

**TITLE 16. CEMETERY AND FUNERAL BUREAU
DEPARTMENT OF CONSUMER AFFAIRS**

NOTICE OF PROPOSED REGULATORY ACTION CONCERNING

**Article 3.5 Endowment Care Fund Unitrust Distribution
§ 2334, Endowment Care Fund Conversion Application
§ 2334.1, Endowment Care Fund Conversion Condition
§ 2334.2, Denial of Endowment Care Fund Conversion Application
§ 2334.3, Abandonment of Endowment Care Fund Conversion Application
§ 2334.4, Reversion to Net Income Distribution Method
§ 2350, Endowment Care Fund Reports**

California Code of Regulations (CCR)

NOTICE IS HEREBY GIVEN that the Cemetery and Funeral Bureau (Bureau) is proposing to take the rulemaking action described below under the heading Informative Digest/Policy Statement Overview. Any person interested may present statements or arguments relevant to the action proposed in writing. Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, must be received by the Bureau at its office by **5:00 p.m., Tuesday, September 14, 2021**.

PUBLIC HEARING AVAILABILITY

The Bureau has not scheduled a public hearing on this proposed action. The Bureau will, however, hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days prior to the close of the written comment period.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

The Bureau may, after considering all timely and relevant comments, adopt the proposed regulations substantially as described in this notice, or may modify the proposed regulations if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as the contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

AUTHORITY AND REFERENCE:

Pursuant to the authority vested by Business and Professions Code (BPC) sections 142,

and 7606, and Government Code (GC) section 11445.20, and to implement, interpret or make specific BPC sections 142, 7612.6, 7613.9, 7653.6, 7711.1, and Health and Safety Code (HSC) sections 8726, 8726.1, 8726.2, 8731, 8733.5, 8736, 8738, 8738.1, 8740, 8751, 8751.1, and GC sections 11445.10 and 11445.20, the Bureau is considering adding a new Article 3.5 and title, adding sections 2334, 2334.1, 2334.2, 2334.3, 2334.4, and amending section 2350 in Article 5 of Division 23 (commencing with section 2300) of Title 16 of the California Code of Regulations (CCR) as described in this Notice.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The death care industry transacts business with consumers at a time when they are emotionally vulnerable. Protection of the public is mandated to be the highest priority for the Bureau in exercising its licensing, regulatory, and disciplinary functions. The Bureau achieves its goal of consumer protection through the following primary methods: issuing and renewing licenses; overseeing funeral and cemetery trust funds; investigating complaints; conducting inspections; and disciplining licensees for violations of its laws and regulations.

The Bureau licenses, regulates, and investigates complaints against 14 different licensure categories in California, totaling approximately 13,100 licensees. These licensing categories include funeral establishments, funeral directors, embalmers, apprentice embalmers, cemetery brokers, cemetery broker branch, cemetery broker additional, cemetery salespersons, cremated remains disposers, crematories, crematory managers, hydrolysis facilities, cemetery managers, and private, nonreligious cemeteries.

Existing law requires each privately-owned cemetery authority create an endowment care trust fund through a written trust agreement executed by their board of directors and requires them to deposit funds to the trust for each interment space they sell. There are various types of interments cemeteries sell (graves, crypts, niches, and scattering of cremated remains on the cemetery's property) and each type of interment has a minimum required deposit. The deposits cemeteries make to endowment care trusts, along with the initial contribution required by HSC section 8738.1, form what is known as the corpus of the trust. The law prohibits expenditure of the fund corpus.

In 2017, the Legislature passed Assembly Bill (AB) 926 (Irwin, Chapter 750, Statutes of 2017), requiring the Bureau to develop processes and functions necessary to facilitate and regulate the conversion of endowment care trust funds from the net income distribution method to the unitrust distribution method ("unitrust method") beginning January 1, 2020 (see HSC sections 8726.1, 8726.2).

Under the net income distribution method, only the income and a portion of realized capital gains generated from endowment care fund investments may be used for cemetery care and maintenance whereas, the unitrust method allows expenditures based on the total net

value of the endowment care fund assets. AB 926 capped the unitrust amount at 5 percent and capped trustee fees at 0.1 percent of the net fair market value of the endowment care

fund as of the last trading day for each of the three preceding fiscal years. AB 926 further requires the Bureau to evaluate the effectiveness of the unitrust distribution method and to report its findings at its next two hearings before the Joint Sunset Review Oversight Hearings of the Assembly Committee on Business and Professions and Senate Committee on Business, Professions and Economic Development.

In 2019, AB 795 (Irwin, Chapter 309, Statutes of 2019) was passed amending the prior version of HSC section 8726.2 enacted by AB 926 and delaying the implementation date to January 1, 2021. HSC section 8726.2 now sets limits on trustee compensation that allows professional management of trust assets and prevents depletion of assets via excessive trustee fees. Additionally, HSC sections 8726.2 and 8726.3 place controls on excessive investment adviser fees that could unduly deplete a fund and limits the ability of private creditors to seize trust fund assets. HSC section 8726.3 also makes clear that, in the event of a seizure by a public entity, trust fund assets can only be used for care, maintenance, and embellishment of the cemetery for which the funds were originally put in trust.

Significantly, HSC section 8726.2 authorizes a cemetery authority to apply to the Bureau to convert from the net income distribution method to the unitrust method and provides the Bureau with authority to review and evaluate information provided by the applicant (cemetery authority, board of trustees or corporate trustee) to determine whether the cemetery authority meets Section 8726.2's conditions for approval, including the provision of "relevant trust documents." In addition, subdivision (f) of that section authorizes the Bureau to adopt rules to administer HSC section 8726.2 and ensure compliance, including, but not limited to, reporting requirements for cemetery authorities.

There are no existing regulations that specify the processes and procedures for how a cemetery authority applicant may apply to the Bureau to convert from the net income distribution method to the unitrust distribution method as authorized by Section 8726.2 of the Health and Safety Code. Further, there are no regulations that specify how a cemetery authority may maintain such approval, report any updated or changed information, and the processes and procedures for denial of approval or reversion to the net income distribution method in the event that specified conditions are not met. This proposal would establish such regulations. The Bureau has drafted proposed text to specify: (1) the processes and procedures for applying for and receiving approval from the Bureau to convert from a net income distribution method to a unitrust distribution method, including the provision of a completed application form "Unitrust Conversion Application", (2) the grounds for denying a unitrust conversion application, (3) the circumstances under which a unitrust conversion application will be deemed abandoned, (4) the process for reverting

to a net income distribution method from a unitrust method; and, (5) the process for providing any “created, updated, or changed” information to the Bureau in the cemetery authority’s annual report.

The Bureau has consulted with stakeholders (licensees, consumer advocates, and members of the public) regarding the proposed unitrust distribution method regulations. The Bureau held a stakeholder workshop on June 21, 2021 and discussed and made available for public comment the draft language and application for endowment care fund conversion. Based on stakeholder comments, the Bureau revised the proposed language to address stakeholders’ concerns. The revised proposed language is included with this proposal.

In addition to the aforementioned authority in Section 8726.2 of the Health and Safety Code, BPC section 7606 authorizes the Bureau to adopt, amend, or repeal such rules and regulations as may be reasonably necessary to enable it to carry into effect the provisions of the Cemetery and Funeral Act (Act).

The Bureau proposes to:

- **Add a new Article 3.5, and Title, “Endowment Care Fund Unitrust Distribution” and Sections 2334, 2334.1, 2334.2, 2334.3, 2334.4, and Amend Section 2350 in Article 5 of Division 23 of Title 16 of the California Code of Regulations.**
- **Adopt CCR section 2334, Unitrust Conversion Application**

The Bureau proposes to adopt a regulation setting forth the timeframe, required contents of, and documents required to be submitted with a “Unitrust Conversion Application,” and incorporates the form by reference. The proposal would also provide a process for applicants to use when relevant trust documents are not available, allow the Bureau discretion to condition approval on the applicant’s provision of the relevant trust documents within a certain timeframe and revoke the conditional approval, after notice and potential hearing, as provided in Section 2334.2. The proposal would also require a completed application be submitted at least 90 days prior to the beginning of the cemetery authority’s reporting year for which the conversion is requested.

- **Adopt CCR section 2334.1, Approval of Endowment Care Fund Conversion**

The Bureau proposes to adopt a regulation to establish the requirement for cemeteries to obtain prior approval for, and specify the timing of, the endowment care fund conversion to the unitrust distribution method

- **Adopt CCR section 2334.2, Denial of Unitrust Conversion Application**

The Bureau proposes to adopt a regulation to establish the denial, written notice and

appeal process for the endowment care fund conversion to the unitrust distribution method, including opportunities for an informal office conference and informal hearing.

- **Adopt CCR section 2334.3, Abandonment of Unitrust Application**

The Bureau proposes to adopt a regulation to establish the abandonment date for unitrust conversion applications that are returned as incomplete. In addition, this section provides that an applicant who abandons an application must submit a new application and documents to obtain the Bureau’s approval.

- **Adopt CCR section 2334.4, Reversion to Net Income Distribution Method**

The Bureau proposes to adopt a regulation to establish the process for requiring a cemetery authority to revert an endowment care fund to the net income distribution method, including options for the effective date of reversion. The proposal would set standards for notifying the cemetery authority of the requirement to revert and specifies what the Bureau determines is “satisfactory proof” of reversion, as well as the response date for providing the Bureau such proof. The proposal would establish that it constitutes unprofessional conduct to fail to comply with the Bureau’s notice requiring the cemetery authority to revert, or to refuse to provide the “satisfactory proof” of reversion as specified by this section. Finally, the proposal would specify that a cemetery authority that has reverted to net income distribution and seeks to reconvert its endowment care fund to the unitrust method shall submit a new application and receive Bureau approval prior to conversion.

- **Amend CCR section 2350, Endowment Care Fund Reports**

Existing law addresses the annual report required pursuant to BPC section 7612.6(b).

The Bureau proposes to amend the regulation to separate it into two subdivisions to clarify existing regulatory language. Proposed changes to subdivision (a) correct the terminology and citations of the existing regulation which pertains to the annual report requirements pursuant to BPC section 7612.6(b) and proposes other technical and grammatical clean-up to this Section to improve readability. It also adds a requirement for the audit report to be “signed” by a licensed independent certified public accountant or public accountant and adds text to clarify that the report must fully and accurately disclose the “financial” position of the endowment care fund. It strikes references to the requirement of rendering an “independent” opinion and replaces it with an “unmodified” opinion requirement.

This proposal adds a new subdivision (b) that lists the additional information that must be provided with the endowment care fund report when the cemetery authority is using the unitrust distribution method including any information that has been created, updated or changed since the Bureau’s approval. It also replaces outdated code BPC

section 9650(c) with BPC section 7612.6(b) in the text and the Authority and Reference section.

ANTICIPATED BENEFITS OF PROPOSED REGULATIONS

This regulatory proposal would establish: (1) a consistent and straightforward process for obtaining Bureau approval to convert to the unitrust distribution method, (2) the grounds for denying a unitrust conversion application, (3) the circumstances under which a unitrust conversion application will be deemed abandoned, (4) the process for reverting to a net income distribution method from a unitrust method; and, (5) the process for providing any “created, updated, or changed” information to the Bureau in the cemetery authority’s annual report.

Section 2334 will help eliminate confusion for licensed cemetery authorities and the public regarding the application and documentation requirements, procedures, and timelines for seeking the Bureau’s approval to convert an endowment care fund from the net income distribution method to the unitrust distribution method. The information collected from the application and the accompanying documents enables the Bureau to properly evaluate the application and determine the cemetery authority meets the conditions of approval set forth in HSC section 8726.2(b). This will help ensure that only qualified cemetery authorities are able to use the unitrust income distribution method, and therefore helps ensure the licensee’s ongoing care and future maintenance of the cemetery for the benefit of the public in general.

The proposed adoption of section 2334.1 will provide notice and clarity to licensed cemetery authorities and the public of the requirement to receive the Bureau’s approval before converting to the unitrust distribution method and notifies them of the effective date of the conversion.

The proposed adoption of section 2334.2 will inform licensed cemetery authorities and the public of the denial process for unitrust conversion applications. In addition, it provides an opportunity for the applicant to submit additional documentation and information which the applicant believes supports a reversal of the denial resulting in the approval of the application. Its establishment of an appeal process will ensure due process is provided to applicants.

The proposed adoption of section 2334.3 will provide transparency and clarity to cemetery authorities and the public of the date for abandonment of the application. The 12-month limit will encourage applicants to submit documentation necessary to complete the application and to obtain the Bureau’s approval in a timely manner.

The proposed adoption of section 2334.4(a) through (e) provides straightforward and uniform procedures and instruction to cemetery authorities and the public of the requirements, procedures, and timeframes applicable to the reversion process. It will

provide that a failure to comply with the Bureau's direction to revert to the net income distribution method will subject cemetery authorities to disciplinary action for unprofessional conduct. Since the size of the endowment care fund when the cemetery is sold out is the dominant factor in determining how much income can be produced to meet the needs of cemeteries, protection of principal through reversion will ensure that cemeteries have adequate funds now and in the future so that they do not fall into disrepair.

The proposed amendment of section 2350 clarifies the annual reporting requirements for cemetery authorities who have been approved to convert to the unitrust method. This new requirement provides a simplified and efficient method for the Bureau to meet section 8726.2(e)'s review requirement. It also provides a less costly alternative for the cemetery authority to report updated or new information to the Bureau rather than requiring the filing of a separate report or notice with the Bureau. The proposed amendments also eliminate confusion regarding those requirements by replacing an outdated code reference and updating other provisions consistent with BPC section 7612.6.

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING REGULATION(S)

During the process of developing these regulations and amendments, the Bureau has conducted a search of any similar regulations of these topics and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

INCORPORATION BY REFERENCE

Unitrust Conversion Application, form 23-UCA (New 7/21)

DISCLOSURES REGARDING PROPOSED ACTION

FISCAL IMPACT ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies:

The proposed regulations are not anticipated to increase workload or costs to the state.

Current law requires the Bureau to implement and oversee an application process to convert an endowment care fund from a net distribution method to a unitrust distribution method. Any workload and costs of implementation are a result of current law.

Cost or Savings in Federal Funding to the State: None

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Sections 17500 - 17630 Require Reimbursement: None

Business Impact:

The Bureau has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

- The Bureau has determined that the only types of businesses that may be affected are licensed cemetery authorities seeking the Bureau’s approval to convert their endowment care trust fund from the net income distribution method to the unitrust distribution method.
- As of July 2020, the Bureau licenses 194 endowment care cemeteries, which are all projected to apply for the unitrust distribution method in the first year. Of the 194, the Bureau anticipates 96 licensees will qualify for the unitrust distribution method. Given that the licensee population is only 194, and not all will meet the conditions of approval, the Bureau has determined that the number of licensees is insufficient to create a statewide adverse economic impact.
- These proposed regulations would provide licensed cemeteries with an additional business structure option consistent with current law. The regulation does not require licensed cemeteries to convert to or to be established using the unitrust distribution method.
- Opting to utilize the unitrust distribution method is a voluntary business decision made by the cemetery and therefore, any business impact is a result of this choice and not the regulations.
- Existing law requires licensed cemetery authorities to annually submit an endowment care fund report. The Bureau is requesting additional documents and/or information to aid in its evaluation of the effectiveness of the unitrust distribution method. The additional documents and/or information add to the existing reporting requirements, which would not add additional cost to the cemetery authorities because the cemetery already keeps records of this information and this proposal would not require a separate report to be filed.

Business Reporting Requirement

The proposed regulations impose additional reporting, recordkeeping, or other compliance requirements:

BPC section 7612.6(b) addresses the cemetery authority annual report requirements. Proposed amendments to Section 2350 would require additional information to be included in that report for cemetery authorities who elect to convert to the unitrust method and who have information that was created, updated or changed since the cemetery authority was approved to convert by the Bureau.

Health and Safety Code section 8726.2(e)(1) requires the Bureau to review on an annual basis whether a cemetery authority continues to meet the conditions of approval for use of the unitrust method. The Bureau has determined that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses. Adding reporting requirements and/or information to the existing regulation will aid the Bureau in its annual evaluation that will demonstrate the cemetery authority continues to meet the conditions of approval, which helps ensure sufficient oversight over the administration of the endowment care fund.

Cost Impact on Representative Private Person or Business:

The Bureau is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. There is no cost for the cemetery authority to apply for the Bureau's approval to convert from the net income distribution method to the unitrust distribution method.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS

The Bureau has determined that the proposed regulations does not affect small businesses because this proposed regulation only applies to licensed cemetery authorities seeking the Bureau's approval to convert the endowment care fund to the unitrust distribution method. These proposed regulations would provide licensed cemeteries with an additional business structure option consistent with current law. The option is not expected to result in any additional operating costs to cemeteries choosing to use the unitrust distribution method. The regulation does not require licensed cemeteries to convert to the unitrust distribution method.

RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Impact on Jobs/Businesses:

As explained further below, the Bureau has determined that this regulatory proposal will not create or eliminate jobs, will not create new business or eliminate existing businesses, and will not affect the expansion of businesses currently doing business within the State of California.

As of July 2020, the Bureau currently licenses 194 endowment care cemeteries, which are all projected to apply for the unitrust distribution method in the first year. Of the 194,

the Bureau anticipates 96 licensees will qualify for the unitrust distribution method. The Bureau expects at least half of all licensees annually will remain utilizing the unitrust distribution method.

The Bureau has determined that this regulatory proposal will have the following effects:

- It will not create or eliminate jobs in the State of California because this proposed regulation applies to the licensed cemetery authorities seeking the Bureau's approval to convert the endowment care fund to the unitrust distribution method. These proposed regulations would provide licensed cemeteries with an additional business structure option consistent with current law. The regulation does not require licensed cemeteries to convert to or to be established using the unitrust distribution method.
- It will not create new businesses within the State of California because the proposed regulations would only allow existing licensed cemetery authorities to apply for the Bureau's approval to convert to the unitrust distribution method. The proposed regulation does not negatively impact the existing cemetery industry. The regulation does not require licensed cemeteries to convert to or to be established using the unitrust distribution method.
- It will not expand or eliminate existing business because this regulation applies to the existing licensed cemetery authorities in California. The proposed regulations are only applicable to cemeteries that are already licensed by the Bureau and provides the cemetery with the business option to expend funds, which may be available to the cemetery under the unitrust distribution method. The regulation proposal does not require licensed cemeteries to convert to or to be established using the unitrust distribution method.
- This regulatory proposal will not affect the health and welfare of California residents because the regulations are aimed toward licensed cemetery authorities seeking the Bureau's approval to convert the endowment care fund to the unitrust distribution method.
- This regulatory proposal may positively affect worker safety if a sufficient endowment care fund is maintained by the cemetery that would allow the cemetery to expend funds to repair surfaces and ensure the property is kept in a condition so as to prevent a hazard to the worker.
- This regulatory proposal may positively affect the state's environment if a sufficient endowment care fund is maintained over the life expectancy of the cemetery, which may enhance the condition of the cemetery grounds, thus making a positive impact on the environment.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Bureau has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations, and any document incorporated by reference, and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained upon request from the Bureau at 1625 North Market Blvd., Suite S-208, Sacramento, California 95834.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file that is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the Contact Person named below or by accessing the website listed below.

CONSIDERATION OF ALTERNATIVES

The Bureau must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposal described in this Notice, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Set forth below are the alternatives that were considered and the reason the alternative was rejected or adopted:

Alternative 1: Maintain the status quo. This alternative was rejected because it would make the Bureau non-compliant with the statutory mandates of Health and Safety Code section 8726.2.

Alternative 2: Adopt new regulations and amend existing regulatory sections. This alternative was accepted as the most compliant and administratively consistent option for the Bureau to evaluate the application to grant approval to licensed cemetery authorities seeking the

Bureau's approval to convert the endowment care fund to the unitrust distribution method, in order to comply with Section 8726.2 of the Health

and Safety Code, which mandates the Bureau allow application for conversion to the unitrust distribution method by a cemetery authority, its board of trustees or its corporate trustee by January 1, 2021.

Any interested person may submit comments to the Bureau in writing relevant to the above determinations at 1625 North Market Blvd., Suite S-208, Sacramento, California 95834.

CONTACT PERSON

Inquiries or comments concerning the proposed administrative action may be addressed to:

Name: Carolina Sammons
Address: 1625 North Market Boulevard, Suite S-208
Sacramento, CA 95834
Telephone No.: (916) 574-7876
Fax No. (916) 928-7988
Email Address: carolina.sammons@dca.ca.gov

The backup contact person is:

Name: Cheryl Jenkins
Address: 1625 North Market Boulevard, Suite S-208
Sacramento, CA 95834
Telephone No.: (916) 574-8203
Fax No. (916) 928-7988
Email Address: cheryl.jenkins@dca.ca.gov

Inquiries concerning the substance of the proposed regulations may be directed to Carolina Sammons at (916) 574-7876.

Website access: Materials regarding this proposal can be found at https://www.cfb.ca.gov/laws_regs/proposed_regs.shtml