2627

From: Harry C. Neel [hcneel@verizon.net]
Sent: Monday, October 19, 2009 2:01 PM
To: IRRC
Cc: ST-FUNERAL@state.pa.us
Subject: Neel Comments on 16A-4815 (IRRC# 2627)
Attachments: Neel Comments on 16A-4815 (2627) 10-19-09.pdf

Dear Mr. Jewett,
Attached are my comments on the above referenced proposed regulation and my attachment.

Please acknowledge receipt of this email.

Harry C. Neel
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Jefferson Memorial Cemetery and Funeral Home

October 19, 2009

Mr. John H. Jewett, Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pa. 17101

Via email: irrc@irrc.state.pa.us
CC: st-funeral@state.pa.us

RE: Comments in Opposition to Proposed State Board of Funeral Directors Regulation No. 16A-4815 (IRRC # 2627)

Dear Mr. Jewett and Members of the Commission,

I am a 3rd generation death care provider. My family owns and operates one of the largest funeral homes in Pittsburgh and one of the largest cemeteries in the country. In 2008 the funeral home performed 456 funerals and the cemetery 1,406 burials. Of those 30% of our funerals were pre-need, generally 5-10 years before needed, and in the cemetery 92% of those buried already owned their lots generally for 20-30 years before needed. Pennsylvania consumers want pre-need options and pre-need in Pennsylvania works well under the current laws and regulations.

I have observed this board for 16 years. At each turn they have done everything they can to make preneed so difficult as to render it very nearly impossible for a provider to offer preneed to the public. Again here the proposed regulation create such road blocks that funeral directors who have offered preneed for years will fear sanction by this board if they continue.

On September 20th, 2007 I submitted detailed comments to the State Board in opposition to this proposed regulation. Since I see very little change of substance those comments remain valid. A copy of those comments is attachment 1. Here I will add a few additional concerns as to why IRRC should reject these regulations.

I. *THE CONSUMER IS HARMED BY THIS REGULATION*

Let's start with the consumer in whose interest government passes laws and agencies write regulations. The key question should be - is the consumer's interest helped by these regulations? The sad fact is the consumer may well be harmed by these regulations. The central point of this regulation is to allow the consumer to "transfer" his irrevocable pre-need contract to another provider (for now let us set aside the fact that the consumer willingly and with a clear business mind, unobstructed by grief, entered into this irrevocable contract). Will this transfer scheme work? From a practicable and economical point of view the answer is no!

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A) This regulation endangers the spend-down exemption for social security and medical assistance programs. Though the board states in its 'Summary Of Comments and Responses to Proposed Rulemaking' of September 21st, 2009 on page 3 paragraph 2 that since the regulation *"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."* However by their own admission (Regulatory Analysis Form Question #8) the first contract is "cancelled". From a contractual, business and practical point of view no business will take another businesses contract and simply put it on their books. So a new contract will be written (and the original cancelled). Since Pennsylvania law generally requires a three day right of revocation; a consumer can cancel with provider A, transfer to provider B, then cancel provider B's contract within 3 days. This loophole gives the consumer the opportunity for a refund therefore it would not be an irrevocable contract. Further in this same paragraph the Board related its review of the Department of Public Welfare policies that require that *"the funds cannot be withdrawn before the death of the named beneficiary."* But in fact they will be! If a pre-need funeral is moved from one provider to another the money in trust must be moved also--so it will be withdrawn. Certainly I would not want a pre-need contact I am responsible for, which has the money funding that contract in a trust with another provider, where I do not know (or agree with) the investment philosophy or have any control over what investments were or are made. Nor would I allow money to remain in our firms trusts if a contract were transferred to another provider. In summary the original contract will be cancelled and the money will be withdrawn. These two actions could be deemed to have violated the spend-down requirements and the consumer may lose his funeral exemption. The board should have obtained opinion letters from the various state and federal agencies on this scheme so the consumer will know exactly where he stands rather than leaving the consumer to a crap shoot as to whether this regulation passes muster or not.

B) From a financial prospective this scheme will likely harm the consumer. Using a simple example: A consumer contracted for his services and casket 5 years ago for $5000. Today he tries to transfer his contract to another provider. Even as the Board recognizes the consumer will have to "cancel" (Regulatory Analysis Form Question #8) his contract with his original provider, therefore the new provider will have to execute a new contract. The trust has grown at 4% compounded and is now worth $6083[1]. What will occur if the new provider list price for the same services and casket are $6,500, $7,000 or even $7,500 (not uncommon prices in my market area)? I know of no provider, including my firm, who to gain one customer through transfer would agree to a guaranteed price contract while beginning the contractual relationship accepting a transferred trust with less that his current list price. Therefore the consumer will likely have to pay more to change providers or accept a contract that is not price guaranteed thereby accepting all the risk for past and future inflation. The consumer is thus harmed by having to pay more money, now or in the future, for what he thought he already had paid for.

- Please note that the proposed regulation **does not** require the new provider to deliver comparable services and merchandise at the original contract price even though he receives the original amount trusted plus interest. I suspect the reason is that the professional board members know that trust growth rarely if ever keeps pace with inflation and the audience they are playing too would not accept the transfer if required to honor the original contract price.

C) Further the Board has not considered the effects of the market fluctuation that all investors, including funeral trusts, go through (see footnote 1 below). Using the above example when the market goes down 33% , as our companies did last year, the $5000 placed on deposit is now only worth $3350 + accumulated interest.

[1] The calculation of return on investment is more complicated than this example. A balanced trust will have both fixed investments for income generation and equities for growth. The actual return is a mix of the fixed and equity performance. When the equities market nose dives -33% even the 4.18% return on our fixed assets did not balance out the overall decline (Both are actual numbers from our 2008 trust statements). You can see the financial predicament the funeral director is in if this were an 'individual' trust that had to be withdrawn to deliver the services. That is the reason many of us use 'Master trusts' to allow the size of the trust to average out market fluctuations. (see also footnote 4)

A huge drop in principal. I don't think there is any provider who will accept a transfer of $3350 + interest as payment in full for a funeral priced at today's higher list price.

- After reading paragraphs B and C you may wonder why a funeral business would expose itself to these potential "losses". The answer is simple: market share. Through pre-need guaranteed price contracts the pre-need oriented firms continually gain clients and generally clients another provider used to serve. It is true that many pre-need contracts we deliver are sometimes $150 to $300 (and much more for the older contracts) below our current list price. The staff, utilities, taxes and mortgage are being paid no matter how many families we serve. We consider this 'differential' another cost of doing business. Sixteen years ago we opened our funeral home with zero clientele in a market saturated with funeral homes. Today we are one of the largest, if not the largest, facility in Pittsburgh serving 456 families in 2008. Preneed was an important factor in this growth.

D) If this regulation is enacted the business will incur higher costs and those costs will be passed on to the consumer in the form of higher prices (see section IV for more details). Higher prices harm the consumer, most especially seniors who are the majority of consumers of at-need or pre-need funeral services. If this regulation will also harm retiring funeral directors, as I believe it will (see section IV B), then some establishments will simply close their doors. Fewer funeral homes mean less competition and ultimately higher prices- the consumer is harmed.

The consumer will be harmed by these regulations therefore the IRRC should reject these regulations.

II. *THERE IS NO NEED FOR THIS REGULATION*

Question 13 of the IRRC Regulatory Analysis Form is probably the most important question of the form. It is here that the regulatory agency is to document ***"the compelling public interest that justifies the regulation"***. The Funeral Board did not answer the question posed. In fact they gave no compelling public interest whatsoever. Further admitting, in question 14, that the rulemaking is not based upon any data whatsoever.

To justify this regulation the Board has not produced large quantity of harmed consumers, the board has not produced a handful of harmed consumers, and in fact the board has not produced even one (1) injured consumer. This was a non-responsive answer. This board's propensity to make policy statements or regulations without a shred of fact or public interest behind their actions has been documented in both the Bean litigation[2] and the Walker litigation[3] and here they do it again. In reality there is no large or small group of consumers currently being harmed. In fact this regulation has no compelling public interest to justify it.

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[2] Bean v. Department of State, State Board of Funeral Directors the Commonwealth Court concluded that the Board could not demonstrate any reason for declaring all pre-need agreements rescindable.

[3] Judge Jones also noted in Walker v. Flitton that the Board failed to show any compelling need for such broad restrictions on licensee's rights:

- Page 15: *"There is no evidence in the Record, however, disclosing the nature of this "festering problem" other than this one unsubstantiated opinion of Pinkerton."* (emphasis added)
- Page 26: *"There is no evidence that the Defendants (the Board) fully analyzed the relevant issues in order to test their assumptions about preneed solicitation by unlicensed individuals by conducting research, nor did they complete studies or take testimony in an effort to create a carefully crafted response to the exigencies of the growing preneed industry."*
- Page 37: *"... the record is devoid of evidence supporting the proposition that consumers in Pennsylvania have experienced difficulties at the hands of unlicensed individuals employed by funeral directors who attempt to disseminate truthful information regarding preneed funerals and life insurance policies to fund them."*

The board opined that the law was old and that pre-need was a very tiny portion of funerals when the law was enacted in 1952. However updating laws is a legislative prerogative not delegated to boards through regulations. And though "old" the law covers all the basics and works very well.

The board further opined that because funeral directors guarantee the price of pre-need funerals *"A funeral director is thus tempted to authorize the trustee to place the funds in a higher risk investment 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."* As a firm with just under 7,000,000 in pre-need trusts I can attest that nothing is further from the truth and this flawed logic is a figment of the board's imagination. First the statement totally overlooks the fact that the bank trustee has a fiduciary obligation to the trust to act as a reasonable man. No Bank trustee would allow a large portion of a funeral trust under his management to be so invested. Based upon 30 years of experience it is my opinion that if I instructed our trustee to invest all our trust's assets in such high return (and high risk) instruments he would resign rather than violate his fiduciary duty and expose himself to sanctions. The second half of the statement is equally non-sensible; to say that such investments expose the funeral director to ONLY the loss of the wholesale cost of services and merchandise is simply asinine. Employees are the most expensive part of any business and even at wholesale funeral merchandise is expensive. An average funeral business may make a 15% net profit after all expenses. By this board's logic the funeral director, to gain the highest return, is willing to gamble with 85% (his real cost) of the money he received. The board appears to be referring to the merchandise only cost. This is so illogical I do not even know how to refute it. No reputable business would do this. They would only be risking their future- and no rational owner would take such a risk.

<u>This board has not made any case, let alone one of a compelling public interest, to justify these regulations and therefore the IRRC should reject these regulations.</u>

III. *THERE IS NO STATUTORY AUTHORITY FOR THIS REGULATION*

Nothing in the Funeral Director Law discusses irrevocable contracts nor transportability of same and certainly paragraph 13(c) does not. Simply because 13(c) mentions the word "contract", even by the greatest stretch imaginable, does not permit this board to violate recent president setting litigation and fundamental contract law. This is creating statute through regulation.

There is nothing in this statute giving this board the right to restrict a man or woman's choice of occupation simply because they also are licensed as a funeral director. Nearly every month this board approves funeral supervisors that also have other employment. This boards statement (Summary of Comments and Responses to Proposed Rulemaking, page 2, second paragraph) that *"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."* This statement is condescending at best and a violation of an individual's constitutional rights at worst.

There is nothing in the Funeral Director Law whatsoever that gives this board authority to prohibit "split contract" arraignments as it does in 13.224(a). In fact until a decade or so ago the board considered them legal. It is totally legal for 3rd party seller to sell merchandise to a consumer. Even this board does not dispute that---unless you're a funeral director operating under this regulation (Summary of Comments and Responses to Proposed Rulemaking, page 5 last paragraph). There is no statuary authority for this board to deny licensees the right to split contracts or to legally operate under other available laws.

There is nothing in the statute that gives this board the authority to require the purchaser of a funeral business with preneed funds to notify the purchasers of those pre-need contracts that they have 90 days to cancel or transfer their contracts.

There is no statutory Authority for any part of this regulation. This regulation is a blatant attempt to "legislate" through the regulatory process. Therefore the IRRC should reject these regulations.

IV. *THE COST TO PROVIDERS IS SIGNIFICANT*

Contrary to the Boards statements, that there are "no" costs associated with this regulation, the costs to the funeral business will be significant. And since every cost the business incurs is ultimately passed on to the consumer in higher prices the consumer will ultimately be harmed.

A) Section 13.224(b) may be thought to reduce paperwork because it *"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 revised regulation, though well meaning, will have the unintended consequence of increasing costs to the provider and thus to the consumer. As it is now we file one report when the contract is established and one report when it is delivered. Under the new regulation paragraph (b)(4) requires *"the account balance at the beginning of the period, the total principal amounts added, interest or other earnings, disbursements or other transfers out, and the balance at the end of the period."* This type of report is doable for an individual trust invested in one individual's name. However, for the larger firms that use a [4]master trust this new report format will require a complete reprogramming of computers to convert to a retirement or pension type of reporting. And it is not something we can use only going forward, this regulation would require this of all existing deposits. I actually looked into this for my firm some years ago and was astounded at the cost. It is not simply the cost of a more complex program, it is the fact that moving your data into the program, debugging the conversion and calculating backwards on earnings then getting it all to balance again. It sounds simple but it takes hundreds and hundreds of hours. For those of us with hundreds or thousands of preneed contracts the cost to comply with this revised rule, even with modern computers will be extremely high.

B) Funeral Directors large and small who wish to sell their business and retire may well see a substantial drop in the sales price for their business (the business value is generally the majority of his retirement planning). For some the backlog of preneed business is a substantial asset giving their establishment increased value. Paragraph 13.229 of the proposed regulation requires the buyer of a funeral business to notify all existing preneed contract holders of the change of ownership[5] and offer them a chance to cancel or transfer their contract. Obviously this will significantly diminishes the value of the business to the purchaser. Basic contract law already requires the new owner to honor the contracts of the business that are in force. This regulation would significantly harm the funeral director with no corresponding benefit to the consumer.

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[4] A Master Trust is like a mutual fund. Rather than making decisions about 100 or 1000 individual accounts the Master Trust is managed and diversified as a single fund. Records are kept about individual depositors. When the contract is delivered the original deposit is withdrawn and interest earnings are reasonably estimated by the duration held and the performance of the overall fund. Though not accurate to the penny it is reasonably accurate and so very much less costly than applying earnings to each account each earning period. It is an accepted approach that has worked well for the industry for many decades.

[5] The regulation states "any portion of its preneed funeral business". Therefore if I sell even 1 shares to a new investor, who by definition is buying any % of the business (therefore including the preneed business) I must give all my existing contract holders the opportunity to cancel or transfer their preened contract. This is an absurd and onerous regulation.

- ✓ Please understand that every preneed funeral contract written IS NOT irrevocable. At our company I would estimate that only 30% of the contracts are irrevocable when initiated. Later some families, as they are preparing to apply for government benefits, come back and make their existing preneed contract irrevocable.

- ❖ There are consumer advantages to a contract that is not made irrevocable. For example: Often a couple who wishes to pre-arrange both of their funerals simply does not have the funds to do it all at once. Frequently they will arrange for one pre-need funeral now. If the contract is not irrevocable the pre-paid funeral can be delivered to whichever purchaser needs it first. In fact, in a family emergency, it can be delivered to anyone the purchaser designates (child, parent, friend). Since it was not irrevocable it is their pre-need to be used as they see fit. The consumer looses this benefit of this type of flexibility if the agreement is irrevocable. At our firm we simply explain the advantages and disadvantages of each type of agreement and let the consumer decide.

C) The proposed 13.227(b) of the regulation **is a devious clause that is disastrous all preneed providers and will also harm consumers by restricting their choices as providers stop offering preneed.**

"13.227 (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 and services are provided~~ OF ENTERING INTO THE CONTRACT."

Reading the revised language minus all the strike outs comes out: ***"The fees to be charged under a preneed funeral contract for funeral goods and services may not exceed the fees for such goods and services as set forth on the funeral entity's general price list at the time of entering into the contract"***

The reality is that the fees are actually 'charged' at the time of delivery (at the time of sale the contract is actually on the liability side of the ledger—something we owe in the future). As you can clearly see the intent is that if the amount accumulated in the preneed trust exceeded the GPL prices at the time of delivery of the services that overage would have to be refunded. This totally ignores the basic tenants of a contract--a deal is a deal. The consumer pays the current cost of a funeral and gets a guaranteed price. The funeral director must deliver that funeral at the contract price. If the trust has done well he may have a small surplus. If the trust has underperformed he will have a shortfall. Over time one simply offsets the other. However with this regulation the funeral director has all the risk with none of the potential upside. Once again this board and its proposed regulations will harm the consumer because funeral directors will stop offering preneed because it simply isn't worth it.

D) Paragraph 13.227 (c) of the regulation does not make sense; *"A preneed funeral contract may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director."* Does this mean that if a funeral director writes on his statement of goods and services vault by xxx or casket by xxx (because the family previously purchased a burial vault or casket from another vender) that they are in violation of this regulation? Or is this tied paragraph 13.224 (a) *"The 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."* Nothing else makes sense.

V. *Regulation makes honest business violators*

Paragraph 13.224 (a) of the regulation requiring the deposit of funds within 10 days adds another sneaker clause that is devastating all preneed providers: ***"The 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."*** It is highly unlikely that this would be interpreted as written; meaning that you may not avoid the 10 day deposit requirement. Therefore in this provision the Board has targeted the larger and more progressive firms in a way that will decimate preneed and will thereby harm the consumer by reducing their options.

- Preneed funerals are closely akin to life insurance. The consumer pays now for a future benefit. Do you believe the life insurance industry would exist today if insurance companies were required to place 100% of their moneys in trust? Of course not. Insurance companies have agents, actuaries, clerical, managers, computers and buildings to pay for--- all so they can offer insurance policies to the consumer. Insurance companies are highly regulated, yet they permitted to retain certain dollars to pay these necessary expenses so they can offer their products.

Paragraph 13 (c) of the statute does require that a funeral director who accepts money for pre-need contracts deposit the money in escrow, or in a trust with a banking institution. Prior litigation has set the precedent that 100% of the "service" moneys received by a funeral director must be trusted. It is obvious that a business cannot pay its employees, set up trusts and cover its overhead when 100% of the funds are put in trust.

In small firms where pre-need is a small part of their business[6] the owner simply absorbs the costs into his yearly budget and in effect shifts the cost of pre-need into his at-need pricing. No matter how small an amount this might be the at-need consumer is paying the cost for the person buying pre-need.

In larger firms and in combination funeral and cemetery operations ("combinations") the absorption of pre-need costs into daily at-need business is simply not feasible or fair to the at-need client. Active preneed firms have dedicated personnel who work only with pre-need families, do significant advertizing and have other overheads directly and only applicable to their preneed activities. This cost is too significant to be absorbed into their at-need activities. For this reason most combinations trust merchandise sales into their legal future interment trusts and many progressive funeral homes established separate merchandise companies using a future interment trust for their merchandise sales. Thus they are permitted to retain 30% of the merchandise revenue to cover their pre-need expenses while placing 100% of the funeral services in a separate trust or an insurance policy. Until recently the Board considered this "contract splitting" a legal and acceptable practice (and even Pennsylvania Funeral Directors Association [PFDA] promoted this approach to its members). Then the board did a reversal in its opinions (as did PFDA) and began prosecuting funeral directors who established separate merchandise companies. This 'change' of policy by the Board has already driven a number of firms out of the pre-need market because fighting the state with private funds is often unaffordable.

If this regulation passes it will be illegal for any funeral director to work with their companion or parent company staff to serve their families pre-need. There is no consumer protection gained by this regulation. There is consumer harm because consumer pre-need options will be lost as funeral directors fear sanction by the Board and refuse to offer pre-need. This reduces competition and reduced competition always means higher prices for consumers.

One day we are perfectly legal the next day we are not.

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[6] Every funeral director will tell you he is in the preneed business and he has a back log of XXX. And after 25 years he might have 25 or 50 or even 100 preneed funerals on file. But his preneed is generally a widow who contacts the funeral director asking to prearrange a funeral just like Dads to protect her children. It is not the same as a firm that actively markets, has a dedicated staff that specialize only in preneed and therefore may consummate 25 agreements a month and has hundreds and even thousands of preneed contracts of record.

There is no consumer benefit gained by these severe restriction of a funeral directors rights therefore IRRC should reject this regulation.

VI. *BOARD DID NOT ACCEPT SUGESTIONS BY INDSUSTRY, IRRC OR HRRC*

Contrary to the boards statements in question 22 of the Regulatory Analysis Form about considering the regulated communities comments; they have only provided lip service to that obligation. In fact this board has not accepted even one of the suggestions made by the pre-need side of the industry. In question 23 the board admits that *"No alternative regulatory schemes were considered."* Many of us in the industry have attempted to work with the board as these regulations were being developed. We have attended the public hearings, board meetings, participated in workshops and made written comments and suggestions. Yet not even one of our suggestions was accepted. It is very distressing that after all this time and all our effort and input the final regulation is so close to the first draft regulation as to be indistinguishable on the major points. IRRC and HRRC made numerous suggestions. Though a number of the minor suggestions were addressed it appears that the more serious questions or objections by IRRC and HRRC were not addressed either.

WHY IS THE BOARD REALLY DOING THIS?
AT-NEED VS. PRE-NEED PROVIDERS

In the funeral Industry there are two distinct groups of providers; those who prefer at-need clients and those who actively market preneed. The providers who prefer at-need far outnumber those who market pre-need. The rift is so severe between the two groups that most if not all of the pre-need oriented providers have abandoned their traditional state organization, The Pennsylvania Funeral Directors Association (PFDA), and have joined with others who share their preneed philosophy by becoming members of the Pennsylvania Cemetery, Cremation and Funeral Association (PCCFA). The past decade has been nothing short of turf wars on who can sell what to whom. It is well known in the industry that the PFDA has been the "gatekeeper" as to who is appointed the State Board. Thusly the state board has become a "captured board" following the whims of the at-need side of the industry---as is readily apparent by the board's recent positions and rulemaking. Because of this the funeral board has been litigated at least four (4) times; losing two, one still in progress and one buy out of a board member. Of the litigations (Walker) was a civil rights claim so the winning plaintiffs were reimbursed their attorney fees in the amount of $70,000 (negotiated to $55,000) and the state reputedly spent $150,000 to 'buy' one of its members out of another litigation and let us not overlook the terrible cost to the taxpayer of the unnecessary and wasted time by state attorneys and employees necessary to defend these actions. Passage of these regulations, without significant modification, will no doubt force the pre-need providers to go to the courts once again for relief for nothing else seems to get through to this Board.

Why is this rift so severe between at-need and pre-need oriented providers who both desire to serve the public? The answer is simple---economics and market share. Active pre-need funeral homes are taking market share away from at-need funeral homes. The client of today's market are not willing to simply use the prior traditional demographic funeral providers their parents always used (i.e. catholic providers, Italian providers, Irish Providers etc.). When today's consumer perform family estate planning, i.e. pre-need, they demand higher service, a fixed price and the emotional and financial benefits pre-need offers. Active pre-need providers are growing their inventory of future services as traditional at-need providers see their case volume slowly declining. None of this is about protecting the consumer; **ultimately it is about who gets the sale** the at-need firm or the pre-need firm.

In summary, the board has not proven that consumers are being harmed by the current practices of pre-need providers. The regulation will stifle competition, reduce consumer choices and thereby increase costs to the consumer. This regulation exceeds the statuary authority, violates existing contract law, court precedent and may expose the consumer to a loss of the funeral exemption. This regulation is nothing more than a transparent attempt to choke off the legal avenues currently enjoyed by providers and make those avenues illegal by regulation. Funeral directors will fear sanctions by this board if they continue current practices of coordinating pre-need with parent company or affiliated organizations.

For these reasons I respectfully urge IRRC to reject this regulatory proposal.

Sincerely,

Harry C. Neel
President

NEEL ATTACHMENT

PRIOR COMMENTS Dated 9-20-2007

ON Proposed Regulation 16A-4815 (2627)

Jefferson Memorial Funeral Home, Inc.

Jan B. Jefferson
Supervisor

301 Curry Hollow Road • Pittsburgh, Pennsylvania 15236 • 412/655-4501

September 20, 2007

Michelle T. Smey, Administrative Officer
State Board of Funeral Directors
P.O. Box 2649
Harrisburg, Pa. 17105-2649

RE: Proposed Rule Making Regulation ID #16A-4815 (#2627).
State Board of Funeral Directors [49 PA. Code Ch. 13] Preneed Funeral Arrangements

Via Email: msmey@state.pa.us and st-funeral@state.pa.us

Dear Mrs. Smey,

I am a third generation death care provider. My family owns and operates one of the largest funeral homes in Pittsburgh. I have, for more than two years, provided input to this Board regarding these preneed regulations. I attended the public work session regarding these regulations, participated in the Board committee meeting, written comment letters and have been a frequent attendee at the monthly board meetings. I have watched this Board press ahead with its "agenda" without any documented or compelling need to issue these regulations. Further these proposed regulations exceed the statuary authority granted by the legislature in the Funeral Director Law. And these proposed regulations clearly violate the Federal Court Walker decision[1] as well as the Commonwealth Court Bean decision[2]. Over the many years I have observed this Board I have concluded that they are dead set on drafting regulations that restrict competition, restrict free communication of honest information, and establish a monopoly in the death care industry for licensed funeral directors. The end result will do nothing but hurt Pennsylvania consumers by driving up prices as alternate vendors are driven from the market by this Boards actions and regulations. In my opinion this Board is perhaps the most reactionary funeral licensing board in the United States and the expensive renegade among all the boards BPOA oversees. It takes little effort to see the partisanship of this Board when one of the "independent consumer members" was previously the legal council for the trade association The Pennsylvania Funeral Directors Association

[1] United States District Court for the Middle District of Pennsylvania in the matter captioned Michael Walker, et al. v. Jodi Flitton, et al., No. 4: CV-01-02252
[2] Commonwealth court of Pennsylvania in the matter captioned Kevin M. Bean v. Department of State, state Board of Funeral Directors No. 1088C.D.2003

(PFDA). It was this member who spoke the loudest and the longest pressing for approval of these regulations.

In the section titled "Input from the Regulated Community the Board states" that it has solicited the opinions from funeral directors and organizations. However the input they have received has fallen on deaf ears. During a public work session the over whelming majority of participants, both in writing and/or in testimony, urged rejection or substantive and significant revision to the proposed regulations. Later I and others were invited to participate in a two component board meeting reviewing the proposed regulations. After those two meetings some amendments were made in the second draft of the regulations. Yet in the May 2007 meeting the Board has jettisoned all the work and input by the participants by voting a third draft and current draft of the regulations. This third draft is essentially fraught with the same series of problems as the initial draft they started with two years ago. The end result is that the regulated community has been ignored.

In the "Background and Need for the Amendment" the board summarizes that it has ***"determined that the regulations need to be updated to conform to existing practices in the funeral industry"***. I cannot imagine what the board is referring too. These proposed regulations do not "conform" to any existing practices and in reality force the industry to reverse 50 years of progress. The end result of these proposed regulations will force the industry to offer fewer consumer choices because of the unnecessary restrictions they impose on the funeral provider.

- For example: the proposed definition of a Preneed Funeral Contract makes a "contract" out of a non-binding wish list. As you may know many consumers make their future wishes known to a funeral provider without paying for their funeral. The industry commonly refers to this as a "wish list". There is no offer or consideration so a wish list is not a contract. It is not binding on the consumer or the funeral establishment. Regardless of contract law this proposed regulation defines this as a contract ***"whether or not the funeral entity receives preneed funeral funds."*** This exceeds the statutory authority granted in 13 (c) which clearly requires money to change hands for a contract to be executed.

- The proposed Preneed Funeral Funds definition is confusing if not treacherous to a funeral provider. In (i) it states that preneed funds are funds provided to the funeral ***provider "whether or not a contract to provide specified funeral services or merchandise exists."*** Yet the proposed 13.227 (a) requires all contracts to be in writing.

- The proposed definitions in (iii) include assignment of an insurance policy. However (iv) excludes any premium paid to an insurance company. This proposal does not discuss whether the assignment is revocable or irrevocable.

Obviously a revocable assignment can be rescinded at any time. Even with an irrevocable assignment of an insurance policy the funeral provider does not have the money, has no control of the money and will not receive the money until the death occurs (assuming and providing the policy is in enforce at the time of death).

- This proposal, contrary to industry practice and current regulations, wants this insurance assignment of a pre-existing policy reported as a contract ***"whether or not a contract to provide specified funeral services or merchandise exists"*** and the ***"premiums (are) paid directly to an insurance company".*** There is no possible reason for such convoluted regulatory logic. And such a regulation exposes the funeral provider to the extreme risk of prosecutorial misconduct.

The single issue the Board got right in their "Background and Need for the Amendment" is the fact that ***"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."*** The basis of adherence with all laws in our country is VOLUNTAIRY COMPLIANCE. Honest individuals and businesses comply with laws; the dishonest do not. No amount of government paperwork sent to a regulatory agency will stop someone who wishes to intentionally defraud the consumer. Business keeps records so that they can honor their contracts and serve their customers. Regulatory agencies often specify record retention periods for enforcement reasons. These reports, even if the board has time and manpower to really review them (by their own admission they do not), will not prevent one potential problem. Therefore they are nothing but an unnecessary and expensive burden on Pennsylvania funeral businesses that has no effect other than to raise the cost to Commonwealth consumers.

- The current regulations allow 90 days to report each preneed. Though this is a burdensome requirement the proposed requirement is even more so. The proposed regulation would require a report every 90 days that has been expanded to ***"include all accounts held by the funeral entity at any time during the reporting period, including those first created during the reporting period and those closed during the period."*** In addition the report shall include ***"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."*** For any long established firm with hundreds or thousands of preneeds on file this is a massive report. The cost of updating this report for submission 4 times a year will be enormous. The cost of this unnecessarily burdensome report will be passed along to the consumer in the form of higher funeral costs.

- To require the deposit into escrow or transfer within 10 days is a requirement that is out of touch with the way business accounting is done in our computerized world. Firms small and large run monthly closeouts of the firm (not daily each time an individual contract is consummated). When the monthly closeout is complete, which usually takes a week, the amount due the escrow is calculated.

Then the escrow is paid. To update the regulations to conform to existing practices, as the Board stated it desired to do, this regulation should allow 45-60 days to deposit into the escrow account not 10 days. To comply with this regulation firms would be required to perform a closeout each time a contract is written or revert to manual accounting requiring repeated computer journal entries for each contract. From a practical point of view this is archaic.

The reasonable and necessary current regulation 13.226 (c) requires that upon sale or transfer of a business the new licensee-transferee notify the board of his/her willingness to accept responsibility for completion of the preneeds on account. This reasonable requirement is to be replaced with the unreasonable 13.229 requiring the new owner to notify each customer of the change of ownership and to give that customer up to 90 days to transfer their preneed to another funeral home. This is just another example of this board exceeding it's statuary authority and heaping onerous and expensive requirements on licensee's whose cost ultimately gets passed on to Commonwealth consumers.

- This proposed regulation violates established contract law by invalidating the established contracts so that they can be transferred.

- The reality is that, unless it is an irrevocable contract (in which case this regulation violates the Bean decision) a consumer can move their preneed funds at the time of delivery to any funeral provider they wish. Transfers happen infrequently but they do occur. A reputable firm will not force a family to use them if the family does not want too. The Board has documented no case where this has been an issue requiring additional regulation.

- In addition this regulation would do great and unnecessary harm to the licensee it regulates. When a funeral director wishes to retire and potential purchasers value his business the number of preneed contracts on file is a tremendous plus in raising the value of the business. This proposed regulation invalidates those contracts and lowers the value of the business.

The "limitations on preneed funeral contracts" created in 13.227 clearly exceed the statutory authority granted by the law and unreasonably restrict the licensees constitutional right to operate legally under other existing laws. Yet this onerous proposal does nothing to protect the consumer. These regulations would, however, remove alternative vendors from the market, thereby reducing consumer choice and increasing consumer funeral costs.

- There are a number of legally established 3rd party companies selling death care merchandise (caskets, burial vaults, grave markers, cremation urns etc.). These 3rd party sellers are regulated by the Future Interment Act (63 P.S. 480). A few of

these firms have been established by funeral directors. There is nothing illegal or immoral about this as long as the respective laws are followed by the entity making the sale.

- This board has not shown even one instance of harm to a consumer who purchased their merchandise from a 3rd party seller rather than a traditional funeral provider.

The transferability of a funeral contract proposed in 13.228 means that any contract written is a binding contract on the funeral provider but not upon the consumer. This proposal will restrict the consumer's choices because few funeral firms will wish to offer guarantee preneed contracts when they cannot be assured their contract is enforceable on the purchaser. This proposed regulation certainly exceeds the statutory authority and attempt to circumnavigate contract law and the Bean decision with regulation.

- This board somehow overlooks the issue that preneed contracts are price guaranteed by the selling funeral firm. If the consumer transfers his/her preneed to another firm, the new firm will not guarantee to perform the funeral for the same price as the original contract- generally written years ago. If transferability is to be truly beneficial to the consumer the regulation MUST require the receiving funeral establishment assume the entire contract as it was originally written (at the original price) and perform the funeral at no additional cost other than what has been trusted (As costs and prices have no doubt increased since the contract was originally written, it is doubtful any funeral home, not even mine, would do that).

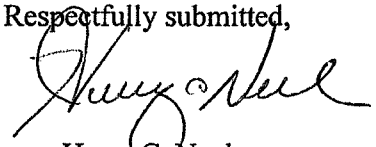
- This board also overlooks the fact that the funds and markets these preneed funds are invested in go up and down. For example: If a $5000 preneed funeral was trusted and the market contracted 10% there would only $4,500 in the trust account. Yet if the death should occur the selling funeral home is obligated to deliver the funeral at the contracted price. Under the proposed regulations if the family chooses to move their money then the receiving funeral director would receive $4500.

- These proposed regulations seem to indicate that using a master trust would no longer be approved since everything must be trusted individually. The end result of this is consumers choices will become limited as funeral firms choose not to offer preneed because of the risks created by this regulation.

In summary these regulations should not be passed. The Board has shown no documented consumer harm caused by current industry conduct requiring it to promulgate such draconian regulations. The proposed regulations exceed the statutory authority granted under the funeral director law. And these regulations violate many of the tenants set forth in the recent court rulings of Walker and Bean.

I urge you to disapprove these proposed regulations by the State Board of Funeral Directors.

Respectfully submitted,



Harry C. Neel
President