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REVIEW COMMISSION

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#2639

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.”

Id. at 520.

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

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

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:

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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.

December 5, 2005

BY HAND DELIVERY

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PENNSYLVANIA

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ALLENTOWN

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

Dear Ms. Smey:

NEW JERSEY

PRINCETON

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.

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

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

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

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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.

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

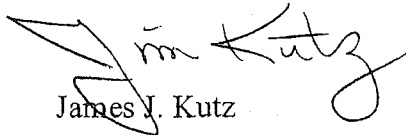
Michelle T. Smey
January 9, 2006
Page 3

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



FILE

#2639

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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

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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.