

BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF AMENDMENT,
ARM 24.147.1301 applications for)	ADOPTION, AND REPEAL
cemetery licenses, 24.147.1313)	
transfer of cemetery ownership,)	
24.147.1502 prearranged,)	
prefinanced, or prepaid funerals, and)	
24.147.1503 requirements for sale of)	
at-need, preneed, and prepaid funeral)	
arrangements; the adoption of NEW)	
RULE I trust funds – general, NEW)	
RULES II through V cemetery)	
perpetual care and maintenance trust)	
accounts – financial records – annual)	
reporting requirements – audits, and)	
NEW RULES VI through IX mortuary)	
and crematory preneed trust accounts)	
– financial records – annual reporting)	
requirements – audits; and the repeal)	
of ARM 24.147.1304 perpetual care)	
and maintenance fund reports,)	
24.147.1305 audit fees, 24.147.1312)	
restrictions on use of cemetery funds,)	
24.147.1314 perpetual care and)	
maintenance funds, and 24.147.1505)	
trust funds)	

TO: All Concerned Persons

1. On September 8, 2017, the Board of Funeral Service (board) published MAR Notice No. 24-147-38 regarding the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules, at page 1461 of the 2017 Montana Administrative Register, Issue No. 17.

2. On October 3, 2017, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. Several comments were received by the October 6, 2017, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board responses are as follows:

COMMENT 1: Multiple commenters generally supported the overall concept of what the board is attempting to accomplish with the proposed rules.

RESPONSE 1: The board appreciates all comments received during the rulemaking process.

COMMENT 2: One commenter asserted that the provisions of New Rule II(7) exceed the board's authority because the board has the authority to discipline licensees who do not comply with board laws or rules, but must do so through the disciplinary process. The commenter recommended striking (7) in its entirety.

RESPONSE 2: The board agrees and is amending the rule accordingly.

COMMENT 3: Multiple commenters expressed concern that if the recordkeeping and reporting requirements for cemeteries in New Rules II through V become costlier, there could be fewer for-profit cemeteries licensed under the board. Commenters also believed annual reporting would become a burden to licensees if they are required to report separately from the financial institutions' reports.

RESPONSE 3: Cemeteries are already required to report annually to the board regarding perpetual care and maintenance trust funds. New Rules II through V will utilize reporting forms that require slightly different data than the current rules and reporting form. However, the information requested is the same information licensees should be maintaining per 37-19-822 and 37-19-823, MCA. The adoption of the new rules will not substantially change the current annual reporting process.

COMMENT 4: Multiple commenters believed the February 1 reporting deadline for cemeteries in New Rule IV will make it difficult to obtain the necessary financial records from banking institutions to complete the trust reports under the rules. One commenter stated that many banks do not send licensees the year-end trust reports until late January or mid-February. The commenters understood that the board intended to tie the reporting date to the February 1 reporting deadline for financial institutions in 37-19-829, MCA. Commenters suggested shifting the reporting deadline one month later to give the licensees more time to collect year-end trust information from the financial institutions.

RESPONSE 4: The board had originally selected February 1 to coincide with the financial institution reporting deadline, but agrees that moving the deadline to March 1 will not affect the board's ability to review the information during the board's typical quarterly meeting schedule dates. The board agrees that a March 1 date is more reasonable and is amending New Rule IV(2) accordingly.

COMMENT 5: One commenter suggested that the board go back to requiring that independent accountants compile cemeteries' annual perpetual care and maintenance fund reports, using the current reporting forms and including the financial institution's annual report. The commenter believed this would provide the board the same information without the expense of an audit under New Rule IV.

RESPONSE 5: Because the board does not require that accountants submit cemetery perpetual care and maintenance annual reports, cemetery owners can

prepare the annual reports. If the board selects a licensee for an audit, then an auditor or an independent accountant can be designated to perform the audit. Additionally, it is not the board's initial intent with these rules to randomly audit licensees, but to require and conduct audits under New Rules IV and V only when deemed necessary based on information reviewed during the annual reporting process.

COMMENT 6: One commenter questioned the requirement in New Rules IV and VIII that financial institutions report annually to the board on a state-provided form, believing it will create additional administrative costs which are passed on to the trust. The commenter suggested that if licensees submitted annual reports from the trust institutions, it would provide the same result without the additional costs.

RESPONSE 6: Financial institutions are already required to annually report to the department per 37-19-829, MCA, which was enacted in 1999. The method for collecting that information is set forth in department procedures and includes a designated form. The board points out that the references in New Rules IV and VIII do not reflect any changes from current reporting practices.

COMMENT 7: Multiple commenters were concerned that licensees are responsible for audit costs under New Rule V(4) and did not believe they should have to pay for audits the board orders.

RESPONSE 7: Per 37-19-808, MCA, the cost of a cemetery audit must be paid by a licensee. The board has no authority to change the statutory requirement through rule. Additionally, the board's current position is that an audit will only be initiated if the board suspects a licensee of violating the statutes or rules.

COMMENT 8: Multiple commenters expressed confusion regarding whether the trust requirements in ARM 24.147.1503 and New Rules VI through IX refer to preneed arrangements financed with monies and preneed agreements funded through insurance.

RESPONSE 8: The board has no jurisdiction over insurance and ARM 24.147.1503 refers only to preneed funeral arrangements funded with monies. The board concluded that it is not necessary to amend these rules to clarify that insurance is not included as that distinction is already made in statute. The board acknowledges this could be confusing and will address any confusion through communication with licensees.

COMMENT 9: Multiple commenters believed the February 1 reporting deadline for mortuaries and crematories in New Rule VIII will make it difficult to obtain the necessary financial records from banking institutions to complete the trust reports under these rules. One commenter stated that many banks do not send licensees the year-end trust reports until late January or mid-February. The commenters understood that the board intended to tie the reporting date to the statutory February 1 reporting deadline for financial institutions in 37-19-829, MCA. Commenters

suggested shifting the reporting deadline one month later to give the licensees more time to collect year-end trust information from the financial institutions.

RESPONSE 9: The board had originally selected February 1 to coincide with the financial institution reporting deadline, but agrees that moving the licensees' deadline to March 1 will not affect the board's ability to review the information per the board's typical quarterly meeting schedule dates. The board agrees that a March 1 date is more reasonable and is amending New Rule VIII(2) accordingly.

COMMENT 10: Several commenters believed the board is requiring over-reporting regarding preneed trusts and cemetery perpetual care and maintenance trusts. Commenters said the documents and information the board already obtains from financial institutions should be sufficient to meet trust reporting requirements without requiring additional reporting costs to the licensees.

RESPONSE 10: The board does not intend to overburden licensees. The board has a responsibility to protect the public, which includes the public's money held in trusts. Further, the board has jurisdiction over funeral trusts because of the possibility of theft from these trusts. The financial institutions' reports only show the financial institutions' information and do not reflect the information licensees are required to keep regarding the preneed agreements and deposit information. The board determined that information from both sources is necessary for the board to determine whether licensee audits are necessary.

COMMENT 11: One commenter opposed New Rules VI through IX because while Title 37, chapter 19, part 8, MCA, allows the board to regulate privately owned for-profit cemeteries, it does not provide the board authority to regulate funeral preneed trusts. The commenter suggested the board must obtain statutory authority from the legislature to make the changes proposed in New Rules VI through IX. The commenter opined that sufficient oversight procedures for mortuary and crematory preneed trusts already exist and recommended the board instead address other areas not included in this rulemaking.

RESPONSE 11: The board has the statutory authority to regulate funeral trusts and specifically 37-19-131, 37-19-202, 37-19-708, 37-19-807, 37-19-827, 37-19-828, and 37-19-829, MCA, provide the board the authority for the proposed new rules. Additionally, the board has the authority to regulate preneed contracts and no change in legislation is required. The board is unable to address suggestions to other areas of the board's rules which are outside the scope of this rulemaking.

COMMENT 12: Regarding New Rules VI through IX, one commenter stated the board is not qualified to interpret trust reports to determine whether an audit of preneed funeral trusts is necessary, and believed that requiring an audit would then result in audit costs to the mortuary or crematory.

RESPONSE 12: The board's current position is that an audit would only be initiated if the board suspected a licensee of wrongdoing under the statutes and rules based

on annual reporting information submitted by licensees. Reviewing annual trust reports to determine if an audit is necessary is within the board's authority and ability and does not require an auditor or accountant.

COMMENT 13: Multiple commenters were concerned about the costs of audits per New Rule IX(4) and did not believe the licensee should have to pay for an audit ordered by the board. One commenter compared New Rule IX and potential audits to the annual inspections performed by the board's inspector at no charge to licensees.

RESPONSE 13: There is no specific statute that requires mortuaries or crematories to pay the costs of audits, which is different from cemetery audits (see RESPONSE 7). However, the board only intends to conduct audits of mortuaries and crematories as necessary if it suspects a licensee has violated statutes or rules. If the board paid the cost of the audits, then those costs would be allocated among all licensees, not just the licensee(s) suspected of wrongdoing. These audits are also not comparable to facility inspections because inspections are conducted annually on all mortuaries, crematories, and branch establishments, thus spreading the cost among all licensees is equitable. Further, it is not the board's intent to conduct annual licensee audits at this time.

COMMENT 14: One commenter noted that if these rules do not apply to preneed arrangements funded through insurance, then a mortuary would not need to report to the board under these rules if it only sold preneed arrangements funded by insurance and did not have money in trust.

RESPONSE 14: The board agrees with the commenter.

4. The board amends ARM 24.147.1301, 24.147.1313, 24.147.1502, and 24.147.1503 exactly as proposed.

5. The board adopts NEW RULES I (24.147.1601), III (24.147.1603), V (24.147.1605), VI (24.147.1606), VII (24.147.1607), and IX (24.147.1609) exactly as proposed.

6. The board repeals ARM 24.147.1304, 24.147.1305, 24.147.1312, 24.147.1314, and 24.147.1505 exactly as proposed.

7. The board adopts NEW RULES II (24.147.1602), IV (24.147.1604), and VIII (24.147.1608) as proposed, but with the following changes to the original proposal, stricken matter interlined, new matter underlined:

NEW RULE II CEMETERY PERPETUAL CARE AND MAINTENANCE TRUST ACCOUNTS – GENERAL (1) through (6) remain as proposed.

~~(7) Failure to provide the annual report shall void the operating license of the cemetery.~~

NEW RULE IV CEMETERY PERPETUAL CARE AND MAINTENANCE TRUST ACCOUNTS – ANNUAL REPORTING REQUIREMENTS (1) remains as proposed.

(2) Annual perpetual care and maintenance fund reports must be submitted to the board by ~~February~~ March 1.

(a) through (3) remain as proposed.

NEW RULE VIII MORTUARY AND CREMATORY PRENEED TRUST ACCOUNTS – ANNUAL REPORTING REQUIREMENTS (1) remains as proposed.

(2) Annual funeral preneed trust reports must be submitted to the board by ~~February~~ March 1.

(a) through (4) remain as proposed.

BOARD OF FUNERAL SERVICE
JOHN TARR, PRESIDING OFFICER

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ GALEN HOLLENBAUGH
Galen Hollenbaugh, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State November 13, 2017.