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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 4, 2009

Michael J. Yeosock, Chair
State Board of Funeral Directors
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-4815 (IRRC #2627)
State Board of Funeral Directors
Preneed Funeral Arrangements

Dear Mr. Yeosock:

The Independent Regulatory Review Commission disapproved your regulation on October 22, 2009. Our order is enclosed and will be available on our website at www.irrc.state.pa.us.

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff have any questions, please contact Kim Kaufman, our Executive Director, at 783-5506.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Robert M. Tomlinson, Majority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Michael P. McGeehan, Majority Chairman, House Professional Licensure Committee
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held October 22, 2009

Arthur Coccodrilli, Chairman
George D. Bedwick, Vice Chairman
S. David Fineman, Esq.
Silvan B. Lutkewitte, III
John F. Mizner, Esq.

Regulation No. 16A-4815 (#2627)
State Board of Funeral Directors
Prened Funeral Arrangements

On August 15, 2007, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the State Board of Funeral Directors (Board). This rulemaking amends 49 Pa. Code by amending §§ 13.1 and 13.224-13.226, and adding §§ 13.227-13.229. The proposed regulation was published in the August 25, 2007 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on September 21, 2009.

This regulation represents a significant revision of existing provisions governing “prened” arrangements. It creates new recordkeeping and notice requirements for funeral entities involved in preneed arrangements. Major components of this regulation are the Board’s response to the Commonwealth Court decision in *Bean v. Department of State, State Board of Funeral Directors*, 855 A.2d 148 (2004) (*Bean*). In this case, the court held that the Board had improperly determined that the Funeral Director Law (Law) and the Board’s existing regulations allowed customers to rescind irrevocable preneed contracts and transfer the preneed funds to a different funeral business. Through this regulation, the Board seeks to codify its policy that preneed contracts should always allow the customer to transfer the preneed funds or account from one funeral business to a different one.

In determining whether a regulation is in the public interest, the Commission is directed by the Regulatory Review Act (Act) to consider criteria set forth in eight separate categories. See 71 P.S. § 745.5b. Based on these criteria, there are several concerns and objections to this regulation that are the reasons for our unanimous vote to disapprove this regulation.

Consistency or possible conflict with the statute (71 P.S. § 745.5b(b)(3)(ii))

In our comments on the proposed version of this regulation dated October 24, 2007, we questioned the consistency of this regulation with Section 13(c) of the Law (63 P.S. § 479.13(c)) which states:

... If any such licensed funeral entity shall accept any money for such contracts, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust to, a banking institution in this Commonwealth, conditioned upon its **withdrawal or disbursement only for the purposes for which such money was accepted....** (Emphasis added.)

The Board responded with the following statements on page six of the Preamble:

... IRRC also questioned whether this provision is consistent with section 13(c) of the act that requires a funeral director to condition acceptance of preneed funds upon "withdrawal or disbursement only for the purpose for which such money was accepted." Because the regulation authorizes only the transfer of the funds to another funeral director, those funds will be withdrawn or disbursed only for the provision of funeral services and incidental goods, i.e., the purposes for which the money was initially accepted.

We find that these statements are inconsistent with the language in the regulation. These purposes were set forth in the original preneed contract but nothing in the regulation places any restraints on subsequent contracts. Therefore, it remains unclear how the final-form regulation is consistent with the Law since none of its provisions guarantee that the money will be used for the purposes for which it was accepted.

The Court in the *Bean* case noted that the Board's position that a customer may revoke a contract with a funeral business at any time and have preneed funds transferred to another funeral business was based on the Board's interpretation of Section 13(c) of the Law. The Court further observed: "The only section in the Funeral Director Law pertaining to pre-need agreements is *Section 13(c)* which does not address whether irrevocable pre-need agreements may be rescinded." See 855 A.2d at 154. Therefore, the origin of the Board's position remains unclear.

The Board needs to provide a detailed explanation of its interpretation of the statute and how the Law calls for revocability or transferability in contracts but simultaneously maintains and preserves the funds as irrevocable.

Need for the regulation (71 P.S. § 745.5b(b)(3)(iii))

Our comments on the proposed rulemaking noted that the Board has the statutory authority under Section 16(a) of the Law (63 P.S. § 479.16(a)) to "formulate necessary rules and regulations" that are "deemed necessary...to safeguard the interests of the public and the standards of the profession." We stated that "the Board should explain the need for this regulation, and how it will protect consumers."

The Board did not respond to this comment in the Preamble submitted with the final-form regulation. At our public meeting on October 22, 2009, the Board's counsels stated that they are aware of only a handful of consumers per year who express interest in transferring or revoking their preneed contracts. The Board has not provided any documentation or evidence of any significant harm that would be addressed by this final-form regulation. Since the Board is unable to document the need for this regulation or how it protects consumers by addressing a significant harm or problem, we determine that this regulation is not in the public interest under Section 5.2(b)(3)(iii) of the Act.

Compliance with the provisions of the Act or the regulations of the Commission (71 P.S. § 745.5b(b)(6))

Section 5.1(a) of the Act (71 P.S. § 745.5a(a)) requires agencies to respond to the comments received on their proposed regulations. We raised numerous concerns regarding the proposed version of this regulation in our comments dated October 24, 2007. We identified critical questions and problems regarding the transfer clause in Section 13.228 as well as other provisions. Our comments were based on criteria relating to fiscal impact, reasonableness, feasibility, need, implementation

procedure, clarity and consistency with the statute. See 71 P.S. § 745.5b(b)(1) and (3). The documents submitted by Board with this final-form regulation on September 21, 2009, did not contain responses to many of the comments submitted by commentators including this Commission. The lack of substantive responses to comments filed on the proposed version of this regulation represents a failure to comply with the requirements of the Act and is a basis for disapproving the regulation pursuant to Section 5.2(b)(6) of the Act. We find that the Preamble to the final-form regulation did not address all the comments issued by commentators including this Commission.

*Fiscal impact, protection of the public health, safety and welfare, reasonableness, feasibility
(71 P.S. §§ 745.5b(b)(1), (2) and (3))*

Our comments on the regulation questioned how preneed funds would be protected from classification as an asset for the purposes of eligibility for Social Security or Medical Assistance programs. This issue was raised both in written comments and at our public meeting by the Disability Rights Network (DRN) and the Pennsylvania Association of Resources for Autism and Intellectual Disabilities (PAR). Bureau of Professional and Occupational Affairs (BPOA) Commissioner Basil L. Merenda submitted a letter, dated on October 19, 2009, to the Commission responding to these concerns.

The BPOA letter quoted the Office of Chief Counsel of the Department of Public Welfare (DPW) as indicating that “there is no requirement that an individual be contractually bound to one funeral establishment” and noting that individuals could “establish an irrevocable burial reserve with a bank or other financial institution.” The Board’s counsel at our public meeting reiterated this response by stating that a customer could go with an attorney to a local bank and set up an irrevocable burial trust.

At our public meeting, representatives of DRN and PAR reported that persons with disabilities, who depend upon public assistance, often are not able to hire attorneys and negotiate with financial institutions to set up their own irrevocable reserves, accounts or trusts. Currently, they rely on preneed contracts with funeral directors to provide “irrevocable” funding sources. If they enter into a preneed contract under this regulation, it could negatively affect their eligibility for public assistance. Therefore, this regulation may pose a threat to both access and continuity of care that maintains public health, safety and welfare, and it could cause financial hardships for this population.

Furthermore, this regulation and Law (63 P.S. § 479.13(c)) only address situations where a funeral director or entity accepts money from a customer. It is the seller who deposits or transfers the money not the customer. Nothing in this regulation or the Law discusses consumers establishing their own “irrevocable” burial reserves or trusts. In fact, the term “irrevocable” is never used in the regulation. Therefore, we find that the regulation is not clear or reasonable in that it neither addresses nor ensures that the funds can be classified as irrevocable for purposes of Social Security or Medical Assistance programs.

*Transfer of funds and new contracts – Clarity and lack of ambiguity, implementation procedure
(71 P.S. §§ 745.5b(b)(3)(ii) and (iv))*

Our comments identified the following issues relating to transfer of funds:

The provisions of this section [§ 13.228] are very clear that the current funeral entity must transfer all the preneed funds, interest and earnings to the new funeral

entity as requested by the customer. However, there is nothing that directs the actions of the new entity or what it may do with the funds. Nothing in the proposed regulation requires that the new funeral entity honor the terms and conditions of the original contract or that it use all the preneed funds, interest and earnings for funeral services. For example, what would prevent the new funeral entity from giving a portion of the funds to the customer and reducing the list of services? The Board should clarify how the new funeral entity must treat the original contract and the funds.

Section 13.228 remains unchanged from the proposed version. Nothing in the regulation would prevent a new funeral director from agreeing via a new contract to provide a lower price with a partial refund to the customer. There may be a contention that will not happen since another provision in this regulation (Section 13.224(a)) requires funeral directors to deposit in escrow or transfer in trust to a banking institution all preneed funds including accumulated interest or earnings. However, it is unclear how this provision would prevent a refund at a later date. If the intent was to require that all the transferred money be used strictly for goods and services, it is not reflected in the language of the regulation and there is no indication of how it would be enforced.

The fact that this regulation limits consumers to revocable contracts can cause other problems. If a customer with a preneed contract becomes incapacitated before death and power of attorney (POA) is given to a relative or other person. Nothing in this regulation would prevent the person with POA from negotiating a new preneed contract with a new funeral business for the incapacitated customer regardless of the customer's preferences and original intent.

Another problem found relates to the fact that the Court in *Bean* documented that a preneed contract form, approved by the Board, contained a clause that allowed the customer to cancel the contract within three business days of signing. Such a clause in subsequent contracts would allow the customer to gain access to the preneed funds and this undermines the irrevocable status of the funds or any assurance that the preneed funds will be used only for the purposes for which the money was initially accepted.

The Board responded to our comments with the following statements in the Preamble:

... Because § 13.228 requires that the contract expressly allow the customer to transfer the **contract and funds** to another funeral entity, but does not require that the customer be permitted to rescind or cancel or revoke the agreement and have the funds returned to the customer, the funds will remain irrevocably placed with a funeral director for purposes of those programs.

... In this rulemaking, the Board does not intend to provide that any customer may **revoke, rescind or cancel a preneed agreement at will**. The Board intends only that a customer who has entered into a preneed contract must be able to transfer that preneed account to another funeral entity to perform the services and provide the funeral merchandise. (Emphasis added.)

We find there is no consistency between these statements and the regulation. Nothing in the regulation addresses the transfer of contracts. It would not stop a customer from revoking, rescinding or canceling the original contract, and negotiating a new one with the new funeral business receiving

the transferred preneed funds. The Board needs to respond to these questions and concerns with revisions to the Preamble. In addition, the Board must clearly and consistently establish its intent in both the Preamble and regulation.

Contract options – Feasibility, reasonableness (71 P.S. § 745.5b(b)(3))

On page five of our comments, we noted that “the *Bean* decision reported that Board-approved contract forms allowed customers to select an irrevocable or revocable contract.” This system allowed customers to select either option. We concluded that “the Board should investigate a variety of options to allow for portability when needed while also guaranteeing irrevocability of the funds and terms in the contract.” The Board did not respond to this comment in the preamble to the final-form regulation. At our public meeting, the Board’s counsels suggested that providing different options would be confusing for customers. We disagree.

Revising the regulation to include both irrevocable and revocable contracts could address many of the objections to the final-form regulation. We note that if the Board amends the regulation to provide several contract options, it will need to ensure that other portions of the rulemaking are consistent with the amended contract options.

Fiscal impact, adverse effects on prices of goods and services (71 P.S. § 745.5b(b)(1)(ii))

We share commentators’ concerns that this final-form regulation, as currently written, will increase the costs of preneed contracts for both funeral directors and consumers. Both consumers and licensees have indicated that the costs are lower when the preneed contract is irrevocable because the funeral entity may place the funds in accounts for longer terms with the potential for greater return and increased earnings rather than being required to have the funds continually and readily available for transfer to another licensee as requested by the customer. In addition, representatives for DRN and PAR are concerned that funeral directors may discontinue offering preneed arrangements to people on public assistance since this regulation will increase the costs of engaging in the preneed business. The Board should fully examine and explain the fiscal impacts of all the provisions in this regulation on both funeral directors (or entities) and customers and explain why the imposed costs are necessary.

Merchandise from other vendors – Clarity, reasonableness (71 P.S. § 745.5b(b)(3))

Section 13.227(c) provides: “A preneed funeral contract may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.” We understand that the Board believes this language is necessary to prevent its licensees from utilizing the different trusting provisions in the Future Interment Act. However, we are concerned that some licensees may use this subsection to tell customers that they cannot make provisions for the use of merchandise from other suppliers in their contracts. The regulation should include a clarification that nothing in the regulation prevents the funeral entity or director from including provisions for the use of merchandise from other vendors and suppliers that may not be necessarily tied to the funereal director or entity.

Policy decision requiring legislative review (71 P.S. § 745.5b(b)(4))

Given the extensive concerns and questions generated by this rulemaking and the interests expressed by four legislators, this regulation may represent a policy decision of such a substantial

nature that it requires a legislative review. The Board should give strong consideration to withdrawing this regulation and proceeding to develop new legislation. We recommend the Board work with all licensees, affected parties and legislators on new legislation to provide competent regulation of preneed activities, keep costs reasonable, and safeguard the public.

There is another final-form regulation related to preneed activities (Regulation #16A-4816 (#2639)) that is currently scheduled for consideration by this Commission in the next few weeks. It may be advisable for the Board to consider the possibility of also withdrawing Regulation #16A-4816 (#2639) and/or consolidating it with this regulation, to address the First Amendment concerns raised in the case of *Walker v. Flitton*, 364 F.Supp.2d 503 (M.D. Pa. 2005), as well as the need for new legislation.

Therefore, based upon the information presented to us and after considering the criteria of the Regulatory Review Act discussed above, we find that promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

The regulation #16A-4815 (IRRC # 2627) from the State Board
of Funeral Directors was disapproved on October 22, 2009.



Arthur Coccodrilli

Arthur Coccodrilli, Chairman