

#2627

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Via email irrc@irrc.state.pa.us, jjewett@irrc.state.pa.us

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

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

Dear Attorney Jewett,

Thank you for the opportunity to offer written comments regarding Regulation No. 16A-4815 (IRRC #2627) as proposed by the State Board of Funeral Directors. I am the manager of the Diversified Services Division of AmeriServ Trust and Financial Services Company ("AmeriServ"). Within this division we provide trust services to one hundred and sixty-five Pennsylvania funeral homes and cemeteries. Additionally, we provide services to Pennsylvania agencies providing therapeutic and support services to the special needs community. You will note several responses from the special needs community in your public comments area. AmeriServ, a member of the Pennsylvania Cemetery, Cremation & Funeral Association, provided a written response to the proposed changes in 2007, a copy of which is attached.

Attached is my response to commentary provided in the Final Regulation of the *Regulatory Analysis Form* downloaded from the IRRC website. I will address how the proposed regulation will adversely impact both consumers and the funeral industry.

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I will be happy to answer any questions or provide additional documentation that may be requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Ernest L. Petersen, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ernest L. Petersen, III

Vice President and Manager/ Diversified Services Division

cc: James Kutz, Esq.

Daniel J. Reisteter, Vice President Government Relations, Pennsylvania Bankers Association

Thomas A. Blackburn, Regulatory Unit Counsel State Board of Funeral Directors Department of

State P.O. Box 2649, Harrisburg, PA 17105-2649

<http://www.irc.state.pa.us/Regulations/RegInfo.cfm?IRRCNo=2627>

Final Regulation

(8) Briefly explain the regulation in clear and nontechnical language.

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.

For those funeral homes for which we provide recordkeeping, we have no problem submitting annual reports to the state board from our automated system listing each individual contract held in the grantors' (i.e. the individual funeral homes') accounts. That being said, we would require knowledge of the format for such submission in order to have our reports modified to comply with the PA Funeral Board's format.

However, we cannot provide the same assurance for those funeral homes whose assets we hold but who retain the record-keeping duties themselves or those that have contracted with an independent, third party recordkeeper.

It should be noted that an attempt at similar legislation has been recently abandoned in Maryland. There, an attempt was made to change from an annual report to an independent audit required to be completed by a CPA to certify the accuracy. The Maryland regulation was abandoned because the average cost of an audited report was estimated to be \$3,000 which was determined to be too financially burdensome to comply with.

A preneed contract may not be made irrevocable as to the funeral director who is to perform the services.

How is a contract a contract if it does not bind both parties? In addition, irrevocability is imperative to ensure that the burial contract is not considered when Medicaid and SSI benefits are determined. To remove the irrevocable nature of a pre-need contract would create a severe problem for many elderly individuals and their families and be extremely unfair to the funeral director who agreed to provide the goods and services at a fixed price.

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.

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Once again, the revocability of a contract creates a major problem for elderly individuals who are applying for Medicaid and/or SSI. In addition, it once again penalizes the funeral director who has agreed to accept the risk of escalating prices and other inflammatory influences on the goods and services he has agreed to furnish.

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.

A trust has its own life regardless of the status of the grantors (the funeral director/funeral home). With separate tax identification number, the trust is a legal entity administered pursuant to the provisions of the governing document by the trustee. Those funds are held for the payment of merchandise and services provided at the time of their death. Therefore, the individual contract held in the trust can be assigned to the funeral director providing the goods and services. The assignee will then receive payment upon certification that the services and merchandise promised in the contract have been provided.

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.

This provision appears to be prejudicial to the Pennsylvania banking industry and unduly in favor of the insurance industry.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

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.

The term "purport" used in the foregoing paragraph is inappropriate and shows the bias and slant of the Board. A contract is a legally binding document, yet the Board is suggesting hampering the contract's effectiveness. At the same time, the Board

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describes the industry that it regulates as being questionable in their guarantees? If the fear is that contracts are not being fulfilled, should the regulation weaken them? Based on our experience in handling over 15,000 contracts in the pre-need trusts that we administer many of which have matured when an individual contract holder died, we cannot site one contract in which the family of a decedent had felt they were short changed or did not receive the merchandise and services for which the decedent had contracted.

A funeral director is thus tempted 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.

As a fiduciary in a highly, regulated industry, I find this statement to be ludicrous. I have reviewed the clients' Investment Objective Statement with internal auditors, state examiners, and federal examiners, without censure. To suggest that we are conspiring to put a Buyer's funds at risk is absurd. Until the recent financial meltdown, the primary concern that drove pre-need trust investment objectives was inflation. One of our customers said it well, "Death has no mercy, and neither does inflation." In addition, who is at risk if there is a binding irrevocable contract in place for let's say \$7,500? The investments deteriorate over a life of the contract to a value of \$5,000. The funeral director is bound to provide the merchandise and services incorporated in the contract and he must do so even if the balance in the individual account is less than his cost of providing the agreed upon merchandise and services. To carry this through further, if the contract were irrevocable as the Board is espousing, the funeral director in this example could just walk away from the contract, refund the assets remaining, namely \$5,000, and leave the family the responsibly of trying to bury the decedent for the \$5,000.

Prohibiting a funeral director from collecting a fee for providing a preneed funeral in excess of the fee on the funeral director's current price list for that service and requiring a funeral director to honor a customer's demand to rescind the contract and transfer the funds to another funeral director of the customer's choosing would take away all 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.

So if the regulation prohibits the funeral director from receiving any excess when investments have grown and he must cover the shortfall if investments have shrunk, it is no surprise that the regulation must then consider what to do if the funeral director goes out of business.

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

This item has already been responded to under Item 8 above.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

All licensed funeral directors and funeral entities will be subject to the amended regulation and may be adversely affected. The Board has identified no other group of individuals or entities that will be adversely affected by the regulation.

The Funeral Board continues to be blind to the adverse impact any revocable contract has on those that have had pre-need funds excluded from their Medicaid and/or SSI determination. Upon their decision to remove funds (which may run afoul of the state statutes), their exclusion of those funds goes away for purposes of such determination. Government benefits and services may be severed and that individual must reapply to reinstate their benefits.

The concept expressed in this paragraph will cause reputable funeral directors to no longer offer pre-need contracts to the public. This would be a travesty for the consumer who benefits significantly financially because the merchandise and service he will get at death sometime in the future will be paid for at today's prices which no doubt will be less than they would be at some future date. In addition, the concerns and distraction that the decedent's family must go through at the time of bereavement would be eliminated if the decedent had in place a pre-need contract. Therefore, the Board's proposal not only removes the financial benefits of a pre-need contract, it also puts the decedent's survivors in a position they would not have been in had a pre-need contract been in place. The funeral director bears the risk of providing the merchandise and services pursuant to a bona fide contract. Therefore, the funeral director should be allowed to invest the funds in a manner considered appropriate and to retain all earnings on said fund during the term of the contract. This is only equitable since the funeral director could stand to lose money on a funeral if the cost of merchandise and materials at the time of the funeral exceed the cost of the contract.

From: Jewett, John H.
Sent: Tuesday, October 20, 2009 10:26 AM
To: IRRC; Gelnett, Wanda B.; Wilmarth, Fiona E.; Cooper, Kathy
Subject: FW: AmeriServ Trust Response to Proposed Regulation 16A-4815 (IRRC #2627)
Attachments: IRRC Response 101909.pdf

A final comment on #2627.

-----Original Message-----

From: EPetersen@ameriservfinancial.com [mailto:EPetersen@ameriservfinancial.com]
Sent: Tuesday, October 20, 2009 10:22 AM
To: IRRC; Jewett, John H.
Cc: jkutz@postschell.com; dreistet@pabanker.com
Subject: AmeriServ Trust Response to Proposed Regulation 16A-4815 (IRRC #2627)

Attorney Jewett;

Thank you for this opportunity to provide a written response to the Proposed Regulation 16A-4815 (IRRC #2627).

Ernest L. Petersen, III
Vice President/ Manager, Diversified Services Division

(814) 533-5270 (office)
(814) 533-5454 (fax)
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(See attached file: IRRC Response 101909.pdf)

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