

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

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In re:)	
)	
CEMETERY AND FUNERAL)	DECISION OF DISAPPROVAL
BUREAU)	OF REGULATORY ACTION
)	(Gov. Code section 11349.3)
)	
REGULATORY ACTION:)	
Adopt sections 1258.4, 1277 and)	OAL File No. 03-1020-01S
1277.5 of title 16 of the California)	
Code of Regulations)	
_____)	

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Cemetery and Funeral Bureau of the Department of Consumer Affairs implements provisions of Business and Professions Code sections 7685, 7685.6, and 7745 pertaining to funeral establishments disclosing a “preneed agreement” (sometimes also called a “preneed arrangement” or “preneed”) to a deceased’s survivor or responsible party.

SUMMARY OF DECISION

On December 3, 2003, the Office of Administrative Law (“OAL”) notified the Cemetery and Funeral Bureau (“Bureau”) of the disapproval of the above-referenced regulatory action. OAL disapproved the regulations because proposed regulation sections 1258.4 and 1277 of title 16 of the California Code of Regulations (“CCR”) failed to comply with the “authority” and “reference” standards of Government Code section 11349.1, subdivisions (a)(2) and (a)(5).

DISCUSSION

Regulations adopted by the Bureau must be adopted pursuant to the provisions of the Administrative Procedure Act (the “APA;” Gov. Code section 11340 et seq.) (See generally Bus. & Prof. Code section 7606.) Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the act from compliance with the APA. (See Gov. Code section 11346). No exemption or exclusion applied to the regulatory action here under review. Consequently, before these regulations could become effective, the regulations were reviewed by OAL for compliance with the procedural requirements and substantive standards of the APA, in accordance with Government Code section 11349.1.

AUTHORITY AND REFERENCE STANDARDS

Government Code section 11349.1 requires that OAL review all regulations for “authority” and “reference.” “Authority” is defined in Government Code section 11349, subdivision (b), as meaning “... the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” “Reference” is defined in Government Code section 11349, subdivision (e), as meaning “... the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.” Furthermore, Government Code section 11344, subdivision (d), provides that OAL shall “[e]nsure that each regulation is printed together with a reference to the statutory authority pursuant to which it was enacted and the specific statute or other provision of law which the regulation is implementing, interpreting, or making specific.”

In addition to the statutory law cited above, CCR, title 1, section 14 (entitled “‘Authority’ and ‘Reference’”) provides, in part, the following:

“(d) Citations. Citations of ‘authority’ and ‘reference’ for each regulatory section which has been adopted or amended and submitted to OAL for filing with the Secretary of State shall appear at the end of each section. Court decisions relied upon by the agency as support for the citations may also be cited at the end of each relevant section.”

The text of proposed regulation sections 1258.4 and 1277, as submitted by the Bureau to OAL for review and filing with the Secretary of State, did not include “authority” and “reference” citations at the end of each section. Consequently, these regulations fail to comply with the “authority” and “reference” standards of Government Code section 11349.1.

ADDITIONAL CONCERNS

OAL notes the following additional concerns with the regulations and rulemaking file:

1. In regulation section 1277 and also on the “Disclosure of Preneed Funeral Agreement” form (which form is incorporated by reference in regulation section 1277.5), beginning quotation marks appear to be missing where you define the term “preneed agreement.”
2. On the “Disclosure of Preneed Funeral Agreement” form, the language in the box referring to “... a copy of the preneed agreement which has been signed and paid for in full, or in part by, or on behalf of the deceased and is in the possession of the funeral establishment ...” should perhaps instead refer to “... a copy of any preneed agreement” (See Bus. & Prof. Code section 7745.)
3. The Bureau appears to be placing proposed regulation sections 1277 and 1277.5 within article 8 of division 12 of title 16 of the CCR, an article currently titled “Reporting of Preneed Funds.” The Bureau may wish to consider amending this article title to language such as “Reporting of Preneed Funds and Disclosure of Preneed Agreements” to better reflect the broadened scope of this article.

4. The Form 400, "Notice Publication/Regulations Submission," accompanying the regulations indicates in Section B.5. of the form that the Bureau is requesting that the effective date of the regulatory changes be "effective on filing with Secretary of State." Pursuant to Government Code section 11343.4, subdivision (c), the rulemaking file must include a written request demonstrating "good cause" for this early effective date. (See Gov. Code section 11343.4.)
5. Please note CCR, title 1, section 8, pertaining to "Final Text: Underline and Strikeout."

CONCLUSION

For the reasons set forth above, OAL has disapproved the adoption of sections 1258.4, 1277, and 1277.5 of title 16 of the CCR. If you have any questions, please contact me at (916) 323-4237.

Date: December 9, 2003

BRADLEY J. NORRIS
Staff Counsel

For: JOHN D. SMITH
Interim Director

Original: G. V. Ayers, Bureau Chief
cc: Linda Kassis, Regulations Coordinator