

#2627

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INDEPENDENT REGULATORY  
REVIEW COMMISSION



John A. Zurik,  
Supervisor

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

October 19, 2007

Mr. Arthur Coccodrilli, Chairman  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, Pa. 17101  
Telephone 717-783-5417

RE: Proposed Pre-Need Regulation #16A-4815 (Short Title: Preneed funeral arrangements) published 8-25-2007

Dear Chairman Coccodrilli,

As A third generation death care provider I write to encourage IRRRC to NOT APPROVE the above referenced regulations for two very basic reasons:

**1. The Board has failed to demonstrate a compelling need for regulation**

The state board is required in item 11 to explain the compelling public interest that justifies the issuance of these regulations and in item 12 to specify the public health or general welfare risks associated with nonregulation. I submit that the State Board of Funeral Directors has failed to meet this burden in both areas. In fact it has documented NO actual cases where the type of conduct proposed to be regulated has caused consumer harm. The justification used for issuing these regulations is pure speculation.

It seems to be overlooked by this Board that a consumer purchase of a preneed funeral is a discretionary purchase. The purchaser wishes to make these decisions in a sound state of mind unburdened by emotion (very few are made when a death is eminent). Peace of mind and financial considerations are the two primary reasons someone buys their own funeral. Therefore the consumers who purchase funerals are well informed and willing purchasers.

The Board has failed to provide documented consumer harm caused by current funeral director preneed practices to justify this regulation. In fact if you query the board history of prosecution on preneed issues you will find the plaintiff is another funeral home or the state association PFDA. The actual insistence of consumer complaints is statically zero.

## **2. The Board has significantly exceeded the authority granted by the law and is in fact "legislating" through these regulations.**

13.224 of the proposed regulation requires deposit of funds within 10 days and purportedly to ensure no one avoids this requirement, prohibits a funeral director from "creating or controlling or otherwise utilizing a person or entity that is not a funeral entity." This has a facial appearance of reasonableness. But it's not. This regulation will take away funeral directors constitutional right to own a separate company to trust merchandise under the Future Interment Law that was enacted just for such funeral and cemetery pre-need sales. For years funeral directors have used the Future Interment Law this way with NO HARM to any consumer. Nothing in the law prohibits a funeral director from doing this and for years the Board held this was not a violation of the statute or regulations. Even the PFDA promoted such separate companies. From a practical point of view insurance companies could not offer insurance if they were required to trust 100% of their premiums in trust-neither can funeral homes. This regulation would take away a long standing and legal means for funeral homes to offer pre-need and retain a percentage of the funds from the merchandise to cover their upfront expenses.

I attended the House Professional Licensure Committee meeting on October 3<sup>rd</sup>, 2007 and received a copy of the Regulatory Analysis Form-a copy of which is attached. In reading the analysis I note several inaccuracies that could be misleading to the committee members who may use it as a basis for their ultimate decision and vote. To correct these inaccuracies I provide the following clarification and comments on selected areas of the analysis.

### **Clarification of the Regulatory Review Analysis Form**

*Item 8. Third Sentence: "A funeral director would not be able to retain the earnings of funds in excess of the increase in the retail cost of the funeral."*

*Item 11: A funeral director is thus tempted to place the funds in higher risk investments in order to maximize the funeral directors return. Prohibiting a funeral director... .. would take away all motivation for a funeral director to make risky investments...*

*Item 12: Non-regulation would continue to place before the funeral director significant temptation to become overly involved in investment of preneed funds.*

It is true that most preneed contracts guarantee the price to the consumer-this is a major reason why consumers pre-arrange their own funeral. If the funds received by the funeral director at the time of delivery are less than the cost of the funeral at time of delivery the consumer (and contract law) demand the funeral director to honor the agreement and absorb the 'loss'. However if the deposited funds and growth exceed the cost of the

funeral these regulations say it must be refunded<sup>1</sup>. With such regulation a funeral establishment can see only a potential downside to preneed. The true effect of this regulation would be that many funeral directors would stop offering preneed. The consumer received what he contracted for-a guaranteed price funeral- and is not harmed if the funeral director has a small surplus at the time of delivery.

It is grossly misleading to state that funeral directors will be tempted to place funds in higher risk investments. The current regulation 13.226 (b) requires "deposit in a banking account which bears interest, or are invested by the trustee bank and produce earnings". This analysis totally over looks the fact that the bank trustee is bound by its fiduciary duties and will not allow "risky" investments.

**Please note that this regulation proposes to delete the requirement for a trustee bank to be involved in preneed funds.** Though the funds would still be deposit in a banking institution- a bank trustee would NO longer be required. This is certainly a major change and not one that is in the consumer's best interest.

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*Item 11 last sentence: the proposed rulamaking would reduce the burden imposed by the existing prepaid contract reporting requirements.*

*Item 13. Licensees will benefit from the simplified reporting of preneed contracts.*

The current regulations require the funeral director notify the board within 90 days of each preneed contract or 30 days of each death and delivery of a preneed contract. Time consuming and costly as the current regulation is it requires only this report only one time.

The proposed regulation requires quarterly "running" reports updating the current status of ALL preneeds on file. For any firm this will be a massive and very expensive report. The cost of which will be passed on to the consumer in higher funeral costs. The result of this regulation is many firms will question the wisdom of continuing to offer preneed to consumers.

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<sup>1</sup> Insurance companies are not required to refund premiums if the total premium paid exceeds the face value at time of payoff.

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*Item 16. The board considered all these comments in preparing this proposed rulemaking.*

*Item 23. The Board did not consider any alternative regulatory schemes.*

I was present at the public work session conducted in 2002. There were many suggestions presented by various funeral directors whose firms were active preneed sellers. At the request of Commissioner Merinda the Pennsylvania Cemetery, Cremation and Funeral Association<sup>2</sup> (PCCFA) presented a very detailed alternative regulatory scheme. Not one suggestion made by PCCFA has been incorporated into the proposed rules.

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*Item 13. Licensees will benefit from the simplified reporting of preneed contracts, and the public will benefit from the increased rights of consumers embodied in the proposed rulemaking.*

This statement is inaccurate and very misleading. As discussed above the reporting requirement is much more onerous than the existing requirement and will be exceedingly expensive. The increased cost will be passed on to the consumer in the form of higher prices. By the board's own admission<sup>3</sup> *the "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."* I submit to you that if the reporting requirement in regulation today provides little value to the Board or the public; how can the Board propose an even more complex and expensive regulation under the guise of "simplification".

There is a facial appeal to "increased consumer rights". However we must remember no consumer is forced to purchase their funeral preneed. They make a conscious decision to do so thereby avoiding the potential overspending that often occur arraigning at the time of a death. If the Commonwealth wishes to increase consumer rights should also mandate that the consumer can return their automobile 6 months after purchase because they changed their mind on the color, or that the insurance policy that has been in force for years on a husband can be transferred to the wife, or since no one died their premiums should be refundable? It sounds pro-consumer--but we all know it doesn't work. If a contract is not a contract, for both the consumer and the business, few of us will be left in business to provide services to the consumer.

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<sup>2</sup> PCCFA is the state association that actively supports preneed. The funeral directors, cemeteries and cremationists who belong to PCCFA are all preneed oriented. PFDA was the original funeral directors organization that in general has the traditional funeral directors who do not actively promote preneed and prefer to service families after a death has occurred.

<sup>3</sup> Page 1 last paragraph of the cover letter to submission of these regulations dated August 15, 2007 to The Honorable Mike Sturla, Chairman of the Professional Licensure Committee.

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*Item 17. It is impossible to estimate the cost or savings to the regulated community... In order to minimize the costs of compliance, the Board has simplified the reporting requirements.*

This statement is also inaccurate and misleading. As discussed above this proposed regulation has not simplified the reporting requirement it has made it more complicated and expensive.

It is not impossible to estimate the costs to the regulated community. In fact any bank or financial institution which handles preneed trusts, pensions or similar trusts can make a reasonable estimate. I think it should be required of the Board to obtain such an estimate before adding this burden on the licensee (I'm sure we can assume it will cost the licensee some substantial amount that will be passed on to the consumer)

In comparison: The average cost of a business letter today is around \$10.00 Therefore we shall assume the current (one time) preneed report to the Board will cost \$10 to file. When that person passes away another \$10 to file a delivery report. I think there can be no disagreement that the current regulation will be less costly than the proposed regulation.

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*Item 23. The board did not consider any alternative regulatory schemes.*

The Board was presented with a detailed alternative scheme by PCCFA but apparently did not consider it.

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*Item 24. The proposed regulatory amendments do not overlap or conflict with any federal requirements.*

The proposed regulations do definitely conflict with the Federal Court decision of 'Walker' and also conflict with the Commonwealth decision of 'Bean'.

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  
Commonwealth court of Pennsylvania in the matter captioned Kevin M. Bean v. Department of State, State Board of Funeral Directors No. 1088C.D.2003

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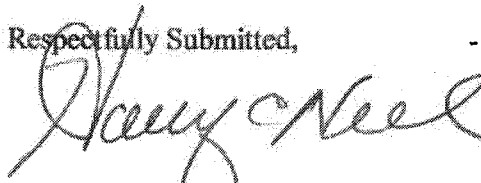
*Item 28. The proposed rule making would eliminate the reporting to the Board by funeral directors of the execution and fulfillment (emphasis added) of each preneed contract, in favor of a single report every quarter of the preneed funds held by the funeral director.*

The current one time report at execution and fulfillment of each contract is far simpler than the proposed complex quarterly report that encompasses updating the report on all preneed

contracts on file as well as all new preneed contracts on that quarter. Said report must be updated each quarter to post all earnings and other activity in the account. This is a massive undertaking for a funeral provider with hundreds or thousands of preneeds in trust. The cost of preparing this report will be significant. It is unfathomable as to why the board is proposing this regulation when by their own admission the current "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."

I appreciate this opportunity to offer further information and continue to hope and encourage the IRRC to see fit to not approve these proposed regulations.

Respectfully Submitted,



Harry C. Neel  
President

CC: via Email:

John H. Jewett, Regulatory Analyst, IRRC

Fiona E. Wilmarth, Director of Regulatory Review, IRRC

Heather Wimbush Emery, Assistant Counsel, IRRC

Representative P. Michael Sturla, Chairman, House Professional Licensure Committee

Marlene Tremmel, Executive Director, House Professional Licensure Committee

Christine Line, Counsel, House Professional Licensure Committee

Donald F. Morabito, D. Ed, Office of Public Liaison

Representative Stanley Saylor, House Professional Licensure Committee

Representative Susan Helm, House Professional Licensure Committee

James J. Kutz, Esquire

**Gelnett, Wanda B.**

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**From:** Jewett, John H.  
**Sent:** Monday, October 22, 2007 8:26 AM  
**To:** Gelnett, Wanda B.  
**Subject:** FW: Proposed Pre-Need Reg #16A-4815 Additional Comments

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INDEPENDENT REGULATORY  
 REVIEW COMMISSION

This is another "proposed comment" on #2627. Please place a copy of the email and attached letter into the file.

The second attachment is a copy of the RAF, preamble and regulation as submitted by the Board.

You don't need to add it to the file since it is already there.

Thanks!

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

**From:** Harry C. Neel [mailto:hcneel@verizon.net]  
**Sent:** Friday, October 19, 2007 6:50 PM  
**To:** IRRC  
**Cc:** Jewett, John H.; Wilmarth, Fiona E.; Emery, Heather; msturla@pahouse.net; mtremmel@pahouse.net; cline@pahousegop.com; dmorabito@state.pa.us; ssaylor@pahousegop.com; shelm@pahousegop.com; jkutz@postschell.com  
**Subject:** Re: Proposed Pre-Need Reg #16A-4815 Additional Comments

Arthur Coccodrilli, Chairman

Independent Regulatory Review Commission  
 333 Market Street, 14<sup>th</sup> Floor,  
 Harrisburg, PA 17101

Dear Chairman Coccodrilli,

Attached is my second letter of additional comments presented to you in **opposition** to Proposed Pre-Need Regulations # 16A-4815 (Pre-Need Funeral Arrangements) published 8.25.07. I believe this regulation to be anti-consumer and anti-trust. These regulations serve no purpose other than to shield funeral directors who only wish to deal with consumers at the time of a death (when they are most vulnerable) from those funeral directors who actively offer preneed to help the consumer avoid an emotional purchase. The end of these regulations are at need funeral director protection, not consumer protection because the consumer has not been harmed from what we are currently doing.

Chairman Coccodrilli, I would appreciate your consideration to **not approve** Proposed Pre-Need Regulations # 16A-4815 .

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 Cemetery & Funeral Home  
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