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August 8, 2006

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Department of State, Office of Chief Counsel
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Mary S. Wyatte, Chief Counsel
Independent Regulatory Review Commission
Harristown 2, 14th Floor
333 Market Street
Harrisburg, PA 17101

RE: Draft Regulations/State Board of Funeral Directors
Re: Pre-Need Solicitations

Dear Ms. Wyatte and Gentlemen:

I am communicating with you on behalf of my client, The Pennsylvania Cemetery and Funeral Association ("PCFA"). PCFA is a statewide trade organization which includes among its members licensed funeral directors, cemeterians, licensed insurance agents, crematory operators, sellers of death industry merchandise subject to the Future Interment Law, and others who are not licensed funeral directors, yet employ or are affiliated with the death care industry. We believe that this broad-based representation allows us to speak and evaluate for the entire death care industry, a capability not available to any other statewide group. It is our understanding that you have recently been provided with a draft set of proposed regulations of the State Board of Funeral Directors ("Board") purporting to deal with (a) preneed, (b) the involvement of non-funeral directors in the solicitation and sale of preneed, and (c) a response to the federal court case of *Walker v. Flitten*, 361 F.Supp.2d 503 (U.S.D.C. Md. 2005), which addressed at length the Constitutional entitlement of employees and agents of funeral directors to interact with the public concerning preneed.

As a bottom line, PCFA is urging that this current set of draft regulations, a copy of which is attached hereto as Exhibit A for your convenience, *not* be promulgated. Unfortunately, this current draft is essentially identical to a draft which this same Board circulated back in November of 2005. It was that earlier draft which caused substantial outcry and consternation from much of the death care industry such that the Board agreed to scrap those regulations in

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exchange for public hearing and work sessions, all of which is described more fully below. Regrettably, it appears, however, that despite the facial appearance of this Board conducting work sessions, requesting input, and holding additional work sessions, that endeavor was worthless and meaningless as these now proffered regulations remain as restrictive and anticompetitive as the regulations floated last year. Precisely why some members of this Board refuse to yield to openness and fair competition is unclear but, in any event, regulations should not be passed which unnecessarily restrict legitimate and noninjurious communications with Pennsylvania consumers concerning their rights or options concerning preneed.

There is one portion of the currently proposed regulations which are correct and that relates to the reference of the irrefutable fact that the federal court was compelled to strike down this Board's attempt to eliminate anyone except a licensed funeral director from discussing with any potential customer aspects of preneed sales or services. That decision, which is indeed the *Walker* case, made a number of poignant observations yet this current draft regulation can only be characterized as presenting a quintessential example of a governmental entity refusing to acknowledge the logic, rationale or concerns as expressed by that federal court.

Although the draft regulations parrot, in small part, excerpts from the federal court decision, the overall regulatory package, as proposed, essentially renders the *Walker* decision useless for those who prevailed in the litigation. Indeed, the Regulation (as drafted) is so restrictive of unlicensed individuals that it would make no economic sense for their involvement in the preneed market. Beyond that, the Regulations, as proposed, are so vague that it would be unwise for the unlicensed individual to say *anything* to a prospective customer for fear that he/she would be prosecuted because they are "practicing funeral directing."

In response to the initially circulated exposure draft of the Board back in November 2005, PCFA submitted comments to the Board Administrator under letter dated December 5, 2005. In that correspondence, a copy of which is attached hereto as Exhibit B, we pointed out why those regulations were not needed as a matter of law; why they created confusion; and why they failed to comport with the spirit and language of the federal court *Walker* decision. Importantly, PCFA was not alone in its opposition. Numerous other entities raised the same type of objection as set forth in PCFA's Comments, all of which lead to what, we believed, would be a productive and candid public hearing which, in fact, the Board scheduled and held on December 12, 2005 in the North Office Building. During that public hearing session, the Board heard compelling testimony from, among others, the National Alliance of Life Companies, individual funeral directors, the undersigned on behalf of PCFA, an executive of Forethought Financial Services, an executive of Homesteaders Life Company as well as other life insurance related executives. The predominant clarion call which emanated from that public hearing session was that the initially drafted exposure regulations were not an appropriate or even-handed approach to the *Walker* decision or, for that matter, for consumers or consumers' interests.

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At the close of that public hearing session on December 12, 2005, the Bureau Commissioner, the Honorable Basil Merenda, issued an "encouragement" to the presenters to "submit specific suggestions on specific language . . . that would be helpful to the Board." See, Transcript at page 221. Picking up on this suggestion, the Board Chairman requested comments to be submitted within thirty days. As a result of that public hearing and as a result of the invitation to submit specific proposals to deal with the unlicensed individuals involved in the preneed arena, PCFA, by letter dated January 19, 2006, tendered to the Board a full and comprehensive set of proposed regulatory provisions. It was the expectation of PCFA that, premised upon the representations made by the Board members at the hearing of December 12, 2005, these proposals would be seriously considered and integrated, to the extent feasible and appropriate, into the draft regulations which had initially been presented by the Board and which resulted in the need for the public hearing of 2005. A copy of that regulatory proposal submitted by PCFA is attached hereto as Exhibit C.

Notably, this proposal submitted by PCFA was endorsed by, among others, Mr. Alan Creedy, President of Trust 100; David L. Dolan, President of Counsel Trust Co.; Ronald W. Virag, President and CEO of Ameriserve Trust and Financial Services, Company; Fred L. Meese, CFO of Great Western Insurance Company; Matthew J. Dew, Assistant Vice President and General Counsel of NGL Insurance Group; Adam Sheer, President of the Roosevelt Investment Group; Scott A. Sides, Senior Vice President of Smith Barney; Kevin Bean, President of Bean Funeral Home and Crematory; Harry Neel, President of Jefferson Memorial Funeral Home and Cemetery; Robert M. Fells, External COO and General Counsel of the International Cemetery Funeral Association; Gregg Strom, Senior Vice President of StoneMor Partners, L.P.; Robert S. Ray, President of Golden Considerations Inc.; Ernie Heffner, President of Heffner Funeral Chapels and Crematory; Matthew F. McGuire, Chief Legal Officer of Assurant Preneed and its related insurance companies; and James H. Hodges of the National Alliance of Insurance Companies. To say the least, it was the sincerest belief of all of those who signed on to that proposed set of regulations in January, 2006, that the Board would seriously and honestly review same, understanding that a very significant portion of the death care industry had significant concerns with the initially circulated draft of the Board.

What transpired next was a public work session of the Board on March 21, 2006, a session which was attended by representatives of PCFA and others. What became immediately clear at that session was that certain members of the Board had simply turned a blind eye to *any* of the proposed regulatory provisions of PCFA as endorsed by the numerous entities referenced above. Indeed, we believe it is fair to say that certain members attempted to transform that work session into a defensive justification for the originally proposed regulations which had met with such extreme opposition. Whereas some members of the Board participating in that work session seemed open to criticism and revision, what has now transpired underscores the fact that the entire past nine months of effort, public hearing, request for input and follow up assessment was a waste of time and resources inasmuch as this now currently proposed second draft of the Board

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is essentially identical to that which was floated some nine months ago and, with respect, is, by any other name, a directive that insurance agents and employees of funeral homes can do little to effectively assist the consumer with considerations governing the benefits of preneed. Protectionism for an industry is not an appropriate basis for enacting regulations. Yet that is what will occur here if these regulations are permitted to proceed into "law."

At this juncture, it seems appropriate to refer to excerpts of the *Walker v. Flitten* Opinion of Judge Jones. For example, Judge Jones pointed to the irrefutable fact that the Board has yet to conduct a single research study which would suggest the need for such restrictions on agents and employees of licensed funeral directors. *See, e.g.*, 364 F.Supp.2d at 516 ("there is no evidence that the defendants (meaning the Board members) fully analyzed the relevant issues in order to test their assumptions about preneed solicitation by unlicensed individuals by conducting research . . .") That Opinion also chastised the Board for having failed to take any testimony in an effort to create a carefully crafted set of regulations to deal with the preneed industry. Although the Board has now held public hearings, it has already chosen to ignore comments and considerations other than those considerations which benefit *some* licensed funeral directors.

Perhaps more important is the fact that these regulations, even if they were viable and fair, serve only as a piecemeal approach to an industry which is in dire need of comprehensive *statutory* overhaul. In this regard, the Court, at footnote 13, strongly urged our General Assembly to consider comprehensive changes to the law, as they are "clearly long overdue." *See, id.* at 516. The Board has currently formed a subcommittee to address statutory revisions to the Funeral Director Law and other related enactments. PCFA commends the creation of that subcommittee and believes that the far more appropriate way to deal with the issue of preneed and the utilization of agents and employees of funeral directors in the solicitation of preneed is to establish a statutory framework as opposed to having this piecemeal regulatory scheme thrust upon an industry, which proposed scheme, as noted above, actually provides greater confusion and concern for those who involve themselves in preneed. Perhaps to state the issue differently, it makes far more sense to craft a comprehensive statutory scheme which can deal with all issues in need of "modernization" such as crematories, merchandise sales, and the like.

Other portions of the *Walker* decision seem pertinent here. For example, at page 520 of the Opinion, the Court notes that the record is "devoid of evidence supporting the proposition that consumers in Pennsylvania have experienced difficulties at the hands of unlicensed individuals employed by funeral directors who attempt to disseminate truthful information regarding preneed funerals and life insurance policies to fund them." This finding goes to the heart of the issue -- what is the governmental interest which is being abused and, thus, in need of these proposed regulations? We submit the answer is that there is no consumer concern and that the only consideration for such a restrictive set of draft regulations would be to, *de facto*, eliminate any communication or competition from anyone unless he/she is a licensed funeral director.

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PCFA is not suggesting that the solicitation and sale of preneed arrangements for funeral services should be beyond the reach of any regulation. Rather, PCFA believes, and therefore submits, that what is needed is a system whereby the licensed funeral director remain responsible for the acts of his/her agents and employees and allows the actual interplay between consumers and the funeral homes agents to be addressed as a market place reality. Again, a review of the *Walker* analysis essentially makes this point by noting that funeral directors have a keen interest in ensuring that their agents and employees perform properly and competently. *See, id.* at 528. *See also*, the Court's response to the Board's contention that only funeral directors have the "unique ability" to counsel customers both at the time of death and in a preneed situation:

We do not disagree with [the] assertion (meaning that when a consumer seeks services, there is an element of emotionality and vulnerability), however, it is clear that an unlicensed but properly trained and supervised employee or agent of a licensed funeral director will be able to discern what questions by a customer are best addressed to the funeral director (*e.g.*, an explanation of embalming and its effects on the body) and what the preneed sales person can address (*e.g.*, the individual prices for various services). Our holding today will, in no way, take away from the important task licensed funeral directors have in counseling aggrieved individuals in their time of need. It is in the best interests of a funeral director, desirous of maintaining his license, to ensure that his employees do not offer information beyond their training and that they remain truthful and respectful in every way when dealing with customers.

Id. at 528.

These numerous references to the *Walker* decision lead to the inescapable conclusion that the federal court did not intend for the Board to promulgate regulations which are so restrictive that they render valueless the utilization of employees or agents to assist the funeral home in the advertisement, solicitation, or ultimate sale of preneed funeral services. Unfortunately, promulgating a Regulation that advises the funeral director and his unlicensed employee or agent that they cannot engage in communications "otherwise prohibited by the Act or this Chapter" is circular; it places the employee or agent in an untenable position; and, frankly, it effectuates a nullification of the *Walker* decision and the extensive rationale set forth in that decision.

Again, it would be the strongest recommendation of PCFA that, rather than rushing to judgment with these piecemeal regulations, the more appropriate route be a measured reconstruction of those statutory laws currently regulating the death care industry so that all interests of the death care industry can be modernized in an even handed manner which is fair to the consumer yet

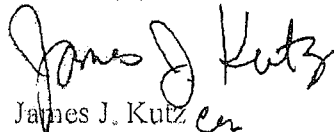
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permits freedom within the market place. Alternatively, if the Commonwealth is intent on promulgating piecemeal regulations, it is respectfully submitted that the draft authored by PCFA and signed onto by the numerous above-referenced entities be the working piece through which that piecemeal regulation is ultimately adopted.

We thank you for allowing PCFA to submit to you these comments and concerns with regard to the Board's currently proposed regulations, which, for the many reasons set forth above, we believe are excessively restrictive and anti-consumer.

Many thanks.

Sincerely yours,



James J. Kutz

JJK/cln

cc: Commissioner Basil Merenda
The Pennsylvania Cemetery and Funeral Association c/o Ernie Heffner, President
Contributing Stakeholders

Exhibit A

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16A-4816

Preneed activities of unlicensed employee – proposed

The State Board of Funeral Directors (Board) proposes to amend § 13.1 (relating to definitions) and to add § 13.206a (relating to utilization of employees or agents by funeral director or funeral entity), to read as set forth in Annex A.

Effective date

The amendments will be effective upon publication of the final rulemaking in the *Pennsylvania Bulletin*.

Statutory Authority

The amendments are authorized under sections 11, 13 and 16(a) of the Funeral Director Law (Act) (63 P.S. §§ 479.11, 479.13 and 479.16(a)).

Background and Need for the Amendment

Section 13(c) of the Act (63 P.S. § 479.13(c)) provides, “No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed.” In *Ferguson v. State Bd. of Funeral Directors*, 768 A.2d 393 (Pa. Cmwlth. Ct. 2001), *appeal denied*, 566 Pa. 670, 782 A.2d 549, the court affirmed the Board’s conclusions that an insurance agent engaged in the unlicensed practice of funeral directing (in violation of section 13(c) of the Act) by counseling the selection of funeral goods and services, even though a funeral director later met with each customer and had the customer sign a statement of funeral goods and services prepared by the funeral director on the basis of the insurance agent’s worksheets. However, in *Walker v. Flitton*, 364 F.Supp.2d 503 (U.S.D.C. M.D. Pa. 2005), a case involving commercial free speech rights under the First Amendment of the federal constitution, the court ordered that the Board “shall not prohibit agents or employees of specific licensed funeral directors from providing accurate information to consumers regarding the sale of preneed funeral plans and services. This interaction shall include, but shall not necessarily be limited to, the distribution of accurate price lists to consumers, but under no circumstances may unlicensed individuals contract with consumers for the sale of preneed funerals, nor may they act as a ‘funeral director’ as defined in [the Act.]” The court indicated that it did not intend to alter the Pennsylvania substantive law set forth in *Ferguson*. *Id.* at 513.

The Board has determined that its regulations need to address what unlicensed employees of a funeral establishment may do concerning preneed sales. *See, Walker* at 525-26 (“as a result of the [Board’s] considered failure to enact a clarification of [its] interpretation of [the Act], both consumers and the funeral industry in Pennsylvania have been forced to speculate as to precisely what conduct by unlicensed individuals is permissible”). The court “strongly urge[d] the Board members to fulfill their mandate by giving prompt attention to the goal of resolving all of the unclarity which has attended the sale and marketing of preneed funerals and life insurance policies to fund them in Pennsylvania.” *Id.* at 529.

Description of the Proposed Amendments

In § 13.1, a definition of “funeral entity” would be added to include persons, corporations

and others authorized by the Board to practice funeral directing. The term “preneed activity” would be defined as activity concerning the provision of funeral merchandise and services upon the death of a specifically identified person living at the time of the activity, and the term “preneed funeral contract” would be defined as an agreement under which a funeral entity promises or agrees to provide funeral merchandise and render services upon the death of a person living at the time the contract is made. These latter two definitions are consistent with the provisions of section 13(c) of the Act.

Proposed § 13.206a would address the use of unlicensed employees of the funeral entity. In *Walker, supra*, at pages 526-27, the court noted the responsibility of the Board to delineate with precision what conduct by unlicensed persons is permissible. Proposed § 13.206a(a)(1) would make clear that the funeral director and funeral entity are professionally responsible for the actions of the unlicensed employee. *See, Walker* at 515 (funeral director is exposed to sanction by Board for improper action of unlicensed employee). Proposed § 13.206a(a)(2) would require the funeral director to closely supervise the unlicensed employee. *See, Walker* at 527 (Board may require close supervision by funeral director of unlicensed employees interacting with customers concerning preneed sales). Proposed § 13.206a(a)(3) would prohibit the funeral director from paying any commission to the unlicensed employee for soliciting business. *See*, section 11(a)(8) of the Act (63 P.S. § 479.11(a)(8)) (Board may take disciplinary action against a funeral director who “solicit[s] patronage ... by paying a commission or agreeing to pay a commission to any person or persons for soliciting or for business secured, or paying any gratuity to any person with the intent to have such person aid in securing business”). Proposed § 13.206a(a)(4) would require the funeral director to meet face-to-face with the customer before entering into the contract, and proposed § 13.206a(a)(5) would require that any document presented to a customer by the unlicensed employee must include a notice that the document will not be binding and that a licensed funeral director must meet with the customer before entering into any contract. *See, Walker* at 527 (unlicensed individual may not contract with customer, and Board may require licensed funeral director to consult face-to-face with preneed customer before the customer’s proposed contract is signed by the funeral director).

Proposed § 13.206a(b) would specifically authorize an unlicensed employee to distribute general price lists of the employing funeral entity and to provide general assistance to the employing funeral entity by engaging in activities not otherwise prohibited.

Proposed § 13.206a(c) would prohibit an unlicensed employee from engaging in certain actions. Under proposed § 13.206a(c)(1), an unlicensed employee may not be associated with any other funeral entity. *See, Walker* at 506, n. 17 at 520 (court need not address unlicensed person not trained by and acting on behalf of specified funeral director, because plaintiffs are fulltime employees of funeral home trained and supervised by licensed funeral director). Under proposed §§ 13.206a(c)(2) and 13.206a(c)(3), an unlicensed employee would not be permitted to prepare worksheets, proposals or other presentations for funeral services or to engage in discussions or other communications with customers regarding the actual selection of funeral services and merchandise incidental to those services. *See, Ferguson* at 400 (counseling selection of preneed funeral services is practice of funeral directing). Under proposed § 13.206a(c)(4), an unlicensed employee would not be permitted to make financial arrangements for the rendering of funeral services and merchandise incidental to such services. *See, Walker* at 527 (under no circumstances may unlicensed individuals act as a funeral director as defined in section 2(1) of the Act); section 2(1) of the Act (term “funeral

director” includes “a person who makes arrangements for funeral service and who sells funeral merchandise to the public incidental to such service or who makes financial arrangements for the rendering of such services and the sale of such merchandise).

Finally, proposed § 13.206a(d) would make clear that the Board’s rulemaking is not intended to affect the scope of practice of insurance agents licensed by the Department of Insurance.

Compliance with Executive Order 1996-1

The Board solicited input from and provided an exposure draft of this proposed rulemaking to funeral directors and organizations as required under the directives of Executive Order 1996-1 (February 6, 1996). In addition, the Board considered the impact the rulemaking would have on the regulated community and on public health, safety and welfare. The Board finds that the proposed rulemaking addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

Fiscal Impact and Paperwork Requirements

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The rulemaking will impose no additional paperwork requirements upon the Commonwealth, its political subdivisions, or the private sector.

Sunset Date

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on _____, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee and the House Professional Licensure Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Michelle T. Smey, Administrative Officer, State Board of

Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Please reference No. 16A-4816 (Preneed activities of unlicensed employees), when submitting comments.

Anthony Scarantino
Chairperson

ANNEX A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. Professional and Occupational Affairs

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

GENERAL PROVISIONS

§ 13.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * *

Funeral entity – A restricted business corporation, professional corporation, pre-1935 corporation, partnership, sole proprietorship, widow, widower, or estate authorized by the Board to practice the profession of funeral director.

* * *

Preneed activity – Any activity on behalf of a funeral entity concerning the provision of funeral service upon the death of a specifically identified person living at the time of the activity.

Preneed funeral contract – An agreement under which a funeral entity promises or agrees to provide funeral merchandise and render services upon the death of a person living at the time the contract is made, whether or not the funeral entity receives preneed funeral funds.

* * *

§ 13.206a. Utilization of employees or agents by a licensed funeral director or funeral entity.

(a) A licensed funeral director or funeral entity may permit an unlicensed employee or agent to

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interact with customers concerning preneed activity in accordance with this section.

- (1) The funeral director or funeral entity utilizing an unlicensed employee or agent shall be professionally responsible for the actions of the unlicensed employee or agent.
- (2) The unlicensed employee or agent shall operate only under the close supervision of a licensed funeral director.
- (3) The funeral director or funeral entity may not pay or agree to pay a commission to the unlicensed employee or agent for soliciting business or for business secured by the unlicensed employee or agent.
- (4) A licensed funeral director of the funeral entity employing an unlicensed employee or agent in this capacity shall consult face-to-face with each customer before entering into or offering to enter into a preneed funeral contract.
- (5) Any document presented by the employee or agent to the customer for signature or acknowledgment must bear in 20-point or larger print the following notice completed with the name of the funeral entity:

THIS DOCUMENT DOES NOT CONSTITUTE A CONTRACT OR AN OFFER TO CONTRACT. THIS DOCUMENT IS NOT BINDING ON YOU (THE CUSTOMER) OR [name of funeral entity], BUT IS MERELY FOR INFORMATION PURPOSES TO INFORM YOU OF THE SERVICES AND MERCHANDISE AVAILABLE AND THE COST THEREOF, AS WELL AS FUNDING OPTIONS. ANY NEGOTIATIONS WITH A VIEW TO ENTERING INTO A CONTRACT WITH [name of funeral entity] MUST TAKE PLACE IN A FACE-TO-FACE MEETING WITH A

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LICENSED FUNERAL DIRECTOR OF [name of funeral entity].

(b) An employee or agent not licensed under the act may:

- (1) Distribute general price lists of the employing funeral director or funeral entity only.
- (2) Provide general assistance to the employing funeral director or funeral entity by engaging in activities, including communications with customers, not otherwise prohibited by the act or this chapter.

(c) An employee or agent not licensed under the act may not:

- (1) Be associated with any other funeral director or funeral entity.
- (2) Prepare worksheets, proposals or other presentations for funeral services.
- (3) Engage in discussions or other communications with customers regarding the actual selection of funeral services and merchandise incidental to such services.
- (4) Make financial arrangements for the rendering of funeral services and merchandise incidental to such services.
- (5) Offer to or enter into a preneed funeral contract with any customer on behalf of the funeral director or funeral entity.
- (6) Engage in any activity that would cause a customer to believe that the unlicensed employee or agent is skilled in the knowledge, science or practice of funeral directing.
- (7) Engage in any activity that constitutes the practice of funeral directing under the act.

(d) Nothing in this section shall be construed to alter the scope of practice of a licensed insurance agent acting pursuant to licensure from the Department of Insurance, so long as the insurance agent is not acting as a funeral director or practicing funeral directing.

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PRENEED ACTIVITIES BY UNLICENSED EMPLOYEES

ANNEX A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. Professional and Occupational Affairs

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

GENERAL PROVISIONS

§ 13.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * *

Funeral entity – A restricted business corporation, professional corporation, pre-1935 corporation, partnership, sole proprietorship, widow, widower, or estate authorized by the Board to practice the profession of funeral director.

Preneed – Any activity on behalf of a funeral entity concerning the provision of funeral merchandise and services upon the death of a specifically identified person living at the time of the activity.

* * *

§ 13.230. Utilization of employees or agents by a licensed funeral director or funeral entity.

(a) A licensed funeral director or entity may permit an unlicensed employee or agent to interact with customers concerning preneed in accordance with this section.

(1) The funeral director or funeral entity utilizing such employees or agents shall be

EXPOSURE DRAFT

PRENEED ACTIVITIES BY UNLICENSED EMPLOYEES

professionally responsible for the actions of such employees or agents.

(2) The unlicensed employee or agent shall operate only under the close supervision of the licensed funeral director or funeral entity.

(3) The funeral director or funeral entity may not pay or agree to pay a commission to such employee or agent for soliciting or for business secured.

(4) A licensed funeral director of the funeral entity employing unlicensed employees or agents in this capacity must consult face to face with each preneed customer before entering into or offering to enter into a preneed funeral contract.

(5) Any document presented by the employee or agent to the consumer for signature or acknowledgment shall bear in 20-point or larger print the following admonition:

THIS DOCUMENT DOES NOT CONSTITUTE A CONTRACT OR AN OFFER TO CONTRACT. THIS DOCUMENT IS NOT BINDING ON YOU (THE CONSUMER) OR THE FUNERAL DIRECTOR, BUT IS MERELY FOR INFORMATION PURPOSES TO INFORM YOU OF THE SERVICES AND MERCHANDISE AVAILABLE AND THE COST THEREOF, AS WELL AS FUNDING OPTIONS. ANY NEGOTIATIONS WITH A VIEW TO ENTERING INTO A CONTRACT WITH THE FUNERAL HOME MUST TAKE PLACE IN A FACE TO FACE MEETING WITH A LICENSED FUNERAL DIRECTOR OF THE FUNERAL HOME.

(b) Employees or agents not licensed under the act may:

(1) Distribute general price lists of his employer or principal only.

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PRENEED ACTIVITIES BY UNLICENSED EMPLOYEES

(2) Provide general assistance to his employer or principal by engaging in activities, including communications with consumers, not otherwise prohibited by the Act or this chapter.

(c) Employees or agents not licensed under the act shall not:

(1) Be associated with any other funeral director or funeral entity.

(2) Prepare worksheets, proposals or other presentations for funeral services.

(3) Engage in discussions or other communications with consumers regarding the actual selection of funeral services and merchandise incidental to such services.

(4) Make financial arrangements for the rendering of funeral services and merchandise incidental to such services.

(5) Contract with or offer to contract with consumers on behalf of the funeral entity for the sale of preneed funerals.

(6) Engage in any activity that would cause the consumer to believe that the employee or agent is skilled in the knowledge, science or practice of funeral directing.

(7) Engage in any activities that constitute the practice of funeral directing under the act.

Exhibit B

Received by Michelle Smey
Funeral Board Administrator
2:00 p.m. 12/5/05
Michelle Smey

James J. Kutz
Direct Dial: 717-612-6038
Fax Number: 717-731-1985
jkutz@postschell.com

December 5, 2005

BY HAND DELIVERY

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

PENNSYLVANIA
PHILADELPHIA
PITTSBURGH
HARRISBURG
LANCASTER
ALLENTOWN
NEW JERSEY
PRINCETON

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

Dear Ms. Smey:

On behalf of the Pennsylvania Cemetery & Funeral Association ("PCFA"), this is to provide written comments on the draft Regulations of the State Board of Funeral Directors (the "State Board") dealing with "pre-need activities by unlicensed employees..." as set forth in your cover letter of November 4, 2005. First, I wish to thank you for the opportunity to submit these comments on behalf of PCFA. PCFA is a statewide trade organization which I believe is unique in that its membership includes, among others, licensed funeral directors, cemeterians, licensed insurance agents, crematory operators, sellers of death industry merchandise subject to the Future Interment Law, and others who are not licensed funeral directors. We feel this broad-based representation allows us to speak for the entire death care industry, a capability not available to any other statewide group.

Upon review of the draft Regulations, it appears, at first blush, that they are being proposed to purportedly address certain judicial decisions which bind the Board and, in particular, the decision of the Honorable John E. Jones, III that was rendered in the recent case of Walker, et al. v. Flitton, et al., 364 F. Supp. 2d 503 (M.D. Pa. 2005). As the Board should be fully aware, that detailed decision struck down Board resolutions and related interpretations which attempted to restrict unlicensed individuals in the pre-need market because they were violative of the First Amendment's commercial speech provision. The Court did not write a summary opinion for its conclusion. Rather, it tediously vetted the federal court record; applied those record references to the commercial speech prongs of analysis; noted the

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absence of any evidence of consumer harm; and thus directed the Board not to enforce its previously enacted resolution or any formative thereof because it was not justified under a First Amendment analysis; therefore, under principals of preemption, the federal law prohibited same.

Unfortunately, it appears that some, if not all, of the provisions of the draft Regulations not only fail to address the substantive concerns adjudicated by the federal court, most of those provisions appear to remain violative of the First Amendment rights of licensed funeral directors and their unlicensed employees and agents who seek to communicate honest and accurate information concerning pre-need. To be further candid, the "prohibition" portion of these draft regulations is so restrictive that no reasonable person would dare to utilize support personnel to communicate or interact with consumers as any fair reading thereof would allow this Board and its prosecutors to continue to prosecute individuals as if Walker v. Flitton had never been decided and rendered final and binding on this Board. Indeed, these draft Regulations reflect a selective and misleading use of passages from Judge Jones' 56-page Opinion, in that every reference to "no consumer harm", along with the Judge's conclusions as to why consumer harm did not exist, is ignored, without explanation. With respect, we do not believe that Judge Jones accepted jurisdiction and tirelessly searched the record in concluding that this Board was excessively interfering with the rights of individuals in the marketplace, only to have this Board propose Regulations which, by the time they are read and digested in their entirety, relegate the unlicensed support person to nothing more than the equivalent of an advertising "flyer" which is received in the mail every day by consumers along with tons of other advertising literature. Judge Jones painstakingly noted that the Board's restrictions likely harmed the consumer and others because of their excessive restriction which, by any other name, is anti-competitive and a quintessential example of protectionism. Admittedly, these Regulations allow unlicensed employees or agents to distribute one and only one general price list and it vaguely permits the employee or agent to "provide general assistance" but with no explanation as to what that "general assistance" may be comprised of. Apparently, the reason for that becomes evident in subsection (c) of the draft Regulation which deals with that which employees and agents are not permitted to do which, with respect, is a virtual total ban on communication with the customer or prospective customer. Perhaps the obvious rhetorical question to be asked in view of these draft Regulations is the following:

What exactly is the unlicensed agent or employee permitted to say to a prospective customer other than here is a general price list of the only funeral director for whom I am allowed to speak and if you have any questions, I am not allowed to say anything?

Without attempting to be pejorative, that is precisely what these Regulations now call for.

PCFA implores this Board to read that excerpt from Judge Jones' Opinion dealing with other states which permit unlicensed agents of funeral directors or third parties to sell pre-need plans. Indeed, noting that at least 34 states permit same, the Court goes on to note that "a search of case law in these states uncovered no examples of consumers being harmed from being solicited by unlicensed individuals...". More to that point, 34 other states permit unlicensed agents and employees to work on behalf of licensed funeral directors and it is indeed disturbing that this Board would continue to hold tight to a policy which restricts information, restricts employment, restricts the free exchange of communication; and restricts when there is no need, let along a compelling need, to protect the consumer, given the fact that other portions of this draft Regulation require any contracts to ultimately be executed with the funeral director.

Beyond this, the "need" for these proposed Regulations becomes dubious in view of § 13(d), which permits funeral arrangements at-death to be made by any unlicensed member of the funeral home staff, without ratification for up to 48 hours – a period of time long enough to dictate, *de facto*, that all decision-making has taken place in the absence of the licensed funeral director. In short, there is no legitimate reason for this Board to make pre-need information, potential sales, and actual sales so difficult as to "cause" consumers to have no "time of death" plans until death itself occurs, at which time emotions are high and judgment affected.

Having stated the above, allow me to now discuss some of the more problematic provisions as follows:

The provisions which raise significant concerns are set forth in § 13.230(b) and (c) of the draft Regulations. The former section identifies those activities in which employees or agents not licensed under the Act may engage and the latter identifies those activities which an employee or agent not licensed under the Act may not perform, or in which they are otherwise restricted. In order to fully understand the constitutional flaw associated with these provisions, certain basic principles of law must be addressed.

First, in order for any governmental entity to restrict speech, a substantial governmental interest that the government seeks to protect must be implicated. It is clear that certain portions of the draft Regulations seek to prohibit employees or agents from fully communicating with pre-need customers. For example, subsection (c) provides, in relevant part, that:

Employees or agents not licensed under the Act shall not:

* * *

(2) Prepare work sheets, proposals or other presentations for funeral services.

- (3) Engage in discussions or other communications with consumers regarding the actual selection of funeral services and merchandise incidental to such services.

* * *

These two provisions clearly seek to restrict an employee's or agent's communications with consumers. Significantly, the federal court, in Walker, examined whether there is a substantial government interest in barring unlicensed individuals from interacting with consumers. According to the Court:

We fail to see, on the record before us, what substantial governmental interest exists relating to allowing only licensed funeral directors, rather than non-licensed insurance sales people who are employed by, or agents of those funeral directors, to interact with customers and disseminate price and other information regarding pre-need services. Here, as the unlicensed Plaintiffs are trained, supervised, employed and directly controlled by a licensed funeral director, it appears that many of the Defendant's consumer concerns are overstated and thus misplaced. 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.

Walker, 364 F. Supp. 2d at 519-520 (emphasis added).

Similar to Walker, one must question what "substantial governmental interest" is promoted by prohibiting unlicensed employees and agents from preparing work sheets, proposals or other presentations for funeral services, and from prohibiting employees or agents from engaging in discussions or other communications with consumers regarding the selection of funeral services and merchandise incidental to such services. These two provisions seek to prohibit some of the very type of communications that the federal court concluded should not be restricted. If paragraph (3) of section (c) precluded unlicensed employees or agents from engaging in discussions concerning the technical aspects of, say, the chemical benefits of embalming, such would likely be reasonable and legitimate. This section, however, is overly broad and precludes an unlicensed employee or agent from engaging in those discussions or communications with a consumer pre-need that an unlicensed individual can engage in with a consumer at-need. See, 63 Pa. C.S. § 479.13(d). Indeed, the federal court recognized the inconsistency that exists with this type of preclusion. See, e.g., Walker, 364 F. Supp. 2d at 511 ("...although the Law prohibits unlicensed individuals from offering for sale pre-need

contracts, these same unlicensed individuals are permitted to make tentative funeral arrangements in certain situations.")

Similarly, the "substantial governmental interest" promoted by paragraph (2) of section (c) is also absent. Query: Insofar as only a licensed funeral director can actually contract with consumers for the sale of pre-need funeral services, why absolutely prohibit an employee or agent from preparing worksheets, proposals, or other presentations for the funeral services? Quite frankly, it is to a consumer's benefit for an employee or agent to provide to that consumer a worksheet, proposal or other presentation for funeral service so that the proposal will be in writing and documented. It will effectively memorialize the conversation between the consumer and the employees or agents; it will give that consumer the opportunity to "shop" for better deals. Obviously, if the information provided on those work sheets, proposals or presentations is inaccurate and improper, the licensed funeral director will become aware of the same when that consumer discusses the pre-need contract with the licensed funeral director. Not only will the worksheets, proposals and presentations be of benefit to consumers, but they are also beneficial to the licensed funeral director, as it provides a "check" on the unlicensed employees and agents and helps the funeral director to supervise the employees' and agents' work product. No governmental interest is promoted by section (c) (2) of the draft Regulations.

Other very significant constitutional, as well as practical, concerns are raised by the draft Regulations. First, § 13.230(c)(1) provides that employees or agents not licensed under the Act shall not "[b]e associated with any other funeral director or funeral entity." What possible governmental interest is promoted with this provision? Without a doubt, this proposed provision restricts lawful association and improperly interferes with the same. This provision will economically strangle trained but unlicensed individuals such as licensed insurance agents and sellers of death industry merchandise by precluding them from working with more than one funeral entity or funeral director. This restraint is unjustified and cannot be sustained. The motivation behind this provision is transparent – it seeks to curtail competition within the pre-need industry. Certainly, this provision will not withstand constitutional muster.

In addition to the foregoing, the PCFA has additional concerns with other provisions of the draft Regulations. Specifically, it is believed that subsection (6) of section (c) is redundant. Subsection (7) prohibits employees or agents not licensed under the Act from engaging in any activities that constitute the practice of funeral directing. Subsection (6) would fall within the scope of subsection (7) and, hence, is redundant. It is suggested that such language be removed.

Additionally, subsection (2) of section (b) is circular. That section states that employees or agents not licensed under the Act may "[p]rovide general assistance to his employer or principal by engaging in activities, including communications with consumers, not otherwise

prohibited by the Act or this chapter." One of the issues and concerns involved in the Walker litigation was that the Law failed to clearly identify what an unlicensed individual may do. To state that an unlicensed person can engage in those activities "not otherwise prohibited" provides no clarity or guidance whatsoever. To the extent that the draft Regulations are intended to expressly state what employees or agents not licensed under the Act may do, subsection (2) provides little guidance.

Turning to Section 13.230(a), a concern exists with subsection (3), which states that: "[t]he funeral director or funeral entity may not pay or agree to pay a commission to such employee or agent for soliciting or for business secured." This is an economic restraint on trade that is not justified. Again, what is the harm that is sought to be protected by the State Board on this trade practice? Provided that any such commission is not passed on to the consumer, none exists.

Finally, a substantial concern exists with respect to section (a)(5). This provision requires any document presented by the employee or agent to a consumer for signature or acknowledgment to bear language that states that the document does not constitute a contract or an offer to contract. Query: What if, among other things, a licensed insurance agent, who is an agent for a funeral home, is writing an insurance policy for the consumer which the consumer ultimately intends to use to fund a pre-need contract? Does § 13.230(a)(5) apply to this policy? On its face, it does, yet an insurance policy is most certainly a "contract" within the legal definition of the same. To the extent that this provision is attempting to dictate the terms of an insurance policy and to alter the legal import of those policies, this draft Regulation is not only overly broad, but it is also interfering with the jurisdiction of the Insurance Department and is infringing on those Regulations. If section (a)(5) is not intended to include within its scope insurance policies, this provision needs to be revised accordingly.

In closing, a review of the official minutes of the Board confirms that detailed discussions have indeed ensued as to what it is that the federal court directed. These draft Regulations, however, reflect a patent effort to yield on its previous, restrictive policy only to the extent mandated by the federal court and even then, as noted above, we believe that compliance with the rationale of that decision has not been met in the form of these Regulations. Nevertheless, PCFA suggests that what this Board should be doing is to promulgate Regulations which allow the free flow of information; allow the free flow of communication between consumers and offerors of funeral services and merchandise, yet protect the public. Instead, and with all due respect, these Regulations are an example of a profession seeking to impede the free flow of information and the knowledgeable decision-making of consumers who are not at risk by interacting with agents or employees of licensed funeral directors who are doing nothing more than making available to the consumer informed choices, understanding that the licensed funeral director is ultimately responsible for any decision-making or contractual terms thereon.

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The Regulatory Review Act, 71 P.S. § 745.1 et seq., as well as the Governor's Executive Order expressly referenced in the Board's own letter requesting comments, makes clear that regulations should be proposed only when there is a need. See, 71 P.S. § 745.5(a)(3). Here, as noted aptly by the federal court, there is not one shred of factual evidence supporting the "need" for such a restrictive regulatory scheme, at least not a consumer need. And, with respect, we believe that the "need" referenced in the law was intended to refer to the "public's" need and not the professional's pecuniary need.

PCFA thanks this Board for reviewing these written comments and it urges the Board to consider same and react in a manner which advances the interests of consumers, fair pricing, and legitimate competition.

Respectfully submitted,



James J. Kutz
JKK:dlh

Exhibit C



FILE

Hand by
Michelle Smey
Administrative
State Board of Funeral Directors
James J. Kutz
Direct Dial: 717-612-6038
Fax Number: 717-731-1985
jkutz@postschell.com
1/9/06

January 9, 2005

Via Hand Delivery

The State Board of Funeral Directors
c/o Board Administrator Michelle T. Smey
Department of State
2601 North Third Street
P.O. Box 2649
Harrisburg, PA 17105-2649

PENNSYLVANIA

PHILADELPHIA

PITTSBURGH

HARRISBURG

LANCASTER

ALLENTOWN

NEW JERSEY

PRINCETON

**RE: Suggested Draft Regulations Concerning the Activities of
Employees and Agents of Licensed Funeral Directors Involved
In Pre-Need Arrangements**

Dear Ms. Smey:

I am honored to submit, on behalf of the Pennsylvania Cemetery & Funeral Association ("PCFA"), suggested Regulations for adoption by the Funeral Board concerning the inter-relationship between licensed funeral directors and employees and agents thereof involved in pre-need. In submitting these regulations for consideration, PCFA has attempted to take into consideration the licensed funeral director, the consumer, the protection of the public, and the ability to operate in the free market fairly and competitively. Because PCFA is a membership organization comprised of licensed funeral directors, cemeterians, sellers of merchandise, owners of crematories, licensed insurance agents and employees of licensed funeral directors involved in pre-need, we believe that the viewpoints and policy considerations of PCFA, as evidenced in this attached draft set of Regulations, is indeed balanced and reasonable for all involved in the death care industry.

You will note that the Regulations impose liability on the funeral director for the wrongful acts of his/her employees or agents and they require certain disclosures to prospective customers which, we believe, adequately protects the public and, at the same time, allows the free dissemination of information concerning the opportunity for consumers to enter into pre-need arrangements which eliminate uncertainty and confusion and/or dispute at the time of one's death. Additionally, you will see that we have proposed new defined terms involving pre-need and think that these new terms more appropriately represent terminology and documentation currently in place compared to those older definitions which we are recommending to be deleted. In this regard, if new terminology was adopted, as we propose, there may be a need for one or two other existing regulatory sections to have conforming language inserted which, of course, would simply involve replacing the old terminology with the new terminology.

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In submitting these proposed Regulations for consideration by this Honorable Board, PCFA is pleased to report that the following organizations, entities and individuals have given their imprimatur to the suggested language and have authorized us to advise the Board of their agreement with PCFA's proposed language. Attached you will find copies of affirmations of support from the following:

1. Alan Creedy, President
Trust 100
2. David L. Dolan, President
Counsel Trust Company
3. Ronald W. Virag, President and CEO
Ameriserv Trust and Financial Services Company
4. Fred L. Meese, CFO
Great Western Insurance Company
5. Matthew J. Dew, Assistant V.P. and General Counsel
NGL Insurance Group
6. Adam Sheer, President
The Roosevelt Investment Group
7. Scott A. Sides, Senior V.P.
Smith Barney
8. Kevin Bean, President
Bean Funeral Homes & Crematory
9. Harry Neel, President
Jefferson Memorial Funeral Home & Cemetery
10. Robert M. Fells, External COO and General Counsel
International Cemetery Funeral Association
11. Gregg A. Strom, Senior V.P.
StoneMor Partners, L.P.
12. Robert S. Rae, President
Golden Considerations, inc.
13. Ernie Heffner, President
Heffner Funeral Chapels & Crematory

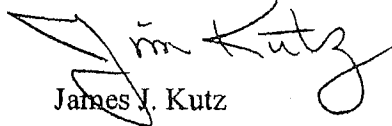
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14. Matthew F. McGuire, Chief Legal Officer
Assurant Preneed and its related insurance companies including American Memorial Life Insurance Company, Union Security Insurance Company and United Family Life Insurance Company
15. James H. Hodges
National Alliance of Life Companies

PCFA remains committed to working with the Board in an effort to finalize these Regulations and, to that extent, I would respectfully request that, if the Board has any questions or thoughts concerning this draft, they contact me so that I may allow my collective client to continue to cooperate with the Board in finalizing a set of Regulations which is balanced, protects the consumer, and allows for a fair and competitive market place environment, consistent with the rationale set forth in *Walker, et al. v. Flitton, et al.*

Many thanks.

Very truly yours,



James J. Kutz

JJK:dlh

Enclosure

cc: PCFA Board

DRAFT - PRENEED ACTIVITIES
BY EMPLOYEES & AGENTS OF
LICENSED FUNERAL DIRECTORS

ANNEX A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. Professional and Occupational Affairs

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

GENERAL PROVISIONS

§ 13.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * *

[Prepaid burial account-An account in which moneys are deposited by the funeral director during the lifetime of an individual in accordance with a contract executed between the parties for funeral merchandise and services to be performed and delivered at a future time.]

[Prepaid burial contract-A contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death or the death of another designated individual and for which the consumer pays to the funeral director moneys at the time of the contract or at a time prior to the rendition of these services.]

Pre-Need Arrangement - Any activity by or on behalf of a licensed funeral director contracting for the provision of services to be provided by a licensed funeral director upon the death of a specifically identified person living at the time of the activity.

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Funded Pre-Need Arrangement - A pre-need arrangement for which monies are committed in advance of death either into a banking instrument via the licensed funeral director or paid to an insurance company for the purchase of an insurance product.

Pre-Need Contract - Any contract for the provision of services to be provided by a licensed funeral director upon the death of a specifically identified person living at the time of the activity.

Unlicensed Employee or Agent - Any employee or agent that is not a Licensed Funeral Director.

* * *

13.230. Utilization of employees or agents by a licensed funeral director.

(a) A licensed funeral director may permit an employee or agent to interact with customers concerning a pre-need arrangement in accordance with this section.

- (1) The funeral director utilizing such employees or agents shall be professionally responsible for the actions of such employees or agents.
- (2) Services to fulfill a pre-need arrangement subsequent to a death shall be provided by a licensed funeral director in accordance with the Act.
- (3) The licensed funeral director shall retain, and shall make available for inspection by the Board, employment or agency agreements with those employees or agents who are involved in pre-need arrangements.
- (4) When the employee or agent of the licensed funeral director discusses a pre-need arrangement with a prospective customer, the customer shall be requested to execute an Acknowledgment confirming that
 - (i) the customer understands that the employee or agent is not a licensed funeral director;
and
 - (ii) the customer may, if he or she desires, speak with the licensed funeral director before

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signing any pre-need agreement.

(b) Funded Pre-Need Arrangements

(1) A Non-Insurance Funded Pre-Need Arrangement: A Pre-Need Arrangement for which the licensed funeral director, employee or agent is receiving monies under the Act shall be in full compliance with the three-day right-of-rescission and Notice of Cancellation as provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201.7.

(2) An Insurance Funded Pre-Need Arrangement: A Pre-Need Arrangement for which a licensed life insurance producer is involved shall be in full compliance with all laws enforced by the Pennsylvania Insurance Department.

(c) Ratification by a licensed funeral director

(1) A Non-Insurance Funded Pre-Need Arrangement shall be ratified by a licensed funeral director within the three-day right-of-rescission provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201.7.

(2) An Insurance Funded Pre-Need Arrangement shall be ratified by a licensed funeral director within the free look or grace period established by the Pennsylvania Insurance Department.

(d) Compliance: The failure to comply with the provisions of this section will be considered unprofessional conduct on the part of the funeral director in charge.