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## INDEPENDENT REGULATORY REVIEW COMMISSION

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

November 28, 2007

Anthony Scarantino, Chairman  
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 Chairman Scarantino:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman  
Executive Director  
wbg  
Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional  
Licensure Committee  
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and  
Professional Licensure Committee  
Honorable P. Michael Sturla, Majority Chairman, House Professional Licensure Committee  
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure  
Committee  
Honorable Pedro A. Cortes, Secretary, Department of State

# **Comments of the Independent Regulatory Review Commission**

**on**

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

### **Preneed Activities of Unlicensed Employee**

**November 28, 2007**

We submit for your consideration the following comments on the proposed rulemaking published in the September 29, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the State Board of Funeral Directors (Board) to respond to all comments received from us or any other source.

#### **1. Comments from the House Committee - Fiscal impact; Public health and welfare; Implementation procedures; Feasibility; Reasonableness; Consistency or conflict with the statute; Need; Clarity; Compliance with the Act.**

By letter dated November 14, 2007, the House Professional Licensure Committee (House Committee) submitted its comments on this proposed regulation which identified concerns, issues and questions that relate directly to the criteria and requirements for submitting regulations. We share the comments presented by the House Committee and incorporate them into the Commission's comments on this proposed regulation.

One of the most important concerns raised by the House Committee and other commentators was the fiscal impact of the proposed regulation. They assert that the proposed regulation does not reflect current practices in many segments of the preneed market and will increase costs for funeral entities and customers. The Board failed to provide any estimates of these potential costs in the Regulatory Analysis Form or the Preamble that accompanied the proposed regulation. Fiscal impact and other information is required by Section 5(a) of the Regulatory Review Act (Act) (71 P.S. § 745.5(a)). Therefore, the Board needs to develop and document an analysis of the fiscal impact of this proposed regulation on both the public and private sectors. This analysis should include detailed information as required by the Act (71 P.S. §§ 745.5(a)(4), (a)(5), and (a)(9)-(12)).

#### **2. Section 13.1. Definitions. - Reasonableness; Need; Clarity.**

*Preneed activity -*

This term is used only once in the proposed regulation. Therefore, this definition may be unnecessary and should be deleted from the final-form regulation unless the Board can explain both the intent and need for the definition.

*Preneed funeral contract -*

We have questions in two areas concerning this definition.

First, why does this definition only include the term “funeral entity”? In addition to “funeral entity,” the term “licensed funeral director” is defined in Section 13.1 of the existing regulations. Why not include both “funeral entity” and “licensed funeral director” in the definition for preneed funeral contract?

Second, what is the intent of including the phrase “whether or not the funeral entity receives preneed funeral funds”? Why would a business enter into such a contract without receiving funds?

Furthermore, a significant focus of Section 13(c) of the Funeral Director Law (Law) (63 P.S. § 479.13(c)) is the money received for such contracts. What type of review or oversight would the Board exercise in a situation where there is no monetary transaction?

**3. Section 13.206a. Utilization of unlicensed employees by a funeral entity. - Fiscal impact; Public welfare; Implementation procedures; Feasibility; Reasonableness; Consistency or conflict with statutes and other regulations; Need; Clarity.**

There are four subsections in this section. Our comments include issues and questions relating to the whole section, and also identify specific questions or issues relating to provisions in each subsection.

Throughout the section, the terms or phrases “unlicensed employee” and “employee not licensed under the act” appear to be used interchangeably. If both refer to the same type of individual, the Board should pick one term or phrase and use it consistently in the final-form regulation.

*Subsection (a) - Responsibilities and conditions*

This subsection contains five subparagraphs. Our comments and questions address four areas regarding these subparagraphs.

First, the intent of the phrase “close supervision” in Subparagraph (a)(2) is unclear. The final-form regulation should specify the standards for the term “close supervision” or delete this subparagraph from the final-form regulation.

Second, Subparagraph (a)(3) mirrors Section 11(a)(8) of the Law (63 P.S. § 479.11(a)(8)). In discussing this provision, the Preamble states:

By prohibiting the unlicensed employee from being paid based upon how much preneed business the employee brings into the funeral home, 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 interest.

What safeguards are in place to deter funeral entities and licensed funeral directors from persuading a customer to select services and merchandise that are not in the customer's interest regardless of whether unlicensed employees are involved?

Third, we have questions and concerns in two areas relating to Subparagraph (a)(4) which reads:

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.

It is unclear whether this provision also applies to funeral entities that do not hire unlicensed employees to conduct preneed business. What are the requirements for entities or directors who do not have unlicensed employees involved in preneed business? Would the "face-to-face" rule apply to them? If not, could such a funeral director conduct preneed business via the postal service, email or telephone? If some form of "face-to-face" rule is retained in the final-form regulation, it should apply to all transactions, not just the ones where unlicensed employees are involved.

The House Committee, Pennsylvania Association for Autism and Intellectual Disabilities and other commentators expressed serious concerns with, and opposition to, the "face-to-face" requirement. It is our understanding that there may be hundreds to thousands of preneed contracts being completed via the postal service without "face-to-face" meetings. Many of these customers are confined to their residences for various health reasons. They live in various regions across the state. Many are also seeking to set aside preneed funds and avoid having them counted as resources in eligibility determinations for Social Security or Medical Assistance programs. Under a "face-to-face" mandate, these prearrangement services and the setting aside of resources may be unavailable. Given these conditions, is this new requirement feasible or necessary?

Before the Board requires "face-to-face" meetings, it should determine whether there are sufficient numbers of licensees available to meet with these parties and whether a "face-to-face" rule is needed. The final-form regulation could provide for flexibility and consumer choice by requiring that customers be given options such as: 1) "face-to-face" consultation; 2) teleconference; 3) email, facsimile or postal service; or 4) communication via intermediaries or unlicensed employees.

Fourth, Subparagraph (a)(5) contains language for a prescribed notice stating that a document presented by an unlicensed employee is not a binding contract. The Pennsylvania Funeral Directors Association (PFDA) and other commentators questioned the need for this requirement. Since a preneed contract must be signed by a funeral director, why is the prescribed notice necessary?

As an alternative to this notice, the Board should consider requiring a different disclosure statement. This disclosure would inform customers that an agent or employee is not a licensed funeral director and is acting only as an employee or agent for the licensed funeral director(s). In

part, the language of this disclosure could mirror Section 15(1) of the Law (63 P.S. § 479.15(1)) which is entitled “What constitutes practice.” Section 15(1) reads:

A person, either individually or as a member of a partnership or of a corporation, shall be deemed to be practicing as a funeral director within the meaning and intent of this act who:

(1) holds himself out to the public in any manner as one who is skilled in the knowledge, science and practice of funeral directing, embalming or undertaking, or who advertises himself as an undertaker, mortician or funeral director.

By disclosing that the unlicensed person is not practicing as a person skilled in the profession, it would prevent any misconceptions on the part of customers as to whether the unlicensed person is practicing as a licensed funeral director.

#### *Subsection (b) - Permitted activities*

This subsection describes what an unlicensed employee may do in conducting preneed business. The employee may:

- Distribute general price lists of the employing funeral entity only.
- Provide general assistance... including communications with customers, not otherwise prohibited by the act or this chapter.

The Board submitted a copy of the federal court decision in *Walker v. Flitton*, 364 F.Supp.2d 503 (M.D. Pa. 2005) (*Walker*) with this proposed regulation. The Preamble of the proposed regulation states that in the *Walker* decision, “the court noted the responsibility of the Board to delineate with precision what conduct by unlicensed persons is permissible.” The proposed regulation does not provide sufficient detail to satisfy the court’s mandate. The final-form regulation should provide specific direction and concrete examples of the types of interaction and assistance that may be conducted by unlicensed employees in the preneed business.

#### *Subsection (c) - Prohibited activities*

This subsection includes a list of prohibitions that apply to unlicensed employees. The list is divided into seven subparagraphs. We have identified the following questions and issues with the language of these subparagraphs.

There is an overall concern. To justify these subparagraphs, the Preamble relies exclusively on the Commonwealth Court decision in *Ferguson v. State Bd. of Funeral Directors*, 768 A.2d 393 (2001) (*Ferguson*). The Board’s position that assisting customers in the selection of services and merchandise constitutes the practice of funeral directing was upheld in *Ferguson*. However, in its opinion, the court clearly noted both its obligation to give deference to the Board’s interpretation of its rules and regulations, and the court’s limited scope of review. 768 A.2d at 398.

Several commentators raised fiscal and policy concerns regarding this subsection. In addition, the federal court in *Walker* clearly expressed a preference for prohibitions on commercial speech that are “narrowly tailored” to achieve a governmental interest. 364 F.Supp.2d at 525-526. In this light, we would encourage the Board to review its interpretation of the Law and consider allowing for more active and robust participation in preneed activities by unlicensed employees.

As the Board responds to commentators’ concerns and questions regarding Subsection (c), it should:

- 1) Specifically identify the governmental interest or policy objective that each prohibition is designed to achieve.
- 2) Clarify how the provision is “deemed necessary or proper to safeguard the interests of the public and the standards of the profession” (63 P.S. § 479.16(a)).
- 3) Explain how the provision has been “narrowly tailored” to implement the governmental interest or policy objective.

The Board should provide solid and factual documentation to explain how each restriction on commercial speech will effectively protect the public from real and ongoing harm.

Subparagraph (c)(1) requires that an unlicensed employee be associated with only one funeral entity. Several commentators assert that this requirement will place a hardship on smaller funeral homes, especially in rural areas. A smaller business may not be able to hire an employee to assist in preneed business. But, two or more funeral homes could combine resources to share an employee who focuses on preneed business. Removing this option may reduce the ability of funeral entities to offer preneed services and increase the price of such services (since a single funeral home will need to charge more to compensate its employee). The Board should explain the need for this requirement and how it will impact the availability and cost of services.

Subparagraph (c)(2) prohibits the unlicensed employee from preparing “worksheets, proposals or other presentations.” This language is overly broad. Can these employees work independently and away from customers in preparing these items with or for a licensee?

Subparagraphs (c)(3) and (c)(4) prohibit the involvement of unlicensed employees in communications with customers concerning the “actual selection of funeral services and merchandise incidental to the services” and making of “financial arrangements.” How will the Board monitor these activities and enforce the prohibitions? Another concern is possible confusion relating to sale of “merchandise.” Any person may sell merchandise under Act 1059 of 1963 (63 P.S. §§ 480.1-480.11) (Act 1059), also known as the Future Interment Law. Currently, unlicensed vendors legally sell funeral merchandise in Pennsylvania. The *Walker* court also observed that unlicensed individuals may sell funeral merchandise. 364 F.Supp.2d at 525-526. The Board should address this potential conflict between Act 1059 and its interpretation of the Law, and it should explain what is meant by “merchandise incidental to the services.”

Subparagraph (c)(5) would not allow an unlicensed employee to “[o]ffer to or enter into a preneed funeral contract with any customer on behalf of the funeral director or funeral entity.” Would an unlicensed employee be allowed to deliver or present a copy of a draft contract to a customer? If not, why?

*Subsection (d) - Insurance agents*

There are two concerns with this subsection.

First, this is the only subsection which uses the word “agent.” The House Committee requested more information concerning the impact of this proposed regulation on other professions but it did not identify all these professions as “agents.” The federal court in *Walker* referred to “agents” in conjunction with employees of a funeral director even though the specific circumstances of the case were limited to employees of funeral entities. 364 F.Supp.2d at 507, 513, 520, 522-526, 528 and 529. The *Walker* decision also used the words “employer” and “principal” in discussing employees and agents. 364 F.Supp.2d at 506, 520, 522 and 528. The final-form regulation should provide specific direction for agents working on preneed accounts, or the Board should explain why they are not included.

Second, the last subsection includes the phrase “a licensed insurance agent acting under licensure from the Insurance Department.” This reference is incomplete and out-of-date. Act 147 of 2002 (Act 147) changed this term to “insurance producer.” However, the existing regulations for the Insurance Department at 31 Pa. Code Chapters 37 and 39 have not yet been revised and continue to use the terms “insurance agents and brokers.” These two chapters remain effective to the extent they are not “clearly inconsistent” with the new act (40 P.S. § 310.98). If this subsection is retained in the final-form regulation, it should be revised to include references to the existing regulations and Act 147.

**4. General - Fiscal impact; Reasonableness; Implementation procedures; Feasibility; Need; Clarity.**

PFDA submitted extensive comments supporting the goal of the proposed regulation. It also made several suggestions for revisions and additions of new and substantive provisions. Its recommendations included proposals for new rules and procedures regulating registration and bonding, direct mail, seminars, and telemarketing. We urge the Board to carefully examine and consider PFDA’s recommendations.

However, if the Board opts to pursue promulgation of substantial and extensive provisions that were not included in the notice of proposed rulemaking in the *Pennsylvania Bulletin* for this regulation, it should introduce these programs via a future notice of proposed rulemaking. The general public and General Assembly should be afforded a full opportunity to review such provisions and offer comments before such substantive proposals are submitted in a final-form regulation.

**Facsimile Cover Sheet**

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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
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Cynthia Montgomery  
**Agency:** Department of State  
Licensing Boards and Commissions  
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**Date:** November 28, 2007  
**Pages:** 8

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the State Board of Funeral Directors' regulation #16A-4816 (IRRC #2639). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:

Date:

11/28/07