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## INDEPENDENT REGULATORY REVIEW COMMISSION

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

March 10, 2010

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

Re: Regulation #16A-4816 (IRRC #2639)  
State Board of Funeral Directors  
Preneed Activities of Unlicensed Employee

Dear Mr. Yeosock:

On February 25, 2010, the Independent Regulatory Review Commission disapproved the board's report and revised regulation, filed pursuant to section 7(c) of the Regulatory Review Act. A copy of our order is enclosed.

The Commission's disapproval bars final publication of the regulation for 14 days. If either the Senate Consumer Protection and Professional Licensure Committee or the House Professional Licensure Committee reports out a concurrent resolution, the bar will continue until the General Assembly completes its review pursuant to Section 7(d) of the Act.

If you have any questions on this regulation, please contact me at 783-5417.

Sincerely,

Kim Kaufman  
Executive Director

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Enclosure

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

**INDEPENDENT REGULATORY REVIEW COMMISSION  
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held February 25, 2010

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

Regulation No. 16A-4816 (#2639)  
State Board of Funeral Directors  
Preneed Activities of Unlicensed Employee

On September 19, 2007, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the State Board of Funeral Directors (Board). This rulemaking adds Section 13.206a to 49 Pa. Code. The proposed regulation was published in the September 29, 2007 *Pennsylvania Bulletin* with a 30-day public comment period. The initial final-form regulation was submitted to the Commission on October 6, 2009. The Commission's majority voted to disapprove the final-form regulation on November 19, 2009. The Board submitted its report and the revised final-form regulation to the Commission on January 7, 2010.

The revised regulation sets forth procedures and requirements for the utilization of unlicensed individuals by funeral directors and funeral entities. A key provision requires that the funeral director or entity be "professionally responsible" for the actions of the unlicensed individual. Permissible activities for unlicensed individuals would include furnishing customers with general price lists and other materials in print or electronic media, telemarketing, direct mail solicitation or communicating with customers in ways "not otherwise prohibited by the act or this chapter." Prohibited activities are divided into seven areas. Unlicensed individuals would not be allowed to communicate with customers about the "actual selection" of services or merchandise, or payment arrangements.

This rulemaking is the Board's response to two court decisions. First, the Pennsylvania Commonwealth Court in *Ferguson v. State Bd. of Funeral Directors*, 768 A.2d 393 (2001) (*Ferguson*) upheld the Board's interpretation of the state Funeral Director Law (Law) as prohibiting unlicensed individuals from helping customers select and purchase preneed contracts. Subsequently, the federal court in *Walker v. Flitton*, 364 F.Supp.2d 503 (USDC, MD Pa. 2005) (*Walker*) also accepted Commonwealth Court's interpretation that state law prohibited unlicensed individuals from executing preneed funeral contracts. However, the court held that the Board's actions to enforce the state statute infringed upon the commercial free speech rights of unlicensed employees of funeral businesses. A key distinction between the two cases was that the *Walker* plaintiffs were employees whose activities were supervised by the licensed funeral director. Accordingly, such activities can include the following:

- Interacting with consumers,
- Disseminating accurate price information, and
- Discussing preneed plans with consumers so long as these communications occur under the auspices, employment, direction, and control of a licensed funeral director.

364 F.Supp.2d at 526-527. The *Walker* court also cited the lack of clarifying regulations as a significant issue to be addressed by the Board.

We commend the Board for its efforts to respond to our previous order submitted on November 30, 2009. After the Board's submittal of the revised final-form regulation, we received comments from a variety of organizations expressing concern and opposition. The Majority and Minority Chairs of the Senate Consumer Protection and Professional Licensure Committee and two Representatives also submitted letters expressing serious concerns. No one submitted comments in support.

In evaluating the revised regulation and report submitted by the Board, the Commission must look at our previous order and the criteria set forth by the Regulatory Review Act (Act). *See* 71 P.S. § 745.5b. Substantive concerns and objections remain and form the basis for our vote to again disapprove the revised final-form regulation.

***Statutory authority, Legislative intent, Pertinent opinions of courts (71 P.S. § 745.5b(a))***

Our previous order began its findings on these issues with the following observation:

... The rules of statutory construction at 1 Pa.C.S. § 1922(3) require the presumption that a statute was not intended to violate the Constitution of the United States or of this Commonwealth. Therefore, any interpretation of a statute must be balanced with the rights established under the First Amendment. This was the task set for the Board by the court in *Walker*.

The Board specifically identified additional activities that may be performed by unlicensed individuals. However, the list of prohibited activities remains in the revised regulation and is overly broad. In exercising its authority under the Law, the Board must devise precise rules that accomplish clearly recognizable, limited and necessary objectives without imposing undue infringement on free speech.

Additionally, Section 13.206a(d) includes new language that requires a licensed insurance producer to "inform the consumer that the person is not acting on behalf of the funeral director or funeral entity while acting as an insurance producer." Representatives for the insurance industry question the Board's authority to place disclosure requirements on insurance licensees. Although the Board stated that it was not the intent to regulate the actions of insurance producers, the language of the regulation does impose a disclosure mandate on these professionals who are licensed and regulated by the Insurance Department, not this Board.

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

In our previous order, we asked the Board "to respond to the guidance provided by *Walker* that prohibitions on commercial speech should be 'narrowly tailored' to achieve a governmental interest or purpose." *See* 364 F.Supp.2d at 525-526. In addition, we requested that the Board "identify and thoroughly explain the need for, or harm to be resolved by each provision," and that the harm must be real rather than "speculative." *See* 364 F.Supp.2d at 521.

In reply, the Board states the regulation is needed because *Walker* directs the Board to promulgate regulations. On page 12 of the Preamble, the Board also states that four of the seven paragraphs in the list of prohibited activities in Section 13.206(a)(c) “are directly from the act [Law] and therefore are consistent with the act and are necessary and proper to safeguard the standards of the profession.” However, there is no description of any harm, how the prohibitions protect consumers, or why they are necessary. In response to questions about consumer complaints, the Board reports on pages four and five of the Preamble that from 1999 to 2008, while there were 420 complaints concerning possible unlicensed practice of funeral directing, only one case “involved a situation where a licensed funeral entity utilized an unlicensed individual to engage in preneed sales.” These statistics are consistent with the record in both *Ferguson* and *Walker* that indicated there was little to no record of consumer complaints or harm related to the activities of unlicensed individuals and unlicensed employees. See 768 A.2d at 393 (note 5) and 364 F.Supp.2d at 511-513.

In contrast to Board’s position, *Walker* indicated a potentially wide breadth of activities allowable to unlicensed individuals, including the handling a multitude of questions and subjects with consumers. The federal court also noted that unlicensed people may currently sell caskets in Pennsylvania. *Walker* mentioned how the Board’s statements and actions could be construed to prohibit such sales, and made this observation: “Again, there is no evidence that they intend to extend their prohibitions to this area, but this lack of clarity as well as the potential sweeping effect of the Board members’ statements clearly create unconstitutional restrictions on the Plaintiffs’ right of free speech.” See 364 F.Supp.2d at 525-526 and 528.

Our previous order observed that *Walker* “asked the Board to clarify the Law not repeat it.” This challenge remains unmet. In order to justify prohibitions and restrictions on rights guaranteed by the First Amendment, the Board must clarify the Law by identifying and documenting real harm, why a prohibition or restriction is necessary, and how it narrowly prevents or resolves the harm. We strongly recommend that the Board discard the prohibitions in this regulation, and use the guidelines established by *Walker* to fashion a new rulemaking.

***Possible conflict with other statutes (71 P.S. § 745.5b(b)(3)(i))***

Under Act 1059 of 1963, also known as the Future Interment Law (Act 1059), any person may sell funeral-related merchandise in Pennsylvania. In our previous order, we noted a possible conflict with Act 1059 and recommended that the rule “should be amended to allow unlicensed employees to sell merchandise for their employing funeral entity.” The Board did not adopt this recommendation. In its reply, the Board included a reference to the decision in *Pennsylvania Funeral Directors Association v. State Board of Funeral Directors*, 494 A.2d 67 (Pa. Cmwlth 1985), *affirmed* 511 A.2d 763 (Pa. 1986). However, this decision touched upon the differing trust requirements in the Law and Act 1059, and not on who could sell merchandise. In addition, the Board failed to identify why this restriction is necessary or how it is narrowly tailored to address a problem or harm.

***Reasonableness; Clarity (71 P.S. §§ 745.5b(b)(3)(ii) and (iv))***

We have identified three areas of concern related to these criteria. Our previous order included the following observation:

At our public meeting, the Board's counsel indicated that it was the Board's intent to allow unlicensed employees to go beyond just handing out general price lists and printed materials. Their actions could include discussing or answering questions about prices for various services or combinations of services, selling funeral merchandise, handing out samples of unsigned contracts, and arranging alternative forms of payment, especially if they are licensed insurance producers. However, the final-form regulation does not reflect the Board's intent.

As noted above, the revised regulation provides more details concerning permissible activities for unlicensed individuals. In addition, on page four of its Report, the Board states that even though unsigned contracts are not expressly mentioned in the regulation, "providing sample unsigned contracts is included in this paragraph's authorization to 'furnish truthful and non-misleading printed ... materials....'" See Section 13.206a(b)(2). Likewise, the Board contends that since it has deleted the word "worksheets" from the list of prohibited activities, unlicensed individuals will be allowed to prepare them. See Section 13.206a(c)(2).

The first concern is that since these activities are not specifically listed in the regulation, it will remain unclear to the regulated community that they are permissible for unlicensed individuals. In addition, the regulation still prohibits unlicensed individuals from preparing "a statement of funeral goods and services selected or other proposal" and from discussing the "actual selection" of services with consumers. The Board explains its intent on page 11 of the Preamble:

Actually selecting funeral services is little different from accepting an offer (even if conditional) to provide those services. By prohibiting unlicensed individuals from participating in the actual selection of funeral services, the Board has drawn a **bright line** between informational exchanges and selling preneed funeral services.... (Emphasis added.)

Unfortunately, none of these terms are defined. What is the difference between a worksheet and a proposal or a statement of goods and services? Without the list of goods and services selected by a customer, how will an insurance producer determine the costs of the preneed insurance policy? If a licensed funeral director still must sign the preneed contract to provide services and goods, what harm occurs if an unlicensed employee discusses the selection of goods and services with the customer before the licensee and customer sign the contract?

A second area of concern is the disclosure requirements. The prescribed list for the disclosure form in Section 13.206a(a)(5)(iii) is not consistent with new language in the revised Section 13.206a(c). For example, it states that an unlicensed individual "may not make financial arrangements" but nothing in the disclosure form indicates that this prohibition does not apply to licensed insurance producers. As stated on page two of this order, representatives for insurance companies question the Board's authority to place disclosure mandates on insurance licensees. See Section 13.206a(d). They also contend it will unnecessarily confuse their customers.

The third set of concerns relates to Section 13.206a(e), which serves as a "definitions" subsection. In a partial response to our previous order, the Board amended its definition of "direct personal contact" to include "private courier mail." As we stated in our previous order,

the regulation should also allow for delivery by an unlicensed individual employed by a licensed funeral director or entity. We support the Board's move to allow licensees to communicate, and offer and enter into contracts with consumers via telephone, fax, email, or postal service or private courier mail. However, it is a needless infringement not to also allow an unlicensed employee or agent supervised by a licensee to perform the same task.

A final issue in Subsection (e) is the addition of a definition for "preneed funeral contract." A similar definition was in the proposed version but was deleted from the previous final-form submittal. A definition for this term was also in the other preneed regulation #16A-4815 (IRRC #2627). We commented on this definition in the proposed versions of both regulations. In response to our comments, the Board amended the definition in the other regulation to clarify its intent. The clarifying language is missing from the definition in this revised regulation. If the Board believes this definition is necessary, it should use the language that was in the final-form version of #16A-4815 (IRRC #2627) which was submitted by the Board on September 21, 2009.

***Fiscal impact; Compliance with the provisions of the Act and the Commission's regulations (71 P.S. §§ 745.5b(b)(1) and (6))***

On the issue of fiscal impact, our order stated:

A similar concern is the lack of a substantive response to requests for fiscal impact estimates by the House Professional Licensure Committee in its letter dated November 14, 2007, and this Commission in its comments on the proposed regulation. The Board needs to provide a detailed fiscal impact analysis of the regulation.

In the Preamble, the Board noted that stakeholders have not substantiated their claim that the regulation will have an adverse fiscal or economic impact on their operations. The Board asserts that any impact will be minimal because the *Walker* decision did not alter the scope of practice of licensed funeral directors, and limitations on unlicensed activities established by the interpretation of the Law in *Ferguson* still apply. As noted above, the Board's position is that unlicensed people should be prohibited from working with consumers in the "actual" selection of services and goods. On the other hand, while they have not been forthcoming with detailed information describing the fiscal impact, the commentators strongly disagree with the Board's analysis. Based upon the level of comments received, it is evident that the revised regulation will create confusion and may restrict currently lawful activities of unlicensed agents and employees working for licensees. It will have a significant impact on both these businesses and consumers. Under the Act, the Board is still responsible for providing estimates of this impact.

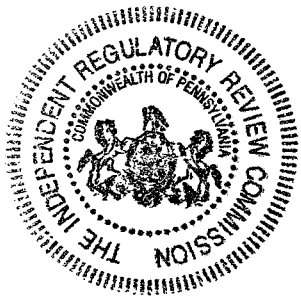
Based upon the information presented to us and after considering the criteria of the Regulatory Review Act discussed above, we find that promulgation of this revised regulation is not in the public interest.

**BY ORDER OF THE COMMISSION:**

**State Board of**

The regulation # 16A-4816 (IRRC # 2639 ) from the Funeral Directors

Preneed Activities of Unlicensed Employee was disapproved on February 25, 2010.



*Arthur Coccodrilli*  
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Arthur Coccodrilli, Chairman

**Regulation #16A-4816 (IRRC #2639)  
State Board of Funeral Directors  
Preneed Activities of Unlicensed Employee**

**Michael J. Yeosock, Chair**

*M. Yeosock*

Date: 3/10/10

**Regulation #16A-4816 (IRRC #2639)  
State Board of Funeral Directors  
Preneed Activities of Unlicensed Employee**

**Honorable Pedro A. Cortes, Secretary**

Date: *PAC* 3/10/10

**Regulation #16A-4816 (IRRC #2639)  
State Board of Funeral Directors  
Preneed Activities of Unlicensed Employee**

**Honorable Julie Harhart  
Minority Chairman**

*Michelle Warren*

Date: 3/10/10



**Regulation #16A-4816 (IRRC #2639)**  
**State Board of Funeral Directors**  
**Preneed Activities of Unlicensed Employee**

Honorable Michael McGeehan  
Majority Chairman

Date: 3/10/10

**Regulation #16A-4816 (IRRC #2639)**  
**State Board of Funeral Directors**  
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Honorable Robert M. Tomlinson  
Majority Chairman

Date: 3-10-10

**Regulation #16A-4816 (IRRC #2639)**  
**State Board of Funeral Directors**  
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Honorable Lisa Boscola  
Minority Chairman

Date: 3/10/10