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Division of Publications**

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Sequence Number: 11-14-14
Rule ID(s): 5833
File Date: 11/14/2014
Effective Date: 2/12/2015

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Burial Services Section
Division:	Department of Commerce and Insurance, Regulatory Boards Division
Contact Person:	Ellery Richardson
Address:	Office of Legal Counsel 500 James Robertson Parkway Davy Crockett Tower, 5 th Floor Nashville, TN 37243
Zip:	37243
Phone:	615-741-8689
Email:	Ellery.richardson@tn.gov

Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

Chapter Number	Chapter Title
0780-05-09	Cemeteries
Rule Number	Rule Title
0780-05-09-.02	Cemeteries – Definitions
0780-05-09-.14	Community Cemeteries – Request for Exemption
0780-05-09-.15	Community Cemeteries – Granting of Exemption
0780-05-09-.16	Community Cemeteries – Notice of Changes
0780-05-09-.17	Community Cemeteries – Improvement Care Trust Fund
0780-05-09-.26	Cemeteries – Paper Size
0780-05-09-.27	Cemeteries – Changes
0780-05-09-.28	Cemeteries – Professional Conduct

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

Substance of Proposed Rules
Chapter 0780-5-9
Cemeteries

Amendments

Rule 0780-05-09-.02 Cemeteries - Definitions is amended by deleting the rule in its entirety and substituting the following language so that, as amended, the rule shall read:

0780-05-09-.02 Definitions.

All definitions contained in T.C.A. 46-1-102 apply equally to the rules of this chapter, with the following additions and exceptions:

- (1) "Cemetery owner" means any individual, association, partnership, corporation, limited liability company or other legally cognizable entity that owns or controls cemetery lands or property and conducts the business of a cemetery.
- (2) "Commissioner" means the Commissioner of the Tennessee Department of Commerce and Insurance or the Commissioner's designee.
- (3) "Director" means the Executive Director of the Burial Services Section.
- (4) "Master Map" means a cemetery map showing each site for disposition of human remains, including sites for interment, inurnment and entombment.
- (5) "Person" means, according to the context, any individual, association, partnership, corporation, or any other legally cognizable organization or entity.

Authority: T.C.A. §§ 46-1-102 and 46-1-301(b).

Rule 0780-05-09-.14 Community Cemeteries – Request for Exemption is amended by deleting the rule in its entirety and substituting the following language so that, as amended, the rule shall read:

0780-05-09-.14 Community Cemeteries – Request for Exemption.

A cemetery may submit a written request for exemption as a community cemetery in typewritten form on 8 ½ x 11 inch paper which shall contain the following information:

- (1) The name and address of the cemetery, or description of its location if it has no street address;
- (2) The name, address, and telephone number of the person in responsible charge of the cemetery who is submitting the application on behalf of the cemetery;
- (3) A description of the historic nature of the cemetery and/or its environs, if applicable;
- (4) The area remaining for future use and (if different) the area remaining for future sales;
- (5) The sale of lots, by number of lots sold per year, over the preceding ten (10) years and the price or prices at which the lots sold; and
- (6) The population of the community normally served by the cemetery.

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Rule 0780-05-09-.15 Community Cemeteries – Granting of Exemption is amended by deleting the rule in its entirety and substituting the following language so that, as amended, the rule shall read:

0780-05-09-.15 Community Cemeteries – Granting of Exemption.

The Commissioner has the discretion to grant an exemption from the registration requirements of this chapter to a community cemetery after taking into consideration the intent of T.C.A. Title 46, Chapter 1 and factors including, but not limited to, the following:

- (1) The age of the cemetery;
- (2) The remaining area for future use;
- (3) The sale of lots over the preceding ten (10) years and the price at which sold;
- (4) The population of the community normally served by the cemetery;
- (5) Whether a community cemetery association has been formed and such association has been incorporated or has been granted tax exempt status;
- (6) The historic nature of the cemetery and/or its environs;
- (7) Whether a savings account or a trust fund in the name of the cemetery has been established at a financial institution for the maintenance and upkeep of the cemetery;
- (8) The source or sources of funds used for the maintenance and upkeep of the cemetery; and
- (9) Whether the exemption is in the best interest of the citizens of the State of Tennessee.

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Rule 0780-05-09-.16 Community Cemeteries – Notice of Changes is amended by deleting the rule in its entirety and amending it so that the new rule shall read:

0780-05-09-.16 Community Cemeteries – Notice of Changes.

- (1) With respect to an exempt community cemetery and/or its trust corporation, if applicable, the Commissioner shall be notified in writing within ten (10) days of the effective date of any change in:
 - (a) The corporate charter;
 - (b) The corporate by-laws;
 - (c) The officers and/or directors of the corporation;
 - (d) The tax exempt status;
 - (e) The corporate registration status with the Tennessee Secretary of State;
 - (f) The amount of land dedicated to cemetery purposes; or
 - (g) The identity of the controlling party.
- (2) Such notice of change shall be submitted in writing to the Burial Services Section of the Tennessee Department of Commerce and Insurance and shall include copies of all documents affected by such change.

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Rule 0780-05-09-.17 Community Cemeteries – Improvement Care Trust Fund is deleted in its entirety.

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Chapter 0780-05-09
Cemeteries

New Rules

- Rule 0780-05-09-.26 Paper Size
Rule 0780-05-09-.27 Changes
Rule 0780-05-09-.28 Professional Conduct

0780-05-09-.26 Paper Size.

- (1) All documents submitted to Burial Services, including those submitted to auditors pursuant to any audit, shall be on 8.5 X 11 inch paper if the documents are not submitted by electronic means.
- (2) The requirements of this rule may be waived by the Director.

Authority: T.C.A. §§ 46-1-301(b).

0780-05-09-.27 Changes.

In addition to any other requirement of the rules promulgated by the Commissioner or any statute pertaining to the operation of a cemetery company, the cemetery company shall report the following changes in writing to the Commissioner within ten (10) days of the effective date of the change:

- (1) Change in the identity of person responsible for compliance with cemetery statutes;
- (2) The conviction of any partnership, corporation, association, employee, owner, director, principal, manager, member, stockholder with a majority ownership interest, or other person who has any ownership interest in, or has any control over, the financial operations of a cemetery for a misdemeanor involving fraud, dishonesty or moral turpitude or a conviction of any felony.

Authority: T.C.A. §§ 46-1-301(b) and 46-1-306(a)(8)

0780-05-09-.28 Professional Conduct.

The Commissioner may deem a cemetery company, or any cemetery operator, to have violated the rules of professional conduct for:

- (1) Failing to perform legal obligations under any contract with a purchaser;
- (2) Negligently failing to protect the safety, health and welfare of the public in the performance of the registrant's professional duties;
- (3) Providing any false or misleading statement on any reports submitted to the Commissioner;
- (4) Selling or offering to sell any contract in violation of the Tennessee Pre-paid Funeral Benefits Act [Tenn. Code Ann. §§ 62-5-401 et seq.];
- (5) Failing to submit payment within the time provided by a written notice from Burial Services assessing a fee pursuant to statute or rule;
- (6) Failing to respond within the time specified in any notice from Burial Services, provided, however, that the director may grant a request for extension submitted within the period of time stated in the original notice; or
- (7) Treating members of the public in an unreasonable manner that, under the circumstances, falls below the standard of professional cemetery operators. Such treatment includes, but is not limited to:
 - (a) Abusive, aggressive, hostile, or disrespectful conduct; or

- (b) Being unresponsive to a member of the public for an unreasonable period of time without justification, such as: not returning phone calls, not answering inquiries, or leaving a member of the public unattended.

Authority: T.C.A. §§ 46-1-301(b), 46-1-206(c), 46-1-306(a)(7), and §§ 62-5-401 et seq.

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
N/A					

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Commissioner of the Department of Commerce and Insurance (board/commission/ other authority) on 10/27/14, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 9/23/2013

Rulemaking Hearing(s) Conducted on: (add more dates). 12/12/2013



Date: 10/27/14

Signature: Julie Mix McPeak

Name of Officer: Julie Mix McPeak

Title of Officer: Commissioner, Department of Commerce and Insurance

Subscribed and sworn to before me on: 10/27/14

Notary Public Signature: Denise M Lewis

My commission expires on: 2/15/16

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slattery III
 Herbert H. Slattery III
 Attorney General and Reporter
11/12/14
 Date

Department of State Use Only

RECEIVED
 2014 NOV 14 PM 1:51
 SECRETARY OF STATE

Filed with the Department of State on: 11/14/2014

Effective on: 2/12/2015

Tre Hargett
 Tre Hargett
 Secretary of State

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Comment 1

0780-05-09-.28(2) [Originally Paragraph (3)]

There was a comment that this rule, which was moved to (2) in the renumbering of the professional conduct violations, is too broad, vague, and could create liability for cemetery operators arising from natural elements rather than negligence.

Agency Response to Comment 1: The Department agrees with the comment. The rule has been clarified to state that there must be a negligent failure to protect the safety, health, and welfare of the public in order to show a violation of this rule.

Comment 2

0780-05-09-.28(4) [As originally published]

There was a comment that this rule on selling interment rights was duplicative of T.C.A. § 46-1-306(a)(16), which provides similar acts as grounds for disciplinary action.

Agency Response to Comment 2: The Department agrees with this comment. This rule has been deleted as duplicative.

Comment 3

0780-05-09-.28(3) [Originally Paragraph (5)]

There was a comment that providing a false or misleading statement to the Department does not necessarily constitute a breach of professional conduct and that a higher standard should be used.

Agency Response to Comment 3: The Department disagrees with this comment. The Department relies on the information provided by registrants in making regulatory decisions. It is the duty of a registrant to ensure that information provided to the Department is truthful and accurate. Failure to do so hinders the Department's ability to protect the health, safety, and welfare of the public, as the Department would lack information necessary to make meaningful decisions. Providing any false or misleading information to the Department is not acceptable; setting a higher standard would provide less protection for the public.

Comment 4

0780-05-09-.28(4) [Originally Paragraph (6)]

There were several comments that it was not appropriate for a violation under the Tennessee Pre-paid Funeral Benefits Act to be considered a violation of professional conduct for cemetery companies and operators.

Agency Response to Comment 4: The Department disagrees with this comment. Cemetery companies and operators may engage in the sale of some pre-paid funeral benefits as defined under the Tennessee Pre-Paid Funeral Benefits Act. Failure to follow that Act, to any extent it applies to their activities, may reflect on a cemetery company or operator's fitness to continue acting in such capacity, given the great public trust involved in operating a cemetery. Failing to abide by the requirements of that Act should constitute a violation of the expectations of professional conduct for a cemetery company or operator.

Comment 5

0780-05-09-.28(4) [Originally Paragraph (6)]

There was a comment expressing concern that this rule might be broadened to enforce the prohibition of discounts on cemetery property and merchandise.

Agency Response to Comment 5: The Department disagrees with this comment. The Tennessee Pre-paid Funeral Benefits Act already applies to cemetery owners and operators to the extent they choose to engage in the sale of pre-paid funeral merchandise. The prohibition on discounts is found at T.C.A. 62-5-409(c) and expressly applies to funeral merchandise only. This rule does not broaden any existing limit on discounts to include cemetery property or merchandise.

Comment 6

0780-05-09-.28(7) [Originally Paragraph (1)]

There was a comment that the scope of this rule was too vague.

Agency Response to Comment 6: The Department agrees with this comment and has edited the rule to give cemeteries and cemetery operators more guidance as to the standards the Department will expect. Because of the nature of the industry, the Department thinks that it is especially important for cemetery operators to be respectful and cognizant that their customers are going through an emotional and stressful time.

Comment 7

There was a comment that the Department should notify the Cemetery Association of Tennessee prior to formulating new rules

Agency Response to Comment 7: The Department appreciates the Cemetery Association of Tennessee's interest in the rulemaking process and will consider its request in the future. However, the Department would note that the Cemetery Association of Tennessee, and other members of the public, were given notice of this hearing pursuant to the Uniform Administrative Procedures Act and were given the opportunity provide both oral and written comments regarding these rules.

Comment 8

There was a comment that the Department should provide a list of items for a cemetery to prepare for prior to an audit, as current standards are inconsistent.

Agency Response to Comment 8: The requested list of items is outside of the scope of this rulemaking proceeding, so the Department cannot address this comment at this time.

Comment 9

There was a comment asking how rules are drafted, who is involved, and when the rules at this hearing were promulgated.

Agency Response to Comment 9: Rules are drafted with the assistance of Departmental staff, including the Executive Director for Burial Services and legal counsel. Notice of this hearing was filed with the Tennessee Secretary of State's Office on September 23, 2013, and the hearing was held on December 12, 2013. After review of the comments, the final version of the rules is filed with the Secretary of State. These rules will be effective ninety (90) days after their final filing with the Secretary of State's Office pursuant to T.C.A. § 4-5-207.

Comment 10

There was a comment that the Cemetery Association of Tennessee generally supported the rules outside of their concerns with Rule 0780-05-09-.28 [Professional Conduct]

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

- (1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule:

The proposed rules would apply equally to all registered cemeteries located in the state of Tennessee, regardless of size. The cemetery companies will not incur additional costs due to the promulgation of these rules; furthermore, smaller cemeteries may benefit from changes to the community cemetery rules that clarify the community cemetery requirements and reduce the burden on applicants. The estimated number of registered cemetery companies in Tennessee is one hundred eighty six (186).

- (2) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record;

Any reported, recordkeeping and /or other administrative costs resulting from these proposed rules is necessary to protect the citizens of the State of Tennessee, which is accomplished by providing less burdensome requirements in attaining the status of community cemetery, requiring cemetery companies to notify Burial Services of a change in manager or update any change in criminal history of an individual with ownership interest or employee status with a cemetery company, and clear expectations of professional conduct expected from cemetery companies and their representatives. These rules are not expected to create any additional reporting, recordkeeping and/or other administrative costs that may be deemed burdensome to small businesses.

- (3) A statement of the probable effect on impacted small businesses and consumers;

The proposed rules are expected to have little to no effect on impacted small businesses, as the proposed rules make it less burdensome to attain community cemetery status and provide clear and concise expectations regarding what is expected from cemetery companies regarding changes in the status of a person's criminal history, specifically any partnership, corporation, associations, employee, owner, director, principal, manager, member, stockholder with majority ownership interest, or other person who has any interest in, or has any control over, financial operations of a cemetery for a misdemeanor involving fraud, dishonesty or moral turpitude or a conviction of any felony. Consumers will be impacted in positive ways as the rules for community cemetery exemption will be more relaxed, allowing small non-profit corporations to attain community cemetery status more easily, and will provide clear and concise expectations regarding professional conduct, and the requirements for individuals to notify Burial Services regarding changes in criminal history.

- (4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small businesses;

The proposed rules appear to be the least burdensome, least intrusive and least costly methods of achieving the purpose and objectives of the rules proposed by the Commissioner in comparison to other alternatives that may be available. The proposed rules reduce the burden on small not for profit corporations seeking community cemetery exemptions and places very little burden on cemetery companies to notify Burial Services of a change in the status of the person responsible for compliance with cemetery statutes or change in the criminal history of specific individuals listed in the rule. Furthermore, the rules clarify the expectations of the Commissioner regarding professional conduct of a cemetery company or cemetery operator.

- (5) A comparison of the proposed rule with any federal or state counterparts; and

The proposed rules appear consistent with similar rules adopted by other boards as well as by the Burial Services Section with regard to its other registrants. There are no known federal counterparts to these laws. However, many states regulate cemeteries to varying degrees. For instance, it is a violation of Wisconsin law at Wis. Stat. Ann. § 440.93 to "[e]ngage[] in any practice relating to the sale of a cemetery lot, cemetery merchandise or mausoleum space which clearly demonstrates a lack of knowledge or ability to apply professional principles or skills." Illinois maintains an extensive professional standards rule at Ill. Admin. Code tit. 68, § 1249.330, which includes violations for dishonorable, unethical or unprofessional conduct as well as professional incompetence.

Cemetery operators in Washington State are subject to the disciplinary authority of the Washington Department of Licensing. That disciplinary authority under Wash. Rev. Code 18.235.130(4) includes potential discipline for "[i]ncompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another.

Georgia, in Ga. Code Ann. § 590-3-1-.15, has a list of prohibited "Dishonest or Unethical Business Practices" that includes a prohibition on false, misleading, or incomplete statements and any misleading action.

- (6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

Exemption of small businesses from these rules would result in less protection for the citizens of the State of Tennessee. Furthermore, such exemption may create more burdensome regulations for not for profit corporations seeking the status of community cemetery exemption. Exempting small businesses from the rules of professional conduct and the requirements to notify Burial Services of any changes in criminal history may cause harm to the public and place an unfair burden on larger businesses that are held to different standards.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The proposed rules have no projected impact on local governments

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

Rule 0780-05-09-.02 adds the definition of "Director" to the definition section, and refers to the Executive Director of the Burial Services Section
<u>0780-05-09-.14</u> : This rule deletes several subdivisions that are currently required when requesting exemption as a community cemetery, making it easier to apply and be granted the exemption.
<u>0780-05-09-.15</u> : This rule adds the best interests of the citizens of the State of Tennessee as a factor to be considered regarding the granting of community cemetery status and is amended to allow community cemeteries to maintain upkeep funds in a savings account as well as a trust account.
<u>0780-05-09-.16</u> : This rule deletes one subdivision that requires the applicant to notify the Commissioner of a change in the terms of a trust agreement.
<u>0780-05-09-.17</u> : This rule deletes the rule requiring that community cemeteries have improvement care trust funds, as the requirement was found to be too burdensome on applicants for community cemetery status.
<u>0780-05-09-.26</u> : This rule adds a new section in which registrants must submit all documents to Burial Services on 8.5 x 11 inch size paper.
<u>0780-05-09-.27</u> : This rule adds a new section regarding the types of status changes a cemetery company is required to communicate to Burial Services.
<u>0780-05-09-.28</u> : This rule adds specific rules setting out standards of professional conduct to which a cemetery company must adhere.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 46-1-306(7) expects the commissioner to create rules of professional conduct.
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- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The proposed rules would apply equally to all registered cemeteries located in the state of Tennessee. There were a few individuals who expressed concerns with the professional conduct rules. See the public comments for particular concerns.
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- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None at this time. However, there is a pending contested case in which a cemetery company has been charged for violating the Tennessee Pre-paid Funeral Benefits Act ("TPFBA") due to its allegedly improper trusting of monies received on a pre-need basis. The cemetery company alleges that the TPFBA does not apply to cemetery companies and, consistent with that view, expressed concerns with the professional conduct rules, in particular 0780-05-09-.28(4). See the public comments.
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- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

There is no expected impact on state or local government revenues and expenditures.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Robert Gribble 500 James Robertson Parkway	Ellery Richardson 500 James Robertson Parkway
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Nashville, TN 37243
(615) 741-3072

- (G)** Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Robert Gribble, Executive Director, Burial Services
Ellery Richardson, Assistant General Counsel

- (H)** Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Robert Gribble
500 James Robertson Parkway
Davy Crockett Tower, 5th Floor
Nashville, TN 37243
(615) 253-1725
Robert.Gribble@tn.gov

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Davy Crockett Tower, 5th Floor
Nashville, TN 37243
(615) 741-3072
Ellery.Richardson@tn.gov

- (I)** Any additional information relevant to the rule proposed for continuation that the committee requests.

N/A

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Agency/Board/Commission:	Burial Services Section
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Rule 0780-05-09-.02 Cemeteries - Definitions is amended by deleting the rule in its entirety and substituting the following language so that, as amended, the rule shall read:

0780-05-09-.02 Definitions.

All definitions contained in T.C.A. 46-1-102 apply equally to the rules of this chapter, with the following additions and exceptions:

- (1) "Cemetery owner" means any individual, association, partnership, corporation, limited liability company or other legally cognizable entity that owns or controls cemetery lands or property and conducts the business of a cemetery.
- (2) "Commissioner" means the Commissioner of the Tennessee Department of Commerce and Insurance or the Commissioner's designee.
- (3) "Director" means the Executive Director of Burial Services.
- (4) "Master Map" means a cemetery map showing each site for disposition of human remains, including sites for interment, inurnment and entombment.
- (5) "Person" means, according to the context, any individual, association, partnership, corporation, or any other legally cognizable organization or entity.

Authority: T.C.A. §§ 46-1-102 and 46-1-301(b).

Rule 0780-05-09-.14 Community Cemeteries – Request for Exemption is amended by deleting the rule in its entirety and substituting the following language so that, as amended, the rule shall read:

0780-05-09-.14 Community Cemeteries – Request for Exemption.

~~The person in responsible charge of the cemetery shall~~ A cemetery may submit a written request for exemption as a community cemetery in typewritten form on 8 ½ x 11 inch paper which shall contain the following information:

- (1) The name and address of the cemetery, or description of its location if it has no street address;
- (2) The name, address, and telephone number of the person in responsible charge of the cemetery who is submitting the application on behalf of the cemetery;
- (3) ~~A statement as to whether a cemetery association has been formed and incorporated or is to be incorporated, and, if so, a copy of the charter and by-laws of the associations and the names, addresses, and telephone numbers of the officers and directors of the association, and whether the cemetery association has been granted tax exempt status, and, if so, documentation of such status;~~
- (4) ~~A statement as to whether a trust fund or a not-for-profit general welfare trust corporation pursuant to T.C.A. Title 46, Chapter 7, has been, or is to be, created for the maintenance and upkeep of the cemetery, and, if so, the name, address, and telephone number of the trustee appointed or to be appointed and a copy of the trust agreement or a copy of the charter and by-laws of the trust corporation with the names, addresses, and telephone numbers of the officers and directors of the corporation;~~
- (5) ~~Identification of the source of funds (i.e. lot sales, donations, bequests, or other contributions) used for the maintenance and upkeep of the cemetery, the method used to account for such funds, and the frequency of audits and/or examinations of financial records of the cemetery and trustee, and by whom such audits and/or examinations are performed;~~

- ~~(a) For funds derived from lot sales, identification of the percentage of the lot sale price which is deposited into the trust fund;~~
- ~~(b) For funds derived from donations, bequests, and other contributions, identification of the percentage which is deposited into the trust fund;~~
- ~~(6) The age of the cemetery;~~
- (3) A description of the historic nature of the cemetery and/or its environs, if applicable;
- (4) The area remaining for future use and (if different) the area remaining for future sales;
- (5) The sale of lots, by number of lots sold per year, over the preceding ten (10) years and the price or prices at which the lots sold; and
- (6) The population of the community normally served by the cemetery.

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Rule 0780-05-09-.15 Community Cemeteries – Granting of Exemption is amended by deleting the rule in its entirety and substituting the following language so that, as amended, the rule shall read:

0780-05-09-.15 Community Cemeteries – Granting of Exemption.

The Commissioner has the discretion to grant an exemption from the registration requirements of this chapter to a community cemetery after taking into consideration the intent of T.C.A. Title 46, Chapter 1 and factors including, but not limited to, the following:

- (1) The age of the cemetery;
- (2) The remaining area for future use;
- (3) The sale of lots over the preceding ten (10) years and the price at which sold;
- (4) The population of the community normally served by the cemetery;
- (5) Whether a community cemetery association has been formed and such association has been incorporated or has been granted tax exempt status;
- (6) The historic nature of the cemetery and/or its environs;
- (7) Whether a savings account or a trust fund in the name of the cemetery has been established at a financial institution for the maintenance and upkeep of the cemetery; and
- (8) The source or sources of funds used for the maintenance and upkeep of the cemetery; and
- (9) Whether the exemption is in the best interest of the citizens of the State of Tennessee.

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Rule 0780-05-09-.16 Community Cemeteries – Notice of Changes is amended by deleting subparagraph (1)(f) in its entirety, adding the word "or" to the end of subparagraph (1)(e) and re-lettering the remaining subparagraph accordingly so that, as amended, the rule shall read:

0780-05-09-.16 Community Cemeteries – Notice of Changes.

- (1) With respect to an exempt community cemetery and/or its trust corporation, if applicable, the Commissioner shall be notified in writing within ten (10) days of the effective date of any change in:

- a. The corporate charter;
- b. The corporate by-laws;
- c. The officers and/or directors of the corporation;
- d. The tax exempt status;
- e. The corporate registration status with the Tennessee Secretary of State;
- ~~f. The terms of the trust agreement; or~~
- g. f. The amount of land dedicated to cemetery purposes; or
- g. The identity of the controlling party.

- (2) Such notice of change shall be submitted in writing to the Burial Services Section of the Tennessee Department of Commerce and Insurance and shall include copies of all documents affected by such change.

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Rule 0780-05-09-.17 Community Cemeteries – Improvement Care Trust Fund is deleted in its entirety.

~~0780-5-9-.17 Community Cemeteries – Improvement Care Trust Fund.~~

- ~~(1) As a condition precedent to the granting of an exemption as a community cemetery, the cemetery applying for such status shall deposit all funds allotted for the maintenance and upkeep of the cemetery into an improvement care trust fund. The trust fund shall be overseen by an independent third party trustee or a not-for-profit general welfare trust corporation created pursuant to T.C.A. Title 46, Chapter 7.~~
- ~~(2) Only the interest and earnings shall be withdrawn from the trust fund for the maintenance and upkeep of the cemetery. Withdrawals from the trust fund shall be made for no purpose other than reasonable compensation to the trustee, which shall in no event exceed the amount of interest earned.~~
- ~~(3) The trust agreement shall state the percentage of a lot sale price which shall be deposited into the trust fund. In no event shall the percentage be less than twenty percent (20%).~~
- ~~(4) Donations, bequests, and other contributions shall be deposited into the trust fund in the amount or percentage designated by the donor, or, in the event that no amount or percentage is specified, then one hundred percent (100%) of the donation, bequest, or other contribution shall be deposited into the trust fund.~~

Authority: T.C.A. §§ 46-1-106(b) and 46-1-301(b).

Chapter 0780-05-09
Cemeteries

New Rules

- Rule 0780-05-09-.26 Paper Size
- Rule 0780-05-09-.27 Changes
- Rule 0780-05-09-.28 Professional Conduct

0780-05-09-.26 Paper Size.

- (1) All documents submitted to Burial Services, including those submitted to auditors pursuant to any audit, shall be on 8.5 X 11 inch paper if the documents are not submitted by electronic means.
- (2) The requirements of this rule may be waived by the Director.

Authority: T.C.A. §§ 46-1-301(b).

0780-05-09-.27 Changes.

In addition to any other requirement of the rules promulgated by the Commissioner or any statute pertaining to the operation of a cemetery company, the cemetery company shall report the following changes in writing to the Commissioner within ten (10) days of the effective date of the change:

- (1) Change in the identity of person responsible for compliance with cemetery statutes;
- (2) The conviction of any partnership, corporation, association, employee, owner, director, principal, manager, member, stockholder with a majority ownership interest, or other person who has any ownership interest in, or has any control over, the financial operations of a cemetery for a misdemeanor involving fraud, dishonesty or moral turpitude or a conviction of any felony.

Authority: T.C.A. §§ 46-1-301(b) and 46-1-306(a)(8)

0780-05-09-.28 Professional Conduct.

The Commissioner may deem a cemetery company, or any cemetery operator, to have violated the rules of professional conduct for:

- (1) Failing to perform legal obligations under any contract with a purchaser;
- (2) Negligently failing to protect the safety, health and welfare of the public in the performance of the registrant's professional duties;
- (3) Providing any false or misleading statement on any reports submitted to the Commissioner;
- (4) Selling or offering to sell any contract in violation of the Tennessee Pre-paid Funeral Benefits Act [Tenn. Code Ann. §§ 62-5-401 et seq.];
- (5) Failing to submit payment within the time provided by a written notice from Burial Services assessing a fee pursuant to statute or rule;
- (6) Failing to respond within the time specified in any notice from Burial Services, provided, however, that the director may grant a request for extension submitted within the period of time stated in the original notice; or
- (7) Treating members of the public in an unreasonable manner that, under the circumstances, falls below the standard of professional cemetery operators. Such treatment includes, but is not limited to:
 - (a) Abusive, aggressive, hostile, or disrespectful conduct; or
 - (b) Being unresponsive to a member of the public for an unreasonable period of time without justification, such as: not returning phone calls, not answering inquiries, or leaving a member of the public unattended.

Authority: T.C.A. §§ 46-1-301(b), 46-1-206(c) and 46-1-306(a)(7).

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
N/A					

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Commissioner of the Department of Commerce and Insurance (board/commission/ other authority) on 10/27/2014, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 9/23/2013

Rulemaking Hearing(s) Conducted on: (add more dates). 12/12/2013

Date: _____

Signature: _____

Name of Officer: Julie Mix McPeak

Title of Officer: Commissioner, Department of Commerce and Insurance

Subscribed and sworn to before me on: _____

Notary Public Signature: _____

My commission expires on: _____

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery, III
Attorney General and Reporter

Date

Department of State Use Only

Filed with the Department of State on: _____

Effective on: _____

Tre Hargett
Secretary of State

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Comment 1

0780-05-09-.28(2) [Originally Paragraph (3)]

There was a comment that this rule, which was moved to (2) in the renumbering of the professional conduct violations, is too broad, vague, and could create liability for cemetery operators arising from natural elements rather than negligence.

Agency Response to Comment 1: The Department agrees with the comment. The rule has been clarified to state that there must be a negligent failure to protect the safety, health, and welfare of the public in order to show a violation of this rule.

Comment 2

0780-05-09-.28(4) [As originally published]

There was a comment that this rule on selling interment rights was duplicative of T.C.A. § 46-1-306(a)(16), which provides similar acts as grounds for disciplinary action.

Agency Response to Comment 2: The Department agrees with this comment. This rule has been deleted as duplicative.

Comment 3

0780-05-09-.28(3) [Originally Paragraph (5)]

There was a comment that providing a false or misleading statement to the Department does not necessarily constitute a breach of professional conduct and that a higher standard should be used.

Agency Response to Comment 3: The Department disagrees with this comment. The Department relies on the information provided by registrants in making regulatory decisions. It is the duty of a registrant to ensure that information provided to the Department is truthful and accurate. Failure to do so hinders the Department's ability to protect the health, safety, and welfare of the public, as the Department would lack information necessary to make meaningful decisions. Providing any false or misleading information to the Department is not acceptable; setting a higher standard would provide less protection for the public.

Comment 4

0780-05-09-.28(4) [Originally Paragraph (6)]

There were several comments that it was not appropriate for a violation under the Tennessee Pre-paid Funeral Benefits Act to be considered a violation of professional conduct for cemetery companies and operators.

Agency Response to Comment 4: The Department disagrees with this comment. Cemetery companies and operators may engage in the sale of some pre-paid funeral benefits as defined under the Tennessee Pre-Paid Funeral Benefits Act. Failure to follow that Act, to any extent it applies to their activities, may reflect on a cemetery company or operator's fitness to continue acting in such capacity, given the great public trust involved in operating a cemetery. Failing to abide by the requirements of that Act should constitute a violation of the expectations of professional conduct for a cemetery company or operator.

Comment 5

0780-05-09-.28(4) [Originally Paragraph (6)]

There was a comment expressing concern that this rule might be broadened to enforce the prohibition of discounts on cemetery property and merchandise.

Agency Response to Comment 5: The Department disagrees with this comment. The Tennessee Pre-paid Funeral Benefits Act already applies to cemetery owners and operators to the extent they choose to engage in the sale of pre-paid funeral merchandise. The prohibition on discounts is found at T.C.A. 62-5-409(c) and expressly applies to funeral merchandise only. This rule does not broaden any existing limit on discounts to include cemetery property or merchandise.

Comment 6

0780-05-09-.28(7) [Originally Paragraph (1)]

There was a comment that the scope of this rule was too vague.

Agency Response to Comment 6: The Department agrees with this comment and has edited the rule to give cemeteries and cemetery operators more guidance as to the standards the Department will expect. Because of the nature of the industry, the Department thinks that it is especially important for cemetery operators to be respectful and cognizant that their customers are going through an emotional and stressful time.

Comment 7

There was a comment that the Department should notify the Cemetery Association of Tennessee prior to formulating new rules

Agency Response to Comment 7: The Department appreciates the Cemetery Association of Tennessee's interest in the rulemaking process and will consider its request in the future. However, the Department would note that the Cemetery Association of Tennessee, and other members of the public, were given notice of this hearing pursuant to the Uniform Administrative Procedures Act and were given the opportunity provide both oral and written comments regarding these rules.

Comment 8

There was a comment that the Department should provide a list of items for a cemetery to prepare for prior to an audit, as current standards are inconsistent.

Agency Response to Comment 8: The requested list of items is outside of the scope of this rulemaking proceeding, so the Department cannot address this comment at this time.

Comment 9

There was a comment asking how rules are drafted, who is involved, and when the rules at this hearing were promulgated.

Agency Response to Comment 9: Rules are drafted with the assistance of Departmental staff, including the Executive Director for Burial Services and legal counsel. Notice of this hearing was filed with the Tennessee Secretary of State's Office on September 23, 2013, and the hearing was held on December 12, 2013. After review of the comments, the final version of the rules is filed with the Secretary of State. These rules will be effective ninety (90) days after their final filing with the Secretary of State's Office pursuant to T.C.A. § 4-5-207.

Comment 10

There was a comment that the Cemetery Association of Tennessee generally supported the rules outside of their concerns with Rule 0780-05-09-.28 [Professional Conduct]

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

- (1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule:

The proposed rules would apply equally to all registered cemeteries located in the state of Tennessee, regardless of size. The cemetery companies will not incur additional costs due to the promulgation of these rules; furthermore, smaller cemeteries may benefit from changes to the community cemetery rules that clarify the community cemetery requirements and reduce the burden on applicants. The estimated number of registered cemetery companies in Tennessee is one hundred eighty six (186).

- (2) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record;

Any reported, recordkeeping and /or other administrative costs resulting from these proposed rules is necessary to protect the citizens of the State of Tennessee, which is accomplished by providing less burdensome requirements in attaining the status of community cemetery, requiring cemetery companies to notify Burial Services of a change in manager or update any change in criminal history of an individual with ownership interest or employee status with a cemetery company, and clear expectations of professional conduct expected from cemetery companies and their representatives. These rules are not expected to create any additional reporting, recordkeeping and/or other administrative costs that may be deemed burdensome to small businesses.

- (3) A statement of the probable effect on impacted small businesses and consumers;

The proposed rules are expected to have little to no effect on impacted small businesses, as the proposed rules make it less burdensome to attain community cemetery status and provide clear and concise expectations regarding what is expected from cemetery companies regarding changes in the status of a person's criminal history, specifically any partnership, corporation, associations, employee, owner, director, principal, manager, member, stockholder with majority ownership interest, or other person who has any interest in, or has any control over, financial operations of a cemetery for a misdemeanor involving fraud, dishonesty or moral turpitude or a conviction of any felony. Consumers will be impacted in positive ways as the rules for community cemetery exemption will be more relaxed, allowing small non-profit corporations to attain community cemetery status more easily, and will provide clear and concise expectations regarding professional conduct, and the requirements for individuals to notify Burial Services regarding changes in criminal history.

- (4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small businesses;

The proposed rules appear to be the least burdensome, least intrusive and least costly methods of achieving the purpose and objectives of the rules proposed by the Commissioner in comparison to other alternatives that may be available. The proposed rules reduce the burden on small not for profit corporations seeking community cemetery exemptions and places very little burden on cemetery companies to notify Burial Services of a change in the status of the person responsible for compliance with cemetery statutes or change in the criminal history of specific individuals listed in the rule. Furthermore, the rules clarify the expectations of the Commissioner regarding professional conduct of a cemetery company or cemetery operator.

- (5) A comparison of the proposed rule with any federal or state counterparts; and

The proposed rules appear consistent with similar rules adopted by other boards as well as by the Burial Services Section with regard to its other registrants. There are no known federal counterparts to these laws. However, many states regulate cemeteries to varying degrees. For instance, it is a violation of Wisconsin law at Wis. Stat. Ann. § 440.93 to "[e]ngage[] in any practice relating to the sale of a cemetery lot, cemetery merchandise or mausoleum space which clearly demonstrates a lack of knowledge or ability to apply professional principles or skills." Illinois maintains an extensive professional standards rule at Ill. Admin. Code tit. 68, § 1249.330, which includes violations for dishonorable, unethical or unprofessional conduct as well as professional incompetence.

Cemetery operators in Washington State are subject to the disciplinary authority of the Washington Department of Licensing. That disciplinary authority under Wash. Rev. Code 18.235.130(4) includes potential discipline for "[i]ncompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another.

Georgia, in Ga. Code Ann. § 590-3-1-.15, has a list of prohibited "Dishonest or Unethical Business Practices" that includes a prohibition on false, misleading, or incomplete statements and any misleading action.

- (6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

Exemption of small businesses from these rules would result in less protection for the citizens of the State of Tennessee. Furthermore, such exemption may create more burdensome regulations for not for profit corporations seeking the status of community cemetery exemption. Exempting small businesses from the rules of professional conduct and the requirements to notify Burial Services of any changes in criminal history may cause harm to the public and place an unfair burden on larger businesses that are held to different standards.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 “any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments.” (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The proposed rules have no projected impact on local governments

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

Rule 0780-05-09-.02 adds the definition of "Director" to the definition section, and refers to the Executive Director of the Burial Services Section
0780-05-09-.14: This rule deletes several subdivisions that are currently required when requesting exemption as a community cemetery, making it easier to apply and be granted the exemption.
0780-05-09-.15 This rule adds the best interests of the citizens of the State of Tennessee as a factor to be considered regarding the granting of community cemetery status and is amended to allow community cemeteries to maintain upkeep funds in a savings account as well as a trust account.
0780-05-09-.16 This rule deletes one subdivision that requires the applicant to notify the Commissioner of a change in the terms of a trust agreement.
0780-05-09-.17: This rule deletes the rule requiring that community cemeteries have improvement care trust funds, as the requirement was found to be too burdensome on applicants for community cemetery status.
0780-05-09-.26 This rule adds a new section in which registrants must submit all documents to Burial Services on 8.5 x 11 inch size paper.
0780-05-09-.27 This rule adds a new section regarding the types of status changes a cemetery company is required to communicate to Burial Services.
0780-05-09-.28 This rule adds specific rules setting out standards of professional conduct to which a cemetery company must adhere.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 46-1-306(7) expects the commissioner to create rules of professional conduct.
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- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The proposed rules would apply equally to all registered cemeteries located in the state of Tennessee. There were a few individuals who expressed concerns with the professional conduct rules. See the public comments for particular concerns.
--

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None at this time. However, there is a pending contested case in which a cemetery company has been charged for violating the Tennessee Pre-paid Funeral Benefits Act ("TPFBA") due to its allegedly improper trusting of monies received on a pre-need basis. The cemetery company alleges that the TPFBA does not apply to cemetery companies and, consistent with that view, expressed concerns with the professional conduct rules, in particular 0780-05-09-.28(4). See the public comments.
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- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

There is no expected impact on state or local government revenues and expenditures.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Robert Gribble 500 James Robertson Parkway	Ellery Richardson 500 James Robertson Parkway
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- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Robert Gribble, Executive Director, Burial Services
Ellery Richardson, Assistant General Counsel

- (H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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- (I) Any additional information relevant to the rule proposed for continuation that the committee requests.

N/A

SECRETARY OF STATE
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