

## INSURANCE DIVISION[191]

### Notice of Intended Action

**Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”**

**Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.**

Pursuant to the authority of Iowa Code section 523I.207, the Insurance Division (the Division) hereby gives Notice of Intended Action to adopt a new Chapter 101, “Burial Sites and Cemeteries,” and to rescind Chapter 140, “Burial Sites and Cemeteries,” Iowa Administrative Code.

The proposed new chapter is intended to implement Iowa Code chapter 523I as amended by 2016 Iowa Acts, House File 2394, sections 12 and 13. Iowa Code chapter 523I regulates the sale of purchase agreements for cemetery merchandise and services, and authorizes the Iowa Insurance Commissioner to adopt rules as are necessary to administer Iowa Code chapter 523I.

New Chapter 101 is proposed so that the rules shall be in accordance with Iowa Code chapter 523I as amended by 2016 Iowa Acts, House File 2394, related to the annual report required to be filed with the Division. The proposed new chapter also clarifies the current requirements for occasions when care fund amounts are distributed using a total return distribution method. Finally, the proposed new chapter includes other clarifications and general updates in accordance with Iowa Code section 17A.7(2).

The Division intends that these amendments shall go into effect December 14, 2016.

Any interested person may make written suggestions or comments on the proposed new chapter on or before October 4, 2016. Such written materials should be directed to Rosanne Mead, Iowa Insurance Division, Securities and Regulated Industries Bureau, Two Ruan Center, 601 Locust Street, Fourth Floor, Des Moines, Iowa 50319; fax (515)281-3059; e-mail [rosanne.mead@iid.iowa.gov](mailto:rosanne.mead@iid.iowa.gov).

Also, there will be a public hearing regarding the proposed new chapter on October 4, 2016, at 10 a.m. at the offices of the Iowa Insurance Division, Two Ruan Center, 601 Locust Street, Fourth Floor, Des Moines, Iowa, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the new chapter.

Any persons who intend to attend the public hearing and have special requirements, such as those relating to hearing or mobility impairments, should contact the Division and advise of specific needs.

The Insurance Division’s general waiver provisions in 191—Chapter 4 apply to these rules.

These rules will impose no fiscal impact on the State.

After review and analysis of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code chapter 523I as amended by 2016 Iowa Acts, House File 2394, sections 12 and 13.

The following amendments are proposed.

ITEM 1. Adopt the following **new** 191—Chapter 101:

#### CHAPTER 101 BURIAL SITES AND CEMETERIES

**191—101.1(523I) Purpose.** This chapter is intended to implement and administer the provisions of Iowa Code chapter 523I as amended by 2016 Iowa Acts, House File 2394, which regulates burial sites and cemeteries.

**191—101.2(523I) Definitions.** For purposes of this chapter, the definitions of Iowa Code chapter 523I are incorporated by reference. In addition, the following definitions shall apply:

“*Division*” means the Iowa insurance division, supervised by the commissioner pursuant to Iowa Code section 505.8, in the division’s performance of the duties of the commissioner under Iowa Code chapters 505 and 523I.

“*Net appreciation*” means the amount by which cumulative capital gains exceed the sum of the capital losses.

**191—101.3(523I) Examination expenses assessment.** If the division performs an on-site examination of a perpetual care cemetery pursuant to Iowa Code section 523I.213A, the perpetual care cemetery shall pay the division fee of \$150. The fee will not be assessed more than once every five years. In addition, the division reserves the right, in special circumstances, or for investigative examinations for cause, as often as necessary, to assess actual costs of examiners’ time, travel, meals and lodging. The fee or costs may be waived by the division, in the division’s sole discretion.

**191—101.4(523I) Sale of insurance.** The sale of cemetery merchandise or services for a death in the future, except if it is the sale of a purchase agreement in compliance with Iowa Code chapter 523A and 191—Chapter 100, is the sale of insurance, and cannot be sold unless it is both of the following:

**101.4(1)** Sold by an insurance producer licensed in Iowa.

**101.4(2)** Underwritten by an insurance company authorized to sell insurance in Iowa.

**191—101.5(523I) Notice of disinterment.** The notice filed by a cemetery reporting a disinterment pursuant to Iowa Code section 523I.309(6) shall include a description of the error, the reason the error occurred, the identity of all parties in interest, the date of the initial interment, the identity of the remains being relocated, the location where the disinterment will occur, and the location of the new interment space. The division and parties in interest may waive the notice required by Iowa Code section 523I.309(6) if all parties in interest have otherwise received notice of the action and consented to the disinterment and relocation.

**191—101.6(523I) Cemeteries owned or operated by a governmental subdivision.**

**101.6(1)** *Governmental subdivision deemed trustee.* A governmental subdivision holding care fund amounts shall be deemed the trustee of the care fund for purposes of Iowa Code chapter 523I unless a care fund trust agreement provides otherwise.

**101.6(2)** *Governmental subdivision’s adoption of ordinance to create care fund.* For purposes of Iowa Code section 523I.502, if a governmental subdivision adopts an ordinance or resolution as required by Iowa Code section 523I.502 with the language set forth on the division’s Web site, [www.iid.iowa.gov](http://www.iid.iowa.gov), or alternate similar language approved in writing by the division, the division shall deem the action as creating a care fund trust agreement for a perpetual care cemetery.

**191—101.7(523I) Commingling of care fund accounts.**

**101.7(1)** *Generally, commingling not permitted.* Except as otherwise provided in subrules 101.7(2), 101.7(3) and 101.7(4), the assets of a care fund may not be commingled with the assets of another care fund or with any other fund’s assets.

**101.7(2)** *Master trusts.* The trustee of a master trust may manage the assets of more than one care fund within the master trust if separate title and separate accounting are maintained for each care fund pursuant to Iowa Code section 523I.810(1) “c.”

**101.7(3)** *Other care funds.* The assets of a care fund may be commingled with other cemeteries’ care funds for investment purposes if separate title and separate accounting are maintained for each cemetery’s care fund.

**101.7(4)** *Governmental subdivisions.* A governmental subdivision may commingle care funds pursuant to Iowa Code section 523I.506.

**191—101.8(523I) Distribution of care fund amounts using a total return distribution method.**

**101.8(1) Purpose.** This rule is authorized by Iowa Code section 523I.811(2) and is intended to encourage care fund investments in appreciating assets that will produce higher care fund income levels created by growth in the care fund principal.

**101.8(2) Definition of “total return distribution method.”** For purposes of this rule, a “total return distribution method” is a plan for distributing care fund amounts which takes into account both income (interest and dividends) earned by the care fund and capital appreciation (the change in the market value) of the care fund’s assets. A total return distribution method takes into account the estimated rate of return over a specified period of time.

**101.8(3) Principal of care fund.** The principal of a care fund required by Iowa Code section 523I.806 shall remain available as a funding source for care of the cemetery. A cemetery shall not reduce the principal of a care fund voluntarily, except for the distribution of income. Pursuant to Iowa Code section 523I.811(2), the commissioner, by this rule, establishes terms and conditions under which a care fund trustee or, in the event of multiple trustees, a majority of the trustees, may, in the trustee’s or trustees’ sole discretion, adopt a total return distribution method for the distribution of care fund income, subject to the terms and conditions of this rule.

a. In maintaining accounts for the care fund, the trustee or trustees shall maintain separate accountings of principal and of income.

b. The care fund trust’s governing instrument must clearly manifest intent to use a total return distribution method. Conversion to an investment policy utilizing the total return distribution method shall not conflict with or affect any provision of the trust agreement, if any, regarding the distribution of principal. If the trust agreement indicates intent that net appreciation shall not be expended, the trust may not use the total return distribution method. The trust shall clearly indicate how loss of trust fund value shall affect the total return distribution method and any system of reserve accounts for capital losses.

c. Distributions permitted under the total return distribution method shall be paid from the following sources in the order listed, and the amounts paid from each source shall be labeled:

- (1) Net income; and
- (2) Other ordinary income as determined for federal income tax purposes.

d. The distributions under the total return distribution method shall be used in any manner determined to be in the best interests of the cemetery if authorized by a resolution, bylaw, or other action or instrument establishing the care fund, including but not limited to the following: the general care of memorials; memorialization; cutting and trimming lawns, shrubs, and trees at reasonable intervals; maintaining drains, water lines, roads, buildings, fences, and other structures; maintaining machinery, tools, and equipment; compensating maintenance employees; paying insurance premiums; making payments to maintenance employees’ pension and benefit plans; paying expenses necessary to maintain ownership, transfer, and interment records of the cemetery; capital improvements; and paying overhead expenses incidental to such purposes.

e. The trustee or trustees shall, not less than annually, determine the fair market value of each asset of the care fund that consists primarily of real property or other property that is not traded on a regular basis in an active market, by appraisal or other reasonable method or estimate. That determination, if made reasonably and in good faith, shall be conclusive as to all persons interested in the care fund.

**101.8(4) Trustee to exercise care and prudence.** The trustee or trustees shall exercise ordinary business care and prudence regarding the investment of care fund amounts, by considering the following:

- a. The Probate Code, Iowa Code chapter 633;
- b. The Uniform Prudent Investor Act, Iowa Code sections 633A.4301 through 633A.4309;
- c. Present and anticipated financial requirements of the cemetery, including but not limited to the following: the cemetery’s need to fund the current and long-term expenses of care and maintenance; expected total return from income and appreciation of principal; price level trends of equity and fixed income investments; needs for liquidity; regularity of income; preservation or appreciation of capital; general economic conditions; the possible effect of inflation or deflation; and the retention of income and net appreciation to adjust for inflation.

**101.8(5) Adoption and implementation of a total return distribution method.**

a. Prior to implementation of a total return distribution method, the trustee or trustees shall do all of the following:

(1) Adopt a written investment and distribution policy under which future distributions from the care fund will be total return distribution amounts rather than net income distribution amounts.

1. The investment goals and objectives shall be to achieve principal growth through equity investment; current income through income investments; and an appropriate balance between:

- Maintaining purchasing power through principal appreciation; and
- Generating current income to support the cemetery's current requirements for care and maintenance.

2. The trustee or trustees shall treat the net appreciation, realized and unrealized, in the fair value of the assets of a care fund as if it were net income of the care fund for purposes of determining the amount available for distributions, from time to time, from the care fund.

(2) Ninety days prior to implementation of the total return distribution method, file with the division a request for the division's approval of the proposed plan for use of the total return distribution method. The request shall include copies of the following:

1. The care fund governing instrument.
2. The written election adopting the total return distribution method.
3. The written investment and distribution policy required by paragraph 101.8(5) "a."
4. Evidence of the existence of any reserve fund required and information explaining how the amount of the reserve fund was calculated.
5. Other information requested by the division.

b. The division may limit or prohibit adoption of a total return distribution method by a care fund for any of the following reasons:

- (1) The trustee or trustees and any investment manager are not able to demonstrate sufficient knowledge and expertise regarding effective implementation of the total return distribution method.
- (2) Trust assets cannot be adequately valued at market value.
- (3) Terms of the care fund governing instrument are inconsistent.

c. The division shall notify the trustee or trustees of its decision regarding approval of the implementation plan. If the division does not approve of the plan, the total return distribution method may not be implemented.

**101.8(6) Amount of distribution payment.**

a. Unless another amount is approved by the division upon a showing of good cause, the annual distribution amount shall not exceed the greater of:

- (1) The net ordinary income, or
- (2) Five percent of the fair market value of the care fund as of the last day of the care fund calendar year immediately preceding the distribution year.

b. When determining the distribution amounts, the trustee or trustees shall take into consideration the cemetery's need to fund both:

- (1) The current and future expenses of care; and
- (2) The maintenance and preservation of principal.

c. For the purpose of determining the amounts to be paid out annually, the following factors shall be taken into account:

- (1) The perpetual duration of the care fund;
- (2) Present and anticipated financial requirements;
- (3) Expected total return from income and appreciation of principal;
- (4) Price level trends of equity and fixed income investments;
- (5) Needs for liquidity;
- (6) Regularity of income;
- (7) Preservation or appreciation of capital;
- (8) General economic conditions;
- (9) The possible effect of inflation or deflation; and

(10) The retention of income and net appreciation to adjust for inflation.

*d.* Any excess of income and capital appreciation over allowable cemetery expenses shall be retained in the care fund as undistributed income until needed to fund the cemetery's allowable expenses. This retained income shall be reserved for the purpose of future maintenance unless the division approves in writing of another purpose.

**101.8(7) *Records maintenance.*** The care fund trustee or trustees shall document and maintain a record of the net fair market value of the care fund's assets, calculated as of the end of the last care fund accounting period that preceded the date of the distribution.

**101.8(8) *Reserve fund.*** A cemetery using the total return distribution method shall create and maintain a reserve fund to replace any care fund principal lost by capital losses incurred from the care fund's investments. The reserve fund shall be created by retaining and setting aside a reasonable percentage of the income and capital appreciation within the care fund. The fair market value of the care fund shall be determined at least annually, using such valuation date or dates or averages of valuation dates as are readily ascertainable. Reasonable and appropriate valuation methods shall be utilized. As appropriate, assets may be excluded from valuation, provided all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the care fund agreement.

**101.8(9) *Division may limit use of total return distribution method.*** The division may limit or prohibit ongoing use of a total return distribution method by a care fund under the following circumstances:

*a.* The trustee or trustees and any investment manager are not able to demonstrate sufficient knowledge and expertise regarding effective implementation of the total return distribution method. In making this determination, the division shall consider the factors for approval of a total return distribution plan as set out in subrule 101.8(5).

*b.* In situations where investment returns and distribution practices have not resulted in sufficient protection of the care fund's principal from either a middle-term (three to five years) or a long-term (more than five years) analysis, the division may limit or prohibit the distribution of realized capital gains. In making this determination, the division shall consider the presence and stated value of assets that do not have an active market and are not traded on a regular basis, the frequency of appraisals and evaluations, the asset allocation of the care fund, and whether care fund principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

**101.8(10) *Reversion from total return distribution method.*** If a care fund's trustee or trustees make an election pursuant to this rule to use a total return distribution method, that method is irrevocable unless a reversion is approved by the division. The care fund's trustee or trustees shall file a request for approval of a reversion with the division 90 days prior to a proposed reversion from the total return distribution method to the traditional net income distribution method. The division may prohibit a reversion from the total return distribution method to the traditional net income distribution method if the care fund principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

**101.8(11) *Annual report of total return distribution method information.*** As part of the annual report required by Iowa Code section 523I.813 and rule 199—101.9(523I), a perpetual care cemetery using the total return distribution method shall file an addendum to the annual report related to the total return distribution method, detailing the following:

- a.* The asset allocation.
- b.* The annual payout.
- c.* Any changes in investment policy.
- d.* An accounting in regard to whether growth of the care fund's principal has exceeded an amount needed to compensate for inflation.
- e.* The existence and amount in a reserve fund as required by subrule 101.8(8).
- f.* A description of how the total return distribution method meets the requirements of paragraph 101.8(6) "a."
- g.* A statement that the perpetual care cemetery and care fund are in compliance with this chapter.
- h.* The investment portfolio for the perpetual care cemetery and care fund.

- i.* A statement describing how the investment portfolio for the care fund has performed in comparison to the consumer price index.
- j.* Any other pertinent information.

**191—101.9(523I) Filing annual reports.**

**101.9(1)** *Annual reports filed by perpetual care cemeteries.*

*a.* Each year between January 1 and April 30, perpetual care cemeteries shall file a complete and accurate annual report for the prior reporting period, in the form and manner required by the division. For purposes of Iowa Code section 523I.813 as amended by 2016 Iowa Acts, House File 2394, section 13, and of this rule, “reporting period” means a calendar year.

*b.* This rule shall apply to all perpetual care cemeteries submitting annual reports after January 1, 2017, providing information for the 2016 calendar year reporting period.

**101.9(2)** *Forms and instructions.* Forms and instructions for perpetual care cemeteries filing the annual report required by Iowa Code section 523I.813 as amended by 2016 Iowa Acts, House File 2394, sections 12 and 13, can be found on the division’s Web site, [www.iid.iowa.gov](http://www.iid.iowa.gov).

**191—101.10(523I) Independent review.** The division may use an independent expert to review whether a care fund or a perpetual care cemetery is in compliance with the withdrawal restriction and expertise requirements for advisors and trustees to the care fund and perpetual care cemetery. Costs of the independent expert review shall be borne by the perpetual care cemetery.

These rules are intended to implement Iowa Code chapter 523I as amended by 2016 Iowa Acts, House File 2394.

ITEM 2. Rescind and reserve **191—Chapter 140.**