission;
- 3 (2) an authorized agent of the state; or
- 4 (3) an authorized agent of the county or municipality
- 5 in which the premises is located.

6 (f) Before a commission agent inspects a cemetery,

7 crematory, or funeral establishment, the agent shall review the

8 inspection reports filed with the commission on the establishment.

9 During the inspection, the agent shall determine whether previously

10 identified problems have been corrected and whether a pattern of

11 violations exists. The commission shall consider the information

12 from the inspection reports in determining whether a penalty should

13 be imposed against an establishment.

14 SECTION 11. Subchapter D, Chapter 651, Occupations Code, is

15 amended by adding Section 651.1571 to read as follows:

16 Sec. 651.1571. INSPECTION REQUIREMENTS FOR CERTAIN

17 CEMETERIES; EXCEPTION FOR PERPETUAL CARE CEMETERIES. (a) This

18 section and Section 651.157 do not apply to perpetual care

19 cemeteries.

20 (b) Except as provided by Section 651.157(b):

21 (1) a cemetery may not be inspected unless:

22 (A) an interment has occurred in the cemetery

23 within the two years preceding the inspection; or

24 (B) the commission has received a complaint about

25 the cemetery; and

26 (2) the commission shall give lower priority to an

27 inspection of a cemetery than to an inspection of a crematory or

1 funeral establishment.

2 SECTION 12. Section 651.164, Occupations Code, is amended
3 to read as follows:

4 Sec. 651.164. LICENSE [~~OR REGISTRATION~~] EXPIRATION. The
5 commission by rule may adopt a system under which licenses [~~or~~
6 ~~registrations~~] expire on various dates during the year. For the
7 year in which the license [~~or registration~~] expiration date is
8 changed, the commission shall prorate license [~~or registration~~]
9 fees on a monthly basis so that each license holder [~~or registrant~~]
10 pays only that portion of the license [~~or registration~~] fee that is
11 allocable to the number of months during which the license [~~or~~
12 ~~registration~~] is valid. On renewal of the license [~~or~~
13 ~~registration~~] on the new expiration date, the total license [~~or~~
14 ~~registration~~] renewal fee is payable.

15 SECTION 13. Subchapter D, Chapter 651, Occupations Code, is
16 amended by adding Sections 651.166 and 651.167 to read as follows:

17 Sec. 651.166. USE OF TECHNOLOGY. The commission shall
18 develop and implement a policy requiring the executive director and
19 commission employees to research and propose appropriate
20 technological solutions to improve the commission's ability to
21 perform its functions. The technological solutions must:

22 (1) ensure that the public is able to easily find
23 information about the commission on the Internet;

24 (2) ensure that persons who want to use the
25 commission's services are able to:

26 (A) interact with the commission through the
27 Internet; and

1 (B) access any service that can be provided
2 effectively through the Internet; and

3 (3) be cost-effective and developed through the
4 commission's planning processes.

5 Sec. 651.167. NEGOTIATED RULEMAKING AND ALTERNATIVE
6 DISPUTE RESOLUTION PROCEDURES. (a) The commission shall develop
7 and implement a policy to encourage the use of:

8 (1) negotiated rulemaking procedures under Chapter
9 2008, Government Code, for the adoption of commission rules; and

10 (2) appropriate alternative dispute resolution
11 procedures under Chapter 2009, Government Code, to assist in the
12 resolution of internal and external disputes under the commission's
13 jurisdiction.

14 (b) The commission's procedures relating to alternative
15 dispute resolution must conform, to the extent possible, to any
16 model guidelines issued by the State Office of Administrative
17 Hearings for the use of alternative dispute resolution by state
18 agencies.

19 (c) The commission shall designate a trained person to:

20 (1) coordinate the implementation of the policy
21 adopted under Subsection (a);

22 (2) serve as a resource for any training needed to
23 implement the procedures for negotiated rulemaking or alternative
24 dispute resolution; and

25 (3) collect data concerning the effectiveness of
26 those procedures, as implemented by the commission.

27 SECTION 14. Sections 651.202(a) and (b), Occupations Code,

1 are amended to read as follows:

2 (a) The commission by rule shall establish methods by which
3 consumers and service recipients are notified of the name, mailing
4 address, and telephone number of the commission for the purpose of
5 directing complaints to the commission. The commission may provide
6 for that notice:

7 (1) on each license [~~or—registration~~] form,
8 application, or written contract for services of a person regulated
9 under this chapter;

10 (2) on a sign prominently displayed in the place of
11 business of each person regulated under this chapter; or

12 (3) in a bill for service provided by a person
13 regulated under this chapter.

14 (b) The commission shall adopt rules concerning a complaint
15 filed under this section. The rules adopted under this subsection
16 must:

17 (1) establish procedures regarding the receipt,
18 investigation, and disposition of complaints;

19 (2) allow for an informal hearing process;

20 (3) establish a formal hearing process;

21 (4) ensure that the person who filed the complaint has
22 an opportunity to explain the allegations made in the complaint;

23 (5) ensure that the license holder [~~or—registrant~~] who
24 is the subject of the complaint has an opportunity to be heard
25 regarding the complaint; and

26 (6) establish procedures by which a commission
27 employee may dismiss a complaint, subject to approval by the

1 executive director or the executive director's designee, if the
2 investigation does not reveal a violation.

3 SECTION 15. Section 651.2595(d), Occupations Code, is
4 amended to read as follows:

5 (d) The commission shall approve or deny a provisional
6 license holder's application for a license not later than the
7 second anniversary of [~~180th day after~~] the date on which the
8 provisional license is issued. The commission may extend the
9 two-year [~~180-day~~] period if the results of an examination have not
10 been received by the commission before the end of that period.

11 SECTION 16. Section 651.261, Occupations Code, is amended
12 to read as follows:

13 Sec. 651.261. POSTING OF LICENSE. A license holder shall
14 conspicuously display the holder's license in each place of
15 business at which the license holder practices [~~funeral directing~~
16 ~~or embalming~~].

17 SECTION 17. Sections 651.267(a) and (d), Occupations Code,
18 are amended to read as follows:

19 (a) On application, the commission may reissue a [~~funeral~~
20 ~~director's or embalmer's~~] license issued under this subchapter to a
21 person whose license has been suspended or revoked. An application
22 to reissue a license may not be made before the first anniversary of
23 the date of the suspension or revocation.

24 (d) A license that has been revoked or suspended for a
25 period of five years or more may be reinstated only after the
26 applicant passes the applicable [~~written embalming or funeral~~
27 ~~directing~~] examination.

1 SECTION 18. Sections 651.302(a) and (b), Occupations Code,
2 are amended to read as follows:

3 (a) The commission shall issue a provisional license to
4 practice funeral directing to an applicant who:

5 (1) is at least 18 years of age;

6 (2) has completed the educational requirements of
7 Section 651.253 or is enrolled in an accredited school or college of
8 mortuary science;

9 (3) is employed by a funeral director to learn funeral
10 directing or embalming under the instruction and supervision of the
11 funeral director [~~takes the written examination given by the~~
12 ~~commission~~];

13 (4) files an application for a provisional license on
14 a form provided by the commission and verified under oath by the
15 applicant; and

16 (5) pays any required application or license fee.

17 (b) The commission shall issue a provisional license to
18 practice embalming to an applicant who:

19 (1) is at least 18 years of age;

20 (2) has completed the educational requirements of
21 Section 651.253 or is enrolled in an accredited school or college of
22 mortuary science;

23 (3) [~~takes the written examination given by the~~
24 ~~commission~~];

25 [~~(4)~~] files an application for a provisional license;

26 (4) [~~(5)~~] pays any required application or license
27 fee; and

1 (5) [~~(6)~~] complies with the requirements of this
2 chapter and of the commission.

3 SECTION 19. Section 651.303(b), Occupations Code, is
4 amended to read as follows:

5 (b) The commission by rule shall define the terms of
6 employment of a provisional license holder. The terms of
7 employment:

8 (1) must include service by the provisional license
9 holder:

10 (A) of at least 17 hours a week or 73 hours a
11 month; and

12 (B) under actual working conditions and under the
13 personal supervision of a funeral director or embalmer; and

14 (2) may not require more than 17 hours a week or 73
15 hours a month.

16 SECTION 20. Subchapter G, Chapter 651, Occupations Code, is
17 amended by adding Section 651.3035 to read as follows:

18 Sec. 651.3035. MORTUARY COLLEGE CREDIT FOR PROVISIONAL
19 LICENSE PROGRAM. (a) A case completed under Section 651.303(d) may
20 serve as credit for both mortuary school or college and the
21 provisional license holder program.

22 (b) A mortuary school or college may designate a funeral
23 director or embalmer who is supervising a provisional license
24 holder under Section 651.303 as a clinical instructor for the
25 provisional license holder.

26 SECTION 21. Section 651.304(b), Occupations Code, is
27 amended to read as follows:

1 (b) A provisional license holder shall report to the
2 commission monthly. The report must:

3 (1) be made not later than the 10th day after the end
4 of the month;

5 (2) identify each case that the provisional license
6 holder:

7 (A) assisted in handling during that month if the
8 provisional license holder is a funeral director applicant; or

9 (B) handled or assisted in handling during that
10 month if the provisional license holder is an embalmer applicant;

11 (3) list any credit earned for mortuary school or
12 college under Section 651.3035; and

13 (4) [~~3~~] be certified by the funeral director or
14 embalmer under whom the provisional license holder performed the
15 work.

16 SECTION 22. The heading to Subchapter H, Chapter 651,
17 Occupations Code, is amended to read as follows:

18 SUBCHAPTER H. LICENSE REQUIREMENTS: CEMETERY, FUNERAL,
19 [ESTABLISHMENTS] AND COMMERCIAL EMBALMER ESTABLISHMENTS

20 SECTION 23. Subchapter H, Chapter 651, Occupations Code, is
21 amended by adding Section 651.353 to read as follows:

22 Sec. 651.353. CEMETERY ESTABLISHMENT REQUIREMENTS. (a) A
23 cemetery may not conduct a cemetery business unless the facility is
24 licensed by the commission.

25 (b) This chapter does not require a cemetery to be owned by a
26 person licensed under this chapter.

27 (c) To obtain an initial cemetery license, an applicant must

1 apply for a license and pay the licensing fee. The commission shall
2 issue an initial cemetery license on determining that the applicant
3 satisfies the requirements of this chapter.

4 (d) This section does not apply to:

5 (1) a family, fraternal, or community cemetery that is
6 not larger than 10 acres;

7 (2) an unincorporated association of plot owners not
8 operated for profit;

9 (3) a church, a religious society or denomination, or
10 an entity solely administering the temporalities of a church or
11 religious society or denomination; or

12 (4) a public cemetery owned by this state, a county, or
13 a municipality.

14 SECTION 24. Section 651.354, Occupations Code, is amended
15 to read as follows:

16 Sec. 651.354. RENEWAL OF CEMETERY OR FUNERAL ESTABLISHMENT
17 LICENSE. (a) The commission shall mail written notice to a
18 cemetery or funeral establishment of the impending expiration of
19 the [~~funeral~~] establishment's license not later than the 30th day
20 before the expiration date of the license. Except as provided by
21 Subsection (d), the [~~The~~] notice must state that:

22 (1) to renew the license, the cemetery or funeral
23 establishment must pay the renewal fee not later than September 30;
24 and

25 (2) the license is automatically renewed on receipt of
26 the renewal fee.

27 (b) A cemetery or funeral establishment that fails to pay

1 the license renewal fee by the due date is subject to a late payment
2 penalty equal to the amount charged for the license renewal fee.

3 (c) If the license is expired for longer than 30 days, the
4 cemetery or funeral establishment may not renew the license and may
5 not operate as a cemetery or funeral establishment until the
6 establishment is issued a new license in the manner provided for
7 issuing an original license.

8 (d) To renew a license for a perpetual care cemetery, the
9 cemetery must submit a renewal on a form prescribed by the
10 commission. The license is renewed on receipt of the form by the
11 commission.

12 SECTION 25. Section 651.4065(c), Occupations Code, is
13 amended to read as follows:

14 (c) The operator of a [~~registrant for the~~] cemetery [~~or~~
15 ~~crematory~~] shall sign a [the] purchase agreement for a cemetery.

16 SECTION 26. Section 651.455(a), Occupations Code, is
17 amended to read as follows:

18 (a) A person regulated by the commission violates this
19 chapter if the person uses a statement that misleads or deceives the
20 public, including a fraudulent statement or any other type of a
21 false or misleading statement regarding:

22 (1) a legal, religious, or cemetery requirement for
23 funeral merchandise or funeral, cemetery, or crematory services;

24 (2) the preservative qualities of funeral merchandise
25 or funeral, cemetery, or crematory services in preventing or
26 substantially delaying natural decomposition of human remains;

27 (3) the airtight or watertight properties of a casket

1 or outer enclosure; ~~[or]~~

2 (4) the licenses ~~[or registrations]~~ held by the
3 personnel in the operation of the cemetery, crematory, or funeral
4 establishment; or

5 (5) an activity regulated under this chapter,
6 including the sale of funeral-related goods or services.

7 SECTION 27. Section 651.456, Occupations Code, is amended
8 to read as follows:

9 Sec. 651.456. UNETHICAL CONDUCT REGARDING CUSTODY OF DEAD
10 HUMAN BODY. A person violates this chapter if the person:

11 (1) takes custody of a dead human body without the
12 permission of:

13 (A) the person or the agent of the person
14 authorized to make funeral arrangements for the deceased; or

15 (B) a medical examiner or a justice of the peace
16 who has jurisdiction over the body under Articles 49.02-49.05, Code
17 of Criminal Procedure; ~~[or]~~

18 (2) refuses to promptly surrender a dead human body to
19 a person or agent authorized to make funeral arrangements for the
20 deceased; or

21 (3) violates any state law governing the
22 transportation, storage, refrigeration, inurnment, interment, or
23 disinterment of a dead human body.

24 SECTION 28. Section 651.459(a), Occupations Code, is
25 amended to read as follows:

26 (a) A person violates this chapter if the person:

27 (1) wilfully makes a false statement on:

1 (A) a death certificate, including forgery of a
2 physician's signature; or

3 (B) a document required by this chapter or a rule
4 adopted under this chapter;

5 (2) engages in fraudulent, unprofessional, or
6 deceptive conduct in providing funeral services or merchandise to a
7 customer;

8 (3) engages in dishonest conduct, wilful conduct, or
9 negligence in the practice of embalming or funeral directing that
10 is likely to or does deceive, defraud, or otherwise injure the
11 public;

12 (4) causes the execution of a document by the use of
13 fraud, deceit, or misrepresentation;

14 (5) directly or indirectly employs a person to solicit
15 individuals or institutions by whose influence dead human bodies
16 may be turned over to a particular funeral director, embalmer, or
17 funeral establishment;

18 (6) misappropriates funds held by a license holder, a
19 funeral establishment, an employee or agent of the funeral
20 establishment, or another depository, that create an obligation to
21 provide a funeral service or merchandise, including retaining for
22 an unreasonable time excess funds paid by or on behalf of the
23 customer for which the customer is entitled to a refund; or

24 (7) performs acts of funeral directing or embalming
25 that are outside the licensed scope and authority of the license
26 holder, or performs acts of funeral directing or embalming in a
27 capacity other than that of an employee, agent, subcontractor, or

1 assignee of a licensed funeral establishment that has contracted to
2 perform those acts.

3 SECTION 29. Subchapter K, Chapter 651, Occupations Code, is
4 amended by adding Section 651.5026 to read as follows:

5 Sec. 651.5026. TEMPORARY LICENSE SUSPENSION OR
6 RESTRICTION; DISCIPLINARY PANEL. (a) The presiding officer of the
7 commission shall appoint a three-member disciplinary panel
8 composed of two funeral industry members and one public member of
9 the commission to determine whether a funeral director's or
10 embalmer's license should be temporarily suspended or restricted.

11 (b) Chapter 551, Government Code, does not prohibit the
12 disciplinary panel from holding a meeting by telephone conference
13 call if convening the panel at one location is inconvenient for any
14 member of the panel.

15 (c) The disciplinary panel shall temporarily suspend or
16 restrict the license if the panel determines from the information
17 presented to it with or without a hearing, that the license holder
18 has violated this chapter or a rule adopted under this chapter and
19 would, by the license holder's continued unrestricted activity,
20 constitute a continuing threat to the public welfare.

21 (d) The suspension or restriction may be without notice or
22 hearing if:

23 (1) the commission immediately provides notice of the
24 suspension or restriction to the funeral director or embalmer;

25 (2) proceedings for a hearing under Section 651.506
26 are initiated simultaneously with the suspension or restriction;

27 and

1 (3) the hearing is held as required by Chapter 2001,
2 Government Code, and this chapter not later than 48 hours after the
3 suspension or restriction.

4 (e) If the disciplinary panel affirms the temporary
5 suspension or restriction at a hearing, the commission shall
6 schedule an informal compliance meeting that meets the requirements
7 of Section 2001.054(c), Government Code, and this chapter to be
8 held as soon as practicable unless:

9 (1) it is evident from the determination of the panel
10 that the funeral director or embalmer would be unable to show
11 compliance at the informal meeting regarding the issues that are
12 the basis for the temporary suspension or restriction; or

13 (2) an informal meeting has already been held
14 regarding the issues that are the basis for the temporary
15 suspension or restriction.

16 (f) If the funeral director or embalmer is unable to show
17 compliance at the informal meeting under Subsection (e), the
18 commission shall file a formal complaint under this chapter as soon
19 as practicable.

20 (g) If the disciplinary panel does not temporarily suspend
21 or restrict the license after considering the information presented
22 to it at a hearing under Subsection (c), the facts that were the
23 basis for the temporary suspension or restriction may not be the
24 sole basis of another proceeding to temporarily suspend or restrict
25 the funeral director's or embalmer's license. The commission may
26 use those same facts in a later investigation to obtain new
27 information that may be the basis for the temporary suspension or

1 restriction of a funeral director's or embalmer's license,
2 including facts presented to the disciplinary panel and facts known
3 to the commission at the time evidence was presented to the
4 disciplinary panel.

5 SECTION 30. Subchapter M, Chapter 651, Occupations Code, is
6 amended by adding Section 651.603 to read as follows:

7 Sec. 651.603. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except
8 as provided by this section, a person who makes a voluntary
9 disclosure of a violation of this chapter is immune from an
10 administrative or civil penalty for the violation disclosed.

11 (b) A disclosure is voluntary only if:

12 (1) the disclosure was made promptly after knowledge
13 of the information disclosed is obtained by the person;

14 (2) the disclosure was made in writing by certified
15 mail to the commission with regard to the violation disclosed;

16 (3) an investigation of the violation was not
17 initiated or the violation was not independently detected by the
18 commission before the disclosure was made using certified mail;

19 (4) the disclosure arises out of a voluntary audit;

20 (5) the person who makes the disclosure initiates an
21 appropriate effort to achieve compliance, pursues that effort with
22 due diligence, and corrects the noncompliance within a reasonable
23 time;

24 (6) the person making the disclosure cooperates with
25 the commission in connection with an investigation of the issues
26 identified in the disclosure; and

27 (7) the violation did not result in injury or imminent

1 and substantial risk of serious injury to one or more persons at the
2 site or off-site substantial actual harm or imminent and
3 substantial risk of harm to persons or property.

4 (c) A disclosure is not voluntary for purposes of this
5 section if it is a report to the commission required solely by a
6 specific condition of an enforcement order or decree.

7 (d) The immunity established by Subsection (a) does not
8 apply and an administrative or civil penalty may be imposed under
9 applicable law if:

10 (1) the person who made the disclosure intentionally
11 or knowingly committed or was responsible within the meaning of
12 Section 7.02, Penal Code, for the commission of the disclosed
13 violation;

14 (2) the person who made the disclosure recklessly
15 committed or was responsible within the meaning of Section 7.02,
16 Penal Code, for the commission of the disclosed violation and the
17 violation resulted in substantial injury to one or more persons at
18 the site or off-site harm to persons or property;

19 (3) the offense was committed intentionally or
20 knowingly by a member of the person's management or an agent of the
21 person and the person's policies or lack of prevention systems
22 contributed materially to the occurrence of the violation;

23 (4) the offense was committed recklessly by a member
24 of the person's management or an agent of the person, the person's
25 policies or lack of prevention systems contributed materially to
26 the occurrence of the violation, and the violation resulted in
27 substantial injury to one or more persons at the site or off-site

1 harm to persons or property; or

2 (5) the violation has resulted in a substantial
3 economic benefit that gives the violator a clear advantage over its
4 business competitors.

5 (e) A penalty imposed under Subsection (d) should, to the
6 extent appropriate, be mitigated by factors such as:

7 (1) the voluntariness of the disclosure;

8 (2) efforts by the disclosing party to conduct audits;

9 (3) remediation;

10 (4) cooperation with government officials
11 investigating the disclosed violation; or

12 (5) other relevant considerations.

13 (f) In a civil or administrative enforcement action brought
14 against a person for a violation for which the person claims to have
15 made a voluntary disclosure, the person claiming the immunity has
16 the burden of establishing a prima facie case that the disclosure
17 was voluntary. After the person claiming the immunity establishes
18 a prima facie case of voluntary disclosure, other than a case in
19 which under Subsection (d) immunity does not apply, the enforcement
20 authority has the burden of rebutting the presumption by a
21 preponderance of the evidence or, in a criminal case, by proof
22 beyond a reasonable doubt.

23 (g) In order to receive immunity under this section, a
24 person conducting an audit under this section must give notice to
25 the commission of the fact that the person is planning to commence
26 the audit. The notice shall specify the facility or portion of the
27 facility to be audited, the anticipated time the audit will begin,

1 and the general scope of the audit. The notice may provide
2 notification of more than one scheduled audit at a time.

3 (h) The immunity under this section does not apply if a
4 court or administrative law judge finds that the person claiming
5 the immunity has:

6 (1) repeatedly or continuously committed significant
7 violations; and

8 (2) not attempted to bring the facility or operation
9 into compliance, so as to constitute a pattern of disregard of this
10 chapter.

11 (i) In order to be considered a "pattern" under Subsection
12 (h), a series of violations that were due to separate and distinct
13 events must have been committed within a three-year period at the
14 same facility or operation.

15 (j) A violation that has been voluntarily disclosed and to
16 which immunity applies must be identified in a compliance history
17 report as being voluntarily disclosed.

18 SECTION 31. Section 711.004(f), Health and Safety Code, is
19 amended to read as follows:

20 (f) Except as is authorized for a justice of the peace
21 acting as coroner or medical examiner under Chapter 49, Code of
22 Criminal Procedure, remains may not be removed from a cemetery
23 except on the written order of the state registrar or the state
24 registrar's designee. The cemetery organization shall keep a
25 duplicate copy of the order as part of its records. The Texas
26 Funeral Service Commission [~~Board of Health~~] may adopt rules to
27 implement this subsection.

1 SECTION 32. Section 711.007(b), Health and Safety Code, is
2 amended to read as follows:

3 (b) The proceeding may be brought by:

4 (1) the attorney general;

5 (2) the Banking Commissioner of Texas;

6 (3) the governing body of a municipality with a
7 population of more than 25,000, if the cemetery is located in the
8 municipality or not farther than five miles from the municipality;

9 (4) the district attorney of the county, if the
10 cemetery is located in an area of the county not described by
11 Subdivision (3);

12 (5) the owner of a residence:

13 (A) in or near the municipality in which the
14 cemetery is located; or

15 (B) in the area proscribed for the location of a
16 cemetery by Section 711.008;

17 (6) the Texas Funeral Service Commission; or

18 (7) [~~6~~] the owner of a plot in the cemetery.

19 SECTION 33. Subchapter A, Chapter 711, Health and Safety
20 Code, is amended by adding Section 711.012 to read as follows:

21 Sec. 711.012. RULES. (a) The Finance Commission of Texas
22 may adopt rules to enforce and administer Sections 711.003,
23 711.008, 711.021-711.024, 711.032-711.035, 711.038,
24 711.040-711.042, 711.052, 711.061, and 711.062 relating to
25 perpetual care cemeteries.

26 (b) The Texas Funeral Service Commission may adopt rules,
27 establish procedures, and prescribe forms to enforce and administer

1 Sections 711.003, 711.008, 711.010, 711.011, 711.021-711.035,
2 711.038, 711.041, 711.042, 711.061, and 711.062 relating to
3 cemeteries that are not perpetual care cemeteries.

4 SECTION 34. Subchapter D, Chapter 711, Health and Safety
5 Code, is amended by adding Sections 711.053-711.056 to read as
6 follows:

7 Sec. 711.053. DEFINITION. In this subchapter,
8 "commissioner" means the banking commissioner of Texas.

9 Sec. 711.054. ENFORCEMENT BY FINANCE COMMISSION OF TEXAS.
10 The Finance Commission of Texas may use remedies available under
11 Chapter 712 to enforce a section listed under Section 711.012(a)
12 relating to perpetual care cemeteries.

13 Sec. 711.055. ENFORCEMENT BY COMMISSIONER. (a) Chapter
14 2001, Government Code, applies to a proceeding under this section.

15 (b) After notice and opportunity for hearing, the
16 commissioner may impose an administrative penalty on a person who:

17 (1) violates this chapter or a final order of the
18 commissioner or rule of the Finance Commission of Texas and does not
19 correct the violation before the 31st day after the date the person
20 receives written notice of the violation from the Texas Department
21 of Banking; or

22 (2) engages in a pattern of violations, as determined
23 by the commissioner.

24 (c) The amount of the penalty for each violation may not
25 exceed \$1,000 for each day the violation occurs.

26 (d) In determining the amount of the penalty, the
27 commissioner shall consider the seriousness of the violation, the

1 person's history of violations, and the person's good faith in
2 attempting to comply with this chapter. The commissioner may
3 collect the penalty in the same manner that a money judgment is
4 enforced in district court.

5 (e) In addition to any penalty that may be imposed under
6 Subsection (b), the commissioner may bring a civil action against a
7 person to enjoin a violation described in Subsection (b) that has
8 not been corrected within 30 days after receipt by the person of
9 written notice of the violation from the commissioner. The civil
10 action may be brought in the district court of the county in which
11 the cemetery is operated.

12 (f) The commissioner may issue an order to cease and desist
13 if a violation described in Subsection (b) has not been corrected
14 within 30 days after receipt by the person of written notice of the
15 violation from the commissioner. Any order proposed under this
16 subsection shall be served on the person, shall state the grounds
17 for the proposed order with reasonable certainty, and shall state
18 the proposed effective date, which may not be less than 15 days
19 after receipt by the person. Unless the person requests a hearing
20 within 15 days after the receipt, the order is effective as
21 proposed.

22 Sec. 711.056. PATTERN OF WILFUL DISREGARD. (a) If after a
23 hearing conducted as provided by Chapter 2001, Government Code, the
24 trier of fact finds that a violation of this chapter or a rule of the
25 Finance Commission of Texas establishes a pattern of wilful
26 disregard for the requirements of this chapter or rules of the
27 finance commission, the trier of fact shall recommend to the

1 commissioner that the maximum administrative penalty permitted
2 under Section 711.055 be imposed on the person committing the
3 violation or that the commissioner cancel or not renew the person's
4 permit under Chapter 154, Finance Code, if the person holds such a
5 permit.

6 (b) For the purposes of this section, violations corrected
7 as provided by Section 711.055 may be included in determining
8 whether a pattern of wilful disregard for the requirements of this
9 chapter or rules of the finance commission exists.

10 SECTION 35. Section 712.002, Health and Safety Code, is
11 amended to read as follows:

12 Sec. 712.002. EXEMPTIONS FROM CHAPTER. This chapter does
13 not apply to:

14 (1) a family, fraternal, or community cemetery that is
15 not larger than 10 acres;

16 (2) an unincorporated association of plot owners not
17 operated for profit;

18 (3) ~~[a nonprofit corporation organized by plot owners,~~
19 ~~or~~

20 [~~4~~] a church, a religious society or denomination,
21 or an entity solely administering the temporalities of a church or
22 religious society or denomination; or

23 (4) a public cemetery owned by this state, a county, or
24 a municipality.

25 SECTION 36. Section 715.003, Health and Safety Code, is
26 amended to read as follows:

27 Sec. 715.003. PARTIES TO ACTION. An action commenced under

1 this chapter shall be brought by the incorporators of the nonprofit
2 corporation on behalf of the nonprofit corporation. The necessary
3 parties to the action on which citation shall be served under
4 Section 715.006 are:

5 (1) the record owners of the real property comprising
6 the historic cemetery;

7 (2) the owners of plots in the cemetery, who may be
8 designated as a class in the petition; ~~and~~

9 (3) the Texas Historical Commission; and

10 (4) the Texas Funeral Service Commission.

11 SECTION 37. Section 715.006(a), Health and Safety Code, is
12 amended to read as follows:

13 (a) Before the 31st day after the date an action is
14 commenced by a nonprofit corporation under this chapter, the
15 nonprofit corporation shall cause citation to be issued and served
16 by certified mail, return receipt requested, on:

17 (1) the record owners of the real property comprising
18 the cemetery at their last known addresses;

19 (2) the owners of plots in the cemetery at their last
20 known addresses;

21 (3) the Texas Historical Commission at its office in
22 Austin, Texas;

23 (4) the Texas Funeral Service Commission; and

24 (5) [~~4~~] the county auditor of the county in which
25 the cemetery is located.

26 SECTION 38. The following laws are repealed:

27 (1) Section 651.1575, Occupations Code;

- 1 (2) Section 651.302(c), Occupations Code;
- 2 (3) Section 651.455(b), Occupations Code; and
- 3 (4) Section 651.506(j), Occupations Code.

4 SECTION 39. On September 1, 2003:

5 (1) all functions and activities related to Chapter
6 711, Health and Safety Code, performed by the Texas Department of
7 Health immediately before that date are transferred to the Texas
8 Funeral Service Commission;

9 (2) a rule or form of the Texas Department of Health
10 related to Chapter 711, Health and Safety Code, is a rule or form of
11 the Texas Funeral Service Commission and remains in effect until
12 amended or replaced by that commission;

13 (3) a reference in law or an administrative rule to the
14 Texas Department of Health that relates to Chapter 711, Health and
15 Safety Code, means the Texas Funeral Service Commission; and

16 (4) a complaint, investigation, or other proceeding
17 before the Texas Department of Health that is related to Chapter
18 711, Health and Safety Code, is transferred without change in
19 status to the Texas Funeral Service Commission, and the Texas
20 Funeral Service Commission assumes, as appropriate and without a
21 change in status, the position of the Texas Department of Health in
22 an action or proceeding to which the Texas Department of Health is a
23 party.

24 SECTION 40. On March 1, 2004, Subchapter N, Chapter 651,
25 Occupations Code, is repealed.

26 SECTION 41. A cemetery is not required to hold a license
27 under Chapter 651, Occupations Code, as amended by this Act, until

H.B. No. 1538

1 March 1, 2004.

2 SECTION 42. This Act takes effect September 1, 2003.