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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

October 24, 2007

Anthony Scarantino, Chairman
State Board of Funeral Directors
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-4815 (IRRC #2627)
State Board of Funeral Directors
Preneed Funeral Arrangements

Dear Chairman Scarantino:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable P. Michael Sturla, Majority Chairman, House Professional Licensure Committee
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State

Comments of the Independent Regulatory Review Commission

on

State Board of Funeral Directors Regulation #16A-4815 (IRRC #2627)

Preneed Funeral Arrangements

October 24, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the August 25, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the State Board of Funeral Directors (Board) to respond to all comments received from us or any other source.

1. Section 13.1. Definitions. - Reasonableness; Consistency with other regulations; Need; Clarity.

Preneed funeral contract –

We have questions in two areas concerning this definition.

First, why does this definition only include the term “funeral entity”? In addition to “funeral entity,” the term “licensed funeral director” is defined in Section 13.1 of the existing regulations. Why not include both “funeral entity” and “licensed funeral director” in the definition for preneed funeral contract?

Second, what is the intent of including the phrase “whether or not the funeral entity receives preneed funeral funds”? Why would a business enter into such a contract without receiving funds?

Furthermore, a significant focus of both Section 13(c) of the Funeral Director Law (Law) (63 P.S. § 479.13(c)) and this proposed regulation is the money received for such contracts. What type of review or oversight would the Board exercise in a situation where there is no monetary transaction? Unless the Board can justify the inclusion of this phrase, it should be deleted from the final-form regulation.

Preneed funeral funds –

In Paragraph (i) of this definition, what is the purpose of the last phrase, “whether or not a contract to provide specified funeral services or merchandise exists”? How could the Board verify that money held by a licensee or funeral entity was related to “preneed” monies if no contract existed? If a customer has not finalized her or his decisions concerning which services to select but gives money to a funeral director or funeral entity, is the funeral director or entity required to document the transaction?

Finally, Paragraphs (iii) and (iv) may be inconsistent or incompatible with the proposed regulation since they involve insurance policies and not just contracts. An assignment of an insurance policy may exist with or without a preneed contract. If there is no contract, the transfer clause required by Section 13.228(a) will not apply. If an insurance policy includes a provision requiring assignment to a particular funeral entity, the Board needs to review and explain how it will regulate a change in the policy. The Board may need to develop separate provisions to address insurance policies.

2. Section 13.224. Depositing and reporting preneed funeral funds. - Fiscal impact; Reasonableness; Consistency with the statute and regulations; Implementation procedure; Feasibility; Clarity.

Subsection (a) contains new language. For example, there is a new rule that all the preneed funds received by the funeral director or entity must be deposited within ten days of receipt. We identified questions in two areas.

First, why is the ten-day rule necessary? Is there any record or history of problems with the timeliness of deposits? The Board should explain the need for the new language in this subsection or delete it from the final-form regulation.

Second, it is unclear if Subsection (a) applies to a funeral entity that receives a preneed fund transfer from another entity at the request of a customer. If this subsection does apply to such a transfer, what happens to any accumulated earnings or interest? The earnings or interest are not mentioned in the definition of "preneed funeral fund." However, Section 13.228(b) in this proposed regulation specifically requires the transfer of "accumulated interest and earnings" with preneed funeral funds. If the first funeral entity must transfer both the preneed funds (the original money given by the customer) and any accumulated interest and earnings, then the receiving entity should be required by the final-form regulation to deposit the interest and earnings with the customer's preneed funeral funds.

Subsection (b) mandates quarterly reporting of the information described in Subsection (c). There are four concerns.

First, why is mandated reporting necessary? What will the Board do with this information? The Board needs to explain how it plans to review and utilize these reports.

Next, what will be the costs for the Board in processing and reviewing the reports, and for funeral entities or funeral directors to transmit or submit the reports? Does the Board have adequate staff to process and review these records on a regular and timely basis? Commentators report that there are thousands of preneed contracts across the state. The Board should examine these costs and provide cost estimates when it submits the final-form regulation. If the Board opts to retain the reporting requirement, the costs for both the Board and the regulated community may be reduced significantly by requiring annual or biennial reporting, rather than quarterly.

Third, the Preamble indicates that changes are necessary because the existing provisions "do not address the transferability of funds when a funeral director other than the contracting funeral director provides funeral services and merchandise or the ability of a customer to change funeral

directors or transfer funds in the event of a change of funeral directors.” However, quarterly or periodic reporting is not necessary to monitor these transactions. The existing regulations require a licensee to submit a report every time the funeral director enters into a preneed contract or provides the services required by a preneed contract. The final-form regulation could mirror the current rules by requiring reports whenever there is a change or an end to the contract, a switch to another funeral entity or funeral director, or a transfer of funds.

Fourth, what is the definition of the term “rollover” in Subsection (b)? As noted by the House Professional Licensure Committee (House Committee) on October 3, 2007, the final-form regulation should include a definition for this term. In addition, the intent of the last sentence of Subsection (b) is unclear. The need for this sentence should be clarified in the final-form regulation.

Regarding Subsection (c)(2), please explain the need for deleting the phrase “100% of the money received by the funeral director on account of the contract had been deposited.” This language is consistent with Section 13(c) of the Law and should be retained.

3. Section 13.227. Limitations on preneed funeral contracts. - Fiscal impact; Consistency with the statute; Reasonableness; Clarity.

Commentators for the Pennsylvania Cemetery, Cremation and Funeral Association and the Funeral Consumers Alliance of Greater Philadelphia expressed concerns with provisions in this section. We share three concerns.

First, the new language in Subsection (b) reads:

A funeral director or funeral entity may not charge or collect any fees under a preneed funeral contract for funeral goods and services that exceed the fees for the goods and services as set forth on the funeral entity's general price list **at the time** the goods or services are provided. [Emphasis added.]

This provision could possibly negate a benefit of preneed contracts. Price lists may be guaranteed in preneed contracts at the time when the contracts are signed. The consumer gets the benefit of the prices available at the time of the contract, and the funeral entity gets the benefit of accepting funds before they are needed. With promulgation of Subsection (b), would funeral entities be able to increase costs charged to customers based on price lists at the time of service? What happens if the preneed funds in an account do not cover the price list at the time of service? What impact would this provision have on irrevocable contracts? Should the subsection state “at the time the contract is initiated”? The Board must explain the need for this subsection or delete it from the final-form regulation.

Second, Subsection (b) refers to a “funeral entity’s general price list.” Is there any situation when a funeral director would maintain a “general price list”?

Third, we question the rationale and need for Subsection (c), which reads:

A preneed funeral contract may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.

The Law does not identify any restrictions on the source of the merchandise included in a funeral director's contract. In addition, it is our understanding that the National Funeral Directors Association recommends that "a funeral home should never refuse to service a family because they indicate that they will be using a third-party casket." This provision appears to limit the ability of a consumer to select from a variety of products. The Board should justify this provision or delete it from the final-form regulation.

4. Section 13.228. Transfer of a preneed funeral contract by customer. - Fiscal impact; Consistency with statute; Reasonableness; Feasibility; Clarity.

Pursuant to Subsection (a), every preneed contract initiated after the effective date of this regulation must expressly permit the customer to transfer the account and funds to another funeral director or funeral entity. The Preamble offers no explanation for this change beyond generic references to protection of consumers and updating regulations to match current practices in the profession.

The statute gives the Board the authority to adopt regulations. Section 16(a) of the Law (63 P.S. § 479.16(a)) reads:

The board shall be charged with the enforcement of this act. It shall be empowered to formulate **necessary** rules and regulations not inconsistent with this act for the proper conduct of the business or profession of funeral directing and as may be deemed **necessary** or **proper** to **safeguard** the interests of the public and the standards of the profession. (Emphasis added.)

The Board has not demonstrated the need for this proposed regulation. Specifically, the Board has not explained how this proposed regulation will "safeguard the interests of the public." Additionally, the Board has disclosed no record indicating a high level of consumer complaints or significant harm to consumers related to preneed contracts. In the final-form regulation submittal, the Board should explain the need for this regulation, and how it will protect consumers.

In its comments, the House Committee expressed concerns with the impact of this regulation on the calculation of resources in determining eligibility for benefits from Social Security or Medical Assistance (MA) programs. The Board claims that customers will be able to set aside the preneed funds and avoid having them calculated as a resource because the account, money or trust remains "irrevocable." Subsection (b) directs the transfer of the preneed funds from one funeral entity to another at the direction of the customer. However, nothing in this section states that the funds are "irrevocable" or that none of the funds may be returned to the customer. In fact, the words "revocable," "irrevocable" or "irrevocability" do not appear in the proposed regulation or the Preamble. In the final-form regulation, the Board should clarify whether preneed funds would be irrevocable, and how the funds would be protected from classification as an asset for the purposes of Social Security or MA programs.

The provisions of this section are very clear that the current funeral entity must transfer all the preneed funds, interest and earnings to the new funeral entity as requested by the customer. However, there is nothing that directs the actions of the new entity or what it may do with the

funds. Nothing in the proposed regulation requires that the new funeral entity honor the terms and conditions of the original contract or that it use all the preneed funds, interest and earnings for funeral services. For example, what would prevent the new funeral entity from giving a portion of the funds to the customer and reducing the list of services? The Board should clarify how the new funeral entity must treat the original contract and the funds.

The Board should also respond to the questions raised by the House Committee as to whether the preneed funds can be irrevocable yet still transferable. There is also a concern with the Law. Section 13(c) of the Law includes the following sentence:

... If any such licensed funeral entity shall accept any money for such contracts, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust to, a banking institution in this Commonwealth, conditioned upon its **withdrawal or disbursement only for the purposes for which such money was accepted....** (Emphasis added.)

It is unclear how the proposed regulation is consistent with the Law since none of its provisions guarantee that the money will be used for the purposes for which it was accepted. These purposes are set forth in the original preneed contract. The final-form regulation should ensure that the purposes in the original contract are fulfilled.

In its comments, the House Committee also requested further information concerning regulations or laws in other states pertaining to the portability of preneed contracts. Portability is an important issue for both the House Committee and commentators. The difficult question appears to be providing for portability while simultaneously maintaining the irrevocability of preneed funds, especially for income and asset determinations in Social Security or MA programs.

If it was only a question of portability, it is available under the existing regulations. The Board submitted a copy of the Commonwealth Court decision *Bean v. Department of State, State Board of Funeral Directors* (855 A.2d 148, 2004) with this proposed regulation. The *Bean* decision reported that Board-approved contract forms allowed customers to select an irrevocable or revocable contract. With a revocable contract, the customer can transfer preneed funds at a later date. This is portability. If the Board believes these options are insufficient, then it could establish an additional option for these forms that is based on this section.

If the goal is to combine both portability and irrevocability, the Board needs to thoroughly review options that ensure irrevocability while allowing for consumer choice. This would allow the marketplace to provide what consumers want and need. The Board should investigate a variety of options to allow for portability when needed while also guaranteeing irrevocability of the funds and terms in the contract.

5. Section 13.229. Sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director. - Fiscal impact; Consistency with statute; Reasonableness; Feasibility; Clarity.

Under Subsection (a), why is it necessary to notify each customer of a transfer within 30 days? The Board should explain the basis for the 30-day period or consider extending the time period.

