

CHAPTER 7

AN ACT

HB 4117

Relating to funeral products; creating new provisions; amending ORS 97.923, 97.925, 97.927, 97.933, 97.935, 97.936, 97.939, 97.941, 97.942, 97.943, 97.945, 97.947, 97.948 and 97.949; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 97.923 is amended to read:

97.923. As used in ORS 97.923 to 97.949 and 97.994 unless the context requires otherwise:

(1) "Beneficiary" means the person, *if known*,] who is to receive the funeral and cemetery merchandise, funeral and cemetery services or completed interment spaces.

(2) "Certified provider" means *[any person]* **an entity** certified under ORS 97.933 to:

(a) Sell or offer for sale prearrangement sales contracts or preconstruction sales contracts;

(b) **Administer prearrangement sales contracts or preconstruction sales contracts; or**

(c) **Provide merchandise or services to fulfill prearrangement sales contracts or preconstruction sales contracts.**

(3) "Delivery" occurs when:

(a) Physical possession of the funeral or cemetery merchandise is transferred to the purchaser; or

(b) If authorized by a purchaser under a purchase agreement:

(A) The title to the funeral or cemetery merchandise has been transferred to the purchaser, has been paid for, and is in the possession of the seller, who has documented the sale in the purchaser's records through use of a serial or other identifying number and placed the merchandise, until needed, for storage on the seller's premises; or

(B) The merchandise has been identified for the purchaser or the beneficiary as documented by the manufacturer's receipt placed by the seller in the purchaser's records and held by the manufacturer for future delivery.

(4) "Depository" means a financial institution or trust company, as those terms are defined ORS 706.008, that is authorized to accept deposits in this state or to transact trust business in this state **and is not registered as a master trustee.**

[(5) "Director" means the Director of the Department of Consumer and Business Services.]

[(6)] (5) "Guaranteed contract" means a written preconstruction sales contract or prearrangement sales contract that guarantees the beneficiary the specific undeveloped space or spaces or funeral and cemetery merchandise or funeral and cemetery services contained in the contract and under which no charges other than the sales price contained in the contract *[shall be]* **are** required upon delivery or performance of the funeral or cemetery merchandise or services[.], **if:**

(a) **Required payments have been made as specified in the contract; and**

(b) **The balance of payment required by the contract is paid before the death of the beneficiary.**

(6) **"Joint trust fund account" means trust funds received by a certified provider from two or more beneficiaries.**

(7)(a) "Master trustee" means an entity that is not a certified provider under ORS 97.923 to 97.949 and that has fiduciary responsibility for the uniform administration of funds including, but not limited to, acceptance, custodianship, investment and accounting, delivered to it by a certified provider for the benefit of purchasers of preconstruction sales contracts or prearrangement sales contracts.

(b) "Master trustee" does not include a financial institution, as defined in ORS 706.008, that acts solely as a depository under ORS 97.923 to 97.949.

(8) "Nonguaranteed contract" means a written preconstruction sales contract or prearrangement sales contract that guarantees the beneficiary the specific undeveloped space or spaces or funeral or cemetery merchandise or services contained in the contract, when the price of the merchandise and services selected has not been fixed and will be determined by existing prices at the time the merchandise and services are delivered or provided.

(9) "Prearrangement sales" or "prearrangement sales contract" means any sale, excluding the sale and contemporaneous or subsequent assignment of a life insurance policy or an annuity contract, made to a purchaser, that has as its purpose the furnishing of funeral or cemetery merchandise or services in connection with the final disposition or commemoration of the memory of a dead human body, for use at a time determinable by the death of the person or persons whose body or bodies are to be disposed and where the sale terms require payment or payments to be made at a currently determinable time.

(10) "Preconstruction sale" or "preconstruction sales contract" means a sale made to a purchaser, for the purpose of furnishing undeveloped interment spaces and when the sale terms require payment or payments to be made at a currently determinable time.

[(11) "Provider" means any entity that sells and offers for sale funeral or cemetery merchandise or services.]

[(12)] (11) "Purchaser" means a beneficiary or a person acting on behalf of a beneficiary who enters into a prearrangement sales contract or a preconstruction sales contract with a certified provider under which any payment or payments made under the contract are required to be deposited in trust under ORS 97.941.

[(13)] (12) "Salesperson" means an individual registered under ORS 97.931 and employed by a certified provider to engage in the sale of prearrangement or preconstruction sales contracts on behalf of the certified provider.

[(14)] (13) "Sales price" means the gross amount paid by a purchaser for a prearrangement sales con-

tract or preconstruction sales contract, excluding sales taxes, credit life insurance premiums and finance charges.

[(15)] (14) "Trust" means an express trust created under ORS 97.941 whereby a trustee has the duty to administer the amounts specified under ORS 97.941 received under a prearrangement sales contract or a preconstruction sales contract for the benefit of the purchaser of a prearrangement sales contract or preconstruction sales contract.

[(16)] (15) "Undeveloped interment spaces" or "undeveloped spaces" means any space to be used for the reception of human remains that is not completely constructed or developed at the time of initial payment.

SECTION 2. ORS 97.925 is amended to read:

97.925. It is the purpose of ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 to [assure] **ensure** funds for performance to [those] purchasers who contract through prearrangement sales contracts for the purchase of funeral or cemetery merchandise or services, and through preconstruction sales contracts for undeveloped interment spaces. It is also the purpose of ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 to provide for the certification or registration of [persons] **entities** selling [or], offering for sale, **administering or providing merchandise or services to fulfill** prearrangement sales contracts and preconstruction sales contracts, the creation and administration of prearrangement sales contract and preconstruction sales contract trust funds, the disbursement and allocation of trust funds upon the certified provider's performance of its contractual obligations and [to provide] **the** protection for the purchaser upon the certified provider's default.

SECTION 3. ORS 97.927 is amended to read:

97.927. [(1) Except as provided in this section, ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 apply to all certified providers, master trustees and salespersons who sell or offer for sale prearrangement sales contracts or preconstruction sales contracts.]

[(2)] (1) ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 do not apply to[.]

[(a) Agreements to sell or sales made by endowment care cemeteries under ORS 97.929; or]

[(b) Any] **a** nonprofit memorial society charging less than a \$100 membership fee.

[(3)] (2) Notwithstanding subsection [(2)] (1) of this section, ORS 97.937 applies to[.]

[(a) Agreements to sell or sales made by endowment care cemeteries under ORS 97.929; or]

[(b) Any] **a** nonprofit memorial society charging less than a \$100 membership fee.

SECTION 4. ORS 97.933 is amended to read:

97.933. (1) [A provider] **An entity** may not engage in prearrangement sales or preconstruction sales, **administer prearrangement sales or preconstruction sales or provide merchandise or services to fulfill prearrangement sales or preconstruction sales** unless the [provider] **entity** is

certified by the Director of the Department of Consumer and Business Services. **Each location at which an entity engages in prearrangement sales or preconstruction sales, administers prearrangement sales or preconstruction sales or provides merchandise or services to fulfill prearrangement sales or preconstruction sales must be separately certified.** The director shall:

(a) Establish procedures for issuing certificates required by this section.

(b) Establish standards for determining whether a certificate should be issued.

(c) Set certification and renewal fees.

(d) Require annual renewal of certification.

(e) Establish standards for rules of conduct of certified providers.

(2) The fees described in this section [shall be reasonable and shall defray] **must be sufficient to meet** the costs associated with the administration of ORS 97.923 to 97.949 **and to maintain a reasonable emergency fund.**

(3)(a) [Every] **A** certified provider shall file an annual report with the director on forms [provided] **prescribed** by the director **by rule.** The annual report [shall] **must** contain any information reasonably considered necessary by the director, including but not limited to:

(A) A disclosure of [changes in] **deposits and withdrawals of trust [deposits] funds;**

(B) The number of consecutively numbered prearrangement or preconstruction sales contracts sold during the reporting period;

(C) A complete inventory of the funeral merchandise[,] **and** cemetery merchandise [or a combination thereof] delivered in lieu of trust fund requirements under ORS 97.941, including:

(i) The location of the merchandise;

(ii) Merchandise serial numbers or warehouse receipt numbers identified by the name of the purchaser or the beneficiary; and

(iii) The statement of the certified provider that each item of merchandise is in the seller's possession at the specified location; and

(D) The number of withdrawals from or terminations of any trusts.

(b) If the annual report is not filed or is filed and shows any material discrepancy, the director may take appropriate action and send notification of the matter to the State Mortuary and Cemetery Board.

(c) The director may relieve a certified provider of the duty to file the annual report upon a determination that the certified provider has performed all obligations under the prearrangement sales contract or preconstruction sales contract, or that such obligations lawfully have been assumed by another **certified provider** or have been discharged or canceled.

(4) The director may audit the records of a certified provider that relate to prearrangement sales or preconstruction sales, as the director may consider appropriate. The director may refer any matter outside of normal auditing procedures to the office of the Attorney General for investigation and send

notification of the referral to the State Mortuary and Cemetery Board.

(5) The conduct of individuals, including salespersons as defined in ORS 97.923, employed by a certified provider is the direct responsibility of the certified provider.

(6) [A certificate issued to a] **Authority to operate as a certified** provider is not transferable. [A person] **An entity** that seeks to purchase or otherwise acquire control of a cemetery or funeral establishment [that is a certified provider] shall first apply to the director [and obtain approval of the purchase or change in control] **to become a certified provider.**

[7] *A certificate issued to a provider becomes inactive when the certificate is surrendered to the director. The director retains jurisdiction over the provider as long as trust funds remain on deposit for prearrangement sales contracts or preconstruction sales contracts. While the certificate is inactive, the provider shall:*

[a] *Cease all prearrangement sales to the public;*

[b] *Collect and deposit into trust all installment funds paid toward contracts sold prior to becoming inactive;*

[c] *Seek disbursement of trust funds only in accordance with the requirements of the written contracts and ORS 97.923 to 97.949 until the funds have been exhausted; and*

[d] *Continue to submit required annual reports and renewal fees until no trust funds remain on deposit.*

SECTION 5. ORS 97.935 is amended to read:

97.935. (1) [A person] **An entity** may not operate as a master trustee unless the [person] **entity** is registered with the Director of the Department of Consumer and Business Services. The director shall:

(a) Establish procedures for registering [persons] **master trustees** under this section.

(b) Establish standards for master trustees.

(c) Set registration and renewal fees.

(d) Establish standards for rules of conduct of master trustees.

(2)(a) [Every] **A** master trustee shall file an annual report with the director on forms [provided] **prescribed** by the director **by rule.** The annual report [shall] **must** contain any information reasonably considered necessary by the director, including but not limited to:

(A) A disclosure of changes in trust deposits; and

(B) A list of all certified providers for which the master trustee holds funds and the total amount of funds held for each certified provider.

(b) The director may take appropriate action under ORS 97.948 and 97.949 if a master trustee fails to file the annual report or the report contains any material discrepancy.

(c) The director may relieve a master trustee of the duty to file the annual report upon a determination that the master trustee has performed all obligations under the trust agreement with each certified provider, or that the master trustee's obli-

gations have been lawfully assumed by another [person] **master trustee** or have been discharged or canceled.

(3) The director may conduct an annual audit of a master trustee. The director shall prescribe the form of audits under this section **by rule.**

(4) A master trustee who is audited under this section shall pay all expenses and costs incurred by the director in conducting the audit.

SECTION 6. ORS 97.936 is amended to read:

97.936. (1) In addition to other actions authorized under ORS 97.948 (2), the Director of the Department of Consumer and Business Services may:

(a) Issue an emergency order suspending or restricting a certificate or registration or ordering a certified provider or master trustee or [a person] **an entity** acting as a certified provider or master trustee to cease and desist from specified conduct; or

(b) Take other action deemed necessary by the director in the circumstances.

(2) The director shall promptly provide opportunity for hearing pursuant to ORS chapter 183.

(3) Emergency orders are:

(a) Effective when issued;

(b) Reviewable as provided in ORS 183.480; and

(c) Enforceable in the courts of this state.

SECTION 7. ORS 97.939 is amended to read:

97.939. (1) Three copies of a written sales contract shall be executed for each prearrangement sales contract or preconstruction sales contract sold by a certified provider. The certified provider shall retain one copy of the contract and a copy of the completed contract shall be given to:

(a) The purchaser; and

(b) The depository or the master trustee, if applicable.

(2) Upon receiving [a trust deposit] **trust funds** under ORS 97.941, the master trustee shall sign a copy of the contract received under subsection (1) of this section, retain a copy for its files and return the contract to the purchaser.

(3) Each completed contract shall:

(a) Comply with the plain language standards described in ORS 180.545 (1);

(b) Be consecutively numbered;

(c) Have a corresponding consecutively numbered receipt;

(d) Be preprinted or, if the certified provider uses a master trustee, be obtained from the master trustee;

(e) Identify the purchaser and certified provider who sold the contract;

(f) Specify whether the contract is a guaranteed contract or a nonguaranteed contract;

(g) Specify the specific funeral or cemetery merchandise or services or undeveloped interment spaces included and not included in the contract; and

(h) If a guaranteed contract, disclose that the certified provider [may retain] **is entitled to receive** 10 percent of the sales price.

(4)(a) Notwithstanding ORS 97.943 (8), in the case of a prearrangement sales contract, if at the time of entering into the contract, the beneficiary of the contract is a recipient of public assistance or reasonably anticipates becoming a recipient of public assistance, the contract may provide that the contract is irrevocable.

(b) The contract may provide for an election by the beneficiary, or by the purchaser on behalf of the beneficiary, to make the contract thereafter irrevocable if after the contract is entered into, the beneficiary becomes eligible or seeks to become eligible for public assistance.

SECTION 8. ORS 97.941 is amended to read:

97.941. (1) Upon receiving anything of value under a prearrangement sales contract or preconstruction sales contract, the certified provider who sold the contract shall deposit the following amounts into one or more trust funds maintained pursuant to ORS 97.923 to 97.949, 97.992, 97.994 and 692.180:

(a) *[Ninety percent of]* **If** the amount received is in payment of a guaranteed prearrangement sales contract or guaranteed preconstruction sales contract, **90 percent of the amount received.** *[The remaining 10 percent shall be paid to]* The **certified provider** who sold the contract **is entitled to receive the remaining 10 percent.***[: or]*

(b) *[One hundred percent of]* **If** the amount received **is** in payment of a nonguaranteed prearrangement sales contract or nonguaranteed preconstruction sales contract, **100 percent of the amount received.**

(2) **A certified provider shall pay** all trust *[deposits]* **funds** required by ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 *[shall be placed in a depository or delivered]* **directly** to a master trustee **or depository** within five business days *[of their receipt]* **after the certified provider receives the funds from the purchaser.**

[(3)(a) The trust deposits of a provider that does not use the services of a master trustee shall be maintained in a depository, except that the provider may invest the trust funds in a manner that is, in the opinion of the provider, reasonable and prudent under the circumstances.]

[(b) A provider that invests trust funds may invest the funds only in:]

(3)(a) If a certified provider places trust funds in a depository, the funds may be invested only in:

(A) Certificates of deposit;

(B) *[U.S. Treasuries;]* **United States Treasury bills;**

(C) Issues of *[U.S.]* **United States** government agencies;

(D) Guaranteed investment contracts; or

(E) Banker's acceptances or corporate bonds rated A or better by Standard & Poor's Corporation or Moody's Investors Service.

[(c) All investments made under paragraph (b) of this subsection shall be placed in the custody of the depository in which the trust funds were originally

deposited or any other depository that may qualify under ORS 97.923 to 97.949.]

[(d)] **(b)** Prearrangement sales contract trust fund and preconstruction sales contract trust fund accounts *[shall]* **must** be in the name of the **certified provider** who sold the contract under ORS 97.923 to 97.949, 97.992, 97.994 and 692.180.

(4) **A certified provider shall identify** funds deposited in the trust fund account *[shall be identified]* in the records of the **certified provider** by the name of the purchaser and beneficiary *[and adequate records shall be maintained to allocate]*. **The certified provider shall maintain records that specify the allocation of** all earnings to each prearrangement sales contract or preconstruction sales contract. Nothing *[shall prevent the]* **prohibits the certified provider** from *[commingling]* **directing a master trustee or a depository to commingle** the deposits in *[any such]* **a** trust fund account for purposes of managing and investing the funds. A *[common]* **joint** trust fund account *[shall]* **must** be identified by the name of the **certified provider.**

(5) When a prearrangement sales contract or preconstruction sales contract includes rights of interment and funeral or cemetery merchandise or services, **the terms of the contract must clearly provide for** the application of payments received under the contract *[shall be clearly provided in the contract]*.

(6) *[Any person]* **An entity** engaging in prearrangement sales or preconstruction sales *[who enters into a combination sale which involves]* **that involve** the sale of items subject to trust and any item not subject to trust *[shall be prohibited from increasing]* **may not increase** the sales price of those items not subject to trust with the purpose of allocating a lesser sales price to items *[which]* **that** require a *[trust]* **deposit of trust funds.**

(7)(a) **Except when the Director of the Department of Consumer and Business Services has made the determination described in subsection (9)(a) of this section, a certified provider** may appoint a successor **certified provider.** The **master trustee or depository** shall release the trust funds deposited under ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 and accrued income only to the successor **certified provider** as described in ORS 97.943 and 97.944 *[or upon presentation of the written request of the purchaser]*.

(b) If appointing a successor **certified provider** under this subsection, the original **certified provider** shall notify the director *[of the Department of Consumer and Business Services]* of the proposed change at least 30 days *[prior to]* **before** the appointment.

(8)*[(a)]* A **certified provider** may appoint a successor depository or a master trustee *[as defined in ORS 97.923.]*

[(b) If appointing a successor depository or master trustee under this subsection, the provider, the successor depository and the master trustee must] **and shall** notify the director of the proposed change at least 30 days *[prior to]* **before** the appointment.

(9)(a) The director may appoint a successor certified provider upon a determination that:

(A) The original certified provider has *[ceased to provide the services and merchandise that the original]* **failed to perform the duties of a certified provider** *[agreed to provide]*;

(B) The certificate issued to the original certified provider has been revoked or surrendered; and

(C) The appointment of a successor certified provider is *[appropriate in order]* **necessary** to protect the interests of the purchasers and beneficiaries of prearrangement sales contracts or preconstruction sales contracts.

(b) Depositories or master trustees holding deposits of trust funds by the original certified provider shall change their records to reflect the appointment of a successor certified provider upon receipt of written notice of the appointment from the director.

(10) *[The]* **A trust fund** *[accounts shall]* **account must** be a single purpose fund. In the event of the **certified** provider's bankruptcy, the funds and accrued income *[shall not be]* **are not** available to any creditor as assets of the **certified** provider, but *[shall]* **must** be distributed to the purchasers or managed for *[their]* **the purchasers'** benefit by the trustee in bankruptcy, receiver or assignee.

(11)(a) If the original **certified** provider is licensed under ORS chapter 692 and voluntarily surrenders the license to the State Mortuary and Cemetery Board, *[the original provider shall transfer responsibility as provider under this section to a successor provider who holds a certificate issued by the director under ORS 97.933]* **prearrangement sales contracts and preconstruction sales contracts must be transferred to the successor certified provider appointed by the director.**

(b) If the original **certified** provider is not licensed under ORS chapter 692, upon presentation of proof of the *[death,]* dissolution,*[]* or insolvency, or merger with another **certified** provider, of the original **certified** provider, the depository shall release the prearrangement trust fund deposits or preconstruction trust fund deposits to the purchaser.

(c) If the original **certified** provider is licensed under ORS chapter 692, upon proof of the *[death,]* insolvency or involuntary surrender of the license of the original **certified** provider, the depository shall release the prearrangement trust fund deposits or preconstruction trust fund deposits to the purchaser.

(12) The purchaser or beneficiary of a prearrangement sales contract or preconstruction sales contract may be named cotrustee with the **certified** provider with the written consent of the purchaser or beneficiary.

(13) A **certified** provider who has not appointed a master trustee **and is placing funds with a depository** shall have an annual audit of all trust account funds performed by an independent certified public accountant in accordance with generally accepted accounting procedures. The **certified** provider shall *[make]* **provide** the audit results

[available] to the director *[if requested]* **as part of the annual report required under ORS 97.933.**

[(14) As used in this section, "common trust fund account" means trust funds received by a provider from two or more purchasers.]

SECTION 9. ORS 97.942 is amended to read:

97.942. (1) The Attorney General, on behalf of the Director of the Department of Consumer and Business Services, may petition the circuit courts of this state for appointment of a receiver for a certified provider or *[person]* **entity** acting as a certified provider without certification.

(2) If the court determines that a receivership is necessary or advisable, the court shall appoint a receiver:

(a) When a receiver would ensure the orderly and proper conduct of a **certified** provider's professional business and affairs during or in the aftermath of an administrative proceeding to revoke or suspend the **certified** provider;

(b) When a receiver would protect the public's interest and rights in the business, premises or activities of the **certified** provider **or entity** sought to be placed in receivership;

(c) Upon a showing of serious and repeated violations of ORS 97.923 to 97.949 demonstrating an inability or unwillingness to comply with the provisions of ORS 97.923 to 97.949;

(d) When a receiver would prevent loss, wasting, dissipation, theft or conversion of assets that should be marshaled and held available for the honoring of obligations under ORS 97.923 to 97.949; or

(e) When the court receives proof of other grounds that the court deems good and sufficient for instituting receivership action concerning the *[receiver]* **certified provider or entity** sought to be placed in receivership.

(3)(a) A receivership under this section may be temporary or for the winding up and dissolution of a business, as the director may request and the court determines to be necessary or advisable in the circumstances.

(b) Venue of receivership proceedings may be, at the director's request, in Marion County or the county where the subject of the receivership is located. The appointed receiver shall be the director or a person that the director nominates and that the court approves.

(c) The director may expend money from budgeted funds or the Funeral and Cemetery Consumer Protection Trust Fund to implement a receivership. Any expenditures are a claim against the estate in the receivership proceedings.

SECTION 10. ORS 97.943 is amended to read:

97.943. (1) A **master trustee or a depository** may not make any distributions from prearrangement sales contract trust **fund** deposits except as provided in this section.

(2) The principal of a trust created pursuant to a prearrangement sales contract shall be paid to the certified provider who sold the contract if the certi-

fied provider who sold the contract swears, by affidavit, that the certified provider has delivered all merchandise and performed all services required under the prearrangement sales contract and delivers to the **master trustee or the** depository one of the following:

(a) A certified death certificate of the beneficiary; or

(b) A sworn affidavit signed by the certified provider and by:

(A) One member of the beneficiary's family; or

(B) The executor of the beneficiary's estate.

(3) The principal of a trust created pursuant to a prearrangement sales contract *[shall]* **must** be paid to the purchaser if the original **certified** provider is no longer qualified to serve as **the certified** provider under ORS 97.941 (11).

(4) Upon completion by the certified provider of the actions described in subsection (2) of this section, the **master trustee or the** depository shall pay to the certified provider from the prearrangement sales contract trust fund an amount equal to the sales price of the merchandise delivered.

(5) Upon the final payment to the certified provider of the principal in trust under subsection (2) of this section, the undistributed earnings of the trust *[shall]* **must** be paid to:

(a) The certified provider who sold the contract if the contract is a guaranteed contract; or

(b) The contract purchaser, or the purchaser's estate, if the contract is a nonguaranteed contract.

(6) The **master trustee or the** depository may rely upon the certifications and affidavits made to it under the provisions of ORS 97.923 to 97.949, 97.992, 97.994 and 692.180, and *[shall not be]* **is not** liable to any person for such reliance.

(7) If *[for any reason]* a certified provider who sold *[the]* a prearrangement sales contract *[has refused to comply, or cannot or]* does not comply with the terms of the prearrangement sales contract within a reasonable time after the certified provider is required to do so, the purchaser or heirs or assigns or duly authorized representative of the purchaser or the beneficiary *[shall have]* **has** the right to a refund in the amount equal to the sales price paid for undelivered merchandise and unperformed services plus undistributed earnings amounts held in trust attributable to such contract, within 30 days of the filing of a sworn affidavit with the certified provider who sold the contract and the **master trustee or the** depository setting forth the existence of the contract and the fact of breach. A copy of this affidavit shall be filed with the Director of the Department of Consumer and Business Services. In the event a certified provider who has sold a prearrangement sales contract is prevented from performing by strike, shortage of materials, civil disorder, natural disaster or any like occurrence beyond the control of the certified provider, the certified provider's time for performance *[shall be]* **is** extended by the length of such delay.

(8) Except for an irrevocable contract described in ORS 97.939 (4), at any time prior to the death of

the beneficiary of a prearrangement sales contract, the purchaser of the prearrangement sales contract may cancel the contract and *[shall be]* **is** entitled to a refund of all amounts paid on the contract, all amounts in trust including earnings allocated to the contract that are in excess of all amounts paid on the contract and unallocated earnings on trust contract amounts from the date of the last allocation to the date of the refund request, less any amounts paid for merchandise already delivered or services already performed, which amounts may be retained by the certified provider as compensation.

(9) Notwithstanding ORS 97.941 (4) and subsection (5) of this section, *[upon receiving a sworn affidavit from the master trustee or provider stating that qualifying expenses, taxes or fees have been incurred, a depository shall allow]* a master trustee or **certified** provider *[to pay from earnings of trust fund deposits any expenses,]* **may pay** accounting fees, taxes, depository fees, investment manager fees and *[other fees as may be necessary to enable the provider to comply with the reporting required by ORS 97.923 to 97.949, and to perform other services for the trust as may be authorized by ORS 97.923 to 97.949]* **master trustee fees from earnings of trust fund deposits**. Any payment of expenses or fees from earnings of a trust fund deposit under this subsection *[shall]* **must** not:

(a) Exceed an amount equal to two percent per calendar year of the value of the trust as determined *[on the first day of January of each calendar year]* **at least once every six months as prescribed by the director by rule;**

(b) Include the payment of any fee to the **certified** provider in consideration for services rendered as **certified** provider; or

(c) Reduce, diminish or in any other way lessen the value of the trust fund deposit so that the **merchandise or** services *[or merchandise]* provided for under the contract are reduced, diminished or in any other way lessened.

SECTION 11. ORS 97.945 is amended to read:

97.945. (1) *[Every prearrangement sales contract or preconstruction sales contract seller]* **A certified provider** shall pay to the Director of the Department of Consumer and Business Services a \$5 fee for each prearrangement sales contract or preconstruction sales contract entered into, to be paid into a special income earning fund in the State Treasury, separate from the General Fund, known as the Funeral and Cemetery Consumer Protection Trust Fund. The fees shall be remitted to the director annually within 30 days after the end of December for all contracts that have been entered into during the 12-month period.

(2) Except as provided in this section, the fund shall be used solely for the purpose of providing restitution to purchasers who have suffered pecuniary loss arising out of prearrangement sales contracts or preconstruction sales contracts. The fund may be used for payment of actual administrative expenses incurred in administering the fund. All

moneys in the Funeral and Cemetery Consumer Protection Trust Fund are appropriated continuously to the director for the payment of restitution under this section and the payment of expenses incurred in performing the duties and functions of the director required under ORS 97.923 to 97.949, 97.992, 97.994 and 692.180.

(3) The director shall administer the fund and shall adopt rules governing the payment of restitution from the fund.

(4) Payments for restitution shall be made only upon order of the director where the director determines that the obligation is noncollectible from the certified provider. Restitution *[shall]* **must** not exceed the amount of the sales price paid plus interest at the statutory rate.

(5) The fund *[shall]* **must** not be applied toward any restitution for losses on a prearrangement sales contract or preconstruction sales contract entered into prior to September 27, 1987.

(6) The fund *[shall]* **must** not be allocated for any purpose other than that specified in ORS 97.923 to 97.949, 97.992, 97.994 and 692.180.

(7) If the director proposes to deny an application for restitution from the fund, the director shall accord an opportunity for a hearing as provided in ORS chapter 183.

(8) Notwithstanding any other provision of this section, the payment of restitution from the fund *[shall be]* **is** a matter of grace and not of right and no purchaser *[shall have]* **has** vested rights in the fund as a beneficiary or otherwise.

(9)(a) The **director shall annually review the status of the fund** *[shall be reviewed annually by the director]*. If the *[review]* **director** determines that the fund together with all accumulated income earned on the fund is sufficient to cover costs of potential claims against the fund and that the total number of outstanding claims filed against the fund is less than 10 percent of the fund's current balance, then payments to the fund *[shall]* **may** be adjusted accordingly at the discretion of the director.

(b) If the fund's balance falls below acceptable levels to meet future obligations, the director by rule may increase the fee or impose an assessment on certified providers.

(c) The balance of the fund may not exceed \$2 million. The director is authorized to adjust the fee or assessment as necessary to comply with this paragraph.

SECTION 12. Section 13 of this 2012 Act is added to and made a part of ORS 97.923 to 97.949.

SECTION 13. A person may not, in connection with performing certified provider activities, operating an endowment care cemetery, providing services as a master trustee or providing related services:

(1) **Employ any device, scheme or artifice to defraud;**

(2) **Knowingly make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which the statements are made, not misleading;**

(3) **Engage in any act, practice or course of business that operates or would operate as a fraud or deceit upon any person; or**

(4) **Make or file, or cause to be made or filed, to or with the Director of the Department of Consumer and Business Services any statement, report or document that is known to be false in any material respect or matter.**

SECTION 14. ORS 97.947 is amended to read:

97.947. (1)(a) The Director of the Department of Consumer and Business Services may examine the conditions and resources, including sales contracts, of a certified provider, master trustee or *[person]* **entity** acting as a certified provider or master trustee without certification or registration to determine whether the certified provider, master trustee or *[person]* **entity** acting as a certified provider or master trustee without certification or registration is complying with ORS 97.923 to 97.949, the rules of the director and any other laws of this state applicable to a certified provider or master trustee.

(b) In addition to the authority conferred by ORS 97.948, the director may require a certified provider, master trustee or *[person]* **entity** acting as a certified provider or master trustee without certification or registration to pay the actual and reasonable costs of the examination.

(2) For the purpose of an examination under this section, the director may administer oaths and affirmations, compel the attendance of witnesses, take evidence and require the production of books, papers, correspondence, memoranda, agreements or other documents or records that the director considers relevant or material to the examination.

(3) If a certified provider, master trustee or *[person]* **entity** acting as a certified provider or master trustee without certification or registration fails to comply with a subpoena issued under this section or a party or witness refuses to testify on any matter, the judge of the circuit court for any county, on the application of the director, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify on a matter before the court.

(4) Each witness who appears before the director under a subpoena issued under this section shall receive the fees and mileage provided for witnesses in ORS 44.415 (2), except that a witness subpoenaed at the instance of parties other than the director or an examiner may not be compensated for attendance or travel unless the director certifies that the testimony of the witness was material to the matter investigated.

(5) During the course of any examination, the director may cause the depositions of witnesses to

be taken in the manner prescribed by law for like depositions in civil suits in the circuit court.

SECTION 15. ORS 97.948 is amended to read:

97.948. (1) The Director of the Department of Consumer and Business Services may discipline a certified provider, master trustee or [person] **entity** acting as a certified provider or master trustee without certification or registration who has been found by an audit or examination conducted by the director:

- (a) To be in violation of ORS 97.923 to 97.949;
 - (b) To have liabilities that exceed assets;
 - (c) To be unable to meet obligations as they come due; or
 - (d) To be in a financial condition that fails to adequately protect the interests of customers.
- (2) In disciplining a certified provider, master trustee or [person] **entity** acting as a certified provider or master trustee without certification or registration under subsection (1) of this section, the director may take the following actions:
- (a) Impose probation.
 - (b) Suspend the certificate or registration.
 - (c) Revoke the certificate or registration.
 - (d) Place limitations on the certificate or registration.
 - (e) Refuse to issue or renew a certificate or registration.
 - (f) Issue an order to cease and desist from the activities that support the discipline.
 - (g) Take any other disciplinary action that the director finds proper, including assessment of the costs of the investigation and disciplinary proceedings and assessment of a civil penalty not to exceed \$10,000 per violation.

(3) If the certificate or registration of a certified provider or master trustee is suspended under this section, the holder of the certificate or registration may not engage in the activities allowed by the certificate or registration during the term of suspension. Upon the expiration of the term of suspension,

the director shall reinstate the certificate or registration if the conditions for which the certificate or registration was suspended no longer exist.

(4) The director shall enter each case of disciplinary action on the records of the Department of Consumer and Business Services.

(5) Civil penalties under this section may be imposed as provided in ORS 183.745.

(6) If the director takes disciplinary action under this section, the director may send a notice of the action to the State Mortuary and Cemetery Board and to the Attorney General.

SECTION 16. ORS 97.949 is amended to read:

97.949. (1) If the Director of the Department of Consumer and Business Services has reason to believe that a person has violated any provision of ORS 97.923 to 97.949, the director may give the information relative to the violation to the appropriate federal, state or local law enforcement officer having jurisdiction over the violation.

(2) If the director, in the course of taking an action against a certified provider, master trustee or [person] **entity** acting as a certified provider or master trustee without certification or registration, finds that a salesperson or person acting as a salesperson has violated any provision of ORS 97.923 to 97.949, the director shall provide the State Mortuary and Cemetery Board with a copy of the findings and the order of the director. The board shall, upon receipt of such information, discipline the salesperson or person acting as a salesperson as required by law.

SECTION 17. This 2012 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2012 Act takes effect on its passage.

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