

Regulatory Analysis Form

(Completed by Promulgating Agency)



SECTION I: PROFILE

(1) Agency:
Department of State, Bureau of Professional and Occupational Affairs, State Board of Funeral Directors

(2) Agency Number: **16A**

Identification Number: **4816**

IRRC Number: **2639**

(3) Short Title:
Preneed activities of unlicensed employee

(4) PA Code Cite:
49 Pa. Code § 13.206a

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: Thomas A. Blackburn, Regulatory unit counsel, Department of State;
(717)783-7200; P.O. Box 2649, Harrisburg, PA 17105-2649; (717)787-0251; tblackburn@state.pa.us

Secondary Contact: Joyce McKeever, Deputy Chief Counsel, Department of State
(717)783-7200; P.O. Box 2649, Harrisburg, PA 17105-2649; (717)787-0251; jmckeever@state.pa.us

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5: **State Board of Funeral Directors**
(717)783-3397; P.O. Box 2649, Harrisburg, PA 17105-2649; (717)705-5540; st-funeral@state.pa.us

(All Comments will appear on IRRC'S website)

- (7) Type of Rulemaking (check applicable box):
- Proposed Regulation
 - Final Regulation
 - Final Omitted Regulation
 - Emergency Certification Regulation;
 - Certification by the Governor
 - Certification by the Attorney General

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(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

This rulemaking amends the Board's existing regulations to set forth limitations on what an unlicensed employee of a funeral entity may do concerning preneed sales. In general, the unlicensed employee is permitted to provide information, including price lists, concerning the services available from the funeral home, but could not practice funeral directing or hold himself out as a funeral director.

(9) Include a schedule for review of the regulation including:

- | | |
|---|-----------------------|
| A. The date by which the agency must receive public comments: | <u>10/29/2007</u> |
| B. The date or dates on which public meetings or hearings will be held: | <u>N/A</u> |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | <u>fall 2009</u> |
| D. The expected effective date of the final-form regulation: | <u>publ. as final</u> |
| E. The date by which compliance with the final-form regulation will be required: | <u>publ. as final</u> |
| F. The date by which required permits, licenses or other approvals must be obtained: | <u>N/A</u> |

(10) Provide the schedule for continual review of the regulation.

The Board continually reviews the efficacy of its regulations, as part of its annual review process under Executive Order 1996-1. The Board reviews its regulatory proposals at regularly scheduled public meetings, generally the first Wednesday of each month. More information can be found on the Board's website (www.dos.state.pa.us/funeral).

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SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The regulatory amendments are authorized by Sections 11, 13, 15 and 16(a) of the Funeral Director Law (63 P.S. §§ 479.11, 479.13, 479.15 and 479.16(a)).

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

In general, the rulemaking is not mandated by any federal or state law or court order or federal regulation. However, this rulemaking was suggested by the comments of the trial court judge in *Walker v. Flitton*, 364 F.Supp.2d 503 (U.S.D.C. M.D. Pa. 2005), as indicated in the preamble. There are no deadlines for action.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

As recognized in *Walker*, there is considerable confusion in the profession and the entire death care industry over the extent to which persons not licensed to practice funeral directing may assist funeral directors in the area of preneed sales. Regulation will reduce this confusion.

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

This rulemaking is not based upon any scientific data, studies, or references.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

The Board does not foresee any groups being adversely affected by the proposed rulemaking.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

All funeral directors and funeral entities will be subject to the rulemaking. Those funeral directors that currently utilize unlicensed employees beyond what is authorized in this rulemaking (which current law prohibits) may be adversely affected by having to curtail that activity. There are approximately 3300 funeral directors holding a current license and approximately 1400 licensed funeral establishments (other than separately-licensed branch establishments) in Pennsylvania.

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SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings to the regulated community associated with compliance with the proposed rulemaking.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings to local governments associated with compliance with the proposed rulemaking.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings to state government associated with compliance with the proposed rulemaking.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings	NA	NA	NA	NA	NA	NA
COSTS:						
Regulated Community						
Local Government						
State Government						

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Total Costs	NA	NA	NA	NA	NA	NA
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	NA	NA	NA	NA	NA	NA

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3 (FY 05-06)	FY -2 (FY 06-07)	FY -1 (FY 07-08)	Current FY (FY 08-09)
Pa. State Board of Funeral Directors	\$740,332	\$851,657	\$986,024	\$928,000

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

No adverse effects or costs have been associated with compliance with the rulemaking. Therefore, the above-identified benefits would outweigh any costs.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

In November, 2005, the Board distributed an exposure draft of this proposed rulemaking and invited interested persons to provide comments and attend an upcoming public hearing. The Board received written comments from: James H. Hodges, National Alliance of Life Companies; M. Merritt Hughes, Luzerne County Funeral Directors Association; John F. Givnish, FD, Deitner/Givnish Funeral Home, Inc.; Matthew Dew and Tim Nicholson, National Guardian Life Insurance Co.; Kevin M. Bean, FD, Bean Funeral Home and Cremation Services, Inc.; James J. Kutz, Esquire, Pennsylvania Cemetery & Funeral Ass'n; Mark A. Willoughby, Forethought Financial Services, Inc.; Dean K. Wetzler, Jr., FD, Pennsylvania Funeral Directors Ass'n; Ray Landis, AARP; Monumental Life Insurance Co; Jefferson Memorial Funeral Home, Inc.; James Smith Dietterick & Connelly, LLP, attorneys at law; Ernest F. Heffner, FD, Heffner Funeral Chapel & Crematory, Inc.; Gerry Kraus, Homesteaders Life Company. On December 12, 2005, the Board held a public hearing at which the following persons testified: James H. Hodges, National Alliance of Life Companies; M. Merritt Hughes, Luzerne County Funeral Directors Ass'n; John F. Givnish, FD, Deitner/Givnish Funeral Home, Inc.; Kevin M. Bean, FD, Bean Funeral Home and Cremation Services, Inc.; James J. Kutz, Esquire, Pennsylvania Cemetery & Funeral Ass'n; Mark A. Willoughby, Forethought Financial Services, Inc.; Dean K. Wetzler, Jr., FD, Pennsylvania Funeral Directors Ass'n; Ray Landis, AARP; Ernest F. Heffner, FD, Heffner Funeral Chapel & Crematory, Inc.; Gerry Kraus, Homesteaders Life Co.; Warren Miller, FD,

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Wetzel Funeral Home; Jack Yanosky, Pennsylvania Dept. of Insurance; Andrew W. Nix, Jr., FD, Nix Funeral Home; Vince Baker, FD, Baker Funeral Home; Kevin Griesiger, Homesteaders Life Co.; Sheila Burke, Homesteaders Life Co.; Sam Cummings, Jr., FD; and Bob Rae, FD, Golden Considerations. Subsequent to the hearing, the Board also received additional written comments from: Warren F. Miller, FD; Gerry Kraus, Homesteaders Life Co. and Scott J. Cipinko, Life Insurance Council. The Board considered all testimony and comments in preparing the proposed rulemaking.

Following publication as proposed and receipt of public comments, the Board discussed these comments and all comments from the standing committees and IRRC at public meetings of the Board, which are routinely attended by members of the regulated community and their professional associations. The Board considered all these comments in preparing the final rulemaking package.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No alternative regulatory schemes were considered.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The rulemaking is not more stringent and does not overlap or conflict with any federal requirements.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

Delaware, New Jersey, New York, and West Virginia all permit, either via enacted law or administrative regulations, third parties or agents of funeral directors to sell or solicit preneed funeral plans. Maryland does not. The proposed rulemaking will not put Pennsylvania at a competitive disadvantage with these other states.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This regulation will not affect other regulations of the Board or other state agencies.

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(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

This rulemaking will not require any additional recordkeeping or other paperwork.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The Board has determined that there are no special needs of any subset of its applicants or licensees for whom special accommodations should be made.

would prohibit the funeral director from paying any commission to the unlicensed employee for soliciting business. See, section 11(a)(8) of the act (63 P.S. § 479.11(a)(8)) (Board may take disciplinary action against a funeral director who "solicit[s] patronage . . . by paying a commission or agreeing to pay a commission to any person or persons for soliciting or for business secured, or paying any gratuity to any person with the intent to have such person aid in securing business"). 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. Proposed § 13.206a(a)(4) would require the funeral director to meet face-to-face with the customer before entering into the contract, and proposed § 13.206a(a)(5) would require that any document presented to a customer by the unlicensed employee must include a notice that the document will not be binding and that a licensed funeral director must meet with the customer before entering into any contract. See, *Walker* at 527 (unlicensed individual may not contract with customer, and Board may require licensed funeral director to consult face-to-face with preneed customer before the customer's proposed contract is signed by the funeral director).

In *Walker*, supra, at pages 526-27, the court noted the responsibility of the Board to delineate with precision what conduct by unlicensed persons is permissible. Proposed § 13.206a(b) and (c) would set forth those actions of unlicensed employees that would be permitted or prohibited, respectively. Proposed § 13.206a(b)(1) would specifically authorize an unlicensed employee to distribute general price lists of the employing funeral entity, and proposed § 13.206a(b)(2) would authorize an unlicensed employee to provide general assistance to the employing funeral entity by engaging in activities not otherwise prohibited. These provisions are intended to allow funeral entities enough latitude to be responsive in allowing unlicensed employees to communicate with consumers with regard to preneed activity without violating the act, while being responsive to the mandate of the court in *Walker*.

Proposed § 13.206a(c) would prohibit an unlicensed employee from engaging in certain actions concerning preneed activities. Proposed § 13.206a(c)(1) would prohibit an unlicensed employee from being associated with any other funeral entity. See, *Walker* at 506, n. 17 at 520 (court need not address unlicensed person not trained by and acting on behalf of specified funeral director, because plaintiffs are fulltime employees of funeral home trained and supervised by licensed funeral director). Being restricted to a single funeral entity, the unlicensed employee would be acting only on behalf of the funeral director and funeral entity responsible for the unlicensed employee's actions who also have presumably trained the unlicensed employee. Additionally, if an unlicensed employee were to work for more than one funeral entity, the various funeral directors may be less likely to closely supervise the unlicensed employee, because each funeral director might tacitly assume that all work away from that funeral entity would be supervised by the funeral directors at other funeral entities, and the unlicensed employee might not be closely supervised at all.

Because the Board cannot authorize unlicensed employees of a funeral entity to practice funeral directing, proposed § 13.206a(c)(2) and (3) would prohibit an unlicensed employee from preparing worksheets, proposals or

other presentations for funeral services or to engage in discussions or other communications with customers regarding the actual selection of funeral services and merchandise incidental to those services. See, *Ferguson* at 400 (counseling selection of preneed funeral services is making arrangements for funeral service and selling funeral merchandise incidental to the services and is therefore engaging in the practice of funeral directing). Similarly, proposed § 13.206a(c)(4) would prohibit an unlicensed employee from making financial arrangements for the rendering of funeral services and merchandise incidental to such services. See, *Walker* at 527 (under no circumstances may unlicensed individual act as a funeral director as defined in section 2(1) of the act; section 2(1) of the act (term "funeral director" includes "a person who makes arrangements for funeral service and who sells funeral merchandise to the public incidental to such service or who makes financial arrangements for the rendering of such services and the sale of such merchandise"); see also, *Ferguson* at 400 (entering into contract for life insurance to fund funeral and effectuating the assignment of the policy to the funeral director as previously agreed constitutes making financial arrangements for funeral services and merchandise). Because these actions by the unlicensed person constituted the unlicensed practice of funeral directing in *Ferguson*, the Board must make clear that an unlicensed person cannot practice funeral directing by engaging in these actions.

Proposed § 13.206a(c)(5) would prohibit an unlicensed employee from offering to or entering into a preneed funeral contract with any customer on behalf of the funeral entity. See, *Walker* at 527 (under no circumstances may unlicensed individual contract with consumer for sale of preneed funeral). Section 13(c) of the act, as construed in *Ferguson*, makes it clear that only a licensed funeral director may enter into a preneed contract. This proposed provision is necessary to maintain that limitation. Proposed § 13.206a(c)(6) and (7) would prohibit an unlicensed employee from engaging in any activity that would cause a customer to believe that the unlicensed employee is skilled in the knowledge, science or practice of funeral directing or to engage in any activity that constitutes the practice of funeral directing under the act. See, *Walker* at 527 (under no circumstances may unlicensed individuals act as a funeral director as defined in section 2(1) of the act); section 15(1) of the act (person is deemed to be practicing as a funeral director under the act if he "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"). These prohibitions of proposed § 13.206a(c) are intended to protect the public by clearly defining what an unlicensed employee of a funeral entity may not do in regard to preneed activity consistent with the act as construed in *Ferguson* and in accordance with the judicial mandate in *Walker*.

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

In November, 2005, the Board solicited input from and provided an exposure draft of this proposed rulemaking to funeral directors and organizations as required. The Board held a public hearing on the exposure draft on December 12, 2005. At a public meeting in March 2006, a committee of the Board discussed the various comments and prepared a revised draft of this proposed rulemaking, which the Board subsequently approved. The Board prepared an alternate version of this proposed rulemaking,

PROPOSED RULEMAKING

STATE BOARD OF FUNERAL DIRECTORS

[49 PA. CODE CH. 13]

Preneed Activities of Unlicensed Employee

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

Effective date

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

Statutory Authority

The amendments are authorized under sections 11, 13, 15 and 16(a) of the Funeral Director Law (act) (63 P. S. §§ 479.11, 479.13, 479.15 and 479.16(a)).

Background and Need for the Amendment

Section 13(c) of the act (63 P. S. § 479.13(c)) provides, "No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed." In *Ferguson v. State Bd. of Funeral Directors*, 768 A.2d 393, 400 (Pa. Cmwh. 2001), appeal denied, 566 Pa. 670, 782 A.2d 549, the court affirmed the Board's conclusion that an insurance agent who identified herself as working with a funeral director and, equipped with the funeral director's price lists and other literature, counseled the preneed selection of funeral goods and services, even though the funeral director later met with each customer and had the customer sign a statement of funeral goods and services prepared by the funeral director on the basis of the insurance agent's worksheets, offered to enter into a contract with the insured for funeral goods and services when needed without being licensed to practice funeral directing (in violation of section 13(c) of the act). The court also held that by doing so the insurance agent made arrangements for funeral services and sold funeral merchandise to the public incidental to the funeral services and therefore engaged in the practice of funeral directing without a license (in violation of section 13(a) of the act). Id. at 399-400. By doing that and entering into a life insurance contract to fund the preneed arrangements, which the funeral director had already agreed to accept as payment in full, the insurance agent also made financial arrangements for the rendering of funeral services and sale of merchandise incidental to the services and therefore engaged in the practice of funeral directing without a license (in violation of section 13(a) of the act). Id. However, in *Walker v. Flitton*, 364 F.Supp.2d 503 (U.S.D.C. M.D. Pa. 2005), a case involving commercial free speech rights under the First Amendment of the Federal constitution, the court ordered that the Board "shall not prohibit agents or employees of specific licensed funeral directors from providing accurate information to consumers regarding the sale of preneed funeral plans and services. This interaction shall include, but shall not necessarily be limited to, the distribution of accurate price lists to consumers, but under no circumstances may unlicensed individuals contract with consumers for the sale of preneed funerals, nor may they act as a 'funeral director' as defined in [the act]." The court indicated that

it did not intend to alter the Pennsylvania substantive law set forth in *Ferguson*. Id. at 513.

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

This proposed rulemaking addresses only preneed activities and not actions after a death has occurred. In the event the licensed funeral director is temporarily absent, an unlicensed member of the funeral home staff may make tentative funeral arrangements after a death has occurred. See section 13(d) of the act (63 P. S. § 479.13(d)). Making tentative arrangements does not include offering to enter into a contract with a living person to render funeral services to the person when needed, and does not include making arrangements for funeral services and selling merchandise incidental to the service and does not include making financial arrangements for the rendering of funeral services and sale of merchandise incidental to the services. See 49 Pa. Code § 13.205 (relating to tentative agreements) tentative arrangements means contacting a licensed funeral director for the embalming operation, obtaining and placing obituary notices, setting a service time with the clergyperson and cemetery official and making an appointment for the family with a licensed funeral director for the selection of merchandise.

Description of the Proposed Amendments

In § 13.1 (relating to definitions), the term "preneed activity" would be defined as activity concerning the provision of funeral merchandise and services upon the death of a specifically identified person living at the time of the activity, and the term "preneed funeral contract" would be defined as an agreement under which a funeral entity promises or agrees to provide funeral merchandise and render services upon the death of a person living at the time the contract is made. These definitions are consistent with section 13(c) of the act.

Proposed § 13.206a would address the use of unlicensed employees of the funeral entity concerning preneed activity. Proposed § 13.206a(a) would set forth standards for the relationship between the funeral director or entity and the unlicensed employee. Proposed § 13.206a(a)(1) would make clear that the funeral director and funeral entity are professionally responsible for the actions of the unlicensed employee. See, *Walker* at 515 (funeral director is exposed to sanction by Board for improper action of unlicensed employee). Proposed § 13.206a(a)(2) would require the funeral director to closely supervise the unlicensed employee. See, *Walker* at 527 (Board may require close supervision by funeral director of unlicensed employees interacting with customers concerning preneed sales). Proposed § 13.206a(a)(3)

which would permit unlicensed employees to engage in a greater range of activities. In January 2007, the Board provided to interested parties this alternative exposure draft and solicited comments. In response to extensive comments from the regulated community, the Board determined that it should proceed with the proposed rulemaking in substantially the same form as previously approved. In addition, the Board considered the impact the rulemaking would have on the regulated community and on public health, safety and welfare.

Fiscal Impact and Paperwork Requirements

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

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 19, 2007, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee and the House Professional Licensure Committee. A copy of this material is available to the public upon request.

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

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Michelle T. Smey, Administrative Officer, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Please reference No. 16A-4816 (Preneed activities of unlicensed employees), when submitting comments.

ANTHONY SCARANTINO,
Chairperson

Fiscal Note: 16A-4816. No fiscal impact; (8) recommends adoption.

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:

* * * * *

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

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

* * * * *

§ 13.206a. Utilization of unlicensed employees by a funeral entity.

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

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

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

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

(4) 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.

(5) Any document presented by the unlicensed employee to the customer for signature or acknowledgment must bear in 20-point or larger print the following notice completed with the name of the funeral entity:

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

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

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

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

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

(1) Be associated with any other funeral entity.

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

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

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

(5) Offer to or enter into a preneed funeral contract with any customer on behalf of the funeral director or funeral entity.

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

(7) Engage in any activity that constitutes the practice of funeral directing under the act.

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

[Pa.B. Doc. No. 07-1793. Filed for public inspection September 28, 2007, 9:00 a.m.]

STATE BOARD OF PHARMACY

[49 PA. CODE CH. 27]

Revisions Regarding Current Pharmacy Practice

The State Board of Pharmacy (Board) proposes to amend §§ 27.1, 27.2, 27.12, 27.17—27.19, 27.21, 27.25 and 27.31 and to delete § 27.3 to read as set forth in Annex A.

Effective Date

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

Statutory Authority

The proposed rulemaking is authorized under sections 4(j), 6(k)(1) and (9) of the Pharmacy Act (act) (63 P. S. §§ 390-4(j), 390-6(k)(1) and (9)).

Background and Need for Amendment

The Board undertook a wholesale review of its regulations to determine what provisions were outdated. Through careful review and with input from stakeholders, the Board decided to delete certain regulations and to update others to reflect current pharmacy practice.

Description of Proposed Amendments

General Changes

In § 27.1 (relating to definitions), the Board proposes to update the definition of "ACPE" to reflect the organization's current name—the Accreditation Council for Pharmacy Education. The Board also proposes to define "licensed person" to clarify that as used throughout Chapter 27, the term refers only to persons licensed by the Board and not to persons licensed by other boards under the Bureau of Professional and Occupational Affairs.

The Board proposes to amend § 27.2 (relating to other definitions) to replace the outdated acronym "BNDD," which previously stood for Bureau of Narcotics and Dangerous Drugs, with the defined term "DEA," which is the Federal agency responsible for enforcing the Federal drug laws. The Board also proposes to delete § 27.3 (relating to location of office), because the address provided has been long outdated. The Board chose not to replace it because the Board's current address is subject to change and is readily available on the Board's website.

§ 27.12 (relating to practice of pharmacy and delegation of duties)

The Board proposes to amend § 27.12 to delete the prohibition on pharmacy interns accepting and transcribing oral orders and telephone prescriptions. The purpose of a pharmacy internship is to prepare a pharmacy student to function as a pharmacist. One of the pharmacist's duties is to receive telephone prescriptions and other oral orders. Pharmacy interns are well prepared to assume this responsibility and, with direct supervision by a pharmacist required for all pharmacy interns, there is no increased risk to the public.

§ 27.17 (relating to security for Schedule II controlled substances)

The Board proposes to amend § 27.17 to remove the requirement that Schedule II controlled substances be stored in a separate, secure area in the pharmacy. The Board had previously amended § 27.16(b)(3) (relating to construction and equipment requirements) to conform to Department of Health regulations in 28 Pa. Code § 25.63 (relating to security controls for practitioners and research personnel), to allow controlled substances to be dispersed throughout the stock of the pharmacy in a manner that obstructs theft or diversion of controlled substances. Section 27.17, however, was not amended and has resulted in confusion over how Schedule II controlled substances must be stored. With the proposed revision, § 27.17 will be consistent with the Department of Health regulations and with previously amended regulations of the Board.

§ 27.18 (relating to standards of practice)

The Board proposes to amend § 27.18(b)(4) to clarify that readily retrievable images of prescriptions may serve as the original prescriptions. This change was already effected by amendments to §§ 27.14 and 27.201 (relating to supplies; and electronically transmitted prescriptions). The proposed change merely serves to conform this section to those recent amendments. The Board also proposes to add § 27.18(l) to codify the standard practice that prescriptions may be refilled for a period up to 1 year from the date of the prescription.

In addition, the Board proposes to amend § 27.18(j) to prohibit the filling of Schedule II prescriptions after 6 months have passed from the date of the prescription. Currently, there is no time limit as to how long a prescription for a Schedule II controlled substance is valid. The Board believes there should be a limit and proposes 6 months as a reasonable time during which a Schedule II controlled substance prescription may be filled. The Board believes that this requirement will bring the time restriction in line with the restriction for filling of Schedule III, IV and V substances.

The Board also proposes to amend § 27.18(l)(3) to allow mailing of prescriptions subject to significant deterioration of the original content due to heat, cold fermentation or prolonged agitation, if the shipping is done in a manner that would preserve the integrity of the drug.

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November 14, 2007

Mr. Anthony Scarantino
Chairperson
State Board of Funeral Directors
Post Office Box 2649
Harrisburg, PA 17105

RE: Proposed Regulation
State Board of Funeral Directors
16A-4816: Preneed Activities of Unlicensed Employee

Dear Chairperson Scarantino:

The House Professional Licensure Committee on this date voted to take no formal action on Regulation 16A-4816 until final regulation is promulgated and submit the following comments:

1. The Committee notes that according to the board's Regulatory Analysis Form at question 14, the board found that no funeral directors or other group of individuals would be adversely affected by this new regulation. However, the committee notes at least two different groups of individuals would most likely be impacted: the unlicensed employee currently engaged in the sales aspect of preneed contracts and the consumer.
2. Currently, unlicensed personnel secure pre-need contracts. The Committee would like to know the extent to which this proposed regulation will limit the number of sales people that will retain their employment or cause a reduction in salary due to the restrictions contained in the regulation.
3. The regulations would allow only funeral directors to conduct pre-need sales presentations. If, as a result of the regulations, a funeral entity would need to hire licensed funeral directors to take the place of the unlicensed salespeople that were employed to conduct these tasks. The higher pay scale of the licensed funeral director versus the unlicensed salesperson would currently result in the funeral entity needing to charge more for its services. Based on this observation, the committee would like to know how there will be a cost savings to the public, as indicated in the answer to question 13 of the Regulatory Analysis Form.
4. The Committee notes that there are instances in which a person residing out the area or unable to travel to the funeral entity would enter into a preneed contract utilizing means other than face to face contact. The committee also notes that the funeral director would not have any alternative means to utilize when working with a customer who may be from out of the area or unable to travel to the funeral home. Considering this, the committee questions why a face-to-face meeting is necessary with a preneed contract. The committee suggests the use of a brief consultation and final approval of the funeral director, without the face-to-face requirement.

5. The Committee notes that unlicensed employees working in funeral entities in less populated areas may be adversely affected by §13.206a(c). This provision provides that an unlicensed employee may be affiliated with only one funeral entity. There may be funeral entities in rural areas that have very few funerals each year, and as a result, unlicensed employees may be employed at more than one funeral entity out of necessity. Vice versa, a funeral director may not have the resources for a full time unlicensed employee and would like to utilize a person familiar with the industry. This would not permit an unlicensed employee to work for more than one funeral entity and, as a result, could reduce their income.
6. Further, section 13.206a(d) states that nothing in this regulation shall alter the scope of practice of the insurance agent. However, it is unclear if the limit on employment to one funeral entity in § 13.206a(c) would also apply to insurance agents. The committee requests clarification on this point.
7. The Committee would also like further information regarding the impact the regulation will have on attorney's, financial planners, etc. who may be involved with the preneed contracts but appear to be limited by the regulation.
8. Although the Committee has been trying to expand the scope of practice for many licensee's throughout the Commonwealth, this regulation as a whole appears to severely limit the ability of a funeral director to utilize an unlicensed employee or cooperate with insurance agents, attorneys, and financial planners; and would require a licensed funeral director for almost every function within a funeral home. If a funeral entity only employs one funeral director, it appears as though the funeral director will need to conduct all sales business in addition to embalming, transporting the deceased, performing the funeral services, writing price worksheets, conducting sales presentations, advising prospective and current customers of pricing and supervising interment. The committee questions this change as being too dramatic.
9. The Committee suggests that some restrictions in the regulation could put consumers at a disadvantage and lead to consumer complaints because of the lack of attention a funeral director can give any one client when spread among the many tasks in a busy funeral home.
10. The Committee requests information on the number of consumer complaints that have been filed with the board regarding the topics contained in this regulation.

Sincerely,



P. Michael Sturla
Chairman, House Professional Licensure Committee

Mr. Chairman:

I would like to take this opportunity to say that I support that the Committee take no formal action until the final regulations are promulgated. However, I feel it necessary to point out to the Committee and staff that I question the premise of the analysis regarding some of the recommendations and questions raised by the Committee. For example, points 1 and 2 imply that unlicensed salespeople currently can in fact secure or sell preneed contracts on behalf of a funeral home or funeral homes. This is not correct as a matter of law. In February of 2001, the Commonwealth Court of Pa issued a decision which is commonly referred to as Ferguson v. State Board. In that decision, there were four keys points of which the Committee should be aware:

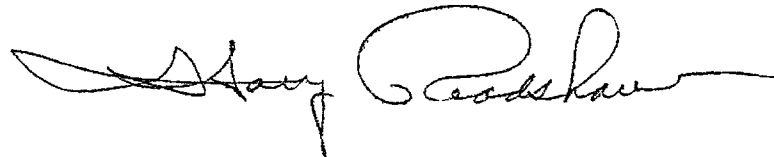
- 1) Section "13 (c) does not permit a licensed funeral director to offer prearranged services through unlicensed employees."
- 2) "The law prohibits persons other than licensed funeral directors from:
 - A) engaging in discussions with individuals regarding the selection of funeral services;

B) offering to enter into a contract funeral goods and services when needed and;

C) making financial arrangements for the sale of funeral services and merchandise incidental to those services."

See Ferguson v. State Board, p. 10, 768 A.2d 393 (2001).

As a matter of information, I will provide you a copy of the decision so that you can be well informed regarding the current status of unlicensed pre-need sales in the Commonwealth. Thank you for your time.

A handwritten signature in black ink, appearing to read "Mary Goodshaw". The signature is fluid and cursive, with a large, prominent loop at the end of the last name.

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.

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State Board of Funeral Directors

BY _____
(DEPUTY ATTORNEY GENERAL)

(AGENCY)

BY Andrew C. Clark
1 2 2016

DOCUMENT/FISCAL NOTE NO 16A-4816

DATE OF APPROVAL

DATE OF APPROVAL

DATE OF ADOPTION

(Deputy General Counsel
(~~Chief Counsel,~~
~~Independent Agency~~
(~~Strike inapplicable title~~)

BY Michael J. Yeosock
Michael J. Yeosock, FD

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Objections attached

TITLE Chairperson
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

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after submission

FINAL RULEMAKING

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS

49 Pa. Code §§ 13.1, 13.206a
PRENEED ACTIVITIES OF UNLICENSED EMPLOYEE

The State Board of Funeral Directors (Board) adds § 13.206a (relating to utilization of employees by funeral entity), to read as set forth in Annex A.

Description and Need for the Rulemaking

Section 13(c) of the Funeral Director Law (act) (63 P.S. § 479.13(c)) provides, “No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed.” In *Ferguson v. State Bd. of Funeral Directors*, 768 A.2d 393, 400 (Pa. Cmwlth. Ct. 2001), *appeal denied*, 566 Pa. 670, 782 A.2d 549, the court affirmed the Board’s conclusion that an insurance agent who identified herself as working with a funeral director and, equipped with the funeral director’s price lists and other literature, counseled the preneed selection of funeral goods and services, even though the funeral director later met with each customer and had the customer sign a statement of funeral goods and services prepared by the funeral director on the basis of the insurance agent’s worksheets, offered to enter into a contract with the insured for funeral goods and services when needed without being licensed to practice funeral directing in violation of section 13(c) of the act. The court also held that by doing so the insurance agent made arrangements for funeral services and sold funeral merchandise to the public incidental to the funeral services and therefore engaged in the practice of funeral directing as defined in section 2(1) of the act (term “funeral director” includes a person who makes arrangements for funeral service and sells funeral merchandise incidental to such service or who makes financial arrangements for the rendering of such services and the sale of such merchandise) without a license, in violation of section 13(a) of the act (no person shall practice as a funeral director in this Commonwealth unless he holds a valid license to do so as provided in the act). *Id.* at 399-400. By doing that and entering into a life insurance contract to fund the preneed arrangements, which the funeral director had already agreed to accept as payment in full, the insurance agent also made financial arrangements for the rendering of funeral services and sale of merchandise incidental to the services and therefore engaged in the practice of funeral directing without a license in violation of section 13(a) of the act. *Id.* However, in *Walker v. Flitton*, 364 F.Supp.2d 503 (U.S.D.C. M.D. Pa. 2005), a case involving commercial free speech rights under the First Amendment of the Federal Constitution, the court ordered that the Board “shall not prohibit agents or employees of specific licensed funeral directors from providing accurate information to consumers regarding the sale of preneed funeral plans and services. This interaction shall include, but shall not necessarily be limited to, the distribution of accurate price lists to consumers, but under no circumstances may unlicensed individuals contract with consumers for the sale of preneed funerals, nor may they act as a ‘funeral director’ as defined in [the act.]” The court indicated that it did not intend to alter the Pennsylvania substantive law as set forth in *Ferguson*. *Id.* at 513. It should be noted that section 15(1) of the act (63 P.S. § 479.15(1)) provides that anyone who holds himself out to the public in any manner as one who is skilled in the knowledge, science and practice of funeral directing is construed to be practicing as a funeral director.

The Board determined that its regulations need to address what unlicensed employees of a funeral establishment may do concerning preneed sales. *See, Walker* at 525-26 (“as a result of the [Board’s] considered failure to enact a clarification of [its] interpretation of [the act], both consumers and the funeral industry in Pennsylvania have been forced to speculate as to precisely what conduct

by unlicensed individuals is permissible”). The court “strongly urge[d] the Board members to fulfill their mandate by giving prompt attention to the goal of resolving all of the unclarity which has attended the sale and marketing of preneed funerals and life insurance policies to fund them in Pennsylvania.” *Id.* at 529. The Board published proposed rulemaking intending to be responsive to the court’s mandate while remaining true to the act as previously construed. It is not the province of the Board in promulgating regulations to override the policy decisions made by the General Assembly in enacting the act.

The proposed rulemaking had four general substantive portions. First, proposed § 13.206a(a) would set forth as standards for the funeral director-employee relationship that (i) the funeral director is professionally responsible for the actions of the unlicensed employee, (ii) the unlicensed employee may operate only under the close supervision of the funeral director, (iii) the funeral director may not pay the unlicensed employee a commission for soliciting business, (iv) the funeral director must consult with the customer face-to-face before entering into a preneed contract, and (v) the unlicensed employee must provide the customer with a notice that the funeral director is the one with whom to negotiate the preneed funeral contract. Proposed § 13.206a(b) would specifically authorize the unlicensed employee to distribute general price lists of the employing funeral entity and to provide general assistance to the employing funeral entity by engaging in activities not otherwise prohibited. Proposed § 13.206a(c) would prohibit an unlicensed employee from (i) being associated with any other funeral entity, (ii) preparing worksheets, proposals or other presentations for funeral services, (iii) engaging in discussions or other communications with customers regarding the actual selection of funeral services and incidental merchandise, (iv) making financial arrangements for the rendering of funeral services and incidental merchandise, (v) offering to or entering into a preneed funeral contract with any customer on behalf of the funeral entity, (vi) engaging in any activity that would cause a customer to believe that the unlicensed employee is skilled in the knowledge, science or practice of funeral directing, or (vii) engaging in any activity that constitutes the practice of funeral directing under the act. Finally, proposed § 13.206a(d) would make clear that the Board’s rulemaking is not intended to affect the scope of practice of insurance producers licensed by the Department of Insurance.

Summary of Comments and Responses to Proposed Rulemaking

The Board published notice of proposed rulemaking at 37 Pa.B. 5257 (September 29, 2007) with a 30-day public comment period. The Board received written comments from the following members of the public: The Association for Independent Growth, Inc.; Funeral Consumers Alliance of Greater Philadelphia; John F. Givnish, FD; Ernest F. Heffner, FD; Harry C. Neel, FD; Pennsylvania Association of Resources; Pennsylvania Cemetery Cremation & Funeral Association; and Pennsylvania Funeral Directors Association. The Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) as part of their review of proposed rulemaking under the Regulatory Review Act (71 P.S. §§ 745.1-745.12).

Overall comments

The HPLC first suggested that, contrary to the Board's statement in the Regulatory Analysis Form that the Board has not identified any group of individuals who would be adversely affected by this rulemaking, unlicensed employees currently engaged in preneed sales and consumers would be adversely impacted by the rulemaking. The Board considers those groups to be beneficially, rather than adversely, impacted by this rulemaking. Under *Ferguson*, one not licensed as a funeral director may not lawfully engage in preneed sales activity. Through this rulemaking, the Board is reinterpreting sections 2 and 13(c) of the act in light of the Federal Constitutional considerations addressed in *Walker* to permit funeral entities' unlicensed employees to engage in the informational phase of this activity on a limited basis. Preneed customers will benefit by receiving this additional information from persons who are qualified to provide that information under the close supervision of a licensed funeral director. The HPLC also inquired about the extent to which the restrictions in this rulemaking will cause current salespeople to lose employment or suffer a reduction in hours or earnings and whether customers will see an increase in costs resulting from the restrictions on activities of presumably lower paid unlicensed employees. Similarly, the HPLC questioned whether such a reduction in scope of the unlicensed person's practice by requiring greater funeral director involvement would spread funeral directors more thinly and put consumers at greater risk due to lack of attention from a licensed funeral director. Again, because it is not currently lawful for unlicensed persons to engage in sales activities, this rulemaking provides greater opportunities for employment of unlicensed persons and resultant cost reductions and for funeral directors to serve more customers.

IRRC commented that the proposed rulemaking did not provide any analysis of the fiscal impact of restricting the activities in which unlicensed employees may engage on behalf of funeral entities. As discussed below, under *Ferguson*, the law in Pennsylvania is that unlicensed persons may not engage in preneed sales. Through this rulemaking, the Board is reinterpreting provisions of the act to now permit certain activity. This is not a new restriction, but an expansion, of opportunity.

The HPLC also requested from the Board information on the number of complaints that have been filed regarding the topics contained in this rulemaking. The professional compliance office of the Department of State receives complaints on behalf of the Board and other licensing boards within the Bureau of Professional and Occupational Affairs. The Board itself has no information about complaints unless a prosecuting attorney has instituted formal action before the Board. However, the professional compliance office and the prosecution division are able to provide some statistical information. Upon receipt of a complaint, it is identified with one or more statistical categories of complaint. Because under *Ferguson* it is unlawful for unlicensed persons to engage in preneed sales activity, i.e., practice funeral directing, any complaint concerning an unlicensed person involved in selling preneed funeral services was treated as an unlicensed practice case, and no consideration was given as to the quality of performance. The statistical information has not distinguished between unlicensed practice on a preneed basis or at the time of need. From 1999 through 2008, the professional compliance office received 420 complaints concerning the possible unlicensed practice of funeral directing. This total includes 237 complaints of unlicensed practice, 136 complaints of aiding or assisting unlicensed practice, 32 complaints of operating an unlicensed facility, 16 complaints of employing an unlicensed person, and 5 complaints of using another's license.

(Because each complaint may be given multiple descriptive codes, the totals do not necessarily match.) A complaint involving an unlicensed person engaging in preneed sales on behalf of a licensed funeral entity may have been coded as unlicensed practice, aiding and assisting unlicensed practice, or employing an unlicensed person. These numbers reflect the total number of complaints filed, not necessarily those for which the Board took final disciplinary action. A review of all cases included in these statistics for which the Board took final disciplinary action shows that, although many cases involved an unlicensed entity selling preneed funeral services (typically with some involvement of a licensed funeral director) only one case (coded both as unlicensed practice and as aiding and assisting unlicensed practice) involved a situation where a licensed funeral entity utilized an unlicensed person to engage in preneed sales.

As noted by IRRC, at least one public commenter suggested that the Board adopt a system of registration of those persons not licensed to practice funeral directing who would be permitted to engage in any preneed activity on behalf of a funeral entity. Although this might be a very useful policy choice, the Board did not propose additional registration because the Board has no statutory authority to adopt such a regulatory scheme.

Section 13.1 (relating to definitions)

In regards to § 13.206a generally, IRRC noted that the Board used the term “unlicensed employee” and “employee not licensed under the act” in a fashion that suggested the terms are interchangeable. IRRC suggested using a single term for clarity. Although the Board intended to use these terms interchangeably, for increased clarity the Board has replaced the expression “employee not licensed under the act” in subsections (b) and (c) with the term “unlicensed employee” and has provided a definition of “unlicensed employee” as a person not currently licensed to practice funeral directing who is employed by a funeral entity. Similarly, the Board has corrected the rulemaking to consistently refer to “consumers” rather than “customers,” as the unlicensed employee certainly cannot make or offer to make any actual sales.

IRRC suggested that the Board delete from § 13.1 the definition of the term “preneed activity,” because that term is used only once. The Board has deleted the definition and inserted its substantive provisions in § 13.206a(a), the only place that term was used in the rulemaking. IRRC questioned why the definition of the term “preneed funeral contract” referenced obligations only of the funeral entity and not the funeral director and included contracts for which no funds were provided. The Board published proposed rulemaking 16A-4815 (preneed funeral arrangements) that would provide in § 13.1 a definition of the term “preneed funeral contract” identical as published here. In finally promulgating that rulemaking in response to substantially similar comments, the Board revised the definition of “preneed funeral contract” to read, “an agreement under which a funeral director or funeral entity promises or agrees to provide funeral merchandise and render services upon the death of a person living at the time the contract is made, whether the funeral entity receives preneed funeral funds at the time of execution of the contract or through one or more subsequent payments during the person’s lifetime.” Accordingly, the Board has removed from this rulemaking as redundant the definition of “preneed funeral contract.”

Because, as discussed below, there is a need to define certain terms that are used in this one section of the rulemaking, the Board has added § 13.206a(e) to provide those necessary definitions.

Subsection 13.206a(a)

IRRC questioned what the Board means in § 13.206a(a)(2) by requiring that the unlicensed employee operate only under “the close supervision” of a licensed funeral director. As indicated in the preamble for publication as proposed, this requirement arises from the *Walker* district court’s opinion that, “In light of the substantial and appropriate governmental interest asserted, we are not restricting the [Board] from requiring close supervision of the said unlicensed employees” in “discuss[ing] preneed plans with consumers so long as these communications occur under the auspices, employment, direction, and control of a licensed funeral director.” In response to this comment and those of various public commenters, the Board has provided in § 13.206a(e) a definition of the term “close supervision” as the exercise of complete direction and control of a subordinate with awareness and authorization of the subordinate’s activities without intermediary supervision. By following this standard, the licensed funeral director, who is professionally liable for the actions of the unlicensed employee, will be in a position to assure compliance.

IRRC acknowledged the Board’s explanation that proposed § 13.206a(a)(3) (funeral director may not pay or agree to pay unlicensed employee a commission for soliciting business or business secured) was intended to deter unlicensed employees from attempting to persuade a customer to select funeral services and merchandise not in the customer’s interest and questioned what provisions would deter or prohibit a funeral director from taking similar action. The Board first notes that this provision was not solely to deter such overreaching, for it repeats in the context of a funeral director’s employee who is not also a funeral director section 11(a)(8) of the act which provides that a funeral director is subject to disciplinary action for “paying a commission or agreeing to pay a commission to any person or persons for soliciting or for business secured.” As discussed below, this provision does not preclude an unlicensed employee who is also a licensed insurance producer from receiving a commission from the insurance company for selling insurance to fund preneed arrangements. Additionally, in considering this comment, the Board has realized that, except for § 13.20(2) (responsibilities of funeral director include counseling the family in the selection of services and furnishings taking into consideration both the wishes of the family and their financial limitations), it does not separately specifically prohibit a funeral director from any overreaching in negotiating a preneed contract. Accordingly, at new § 13.206a(a)(6) the Board has additionally prohibited the funeral director or unlicensed employee from engaging in any act in violation of the Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1 – 201-9.3). Additionally, although the Board at § 13.202(16) already defines “unprofessional conduct” to include failing to comply with the regulations of the Federal Trade Commission (FTC) relating to funeral industry practices, the Board has also added new § 13.206a(a)(7) to require that the unlicensed employee also comply with the FTC’s funeral industry practices regulation.

Because potential customers might live in another town or be unable to travel, the HPLC raised concerns about the requirement of proposed § 13.206a(a)(4) (licensed funeral director must consult face-to-face with each customer before entering into or offering to enter into preneed funeral

contract) and its inclusion in the required notice of proposed § 13.206a(a)(5) (unlicensed employee must provide form notice that, among other things, negotiations must take place in a face-to-face meeting with a licensed funeral director). In order to avoid an unlicensed employee negotiating the sale and leaving only the rubber stamp of signing the contract to the funeral director, the Board proposed this requirement to assure that only a licensed funeral director actually negotiates preneed sales. Given this concern as raised by the HPLC, as well as IRRC and various public commenters, the Board has revised this requirement as “direct personal contact” rather than a “face-to-face contact.” As alluded to by IRRC, this direct personal contact may include a face-to-face meeting, a teleconference, or exchange of emails, faxes or postal service mail; it may not include communication by intermediaries, such as an unlicensed employee. The Board has now added this definition of “direct personal contact” in § 13.206a(e) (relating to definitions).

IRRC echoed public commenters in questioning the need for the notice of § 13.206a(a)(5). Although § 13.206a(a)(4) specifically requires the licensed funeral director’s involvement, the Board proposed requiring this notice so that the customer would know that the other various documents do not constitute the preneed contract and therefore there will be another document to be executed with the funeral director. IRRC suggested that an alternative notice could state that the unlicensed employee is not a funeral director and is not permitted to engage in certain practices specified in the act. After further consideration, the Board agrees that a notice that the unlicensed employee is not a funeral director and cannot act as a funeral director is a preferred regulatory requirement. In order to avoid any misrepresentation that the unlicensed person represents a particular funeral entity and to assure that the funeral entity responsible for the unlicensed person’s actions is known, the required disclosure must be on letterhead of the funeral entity, be signed by a licensed funeral director who closely supervises the unlicensed employee, identify the unlicensed employee, and state that the funeral entity has authorized the unlicensed employee to furnish information on its behalf. In order to make the customer aware of the limitations of what the unlicensed person may do, the disclosure must state that the unlicensed employee is not a funeral director, is not skilled in funeral directing, may not practice funeral directing, may not assist the customer in selecting specific funeral services, may not negotiate the sale of funeral services, may not enter into an agreement to provide funeral services, and may not make financial arrangements to provide funeral services in the employee’s capacity as a representative of a licensed funeral director. In order to deter permitting the sale of insurance to swallow the informational purpose of the interactions authorized by this rulemaking, the disclosure must also state that alternative funding options might be available upon consultation with a licensed funeral director. The unlicensed employee must provide this written disclosure to the customer and request that the consumer sign an acknowledgement of receipt of the disclosure.

In order to emphasize that this rulemaking concerns only the funeral entity’s right to provide information, the Board has revised the introductory language to subsection (a) to provide that the unlicensed employee may “furnish information to consumers on behalf of the funeral entity concerning the availability of funeral services and merchandise” on a preneed basis in accordance with this rulemaking.

Subsection 13.206a(b)

IRRC questioned how the limited authorization of activity in of proposed § 13.206a(b) (may distribute general price list and provide general assistance not otherwise prohibited) would “delineate with precision what conduct by unlicensed persons is permissible.” As noted in the preamble to publication as proposed, proposed § 13.206a(b)(1) would specifically authorize an unlicensed employee to distribute price lists of the employing funeral entity only. Because the funeral entity has a right to disseminate truthful non-misleading information about the goods and services it lawfully provides, and the Board should ultimately prohibit only the practice of funeral directing (including attempted preneed sale of funeral services and incidental merchandise) by the unlicensed person, the Board has added to the authorized activities of § 13.206a(b) in renumbered paragraph (3) that the unlicensed employee may provide truthful and non-misleading printed materials concerning funeral services and merchandise available from the funeral entity. Moreover, because this rulemaking addresses only the funeral entity’s ability to provide information, the Board has revised renumbered § 13.206a(b)(3) to authorize the unlicensed employee only to communicate with a consumer in a manner not otherwise prohibited by the act or Board regulation, rather than to provide general assistance to the funeral entity.

In order to emphasize that this rulemaking concerns only the funeral entity’s right to provide information, the Board has revised the introductory language of subsection (b) to address “when interacting with a consumer as described in this section, an unlicensed employee” may or may not perform certain acts.

Subsection 13.206a(c)

The HPLC raised concern that the requirement of proposed § 13.206a(c)(1) (unlicensed employee engaging in preneed activity may not be associated with any other funeral entity) may unduly restrict employment opportunities where the preneed sales activity would not justify a full-time employee. In proposing this restriction, the Board intended first to assure that it would be clear what funeral entity is responsible for the actions of the unlicensed person engaging in preneed sales activity, second to avoid any employee conflict of interest between various funeral entities, third to avoid customer confusion as to who would provide the funeral services and merchandise, and finally to avoid price collusion. But even more significantly, the Board sought to avoid permitting the unlicensed person to act as a broker on behalf of various funeral entities, thereby diluting the professional oversight of the funeral entities and their licensed funeral directors. (For this reason, the proposed rulemaking spoke only of employees of the funeral entity and not of persons acting as agents of the funeral entity.) It should also be noted that although section 7 of the act provides that a licensed funeral director is authorized to practice only at the establishment to which the license is issued, that section also permits a licensed funeral director to assist other licensed funeral directors in practicing at an approved establishment. In light of this comment from the HPLC and various public commenters, because the unlicensed employee will be required to disclose the funeral entity which the employee represents, the Board has revised § 13.206a(c)(1) simply to prohibit an unlicensed person acting on behalf of any entity other than the employing funeral entity. This employing funeral entity has provided the disclosure and materials that the unlicensed person is using and is readily identifiable.

IRRC also questioned how the prohibitions of proposed § 13.206a(c) were narrowly tailored to meet specific governmental interests and are necessary or proper to safeguard the interests of the public and standards of the profession. As noted in the preamble to publication as proposed, the restriction of subsection (c)(4) (unlicensed employee may not make financial arrangements for rendering of funeral services and merchandise incidental to such services) is straight from the definition of the practicing funeral directing in section 2 of the act. The restriction of subsection (c)(5) (unlicensed employee may not offer to or enter into a preneed funeral contract with any customer) repeats the prohibition against unlicensed persons selling funeral services on a preneed basis in section 13(c) of the act; the restriction in subsection (c)(6) (unlicensed employee may not engage in any activity that would cause customer to believe that the unlicensed employee is skilled in the knowledge, science or practice of funeral directing) is from section 15(1) of the act, and the restriction of subsection (c)(7) (unlicensed employee may not engage in any activity that constitutes the practice of funeral directing) simply repeats the prohibition against unlicensed practice in section 13(a) of the act. Other than as discussed above, the Board has not revised § 13.206a(c)(1) (when interacting with consumers, unlicensed employee may not act on behalf of any entity other than the employing funeral entity). As the rulemaking addresses only the unlicensed employee's interactions with a consumer and not other activities at the funeral entity or on behalf of the funeral director, there is no reason to explicitly prohibit the unlicensed employee from preparing other presentations for funeral services, as in proposed § 13.206a(c)(2). The Board has not otherwise revised § 13.206a(c)(2) or subsection (c)(3) (may not engage in discussions or other communications with customers regarding the actual selection of funeral services and incidental merchandise), as these activities are clearly part of selling preneed funeral services (as acknowledged by the court in *Ferguson* to be the practice of funeral directing) rather than simply providing or gathering information, i.e., speech. As with the other restrictions, these subsections simply codify the existing law as recognized in *Walker*.

In order to emphasize that this rulemaking concerns only the funeral entity's right to provide information, the Board has revised the introductory language of subsection (c) to address "when interacting with a consumer as described in this section, an unlicensed employee" may or may not perform certain acts.

Subsection 13.206a(d)

IRRC noted that the statutory law applicable to insurance agents has been amended to refer to insurance producers, though the Department of Insurance has not yet amended its regulations to reflect this new nomenclature. The Board has revised § 13.206a(d) to refer to insurance "producers" rather than insurance "agents."

The HPLC questioned whether this requirement would impact licensed insurance producers, despite the statement in proposed § 13.206a(d) that this rulemaking does not affect the scope of practice of a licensed insurance producer acting pursuant to that license, so long as the producer is not acting as a funeral director or practicing funeral directing. The Board notes that proposed § 13.206a(a)(3) (funeral director may not pay or agree to pay unlicensed employee a commission for soliciting business or business secured) and section 11(a)(8) of the act (funeral director is subject to

disciplinary action for “paying a commission or agreeing to pay a commission to any person or persons for soliciting or for business secured”) do not preclude an unlicensed employee who is also a licensed insurance producer from receiving a commission from the insurance company for selling insurance to fund preneed arrangements. The Board has added to § 13.206a(d) a requirement that the insurance producer must comply with all applicable insurance law, including any required disclosures. Provided that the insurance producer makes the required disclosures and otherwise complies with the applicable insurance law, the Board does not believe that there should be any impact on licensed insurance producer. As provided in this subsection, whenever a licensed insurance producer is acting as an insurance agent and not as a funeral director (or person acting only under the authority of a funeral director), the other provisions do not apply. The Board does not anticipate any impact on the practice of attorneys or financial planners acting as such.

Fiscal Impact and Paperwork Requirements

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

Effective date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Statutory Authority

The final rulemaking is authorized under sections 11, 13, 15 and 16(a) of the Funeral Director Law (63 P.S. §§ 479.11, 479.13, 479.15 and 479.16(a)).

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 19, 2007, the Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 4643, to IRRC and the chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on _____, 2009, the HPLC approved the final-form rulemaking. On _____, 2009, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, 2009, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Regulatory Unit Counsel, Department of State, by mail to P.O. Box 2649, Harrisburg, PA 17105-2649, by telephone at (717) 783-7200, or by e-mail at st-funeral@state.pa.us.

Findings

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 37 Pa.B. 5257.
- (4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of the Funeral Director Law.

Order

The Board, acting under its authorizing statute, orders that:

- (a) The regulations of the Board at 49 Pa. Code Chapter 13 are amended, by adding § 13.206a, to read as set forth in Annex A.
- (b) The Board shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.
- (c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

Michael J. Yeosock, FD, Chairman
State Board of 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:

* * * * *

~~*Preneed activity* — Any activity on behalf of a funeral entity concerning the provision of funeral service or merchandise upon the death of a specifically identified person living at the time of the activity.~~

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

* * * * *

§ 13.206a. Utilization of unlicensed employees by a funeral entity.

(a) A licensed funeral director or funeral entity may permit an unlicensed employee of the funeral entity to interact with customers FURNISH INFORMATION TO CONSUMERS ON BEHALF OF THE FUNERAL ENTITY concerning preneed activity THE AVAILABILITY OF FUNERAL SERVICE OR MERCHANDISE FOR A LIVING PERSON WHEN NEEDED, ONLY

in accordance with this section.

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

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

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

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

(5) ~~Any document presented by the unlicensed employee to the customer for signature or acknowledgment must bear in 20-point or larger print the following notice completed with the name of the funeral entity:~~

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

~~ENTERING INTO A CONTRACT WITH [name of funeral entity]
MUST TAKE PLACE IN A FACE-TO-FACE MEETING WITH A
LICENSED FUNERAL DIRECTOR OF [name of funeral entity].~~

A FUNERAL ENTITY UTILIZING AN UNLICENSED EMPLOYEE AS AUTHORIZED IN THIS SECTION SHALL DEVELOP AND USE A DISCLOSURE FORM AS DESCRIBED IN THIS PARAGRAPH.

(I) THE UNLICENSED EMPLOYEE SHALL PROVIDE THE WRITTEN DISCLOSURE TO THE CONSUMER BEFORE FURNISHING THE CONSUMER WITH ANY INFORMATION REGARDING GOODS AND SERVICES OFFERED BY THE FUNERAL ENTITY.

(II) THE DISCLOSURE FORM MUST BE ON LETTERHEAD OF THE FUNERAL ENTITY AND SIGNED BY A LICENSED FUNERAL DIRECTOR WHOSE LICENSE IS ASSOCIATED WITH THE FUNERAL ENTITY AND WHO CLOSELY SUPERVISES THE UNLICENSED EMPLOYEE, IDENTIFY THE UNLICENSED EMPLOYEE, AND STATE THAT THE FUNERAL ENTITY HAS AUTHORIZED THE UNLICENSED EMPLOYEE TO FURNISH INFORMATION ON ITS BEHALF AS PROVIDED IN THIS SECTION.

(III) THE DISCLOSURE MUST STATE THAT THE UNLICENSED EMPLOYEE IS NOT A LICENSED FUNERAL DIRECTOR, IS NOT SKILLED IN FUNERAL DIRECTING, MAY NOT PRACTICE FUNERAL DIRECTING, MAY NOT ASSIST THE CONSUMER IN SELECTING SPECIFIC FUNERAL SERVICES, MAY NOT NEGOTIATE THE SALE OF FUNERAL SERVICES,

MAY NOT ENTER INTO ANY AGREEMENT TO PROVIDE FUNERAL SERVICES, AND MAY NOT MAKE FINANCIAL ARRANGEMENTS FOR RENDERING FUNERAL SERVICES IN THE CAPACITY OF A REPRESENTATIVE OF THE LICENSED FUNERAL DIRECTOR.

(IV) THE DISCLOSURE MUST STATE THAT ALTERNATIVE FUNDING OPTIONS MIGHT BE AVAILABLE UPON CONSULTATION WITH A LICENSED FUNERAL DIRECTOR.

(V) THE UNLICENSED EMPLOYEE SHALL REQUEST THE CONSUMER OR THE CONSUMER'S REPRESENTATIVE TO SIGN AN ACKNOWLEDGMENT OF RECEIPT OF THE DISCLOSURE AND SHALL MAINTAIN A COPY OF THE ACKNOWLEDGMENT.

(6) THE FUNERAL DIRECTOR OR FUNERAL ENTITY AND THE UNLICENSED EMPLOYEE MAY NOT ENGAGE IN ANY ACT IN VIOLATION OF THE UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (73 P.S. §§ 201-1 – 201-9.3).

(7) THE UNLICENSED EMPLOYEE SHALL COMPLY WITH THE REGULATIONS OF THE FEDERAL TRADE COMMISSION AT 16 CFR PART 453 (RELATING TO FUNERAL INDUSTRY PRACTICES).

(b) ~~An employee not licensed under the act acting in accordance with~~ WHEN INTERACTING WITH A CONSUMER AS DESCRIBED IN this section, AN UNLICENSED EMPLOYEE may:

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

(2) FURNISH TRUTHFUL AND NON-MISLEADING PRINTED MATERIALS CONCERNING FUNERAL SERVICES AND MERCHANDISE AVAILABLE FROM THE FUNERAL ENTITY.

(3) ~~Provide general assistance to the employing funeral entity by engaging in activities, including communications with customers.~~ COMMUNICATE WITH A CONSUMER IN A MANNER not otherwise prohibited by the act or this chapter.

(c) ~~An employee not licensed under the act who engages in the activity described above~~ WHEN INTERACTING WITH A CONSUMER AS DESCRIBED IN THIS SECTION, AN UNLICENSED EMPLOYEE may not:

(1) ~~Be associated with any other~~ ACT ON BEHALF OF ANY ENTITY OTHER THAN THE EMPLOYING funeral entity.

(2) ~~Prepare worksheets, proposals or other presentations~~ A WORKSHEET OR PROPOSAL for funeral services.

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

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

(5) ~~Offer to or enter into a preneed funeral contract with any customer~~ CONSUMER on behalf of the funeral director or funeral entity.

(6) ~~Engage in any activity that would cause a customer~~ CONSUMER to believe that the unlicensed employee is skilled in the knowledge, science or practice of funeral

directing.

(7) Engage in any activity that constitutes the practice of funeral directing under the act.

(d) Nothing in this section shall be construed to alter the scope of practice of a licensed insurance agent PRODUCER acting pursuant to licensure from the Department of Insurance, so long as the insurance agent PRODUCER is not acting as a funeral director or AS A PERSON practicing UNDER THE AUTHORITY OF A funeral directing DIRECTOR. AN UNLICENSED PERSON ACTING AS AN INSURANCE PRODUCER LICENSED BY THE DEPARTMENT OF INSURANCE SHALL COMPLY WITH ALL APPLICABLE PROVISIONS OF LAW CONCERNING INSURANCE SALES, INCLUDING ALL REQUIRED DISCLOSURES. A PERSON ACTING AS AN INSURANCE PRODUCER SHALL INFORM THE CONSUMER THAT THE PERSON IS NOT ACTING ON BEHALF OF THE FUNERAL DIRECTOR OR FUNERAL ENTITY WHILE ACTING AS AN INSURANCE PRODUCER.

(E) THE FOLLOWING WORDS AND TERMS, WHEN USED IN THIS SECTION, HAVE THE FOLLOWING MEANINGS, UNLESS THE CONTEXT CLEARLY INDICATES OTHERWISE.

CLOSE SUPERVISION – THE EXERCISE OF COMPLETE DIRECTION AND CONTROL OF A SUBORDINATE WITH AWARENESS AND AUTHORIZATION OF THE SUBORDINATE’S ACTIVITIES WITHOUT INTERMEDIARY SUPERVISION.

DIRECT PERSONAL CONTACT - INCLUDES A FACE-TO-FACE MEETING, A TELECONFERENCE, OR AN EXCHANGE OF EMAILS, FAXES OR POSTAL SERVICE MAIL. THIS TERM DOES NOT INCLUDE COMMUNICATION THROUGH

AN INTERMEDIARY, SUCH AS AN UNLICENSED EMPLOYEE.


UNLICENSED EMPLOYEE – A PERSON NOT CURRENTLY LICENSED TO
PRACTICE FUNERAL DIRECTING WHO IS EMPLOYED BY A FUNERAL ENTITY.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

DATE: August 31, 2009

SUBJECT: Final Rulemaking:
State Board of Funeral Directors
Preneed activities of unlicensed employee (16A-4816)

TO: Andrew C. Clark, Deputy General Counsel
Office of General Counsel

FROM: Thomas A. Blackburn, Regulatory Unit Counsel
Department of State 

Other than as set forth in the preamble, there are no significant legal and policy issues presented by this amendment to the regulations of the State Board of Funeral Directors regarding preneed activities of unlicensed employees.

I certify that I have reviewed this regulation for form and legality, that I have discussed any legal and policy issues with the administrative officers responsible for the program, and that all information contained in the Preamble and Annex is correct and accurate.

TAB

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PHILADELPHIA PA 19103



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS
Post Office Box 2649
Harrisburg, Pennsylvania 17105-2649
(717) 783-3397

October 6, 2009

The Honorable Arthur Coccodrilli, Chairman
INDEPENDENT REGULATORY REVIEW COMMISSION
14th Floor, Harristown 2, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Final Regulation
State Board of Funeral Directors
16A-4816: Preneed Activities of Unlicensed Employee

Dear Chairman Coccodrilli:

Enclosed is a copy of a final rulemaking package of the State Board of Funeral Directors pertaining to Preneed Activities of Unlicensed Employee.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Yeosock".

Michael J. Yeosock, Chairperson
State Board of Funeral Directors

MJY/TAB:rs

Enclosure

cc: Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs
Peter V. Marks, Executive Deputy Chief Counsel
Department of State
Joyce McKeever, Deputy Chief Counsel
Department of State
Cynthia Montgomery, Regulatory Counsel & Senior Counsel in Charge
Department of State
Thomas A. Blackburn, Counsel
State Board of Funeral Directors
State Board of Funeral Directors

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 16A-4816
SUBJECT: PRENEED ACTIVITIES OF UNLICENSED EMPLOYEE
AGENCY: DEPARTMENT OF STATE
STATE BOARD OF FUNERAL DIRECTORS

TYPE OF REGULATION

Proposed Regulation
X Final Regulation
Final Regulation with Notice of Proposed Rulemaking Omitted
120-day Emergency Certification of the Attorney General
120-day Emergency Certification of the Governor
Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
10/6/09	<i>Kristin Fuller</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE MAJORITY CHAIRMAN <u>Michael P. McGeehan</u>
10/6/09	<i>Mary Walmer</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE MAJORITY CHAIRMAN <u>Robt. M. Tomlinson</u>
10/6/09	<i>J. Lambert</i>	INDEPENDENT REGULATORY REVIEW COMMISSION ATTORNEY GENERAL (for Final Omitted only) LEGISLATIVE REFERENCE BUREAU (for Proposed only)