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Linda Bohrer
Acting Director
Missouri Department of Insurance,
Financial Institutions & Professional Registration
301 West High St, Room 530
PO Box 690
Jefferson City, MO 65102

Re: Missouri Division of Finance (MDF)
Death Care Trust Oversight

Dear Ms. Bohrer:

The attached legislative proposals have been submitted to the Chapter 436 Review Committee on behalf of the Department. While I do have dissenting comments, I believe that the legislature should give consideration to expanding upon your proposals.

Transfer of Fiduciary/Trust Oversight

With regard to insurance funded preneed contracts, the Chapter 436 Review Committee agreed that oversight of insurance companies should be handled by the Missouri Division of Insurance. I would suggest that oversight of financial institutions that provide fiduciary services for preneed trusts (funeral or cemetery) and endowed care funds be transferred to the Missouri Division of Finance ("MDF"). This would give rise to a jurisdictional issue for federally chartered institutions. However, Missouri could follow the course adopted by other states in allowing for special consents of process that limit the institution's submission to jurisdiction to specified trust accounts.

There is little doubt that Chapter 436 reforms will impose greater requirements upon death care fiduciaries. The MDF will be better equipped than the State Board of Embalmers and Funeral Directors ("State Board") to assess whether financial institutions are fulfilling their obligations to consumers and death care companies.

Trust funded preneed differs from the insurance funded transaction in that the fiduciary is dependent upon the funeral home/cemetery for individual consumer data. This will remain an issue after reform, and thus, would require the MDF and State Board to coordinate more than what is contemplated for the insurance funded transaction. Accordingly, funding for enforcement procedures will have to be provided to both agencies.

Rulemaking Authority

While the Chapter 436 Review Committee has agreed that the State Board should be afforded rule making authority for the preneed transaction, that authority should be restricted to licensed Chapter 333 entities and preneed sellers. (I would anticipate similar provisions to be established under Chapter 214.) With regard to death care fiduciaries, the MDF should be afforded rulemaking authority to ensure proper oversight of the preneed fiduciary.

While certain trust issues need to be addressed by statute (the required trusting percentage and income accrual/rights), other fiduciary related requirements would be better addressed by regulation:

- Pooling administration
- Income/expense allocations
- Trust expenses
- Service provider arrangements
- Reporting and certifications
- Classifications for civil penalties

NPS Abuse Remedies

Missouri's regulators have been guarded when releasing information about the NPS abuses. The public has come to understand that the NPS preneed trusts invested in insurance issued by a related insurer, and that those policies were improperly administered. However, it is difficult to debate provisions intended to preclude NPS abuses when the public is not fully informed as to those abuses.

I agree that RSMo §436.031.2 should be revised to ensure that the trustee is ultimately responsible to provide investment oversight. However, the fiduciary must be afforded a more definitive investment standard. Accordingly, I would recommend that the Prudent Investor Rule be expressly incorporated instead of the isolated references to "prudence".

In addition to the Department proposals, there have been comments made during the Chapter 436 Review Committee meetings that the trustee must always have 'control' over the trust assets. This term is somewhat nebulous with regard to investment delegated to an independent investment advisor. I would suggest that the fiduciary must have title over the assets, and the responsibility for determining compliance with the Prudent Investor Rule.

Specific MDF Proposals

436.027.1 (and 436.032.1.(3)(d)) – Trusting Percentage and Income Disbursements

The 85% trusting requirement may represent a fair compromise in the absence of industry evidence of actual sales expense. A sales expense of 15% would allow trust-based programs to compete with the commissions paid by insurance companies. Because the 85% requirement is lower than that sought by consumers, the industry should concede the income accrual requirement. However, regulators cannot

impose on the fiduciary the responsibility of determining how much income needs to be accrued. All income should be accrued, leaving the question of the consumer's rights to income upon a termination or transfer.

436.032.1(3)(a) – trust administered solely in the interests of the purchasers and beneficiaries

This provision could create irreconcilable conflicts for the fiduciary with regard to any issue that is not expressly addressed by statute or regulation. Defined contribution pension plans contemplate funding by trusts that must be administered solely in the interest of the plan participant. The statutes and regulations known as ERISA are voluminous. To dictate the fiduciary's duties are owed solely to purchasers/beneficiaries without comprehensive guidelines will force reputable institutions to decline the death care account.

436.032.1(3)(e) – prohibition of investment advice by seller agent

If the fiduciary contracts with an independent investment advisor, it should make no difference whether the advisor has a relationship with the seller so long as the fiduciary remains responsible for the trust's compliance with the Prudent Investor Rule and retains title of the assets.

436.032.3 – Cease and Desist Orders

While the Division of Finance will need enforcement powers (perhaps civil penalty provisions similar to those discussed for Chapter 333 licensees), this provision is too vague.

436.032.4 – Fiduciary Reporting and Seller Suspension

Some form of progressive discipline is needed in lieu of program suspensions. Mutual accountability should be required of the death care company and the fiduciary. Transferring preneed (endowed care) fiduciary oversight to the MDF would negate the need for drastic license actions against funeral homes or cemeteries when the deficiency is solely the fault of the fiduciary.

436.057.2 – Trust Exams/Audits

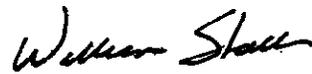
While individual contract sub accounting records are the cornerstone to determining a preneed trust's financial status, funeral directors have a legitimate concern about turning sensitive consumer data over to the State Board. This concern could be addressed by trust reports to the MDF that can be disclosed in situations where cause is shown. However it will be necessary for State Board inspectors to access trustee reports for purposes of reconciling the funeral home's preneed accounts.

436.057.2 – Trust Deficiencies

As today's markets will demonstrate, a 90% threshold of the amount paid is too high for new contracts. A benchmark may be needed for identifying distressed trusts, but this may be a standard that needs to be set by regulation.

I appreciate your consideration of these issues.

Sincerely,

A handwritten signature in black ink that reads "William Stalter". The signature is written in a cursive style with a large, stylized 'W' and 'S'.

William Stalter

Preneed Trust Legislation

1. "Random" or comprehensive audits are often ineffective. Just expanding the frequency of examinations without better standards will not prevent the problems. The law should allow random examinations and require "cause" for audits with "cause" based upon reasonable suspicion of either a violation of 436 or imprudent or unsound investment of trust assets. It should not require a complaint and may be based upon activity in the Trust that appears to be detrimental to the preneed contract holders or contrary to their interests.
2. Require Trustee to file annual report with a listing of assets (a Trust balance sheet.) If the preneed contract deposits (currently 80% of preneed contract sale receipts – which should be raised to 85- 90%) exceed \$3,000,000, the Trustee should be required to file a certified annual report.
3. Require Trustee (or trust officer) to attest to "market value" in the annual report.
4. Define "market value" – a valuation principle that includes transferability of ownership – "market" means you can sell it.
5. Require Trustee to attest that it controls the assets in annual report – It is not problematic for the Trustee to engage the services of an investment advisor, but Trustee must maintain control of assets and the statute should not contain language that might be interpreted to absolve the Trustee of his fiduciary duties or responsibility to attest to market value of trust assets. **This will require deleting the last sentence in §436.031.2 -- "~~The trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor.~~"**

Amended Section § 436.005 Definitions

- (4) "Market value", a fair market value.
- (a) As to cash and credit, the amounts thereof;
 - (b) As to a security as of any date, the price for the security in that date obtained from a generally recognized source or the most recent quotation from a source, or to the extent no generally recognized source exists, the price to sell an asset in an orderly transaction between unrelated market participants at the measurement date; and
 - (c) As to any other asset, the price to sell an asset in an orderly transaction between unrelated market participants at the measurement date consistent with Statements of Financial Accounting Standards.

**Amended Section
§ 436.027**

Designate the current language as 1. and add a second paragraph:

1. The seller may retain as his own money, for the purpose of covering his selling expenses, servicing costs, and general overhead, the initial funds so collected or paid until he has received for his use and benefit an amount not to exceed fifteen percent of the total amount agreed to be paid by the purchaser of such prepaid funeral benefits as such total amount is reflected in the contract.

2. All amounts paid by purchasers to the seller under the terms of a preneed contract, with the exception of those funds permitted to be retained as set forth in subsection 1, shall, within thirty days after collection, be:

(1) deposited in a trust account maintained at a financial institution designated by the seller in section 436.021.2(e) and as subject to the provisions of sections 436.031 and 436.032;

(2) deposited in an account in the joint names of the provider and purchaser pursuant to section 436.053; or

(3) used to purchase from an insurance company with no affiliation to the seller a whole life insurance contract for the face amount of the preneed contract, which names the purchaser as the owner of the insurance contract, and with a cash surrender value of no less than eighty-five percent of the amounts paid by the purchaser.

3. It is unlawful for the seller to use, dispose or transfer the amounts paid by purchasers for any purpose other than as authorized in this section.

**New Section
§ 436.032**

1. Every trustee of a preneed trust that has accepted deposits made to it by the seller of preneed contracts shall before March 31st of each calendar year file with the board the following:

(1) A signed and notarized statement by the trustee, or its officer, attesting to the market value of assets in the preneed trust as of December 31st of the preceding calendar year;

(2) A statement of income and changes in financial position of the preneed trust for the preceding calendar year; and

(3) A signed and notarized statement by the trustee, or its officer, attesting that the trustee during the preceding calendar year has:

(a) administered the trust solely in the interests of the purchasers and beneficiaries;

(b) taken all reasonable steps to control all assets derived from deposits made to it by the seller;

(c) prudently invested and protected all property in the preneed trust in compliance with the duties and obligations of a trustee and

in furtherance of the purposes of sections 436.005 to 436.072, RSMo;

(d) distributed interest, dividends and capital gains, net of losses, from the preneed trust only when prudent under the limitations of section 436.031.3, RSMo; and

(e) not, in connection with the investment of property in the trust, received any advice or been influenced, directly or indirectly, by the seller, any agent of the seller, or any other person with whom the seller has a prior business relationship or has paid or promised to pay any money or other benefit for any purpose.

2. Every trustee that has accepted more than three million dollars in deposits from the seller shall file a certified balance sheet of the trust as of December 31st of the preceding calendar year.

3. Whenever it shall appear to the director of finance that any trustee under this chapter has engaged in any violation of this section, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of the trustee has participated in any violation of this section, the director of finance may initiate an action and issue orders to cease and desist and all other relief pursuant to the provisions of sections 361.260 through 361.290, RSMo.

4. It is unlawful for any seller to continue to sell preneed contracts in this state, if a financial institution designated as trustee by the seller under section 436.021.2(e) has failed to file the annual statements with the board as required by this section.

**New Section
§ 436.057**

1. The board may conduct an examination of any seller or any preneed trust in this state as often as the board in its discretion deems appropriate.

2. Whenever it shall appear to the board that a seller or trustee has failed to comply with any provision of sections 436.027, 436.031 or 436.032, or the market value of assets in trust is less than equal to ninety percent of the total amounts paid by the purchasers of the preneed contracts, the board in its discretion may order an audit of the preneed trust, and such decision by the board does not require a complaint and may be based upon detected activity in a preneed trust that appears to be detrimental to the purchasers or beneficiaries or contrary to their interests.

3. When making an examination or audit under this section, the board may appoint and retain appraisers, independent certified public accountants or other professionals and specialists as examiners, the cost of which shall be borne directly by the seller.

4. The examiner appointed by the board may during normal business hours examine, audit and inspect any and all books and records maintained by a seller or any preneed trust transacting business in this state.

5. It is unlawful during an examination ordered by the board for any person to deny an examiner appointed by the board reasonable access to any and all books and records maintained by the seller or any preneed trust transacting business in this state.