STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS

CHAPTER 436 WORKING GROUP RECOMMENDATIONS

Submitted: September 1, 2008

WORKING DRAFT

September 1, 2008

Dear Joint Committee Members:

Over the last year, the nation has witnessed an unprecedented crisis in the preneed industry. Estimates of the financial impact on Missouri consumers and the funeral industry are alarming. Although recent concerns relate to a single entity, the crisis has focused much needed attention on the regulation of preneed funeral contracts in the state of Missouri and Chapter 436, RSMo, governing preneed sales.

Pursuant to Missouri law, regulatory jurisdiction over preneed sales is vested in the Missouri State Board of Embalmers and Funeral Directors (the "Board"). As part of its statutory duties, the Board annually reviews legislation to identify potential recommendations of the Board. In recent years, this process has included a review of Chapter 436.

As part of its annual legislative review, the Board was invited to gather a working group of representatives from across the preneed industry to collectively identify suggested preneed recommendations for the Joint Committee's review. The Working Group consisted of participants from all aspects of the preneed industry, including, consumer group liaisons, members of the State Board and representatives from the funeral, preneed and insurance industries.

The Working Group respectfully submits the attached recommendations to the Joint Committee for review. While a myriad of opinions were identified, the Working Group unanimously agreed that revisions to Chapter 436 are desperately needed to better protect Missouri consumers and those funeral directors, funeral establishments, preneed providers and preneed sellers who truly dedicate themselves to serving the public.

We commend the General Assembly in convening the Joint Committee and in dedicating the time and resources to this important task.

Sincerely,

To be determined

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III. CONCLUSION

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OVERVIEW

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I. GENERAL OVERVIEW:

During the 2008-2009 legislative session, several Chapter 436 legislative proposals were introduced. Although not enacted, Senate Bill 788 was passed by the General Assembly which created the Joint Committee on Preneed Funeral Contracts.

Although many of the provisions of Chapter 436 were strongly debated, the legislative discussion revealed several common areas of agreement among regulators, industry representatives and consumer groups. At the close of the legislative session, Senator Delbert Scott and Representative Jay Wasson met with several of the legislative participants to discuss many of the Chapter 436 concerns. The Board was subsequently asked to formulate a working group to help identify the collective areas of agreement and to collate suggested legislative recommendations for the Joint Committee's review.

The Working Group subsequently participated in a series of six (6) meetings in Jefferson City, Missouri. [1] Meetings of the Working Group were organized and hosted by the Board and conducted as open meetings in accordance with Chapter 610, RSMo. As required y Missouri law, notice of meetings were made publicly available and posted on the Board's website.

II. PARTICIPANTS:

The Working Group consisted of representatives from all aspects of the preneed industry, including, preneed providers and sellers as well representatives from consumer groups, the Missouri Funeral Directors and Embalmers Association, related insurance companies and representatives from small, large and minority funeral establishments. Participants were chosen from prior legislative involvement and from recommendations made by legislators, Board members and related consumer groups. Members of the public were also invited to attend and given an opportunity to provide both oral and written comments.

The Working Group included:

REGULATORS:

Linda Bohrer	Acting Director- Department of Insurance, Financial Institutions and Professional Registration ("DIFP")
David Broeker	Division Director, Division of Professional Registration*
Sharon Euler	Office of the Attorney General
Mary Erickson	Senior Enforcement Counsel- DIFP
Larry McCord	General Counsel- DIFP
Mark Stahlhuth	Senior Counsel- Financial Section, DIFP

[1] Open meetings were hosted on July 8th. July 15th, July 24th, July 29th August 12th and September 3rd.
* Did not participate as a voting member of the Working Group.

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Rich Weaver Director, Division of Finance

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ADDITIONAL PARTICIPANTS:

James Reinhard,	Chair, State Board of Embalmers and Funeral Directors
Gary Fraker	Board Member
Joy Gerstein	Board Member
Todd Mahn	Board Member
Martin Vernon	Board Member
John McCulloch	Board Member/American Prearranged Services
Bob Baker	Wright Baker Hill Funeral Home
Barbara Brown	Layne Renaissance Chapel, LLC
Norma Collins	AARP
Tom Kutis/ George Cline	Kutis Funeral Home, Inc.
Jim Moody	Lobbyist, SCI
Rep. Timothy Meadows	
Michael Meierhoffer	Meierhoffer Funeral Home & Crematory, Inc.
Barbara Newman	Rep. Meadows' Office
Darlene Russell	Charter Life Insurance Co.
Josh Slocum	Executive Director, Funeral Consumer Alliance
Bill Stalter	Stalter Legal Services
Bill Trimm/ Jo Walker	Silver Haired Legislators
Don Otto	Executive Director, Missouri Funeral Director and Embalmers Association/Missouri Funeral Trust
Mark Warren	Inglish & Monaco- Representing Homesteaders Life Insurance, etc.
Mike Winters	Lobbyist, American Prearranged Services

COMMITTEE SUPPORT STAFF:

Connie Clarkston	Director of Budget & Legislation, Division of Professional Registration*
Becky Dunn	Executive Director, State Board*
Jeana Groose	Administrative Assistant to Director of Budget & Legislation, Division of Professional Registration*
Kimberly Grinston	Legal Counsel, Division of Professional Registration*
Lori Hayes	Inspector, State Board*

III. REVIEW PROCESS:

To guide the review, the Board formulated a survey containing a listing by topic area of Chapter 436 proposals previously submitted to the Board. Participants were asked to rank the priority of topic areas for purposes of discussion. Rankings were subsequently compiled by the Division and used to structure Working Group discussions. [See Appendix 1- Bd. Survey].

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The surveyed topics were ranked as follows:

[INCLUDE SURVEY RESULTS HERE]

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RECOMMENDATIONS

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For purposes of this Report, recommendations have been categorized as follows:

Unanimous Recommendations:	Recommended by a unanimous vote of all Working Group Participants.
Consensus Recommendations:	Recommended by an overwhelming majority of Participants, generally with less than 15% of Participants dissenting.
Majority Recommendations:	Recommended by a simple majority vote of Working Group Participants.
Unresolved:	Majority vote not reached. Suggestions from Participants have been provided.

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GENERAL REGULATORY AUTHORITY

The Working Group agreed to the following **unanimous recommendations**:

1. Regulatory authority over Chapter 436 and preneed licensing should remain with the Board and should not be transferred to another agency. However, regulation of financial institutions and trustees should remain with the Division of Finance.

> ! ***Comments:*** *The Division and Board support this proposal but would also support transferring authority if another regulatory agency is deemed more appropriate.*

2. The Missouri Attorney General should be granted concurrent jurisdiction with local prosecutors to prosecute violations of Chapter 436.

> ! ***Comments:*** *Stalter Legal Services suggested that providing concurrent jurisdiction should be condition upon a requirement that the prosecutor confer with the State Board prior to initiating legal proceedings. Stalter also recommended that concurrent jurisdiction should be limited to violations involving theft or fraud.*

3. The Board should be granted general rulemaking authority to administer Chapter 436 and to establish necessary fees.

4. The Board should be authorized to hire legal counsel to assist in the enforcement of Chapter 436.

> ! ***Comments:*** *The Board indicated this proposal would allow them to utilize both the Attorney General's Office and outside counsel, if necessary. Representatives from the Attorney General's Office refrained from the vote.*

> ! ***Comments:*** *Funeral Consumers Alliance suggested that the current licensee confidentiality restrictions should also be revised to allow dissemination of more information to the public. Division staff indicated that the current confidentiality restrictions apply to all regulated boards/commissions within the Division and would require a statutory change.*

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DEFINITIONS

The definitions governing Chapter 436 are ambiguous and do not reflect current preneed business practices.. Accordingly, the Working Group approved the following **unanimous recommendations**:

- ***"Beneficiary",*** the individual who is to be the subject of the disposition or who will receive funeral services, facilities or merchandise described in a preneed contract.

- ***"Board,"*** the Missouri State Board of Embalmers and Funeral Directors.

- ***"Division",*** the division of professional registration of the department of insurance, financial institutions and professional registration.

- ***"Funeral merchandise",*** caskets, grave vaults, or receptacles, and other personal property incidental to a funeral or burial service, and such term shall also include grave lots, grave spaces, grave markers, monuments, tombstones, crypts, niches or mausoleums.

- ***"Guaranteed Contract",*** A preneed contract in which the seller promises, assures or guarantees to the purchaser that all or any portion of the costs for the disposition, facilities, service or merchandise identified in a preneed contract will be no greater than the price designated in the contract upon the preneed beneficiary's death or that such costs will be otherwise limited or restricted.

- ***"Insurance-Funded Preneed Contract",*** - A preneed contract which is designated to be funded by payments or proceeds from an insurance policy.

- ***"Joint-Account Funded Preneed Contract",*** - A preneed contract which designates that payments for the preneed contract made by or on behalf of the purchaser will be deposited and maintained in a joint account.

- ***"Market Value",***- A fair market value,
  (a) As to cash, the amount 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 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.

- ***"Non-Guaranteed Contract",*** A preneed contract in which the seller does not promise, assure or guarantee that all or any portion of the costs for the disposition, facilities, service or merchandise identified in a preneed contract will be limited to the price designated in the contract upon the preneed beneficiary's death or that such costs will be otherwise limited or restricted.

- ***"Person",*** any individual, partnership, corporation, cooperative, association, or other entity.

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- ***"Preneed contract",*** any contract or other arrangement which provides for the final disposition of a dead human body, or for funeral or burial services or facilities, or for funeral merchandise, where such disposition, services, facilities or merchandise are not immediately required, including, but not limited to, an agreement providing for a membership fee or any other fee having as its purpose the furnishing of burial or funeral services or merchandise at a discount or at a future date.

- ***"Preneed Agent,"*** any person authorized to sell a preneed contract for or on behalf of a preneed seller.

- ***"Preneed trust",*** a trust established by a seller to receive deposits of, administer, and disburse payments received under preneed contracts by such seller, together with income thereon.

- ***"Provider",*** the person designated to provide the disposition or funeral services, facilities, or merchandise described in a preneed contract.

- ***"Purchaser",*** the person who is obligated to pay under a preneed contract.

- ***"Seller",*** the person who executes a preneed contract with a purchaser and who is obligated under such preneed contract to remit payment to the provider.

- ***"Trustee",*** the trustee of a preneed trust, including successor trustees.

- ***"Trust-Funded Preneed Contract",*** - A preneed contract which provides that payments for the preneed contract shall be deposited and maintained in trust.

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GENERAL LICENSING / REGISTRATION REQUIREMENTS

The Working Group agreed to the following **unanimous** recommendations:

1. All preneed providers/sellers should be formally "licensed" by the Board as opposed to the currently required "registration." A "license" denotes legal obligations and more accurately reflects the authorization being issued by the Board.

2. Regulation of Insurance Contracts: Chapter 436 should clearly provide that the provisions of the Chapter are inapplicable to contracts of insurance. However, Chapter 436 should apply to any preneed contract sold in conjunction with insurance. The current statutory language regarding insurance assignments or beneficiary designations is unclear and should be modified in compliance with the recommendation.

3. Bonding/Insurance: Due to potential costs and questioned availability, preneed licensees should not be required to obtain bonding or insurance as a condition of licensure. The Working Group suggested that increasing consumer protections and regulatory oversight would adequately address regulatory concerns.

The Working Group agreed to the following **consensus** recommendations:

1. Licensure of "preneed agents": Individuals selling preneed for or on behalf of a preneed seller should be licensed by the Board as a "preneed agent" (*see Preneed Agent section for recommended licensing requirements*).

> ! *Comments: APS expressed financial concerns regarding imposing full licensing and disciplinary requirements on agents and supported a "registration" requirement versus licensure.*

2. Regulation of Cemetery Operators: Chapter 436 should be clarified to exempt cemetery operators from the provisions of Chapter 436 if the contract includes the sale of any service or funeral merchandise for which payments must be deposited in an endowed care fund pursuant to Chapter 214 or in a segregated account pursuant to 214.387, RSMo. However, cemetery operator should be subject to Chapter 436 if the contract includes any additional service or merchandise or includes any funeral/disposition service that may only be provided by a licensed Missouri funeral director or embalmer.

> ! *Comments: If adopted, Chapter 436 should retain language that would prevent a seller from artificially pricing funeral services and merchandise to avoid the provisions of Chapter 436.*

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PRENEED CONTRACTS

The Working Group approved the following **unanimous** recommendations:

1. To accommodate the varying forms of preneed, Chapter 436 should define and regulate preneed contracts based on their funding mechanism. Specifically, preneed contracts should be classified as either insurance-funded, trust-funded or joint-account funded. Unique regulatory concerns relate to each type of funding. Accordingly, Chapter 436 should be modified to address each funding option.

2. Standard Forms: While the Working Group supported minimum preneed contract requirements, as detailed below, a standard preneed contract form should not be required. Preneed contracts can vary significantly based on the applicable needs of the consumer and individual seller or legal requirements. Adoption of a standard form to accommodate all of these interests may be difficult.

> ! ***Comments:*** *Although MFDEA supported the vote, representatives stressed that a standard form could be beneficial. Other participants suggested granting the Board rulemaking authority to adopt a standard form if deemed necessary.*

3. Minimum Requirements: Preneed contracts should be in writing and should clearly and conspicuously:
   - Include the name, address and phone number of the purchaser, beneficiary, provider and the seller;
   - Detail the disposition or facilities, services or merchandise requested.
   - Identify terms for cancelling the contract by the purchaser or by the seller for payment default.
   - Identify the funding mechanism including, the trust or financial institution where preneed funds will be held or the insurance company issuing an insurance policy.
   - Be signed by the purchaser, the preneed agent and the seller or a representative.

> ! ***Comments:*** *MFDEA recommended that the contract should also be signed by the provider.*

4. Record Keeping: Preneed sellers should maintain "adequate records" of preneed contracts for the duration of the contract and for no less than five (5) years after the final disposition of the beneficiary, cancellation of the contract or after the facilities, services or merchandise have been provided. Contracts should be provided to the Board on request. *Note: The five (5) year record keeping requirement is consistent with the auditing period recommended by the Working Group.*

> ! ***Comments:*** *Funeral Consumers Alliance recommended that sellers should also file a copy of all preneed contracts sold with the Board. While the Board understands the concern, maintaining and storing these records may be burdensome and costly. The Board indicated that production on request would satisfy regulatory concerns.*

5. Voidability: Similar to current law, preneed contracts not in compliance with Chapter 436 should be rendered void and unenforceable at the option of the purchaser. If rendered void, payments may be recoverable by the purchaser or their legal representative plus attorney fees.

6. On the death or legal incapacity of the purchaser, all rights or remedies of the purchaser should accrue to the benefit of the purchaser or his/her successor as designated in the contract. Proceeds payable under a life insurance contract, should be governed by insurance law and the insurance contract. [WORKING GROUP NOTE: Bill suggested incorporating the right of sepulcher law under 194.119].

The Working Group approved the following **consensus** recommendations:

1. Irrevocable Contracts: A preneed contracts should only be designated as irrevocable if the contract is being used to qualify for Medicaid (i.e.-for "spend down"). Purchasers should be clearly granted the right to cancel, transfer or rescind a preneed contract with or without cause.

> ! ***Comments:*** *Kutis Funeral Home suggested that purchasers should also be given the option to make the contract irrevocable. Kutis suggested this would protect purchasers who may want to protect the contract and insure that funds will be used as directed.*
>
> *Alternatively, Homesteaders Life Insurance Co., suggested the funding for preneed contracts should be made irrevocable and not the contract itself. The commenter remarked that irrevocable contracts may hinder a consumer's freedom of choice.*

2. Minimum Requirements: In addition to the recommendations above, a consensus of the Working Group also recommended that preneed contracts should:
   - Designate whether the contract is revocable or irrevocable in a recognizable font.
   - Include mandatory consumer disclosures as established by the Board by rule.
   - Identify the amount/percentage of administrative expenses to be retained by the seller.

> ! ***Comments:*** *Meierhoffer Funeral Chapel, Kutis Funeral Chapel and APS objected to this requirement and to disclosing administrative expenses to the purchaser. However, a consensus of participants believed that, at a minimum, the purchaser should know what he/she is paying for. Under the objection, the seller would be authorized to charge an expense that it never discloses. At the time of cancellation or transfer, the purchaser may not know what amount is subject to refund or the amount actually paid for the services requested. A consensus of participants indicated that disclosure would enhance consumer protection and result in an informed transaction.*

- Identify if the contract is guaranteed or non-guaranteed on the face of the contract in a recognizable type (i.e.- a 12 to 13 point font).

> ! ***Comments:*** *APS suggested an 8-point font is considered recognizable and acceptable.*

3. Contract Redesignation/Conversion: Sellers/providers should be prohibited from redesignating a preneed contract as a trust-funded, insurance-funded or joint-account funded preneed contract without the consent of the purchaser.

> ! ***Comments:*** *Funeral Consumers Alliance suggested that purchasers should also be given a written statement identifying the financial consequences of the redesignation (i.e.- reduction in cash surrender value, interest accrual and fees).*
> *Alternatively, Stalter Legal Services suggested that conversion should be allowed with regulatory approval and without consumer consent. Stalter suggested that conversion may be beneficial for smaller trusts. Additionally, Stalter suggested that facts and circumstances may warrant a change in funding but the expense of seeking purchaser consent could be prohibitive. Stalter suggested conversion may alternatively be in the purchaser's best interest, however, the explanation would likely be confusing.*

> ! ***Comments:*** *The Board also recommended that contracts include notification that complaints regarding preneed sellers/providers may be forwarded to the Board and the current number/address of the Board. [AARP, the Silver Haired Legislators and the Funeral Consumers Alliance also agreed with this suggestion]. However, APS and Meierhoffer Funeral Chapel objected on the grounds that the disclosure may render the Board the de facto arbiter for all contract issues that may arise and would lead to the Board hearing issues that could have been resolved by the parties.*

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PRENEED AGENTS

The Working Group approved the following consensus recommendations:

1. Licensing/Renewal Requirements:
   - Applicants must be of good moral character, remit a licensing fee and have a high school diploma or the equivalent.

> ! *Comments: APS objected to imposing a good moral character or a high school diploma requirement for preneed agents.*

   - To demonstrate minimum proficiency in Chapter 436, applicants should be required to successfully pass the Missouri law examination, provided that currently licensed Missouri funeral directors should not be required to take an additional examination.

> ! *Comments: The Missouri law examination is currently offered by the Board and tests basic knowledge of Chapter 436 and Missouri law governing funeral directing. However, MFDEA objected to exempting currently licensed funeral directors from examination because funeral directors may have taken the examination a significant time ago. MFDEA indicated that funeral directors selling preneed should be required to demonstrate their current understanding of Chapter 436. Although Stalter Legal Services did not support full examination for funeral directors, Stalter recommended that funeral directors should be required to demonstrate a fundamental understanding of Chapter 436 on a periodic basis.*
> *Stalter Legal Services also suggested that funeral directors should be exempted from obtaining another license. Alternatively, Meierhoffer Funeral Chapels and Kutis Funeral Home suggested exempting apprentice funeral directors from just the examination. Meierhoffer also suggested an exemption for licensed insurance producers.*

2. Reporting: Preneed agents should report the name and address of all sellers that the agent will be selling for. Agents should notify the Board in writing within 15 days of any amendments/changes.

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PRENEED PROVIDERS

The Working Group unanimously approved the following recommendations:

1. Authorized Providers: In recent years, suggestions have been made that only Missouri licensed funeral establishments or cemetery operators should be authorized to serve as a preneed provider. However, private individuals are currently authorized by Missouri law to sell funeral merchandise preneed or at-need. In accordance with current law, and in light of recent concerns raised by the Federal Trade Commission, preneed provider licensing should not be restricted solely to funeral establishments or cemetery operators. However, it should be clarified that Chapter 436 does not exempt any person from the licensing requirements of Chapter 333 governing funeral directing.

2. Licensing/Renewal Requirements:
   - Applicants must be of good moral character, remit a licensing fee and have a high school diploma or the equivalent. If a corporation, licensure/renewal requirements should be applicable to each officer, director, manager or controlling shareholder.
   - Providers operating as business entities must be properly registered with the Missouri Secretary of State and authorized to conduct business in Missouri.

3. Provider Obligations: Chapter 436 should clearly state that the provider designated in a preneed contract is obligated to provide the disposition, facilities, services or merchandise designated in the preneed contract.

4. Contractual Arrangements: Providers must have a written agreement with each preneed seller that the provider has authorized to designate the licensee as a provider in a preneed contract. This may potentially eliminate the possibility of a provider being obligated to fulfill a preneed contract without the provider's consent.

5. Reporting: Providers should report to the Board the name and address of its custodian of records and of all sellers authorized to name the licensee as a provider. Providers should notify the Board in writing within 15 days of any amendments/changes.

▪

> **!** *Comments: Although Stalter Legal Services supported the vote, Stalter questioned whether a separate license should be required for the provider servicing the contract. Stalter commented that licensure would only apply to entities not licensed under Chapter 333 governing funeral directors/establishments and that a license requirement may be burdensome if the provider does not handle consumer funds.*

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PRENEED SELLERS

The Working Group adopted the following unanimous recommendations:

1. General Operation: Preneed sellers should have the option to sell either a trust-funded, joint-account funded or insurance-funded preneed contract. Sellers should notify the Board of the type of contracts to be sold and should be prohibited from offering any preneed contract other than the type designated.

2. Licensing/Renewal Requirements:
   - Preneed sellers must be of good moral character, remit a licensing fee and have a high school diploma or the equivalent. If a corporation, licensure/renewal requirements should be applicable to each officer, director, manager or controlling shareholder.

     ! ***Comments***: *Stalter Legal Services suggested that requiring good moral character for each officer, director, manager or controlling shareholder of the corporation would be "excessive and vague."*

   - Sellers operating as business entities must be properly registered with the Missouri Secretary of State and authorized to conduct business in Missouri.
   - For purposes of licensure, a seller should only be required to establish a preneed trust if the seller is issuing trust-funded preneed plans. A trust should not be required if the seller is selling joint-account or insurance-funded preneed plans only.

3. Contractual Arrangements: Sellers should be prohibited from designating, or allowing the designation of, any provider in a preneed contract unless the seller has a written agreement with the provider authorizing the seller to make the designation. This could eliminate the possibility of a provider being obligated to fulfill a preneed contract without the provider's consent. The written agreement between the provider and seller should include:
   - Consent from the provider authorizing the seller to designate the licensee as a provider.
   - Procedures for tracking preneed fund payments received by the provider.

     ! *Comments*: *Stalter Legal Services acknowledged that several things "should" be included in a seller/provider contract but generally questioned whether contract requirements should be governed by statute.*

4. Reporting: Sellers should report to the Board the name and address of its custodian of records and of all providers that have authorized the seller to name the licensee as a provider. Sellers should notify the Board in writing within 15 days of any amendments/changes.

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5. Record Keeping: Sellers should maintain "adequate records" of preneed contracts for the duration of the contract and for no less than five (5) years after the final disposition of the beneficiary, cancellation of the contract or after the facilities, services or merchandise have been provided. Copies of preneed contracts should be provided to the Board upon request. *Note: The five (5) year record keeping requirement is consistent with the auditing period recommended by the Working Group.*

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The Working Group approved the following consensus recommendations:

1. Trusting Structure: Currently, a seller is authorized to retain 20% of the initial preneed payments for administrative expenses and is not required to deposit funds into trust until the seller has retained the allowed 20%. The Working Group recommended reversing the trusting structure to require the seller to deposit 100% of all contract payments into trust. After depositing, sellers should then be allowed to submit a request to the trustee for the allowed administrative expense. *(see administrative expense recommendations below).*

> ! ***Comments:*** *Participants suggested that 100% initial funding would document proper accounting and allow for a more accurate examination/audit. However, APS, Meierhoffer Funeral Chapel and Kutis Funeral Home suggested this change would create additional administrative expenses that could be passed onto the consumer and strongly recommended retaining the current process of allowing the seller to retain the first 20% of contract payments and to trust the remaining 80%.*
>
> *Alternatively, Stalter Legal Services suggested that recommendations for 100% trusting are "shortsighted and ignore the realities of other states' laws." Stalter indicated that income accrual issues are more important to consumer protection. Stalter commented that the recommendation exemplifies the current misunderstanding regarding sales expenses versus administrative expenses.*

2. Regardless of the trusting structure, the seller's administrative expense should be payable from the initial payments received.

3. Reporting: Sellers should report the name and address of its trustee to the Board and should notify the Board in writing within 15 days of any amendments/changes.

The Working Group approved the following consensus recommendations:

4. Preneed contract payments should be deposited into trust within sixty-days of receipt by the seller.

> ! ***Comments:*** *It was suggested that sixty-days would allow sufficient administrative time for processing and forwarding payments to the seller and for clearing payments made by check. However, other participants suggested that a 30-45 day deposit requirement would increase consumer protection.*

The following Working Group recommendations were unresolved:

After considerable discussion and research, the Working Group did not reach a consensus or majority vote on the recommended allowance for seller administrative expenses. However, Participants recommended the following amounts:

5. *Administrative Expenses:*
   - **Three quarters (¾) of 1% of the contract's face value**.
     - Josh Slocum. *Note: This provision models New York's preneed legislation.*
   - **10 % of face value: Although several participants indicated consumers may be better protected with a lower amount of administrative expenses, a slight majority of participants agreed that 10% of the face value would be a reasonable compromise.**

- AARP
- Bob Baker
- Darlene Russell
- MFDEA
- Silver Haired Legislature
- Stalter Legal Services
- Rep. Meadows

- **10 – 15% of face value**
  - DIFP
- **20% of face value:** A slight majority of participants recommended retaining the current 20% allowance for administrative expenses *(however see comments below)*.
  - The Board
  - Layne Renaissance Chapel, LLC
  - Mike Meierhoffer
  - Kutis Funeral Home
  - American Prearranged Services
  - Mike Winters

! ***Comments:*** *The Board recommended that it would support a 20% administrative expense* ***only if a 100% trusting requirement is imposed.***

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GENERAL REQUIREMENTS:

The Working Group approved the following unanimous recommendations:

1. Uniform Trust Law/Uniform Principal and Income Act: The Working Group was asked to make recommendations on whether the provisions of the Uniform Trust Act under Chapter 469 and the Uniform Principal and Income Act under Chapter 456 should be incorporated into Chapter 436. After review, Participants indicated that wholly incorporating Chapters 469 and 456 would be inappropriate given the nature of preneed. Specifically, Participants suggested that the provisions of Chapters 469 and 456 which allow the trustee and grantor to modify the statutory requirements by agreement, or which require consideration of the competing interests of beneficiaries, would conflict with the underlying principals/purpose of a preneed trust. It was further suggested that the definition of income in Chapter 469 is inappropriate for preneed. Accordingly, the Working Group recommended against blanketly incorporating the provisions of Chapter 469 and Chapter 456.

> ! ***Comments:*** *Several of the consumer protection and fiduciary requirements contained in Chapters 469 and 456 have been incorporated into the Working Group's recommendations.*

2. Authorized Trustees: Trustees of a preneed trust should be a state or federally chartered institution authorized to exercise trust powers in Missouri.

> ! ***Comments:*** *Bill Stalter recommended that regulation of the trust and trustee functions should be transferred to the Division of Finance. Additionally, Stalter recommended that non-domicile fiduciaries should be required to: 1) consent to service of process in Cole County, 2) respond promptly to reasonable requests for records and 3) agree to administration pursuant to Chapter 436.*

3. Termination of Trust: Consistent with current law, a preneed trust should terminate when trust principal no longer includes any payments made under any preneed contract. On termination, the trustee should distribute all trust property, including principal and undistributed income, to the seller that established the trust. NOTE TO WORKING GROUP: Meierhoffer suggested that this should be changed to termination when all contracts covered by the trust have been fulfilled.

The Working Group approved the following consensus recommendations:

4. Trust Expenses: Expenses of the trust, including trustee's fees, legal and accounting fees, investment expenses and taxes should be paid from the trust.

> ! ***Comments:*** *Several participants recommended that expenses of the trust should continue to be paid by the seller directly. Concerns were raised that allowing payment from the trust could reduce trust principal. Other participants remarked the seller's allowed administrative expense should be adjusted to account for the savings for trust and legal fees/expenses.*
>
> *Alternatively, Kutis Funeral Home suggested maintaining the current law and requiring the seller to continue paying these expenses.*

The Working Group approved the following majority recommendations:

5. Income Accrual: Income of the trust should accrue and should not be distributed until the contract is fulfilled or otherwise cancelled.

> ! ***Comments:*** *Several participants recommended that the current income distribution rules should be maintained and income distributions allowed as earned. However, Stalter Legal Services indicated that income accrual is important to the future profitability of the seller and to improved portability.*

TRUSTEE DUTIES:

The Working Group unanimously approved the following recommendations:

6. Investment: The trustees should be governed by the prudent investor rule. Specifically, trustees should invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee should exercise reasonable care, skill, and caution.

7. Standard of Duty: Trustees who have special skills or expertise, or who are named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, should have a duty to use those special skills or expertise when investing and managing trust assets.

8. Trust Review: Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee should review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of Missouri law.

9. Record Keeping: The trustee should maintain "adequate books and records" of all transactions administered through the trust and pertaining to the trust generally.

CONFLICTS OF INTEREST:

The Working Group unanimously agreed that conflicts of interest between trustees and investment advisors should be prohibited. Specifically, the following unanimous recommendations were made:

10. The financial institution and investment advisor should not be controlled by or under common control with the seller.

> ! ***Comments:*** *Stalter Legal Services recommended that while the trustee should be independent of the seller, it is unnecessary for the investment advisor to be independent of the seller. Stalter commented that asset management is enhanced by investment advisors who understand the unique circumstances of the Trustor/seller. Stalter noted that under the prudent investment standard recommended by the Working Group, fiduciaries would be otherwise required to ensure the prudence of the advisor selection and the advisor's compliance with the prudent investor rule. Stalter commented that Chapter 436 breached these protocols by exculpating the trustee from fiduciary oversight.*

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11. "Control", "controlled by" and "under common control with" should be defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and polices of a person, whether through the ownership of voting securities, by contact other than the power is the result of an official position with or corporate office held otherwise, unless the power is the result of an official position with or corporate office held by the person.

12. Control should be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent or more of the voting securities of any other person. This presumption may be rebutted by a showing to the board that control does not in fact exist to determine within its sole discretion that control does not in fact exist.

13. Trustees should be prohibited from selling, investing or authorizing any transaction involving the investment or management of trust property with:

- The spouse of the trustee;
- Descendants, siblings, parents, or spouses of a preneed seller or an officer, manager, director or employee of a preneed seller, provider or counselor;
- Agents or attorneys of the trustee, preneed seller or provider; or
- A corporation or other person or enterprise in which the trustee, preneed seller, preneed provider, or a preneed provider owns a significant interest or has an interest that might affect the trustee's best judgment.

> **! *Comments:*** *Stalter Legal Services recommended that a seller should be allowed to have a relationship with the advisor so long as the fiduciary remains responsible for the trust's compliance with the prudent investor rule and retains title of the assets.*

INVESTMENT OF FUNDS:

The Working Group unanimously approved the following recommendations:

14. Investment of trust funds should be limited to investments that have reasonable potential for growth or producing income.

15. Trustees should be prohibited from investing trust funds in any term life insurance product.

16. Asset diversification should be mandatory unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better serviced without diversifying.

> **!** *Comments: Stalter Legal Services suggested that diversification would be difficult/impracticable if fiduciaries are not afforded more latitude in providing pooled investments or collective investment trusts for smaller operators.*

17. In investing trust assets, a trustee should be required to consider:

- General economic conditions;
- The possible effect of inflation or deflation;
- The expected tax consequences of investment decisions or strategies;
- The role that each investment or course of action plays within the overall trust portfolio;
- The expected total return from income and the appreciation of capital;
- Other resources of the beneficiaries known to the trustee;
- Needs for liquidity, regularity of income, and preservation or appreciation of capital;
- An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries; and
- The size of the portfolio, nature and estimated duration of the fiduciary relationship and distribution requirements under the governing instrument.

18. Trustees and preneed licensees should be prohibited from procuring or accepting a loan against any investment or asset of the trust.

The Working Group approved the following consensus recommendations:

19. Commingling of trust funds should only be allowed if the trustee maintains adequate records that individually and separately identify payments and distributions and the income allocated for each preneed contract. However, commingling should be limited to payments received for Missouri preneed contracts.

> ! ***Comments:*** *APS commented that income for an individual preneed contract may be difficult to determine, however, APS agreed that an estimate could be made based on the contract's percentage of the total trust. Alternatively, Stalter Legal Services recommended that restricting commingling to Missouri preneed contracts may be disadvantageous for smaller trusts and could defeat the purpose of allowing collective investing.*

DELEGATION OF TRUST DUTIES/INDEPENDENT INVESTMENT ADVISORS:

The Working Group approved the following consensus recommendations:

20. Delegation of Trust Duties: Trustees should only delegate duties and powers to an agent that a prudent trustee of comparable skills could properly delegate under the circumstances.

21. If an agent is selected, the trustee should exercise reasonable care, skill, and caution in:
- Selecting an agent;
- Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- Periodically reviewing the agent's actions and monitoring the agent's performance and compliance with the terms of the delegation.

22. In performing a delegated function, an agent should owe a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

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23. Agents that accept a delegation of powers or duties from a trustee should be deemed to have consented to the jurisdiction of Missouri courts.

24. By selecting an agent, a trustee should not be relieved of any duty or responsibility imposed on the trustee by Missouri law.

25. Independent Investment Advisors: Trustees should be allowed to select an independent investment advisor subject to the conflict of interest prohibition and the prudent investor rule. Sellers should not be blanketly exempted from liability for the acts of an independent investment advisor.

The Working Group approved the following recommendations by majority vote:

26. Independent Investment Advisors: Sellers should also be allowed to approve the investment advisor selected by the trustee.

> **!** ***Comments:*** *The Department of Insurance, Division of Finance, State Board and the Missouri Attorney General's Office unanimously agree that seller approval of the investment advisor would hinder the independence of the investment advisor and threaten consumer protection. The suggestion proposed would allow the NPS concerns to reoccur. Consumers should not, and cannot, be placed at continued risk of unscrupulous business practices. A trustee of a financial institution should be more than capable of selecting an investment advisor that would be adequate for the trust. Seller "approval" is not and should not be required.*

WORKING DRAFT

INSURANCE-FUNDED PRENEED PLANS

The Working Group adopted the following **unanimous recommendations**:

1. Although commonly used, Chapter 436 does not clearly provide for insurance-funded preneed contracts. As such, insurance-funded preneed plans should be recognized as a preneed funding mechanism.

2. Applicability of Insurance Law: Insurance law should not apply to preneed contracts but should apply to any insurance sold with a preneed contract.

3. Fees/Expenses: Sellers should not charge, assess or collect any administrative fees for an insurance-funded preneed plan. Instead, sellers should only be allowed to receive/collect from a purchaser the amount required to pay insurance premiums as established by the insurer.

4. Payment Handling: Payments received by the seller/provider for insurance-funded preneed contracts should be forwarded to the insurer within thirty (30) days of receipt.

> ! ***Comments:*** *Homesteaders remarked that sellers/providers should only be authorized to collect the initial premium payment. All subsequent premium payments should be made directly to the insurer.*

5. Insurance Restrictions: Sellers should be prohibited from selling or offering to sell any term life insurance product to fund a preneed contract. However, a purchaser should be allowed the option of assigning proceeds from a term-life insurance product to a provider, or to designate a provider as a beneficiary under a preneed contract.

> ! ***Comments:*** *MFDEA recommended that a blanket prohibition may be overreaching and that consumers should still be allowed to assign proceeds from a pre-existing term-life product to a provider or to designate a funeral establishment as the beneficiary. MFDEA remarked that term life insurance may be the only affordable option for some consumers or the only insurance option that may be available to consumers that are older or have significant health problems. It was also suggested that the assignment or designation of a term life insurance product may be necessary for purchasers attempting to qualify for Medicaid.*

6. Reporting: Sellers should report the name and address of all insurance companies used by the seller for insurance funding to the Board and should notify the Board in writing within 15 days of any amendments/changes.

The Working Group adopted the following consensus recommendation:

5. Contract Requirements: Insurance-funded preneed contracts should include:
   - Terms for cancellation by the purchaser or seller;
   - Notice that cancellation of the preneed contract will not cancel the life insurance policy funding the preneed contract.
   - Notice that insurance cancellation must be made in writing to the insurer.

- Notice that the purchaser will only receive the cash surrender value of the policy, which may be less than the amount paid in, if cancelled after a designated time;
- Notice that the purchaser has the right to reassign/transfer the beneficiary designation or assignment to another funeral home.

! ***Comments:*** *Concerns were raised that the majority of this information should be provided by the insurer and included in the insurance contract because it would require the seller to summarize the insurance contract. Alternatively, Homesteaders suggested use of the National Association of Insurance Commissioner's model for insurance funded disclosures.*

Alternatively, MFDEA suggested that sellers should also disclose the amount to be refunded if the insurance contract is cancelled and the total amount the purchaser would be required to pay for their funeral if funded through insurance. MFDEA suggested these disclosures should be required separate from the insurance contract itself.

Funeral Consumers Alliance suggested the contract should also include the amount of any insurance commissions.

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JOINT ACCOUNT-FUNDED PRENEED CONTRACTS

A consensus of the Working Group suggested the current provisions for joint-account funded preneed plans are adequate and should be maintained. However, the Working Group approved the following consensus recommendations:

1. Chapter 436 should be clarified to provide that a preneed seller may sell joint-account funded contracts. Currently, Chapter 436 only authorizes joint accounts for providers.

2. Reporting: Sellers should report the name and address of all financial institutions where a joint account is held and should notify the Board in writing within 15 days of any amendments/changes.

3. A seller should not be required to establish or maintain a trust if the seller is utilizing joint-account funded preneed contracts only.

! ***Comments:*** *MFDEA recommended that joint-funded preneed contracts should be generally subject to the same deposit, cancellation, portability and income allocation requirements as trust-funded preneed contracts.*

Alternatively, Stalter Legal Services indicated that "while small funeral homes need the joint account option as an alternative to insurance and trusting, there seems to be general concern the arrangement has been abused by funeral directors who are placing large sums of funds in a single account or CD. It is understandable that funeral directors would prefer to retain sole control of the funds, and avoid expenses but [joint accounts] exposes the purchasers' funds to the claims of the funeral home creditors (i.e.- a casualty judgment)." Accordingly, Stalter recommended that funeral directors should not be permitted to use the joint account arrangement if their aggregate funds exceed the $100,000 FDIC coverage.

WORKING DRAFT

PAYMENTS TO PROVIDERS

The Working Group adopted the following unanimous recommendations:

1. Payment Requests: Providers requesting payment should submit a "certificate of performance" to the seller certifying that the provider has rendered services to the preneed beneficiary as provided in the contract or as requested. The certificate of performance should be signed by both the provider and the person authorized to make arrangements on behalf of the beneficiary.

2. Sellers should remit payment to the provider within thirty (30) days of receiving the certificate of performance.

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ALLOCATION OF PRENEED FUNDS (EXPENSES, CANCELLATION & PORTABILITY)

The Working Group dedicated significant discussion to the proper allocation of preneed contract funds and related interest. The Working Group considered the proper allocation of preneed funds based on four distinct preneed scenarios:

1. **Contract Fulfillment:** The beneficiary dies and the preneed contract is fulfilled by the original seller and provider according to the contract terms. In this scenario, the purchaser has paid all outstanding costs and the provider and seller have complied with all contractual obligations.

2. **Transfer of Providers**: The purchaser decides to maintain the preneed contract but desires to select a different provider to perform the disposition or to provide the facilities, services or merchandise identified in the contract.

3. **Cancellation By Purchaser**: The purchaser decides to cancel the contract entirely. Here, the purchaser does not wish to designate a new provider or make other changes to the contract. Instead, the contract is to be completely terminated.

4. **Cancellation By Seller For Non-Payment:** This option is exercised by the seller in those instances when the purchaser has failed to remit payment as required by the contract. If exercised, the preneed contract is cancelled and is no longer in effect.

Each of the foregoing scenarios are vastly different and raise different consumer and funding concerns. Accordingly, the Working Group recommends that the Joint Committee separately consider the allocation of preneed funds/interest for each scenario.

A. Contract Fulfillment:

The Working Group approved the following unanimous recommendations:

- On fulfillment, sellers should be entitled to payment of all funds held in trust and any related income, unless otherwise provided in the contract.

B. Transfer of Providers:

The Working Group approved the following unanimous recommendations:

- Chapter 436 should clearly allow for 100% portability. Purchasers should have complete and unrestricted freedom to select an alternative provider and should not be penalized or assessed any additional fee/costs for a transfer.

- The Seller should be required to accept the new provider designated by the purchaser if the provider agrees to accept the remaining payments owed to the original provider, as designated in the contract. Here, the newly designated provider would simply "step into the shoes" of the original provider for purposes of payment and fulfilling the contract.

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! ***Comments:*** *While MFDEA generally supported this recommendation, concerns were raised that: 1) A seller should not be forced into a legal relationship with a party the seller does not have a contract with and with whom the seller does not wish to be in business with and 2) A seller/provider could be forced to invest funds on behalf of, and for the benefit of, a competitor.*

- Interest should be allocated to the seller as provided in the original contract.

C. Purchaser Cancellation:

The Working Group approved the following unanimous recommendations:

- Purchasers should be entitled to a full refund of payments if the purchaser cancels the contract within thirty (30) days after receiving a fully executed contract.
- Purchasers should be allowed to cancel after the thirty day cancellation period with or without cause (see additional recommendations below).

Additional Recommendations:

! ***Comments:*** *MFDEA commented that cancellation and portability cannot be adequately discussed until the allowed amount for administrative expenses is determined. In accordance with MFDEA's comment, the recommended allocation and refunding are generally based on the administrative expense recommended by the participant. Accordingly, the foregoing recommendations. The following allocation/refunding amounts are being provided for informational purposes only. Should the amount of administrative expenses change, the recommendations would also change.*

After extensive discussion and research, the Working Group did not reach a unanimous, consensus or majority recommendation for the refunding of preneed funds if the purchaser cancels the contract after the 30-day review period. However, Working Group Participants suggested the following allocation/refund amounts:

- 100% of all funds held in trust. *Note: This option would require the seller to refund its expenses to the purchaser plus any related income.*
- 100% of the amount paid by the purchaser. *Note: This option would require the seller to refund expenses, however, the seller would retain any related income.*
- 90% of the amount paid by the purchaser. *Note: This option would allow the seller to retain a portion of the funds for expenses plus any related income.*
- 90% of all payments plus a portion of the income earned. *Note: This option would allow the seller to retain a portion of the funds for expenses, however, a portion of the income would be refunded to the purchaser.*

- 80% of the payments made by the purchaser. *Note: This option would allow the seller to retain its expenses plus any related income.*
- 80% of all payments plus a portion of the income earned. *Note: This option would allow the seller to retain a portion of the funds for expenses, however, a portion of the income would be refunded to the purchaser.*
- 80% of all payments plus one percent of any income earned. *Note: This option would allow the seller to retain its administrative expenses, however, 1% of income would be refunded to the purchaser. [State Board Recommendation]*

! ***Comments:*** *The above recommendations were also suggested based on the premise that 100% of payments will be placed in trust with the seller being reimbursed for administrative expenses from the trust. The recommendations would necessarily change if the 100% trusting recommendation is not accepted and the seller allowed to automatically retain its administrative expenses from the initial payments.*

D. Cancellation By Seller For Non-Payment:

The Working Group approved the following consensus recommendations:

- Sellers should be allowed to cancel the contract unilaterally if the purchaser is in default of payment for sixty days *(see additional recommendations for refund provisions)*.
- Prior to cancellation, purchasers should be provided written notification from the seller of the seller's intent to cancel. The notice should be provided thirty days prior to cancellation and should notify the purchaser of the proposed cancellation date and that the contract will be cancelled if payment is not received on or before such dates.

! ***Comments:*** *Currently, a seller can cancel a contract that is 90-days in arrears by notifying the purchaser and issuing the required refund. Notification and cancellation may be completed on the same day. APS suggested the current law is fairer to all parties and should be retained. APS indicated the proposed recommendation could be problematic when handling purchasers that are habitually late.*

- If the seller fails to cancel the contract prior to at-need services being required, the purchaser should be provided the opportunity to remit the payment in arrears. If payment is not remitted, the seller should be required to credit the purchaser's preneed payments towards the at-need cost for services. If a credit is applied, the seller may determine funeral/burial costs based on the seller's at-need prices.

The Working Group approved the following majority recommendations:

- On seller cancellation, 80% percent of the contract payments should be refunded to purchasers. *Note: This option would allow the seller to retain its administrative expenses plus any related income.*

! ***Comments:*** *Other Participants recommended that 100% of all payments made by the purchaser should be refunded to the purchaser. Note: This option would require the seller to refund any administrative expenses, however, the seller would be allowed to retain any income.*

REPORTING REQUIREMENTS

To assist the Board in regulation, the Working Group recommended increasing the information submitted to the Board by preneed licensees as follows:

> ! ***Comments:*** *APS indicated that the majority of information recommended below would be available to the Board upon examination/audit. As a result, APS filed a general objection to the annual reporting requirements and expressed that it would not "be prudent or fair to require preneed sellers to file this much information on annual reports."*

ANNUAL REPORT
REQUIREMENTS FOR ALL PRENEED SELLERS

> ! ***Comments:*** *Sellers should be allowed to submit data electronically.*

The Working Group approved the following consensus recommendations: Annual reports filed with the Board by the seller should include:

1. The purchaser's name and address and preneed contract number, if any, for contracts sold since the last report. The Working Group recommended that contract numbers should not be required but should be provided, if available.
2. The total number and face value of outstanding preneed contracts sold since the last report was filed.
3. The contract amount for each preneed contract sold since the last annual report
4. The name, address and contract number of all preneed agents authorized to sell preneed for the seller.
5. The number of contracts fulfilled by the seller since the last report.
6. The name and address of each provider contracted with the seller.
7. The name and address of a custodian of preneed records.
8. Authorization for the Board to conduct an audit and/or an examination of books and records.
9. Any other information deemed necessary by the Board by rule.

ANNUAL REPORT REQUIREMENTS
FOR TRUST-FUNDED PRENEED CONTRACT SELLERS

The Working Group approved the following consensus recommendations: Annual reports filed by sellers offering trust-funded preneed plans should also include:

(The following should be certified as true and accurate by a corporate office of the trustee.)

1. The name and address of the financial institution where the trust is held and the account number;
2. The trust fund balance as reported in the previous year's report and the current trust fund balance.
3. Principal contributions received since the last report.
4. Total trust earnings and total distributions to the seller since the last report.

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! ***Comments:*** *APS objected to disclosing the trust earnings on the grounds that company profits should not have to be reported. APS remarked that other businesses are not required to disclose this confidential information.*

5. Total expenses since the last report, excluding distributions to the seller.
6. A statement of assets and investments of the trust listing cash, real or personal property, stocks, bonds, and other assets. The listing should show cost, acquisition date and current market value of each asset and investment.

! ***Comments:*** *APS objected to identifying the assets and investments of the trust. However, this information would assist the Board in its regulatory functions and could be vital to determining whether an examination or audit may be necessary. Additionally, accurate reporting of assets/investments from the trustee would help to ensure the solvency of the trust and to ensure that funds are being appropriately invested (i.e.- products such as term life insurance are not being purchased).*

ANNUAL REPORT REQUIREMENTS FOR JOINT-ACCOUNT FUNDED PRENEED CONTRACT SELLERS

The Working Group approved the following unanimous recommendations: Annual reports filed by sellers offering joint-account funded preneed plans should also include:

(The following should be certified as true and accurate by a corporate officer of the financial institution.)

1. The number and address of the Missouri financial institution where the joint account is held and the account number.
2. The amount on deposit in each joint account.
3. The joint account balance reported the previous year.
4. Principal contributions placed into each joint account since the last report.
5. Total earnings since the previous report.
6. Total distributions to the seller from each joint account since the previous year.
7. Total expenses deducted from the joint account since the last report, excluding distributions to the seller.

! ***Comments:*** *Stalter Legal Services recommended that the annual report should be certified by the trust officer responsible for the account and not a corporate officer.*

ADDITIONAL ANNUAL REPORT REQUIREMENTS FOR INSURER FUNDED PRENEED CONTRACT SELLERS

The Working Group approved the following unanimous recommendations: The annual report for sellers offering insurance-funded preneed plans should also include:

1. The name and address of each insurer issuing insurance to fund a preneed contract during the preceding year.
2. The status and total death benefit and cash surrender value of each policy in force at the time of the report, if applicable. ***(This should be certified as true and accurate by the insurer.)***

CONSUMER REPORTING / NOTIFICATIONS

The Working Group approved the following consensus recommendations:

- The Board should be granted rulemaking authority to establish consumer disclosure requirements related to portability, cancellation and purchaser refunds.
- Purchasers should be entitled to an annual report from the seller indicating the amount of funds paid by the purchaser during the reporting year and the name and address of the trustee.

> ! ***Comments:*** *APS and Kutis Funeral Home objected to the annual report because administrative and mailing costs would be "extremely burdensome and cost prohibitive." APS objected to reporting payment information to a purchaser on a monthly or annual basis and instead supported reporting if requested by the purchaser.*

- Purchasers should be provided a receipt for each payment made by or on behalf of the purchaser. The receipt should be provided by the person receiving the payment (i.e.- the seller, provider or the agent).

> ! ***Comments:*** *Participants suggested that receipts could be provided by any means agreed to by the purchaser (i.e.- a handwritten or electronic receipt) and could be required monthly or at a longer interval. Meierhoffer Funeral Chapel indicated that a receipt should not be required if payments are made directly to the trustee because these transactions may be otherwise addressed under federal law.*
>
> *Alternatively, MFDEA and Stalter Legal Services suggested that a receipt should only be required for cash payments. If payment is made by check or electronic transfer, the check or transfer acknowledgment should be sufficient. Stalter also indicated that the requirement would be redundant if all payments must pass through the trust and an annual statement is issued by the fiduciary.*
>
> *APS objected to providing the purchaser any type of receipt because the requirement would be "extremely burdensome and cost prohibitive."*

WORKING DRAFT

TERMINATION OF BUSINESS

The Board has experienced significant regulatory difficulty with ensuring that Missouri consumers are adequately protected when preneed providers and sellers cease doing business either voluntarily or involuntarily. As a result, the Working Group approved the following:

PRENEED SELLERS:

The Working Group approved the following consensus recommendations:

- The following notification/reporting requirements should be mandated for preneed sellers:
  - Notice to the Board at least thirty (30) days prior to a seller ceasing business or transferring a majority of its stock/assets.
  - A final annual report filed with the Board which includes a detailed plan indicating how outstanding preneed contracts will be filled and/or satisfied and how assets will be allocated for preneed obligations.
  - Notice to all providers that the seller has ceased doing business thirty (30) days prior to the seller ceasing business or transferring a majority of stock/assets or, in instances of a sale/transfer, within thirty (30) days after completion of the sale/transfer.
  - Notice to consumers that the seller will cease doing business. The notice should include a contact number for questions. Notification should be required at least thirty (30) days prior to ceasing business or, in instances of a sale/transfer, within thirty (30) days after completion of the sale/transfer.
  - Submission of any additional information designated by the Board.
- Upon notification, the Board should have the continuing ability to inspect, examine and/or audit the books and records of the seller to ensure contractual obligations are met.
- The Attorney General should have authority to enter the premises and access/take possession of the books and records of any preneed seller who ceases business without notification to the Board.

PRENEED PROVIDERS:

The Working Group approved the following consensus recommendations:

- The following notification/reporting requirements should be mandated for preneed providers:
  - Notice to the Board at least thirty (30) days prior to the provider ceasing business or transferring a majority of its stock/assets.
  - A final annual report filed with the Board.
  - Notice of the provider's intent to all sellers with whom the provider has outstanding preneed contracts within thirty (30) days prior to the provider ceasing business or, in instances of a sale/transfer of a majority of stocks/assets, within thirty (30) days after the sale/transfer.
  - Upon notification from the providers, sellers should be required to notify all purchasers that the provider has ceased doing business. Notification should include provisions for selecting an alternative provider and should be provided within thirty (30) days after the provider ceasing business.

! ***Comments:*** *APS commented that it would be "extremely burdensome" for the seller to notify purchasers and suggested that providers and the Board should be responsible for the notification. It should be noted, however, that APS opposed providing purchaser information to the Board in the seller's annual report. Further, providers have reported that the seller would have the most current and accurate listing of outstanding preneed contracts.*

Alternatively, Meierhoffer Funeral Chapel objected to notifying the purchaser of the provisions for selecting an alternative provider if the original provider ceases business.

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- Submission of any additional information designated by the Board.

- Upon notification, the Board should have the continuing ability to inspect, examine and/or audit the books and records of the preneed provider to ensure contractual obligations are met.
- The Attorney General should have authority to enter the premises and access/take possession of the books and records any preneed provider who ceases business without notification to the Board.

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AUDITS, INVESTIGATIONS AND EXAMINATIONS

The Working Group unanimously agreed that effective regulation of the preneed industry may only be accomplished by strengthening, clarifying and expanding the current investigation, examination and audit authority of the Board.

The Working Group unanimously recommended the following:

- The Board should be granted clear authority to:
  - Issue subpoenas to compel the production of preneed books and records of any licensee or trustee.
  - Enter the premises or establishment where preneed business is conducted, or is advertised to be conducted, for the purposes of accessing books and records.
  - Conduct random or targeted inspections, with or without cause and at the discretion of the Board.
  - Investigate complaints and to investigate licensees to determine compliance with Chapter 436.
  - Conduct random or targeted examinations of preneed books and records, at the discretion of the Board. The Board should be authorized to conduct an examination of each preneed seller at least once every five years.

> ! ***Comments:*** *Although the Working Group initially recommended every three years, the Board expressed concerns regarding cost and the financial feasibility of conducting such examinations.*

  - Sellers solely issuing joint-account funded plans should be exempt from the examinations conducted by the Board every five years. However, the Board should retain authority to audit or examine the seller, if deemed necessary.
  - Audit a preneed seller with cause if the Board has reasonable grounds for verifying the proper handling of preneed funds.
- Inspections, investigations, audits and examinations should be authorized with or without a complaint.
- The Board may request DIFP, the attorney general or the division of finance to designate investigator(s) or financial examiner(s) to assist the Board with any inspection, investigation, examination or audit.
- Preneed licensees should clearly be required to cooperate with any inspection, investigation, examination or audit conducted by the Board, DIFP, the attorney general or the division of finance.
- The preneed books and records of licensees should be made available to the Board upon request.

> ! ***Comments:*** *Stalter Legal Services indicated the Board's review should be limited to preneed books and records and should not encompass all of the seller's books and records.*

- Costs of an inspection, investigation, examination or audit should be funded through licensing fees and/or fees on preneed contracts as established by the Board by rule.

> ! ***Comments:*** *The Working Group unanimously agreed that examination/audit costs should not be charged to the licensee. Depending on the scope of the audit/examination, costs may be excessive and would be difficult to determine prior to the audit/exam. As a result, charging costs to licensees may have an overwhelming impact and could potentially result in licensee bankruptcies.*

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ATTORNEY GENERAL AUTHORITY

The Working Group unanimously recommended the following:

If a violation of Chapter 436 is found after an investigation, audit or examination, the Attorney General should be authorized to initiate a judicial proceeding to:

- Declare rights.
- Approve a nonjudicial settlement.
- Appoint or remove a trustee.
- Interpret or construe the terms of the trust.
- Determine the validity of a trust or its terms.
- Compel a trustee to report or make an accounting.
- Enjoin a trustee from performing a particular act or to grant the trustee any necessary or desirable power.
- Review the actions of the trustee, including the exercise of any discretionary power.
- Determine trustee liability and to grant any available remedy for breach of a trust.
- Approve employment and compensation of agents.
- Determine the propriety of investments.
- Determine the timing and quantity of distributions and disposition of assets.
- Utilize any other power vested in the attorney general.

NOTE FOR WORKING GROUP: The Division of Finance suggested further review of this provision.

! ***Comments:*** *MFDEA recommended that any legislation should clearly provide that liability, remedies and injunctions should be determined by a court and not the Attorney General. Alternatively, Stalter Legal Services also suggested that Missouri should consider a preneed reporting system that provides a grading of a sellers' compliance with preneed law, as currently employed by the Texas Department of Banking. Stalter commented that the industry and consumers should be afforded transparency with regard to preneed compliance or regulators will continue to bear full responsibility for identifying and addressing potential abuses.*

WORKING DRAFT

DISCIPLINARY AUTHORITY

The Working Group unanimously agreed that to effectively regulate Chapter 436, the Board's disciplinary process must be streamlined to allow for a more efficient and effective remedy. This would necessarily include expanding the current grounds for discipline as well as the disciplinary tools available to the Board.

<u>The Working Group unanimously recommended the following legislative change:</u>

Section A.1. The board may refuse to issue any certificate of registration or authority, permit or license required under this chapter for one or any combination of causes stated in subsection 2 of this section. The board shall notify the applicant in writing of the reasons for the refusal and shall advise the applicant of his or her right to file a complaint with the administrative hearing commission as provided by chapter 621, RSMo.

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use of any controlled substance, as defined in chapter 195, RSMo, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by this chapter;

(2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution under the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated under this chapter, for any offense involving a controlled substance, or for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed;

(3) Use of fraud, deception, misrepresentation or bribery in securing any certificate of registration or authority, permit or license issued under this chapter or in obtaining permission to take any examination given or required under this chapter;

(4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;

(6) Violation of, or assisting or enabling any person to violate, any provision of sections 436 regulating preneed, or of any lawful rule or regulation adopted pursuant thereto;

(7) Impersonation of any person holding a certificate of registration or authority, permit or license or allowing any person to use his or her certificate of registration or authority, permit, license or diploma from any school;

(8) Disciplinary action against the holder of a license or other right to practice any profession regulated by this chapter granted by another state,

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territory, federal agency or country upon grounds for which revocation or suspension is authorized in this state;

(9) A person is finally adjudged insane or incompetent by a court of competent jurisdiction;

(10) Misappropriation or theft of preneed funds;

(11) Assisting or enabling any person to practice or offer to practice any profession licensed or regulated by the provisions of Chapter 436 regulating preneed who is not registered and currently eligible to practice thereunder;

(12) Issuance of a certificate of registration or authority, permit or license based upon a material mistake of fact;

(13) Failure to display a valid certificate or license if so required by this the provisions of Chapter 436 regulating preneed or any rule promulgated thereunder;

(14) Violation of any professional trust or confidence;

(15) Making or filing any report required by the provisions of Chapter 436 regulating preneed which the licensee knows to be false or knowingly failing to make or file a report required by the provisions of Chapter 436 regulating preneed;

(16) Use of any advertisement or solicitation which is false, misleading or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed, or;

(19) Willfully and through undue influence selling a preneed contract.

3. After the filing of such complaint, the proceedings shall be conducted in accordance with the provisions of chapter 621, RSMo. Upon a finding by the administrative hearing commission that the grounds, provided in subsection 2 of this section, for disciplinary action are met, the board may, singly or in combination, censure or place the person named in the complaint on probation on such terms and conditions as the board deems appropriate for a period not to exceed five years, or may suspend, for a period not to exceed three years, or revoke the license, certificate, or permit.

4. Notwithstanding any other provision of this section, the board may automatically suspend a license if the Board finds, after an inspection, examination, investigation or audit, a shortage in any preneed trust or joint account which exceeds 20% of the total amount required to be held or deposited in the trust or account pursuant to the provisions of Chapter 436 regulating preneed.

5. Any person whose license is suspended under subsection 4 of this section may appeal such suspension to the administrative hearing commission. Notice of such appeal must be received by the administrative hearing commission within ninety days of mailing, by certified mail, the notice of suspension. Failure of a person whose license was suspended to notify the administrative hearing commission of his or her intent to appeal waives all rights to appeal the suspension. Upon notice of such person's intent to appeal, a hearing shall be held before the administrative hearing commission pursuant to Chapter 621.

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6. Use of the procedures set out in this section shall not preclude the application of the provisions of subsection 2 of section 333.061.

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ENFORCEMENT AUTHORITY

INJUNCTIVE/CIVIL AUTHORITY

The Working Group unanimously recommended the following:

- Similar to current law, the Board should have authority to seek injunctive relief or any other civil authority necessary to enjoin/restrain an entity from:
  - Unlicensed activity.
  - Engaging in any activity that would pose a substantial probability of danger to the public health, safety or welfare.
  - Engaging in any activity that presents a substantial probability of serious danger to the solvency of any preneed seller.
- The authority granted to the Board should be in addition to any other remedies authorized by law.
- Proper venue for an injunctive action should include Cole County.
- Violation of Chapter 436 should be deemed violations of Chapter 407, under the jurisdiction of the Attorney General. In actions brought under Chapter 407, the court should be authorized to impose any penalty/remedy authorized under Chapter 436 or 407, including, revocation/suspension of the preneed license.

CRIMINAL AUTHORITY

The Working Group unanimously recommended the following:

- Knowing and willful violations of Chapter 436 by incompetence, misconduct, gross negligence, fraud, misrepresentation or dishonesty should be deemed Class C felonies. *Comment: Violations are currently Class D felonies.*

FINES & CIVIL PENALTIES

The Working Group unanimously recommended the following:

- The Board should be authorized to impose civil penalties and fines as a form of discipline.
- Fines/Civil Penalties should be assessed in light of the seriousness of the violation and should be consistent with the fines/penalties currently authorized for other professions within the Division. Specifically, the legislature has approved civil penalties for the Real Estate Commission and Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects in a maximum amount of two thousand five hundred dollars for each offense.
- In considering a fine/civil penalty, the Board should be required to consider, among other factors,:

  (1) If the violations are likely to continue or reoccur;

  (2) Whether actual financial loss was sustained by consumers and if restitution has been made;

  (3) If the violation was detected as part of a self-audit or internal compliance program and immediately reported to the Board; and

  (4) If the violation had previously been detected, but inadequate policies and procedures were implemented to prevent reoccurrence.

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! ***Comments:*** *Currently, the Attorney General also has authority to assess/request fines and penalties under Chapter 407. A concern was raised by MFDEA that preneed licensees may be subjected to double penalties if an action is initiated by the Board as well as through the Attorney General's Office. MFDEA and Meierhoffer suggested that if accepted, language should be developed to prevent duplicate imposition of fines/penalties by the Board and the Attorney General's Office for the same conduct.*

Response: As litigation counsel for the Board, the Attorney General's Office traditionally represents and coordinates with the Board in pursuing any remedy. Additionally, the remedies imposed by the Board and by the Attorney General's Office are distinctly different. The remedies imposed by the Board would be limited to licensing violations only. The remedies authorized under Chapter 407 are to redress/remedy a harm inflicted on the public at large. A concern was raised that if a licensee's conduct violates the licensing law as well as harms the public, expanded remedies would be appropriate.

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FEES

The Working Group approved the following unanimous recommendations: The proposed recommendations would increase costs and require additional funding for the Board. Accordingly, the Working Group recommended the following:

1. The Board should be authorized to establish licensing and renewal fees by rule. Fees should be set at a rate sufficient to cover administration and any related costs. However, preneed agent licensing fees should be minimal and proportionately lower than preneed seller/providers.

2. Preneed sellers should continue to be assessed a minimum fee of two-dollars per preneed contract sold during the annual reporting year, as currently required. However, the Board should be authorized to adjust the fee by rule to pay for auditing, examination and investigation/inspection costs.

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CONCLUSION

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Nationally, the preneed industry has experienced significant and sustained growth as consumers focus more attention on their final needs. Preneed arrangements can provide a valuable option to purchasers desiring to ensure their arrangements. Chapter 436 regulating preneed is in need of significant legislative changes. As reflected in the present crisis, Chapter 436 must be enhanced and amended to ensure consumer protection and the continued viability of Missouri's preneed industry.

The Working Group appreciates the opportunity to share its recommendations. We look forward to providing any further assistance.

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