

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

INITIAL STATEMENT OF REASONS

Hearing Date: No public hearing has been scheduled.

Subject Matter of Proposed Regulations: Cemeteries: Endowment Care Funds.

Section(s) Affected: Amend section 2350 of, and add sections 2334, 2334.1, 2334.2, 2334.3, 2334.4 and 2334.5 to Division 23 (commencing with section 2300) of Title 16 of the California Code of Regulations (CCR).

Background and Statement of the Problem:

The Cemetery and Funeral Bureau (Bureau) licenses, regulates, and investigates complaints against 13 different license categories in California, totaling approximately 13,500 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, cemetery managers, and private, nonreligious cemeteries. It is the Bureau's duty to enforce and administer the Cemetery and Funeral Act (Chapter 12 (commencing with section 7600) of Division 3 of the Business and Professions Code (BPC)) (Act). (BPC, § 7602, subd. (a)(2).) The Bureau is authorized to establish necessary rules and regulations for the enforcement of the Act and the laws subject to its jurisdiction. (BPC, § 7606.)

Existing law requires each privately-owned cemetery authority to 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 Health and Safety Code (HSC) section 8738.1, form what is known as the corpus of the trust. The corpus, along with the portion of accumulated capital gains which have been permanently assigned to the fund, form the principal. The law prohibits the expenditure of the fund corpus. Rather, it must be invested with the intent to earn income for the general care and future maintenance of the cemetery.

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 beginning January 1, 2020. 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. The unitrust method allows expenditures based on the total net value of the endowment care fund assets, regardless of the actual income earned from the investment of those 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 endowment care fund. 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, the Legislature passed AB 795 (Irwin, Chapter 309, Statutes of 2019), which modified AB 926 by delaying the implementation date to January 1, 2021. AB 795 set limits on trustee compensation that will allow professional management of trust assets and prevent depletion of assets via excessive trustee fees. Additionally, AB 795 places controls on excessive investment adviser fees that could unduly deplete a fund and limits the ability of private creditors to seize trust fund assets. It 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.

The Bureau has consulted with stakeholders (licensees, consumer advocates, and members of the public) regarding the proposed unitrust distribution method regulations. At the Bureau's Advisory Committee meeting held on May 21, 2019, the draft language and application for endowment care fund conversion were discussed and made available for public comment. Based upon the comments from stakeholders, the Bureau revised the proposed language into the final draft as submitted with this regulatory package.

In accordance with the statutory mandates implemented by AB 926 and AB 795, the purpose of this proposal is to implement, interpret, and make specific the provisions of BPC section 7612.6, and HSC sections 8725, 8726, 8726.1, 8726.2, and 8726.3.

Accordingly, the Bureau proposes to amend existing section 2350, and to adopt sections 2334, 2334.1, 2334.2, 2334.3, 2334.4 and 2334.5 of Title 16 of the CCR to adhere to the mandates of AB 926 and AB 795, as follows:

- Section 2334 will establish the application requirements for the unitrust endowment care fund conversion.
- Section 2334.1 will establish the endowment care fund conversion conditions.
- Section 2334.2 will establish the conditions the Bureau will consider when denying the unitrust endowment care fund conversion.

- Section 2334.3 will establish the regulatory requirements for abandoned applications.
- Section 2334.4 will establish the conditions the Bureau will consider when reverting a cemetery authority to the net income distribution method.
- Section 2334.5 will establish the requirements for a cemetery authority to re-establish the Reserve for Maintenance account when the cemetery authority reverts from the unitrust distribution method to a net income distribution method.
- Section 2350 will correct terminology in existing regulation pertaining to the annual report requirements pursuant to BPC section 7612.6(b) and lists additional information that must be provided with the endowment care fund report when the cemetery authority uses the unitrust distribution method. It also replaces outdated codes from BPC section 9650(c) to BPC section 7612.6(b) in the regulatory text and the Authority and Reference section.

Specific purpose of each adoption, amendment, or repeal:

Adopt Section 2334 of Division 23 of Title 16 of the CCR (Endowment Care Fund Conversion Application)

Section 2334

Purpose: The Bureau proposes to adopt section 2334(a) to provide that an application for a licensed cemetery authority requesting approval from the Bureau to convert its endowment care fund from the net income distribution method to the unitrust distribution method shall be made on an “Endowment Care Fund Conversion Application,” form 23-ECFC (New 01/21). The regulation will incorporate the form by reference and lists all the requirements, timeframes, and documents that must accompany the conversion request. Subdivision (b) requires a completed application to be submitted at least 90 days prior to the beginning of the reporting year for which the conversion is requested.

Anticipated Benefit(s): Section 2334 will provide clarity to licensed cemetery authorities and the public of the application requirements when seeking the Bureau’s approval to convert its endowment care fund from the net income distribution method to the unitrust distribution method. The information collected on the form enables the Bureau to determine that the cemetery authority meets the conditions of approval set forth in this statute to properly evaluate the application. The timeframe of 90 days prior to the beginning of the reporting year is necessary to give the Bureau sufficient time to evaluate the application.

Rationale: HSC section 8726.2(b) sets forth the conditions of approval the cemetery authority shall meet, and that the Bureau shall consider when granting approval to the cemetery authority requesting to convert from the net income distribution method to the unitrust distribution method. The addition of this section is necessary to establish the

application requirements, timeframes, and documents required for the Bureau to evaluate and approve an applicant to convert its endowment care fund from the net income distribution method to the unitrust distribution method.

The form will contain the following:

Section A: Cemetery Information

1. Name of the Corporation or Limited Liability Company;
2. Name of the cemetery;
3. Year the cemetery was established.
4. License number of the cemetery;
5. Address information;
6. Telephone number;
7. First name, last name, phone number, and email address of the contact person for the application.

Requirements 1 through 7 are necessary to research and verify the applicant's records.

8. Size of the non-endowment section by acres and spaces, or check the box "not applicable";
9. Size of the endowment section of the property remaining to be sold by acres and spaces;
10. Size of the endowment section of the property sold, including preneed sales by acres and spaces;
11. Size of undeveloped section by acres and spaces, if known.

Requirements 8 through 11 are necessary to evaluate the future income stream to the cemetery based on the number of endowment care spaces remaining to be sold. This information will allow the Bureau to assess the cemetery's ability to continue as a going concern with an endowment care fund which is sufficient to provide adequate care and maintenance of the cemetery now, and in the future, when all spaces have been sold.

Section B: Corporate Trustee Information

1. Submission of a completed Certification Affidavit form for each trustee.
2. The corporate trustee's California Department of Financial Protection and Innovation (DFPI) license number or Office of the Comptroller of the Currency charter or certificate number.
3. Name, designated agent, phone number, email address, address, city, state, and zip code of the financial institution acting as the corporate trustee.
4. First name, last name, phone number, and email address for individual trustees.

Requirements 1 through 4 are necessary to verify that the cemetery authority has appointed qualified trustees as defined in HSC sections 8731, 8732, 8732.1, and 8733.5.

Section C: Individual Trustee Requirement Information

Section C requires the proof that the following requirements are met:

1. Possession of a total of 20 combined college units in accounting, auditing, finance, or actuarial science from an educational institution(s) that is recognized by the Western Association of Colleges and Universities, or any nationally recognized accrediting body of colleges and universities, by submitting official transcripts to the Bureau; and

Possession of two years of experience investing and managing an endowment care fund under the unitrust distribution method; **or**

Possession of a Certified Public Accountant, Fiduciary, or other licenses to demonstrate fitness to perform the duties of a trustee.

Requirement 1 is necessary to verify that individual trustees demonstrate sufficient knowledge and expertise in investing and managing an endowment care fund under the unitrust distribution method as specified in HSC section 8726.2(b)(3). The Bureau has determined that 20 college units in the academic areas of accounting, auditing, finance, or actuarial science from an education institution(s) that is recognized by the Western Association of Colleges and Universities, or any national recognized accrediting body of colleges and universities plus the two years of experience is sufficient to demonstrate that the trustee is knowledge in managing the unitrust distribution method of the endowment care fund. In addition, the trustee(s) that holds a Certified Public Accountant, Fiduciary, or other professional license do not require the college units or experience. This is necessary to ensure that cemeteries are managed appropriately.

2. A completed Certification Affidavit (Form 16-CA) for each trustee.
3. An affirmation that individual trustees have not committed any act(s) or crimes(s) constituting grounds for denial of a license under BPC section 480.
4. A completed copy of the Request for Live Scan Service (Form BCIA 8016) verifying that fingerprints have been submitted and all applicable fees have been paid.

Requirements 2 through 4 are necessary to determine that the individual trustee has not committed any act(s) or crimes(s) which would preclude their designation as a trustee.

The Bureau uses the Certification Affidavit for the trustee to affirm that the individual trustee has not had any professional or vocational licenses disciplined by any governmental authority. The Certification Affidavit is required by 16 CCR 2326.3. This aids the Bureau in determining whether the trustee has committed any act(s) that may

negatively reflect on their ability to be a fiduciary (i.e. fiscal dishonesty). Additionally, as it is common for trustees to administer multiple endowment care funds, the form requests the trustee identify if they have already submitted fingerprints to the Bureau.

BPC section 144 requires the Bureau to require an applicant to furnish a full set of fingerprints for purposes of conducting a criminal history record check. The Request for Live Scan Service form is the means of obtaining this information. This background information assists the Bureau in determining whether a trustee has committed any act(s) or crimes(s) that may negatively reflect on their ability to be a fiduciary (i.e. fiscal dishonesty).

Section D: Endowment Care Fund Information

1. The date the endowment care fund was established.
2. The requested total annual unitrust distribution percentage.
3. The expected annual deposits into the unitrust Reserve for Maintenance account.
4. The current value of the Reserve for Future Maintenance, Reserve for Principal Losses, and the Total Combined Reserves before conversion to the unitrust distribution method.
5. A “checkbox” indicating frequency of the proposed income distribution (monthly, quarterly, semiannually, or annually).

Requirements 1 through 5 aid in determining the original sum required to be deposited in the cemetery endowment care fund as determined by the year the endowment care was established. In addition, it allows the Bureau to analyze the projected makeup of the endowment care fund before and after conversion to the unitrust distribution method as specified in HSC section 8726.2 because the ultimate purpose of an endowment care fund is to ensure that the cemetery has sufficient funds to maintain the care of the cemetery in perpetuity, especially after it sells its last remaining plot.

Section E: Long Term Projection for the Endowment Care Fund

1. The total projected value of the endowment care fund necessary to maintain the cemetery at the end of its economic life.
2. The projected annual expenses of the endowment care fund including: personnel costs, building and equipment maintenance, overhead, and other expenses.
3. The projected annual rate of return for the endowment care fund.

Requirements 1 through 3 are necessary to determine if the size of the endowment care fund is sufficient to cover the cost of future and ongoing care and maintenance of the cemetery and generate adequate income to support the cemetery as specified by HSC section 8736.

Section F: Required Attachments.

The Bureau requests the following documents accompany the application:

(1) The endowment care fund trust agreement executed by the board of directors or limited liability company members of the cemetery authority.

HSC section 8725 provides that every cemetery authority that maintains a cemetery may place its cemetery under endowment care and establish, manage, and operate an endowment care fund. In addition, section 2326 of Title 16 of the CCR, specifies that an Application for Certificate of Authority for a cemetery shall be accompanied by specific documents. One of the documents required is the endowment care trust agreement executed by the board of directors or limited liability company members of the cemetery authority. This application question is necessary to determine whether the applicant has the required endowment care fund agreement.

(2) Written investment objectives of the endowment care fund, which shall include the current asset class allocation targets and ranges for the fund as well as the benchmark target long term return for the fund.

Under HSC section 8726.2(b)(1), the cemetery authority must provide the investment objectives of the trust and describe how those objectives promote the mutual goals of growing the principal assets to sufficiently cover the cost of future and ongoing care and maintenance of the cemetery and generate income to support the cemetery as described in HSC section 8726. This document is necessary to prove compliance with all the investing laws applicable to the trust (including HSC sections 8751 and 8751.1). In addition, this document demonstrates and ensures the trustee's understanding of the trustee's responsibilities as defined in HSC section 8731(c). The Bureau shall not issue approval until the Bureau is satisfied that the public interest, human health, and environmental quality will be served by the applicant.

(3) Endowment Care Fund Deposit Rates for all categories.

Under HSC section 8738, the cemetery authority is required to make minimum deposits to the endowment care fund of the interment spaces the cemeteries sell. This document is necessary to demonstrate the cemetery is making at least the minimum deposits required and to ensure the financial condition of the fund. Without a sufficient endowment care fund, privately-owned cemeteries are likely to fall into disrepair.

(4) Cemetery Maintenance Standards.

16 CCR 2333 requires every endowment care cemetery have cemetery maintenance standards. This document aids in determining whether the cemetery is compliant with these standards to prevent deterioration.

Section G: Certified True Statement

A requirement for the Cemetery Manager, President or Vice President, and the Trustee(s) to sign the completed application under penalty of perjury.

The Bureau's application requires the Cemetery Manager, President or Vice President, and the Trustee(s) to certify that they have read and met all requirements to help ensure that representations made by the applicant contain a truthful factual representation and are made in good faith. Certification under penalty of perjury helps to ensure that the documentation contains truthful, factual representations made in good faith. (See e.g., *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1223 [judicial explanation for the use of certifications].) The Bureau relies upon applicants' self-reported information in evaluating license applications. The certification requirement protects consumers because it helps ensure that only applicants who meet licensure requirements, as demonstrated by their application materials, will be eligible for licensure, and that only qualified applicants receive licenses.

In addition, the application includes a statement wherein the applicant(s) and trustee(s), acknowledges that he or she has read and understands the role of the trustee(s) who manages a cemetery's endowment care fund as outlined in the Probate Code (commencing with Section 16000), the BPC (commencing with section 7611), and the HSC (commencing with section 8700). This statement is necessary to assure the Bureau that the applicant(s) and trustee(s) understands their fiduciary responsibility, which is to act in the best interest of the trust's beneficiaries.

The Endowment Care Fund Conversion Application, form 23-ECFC (New 01/21), incorporated by reference, would be cumbersome, unduly expensive and otherwise impractical to publish in the CCR. The form will be available on the Bureau's website and hard copies will be available from the Bureau upon request.

Adopt Section 2334.1 of Division 23 of Title 16 of the CCR (Endowment Care Fund Conversion Condition)

Section 2334.1

Purpose: The Bureau proposes to adopt section 2334.1 to require that a cemetery authority seeking to convert its endowment care fund from the net income distribution method to the unitrust distribution method must first obtain the Bureau's written approval that will specify the effective date of conversion.

Anticipated Benefit(s): Section 2334.1 will provide clarity to licensed cemetery authorities and the public of the requirement to receive the Bureau's approval before converting to the unitrust distribution method. The Bureau's approval of a cemetery authority's use of the unitrust distribution method will have a direct impact on the long-term viability of each cemetery's endowment care fund. In addition, making the effective date of conversion be the first day of the next reporting year is necessary to allow the cemetery authority to report to the Bureau on the unitrust distribution method only rather than on two different methods within the same reporting period.

Rationale: HSC section 8726.2(b) authorizes the Bureau to approve the cemetery authority's application to convert its endowment care fund from the net income distribution method to the unitrust distribution method if the conditions of approval are met.

HSC section 8736 defines endowment care as follows:

Endowment care is a provision for the discharge of a duty due from the persons contributing to the persons interred and to be interred in the cemetery and a provision for the benefit and protection of the public by preserving and keeping cemeteries from becoming unkept and places of reproach and desolation in the communities in which they are situated.

Because the intent of the endowment care fund is to ensure privately-owned cemeteries are properly maintained, even after they have sold all of their interment spaces, the Bureau's approval is essential to ensure the cemetery authority meets the conditions of approval and its mandate of consumer protection. Also, the effective date of conversion provides the applicant sufficient time to prepare for the conversion and avoid having to report to the Bureau on the two different types of distribution methods for the endowment care fund.

Adopt Section 2334.2 of Division 23 of Title 16 of the CCR (Denial of Endowment Care Fund Conversion Application)

Purpose: The purpose of adding section 2334.2(a)(1) through (4), is to list all of the reasons the Bureau may deny the cemetery authority's request to convert its endowment care fund from the net income distribution method to the unitrust distribution method. The reasons are listed in subdivision (a), as follows: (1) the cemetery authority does not meet the conditions of approval described in Section HSC sections 8726.2(b) and (c); (2) the cemetery authority has not provided all relevant trust documents to the bureau pursuant to HSC section 8726.2(d); (3) the cemetery authority has missed the deadline for submission of its annual report pursuant to BPC section 7612.6 and section 2350 two or more times in the preceding three reporting periods; and (4) the cemetery authority has been issued an administrative citation or had disciplinary action in the previous thirty-six months.

In making the determination to deny the unitrust conversion application on the basis set forth in subdivision (a)(4), the Bureau shall consider the factors set forth in subdivision (a)(4)(A) through (D): (1) the severity of the misconduct or act(s) that resulted in the citation or discipline; (2) the nature of the offense; (3) the time elapsed since the offense; and (4) the likelihood that the cemetery authority will engage in future misconduct based on the licensee's history and any relevant information the Bureau may request.

Anticipated Benefit(s): The proposed adoption of section 2334.2 provides transparency and clarity to cemetery authorities and the public of the criteria that the Bureau will

consider when denying an application. The unitrust distribution method allows approved cemeteries to expend more money from their endowment care funds for allowable cemetery expenditures, unlike the net income distribution method, which only allows the income earned along with a portion of realized capital gains for allowable cemetery expenditures. Without proper oversight of cemeteries using the unitrust distribution method consumers could be irreparably harmed if the cemetery's expenditures jeopardize the long-term sustainability of the endowment care fund. In addition, all applicants that are being considered for denial have the benefit of being evaluated by the same set of criteria.

Rationale: HSC section 8726.2(f) authorizes the Bureau to adopt rules to administer the statute and ensure compliance therewith. These criteria allow the Bureau to evaluate the application and grant approval to a cemetery authority to convert its endowment care fund from the net income distribution method to the unitrust distribution method. In addition, it allows the Bureau to continue to carry out its highest priority of consumer protection because without proper oversight of cemeteries using the unitrust distribution method consumers could be irreparably harmed if the cemetery's expenditures jeopardize the long-term sustainability of the endowment care fund. The rationale for each criterion is:

The adoption of subdivision (a) is necessary to provide the appropriate notice to applicants and licensees that the Bureau will deny a cemetery authority's application to convert its endowment care fund from a net income distribution method to a unitrust distribution method under certain conditions. The conditions are set forth in subdivisions (a)(1) through (a)(4).

Subdivision (a)(1) ensures that the cemetery authorities continue to meet the conditions of approval described in HSC sections 8726.2(b) and (c). Section 8726.2(b) sets forth the conditions under which the Bureau must grant an application to convert its endowment care fund from a net income distribution method to a unitrust distribution method. Section 8726.2(c) states that the Bureau must deny a cemetery authority's application if the Bureau has found any of the conditions described in BPC section 7613.9(a)-(f). This proposed subdivision is necessary to inform cemeteries that if they fail to meet the conditions in the statute, their applications will be denied.

Subdivision (a)(2) ensures that the cemetery authorities submit all relevant trust documents pursuant to HSC section 8726.2(d). The endowment care fund is governed by a board of trustees or corporate trustee. The trust documents aid the Bureau in evaluating the trustee(s) assigned to oversee the endowment care fund. This proposed subdivision is necessary so that cemetery authorities know their applications will be denied if they fail to provide all required documents.

Subdivision (a)(3) ensures that cemetery authorities have not missed the deadline two or more times in the three most recent reporting years for submission of its annual report pursuant to BPC section 7612.6 and CCR section 2350. Ensuring the cemetery authorities submit the annual reports on time aids the Bureau to calculate the average

net fair market value of the endowment care fund. Without the timely submission of the reports, the Bureau is unable to calculate the three-years' average of the unitrust distribution.

Subdivision (a)(4) establishes that the issuance of a administrative citation and/or disciplinary action to the cemetery authority in the preceding thirty-six (36) months is a factor in deciding whether to deny the cemetery authority's conversion to the unitrust distribution method. Subdivision (a)(4)(A)-(D) establishes the factors the Bureau considers in determining whether to deny an application on the basis in subdivision (a)(4). The factors are:

The severity of the misconduct or act(s) that resulted in the administrative citation or disciplinary action: The Bureau would consider the severity of the misconduct or act to evaluate the seriousness and the impact the misconduct or act(s) may have in the cemetery authority's management of the unitrust distribution method.

The nature of the offense: The Bureau would consider the nature of the offense because this is the offense against which the applicant will be evaluated to determine if the licensee is fit to manage the endowment care fund under the unitrust distribution method. For example, a citation issued for failure to obtain a Permit for Disposition for burial may not negatively impact the Bureau's decision to grant approval for the unitrust conversion. Conversely, a citation issued for failure to deposit endowment care monies into the endowment care trust fund would greatly impact the Bureau's decision to grant approval for the unitrust conversion.

Time elapsed since the offense: The Bureau would consider the time that elapsed since commission of the prior misconduct of act(s). The passage of time bears on the Bureau's evaluation of the licensee's willingness to conform to the conditions of approval and abide by the Bureau's laws and regulations.

The likelihood that the applicant will engage in future misconduct based on the licensee's history and any relevant information the Bureau may request: The Bureau would consider evidence of reoccurrence based on the licensee's history of administrative citations or disciplinary action issued to judge the applicant's ability to manage the endowment care fund under the unitrust distribution method.

Adopt Section 2334.3 of Division 23 of Title 16 of the CCR (Abandonment of Endowment Care Fund Conversion Application)

Purpose: The purpose of adding section 2334.3(a) and (b) is to inform applicants that an application will be deemed abandoned if the applicant refuses or fails to comply with the provisions set in this regulation within one year of written notification by the Bureau. Any applicant failing to submit documents or information to the Bureau as required by these sections will result in the Bureau deeming the application abandoned, after which the applicant seeking to apply for conversion of an endowment care fund to the unitrust

distribution method will be required to submit a new application and applicable documents.

Anticipated Benefit(s): The proposed adoption of section 2334.3 will provide transparency and clarity to cemetery authorities of the abandoned application requirements. This will encourage applicants to submit timely documentation necessary for the Bureau's approval.

Rationale: The addition of this section is necessary to apply the abandonment of application requirements to cemetery authorities seeking the Bureau's approval to convert its endowment care fund from the net income distribution method to the unitrust distribution method. In the Bureau's experience, deeming an application abandoned because the applicant fails to timely submit information encourages applicants to submit timely information. Under BPC section 142(b), the Bureau cannot deem an application abandoned until 12 months has passed.

Adopt Section 2334.4 of Division 23 of Title 16 of the CCR (Reversion to Net Income Distribution Method)

Purpose: HSC section 8726.2(e)(3) authorizes the Bureau to revert a cemetery authority from the unitrust distribution method to a net income distribution method if the original conditions of approval described in subdivision (b) cease to be met, or the cemetery authority has failed to comply with annual reporting. The Bureau proposes to add section 2334.4(a) through (f), to list the conditions the Bureau will consider when requesting the cemetery authority revert from the unitrust distribution method to a net income distribution method.

Subdivision (a) provides that the Bureau may require the conversion from its unitrust distribution method to the net income distribution method. The conditions are: (1) the Bureau has determined that the cemetery authority no longer meets the conditions of approval specified in HSC section 8726.2(b); (2) the cemetery authority has failed to submit the annual reports required under BPC section 7612.6; or (3) the cemetery's continued use of the unitrust distribution method negatively impact its ability to have funds available for maintenance as required in BPC section 7612.4.

Subdivision (b) provides that the Bureau shall determine the reporting period for which a cemetery authority is required to revert to the net income distribution method.

Subdivision (c) allows a cemetery authority to request in writing to revert to the net income distribution method and the reversion date would be on the first day of the cemetery authority's next reporting year after receiving the Bureau's written approval.

Subdivision (d) provides that when reverting to the net income distribution method, two accounts shall be re-established: (1) the Reserve for Principal Losses; and (2) the Reserve for Future Maintenance.

Subdivision (e)(1) prescribes the method to reestablish the Reserve for Principal Losses account for cemetery authorities that revert to the net income distribution method. The cemetery authority shall deposit into the Reserve for Principal Losses account from the unitrust Reserve for Maintenance account an amount that represents the same percentage the Reserve for Principal Losses account bore to the total unitrust Reserve for Maintenance account at the time the Reserve for Principal Losses account was absorbed into the unitrust Reserve for Maintenance account when the cemetery authority converted to the unitrust distribution method. The remainder of the funds in the unitrust Reserve for Maintenance account shall be deposited into the Reserve for Future Maintenance account re-established under the net income distribution method.

Subdivision (e)(2) provides that if the re-established Reserve for Future Maintenance account would cause the total amount in the fund to exceed ten percent of the endowment care fund in violation of HSC section 8726.1(a)(3), the excess portion shall instead be deposited into the Reserve for Principal Losses account.

Subdivision (f) establishes that a cemetery authority that reverts to the net income distribution method and seeks to reconvert its endowment care fund to the unitrust distribution method shall submit a new application pursuant to section 2334.

Anticipated Benefit(s): The proposed adoption of section 2334.4(a) through (f) provides transparency and clarity to cemetery authorities of the conditions the Bureau will consider in evaluating a reversion from the unitrust distribution method to the net income distribution method. The unitrust distribution method allows approved cemetery authorities to expend more money from their endowment care funds for allowable cemetery expenditures. Without proper oversight of cemeteries using the unitrust distribution method consumers could be irreparably harmed if the cemetery's expenditures jeopardize the long-term sustainability of the endowment care fund.

Rationale: HSC section 8726.2(e) places the responsibility on the Bureau to conduct yearly reviews of the unitrust distribution method and to determine when a cemetery authority no longer meet the conditions of approval for the unitrust distribution method. To meet this mandate, the Bureau is setting forth the criteria it would use when performing the yearly evaluations. These criteria include ensuring the cemetery continues to meet the original conditions of approval, has filed all reports timely, and its continued use of the unitrust distribution method does not jeopardize the endowment care fund.

Pursuant to HSC section 8726.2(e)(3), a cemetery authority that no longer meets the original conditions of approval described in subdivision (b) or fails to file an annual report pursuant to BPS section 7612.6 may be required to revert to the use of the net income distribution method. The statute does not authorize the Bureau to adopt an appeal process when reversion is required. The Bureau retains the discretion to require reversion based on legitimate objective standards and will work with the licensee prior to requiring reversion if the licensee appears to be non-compliant with the original conditions of approval.

The rationale for each criterion is as follows:

Subdivision (a) lists the conditions under which the Bureau may require a cemetery authority to revert to the net income distribution method. The conditions are listed in subdivisions (a)(1) through (a)(3).

The rationale for each condition is as follows:

Subdivision (a)(1) provides that the Bureau may require a cemetery authority to revert to the net income distribution method if the cemetery no longer meets the conditions of approval described in HSC section 8726.2(b). Section 8726.2(b) lists the conditions the cemetery authority must meet to obtain approval. Therefore, it is appropriate for it to revert to the net income distribution method if it ceases meeting these conditions.

Subdivision (a)(2) provides that the Bureau may require a cemetery authority to revert to the net income distribution method if they fail to file the annual report required under BPC section 7612.6 and 16 CCR 2350. Ensuring that the cemetery authority submits the annual report on time aids the Bureau to calculate the average net air market value of the assets in the endowment care fund. Without the timely submission of the reports the Bureau is unable to calculate the three-years' average of the unitrust distribution. The annual report aids the Bureau assess the overall financial health of the endowment care fund under the unitrust distribution method with real time date and actual results as opposed to previously relied upon pro-forma projections.

Subdivision (a)(3) provides that the Bureau may require a cemetery authority to revert to the net income distribution method if the Bureau determines that the cemetery authority's continued use of the unitrust distribution method would negatively impact its ability to have funds available for full distribution for ongoing care and maintenance of the cemetery property. Cemetery authorities with insufficient funds could become unable to maintain cemeteries.

Subdivision (b) states when the cemetery authority must revert to the net income distribution method. Without specific instructions from the Bureau addressing when the reversion must happen, cemeteries may delay or decline to make the reversion, putting cemeteries at risk of deterioration due to lack of adequate funds resulting from over expenditures.

Subdivision (c) provides that cemetery authorities may notify the Bureau in writing of their intent to revert to the net income distribution method. Requiring the reversion to begin on the first day of the cemetery authority's next reporting year following the date on which it receives the bureau's written approval avoids cemetery authorities from changing distribution methods in the middle of the cemetery authority's fiscal year. This makes it easier for the Bureau to review the cemetery authority's financial statements on an annual basis.

Subdivision (d) requires cemetery authorities to establish two reserve accounts when reverting to the net income distribution method, The Bureau determined that without specific instructions the cemetery authority may delay or not establish the reserve accounts putting cemeteries at risk of deterioration due to lack of adequate funds. The two accounts required by subdivisions (d)(1) and (d)(2) are required by HSC section 8726.1(a)(1) and (a)(2) respectively.

Subdivisions (e)(1) and (e)(2) establish the requirements for establishing reserve accounts when reverting to the net income distribution method which is required pursuant to HSC 8726.1(a)(1). For a cemetery to implement the net income distribution method, these two accounts must be re-established as repositories or subaccounts in which to hold and expand income and capital gains in a controlled manner. The instructions set forth in these subdivisions seek to reestablish the two accounts as they were before the cemetery authority converted to a unitrust distribution method. (HSC, § 8726.1, subd. (a)(3).)

Subdivision (f) requires a new application from a cemetery authority that reverts to the net income distribution method and seeks to reconvert its endowment care fund to the unitrust distribution method. As the circumstances may have changed since the cemetery authority last converted to the unitrust distribution method, the Bureau asks for a new application to be submitted.

Adopt Section 2334.5 of Division 23 of Title 16 of the CCR (Endowment Care Reserve for Maintenance after Conversion to the Unitrust Distribution Method)

Purpose: Pursuant to HSC section 8726.2(b)(5), a cemetery authority that has received the Bureau's approval to convert its endowment care fund to the unitrust distribution method shall create a reserve account, (hereinafter referred as "Reserve for Maintenance account") for future maintenance, repair, restoration of property, embellishments, or for use when the endowment fund has inadequate funds for full distribution. The purpose of adding section 2334.5, subdivisions (a) and (b), is to prescribe the method to create the Reserve for Maintenance account. In subdivision (a), the cemetery authority must combine the funds in the cemetery authority's Reserve for Principal Losses and Reserve for Future Maintenance accounts. The Reserve for Maintenance account shall be created no later than the first day of the cemetery authority's conversion to the unitrust distribution method.

Subdivision (b) requires the cemetery authority to separately identify the Reserve for Maintenance account from all other cemetery funds.

Anticipated Benefit(s): Section 2334.5 provides the necessary instructions for the cemetery to create a Reserve for Maintenance account. The account ensures the cemetery authority has enough funds available for distribution and proper maintenance and repairs under the unitrust distribution method.

Rationale: HSC section 8726.2(b)(5) requires cemetery authorities that have been approved to convert to the unitrust distribution method to create a reserve for future maintenance, repair, restoration of property, embellishments, or if the endowment care fund has inadequate funds for full distribution. Section 2334.5 prescribes the method for the cemetery authority to create the Reserve for Maintenance account. This aids the Bureau in evaluating the cemetery authority's application to convert to the unitrust distribution method to ensure the cemetery authority has properly established the Reserve for Maintenance account by combining the funds in the Reserve for Principal Losses and the Reserve for Future Maintenance account described in HSC section 8726.1(a).

Amend Section 2350 of Division 23 of Title 16 of the CCR (Endowment Care Fund Reports)

Purpose: BPC section 7612.6(b) addresses the annual report requirements. The Bureau proposes to divide the regulation into two subdivisions, (a) and (b), to clarify the section.

Subdivision (a) corrects the terminology of the existing regulation pertaining to annual report requirements pursuant to BPC section 7612.6(b).

Subdivision (b) describes the additional information that must be provided with the endowment care fund report when the cemetery authority is using the unitrust distribution method. The additional information consists of: (1) a copy of all the trust documents that were created, updated, or changed since the last annual report including, but not limited to, the trust agreement and investment objectives; (2) the total spaces and acres of the endowment care section of the cemetery that have been sold for interment, including preneed sales; (3) the total spaces and acres of the endowment care section of the cemetery that remain unsold; and (4) the total spaces, if known, and acres of the undeveloped section of the cemetery that remain unsold.

It also replaces outdated codes from BPC section 9650(c) to BPC section 7612.6(b) in the regulatory text and the Authority and Reference section.

Anticipated Benefit(s): The proposed amendment of section 2350 clarifies the annual reporting requirements for cemetery authorities and ensures consumer protection by enabling the Bureau to thoroughly evaluate the continued ability of the cemetery to operate as a going concern now and in the future.

Rationale: The expansion of the regulation into two subdivisions clarifies the meaning of the existing language pertaining to the audit report required under BPC section 7612.6(b) and lists the additional information which cemetery authorities that have been approved to convert to the unitrust distribution method must provide with the annual report. The additional information listed in subdivision (b) assists the Bureau in evaluating the cemetery authority's ability to continue operating in accordance with cemetery law.

The Bureau requests the following additional information to be submitted with the annual report:

- (1) A copy of all trust documents that were created, updated, or changed since its last annual report including, but not limited to, the trust agreement and investment objectives.

HSC section 8725 provides that every cemetery authority that maintains a cemetery may place its cemetery under endowment care and establish, manage, and operate an endowment care fund. In addition, section 2326 specifies that an Application for Certificate of Authority shall be accompanied by specific documents. One of the documents required is the endowment care trust agreement executed by the board of directors or limited liability company members of the cemetery authority. This additional information is necessary to determine whether the applicant continues to have the required endowment care fund agreement.

- (2) The total spaces and acres of the endowment care section of the cemetery that have been sold for interment, including preneed sales.
- (3) The total spaces and acres of the endowment care section of the cemetery that remain unsold.
- (4) The total spaces, if known, and acres of the undeveloped section of the cemetery that remain unsold.

Items 2-4 are necessary to evaluate the future income stream to the cemetery from the number and proportion of endowment care spaces remaining to be sold. This information will allow the Bureau to assess the cemetery's ability to continue as a going concern with an endowment care fund which is sufficient to provide adequate care and maintenance of the cemetery now, and in the future, when all interment spaces have been sold.

It also replaces outdated codes from BPC section 9650(c) to BPC section 7612.6(b) in the regulatory text and the Authority and Reference section.

Underlying Data

Technical, theoretical, or empirical studies, reports, or documents relied upon:

- AB 926 (Irwin, Chapter 750, Statutes of 2017)
- AB 795 (Irwin, Chapter 309, Statutes of 2019)
- Advisory Committee Meeting Minutes, May 21, 2019

Fiscal Impact Assessment:

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.

Business Impact:

The Bureau has made the initial determination that the proposed regulations will not have statewide adverse economic impact directly affecting businesses including the inability of California businesses to compete with businesses in other States.

This initial determination is based on the following facts or evidence/documents/testimony:

- 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 193 endowment care cemeteries, which are all projected to apply for the unitrust distribution method in the first year. Of the 193, the Bureau anticipates 96 licensees will qualify for the unitrust distribution method. Given that the licensee population is only 193, 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.
- 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.

Economic Impact Assessment:

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

- It will not create or eliminate jobs within the State of California because this proposed regulation only offers a licensed cemetery authority an alternative method to structure its endowment care fund.
- It will not create new business or eliminate existing businesses within the State of California or expand businesses currently doing business within the State of California. The proposed regulations are only applicable to cemeteries which 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.

- 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. Although the unitrust distribution method allows approved cemetery authorities to expend more money from their endowment care funds for allowable cemetery expenditures, without proper oversight of cemeteries using the unitrust distribution method consumers could be irreparably harmed if the cemetery's expenditures jeopardize the long-term sustainability of the endowment care fund.
- This regulatory proposal may affect worker safety if a sufficient endowment care fund is maintained by the cemetery, which 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 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.

Specific Technologies or Equipment:

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected or accepted:

Alternative 1: Maintain the status quo. This alternative was rejected because it would make the Bureau non-compliant with the statutory requirements of AB 926 and AB 795.

Alternative 2: Adopt new regulations and amend existing regulatory sections. This alternative was accepted as the most efficient 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 AB 926 and AB 795, which mandates the Bureau to adopt proposed regulations by January 1, 2021.

Incorporated by Reference:

The following forms have been incorporated by reference:

Endowment Care Fund Conversion Application, 23-ECFC (New 01/21)