

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§ 11-10-5, 5F-2-2(a)(11) and 5F-1-1(a)(1)

AMENDMENT TO AN EXISTING RULE: YES NO

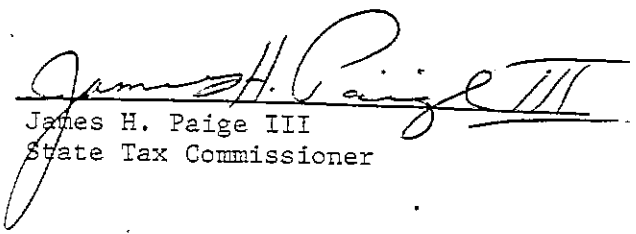
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 36

TITLE OF RULE BEING PROPOSED: Preneed Cemetery Companies

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


James H. Paige III
State Tax Commissioner

7.60



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

TAX DIVISION
P. O. Box 2389
Charleston, WV 25328-2389

JAMES H. PAIGE III
SECRETARY

CONSENT TO FILE RULE

August 13, 1993

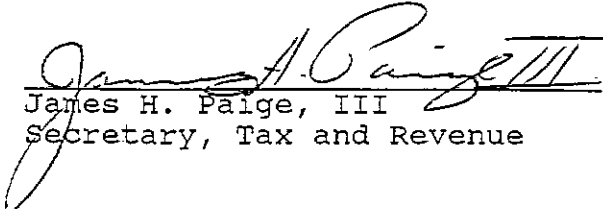
To Whom It May Concern:

Title of Rule: Preneed Cemetery Companies
Title Number: 110
Series Number: 36

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OFFICE OF WEST VIRGINIA
SECRETARY OF REVENUE

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 13th day of August, 1993.


James H. Paige, III
Secretary, Tax and Revenue

STATEMENT OF CIRCUMSTANCES

The Legislature when it enacted Committee Substitute S.B. 407 authorized preneed cemetery companies. This rule provides appropriate regulation of such companies.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Preneed Cemetery Companies

Type of Rule: Legislative Interpretive Procedural

Agency: State Tax Division

Address: State Capitol

Charleston, WV 25305

1. Effect of Proposed Rule

	ANNUAL			FISCAL YEAR	
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

The expenses should not vary from those envisioned by the Legislature when it enacted Committee Substitute for S.B. 407.

3. Objectives of these rules:

Regulate Preneed Cemetery Companies.

Rule Title: Preneed Cemetery Companies

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no economic impact resulting from this rule.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

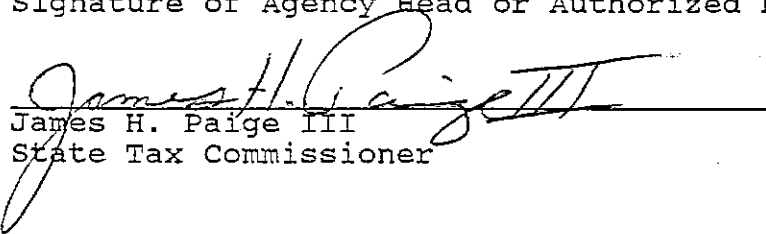
There may be an economic impact on the cemetery industry but there is not sufficient information to calculate its extent.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact resulting from this rule.

Date: August 13, 1993

Signature of Agency Head or Authorized Representative


James H. Paige III
State Tax Commissioner

DATE: August 13, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

LEGISLATIVE RULE TITLE: Preneed Cemetery Companies

1. Authorizing statute(s) citation W.Va. Code §§ 11-10-5,

5F-2-2(a)(11) & 5F-1-1(a)(1)

2. a. Date filed in State Register with Notice of Public Comment Period: July 9, 1993

b. What other notice, including advertising, did you give of the public comment period?

None

c. Date of Public Comment Period: July 9, 1993 -

August 9, 1993

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached No Comments received

e. Date you filed in State Register the agency approved proposed Legislative Rule following public comment period: (be exact)

August 13, 1993

f. Name and phone number(s) of agency person(s) to contact for additional information:

John Montgomery - 558-5330

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: _____

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached _____

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AGENCY APPROVED

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WEST VIRGINIA LEGISLATION REGULATIONS

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

DEPARTMENT OF TAX AND REVENUE

TITLE 110

SERIES 36

1993

PRENEED CEMETERY COMPANIES

§110-36-1. General.

1.1 Scope. - These regulations clarify and implement state law as it relates to property, goods and services purchased by preneed cemetery companies and contracts for services to be rendered by such companies.

1.2 Authority. - W.Va. Code §§ 5F-2-2(a)(11) and 5F-1-1(a)(1).

1.3 Filing Date. -

1.4 Effective Date. -

§110-36-2. Definitions.

As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular and in the plural.

2.1 "Burial vault" means a protective container for a casket which is used to prevent a grave from sinking.

2.2 "Cemetery" means and includes all land and appurtenances including roadways, office buildings, outbuildings and other structures used or intended to be used for or in connection with the interment of human remains: **Provided,** That this definition shall have no effect on the determination of whether real property is exempt from ad valorem property taxation pursuant to West Virginia Code § 11-3-9 and 110 C.S.R. 3. The sprinkling of ashes or their burial in a biodegradable container on church grounds or their placement in a columarium on church property does not constitute the creation of a cemetery.

2.3 "Cemetery company" or "seller" means any person, partnership, firm or corporation engaged in the business of operating a cemetery or selling property, goods or services used

in connection with interring or disposing of the remains or commemorating the memory of a deceased human being, where delivery of the property or goods or performance of the service may be delayed later than 120 days after receipt of the initial payment on account of such sale. Such property, goods or services include, but are not limited to, burial vaults, mausoleum crypts, lawn crypts, memorials, marker bases and opening and closing and/or interment services, but do not include graves or incidental additions such as dates, scrolls or other supplementary matter representing not more than 10% of the total contract price.

2.4 "Commissioner" or "Tax Commissioner" means the Secretary of the West Virginia Department of Tax and Revenue or his delegate.

2.5 "Compliance agent" means a natural person who owns or is employed by a cemetery company to assure the compliance of the cemetery company with the provisions of West Virginia Code § 35-5B-1 et seq. and these regulations.

2.6 "Cost requirement" means the total cost to the seller of the property, goods or services subject to the deposit requirements of West Virginia Code § 35-5B-4 and these regulations and as required by that seller's total contracts.

2.7 "Delivery" means that the seller has transferred physical possession of the identified goods, has attached or installed such goods at the designated interment space or has actually furnished preneed cemetery company identified services. In the case of preneed goods which are identified with the name of the buyer or other contract beneficiary, "delivery" may also occur when:

2.7.1 The seller pays for and stores the goods at the cemetery where they are intended to be used; or

2.7.2 The seller has paid the supplier of such goods and the supplier has caused such merchandise to be manufactured and stored, has caused title to such merchandise to be transferred to the buyer or other contract beneficiary and has agreed to ship such merchandise upon his or her request.

2.8 "Grave" means a below-ground right of interment.

2.9 "Interment" means the disposition of human remains by earth burial, entombment or inurnment.

2.10 "Lawn crypt" means a burial receptacle, usually constructed of reinforced concrete, installed underground in a quantity of gravel or with tile underlay. Each crypt becomes an integral part of the given garden area and is considered real property.

2.11 "Marker base" means the visible part of the base or foundation upon which the memorial, marker or monument rests and is considered personal property.

2.12 "Mausoleum crypt" means a burial receptacle usually constructed of reinforced concrete and usually constructed or assembled above the ground and is considered real property.

2.13 "Memorials, markers or monuments" means the object used to identify the deceased including the base and is considered personal property.

2.14 "Opening and closing or interment service" means any service associated with the excavation and filling in of a grave in a manner which will not disturb or invade adjacent grave sites: **Provided**, That even if adjacent grave sites are unintentionally disturbed or invaded, the excavation and filling in of a grave shall fall within the meaning of this definition.

2.15 "Person" includes any state, and its political subdivisions or an agency of either, the State of West Virginia and its political subdivisions or an agency of either, and any individual, firm, partnership, joint venture, joint stock company, any public or private corporation, municipal corporation, cooperative, estate, trust, business trust, receiver, executor, administrator, any other fiduciary, any representative appointed by order of any court or otherwise acting on behalf of other, or any other group or combination acting as a unit.

2.16 "Preneed" means at any time other than either at the time of death or while death is imminent.

2.17 "Preneed cemetery company contract" or "contract" means a contract for the sale of real and personal property, goods or services used in connection with interring or disposing of the remains or commemorating the memory of a deceased human being, where delivery of the property or performance of the service may be delayed for more than 120 days after the receipt of initial payment on account of such sale. Such property, goods or services include, but are not limited to, burial vaults, mausoleum crypts, lawn crypts, memorials, marker bases and opening and closing and/or interment services, but do not include graves or incidental additions such as dates, scrolls or other supplementary matter representing not more than 10% of the total contract price.

2.18 "Seller's trust account" means the trust account established for the specific seller and into which is deposited the total specific funds from all of a specific seller's contracts, plus income on such funds allotted to that seller.

2.19 "Specific trust funds" means funds identified with a certain preneed cemetery company contract for personal property, goods or services.

2.20 "Trustee" means any natural person, partnership or corporation, including any bank, trust company, broker-dealer, foreign state chartered trust, savings and loan association or credit union which receives money in trust pursuant to any agreement or contract made pursuant to the provisions of West Virginia Code § 35-5B-1 et seq. and these regulations.

§110-36-3. Information filing; fees, compliance agent.

3.1 On or after July 1, 1993 and to the extent one of the exemptions in Section 4 of these regulations does not apply, no person, partnership, firm or corporation may engage in the business of operating a cemetery company in this state without having first paid to the Tax Commissioner an annual registration fee in the amount of \$400.00, and filing with the Tax Commissioner on the form specified certain information which shall include the names and addresses of all officers, owners and directors of the cemetery company and the name of the designated compliance agent. The cemetery company shall notify the Tax Commissioner of any changes in the information required to be filed within 90 days of the date on which the change occurs.

3.2 A new filing shall also be required if there is a change in the ownership of the cemetery company or if there is a change in the name of the compliance agent designated by the cemetery company. The cemetery company shall pay to the Tax Commissioner an additional fee of \$100.00 when reporting any such changes.

3.3 All fees collected under the authority of West Virginia Code § 35-5B-1 et seq. and these regulations shall be deposited in the "Cemetery Company Account" created in the State Treasury.

3.3.1 Amounts collected which are found from time to time to exceed the funds needed may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature.

3.3.2 Funds in this account shall be expended upon appropriation of the Legislature by the Secretary of Tax and Revenue in connection with the administration of West Virginia Code § 35-5B-1 et seq. and these regulations.

§110-36-4. Exemptions.

The provisions of West Virginia Code § 35-5B-1 et seq. and the regulations do not apply to:

4.1 Sales of property, goods and services subject to the provisions of West Virginia Code § 47-14-1 et seq.;

4.2 Sales of services by perpetual care cemeteries subject to the provisions of West Virginia Code § 35-5A-1 et seq.;

4.3 Sales of property, goods and services by cemeteries owned and operated by a county, municipal corporation, church or nonstock corporation not operated for profit if the cemetery:

4.3.1 Does not compensate any officer or director except for reimbursement of reasonable expenses incurred in the performance of official duties;

4.3.2 Does not sell or construct or directly or indirectly contract for the sale or construction of vaults or lawn or mausoleum crypts; and

4.3.3 Uses proceeds from the sale of all graves and entombment rights for the sole purpose of defraying the direct expenses of maintaining the cemetery;

4.4 Sales of property, goods and services by community cemeteries not operated for profit if the cemetery:

4.4.1 Does not compensate any officer, owner or director except for reimbursement of reasonable expenses incurred in the performance of official duties; and

4.4.2 Uses the proceeds from the sale of the graves for the sole purpose of defraying the direct expenses of maintaining its facilities; and

4.5 Sales of property, goods and services by family cemeteries wherein lots or spaces are neither offered for public sale nor sold to the public.

4.6 Any person which otherwise would be exempt from the provisions of West Virginia Code § 35-5B-1 et seq. and these regulations ceases to retain such exemption when selling preneed cemetery company contracts.

§110-36-5. Deposit in preneed trust required; who may serve as trustee.

5.1 Each cemetery company shall deposit into an interest bearing trust fund 40% of the receipts from the sale of property, goods or services purchased pursuant to a preneed cemetery company contract, including sales of opening and closing or interment services, when the anticipated delivery thereof will be delayed more than 120 days from the initial payment on said contract. However, should the proceeds from the sale be financed through a lending institution, it shall be considered a cash sale. Deposits are required to be made by the cemetery company within 30 days after the close of the month in which said receipts are paid to it.

5.1.1 When depositing sales receipts into the trust fund, the seller may combine the receipts from different contracts into one deposit: **Provided**, That the seller shall maintain appropriate records which specify the amounts deposited relative to the identified contracts and that the trustee is provided with such information.

5.2 If payment is made on an installment or deferred payment basis, the seller shall have the option of initially depositing into the trust fund 40% of the amount of the principal, or in the alternative, depositing 40% of the principal of each payment within 30 days after the close of the month in which said payments are received.

5.3 The trustee of the trust fund shall be appointed by the person owning, operating, or developing a preneed cemetery company. If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, the trustee shall be approved by the Tax Commissioner. A trustee that is not a bank, savings and loan or other federally insured investment banking institution shall apply to the Tax Commissioner for approval. The Tax Commissioner shall approve the trustee when satisfied that:

5.3.1 The applicant employs and is directed by persons who are qualified by character, experience, and financial responsibility to care for and invest the funds of others; and

5.3.2 The applicant will perform its duties in a proper and legal manner and the trust funds and interest of the public generally will not be jeopardized.

5.4 If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, the trustee shall furnish a fidelity bond with the corporate surety thereon licensed to do business in this State, payable to the trust established, in a sum equal to but not less than 100% of the value of the principal of the trust estate at the beginning of each calendar year, which bond shall be deposited with the Tax Commissioner: **Provided**, That the amount of such bond shall not be less than one hundred thousand dollars (\$100,000.00).

5.3.4 If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, and if it appears that an officer, director or employee of the trustee is dishonest, incompetent or reckless in the management of a trust fund required by the provisions of West Virginia § 35-5B-1 et seq. and these regulations, the Tax Commissioner may bring an action in the circuit courts of this State to remove the trustee and to impound the property and business of the trustee as may be reasonably necessary to protect the trust funds.

§110-36-6. Requirements for preneed cemetery company contracts.

A preneed cemetery company contract shall:

6.1 Be written in clear understandable language and printed in easy-to-read type, size and style;

6.2 Identify the seller, the contract buyer and the person for whom the contract is purchased if other than the contract buyer;

6.3 Contain a complete description of the property, goods or services purchased;

6.4 Clearly disclose whether the price of the property, goods or services purchased is guaranteed;

6.5 Provide that if the particular property, goods and services specified in the contract are unavailable at the time of delivery, the seller shall be required to furnish property, goods and services similar in size and style and at least equal in quality of material and workmanship and that the representative of the deceased has the right to reasonably choose the property, goods or services to be substituted; and

6.6 Be executed in duplicate and a signed copy given to the buyer.

§110-36-7. Identification of funds.

Any funds deposited in the seller's trust account shall be identified in the records of the trustee and the seller by the contract number and by the name of the buyer. The trustee may commingle the deposits in any preneed trust account for the purposes of the management thereof and the investment of funds therein.

§110-36-8. Corpus of trust account and income to remain in preneed trust account; exception.

The corpus of the seller's trust account shall remain intact until the property or goods are delivered or services performed as specified in the contracts which comprise such trust account: **Provided**, That the net income from the preneed trust account may be used to pay any appropriate trustee and auditor fees, commissions and costs. The net income from the preneed trust account, after payment of any appropriate trustee and auditor fees, commissions and costs, shall remain in the account and be reinvested and compounded. Any trustee fees, commissions and costs in excess of income shall be paid by the cemetery company and not from the trust. However, the trustee shall, as of the close of the cemetery company's fiscal year, upon the written assurance to the trustee by a certified public accountant employed by the seller, return to the seller any income in the seller's account which, when added to the corpus of the trust account is in excess of the current cost requirements for all

undelivered property, goods or services included in the seller's preneed cemetery company contracts including all outstanding preneed cemetery company contracts entered into prior to July 1, 1993. The seller's cost requirements shall be based upon wholesale cost to the seller and shall be certified in its records by a sworn affidavit by the compliance agent and determined by the seller as of the close of the cemetery company's fiscal year.

§110-36-9. Disbursement of trust funds upon performance of contract; mausoleum construction required.

9.1 Upon performance of the preneed cemetery company contract, the seller shall certify to the trustee by affidavit the amount of specific funds in the trust, identified with the contract performed, which the trustee shall pay to the seller. The seller may in its records itemize the property, goods or services and the consideration paid or to be paid therefore, to which the established deposit requirements apply. In such case the seller may, upon certification to the trustee of performance or delivery of such property, goods or services and of the amount of specific trust funds identified in its records with such items, request disbursement of that portion of the specific funds deposited pursuant to the contract, which the trustee shall pay to the seller.

9.1.1 When disbursing funds to the seller for payment on more than one preneed cemetery company contract, the trustee may combine all such payments into one payment: **Provided**, That the trustee maintains appropriate records which specify that portion of the total payment which is applied to the identified preneed cemetery company contract and such information is provided to the seller, **Provided**, However, That the seller may net out funds received from sales and funds to be paid for expenses incurred by depositing only the amount in excess of the disbursements and utilizing the remaining funds for payment of contract expenses: **Provided** further, That when utilizing the netting out method for recording activities, complete documentation of the transactions must be retained by the seller and provided to the trustee.

9.1.2 When disbursing funds received from the trustee, the seller may combine into one payment the amounts to be paid to a single payee: **Provided**, That the seller maintains appropriate records which specify that portion of the payment which is applied to the identified preneed cemetery company contract and such information is provided to the payee.

9.2 If the preneed contract provides for two or more persons, the seller may, at its option, designate in its records the consideration paid for each individual in the preneed cemetery company contract. In such case, upon performance of that portion of the contract identified with a particular individual, the seller may request, by certification in the manner described

above, the disbursement of trust funds applicable to that portion of the contract, which the trustee shall pay to the seller.

9.3 Any cemetery company that sells space in an unconstructed mausoleum must commence construction within 7 years from the date of the first sale or when 80% of the spaces in the original mausoleum plan are sold, whichever occurs first.

9.3.1 Because the preneed cemetery company contract is purchased from the seller and not from the contractor constructing the mausoleum, the cemetery company is the person that contracts with and pays the contractor for construction of the structure.

9.3.2 The cost of constructing a mausoleum shall be borne by the cemetery company: **Provided**, That if preneed cemetery company contracts are used to sell space in the mausoleum, the proceeds from such sales must be accounted for in the same manner as the proceeds from the sale of other contracts.

9.3.3 Once mausoleum construction has commenced, the cemetery company is authorized to draw down progress payments from the trust funds received from the sale of the mausoleum spaces funds to pay for the construction: **Provided**, That such progress payments are according to a schedule incorporated into the construction contract: **Provided**, However, That the cemetery company must bear any construction expense in excess of the trust funds available from the sale of spaces in the mausoleum being constructed.

§110-36-10. Seller required to keep records.

Each seller of a preneed cemetery company contract shall record and keep detailed accounts of each and every contract and of all transactions regarding each preneed cemetery company contract. All such records shall be subject to examination by the Tax Commissioner.

§110-36-11. Financial report and written assurance required.

11.1 The cemetery company shall report the following information to the Tax Commissioner within 4 months following the close of the cemetery company's fiscal year:

11.1.1 The total amount of principal in the seller's trust account;

11.1.2 The securities in which the seller's trust account is invested;

11.1.3 The income received from the trust and the source of that income during the preceding fiscal year;

11.1.4 An affidavit executed by the compliance agent that all provisions of West Virginia Code § 35-5B-1 et seq. and these regulations which are applicable to the seller and which relate to the seller's trust accounts have been complied with;

11.1.5 The total receipts required to be deposited in the seller's trust account;

11.1.6 All expenditures from the seller's trust account;
and

11.1.7 If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, proof, in a manner determined by the Tax Commissioner, that the required fidelity bond has been secured and that it is in effect.

11.1.8 Appropriate documentation provided by the trustee may be utilized to support the foregoing information.

11.2 The cemetery company shall employ an independent certified public accountant who is to audit the account and provide assurance, which assurance shall be forwarded with the foregoing required report, that 40% of the cash receipts from the sale of preneed property, goods or services which is not anticipated to be delivered or performed within 120 days after receipt of the initial payment on account has been deposited in the account within 30 days after the close of the month in which such payments were received.

§110-36-12. Inclusion of property, goods and services to be delivered within one hundred twenty days.

The contract may include the sale of preneed property, goods or services to be delivered within 120 days after the receipt of the initial payment on account of such sale. Contracts may specify separately the total consideration paid or to be paid for preneed property, goods or services not anticipated to be delivered or provided within 120 days after receipt of initial payment. If a contract does not specify the preneed property, goods or services not anticipated to be delivered or provided within the 120 day period, the seller shall deposit 40% of the total consideration for the entire contract.

§110-36-13. Breach of contract by seller; trust to be single purpose trust.

13.1 If, after a written request, the seller fails to perform its contractual duties, the purchaser, executor or administrator of the estate, or heirs, or assigns or duly authorized representative of the purchaser shall be entitled to maintain a proper legal or equitable action in any court of competent jurisdiction. No other purchaser need be made a party to or receive notice of any proceeding brought relating to the performance of any other contract.

13.2 The seller's trust shall be a single purpose trust. The trust funds shall not be available to any creditors as assets of the seller, nor may the seller encumber any portion of the trust funds.

§110-36-14. Trustee may rely on certifications and affidavits.

The trustee may rely upon all certifications and affidavits which have been made pursuant to the provisions of West Virginia Code § 35-5B-1 et seq. and these regulations and is not liable to any person for such reasonable reliance.

§110-36-15. Transfer of trust funds to another trustee.

15.1 The seller may, upon notification in writing to the trustee, and upon such other terms and conditions as the agreement between them may specify, transfer its account funds to another qualified trustee. The trustee may, upon notification in writing to the seller, and upon such other terms and conditions as the agreement between them may specify, transfer the trust funds to another qualified trustee.

15.2 Notwithstanding any terms or conditions of any agreement between the seller and the trustee to the contrary, if either the seller or the trustee transfers the seller's trust account to another qualified account, the trustee may not retain and the seller may not pay any portion of the trust funds as payment for any penalty or for any other reason related to such transfer.

§110-36-16. Use of trustee's name in advertisements.

No person subject to the provisions of West Virginia Code § 35-5B-1 et seq. or these regulations may use the name of the trustee in any advertisement or other public solicitation without written permission of the trustee.

§110-36-17. Cemetery property maintained by cemetery company.

With respect to cemetery property maintained by a cemetery company, the cemetery company is responsible for the performance of:

17.1 The care and maintenance of the cemetery property it owns; and

17.2 The opening and closing of all graves, crypts or niches for human remains in any cemetery property it owns.

§110-36-18. Waiver of article void.

Any provision of any contract which purports to waive any provision of West Virginia Code § 35-5B-1 et seq. or these regulations is void.

§110-36-19. Violation a misdemeanor.

19.1 Any person who violates any of the provisions of West Virginia Code, § 35-5B-1 et seq. or these regulations is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than \$100 nor more than \$1,000 for each occurrence, or incarcerated in the county or regional jail for a term not to exceed one year, or both fined and incarcerated.

19.2 Any person who violates any of the provisions of West Virginia Code § 35-5B-1 et seq. or these regulations shall for a second offense be guilty of a felony and, upon conviction thereof, shall be fined not less than \$500 nor more than \$3,000, or incarcerated in the penitentiary not less than one nor more than three years, or, in the discretion of the court, be incarcerated in the county jail for a term not to exceed one year.

PUBLIC COMMENTS AND RESPONSES
THERETO ON THE PRENEED CEMETERY COMPANY RULE

Set forth below are public comments received and responses provided by the State Tax Division pertaining to the proposed Preneed Cemetery Company rule. For purposes of responding to the issues presented, the comments have been condensed rather than repeated verbatim.

Comment: Sections 110-36-5.1.1, 110-36-7, and 110-36-9.1.1 should be changed so as to not require separate contract record keeping by the trustee.

Response: In West Virginia Code § 35-5B-8, the seller is required to certify to the trustee the amount of specific funds in the trust, identified with the contract performed, which the trustee is to pay to the seller. Further, the seller may request disbursement of trust funds applicable to that portion of the contract and the trustee is to pay that amount to the seller. This raises a presumption that the trustee's records must be substantially similar to those of the seller in order to assure that for both the seller and the trustee, the financial transaction is identified with the proper contract. This therefore, will assure protection of the consumer.

Comment: The fidelity bond required by Section 110-36-5.4 to be furnished by a non-bank trustee should have a minimum stated amount.

Response: The State Tax Division agrees. The minimum amount of the bond has been established at \$100,000.00.

Comment: Section 110-36-8 should be changed so as to not be construed to require that no payments may be made from the trust account corpus until all contracts are fully completed.

Response: The State Tax Division agrees because it is essential that contract payments be made when relevant expenses are incurred. This Section has been appropriately amended.

Comment: The requirement in Section 110-36-9.3.2 that the cost of constructing a mausoleum shall be borne by the cemetery company is unfair.

Response: It is necessary that the subject subsection be read in context with all of Section 9.3. A cemetery company that sells space in an unconstructed mausoleum must commence construction at the earlier of: (1) within seven years from the date of the first sale; or (2) when 80% of the spaces in the original mausoleum plan are sold. The cemetery company, and not the purchaser of the space, is the person that contracts with and pays the contractor for construction. Therefore, it is the cemetery company that bears the expense of construction.

The foregoing is not intended to prevent the use of funds obtained from the sale of mausoleum spaces to defray construction costs. However, if a sufficient number of spaces have not been sold within the required time frame, it is implicitly implied from the construction requirement in West Virginia Code § 35-5B-8 that the cemetery company must bear any construction costs which are in excess of sales.

Comment: Cemetery companies should be able to draw down trust funds to pay for mausoleum construction.

Response: The State Tax Division agrees to the extent that the cemetery company may use only those funds received from the sale of spaces in the specific mausoleum being constructed. The rule has been changed accordingly.

Comment: Seller should be authorized to net out deposits and disbursements so as to reduce the number of transactions and the amount of transaction fees.

Response: The State Tax Division agrees so long as both the seller and the trustee retain documentation which supports the transaction by clearly identifying those contracts involved therein and stating the nature of each contract's involvement. The rule has been changed accordingly.

LD:JM/lr

**Charleston
National Bank**

A New Century Bank

Charleston National Plaza
P. O. Box 1113
Charleston, WV 25324-1113
(304) 348-4411
FAX (304) 348-4462

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STATE TAX DEPARTMENT
LEGAL DIVISION

HAND DELIVER

August 3, 1993

Department of Tax & Revenue
Legal Division
401 Main Capitol Building
West Wing
Charleston, WV 25305

RE: Preneed Cemetery Companies
Title Number: 110
Series 36

Gentlemen:

As a professional corporate fiduciary, we have extensively reviewed the provisions of the newly enacted statute cited as Enrolled Committee Substitute For Senate Bill No. 407 passed on April 8, 1993 with effective date of July 1, 1993, which became part of the West Virginia Code regarding Preneed Cemetery Companies. We have also reviewed the recently drawn rules applicable thereto and offer the following observations:

- 1.Re: 110-36-3.3.1 There appears to be a typographical error in the second line in that the word "the" precedes rather than follows the word "exceed".

- 2.Re: 110-36-5.1.1 This section states ... "Provided, that the seller shall maintain appropriate records which specify the amounts deposited relative to the identified contracts and that the trustee is provided with such information..." The intent of the rule is unclear regarding the purpose for which the trustee would be provided such [specific contract] information. Is the intent that the trustee maintain specific contract-by-contract records?

It is our understanding that many of the cemeteries have computerized recordkeeping capabilities. Therefore, to require those cemeteries to engage the recordkeeping services of a

trustee would be both a duplication of effort and an unnecessary and costly requirement. Utilizing a trustee for recordkeeping should be optional and not mandatory for those cemeteries that do not have the computer capability or who would prefer that the trustee maintain the individual records.

- 3.Re: 110-36-5.4 This section provides that a non-bank trustee furnish a fidelity bond in an amount equal to but not less than 100% of the value of the principal of the trust estate at the beginning of each calendar year. This bond should have a minimum limit of \$50,000 or \$100,000 established to ensure the protection of the funds deposited.
- 4.Re: 110-36-7 This section requires that funds deposited with the trustee shall be identified in the records of the trustee and the seller by the contract number and by the name of the buyer. As stated in our comments regarding 110-36-5.1.1 above, this provision can cause the seller to encounter considerable expenses and actually represents a duplication of effort and recordkeeping. Could the requirement that the trustee keep separate records be waived if it is certified that the seller is maintaining adequate records?
- 5.Re: 110-36-8 The first sentence therein creates an ambiguity. It states, "The corpus of the seller's trust account shall remain intact until property or goods are delivered or services performed as specified in all of the contracts which comprise such that account..." (emphasis added). The word all, highlighted above, might be construed to refer to the fact that no payment of principal shall be made to the cemetery company until all contracts are fully satisfied. However, it appears that the legislative intent was not to incur the principal of the trust ad infinitum, but to require a uniformity of contract provisions. The former interpretation would also conflict with 110-36-9.1.1 et seq. Therefore, provision should be made to clarify the intent thereof.
- 6.Re: 110-36-9.1.1 The comment above relative to 110-36-5.1.1 and 110-36-7 regarding the required separate recordkeeping by the trustee and expenses involved are also applicable regarding this section.

7.Re: 110-36-9.3.2

This section requires the cemetery company to bear all the expenses of constructing a mausoleum. This provision is extremely unfair to the cemetery company and could, in some cases, place an undue hardship on some companies. The hardship encountered by a cemetery company may be such that could lead to delay in construction and/or delivery of the service or even failure of the company if it is overburdened with interest expenses encountered through borrowing to keep draws or progress payments current.

It seems more appropriate to allow the trustee to disburse funds when certified "draw" requests or progress payment requests are received during periodic stages of construction. Each draw request would have to be certified by the contractor as well as the cemetery company.

It appears that one of the primary legislative intents in adopting the Preneed Cemetery Company statute was to ensure the safety and security of a percentage of the funds collected by sellers of real and personal property (see page 5 of rules for marked area). However, the rules require the payment by the trustee to the seller of cash for goods and services delivered by the seller.

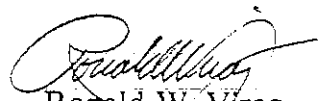
The provision for pay-out to the seller should be modified allowing the trustee to accept the net of the amount due the trustee from the seller against the amount due the seller from the trustee. In the event the amount due the trustee is greater, cash representing the net amount could be transferred to the trust by the seller, thereby precluding the necessity of the trustee liquidating investments. By not liquidating investments, the expenses of the investment transaction would be avoided and the value of the trust would be protected from forced sales.

If the trustee is required to disburse the gross amount due the seller, there will be investment transaction expenses for the sale of securities to raise cash for disbursement as well as to invest the cash transferred to the trustee by the seller. This represents a duplication of expenses and once again places undue burden of the fund and reciprocally, the cemetery company which is in apparent contravention of the legislative intent.

Department of Tax & Revenue
Legal Division
August 3, 1993
Page Four

We are hopeful that you will give adequate consideration to our comments related to each rule. If you need additional information or clarification with regard to our comments, please do not hesitate to contact me directly at 348-5620.

Sincerely,



Ronald W. Virag
Senior Vice President
Head of Trust Group

/kac

West Virginia Cemetery Association Inc.

P.O. Box 3347
Parkersburg, WV 26103-3347
304/863-6011

August 04, 1993

Department of Tax and Revenue
Legal Division
John E. Montgomery Attorney
P.O. Box 1005
Charleston, WV 25324-1105

RECEIVED
93 AUG -6 AM 10:26
STATE TAX DEPARTMENT
LEGAL DIVISION

**RE: Preneed Cemetery Companies
Title Number 110
Series 36**

Dear Mr. Montgomery:

In the interest of your time the Board of Directors of the West Virginia Cemetery Association have asked that I write to you on behalf of the entire membership of the Association with our comments on the purposed emergency rules Title 110 Series 36. We submit the following comments for your consideration.

1. Re: 110-36-7 This section states "Any funds deposited into the seller's trust account shall be identified in the records of the (Trustee) and the seller by contract number and by the name of the buyer. This section requires a duplication of records by the Trustee. The additional cost would be a great burden on all cemeteries and would not provide any additional reliability of the information. The Statue 35-5-b requires the Seller to keep such records, and requires an audit by the seller's C.P.A. and then the C.P.A. is required to certify the accuracy of the information by affidavit to the tax department. See section 7 of 35-5-b of the code. The rules additional requirements could not provide more assurances than that which is already required by 35-5-b of the code. Please consider removing the word "trustee" from this section.

2. Re: 110-36-8 This section states that "The corpus of the seller's trust account shall remain intact until property or goods are delivered or services performed as specified in **All** of the contracts which comprise such trust account." This would appear to prevent any withdrawal for goods or services delivered until **All** goods and services were delivered for every contract in the seller's account. The intent of the legislation was to assure delivery of the goods and services in a timely manner, either as needed due to death or at the request of the customer prior to death. The delivery of **All** of the goods and services would almost never occur all at the same time even in the case of husband and wife. The highlighted word **All** as used in this section would make delivery impossible. If all the money must be left in the trust account until **All** the contracts are fulfilled, we would not have the funds to pay for the goods as they are delivered on an individual basis as the customer needs or wants them delivered. (The use of the word **All** in this section also creates a contradiction to 35-5b-8 and 35-5b-12 of the Statue and 110-36-9.1 and 110-36-13.1 of the purposed rules.)

3. Re: 110-36-9.1.1 The Statue 35-5-b-8 requires that the seller provide this information to the Trustee. The Statue provides for certification of the information by the seller and an annual audit by a C.P.A. of the seller's trust accounts. The Rule 110-36-9.1.1 seems to require a duplication of this information, again increasing the cost to the seller. Please reconsider the need for this rule.

4. Re: 110-36-9.3.2 This section states that "The cost of constructing a mausoleum shall be borne by the cemetery company." This section would seem to prevent the withdrawal of progress payments during construction of the mausoleum building for which the money was trusted. Such prevention would create extreme financial hardships on all cemeteries. Listed below are a partial list of the reasons for the need for the permitting of "progress payments" on under construction mausoleum.

1. Most mausoleum buildings to be constructed in cemeteries today are several hundred casket spaces in size.
2. The cost of construction for a such a building will run into the hundreds of thousands of dollars.
3. The construction can take several months or even an entire year to complete, depending on number of casket spaces being constructed.
4. The standard practice within the construction industry requires progress payments be made to the contractor as "stages" of the construction are completed; such as completion of the foundation, pouring of the base slab, concrete pour of each lift of crypts, placement of granite trim, etc.
5. "Stages" completed does not necessarily mean that casket spaces are ready for delivery to the customer.
6. This section would require most, if not all, cemeteries to borrow the money to pay progress payments if they could obtain a loan. Servicing the debt could lead to an overburden of interest expense leading to financial failure of the cemetery. Failure to obtain a loan could lead to violation of 35-5-B-8(c).

Could withdrawals be permitted for progress payments if an affidavit were provided to the trustee signed by both the contractor and the seller?

It appears that the Rules (110-36) do not provide for "net out" of payments due from the trustee to the seller against what the seller is required to deposit to the trustee. Without such "net out" the trustee could be forced to sell securities or other investments of the trust at a loss in order to raise cash for distribution to the seller; when all the while the seller's required deposit to trust would be more that what is required for the trustee to send to the seller. This would only serve to increase the transaction cost and reduce the interest earned by the trust. A sale of securities at a loss could result in a loss of principal as well.

The additional transaction charges associated with a "no net out" requirement coupled with the prospect of selling securities at a loss could render the trust funds inadequate to pay the higher cost the goods and service will require in the future. This condition would serve to undermine the very reason for the trust requirement in the first place.

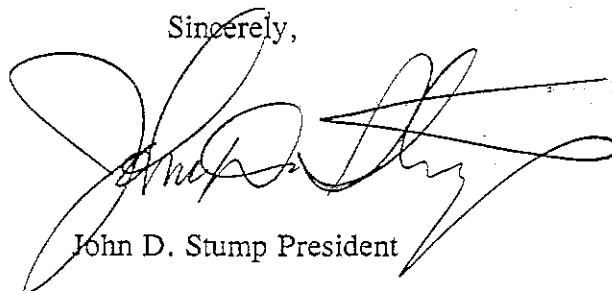
Would not the audit, affidavit, and certification requirement of the seller's C.P.A. serve to insure the accuracy of these "net out" transactions and provide an audit trail as required by section (110-36-1.2)?

The West Virginia Cemetery Association in conjunction with the attorneys for the consumer's of a cemetery in bankruptcy (see attached letter) as well as the leadership of the legislature, studied many different state statues and proposals regarding pre-need trusting requirements for cemeteries before selecting and endorsing the current statue. This legislation is a replication of the Virginia Law, except ours is tougher on violators. Virginia's law has been protecting consumers of pre-need purchases for many years now. (See attached letter from Virginia Regulator). It's working in Virginia.

We sincerely hope you will give our comments serious consideration as these matters will have a significant impact on the financial stability of all small and large cemetery businesses in our state. While no legislation would stop a crook, we believe this legislation carries harsh enough penalties, certification and audit requirements to strongly encourage full compliance among the cemetery operators of our state.

We have limited our comments to only the most critical of the issues raised by the purposed rules, after reviewing our comments if you require clarification or additional information , please do not hesitate to contact me at my office by dialing 304-863-6011.
Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Stump", with a large, stylized flourish extending to the right.

John D. Stump President