Comments by: American Prearranged Services, Inc. ("APS")

STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS

WORKING DRAFT

CHAPTER 436 WORKING GROUP RECOMMENDATIONS

Submitted: September 1, 2008

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. While 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.

The State Board of Embalmers and Funeral Directors (the "Board"), under the auspices of the Missouri Division of Professional Registration (the "Division"), regulates embalmers, funeral directors, funeral establishments, preneed sellers and preneed providers licensed in this state. 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.

Senate Bill 780, enacted by the General Assembly 2008, which created the Joint Committee on Preneed Funeral Contracts. 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 a diverse representation from all aspects of the preneed industry, including, liaisons from various consumer groups, 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 diverse interests were represented, 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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OVERVIEW

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I. GENERAL OVERVIEW:

During the 2008-2009 legislative session, various Chapter 436 proposals were introduced. Although not enacted, the proposals sparked intense discussion among regulators, consumers and professional groups. While a consensus was not reached, industry and regulatory groups were able to identify several common areas of agreement.

At the close of the legislative session, various representatives met with Senator Delbert Scott and Representative Jay Wasson to discuss Chapter 436 concerns. The Board was subsequently asked to formulate a working group to help identify agreed areas for legislative recommendations.

The Board hosted five (5) open meetings for the Working Group in Jefferson City, Missouri.[1] All meetings of the Working Group were conducted as open meetings in accordance with Chapter 610, RSMo. Notice of meetings and the proposed agenda were made available to the public and published on the Board's website.

II. PARTICIPANTS:

The Working Group consisted of representatives from consumer groups, funeral directors, preneed providers, preneed sellers, third-party preneed sellers, 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
Rich Weaver	Director, Division of Finance

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

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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
George Kutis/ George Kline	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 circulated a survey with a listing by topic area of Chapter 436 proposals submitted to the Board in prior years. Participants were asked to rank the priority of topic areas listed for purposes of discussion. Surveys were made publicly available and were posted on the Board's website. The Division subsequently compiled the rankings and utilized results to structure the Working Group. [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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Working Group recommendations have been compiled 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.

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

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GENERAL REGULATORY AUTHORITY

The Working Group unanimously agreed to the following recommendations:

- Regulatory authority over Chapter 436 and preneed licensing should remain with the Board. Regulatory authority should not be transferred to another agency.

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

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

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

> ! ***Comments:*** *Funeral Consumer Alliance suggested that the current licensee confidentiality restrictions should be revised to allow the 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 specific to the Board.*

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

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

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DEFINITIONS

Several of Chapter 436's current definitions are insufficiently defined. 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 space, grave markers, monuments, tombstones, crypts, niches or mausoleums.

- ***"Guaranteed Contract",*** A preneed contract in which the future costs for the disposition, facilities, services or merchandise identified in the preneed contract are definitively designated and guaranteed by contract.

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- ***"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 on 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.

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- ***"Non-Guaranteed Contract",-*** A preneed contract in which the costs for the disposition, facilities, services or merchandise are not guaranteed by contract.

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- ***"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 future date.

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- ***"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, as grantor, to receive deposits of, administer, and disburse payments received under preneed contracts by such seller.

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- ***"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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LICENSING / REGISTRATION

The Working Group agreed to the following consensus recommendations:

- A "license" should be required for all preneed providers/sellers. Currently, sellers and providers are "registered" with the Board. A "license" denotes legal obligations and more accurately reflects the authorization being issued by the Board.

- Individuals selling preneed for or on behalf of a registered preneed seller should be

! ***Comments**: John McCulloch (APS) expressed concerns imposing full licensing, testing or disciplinary requirements on preneed agents.*

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Deleted: As a condition of licensure, preneed agents should successfully pass the Missouri law examination currently offered by the Board, provided that Missouri licensed funeral directors should not be required to take an additional examination. ¶

- To be eligible for licensure/renewal, providers and 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.

Deleted: preneed agents,

- All preneed sellers or providers operating as business entities must be properly registered with the Missouri Secretary of State and authorized to conduct business in the state.

- Chapter 436 should be clarified to exempt endowed care cemetery operators governed by Chapter 214 from the provisions of Chapter 436. However, cemetery operators should be subject to Chapter 436 if the contract includes services that may only be lawfully provided by a licensed funeral director or embalmer.

- 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.

- Due to potential costs, preneed licensees should not be required to obtain bonding or any specific insurance. The Working Group suggested that increasing consumer protections and regulatory oversight would adequately address the need for additional insurance/bonding.

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PRENEED CONTRACTS

The Working Group unanimously approved the following recommendations:

- 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 concerns relate to each different type of funding. Chapter 436 could be more effectively regulated if the provisions were modified to accommodate each specific form of funding.

- While minimum preneed contract requirements should be established, as provided below, a standard preneed contract form should not be required.

> ! ***Comments:*** *Although MFDEA supported the vote, representatives stressed that a standard form could be beneficial.*

- Preneed sellers should be required to maintain "adequate records" of preneed contracts for the duration of the contract and for no less than two (2) 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.

> ! ***Comments:*** *Funeral Consumer Alliance recommended that sellers should also provide copies of all preneed contracts to the Board. The Board suggested this requirement may be unduly burdensome and that requiring sellers to provide copies upon request would satisfy regulatory concerns.*

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- Preneed contracts should only be designated as irrevocable if the contract is being used to qualify for Medicaid (i.e.-for "spend down").

- Preneed contracts should be in writing and should clearly and conspicuously:
  - Include the name, address and phone number of the purchaser, beneficiary (if different), provider and the seller;
  - Detail the disposition or facilities, services or merchandise requested;
  - Clearly identify if the contract is guaranteed or non-guaranteed on the face of the contract in a recognizable type (i.e.- a 10-point type).

    [Note: The 12- to 13-point font type seems excessive, as Truth-in-Lending considers an 8-point font type to be the minimum size considered recognizable and acceptable.]

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  - 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.

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- Identify expenses to be retained by the seller.
- Be signed by the purchaser, the preneed agent and the seller or a representative.

- Preneed contracts not in compliance with Chapter 436 should be rendered void [should this be voidable by the purchaser] and unenforceable. If not in compliance, payments may be recoverable by the purchaser or their legal representative plus attorney fees.

> ! ***Comments:*** *This requirement is similar to current law.*

- Sellers/providers should be prohibited from redesignating a preneed contract as a [illegible] contract un[illegible]

> ! ***Comments:*** *The Funeral Consumer 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).*

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- 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.

The Working Group approved the following consensus recommendations:

- Preneed contracts should clearly designate whether the contract is revocable or irrevocable.

> ! ***Comments:*** *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.*

> ! ***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. Representatives of AARP, the Silver Haired Legislators and the Funeral Consumer Alliance agreed with this suggestion.*

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PRENEED PROVIDERS

The Working Group unanimously approved the following recommendations:

- In light of recent concerns raised by the Federal Trade Commission, preneed provider licensing should not be restricted to only funeral establishments or cemetery operators. Private individuals are currently authorized to sell funeral merchandise preneed or at-need. However, it should be clarified that Chapter 436 does not exempt any person from the licensing requirements of Chapter 333 governing funeral directors and establishment.

- 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.

- 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.

- Providers should be required to report the name and address of its custodian of records and of all sellers authorized to name the licensee as a provider. The Board should be notified by the provider in writing within 15 days of any amendments or changes.

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PRENEED SELLERS

The Working Group adopted the following unanimous recommendations:

- For purposes of licensure, Chapter 436 should be clarified to provide that a preneed trust is not required if the seller is only selling joint-account or insurance-funded preneed plans.

- Preneed sellers should have the option to sell either trust-funded, joint-account funded or an insurance-funded preneed contract. Sellers should notify the Board of the type of contracts to be sold.

- 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. The Board should be notified by the seller in writing of any amendments or changes.

- 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.

- Sellers should maintain "adequate records" of preneed contracts for the duration of the contract and for no less than two (2) years after the final disposition of the beneficiary, cancellation of the contract or after the facilities, services or merchandise have been provided.

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- WRONG! The Working Group absolutely did not approve this language! This would create a huge burden on preneed sellers and be extremely cost prohibitive! It would require a huge amount of extra staffing hours, supplies, and postage to issue receipts for all preneed payments received. Purchasers have their cancelled checks as receipts and can always call to request documentation and verification of all payments made at anytime. Other vendors, banks, credit card companies, utility companies, etc., are not required to issue receipts for every payment received! You could always add language requiring preneed sellers to provide written documentation of all payments received when requested by purchasers ....[We certainly provide written receipts immediately upon request and I would assume that all sellers do the same; however, it would be extremely difficult to send out thousands of receipts each month for every single payment received ...]

Deleted: <sp>The Working Group unanimously approved the following recommendations:¶
<#>Sellers should be required to issue receipts to the purchaser for preneed payments received by the seller.¶

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The Working Group approved the following consensus recommendations:

- 100% of all payments for a trust-funded preneed contract should be deposited into trust. Sellers should be authorized to submit a request to the trustee for administrative expenses (see Additional Comments below).

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NOTE: Please use the language finalized by the State Board in our last meeting ... depositing 100% but allowing sellers to request up to 20% back from the trust for administrative expenses.

> ! ***Comments:*** *APS and Meierhoffer suggested that requiring sellers to request expenses from the trustee would create additional administrative expenses that may be passed onto the consumer. APS and Meierhoffer strongly recommended retaining the current process of allowing the seller to retain the first 20% of contract payments and to trust the remaining 80%.*

- Payments for trust-funded preneed contracts should be deposited into trust within sixty-days of receipt.

> ! ***Comments:*** *Participants 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.*

- Seller administrative expenses should be authorized from the initial payments received.

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:

- No administrative expense should be allowed.
- Three quarters (¾) of 1% of the face value of the Preneed Contract.
    - Josh Slocum
    - *Note: This provision models New York's preneed legislation.*
- ***Ten percent of face value: The majority of Participants agreed that 10% of the contract's face value would be a reasonable compromise.***
    - AARP
    - Silver Haired Legislature
    - Rep. Meadows
- Ten to fifteen percent
    - DIFP
- Twenty percent of face value
    - Mike Meierhoffer
    - Kutis Funeral Home
    - John McCulloch
    - Mike Winters
    - Austin-Layne

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REGULATION OF TRUSTS & TRUSTEES

The Working Group unanimously approved the following recommendations:

GENERAL REQUIREMENTS:

> ! ***Comments:*** *Bill Stalter recommended that regulation of the trust and trustee functions activities would be better served if oversight of the trust was transferred to the Division of Finance.*

- Trustees of a preneed trust must be a state or federally chartered institution authorized to exercise trust powers in Missouri.

- Provisions of the Uniform Trust Act under Chapter 469 and Chapter 456 should not be wholly incorporated into Chapter 436.

> ! ***Comments:*** *Participants commented that Chapters 469 and 456 contain provisions that are not suited for preneed. For example, Chapters 469 and 456 allow the trustee and grantor to modify the statutory requirements by agreement. It was also suggested that the definition of income would be inappropriate for Chapter 436.*

- 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 which established the trust.

The Working Group approved the following consensus recommendations:

- Expenses of the trust, including trustee's fees, legal and accounting fees, investment expenses and taxes should be paid from the trust. (APS agrees.)

> ! ***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.*

The Working Group approved the following majority recommendations:

- Income of the trust should accrue and should generally 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. [APS agrees.]*

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Dated August 17, 2008 at 5:00 p.m.

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TRUSTEE DUTIES:

The Working Group unanimously approved the following recommendations:

- The prudent investor rule should be adopted for trustees. 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.

- 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.

- 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.

- 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 recommendations were made:

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

- "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.

- 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.

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- 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:*** *Bill Stalter 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:

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

[This was not agreed to by the Working Group. See page 24, first paragraph, which supports investing trust funds into insurance products and recognizes such investments as safe and necessary.]

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- Diversification of trust assets should be mandatory unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better serviced without diversifying.

- 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.

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

- Commingling of trust funds should be only be allowed if the trustee maintains adequate records that individually and separately identify the paymentsand distribution for each preneed contract. Commingling should be limited to payments received for Missouri preneed contracts.

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NOTE: It is not possible to exactly identify the income individually by preneed contract when trust funds are commingled. You could equate the estimated income earned by dividing the total income earned among the preneed contracts based on the percentage of the total trust. However, since interest is paid at the time of death based on the percentage contractually agreed to, the actual amount of income earned on each individual preneed contract will not necessarily be the amount paid out at distribution.

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SELECTIONS OF AGENTS/INDEPENDENT INVESTMENT ADVISORS:

- Trustees should only delegate duties and powers to an agent that a prudent trustee of comparable skills could properly delegate under the circumstances.

- 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.

- 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.

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

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

The Working Group approved the following recommendations by majority vote:

- Sellers should be allowed to approve the investment advisor selected.

?? Comment by APS: Would investment advisors be required or allowed? We typically invest in GNMA's and other guaranteed funds and it would not be feasible to pay investment advisor fees on the entire trust balance.

! ***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 occur again. 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.*

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INSURANCE-FUNDED PRENEED PLANS

The Working Group adopted the following unanimous recommendations:

- Currently, Chapter 436 does not clearly allow/regulate insurance-funded plans. Insurance funded preneed plans are a safe and necessary option. Accordingly, Chapter 436 should clearly authorize insurance-funded contracts.

- Insurance law should not apply to preneed contracts but should apply to any insurance sold with a preneed contract.

- 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.

- In no instance, should a term life insurance product be used to fund a preneed contract. However, consumers should be allowed to assign proceeds from a term-life insurance product to a provider, or to designate a provider as a beneficiary under a preneed contract, provided that the assignment is not related to, or done in contemplate of, executing the sale of 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 consumers who are older or have significant health problems may qualify for.*

The Working Group adopted the following consensus recommendations:

- 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.*

- Preneed contracts funded by a life insurance policy 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:*** *To avoid confusion and potential misconstructions, concerns were raised that the majority of this information should be provided by the insurer and included in the insurance contract since it would require the seller to summarize the insurance contract. Additionally, Homesteaders suggested use of the National Association of Insurance Commissioner's model for insurance funded disclosures. Funeral Consumer Alliance also suggested that the amount of commission should also be disclosed in an insurance-funded contract.*

! ***Comments:*** *Funeral Consumer Alliance suggested that licensees should disclose to the purchaser if the licensee is an insurance agent/producer and if the licensee will receive any commission, payment or other consideration for the sale of an insurance product.*

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JOINT ACCOUNT-FUNDED PRENEED CONTRACTS

The Working Group unanimously recommended that the current provisions for joint-account funded preneed plans are adequate and should be maintained. However, the Working Group suggested the following minor changes:

- 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.

- Sellers only utilizing joint-account funded preneed contracts should not be required to have a trust.

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PAYMENTS TO PROVIDERS

The Working Group unanimously recommended the following:

- To request payment, providers should be required to submit a certificate of performance certifying that the provider has rendered services to the preneed beneficiary. The certificate of performance should be signed by the provider and the person authorized to make arrangements on behalf of the preneed beneficiary.

- Sellers should remit payment to providers within thirty (30) days after receiving a certificate of performance. Sellers should not be prohibited from also requiring submission of a certified death certificate.

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CANCELLATION/PORTABILITY OF PRENEED CONTRACTS

The Working Group considered four distinct scenarios that generally arise over the life of a preneed contract:

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.

A. Contract Fulfillment:

The Working Group approved the following unanimous recommendations:

- On fulfillment, sellers should be entitled to payment as provided in the contract and the related income.

B. Transfer of Providers:

The Working Group approved the following unanimous recommendations:

- Chapter 436 should allow for 100% portability. Purchasers should have complete and unrestricted freedom to select an alternative provider. Purchasers should not be penalized nor should any additional fee or costs be assessed to the purchasers for a transfer.

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Comment by APS: The State Board approved 100% portability with 1% interest on preneed transfers. However, we believe this would create problems, as some trusts may not earn 1% and some sellers will have used the initial 20% for commissions and overhead and this language would then allow transfers to other funeral homes and

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require the funeral home that wrote the business to pay back 100% of the face amount of the preneed contract plus interest when they have already spent a portion of the funds to obtain the business (i.e., paid commissions to preneed agents, paid taxes on the income earned on the preneed funds, etc.).

- The new provider designated by the purchaser should be accepted by the seller if the provider agrees to accept the remaining payment owed 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.

> ! ***Comments:*** *While MFDEA generally supported this recommendation, concerns were raised that the seller should be able to reject a designated provider if the seller does not have a contract with the provider or if legitimate business reasons exist for the seller not accepting the designation (i.e.- the provider has failed to comply with the contract in other instances or has misappropriated funds from the seller).*

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. The refund amount should be designated by statute (however, see below).

Additional Recommendations: 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, the following recommendations were suggested by Working Group Participants:

APS agrees with the Board's recommendation that only 80% should be paid back on cancellations. However, if the statute is changed to require 100% of the monies to be initially paid into trust, then this cancellation language should be written to clearly state that cancellations would require a refund of all monies in trust less 20% of the face amount of the contract.

- 100% of all funds paid and held in trust should be refunded to the purchaser (including income).
- 100% of all funds held in trust should be refunded.
- 80% of all funds held in trust should be refunded.

- 80% of all funds paid by the purchaser should be refunded.
- 80% of all funds paid should be refunded plus a portion of the income earned.

D. Cancellation By Seller For Non-Payment:

The Working Group approved the following unanimous recommendations:

- Sellers should be allowed to cancel the contract unilaterally if the purchaser is in default of payment.

If cancelled by the seller, preneed purchasers should be refunded all monies in trust less 20% of the face amount of the contract, which is the amount allowed to be retained by the seller for administrative expenses.

NOTE: Refunding 80% really won't work. What if the purchaser had only paid in 20%, then the seller would only be allowed to retain 4% (20% of the 20% paid in). That would be significantly less than the commissions paid to obtain the business.

- Prior to cancellation, purchasers should be provided written notification from the seller of the seller's intent to cancel. The notice should be provided forty-five days prior to cancellation and should allow the purchaser thirty days to remit the payment in arrears to avoid cancellation.

APS believes the current law which allows sellers to cancel contracts in arrears for 90 days is more fair to all parties. If purchasers are allowed 30 days to remit payments in arrears to avoid cancellation and contracts sometimes allow payments over a period of 120 months, just think how hard it would be to collect payments from purchasers who consistently pay late!

NOTE: If this portion of the statute is changed, then it should be clearly written that these changes only apply to contracts written after the date that these changes become effective. Since contracts written in the past clearly allow cancellation when payments are 90 days in arrears without the requirement that parties be given 30 days to remit payments in arrears to avoid cancellation.

- If the seller does not cancel 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:

This was not approved by the Working Group and should be removed! This also directly contradicts the prior paragraph. Additionally, as stated earlier, it would

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Deleted: <#>On seller cancellation, 100% of all funds paid and held in trust should be refunded to the purchaser (including income).¶

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be unfair to require sellers to refund 100% of the funds paid in plus interest, as commissions would have been paid out to obtain the business and income taxes would have been paid on the income earned.

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- Eighty percent of all funds paid and held in trust should be refunded to purchasers.

> ! ***Comments:*** *Bill Stalter recommended that issues regarding trust expenses and income/expense allocations would be better addressed in rulemaking. Untrue!!!*

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REPORTING REQUIREMENTS

To assist the Board in regulation, the Working Group unanimously recommended expanding the information submitted to the Board by preneed licensees.

ANNUAL REPORT
REQUIREMENTS FOR ALL PRENEED SELLERS

Would these reports be available for public viewing? This information should be maintained as strictly CONFIDENTIAL. Information relative to purchasers should not be seen by the Board Members or the public, as funeral homes certainly would not want their competition to have access to this information. This would especially be true since proposed changes would allow people to freely change funeral homes and transfer 100% of their trust plus interest to competing funeral homes!

Purchaser names, addresses, preneed contract numbers, etc., would be available during Board reviews and audits if necessary. Therefore, we do not believe it would be prudent or fair to require preneed sellers to file this much information on annual reports.

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

- The purchaser's name and address and preneed contract number, if any. Contract numbers should not be required but should be provided if available..
- The total number and face value of outstanding preneed contracts sold since the last report was filed.
- The contract amount for each preneed contract sold since the last annual report
- The name, address and contract number of all preneed agents authorized to sell preneed for the seller.
- The number of contracts fulfilled by the seller since the last report.
- The name and address of each provider contracted with the seller.
- The name and address of a custodian of preneed records.
- Authorization for the Board to conduct an audit and/or an examination of books and records.
- 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 unanimous recommendations: Annual reports filed with the Board by the seller should include:

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

- The name and address of the financial institution where the trust is held and the account number;

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- The trust fund balance as reported in the previous year's report and the current trust fund balance.
- Principal contributions received since the last report.

Company profits should not have to be reported. Other businesses do not disclose this confidential information.

- Total expenses since the last report, excluding distributions to the seller.

Deleted: <#>Total trust earnings and total distributions to the seller since the last report.¶
<#>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.¶

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ANNUAL REPORT REQUIREMENTS FOR JOINT-ACCOUNT FUNDED PRENEED CONTRACT SELLERS

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

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

- The number and address of the Missouri financial institution where the joint account is held and the account number.
- The amount on deposit in each joint account.
- The joint account balance reported the previous year.
- Principal contributions placed into each joint account since the last report.
- Total earnings since the previous report.
- Total distributions to the seller from each joint account since the previous year.

You cannot deduct any expenses from joint accounts. Income taxes would likely be paid by the seller, unless the purchaser's social security number was used for income tax reporting purposes on the joint account by the written agreement of the parties. We do not believe there would be any bank fees involved; however, if there were, they would be paid by the seller.

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ANNUAL REPORT REQUIREMENTS FOR INSURER FUNDED PRENEED CONTRACT SELLERS

The Working Group approved the following unanimous recommendations:

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

This information is regulated by the Department of Insurance and should not be required. Also, as stated earlier, this information would be available for review or audit by the Board, if necessary.

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The Working Group absolutely did not approve this language! It would be extremely burdensome and cost prohibitive for preneed sellers to provide receipts to every single purchaser for every single payment received. Preneed sellers receive thousands of payments each month, sometimes as little as $5 each! It would require a huge amount of extra staffing hours, supplies, and postage to issue receipts for all preneed payments received. Purchasers have their cancelled checks as receipts and can always call to request documentation and verification of all payments made at anytime. Other vendors, banks, credit card companies, utility companies, etc., are not required to issue receipts for every payment received! You could always add language requiring preneed sellers to provide written documentation of all payments received when requested by purchasers ....[We certainly provide written receipts immediately upon request and would assume that all sellers do the same.]

Deleted: <*sp*>The Working Group unanimously approved the following recommendations:¶
<#>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.¶
<#>Sellers should inform purchasers of a change in trustee within thirty (30) days after the change. Notification should include the name, address and phone number of the trustee.¶
¶
The Working Group approved the following majority recommendations:¶
<#>Purchasers should be notified by the trustee each time a deposit is made into trust for the contract.¶
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<#>Purchasers should be provided a receipt for each payment made by or on behalf of the purchaser. The receipt should be provided by the initial person receiving the payment (i.e.- the seller, provider or the agent). ¶
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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 unanimously recommended the following:

PRENEED SELLERS:

- The Working Group approved the following unanimous 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.
  - Notice to consumers that the seller will cease doing business and indicate a contact number for questions regarding preneed contracts, consumer refunds or how arrangements will be satisfied. Purchaser 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 preneed provider/seller to ensure contractual obligations are met.
- The Attorney General should be granted authority to enter the premises and access/take possession of the books and records any preneed seller who ceases business without notification to the Board.

PRENEED PROVIDERS:

- 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 transferring/disposing of a majority of stock/assets.
  - Upon notification from the providers, should be required to notify all purchasers that the provider has ceased doing business or has transferred ownership. Notification should include provisions for selecting an

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alternative provider and should be provided within thirty (30) days after the provider ceasing business or transferring ownership/assets.

It would be extremely unfair and burdensome to expect the seller to notify purchasers. This should be a joint effort between the provider who is going out of business and the State Board, since the State Board would have the information available and would also have more resources to handle this.

- 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 be granted 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 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 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 selling joint-account funded plans only 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.
- Books and records of licensees should be made available to the Board by the licensees upon request.
- Costs of an inspection, investigation, examination or audit should be funded through licensing fees established by the Board by rule.

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! ***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.*

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.

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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;

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(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;

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

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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.

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 any such action should be amended to 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. Additionally remedies should include 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 found.
- Fines/civil penalties 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 the 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

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(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 proposed recommendations would require additional funding for the Board to regulate the proposed provisions and to fulfill all statutory obligations.

The Working Group unanimously approved the following recommendations:

- Licensing and renewal fees for preneed seller, providers and agents as established by the Board by rule. If both the preneed sellers/providers are required to pay fees, the preneed agent licensing fees should be minimal and proportionately lower than preneed seller/providers.
- Preneed sellers should continue to be assessed a two-dollar fee per preneed contract sold during the annual reporting year as currently required.

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CONCLUSION

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CONCLUSION

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 impacting Missouri, 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 you may need.

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