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INDEPENDENT REGULATORY REVIEW COMMISSION

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March 9, 2007

Via Hand Delivery and Email

Michelle T. Smey
Board Administrator
Department of State
2601 North Third Street
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Harrisburg, PA 17105-2649

RE: Comments on Revised Draft Regulations of State Board of Funeral Directors Submitted on Behalf of Pennsylvania Cemetery Cremation & Funeral Association

Dear Ms. Smey:

On behalf of the Pennsylvania Cemetery Cremation & Funeral Association ("PCCFA"), allow this letter to serve as the organization's comments on the most recently revised draft Regulations of the State Board of Funeral Directors ("Board"), dealing with pre-need activities of unlicensed employees and agents as set forth in your cover letter to me of February 6, 2007.

I wish to thank the Board, the Administration, and yourself for giving PCCFA the opportunity to submit these comments. Although we have previously communicated to the Board, let me reiterate the fact that PCCFA is a statewide trade organization which is unique in that its membership includes, among others, licensed funeral directors, ceterierians, licensed insurance agents, crematory operators, sellers of death industry merchandise subject to the Future Interment Law, and others who are not licensed funeral directors. I would submit that this broad-based representation probably renders PCCFA as a most appropriate entity to speak to these draft Regulations on behalf of the entire death care industry, a capability not available to any other statewide group.

PCCFA wishes to compliment the Administration and the Board for its diligent assessment and vetting of the numerous comments submitted in response to earlier draft Regulation proposals of the Board. It is abundantly clear that numerous concerns have been addressed, at least in part, and for this, we are most appreciative and thus extend our thanks. Indeed, this latest draft proposal has moved significantly in what we believe to be the proper direction; it clarifies many areas where uncertainty and confusion had existed; it takes into account, at least in part, the comprehensive opinion and analysis of the federal court, as set forth in Walker v. Flitton, 364 F. Supp. 2d 503 (M.D. PA) 2005; and this latest draft also demonstrates an effort to attempt to deal

with a licensure act whose provisions are now more than half a century old and in many instances, antiquated and outdated. However, PCCFA believes that this most current draft requires still further refinement and, with respect, further conformance with current law in order to be viable and reasonable if finally promulgated as binding law.

Perhaps in part some of the struggle in crafting a set of viable Regulations stems from the fact that the statute governing conduct of funeral directors within this Commonwealth has been left to stand "largely unchanged since the 1950's, thus providing little help or guidance to the Board." See Walker at n.13. It was for this reason that PCCFA, in prior submissions to this Board, urged consideration of a strategy which deferred promulgating any Regulations until necessary comprehensive changes could be made to the statutory law which, as the federal court aptly noted "are clearly long overdue", rather than attempting to promulgate against a back drop of "antiquated provisions of the law...". See, Id. Thus, although PCCFA continues to believe that deferral of this rule-making process until these antiquated provisions of law can be conformed to the realities of the 21st Century, the following specific comments to the specifically proffered regulatory provision are offered below.

Proposed Section 13.206(a) is identified under a "heading" of "Utilization of Unlicensed Employees by a Funeral Entity". PCCFA submits that the heading of this section, as well as the language which follows must be amended to include not only unlicensed "employees" but also unlicensed "agents" of the funeral director. Indeed, a substantial portion of the Walker decision focused on licensed insurance agents who would be affiliated with licensed funeral directors in offering pre-need packages to prospective customers. From both a historical, regulatory and real-life perspective, licensed insurance agents are "agents" rather than traditional "employees". Limiting unlicensed affiliations to "employees" only is overly restrictive, unnecessary, and substantially defeats one of the holdings of Walker; *i.e.*, to address the permissibility of licensed insurance agents working in conjunction with licensed funeral directors. As we see it, the more important component of the relationship would indeed be the written agreement between the licensed funeral director and his or her employee or agent – a concept specifically contemplated and proposed by the Board in subsection (a)(2) of Section 13.206(a). In other words, the agreement controls the relationship, the level of supervision, and all other interaction between the licensed funeral director and his or her employee or agent, rather than the technical label appended to that unlicensed assistant. There could be a host of reasons, including tax reasons and other affiliations of the licensed insurance agent which would make his or her designation as an "employee" improper or inconsistent with other statuses or affiliation. Under current appellate case law, the licensed funeral director or funeral director supervisor serves in the capacity as "captain of the ship" and is responsible for the acts of his or her subordinates and affiliates. See Geisel v. State Board of Funeral Directors, 755 A.2d 750 (Pa. Commw. 2000). To state the point differently, it is not the label attached to the unlicensed affiliate that is important but rather the language in the written agreement which ensures control over the relationship and ultimate responsibility with the licensed funeral director. Obviously, the language which follows under the heading in Section 13.206(a) would require revision so as to add the words "or agent(s)" each and every time there is a reference to "unlicensed employee".

Second, PCCFA respectfully urges the elimination of proposed subsection (4) under Section 13.206(a). That proposed revision directs that a funeral director may not agree to pay a commission to the unlicensed employee (or agent) for either soliciting business or for business secured by the unlicensed representative. PCCFA is not unaware of 63 P.S. § 479.11(a)(8), which suggests that it is improper to pay a commission or agree to pay a commission to any person for soliciting or for business secured, or paying any gratuity to any person with the intent to have such person aid in securing business. With all due respect, the federal court decision in Walker v. Flitton, while not expressly voiding this provision of law, nevertheless, by logic, implication, and *de facto* application, did precisely that! If this subsection in the proposed Regulations were allowed to remain in the final rule-making, it would have the practical affect of essentially "gutting" the primary value achieved by the Plaintiffs in Walker v. Flitton. Certainly, an unlicensed employee or agent is not prepared to work for a licensed funeral director if they can neither receive a commission for their valuable and competent services, nor be given a "gratuity" for such efforts. Although definitions may vary, gratuity is essentially defined as a sum of money given as a reward for a service. See, e.g., *Cambridge Advanced Learner's Dictionary*. The major thrust of the contention in Walker was that the federal constitution was being infringed by the Board's prohibition against licensed funeral directors using unlicensed employees or agents to help them in securing pre-need business. It would defy logic to conclude that the federal court intended to declare such prohibition unconstitutional, yet allow this Board to completely impede the very relief secured by Plaintiffs by forcing these employees and agents to work without commissions or other gratuity. This proposed subsection of the Regulations must be removed because it conflicts with the heart and soul of the Walker logic and holding.

In subsection (5) of Section 13.206(a), the Board continues to propose the requirement that a licensed funeral director "shall consult face-to-face with each customer before entering into or offering to enter into a pre-need funeral contract". PCCFA acknowledges the federal court's reference to the possibility of such a provision. However, upon analysis, it is respectfully submitted that this requirement is both onerous and unnecessary, primarily to the consumer. For example, an elderly widower living in California wishes to return to Pennsylvania and be buried next to his now-deceased wife at the time of his demise. He is unable to travel to Pennsylvania but wants to ensure that his funeral arrangements are completely addressed pre-need. He is permitted under Pennsylvania law to enter into all aspects of a pre-need agreement with a Pennsylvania funeral director without so much as speaking to the Director, let alone meeting him face-to-face. Obviously, neither the General Assembly nor this Board apparently had concerns with a contract being entered into under such circumstances. Moreover, the requirements would be no different if the widower was living in Erie and contracted with a Philadelphia funeral director whose funeral home was within close proximity to the cemetery where his deceased wife was buried. Query: If both of these scenarios can result lawfully in the effectuation of pre-need contracts, why does the injection of the trained employee or agent into the preliminary process compel any different result? The funeral director must still execute any pre-need contract in order for the pre-need funeral service arrangements to be effective – PCCFA does not dispute this requirement. Why require the consumer to journey to the home of the funeral director if that

customer is fully satisfied with his pre-arranged plans; does not have the time or ability to travel to the funeral home, yet understands that the prearranged contract becomes effective only upon the execution by the funeral director? Respectfully, this Regulation would be far more logical and reasonable if it required notification to the customer that he or she has the option of speaking with and/or meeting with the funeral director prior to any arrangement becoming effective. In other words, allow the consumer to make his or her choice as to the extent of interaction desired with the licensed funeral director.

This suggestion is consistent with the manner in which virtually all other business transactions may be effectuated. For example, an attorney within this Commonwealth can be formally and legally retained by having a client execute a representation letter, without ever speaking with or meeting the retained attorney. The representation may involve matters of critical importance and millions of dollars but that does not defeat the absence of a face-to-face meeting requirement. Similarly, real estate agents and brokers buy and sell millions of dollars of real estate and improved property on behalf of contractees who never meet the real estate broker or agent. Insurance agents sell annuities in the hundreds of thousands of dollars to customers they have never met. With all due respect, and without attempting to belittle the importance of preparing one's funeral arrangements, if business transactions involving millions of dollars can be effectuated without face-to-face meetings, entering into a prearranged funeral for \$6,000 or \$7,000 should require no more, especially under circumstances where this Board is proposing that requirement only if the trained, unlicensed employee or agent is involved in the sharing of information with the consumer.

In view of the above logic and reasoning, PCCFA respectfully submits that subsection (5) should be revised to provide that the consumer shall be specifically advised of his or her option to either speak with or personally meet the funeral director before the pre-need contract is effectuated by execution of the funeral director.

With regard to subsection (6) of Section 13.206(a), PCCFA again urges this Board to consider the necessity of a bold print notification to a consumer as that notification is proposed by the Board. First, a portion of the proposed notification is inconsistent with other sections of the proposal setting forth those things which an employee or agent can do when interacting with the prospective customer. Specifically, the employee or agent is permitted under this proposal to do more than simply inform a customer of available services and funding options. Moreover, to the extent the notification would require any "negotiations" to take place in a face-to-face meeting with the funeral director, the comments set forth above relating to the absence of necessity for that requirement are incorporated into this comment. Having stated this, PCCFA would suggest that, if any notification was required, that it contain information advising the customer that the contract will become effective only upon the licensed funeral director executing a pre-need agreement and that if the customer wishes, he or she may consult, either in person or by other means, with the licensed funeral director. However, as the notice is proposed here, the result may have unintended consequences which unnecessarily alarm families with regard to matters which unlicensed individuals speak to everyday, and, moreover, in the case of the licensed

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insurance agent, he or she is permitted to actually contract with the customer in terms of that customer purchasing a final expense insurance policy.

In subsection (b), the proposed Regulation suggests that an employee or agent may only distribute the general price list for his or her employing funeral entity and no other home. To be candid, this restriction is illogical and inconsistent with competition, disclosure to the consumer, the providing of an opportunity for the consumer to make informed choice, and it is also anti-competitive. General Price Lists (GPL) are required under the Federal Trade Commission Funeral Rule to be distributed whenever an inquiry about funeral services in general is made by a consumer or upon specific request of a GPL. It is the heart and sole of free enterprise that a merchant be permitted to discuss the comparative value of his product with that of a competitor. It is equally the heart and soul of free enterprise that a consumer should be allowed to make an informed choice. Query: What should the employee or agent tell a customer when asked whether his or her prices are competitive with the funeral home down the street? The obvious answer is that, if the employee or agent knows the general price list of a competitor, it should be disclosed so that the Pennsylvania consumer is more fully informed before he or she commits to a particular financial proposal. This anti-competitive and protective provision set forth in (b)(1) is not in the public interest and it should be stricken.

The next proposed provision upon which PCCFA would like to comment relates to subsection (c) which sets forth those actions which are prohibited by the employee or agent. Subsection (1) thereof prohibits the employee or agent from engaging in any pre-need activity on behalf of more than one funeral entity. With respect, this restriction is unnecessary and will have the effect of precluding many funeral directors from utilizing agents. For example, if we take a rural funeral home which does 35 or 40 "calls" a year, there is no reasonable means by which the licensed funeral director can employ or affiliate full-time with an unlicensed employee or insurance agent -- there is simply insufficient cash flow to allow that. Moreover, in the case of the licensed insurance agent, he or she is regulated closely by the Pennsylvania Department of Insurance and, to this extent, there is little concern for confusion, misrepresentation or consumer harm. What should be important and what should provide adequate protection is the terms and conditions of the employment or engagement agreement between the funeral director and the unlicensed individual. If the licensed funeral director wants exclusive rights over the employee or agent, and if that funeral director has the financial means to secure exclusive employment or agency rights, such a condition can easily be written into any employment or engagement contract. However, so long as the consumer is not misled (and certainly if the consumer is misled, this Board can respond thereto), there is no compelling need for this overly restrictive clause.

In closing, PCCFA wishes to make clear that its suggested revisions, amendments and deletions derive from a basic belief that the Pennsylvania consumer is best served when he or she has more information rather than less; is able to make an informed decision without imposing unreasonable burdens on that consumer, such as traveling to a funeral home across state simply because a requirement compels it; and that restriction on competition and free enterprise should be no greater than that necessary to protect the public. Notably, in Walker v. Flitton, the federal

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court, when discussing the absence of evidence in support of prohibiting unlicensed individuals from discussing funeral arrangements states the following:

Furthermore, because the law requires all pre-need contracts to be signed by a funeral director, the funeral director must review his employee's work each time they submit a contract for his signature.

See Walker, 364 F. Supp. 2d at 519-520 (emphasis added). Simply stated, the federal court expressly envisioned the scenario under which employees and agents of the licensed funeral director would have contracts filled out and signed by the customer, subject, of course, to the funeral director "reviewing" the employee's work whenever they "submit a contract for his signature". Inasmuch as the funeral director remains responsible for the acts of his employees and agents, there is an inherent, built-in incentive for these employees and agents to be trained, to act properly, and to not harm either the consumer or the status of the licensed funeral director.

We thank the Board for the opportunity to submit these comments; we urge the Board to consider them in earnest as we believe they are fairly measured and sincere; and we look forward to a continued dialogue with the Board and this Administration, which has seen fit to fully analyze before promulgating.

Very truly yours,

James J. Kutz

JJK:dlh