



#2639

HEFFNER
Funeral Chapel & Crematory, Inc.

RECEIVED

OCT 29 PM 3:30

PHONE 717-767-1551
Fax 717-764-9919
Toll Free 888-767-1551
C. Frederick Koller, Supervisor
Ernie Heffner, President
John Katora, Vice-President
Scott Mahkovec, CPA, Controller

INDEPENDENT REGULATORY
REVIEW COMMISSION

**PENNSYLVANIA
AFFILIATES**

RED LION
Olewiler & Heffner

YORK
Everhart-Jackson-Heffner

LEWISBERRY
Beaver Ulrich

POTTSVILLE
Schlitzer-Allen-Pugh

TROY
Vickery

MILL HALL
Helt Chapel

RENOVO
Maxwell

WILLIAMSPORT
Allen & Redmond

WILKES-BARRE
Kniffen O'Malley

AVOCA
Kniffen O'Malley

MILTON
Ranck

ADVANCE PLANNING
Preneed Associates, Inc.

**NEW YORK STATE
AFFILIATE**

WELLSBURG
Roberts

October 29th, 2007

Michelle T. Smey, Administrative Officer
State Board of Funeral Directors
P.O. Box 2649
Harrisburg, PA 17105-2649

Submitted Via Email To: st-funeral@state.pa.us , mmsmey@state.pa.us , hweirich@state.pa.us

RE: Proposed Pre-Need Regulation # 16A-4816 (Pre-Need activities of unlicensed employees) published 9.29.07

Dear Ms. Smey,

This letter is submitted to go on record as being adamantly opposed to the Proposed Pre-Need Regulation #16A-4816. I was one of the plaintiffs in the Federal Action known as *Walker v. Flitton* in which the Funeral Board was found to have willfully violated my rights and the rights of others under the Constitution of the United States of America. I was then and still am represented by Attorney James J. Kutz. I am requesting that the attached comments by my counsel, in his letter dated this same date and written on behalf of the Pennsylvania Cemetery, Cremation & Funeral Association (PCCFA), be incorporated with this objection to Proposed Pre-Need Regulation #16A-4816.

The fact that this Board would put forth a proposed regulation that flies in the face of a Federal Court Order against them is shocking, however, unfortunately not surprising. This action reaffirms this Board's escalating level of unchecked, chronic arrogance and documented disrespect for authority including a Federal Court Order and an *en banc* Commonwealth Court Opinion upheld by the Pennsylvania Supreme Court.

The Federal Court described this Funeral Board as "**being clumsy and disingenuous.**" In the end, this board was forced to pay \$55,000 of taxpayer's money in restitution of legal fees [copy of check and letter attached] due to their conspired antics with the trade association, Pennsylvania Funeral Directors Association (PFDA), which was discovered to be the source of the infamous anti-consumer "Resolution" adopted by the board and which violated the Constitutional rights of people like me who were not in lock-step with the anti-competitive position of PFDA.

In another matter, this board was overturned by a Commonwealth Court *en banc* decision upheld by the Pennsylvania Supreme Court. In that decision, this Funeral Board's conduct was aggressively condemned by the Court for "**reneging on the agreement and representation it made to the Court.**"

This Board's disregard for higher authority is unconscionable. Within the August 3rd, 2005 minutes of the Funeral Board meeting, a board member, an attorney no less, stated, "**Who cares what the Judge said?**" and then 11 pages later stated, "**Who cares what the Judge wants?**" [Copy attached; full minutes available upon request]

1551 Kenneth Rd., York, PA 17408

October 29th, 2007

Heffner Letter to Funeral Board

RE: Proposed Pre-Need Regulation # 16A-4816 (Pre-Need activities of unlicensed employees)

This proposed regulation is contrary to both the language and the spirit of the Federal Court Order. For example, unlike the Federal Court Order which refers repeatedly to "unlicensed employees and/or agents," the proposed regulation appears to intentionally make no reference to or even allowance for "agents" to be engaged but only refers to "unlicensed employees" and then goes on to recite a list of all the things that cannot be done by an unlicensed employee in a pre-need circumstance. Additionally the proposed regulation appears to exclude any licensed insurance agent who might be an employee from receiving any remuneration for an insurance policy that might be used to fund final arrangements.

Just how overreaching and ridiculously restrictive is this proposed regulation? The current statute and regulation permits any unlicensed employee, whether full time or part-time employee, administrative or maintenance, to 1) make funeral arrangements and 2) determine if there is a need for embalming and if there is, then to engage a licensed funeral director to perform that act. *See Section 13.(d) Practice Without License; Exceptions. Tentative funeral arrangements after a death has occurred can be made by an unlicensed member of the funeral home staff in the event the licensed funeral director is temporarily absent.* In 1968, the Legislature determined that any unlicensed employee has the authority and the skill sets necessary, simple as they must be, to make a determination as to whether or not there is a need for embalming and to enter into a funeral arrangement contract when a death has occurred and a consumer is distraught. The only additional stipulation per the current Rules & Regulations is that the contract must be ratified by a licensed funeral director within 48 hours! In certain instances, including religious requirements, burial or cremation may well already have been completed prior to the 48 hour ratification. *See § 13.205. Tentative agreements. Under section 13(d) of the act (63 P. S. § 479.13(d)), tentative arrangements for funerals may be made by unlicensed funeral home staff persons in the temporary absence of the funeral director in charge. A licensed funeral director shall ratify the tentative arrangements within 48 hours.*

The current statute and regulations are clear that involvement of a licensed funeral director is only required for 1) the act of embalming, the need for which would have been determined by an unlicensed person on staff, and 2) the ratification within 48 hours of the arrangement made by the unlicensed employee.

It is totally irrational for this Funeral Board to propose via 16A-4816 that trade restraints are more critical for pre-planning when there is:

1. No emergency
2. No time pressure
3. No dead person
4. No tragedy to contend with
5. No emotionally distraught consumers
6. And unlike time of death arrangements, pre-planning affords consumers with a federally mandated minimum of a 3 business day right of rescission.

The sad irony is that consumers need to be protected from predatory, corrupt funeral directors, not unlicensed employees or agents of forthright funeral directors. Consider these ugly instances that all

October 29th, 2007

Heffner Letter to Funeral Board

RE: Proposed Pre-Need Regulation # 16A-4816 (Pre-Need activities of unlicensed employees)

occurred in the past couple years. [Copies of news paper articles are available upon request]

- A. Dead babies and fetuses stored in garage by licensed funeral director
- B. Body parts being sold by licensed funeral directors
- C. Cremation of murder evidence rather than the deceased after the licensed funeral director attested to having identified the deceased and then returned alleged cremated remains of the deceased to the family. Months later, the deceased was discovered in the Allegheny County morgue when detectives went to retrieve the evidence for the murder trial. Evidence was gone. Deceased was there!

These unseemly matters range geographically from Pittsburgh to Philadelphia and all involved licensed funeral directors, **not unlicensed employees**. It is predatory licensed funeral directors that consumers need protection from, not unlicensed employees or agents of forthright funeral directors who encourage pre-planning.

It is also significant to note that all of these matters were uncovered by authorities other than the funeral board or its licensed and non-licensed inspectors or investigators.

Further, the funeral board long ignored that portion of the statute that requires inspections be performed by a licensed funeral director with not less than 10 years experience. In fact for years, inspections had been performed using non-licensed state employees thus proving that there is no need for licensing of an individual in order to inspect licensees and of course, and as an additional observation, the funeral board saw no need to follow statute or regulation if it was not convenient to the board. Historically, the funeral board is neither first on the scene nor can it be credited with uncovering infractions against Commonwealth consumers.

Aside from being in conflict with the Federal Court Order, this proposed regulation fails to identify let alone address any documented consumer need. Estimating that approximately 20% of death care services provided annually have been pre-planned, there are likely over 27,000 pre-arrangements being fulfilled every year in the Commonwealth. Surely if there was a compelling consumer need to change the current system by restraining trade there would be at least hundreds of complaints every year for reference. However, the Funeral Board identifies none. Incredibly, the Funeral Board is unable to cite even one consumer complaint. I suspect if there are any, it is the statistical equivalent of zero!

A Federal Court has found this Funeral Board guilty of violating my commercial free speech rights under the on the U.S. Constitution. Nonetheless, this Funeral Board drafted and presented this conflicted proposed regulation demonstrating and documenting their escalating level of unchecked, chronic arrogance and disrespect for the law as written by the Legislature and for authority, specifically the Federal Court.

Whether the pressure to do PFDA's bidding comes from the former counsel to PFDA, who serves as an alleged consumer member on the board, or whether it comes from the hand-picked and approved professional members who are all affiliated members of PFDA, it does not really matter. The interest of consumers is not being served. Proposed Pre-Need Regulation # 16A-4816 is just another example.

October 29th, 2007

Heffner Letter to Funeral Board

RE: Proposed Pre-Need Regulation # 16A-4816 (Pre-Need activities of unlicensed employees)

I would suggest that the vast majority of issues this Funeral Board deals with are not consumer issues but rather protective turf issues amongst competitors not in lock step with PFDA and who are not participating in the PFDA pre-need kickback scheme through it's for profit subsidiary, SecurChoice.

It may be time for the Commonwealth to go the way of Colorado which more than a quarter century ago eliminated their funeral board and licensing. Today, Colorado death care consumers experience lower death care service costs than do Pennsylvania's consumers.

Inasmuch as there are few actual death care service consumer issues that need to be addressed in Pennsylvania and the fact that the matters that have surfaced have been uncovered by authorities other than the funeral board and its licensed and non-licensed inspectors or investigators, I suggest for the Commonwealth, it would be far more financially efficient and for consumers more meaningful and effective if those few real consumer issues were addressed by existing consumer protection agencies in the Commonwealth rather than an expensive regulatory authority that is controlled by a trade association and which has an impressive track record of incurring financial liabilities and legal expense for the Commonwealth such as;

- ✓ The Federal Court Order; and
- ✓ The a Commonwealth Court *en banc* decision upheld by the Pennsylvania Supreme Court; and
- ✓ Most recently, the \$77,000 cost to Pennsylvania taxpayers in outside legal expenses incurred when Commonwealth Court again ruled against the funeral board in a matter that adversely impacted all licensing boards under the B.P.O.A. when the Court determined that individuals do have the right to subpoena and depose investigators, prosecutors and their records and files in civil matters. This matter was in reference to a case involving Commonwealth Funeral Consultants/Rae V. PFDA, Erikson, Pinkerton in which the Commonwealth chose to get involved. Mr. Pinkerton is currently a professional member of the Funeral Board and I understand also a Past President and current member of PFDA, all of which relates back to the situation of regulatory capture by and incestuous relationship with PFDA.

By their actions, the funeral board repeatedly demonstrates the degree to which they are a problematic financial liability to the Pennsylvania taxpayers and unknowingly demonstrate the rational feasibility of the concept of their elimination and the lack of any adverse impact to consumers. The funeral board has neither been first on the scene nor can it be credited with uncovering infractions against Commonwealth consumers. This is offered as a suggestion to the real problem inasmuch as no authority to date seems to have been willing or able to hold this board accountable for their inappropriate actions.

For additional perspective, detail and for your convenience, I have attached the comments from others as listed who are also in objection to Proposed Pre-Need Regulation #16A-4816.

- ✓ Insurance provider Homesteaders
- ✓ Insurance provider Assurant
- ✓ Service provider Jefferson Memorial Funeral Home President, Harry Neel
- ✓ Service provider Cavanagh Family Funeral Home supervisor Bart Cavanagh, a past professional member of the Funeral Board

October 29th, 2007

Heffner Letter to Funeral Board

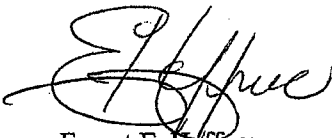
RE: Proposed Pre-Need Regulation # 16A-4816 (Pre-Need activities of unlicensed employees)

The Funeral Board and this Proposed Regulation # 16A-4816 (Pre-Need activities of unlicensed employees), does not represent the interests of consumers. It represents the protectionist, anti-consumer interests of PFDA for the sole benefit of its funeral director members and to the detriment of Pennsylvania consumers.

The impact of this anti-consumer Proposed Regulation # 16A-4816 will be to maintain the stronghold of an economic lock on final arrangements, made under time constraints and made at an emotionally charged moment all to the advantage of predatory licensees who want to prevent the education of consumers about the option of making rational decisions before a death.

This Funeral Board should withdraw the Proposed Pre-Need Regulation # 16A-4816, reevaluate what its real purpose is supposed to be and focus on issues that protect consumers rather than trying to protect the profitability of PFDA member funeral directors.

Sincerely,



Ernest F. Heffner
Licensed Funeral Director

Copies via Email:

Arthur Coccodrilli, Chairman, IRRC

John H. Jewett, Regulatory Analyst, IRRC

Fiona E. Wilmarth, Director of Regulatory Review, IRRC

Heather Wimbush Emery, Assistant Counsel, IRRC

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

Marlene Tremmel, Executive Director, House Professional Licensure Committee

Christine Line, Counsel, House Professional Licensure Committee

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

Representative Stanley Saylor, House Professional Licensure Committee

Representative Susan Helm, House Professional Licensure Committee

Ron Virag, President and CEO, Ameriserv Trust and Financial Services Company

Ernie Peterson, Ameriserv Trust and Financial Services Company

Lowell Thomas, Office of the Governor

James J. Kutz

PCCFA



RECEIVED

2007 OCT 29 PM 3:32

INDEPENDENT REGULATORY
REVIEW COMMISSION

17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Fax
www.postschell.com

James J. Kutz

jkutz@postschell.com
717-612-6038 Direct

October 29, 2007

Via Hand Delivery

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

RE: Comments on Proposed Pre-Need Regulation # 16A-4816 (Pre-Need Activities of Unlicensed Employees) published 9/29/07 Submitted on Behalf of Pennsylvania Cemetery Cremation & Funeral Association

Dear Ms. Smey:

On behalf of the Pennsylvania Cemetery Cremation & Funeral Association ("PCCFA"), allow this correspondence to serve as the written comments to the draft Regulations of the State Board of Funeral Directors (the "State Board") relating to "Preneed Activities of Unlicensed Employee [sic]", a proposal which appeared on September 29, 2007 at 37 Pa. B.5257 in the Pennsylvania Bulletin. Pursuant to that rule-making notice, PCCFA submits its comments to the State Board through you. Whereas I thank the State Board for the technical opportunity to present comments, it is with extreme pessimism that these comments will be meaningfully reviewed and considered by the Members of the State Board, given the history of this entire issue. Nevertheless, consistent with that statutory opportunity to respond, PCCFA wishes to go on record as opposing most strenuously this draft set of Regulations because it believes: (1) the Regulations are unconstitutional; (2) the Regulations conflict with federal court decisional law involving a lawsuit to which the State Board itself was a losing party; (3) there is no need for this Regulation in its current form; (4) the regulatory scheme is patently anti-consumer, anti-disclosure, and anti-competitive; and (5) the end result of this Regulation's adoption will be to effectively stymy pre-need opportunities for the Pennsylvania consumer, thus securing a victory for those members of the funeral director profession who benefit far more substantially if funeral services are contracted for at-need (rather than pre-need) at a time when the death of a loved one and its concurrent grief predominate over logical decision-making.

Although the preamble to the draft suggests that the Regulations are proposed to be "responsive" to the [federal] court's mandate... "any summary reading of this Regulation confirms that the heart and soul of that federal court decision is being ignored, save some *de minimus* (and out of context) references in the Court Opinion as to what type of control or regulation the State Board

might retain over trained employees and licensed insurance agents involved in the field of pre-need.

The Funeral Director Law has existed for more than half a century. The Future Interment Law has existed for approximately 45 years. Funeral directors have operated professionally and successfully over that lengthy period of time. Cemeterians have operated with dignity and success. Licensed crematories have operated as well over that period of time and sellers of funeral merchandise and licensed insurance agents involved in the sale of final expense insurance have similarly operated, with success, and with adequate protection to the consumer. Unfortunately, the State Board, the catalyst for the subject Regulations, has made a decision within the last several years to effectuate a monopoly within the death-care industry and it has systematically and, in most instances, successfully, achieved its desired goal of eliminating competition and preserving a system which retards a consumer's access to relevant information and competitive pricing. These subject Regulations are simply another example of that goal – a goal which is strongly discouraged, if not precluded, by the language and intent of the Pennsylvania Regulatory Review Act of 1982, as amended, 71 P.S. § 745.1 et seq.

By way of background, this entire problem, a problem created by the Board, had its genesis in a 1999 "Resolution" which was adopted by the State Board. That Resolution was drafted by a trade organization (the Pennsylvania Funeral Directors Association); handed off to the State Board whose membership traditionally derives from PFDA activists; and predictably, adopted by the Board. That Resolution, which has now been strongly condemned by the federal court system, threatened everyone that the State Board would seek prosecution if anyone other than a licensed funeral director so much as spoke to a third party about the benefits or options relating to pre-need. The Board suggested, disingenuously, that the Resolution was necessary in order to address a "festering" problem, yet to that point in time (*to wit*, 1999), there was no evidence of any Pennsylvania consumer who had complained that he or she had been harmed from receiving information and/or having interaction with employees or agents of licensed funeral directors who provided pre-need information, pricing options, and discussed generally some of the benefits associated with entering into a pre-need contract, rather than awaiting the time of one's death. As this Board made clear that it intended to enforce that Resolution, legitimate and successful funeral directors, insurance agents, and trained employees of funeral directors brought suit in the United States District Court for the Middle District of Pennsylvania. Those individuals, as Plaintiffs, sought a declaration from the federal court that this Resolution, and the Board's threat of prosecution if the Resolution was violated, violated constitutional rights firmly ingrained into our jurisprudential system.

The case proceeded slowly but, ultimately, became the subject of discovery, after which motions for summary judgment were filed. On April 14, 2005, District Court Judge John E. Jones, III issued a 56-page Opinion and Order, wherein he declared that the Resolution and the Board Members' continued belief that the Resolution was a proper enunciation of Pennsylvania law, mandated the entry of judgment against the Board Members. Specifically, the Court concluded that the Funeral Board had no legitimate basis for prohibiting licensed insurance agents and

trained employees of funeral directors from communicating honest information and otherwise interacting with prospective pre-need customers. In order to reach that determination, the Court was required to make several findings, all of which were adverse to this Board. The Court concluded that the First Amendment protected the communications between these agents/employees and prospective customers of pre-need. It concluded secondly that the Board Members could point to no substantial government interest that was advanced by the prohibition. It concluded thirdly that the resolution failed to advance any legitimate government interest. Finally, the Court concluded that the prohibition was far "more extensive than necessary" to serve any arguable government interest. In short, despite being given the opportunity to present the Court with any evidence that there was, in fact, this festering problem, the record demonstrated that no problem whatsoever existed except, perhaps, protectionism for the funeral director industry. Several passages from that opinion deserve discussion in this letter, inasmuch as the preamble to these Regulations suggests that it was the federal court decision which requires these Regulations. Whereas the Court did suggest that the Board had failed to provide clarity on the issue except for the adoption of the Resolution which, in effect, was a total ban on communication, the Court's analysis and logic hardly dictates the type of restricted activity now proposed by this Board. Indeed, any fair reading of the currently-proposed Regulation would lead any funeral director to not utilize or otherwise affiliate with any employee or insurance agent regarding pre-need sales for fear of prosecution under these Regulations.

By way of example, the Court rejected this Board's argument that only licensed funeral directors are competent to interact with pre-need customers, reasoning, *inter alia*, that the Board's consumer concerns are "overstated and thus misplaced...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...". Clearly, the Court envisioned, as an allowable process, these agents and employees to prepare work sheets and to prepare contracts, subject, of course, to review and approval by the funeral director. The Court's decision could not be clearer. See 364 F. Supp. 2.d at 520.

The Court further concluded that there was absolutely "no evidence that an unlicensed individual working as the employee or agent of a licensed funeral director will give inaccurate or inappropriate information to consumers." Instead, as the Court noted, "there is a strong disincentive for that to take place, given the funeral director's clear exposure to sanctions by the Commonwealth. *Id.*

One of the fundamental absurdities in this Board's purported concern for consumers derives from Section 13(d) of the Funeral Director Law. Specifically, although the 1951 Funeral Director Law was silent regarding when and under what circumstances unlicensed employees of funeral homes could interact with customers for "at-need" funerals, in 1968, the law was amended to provide that:

“Tentative funeral arrangements after a death has occurred can be made by an unlicensed member of the funeral home staff in the event the licensed funeral director is temporarily absent.”

See 63 P.S. § 479.13. Pursuant to that statutory grant, this Board proceeded to promulgate Regulations dealing with unlicensed individuals and their ability to interact with at-need customers (*i.e.*, the next-of-kin). The Board subsequently amended that Regulation in 1991 and it now appears at 49 Pa. Code 13.205. Importantly, that Regulation allows the tentative arrangements, effectuated by the unlicensed individual with the at-need customer, to remain in effect, so long as those arrangements are “ratified” by a licensed funeral director within 48 hours. This Board allows that unlicensed individual to interact with a licensed funeral director in order to embalm; it permits the unlicensed individual to obtain and place obituary notices; it permits the unlicensed individual to set a service time and it permits that individual to interact with clergymen and cemetery officials. In short, by the time the licensed funeral director is required to get involved and ratify the agreement, all arrangements and commitments have *de facto* been accomplished. Beyond that, this Board’s Regulation dealing with tentative arrangements at need imposed no requirement whatsoever upon the knowledge, skill or training of the unlicensed individual. Indeed, this Board apparently believes that it remains legitimate and reasonable for the funeral home sexton or receptionist to make these arrangements, inasmuch as no regulatory change is currently being proposed to Section 13.205. In this regard, it seems anomalous and perplexing that this Board is so intent on restricting unlicensed agents of funeral directors from having meaningful discussions with pre-need customers (who are not affected by grief and death), yet essentially allow unfettered communication between a customer and the funeral director’s employee when exigent at-need arrangements are at issue. Accordingly, we would ask the Board to explain why it feels compelled to severely restrict meaningful communication with potential pre-need customers but leaves alone the current regulatory scheme which permits that unlicensed individual to make all necessary funeral arrangements subject only to ratification some 48 hours thereafter. Respectfully, there are many occasions where the funeral is conducted within the 48 hours; this Board knows fully well that embalming decisions are made long before the passage of 48 hours; and there are numerous religious beliefs which compel decision-making, if not burial, within 48 hours. PCCFA does not necessarily suggest that the tentative arrangement provision is dangerous. However, it does assert that, when the Board proffers as a justification for the current Regulations “ a need to protect the consumer”, that assertion and its veracity need to be weighed against Section 13.205. This very point was noted by the Federal Court when, in condemning the Board’s asserted governmental interest of protecting the public, it countered as follows:

“The Board Members’ stated governmental interest clashes with the provision of the law which allows for unlicensed individuals to make temporary funeral arrangements after a death, when the possibility of misleading consumers is no doubt far higher.”

Other notable passages from Walker include the finding from the Court that the record developed by the Board was completely “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 pre-need funerals and life insurance policies to fund them.” Id. In other words, and as having been stated above, there simply is no need for this type of restrictive regulatory scheme.¹

The Court noted at least 34 states currently allow unlicensed agents of funeral directors or third parties to sell pre-need funeral plans; it noted that a search of case law in those states uncovered no examples of consumers being harmed from solicitation by unlicensed individuals; and the Court also concluded that the consumer is better served when it is provided with exact prices for funerals so that a customer can make a better-informed decision. Id. at 523-524.

In conclusion, the Federal Court noted that these employees and agents should be allowed to interact with customers, to disseminate accurate price information, and to “solicit those individuals for the purpose of having their employer sell pre-need funeral services and plans...” Stated alternatively, the Court expressly noted its intent to “permit unlicensed individuals to discuss pre-need plans with consumers so long as these communications occur under the auspices, employment, direction and control of a licensed funeral director...”. Id. at 527.

With all due respect, it is difficult to understand how this Board can fairly proffer the Regulations that now seeks to adopt. Indeed, the currently-proposed Regulations are, in all material respects, identical to the draft Regulations first circulated by this Board relating to unlicensed activity on or about November 3, 2005. See Exhibit “A”.² As this Board is well aware, in response to those exposure draft Regulations, numerous comments were submitted, many of which were in vehement opposition to the restrictive nature of the scheme. This Board agreed to hold a public hearing work session on December 12, 2005, purportedly for the purpose of exploring further the significant concerns of many of those affiliated with the death-care industry. In fact, as a result of that session, the Board indicated a willingness to receive draft Regulations different from that which it had proposed and, pursuant to that invitation, PCCFA, under letter dated January 9, 2006, tendered a comprehensive set of Regulations, which, in our opinion, were even-handed, allowed for reasonable communication; yet fully protected any arguable consumer interest. See Exhibit “C”.

On March 21, 2006, this Board held a “regulations committee meeting” to further discuss an appropriate set of Regulations to deal with the interaction of insurance agents and employees of funeral directors involved in pre-need sales. Whereas certain members appeared to be generally

¹ The Court also noted that the Board was given every opportunity to cite to consumer complaints, studies or other analyses which would support its assertion that consumer injury would flow if unlicensed individuals were involved in pre-need planning. However, as the Court noted, “none of the Defendants (meaning the State Board Members) put forth any evidence that consumers had been harmed by the unlicensed solicitation of pre-need services. Id. at 523.

² One of those who commented in opposition to those draft Regulations was PCCFA and we incorporate those concerns into this set of comments. See Exhibit “B” hereto.

interested in the concerns raised by the numerous different entities which had filed comments, other members appeared intractable and intent on pushing through that which had been initially drafted and so strenuously objected to. Perhaps even worse, certain Board Members appeared to respond to Judge Jones' Opinion with disdain and disrespect. Indeed, one Board Member commented that the Judge did not "really understand how funeral directing operates" and a counsel representing PFDA wondered out loud "how much the Judge really understood". On an earlier occasion, a Member of this Board indicated that she did not "care" what Judge Jones said, specifically stating "who cares what the Judge said". Copies of these relevant excerpts are attached hereto as Exhibit "D", lest there be any question as to the accuracy of this correspondence.

Ultimately, this Board issued a slightly-revised regulatory schema and again circulated same for comment. Unfortunately, although a couple of *di minimus* changes did appear, the overwhelming problems associated with the initial draft remained. See second draft attached hereto as Exhibit "E". As a result, on August 8, 2006, the undersigned, on behalf of PCCFA, directed correspondence to executives within the Department of State, as well as the Chief Counsel of the Independent Regulatory Review Commission urging, for a second time, that these overly restrictive provisions be rejected as anti-consumer, anti-competitive and inconsistent with the theme and discussion of Federal Court Judge John Jones in Walker v. Flitton. A copy of this August 8, 2006 letter is attached hereto as Exhibit "F".

Although PCCFA and the undersigned were not privy to everything which transpired subsequent to August 8, 2006, we do know that certain concerns were raised at the highest levels of the executive branch. In fact, on October 25, 2006, the Governor's Policy Office advised that said Office, along with the General Counsel's Office and Board Counsel "are all of one mind and agree that the Board cannot adopt and promulgate any regulations under Section 13(a) of the Funeral Director Law, in light of the rulings in the Ferguson and Walker cases. That notice goes on to advise that counsel for the Board has agreed "to draft an opinion to this effect." See Exhibit "G".

Saddled with the direction of the Governor's Office, this Board, apparently through some of its agents, crafted a revised set of Regulations, which, although not acceptable in its entirety, provided a major step in the right direction. See cover letter and revised Regulations under date of February 6, 2007, attached hereto as Exhibit "H". Indeed, on March 9, 2007, the undersigned, on behalf of PCCFA, went so far as to compliment the Administration and the Board for its diligent assessment and vetting of the numerous comments submitted. PCCFA noted that the most-recently circulated Regulations had "moved significantly in what we believe to be the proper direction" but did go on to point out certain sections of the draft which PCCFA felt needed further tweaking. A copy of this March 9, 2007 comment letter is attached hereto as Exhibit "I".

Whatever occurred between March 9, 2007 and this Board's meeting in May of 2007 is not entirely clear. What is clear, however, is that the draft Regulations, which appeared in the

Pennsylvania Bulletin on September 29, 2007 are identical in every material regard to that wholly objectionable set of Regulations that were circulated in late 2005. To state the issue differently, although this Board apparently paid lip service and went through the motions of supposedly considering comments and circulating more reasonable regulations, that endeavor was apparently nothing short of "show" as these current Regulations aptly and unfortunately demonstrate. Equally concerning is the question of how these currently-proposed Regulations made their way to the Pennsylvania Bulletin in the face of the Administration's October 25, 2006 determination that Walker v. Flitton precluded such a restrictive scheme.

Turning to the specifics of this currently-proposed Regulation, PCCFA first wishes to incorporate those comments which it proffered back on December 5, 2005, as well as those comments offered on August 8, 2006, inasmuch as those two prior drafts are essentially identical to the current one. In addition to that incorporation, we specifically object to Section 13.206(a) in its entirety. First, it is unclear why there is now no reference to "agents" of funeral homes, rather only to employees. Prior drafts included agents in the Regulation and there seems no legitimate explanation for exclusion of agents. We fear that the deletion of "agent" would prohibit a relationship other than employer/employee and, in the case of an insurance agent, there is no valid reason why an agency relationship would be improper, so long as the funeral director was ultimately responsible for the acts of the agent. This concern (*i.e.*, the removal of "agent") is a theme which appears throughout the Regulations.

Second, subsection (a)(3) prohibits the funeral director from paying any commission for those employees who secure business for the funeral director. This prohibition is absurd even though similar language first appeared in the Funeral Director Law. Clearly the Federal Court did not envision that its order would permit employees to solicit business for the licensed funeral director, yet prohibit that employee from receiving remuneration for his or her effort. In all likelihood, if the Legislature had any concern with funeral directors paying "finder's fees", the focus was to preclude, for example, hospitals, morgues and coroners from having an "understanding" with one particular funeral director. To that extent, any provision of the Funeral Director Law which could be read as prohibiting the employees and agents of the type we are discussing herein from receiving remuneration was eliminated, at least impliedly by Judge Jones and must be eliminated in subsection 3.

Next, it is unclear why the Board would require that a licensed funeral director meet and consult with every customer before a contract can be entered into. There is absolutely no prohibition against a consumer entering into a contract with a funeral director by phone, by telefax, or by mail. Everyday, funeral arrangements are made via telephone; the agreement is roughed-out and forwarded to the customer; and the customer returns the contract executed. To impose a requirement of a face-to-face meeting for pre-need agreements, yet to have no similar obligation for at-need contracts or contracts entered into directly between a funeral director and a customer makes no sense. Indeed, the sole purpose for this requirement is to make pre-need sales, through the use of agents, so burdensome and meaningless that pre-need opportunities will fall by the wayside. If the Regulations were to read that a consumer be given the option of meeting face-to-

face with the funeral director, that would certainly be more logical, as such is the case in any arrangement, pre-need or at-need.

Subsection (5) is equally objectionable. Indeed, it suggests that the only "document" that the agent or employee can provide to the customer is the price list of the particular home the employee is representing. Because PCCFA believes that pre-need discussions necessarily require worksheets and discussions, subsection (5) as a basic premise, is objectionable. Indeed, subsection (5) indicates precisely the limits which this Board would allow any agent to perform and that limitation is to hand a price list to a customer and then, when asked further information by the customer, to stand mute for fear of being charged with the "unlicensed practice of funeral directing". Indeed, proposed section (b)(2) creates that precise dilemma. Whereas it indicates that the employee can provide "general assistance", that same section warns that the employee cannot do anything "otherwise prohibited by the Act or this subchapter". Stated alternatively, this subsection will become a font for prosecution – a favored method by which this Board creates and interprets law. However, PCCFA believes that *quasi penal* prosecutions should not be the means by which laws are defined by this Board. Finally, why preclude an employee or agent from also providing price lists of other funeral homes? As the price list is an FTC-ordered public document, why play "hide the peanut" with the customer? The customer is far better served by having in-hand comparable pricing so a truly meaningful decision can be made.

This brings me to the next provision and our objections. In subsection (c) the Board proposes that an employee may not be associated with any other funeral entity. Why? What is important is that the employee make clear to the prospective customer who the funeral director is that he or she is representing. Why could not a trained employee, or for that matter, a trained licensed life insurance agent work for one funeral home in one area and work for another funeral home in another geographical area? In those outlying areas of our Commonwealth, where populations are sparse, it is most logical that insurance agents, traveling said territory, could and would be affiliated with more than one funeral home, depending upon the location of the customer. Again, this proposed provision is simply another effort to make financially untenable the use of agents or employees.

Subsection (c)(2) is one of the most objectionable provisions being proposed. It is simply illogical and clearly inconsistent with Judge Jones' discussion, to suggest that the life insurance agent or trained employee cannot pull out a work sheet and discuss with the customer how much it would cost for a funeral service and the type of merchandise the customer is contemplating. PCCFA is not suggesting that the employee or agent be able to "contract" with the customer. However, when a pre-need customer takes the time to meet with an agent, one would expect that the customer intends the encounter to be meaningful; to allow for the dissemination of enough information so as to make appropriate decisions and analyses; and substantive enough so as not to make this encounter the equivalent of handing out a flyer under one's front door mat. Along these same lines, subsection (c)(3), which prohibits the agent from engaging in "discussions or other communications with customers regarding the actual selection of funeral services and

Michelle T. Smey
October 29, 2007
Page 9

merchandise" suffers from the same absurdity. Again, the intent clearly renders the use of employees or agents worthless, if this type of language is adopted.

Subsection (4) of section (b) now prohibits the individual from making financial arrangements. Query: If a licensed insurance agent first discusses the funding of a pre-need agreement with life insurance, why not allow him to discuss financial arrangements? Again, as with the other sections, subsection (4) is not reasonable; it is excessively restrictive; and its design and purpose is to render pre-need agents and employees of the funeral director meaningless.

Finally, subsection (7) of (c) prohibits any activity that "constitutes the practice of funeral directing under the Act". If anything has been made clear by this Honorable Board, it is their belief that anyone who discusses any aspect of any funeral service or any aspect of funeral merchandise is engaged in the practice of funeral directing. Subsection (7) is a trap for the unwary and will have the practical effect of impeding any funeral director's use of employees or agents. Indeed, subsection (7) is akin to the same Resolution which this Board adopted in 1999, only to have the Federal Court declare it unconstitutional!

PCCFA submits that a regulatory schema, similar to that proposed by it through its letter of January 9, 2006 (see, Exhibit "C") is a fair and reasonable resolution of this issue. The currently proposed Regulations, however, are not fair and they certainly are not necessary.

Very truly yours,



James J. Kutz

JJK:dlh

cc: PCCFA Board

EXHIBIT "A"

EXPOSURE DRAFT

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:

EXPOSURE DRAFT

PRENEED ACTIVITIES BY UNLICENSED EMPLOYEES

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



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

ALLEN TOWN

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

Michelle T. Smey
December 5, 2005
Page 2

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.

Michelle T. Smey
December 5, 2005
Page 3

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 alone 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.

Michelle T. Smey
December 5, 2005
Page 4

(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

Michelle T. Smey
December 5, 2005
Page 5

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.

Michelle T. Smey
December 5, 2005
Page 7

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
JK:dlh

EXHIBIT "C"



FILE

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

2006
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.

Michelle T. Smey
January 9, 2006
Page 2

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

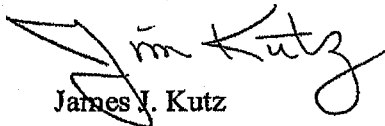
Michelle T. Smey
January 9, 2006
Page 3

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.

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

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

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

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.

Trust 100

VANGUARD AMERICA CO.

January 2, 2006

Ernie Heffner, President
Pennsylvania Cemetery Funeral Association
c/o Heffner Funeral Homes
1551 Kenneth Rd.
York, PA 17404

Dear Mr. Heffner:

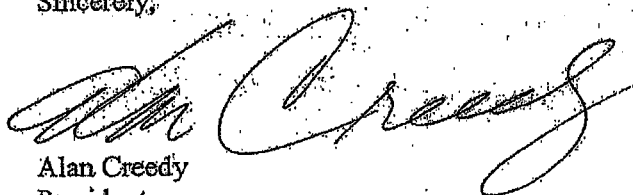
This letter is in reference to the "Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors" under Annex A, Title 39. Professional and Vocational standards Part I. Department of State Subpart A. Professional and Occupational Affairs; Chapter 13. State Board of Funeral Directors - General Provisions.

I have reviewed the draft you supplied as of this date and believe it to be in the best interests of the consumer and the profession. It is an honor to support this measure as written.

Trust 100 is one of the oldest and largest independent marketers of pre-paid funerals in North America. Founded in 1979 we now market in 18 states and the Province of Ontario.

Thank you for allowing us to participate in this way.

Sincerely,



Alan Creedy
President
Trust 100

CounselTrust

COMPANY

January 5, 2006

Ernie Heffner, President
Pennsylvania Cemetery Funeral Association
c/o Heffner Funeral Homes
1551 Kenneth Road
York, PA 17404

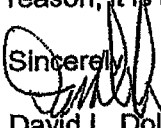
Re: Suggested Regulation – Pre-Need Arrangements

Dear Mr. Heffner:

Because of this company's recent fiduciary responsibilities relative to a significant number of pre-need accounts, I have researched litigation and other developments regarding pre-need accounts, arrangements and contracts. Recently, I have had an opportunity to review the draft regulation entitled, Pre-Need Activities by Employees and Agents of Licensed Funeral Directors that your association intends to submit to the State Board of Funeral Directors.

I have found the above-cited draft to be fair to both the funeral directors who will be providing the goods and services as well as the consumer who is making the arrangements. In the trust company's capacity as trustee of pre-need accounts, we maintain a fiduciary duty to the funeral director as well as to his customer whose funds are being held in trust as required by statute. In this regard, it is my opinion that the suggested regulation fairly represents the interests of each such entity and adequately addresses the recently debated and litigated role of non-licensed agents. For this reason, it is an honor to support this measure as written.

Sincerely,


David L. Dolan
President



January 3, 2006

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

Re: Suggested Regulation – Pre-Need Arrangements


Dear Ms. Smey:

Because of this company's fiduciary responsibilities relative to a significant number of pre-need accounts, I have closely followed litigation and other developments regarding pre-need accounts, arrangements and contracts. Recently, I have had an opportunity to review the draft regulation entitled, Pre-Need Activities by Employees and Agents of Licensed Funeral Directors that the Pennsylvania Cemetery Funeral Association intends to submit to your board.

I have found the above-cited draft to be fair to both the funeral directors who will be providing the goods and services as well as the consumer who is making the arrangements. It provides structure to the sales process and recognizes the role and the importance of agents who are not licensed funeral directors in dealing with the consumer. Most of all, the suggested regulation holds the licensed funeral director "professionally responsible for the actions of such employees or agents". It also requires disclosure to the prospective customer that the agent is not a licensed funeral director, but if the customer so desires, the licensed funeral director will be available to discuss the arrangements and proposed contract before it is signed by the customer.

In the trust company's capacity as trustee of pre-need accounts, we maintain a fiduciary duty to the funeral director as well as to his customer whose funds are being held in trust as required by statute. In this regard, it is my opinion that the suggested regulation fairly represents the interests of each such entity and adequately addresses the recently debated and litigated role of non-licensed agents. For this reason, I wholeheartedly support the suggested regulation and submit this letter as evidence thereof.

Sincerely,


Ronald W. Virag
President and CEO

RWV/dg



4 January 2006

Ernie Heffner
Pennsylvania Cemetery & Funeral Association
ernieheffner@hotmail.com
FAX 717-764-9919

RE: Pre-Need Regulation Draft of PCFA

Dear Mr Heffner,

Great Western Insurance Company endorses the proposed pre-need regulation as drafted by the PCFA. We authorize you to include us in the list of entities in support of this draft that you are submitting to the State Board of Funeral Directors.

We appreciate all of the efforts you and your staff, along with others from the funeral industry, have made to pull this draft together. It will be a major step forward in providing adequate disclosure to Pennsylvania consumers, while creating a fair and competitive market place.

Sincerely

Fred L Meese FLMI
CFO

3434 Washington Blvd.
Suite 100
Ogden, Utah 84401
800 621 5688
F 801 689 1391
gwic.com



NGL Insurance Group

Mathew J. Dew
Assistant Vice President & General Counsel
(608) 443-5219
FAX (608) 443-5191
mjdew@nglic.com

January 4, 2006

Michelle T. Smey, Board Administrator
State Board of Funeral Directors
PO Box 2649
Harrisburg, PA 17105-2649

Re: Proposed Draft Regulations Submitted by the Pennsylvania Cemetery & Funeral Association Concerning Preneed Activities by Employees & Agents of Licensed Funeral Directors.

Dear Ms. Smey:

National Guardian Life Insurance Company submitted written comments and registered to provide testimony at the hearing on the Board's *Exposure Draft Pre-Need Activities by Unlicensed Employees* held in Harrisburg on December 12, 2005. Unfortunately, a delayed flight kept me from arriving in time to testify.

Recently I had the opportunity to review the *Draft - Preneed Activities by Employees & Agents of Licensed Funeral Directors* prepared by the Pennsylvania Cemetery & Funeral Association. I believe this proposal merits adoption by the Board. This letter confirms that the proposed language of the draft has the full support of National Guardian Life Insurance Company.

Thank you for your consideration.

Sincerely,

Mathew J. Dew



**THE ROOSEVELT
INVESTMENT GROUP**

January 2, 2006

Ernie Heffner, President
Pennsylvania Cemetery Funeral Association
100 South 21st Street,
Harrisburg, PA 17104
Via email to ernieheffner@hotmail.com

Dear Mr. Heffner:

This letter is in reference to the draft regulation titled, "*Draft – Pre-need Activities by Employees & Agents of Licensed Funeral Directors*" as prepared by the Pennsylvania Cemetery Funeral Association.


I wanted you to know that I support the regulation as drafted by PCFA.

Sincerely,

Adam Sheer
President

Scott Sides from Smith Barney

Sides, Scott A [PVTC]
<scott.a.sides@smithbarney.com>
>

 Inbox

Sent : Thursday, January 5, 2006 11:43 AM
To : "Ernie Heffner" <ernieheffner@hotmail.com>
Subject : Pre-Need in PA

📎 Attachment 0_ssb_logo1.gif (< 0.01 MB)

Good morning Ernie and members of the Board of Directors for PCFA,

I have actively worked as a financial adviser to funeral homes and cemeteries in the death care industry since 1991. Having reviewed the *Draft - Preneed Activities by Employees & Agents of Licensed Funeral Directors*, as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), I am very pleased to provide you with this email confirming my full support for the proposed language as presented.

If I can be of any other assistance to the you or the Board regarding this matter, please feel free to give me a call.

Sincerely,

Scott A Sides

**Senior Vice President-Wealth Management
Corporate Client Group Director
Smith Barney
204 N. George St., Suite 300
York, PA 17401
717-854-5553 or 800-343-5235**


SMITHBARNEY



*Bean Funeral Homes &
Cremation Services, Inc.*

North 16th & Rockland Sts.
Lampden Heights
Reading, PA 19604

Robert E. Bean, Supv.
(610) 376-0985

29 East Lancaster Avenue
Phillington, PA 19607

Kevin M. Bean, Supv.
(610) 376-1120

*Bean Funeral Homes &
Crematory, Inc.*

1825 Penn Avenue
Sinking Spring, PA 19608

Terrence J. Shannon, Supv.
(610) 376-1129

5 Fairlane Road
Exeter Township
Reading, PA 19606

Joseph G. McCullough, Supv.
(610) 779-2800

www.beanfuneralhomes.com

Wednesday January 3, 2006

Pennsylvania Cemetery Funeral Association
Board of Directors
C/O Mr. Ernest F. Heffner, President
1551 Kenneth Road
York, PA 17404

RE: Proposed Pre Need Regulations

Dear Mr. Heffner;

Kindly accept this correspondence as my formal indication of support and endorsement for the PCFA proposed Draft Regulation pursuant to pre need activities by "unlicensed" individuals employed by licensed funeral directors in the Commonwealth of Pennsylvania.

Sincerely,

Kevin M. Bean
President
Bean Funeral Homes & Crematory, Inc.



Jan B. Jefferson
Supervisor

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

January 3, 2006

Pennsylvania Cemetery Funeral Association
100 South 21st Street
Harrisburg, Pa. 17104

To Whom It May Concern:

I was in attendance at the December 12th, 2005 hearing in Harrisburg regarding the State Board of Funeral Directors "Exposure Draft Pre-Need Activities by Unlicensed Employees." Though I did not testify I was definitely opposed to regulations the board had proposed. I was pleased to see that the Chair extended an invitation to submit comments and alternatives by Jim Kutz.

I have reviewed the "Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors proposed by the Pennsylvania Cemetery Funeral Association (PCFA). I believe that the draft regulations presented by PCFA protect the interest of Pennsylvania consumers. They are also in keeping with the spirit of the Walker v. Flitton Federal Court ruling.

Please accept this letter as confirmation of my complete and full support for the proposed Regulations presented by PCFA.

Sincerely,



Harry C. Neel
President



January 4, 2006

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

Re: Suggested Draft Regulations Concerning the Activities of Employees
and Agents of Licensed Funeral Directors Involved in Preneed Arrangements

Dear Ms. Smey:

On behalf of the International Cemetery and Funeral Association ("ICFA"), we are pleased to endorse the above-referenced "Suggested Draft Regulations" that are in the process of being submitted to the Board by the Pennsylvania Cemetery & Funeral Association. We have been given the opportunity to review the draft regulations and we believe they represent a responsible, ethical method of disseminating important information to the public in order to facilitate the prearrangement of funerals. In particular, the fact that the draft regulations seek to hold the licensed funeral director responsible for the conduct of his or her employees and agents is an important safeguard in consumer protection. The draft regulations also provide that consumers will continue to have the opportunity to consult with licensed funeral directors if they wish. In sum, the draft regulations represent a responsible framework to expand the methods by which accurate and truthful information is conveyed to funeral consumers.

The ICFA was founded in 1887 and currently represents over 7,000 members primarily in the United States, but also in twenty-four foreign countries. The Association represents funeral homes, cemeteries, crematories, monument retailers, and related businesses such as accountants, attorneys, architects and engineers. Please contact me if you have any questions or wish additional information. Thank you,

Very truly yours,

A handwritten signature in black ink that reads "Robert M. Fells". The signature is written in a cursive style and is enclosed within a simple, hand-drawn rectangular box.

Robert M. Fells
External Chief Operating Officer
and General Counsel

STONEMOR

STONEMOR PARTNERS L.P.

January 3, 2006

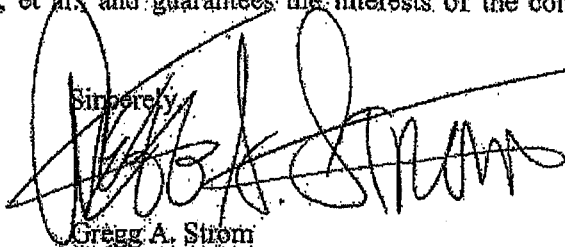
Board of Directors
Pennsylvania Cemetery Funeral Association
100 S. 21st Street
Harrisburg, PA 17104

Re: Suggested Draft Regulations Concerning the Activities of Employees and Agents
of Licensed Funeral Directors Involved in Pre-need Arrangements

Dear Directors:

It is my pleasure to submit this letter of endorsement after having reviewed the *Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors*. This draft, as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), deserves due consideration and has the total support of StoneMor Partners L.P., owners and operators of 50 cemeteries and 7 funeral homes in the Commonwealth. This draft by the PCFA follows the intent of the Federal Court ruling in the Walker, et al. v. Flitton, et al. and guarantees the interests of the consumer in Pennsylvania.

Sincerely,



Gregg A. Strom
Sr. Vice President - Business Development

GAS/epk



January 3, 2006

Ernie Heffner, President
Pennsylvania Cemetery and Funeral Association
c/o Heffner Funeral Homes & Crematory
1551 Kenneth Road
York, PA 17404

Dear Mr. Heffner:

Thank you for the opportunity to comment on PCFA's Proposed Preneed Regulations. As a thirteen-year-old independent preneed agency serving more than 5700 customers in 2005 through our affiliated agents and funeral homes in Pennsylvania, I feel well qualified to speak on the matter. From that vantage point, I would like to place my full support behind the proposed regulations. While not infringing upon the rights of those who embrace the dissemination of true and accurate information, this draft simply and concisely offers protection to the consumer and holds the Funeral Director responsible for the actions of their agents.

Good luck with the proposal, if I can be of any assistance please do not hesitate to call.

Sincerely,

Robert S. Rae
President
Golden Considerations, Inc.

Golden Considerations

Phone 888-574-7020

615 Green Valley Road • York, PA 17403

Fax 717-741-4540



HEFFNER

Funeral Chapels & Crematory

PHONE 717-767-1551
Fax 717-764-9919
Toll Free 888-767-1551
G. Frederick Koller, Supervisor
Ernie Heffner, President
John Katora, Vice-President
Scott Mahkovec, CPA, Controller

PENNSYLVANIA AFFILIATES

RED LION
Olawiler & Hoffman

YORK
Evanhart-Jackson-Heffner

LEWISBERRY
Beaver Ulrich

POTTSVILLE
Schlitzel-Allen-Pugh

MANSFIELD
Scureman

TROY
Vickery

LOCK HAVEN
Heix Chapel

RENÔVO
Maxwell

WILLIAMSPORT
Allen & Redmond

WILKES-BARRE
Kniffen O'Malley

AVOCA
Kniffen O'Malley

MILTON
Ranck

ADVANCE PLANNING
Preneed Associates, Inc.

NEW YORK STATE AFFILIATE

WELLSBURG
Roberts

January 3rd, 2006

Board of Directors
Pennsylvania Cemetery Funeral Association
100 South 21st Street,
Harrisburg, PA 17104

To Whom It May Concern:

I was one of the eleven registered participants who provided testimony at the December 12th, 2005 hearing in Harrisburg conducted by the State Board of Funeral Directors regarding the Funeral Board's "Exposure Draft Pre-Need Activities by Unlicensed Employees."

Having reviewed the *Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors* as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), I am pleased to provide this letter confirming my full support for the proposed language as presented.

It is my opinion that the draft presented by the Pennsylvania Cemetery Funeral Association is in keeping with the spirit of the Federal Court ruling in *Walker v. Flittan* while protecting the interests of consumers in the Commonwealth.

Sincerely,

Ernie Heffner

1551 Kenneth Rd., York, PA 17404



ASSURANT
Preneed

PO Box 2730
Rapid City, SD 57709-2730
T 800.352.5173

www.assurant.com

January 5, 2006

Ernie Heffner
President
Pennsylvania Cemetery Funeral Association
c/o Heffner Funeral Homes
1551 Kenneth Road
York, PA 17404

Re: Draft Regulations concerning the Activities of Employees
and Agents of Licensed Funeral Directors involved in
Preneed Arrangements Suggested by the Pennsylvania
Cemetery Funeral Association (PCFA) ("Draft Regulation")

Dear Mr. Heffner:

This letter is in reference to the PCFA "Draft Preneed Activities by Employees and Agents of Licensed Funeral Directors" under Annex A, Title 39, Professional and Occupational Affairs, Chapter 13; State board of Funeral Directors – General Provisions.

We have been given the opportunity to review the draft regulations and we believe they represent a responsible and fair method of disseminating needed information to the Pennsylvania consumers in order to help them prearrange their funerals.

We appreciate all of the efforts you and your staff, along with others from the death care, trust and insurance industries, have made to prepare this comprehensive draft.

This letter is sent on behalf of Assurant Preneed. Assurant Preneed is a major preneed insurance and annuity underwriter in the U.S. and Canada. Assurant Preneed includes American Memorial Life Insurance Company (a South Dakota domestic), the preneed operations of Union Security Insurance Company (an Iowa domestic), and United Family Life Insurance Company (a Georgia domestic).

Page 2

This letter confirms that the proposed draft regulation has the full support of Assurant Preneed.

Thank you for allowing us the opportunity to comment.

Very truly yours,

Matthew F. McGuire
Chief Legal Officer
Assurant Preneed
Tel: 605-719-0100
Toll Free: 800-352-9281
Fax: 605-719-0853
Email: matt.mcguire@assurant.com

MFM/cj

NALC
NATIONAL ALLIANCE OF LIFE COMPANIES
An association of Life and Health Insurance Companies
P.O. BOX 607906, Chicago, IL 60660 -- 7229 N. Bell, Unit 2, Chicago, IL 60645
Telephone (773) 274-9050 -- Fax (773) 274-9063

January 5, 2006

Board of Directors
Pennsylvania Cemetery Funeral Association
100 South 21st Street
Harrisburg PA 17104

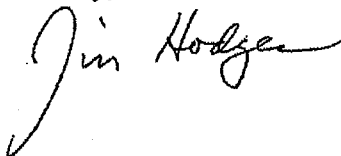
To Whom It May Concern:

I was one of the registered participants who provided testimony at the December 12, 2005, hearing in Harrisburg conducted by the State Board of Funeral Directors regarding the Funeral Board's "Exposure Draft Pre-Need Activities by Unlicensed Employees."

Having reviewed the *Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors* as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), I am pleased to provide this letter confirming my full support for the proposed language as presented.

It is my opinion that the draft presented by the Pennsylvania Cemetery Funeral Association is in keeping with the spirit of the Federal Court ruling in *Walker v. Flitton* while protecting the interests of consumers in the Commonwealth.

Sincerely,



James H. Hodges

EXHIBIT "D"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF STATE

BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

V E R B A T I M T R A N S C R I P T

STATE BOARD OF FUNERAL DIRECTORS
REGULATIONS COMMITTEE MEETING

TIME: 10:09 A.M.

BOARD ROOM B

ONE PENN CENTER
2601 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA

MARCH 21, 2006

Diaz Data Services
331 Schuylkill Street
Harrisburg, PA 17110

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

State Board of Funeral Directors

Regulations Committee Meeting

March 21, 2006

Committee Members:

- Michael J. Yeosock, Chair
- Jodi Zucco, Esquire
- Donald J. Murphy
- Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs

Bureau Personnel:

- Frank J. Bolock, Jr., Esquire, Board Counsel
- Michelle T. Smey, Board Administrator

Also Present:

- Kathleen Ryan, Esquire, Pennsylvania Funeral Directors Association
- Charles Bowen, PFDA
- James J. Kutz, Esquire, Pennsylvania Cemetery and Funeral Association (PCFA)
- John W. Erikson, Director, Pennsylvania Funeral Directors Association
- John Katora, PCFA
- Bob Stewart, PCFA
- Chris Williams
- Tim Kernan, PCFA
- Harry Neel, PCFA
- Deborah Lee, Pennsylvania Insurance Department
- Thomas G., Kukuchka, PFDA

Diaz Data Services
331 Schuylkill Street
Harrisburg, PA 17110

1 MS. RYAN:

2 Well, and...

3 MR. MURPHY:

4 Say, "Jones was wrong." Let's start another
5 suit against us.

6 COMMISSIONER MERENDA:

7 Right.

8 MS. RYAN:

9 Well, you know I wasn't there but I wonder
10 how much the Judge really understood.

11 MR. MURPHY:

12 I don't think the Judge really understood.

13 I don't think the Judge had the full case of
14 how funeral directing operates. I don't
15 think he had it. It was an unfortunate fact
16 the way this was given to the Judge to
17 decide. It was lucky for Jim. It was
18 unlucky for us.

19 COMMISSIONER MERENDA:

20 Of course Mr. Kutz would say that it was
21 excellent lawyer...

22 MR. MURPHY:

23 Well, there's a strong element of that too

Diaz Data Services
331 Schuylkill Street
Harrisburg, PA 17110

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF STATE

BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

V E R B A T I M M I N U T E S

MEETING OF:

STATE BOARD OF FUNERAL DIRECTORS

TIME: 9:30 A.M.

BOARD ROOM D
ONE PENN CENTER
2600 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA

AUGUST 3, 2005

1 State Board of Funeral Directors

2 August 3, 2005

3 Board Members:

- 4 Janice H. Mannal, Professional Member, Chairperson -
- 5 Absent
- 6 Michael D. Morrison, Professional Member, Vice-
- 7 Chairman
- 8 Donald J. Murphy, Public Member, Secretary
- 9 Joseph A. Fluehr, III, Professional Member - Absent
- 10 James O. Pinkerton, Professional Member
- 11 Anthony Scarantino, Public Member
- 12 Michael J. Yeosock, Professional Member
- 13 Jodi L. Zucco, Esquire
- 14 Bureau of Consumer Protection
- 15 Basil L. Merenda, Commissioner
- 16 Bureau of Professional and Occupational Affairs

17
18 Bureau Personnel:

- 19
- 20 Thomas A. Blackburn, Esquire, Board Counsel
- 21 Michelle Smey, Board Administrator
- 22

23 Also Present:

- 24
- 25 Alison Flowers, Klett Rooney
- 26

1 anyway? Would that impede the, the funeral
2 business, the licensee's business? Why
3 don't we just require, as the Law currently
4 seems to indicate, that you have to engage
5 in this discussion and this agreement
6 through a consultation with a licensed
7 funeral director?

8 JAMES O. PINKERTON:

9 There's a Federal Court case that says that..

10 JODI L. ZUCCO:

11 Well what is the impact on that? We also
12 have our Statute and our current regs. Who
13 cares what the Judge said? He said "not
14 engaging in funeral direction."

15 JAMES O. PINKERTON:

16 But he's saying we can't restrict people
17 from going out there and delivering
18 information.

19 MICHAEL MORRISON:

20 But is information a contract?

21 JODI L. ZUCCO:

22 Well, isn't it funeral directing which the
23 Order says, as opposed to the Opinion, isn't

1 But it's got to be consistent with our prior
2 decisions. Who cares what the Judge wants?
3 It has to be consistent with our prior
4 decisions. It has to be consistent with
5 Ferguson...

6 MICHAEL MORRISON:

7 Support Ferguson with what we do because
8 that's still (inaudible). This to me just
9 supports Ferguson is what it's doing. It's
10 saying they can get out information, but
11 they can't do the contract.

12 DONALD J. MURPHY:

13 Right, exactly. But we need to say that, we
14 need to get out in print.

15 JODI L. ZUCCO:

16 Well.

17 DONALD J. MURPHY:

18 Let me ask another question. Counselor, are
19 we in contempt if we go too far?

20 JODI L. ZUCCO:

21 I wondered about that.

22 THOMAS BLACKBURN:

23 I'm not.

EXHIBIT "E"

DRAFT

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

DRAFT

16A-4816 Annex
Preneed activities of unlicensed employee - Proposed

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]

DRAFT

16A-4816 Annex
Preneed activities of unlicensed employee - Proposed

MUST TAKE PLACE IN A FACE-TO-FACE MEETING WITH A
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.

EXHIBIT "F"



17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Fax
www.postschell.com

James J. Kutz

jkutz@postschell.com
717-612-6038 Direct
717-731-1985 Fax

August 8, 2006

Andrew Sislo, Chief of Staff
Department of State, Office of the Secretary of
the Commonwealth
302 North Office Building
Harrisburg, PA 17102

Albert H. Masland, Chief Counsel
Department of State, Office of Chief Counsel
301 North Office Building
Harrisburg, PA 17102

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

ALLENTOWN HARRISBURG LANCASTER PHILADELPHIA PITTSBURGH PRINCETON WASHINGTON, D.C.

A PENNSYLVANIA PROFESSIONAL CORPORATION

376105

Andrew Sislo, Chief of Staff
Albert H. Masland, Chief Counsel
Mary S. Wyatte, Chief Counsel
August 8, 2006
Page 2

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.

Andrew Sislo, Chief of Staff
Albert H. Masland, Chief Counsel
Mary S. Wyatte, Chief Counsel
August 8, 2006
Page 3

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

Andrew Sislo, Chief of Staff
Albert H. Masland, Chief Counsel
Mary S. Wyatte, Chief Counsel
August 8, 2006
Page 4

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.

Andrew Sislo, Chief of Staff
Albert H. Masland, Chief Counsel
Mary S. Wyatte, Chief Counsel
August 8, 2006
Page 5

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

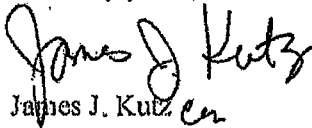
Andrew Sislo, Chief of Staff
Albert H. Masland, Chief Counsel
Mary S. Wyatte, Chief Counsel
August 8, 2006
Page 6

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 *en*

JJK/cln

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

Exhibit A

DRAFT

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 of 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

16A-4816

Prereed activities of unlicensed employee – proposed

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 (Prereed activities of unlicensed employees), when submitting comments.

Anthony Scarantino
Chairperson

DRAFT

16A-4816 Annex
Preneed activities of unlicensed employee - Proposed

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

July 10, 2006

DRAFT

16A-4816 Annex
Preneed activities of unlicensed employee - Proposed

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

DRAFT

16A-4816 Annex
Preneed activities of unlicensed employee - Proposed

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.

EXPOSURE DRAFT
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

July 14, 2006

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.

EXPOSURE DRAFT

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: 717-612-8038
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

Michelle T. Smey
December 5, 2005
Page 2

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.

Michelle T. Smey
December 5, 2005
Page 3

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 alone 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

Michelle T. Smey
December 5, 2005
Page 5

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

Michelle T. Smey
December 5, 2005
Page 6

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.

Michelle T. Smey
December 5, 2005
Page 7

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
JK:dlh

Exhibit C



FILE

Hand by
Michelle Smey
Administrator
State Board of Funeral Directors
James J. Kutz
Direct Dial: 717-612-8038
Fax Number: 717-731-1885
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.

Michelle T. Smey

January 9, 2006

Page 2

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

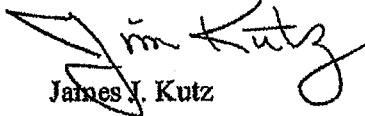
Michelle T. Smey
January 9, 2006
Page 3

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.

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

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

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

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.



VANGUARD AMERICA CO.

January 2, 2006

Ernie Heffner, President
Pennsylvania Cemetery Funeral Association
c/o Heffner Funeral Homes
1551 Kenneth Rd.
York, PA 17404

Dear Mr. Heffner:

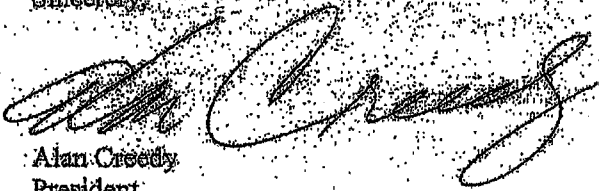
This letter is in reference to the "Draft - Pre-paid Activities by Employees & Agents of Licensed Funeral Directors" under Annex A, Title 39, Professional and Vocational standards Part I, Department of State Subpart A, Professional and Occupational Affairs; Chapter 13, State Board of Funeral Directors - General Provisions.

I have reviewed the draft you supplied as of this date and believe it to be in the best interests of the consumer and the profession. It is an honor to support this measure as written.

Trust 100 is one of the oldest and largest independent marketers of pre-paid funerals in North America. Founded in 1979 we now market in 18 states and the Province of Ontario.

Thank you for allowing us to participate in this way.

Sincerely,



Alan Creed
President
Trust 100

CounselTrust

COMPANY

January 5, 2006

Ernie Heffner, President
Pennsylvania Cemetery Funeral Association
c/o Heffner Funeral Homes
1551 Kenneth Road
York, PA 17404

Re: Suggested Regulation – Pre-Need Arrangements

Dear Mr. Heffner:

Because of this company's recent fiduciary responsibilities relative to a significant number of pre-need accounts, I have researched litigation and other developments regarding pre-need accounts, arrangements and contracts. Recently, I have had an opportunity to review the draft regulation entitled, Pre-Need Activities by Employees and Agents of Licensed Funeral Directors that your association intends to submit to the State Board of Funeral Directors.

I have found the above-cited draft to be fair to both the funeral directors who will be providing the goods and services as well as the consumer who is making the arrangements. In the trust company's capacity as trustee of pre-need accounts, we maintain a fiduciary duty to the funeral director as well as to his customer whose funds are being held in trust as required by statute. In this regard, it is my opinion that the suggested regulation fairly represents the interests of each such entity and adequately addresses the recently debated and litigated role of non-licensed agents. For this reason, it is an honor to support this measure as written.

Sincerely,


David L. Dolan
President

235 St. Charles Way, Suite 100 • York, PA 17402 • 717.718.1601 • 717.718.1602 Fax
601 Carlisle Road • Hanover, PA 17331 • 717.637.9661 • 717.637.9843 Fax
866.725.6681 Toll Free • www.counseltrust.com



January 3, 2006

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

Re: Suggested Regulation -- Pre-Need Arrangements


Dear Ms. Smey:

Because of this company's fiduciary responsibilities relative to a significant number of pre-need accounts, I have closely followed litigation and other developments regarding pre-need accounts, arrangements and contracts. Recently, I have had an opportunity to review the draft regulation entitled, Pre-Need Activities by Employees and Agents of Licensed Funeral Directors that the Pennsylvania Cemetery Funeral Association intends to submit to your board.

I have found the above-cited draft to be fair to both the funeral directors who will be providing the goods and services as well as the consumer who is making the arrangements. It provides structure to the sales process and recognizes the role and the importance of agents who are not licensed funeral directors in dealing with the consumer. Most of all, the suggested regulation holds the licensed funeral director professionally responsible for the actions of such employees or agents. It also requires disclosure to the prospective customer that the agent is not a licensed funeral director, but if the customer so desires, the licensed funeral director will be available to discuss the arrangements and proposed contract before it is signed by the customer.

In the trust company's capacity as trustee of pre-need accounts, we maintain a fiduciary duty to the funeral director as well as to his customer whose funds are being held in trust as required by statute. In this regard, it is my opinion that the suggested regulation fairly represents the interests of each such entity and adequately addresses the recently debated and litigated role of non-licensed agents. For this reason, I wholeheartedly support the suggested regulation and submit this letter as evidence thereof.

Sincerely,



Ronald W. Vrag
President and CEO

RWV/dg



4 January 2006

Ernie Heffner
Pennsylvania Cemetery & Funeral Association
ernieheffner@hotmail.com
FAX 717-764-9919

RE: Pro-Need Regulation Draft of PCFA

Dear Mr Heffner,

Great Western Insurance Company endorses the proposed pre-need regulation as drafted by the PCFA. We authorize you to include us in the list of entities in support of this draft that you are submitting to the State Board of Funeral Directors.

We appreciate all of the efforts you and your staff, along with others from the funeral industry, have made to pull this draft together. It will be a major step forward in providing adequate disclosure to Pennsylvania consumers, while creating a fair and competitive market place.

Sincerely

A handwritten signature in black ink, appearing to read "Fred L. Meese", is written over a faint, illegible printed name.

Fred L. Meese FLMI
CFO

3434 Washington Blvd.
Suite 100
Ogden, Utah 84401
800 621 5688
F 801 889 1391
gwic.com



NGL Insurance Group

Mathew J. Dew
Assistant Vice President & General Counsel
(608) 443-5219
FAX (608) 443-5191
mjdew@nglic.com

January 4, 2006

Michelle T. Smey, Board Administrator
State Board of Funeral Directors
PO Box 2649
Harrisburg, PA 17105-2649

Re: Proposed Draft Regulations Submitted by the Pennsylvania Cemetery & Funeral Association Concerning Preneed Activities by Employees & Agents of Licensed Funeral Directors.

Dear Ms. Smey:

National Guardian Life Insurance Company submitted written comments and registered to provide testimony at the hearing on the Board's *Exposure Draft Pre-Need Activities by Unlicensed Employees* held in Harrisburg on December 12, 2005. Unfortunately, a delayed flight kept me from arriving in time to testify.

Recently I had the opportunity to review the *Draft - Preneed Activities by Employees & Agents of Licensed Funeral Directors* prepared by the Pennsylvania Cemetery & Funeral Association. I believe this proposal merits adoption by the Board. This letter confirms that the proposed language of the draft has the full support of National Guardian Life Insurance Company.

Thank you for your consideration.

Sincerely,

Mathew J. Dew



**THE ROOSEVELT
INVESTMENT GROUP**

January 2, 2006

Ernie Heffner, President
Pennsylvania Cemetery Funeral Association
100 South 21st Street,
Harrisburg, PA 17104
Via email to ernieheffner@hotmail.com

Dear Mr. Heffner:

This letter is in reference to the draft regulation titled, "*Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors*" as prepared by the Pennsylvania Cemetery Funeral Association.


I wanted you to know that I support the regulation as drafted by PCFA.

Sincerely,


Adam Sheer
President

Scott Sides from Smith Barney

Sides, Scott A [PVT]
<scott.a.sides@smithbarney.com>
>

◆ | ◆ | X |  Inbox

Sent : Thursday, January 5, 2006 11:43 AM
To : "Ernie Heffner" <ernieheffner@hotmail.com>
Subject : Pre-Need in PA

@ Attachment 0_ssb_logo1.gif (< 0.01 MB)

Good morning Ernie and members of the Board of Directors for PCFA,

I have actively worked as a financial adviser to funeral homes and cemeteries in the death care industry since 1991. Having reviewed the *Draft - Preneed Activities by Employees & Agents of Licensed Funeral Directors*, as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), I am very pleased to provide you with this email confirming my full support for the proposed language as presented.

If I can be of any other assistance to the you or the Board regarding this matter, please feel free to give me a call.

Sincerely,

Scott A Sides

**Senior Vice President-Wealth Management
Corporate Client Group Director
Smith Barney
204 N. George St., Suite 300
York, PA 17401
717-854-5553 or 800-343-5235**


SMITHBARNEY



*Bean Funeral Homes &
Cremation Services, Inc.*

North 16th & Rockland Sts.
Hampden Heights
Reading, PA 19604

Robert E. Bean, Supv.
(610) 376-0985

129 East Lancaster Avenue
Shillington, PA 19607

Kevin M. Bean, Supv.
(610) 376-1120

*Bean Funeral Homes &
Crematory, Inc.*

3825 Penn Avenue
Staking Spring, PA 19608

Terrence J. Shannon, Supv.
(610) 376-1129

6 Fairlane Road
Exeter Township
Reading, PA 19606

Joseph G. McCullough, Supv.
(610) 779-2800

www.beanfuneralhomes.com

Wednesday January 3, 2006

Pennsylvania Cemetery Funeral Association
Board of Directors
C/O Mr. Ernest F. Heffner, President
1551 Kenneth Road
York, PA 17404

RE: Proposed Pre Need Regulations

Dear Mr. Heffner;

Kindly accept this correspondence as my formal indication of support and endorsement for the PCFA proposed Draft Regulation pursuant to pre need activities by "unlicensed" individuals employed by licensed funeral directors in the Commonwealth of Pennsylvania.

Sincerely,

Kevin M. Bean
President
Bean Funeral Homes & Crematory, Inc.



Jan B. Jefferson
Supervisor

301 Curry Hollow Road • Pittsburgh, Pennsylvania 15236 • 412/855-4501

January 3, 2006

Pennsylvania Cemetery Funeral Association
100 South 21st Street
Harrisburg, Pa. 17104

To Whom It May Concern:

I was in attendance at the December 12th, 2005 hearing in Harrisburg regarding the State Board of Funeral Directors Exposure Draft Pre-Need Activities by Unlicensed Employees. Though I did not initially support the regulations the board had proposed, I was pleased to see that the Chair extended an invitation to submit comments and alternatives by Jim Kutz.

I have reviewed the Draft -- Pre-need Activities by Employees & Agents of Licensed Funeral Directors proposed by the Pennsylvania Cemetery Funeral Association (PCFA). I believe that the draft regulations presented by PCFA protect the interest of Pennsylvania consumers. They are also in keeping with the spirit of the Walker v. Flitton Federal Court ruling.

Please accept this letter as confirmation of my complete and full support for the proposed Regulations presented by PCFA.

Sincerely,

 Harry J. Noel
 President



January 4, 2006

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

Re: Suggested Draft Regulations Concerning the Activities of Employees
and Agents of Licensed Funeral Directors Involved in Preneed Arrangements

Dear Ms. Smey:

On behalf of the International Cemetery and Funeral Association ("ICFA"), we are pleased to endorse the above-referenced "Suggested Draft Regulations" that are in the process of being submitted to the Board by the Pennsylvania Cemetery & Funeral Association. We have been given the opportunity to review the draft regulations and we believe they represent a responsible, ethical method of disseminating important information to the public in order to facilitate the prearrangement of funerals. In particular, the fact that the draft regulations seek to hold the licensed funeral director responsible for the conduct of his or her employees and agents is an important safeguard in consumer protection. The draft regulations also provide that consumers will continue to have the opportunity to consult with licensed funeral directors if they wish. In sum, the draft regulations represent a responsible framework to expand the methods by which accurate and truthful information is conveyed to funeral consumers.

The ICFA was founded in 1887 and currently represents over 7,000 members primarily in the United States, but also in twenty-four foreign countries. The Association represents funeral homes, cemeteries, crematories, monument retailers, and related businesses such as accountants, attorneys, architects and engineers. Please contact me if you have any questions or wish additional information. Thank you,

Very truly yours,

A handwritten signature in black ink, appearing to read "R. M. Fells", is written over a horizontal line. The signature is enclosed within a vertical rectangular box.

Robert M. Fells
External Chief Operating Officer
and General Counsel

STONEMOR

STONEMOR PARTNERS L.P.

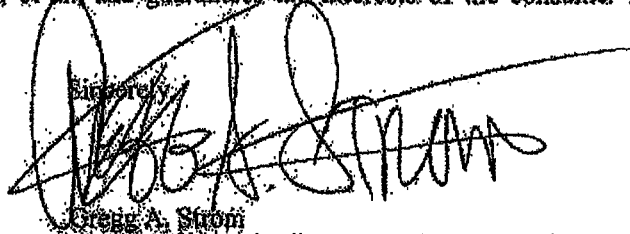
January 3, 2006

Board of Directors
Pennsylvania Cemetery Funeral Association
100 S. 21st Street
Harrisburg, PA 17104

Re: Suggested Draft Regulations Concerning the Activities of Employees and Agents
of Licensed Funeral Directors Involved in Pre-need Arrangements.

Dear Directors:

It is my pleasure to submit this letter of endorsement after having reviewed the *Draft -- Pre-need Activities by Employees & Agents of Licensed Funeral Directors*. This draft, as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), deserves due consideration and has the total support of Stonemor Partners L.P., owners and operators of 30 cemeteries and 7 funeral homes in the Commonwealth. This draft by the PCFA follows the intent of the Federal Court ruling in the *Walker, et al. v. Filton, et al.* and guarantees the interests of the consumer in Pennsylvania.



Greg A. Strom
Sr. Vice President - Business Development

GAS/epk



January 3, 2006

Ernie Heffner, President
Pennsylvania Cemetery and Funeral Association
c/o Heffner Funeral Homes & Crematory
1551 Kenneth Road
York, PA 17404

Dear Mr. Heffner:

Thank you for the opportunity to comment on PCFA's Proposed Preneed Regulations. As a thirteen-year-old independent preneed agency serving more than 3700 customers in 2005 through our affiliated agents and funeral homes in Pennsylvania, I feel well qualified to speak on the matter. From that vantage point, I would like to place my full support behind the proposed regulations. While not infringing upon the rights of those who embrace the dissemination of true and accurate information, this draft simply and concisely offers protection to the consumer and holds the Funeral Director responsible for the actions of their agents.

Good luck with the proposal, if I can be of any assistance please do not hesitate to call.

Sincerely,

Robert S. Rae
President
Golden Considerations, Inc.

Golden Considerations

Phone 888-574-7020

615 Green Valley Road • York, PA 17403

Fax 717-741-4540



HEFFNER

Funeral Chapels & Crematory

PHONE 717-767-1551
Fax 717-764-9919
Toll Free 888-767-1551
C. Frederick Koller, Supervisor
Ernie Heffner, President
John Kaura, Vice-President
Scott Minkmetz, CPA, Controller

PENNSYLVANIA AFFILIATES

RED LION
Olewiak & Heffner

YORK
Everhart-Jackson-Heffner

LEWISBERG
Bauer Ulrich

POTTSVILLE
Schultz-Alten-Pugh

MANSFIELD
Souraman

TROY
Vickery

LOCK HAVEN
Heik Chapel

RENOMO
Micknell

WILLIAMSPORT
Allen & Redmond

WILKES BARRE
Kulfran O'Malley

AVOCA
Whitton O'Malley

MILTON
Ranck

ADVANCE PLANNING
Pruned Associates, Inc.

NEW YORK STATE AFFILIATE

WELLBURG
Raberta

January 3rd, 2006

Board of Directors
Pennsylvania Cemetery Funeral Association
100 South 21st Street,
Harrisburg, PA 17104

To Whom It May Concern:

I was one of the eleven registered participants who provided testimony at the December 12th, 2005 hearing in Harrisburg conducted by the State Board of Funeral Directors regarding the Funeral Board's "Exposure Draft Pre-Need Activities by Unlicensed Employees."

Having reviewed the *Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors* as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), I am pleased to provide this letter confirming my full support for the proposed language as presented.

It is my opinion that the draft presented by the Pennsylvania Cemetery Funeral Association is in keeping with the spirit of the Federal Court ruling in *Walker v. Fillet* while protecting the interests of consumers in the Commonwealth.

Sincerely,

Ernie Heffner

1551 Kenneth Rd., York, PA 17404



ASSURANT
Preneed

PO Box 2730
Rapid City, SD 57709-2730
T 800.352.5173

www.assurant.com

January 5, 2006

Ernie Heffner
President
Pennsylvania Cemetery Funeral Association
c/o Heffner Funeral Homes
1551 Kenneth Road
York, PA 17404

Re: Draft Regulations concerning the Activities of Employees
and Agents of Licensed Funeral Directors involved in
Preneed Arrangements Suggested by the Pennsylvania
Cemetery Funeral Association (PCFA) ("Draft Regulation")

Dear Mr. Heffner:

This letter is in reference to the PCFA "Draft Preneed Activities by Employees and Agents of Licensed Funeral Directors" under Annex A, Title 39, Professional and Occupational Affairs, Chapter 13; State board of Funeral Directors – General Provisions.

We have been given the opportunity to review the draft regulations and we believe they represent a responsible and fair method of disseminating needed information to the Pennsylvania consumers in order to help them prearrange their funerals.

We appreciate all of the efforts you and your staff, along with others from the death care, trust and insurance industries, have made to prepare this comprehensive draft.

This letter is sent on behalf of Assurant Preneed. Assurant Preneed is a major preneed insurance and annuity underwriter in the U.S. and Canada. Assurant Preneed includes American Memorial Life Insurance Company (a South Dakota domestic), the preneed operations of Union Security Insurance Company (an Iowa domestic), and United Family Life Insurance Company (a Georgia domestic).

Page 2

This letter confirms that the proposed draft regulation has the full support of Assurant Preneed.

Thank you for allowing us the opportunity to comment.

Very truly yours,

Matthew F. McGuire
Chief Legal Officer
Assurant Preneed
Tel: 605-719-0100
Toll Free: 800-352-9281
Fax: 605-719-0853
Email: matt.mcguire@assurant.com

MFM/cj

NALC
NATIONAL ALLIANCE OF LIFE COMPANIES
An association of Life and Health Insurance Companies
P.O. BOX 607906, Chicago, IL 60660 -- 7229 N. Bell, Unit 2, Chicago, IL 60645
Telephone (773) 274-9050 -- Fax (773) 274-9063

January 5, 2006

Board of Directors
Pennsylvania Cemetery Funeral Association
100 South 21st Street
Harrisburg PA 17104

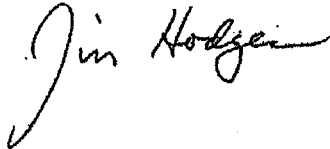
To Whom It May Concern:

I was one of the registered participants who provided testimony at the December 12, 2005, hearing in Harrisburg conducted by the State Board of Funeral Directors regarding the Funeral Board's "Exposure Draft Pre-Need Activities by Unlicensed Employees."

Having reviewed the *Draft - Pre-need Activities by Employees & Agents of Licensed Funeral Directors* as proposed by the Pennsylvania Cemetery Funeral Association (PCFA), I am pleased to provide this letter confirming my full support for the proposed language as presented.

It is my opinion that the draft presented by the Pennsylvania Cemetery Funeral Association is in keeping with the spirit of the Federal Court ruling in *Walker v. Flitton* while protecting the interests of consumers in the Commonwealth.

Sincerely,



James H. Hodges

DRAFT

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

July 10, 2006

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(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(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(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(4) would require the funeral director to meet face-to-face with the customer before entering into the contract, and proposed § 13.206a(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 of 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

DRAFT

16A-4816 Annex
Preneed activities of unlicensed employee - Proposed

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

DRAFT

16A-4816 Annex
Preneed activities of unlicensed employee - Proposed

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.

EXHIBIT "G"

Kutz, James

From: [REDACTED]
Sent: Wednesday, October 25, 2006 4:43 PM
To: Kutz, James
Subject: Proposed Preneeds Regulations

Jim:

I just want to confirm that after consulting with our General Counsel's office and Frank Bullock, outside counsel for the Funeral Directors Board, we are all of one mind and agree that the Board cannot adopt and promulgate any regulations under Section 13(a) of the Funeral Director Law in light of the rulings in the Ferguson and Walker cases. Therefore, I have requested Frank, and he has agreed, to draft an opinion to this effect. Please call or email if you or Ernie have any further questions or comments with respect to this matter.

[REDACTED]
[REDACTED]
Governor's Policy Office
506 Finance Building
Harrisburg, PA 17120
[REDACTED]
[REDACTED]
[REDACTED]

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination, or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this information in error, please contact the sender and delete the material from any computer.

10/17/2007

EXHIBIT "H"

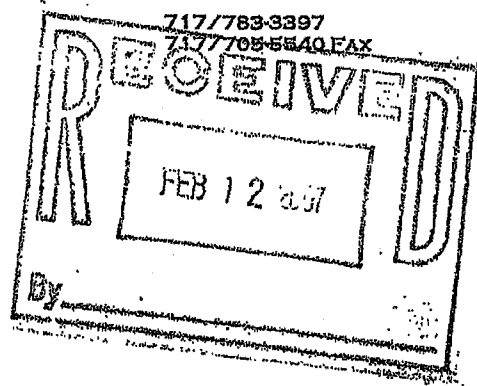


COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS
P. O. Box 2649
HARRISBURG, PA 17105-2649

MICHELLE T. SMEY
BOARD ADMINISTRATOR

February 6, 2007

James J. Kutz, Esquire
Post & Schell
17 North Second Street
12th Floor
Harrisburg, PA 17101-1601



Dear Mr. Kutz, Esquire:

The State Board of Funeral Directors is continuing its efforts to promulgate regulations concerning preneed activities by unlicensed employees. The Governor's Executive Order 1996-1 requires the Board to solicit pre-draft commentary from statewide organizations that might be interested in the Board's rulemaking. Please consider the attached rulemaking and submit any comments to my attention at the address listed above.

The shaded areas indicate changes from the Board's prior draft. The strikethroughs indicate deletions from the prior draft.

Comments must be received by March 10, 2007. The Board will be discussing this regulation, and any comments received, at its regular board meeting on April 4, 2007. The meeting location is One Penn Center, 2601 North Third Street, Harrisburg, Pennsylvania, 17110. The meeting will begin at 9:30 a.m. As per the Sunshine Act, all board meetings are open to the public.

If you have any questions, please contact me.

Sincerely,

Michelle T. Smey
Michelle T. Smey

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 or merchandise 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 or 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 unlicensed employees by a funeral entity.

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

(1) The funeral director or funeral entity utilizing an unlicensed employee shall be professionally responsible for the actions of the unlicensed employee.

(2) The funeral entity utilizing an unlicensed employee shall execute a written employment agreement with the unlicensed employee, and shall retain a copy of that agreement for at least one year after the employee has left employment.

(3) The unlicensed employee shall operate only in the name of and on behalf of the employing funeral entity, and under the close supervision of a licensed funeral director.

(4) The funeral director or funeral entity may not pay or agree to pay a commission to the unlicensed employee for soliciting business or for business secured by the unlicensed employee.

(5) A licensed funeral director of the funeral entity employing an unlicensed employee in this capacity shall consult face-to-face with each customer before entering into or offering to enter into a preneed funeral contract.

(6) Any document presented by the unlicensed employee 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 LICENSED FUNERAL DIRECTOR OF [name of funeral entity].

(b) An employee not licensed under the act acting in accordance with this section may:

(1) Distribute general price lists of the employing funeral entity only.

(2) Prepare worksheets, proposals or other presentations for funeral services and merchandise incidental to such services.

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

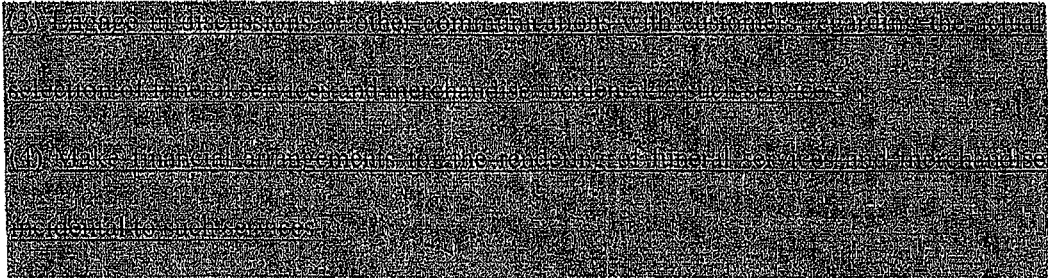
(4) Engage in discussion or other communications with customers regarding financial arrangements for the financing of funeral services and merchandise incidental to such services.

(5) Provide general assistance to the employing funeral entity by engaging in activities, including communications with customers, not otherwise prohibited by the act or this chapter.

(c) An employee not licensed under the act who engages in the activity described above may not:

(1) Engage in preneed activity on behalf of any other funeral entity.

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

EXHIBIT "I"



17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Fax
www.postschell.com

James J. Kutz

jkutz@postschell.com
717-812-6038 Direct

March 9, 2007

Via Hand Delivery and Email

Michelle T. Smey
Board Administrator
Department of State
2601 North Third Street
P.O. Box 2649
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, ceterians, 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

Michelle T. Smey
March 9, 2007
Page 2.

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

Michelle T. Smey
March 9, 2007
Page 4

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

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. Subsequent (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

Michelle T. Smey
March 9, 2007
Page 6

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



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
July 6, 2005

TOM CORBETT
ATTORNEY GENERAL

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone (717) 705-2503
Fax (717) 772-4526

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

James J. Kutz, Esquire
Post & Schell, PC
240 Grandview Avenue
Camp Hill PA 17011

Re: *Walker v. Flitton*

Dear Jim:

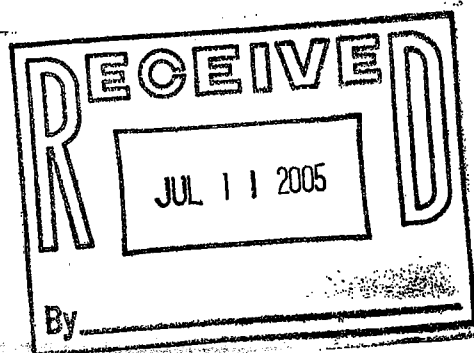
Enclosed please find a settlement draft in the amount of \$55,000 in full and final settlement of the above-referenced matter. Should you have any questions or concerns, please contact me at the number listed above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah C. Yerger".

Sarah C. Yerger
Deputy Attorney General

SCY:cks
Enclosure



00000	015	062805	0050915	07/06/2005	000000	000000	22	08363588
CDC	FUND	DEPT	PREP. DATE	VOUCHER	WARRANT	ID	CHECK NUMBER	

PNC BANK N.A.
 PITTSBURGH, PA
 VERIFICATION AVAILABLE - "POSITIVE PAY" PROTECTED

07/06/2005
 DATE

0700005500000

PAY ONLY **550000**
 FIVE FIVE ZERO ZERO ZERO CTS CTS

TO THE ORDER OF

POST & SCHELL P C
 240 GRANDVIEW AVENUE
 CAMP HILL PA 17011-0000

VOID AFTER 180 DAYS

\$ *****55,000.00

Robert O. Carey, Jr.
 TREASURER OF PENNSYLVANIA

⑈08363588⑈ ⑆043301627⑆ 2 183189⑈

DO NOT ACCEPT WITHOUT HOLDING TO LIGHT TO VERIFY WATERMARKS.

1 anyway? Would that impede the, the funeral
2 business, the licensee's business? Why
3 don't we just require, as the Law currently
4 seems to indicate, that you have to engage
5 in this discussion and this agreement
6 through a consultation with a licensed
7 funeral director?

8 JAMES O. PINKERTON:

9 There's a Federal Court case that says that...

10 JODI L. ZUCCO:

11 Well what is the impact on that? We also
12 have our Statute and our current regs. Who
13 cares what the Judge said? He said "not
14 engaging in funeral direction."

15 JAMES O. PINKERTON:

16 But he's saying we can't restrict people
17 from going out there and delivering
18 information.

19 MICHAEL MORRISON:

20 But is information a contract?

21 JODI L. ZUCCO:

22 Well, isn't it funeral directing which the
23 Order says, as opposed to the Opinion, isn't

1 it our position that the exchange of
2 information is tantamount to consultation
3 which is already restricted under the
4 current Law as it stands.

5 JAMES O. PINKERTON:

6 But here's the complicating factor. You
7 have the individual going out and acting.
8 Let's say that you're the sales
9 representative.

10 JODI L. ZUCCO:

11 Yeah. Of a licensee?

12 JAMES O. PINKERTON:

13 Of a licensee, the funeral home has said go
14 out and represent me.

15 JODI L. ZUCCO:

16 Right.

17 JAMES O. PINKERTON:

18 So you go out and you deliver the price list
19 and you say here's the options in this
20 funeral home.

21 JODI L. ZUCCO:

22 And the consumer is going to say well what
23 does this mean?

DRAFT

1 JAMES O. PINKERTON:

2 Yeah. And you can say well it's described
3 in there. This is, generally it's a two-day
4 visitation and a traditional funeral.

5 JODI L. ZUCCO:

6 Right, I'm consulting now.

7 JAMES O. PINKERTON:

8 Okay. Well, you're telling me what it says.
9 You're, you're interpreting. So whether
10 you're consulting...

11 JODI L. ZUCCO:

12 Well I call that a consultation.

13 JAMES O. PINKERTON:

14 Okay. But you're not telling them you
15 should choose this over this. They choose
16 it.

17 JODI L. ZUCCO:

18 That's, that's...

19 JAMES O. PINKERTON:

20 But let me just give you the complicating
21 factor. You're also a licensed insurance
22 agent. So based on your general discussion
23 and interaction with the consumer you've

1 delivered the information, they, you,
2 somebody makes a determination on how much
3 the funeral should be. Okay? Now you write
4 the insurance policy for the total of that.
5 Now you've contracted as an insurance agent,
6 which you're authorized to do because you're
7 a licensed insurance agent. You take the
8 Statement of Funeral Goods and Services back
9 to the funeral director and they sign off,
10 but the money technically has gone to the
11 insurance company.

12 JODI L. ZUCCO:

13 I think that that was a consultation.

14 DONALD J. MURPHY:

15 That, that's really blurring things.

16 JAMES O. PINKERTON:

17 I'm telling you the way it happens.

18 JODI L. ZUCCO:

19 That's got to be a consultation.

20 THOMAS BLACKBURN:

21 But that's exactly what we saw in the
22 Ferguson case. That's the same recitation
23 of facts.

1 UNKNOWN:

2 And Ferguson says you can't do that.

3 THOMAS BLACKBURN:

4 That's what we said, and the Commonwealth
5 Court affirmed that

6 JODI L. ZUCCO:

7 That's got to be a consultation.

8 JAMES O. PINKERTON:

9 So they can't do that? Okay, now where does
10 this Federal case...

11 DONALD J. MURPHY:

12 Now the Federal case says I can take an
13 unlicensed employee of mine, could be maybe
14 he or she is a licensed insurance agent, but
15 in his capacity or her capacity as my
16 employee, as my agent, she goes out and she
17 can show price lists, she can discuss what's
18 possible, what's not possible, and wind up
19 by saying, "This is what you want. I'm
20 going to have you visit the funeral director
21 and he'll confirm whether or not he's going
22 to do it for these prices, and if so, then
23 you can purchase an insurance policy from

1 me. Or then you can give him money on this
2 pre-need contract.

3 JAMES O. PINKERTON:

DRAFT

4 But we probably don't have the ability to
5 restrict them from selling insurance.

6 DONALD J. MURPHY:

7 He's, he's not out there in his capacity as
8 a "insurance agent." He's out there as my
9 agent, my employee.

10 JODI L. ZUCCO:

11 If you ask me, you're engaging in
12 consultation, which is the practice of
13 funeral direction.

14 UNKNOWN:

15 Let's, let's, in actuality supposing
16 (inaudible) he or she goes out there, and
17 says fine, give me a thousand bucks as an
18 incentive for this policy. He goes in to
19 the funeral director. He's says, "bullshit,
20 I'm not going to go into that, I'm not."
21 Now here I am. I got a \$5,000.00 or a
22 \$6,000.00 life insurance policy that was
23 going to pay for my funeral with the funeral

1 director. The funeral director says no he
2 doesn't want to deal with me. Now what am I
3 going to do with the life insurance policy?

4 UNKNOWN:

5 I'm not disagreeing with you on that because
6 that's what happens with the Catholic
7 Funeral Plan all the time.

8 JODI L. ZUCCO:

9 Well, what is the effect of this Holding
10 that says they can engage in discussion at
11 the direction and control of a licensed
12 funeral director, but they cannot engage in
13 funeral directing. That's the question in
14 my mind. Commissioner?

15 BASIL L. MERENDA:

16 You guys, you guys started it all because
17 you guys should have appealed this to the
18 Third Circuit.

19 JODI L. ZUCCO:

20 Hey, I'm not one of those guys.

21 THOMAS BLACKBURN:

22 The problem with that is you can't appeal
23 the Opinion, you can only appeal the Order.

1 And the Order, as Jodi just pointed out,
2 says they can't engage in the practice of
3 funeral directing as defined in the Act.
4 And we've said the Act defines funeral
5 directing to include counseling.

6 JODI L. ZUCCO:

7 Consultation, yeah. So why don't we just
8 blow off the Opinion and go with the Order?

9 THOMAS BLACKBURN:

10 And that's what we've been essentially
11 saying for the last two or three months.

12 DONALD J. MURPHY:

13 What I'm saying is we should do it. Not sit
14 here and say oh it's fine and then we go out
15 of here. I know, Tony knows, she knows, he
16 knows...

17 JODI L. ZUCCO:

18 The licensees don't know.

19 DONALD J. MURPHY:

20 Right.

21 JODI L. ZUCCO:

22 They have no clue what's going on here.

23 DONALD J. MURPHY:

1 The Board made a decision. Hurray. The
2 effect of that is telling the public,
3 telling the funeral directors here's what
4 you can and can't do. We need to fire a
5 counter barrage against...

6 JODI L. ZUCCO:

7 The effect of that is...

8 THOMAS BLACKBURN:

9 We can put an article in the newsletter that
10 says to licensees, "here's what we're
11 planning to do."

12 UNKNOWN:

13 Court says, you know, Board get off your
14 duff, Board get off your duff, Board issue
15 regulations.

16 THOMAS BLACKBURN:

17 Well obviously that Judge doesn't understand
18 how we promulgate regulations in the
19 Commonwealth of Pennsylvania.

20 MICHAEL J. YEOSOCK:

21 This would support an appropriate
22 regulation, which requires licensed funeral
23 directors employing unlicensed individuals

1 in the capacity, to consult face-to-face.

2 Can't we tell them that?

3 JODI L. ZUCCO:

4 No, we don't want to tell them that.

5 Because that's constituting funeral

6 direction.

7 MICHAEL J. YEOSOCK:

8 All right then we go down here. We issue a

9 regulation that says you have the

10 responsibility for training your unlicensed

11 people who are going to do this, you have a

12 responsibility for supervising the people

13 who do this, you have a responsibility for

14 letting them make clear to the individual

15 that they are not selling the contract.

16 That you have to have a face-to-face

17 consultation with the funeral director. We

18 can say all that and we're in compliance

19 with the Order.

20 BASIL L. MERENDA:

21 In a reg.

22 UNKNOWN:

23 In a regulation, yes.

1 THOMAS BLACKBURN:

2 If you want I can draft something to add on
3 to the existing pre-need reg that says
4 exactly those things. And we're still
5 consistent with the view that that
6 unlicensed person cannot counsel the sale.
7 They can share information and here are the
8 restrictions on the funeral director's
9 (inaudible).

10 JODI L. ZUCCO:

11 Where is the sharing information versus
12 consultation, coming in?

13 THOMAS BLACKBURN:

14 That's something else we'll have to stick in
15 there.

16 JODI L. ZUCCO:

17 I have to disagree with Mr. Murphy I think.

18 MICHAEL J. YEOSOCK:

19 Maybe we could (inaudible) and hand out the
20 price list, but they can't do this and they
21 can't do that.

22 JODI L. ZUCCO:

1 But it's got to be consistent with our prior
2 decisions. Who cares what the Judge wants?
3 It has to be consistent with our prior
4 decisions. It has to be consistent with
5 Ferguson...

6 MICHAEL MORRISON:

7 Support Ferguson with what we do because
8 that's still (inaudible). This to me just
9 supports Ferguson is what it's doing. It's
10 saying they can get out information, but
11 they can't do the contract.

12 DONALD J. MURPHY:

13 Right, exactly. But we need to say that, we
14 need to get out in print.

15 JODI L. ZUCCO:

16 Well.

17 DONALD J. MURPHY:

18 Let me ask another question. Counselor, are
19 we in contempt if we go too far?

20 JODI L. ZUCCO:

21 I wondered about that.

22 THOMAS BLACKBURN:

23 I'm not.



Homesteaders Life Company

5700 Westown Parkway
P.O. Box 1756
Des Moines, IA 50306

Gerry Kraus, Vice President-Compliance

Phone: 800-477-3633 Ext. 7705

Fax: (515) 440-7690

email: gkraus@homesteaderslife.com

October 8, 2007

Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Via e-mail to: irrc@irrc.state.pa.us
Hard copy to follow by regular mail

IN RE: Proposed rulemaking concerning preneed activities of unlicensed employee(s)
Pennsylvania State Board (the Board) of Funeral Directors Reference No. 16A-4816
Link: <http://www.pabulletin.com/secure/data/vol37/37-39/1793.html>

Dear Chairman Coccodrilli

Homesteaders Life Company is an Iowa based mutual insurer specializing in the administration of life insurance and annuity products marketed through the funeral industry to fund formal preneed contracts. We are a national leader and innovator in this niche of both industries and we have considerable concerns about Pennsylvania consumer's and their opportunities regarding funeral planning.

Mr. Ernie Heffner, President of Heffner Crematory and Funeral Chapel and licensed funeral director from York, PA, has provided me with a copy of his comments to you dated October 1 and 2, 2007 regarding this same proposal by the Board. His comments and your possible review of the Board's action relative to this rule have prompted me to provide you with these comments.

We see funeral home operations in many, many states similar to what we here propose. In fact, it is our observation that in most of the other states funeral regulations regarding the activities of unlicensed persons are now more liberal than those currently in force in Pennsylvania.

The Board should find some comfort regarding the liberalization of controls on unlicensed person from the stellar track record of the funeral industry in providing the utmost in terms of consumer satisfaction. Since it relies on the complete satisfaction of not only its immediate customers but also on successive future generations of those customers, the funeral industry makes sure that it conducts itself with the highest of standards. From this position of self-conduct the funeral industry stands in good stead to merit more self-control over its activities.

We have also observed a great deal of unwarranted over-regulation in the funeral and insurance industries. We hope that the Board takes this opportunity to acknowledge that a move toward liberalization is due in the Pennsylvania preneed market.

We look forward to working with the Board and the members of the funeral industry in preserving the value of funeral service. We provided testimony previously on this subject to the Board and have remaining concerns we hope you will give due consideration.

1. Since some funeral providers wish to engage persons to act for them who may not be employees we suggest the term "employee" throughout this proposal be revised to read "employee or agent". This would be consistent with the Federal Court Order in Walker v Flitton. There should be no valid reason to require these persons to be employees so long as they operate under the close supervision of a licensed funeral director and under the terms of a formal engagement or authorization agreement with the funeral entity.
2. In conformance with the suggestion above the "employment" agreement should be renamed an "engagement" agreement or "authorization" agreement. Again, this would be consistent with the Federal Court Order in Walker v Flitton
3. The transaction of the funeral agreement should be considered a distinctly separate act from the transaction of the sale of insurance. Given that distinction, any licensed insurance agent involved in the insurance transaction should be permitted to receive a commission, irrespective of licensure or lack of licensure of any other type.

Both funeral providers and other persons not licensed as funeral directors, so long as they have a valid insurance license, should be permitted to receive insurance commissions. The funeral entity can adequately control the actions of both funeral directors and unlicensed persons through the engagement agreement and their supervisory procedures to the extent that any concerns associated with insurance commissions should be negated.

4. In today's world of electronic commerce the requirement that each customer must consult face-to-face with a licensed funeral director is overly restrictive. Unlicensed persons should be permitted, within the terms of their engagement agreement and under the close supervision of a licensed funeral director, to perform all of the activities involved in preneed contracting.

If the individual funeral entity wishes to further restrict these activities then they can be controlled at the individual funeral home level under the terms of the engagement agreement. The individual funeral entity could then chose how liberally or restrictively to control the activities of unlicensed persons.

Some jurisdictions, including our home state, Iowa, require that if funeral services are provided in the contract a licensed funeral director must sign the contract. These types of variations in controlling these activities need not be controlled by regulation however, since they can be adequately controlled individually by the funeral entity. This permits much wider flexibility by the funeral entity and the regulator.

5. The requirement that any document provided to the consumer by the unlicensed person contain the proposed 20-point type disclosure seems an unwarranted burden on funeral entities. The practice would have many unintended consequences including alarming families about the actions of unlicensed persons in handling documents that are now routinely handled by unlicensed persons but have nothing to do with the funeral contract.

We favor consumer disclosure but feel this part of the proposal has not been well considered. The disclosure seems partially appropriate for situations where the parties may decide not to contract formally, such as when only a worksheet is prepared. The portion that discloses the need for the face-to-face meeting with a licensed funeral provider seems inappropriate, especially for situations where no contract is transacted.

We recommend the proposed disclosure requirement be deleted in its entirety.

6. The permitted activities of unlicensed persons under the proposal should be expanded to include the authority to contract for the funeral entity as permitted under the terms of the engagement agreement.
7. Unlicensed persons should be permitted to act for more than one funeral entity so long as the supervision and engagement agreement requirements are met. This is particularly important for smaller funeral entities and communities where the unlicensed persons may be now acting for more than one funeral entity.

We will again provide these comments to the Board, with little optimism for their favorable consideration, since the Board has previously ignored them summarily.

We appreciate your thoughtful inquiry into the Board's oversight of this important consumer market. Please let me know if you have questions or need more information.

Sincerely

Gerry Kraus

Cc: John H. Jewett, Regulatory Analyst, IRRC, jjewett@irrc.state.pa.us
Fiona E. Wilmarth, Director of Regulatory Review, IRRC, fwilmarth@irrc.state.pa.us
Heather Wimbush Emery, Assistant Counsel, IRRC, hemery@irrc.state.pa.us
Representative P. Michael Sturla, Chairman, House Professional Licensure Committee, msturla@pahouse.net
Marlene Tremmel, Executive Director, House Professional Licensure Committee mtremmel@pahouse.net

Christine Line, Counsel, House Professional Licensure Committee,
cline@pahousegop.com

Donald F. Morabito, D. Ed, Office of Public Liaison, dmorabito@state.pa.us

Representative Stanley Saylor, House Professional Licensure Committee,
ssaylor@pahousegop.com

Ron Virag, President and CEO, Ameriserv Trust and Financial Services Company,
rvirag@ameriservfinancial.com

Ernie Peterson, Ameriserv Trust and Financial Services Company,
epetersen@ameriserv.com

James J. Kutz, Esquire, jkutz@postschell.com



ASSURANT
Solutions

260 Interstate North Circle SE
Atlanta, Georgia 30339

Writer's Direct Dial: 770-763-2504
Email: barbara.hollonquest@sssurant.com

October 26, 2007

Michelle T. Smey, Board Administrator
Commonwealth of Pennsylvania
Department of State
Bureau of Professional and Occupational Affairs
State Board of Funeral Directors
P.O. Box 2649
Harrisburg, PA 17105-2649

Re: Pennsylvania Administrative Code Title 49, Part I, Subpart A, Chapter 13 - No. 16A-4816 (Preneed activities of unlicensed employees)

Dear Ms. Smey:

Assurant Solutions -- Preneed Division is a major preneed life insurance and annuity underwriter in the United States and Canada. The Preneed Division includes American Memorial Life Insurance Company, a South Dakota corporation and the pre-need operations of Union Security Insurance Company, an Iowa Corporation.

Thank you for the opportunity to comment on the proposed regulation regarding the preneed activities of unlicensed persons. Assurant remains deeply concerned with provisions of the rule. We urgently request that proposed Title 49, Part I, Subpart A, Chapter 13 of the Pennsylvania Administrative Code (No. 16A-4816) concerning preneed activities of unlicensed employees not be adopted in its current form.

The State Board of Funeral Directors has once again chosen to approve and propose a regulation that ignores the federal court decision in *Walker v. Flitten*, 361 F. Supp.2d 503 and that is clearly not in the best interests of Pennsylvania consumers.

Section 13.206a(a)(1) of the proposed rule uses the term "unlicensed employee". The term is not defined. Some licensed funeral directors and entities may wish to retain the services of independent contractors to provide assistance to the funeral director or funeral entity.

Section 13.206a(a)(4) states: *A licensed funeral director of the funeral entity employing the unlicensed employee in this capacity shall consult face to face with each customer*

Ms. Smey
October 26, 2007
Page 2

before entering into or offering to enter into a preneed funeral contract. This section is unduly restrictive and very consumer unfriendly. Are we to suppose that it is in the best interest of consumers with restricted mobility, health issues or simply with busy lives, to be asked to take the time, expense and burden of transporting themselves to the funeral directors place of business to even consult about funeral planning? How does this serve the interests of consumers? There appears to no real justification for forcing the consumer to take the time and effort of making a visit to the funeral director's establishment for a face-to-face meeting. It makes even less sense to have the licensed funeral director visit the residence of each consumer who wishes to prearrange the financing of funeral services. The consumer may communicate directly with the licensed funeral director by telephone, facsimile machine, email or mail. Surely one or more of these alternative methods of communication should be available for the consumer's convenience.

Section 13.206a(a)(5) requires a notice in 20-point type, which should be deleted in its entirety. The reference to "any document" is too broad and could have unintended consequences for the consumer and for the licensed funeral director. The notice itself is confusing and implies that unlicensed persons acting at the direction, instruction and under the close supervision of the licensed funeral director is either undependable or untruthful. This does service to no one.

Sections 13.206a(c) contains the list of activities that may be performed by employees that do not have a funeral directors license. We feel this list is overly broad and again very unfriendly to consumers.

Section 13.206a(c)(1) requires that an unlicensed employee be permitted to act for only one funeral entity. There may be situations where multiple funeral homes, that are incorporated separately, operate under a common ownership. In this situation an unlicensed employee should be permitted to act for more than one funeral entity.

This ability is also very important for smaller funeral entities where the "unlicensed employee" or independent contractor could be acting for more than one funeral entity. This permits funeral entities to reduce the cost of their operations while enabling them to compete in the marketplace.

Section 13.206a(c)(2) requiring that only licensed funeral directors be allowed to prepare certain information pieces such as, worksheets, presentations and proposals should be deleted. The idea that a funeral director's license is needed to perform such ministerial tasks is patently ridiculous. We can only presume that under this section a funeral director's secretary or administrative assistant could not participate in the preparation of worksheets, presentations and proposals.

Ms. Smey
October 26, 2007
Page 3

Section 13.206a(c)(3) prohibits discussions about merchandise that is incidental to funeral services. This should be deleted. Restricting the sale of funeral merchandise to licensed funeral directors serves only to limit access. This is not in the best interests of the consumers of such merchandise.

For reasons stated above we firmly believe the proposed rule to be so flawed and against the interests of the consuming public that it must not be adopted. We note that this proposed regulation persists in the restriction of who may circulate funeral information. We continue to object to this overly restrictive "solution" to a plainly undocumented and unsubstantiated "problem".

In conclusion, the proposed regulations are not necessary or proper to safeguard the interests of the public and standards of the profession; and, thus not in accordance with the Board's statutory grant of authority to adopt regulations. We appreciate the opportunity to comment. Please contact me using the information on letterhead if you have any questions.

Barbara J. Hollonquest



Regional Director
Government Relations

Cc: Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission



John A. Zurik
Supervisor

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

October 26, 2007

Michelle T. Smey, Administrative Officer
State Board of Funeral Directors
P.O. Box 2649
Harrisburg, Pa. 17105-2649

Via email: st-funeral@state.pa.us and msmey@state.pa.us

Re: No. 16A-4816 - Preneed activities of unlicensed employees

Dear Ms. Smey,

I am writing you in **opposition** to the proposed rulemaking no. 16A-4816 - Preneed activities of unlicensed employees. These regulations should not be approved for three reasons. First they exceed the statutory authority granted in the Funeral Director Law. Second this Board has not shown that Pennsylvania consumers are being harmed by unlicensed employee or agents selling preneed. Therefore there is no compelling reason to issue these regulations. Third these regulations directly conflict with and contradict the Federal Decision of Walker V. Flitton.¹

Board has exceeded its Statuary Authority

A plain language reading of the statute clearly shows that 13(c) allows a funeral director to enter into preneed contracts directly (himself) or indirectly (his employees), or through an agent (his agent). Section 13(c) of the act states, "*No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to enter into a contract with a living person to render funeral services to such person when needed.*" The intent of the legislature is clear and unambiguous.

These proposed regulations are so overly restrictive that they totally override and negate the privileges granted in 13(c). Thirteen C currently permits the funeral entity to employ sales representative to meet with the family, engage in discussions regarding the pricing and actual selection of services and merchandise, prepare worksheets, proposals and

¹ United States District Court for the Middle District of Pennsylvania in the matter captioned Michael Walker, et al. v. Jodi Flitton, et al., No. 4: CV-01-02252

initiate contracts for the funeral directors final review, acceptance and signature. These regulations propose to remove from the funeral provider the rights the legislature has granted. These many years' preneed oriented funeral firms across this Commonwealth have operated under the existing law without harm to the consumer.

These regulations overturn the law by only permitting a funeral employee to perform two minor functions (13.206a (b) (1) (2)) and prohibit him from performing the seven functions (13.206a (c) (1) thru (6)) that would in any other industry be the items you would expect your sales representative to perform. I can only conclude these regulations have been intentionally designed to force funeral directors not to use unlicensed employees to sell pre-need.

Judge Jones recognized the mind set of this Board in creating unnecessary restrictions to preneed sales in the Walker v Flitton decision:

- Page 48: *"Therefore, the Board member's interpretation of the Law and the resulting prohibitions are more extensive than necessary and are not narrowly tailored to meet the asserted interest."*

Board has failed to show a compelling need for these regulations

The second reason these regulations should not be approved is because the state board has failed to meet its burden in showing there is a compelling need to issue said regulations. The Board has submitted no factual evidence to establish that there are any problems with pre-need. Therefore pre-need contracts currently being sold by funeral directors are NOT causing harm to the consumers of the Commonwealth regardless of whether sold by licensed or unlicensed employees or agents. Without documented consumer harm what compelling reason does the Commonwealth have in restricting the activities of its licensee's when the activates the proposed regulations restrict have caused no consumer harm.

Judge Jones also noted in Walker V. Flitton that the Board failed to show any compelling need for such broad restrictions on licensee's rights:

- Page 15: *"There is no evidence in the Record, however, disclosing the nature of this "festering problem" other than this one unsubstantiated opinion of Pinkerton." (emphasis added)*
- Page 26: *"There is no evidence that the Defendants (the Board) fully analyzed the relevant issues in order to test their assumptions about preneed solicitation by unlicensed individuals by conducting research, nor did they complete studies or take testimony in an effort to create a carefully crafted response to the exigencies of the growing preneed industry."*
- Page 37: *"... 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."

The proposed regulations violate the essence of Walker V. Flitton

I note that in "Background and Need for the Amendment" preamble to these proposed regulations the Board quoted extensively from Judge Jones in the Walker v. Flitton decision. I further note that the quotes given often were selective and tended to ignore other comments in and around the selected quote. The effect was to deflect the full impact of Judge Jones decision. I encourage you to read the full decision for your self and draw your own conclusions. (A Copy is attached)

The most comprehensive statement by Judge Jones that summarized the thrust of his decision is found on page 35:

- *We fail to see, on the record before us, what governmental interest exists relating to allowing only licensed funeral directors, rather than non-licensed insurance salespeople who are employed by, or agents of those funeral directors, to interact with customers and disseminate price and other information regarding preneed services. Here, as the unlicensed Plaintiffs are trained², supervised, employed, and directly controlled by a licensed funeral director, it appears that many of the Defendants (the Boards) consumer concerns are overstated and thus misplaced. Further, because the Law requires all preneed contracts to be signed by a funeral director, the funeral director must review his employees' work each time they submit a contract for his signature."*

As we can see by Judge Jones comments above the Judge:

1. Acknowledges that the Law allows a funeral director to utilize unlicensed employees or agents to make preneed sales.
2. Those employees or agents may disseminate price and other information,
3. Those employees or agents must be supervised by the funeral,
4. The employee or agent may prepare the contract and submit it to his employing funeral director for signature.

² Trained pre-need sales employees can be equally effective as any licensed employee in assisting consumers in making their pre-need arrangements. It is not complex to train funeral sales people in the proper procedures to arrange a preneed funeral. In fact mortuary schools have little in the way of class room training on sales, merchandizing or the procedures and paperwork involved with the actual Preneed (or at-need) arrangements. The real training in at-need and preneed arrangements and merchandizing is fundamentally learned on the job. Therefore the funeral directors who desire to have unlicensed salespeople or agents will train them in precisely the same manor he trains his licensed staff. Each Supervisor or owner is currently responsible for the conduct of all his employees and will not permit any action by his licensed or unlicensed employees or agents that might risk the firm's reputation in the community or sanctions by the State Board against his license.

It is clear that the Judge recognizes that 13(c) authorizes a preneed sales person to act as a legal extension of the funeral director with the ability to work with a family from introduction through the preparation of the contract for his employers. The Judge further acknowledges that only the funeral director can sign the contract thereby consummating the agreement.

Yet proposed regulations 13.206a 9 (c) (1) through (6) and 13.206a (d) **prohibit** the very conduct authorized in 13 (c) and which has been confirmed by Judge Jones as conduct that may be legally performed by unlicensed employees or agents. One can only assume that the Board in presenting these regulations is intentionally attempting to negate the legislative intent of 13(c) and to overturn the Federal Walker v. Flitton decision.

In the spirit of co-operation with the regulatory process here are my detailed comments regarding the regulation as proposed:

13.1 Definitions

Preneed Activity This definition is unnecessary and “Any activity” is overly broad and should be defined. This also conflicts with the proposed 13.206a (d).

Preneed funeral contract: The definition in the existing regulations of a “Prepaid burial contract” seems more than adequate rendering this new definition unnecessary. In addition the final portion, “whether or not the funeral entity receives preneed funds”, is very problematic. First if the funeral director does not receive any funds there is no contract. Second this would seem to imply the Board would consider a funeral insurance policy a contract with the funeral home- when in fact it is a contract with an insurance carrier. This appears to conflict the exemption given licensed insurance agents proposed in 13.206a (d)

13.206a Utilization of unlicensed employees by a funeral entity.

13.206a (1) requiring the funeral entity to be responsible for the conduct of its employees is the only reasonable proposed regulation in this proposal and should be retained.

- However I question who will be held responsible. This indicates the establishment (entity) will be held responsible as opposed to the funeral director or supervisor. I suggest the language be revised to hold the funeral supervisor responsible.

13.206a (2) should be deleted. Requiring the funeral supervisor to be responsible for the conduct of his employee adequately protects the public. If the requirement of close supervision is retained it must be defined. What is reasonable (close) supervision to one may be loose supervision to another. Left undefined this section will surely lead to prosecutorial excess.

13.206a (3) should be deleted. The Board has referred to section 11(a) (8) of the act as justification. The purpose of 11(a) (8) when the law was drafted was to prohibit a funeral director from paying a commission or gratuity to the employees of hospitals, morgues, old folk's homes or cemeteries for the "steering" of a deceased family to a specific funeral director at the time of a death. This was written to prevent the potential (and often real) abuse of families immediately after a death when they are vulnerable. There was no preneed when the statute was enacted. Section 11(a) (8) was never intended to apply to employees of the funeral in furtherance of their employment.

- The Board further justified this regulation by stating "this provision is intended to reduce the employee's incentive to persuade a customer to select funeral services and merchandise whether or not that selection would be in the customer's best interest." It is obvious that this board only has experience with dealing with grieving families in an at-need situation.
- In a preneed situation, when the customer's is in full control of his emotions, no such 'overselling' is possible. In addition the Board overlooks two other realities of preneed: 1) no funeral employer will tolerate such actions by an employee for fear of damaging his reputation, 2) salespeople success requires complete satisfaction of not only the immediate customer but on future generations of customers that the immediate customer may talk too.
- It does not protect the consumer one iota to regulate how a funeral business pays its employees; whether that be commission, salary or hourly (should the board then require all funeral staff be salary so the hourly employee does not take 3 hours to make an arraignment when it should have been done in 1 ½).
- Once again holding the funeral supervisor responsible for the actions of his employees adequately protects the public in this area.

13.206a (4) should be deleted. Requiring the funeral director to meet face to face with each customer before entering or offering to enter into a preneed contract is overly restrictive and unnecessary. If the funeral supervisor is responsible for the conduct of his employee that supervisor will ensure they are trained to the funeral homes standard. The states need to protect the consumer is thereby satisfied.

- Why does the state wish to unjustifiably handcuff the funeral provider. It should be that funeral entities decision as to whether it feels its reputation in the community is safe by allowing his unlicensed employees make preneed arraignments without the funeral director personally present.
- As the size of a firm increases it is harder and harder for the funeral supervisor to do all things. He or she must be able to delegate to trained and responsible employees various functions. Preneed is a function many funeral homes wish to have handled by trained customer service salespeople.
- There are actually fair numbers of families who do not wish to meet with a funeral director or even come to the funeral home to select merchandise

(superstition). They request we come to their home to make the preneed arrangement using catalogs and brochures for the selection of merchandise.

- Factually it is not that difficult to learn how to arrange a funeral (though each funeral director you talk too will try to convince you it verges on brain surgery-it is not). Most families have a firm idea or know precisely what type of service they want when they walk in the door, merchandise is simply a selection process based on appearance and cost, the balance and the bulk of time is spent on the myriad of details which are all laid out in fill in the blank pre-arrangement forms.³

13.206a (5) should be deleted. What possible consumer protection does the state see in this proposal? Surly this is the most ridiculous section of all. First-on the face of it this is overly restrictive. What other industry is so "hog-tied" by its own regulatory board that its employees are required to have such a disclosure. Second-These proposed regulations contradict themselves since 13.206a (c) (4) and (5) prohibit the employee from making financial arrangements or entering into contracts. What possible documents would the employee be asking the customer to sign that would require this disclosure.

- **What should be substituted here is that any contract executed with the consumer by an unlicensed employee or agent must be reviewed, accepted and signed by a funeral director within 48 hours and said contract shall not be binding on the consumer until so ratified.** This practice is currently done in Pennsylvania and other areas of the country (Iowa for example) whether by regulation or good business practice without any consumer harm. This also mimics 13(d) of the statute which permits unlicensed employees to make tentative funeral arraignments to grieving families which must be ratified by the funeral director within 48 hours. It seems logical to allow the same amount of time for the funeral director to ratify a pre-need sale that the statute allows for an at-need sale.

13.206a (b) (1) and (2) allow the employee to distribute the general price lists of the employing entity (*only) and to provide general assistance "including communications with customers, not otherwise prohibited by this chapter (emphasis added). This relegates the employee to little more than a clerical position.

- * 13 (c) permits the funeral director to have an agent. There is nothing wrong with that agent working for more than one funeral home. In a small establishment there may not be enough preneed "work" for one individual. It is incumbent upon the funeral director to establish the boundaries of the agency relationship. In the past decade there has been more than one of these types of insurance agent "sharing" arraignments successfully offering preneed to the mutual benefit of multiple funeral homes and the general public.⁴

³ I would be honored to host any member or group of members of the Professional Licensure Committee, IRRC or any other agency at Jefferson Memorial Funeral Home to demonstrate how a preneed sales conference is done.

⁴ "The Catholic Funeral Plan" of the Dioceses of Pittsburgh was one such program.

13.206a (c) (1) through (6) lists what an employee may not do. These 'prohibited' acts are precisely the things I want my preneed salespeople to do for my firm.

- **This regulation should be revised to move these six items up to the 'permitted acts' of section (b)** The legitimate interest of the state of protecting the consumer is adequately covered by holding the funeral director professionally responsible for the actions of his employee's.
- In all business employers "delegate" various aspects and responsibilities of the business to trained and trustworthy employees. Yet the employer is held professionally accountable (by their governing body) and publicly accountable (their reputation in the community) for the acts of each of their employees. In this regard even making financial arraignments for a funeral is currently and should remain a function the funeral director can delegate [as authorized in 13(c) directly, indirectly or through an agent]
- In this regard delegating the function of Preneed sales in funeral service is no different than sales in any other industry. In reality sales made at the time of a death have a far greater potential of funeral director abuse or indirect pressure to high end the merchandise sale ('up-selling'). In fact the average preneed sale is a lower gross sale than the average At-Need sale (consumers make more frugal decisions without tears in their eyes).

13.206a (c) (7) is unnecessarily duplicative of the statute.

13.206a (d) needs substantially revised. On its face this seems to exempt licensed insurance agents. However in actual practice it does not. The only insurance agents working in the funeral industry as those offering specialized insurance policies designed specifically to fund preneed funerals. These 'funeral' insurance agents are licensed funeral directors, employees of the funeral home or independent agents employed by the funeral home to further their establishments preneed activities (your general insurance agent who sells you a \$50,000 or \$100,000 life insurance policy does not generally deal in the relatively small policies involved in funding a single funeral).

To provide Pennsylvania consumers with more preneed options the Board should consider expanding the ability of licensee's to offer preneed through unlicensed employees and agents while protecting consumers by holding the funeral supervisor responsible for their conduct. No funeral supervisor or funeral home owner will allow his unlicensed employee or agent to do anything that would affect his reputation. When you come right down to it to that consumer that salesperson is the representative of the funeral home. A funeral establishment will not risk the negative publicity of a dissatisfied preneed client let alone the potential a potential enforcement action by this State Board.

The Board should take comfort in the fact that thousands of preneed contracts are consummated with Pennsylvania consumers each year and that the Board has had virtually a statistical zero of consumer complaints regarding preneed contracts. This alone speaks volumes as to the consumer care and professionalism exhibited by funeral directors making preneed sales with unlicensed employees or agents. **There is simply not a problem in funeral preneed that requires additional regulation.**

However if the Board feels compelled to issue new regulations I suggest they need only promulgate two (2) regulations to protect Pennsylvania consumers and to clarify the responsibilities of licensed funeral directors in regards to pre-need sales.

- 1) That the Supervisor of each funeral home is responsible for the actions of all licensed or unlicensed employees and agents.
- 2) All contracts executed by other than a licensed funeral director by confirmed and approved by a funeral director within 48 hours and said contract shall not be binding upon the consumer until so ratified.

Again I wish to state my adamant opposition to these proposed regulations based upon the grounds that they 1) exceed the authority granted under the statute and 2) the Board has shown no compelling need to issue these regulation as there is no documented pattern of consumer harm, and 3) the regulations violate the Federal Decision of Walker v. Flitton.

Sincerely,

Harry C. Neel
President

CC: via Email:

Arthur Coccodrilli, Chairman IRRC

John H. Jewett, Regulatory Analyst, IRRC

Fiona E. Wilmarth, Director of Regulatory Review, IRRC

Heather Wimbush Emery, Assistant Counsel, IRRC

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

Marlene Trammel, Executive Director, House Professional Licensure Committee

Christine Line, Counsel, House Professional Licensure Committee

Donald Fl Morabitio, D. Ed, Office of Public Liaison

Representative Stanley Saylor, House Professional Licensure Committee

Representative Susan Helm, House Professional Licensure Committee

James J. Kutz, Esquire

Bart Cavanagh ltr IRRC on 16A 4816

BHC.SBFD

From: **Bart cavanagh** (bhcavanagh@comcast.net)

Sent: Fri 10/26/07 3:19 PM

To: Ernie Heffner (ernieheffner@hotmail.com)

CAVANAGH FAMILY FUNERAL HOME, INC.

301 CHESTER PIKE, NORWOOD, PENNSYLVANIA 19074

PHONE 610-532-3120

BART H. CAVANAGH, SR.

SUPERVISOR

26 October 2007

Arthur Coccodrilli, Chairman

Independent Regulatory Review Commission

Via e-mail to: irrc@irrc.state.pa.us

333 Market Street, 14th Floor

Harrisburg, Pa. 17101

RE: Proposed Pre-Need Regulation #16A-4815 and
Proposed Regulation #16A-4816 (Pre-Need
activities of unlicensed employees) published
9.29.07 as put forth by the State Board of
Funeral Directors.

Dear Chairman Coccodrilli:

I am writing to you to offer a historical perspective relative to the State Board of Funeral Directors ("SBFD") and the real motivation for the above referenced proposed regulations.

I was appointed to the SBFD in 1980 by then Governor Thornburgh and was subsequently approved by the Senate. At the time of my appointment, I was not and am not presently a member of the Pennsylvania Funeral Directors Association ("PFDA"). As a member of the SBFD, my allegiance was to the citizens of Pennsylvania and not the PFDA which almost immediately resulted in my becoming a target for removal from the SBFD.

After serving as vice chairman of the SBFD for one five year term and being commended by Governor Thornburgh for excellent service, I was reappointed to serve a second term.

However, as a direct result of my serving the interest of Pennsylvania citizens instead of the PFDA, I was not confirmed by the Senate a second time, due to a statewide legislative effort against my confirmation by PFDA. In need of an SBFD board member who would

serve its needs as opposed to those of the public, the PFDA issued a "legislative alert" letter to all of its undertaker members strongly urging them to contact their senators to vote "no" on my confirmation for a second term of the SBFD.

The senate's failure to confirm my reappointment had nothing to do with my service record or integrity which is evidenced by my appointment and senate confirmation to the Pennsylvania Public Television Commission shortly after I was blocked from serving a second term on the SBFD.

The PFDA called for my ouster as the result of my advocacy for the concept of pre-arranged funeral counseling in order to educate consumers and create competition, both of which tend to reduce customer costs while increasing customer service.

The PFDA continues to exert undue influence on the SBFD. Its Funeral Director Members all have been incubated in the PFDA's philosophical hen house. By way of illustration, when I served on the SBFD, former PFDA president, John Lutton, then Board Chairman, had a phone in the conference room that served basically as a direct line to J. Scott Calkins, Esquire, legal counsel for the PFDA. In house- counsel for the SBFD was down the hall from the SBFD conference room and yet Mr. Lutton would instead call counsel for the PFDA when he required an opinion on a legal issue.

During my time on the SBFD, in addition to serving the needs of the public instead of the PFDA, I also ended Mr. Lutton's practice of using PFDA counsel instead of SBFD counsel for advice on SBFD issues which presented another reason for the PFDA to call an end to my time on the SBFD.

Having noted my first-hand knowledge of the regulatory capture between the SBFD and the PFDA I turn my attention to the above referenced proposed regulations which if approved will make offering pre-need education, goods and services to the public very difficult and intimidating for ethical funeral directors. Failure to offer pre-need options to the public will allow certain funeral directors to maintain the very emotional "time of death atmosphere" in which consumers are likely to be taken advantage of at the hands of opportunistic undertakers.

An educated and unemotional consumer poses a problem for the PFDA's predatory "marketing mentality" in that the educated and unemotional consumer is not likely to spend as much money when in a calm state as they might when forced to arrange and pay for a funeral during a time of distress and emotional vulnerability. In fact, maintaining that type of predatory practice is what these proposed regulations are really about.

If the proposed regulations are approved they will make pre-need services so unattractive and

intimidating that ethical funeral directors will not offer pre-need care. As part of the PFDA's campaign to abolish pre-need, the SBFD recently fined a funeral director \$89,000.00 for what could easily be explained as a misunderstanding regarding fees for counseling pre-need clients. In that instance, nothing was hidden and no consumer was hurt. Why this funeral director was made a target is unknown to me. Most disturbing is that the funeral director was represented in that case by a former SBFD prosecutor who is now in-house counsel to the PFDA and who also, between those two positions, was an unlicensed person associated with pre-need funeral sales.

By writing this very letter I have made myself and family a target of The Board as in my opinion it acts as an enforcer and metes out discipline as the PFDA sees fit.

Be aware that the proposed regulations are a tool by which the PFDA can retain its grip on the SBFD in an effort to maintain the "at-need" funeral market to the exclusion of the "pre-need" funeral market. At-need sales present an opportunity for predatory funeral directors to take advantage of people that results in a financial windfall for the predatory undertaker. Pre-need sales present an opportunity for the many Pennsylvania funeral directors who serve sincerely and are ethical to counsel, educate and assist in difficult choices that will not result in a financial hardship to the consumer.

Much of this letter echoes testimony I gave 20-odd years ago before IRC which resulted in the PFDA issuing its "legislative alert" which in turn resulted in my removal from the SBFD. The concept which I advocate is a simple one – providing the highest level of service to the consumer. By offering education and advice in the unemotional pre-need setting as opposed to the time constraints present when arranging a service at the time of death, the pre-need consumer can take all the time they want to make a decision; days, weeks, whatever, a tough environment for a predatory funeral director. Approval of the proposed regulations advocates fewer consumer choices.

Having heard all the legal reasons for not approving these regulations, hopefully my historical perspective will create a greater understanding of this issue.

Sincerely,

Bart H. Cavanagh, Sr.

P.S. It is comical that existing regulation will permit the funeral home maintenance man to arrange an at need funeral and determine if embalming is necessary as long as the licensee okays it in forty-eight hours; but, the unlicensed maintenance man cannot make a pre-need arrangement to be ratified later by the licensee.

Gelnett, Wanda B.

From: Jewett, John H.
Sent: Monday, October 29, 2007 3:16 PM
To: Gelnett, Wanda B.
Subject: FW: Heffner Objection to 16A-4816 Proposed Pre-Need Regulation

FYI – another “proposed comment” on #2639. Looks like it, too, was sent to the IRRC email box.

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

From: Ernie Heffner [mailto:ernieheffner@hotmail.com]
Sent: Monday, October 29, 2007 3:13 PM
To: st-funeral@state.pa.us; msmeay@state.pa.us; hweirich@state.pa.us
Cc: IRRC; Jewett, John H.; Wilmarth, Fiona E.; Emery, Heather; msturla@pahouse.net; mtremmel@pahouse.net; cline@pahousegop.com; dmorabito@state.pa.us; ssaylor@pahousegop.com; shelm@pahousegop.com; rvirag@ameriservfinancial.com; epetersen@ameriservfinancial.com; jkutz@postschell.com; epetersen@ameriserv.com
Subject: Heffner Objection to 16A-4816 Proposed Pre-Need Regulation

Sent Via Email
Monday, October 29, 2007 email

Michelle T. Smey, Administrative Officer
State Board of Funeral Directors

RE: Proposed Pre-Need Reg #16A-4816 (Pre-Need activities of unlicensed employees) published 9.29.07

Dear Ms. Smey,

Please acknowledge receipt of my attached 5 page letter dated 10.29.07 and the 160 pages of supporting material for the Funeral Board in **opposition** to Proposed Pre-Need Regulations #16A-4816 (Pre-Need activities of unlicensed employees) published 9.29.07.

Thank you.

Ernie

Ernie Heffner
Heffner Funeral Chapels & Crematory
1551 Kenneth Road,
York, PA 17408
Ph. 717-767-1551
ernieheffner@hotmail.com

10/30/2007