

WILLIAM STALTER
COMMENTS

CHAPTER 436
WORKING GROUP
8/17/08 RECOMMENDATIONS DRAFT

General Regulatory Authority

Page 10

The Working Group unanimously agreed to the following recommendations:

1. Regulatory authority over Chapter 436 and preneed licensing should remain with the Board. Regulatory authority should not be transferred to another agency. *(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.
3. The Board should be granted general rulemaking authority to administer Chapter 436 and to establish necessary fees. *(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.)*
4. The Board should be authorized to hire legal counsel to assist in the enforcement of Chapter 436. *(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.)*

Bill Stalter Page 10 Comments:

1. While the State Board should retain regulatory oversight of the preneed transaction and the licensing of preneed sellers, oversight of financial institutions that provide fiduciary services for preneed trusts (funeral or cemetery) should be transferred to the Missouri Division of Finance. Please refer to my 8/7/08 letter to Linda Bohrer, Acting Director, Missouri Department of Insurance, Financial Institutions & Professional Registration.
2. Providing concurrent jurisdiction to local prosecutors should be conditioned upon a requirement that the prosecutor confer with the State Board prior to initiating legal proceedings, and restricted to violations involving theft or fraud.
3. Transparency with regard to preneed compliance should be afforded the industry and the consumer, or regulators will continue to bear full responsibility for identifying and addressing potential abuses. Missouri needs to consider a preneed reporting system similar to that employed by the Texas Department of Banking which provides a grading of sellers' compliance with the Texas preneed law.

Definitions

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1. **"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.
2. **"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/assured in the contract.

Bill Stalter Page 11 Comments:

The "Funeral Merchandise" definition should not include interment spaces, or cemetery merchandise and services sold preneed pursuant to Chapter 214 trusting requirements that are substantially similar to that imposed on the funeral industry. If funeral trusting is set at 90% or higher, cemeteries should be allowed to trust at a lower percentage because insurance funding is not available to cemeteries. (Cemeteries that do not comply with Chapter 214.387 et seq, would be required to comply with Chapter 436.) Accordingly I would suggest the following definition:

"Funeral merchandise" means personal property used for the final disposition of a dead human body, including but not limited to clothing, caskets, vaults, urns, and interment receptacles. *"Funeral merchandise"* does not include interment rights for burial in a cemetery, or a vault, urn, casket, or similar cemetery merchandise when sold by an endowed cemetery in compliance with R.S.Mo. §214.387 et seq.

Preneed contracts may include both guaranteed and non-guaranteed components, and the "Guaranteed Contract" definition may need to reflect this hybrid character of some contracts.

"Guaranteed Contract", A preneed contract in which the Seller makes promises or assurances to the Purchaser that, at the Beneficiary's death, certain specified costs for the disposition, facilities, services or merchandise identified in the preneed contract will be no greater than the purchase price paid by the Purchaser, or that such costs will be limited or restricted in some manner.

"Non-Guaranteed Contract", A preneed contract in which the Seller makes no promises or assurances to the Purchaser regarding the costs for the disposition, facilities, services or merchandise to be provided at the Beneficiary's death.

Definitions

Page 12

1. **"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.
2. **"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, together with income thereon.

Bill Stalter Page 12 Comments:

1. If Chapter 214 imposes substantially similar trusting requirements, the "preneed contract" definition should exclude burial services, merchandise and property pursuant to the following:

- **"Preneed contract"**, any contract or other arrangement which provides for the final disposition of a dead human body, or for funeral services, facilities, or merchandise, or for burial services, facilities or merchandise when the Purchaser's payments are not administered pursuant to R.S.Mo. Section 214.387 et. Seq., 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.

2. The reference to "grantor" in "Preneed trust" definition has tax reporting connotations which are no longer applicable. Consequently, the phrase "as grantor" should be stricken.

Licensing/Registration

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1. A “license” should be required for all preneed providers/sellers.
2. Individuals selling preneed for or on behalf of a preneed seller should be licensed by the Board as a preneed agent. 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.
3. To be eligible for licensure/renewal, preneed agents, 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.
4. 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.

Bill Stalter Page 13 Comments:

1. While it is clear that licensing should be required for the entity that engages in preneed sales, a clear case was never made for requiring separate licensure of the entity that agrees to honor the contract. Ostensibly, the recommendation would only apply to entities not licensed under Chapter 333 that are not also licensed as the seller. If the provider does not handle consumer funds, a license requirement would seem burdensome.
2. The Review Committee also discussed a licensing structure where the preneed seller is licensed as an organization, and would assume responsibility for the individual agent’s compliance with Chapter 436. Under that scenario, the preneed agents would be registered. The concern expressed about individual licensing was for the burden in terms of expense and time to the individuals. For those who are not familiar with the Missouri law examination test, it is not possible to assess whether this would be adequate or burdensome. While I would agree that licensed funeral directors should not be required to obtain an additional license, funeral directors should still be required to demonstrate on a periodic basis a fundamental understanding of Chapter 436 requirements.
3. The NPS fraud notwithstanding, requiring ‘good moral character’ of every **officer, director, manager or controlling shareholder** of the corporation would be excessive and vague.
4. Endowed Care Cemeteries that comply with a Chapter 214 preneed provision with comparable preneed trust requirement should be exempt from Chapter 436. Chapter 214 will have to be narrowly drawn to address the funeral services issue.

Preneed Contracts

Page 14

1. While minimum preneed contract requirements should be established, as provided below, a standard preneed contract form should not be required. *(Although MFDEA supported the vote, representatives stressed that a standard form could be beneficial.)*
2. 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.

Bill Stalter Page 14 Comments:

1. While it was agreed that a standard contract form was not feasible, there was discussion that the State Board should have rule making authority to require certain provisions or disclosures be included in each preneed contract form.
2. If periodic examinations/reviews are to be required of each seller, the seller should be required to retain records of the serviced or cancelled contracts through the subsequent examination/review. If examinations/reviews are made each fifth year, then the 2 year retention period would not be long enough.

Preneed Contracts

Page 15

1. 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.
2. 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.
3. Proceeds payable under a life insurance contract, should be governed by insurance law and the insurance contract.

Bill Stalter Page 15 Comments:

1. Any conversion in the funding of preneed contracts should be done pursuant to regulatory approval. The facts and circumstances may warrant a change in the funding, but the expense of seeking purchaser consent could be prohibitive. Even though the conversion may be in the consumer's best interests, the explanation will likely be confusing.
2. Chapter 436 should incorporate the right of sepulcher law (RSMo. 194.119) for purposes of defining the purchaser's successor.
3. This statement is confusing. If the insurance policy is sold in conjunction with the preneed contract, would this mean the assignment or beneficiary designation cannot be affected by the preneed contract or Chapter 436? There is concern that in most other states, NPS exploited the insurance laws in committing its abuses. If the insurance laws are inadequate, Chapter 436 may need to address how insurance proceeds are paid to sellers and providers.

Preneed Providers

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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.

Bill Stalter Page 16 Comments:

The fundamental question is whether a third party seller can execute a preneed contract as the primary obligor, or must the seller act as an agent of the funeral home (causing the funeral home to have the seller's obligations for payment administration and trust administration). In the NPS situation, should the funeral home have an obligation to perform the contract even when it does not receive payment?

There will be a certain number of Missouri funeral directors that want to assume responsibility for the sales functions and trust administration. In that situation, should the funeral director be held accountable for the seller's activities? These funeral directors simply want to be a service provider.

When the third party seller can contract as the primary obligor, it has more leverage over the funeral home in terms of contracting for performance. One advantage to the consumer is that the 'independent' seller has more flexibility in terms of portability. If the funeral home provider breaches its agreement, the seller may have authority to find a funeral home more suitable to the consumer.

Missouri funeral homes that walk away from their NPS contracts could irreparably damage their reputations, but they have a legal basis for negotiating concessions with consumers. Texas funeral directors who contracted with NPS do not.

To make an analogy, should doctors or medical offices be held accountable if a preferred health care insurer fails and goes out of business?

Greater oversight of the third party seller is needed.

Preneed Sellers

Page 17

1. 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.
2. 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.

Bill Stalter Page 17 Comments:

1. There are several provisions that “should” be included in the agreement between the provider and seller, but I question whether Chapter 436 should attempt to legislate the seller/provider relationship to that degree.
2. If periodic examinations/reviews are required of each seller, the seller should be required to retain records of the serviced or cancelled contracts through the subsequent examination/review. If examinations/reviews are made each fifth year, then the 2-year retention period would not be long enough.

Trust Funded Preneed Contracts

Page 18-19

1. Sellers should be required to issue receipts to the purchaser for preneed payments received by the seller.
2. 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 (*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%.*).
3. Payments for trust-funded preneed contracts should be deposited into trust within sixty-days of receipt. (*However, other participants suggested that a 30-45 day deposit requirement would increase consumer protection.*)
4. Seller administrative expenses should be authorized from the initial payments received.
5. 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:
 - 5a. No administrative expense should be allowed.
 - 5b. Three quarters ($\frac{3}{4}$) of 1% of the face value of the Preneed Contract.
 - 5c. Ten percent of face value: The majority of Participants agreed that 10% of the contract's face value would be a reasonable compromise.
 - 5d. Ten to fifteen percent
 - 5e. Twenty percent of face value

Bill Stalter Page 18-19 Comments:

1. If sellers accept cash payments, then receipts may need to be issued. However, the cash payment is not the norm, and it would be burdensome to require a receipt for check or ACH payments. This requirement becomes redundant if all payments must pass through the trust, and an annual statement is issued by the fiduciary.
- 2 (and 4). The discussion was that if all purchaser payments were deposited to trust, an audit trail would be established. This would not require sellers to 'request' the statutory sales expense (whether it be 20%, 15% or 10%). As a practical matter, most sellers will have to certify to the fiduciary the sales expense. The Review Committee never fully discussed requiring the sales expense to be collected from each payment, but the nominal advantage of 'per payment trusting requirement' may not justify the burden to sellers who must compensate their salesmen. Sellers should be allowed to collect the permitted sales expense from the initial payments.

3. Many sellers make a single monthly deposit. It is burdensome to make more frequent trust deposits. The 60-day requirement provides the monthly depositor a 30-day window with regard to the payments received at the beginning of a calendar month. The consumer protection advantages from a more frequent deposit (bi-monthly) are nominal in comparison to a single monthly requirement with a 30-day window.

5. To sponsor a preneed program, sellers incur costs for salesmen, training, administrative staff, legal expenses for trust instruments and preneed contract forms, marketing, and compliance. When the trusting requirement is set at 100%, proactive preneed sellers must use insurance funded contracts for most sales, leaving trust funded to the purchasers who cannot qualify for insurance or who cannot afford insurance. If trust fund contracts were to assume the commission rates paid by insurance companies, 90% trusting might provide sufficient funds to pay the salesmen (in most cases), but it leaves nothing for program costs such as compliance. Trust funded preneed offers the funeral home more control over its preneed program than insurance, the opportunity for better cancellation rights to the consumer, and greater protections than the joint account contract.

5a. Recommendations for 100% trusting are shortsighted, and ignore the realities of other states' laws. Income accrual issues are far more important to consumer protections.

5b. This recommendation misses the point altogether, and underscores the lack of understanding about sales expenses versus the administrative expenses of trusts. The New York Funeral Directors Association master trust is one of the largest preneed trusts in the world, and can afford to limit its administrative expenses to 75 basis points because it has virtually no competition.

5c. A sales expense of 10% represents a 'fair' compromise, but may not leave the seller sufficient funds for essential program expenses. Texas is a 90% trusting state, and its preneed trust regulator has taken a flexible approach to what expenses can be borne by the trust. When a trust assumes greater responsibilities in compliance issues, the services are governed by written agreements where fees must be reasonable pursuant to state preneed laws, to the fiduciary's regulators, and to the IRS.

5d. A sales expense of up to 15% could provide funding needed for essential program expenses, but the trust may still yet be required to shoulder compliance expenses.

5e. At some point, it would seem incumbent upon sellers to demonstrate that 20% is needed to maintain a preneed program.

Regulation of Trusts & Trustees

Page 20

1. Trustees of a preneed trust must be a state or federally chartered institution authorized to exercise trust powers in Missouri.
2. Provisions of the Uniform Trust Act under Chapter 469 and Chapter 456 should not be wholly incorporated into Chapter 436.
3. Expenses of the trust, including trustee's fees, legal and accounting fees, investment expenses and taxes should be paid from the trust. *(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.)*
4. Income of the trust should accrue and should generally not be distributed until the contract is fulfilled or otherwise cancelled. *(Several participants recommended that the current income distribution rules should be maintained and income distributions allowed as earned.)*

Bill Stalter Page 20 Comments:

1. Missouri needs more flexibility in accepting non-domicile fiduciaries, if they: 1) will consent to submission of service of process in Cole County, 2) can respond promptly to reasonable requests for records, and 3) agree to administration pursuant to Chapter 436.
2. Most of the accounts administered by fiduciaries will be governed by the Uniform Trust Code and the Uniform Principal and Income Act. However, preneed trusts (and endowed care trusts) have special purposes that may contradict underlying principals that permit the trustor to change the terms of the trust, or that require the trustee to consider the competing interests of beneficiaries. Caution must be exercised when incorporating uniform acts so as to not unintentionally negate consumer protections.
3. Invasion of principal is a risk when the seller is permitted to withdraw income currently. The consumer would be better served if income were accrued, and certain compliance requirements were shifted to the trustee.
4. Income accrual is a flash point for preneed reform, and was not discussed to the extent necessary by the Review Committee. Tortious interference with preneed contracts by competitors (or "twisting") has been an industry problem for decades. Income accrual is important to the future profitability of the seller, and to improved portability.

Trustee Duties

Page 21

1. The prudent investor rule should be adopted for trustees.
2. 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.
3. The trustee should maintain “adequate books and records” of all transactions administered through the trust and pertaining to the trust generally.

Bill Stalter Page 21 Trustee Duties Comments:

1. Inherent to the adoption of the Prudent Investor Rule will be the requirement that preneed trusts be diversified for better trust performance. This will be difficult, or impractical, if fiduciaries are not afforded more latitude in providing pooled investments or collective investment trusts for smaller operators.
2. This recommendation is consistent with review procedures advocated by the Office of the Comptroller of the Currency. However, it is worth noting that one of the defendant fiduciaries named in the Missouri class action lawsuit filed against NPS was faulted for following this very procedure. A fiduciary should not be held liable for a seller’s misconduct if the fiduciary withdraws from the relationship within a year of its acceptance.
3. The phrase “adequate books and records” will have to be ‘defined’ through rules and regulations. Fiduciary compliance is dependent upon the individual purchaser records that the seller must provide. There are shared duties with regard to these records, and mutual cooperation is required. The historic view about the death care provider being responsible for individual recordkeeping requirements is changing.

Conflicts of Interest

Page 21-22

1. The financial institution and investment advisor should not be controlled by or under common control with the seller.
2. Trustees should be prohibited from selling, investing or authorizing any transaction involving the investment or management of trust property with:
 - a. The spouse of the trustee;
 - b. Descendants, siblings, parents, or spouses of a preneed seller or an officer, manager, director or employee of a preneed seller, provider or counselor;
 - c. Agents or attorneys of the trustee, preneed seller or provider; or
 - d. 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.

Bill Stalter Page 21-22 Conflicts of Interest Comments:

1. The fiduciary should be independent of the preneed seller, but it is not necessary that the investment advisor be independent of the seller. The fault in Chapter 436 is the provision that authorizes the seller to appoint the investment advisor, and when such is done, the fiduciary is exculpated for investment oversight. Asset management is enhanced by investment advisors who understand the unique facts and circumstances of the Trustor. This is particularly true for the death care trust. The preneed trust is substantially different from the estate planning trust that comprises the vast majority of a fiduciary's business. Fiduciary regulators have guidelines that ensure the fiduciary is to determine the prudence of the selection of the advisor, and the compliance of the advisor's instructions with the Prudent Investor Rule. Chapter 436 breached those protocols by relieving the fiduciary of oversight of the Investment Advisor and his actions.
2. This provision is vague, and overly broad. Investment advisors will be agents of sellers by virtue of most standard engagement agreements. Some fiduciaries will provide the advisor mechanisms to effect asset transactions for efficiency purposes. The fiduciary need only be required to retain title of the trust assets, and ultimate responsibility for compliance with the Prudent Investor Rule.

Investment of Funds

Page 22-23

1. Trustees should be specifically restricted from investing trust funds in any insurance product.
2. Commingling of trust funds should be only be allowed if the trustee maintains adequate records that individually and separately identify the payments, income and distribution for each preneed contract. Commingling should be limited to payments received for Missouri preneed contracts.

Bill Stalter Page 22-23 Investment of Funds Comments:

1. While the Prudent Investor Rule would require diversification (and implicitly preclude insurance investments), many states allow trust conversions (either from trust to insurance, or with insurance as a trust investment) with regulatory approval. There may be circumstances were smaller trusts could benefit from holding individual whole life policies or annuities.
2. Several factors contribute to poor trust performance, but a major issue is the relative small size of many preneed trusts. Pooled investments, or collective investment trusts, should be authorized so long as the fiduciary can demonstrate sufficient accounting and administrative capabilities. Restricting commingling to Missouri preneed contracts may be burdensome or could defeat the purpose of allowing collective investing.

Selections Of Agents/Independent Investment Advisors

Page 23

1. Agents that accept a delegation of powers or duties from a trustee should be deemed to have consented to the jurisdiction of Missouri courts.
2. Sellers should be allowed to approve the investment advisor selected.

Bill Stalter Page 23 Selection of Agent/IIA Comments:

1. For Missouri to gain jurisdiction over service agents (investment advisors and administrative agents) this provision may need to be incorporated into a trust instrument as a requirement for the delegation of authorities.
2. The industry concern is that the fiduciary may seek to impose upon the trust a fund manager that lacks experience or knowledge about death care trusts. In a competitive market, the seller would address this situation by seeking a new fiduciary that would be more responsive to the trust's needs. However, fiduciaries tend to shun these accounts, and this deprives the seller the leverage to force needed changes. Ultimately, the fiduciary must have control over the selection of the Investment Advisor, if only to be able to reject the appointment.

Insurance Funded Preneed Plans

Page 24

In no instance, should a term life insurance product be used to fund a preneed contract. *(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.)*

Bill Stalter Page 24 Insurance Funded Comments:

To elaborate on the MFDEA position, families approach funeral homes about accepting an existing policy as payment for a 'preneed contract'. Some of the policies are small, paid up term insurance. For consumer protection, the funeral home should make some fundamental promises about how the policy proceeds will be applied. However, this is an accommodation transaction, and needs to be recognized by Chapter 436 without imposing significant restrictions or requirements.

Joint Account Funded Preneed Funeral Contracts

Page 26

The Working Group unanimously recommended that the current provisions for joint-account funded preneed plans are adequate and should be maintained.

Bill Stalter Page 26 Joint Account Funded Contract Comments:

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 this procedure exposes the purchasers' funds to the claims of the funeral home's creditors. An accident such as the electrocution of a Texas embalmer a few years ago, or the drowning of a child in a cemetery pond earlier this year, could result in the establishment's joint account being lost to a casualty judgment. To compound matters, the commingling of joint accounts is a violation of Chapter 436. Funeral directors should not be permitted to use the joint account arrangement if their aggregate funds exceed the \$100,000 FDIC coverage. (As a practical matter, the funeral home could have up to \$200,000 of joint accounts with a single bank under the FDIC's joint ownership rules.)

Payments to Providers

Page 27

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.

Bill Stalter Page 27 Payments to Providers Comments:

Perhaps a small distinction, but the certificate of performance should be signed by the same person who actually assumes responsibility for making the at-need arrangement. In situations where there may be a dispute among siblings (who may have equal claim to the authority to make the arrangements), the funeral home can look to the individual prepared to sign the contract (and the statement of goods and services).

Cancellation/Portability of Preneed Contracts

Page 28-29

Transfer of Providers

1. 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.
2. 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. *(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).)*

Bill Stalter Page 28-29 Transfer of Provider Comments:

1. Portability needs to be defined in terms of the consumer’s rights to the funding mechanism. The promises made in a preneed contract regarding ‘guaranteed’ prices or the availability of specific items of merchandise are unique to a specific seller/provider, and cannot be ‘transferred’ to another funeral home without that funeral home’s consent. In other words, a funeral home that is not a party to the preneed contract must agree to assume the obligation to provide the specified services and merchandise. Before doing so, funeral homes will ask: How much will I be paid?

The Attorney General’s position that preneed should be equated to a bank account belonging to the consumer runs contrary to the Securities Exchange Commission’s position regarding preneed. The SEC views the transaction as a sale and purchase, with the trust fund belonging to the seller. The SEC position is the basis for excluding preneed trusts from onerous administrative requirements which would make prohibitive the costs of trust administration. The SEC has also applied this approach to prepaid college tuition plans. The central question is whether the consumer has purchased an investment vehicle or a service (that has limited refund rights). Chapter 436 can enhance portability/cancellation rights by defining what a consumer will receive when he/she (or the successor provider) elects to not use the original provider. In other states, it is typical to see some form of penalty (to help offset the seller’s costs), and that penalty may correlate to the trusting requirement.

2. The ‘stepping into the shoes’ of the original provider is too simplistic of an approach. The fiduciary has an issue that is similar to that expressed by the MFDEA. The fiduciary has a contractual relationship to the seller by virtue of the preneed trust instrument. That document provides promises and assurances with regard to various issues, including distributions. A better approach would be to define the consumer/successor provider’s rights in terms of a cancellation right (trust principal plus 80% of the value in excess of the principal, for example).

Cancellation By Seller For Non-Payment (continued from page 29)

1. 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.

2. Eighty percent of all funds paid and held in trust should be refunded to purchasers. (*Bill Stalter recommended that issues regarding trust expenses and income/expense allocations would be better addressed in rulemaking.*)

Bill Stalter Page 30 Cancellation/Refund Comments:

1. If a Purchaser defaults in making payments, most preneed contracts afford a window of time for bringing the payments current. For consumer protection, a reasonable window of time should be defined. If the payments are not brought current within the window (90 days), the trust account should be available as a credit. If the credit is not used, the principal should be available as a refund.

2. My comments were made in response to a Division of Finance proposal that the fiduciary should determine what would be prudent with regard to expenses and the amount of income to accrue. Limitations on trust expenses would be best addressed by regulation. Income accrual and refund rights should be set out by statute.

Reporting Requirements

Page 31

ANNUAL REPORT REQUIREMENTS FOR ALL PRENEED SELLERS

1. The purchaser's name and address and preneed contract number, if any. Contract numbers should not be required but should be provided if available

ANNUAL REPORT REQUIREMENTS FOR TRUST-FUNDED PRENEED CONTRACT SELLERS

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

Bill Stalter Page 31 Reporting Requirement Comments:

1. Preneed contracts should have unique contract numbers to facilitate examinations and audits. The Review Committee discussion addressed the need for sequential contract numbers, which the general agreement was that sequential numbering should not be required. If sellers are to be required to report individual contracts, it would be important to have unique contract numbers for audit purposes.
2. The fiduciary certification should be provided by the trust officer responsible for the account, not a corporate officer.

With time, the State Board will need to use rulemaking authority to develop annual reports that will help examiners to assess sellers and their individual sub-accounting capabilities. The annual reporting system could expedite the review/exam process, and thus reduce that discussed cost of \$3,000 to \$5,000 per exam. The exam/review process should have some fundamental objectives, which could be tested from a desk review before an onsite visit is made. While reporting procedures are needed to ensure trusts are properly invested, individual sub-accounting is crucial to determining a trust's funding liability.

Consumer Reporting/Notifications

Page 33

1. 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.
2. 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.
3. Purchasers should be notified by the trustee each time a deposit is made into trust for the contract. *(Participants expressed concerns that an annual report would create an unnecessary burden on preneed sellers and increase administrative expenses that would eventually be passed on to the consumer.)*
4. 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).

Bill Stalter Page 33 Consumer Reporting/Notifications Comments:

- 1 (and 4). If all Purchaser payments must flow through the trust (as discussed on page 18), there was a general agreement that the trust would provide an annual statement of the purchaser's deposits for the year and aggregate balance. This would be provided in lieu of receipts for each payment. It will be burdensome for sellers to provide receipts for each payment. While there may be concern for purchasers who pay with cash, the vast majority use checks or automatic debit procedures to pay their preneed contract installments.
2. Fiduciaries will be reluctant to provide the telephone numbers of their trust officers. Communications should be made by mail. If the trustees become a focal point for consumer inquiries, the sellers may see higher trustee fees.
3. There was also discussion whether the consumer should have access to the annual report that is to be filed with the State Board. The annual report (as opposed to the trustee's annual statement) would reflect financial information that would demonstrate the trust's overall performance (as an indicator of the seller's ability to perform in the future). The Trustee's annual statement would serve as a safeguard against the seller who never deposits the purchaser payments. Both of these reporting proposals will have costs that will have to be shared by businesses and consumers.

Termination of Business

Page 34

PRENEED SELLERS:

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.

PRENEED PROVIDERS:

Upon notification from the providers, sellers should be required to notify all purchasers that the provider has ceased doing business or has transferred ownership.

Bill Stalter Page 34 Termination of Business Comments:

I assume the reference to “purchasers” in the Preneed Providers section is meant to address consumers. With regard to consumer notifications on the sale of a business, it will be very difficult to comply with these provisions. The contracts can be many years old, with addresses that are no longer accurate. What purpose does the notification serve other than informational? It is incumbent upon the State Board to take those actions necessary to protect the consumers’ interests.

Successor liability and consumer protection issues were discussed in the Chapter 214 hearings, and consideration is being given to whether escrow arrangements should be used until regulators can provide the due diligence required to protect consumers and the prospective buyer. While property purchasers should perform their own due diligence, circumstances may prevent a thorough review of records until possession is obtained.

Audits, Investigations and Examinations

Page 36-37

1. 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. *(Although the Working Group initially recommended every three years, the Board expressed concerns regarding cost and the financial feasibility of conducting such examinations.)*
2. Audit a preneed seller with cause if the Board has reasonable grounds for verifying the proper handling of preneed funds.
3. Inspections, investigations, audits and examinations should be authorized with or without a complaint.
4. Books and records of licensees should be made available to the Board by the licensees upon request.
5. Costs of an inspection, investigation, examination or audit should be funded through licensing fees established by the Board by rule. *(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.)*

Bill Stalter Page 36-37 Audits, Investigations and Exams Comments:

1. All sellers should be subject to some form of a review or exam within a specified time not to exceed 5 years. It may not necessarily be an exam of all books and records, but rather a review of specified forms and reports that would demonstrate sufficient accounting controls, and fundamental compliance with Chapter 436.
2. The State Board should have the authority for ordering an audit when there is cause, but the issue will be the definition of “cause”. If the costs on an audit are to be assessed against the seller, due process protections must be afforded the seller.
3. It was agreed that the State Board needed greater authority to initiate investigations or exams in the absence of a consumer complaint. Audits could be ordered without a complaint if “cause” is otherwise established.
4. We need to be specific about which books and records are to be made available. Licensees will need to make preneed records available when requested, but general books and records of the business should fall outside this purview unless it relates to an audit.
5. There was a general backlash to the proposed examination fees, but the \$5,000 per exam did seem high. If an audit is based on cause, other states generally assess the licensee with the costs. The protections sought from exams should be shared by consumers and licensees.

Disciplinary Authority

Page 38-40

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].

Bill Stalter Page 38 to 40 Disciplinary Authority Comments:

While Chapter 436 must provide the State Board more disciplinary authority to address abuses such as those committed by NPS, the industry will contest any provision where a license can be automatically suspended for a shortage that does not involve elements of misconduct. Setting an arbitrary percentage as a “shortage” trigger for suspension could have the effect of discouraging a trust’s diversification.

Enforcement Authority

Page 41

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.

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

Bill Stalter Page 41 Enforcement Authority Comments:

With regard to Chapter 333 violations, the State Board has limited enforcement tools, and must resort to the threat of license revocations. This needs to be avoided with respect to Chapter 436. Preneed compliance should be a cooperative effort where funeral directors are encouraged to seek assistance, and not severely punished for mistakes that can be rectified. The State Board will need the flexibility to levy fines for non-compliance, but with the ability to waive the fine if corrective actions are taken. With that said, it may be best to remove 'incompetence' as grounds for a felony violation.

Fees

Page 43

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.

Bill Stalter Page 43 Fees Comments:

Consideration should be given to increasing the \$2 per preneed contract fee. The costs of periodic reviews/examinations will need to be shared with consumers.