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Final Regulation Agency Background Document

Agency name	Board of Funeral Directors and Embalmers; Department of Health Professions
Virginia Administrative Code (VAC) Chapter citation(s)	18VAC65-30-10 et seq.
VAC Chapter title(s)	Regulations for Preneed Funeral Planning
Action title	Periodic Review
Date this document prepared	7/14/20

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The Board is amending its regulations governing preneed funeral planning to ensure greater protections for the public in disclosures of information about what they is and is not included in a contract, in retention of documentation, and in notification if a funeral home closes or changes ownership.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

N/A

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On July 14, 2020, the Board of Funeral Directors and Embalmers amended 18VAC65-30-10 et seq., Regulations Governing Preneed Funeral Planning.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

There are no changes; the mandate for this action is a periodic review that was posted on Townhall and published in the Register of Regulations.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

18VAC65-30-10 et seq. Regulations for Preneed Funeral Planning are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board with authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

- ...
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ [2.2-4000 et seq.](#)) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100 et seq.](#)) and Chapter 25 (§ [54.1-2500 et seq.](#)) of this title.*

In addition, § 54.1-2803 sets out the specific powers and duties of the Board and §§ 54.1-2820, 54.1-2822, 54.-2822.1, 54.1-2824, and 54.1-2825 set out the statutory requirements for preneed contracts:

§ 54.1-2803. Specific powers and duties of Board.

In addition to the general powers and duties conferred in this subtitle, the Board shall have the following specific powers and duties to:

1. Establish standards of service and practice for the funeral service profession in the Commonwealth.
2. Regulate and inspect funeral service establishments, their operation and licenses.
3. Require licensees and funeral service interns to submit all information relevant to their practice or business.
4. Enforce the relevant regulations of the Board of Health.
5. Enforce local ordinances relating to funeral service establishments.
6. Advise the Department of Health Professions of any training appropriate for inspectors serving as the Board's agents.
7. Establish, supervise, regulate and control, in accordance with the law, programs for funeral service interns.
8. Establish standards for and approve schools of mortuary science or funeral service.
9. **Regulate preneed funeral contracts and preneed funeral trust accounts as prescribed by this chapter, including, but not limited to, the authority to prescribe preneed contract forms, disclosure requirements and disclosure forms and to require reasonable bonds to insure performance of preneed contracts.**
10. Inspect crematories and their operations.

§ 54.1-2820. Requirements of preneed funeral contracts.

A. It shall be unlawful for any person residing or doing business within this Commonwealth, to make, either directly or indirectly by any means, a preneed funeral contract unless the contract:

1. Is made on forms prescribed by the Board and is written in clear, understandable language and printed in easy-to-read type, size and style;
2. Identifies the seller, seller's license number and contract buyer and the person for whom the contract is purchased if other than the contract buyer;
3. Contains a complete description of the supplies or services purchased;
4. Clearly discloses whether the price of the supplies and services purchased is guaranteed;
5. States if funds are required to be trusted pursuant to § 54.1-2822, the amount to be trusted, the name of the trustee, the disposition of the interest, the fees, expenses and taxes which may be deducted from the interest and a statement of the buyer's responsibility for taxes owed on the interest;
6. Contains the name, address and telephone number of the Board and lists the Board as the regulatory agency which handles consumer complaints;
7. Provides that any person who makes payment under the contract may terminate the agreement at any time prior to the furnishing of the services or supplies contracted for except as provided pursuant to subsection B; if the purchaser terminates the contract within 30 days of execution, the purchaser shall be refunded all consideration paid or delivered, together with any interest or income accrued thereon; if the purchaser terminates the contract after 30 days, the purchaser shall be refunded any amounts required to be deposited under § 54.1-2822, together with any interest or income accrued thereon;
8. Provides that if the particular supplies and services specified in the contract are unavailable at the time of delivery, the seller shall be required to furnish supplies and services similar in style and at least equal in quality of material and workmanship and the representative of the deceased shall have the right to choose the supplies or services to be substituted;

9. Discloses any penalties or restrictions, including but not limited to geographic restrictions or the inability of the provider to perform, on the delivery of merchandise, services or prearrangement guarantee; and

10. Complies with all disclosure requirements imposed by the Board.

If the contract seller will not be furnishing the supplies and services to the purchaser, the contract seller must attach to the preneed funeral contract a copy of the seller's agreement with the provider.

B. Subject to the requirements of § 54.1-2822, a preneed funeral contract may provide for an irrevocable trust or an amount in an irrevocable trust that is specifically identified as available exclusively for funeral or burial expenses, where:

1. A person irrevocably contracts for funeral goods and services, such person funds the contract by prepaying for the goods and services, and the funeral provider residing or doing business within the Commonwealth subsequently places the funds in a trust; or

2. A person establishes an irrevocable trust naming the funeral provider as the beneficiary; however, such person shall have the right to change the beneficiary to another funeral provider pursuant to § 54.1-2822.

C. If a life insurance or annuity contract is used to fund the preneed funeral contract, the life insurance or annuity contract shall provide either that the face value thereof shall be adjusted annually by a factor equal to the annualized Consumer Price Index as published by the Bureau of Labor Statistics of the United States Department of Labor, or a benefit payable at death under such contract that will equal or exceed the sum of all premiums paid for such contract plus interest or dividends, which for the first 15 years shall be compounded annually at a rate of at least five percent. In any event, interest or dividends shall continue to be paid after 15 years. In addition, the following must also be disclosed as prescribed by the Board:

1. The fact that a life insurance policy or annuity contract is involved or being used to fund the preneed contract;

2. The nature of the relationship among the soliciting agent, the provider of the supplies or services, the prearranger and the insurer;

3. The relationship of the life insurance policy or annuity contract to the funding of the preneed contract and the nature and existence of any guarantees relating to the preneed contract; and

4. The impact on the preneed contract of (i) any changes in the life insurance policy or annuity contract including but not limited to changes in the assignment, beneficiary designation or use of the proceeds, (ii) any penalties to be incurred by the policyholder as a result of failure to make premium payments, (iii) any penalties to be incurred or moneys to be received as a result of cancellation or surrender of the life insurance policy or annuity contract, and (iv) all relevant information concerning what occurs and whether any entitlements or obligations arise if there is a difference between the proceeds of the life insurance policy or annuity contract and the amount actually needed to fund the preneed contract.

D. When the consideration consists in whole or in part of any real estate, the contract shall be recorded as an attachment to the deed whereby such real estate is conveyed, and the deed shall be recorded in the clerk's office of the circuit court of the city or county in which the real estate being conveyed is located.

E. If any funeral supplies are sold and delivered prior to the death of the subject for whom they are provided, and the seller or any legal entity in which he or a member of his family has an interest thereafter stores these supplies, the risk of loss or damage shall be upon the seller during such period of storage.

§ 54.1-2822. Deposit of money received pursuant to preneed funeral contract.

A. Within 30 days following the receipt of any money paid pursuant to any preneed funeral contract or interest or income accrued thereon, unless such amounts are paid to fund either an annuity or an insurance policy which will be used to purchase the funeral supplies or services contracted for, the person receiving such amounts shall deposit all consideration paid pursuant to the terms of a preneed funeral contract in which the price of the supplies and services is not guaranteed, or ninety percent of all consideration paid pursuant to the terms of a preneed funeral contract in which the price of the supplies and services is guaranteed, in a special account in a bank or savings institution doing business in this Commonwealth.

B. The funds shall be deposited in separate, identifiable trust accounts setting forth the names of the depositor, the trustee for the person who is the subject of the contract, the name of the person who will render the funeral services and the name of the person who is the subject of the contract. The purchaser shall have the right to change the beneficiary and trustee of the trust at any time prior to the furnishing of the services or supplies contracted for under the preneed funeral contract. Trust account records shall be subject to examination by the Board.

C. No funeral director, embalmer, funeral service licensee, owner of a funeral establishment, or any person employed by or having an interest in a funeral establishment shall serve as trustee of a trust account for which any such person, or any funeral establishment owned by or employing such person or in which such person has an interest, has been named the beneficiary or designated the provider of services, unless two or more such persons are named and serve as trustees and are required to act jointly in such fiduciary capacity. Subject to the terms of this subsection, and notwithstanding any other provision of law, the trustee for any such trust account may be an incorporated association that is authorized to sell burial association group life insurance certificates in the Commonwealth, as described in the definition of limited burial insurance authority in § 38.2-1800, whose principal purpose is to assist its members in (i) financial planning for their funerals and burials and (ii) obtaining insurance for the payment, in whole or in part, for funeral, burial, and related expenses.

§ 54.1-2822.1. Funeral establishments to maintain preneed records.

Every person selling preneed funeral contracts within this Commonwealth shall keep and maintain such records of preneed transactions, including copies of preneed contracts, as may be prescribed by the Board. All such records shall be maintained on the premises of the funeral establishment providing the preneed services and supplies, except that preneed records of funeral establishments under common ownership, control, or management may be maintained at a single location within this Commonwealth.

§ 54.1-2824. Declaration of trust in consideration other than money.

Within thirty days following the receipt of any personal property other than money delivered pursuant to any preneed funeral contract, the person receiving it, if title thereto is transferred, or the person making such delivery, if title thereto is not transferred, shall execute in writing a declaration of trust setting forth all the terms, conditions and considerations upon which the personal property is delivered, which shall be acknowledged in the same manner as the contract and recorded in the clerk's office of the circuit court of the city or county in which the person delivering the personal property resides; provided, that if such terms, conditions and considerations are contained in the preneed funeral contract, the contract shall be recorded.

§ 54.1-2825. Person to make arrangements for funeral and disposition of remains.

A. Any person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements and be otherwise responsible for his funeral and the disposition of his remains, including cremation, interment, entombment, or memorialization, or some combination thereof, upon his death. Such designee shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is provided to the funeral service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains. Nothing in this section shall preclude any next of kin from paying any costs associated with any funeral or disposition of any remains, provided that such payment is made with the concurrence of any person designated to make arrangements.

B. In cases in which a person has designated in a U.S. Department of Defense Record of Emergency Data (DD Form 93) or any successor form an individual to make arrangements for his funeral and disposition of his remains, and such person dies while serving in any branch of the United States Armed Forces as defined in 10 U.S.C. § 1481, such designee shall be responsible for making such arrangements.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The purpose of this regulatory action is to provide clear, enforceable regulations. Both the licensees and the public need clarity on contracting preneed funeral plans, so public health and safety is not jeopardized.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

A Regulatory Advisory Panel (RAP) was convened to review all provisions of Chapter 30, and the Regulatory Committee of the Board recommended adoption of the following proposed amendments:

18VAC65-30-10. Definitions.

- Removal of definition of “capper, steerer, or shill” as those terms are no longer used.

18VAC65-30-50. Solicitation.

- Clarification that registered funeral service interns are not allowed to engage in funeral preneed planning and/or sales.

18VAC65-30-60. Records; general.

- For consistency with record retention requirements for other funeral-related documents, change in the requirement that preneed contracts and reporting documents be maintained on the premises of the establishment for three years after the death of the contract beneficiary.

18VAC65-30-70. Record reporting.

- Changes include: 1) the alphabetical or chronological listing of all preneed contracts should also include where the contract is funded (e.g. name of insurance provider), where the funds are maintained in addition to the existing requirement of how the contract is funded; and 2) requirements for notification to the board and the existing contract buyers when a contract provider discontinues operation by either closure or change in ownership.

18VAC65-30-90. Disclosures.

- Requirement for licensees to obtain acknowledgement from contract buyers that they have received the general price list and preneed disclosure questions and answers.

18VAC65-30-110. Cancellation or transfer of contract.

- Addition of reference to Virginia Code § 64.2-730.

18VAC65-30-180. Life insurance or annuity.

- Change in reference to Virginia Code § 54.1-2820(C).

18VAC65-30-220. Content of preneed contracts.

- Clarification of language related to “guaranteed” prices/services/goods to avoid confusion for consumers about those items or services that are nonguaranteed or cash advance provided by a third party.
- Add reference to Virginia Funeral Service Licensee to accurately reflect the most common licensure type.

18VAC65-30-230. Content of disclosure statements.

- Clarification of content of disclosure statements for accuracy and clarity for contract buyers/consumers, as well as compliance with federal FTC regulations.
- Clarification and further explanation related to “guaranteed” prices/services/goods to avoid confusion for contract buyers/consumers.
- Addition of language to clarify what happens if a funeral home closes or changes ownership and what impact that change may have on a contract buyer’s/consumer’s choice.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or

amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

1) The primary advantage to the public is a better understanding of preneed contracts for buyers/consumers and some greater assurance that funding for goods and services will be available at the time of need. All amendments are intended to provide additional consumer protection. There are no disadvantages to the public.

2) There are no advantages or disadvantages to the Commonwealth, except more clarity in regulation will assist the Board in interpretation of the law.

3) The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. The Board is authorized under § 54.1-2400 to *“promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary to administer effectively the regulatory system.”*

The amendments are a foreseeable result of the statute requiring the Board to protect the health and safety of patients in the Commonwealth and to enforce the Code of Virginia.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

The regulations are consistent with the Federal Trade Commission rules for disclosures to consumers of funeral services.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. “Particularly affected” are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected - None

Localities Particularly Affected - None

Other Entities Particularly Affected - None

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

There was a public comment period from February 3, 2020 to April 3, 2020; a public hearing was conducted on March 10, 2020. There were no comments on proposed regulations.

Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

In the adoption of final regulations, the Board clarified in section 50 that licensed funeral directors can communicate with contract buyers and write pre-need contracts. This is a long-standing policy and not new regulation.

Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current section number	Current requirement	Change, intent, rationale, and likely impact of new requirements
10	Sets out the definition of words and terms used in the chapter	Deletion of the terms "capper," "steerer," or "skill as they are no longer used in regulation
50	Establishes rules for solicitations of preneed contracts	Subsection B is amended to state that funeral service interns cannot engage in preneed planning or sales. <i>This is not a new rule but a clarification of the current policy; it is not within the statutory authority of an intern to write a preneed contract.</i> <i>In the adoption of final regulations, the Board also clarified that licensed funeral directors can communicate with contract buyers and write pre-need contracts. This is a long-standing policy and not new regulation.</i>
60	Sets out rules for retention of preneed records	Subsection B is amended to change the retention schedule from one year to three years after death of the beneficiary. <i>The three-year retention is</i>

		<i>consistent with rules for all other records, such as the embalming record.</i>
70	Sets out rules for reporting of information in a preneed record	<p>Subsection A is amended to include, in addition to how the preneed contract was funded, where it is funded and where the funds are maintained. <i>The information is essential so buyers are fully informed about where and how their funds are being invested. The additional protection for consumers will make fraudulent contracts less likely.</i></p> <p>Subsection B is amended to provide more explicit requirements in the event a contract provider discontinues operation. <i>Current regulations require notification to the Board and each contract buyer in writing if a provider discontinues operation. Amendments will specifically require the provider that discontinues by closure to: 1) provide the board a current list of preneed contracts; and 2) notify buyers that they have the right to change providers at any time prior to death.</i></p> <p><i>Amendments will further specify what must be done if the provider changes ownership. If the preneed contracts are going to be honored by the new owner, a notice in a publication of general circulation will suffice. If the new owner does not intend to honor the contracts, written notice must be sent to all buyers within 90 days of the sale. The notice, as with a closure, must include a statement about the buyer's right to change providers at any time prior to death.</i></p>
90	Sets out rules for what documents must be given to a contract buyer	<p>Subsection B is amended to require licensee to get a written acknowledgement from the buyer that he/she has received the general price list and preneed disclosure questions and answers. <i>The rule is added for protection of both the consumer and the contract provider (funeral establishment), so there is a record of compliance with required provision of documents and disclosures.</i></p>
110	Sets out the requirements for cancellation of a preneed contract	<p><i>Subsection D is amended to include an applicable section of Code relating to trust agreements.</i></p>
180	Sets the rule for funding of a preneed contract with life insurance or an annuity	<p><i>There is a correction of a cite in Chapter 38 of Title 54.1 of the Code.</i></p>
220	Establishes the required content for a preneed contract	<p>Additional information is included in the section on "Supplies and Services Purchased" 1) It is clarified that there will be no additional costs for the goods and services that are <i>guaranteed</i> in a</p>

		<p>contract <u>if your contract is fully paid or funded at the time of your death.</u> <i>The additional language is necessary to inform the contract buyer that the goods and services are only guaranteed if a buyer has fully funded the contracted price prior to his death.</i></p> <p>2) Language is added in this section to explain that “nonguaranteed” goods and services included in a contract may result in additional costs as prices for these items may increase from the date of the contract to the time of need.</p> <p>3) Language is also added to explain that cash advance items are not guaranteed. A cash advance item is any item obtained from a third party by the funeral home on behalf of the person making funeral arrangements. Examples of cash advance items are given.</p> <p>In section II. Method of Funding, there are several editorial changes to make the language more readable. There is also an amendment to include a “funeral service licensee” in the section on insurance agents. While the Board continues to allow “funeral directors” to renew their licenses, most persons are now licensed as “funeral service licensees” (combination of funeral director and embalmer), so that term should be included in this section.</p> <p>In section III on Consumer Information, the toll free number is identified as the toll-free complaint line for the Department.</p> <p>In section IV on Disclosures, there is a new requirement for the contract seller to acknowledge that the General Price List and required disclosures have been given to the purchaser (contract buyer).</p>
230	Sets out requirements for disclosure statements in a preneed contract	<p>1) There is additional information in the answer to the question about whether there is more than one type of preneed contract. <i>Some consumers are confused about the difference between guaranteed and nonguaranteed contracts. To avoid such confusion, there is an additional explanation about what a “nonguaranteed” contract means. A contract may include guaranteed and nonguaranteed items.</i></p> <p>2) In the answer to the question about cancellation of a contract, there is an editorial addition of “revocable or irrevocable” in describing a trust and an additional section of Code referenced. The addition of “or receive a refund” is not new; it is clarifying the meaning of an</p>

	<p>irrevocable trust – which cannot be cancelled after the initial 30-day period.</p> <p>3) There is a new question added to the disclosure about what happens if the funeral home closes? <i>The answer explains a contract buyer's right to change providers at any time prior to death and explains the responsibility of the provider to notify the buyer in writing of the funeral home is being closed or sold and the new owner does not intend to honor the contracts.</i></p> <p>4) In the answer to the question about guaranteed and nonguaranteed prices, there is additional information similar what is included in the content of a preneed contract (see section 220).</p> <p>5) In the answer to the question about embalming, it is stated more explicitly that embalming is not required by law. The answer currently offers an explanation of situations in which a body will have to be embalmed if a family chooses certain options. The language about embalming also tracks the FTC required notice.</p> <p>6) A new section is added on Records. <i>The purposed of the addition is to emphasize the need for a contract buyer to maintain a copy of the preneed contract and to make the buyer/consumer aware of the legal responsibilities of the provider to also maintain contracts and related documents for three years after the buyer's death.</i></p>
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