

Regulatory Analysis Form

(Completed by Promulgating Agency)



IRRC

INDEPENDENT REGULATORY
REVIEW COMMISSION

2010 JAN -7 AM 10: 07

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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; jmckeeper@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>winter 09-10</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 strongly 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.

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(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 rulemaking.

The Board considers unlicensed individuals currently engaged in preneed sales and consumers to be beneficially, rather than adversely, impacted by this rulemaking. Under *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, one not licensed as a funeral director may not lawfully engage in preneed sales activity. Through this rulemaking, the Board is reconciling the provisions of sections 2 and 13(c) of the act, as construed in *Ferguson* and subsequent cases, in light of the Federal constitutional considerations addressed in *Walker*. The harmonizing of state court decisions with the federal court decision has been accomplished to permit unlicensed individuals, acting on behalf of funeral entities, to engage in the informational phase of preneed sales activity. Preneed consumers 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 restrictions in this rulemaking should not cause current salespeople to lose employment or suffer a reduction in hours or earnings, and customers should not see an increase in costs resulting from the restrictions on activities of presumably lower paid unlicensed individuals. Again, because under *Ferguson* it was not lawful for unlicensed individuals to engage in sales activities, this rulemaking provides greater opportunities for employment of unlicensed individuals and resultant cost reductions and for funeral directors to serve more customers

(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 individuals 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 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 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 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						
Total Costs	NA	NA	NA	NA	NA	NA

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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 06-07)	FY -2 (FY 07-08)	FY -1 (FY 08-09)	Current FY (FY 09-10)
Pa. State Board of Funeral Directors	(actual) \$841,474	(projected) \$1,018,938	(budgeted) \$928,000	(budgeted) \$1,086,000

(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, Wetzler 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

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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, the Board received at least 14 sets of comments from the public, including: The Association for Independent Growth, Inc.; Funeral Consumers Alliance of Greater Philadelphia; John F. Givnish, FD; Ernest F. Heffner, FD; Harry C. Neel; Pennsylvania Association of Resources; Pennsylvania Cemetery Cremation & Funeral Association; and Pennsylvania Funeral Directors Association. The Board discussed these comments, as well as comments from the HPLC 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.

After delivery of the final rulemaking package, 33 members of the General Assembly and at least 28 member of the public contacted IRRC either in support or opposition to the final rulemaking. Following IRRC's disapproval of the final rulemaking, the Board solicited additional comments and then received written comments from Ernest Heffner, FD; James J. Kutz, Esquire, of POST & SCHELL on behalf of the Pennsylvania Cemetery Cremation and Funeral Association; Kathleen K. Ryan, Esquire, on behalf of PFDA; and Robert S. Rae, FD, of Golden Considerations. The Board again discussed this rulemaking at public meetings on December 1 and 2, 2009. Mr. Rae, Mr. Heffner, Mr. Harry Neel; and Ms. Ryan all participated fully in those discussions with the Board. The Board considered the comments received after delivery of final rulemaking, as well as all prior comments, in preparing the revised final rulemaking.

(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.

A number of public commenters suggested that the Board permit unlicensed persons to fully engage in preneed sales of funeral services and incidental merchandise on behalf of funeral homes. Because section 13(c) of the Funeral Director Law, as construed in *Ferguson v. State Bd. of Funeral Directors*, 768 A.2d 393 (Pa. Cmwlth. 2001) and acknowledged in *Walker*, prohibits unlicensed persons from selling funeral services on a preneed basis, the Board rejected this alternative. A public commenter suggested that the Board register otherwise unlicensed persons to sell preneed funeral services on behalf of identified funeral homes, thereby providing some direct regulatory oversight. Although this might be better policy, because the Board does not have any statutory authority to create such a class of licensees, the Board rejected this alternative.

No other alternative regulatory schemes were considered.

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(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.

There are no federal requirements to which this rulemaking may be compared.

(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 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.

(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.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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INDEPENDENT REGULATORY
REVIEW COMMISSION

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Copy below is approved as to form and legality. Executive or Independent Agencies.

State Board of Funeral Directors

(AGENCY)

BY: _____
(DEPUTY ATTORNEY GENERAL)

BY: *Andrew C. Clark*
JAN -6 2009

DOCUMENT/FISCAL NOTE NO. 16A-4816

DATE OF APPROVAL

DATE OF APPROVAL

DATE OF ADOPTION:

BY: *Michael J. Yeosock*
Michael J. Yeosock, FD

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

[] Check if applicable
Copy not approved.
Objections attached.

TITLE: Chairperson
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

[] Check if applicable.
No Attorney General approval
or objection within 30 day
after submission.

FINAL RULEMAKING

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

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

The State Board of Funeral Directors (Board) adds § 13.206a (relating to utilization of unlicensed individuals by a 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 (63 P.S. § 479.2(1)) 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 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 individuals acting on behalf 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; 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 individuals 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 reconciling the provisions of sections 2 and 13(c) of the act, as construed in *Ferguson* and subsequent cases, in light of the Federal constitutional considerations addressed in *Walker*. The harmonizing of state court decisions with the federal court decision has been accomplished to permit funeral entities' unlicensed individuals to engage in the informational phase of preneed sales activity. 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 individuals. Similarly, the HPLC questioned whether such a reduction in scope of the unlicensed individual'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 under *Ferguson* it was not lawful for unlicensed individuals to engage in sales activities, this rulemaking provides greater opportunities for employment of unlicensed individuals 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 individuals may engage on behalf of funeral entities. As discussed below, under *Ferguson*, the current law in Pennsylvania is that unlicensed individuals may not engage in preneed sales. Through this rulemaking, the Board is reconciling provisions of the act with federal case law to now permit certain informational activity. This is not a new restriction, but an expansion, of opportunity. In other words, the Board believes that any impact from this rulemaking will be to lower costs, not raise them, compared to operating in compliance with the current law. Additionally, by complying with this regulation, the unlicensed individual will be able to exchange information with consumers, but will not be able to participate in the actual selection of funeral services and incidental merchandise or offer to or enter into a preneed funeral contract. Ignoring *Ferguson*, because *Walker* has already made clear that the unlicensed individual may not offer to or enter into a preneed funeral contract, the only area of activity that could be described as newly prohibited is participation in the actual selection of funeral services and incidental merchandise. Those stakeholders who have objected to this rulemaking and who presumably seek to utilize the assistance of unlicensed individuals to greatest extent permissible have not provided the Board with any specific information about the fiscal impact on their operations. The Board anticipates that this impact will be minimal, for the licensed funeral director must have direct personal contact with the consumer anyway to offer the preneed funeral contract.

Although several commenters have taken the contrary view that the rulemaking has an adverse fiscal or economic impact on the private sector, that view has been wholly unsubstantiated and consists entirely of conclusory statements. Therefore, the Board is not able to evaluate those claims in any objective fashion. There are no public sources of information from which the Board could derive those figures. The commenters are the only persons who have empirical data to substantiate their claims, including (1) the number of unlicensed individuals who are currently employed in preneed sales activity in this Commonwealth, (2) the average number of hours that each

unlicensed individual is employed in this activity, (3) the average amount of revenue that each unlicensed individual brings to the firm, (4) the anticipated loss of revenue to the firm, and (5) the mechanism within the regulations that would cause the loss of revenue. No private source has offered to document the alleged adverse fiscal impact. In the absence of data, a claim of adverse economic or fiscal impact is purely speculative. A second flaw in the claim of adverse economic and fiscal impact is that commenters appear to measure economic and fiscal impact of the regulations against a standard of complete deregulation. In other words, commenters appear to argue that the proper measurement of impact should be based upon the assumption that unlicensed individuals are currently performing any task their principals assign, including executing contracts for funeral goods and services on behalf of the funeral entity, a task which the rulemaking would prohibit. There are two problems with that yardstick. First, to the extent that the rulemaking prohibits offering to or entering into a contract for funeral services and goods incidental to those services, it is not the rulemaking that is having an adverse impact on unlicensed individuals and their principals, but the express language of section 13(c) of the act, which restricts the offering or entering into a contract to the scope of practice of a licensed funeral director. Second, the *Walker* decision recognizes that it does not alter the scope of practice of funeral directors under the act and expressly prohibits unlicensed individuals from contracting for funeral services and goods. Therefore, under the yardstick chosen by some commenters, the adverse impact is not a product of the rulemaking but of the prior court decisions. The Board, therefore, measures the impact of the rulemaking against lawful activity consistent with *Walker*, the act, and prior court decisions. Because the rulemaking expressly states that it does not alter the scope of practice for the sale of insurance and allows the broadest latitude possible to unlicensed individuals to furnish information short of offering to or entering into a contract for the preneed sale of funeral services and incidental merchandise, the impact of the rulemaking is, at most, neutral. And if one measures the impact of this rulemaking against *Ferguson*, the rulemaking has a very beneficial economic and fiscal impact.

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 individuals to engage in preneed sales activity, that is, practice funeral directing, any complaint concerning an unlicensed individual 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 individual 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 individual 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 individuals 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.

IRRC also noted that the act of August 14, 1963 (P.L. 1059), *as amended* (63 P.S. §§ 480.1-480.11), commonly known as the Future Interment Law, also addresses preneed sales of funeral merchandise. Because vendors not licensed by the Board to practice funeral directing may legally sell funeral merchandise in Pennsylvania, IRRC suggested that the Board revise the regulation to permit unlicensed individuals to sell funeral merchandise, but not services, on behalf of the employing funeral entity. The Board has not done so. The Board's authority is to prohibit unlicensed individuals from practicing funeral directing and to regulate funeral directors licensed by the Board, as well as persons acting under the authority of the licensed funeral directors. This rulemaking responds to the Federal court decision in *Walker* by addressing the interplay of the funeral director's First Amendment commercial free speech right to provide truthful and non-misleading information about what the funeral director lawfully provides with the act's general ban on unlicensed individuals engaging in preneed sales. The definition of "funeral director" in section 2(1) of the act (63 P.S. § 479.2(1)) includes one "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 services and the sale of such merchandise." Section 13(a) of the act (63 P.S. § 479.13(a)) generally prohibits unlicensed individuals from "practic[ing] as a funeral director, as defined herein," and section 13(c) of the act (63 P.S. § 479.13(c)) addresses "a contract with a living person to render funeral services to such person when needed." For the Board's purposes, all funeral merchandise sold by a funeral director is incidental to funeral services to be provided by the funeral director, and the sale of merchandise by a licensed funeral director is of course under the act. *See, Pennsylvania Funeral Directors Ass'n v. State Bd. of Funeral Directors*, 494 A.2d 67 (Pa. Cmwlth. 1985), *aff'd*, 510 Pa. 602, 511 A.2d 763 (1986) (licensed funeral director must trust 100% of funds received on preneed basis for funeral merchandise as required under Funeral Director Law, rather than only 70% as required by Future Interment Law). Accordingly, the Board cannot authorize individuals acting under the authority of a licensed funeral director to act under the Future Interment Law rather than under the act.

Section 13.1 (relating to definitions)

In regards to § 13.206a generally, IRRRC 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. IRRRC 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 individual,” defined as a natural person not currently licensed to practice funeral directing. Additionally, the Board has corrected the rulemaking to consistently refer to “consumers” rather than “customers,” as the unlicensed individual certainly cannot make or offer to make any actual sales of funeral services or incidental merchandise.

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. IRRRC questioned why the definition of the term “preneed funeral contract” referenced obligations only of the funeral entity and not the funeral director. The Board intended no distinction between a funeral director and a funeral entity in defining this term, and it has revised the definition to include a funeral director. IRRRC also questioned why the definition of the term “preneed funeral contract” included contracts for which no funds were provided. The Board proposed this clause because a choice of funding mechanism cannot permit an unlicensed individual to offer to or enter into a contract to provide funeral services and incidental merchandise. Because this term is only used in this section and, as discussed below, there is a need to define certain other terms that are used only in § 13.206a, the Board has added § 13.206a(e) to provide those necessary definitions, including the revised definition of “preneed funeral contract.”

Subsection 13.206a(a)

IRRC questioned what the Board means in § 13.206a(a)(2) by requiring that the unlicensed individual 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, including the manner and method of work performed, 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 individual, will be in a position to assure compliance.

IRRC acknowledged the Board’s explanation that proposed § 13.206a(a)(3), which provides that a funeral director may not pay or agree to pay unlicensed individual a commission for soliciting business or business secured, was intended to deter unlicensed individuals from attempting to persuade a consumer to select funeral services and merchandise not in the consumer’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 the restriction of 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 was not intended to preclude an unlicensed individual 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 revised this paragraph to specifically note that it does not prohibit such a commission for insurance sales. Additionally, in considering this comment, the Board has realized that, except for § 13.201(2) (relating to professional responsibilities), which provides that the responsibilities of a 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, the Board 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 prohibited the funeral director or unlicensed individual 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) (relating to unprofessional conduct) 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 individual also complies with the FTC's funeral industry practices regulation.

Because consumers might live in another town or be unable to travel, the HPLC raised concerns about the requirement of proposed § 13.206a(a)(4), which provides that a licensed funeral director must consult face-to-face with each consumer before entering into or offering to enter into preneed funeral contract, and its inclusion in the notice required by proposed § 13.206a(a)(5). In order to avoid an unlicensed individual 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 or private courier mail; it may not include communication by intermediaries, such as an unlicensed individual who is engaging in the informational activities otherwise authorized in this rulemaking. The Board has now added this definition of "direct personal contact" in § 13.206a(e). This revision does not permit hand-delivery by an unlicensed individual. Such a provision necessarily envisions the unlicensed individual meeting with the consumer and preparing all documents to be delivered to the funeral director and then delivering those documents, steps that would facilitate the unlicensed individual engaging in all steps to sell a preneed funeral except for actually signing the contract.

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 consumer 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 individual 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 individual 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 individual represents a particular funeral entity and to assure that the funeral entity responsible for the unlicensed individual'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 individual, identify the unlicensed individual, and state that the funeral entity has authorized the unlicensed individual to furnish information on its behalf. In order to make the consumer aware of the limitations of what the unlicensed individual may do, the disclosure must state that the unlicensed individual is not a 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 an agreement to provide funeral services, and may not make financial arrangements to provide funeral services in the unlicensed individual'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. Additionally, to provide greater consumer protection and regulatory oversight, the disclosure must notify the consumer that complaints may be directed to the Board and provide contact information. The unlicensed individual is required to provide this written disclosure to the consumer 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 individual 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 proposed § 13.206a(b), which provides that an unlicensed individual 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 individual 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 by the unlicensed individual, including attempted preneed sale of funeral services and incidental merchandise, the Board has added to the authorized activities of § 13.206a(b) in renumbered paragraph (2) that the unlicensed individual may provide truthful and non-misleading printed or electronic 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

individual 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. Also, this paragraph provides examples of certain activity that is acceptable, including putting together a direct mail marketing program and telemarketing in accordance with the Telemarketer Registration Act (73 P.S. §§ 2241-2249).

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 individual" may or may not perform certain acts.

Subsection 13.206a(c)

The HPLC raised concern that the requirement of proposed § 13.206a(c)(1), which provides that an unlicensed individual 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 individual engaging in preneed sales activity, second to avoid any employee conflict of interest between various funeral entities, third to avoid consumer 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 individual 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 individuals acting as agents of the funeral entity. It should also be noted that although section 7 of the act (63 P.S. § 479.7) 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 individual will be required to disclose the funeral entity which the person represents, the Board has revised paragraph (c)(1) simply to prohibit an unlicensed individual 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 individual is using and is readily identifiable. The Board recognizes that, although section 8 of the act (63 P.S. § 479.8) generally restricts a funeral director from having a proprietary interest in more than a single funeral home and a branch, many funeral directors are able, within the restrictions of section 8, to control the operation of multiple funeral establishments, such as through ownership in a family member and supervision by an employee funeral director. The Board recognizes that there may be legitimate business reasons for presentations on behalf of all of the multiple funeral establishments commonly controlled by that funeral director. Accordingly, the Board has revised paragraph (c)(1) to permit an unlicensed individual to act on behalf of multiple funeral entities having common ownership. The Board has also concluded that it need not impose any restrictions on the employment arrangement between the funeral entity and the unlicensed individual, so long as the person is acting under the close supervision of the funeral director. The Board need not concern itself whether the unlicensed individual is a regular employee or agent of the

funeral entity, questions that might be appropriate for other areas of law, such as tax, unemployment or workers' compensation. The Board has defined "unlicensed individual" to avoid these issues. Finally, because it may be appropriate to make informational presentations to more than a single consumer at a time, the Board has revised this paragraph to make clear that the presentation may be made to a group of consumers.

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. The Board has a substantial governmental interest in (1) protecting the interests of the general public in its purchase of preneed funeral services, and (2) ensuring that consumers receive only accurate price lists when purchasing or shopping for preneed funeral services. *Walker* at 519. Also, the Board clearly has an interest in prohibiting the actual sale of a preneed funeral by an unlicensed individual absent the direct involvement of a licensed funeral director. *Walker* at 524. However, the Board does not have any substantial governmental interest relating to allowing only licensed funeral directors, rather than non-licensed insurance salespeople who are employed by, or agents of those funeral directors, to interact with customers and disseminate price and other information regarding preneed services. *Walker* at 519-20. Following an analysis of whether regulation of protected speech is not more extensive than necessary to serve a substantial governmental interest directly advanced by the regulation, the court held that an individual who is a licensed insurance agent but not a licensed funeral director, and who also is an employee or agent of a particular funeral director may interact with consumers, disseminate accurate price information, and solicit those individuals for the purpose of having their employer sell preneed funeral services and plans on behalf of a licensed funeral director; but under no circumstances can unlicensed individuals contract with consumers for the sale of preneed funerals or act as a "funeral director" as defined in section 2(1) of the act. *Walker* at 526-27. The court further acknowledge that, in light of the substantial and appropriate governmental interest asserted, it was not restricting the Board from requiring close supervision of the unlicensed individuals; the governmental interest asserted would support, in the court's view, an appropriate regulation that requires licensed funeral directors employing unlicensed individuals in this capacity to consult face-to-face with all preneed consumers before the consumers' proposed contracts are signed by the funeral director. *Walker* at 527.

The restriction of paragraph (c)(5), which provides that an unlicensed individual may not offer to or enter into a preneed funeral contract with any consumer, repeats the prohibition against unlicensed persons selling funeral services on a preneed basis in section 13(c) of the act. Because an offer may be immediately accepted, an offer to contract with a consumer subject to ratification by another is no different than actually contracting with that consumer. Accordingly, prohibiting an unlicensed individual from offering to or entering into a preneed funeral contract is prohibiting the unlicensed individual from contracting with a consumer for the sale of preneed funerals, a prohibition that the Federal court found to be narrowly tailored to advance a substantial governmental interest. Additionally, the prohibition of paragraph (c)(2), which provides that an unlicensed individual may not prepare a statement of funeral goods and services selected or other proposal for funeral services, prohibits the unlicensed individual from preparing the offer to enter into a preneed funeral contract. If the unlicensed individual could prepare this apparently valid offer during the unlicensed individual's interactions with the consumer, having the licensed funeral

director sign the contract would be an illusory protection. However, the Board agrees that it would not be narrowly tailored to prohibit the unlicensed individual from preparing worksheets or other presentation, and the Board has revised paragraph (c)(2) to remove this language. Additionally, the prohibition of paragraph (c)(3), which provides that an unlicensed individual may not engage in discussions or other communications with a consumer regarding the actual selection of funeral services and incidental merchandise, addresses activities that are the selling of preneed funeral services (as acknowledged by the court in *Ferguson* to be the practice of funeral directing) rather than simply providing or gathering information, that is, speech. Actually selecting funeral services is little different from accepting an offer (even if conditional) to provide those services. By prohibiting unlicensed individuals from participating in the actual selection of funeral services, the Board has drawn a bright line between informational exchanges and selling preneed funeral services in a manner narrowly tailored to advance the governmental interest of prohibiting unlicensed individuals from actually making preneed sales of funeral services without the involvement of a licensed funeral director.

As noted in the preamble to publication as proposed, the restriction of paragraph (c)(4), which provides that an unlicensed individual 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(1) of the act and, as noted by the Federal court would be narrowly tailored to serve a substantial governmental interest. However, as discussed above and below, a licensed insurance producer may be paid for selling a contract of insurance. The Board has revised this paragraph to explicitly exclude that activity. Similarly, the restriction in paragraph (c)(6), which provides that an unlicensed individual may not engage in any activity that would cause customer to believe that the unlicensed individual is skilled in the knowledge, science or practice of funeral directing, is from section 15(1) of the act (63 P.S. § 479.15(1)), which further construes the practice of funeral directing. Also, the restriction of paragraph (c)(7), which provides that an unlicensed individual 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. Prohibiting those actions defined to be the practice of funeral directing is a narrowly tailored regulation that serves a substantial governmental interest under *Walker*.

Because the Board has no direct authority over the unlicensed individual, the prohibition of paragraph (c)(1), which provides that when interacting with consumers, unlicensed individual may not act on behalf of any entity other than the employing funeral entity in the course of a presentation with a consumer or group of consumers, advances the governmental purpose of accountability of the licensed funeral director and the appropriateness of direct personal contact with the consumer and close supervision of the unlicensed individual. Section 13.206a(a)(1) provides that the licensed funeral director is professionally responsible for the unlicensed individual acting on the funeral director's behalf, and § 13.206a(a)(4) requires the licensed funeral director to have direct personal contact with the consumer before offering to or entering into a preneed funeral contract. Supported by the required disclosure, the restriction of paragraph (c)(1) requires that the unlicensed individual act only on behalf of the funeral entity in whose name the unlicensed individual is communicating with the consumer. This restriction advances this accountability interest by clearly identifying on whose behalf the unlicensed individual is acting and is narrowly tailored to do so, because it easily

permits the unlicensed individual to act on behalf of another funeral entity by presenting the appropriate disclosure and beginning another presentation. Moreover, as revised this restriction is not too broad, for it explicitly permits the unlicensed individual to act on behalf of other funeral entities having common ownership. This is consistent with the governmental interest in accountability, because section 8 the act (63 P.S. § 479.8) limits ownership of funeral entities to licensed funeral directors (and in limited situations, family members), those who are responsible for the unlicensed individuals' actions.

Because, as discussed above, all the restrictions of § 13.206a(c) are narrowly tailored to advance a substantial governmental interest, those restrictions also are necessary or proper to safeguard the interests of the public and the standards of the profession. Moreover, the restrictions of paragraphs (4), (5), (6) and (7) are directly from the act and therefore are consistent with the act and are necessary and proper to safeguard the standards of the profession.

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 individual" may not perform the actions prohibited by this subsection.

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 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," does not preclude an unlicensed individual 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 revised § 13.206a(a)(3) to exclude payment of a commission for selling insurance. Additionally, the Board has revised § 13.206a(c)(4), which provides that an unlicensed individual may not make financial arrangements for the rendering of funeral services and merchandise incidental to such services, to exclude selling a contract of insurance. Moreover, the Board has added to § 13.206a(d) the proviso that this rulemaking shall not prohibit or otherwise restrict compensation for work as an insurance producer or for the sale of insurance. The Board has added to § 13.206a(d) a requirement that the insurance producer must inform the consumer that the person is not acting on behalf of the funeral director or funeral entity when acting as an insurance producer. 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, given all these exclusions specifically written into the regulation. 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 considered all comments received from IRRC, the HPLC, the SCP/PLC and the public. On October 6, 2009, the Board delivered final-form rulemaking to IRRC, the HPLC and the SCP/PLC.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), the final-form rulemaking was deemed approved by the HPLC and by the SCP/PLC on November 18, 2009. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 19, 2009, and disapproved the final-form rulemaking.

Under section 7(c) of the Regulatory Review Act (71 P.S. § 745.7(c)), the Board revised the final-form rulemaking and, together with the supporting report required by section 7(c) of the Regulatory Review Act, delivered the revised final rulemaking to IRRC, the HPLC and the SCP/PLC on January 7, 2010. Under section 7(c.1) of the Regulatory Review Act (71 P.S. § 745.7(c.1)), IRRC met on _____, 2010, and approved the revised final-form rulemaking. Under section 7(d) of the Regulatory Review Act (71 P.S. § 745.7(d)), the revised final-form rulemaking was deemed approved by the HPLC and by the SCP/PLC on _____, 2010.

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 INDIVIDUALS by a funeral entity.

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

PERSON LIVING AT THE TIME OF THE INTERACTION, ONLY in accordance with this section.

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

(2) The unlicensed employee INDIVIDUAL 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 INDIVIDUAL for soliciting business or for business secured by the unlicensed employee INDIVIDUAL. THIS PARAGRAPH DOES NOT PROHIBIT THE PAYMENT OR RECEIPT OF A COMMISSION FROM AN INSURANCE COMPANY, INSURANCE BROKER OR INSURANCE PRODUCER FOR THE SALE OF A CONTRACT OF INSURANCE.

(4) A licensed funeral director of the funeral entity employing an unlicensed employee INDIVIDUAL 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 INDIVIDUAL AS AUTHORIZED IN THIS SECTION SHALL DEVELOP AND USE A DISCLOSURE FORM AS DESCRIBED IN THIS PARAGRAPH.

(i) THE UNLICENSED INDIVIDUAL 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 INDIVIDUAL, IDENTIFY THE UNLICENSED INDIVIDUAL, AND STATE THAT THE FUNERAL ENTITY HAS AUTHORIZED THE UNLICENSED INDIVIDUAL TO FURNISH INFORMATION ON ITS BEHALF AS PROVIDED IN THIS SECTION.

(iii) THE DISCLOSURE MUST STATE THAT THE UNLICENSED

INDIVIDUAL:

(A) IS NOT A LICENSED FUNERAL DIRECTOR.

(B) IS NOT SKILLED IN FUNERAL DIRECTING.

(C) MAY NOT PRACTICE FUNERAL DIRECTING.

(D) MAY NOT ASSIST THE CONSUMER IN SELECTING
SPECIFIC FUNERAL SERVICES.

(E) MAY NOT NEGOTIATE THE SALE OF FUNERAL
SERVICES.

(F) MAY NOT OFFER TO OR ENTER INTO ANY AGREEMENT
TO PROVIDE FUNERAL SERVICES.

(G) 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.

(v) THE DISCLOSURE MUST STATE THAT CONSUMER
COMPLAINTS MAY BE DIRECTED TO THE STATE BOARD OF FUNERAL
DIRECTORS AND PROVIDE CONTACT INFORMATION FOR FILING A
COMPLAINT, INCLUDING THE POSTAL ADDRESS, WEB ADDRESS AND
TOLL FREE COMPLAINTS TELEPHONE NUMBER.

(vi) THE UNLICENSED INDIVIDUAL 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 INDIVIDUAL 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 INDIVIDUAL 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 INDIVIDUAL may:

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

~~(2)~~ FURNISH TRUTHFUL AND NON-MISLEADING PRINTED AND ELECTRONIC 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 OR GROUP OF CONSUMERS IN A MANNER not otherwise prohibited by the act or this chapter, INCLUDING THE FOLLOWING:

(i) AN UNLICENSED INDIVIDUAL MAY DEVELOP, CONTROL, DISTRIBUTE AND DESIGN, OR ANY COMBINATION THEREOF, DIRECT

MAIL MARKETING PROGRAMS.

(ii) AN UNLICENSED INDIVIDUAL MAY TELEMARKE TO SOLICIT CONSUMERS FOR THE EMPLOYING FUNERAL ENTITY ONLY IN COMPLIANCE WITH THE TELEMARKETER REGISTRATION ACT (73 P. S. §§ 2241-2249).

(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 INDIVIDUAL may not:

(1) ~~Be associated with any other~~ IN THE COURSE OF A PRESENTATION WITH A CONSUMER OR GROUP OF CONSUMERS, ACT ON BEHALF OF ANY ENTITY OTHER THAN THE funeral entity UTILIZING THE UNLICENSED INDIVIDUAL. THIS PARAGRAPH SHALL NOT PROHIBIT AN UNLICENSED INDIVIDUAL FROM ACTING ON BEHALF OF MULTIPLE FUNERAL ENTITIES HAVING COMMON OWNERSHIP.

(2) ~~Prepare worksheets, proposals or other presentations~~ A STATEMENT OF FUNERAL GOODS AND SERVICES SELECTED OR OTHER 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.~~ THIS PARAGRAPH SHALL NOT PROHIBIT AN

INSURANCE PRODUCER FROM SELLING A CONTRACT OF INSURANCE.

(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 INDIVIDUAL 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 is not acting as a funeral director or practicing funeral directing. 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. NOTHING IN THIS SECTION
SHALL PROHIBIT AN INSURANCE PRODUCER FROM PREPARING DOCUMENTS
RELATING TO THE SALE OR SOLICITATION OF A CONTRACT OF INSURANCE.
NOTHING IN THIS SECTION SHALL PROHIBIT OR OTHERWISE RESTRICT
COMPENSATION FOR WORK AS AN INSURANCE PRODUCER OR THE SALE OF A
CONTRACT OF INSURANCE.

(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, INCLUDING OVER THE MANNER AND METHOD OF WORK PERFORMED BY THE 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 OR PRIVATE COURIER MAIL. THIS TERM DOES NOT INCLUDE COMMUNICATION THROUGH AN INTERMEDIARY, SUCH AS AN UNLICENSED INDIVIDUAL.

PRENEED FUNERAL CONTRACT – AN AGREEMENT WITH OR ON BEHALF OF A PERSON THEN LIVING UNDER WHICH A FUNERAL DIRECTOR OR FUNERAL ENTITY PROMISES OR AGREES TO RENDER FUNERAL SERVICES OR TO PROVIDE MERCHANDISE INCIDENTAL THERETO UPON THE DEATH OF THAT PERSON, WITHOUT REGARD TO ANY MECHANISM TO FUND THE AGREEMENT.

UNLICENSED INDIVIDUAL – A NATURAL PERSON NOT CURRENTLY LICENSED TO PRACTICE FUNERAL DIRECTING, WITHOUT REGARD TO ANY EMPLOYMENT ARRANGEMENT WITH THE FUNERAL DIRECTOR OR FUNERAL ENTITY.

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. Cmwlth. 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 clergy person 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)

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,

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-form 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(i) 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.

REPORT OF THE STATE BOARD OF FUNERAL DIRECTORS:

**RESPONSE TO IRRC'S ORDER DISAPPROVING FINAL RULEMAKING 16A-4816
(PRENEED ACTIVITIES OF UNLICENSED EMPLOYEE)**

On October 6, 2009, the State Board of Funeral Directors delivered final rulemaking 16A-4816 (preneed activities of unlicensed employee) to the Independent Regulatory Review Commission (IRRC), the House Professional Licensure Committee (HPLC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC). On November 18, 2009, the HPLC and the SCP/PLC were deemed to have approved the final rulemaking. At its meeting on November 19, 2009, IRRC disapproved the final rulemaking. As stated in its disapproval order of November 30, 2009, IRRC disapproved the final rulemaking because it concluded that the rulemaking was not in the public interest, under section 5.2(b) of the Regulatory Review Act (71 P.S. § 745.5b(b)). The Board has revised the final rulemaking under section 7(c) of the Regulatory Review Act (71 P.S. § 745.7(c)) and now submits this report responding to IRRC's disapproval order, as required by section 7(c) of the Regulatory Review Act and 1 Pa. Code § 311.3(3).

IRRC first raised concerns about the need for the regulation, a factor to be considered by IRRC under section 5.2(b)(3)(iii) of the Regulatory Review Act (71 P.S. § 745.5b(b)(3)(iii)). The Board is promulgating this regulation in response to the Federal court ruling in *Walker v. Flitton*, 364 F.Supp.2d 503 (U.S.D.C. M.D. Pa. 2005). In its comments on the proposed rulemaking, IRRC requested that the Board explain how the rulemaking is narrowly tailored to achieve a governmental interest or purpose, as noted by the Federal district court and also that the Board explain how the rulemaking is "necessary or proper to safeguard the interests of the public and the standards of the profession," the standard by which section 16(a) of the Funeral

Director Law (63 P.S. § 479.16(a)) authorizes the Board to promulgate regulations. The Board has revised the preamble to provide this analysis.

Similarly, IRRC raised concerns about fiscal impact of the regulation, a factor to be considered by IRRC under section 5.2(b)(1) of the Regulatory Review Act (71 P.S. § 745.5b(b)(1)). IRRC also noted that in its comments the HPLC suggested that, contrary to the Board's statement in the regulatory analysis form that the Board found that no funeral directors or other group of individuals would be adversely affected by the rulemaking, both the unlicensed employee currently engaged in preneed sales and the consumer would most likely be impacted. In the preamble for final rulemaking, the Board stated, "Under *Ferguson*, the law in Pennsylvania is that unlicensed persons may not engage in preneed sales. Through this rulemaking, the Board is reinterpreting its provisions of the act to now permit certain activity. This is not a new restriction, but an expansion, of opportunity." In its disapproval order, IRRC described this statement as "the lack of a substantive response to requests for fiscal impact estimates by the [HPLC]." The Board has also revised the preamble to provide a more complete consideration.

IRRC next raised concerns about whether the regulation is consistent with the enabling statute and appellate court opinions construing the statute, under section 5.2(a) of the Regulatory Review Act (71 P.S. § 745.5b(a)). The Statutory Construction Act (1 Pa.C.S. § 1922(3)) presumes that a statute is not intended to violate the Constitution of the United States or this Commonwealth. Thus, the Board must interpret section 13(c) of the act in a way that does not violate the First Amendment. The Federal court held that "an individual who is a licensed insurance agent but not a licensed funeral director, and who also is an employee or agent of a particular funeral director may interact with consumers, disseminate accurate price information,

and solicit those individuals for the purpose of having their employer sell preneed funeral services and plans on behalf of a licensed funeral director.” *Walker* at 526-27. The court also recognized that “the Board clearly has an interest in prohibiting the actual sale of a preneed funeral by an unlicensed individual absent the direct involvement of a licensed funeral director” and went on to hold that “under no circumstances can unlicensed individuals contract with consumers for the sale of preneed funerals.” *Walker* at 524, 526-27. Throughout its rulemaking, the Board has emphasized that it is prohibiting only those actions that constitute sales activity for preneed funeral services and merchandise incidental to those services. For example, § 13.206a(c)(5) (relating to utilization of unlicensed individuals by a funeral entity) prohibits an unlicensed individual from “offer[ing] to or enter[ing] into a preneed funeral contract with any consumer on behalf of the funeral director or funeral entity.” Also, § 13.206a(c)(2) prohibits the unlicensed individual from “prepar[ing] a statement of funeral goods and services selected or other proposal for funeral services,” rather than prohibiting “prepar[ing] worksheets, proposals or other presentations for funeral services,” as originally proposed.

IRRC also raised concerns about the clarity and reasonableness of the regulation, under sections 5.2(b)(3)(ii) and 5.2(b)(3)(iv) of the Regulatory Review Act (71 P.S. § 745.5b(b)(3)(ii) and (iv)). As noted by IRRC in its disapproval order, at IRRC’s public meeting on November 19, 2009, legal counsel for the Board indicated that it was the Board’s intent to allow unlicensed employees to go beyond just handing out price lists and printed materials. Those actions could include discussing or answering questions about prices for various services or combinations of services, handing out sample unsigned contracts, and arranging for alternative forms of payment, especially if the unlicensed employee is also an insurance producer. IRRC pointed out that the final-form regulation did not reflect such intent and suggested that the Board memorialize its

intent by fully developing and clarifying the permissible actions after discussing these points further with affected parties. At its meeting December 1 and 2, 2009, the Board fully heard from the parties who have most spoken out on this rulemaking. As a result, the Board revised its regulation in a number of ways. For example, under § 13.206a(b)(2), an unlicensed individual may furnish truthful and non-misleading electronic materials, in addition to printed materials, concerning funeral services and merchandise available from the funeral entity. Although the Board did not revise this paragraph to reflect this, providing sample unsigned contracts is included in this paragraph's authorization to "furnish truthful and non-misleading printed ... materials concerning funeral services and merchandise available from the funeral entity." Also, the final rulemaking already provided in § 13.206a(b)(3) that the unlicensed individual may communicate with a consumer in a manner not otherwise prohibited by the act or the Board's regulations. The Board revised this paragraph to provide that an unlicensed individual may develop, control, distribute and design direct mail marketing programs and may telemarket to solicit consumers for the employing funeral entity. As discussed below, the Board also revised the regulation in a number of provisions to clarify that those unlicensed individuals who are also insurance producers are not precluded from certain activities. The Board did not revise its rulemaking to permit unlicensed individuals to sell funeral merchandise, as discussed below.

IRRC acknowledged that the Board revised the requirements for disclosure forms as suggested by IRRC and other commenters. However, IRRC concluded that the disclosure form would serve little to no purpose if there are severe limits on unlicensed employees. IRRC suggested that the provisions for the disclosure form should be revised to clarify the role of the unlicensed employees in assisting consumers, to notify consumers that they have a right to contact or meet with licensed funeral directors, and to state that a licensed funeral director is

responsible for and must review, approve and sign agreements and contracts. In its proposed regulation, the Board would have required any document presented by the unlicensed employee to recite,

THIS DOCUMENT DOES NOT CONSTITUTE A CONTRACT OR AN OFFER TO CONTRACT. THIS DOCUMENT IS NOT BINDING UPON ON YOU (THE CUSTOMER) OR [name of funeral entity], BUT IS MERELY FOR THE 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].

IRRC suggested that, as an alternative to this notice, the Board should consider requiring a disclosure that would inform consumers that the unlicensed employee is not a licensed funeral director and is acting only as an employee or agent for the licensed funeral director(s), with language mirroring section 15(1) of the act (63 P.S. § 479.15(1)), which provides that one is construed to be practicing funeral directing by holding himself out to the public as being skilled in funeral directing. In direct response to this comment, the Board revised the regulation so that the disclosure form will alert the consumer to the limitations of the unlicensed individual's ability to offer funeral services and incidental merchandise on a preneed basis. The purpose of this rulemaking is to permit funeral homes and their employees to provide information and otherwise engage in protected speech, yet prohibit unlicensed persons from practicing as funeral directors. Consumers will not know, until they are told via the mandatory disclosure, that the unlicensed individuals are not funeral directors and cannot engage in the practice of funeral directing. IRRC also suggested that the disclosure form could include contact information for the Bureau of Professional and Occupational Affairs for purposes of filing complaints. The Board has added § 13.206a(a)(5)(v) to impose this requirement.

IRRC suggested that the regulation should make it clear that licensed insurance producers employed by funeral entities or directors are not restrained in their work as insurance producers. The regulation should avoid interfering with any compensation or commissions received as legitimate payments for work by insurance producers who are also licensed funeral directors or who work for funeral entities. The Board has incorporated these suggestions. The Board revised § 13.206a(a)(3), which provided that a funeral director may not pay a commission for soliciting business or securing business, to provide that it “shall not prohibit the payment or receipt of a commission from an insurance company, insurance broker or insurance producer for the sale of a contract of insurance.” The Board revised § 13.206a(c)(4), which provided that an unlicensed individual may not make financial arrangements for the rendering of funeral services and merchandise incidental to such services, to provide that it “shall not prohibit an insurance producer from selling a contract of insurance.” Additionally, the Board has revised § 13.206a(d) to provide that the regulation does not “prohibit an insurance producer from preparing documents relating to the sale or solicitation of a contract of insurance [and does not] prohibit or otherwise restrict compensation for work as an insurance producer or for the sale of insurance.”

IRRC noted that it supports the Board’s decision to relax from the requirement that the licensed funeral director meet face to face to permitting the funeral director to have direct personal contact with the consumer before offering to or entering into a contract to provide funeral services and incidental merchandise. IRRC suggested that, in addition to a telephone call, email, fax or postal service delivery, the Board permit private delivery services (such as Federal Express) or hand-delivery by an unlicensed employee. The Board has revised the rulemaking to permit private delivery services. The Board has not revised the rulemaking to permit hand-delivery by an unlicensed employee. Such a provision necessarily envisions the

unlicensed employee meeting with the consumer and preparing all documents to be delivered to the funeral director and then delivering those documents, steps that would facilitate the unlicensed employee engaging in all steps to sell a preneed funeral except for actually signing the contract.

Finally, IRRC raised concerns about possible conflicts with other statutes, another factor to be considered under section 5.2(b)(3)(i) of the Regulatory Review Act (71 P.S. § 745.5b(b)(3)(i)). The act of August 14, 1963 (P.L. 1059), *as amended* (63 P.S. §§ 480.1-480.11), commonly known as the Future Interment Law, also addresses preneed sales of funeral merchandise. As noted by IRRC, vendors not licensed by the Board to practice funeral directing may legally sell funeral merchandise in Pennsylvania. *See*, section 1 of the Future Interment Law (63 P.S. § 480.1), which provides that, except as provided in that law, no person may “offer to enter into a contract for the sale of personal property or for the furnishing of personal services to be used in connection with the interment of a deceased human being wherein the personal property is not to be delivered or the personal services are not to be performed until the death at some future time of the person for whose interment such property or services are to be furnished.” IRRC therefore suggested that the Board revise the regulation to permit unlicensed individuals to sell funeral merchandise, but not services, on behalf of the employing funeral entity. As explained in the preamble, the Board has not done so.

As discussed above, the Board has revised its rulemaking under section 7(c) of the Regulatory Review Act (71 P.S. § 745.7(c)) and now delivers that revised final rulemaking to IRRC, the HPLC and the SCP/PLC.

Michael J. Yeosock, FD, Chairman
State Board of Funeral Directors



ARTHUR COCCODRILLI, CHAIRMAN
GEORGE D. BEDWICK, VICE CHAIRMAN
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INDEPENDENT REGULATORY REVIEW COMMISSION

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

November 30, 2009

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

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

Dear Chair Yeosock:

The Independent Regulatory Review Commission disapproved your regulation on November 19, 2009. Our order is enclosed and will be available on our website at www.irrc.state.pa.us.

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff have any questions, please contact Kim Kaufman, our Executive Director, at 783-5506.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

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

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held November 19, 2009

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

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

On September 19, 2007, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the State Board of Funeral Directors (Board). This rulemaking adds Section 13.206a to 49 Pa. Code. The proposed regulation was published in the September 29, 2007 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on October 6, 2009.

The regulation sets forth procedures and requirements for the utilization of unlicensed employees by funeral directors and funeral entities. Permissible activities for unlicensed employees would include furnishing customers with general price lists and printed materials, and communicating with customers in ways "not otherwise prohibited by the act or this chapter." Prohibited activities are divided into seven areas. Unlicensed employees would not be allowed to communicate with customers about the "actual selection" of services or merchandise, or payment arrangements. They also may not represent more than one funeral business at a time.

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

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

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

During our review of this regulation, we received many letters from licensed funeral directors and other affected parties. Members of the General Assembly submitted letters expressing support for or opposition to the regulation as well as remaining concerns.

In determining whether a regulation is in the public interest, the Commission is directed by the Regulatory Review Act (Act) to consider criteria set forth in eight separate categories. See 71 P.S. § 745.5b. Based on these criteria, there are substantive concerns and objections that form the basis for our vote to disapprove and provide the Board with an opportunity to clarify and improve the regulation.

Need for the regulation, Fiscal impact, Compliance with the provisions of the Act or the regulations of the Commission (71 P.S. § 745.5b(b)(1), (3)(iii) and (6))

As a part of its response to our action, the Board should review page five of our comments dated November 28, 2007, on the proposed regulation. In our comments, we asked the Board to respond to the guidance provided by *Walker* that prohibitions on commercial speech should be “narrowly tailored” to achieve a governmental interest or purpose. See 364 F.Supp.2d at 525-526. We also stated that the Board should explain how each provision is “deemed necessary or proper to safeguard the interests of the public and the standards of the profession” pursuant to Section 16(a) of the Funeral Director Law (63 P.S. § 479. 16(a))(Law). The Board replied with a reiteration of the Law. This was insufficient. The federal court asked the Board to clarify the Law not repeat it. Both *Ferguson* and *Walker* indicated there was no record of consumer complaints or harm related to the activities of unlicensed individuals. See 768 A.2d at 393(note 5) and 364 F.Supp.2d at 511-513. Despite this lack of a record, a need and purpose for the regulation must still be identified. To properly respond to the court in *Walker* and the criteria of our Act, the Board needs to identify and thoroughly explain the need or harm to be resolved by each provision. The harm must be real rather than “speculative.” See 364 F.Supp.2d at 521. This work will assist the Board in developing clear, fair and reasonable provisions that are the basis of an effective regulation.

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

Statutory authority, Legislative intent, Pertinent opinions of courts; Reasonableness; Clarity (71 P.S. §§ 745.5b(a) and (b)(3)(ii) and (iv))

We acknowledge that the Board is confronted by a difficult quandary. On the one hand, there is the Law and on the other, there is the *Walker* decision and the First Amendment of the United States Constitution. The rules of statutory construction at 1 Pa.C.S. § 1922(3) require the presumption that a statute was not intended to violate the Constitution of the United States or of this Commonwealth. Therefore, any interpretation of a statute must be balanced with the rights established under the First Amendment. This was the task set for the Board by the court in *Walker*.

At our public meeting, the Board’s counsel indicated that it was the Board’s intent to allow unlicensed employees to go beyond just handing out general price lists and printed materials. Their actions could include discussing or answering questions about prices for various services or combinations of services, selling funeral merchandise, handing out samples of

unsigned contracts, and arranging alternative forms of payment, especially if they are licensed insurance producers. However, the final-form regulation does not reflect the Board's intent.

The Board needs to memorialize its intent and fully develop and clarify the list of permissible actions in the final-form regulation. We urge Board members to meet with affected parties to discuss regulatory language that will address the commercial free speech concerns raised by *Walker* while maintaining the central role of licensed funeral directors as envisioned in the Law.

In the final-form regulation, the Board requires the use of a disclosure form as suggested by commentators, including this Commission, in our comments on the proposed rulemaking. However, the form serves little to no purpose if there are severe limits on unlicensed employees. The purpose is to inform the consumer of the unlicensed status of an employee and of the accessibility and responsibility of the licensed funeral director. The provisions for this form in Section 13.206a(a)(5) should be revised to clarify the role of the unlicensed employees in assisting consumers; notify consumers that they have a right to contact or meet with licensed funeral directors; provide direct contact information for the supervising funeral directors; and state that a licensed funeral director is responsible for and must review, approve and sign agreements and contracts. The Board could also require that the form include contact information for consumer complaints to it or the Bureau of Professional and Occupational Affairs, and thereby develop a record of any problems or concerns.

In the case of licensed insurance producers, the regulation should make it clear that licensed insurance producers employed by funeral entities or directors are not restrained in their work as insurance producers. The regulation should avoid interfering with any compensation or commissions received as legitimate payments for work by insurance producers who are also licensed funeral directors or work for funeral entities or directors. As noted in *Ferguson*, nothing in the state court's ruling prevents insurance licensees from selling policies to cover preneed expenses. See *Ferguson*, 768 A.2d 402 (note 14). Section 13.206a(d) is another area in need of additional clarification. Again, the need and purpose of the new language is unclear. Placing requirements on insurance producers may also be beyond the Board's authority. The last sentence of the subsection may cause unnecessary confusion in situations when the supervising funeral director is also a licensed insurance producer.

We support the Board's decision to allow a telephone call, email, fax or postal service delivery to substitute for a "face-to-face meeting" between the customer and funeral director. To further clarify this provision, the definition of "direct personal contact" in Section 13.206a(e) should be amended to include other paper delivery options beyond "postal service mail" including private delivery services (e.g., Federal Express) or hand-delivery by an unlicensed employee.

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

Finally, the regulation needs to recognize that 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. This is another issue that we raised as a question on page five of our comments. 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 regulation should be amended to allow unlicensed employees to sell merchandise for their employing funeral entity.

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

BY ORDER OF THE COMMISSION:

The regulation # 16A-4816 (IRRC # 2639) from the State Board

of Funeral Directors was disapproved on 11/19/09.



Arthur Coccodrilli

Arthur Coccodrilli, Chairman

COMMENTORS

Reg. # 16A-4816

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DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS
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January 7, 2010

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 the report of the State Board of Funeral Directors prepared in accordance with section 7(c) of the Regulatory Review Act, 71 P.S. § 745.7(c), following disapproval of the final form regulation by the Independent Regulatory Review Commission. The Board has amended the final form regulation and resubmits the regulation for approval in accordance with the Regulatory Review Act.

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
Steven V. Turner, 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

RECEIVED
 2010 JAN -7 AM 10:07
 INDEPENDENT REGULATORY
 REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
_____	_____	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
1/7/10	<i>[Signature]</i>	MAJORITY CHAIRMAN <u>Michael P. McGeehan</u>
1/7/10	<i>[Signature]</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
_____	_____	MAJORITY CHAIRMAN <u>Robt. M. Tomlinson</u>
1/7/10	<i>[Signature]</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)