

Regulatory Analysis Form

(Completed by Promulgating Agency)



IRRC

REGULATORY ANALYSIS COMMITTEE

SECTION I: PROFILE

(1) Agency:

Department of State, Bureau of Professional and Occupational Affairs, State Board of Funeral Directors

(2) Agency Number: 16A

Identification Number:

4815

IRRC Number:

2627

(3) Short Title:

Preneed funeral arrangements

(4) PA Code Cite:

49 Pa. Code §§ 13.1, 13.224-13.229

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: **Thomas A. Blackburn, Regulatory unit counsel, Department of State;**
(717)783-7200; P.O. Box 2649, Harrisburg, PA 17105-2649; (717)787-0251; tblackburn@state.pa.us

Secondary Contact: **Joyce McKeever, Deputy Chief Counsel, Department of State**
(717)783-7200; P.O. Box 2649, Harrisburg, PA 17105-2649; (717)787-0251; jmckeever@state.pa.us

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5: **State Board of Funeral Directors**

(717)783-3397; P.O. Box 2649, Harrisburg, PA 17105-2649; (717)705-5540; st-funeral@state.pa.us

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation
- Emergency Certification Regulation;
 - Certification by the Governor
 - Certification by the Attorney General

INDEPENDENT REGULATORY
TELEVISION COMMISSION

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(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

This rulemaking amends the Board's existing regulations concerning prepaid burial contracts and accounts. Instead of reporting to the Board each prepaid burial contract, a funeral director must maintain annual reports on the current status of each preneed account. A preneed contract may not be made irrevocable as to the funeral director who is to perform the services. A funeral director whose customer has cancelled the preneed contract must transfer to another funeral director requested by the customer all preneed funds, and the funeral director may not collect any fee for services or merchandise the funeral director did not provide or for liquidated damages. The rulemaking requires a funeral director selling or discontinuing the business to notify the customers and give them the opportunity to cancel the contract and transfer the preneed funds to another funeral director of the customer's choosing. The rulemaking makes clear that the requirements apply to funds for fees such as an arrangement conference or additional allowance for funeral services or merchandise, but not for premiums to purchase life insurance directly from the insurance company.

(9) Include a schedule for review of the regulation including:

- | | |
|---|----------------|
| A. The date by which the agency must receive public comments: | Sept. 24, 2007 |
| B. The date or dates on which public meetings or hearings will be held: | N/A |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | fall 2009 |
| D. The expected effective date of the final-form regulation: | publ. as final |
| E. The date by which compliance with the final-form regulation will be required: | effective date |
| F. The date by which required permits, licenses or other approvals must be obtained: | N/A |

(10) Provide the schedule for continual review of the regulation.

The Board continually reviews the efficacy of its regulations, as part of its annual review process under Executive Order 1996-1. The Board reviews its regulatory proposals at regularly scheduled public meetings, generally the first Wednesday of each month. More information can be found on the Board's website (www.dos.state.pa.us/funeral).

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SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The regulatory amendments are authorized by Sections 13(c) and 16(a) of the Funeral Director Law (63 P.S. §§ 479.13 (c) and 479.16(a)).

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The rulemaking is not mandated by any federal or state law or court order or federal regulation.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Although at the time the Funeral Director Law was enacted in 1952 preneed was a very tiny portion of funerals, today it is extremely significant. Section 13(c) of the Funeral Director Law (63 P.S. § 479.13(c)) only requires a funeral director who has received preneed funds to place those funds in a banking institution, either in trust or escrow, to be withdrawn or disbursed only for the purpose for which they were deposited. Millions of dollars are now held in preneed accounts for Pennsylvanians. By its current regulations, the Board requires that all interest and other earnings of preneed funds stay with the principal in order to provide funeral goods and services of the quality anticipated in the preneed contract.

Funeral directors who enter into preneed contracts often purport to guarantee the funeral, by promising to provide the funeral goods and services at no additional fee to the customer's family, in exchange for being able to retain all earnings of the preneed funds. A funeral director is thus tempted to authorize the trustee to place the funds in higher risk investments in order to maximize the funeral director's ultimate return, risking only the funeral director's wholesale cost to later provide the funeral services and merchandise. Requiring a funeral director to honor a customer's demand to transfer the contract and funds to another funeral director of the customer's choosing take away some motivation for a funeral director to make risky investment of preneed funds, thereby better assuring that funds are available to provide for the customer's funeral service.

In addition, the rulemaking will reduce the burden imposed by the existing prepaid contract reporting requirements.

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(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

This rulemaking is not based upon any scientific data, studies, or references.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

The Board does not foresee any groups being adversely affected by the rulemaking.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

All funeral directors and funeral entities will be subject to the amended regulation and may be adversely affected. There are approximately 3300 currently-licensed funeral directors and 1400 currently-licensed funeral establishments (other than separately-licensed branch establishments) in Pennsylvania.

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings to the regulated community associated with compliance with the rulemaking.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings to local governments associated with compliance with the rulemaking.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings to state government associated with compliance with the rulemaking.

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(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings	NA	NA	NA	NA	NA	NA
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	NA	NA	NA	NA	NA	NA
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	NA	NA	NA	NA	NA	NA

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3 (FY 06-07)	FY -2 (FY 07-08)	FY -1 (FY 08-09)	Current FY (FY 09-10)
Pa. State Board of Funeral Directors	actual \$841,474	projected \$1,018,938	budgeted \$995,000	budgeted \$1,086,000

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

No adverse effects or costs have been associated with compliance with the rulemaking. Therefore, the above-identified benefits would outweigh any costs.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

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In the spring of 2002, the Board conducted public work sessions concerning regulation of preneed sales of funeral goods and services. In April, 2003, the Board solicited exposure draft comments from the Pennsylvania Funeral Directors Association (PFDA) and all individuals who had attended any Board meeting during the preceding year. Frank Switzer, Jr., FD; Gregory L. Myer, FD; PFDA; Pennsylvania Cemetery Funeral Association; James Kutz, Esquire, (on behalf of Pennsylvania Pre-Need Association); and Philadelphia Trust Company commented. The Board considered all these comments in preparing the proposed rulemaking.

Following publication as proposed and receipt of public comments, the Board discussed these comments and all comments from the standing committees and IRRC at public meetings of the Board, which are routinely attended by members of the regulated community and their professional associations. The Board considered all these comments in preparing the final rulemaking package.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No alternative regulatory schemes were considered.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The rulemaking is not more stringent and does not overlap or conflict with any federal requirements.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

Maryland requirements are similar to those proposed for Pennsylvania. However, a funeral director may retain the earnings of the invested funds when performing under the preneed contract, but must return all principal and interest upon discontinuance or inability to perform. The contract is revocable unless the buyer agrees to an irrevocable trust. Each Maryland funeral director must file an annual report of the preneed accounts he controls. New Jersey requirements are similar to those proposed for Pennsylvania, except that a preneed contract may be irrevocable.

Ohio requirements are similar to those proposed for Pennsylvania. However, a customer has the right to cancel a preneed contract within 7 days or cancel a preneed contract that is not irrevocable at any time, and receive a full refund of principal and earnings. Each funeral director must report preneed funds annually. West Virginia requirements are similar to those proposed for Pennsylvania. However, a West Virginia funeral director must receive a separate certificate of authority to engage in preneed sales and report all contracts and funds biennially. A West Virginia funeral director does not need to trust the costs of selling preneed contracts (up to 10% of the contract price). A customer who has cancelled a preneed contract is entitled to a refund of all payments, but without earnings. West Virginia maintains a payment guarantee fund to protect a preneed customer (principal only) in the event the seller defaults.

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The rulemaking will not put Pennsylvania at a competitive disadvantage.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This rulemaking will not affect other regulations of the Board or other state agencies.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

This rulemaking will not require any additional recordkeeping or other paperwork. To the contrary, the rulemaking will eliminate the reporting to the Board by funeral directors of the execution and fulfillment of each preneed contract, in favor of maintaining an annual report of the preneed funds held by the funeral director. The regulation will change no other record keeping or paperwork requirements.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The Board has determined that there are no special needs of any subset of its applicants or licensees for whom special accommodations should be made.

hours and cover the following subjects; the accompanying breakdown of hours by subjects is recommended:

[MANICURING] NAIL TECHNOLOGY COURSE OUTLINE

* * * * *

(f) A school's natural hair braiding curriculum, excluding electives, must comprise 300 hours and cover the following subjects; the accompanying breakdown of hours by subjects is recommended:

NATURAL HAIR BRAIDING COURSE OUTLINE

Recommended Hours

Professional practices, including sanitation	50
Sciences, including scalp care and anatomy	125
Cognitive and manipulative skills related to natural hair braiding	125
Total	300

PREPARATION BY APPRENTICESHIP METHOD

§ 7.131. Introduction.

An individual who chooses to seek eligibility for the [cosmetologist's] cosmetologist examination by apprenticeship shall comply with section 10 of the act (63 P.S. § 516) and the applicable requirements of this subchapter.

§ 7.132. Apprentice curriculum.

The cosmetology teacher responsible for offering instruction to an apprentice in a cosmetology [shop] salon shall teach the same cosmetology curriculum that the Board prescribes for schools of cosmetology in § 7.129 (relating to curriculum requirements)[.], with additional hours included so that the total number of hours adds up to 2,000, as follows:

BASIC COSMETOLOGY APPRENTICE CURRICULUM

Professional Practices	50
Bacteriology, Disinfection, Sanitation	
Professional Attitude	
Business Practices	
PA Cosmetology Law	
Sciences	200
Histology	
Trichology	
Chemistry	
Physiology	
Cosmetic Dermatology	
Electricity	
Cosmetology Skills-Cognitive and Manipulative	1,750
Shampooing	
Hair Shaping	
Hair Styling/Fingerwaving	
Permanent Waving	
Hair Coloring	
Hair Straightening	
Skin Care	
Nail Technology	
Temporary Hair Removal	
Scalp Treatment	
Care of all Hair Types and Textures	
Total	2,000

§ 7.133. Application for apprentice permit.

To qualify for apprenticeship training in a cosmetology [shop] salon, an individual shall apply to the Board for an apprentice permit.

§ 7.134. Apprentice reports.

The owner of a cosmetology [shop] salon that employs apprentices shall submit to the Board, on a form provided by the Board, a quarterly report of the hours earned by each apprentice. The reports shall be submitted by the following dates: April 15, July 15, October 15 and January 15.

[Pa.B. Doc. No. 07-1548. Filed for public inspection August 24, 2007, 9:00 a.m.]

STATE BOARD OF FUNERAL DIRECTORS

[49 PA. CODE CH. 13]

Preneed Funeral Arrangements

The State Board of Funeral Directors (Board) proposes to amend §§ 13.1, 13.224, 13.225 and 13.226 and to add §§ 13.227, 13.228 and 13.229 (relating to limitations on preneed funeral contracts; transfer of a preneed funeral contract by customer; and sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director) to read as set forth in Annex A.

Effective Date

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

Statutory Authority

The proposed rulemaking is authorized under sections 13(c) and 16(a) of the Funeral Director Law (act) (63 P.S. §§ 479.13(c) and 479.16(a)).

Background and Need for the Amendment

Section 13(c) of the act requires that a funeral director who accepts money under a contract with a living person to render funeral services to that person when needed to forthwith deposit the money in an escrow account or transfer it in trust to a banking institution in this Commonwealth. The money may be withdrawn or disbursed only for the purposes for which it was deposited.

The Board's current regulations regarding preneed funeral arrangements were originally promulgated in 1977 and last amended in 1991. Current § 13.224 (relating to funding and reporting of prepaid burial contracts) requires a funeral director to place the funds received for preneed funeral arrangements into trust or escrow accounts kept separate from the funeral director's personal or business accounts and to make reports to the Board. Under § 13.226 (relating to nature and description of escrow or trust account for prepaid burial contracts), interest or other earnings from preneed funds must be kept together with the principal to assure delivery of the same quality of services and merchandise for which the preneed contract was entered.

The Board determined that the regulations need to be updated to conform to existing practices in the funeral industry and to provide adequate protection to the consumer of preneed services in the instance of changed

circumstances. For example, reports under § 13.224 are time-consuming to prepare and to review. However, the reports provide little value to the Board, the regulated community or the public. Existing regulations 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. The regulations do not adequately address the cessation or acquisition of a preneed funeral business.

Description of the Proposed Amendments

In § 13.1 (relating to definitions), definitions of "prepaid burial contract" and "prepaid burial account" would be deleted and replaced with definitions of new terms "preneed funeral contract" and "preneed funds." The proposed definition of "preneed funds" would exclude premiums paid directly to an insurance company to purchase a life insurance policy. However, preneed funds would include amounts to be paid for arrangement fees or additional allowance for other services or merchandise. Preneed funds would also include the assignment of a life insurance policy or other asset received by a funeral director to fund a preneed contract.

Section 13.224 requires a funeral director to deposit in escrow or transfer in trust money received under a prepaid contract. The Board proposes to amend subsection (a) to require the deposit or transfer be made within 10 days of receipt. In addition, the Board proposes to add a provision to prohibit a funeral director or entity from using another person or entity to avoid this requirement. Currently, a funeral director must submit to the Board a written report every time the funeral director enters into a prepaid burial contract or performs under a prepaid contract. Under proposed subsection (b), a funeral director would be required to report to the Board all preneed accounts on a quarterly basis, including activity during that quarter. A funeral director could submit these reports on paper or disk or electronically and must maintain copies of the report for 3 years. A funeral director closing a business would be required to submit a report showing how all funds were distributed. These reports are not public records and will not be available for public review.

The limitations proposed for contract provisions are added in § 13.227. Under the proposed rulemaking, every preneed contract must be in writing. Also, a funeral director performing under a preneed contract would be prohibited from charging or collecting any fee that exceeds the fees set forth in the funeral director's current price list at the time the service or merchandise is provided. In addition, a preneed contract may not incorporate a contract with an unlicensed person or entity.

Proposed § 13.228 would govern customer transfers of preneed funds to another funeral director or funeral entity. Every preneed funeral contract entered into after the effective date of the final-form rulemaking must expressly permit the customer to transfer the preneed funeral account and funds to another funeral director or funeral entity of the customer's choosing that will provide funeral goods and services. The funeral director would be required to forward to the other funeral director the entire amount of preneed funds, including both principal and interest or other earnings, within 30 days of notice from the customer. The proposed rulemaking would prohibit a funeral director from collecting a fee for funeral goods or services that have not been provided or liquidated damages for the cancellation.

Proposed § 13.229 would govern funeral director transfers of preneed contracts or funds. It would require a funeral director or entity that acquires a portion of the preneed business of another to notify each customer and provide each customer with the opportunity to transfer the contract and funds to another funeral director of the customer's choosing. A funeral director ceasing preneed business must notify each customer and provide each customer with the opportunity to transfer the preneed funds to another funeral director of the customer's choosing.

Input from the Regulated Community

The Board solicited input from and provided an exposure draft of this proposed rulemaking to funeral directors and organizations. In addition, the Board considered the impact the rulemaking would have on the regulated community and on public health, safety and welfare.

Fiscal Impact and Paperwork Requirements

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking will not impose additional paperwork requirements upon the Commonwealth, its political subdivisions or the private sector.

Sunset Date

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 15, 2007, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Michelle T. Smey, Administrative Officer, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649 within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference No. 16A-4815 (Preneed funeral arrangements) when submitting comments.

ANTHONY SCARANTINO,
Chairperson

Fiscal Note: 16A-4815. No fiscal impact; (8) recommends adoption.

Annex A
TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS
PART I. DEPARTMENT OF STATE
Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS
CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS
GENERAL PROVISIONS

§ 13.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

[Prepaid burial account—An account in which moneys are deposited by the funeral director during the lifetime of an individual in accordance with a contract executed between the parties for funeral merchandise and services to be performed and delivered at a future time.

Prepaid burial contract—A contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death or the death of another designated individual and for which the consumer pays to the funeral director moneys at the time of the contract or at a time prior to the rendition of these services.]

Preneed funeral contract—An agreement under which a funeral entity promises or agrees to provide funeral merchandise and render services upon the death of a person living at the time the contract is made, whether or not the funeral entity receives preneed funeral funds.

Preneed funeral funds—

(i) Funds provided to a funeral director or funeral entity for the purpose of providing funeral services or merchandise on behalf of a person living at the time of provision of funds, whether or not a contract to provide specified funeral services or merchandise exists.

(ii) The term includes any funds paid, or to be paid, for arrangement fees, or additional allowance for other fees for service or merchandise.

(iii) The term includes the assignment of an insurance policy and any other asset received by a funeral director or funeral entity to fund a preneed funeral contract.

(iv) The term does not include any premiums paid directly to an insurance company.

* * * * *

[PREPAID BURIAL CONTRACTS]
PRENEED FUNERAL ARRANGEMENTS

§ 13.224. [Funding] Depositing and reporting [of prepaid burial contracts] preneed funeral funds.

(a) A funeral director or funeral entity shall deposit in escrow or transfer in trust to a banking institution in this Commonwealth, the entire amount of [monies received by the funeral director under a prepaid

contract for funeral services or merchandise, including additional service fees or arrangement fees] preneed funeral funds within 10 days of receipt. A funeral director or funeral entity may not avoid the requirements of this subsection by creating or controlling or otherwise utilizing a person or entity that is not a funeral entity.

(b) [In regard to prepaid contracts entered into by funeral directors after November 4, 1989, a funeral director shall file a report with the Board within 90 days containing the information specified in subsection (c) with respect to each prepaid contract for funeral services and merchandise. Forms for the reports, including the report required under subsection (d), will be provided by the Board.] Within 30 days of the end of each calendar quarter, every funeral entity shall file with the Board a report containing the information required in subsection (c) of all accounts of preneed funeral funds of the funeral entity during that quarter. The report must include all accounts held by the funeral entity at any time during the reporting period, including those first created during the period and those closed during the period. The rollover of an account shall be treated as the closing of one account and the opening of another account.

(c) [A funeral director shall file a report] Each report required by subsection (b) shall be filed with the Board on a form provided by the Board, certifying as true and correct, the following information with respect to each [prepaid contract for funeral services and merchandise entered into] account containing preneed funeral funds:

(1) The date [of the prepaid contract] preneed funeral funds were first received by the funeral entity and the name and address of the [purchasers under the contract] person for whose benefit the funds were received.

(2) The name and address of the banking institution in which [100% of the money received by the funeral director on account of the contract had been deposited] the account is held.

* * * * *

(4) [In installment contracts, if the entire amount of the contract has not been paid, the report shall expressly indicate the fact that an installment contract is involved, and the total amount of installments received by the funeral director and deposited in escrow or in trust.] The account balance at the beginning of the period, the total principal amounts added, interest or other earnings, disbursements or other transfers out and balance at the end of the period.

(d) [A funeral director shall report within 30 days all fulfilled prepaid contracts, following:

- (1) The name of the deceased.
(2) The date of death.
(3) The account number.

(4) The name of the banking institution.] Within 30 days of the sale or other cessation of all or part of its preneed business, a funeral entity shall file

with the Board a report, including all accounts as specified in subsection (b) and all information as specified in subsection (c), to demonstrate how all preneed funeral funds were distributed. Each distribution must identify the recipients and amount of funds, including transfers to other funeral entities and payments to the funeral entity for provision of funeral goods and services.

(e) [The report required in subsection (c) is not a public record] The reports required under subsections (b) and (d) are not public records under the act of June 21, 1957 (P. L. 390, No. 212) (65 P. S. §§ 66.1— [66.4] 66.9), known as the Right-to-Know Law. The [report] information contained in the reports will be available to the following:

(1) Parties privy to the preneed funeral contract.

* * * * *

(f) [Prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board and should reflect whether or not an additional service fee or arrangement fee is charged. Prepaid burial contracts or preneed contracts used by a funeral director may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.] Reports made under this section may be filed in paper form or on disk or electronically, as permitted by the Board. A funeral entity shall retain a copy of each report required to be filed under this section for 3 years after the report was due or filed, whichever is later.

§ 13.225. Affidavit for [prepaid burial accounts] preneed funeral funds.

* * * * *

§ 13.226. Nature and description of escrow or trust accounts for [prepaid burial contracts] preneed funeral funds.

(a) [Funds received for prepaid burial contracts] Preneed funeral funds shall be placed in an escrow or trust fund account which shall be separate and distinct from the business and personal accounts of the funeral director and funeral entity.

(b) [If funds received by a funeral director for prepaid burial contracts are deposited in a banking account which bears interest, or are invested by the trustee bank and produce earnings, the] The interest or earnings of all preneed funeral funds shall be retained in the account with the principal and shall be held, accounted for and transferred in the same manner as the principal amount, to assure delivery of the same quality of service and merchandise for which the contract was made or the funds were provided.

[(c) In the event of a sale or transfer of the business of a funeral director, prepaid burial contracts and prepaid burial accounts shall immediately be transferred to the control of the licensee who will assume responsibility for completion of the prepaid burial contracts. The licensee-transferee shall notify the Board in writing of the licensee's willingness to accept responsibility for completion of the prepaid burial contracts.]

§ 13.227. Limitations on preneed funeral contracts.

(a) A preneed funeral contract must be in writing.

(b) 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.

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

§ 13.228. Transfer of a preneed funeral contract by customer.

(a) Every preneed funeral contract entered into after _____ (Editor's Note: The blank refers to the effective date of adoption of this proposed rulemaking.), must expressly permit the customer to transfer the preneed funeral account and funds to another funeral director or funeral entity of the customer's choosing that will provide funeral goods and services.

(b) Within 30 days after written notification of the election to transfer a preneed funeral account and funds as authorized by subsection (a), the funeral director or funeral entity shall forward to the other funeral entity as requested by the customer the entire amount of funds in the prepaid funeral account, including accumulated interest and earnings.

(c) A funeral director or funeral entity may not retain any amount of fees for services that have not been provided or merchandise that has not been delivered to the customer under a preneed funeral contract for which the preneed funeral account or funds have been transferred as authorized by subsection (a).

(d) A funeral director or funeral entity may not collect liquidated damages for the transfer of a preneed funeral account or funds under a preneed funeral contract as authorized by subsection (a).

§ 13.229. Sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director.

(a) In the event of a sale or transfer of any portion of the preneed funeral business of a funeral entity, a funeral entity that assumes an obligation to perform under an existing preneed funeral contract or receives a preneed funeral account or funds shall, within 30 days of the transfer, notify each customer under those contracts or provider of those funds of the transfer and permit each customer who chooses to do so to notify the funeral director within 90 days that the funeral entity is to transfer the preneed funeral account and funds, including all accumulated interest and earnings, to another funeral entity of the customer's choosing as authorized by § 13.228(a) (relating to transfer of a preneed funeral contract by customer).

(b) A funeral entity that is ceasing business or otherwise will not perform under a preneed funeral contract, except as provided in subsection (a), shall notify each preneed customer at least 60 days in advance of the planned cessation and notify each

customer of the customer's right to choose to transfer the preneed funeral account and funds, including all accumulated interest and earnings, to another funeral entity of the customer's choosing as authorized by § 13.228(a).

[Pa.B. Doc. No. 07-1549. Filed for public inspection August 24, 2007, 9:00 a.m.]

STATE BOARD OF MEDICINE

[49 PA. CODE CH. 16]

Expert Witness

The State Board of Medicine (Board) proposes to amend § 16.52 (relating to creation of lists of medical consultants) to read as set forth in Annex A.

A. Effective Date

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

B. Statutory Authority

Sections 8 and 9 of the Medical Practice Act of 1985 (act) (63 P. S. §§ 422.8 and 422.9) authorize the Board to promulgate regulations addressing procedures to be followed in proceedings before it consistent with section 9 of the act.

C. Background and Purpose

To enhance the quality of testimony given in disciplinary proceedings before the Board and the hearing examiners who hear matters on behalf of the Board, the Board is proposing to adopt the criteria for qualification as an expert witness established by section 512 of the Medical Care Availability and Reduction of Error (Mcare) Act (Mcare Act) (40 P. S. § 1303.512). The Board has found that expert testimony offered by witnesses who do not possess the same specialty qualifications as the respondent whose conduct is under review has led to the assertion of expert opinions that lack the thoroughness and accuracy that the nature of the proceedings before the Board demands. The Board is of the opinion that a physician is not competent to offer an expert medical opinion in a disciplinary action before the Board alleging medical professional negligence, incompetence or violation of the standard of care unless that physician possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the qualifications as set forth in this proposed rulemaking.

D. Description of Amendments

Existing § 16.52 is amended to delete references to the maintenance of lists of expert medical consultants who might serve as expert witnesses and would instead establish qualifications consistent with section 512 of the Mcare Act for experts testifying in proceedings before the Board.

Section 16.52(a) would establish the general rule that a person will not be competent to offer an expert medical opinion in a disciplinary action before the Board unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section, as applicable.

Section 16.52(b) would establish qualifications for an expert to testify on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury. Those qualifications would include: (1) possessing an unrestricted physician's license to practice medicine in any state or the District of Columbia; and (2) being engaged in, or having retired within the previous 5 years from, the active clinical practice or teaching of medicine. The Board may waive these requirements for an expert on a matter other than the standard of care if the Board determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.

Section 16.52(c) would establish additional requirements for experts regarding standard of care issues. The expert would need to: (1) be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care; (2) practice in the same specialty and subspecialty as the respondent physician or in a subspecialty that has a substantially similar standard of care for the specific care at issue; and (3) in the event a Board-recognized certifying board certifies the respondent physician, the expert shall also be board certified by the same or a similar approved board.

Under § 16.52(d), the Board may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the Board determines that: (1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and (2) the respondent physician provided care for that condition and that care was not within the Respondent physician's specialty.

Under § 16.52(e), the Board may waive the same specialty, subspecialty and board certification requirements for an expert testifying as to a standard of care if the Board determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous 5-year time period.

Finally, under § 16.52(f), the Board reserves its authority to apply its own expertise in determining the applicable standard of care in disciplinary matters before the Board.

E. Input from the Regulated Community

In drafting and promulgating this proposed rulemaking, the Board solicited input and suggestions from the regulated community and other parties who have identified themselves as interested in the Board's regulatory agenda. The Board received comments from the Hospital and Healthsystem Association of Pennsylvania (HAP), the Pennsylvania Medical Society (PMS) and the Pennsylvania Academy of Family Physicians (PAFP). Comments from HAP and PMS were supportive of this proposed rulemaking. PAFP suggested the standards should only apply to experts testifying against the respondent physician and not those testifying on behalf of the respondent physician. The Board disagrees. Improvement in the quality of expert testimony on all sides can only serve to benefit the quality of the entire proceeding. PAFP also believes only licensed physicians from this Commonwealth should be qualified to testify. The Board believes that PAFP's position is not supported by the act, Mcare Act or the Pennsylvania Rules of Evidence (see 225 Pa. Code).

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State Board of Funeral Directors

(AGENCY)

BY: _____
(DEPUTY ATTORNEY GENERAL)

BY: Andrew C. Clark

DOCUMENT/FISCAL NOTE NO. 16A-4815

JUN 30 2009

DATE OF APPROVAL

DATE OF APPROVAL

DATE OF ADOPTION:

(Deputy General Counsel
~~Chief Counsel~~,
~~Independent Agency~~
(Strike inapplicable title)

BY: Michael J. Yeosock
Michael J. Yeosock, FD

[] Check if applicable
Copy not approved.
Objections attached.

TITLE: Chairperson
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

[] Check if applicable.
No Attorney General approval
or objection within 30 day
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FINAL RULEMAKING

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS

49 Pa. Code §§ 13.1, 13.224-13.229
PRENEED FUNERAL ARRANGEMENTS

The State Board of Funeral Directors (Board) amends §§ 13.1, 13.224, 13.225, and 13.226 and adds §§ 13.227, 13.228 and 13.229 (relating to limitations on preneed funeral contracts; transfer of a preneed funeral contract by customer; and sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director), to read as set forth in Annex A.

Description and Need for the Rulemaking

Section 13(c) of the act requires that a funeral director who accepts money under a contract with a living person to render funeral services to that person when needed to forthwith deposit the money in an escrow account or transfer it in trust to a banking institution in this Commonwealth. The money may be withdrawn or disbursed only for the purposes for which it was deposited. The Board's current regulations regarding preneed funeral arrangements were originally promulgated in 1977 and last amended in 1991. The Board has determined that the regulations need to be updated to conform to existing practices in the funeral industry and to provide adequate protection to the consumer of preneed services in the instance of changed circumstances. For example, reports under § 13.224 (relating to depositing and reporting preneed funds) are time-consuming to prepare and to review. However, the reports provide little value to the Board, the regulated community or the public. Existing regulations 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. Nor do the regulations adequately address the cessation or acquisition of a preneed funeral business.

The Board previously published proposed amendments to the regulations. The proposed regulations would replace reporting of the execution and the performance of each preneed contract with a regular report of the status of the preneed funds. The proposed regulations would require a funeral director to deposit all funds within 10 days of receipt. The proposed regulations would require that a preneed contract be in writing, limit the total fees collected (including interest and other earnings on the advance payments) to those amounts that could be charged if the contract were made at the time of death, and prohibit incorporating by reference any contract with a person not licensed to practice funeral directing. The proposed regulations would require that each preneed contract expressly permit the customer to transfer the preneed funeral account and funds to another funeral director or funeral entity of the customer's choosing that will provide funeral goods and services and that, in the event of a transfer, the funeral director would be required to forward to the other funeral director the entire amount of preneed funds, including both principal and interest or other earnings, within 30 days of notice from the customer. The proposed rulemaking would prohibit a funeral director from collecting a fee for any funeral goods or services that have not been provided or liquidated damages for the cancellation. The proposed regulations would require a funeral director or entity acquiring any portion of the preneed business of another to notify each customer and provide each customer with the opportunity to transfer the contract and funds to another funeral director of the customer's choosing and would require a funeral director ceasing preneed business to notify each customer and provide each customer with the opportunity to transfer the preneed funds to another funeral director of the customer's choosing.

Summary of Comments and Responses to Proposed Rulemaking

The Board published notice of proposed rulemaking at 37 Pa.B. 4643 (August 25, 2007) with a 30-day public comment period. The Board received written comments from the following members of the public: Funeral Consumers Alliance of Greater Philadelphia; The Association for Independent Growth, Inc.; Pennsylvania Funeral Directors Association; Harry C. Neel, FD; Ernest F. Heffner, FD; Pennsylvania Cemetery Cremation & Funeral Association; and John F. Givnish, FD. The Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) as part of their review of proposed rulemaking under the Regulatory Review Act (71 P.S. §§ 745.1-745.12).

A public commenter expressed opposition to the prohibition in proposed § 13.224(a) that a funeral director may not avoid the requirements of that section by creating or controlling or otherwise utilizing an entity that is not a funeral entity. In *Pennsylvania Funeral Directors Ass'n v. State Bd. of Funeral Directors*, 494 A.2d 67 (Pa. Cmwlth. 1985), the court determined that because funeral directors may properly be held to a higher standard than those not licensed to practice funeral directing, funeral director must comply with the 100% trusting requirements of section 13(c) of the act rather than the 70% trusting requirements of the Future Interment Law, even when selling funeral merchandise. By including this restriction, § 13.224(a) seeks to assure that licensed funeral directors continue to act as funeral directors and not as third-party merchandise sellers.

A number of public commenters asserted that § 13.228 (relating to transfer of a preneed funeral contract by customer), which requires that a preneed contract must expressly permit the customer to transfer preneed contract and preneed funds to another funeral director, is precluded by *Bean v. State Bd. of Funeral Directors*, 855 A.2d 148 (Pa. Cmwlth. 2004), *appeal denied*, 584 Pa. 696, 882 A.2d 479 (2005). The Court held that contract principles required upholding the validity of an otherwise irrevocable preneed contract against an assertion that the act and the Board's then-existing regulations required a funeral director to accede to a customer's demand to rescind the contract. The Court did not address whether the Board has the statutory authority to promulgate a regulation prospectively requiring funeral directors to include in their preneed contracts a term that would permit the customer to demand transfer of the contract and funds.

The HPLC first suggested that the term "rollover" as used in § 13.224(b) should be defined. Because the term is used only this one time, the Board has not provided a definition. Instead, in order to increase clarity, the Board has simply replaced the term "rollover of an account" with its intended meaning of "transfer of preneed funds from one trustee to another."

The HPLC also asked whether there is a need to include civil immunity for a purchaser of a preneed contract who then transfers the preneed contract to a different funeral director or funeral entity. Proposed § 13.228(c) prohibits a funeral entity from collecting a fee for services that have not been provided, and proposed § 13.228(d) prohibits a funeral entity from collecting liquidated damages for the transfer of a funeral account. In the Board's view, two provisions preclude a funeral entity from successfully claiming any damages from a customer who has transferred a preneed account to another funeral entity. Because a funeral director has actually provided the service of

helping plan a preneed funeral, the Board considered whether a funeral entity should be able to collect a fee for the arrangement conference in the event the customer transfers the preneed account. Because the Federal Trade Commission defines the arrangements conference services to be part of the basic services of the funeral provider (along with planning the funeral, obtaining necessary permits and placing obituary notices) that may not be included in prices of other categories of services, it appears that federal law prohibits a funeral entity from charging a separate arrangements conference fee. Accordingly, the Board has not made any provision for a funeral entity to collect an arrangement fee if the customer transfers the preneed account to another funeral entity.

The HPLC also suggested the use of a non-compete clause within a 50-mile radius to ensure the integrity of the contract and for consumer protection. The Board understands this to mean authorizing a funeral entity to include in its preneed contract a provision that the customer will not transfer the preneed account to any other funeral entity within a radius of 50 miles. Presumably, this would deter other funeral entities from attempting to cherry-pick the account, while at the same time allowing a preneed customer who has moved far from the community to obtain services in the customer's new community. The Board's intention is to permit customers a greater – not lesser – opportunity to transfer an existing funeral account and therefore utilize the services of a different funeral provider. The Board has not incorporated this suggestion.

The HPLC suggested that the Board verify that the portability provisions would not cause preneed customers to run afoul of the spend-down requirements for social security and medical assistance programs. IRRC echoed this suggestion. Under regulations of the Department of Public Welfare, to be considered irrevocable, the burial reserve funds must be deposited with a financial institution or a funeral director under a written agreement which provides that the funds cannot be withdrawn before the death of the named beneficiary. 55 Pa. Code § 178.5(a). Revocable funds are those funds, whether principal or interest, withdrawn and used for purposes other than the beneficiary's burial expenses, and those revocable funds are counted as a resource. 55 Pa. Code § 178.73(4). Under regulations applicable to the Social Security Administration, funds in an irrevocable trust or other irrevocable arrangement which are available for burial are funds which are held in an irrevocable burial contract, an irrevocable burial trust or an amount in an irrevocable trust which is specifically identified as available for burial expenses. 20 CFR § 416.1231(b)(6). Because § 13.228 requires that the contract expressly allow the customer to transfer the contract and funds to another funeral entity, but does not require that the customer be permitted to rescind or cancel or revoke the agreement and have the funds returned to the customer, the funds will remain irrevocably placed with a funeral director for purposes of those programs.

Because a revocable contract might be considered illusory and therefore unenforceable, the HPLC also questioned whether the language should be clearer as to a preneed contract being irrevocable but still transferable. In this rulemaking, the Board does not intend to provide that any customer may revoke, rescind or cancel a preneed agreement at will. The Board intends only that a customer who has entered into a preneed contract must be able to transfer that preneed account to another funeral entity to perform the services and provide the funeral merchandise.

The HPLC also requested further information about the regulations or statutes in other states

concerning the portability of preneed accounts. The general rule in Delaware is that a preneed contract is revocable, although it may be made irrevocable. Del. Code Ann. tit. 5, § 3403. However, the trust documents must provide that the customer may have the trust funds transferred to a new provider. Del. Admin. Code tit. 5, § 3401.2.1.2. Along with the general rule in Maryland that a customer may end a preneed contract by demanding a refund of all funds paid, a customer who has agreed to an irrevocable contract (permitted solely for the purpose of qualifying for social security or another program) may still select a different provider. Md. Bus. Occ. & Prof. Code Ann. § 7-405(e)(6) and (7). In New Jersey, a preneed contract may be made irrevocable in order to qualify the customer for social security or other public program, but the irrevocable nature of the resulting trust does not affect the selection of the provider. N.J. Rev. Stat. § 2A:102-16.1. In New York, the preneed contract of a customer who is receiving publicly-funded benefits is irrevocable, but the contract may be transferred to another provider. N.Y. Gen. Bus. Law § 453(1)(d). In Ohio, the general rule is that a customer may cancel a contract that is not irrevocable and receive all funds, including income, although a preneed contract may be made irrevocable. Ohio Rev. Code Ann. tit. 11, § 1111.19(F), (G). In West Virginia, an ostensible irrevocable contract must be transferable to another provider. W.Va. Code § 47-14-8(d).

IRRC first addressed § 13.1 (relating to definitions). IRRC questioned why definition of “preneed funeral contract” did not reference those contracts with a funeral director, in addition to those contracts with a funeral entity. Because a funeral director must be providing services on behalf of a funeral entity, the Board assumed that every contract would be made with the funeral entity. In light of IRRC’s question, the Board has revised this definition to include a funeral director. IRRC also inquired why this definition included the phrase, “whether or not the funeral entity received preneed funeral funds.” In drafting its proposed rulemaking, the Board intended to address contracts that were paid in full upon signing, as well as those contracts to be funded through installment payments. Because section 13(c) of the act addresses the funds, rather than the particular goods and services, the Board did not intend to include those contracts that would receive no funding until after the customer’s death. Accordingly, the Board has revised this phrase as, “whether the funeral director or funeral entity receives preneed funeral funds at the time of execution of the contract or through subsequent payments during the person’s lifetime.” IRRC asked why the Board included the phrase, “whether or not a contract to provide specified funeral services or merchandise exists” in part (i) of the definition of “preneed funeral funds.” A preneed customer, especially one driven by spend-down concerns, may wish to provide funds intended to pay for funeral goods and services before fully going through the decisions of what funeral goods and services to purchase. It is the Board’s intention to apply its regulations addressing preneed funds to such a situation. In other words, the Board’s regulations concerning preneed funds should not be avoided by simply failing to provide specific arrangements for funeral goods and services. For increased clarity, the Board has revised this phrase as, “whether or not the contract is specific as to funeral services or merchandise to be provided.” IRRC also questioned why the Board included parts (iii) and (iv) to the extent they deal with insurance policies. Because the apparent purpose of section 13(c) of the act is to assure oversight of funds entrusted to a funeral director, part (iv) continues the Board’s historical practice of excluding insurance policies under the supervision of the Department of Insurance. Part (iii) was proposed in order to address those preneed contracts funded by giving the funeral director ownership of an asset – assignment of an insurance policy. However, because section 13(c) of the act refers

only to the funeral director's acceptance of "money" for a preneed contract, the Board has deleted this proposed provision.

For § 13.224(a), IRRC first asked why it is necessary to require that deposits be made within 10 days. Section 13(c) of the act requires a funeral director to deposit preneed funds "forthwith." This provision is the Board's interpretation of "forthwith." IRRC also asked the Board to clarify that this requirement applies to the accumulated interest or other earnings on preneed funds transferred from another funeral director. The Board has revised this section to clarify that these accumulated earnings must also be deposited. For § 13.224(b), IRRC asked why mandated reporting continues to be necessary and whether reporting on a longer basis would be sufficient. Because historically the Board has not done anything with these reports, except provide them to the prosecution division as requested during an investigation, the Board has determined that it need no longer require the filing of preneed reports at all. Instead, as suggested by a number of public commenters, the Board will require licensees to maintain annual reports and to provide them to the Board upon demand, such as during an inspection or investigation, or upon notice of the closing of a funeral entity. Because the Board will not have already received a copy of the report, the Board believes that it is necessary to increase from 3 years to 4 years the amount of time that a licensee must maintain this report. Because section 13(c) of the act uses this expression, IRRC suggested that the Board not delete the language in § 13.224(c)(2) requiring that the report identify the banking institution in which "100% of the money received by the funeral director on account of the contract has been deposited." The Board has revised this section to retain this requirement.

IRRC commented that it shares the concern of a number of public commenters that proposed § 13.227(b) (relating to limitations on preneed funeral contracts) could negate a substantial benefit of preneed contracts – price guarantee. The Board proposed limiting a funeral entity's total fee (including any interest or other earnings on the principal with a price guarantee) to be collected for performing under a preneed contract to what would have been charged in an at-need situation in order to deter a funeral entity from permitting more risky investment of the funds for possibly greater return. In light of these consumer concerns, the Board has deleted this limitation from its regulation. Instead, this subsection will emphasize that the fees charged on a preneed contract may be no more than the fees then in effect under the general price list. This provision is not intended to prohibit a funeral entity that has guaranteed the price of funeral goods and services (based upon the price list in effect at the time of entering into the contract) and has placed the funds into a trust account from collecting as a total fee the principal and all earnings of that account upon providing the agreed-upon funeral services and incidental merchandise. Citing concerns that this provision could interfere with the ability to use a casket or other merchandise from a third-party seller as expressed by a number of public commenters, IRRC also questioned the need for § 13.227(c) prohibiting the incorporation by reference of a contract with an unlicensed person. Existing § 13.224(f) contains this provision that would simply be moved to § 13.227(c). Its purpose is to avoid split contracts – one contract for services and another for merchandise that would otherwise be subject to different trusting requirements under the Future Interment Act for non-funeral director preneed sellers of funeral merchandise. This provision does not prohibit a customer from purchasing and utilizing merchandise from a third-party seller; that contract would operate separately from the preneed funeral contract. This provision instead only prohibits the funeral director from incorporating that

third-party's contract into the funeral director's preneed contract.

IRRC questioned the need for the requirement of proposed § 13.228(a) that each preneed contract must expressly permit the customer to transfer the account and funds to another funeral director or funeral entity and asked how compliance with this requirement will protect customers. The provision of funeral services is very personal and intimate. A customer selecting funeral director services for himself must be entitled to contract with a willing funeral director of his choosing to provide this personal service, notwithstanding any prior arrangement for funeral services. The Board cannot adopt the suggestion of a public commenter that this provision be made retroactive to all existing preneed contracts. IRRC also questioned whether this provision is consistent with section 13(c) of the act that requires a funeral director to condition acceptance of preneed funds upon "withdrawal or disbursement only for the purpose for which such money was accepted." Because the regulation authorizes only the transfer of the funds to another funeral director, those funds will be withdrawn or disbursed only for the provision of funeral services and incidental goods, i.e., the purposes for which the money was initially accepted.

Finally, IRRC questioned why the Board selected 30 days as the period under proposed § 13.229(a) (relating to sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director) during which a funeral entity assuming an obligation to perform under an existing preneed funeral contract must notify each customer and permit the customer to choose to transfer the funds to another funeral entity and suggested that a longer time period might be appropriate. At the time of assuming the obligation to perform, the acquiring entity should have notice of who the preneed customers are and how to reach them. The Board is aware of no reason that notifications could not routinely be sent within 30 days. Additionally, extending the time period would increase the chance that notification might not be sent until after the customer's death. The Board has not increased the notification period in response to this comment.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Effective date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Statutory Authority

The final rulemaking is authorized under sections 13(c) and 16(a) of the Funeral Director Law (63 P.S. §§ 479.13 (c) and 479.16(a)).

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on August 15, 2007, the Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 4643, to IRRC and the chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on _____, 2009, the HPLC approved the final-form rulemaking. On _____, 2009, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, 2009, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Regulatory Unit Counsel, Department of State, by mail to P.O. Box 2649, Harrisburg, PA 17105-2649, by telephone at (717) 783-7200, or by e-mail at st-funeral@state.pa.us.

Findings

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 37 Pa.B. 4643.
- (4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of the Funeral Director Law.

Order

The Board, acting under its authorizing statute, orders that:

- (a) The regulations of the Board at 49 Pa. Code Chapter 13 are amended, by amending §§ 13.1,

13.224, 13.225, and 13.226 and by adding §§ 13.227, 13.228 and 13.229, to read as set forth in Annex A.

- (b) The Board shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.
- (c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

Michael J. Yeosock, FD, Chairman
State Board of Funeral Directors

ANNEX A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

GENERAL PROVISIONS

§ 13.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Prepaid burial account – An account in which moneys are deposited by the funeral director during the lifetime of an individual in accordance with a contract executed between the parties for funeral merchandise and services to be performed and delivered at a future time.

Prepaid burial contract – A contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death or the death of another designated individual and for which the consumer pays to the funeral director moneys at the time of the contract or at a time prior to the rendition of these services.]

Preneed funeral contract – An agreement under which a FUNERAL DIRECTOR OR funeral entity promises or agrees to provide funeral merchandise and render services upon the death of a person living at the time the contract is made, whether or not the funeral entity receives preneed funeral funds AT THE TIME OF EXECUTION OF THE CONTRACT OR THROUGH ONE OR

MORE SUBSEQUENT PAYMENTS DURING THE PERSON'S LIFETIME.

Preneed funeral funds –

- (i) Funds provided to a funeral director or funeral entity for the purpose of providing funeral services or merchandise on behalf of a person living at the time of provision of funds, whether or not a contract to provide specified THE CONTRACT IS SPECIFIC AS TO funeral services or merchandise exists TO BE PROVIDED, INCLUDING
- (ii) This term includes any funds paid, or to be paid, for arrangement fees, or additional allowance for other fees for service or merchandise.
- (iii) This term includes the assignment of an insurance policy and any other asset received by a funeral director or funeral entity to fund a preneed funeral contract.
- (iv) This term does not include any premiums paid directly to an insurance company.

* * * * *

[PREPAID BURIAL CONTRACTS]

PRENEED FUNERAL ARRANGEMENTS

§ 13.224. [Funding] Depositing and reporting [of prepaid burial contracts] preneed funeral funds.

(a) A funeral director or funeral entity shall deposit in escrow or transfer in trust to a banking institution in this Commonwealth, the entire amount of [monies received by the funeral director under a prepaid contract for funeral services or merchandise, including additional service fees or arrangement fees] preneed funeral funds, INCLUDING ACCUMULATED INTEREST OR OTHER EARNING ON FUNDS TRANSFERRED FROM ANOTHER FUNERAL DIRECTOR OR FUNERAL ENTITY, within 10 days of receipt. A funeral director or funeral entity may not avoid

the requirements of this subsection by creating or controlling or otherwise utilizing a person or entity that is not a funeral entity.

(b) [In regard to prepaid contracts entered into by funeral directors after November 4, 1989, a funeral director shall file a report with the Board within 90 days containing the information specified in subsection (c) with respect to each prepaid contract for funeral services and merchandise. Forms for the reports, including the report required under subsection (d), will be provided by the Board.]

Within 30 days of the end of each calendar quarter YEAR, every funeral entity shall file with the Board PREPARE OR CAUSE TO BE PREPARED a report containing the information required in subsection (c) of all accounts of preneed funeral funds of the funeral entity during that quarter YEAR. The report must include all accounts held by the funeral entity at any time during the reporting period, including those first created during the period and those closed during the period. The rollover of an account TRANSFER OF PRENEED FUNDS FROM ONE TRUSTEE TO ANOTHER shall be treated as the closing of one account and the opening of another account.

(c) [A funeral director shall file a report] Each report required by subsection (b) shall be filed with the Board on a form provided by the Board INCLUDE, certifying as true and correct, the following information with respect to each [prepaid contract for funeral services and merchandise entered into] account containing preneed funeral funds:

(1) The date [of the prepaid contract] preneed funeral funds were first received by the funeral entity and the name and address of the [purchasers under the contract] person for whose benefit the funds were received.

(2) The name and address of the banking institution in which [100% of the money received by the funeral director on account of the contract had been deposited] AND the account is held.

* * * * *

(4) [In installment contracts, if the entire amount of the contract has not been paid, the report shall expressly indicate the fact that an installment contract is involved, and the total amount of installments received by the funeral director and deposited in escrow or in trust.] The account balance at the beginning of the period, the total principal amounts added, interest or other earnings, disbursements or other transfers out, and balance at the end of the period.

(d) [A funeral director shall report within 30 days all fulfilled prepaid contracts, following:

(1) The name of the deceased.

(2) The date of death.

(3) The account number.

(4) The name of the banking institution.] Within 30 days of the sale or other cessation of all or part of its preneed business, a funeral entity shall file with the Board PREPARE a report, including all accounts as specified in subsection (b) and all information as specified in subsection (c), to demonstrate how all preneed funeral funds were distributed. Each distribution shall identify the recipients and amount of funds, including transfers to other funeral entities and payments to the funeral entity for provision of funeral goods and services.

(e) [The report required in subsection (c) is not a public record] The reports required under subsections (b) and (d) are not public records under the act of June 21, 1957 (P.L. 390, No. 212) (65 P.S. §§ 66.1-66.4) FEBRUARY 14, 2008 (P.L. ____, NO. 8) (65 P.S. §§ 67.101 ET SEQ.), known as the Right-to-Know Law. The [report] information contained in the reports will be available to the following:

(1) Parties privy to the preneed funeral contract.

* * * * *

(f) [Prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board and should reflect whether or not an additional service fee or arrangement fee is charged. Prepaid burial contracts or preneed contracts used by a funeral director may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.] Reports made under this section may be filed PREPARED in paper form or on disk or electronically, as permitted by the Board. A funeral entity shall retain a copy of each report required to be filed PREPARED under this section for 3 4 years after the report was due or filed, whichever is later CONCLUSION OF THE REPORTING PERIOD.

§ 13.225. Affidavit for [prepaid burial accounts] preneed funeral funds.

* * * * *

§ 13.226. Nature and description of escrow or trust account for [prepaid burial contracts] preneed funeral funds.

(a) [Funds received for prepaid burial contracts] Preneed funeral funds shall be placed in an escrow or trust fund account which shall be separate and distinct from the business and personal accounts of the funeral director and funeral entity.

(b) [If funds received by a funeral director for preneed burial contracts are deposited in a banking account which bears interest, or are invested by the trustee bank and produce earnings, the] The interest or earnings of all preneed funeral funds shall be retained in the account with the principal and shall be held, accounted for and transferred in the same manner as the principal amount, to assure delivery of the same quality of service and merchandise for which the contract was made or the funds were provided.

[(c) In the event of a sale or transfer of the business of a funeral director, prepaid burial contracts and prepaid burial accounts shall immediately be transferred to the control of the licensee who will assume responsibility for completion of the prepaid burial contracts. The licensee-transferee shall notify the Board in writing of the licensee's willingness to accept responsibility for completion of the prepaid burial contracts.]

§ 13.227. Limitations on preneed funeral contracts.

(a) A preneed funeral contract must be in writing.

(b) ~~A funeral director or funeral entity may not charge or collect any fees~~ THE FEES TO BE CHARGED under a preneed funeral contract for funeral goods and services MAY NOT ~~that~~ exceed the fees for such goods and services as set forth on the funeral entity's general price list at the time the goods or services are provided OF ENTERING INTO THE CONTRACT.

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

§ 13.228. Transfer of a preneed funeral contract by customer.

(a) Every preneed funeral contract entered into after _____ (Editor's note: The blank refers to the effective date of adoption of this rulemaking) must expressly permit the customer to transfer the preneed funeral account and funds to another funeral director or funeral entity of the customer's choosing that will provide funeral goods and services.

(b) Within 30 days after written notification of the election to transfer a preneed funeral account and funds as authorized by subsection (a), the funeral director or funeral entity shall forward to the other funeral entity as requested by the customer the entire amount of funds in the prepaid funeral account, including accumulated interest and earnings.

(c) A funeral director or funeral entity may not retain any amount of fees for services that have not been provided or merchandise that has not been delivered to the customer under a preneed funeral contract for which the preneed funeral account or funds have been transferred as authorized by subsection (a).

(d) A funeral director or funeral entity may not collect liquidated damages for the transfer of a preneed funeral account or funds under a preneed funeral contract as authorized by subsection (a).

§ 13.229. Sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director.

(a) In the event of a sale or transfer of A FUNERAL ENTITY SELLS OR TRANSFERS any portion of the ITS preneed funeral business of a funeral entity, a funeral entity that assumes an obligation to perform under an existing preneed funeral contract or receives a preneed funeral account or funds shall, within 30 days of the transfer, notify each customer under those contracts or provider of those funds of the transfer and permit each customer who chooses to do so to notify the funeral director within 90 days that the funeral entity is to transfer the preneed funeral account and funds, including all accumulated interest and earnings, to another funeral entity of the customer's choosing as authorized by § 13.228(a) (relating to transfer of a preneed funeral contract by customer).

(b) A funeral entity that is ceasing business or otherwise will not perform under a preneed funeral contract, except as provided in subsection (a), shall notify each preneed customer at least 60 days in advance of the planned cessation and notify each customer of the customer's right to choose to transfer the preneed funeral account and funds, including all accumulated interest and earnings, to another funeral entity of the customer's choosing as authorized by § 13.228(a).

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

DATE: March 31, 2009

SUBJECT: Final Rulemaking:
State Board of Funeral Directors
Preneed funeral arrangements (16A-4815)

TO: Andrew C. Clark, Deputy General Counsel
Office of General Counsel

FROM: Thomas A. Blackburn, Regulatory Unit Counsel
Department of State

TAB

Other than as set forth in the preamble, there are no significant legal and policy issues presented by this amendment to the regulations of the State Board of Funeral Directors regarding preneed contracts for funeral services and merchandise.

I certify that I have reviewed this regulation for form and legality, that I have discussed any legal and policy issues with the administrative officers responsible for the program, and that all information contained in the Preamble and Annex is correct and accurate.

TAB

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS
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September 21, 2009

The Honorable Arthur Coccodrilli, Chairman
INDEPENDENT REGULATORY REVIEW COMMISSION
14th Floor, Harrisstown 2, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Final Regulation
State Board of Funeral Directors
16A-4815: Pre-Need Funeral Arrangements

Dear Chairman Coccodrilli:

Enclosed is a copy of a final rulemaking package of the State Board of Funeral Directors pertaining to Pre-Need Funeral Arrangements.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Yeosock".

Michael J. Yeosock, Chairperson
State Board of Funeral Directors

MJY/TAB:rs

Enclosure

cc: Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs
Peter V. Marks, Executive Deputy Chief Counsel
Department of State
Joyce McKeever, Deputy Chief Counsel
Department of State
Cynthia Montgomery, Regulatory Counsel & Senior Counsel in Charge
Department of State
Thomas A. Blackburn, Counsel
State Board of Funeral Directors
State Board of Funeral Directors

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 16A-4815
 SUBJECT: PRENEED FUNERAL ARRANGEMENTS
 AGENCY: DEPARTMENT OF STATE
 STATE BOARD OF FUNERAL DIRECTORS

RECEIVED

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INDEPENDENT REGULATORY
REVIEW COMMISSION

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
_____	_____	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
9/21/09	<i>Michael P. McGeehan</i>	MAJORITY CHAIRMAN <u>Michael P. McGeehan</u>
_____	_____	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
9/21/09	<i>Robert M. Tomlinson</i>	MAJORITY CHAIRMAN <u>Robert M. Tomlinson</u>
9/21/09	<i>Il. Gilbert</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)