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Attachment B

Analysis of Proposed Changes to Missouri Prepaid Funeral Statutes

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Note from J. Slocum — The proposed changes below were drafted by the Board of Embalmers and Funeral directors, and appear in red. My comments are interspersed in blue and look like this --- JS: This is my comment.

In truth, the entire statute needs to be rewritten from the ground up. So many modifications of a law written long ago have created a confusing and sometimes contradictory document. A fresh draft, written in plain, straightforward English, would help drafters, commenters, and funeral directors better understand the law.

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Board of Embalmers and Funeral Director Recommendations

436.005. As used in sections 436.005 to 436.071, unless the context otherwise requires, the following terms shall mean:

(1) "Beneficiary", the individual who is to be the subject of the disposition and who will receive funeral services, facilities or merchandise described in a preneed contract;

(2) "Division", the division of professional registration of the [department of economic development] **insurance, financial institutions and professional registration;**

(3) "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 [if, but only if, such items are sold:

(a) By a companion agreement which is sold in contemplation of trade or barter for grave vaults or funeral or burial services and funeral merchandise; or

(b) At prices, in excess of prevailing market prices, intended to be offset by reductions in the costs of funeral or burial services or facilities which are not immediately required;]

(4) "Person", any individual, partnership, corporation, cooperative, association, or other entity;

(5) "Preneed contract", any contract or other arrangement, **including any insurance contract**, which requires the [current] payment of money or other property in consideration 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, **[except for contracts of insurance, including payment of proceeds from contracts of insurance, unless the preneed seller or provider is named as the owner or beneficiary in the contract of insurance]. In no instance shall a preneed contract be funded by term life insurance;**

JS: This is good - it was shocking to find out anyone was selling term life to back prepaid contracts.

(6) "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;

(7) "Provider", the person obligated to provide the disposition and funeral services, facilities, or merchandise described in a preneed contract;

(8) "Purchaser", the person who is obligated to make payments under a preneed contract;

(9) "Seller", the person who sells a preneed contract to a purchaser and who is obligated to collect and administer all payments made under such preneed contract;

(10) "State board", the Missouri state board of embalmers and funeral directors;

(11) "Trustee", the trustee of a preneed trust, including successor trustees.

436.007. 1. Each preneed contract made after August 13, 1982, shall be void and unenforceable unless:

(1) It is in writing;

(2) It is executed by a seller who is in compliance with the provisions of section 436.021;

(3) It identifies the contract beneficiary and sets out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided;

(4) It identifies the preneed trust **or financial institution where a joint account is held** into which contract payments shall be deposited, **or identifies the insurance company that will be used to fund any preneed contract**, including the name and address of the trustee, **financial institution or insurance company [thereof]. The insurance company shall be in good standing, and duly authorized to conduct business, in the state of Missouri;**

(5) The terms of such trust and related agreements among two or more of the contract seller, the contract provider, and the trustee of such trust are in compliance with the provisions of sections 436.005 to **[436.071] 436.072;**

(6) It contains the name and address of the seller and the provider.

2. If a preneed contract does not comply with the provisions of sections 436.005 to **[436.071] 436.072**, all payments made under such contract shall be recoverable by the purchaser, **[his] the beneficiary or the beneficiary's** heirs, or legal representative, from the contract seller or other payee thereof, together with interest at the rate of ten percent per annum and all reasonable costs of collection, including attorneys' fees.

3. Each preneed contract made before August 13, 1982, and all payments and disbursements under such contract shall continue to be governed by sections 436.010 to 436.080, as those sections existed at the time the contract was made; but, the provisions of subsection 2 of section 436.035 may be applied to all preneed contracts which are

executory on August 13, 1982.

4. Subject to the provisions of subdivision (5) of section 436.005, the provisions of sections 436.005 to **[436.071] 436.072** shall apply to the assignment of proceeds of any contract of insurance for the purpose of funding a preneed contract or written in conjunction with a preneed contract. Laws regulating insurance shall not apply to preneed contracts, but shall apply to any insurance sold with a preneed contract.

5. No preneed contract shall become effective unless and until the purchaser thereof has placed his **or her** signature in a space provided on such contract, or application therefor, and the purchaser has received a copy of such contract signed by the seller.

JS: There are a number of important disclosures that should be on the preneed contract, but the law doesn't require them:

- Whether the contract is price-guaranteed or not.
- Which portions of the contract are guaranteed, and which may rise in price.
- The consumer's right to cancel the contract, and how much money will be returned.
- The consumer's right to transfer the contract to another funeral home, and how much money will be transferred.
- Whether the contract is funded by a trust, or by a life insurance policy. If a funeral home offers both, the customer must have the choice.
- If funded by a life insurance policy, a clear, plain-language explanation must be included stating the cash surrender value of the policy, the consequences of defaulting on premium payments, and how much of a commission, if any, the funeral home is making from the insurance company.

Although Texas' prepaid law has some problems, the state's required preneed contract is a good example of clear, plain-English explanations of consumer rights. Missouri should consider something similar. Here's TX's form:

<http://www.banking.state.tx.us/forms/trcontrt.pdf>

6. The seller and the provider of a preneed contract may be the same person.
436.011. 1. Any seller who designates a person as a provider in a preneed contract **and any provider who designates a person as a seller** without a contractual relationship with such person is in violation of the provisions of sections 436.005 to **[436.071] 436.072. Upon request of the board, a licensed seller or provider shall provide a copy of any contract or agreement with a seller or provider.**

JS: The above is an example of confusing language. If I understand it correctly (and I don't know if I do), it could be written much more clearly: "Funeral providers that use independent contractors or third parties to sell prepaid contracts must have a written agreement with the contractor or third party. This agreement shall describe the duties and obligations of the two parties to each other, and shall state that the funeral provider is responsible for the conduct of the third party or contractor."

2. Any person who knowingly permits a seller to sell a preneed contract designating him as the provider or as one of two or more providers who will furnish the funeral merchandise and services described in the preneed contract shall provide the funeral merchandise and services described in the preneed contract for the beneficiary.

Any person who knowingly permits a provider to sell a preneed contract designating such person as the seller who is obligated to collect and administer all payments made under such preneed contract shall be obligated for all such payments made by the purchaser under such preneed contract. Failure of any such person to do so shall be a violation of the provisions of sections 436.005 to [436.071] **436.072** and shall be cause for suspension or revocation of that person's license under the provisions of section 333.061, RSMo.

JS: Confusing language again. The head swims with so many "sellers" and "providers" and "designations." Why not excise it completely? My suggestion above to establish a contractual relationship between the funeral provider and the preneed seller could spell out these obligations.

3. If a provider has knowledge that a seller is designating him **or her** as the provider of funeral merchandise and services under any preneed contract and fails within thirty days after first obtaining such knowledge to take action to prevent the seller from so designating him **or her** as the provider, the provider shall be deemed to have consented to such designation. **If a seller has knowledge that a provider is designating such seller as the seller of any preneed contract and, within thirty days after obtaining such knowledge, fails to take action to prevent the provider from so designating such seller, the seller shall be deemed to have consented to such designation.**

JS: Even more confusing language. A requirement for a contractual agreement with mutual responsibilities would take care of the problem. Just outlaw the use of contractors if the funeral provider and the contractor don't have a written agreement that meets certain requirements.

436.015. 1. No person shall perform or agree to perform the obligations of, or be designated as, the provider under a preneed contract unless, at the time of such performance, agreement or designation:

(1) Such person is [registered] **licensed** by the state board as a funeral establishment pursuant to the provisions of section 333.061, RSMo, but such person need not be licensed as a funeral establishment if [he] **such person** is the owner of real estate situated in Missouri which has been formally dedicated for the burial of dead human bodies and the contract only provides for the delivery of one or more grave vaults at a future time and is in compliance with the provisions of chapter 214, RSMo, **or such person is only engaged in the retail sale of funeral merchandise**; and

JS: If retail casket sellers are selling their products preneed, they should have to comply with the same trusting, refund, and reporting provisions as funeral homes. But, given the Board of Embalmers' history of improperly targeting retail casket sellers (see the consent decree with the Federal Trade Commission enjoining the Board from enacting any regulations that would stifle retail casket competition), the statute should explicitly limit the Board's regulatory authority over retailers to the enforcement of trust deposit and reporting requirements.

(2) Such person **is registered to conduct business with the Missouri Secretary of State and** is [registered] **licensed** with the state board and files with the state board a

written consent authorizing the state board to order an **investigation**, examination **or audit** [and if necessary an audit by the staff of the division of professional registration who are not connected with the board] of its **joint accounts or** books and records which contain information concerning preneed contracts sold for, [in] **on** behalf of, or in which he **or she** is named as provider of the described funeral merchandise or services. **The state board may order an investigation to determine compliance with this chapter.**

2. Each provider under one or more preneed contracts shall:

(1) Furnish the state board in writing with the name and address of each seller authorized by the provider to sell preneed contracts in which the provider is named as such within fifteen days after the provider signs a written agreement or authorization permitting the seller to sell preneed contracts designating or obligating the provider as the "provider" under the contract. This notification requirement shall include a provider who, itself, acts as seller;

(2) File annually with the state board **by the thirty first day of October** a report.

Annual reports filed after the date provided herein shall be subject to a late fee of one hundred dollars for every six months past the renewal deadline or an amount determined by the board by rule. The annual report [which] shall contain:

(a) The business name or names of the provider and all addresses from which it engages in the practice of its business;

(b) The name and address of each seller with whom it has entered into a written agreement since last filing a report **and a detailed list including the name, contract number and amount of each preneed contract, the phone number and address of the purchaser as identified in the contract, and the total payments collected by the provider for each preneed contract since the last annual report filed with the board;**

JS: Sending the state board a list of preneed contracts sold is insufficient. Rather, the law should require a copy of the actual contract to be sent to the state.

In addition, the law should require the provider to send an annual statement to each consumer stating how much money is in trust (if a trust is used), and how much interest has accrued. This need be only one sheet of paper with basic information - it wouldn't be burdensome.

(c) The name and address of the custodian of its books and records containing information about preneed contract sales and services, **and;**

(d) The name and address of the financial institutions in which joint accounts are held as authorized by 436.053.

(3) Cooperate with the state board , the office of the attorney general of Missouri, and the division in any investigation, examination or audit brought under the provisions of sections 436.005 to ~~[436.071]~~ **436.072**;

(4) At least thirty days prior to selling or otherwise disposing of its business assets, or its stock if a corporation, or ceasing to do business, give written notification to the state board and to all sellers with whom it has one or more preneed contracts of its intent to engage in such sale or to cease doing business. In the case of a sale of assets or stock, the written notice shall also contain the name, **phone number** and address of the purchaser. Upon receipt of such written notification, the state board may take reasonable and necessary action to determine that any preneed contracts which the provider is obligated to service will be satisfied at the time of need, **including, but not limited to, an examination of books and records or audit of the joint account.** The state board may waive the requirements of this subsection, or may shorten the period of notification

whenever in its discretion it determines that compliance with its provisions are not necessary. **[Failure of the state board to take action regarding such sale or termination of business within thirty days shall constitute such a waiver.] Written notice shall be sent to the board and to all purchasers within thirty days of the establishment selling or otherwise disposing of its business assets, or its stock if a corporation, or ceasing to do business identifying the establishment that will be assuming responsibility for any preneed contracts.**

3. It is a violation of the provisions of sections 436.005 to **[436.071] 436.072** and subdivision (3) of section 333.121, RSMo, for any person to sell, transfer or otherwise dispose of the assets of a provider without first complying with the provisions of subdivision (4) of subsection 2 of this section. This violation shall be in addition to the provisions of section 436.061.

4. If any licensed embalmer, funeral director or licensed funeral establishment shall knowingly allow such licensee's name to be designated as the provider under, or used in conjunction with the sale of, any preneed contract, such licensee shall be liable for the provider's obligations under such contract.

5. With respect to a provider or seller licensed under the provisions of chapter 333, RSMo, any violation of the provisions of sections 436.005 to **[436.071] 436.072** shall constitute a violation of subdivision (3) of section 333.121, RSMo.

436.021. 1. No person, including without limitation a person who is a provider under one or more preneed contracts, shall sell, perform or agree to perform the seller's obligations under, or be designated as the seller of, any preneed contract unless, at the time of that sale, performance, agreement, or designation, that person shall:

- (1) Be an individual resident of Missouri or a business entity duly authorized to transact business in Missouri **and registered with the Missouri Secretary of State;**
- (2) Have established, as grantor, a preneed trust or trusts with terms consistent with sections 436.005 to 436.071;
- (3) **[Have registered with] Be licensed as a provider by** the state board.

JS: Does this mean that only funeral directors could sell preneed? If so, why is there language above that makes a distinction between "provider" and "seller?"

2. In lieu of establishing a trust, the applicant may certify to the board that all preneed contracts are to be funded solely by insurance or that preneed funds will be deposited in a joint account as provided in section 436.053.

3. Each seller under one or more preneed contracts shall:

- (1) Maintain adequate records of all such contracts and related agreements with providers and the trustee of preneed trusts regarding such contracts, **or any insurance company used for funding preneed contracts**, including copies of all such agreements. **The seller shall also maintain adequate records of all money paid by purchasers and shall be obligated to collect and administer all payments made under such contracts or agreements under section 436.005, RSMo;**
- (2) Notify the state board in writing of the name and address of each provider who has authorized the seller to sell one or more preneed contracts under which the provider is designated or obligated as the contract's "provider";
- (3) File annually with the state board **by the thirty-first day of October** a signed and notarized report on forms provided by the state board. **Annual reports filed after the date provided herein shall be subject to a late fee of one hundred dollars for**

every six months past the renewal deadline or an amount as determined by the board by rule. Any seller who fails to file their annual report on or before the thirty-first day of October shall be prohibited from selling any preneed contracts

Such [a]report shall [only] contain:

- (a) The date the report is submitted and the date of the last report;
- (b) The name and address of each provider with whom it is under contract;
- (c) The total number of preneed contracts sold in Missouri since the filing of the last report **and a detailed list including the name, contract number, amount of each preneed contract the seller has written in Missouri since the last filing report, the amount the seller has received as payment for each preneed contract and the address and phone number of the purchaser as reflected in the contract;**
- (d) The total face value of all preneed contracts sold in Missouri since the filing of the last report;
- (e) The name and address of the **insurance company used to fund preneed contracts or the** financial institution in Missouri in which it maintains the trust accounts required under the provisions of sections 436.005 to [436.071] **436.072** and the account numbers of such trust accounts;
- (f) A consent authorizing the state board to order an examination and if necessary an audit [by staff of the division of professional registration who are not connected with the board and a] of the trust account, designated by depository account number. [The staff of the division of professional registration in conducting the audit shall not release a detailed accounting of the trust account to the board unless there exist circumstances indicating that the account does not comply with the requirements of sections 436.005 to 436.071, but shall provide the board with a summary of the examination or audit showing general compliance with the provisions of sections 436.005 to 436.071;

(4) File with the state board a consent authorizing the state board to order an **investigation**, examination and if necessary an audit [by staff of the division of professional registration who are not connected with the board] of its books and records relating to the sale of preneed contracts and the name and address of the person designated by the seller as custodian of these books and records. [The staff of the division of professional registration in conducting the audit shall not release a detailed accounting of the trust account to the board unless there exist circumstances indicating that the account does not comply with the requirements of sections 436.005 to 436.071, but shall provide the board with a summary of the examination or audit showing general compliance with the provisions of sections 436.005 to 436.071;]

(5) Cooperate with the state board, the office of the attorney general, and the division in any investigation, examination or audit brought under the provisions of sections 436.005 to [436.071] **436.072**.

[3] **4.** Prior to selling or otherwise disposing of a majority of its business assets, or a majority of its stock if a corporation, or ceasing to do business as a seller, the seller shall provide written notification to the state board of its intent to engage in such sale at least sixty days prior to the date set for the closing of the sale, or of its intent to cease doing business at least sixty days prior to the date set for termination of its business. The written notice shall be sent, at the same time as it is provided to the state board, to all providers who are then obligated to provide funeral services or merchandise under preneed contracts sold by the seller. Upon receipt of the written notification, the state board may take reasonable and necessary action to determine that the seller has made

proper plans to assure that the trust **[assets] accounts** of the seller will be set aside and used to service outstanding preneed contracts sold by the seller, **including, but not limited to, an examination of books and records or audit of the trust account**. The state board may waive the requirements of this subsection or may shorten the period of notification whenever in its discretion it determines that compliance with its provisions are not necessary. **[Failure of the state board to take action regarding such sale or termination of business within sixty days shall constitute such a waiver.] Written notice shall be sent to the provider, to the board and to all purchasers within thirty days of the establishment selling or otherwise disposing of its business assets, or its stock if a corporation, or ceasing to do business identifying the establishment that will be assuming responsibility for the preneed contracts.**

[4]5. It is a violation of the provisions of sections 436.005 to **[436.071] 436.072** for any person to sell, transfer or otherwise dispose of the assets of a seller without first complying with the provisions of subsection 3 of this section.

436.027. **For every contract sold after August 28, 2008, [T]the seller shall deposit into trust one hundred percent of all funds paid for the preneed contract or, in the alternative, one hundred percent of the funds shall be used to purchase life insurance subject to the provisions of section 436.054 provided term life insurance shall not be used to fund any preneed contract. Excluding funds used to purchase life insurance, the seller shall deposit one hundred percent of the funds that are received as payment on a preneed contract into the seller's trust account within sixty days of receipt. [may retain as his own money, for the purpose of covering his selling expenses, servicing costs, and general overhead, the initial funds so collected or paid until he has received for his use and benefit an amount not to exceed twenty percent of the total amount agreed to be paid by the purchaser of such prepaid funeral benefits as such total amount is reflected in the contract.]**

JS: Requiring 100 percent deposit of trust money is a major, positive step forward! There is one important thing this doesn't address though: the customer's right to choose whether to buy a trust-funded or insurance-funded contract. The proposed wording is loose and would allow a funeral home to buy a life insurance policy for the consumer. If a consumer has to cancel a life insurance policy, he typically gets pennies on the dollar - much less of a refund than if he cashed out a trust.

The law should also prohibit funeral providers from cashing out a trust fund and replacing it with insurance, as has happened in some states. And no, getting the customer's permission is insufficient. Few consumers understand how severely the value of their investment changes when converted to insurance, nor do they realize that funeral providers make a commission off such ill-advised conversions.

436.031. 1. The trustee of a preneed trust shall be a state or federally chartered financial institution authorized to exercise trust powers in Missouri **which financial institution may neither control nor be controlled by or under common control with the seller. The term "control", including terms "controlled by" and "under common control with," means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall 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, provided that any such determination shall be within the sole discretion of the board. The trustee shall accept all deposits made to it by the seller of a preneed contract and shall hold, administer, and distribute such deposits, in trust, as trust principal, pursuant to the provisions of sections 436.005 to ~~[436.071]~~ **436.072**. Payments regarding two or more preneed contracts may be deposited into and commingled in the same preneed trust, so long as the trust's grantor is the seller of all such preneed contracts and the trustee maintains adequate records of all payments received.

2. All property held in a preneed trust, including principal and undistributed income, shall be invested and reinvested by the trustee thereof. The trustee shall exercise such judgment and care under circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their ~~[funds]~~ **moneys**, considering the probable income therefrom as well as the probable safety of their capital. ~~[A preneed trust agreement may provide that when the principal and interest in a preneed trust exceeds two hundred fifty thousand dollars, investment decisions regarding the principal and undistributed income may be made by a federally registered or Missouri-registered independent qualified investment advisor designated by the seller who established the trust; provided, that title to all investment assets shall remain with the trustee and be kept by the trustee to be liquidated upon request of the advisor of the seller.]~~ In no case shall control of said assets be divested from the trustee nor shall said assets be placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in. ~~[The trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor.]~~ **One hundred percent of all funds received as payment for a preneed contract sold after August 28, 2008, shall be placed and held in trust or shall be used to purchase insurance to fund the preneed contract provided term life insurance shall not be used to fund any preneed contract.**

JS: Again, the customer needs to be given a choice of funding through a trust or by insurance.

3. Any investment in preneed funds shall be made in investments designed to increase the value of the preneed funds. No investments shall be made in any manner that does not have the potential to increase the value of the preneed funds. No trustee shall invest preneed funds in term life insurance policies or any similar insurance vehicle which does not have the potential to increase the value of the funds. No loans against any life insurance policy purchased with preneed money shall be allowed.

JS: I'm not sure what good it does to state that investments must be designed to make money - that seems obvious. If the intent is to prevent certain kinds of risky investment schemes, the law should spell those out specifically. The prohibition against loans against life insurance is a good measure.

[3.] 4. [The seller of a preneed contract shall be entitled to all income, including, without limitation, interest, dividends, and capital gains, and losses generated by the investment of preneed trust property regarding such contract, and the trustee of the trust

may distribute all income, net of losses, to the seller at least annually; but no such income distribution shall be made to the seller if, and to the extent that, the distribution would reduce the aggregate market value on the distribution date of all property held in the preneed trust, including principal and undistributed income, below the sum of all deposits made to such trust pursuant to subsection 1 of this section for all preneed contracts then administered through such trust.] **Except as provided in this chapter, all income, including, interest, dividends, and capital gains, and losses generated by the investment of preneed trust property regarding such contract, generated by the investment of preneed trust property shall be paid to the provider furnishing funeral services or arrangements upon the final disposition of the beneficiary. If the preneed contract is cancelled by the purchaser, all income from the trust property shall be paid to the purchaser with any other amounts required by this chapter.**

JS: Allowing the funeral provider to take all income generated by the trust at the consumer's death overlooks the fact that some prepaid contracts are not price-guaranteed. Unless the funeral home is willing to assume the risk of making up the shortfall if the trust account hasn't grown enough when the customer dies, why should the funeral home be entitled to all the proceeds in the trust? This is highly irregular - every preneed contract I've seen that entitles the provider to the overage in the trust account does so only in exchange for promising not to charge the consumer or the estate more. If the contract is not price-guaranteed, the provider should have no right to scoop out all the excess in the account above the actual cost of goods and services at the time of death.

[4. All expenses of establishing and administering a preneed trust, including, without limitation, trustee's fees, legal and accounting fees, investment expenses, and taxes, shall be paid or reimbursed directly by the seller of the preneed contracts administered through such trust and shall not be paid from the principal of a preneed trust.]

5. Notwithstanding any other provision of this chapter, the actual expenses of establishing and administering a preneed trust, including, trustee's fees, legal and accounting fees, investment expenses, and taxes, may be paid or reimbursed from the income of the trust, provided that expenses paid shall not exceed five percent of the trust amount or the amount established by the board by rule.

JS: Allowing a five-percent take from the trust for "fees" is way too generous. That amount would actually exceed the growth rate on some accounts. That means the customer's account would decline in value. This allows unwise businesses to put short-term greed ahead of sound long-term security. Missouri could end up with another NPS-style meltdown, with funeral homes having skimmed money from the account that should have been left there to offset rising costs. A dollar spent today is one less dollar in the future - if the profits are skimmed today, the growth is not there in the future to service the contract. It does cost money to run a trust, but not five percent. I'd suggest looking at NY state law, which caps fees at 3/4 of 1 percent.

[5]6. The trustee of a preneed trust shall maintain adequate books of account of all transactions administered through the trust and pertaining to the trust generally. The trustee shall assist **the** seller who established the trust or its successor in interest in the

preparation of the annual report described in subdivision (3) of subsection [2]3 of section 436.021. The seller shall furnish to each contract purchaser, within fifteen days after receipt of the purchaser's written request, a written statement of all deposits made to such trust regarding such purchaser's contract.

7. All payments made by the purchaser of a preneed contract shall be paid to the seller and moneys deposited into the trust account or used to purchase insurance within sixty days of receiving it under the provisions set forth in 436.027. The seller shall notify the provider of all payments within sixty days of receipt of such payments made by the purchaser. Purchasers who choose to make payments with cash and/or pay to the seller's agent shall sign a statement showing receipt of moneys paid to the seller's agent. The seller's agent shall provide a copy of receipt to the purchaser and a copy shall be submitted to the seller with the payment of moneys.

[6] **8.** The trustee of a preneed trust shall, from time to time, distribute trust principal as provided by sections 436.005 to [436.071] **436.072.**

[7] **9.** A preneed trust shall terminate when trust principal no longer includes any payments made under any preneed contract, and upon such termination the trustee shall distribute all trust property, including principal and undistributed income, to the seller which established the trust.

436.035. 1. At any time before the final disposition of the [dead body] **deceased beneficiary**, or before funeral services, facilities, or merchandise described in a preneed contract are provided by the provider designated in the preneed contract, the purchaser may cancel the contract without cause by delivering written notice thereof to the seller and the provider. Within fifteen days after its receipt of such notice, the seller shall pay to the purchaser [a net] **an** amount equal to all payments made into trust under the contract. Upon delivery of the purchaser's receipt for such payment to the trustee, the trustee shall distribute to the seller from the trust an amount equal to [all deposits made into the trust for the contract] **the amount refunded to the purchaser by the seller. At the same time the seller makes payment to the purchaser, the seller shall notify the provider in writing of the payment made to the purchaser, including the date and the amount of the payment made. Insurance agents shall comply with all applicable provisions and laws governing the sale of any insurance.**

JS: Giving customers this right of cancellation and refund is good, but the language above implies the funeral home would be able to keep all the interest earned. Why should the funeral home be entitled to keep the growth on the account if the customer cancels? After all, the funeral home hasn't provided any goods or services to the customer if the contract is canceled before death. The customer is being fleeced here - it's his money, yet someone else makes the interest on it?

I suggest rewriting this passage:

"Purchasers of preneed contracts shall have the right to cancel the contract at any time before the provider furnishes the goods and services in the contract. Purchasers shall do so by notifying the provider in writing. Within 30 days of receiving such a cancellation, the provider shall refund to the purchaser the entire amount in the trust account including accrued interest. The provider shall be entitled to retain no more than 3/4 of 1 percent for administrative fees."

2. Notwithstanding the provisions of subsection 1 of this section, if a purchaser **or**

beneficiary is eligible, becomes eligible, or desires to become eligible, to receive public assistance under chapter 208, RSMo, or any other applicable state or federal law, the purchaser may irrevocably waive and renounce his right to cancel the contract pursuant to the provisions of subsection 1 of this section, which waiver and renunciation shall be made in writing and delivered to the contract seller; but the purchaser may designate and redesignate the provider in the irrevocable agreement or plan [where applicable by the terms of the contract]. **If a purchaser or beneficiary is eligible, becomes eligible, or desires to become eligible to receive public assistance under chapter 208, RSMo, or any other applicable state or federal law, a copy of the preneed contract shall be provided to the appropriate qualifying state or federal agency, if requested by a state or federal agency. Notwithstanding, at any time before the final disposition of the beneficiary or before the funeral services, facilities, or merchandise described in the preneed contract are provided by the provider designated in the preneed contract, the purchaser or beneficiary may designate and redesignate the provider without cause by delivering written notice thereof to the provider and the seller. Within fifteen days after its receipt of such notice, the seller shall notify the newly designated provider of the purchaser's request and request written consent to the designation. Written consent from the newly designated provider shall be attached to the preneed contract to reflect such change. A purchaser may only redesignate a provider if the proposed provider has a contractual relationship with the seller as required by 436.011.1. Nothing in this section shall be construed to restrict, amend or limit a purchaser's right to cancel a contract as provided in sections 436.005 to 436.072.**

JS: There's a problem here. The language above suggests purchasers can't transfer their preneed contracts to a new provider unless the new funeral home has a contractual relationship with the entity that sold the preneed contract. This makes no sense- it would bar consumers from, say, transferring a contract from a Kansas City funeral home to a new funeral home in St. Louis if they move there. After all, the new funeral home wouldn't have a "contractual relationship" with the other funeral home in Kansas City. If I've misinterpreted this, it's an indication that the language is terribly confusing and will cause problems for others. This really must be changed or rewritten.

3. Notwithstanding the provisions of subsection 1 of this section, any purchaser **or beneficiary**, within thirty days of receipt of the executed contract, may cancel the contract without cause by delivering written notice thereof to the seller and the provider, and receive a full refund of all payments made on the contract. Notice of this provision and the appropriate addresses for notice of cancellation shall be so designated on the face of the contract. **Notwithstanding, at any time before the final disposition of the beneficiary or before the funeral services, facilities, or merchandise described in the preneed contract are provided by the provider designated in the preneed contract, the purchaser or beneficiary may designate and redesignate the provider without cause by delivering written notice thereof to the provider and the seller. Within fifteen days after its receipt of such notice, the seller shall notify the newly designated provider of the purchaser's request and request written consent to the designation. Written consent from the newly designated provider shall be attached to the preneed contract to reflect such change. A purchaser may only redesignate a provider if the proposed provider has a contractual relationship with the seller as required by 436.011.1. Nothing in this section shall be construed to restrict, amend or limit a purchaser's right to cancel a contract as provided in sections 436.005 to**

436.072.

4. No preneed contract or funds may be transferred by a seller without prior written notification to and consent from the purchaser.

436.038. If the death of the beneficiary occurs outside the general area served by the provider designated in a preneed contract, then the seller shall either provide for the furnishing of comparable funeral services and merchandise by a licensed mortuary selected by the next of kin of the purchaser or, at the seller's option, shall pay over to the purchaser in fulfillment of all obligations under the contract, an amount equal to all sums actually paid in cash by the purchaser under the preneed contract together with **any** interest **[to be provided for in the contract]**. Upon seller's full performance under the provisions of this section, the trustee of the preneed trust for the contract shall distribute to the seller from the trust an amount equal to all deposits made into the trust for the contract.

436.041. **The seller shall be obligated for the collection, administration and oversight of all payments made under such contract.** If the payments payable under a preneed contract shall be more than three months in arrears, the seller may cancel the contract by delivering written notice thereof to the purchaser and the provider~~]~~ **sixty days before cancellation. The written notice shall indicate the purchaser has sixty days to remit to the seller those payments in arrears. If such payments are not received by the seller within sixty days of notice, the seller may cancel the contract by delivering final written notice to the purchaser and provider** and by making payment to the purchaser of **[a net] an** amount equal to all payments made **[into trust under the contract] by the purchaser under section 436.027**. Upon delivery of the purchaser's receipt of such payment to the trustee, the trustee shall distribute to the seller from the trust an amount equal to all deposits made into the trust for the contract.

JS: Again, this allows the seller or provider to keep all of the interest if the customer defaults. This must not be permitted. We must remember it is the customer's money - all of it - until the provider has actually performed the funeral.

436.045. Within thirty days after a provider and a witness shall certify in writing to the seller that the provider has provided the final disposition of the **[dead body] beneficiary**, and funeral **[services, facilities, and]** merchandise described in the contract, or has provided alternative funeral **arrangements or** benefits for the beneficiary pursuant to special arrangements made with the purchaser **as detailed in the written statement of charges under section 333.145, RSMo**, the seller shall pay to the provider a net amount equal to all payments **[required to be made pursuant to the written agreement between the seller and the provider or all payments]** made **by the purchaser** under the contract **with any income, provided the seller may deduct any expenses allowed in 436.031.5**. Upon delivery to the trustee of the provider's receipt for such payment, the trustee shall distribute to the seller from the trust an amount equal to all deposits made into the trust for the contract.

436.048. If a seller shall fail to make timely payment of an amount due a purchaser, **beneficiary** or a provider pursuant to the provisions of sections 436.005 to **[436.071] 436.072**, the purchaser or provider, as appropriate, shall have the right, in addition to other rights and remedies against such seller, to make demand upon the trustee of the preneed trust for the contract to distribute to the purchaser or provider from

the trust, as damages for its breach, an amount equal to all deposits made into the trust for the contract.

436.051. Upon the death or legal incapacity of a purchaser, all rights and remedies granted to the purchaser pursuant to the provisions of sections 436.005 to **[436.071] 436.072** shall be enforceable by and accrue to the benefit of the purchaser's legal representative or **[his] the purchaser's** successor designated in such contract, and all payments otherwise payable to the purchaser shall be paid to that person.

436.053. 1. Notwithstanding the provisions of sections 436.021 to 436.048, the provider and the purchaser may agree that all **[funds] moneys** paid the provider by the purchaser shall be deposited with financial institutions chartered and regulated by the federal or state government authorized to do business in Missouri in an account in the joint names and under the joint control of the provider and purchaser. **[If the purchaser has irrevocably waived and renounced his right to cancel the agreement between the provider and the purchaser pursuant to subdivision (5) of this subsection, such agreement may provide that all funds held in the account at the beneficiary's death shall be applied toward the purchase of funeral or burial services or facilities, or funeral merchandise, selected by the purchaser or the responsible party after the beneficiary's death, in lieu of the detailed identification of such items required by subdivision (3) of subsection 1 of section 436.007.] One-hundred percent of all funds paid by the purchaser shall be placed in the joint account, provided that the actual expenses of establishing and administering the joint account, including, the financial institution fees, legal and accounting fees, investment expenses and taxes, may be paid or reimbursed from the income of the joint account. Any expenses deducted pursuant hereto shall not exceed five percent of the amount placed in the joint account or the amount established by the board by rule.** The **[agreement] contract** between the provider and purchaser shall **include all applicable information outlined in section 436.027 and shall** provide that:

(1) The total consideration to be paid by the purchaser under the contract shall be made in one or more payments into the joint account, **including the name and address of the financial institution which holds such moneys and the account numbers of such moneys**, at the time the agreement is executed or, thereafter within five days of receipt, respectively;

(2) The financial institution shall hold, invest, and reinvest the deposited **[funds] moneys** in savings accounts, certificates of deposit or other accounts offered to depositors by the financial institutions, as the **[agreement] contract** shall provide;
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(3) The income generated by the deposited funds shall be used to pay the reasonable expenses of administering the agreement, and the balance of the income shall be distributed or reinvested as provided in the agreement. **For all preneed funeral contracts with moneys held in joint accounts written on or after August 28, 2008, the income generated by the deposited moneys shall be used to pay the actual expenses of administering the agreement, as provided in subsection 1 of this section, and the balance of the income shall be reinvested in such preneed account. Expenses deducted pursuant to this section shall not exceed five percent of the amount in the**

joint account or the amount established by the board by rule;

(4) At any time before the final disposition, or before funeral services, facilities, and merchandise described in a preneed contract are furnished, the purchaser may cancel the contract without cause by delivering written notice thereof to the provider and the financial institution, and within fifteen days after its receipt of the notice, the financial institution shall distribute the deposited **[funds] moneys and any income**, to the purchaser, **as provided herein, and shall provide written notification to the provider of the amount of moneys and the date moneys were distributed to the purchaser;**

(5) Notwithstanding the provisions of subdivision (4) of this subsection, if a purchaser is eligible, becomes eligible, or desires to become eligible to receive public assistance under chapter 208, RSMo, or any other applicable state or federal law, the purchaser may irrevocably waive and renounce his **or her** right to cancel such **[agreement] contract**. The waiver and renunciation must be in writing and must be delivered to the provider and the financial institution, **if requested;**

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(6) If the death of the beneficiary occurs outside the general area served by the provider, then the provider shall either provide for the furnishing of comparable funeral services and merchandise by a licensed mortuary selected by the purchaser or, at the provider's option, shall pay over to the purchaser in fulfillment of the obligation of the preneed contract, an amount equal to the sums actually paid in cash by such purchaser under such preneed contract together with **income, as provided in this section, [interest to be provided for in the contract]**, in which event the financial institution shall distribute the **[deposited funds] payment** to the provider **the amount paid to the purchaser. The provider may deduct from the amount paid or reimbursed any expenses authorized under this section;**

(7) Within fifteen days after a provider and a witness certifies in writing to the financial institution that he **or she** has furnished the final disposition, or funeral services, facilities, and merchandise described in a contract, or has provided alternative funeral **arrangements or** benefits for the beneficiary pursuant to special arrangements made with the purchaser **as detailed in the written statement of charges under section 333.145, RSMo**, if the certification has been approved by the purchaser, then the financial institution shall distribute **[the deposited funds] payment to the provider subject to the requirements of this section.**

JS: This overlooks the most basic requirement of proof - a certified death certificate. It's not enough for a provider to "certify in writing" that the customer died and got his/her funeral. No provider should be allowed to withdraw money from the account without providing a certified death certificate, and an itemized statement showing the goods and services rendered.

2. There shall be a separate joint account as described in subsection 1 of this section for each preneed contract sold or arranged under this section. **The seller shall provide written confirmation to the purchaser within sixty days of the purchase of the preneed contract that the joint account authorized by this section has been**

established and shall, within fifteen days after receipt of a purchaser's written

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request, furnish to each contract purchaser a written statement of all deposits made to such joint accounts regarding such purchaser's contract.

[3. If the total face value of the contracts sold by a provider operating solely under the provisions of this section does not exceed thirty-five thousand dollars in any one fiscal year, such a provider shall not be required to pay the annual reporting fee for such year required under subsection 1 of section 436.069.]

436.054. 1. In lieu of holding preneed funds in trust, a preneed contract may be funded by an insurance policy subject to the seller making the following requirements and written disclosures to the purchaser prior to accepting a purchaser's initial payment:

(1) The purchaser shall be fully aware and receive written notice that the preneed contract funds are for the purchase of life insurance, and;

(2) If the insurance funding the preneed contract is sold by an insurance agent who is also an employee of the preneed seller, the agent of a preneed seller, or an employee of a licensed funeral establishment, the purchaser shall receive written notice of such relationship. Insurance agents shall comply with all applicable provisions law governing the sale of the insurance policy.

2. Excluding those sales where the purchaser or beneficiary is eligible, becomes eligible, or desires to become eligible to receive public assistance under Chapter 208, RSMo, or any other applicable state or federal law, the purchaser shall be the owner and the only person allowed to make changes to the life insurance policy. In no event shall the owner of the policy be the preneed seller.

3. In no event shall the seller, or its agent, collect from the purchaser any amount in excess of what is required to pay the premiums on the life insurance policy used to fund the preneed contract nor shall the seller fund any preneed contract by or with term life insurance.

JS: These are good disclosures to require. However, as I wrote above, the customer must be given the choice of whether to use insurance or a trust fund (so long as the provider offers both). The customer must also be told the explicit financial consequences of canceling and cashing out a trust fund vs. an insurance fund.

436.055 1. All complaints received by the state board which allege a [registrant's] licensee's noncompliance with the provisions of sections 436.005 to [436.071] 436.072 or allege that a licensee has committed any act for which the board may discipline or refuse to issue a license under section 436.062, [shall be forwarded to the division of professional registration for investigation, except minor complaints which the state board can mediate or otherwise dispose of by contacting the parties involved] may be investigated by the board.

JS: The word "may" should be changed to "shall." It is the board's responsibility to investigate these complaints and it should not be permitted to decline to do so. I'm also concerned about how this proposal takes responsibility away from the division of professional registration and gives it solely to the Board.

A copy of each such complaint shall be forwarded to the subject [registrant] **licensee**, except [that each complaint] **the board shall not be required to forward complaints** in which the complainant alleges [under oath] that a [registrant] **licensee** has misappropriated preneed contract payments [may be forwarded to the division of professional registration without notice to the subject registrant.] **This section shall not be construed to limit the board's authority to file a complaint with the administrative hearing commission charging a licensee of the board with any actionable conduct or violation, regardless of whether such complaint exceeds the scope of acts charged in a preliminary public complaint filed with the board and whether any public complaint has been filed with the board.**

2. [The division shall investigate each complaint forwarded from the state board using staff who are not connected with the state board and shall forward the results of such investigation to the subject registrant and to the attorney general for evaluation. If the attorney general, after independent inquiry using staff of the attorney general's office who have not represented the board, determines that there is no probable cause to conclude that the registrant has violated sections 436.005 to 436.071, the registrant and the state board shall be so notified and the complaint shall be dismissed; but, if the attorney general determines that there is such probable cause the registrant shall be so notified and the results of such evaluation shall be transmitted to the state board for further action as provided in sections 436.061 and 436.063.] **The board may investigate, examine or audit the books or records of any licensee, or examine or audit a preneed trust or joint account, at any time to ensure a licensee's compliance with the provisions of sections 436.005 to 436.072. The board shall have authority to conduct random inspections or audits.**

3. **Upon determining that an inspection, investigation, examination or audit shall be conducted, the board shall issue a notice authorizing one or more employees or independent contractors to perform such inspection, investigation, examination or audit and instructing such employees or independent contractors as to the scope of such inspection, investigation, examination or audit. The board shall not appoint any employee or contract if such employee or contractor either directly or indirectly has a conflict of interest or is affiliated with the management of, or owns a pecuniary interest in, any person subject to inspection, investigation, examination or audit under section 436.005 to 436.072. The board may assess the cost of any related inspection, investigation, examination or audit to the licensee.**

JS: Allowing the Board to use independent contractors is worrisome. Such complaints are properly investigated by the state, and preferably by the Attorney General's office. If funding is a worry, then assess a \$5, \$10, or \$20 fee on each preneed contract, to be paid by the consumer, and to be earmarked for audit and enforcement. Many states do this, and it's a small price to pay for effective consumer protection.

436.061. 1. Each person **including the officers, directors, partners, agents, or employees of such person** who shall knowingly and willfully violate **or assist or enable any person to violate** any provision of sections 436.005 to [436.071], and any officer,

director, partner, agent, or employee of such person involved in such violation] **436.072 by incompetence, misconduct, gross negligence, fraud, misrepresentation, or dishonesty** is guilty of a class D felony. Each violation of any provision of sections 436.005 to **[436.071] 436.072** constitutes a separate offense and may be prosecuted individually. **The attorney general shall have concurrent jurisdiction with any local prosecutor to prosecute under this section.**

2. Any violation of the provisions of sections 436.005 to **[436.071] 436.072** shall constitute a violation of the provisions of section 407.020, RSMo. In any proceeding brought by the attorney general for a violation of the provisions of sections 436.005 to **[436.071] 436.072**, the court may, in addition to imposing the penalties provided for in sections 436.005 to **[436.071] 436.072**, order the revocation or suspension of the **[registration] license** of a defendant seller **or provider**.

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

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

- (1) Use of any controlled substance, as defined in chapter 195, RSMo, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by this chapter;**
- (2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution under the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated under this chapter, for any offense involving a controlled substance, or for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed;**
- (3) Use of fraud, deception, misrepresentation or bribery in securing any certificate of registration or authority, permit or license issued under this chapter or in obtaining permission to take any examination given or required under this chapter;**
- (4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;**
- (5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;**
- (6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted under this chapter;**

- (7) Impersonation of any person holding a certificate of registration or authority, permit or license or allowing any person to use his or her certificate of registration or authority, permit, license or diploma from any school;**
- (8) Disciplinary action against the holder of a license or other right to practice any profession regulated by this chapter granted by another state, 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 of preneed funds or funds belonging to a preneed trust or joint account holding preneed funds, or funds issued by an insurance company pursuant to a preneed contract;**
- (11) Assisting or enabling any person to practice or offer to practice any profession licensed or regulated by this chapter who is not registered and currently eligible to practice under this chapter;**
- (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 chapter or any rule promulgated hereunder;**
- (14) Violation of any professional trust or confidence;**
- (15) 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;**
- (16) Violation of any statute or regulation related to the funeral industry or to consumer protection.**
- (17) Having any license, permit, or registration revoked by any insurance or preneed regulatory agency or professional licensing board of any state;**
- (18) Violation of any of the provisions of chapter 193, RSMo, chapter 194, RSMo, or chapter 333, RSMo, and;**
- (19) Willfully and through undue influence selling a preneed contract.**

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

4. Notwithstanding any other provision of this section, the board may automatically suspend a license if the Board finds, after an inspection, examination, investigation or audit, a shortage of more than five thousand dollars in any preneed trust or joint account maintained pursuant to this chapter. Failure to provide access to the licensee's books, records or accounts as requested by the board in any inspection, investigation, examination or audit initiated pursuant to this subsection to determine whether suspension is warranted shall constitute grounds for automatic suspension as provided in this section.

- 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. Each person seeking licensure under this chapter shall provide evidence to the board sufficient for the board to determine that each applicant, or if a business entity, in which each owner, partner, officer, member, or controlling ownership interest of the entity, is a person of good moral character.**

[436.063. Whenever the state board determines that a registered seller or provider has violated or is about to violate any provision of sections 436.005 to 436.071 following a meeting at which the registrant is given a reasonable opportunity to respond to charges of violations or prospective violations, it may request the attorney general to apply for the revocation or suspension of the seller's or provider's registration or the imposition of probation upon terms and conditions deemed appropriate by the state board in accordance with the procedure set forth in sections 621.100 to 621.205, RSMo. Use of the procedures set out in this section shall not preclude the application of the provisions of subsection 2 of section 436.061.]

436.065. A preneed contract may offer the purchaser the option to acquire and maintain credit life insurance on the life of the purchaser. Such insurance shall provide for the payment of death benefits to the seller in an amount equal to the total of all contract payments unpaid as of the date of such purchaser's death, and shall be used solely to make those unpaid payments.

436.067. [No information given to the board, the division or the attorney general pursuant to the provisions of sections 436.005 to 436.071 shall, unless ordered by a court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, any person other than the seller, or the provider who is the subject thereof, the authorized employee of the board, the attorney general or the division, without the consent of the person who produced such material. However, under such reasonable conditions and terms as the board, the division or the attorney general shall prescribe, such material shall be available for inspection and copying by the person who

produced such material or any duly authorized representative of such person. The state board, the division or the attorney general, or his duly authorized assistant, may use such documentary material or copies thereof in the enforcement of the provisions of sections 436.005 to 436.071 by presentation before any court or the administrative hearing commission, but any such material which contains trade secrets shall not be presented except with the approval of the court, or the administrative hearing commission, in which the action is pending after adequate notice to the person furnishing such material. No documentary material provided the board, the division or the attorney general pursuant to the provisions of sections 436.005 to 436.071 shall be disclosed to any person for use in any criminal proceeding.] **All complaints, investigation materials, annual registrations, reports, and information pertaining to the licensee shall be closed and may be disclosed only as authorized by statute or order of the court.**

JS: This is a serious flaw, and I doubt it would stand up under Missouri's Open Records laws. This language above would mean no citizen, no journalist, or anyone else would be able to view complaints filed, be able to check that a funeral home is filing the required annual registrations, or anything else. The wording is so broad - "information pertaining to the licensee shall be closed" it could be read to mean the public doesn't even have a right to verify whether a preneed seller is licensed by the state. This is clearly contrary to the intent of Missouri's sunshine laws. As stated on Attorney General Jay Nixon's Web site:

****Missouri's commitment to openness in government is clearly stated in Section 610.011 of the Sunshine Law: "It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy."****

There are reasonable exceptions for ongoing investigations and for personal information, and no one would dispute that. But the broad language in this proposed bill is contrary to the spirit of the law and probably to the letter of it as well. If this is not amended and clarified, Funeral Consumers Alliance will notify press agencies, the National Freedom of Information Coalition at the Missouri School of Journalism, and any other public interest group that may be inclined to challenge it.

436.068. 1. The board may promulgate rules to implement the provisions of sections 436.005 to 436.072 and rules governing standards of service and practice to be followed by licensed providers and sellers as deemed necessary for the public good and consistent with the laws of this state. The board may prescribe a standard of proficiency as to the qualifications and fitness of those engaging in the practice of the preneed industry.

2. The board shall establish the amount of the fees authorized in this chapter and required by rules promulgated thereunder. Such fees shall be set at a level to produce revenue which does not substantially exceed the cost and expense of administering this chapter.

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3. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers vested with the general assembly under chapter 536, RSMo, to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2008, shall be invalid and void.

436.069. 1. [After July 16, 1985, e]Each seller shall remit an annual reporting fee in an amount of [two] **ten** dollars for each preneed contract sold in the year since the date the seller filed its last annual report with the state board **or the fee established by the**

board by rule. This reporting fee shall be paid annually and may be collected from the purchaser of the preneed contract as an additional charge or remitted to the state board from the **[funds] moneys** of the seller.

2. **[After July 16, 1985, e]**Each provider shall remit an annual reporting fee of **[thirty] fifty dollars, or the annual reporting fee established by the board by rule.**

3. The reporting fee authorized by subsections 1 and 2 of this section are in addition to the fees authorized by section 436.071.

436.071. **1.** Each application for **[registration] licensure** under the provisions of section 436.015 or 436.021 shall be accompanied by a preneed registration fee as 4-15-08

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determined by the board pursuant to the provisions of **subsection 2 of** section 333.111[, subsection 2].

436.072. The board or a designated member thereof or any agent authorized by the board may enter the office, premises, establishment, or place of business of any preneed seller or provider of funeral service contracts licensed in this state, or any office, premises, establishment, or place where the practice of selling and/or providing preneed funerals is carried on, or where such practice is advertised as being carried on for the purpose of inspecting such office, premises, establishment, or place to determine compliance with chapter 436, or for the purpose of inspecting, examining, investigating or auditing the licensee or the sale of preneed contracts.

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