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September 24, 2007

Via Hand Delivery

Michelle T. Smey, Board Administrator
State Board of Funeral Directors
Department of State
2601 North Third Street
Harrisburg, PA 17110

RECEIVED
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INDEPENDENT REGULATORY
REVIEW COMMISSION

RE: Comments of Pennsylvania Cemetery Cremation & Funeral Association to Proposed Regulations of State Board of Funeral Directors Published August 25, 2007 Re: Pre-Need Funeral Contracts

Dear Ms. Smey:

On Saturday, August 25, 2007, the State Board of Funeral Directors published Notice of Proposed Rulemaking, inviting public comment within 30 days of that publication. Allow this letter to serve as notice that the undersigned represents the Pennsylvania Cemetery Cremation & Funeral Association ("PCCFA"), and the comments that follow have been authorized by that entity and its members, who comprise every aspect of the death-care industry.

As an initial point, PCCFA wishes to go on record as being strongly opposed to the subject Regulations for a host of reasons. Specifically, these proposed Regulations constitute what is now a third attempt by the State Board and the Pennsylvania Funeral Directors Association ("PFDA") to legislate in an area which should be left for the General Assembly and to render nugatory a comprehensive and well-reasoned Commonwealth Court *en banc* decision authored by Judge Dan Pellegrini, wherein he reversed an Adjudication of the State Board of Funeral Directors, with direction that the Board could not declare irrevocable, pre-need agreements revocable at the whim of the customer and/or urging of another funeral director who is simply trying to harass an existing pre-need customer and pirate the business therefrom. See *Bean v. Department of State, State Board of Funeral Directors*, 855 A.2d 148 (Pa. Cmwlth. 2004), appeal denied, 584 Pa. 696, 882 A.2d 479 (2005) (holding that the Board's proffered "rationale" for requiring revocability or transferability is not supportable). Indeed, there is simply no need to detrimentally overhaul an existing pre-need contract scheme which has worked quite well over the last several decades. In other words, there is nothing "broke" whatsoever; there is little or no genuine consumer benefit to be derived by these proposed changes; and if promulgated, the end result will simply be to benefit the funeral director financially and expose pre-need customers, who have made final arrangements, to constant telemarketing and other harassment by those who

currently do not have pre-need business but are willing to attempt to lure existing customers from funeral directors who have lawfully and fairly secured pre-need business.

These Regulations will also effectively gut the good will and value of any funeral business which holds pre-need contracts because the Regulations, as drafted, create a wholly illusory contract to which one of the parties is bound to no obligation and for which no funeral director could ever convey his funeral business with the pre-need asset. Adding insult to injury, these proposed Regulations would wreak havoc with the currently in-place banking institutions who have agreed to serve as the recipient and trustee of these pre-need monies. With respect, no banking institution would likely continue to serve if the entire pre-need trust account could be drained at any point in time, except, of course, as that arrangement exists with PFDA's for-profit affiliate.

Both Governor Directives and existing statutory law make clear that Regulations are not to be proposed and implemented, unless a decision has been made that a "compelling public interest" needs to be advanced. Here, the Board suggests, without any true basis, that the current Regulations must be updated to "conform to existing practices and to provide adequate protection to the consumer of pre-need services in the instance of changed circumstances." First, the Board never identifies what "existing" practice within the industry has done away with legitimate, irrevocable, pre-need agreements under which the funeral director binds himself to certain significant commitments upon the death of the customer. Indeed, the State Board of Funeral Directors has, for the last many years, reviewed and approved for use pre-need agreements which, by their terms, were irrevocable. Query: If the Board was approving these types of agreements, what new fact or change in circumstance has come into play? The simple answer is - this Regulation is simply another one of PFDA's efforts (and I might add, successful efforts) to utilize the State Board to change the law whenever it suits and helps PFDA. Indeed, for years PFDA pre-need agreements contained irrevocability provisions and they were approved for years by the Board. What truly appears to be the catalyst for this "automatic transferability" requirement is to either (a) create the opportunity for PFDA and its members to pirate away customers who have entered into pre-need agreements with individuals not aligned with PFDA, or (b) make pre-need so unattractive that it ceases to exist, thereby enabling the funeral profession to make more money when the at-need arrangements are made during a time of extreme familial grief. PFDA has its own pre-need affiliate; its own for-profit marketing arm; and PFDA, through its use of this Board (comprised entirely of PFDA members as professional members) now weaves its desired end result. It is certainly legitimate for a trade organization to proffer issues and positions to a regulatory agency. However, in this instance, the proposed Regulations reflect another patent example of PFDA's use of the Board to manufacture any financial end result desired by PFDA. Indeed, in the proceeding involving Bean and the State Board (wherein this irrevocability issue was first and finally litigated), PFDA sought intervention from the Board and was granted intervention. Predictably, PFDA lobbied for an Adjudication which would *defacto* void irrevocable agreements and predictably, the Board concluded precisely what PFDA told it to conclude.

The General Assembly knows where and when to impose restrictions on the otherwise existing right of two private parties to contract. For example, in the Future Interment Law, 63 P.S. § 480.1 *et seq.*, which provides a vehicle for the sale of funeral merchandise pre-need, the statute expressly states that, if the purchaser of a pre-need contract for goods or merchandise moves out of state, the holder of the pre-need agreement is entitled to receive the principal amount of money on deposit to the credit of that particular contract. See 63 P.S. § 480.5. Notably, although the Funeral Director Law has been amended several times since the enactment of the Future Interment Law in 1963, the General Assembly has chosen not to enact a statutory provision dealing with irrevocability for funeral director pre-need contracts. That silence by the Legislature strongly reflects that it has chosen not to intrude upon the right of two parties to contract. Yet, the State Board, by attempting to “legislate” these Regulations, seeks that end result. As the mission and authority of a state agency is to interpret law, and not make law, these Regulations must be rejected.

Beyond these concerns, this Regulation, if adopted, will create absurd and prejudicial effects on consumers. For example, the Social Security Administration currently permits a pre-need customer to exempt funds from estate taxes and other attachments if pre-need arrangements are irrevocable by their terms. Inasmuch as these draft Regulations will allow consumers to “undo” contracts they have entered into, they are, by definition, not irrevocable and will be the subject of the evils set forth above.

The following scenario illustrates another absurd result. Assume customer “x” pays \$6,000 for a pre-need contract which guarantees him/her funeral services and merchandise at the time of death. Assume funeral director Smith, aware of this agreement, lobbies the customer to undo that existing contract and, instead, contract with him at a lower price. Under the Board’s proposed scenario, the funeral director must turn over the then-existing balance in the account of that customer which, in many instances, will be less than the principal amount paid by reason of investment activity. In other words, the consumer, believing that he or she will get \$6,000, is not necessarily guaranteed that amount. Beyond that, the consumer then needs to enter into a second, new contract with a funeral director who may be far less worthy and law abiding than the original contracting funeral director. Then, to add insult, if the second agreement costs the consumer less, the monies are returned to the consumer, thus exposing those funds to the previous in-place protections of SSI.

Simply stated, proposed Section 13.228 is unnecessary; it is anti-competitive; anti-consumer; it will create uncertainty and confusion for the customer; and it will expose the customer to acts of preying by both in-state and out-of-state hustlers. Importantly, if the contract was secured through unfair marketing practices, the Attorney General can intervene, and common law rescission (or fraud) options exist.

There are a number of ways in which the Board could take appropriate steps, if it had a concern that consumers were entering into irrevocable pre-need agreements while not understanding the commitment. For example, a Regulation could arguably be proffered which requires some

separate disclosure of "irrevocability" to the consumer and its implications. Similar to the Pennsylvania Unfair Trade Practices Act, there could be some three-day right of rescission where applicable. Indeed, even with the sale of hearing aids, the General Assembly builds in a 30-day refund "for any reason" clause. Even a geographical provision, similar to the Future Interment Law might make some sense. There appears to be no other instance where an agreement is wholly rescindable by one party in the area of free enterprise and free market. In fact, even federally regulated banking institutions have the right to penalize a customer who seeks to terminate a Certificate of Deposit contract prematurely. These Regulations give the funeral director every disincentive to meet with customers and allow them to plan the type and form of funeral or other service they choose to commit to. Such end result is not pro-consumer. Rather, the end result will either be the harassment of existing pre-need customers by those who do not have pre-need business, or the beginning of the end of pre-need opportunities for Pennsylvania consumers, given the huge disincentive for legitimate funeral homes to commit resources, services and merchandise, only to have the plug pulled at the whim of the consumer. Judge Pellegrini said it best when he indicated there could be circumstances justifying concern within the Board, but the wholesale opportunity to rescind for any reason is simply not justified.

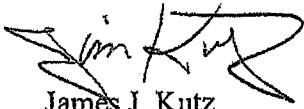
Another area of significant concern is this Board's effort to render illegal that which has been legal for years. Specifically, the Board now proposes that a funeral director may not have any ownership in any other entity involved in the sale of funeral merchandise or goods, even though the law nowhere prohibits same. It is simply unconstitutional and shocking that this Board, in 2007, would seek to render illegal many, many arrangements which funeral directors and others have put in place, wherein the funeral director has an interest in a corporation or other entity which can lawfully sell funeral goods or merchandise. Indeed, as late as 1999, PFDA (the Board's alter ego and vice versa) was disseminating statewide information and recommendations urging funeral directors to create a separate entity, so that funeral merchandise could be sold and trusted at 70%, consistent with the Future Interment Law. Indeed, PFDA went so far as to create an "Incorporation Kit" for use by the funeral directors within the state. Apparently realizing that its project did not get off the ground, PFDA has now convinced "its" State Board to make illegal that which PFDA recommended just some seven or eight years ago. Law should not be interpreted depending upon the whims of a trade organization and a regulatory board which demonstrates a "captured" status to that trade organization by doing whatever the trade organization wants at that particular point in time!!

In closing, PCCFA regrets the zeal with which it has discussed the proposed Regulations and its concerns for those proposals. However, given the total absence of consumer "need" for these draft Regulations, and given the flip-flop approach of the Board to interpreting the Funeral Director Law, PCCFA believes it appropriate to "shoot straight" and urge this Board to do the honorable thing; *to wit*, withdraw the Regulations as unnecessary, anti-consumer, and protectionist. If the Board wishes to do away with legitimate pre-need contracting, it should seek legislative revision. However, it is not the province of the State Funeral Board to make major policy and business decisions which affect significantly and detrimentally businesses which have been operating within the bounds of law for decades. PCCFA is also fully aware that, on the

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heels of these proposed Regulations relating to revocability, the death industry will be met with additional anti-competitive Regulations prohibiting agents and employees of funeral homes from effectively communicating with prospective pre-need customers. The linkage between the current Regulations and those which are going to follow, cannot be ignored. The consumer is not benefitted when reasonable and legitimate pre-need is effectively abolished, in lieu of at-need decision-making where the next-of-kin are obviously emotional and frequently subject to decision-making processes which their deceased loved one would not have wanted, or, in the case of these Regulations, directed to be otherwise.

Very truly yours,

A handwritten signature in black ink, appearing to read "James J. Kutz", written in a cursive style.

James J. Kutz

JJK:dlh