

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/CS/HB 473	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Regulatory Affairs Committee; Government Operations Appropriations Subcommittee; Insurance & Banking Subcommittee; Roberson and others	117 Y's	0 N's
COMPANION BILLS:	CS/CS/SB 854	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/CS/CS/HB 473 passed the House on March 8, 2016, as CS/CS/SB 854.

Chapter 497, F.S., entitled the Florida Funeral, Cemetery, and Consumer Services Act (Act), provides for the regulatory oversight of the death care industry. The Act is administered jointly by the Division of Funeral, Cemetery, & Consumer Services of the Department of Financial Services (DFS) and the Board of Funeral, Cemetery & Funeral Services (Board) as coexisting "licensing authorities."

The bill makes the following changes throughout the Act:

- Creates a total return method as an alternative to the current net income approach for care and maintenance trusts required of cemetery companies, and authorizes the licensing authorities to adopt rules to implement the new method;
- Repeals surety bonding and letters of credit as alternative forms of security for the performance of preneed contracts, and eliminates references to these alternative options throughout the Act;
- Creates definitions of "purchaser" and "beneficiary" for preneed contracts, and updates various financial and trust-related terms throughout the Act;
- Repeals a preneed licensure exemption for certain servicing agents and clarifies the deposit duties of preneed licensees prior to becoming inactive;
- Authorizes the DFS to require email addresses from applicants and licensees for purposes of electronic notifications for official communications;
- Ensures consistent use of the defined term "legally authorized person" throughout the Act;
- Clarifies that cremated remains are not property for purposes of probate, and that division of such remains requires the legally authorized person's consent;
- Requires applicants for the embalmer apprentice program to demonstrate good character, which is currently required of other licensees under the Act;
- Clarifies the scope of funeral directing; and
- Requires cemetery companies to remit unexpended monies paid on irrevocable preneed contracts to the Agency for Health Care Administration (AHCA) for deposit into the Medical Care Trust Fund after the beneficiary's final disposition.

The bill has a positive fiscal impact on state government expenditures by reducing an estimated \$20,000 in operational expenditures from the Regulatory Trust Fund within the DFS. In addition, the bill has a positive, yet indeterminate fiscal impact to the state by requiring the industry to remit unused irrevocable preneed contract funds to AHCA for deposit into the Medical Care Trust Fund. The bill does not have a fiscal impact on local governments. The fiscal impact to the private sector is indeterminate, in that the bill requires annual reporting from trustees of preneed contract funds, but the unitrust method could provide greater long-term returns for cemetery licensees' care and maintenance trusts.

The bill was approved by the Governor on April 1, 2016, ch. 2016-172, L.O.F., and will become effective on July 1, 2016.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0473z1.IBS

DATE: April 5, 2016

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Chapter 497, F.S., entitled the Florida Funeral, Cemetery, and Consumer Services Act (Act), provides for the regulatory oversight of the death care industry, which includes the following individual and entity licenses:¹

- Brokers of burial rights
- Cemeteries
- Central embalming facilities
- Cinerator facilities
- Direct disposer and direct disposal establishments
- Embalmers (including apprentices, interns, and by endorsement)
- Funeral directors and funeral establishments
- Preneed, preneed branches, and preneed sales agents
- Monument establishments and monument establishment sales agents
- Refrigeration facilities
- Removal services
- Training facilities

The Act is administered jointly by the Division of Funeral, Cemetery, & Consumer Services of the Department of Financial Services (“DFS” or “Division”) and the Board of Funeral, Cemetery & Funeral Services (“Board”).

Effect of the Bill

The bill amends a number of provisions of the Act:

E-mail Notifications

As required by the Act, the DFS administers a licensing system to process and track applications, renewals, and fees; the DFS is authorized to require specified information in its application forms, such as the applicant’s work history, criminal history, and business plans. Currently, application forms adopted by rule require the e-mail address of the applicant or licensee as a means of correspondence for the DFS.²

Sections 2 and 3 of the bill amend ss. 497.141 and 497.146, F.S., respectively, to codify the Division’s practice of requiring applicants’ and licensees’ email addresses.

Legally Authorized Persons & the Disposition of Human Remains

Currently, the Act sets forth the order or priority of persons (“legally authorized persons”) who are authorized to direct the disposition of human remains. The “legally authorized person” concept is similar to the Probate Code’s order of preference in appointing a personal representative over an estate.³ The Act sets the priority of legally authorized persons⁴ as:

¹ DFS DIVISION OF FUNERAL, CEMETERY & CONSUMER SERVICES, *Who We Regulate: Regulated Categories & Number of Licensees*, <http://www.myfloridacfo.com/Division/FuneralCemetery/About/Whoweregulate.htm> (last visited Nov. 20, 2015).

² s. 497.141(2) and (11), F.S. See DIVISION OF FUNERAL, CEMETERY & CONSUMER SERVICES, *Applications*, at <http://www.myfloridacfo.com/Division/funeralcemetery/Licensing/LicensingApplications.htm> (last visited Nov. 20, 2015).

³ s. 733.301, F.S.

⁴ s. 497.005(39), F.S. The definition also addresses legally authorized persons when no family member exists or is available.

- (1) A written *inter vivos*⁵ authorization made by the deceased;
- (2) The person designated by the decedent as authorized to direct disposition pursuant to Pub. L. No. 109-163, s. 564, as listed on the decedent's United States Department of Defense Record of Emergency Data, DD Form 93, or its successor form, if the decedent died while serving military service as described in 10 U.S.C. s. 1481(a)(1)-(8) in any branch of the United States Armed Forces, United States Reserve Forces, or National Guard;
- (3) The surviving spouse;
- (4) A son or daughter of majority age;
- (5) A parent;
- (6) A sibling of majority age;
- (7) A grandchild of majority age;
- (8) A grandparent; or
- (9) Another person in the next degree of kinship.

However, current usage of the term throughout the Act is inconsistent, leading to concerns of uncertainty and potential disputes among heirs regarding the disposition of human remains. Such disputes can also involve funeral homes and other licensees under the Act, because they receive, store, and process the remains, and are sometimes sued by the relative whose wishes regarding final disposition did not prevail.⁶

The bill amends several provisions throughout the Act to ensure consistent usage of the term "legally authorized person":

- Section 4 – s. 497.152, F.S., which subjects a licensee to disciplinary action by the DFS for various acts, including refusing to surrender custody of a dead human body, failing to obtain written permission regarding disposition of funeral merchandise, and making material misrepresentations regarding a preneed contract. The bill clarifies that these acts or omissions directed to legally authorized persons are grounds for disciplinary action.
- Section 11 – s. 497.273(4)(b), F.S., regarding the authorization to inter or entomb cremated animal remains with an inurned.
- Section 12 – s. 497.274(1), F.S., regarding the authority to waive the minimum standard adult grave space.
- Section 14 – s. 497.286(3), F.S., regarding the names of certain persons contained in a cemetery's notice to the DFS of presumptively abandoned burial rights.
- Section 17 – s. 497.381(4), F.S., regarding the prohibition of solicitation of goods and services by funeral directors and direct disposers to legally authorized persons or family.⁷
- Section 23 – s. 497.460, F.S., regarding the disbursement of funds paid on defaulted or unperformed preneed contracts.
- Section 29 – s. 497.601(1), F.S., regarding the scope of permissible activities of licensed direct disposers, including securing pertinent information to complete disposition and the death certificate.
- Section 30 – s. 497.607(1), F.S., regarding authorization for cremation services. In addition to clarifying the "legally authorized person" declaration of intent in subsection 1, the bill creates subsection (2) to s. 497.607, F.S., to state that cremated remains are not property as defined in s. 731.201(32), F.S., and not subject to partition for purposes of distribution under s. 733.814, F.S.⁸ The bill provides that division of such remains requires the consent of the legally

⁵ An *inter vivos* authorization is one made during the life of the deceased; "between the living; from one living person to another." See BLACK'S LAW DICTIONARY, <http://thelawdictionary.org/inter-vivos/> (last visited Nov. 25, 2015).

⁶ Florida Department of Financial Services, Agency Analysis of 2016 House Bill 473, p. 2 (Nov. 23, 2015).

⁷ The DFS noted that notwithstanding this provision, monument establishments and any other ch. 497-licensed entity should be able to contact the legally authorized person or family of the decedent, once 30 days have passed from the date of death, to offer for sale grave markers or monuments. DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, p. 16 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff.

⁸ Section 731.201(32), F.S., is the definition of "property" for purposes of the Florida Probate Code, and means both real and personal property or any interest in it and anything that may be the subject of ownership. Section 733.814, F.S., allows the personal

authorized person approving the cremation, or if the legally authorized person is the decedent, the next available legally authorized person. The bill provides that a dispute regarding the division of cremated remains shall be resolved by a court of competent jurisdiction.

Sale of Personal Property or Services by Cemetery Companies

Currently, s. 497.283, F.S., requires cemetery companies that sell personal property or services in connection with burial or commemorative services to deliver such goods or to perform such services within 120 days of receiving final payment, except for preneed contracts. "Delivery" of goods means actual delivery and installation at the time of need or at the request of the owner or owner's agent. However, subsection (2)(c) provides an alternative delivery method only for manufacturers of outer burial receptacles (OBC) who sell to cemetery companies and funeral establishments if they show evidence of "financial responsibility" as set forth in the "standards and procedures" in s. 497.461, F.S. (relating to surety bonding as an alternative to trust deposit for preneed licensees).

According to the DFS, the alternative delivery method's reference to s. 497.461, F.S., as a source of standards and procedures for OBC manufacturers is unclear and unnecessary. The Division is not aware of any applicable standards or procedures in s. 497.461, F.S. Additionally, this alternative delivery method is not currently used by any manufacturer, and the Division has no record of any manufacturer ever seeking to use the alternative offered in s. 497.283(2)(c), F.S., or the applicable rule.⁹ Accordingly, section 13 of the bill deletes the alternative delivery provision in s. 497.283(2)(c), F.S.

Applicants for the Embalmer Apprentice Program

Applicants for the following licenses under the Act require demonstration of good character:

- Cemetery companies - s. 497.263(2)(p), F.S.;
- Brokers of burial rights - s. 497.281(2)(d), F.S.;
- Embalmers and embalmers by endorsement - ss. 497.368(1)(c) and 497.369(1)(d), F.S.;
- Funeral directors and funeral director by endorsement - ss. 497.373(1)(c) and 497.374(1)(d), F.S.;
- Funeral establishments - s. 497.380(4), F.S.;
- Removal services, refrigeration services, and centralized embalming facilities - s. 497.385(1)(a) and (2)(f), F.S.;
- Preneed licensees - s. 497.453(2)(f), F.S.;
- Direct disposers and direct disposal establishments - ss. 497.602(3)(f) and 497.604(3)(c), F.S.;
- Cinerator facilities - s. 497.606(3)(d), F.S.

However, no such requirement currently exists for applicants for the embalmer apprentice program. Section 15 of the bill amends s. 497.371, F.S., to provide that the DFS may not issue a license to an applicant for the embalmer license program, unless it determines that he or she is of good character and has not demonstrated a history of lack of trustworthiness or integrity in business or professional matters.

Scope of Funeral Directing

representative or any beneficiary to petition the court to partition property when two or more beneficiaries are entitled to distribution of undivided interests in any property. By excluding cremated remains from probate property and judicial partition, the bill ensures that the disposition of cremated remains is subject to the order of priority of legally authorized persons.

⁹ DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, p. 14 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff. According to the Division, the applicable rule is 69K-7.0125, F.A.C. Section 497.283, F.S., is the only necessary authority for the rule. The only provision of 497.161, F.S., which is referred to in the rule, is 497.461(12), F.S., which reads as follows: "(12) *In lieu of the surety bond, the licensing authority may provide by rule for other forms of security or insurance.*"

The Act sets forth the scope of the practice of funeral directing which may be performed only by a licensed funeral director. Currently, one of the permitted acts is planning or arranging, on an at-need basis, the details of funeral services, embalming, cremation, or other services relating to the final disposition of human remains with the decedent's family, friends, or other person responsible for such services.

Section 16 of the bill amends s. 497.372(1)(b), F.S., to remove the language stating that such services be performed "with the family or friends of the decedent or any other person responsible for such services." This language is being removed to avoid possible conflict with "legally authorized persons."

Cemetery Companies - Care & Maintenance Trusts

Cemetery companies that own or control cemetery lands and property are required by the Act to ensure that the grounds, structures and improvements of a cemetery are well cared for and maintained in a proper condition.¹⁰ To achieve this, the Act requires cemetery companies to establish "care and maintenance (C&M) trust funds" with state or national trust companies or banks or savings and loan associations with trust powers.¹¹ In other states, these trusts are commonly known as "perpetual care trusts." Cemetery companies are required to set aside and deposit specified amounts from the sales of burial rights into their care and maintenance trust funds.

Net Income Trusts vs. Total Return Unitrusts

Since 1959, the Act has required the *net income* of these trust funds may only be used for the care and maintenance of the cemetery and monuments (excluding the cleaning, refinishing, repairing or replacement of monuments) and reasonable costs of administering care, maintenance, and the trust fund. This net income approach is how cemetery licensees can determine how much may be withdrawn and paid to them every year from the C&M trust fund. While the Act does not define "net income," it has been understood to include only cash received by the trust as interest or dividends from trust investments, not capital gains (which are treated as accretions to principal, not income). This view has been largely informed by trust practices codified in other parts of Florida law.¹² As such, cemetery owners have an economic incentive to invest their C&M trust funds to maximize payments of current interest or cash dividends (e.g., government securities and corporate bonds), as opposed to investing in items that provide capital appreciation (e.g., corporate stocks). This approach typically results in erosion of trust principal as a result of inflation and may negatively affect the trust's long-term growth. Currently, the Act does not expressly dictate the relative mix of income-producing versus capital appreciation investments for C&M trusts, but only speaks to permissible investments that are also allowable for the State Board of Administration (SBA).¹³

Another type of trust, known as the "total return trust," has attracted some interest among trust practitioners for C&M or perpetual care funds. As the name implies, the total return trust allows the trustee to focus on the total return, and to maximize growth of both income and principal by accounting for both income and capital appreciation. One type of total return trust is the unitrust. With the unitrust, the trustee distributes a percentage of the trust based on the fair market value of its assets, regardless of income earned or the original amount invested in the trust. As opposed to withdrawing only income, the unitrust allows cemeteries to withdraw a percentage, no less than 3 percent and no more than 5 percent, of the total fair market value of the trust for annual care and maintenance. Typically, a unitrust:

- Produces a return of 2 to 4 percent greater than an income trust;

¹⁰ s. 497.262, F.S.

¹¹ The appointments of these institutional trustees are subject to the approval of the licensing authority. These trustees are subject to investment limitations and annual financial reporting requirements in the Act.

¹² DFS DIVISION OF FUNERAL, CEMETERY, AND CONSUMER SERVICES, *Unitrust Concept for Cemetery Care & Maintenance Trust Funds: Background and Analysis ("DFS Unitrust Analysis")*, p. 3 (Nov. 18, 2015), on file with the Insurance & Banking Subcommittee staff.

¹³ *Id.* See ss. 497.266(4) and 497.458(5)(a), F.S., and permissible investment statute for the SBA, s. 215.47(1), F.S.

- Allows cemetery operators to receive larger distributions (on average and over time);
- Grows principal at a greater rate than an income trust; and
- Shows exactly how much funds will be available for withdrawal in advance, which is important for budgeting purposes.¹⁴

According to the Division, the unitrust concept as applied to cemetery C&M trusts has only been fairly recently approved for use in 3 states (Iowa, Missouri, and Tennessee).¹⁵

The bill amends the Act to accommodate unitrusts as an alternative option to the current net income approach for C&M trusts.

- *Terminology Updates:* Sections 6 and 7 of the bill update financial and trust terms in existing C&M trust statutes.
 - Section 6 of the bill amends s. 497.266, F.S., to substitute “assets” for “corpus” and provides that withdrawals and transfers of such assets must be in accordance with the new C&M distribution statute, s. 497.2675, F.S. Additionally, the bill provides that the trustee may distribute “withdrawals” from the trust instead of “principal and income.”
 - Section 7 of the bill amends s. 497.267, F.S., to substitute “withdrawals” from the C&M trust fund instead of “income.”
- *Definitions:* Section 1 of the bill creates new unitrust-related definitions in s. 497.005, F.S. (general definitions):
 - Capital gain or capital loss;
 - Fair market value;
 - Income;
 - Net income; and
 - Total return withdrawal percentage.
- *Distributions from C&M Trusts/New Total Return Method:* Section 8 of the bill creates s. 497.2675, F.S., as a comprehensive C&M trust distribution statute, which:
 - Requires the board and department to adopt rules in accordance with ss. 497.267 and 497.268, F.S., that must include:
 - Reporting requirements for a cemetery licensed under ch. 497, F.S., including the requirement that specific reports be made on forms designed and approved by the board by rule; and
 - Rules addressing a cemetery licensed under ch. 497, F.S., whose pro rata share of the fair market value of the trust has not grown over a 3-year average, including limiting withdrawals from the C&M trust fund, and any exceptions approved by the board.
 - Requires each cemetery company licensed under ch. 497, F.S., to select one of the two methods for withdrawals from the cemetery company’s C&M trust fund:
 - *Net income withdrawal method*, which allows the net income to be withdrawn from the trust, as earned, on a monthly basis; or
 - *Total return withdrawal method (unitrust)*, where a licensee must multiply the average fair market value of its pro rata share of the trust by the total return withdrawal percentage and may withdraw one-fourth of that amount at least quarterly beginning the first quarter of the new trust year. The initial total return withdrawal percentage elected by the licensee may not increase the total return withdrawal percentage for that quarter. For purposes of this method, “average

¹⁴ Lauren Moore, *Perpetual Care Roundtable*, AMERICAN CEMETERY, Jan. 2014, at p. 33 (on file with the Insurance & Banking Subcommittee staff).

¹⁵ *DFS Unitrust Analysis*, pp. 1, 7-9. Cemetery unitrusts may be used in Iowa beginning in 2016, while they have been authorized in Missouri in 2009 and in Tennessee in 2006. It appears unitrusts have largely been used in the long-term higher education and charitable foundation endowment trusts.

fair market value” means, in relation to a trust, the average of the fair market value of each asset held by the trust at the beginning of the current year and in each of the 2 previous years, or for the entire term of the trust if there are less than 2 previous years, and adjusted as follows:

- If assets are added to the trust during the years used to determine the average, the amount of each addition is added to all years in which such addition is not included; and
 - If assets are distributed from the trust during the years used to determine the average, other than in satisfaction of the unitrust amount, as defined in s. 738.1041, F.S., the amount of each distribution is subtracted from all other years in which such distribution is not included.
- Requires taxes on capital gains, if any, to be paid from the trust principal, without regard to the withdrawal method selected.
- *Deposit Requirements for Burial Rights Proceeds:* Currently, s. 497.268, F.S., requires each cemetery company to set aside and deposit in its C&M trust fund certain amounts or percentages from sales of burial rights, which include graves, mausoleums, columbaria, ossuary, or scattering gardens. For *burial rights*, the Act requires 10 percent of all payments to be deposited into the C&M trust fund, a \$25 deposit for *burial rights* provided without charge, and a minimum of \$25 per *grave* for every sale made after September 30, 1993. For *mausoleums or columbaria*, 10 percent of payments must be deposited into the C&M trust fund.¹⁶
 - However, because graves, mausoleums, and columbaria are all “burial rights” under the Act, Section 9 of the bill amends s. 497.268, F.S., to provide a consistent deposit requirement for these burial spaces and structures. As such, the bill requires 10 percent of all sales of burial rights to be deposited into the C&M trust fund, a \$25 minimum for each post-1993 sale of a burial right, and \$25 for each burial right provided without charge.
 - *Annual Reporting for C&M Trusts:* Section 497.269, F.S., requires trustees of C&M trust funds to provide an “adequate financial report” to the DFS by April 1 every year, using forms and procedures specified by rule.
 - Section 10 of the bill amends this section to clarify that the annual report record the *fair market value* of the C&M trust fund, which is defined in new s. 497.2675(1)(f), F.S.

Preneed Contracts

A “preneed contract” is any arrangement or method, of which the provider of funeral merchandise or service has actual knowledge, whereby any person agrees to sell funeral merchandise or service in advance. Examples of burial or funeral merchandise are caskets, outer burial containers, urns, monuments, floral arrangements, and register books. A “burial service” includes any service offered or provided in connection with the final disposition, memorialization, interment, entombment, inurnment, or other disposition of human remains or cremated remains.¹⁷

Preneed sales are governed by part IV of the Act, which requires sellers of funeral merchandise or service to obtain a preneed license and also be licensed as a funeral establishment, cemetery company, direct disposal establishment, or monument establishment.¹⁸

¹⁶ s. 497.005(7), F.S. A *grave space* is a space of ground in a cemetery intended to be used for the interment in the ground of human remains; a *mausoleum* is a structure or building that is substantially exposed above the ground and that is intended to be used for the entombment of human remains; and a *columbarium* is a structure or building that is substantially exposed above the ground and that is intended to be used for the inurnment of cremated remains. s. 497.005(37), (42), and (16), F.S.

¹⁷ s. 497.005(56), (6), and (7), F.S.

¹⁸ s. 497.452, F.S. The statute exempts certain cemeteries owned by religious institutions from preneed licensure.

The bill makes the following changes to the preneed provisions of the Act:

- *Definitions:* Section 1 of the bill amends s. 497.005, F.S., to create definitions of “purchaser” and “beneficiary” for use in the context of death care service contracts between consumers and funeral homes and other preneed sellers. “Beneficiary” is defined as a natural person expressly identified in a preneed contract as the person for whom funeral merchandise or services are intended. “Purchaser” means a person who executes a preneed or an at-need contract for services or merchandise with a licensee.
- *Rulemaking Authority for Preneed Contracts Funded by Life Insurance:* Section 5 of the bill amends the Act’s rulemaking authority, s. 497.161, F.S., to provide authority for rules consistent with part IV of the Act (relating to preneed sales) and the Florida Insurance Code that establish conditions of use for insurance as a funding mechanism for preneed contracts. According to the Division, the intent of this change is to create clear rulemaking authority for current Board rule 69K-8.005, F.A.C., relating to preneed contracts funded by life insurance, because the current statutory authority may be subject to challenge. The rule was adopted in 1996, prior to the implementation of legislative changes to the Administrative Procedure Act that significantly restricted rulemaking to clear grants of rulemaking authority.¹⁹
- *Repeal of Servicing Agent Exemption from Preneed Licensure:* In addition to authorizing sales and advertisement of preneed contracts, a preneed license is required in order to receive any funds for payment on a preneed contract. Currently, the license requirement for receipt of funds does not apply to state or national trust companies or banks or savings and loan associations with trust powers receiving any money in trust pursuant to the sale of a preneed contract. It also does not apply to any Florida corporation acting as a servicing agent that are 100 percent owned by persons licensed under part III of the Act (funeral directing, embalming, and related services), if:
 - No stockholder holds, owns, votes, or has proxies for more than 5 percent of the issued stock of such corporation,
 - The corporation has a blanket fidelity bond, covering all employees handling the funds, in the amount of \$50,000 or more issued by a licensed insurance carrier in this state, and
 - The corporation processes the funds directly to and from the trustee within the applicable time limits set forth in the Act.

However, this servicing agent exemption is not currently used and has been recommended for repeal by the industry. Section 18 of the bill deletes the servicing agent exemption from preneed licensure in s. 497.452(2)(c), F.S.

- *Preneed Contract Forms:* Currently, s. 497.454, F.S., requires preneed licensees to file preneed contract forms and related forms with the DFS for approval prior to use in order to guard against misleading contracts. The licensing authority cannot approve preneed contracts unless they meet certain criteria regarding content and format, including sequential prenumbering and specific disclosure regarding the preneed licensee’s ability to select trust funding or the financial responsibility alternative in s. 497.461, F.S. (surety bonding).²⁰
 - Section 19 of the bill amends s. 497.454, F.S., to provide that the licensing authority may not approve any *electronic or paper* preneed contract that does not provide for sequential prenumbering. Additionally, because the bill repeals the financial responsibility alternative in s. 497.461, F.S., the bill also removes the licensee’s method of securing preneed contract proceeds as a required disclosure.
- *Preneed Funeral Contract Consumer Protection Trust Fund:* The Act permits, in certain instances, a claim to be filed against the Florida Consumer Protection Trust Fund (FCPTF) where a purchaser

¹⁹ See s. 120.536, F.S. DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, p. 7 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff.

²⁰ s. 497.454, F.S.

has previously paid for a preneed contract, and the seller of the preneed contract subsequently goes out of business or becomes insolvent, and will not or cannot perform the preneed contract.²¹ The FCPTF is funded by varying portions of each preneed contract, remitted by preneed licensees; all moneys deposited, along with all accumulated *income*, are immune from liens, charges, judgments, and other creditors' claims and shall be used only for the express purposes authorized by the Act.

- Because the bill is repealing s. 497.461, F.S., regarding surety bonding, Section 20 of the bill amends s. 497.456, F.S., to remove a cross-reference to that statute. Additionally, the bill provides that the deposited moneys and accumulated *appreciation* (replacing the term "income") are to be used solely for purposes set forth by the Act.
- *Disposition of Preneed Proceeds*: The Act requires that minimum percentages of proceeds from preneed contract sales be deposited and under the control of an authorized trustee (i.e., state or national trust companies or banks or savings and loan associations with trust powers). The amounts to be deposited depend on the item sold in the contract. The statute also gives powers and duties to the trustee to invest, protect, and to distribute principal and income, subject to rule by the licensing authority. Section 21 of the bill amends s. 497.458, F.S., to:
 - Grants rulemaking authority to the Board to classify items sold in preneed contracts as services, cash advances, or merchandise;²²
 - Requires the trustee to file an annual report with the DFS regarding each preneed trust account held by a trustee at any time during the previous calendar year.
 - The report must contain information identifying the trustee; the licensee to whom the report relates; the trust account number; the beginning and ending trust balance; and, as may be specified by DFS rule, a list of receipts showing the date and amount of any disbursement. The report must be signed by the trustee's account manager and be formatted and submitted pursuant to DFS rule. The first report is due April 1, 2018, and subsequent annual reports must be submitted on or before April 1.
 - Prohibits a trustee from investing in or counting as assets life insurance policies or annuity contracts. Trust investments in real estate may not exceed 25 percent of trust assets. The bill allows the trustee to allocate and divide capital gains and losses, which is also allowed under current law.
- *Cancellation of Preneed Contracts*: Section 497.459, F.S., provides rescission rights, disclosures, and remedies for preneed contract purchasers. Subsection (6) provides that all preneed contracts are cancelable, as long as a preneed contract does not restrict any contract purchaser or a qualified applicant or recipient of certain social benefits from making her or his contract irrevocable.
 - An irrevocable contract is written only for people who are qualified applicants for, or recipients of, supplemental security income (SSI), temporary assistance under the Work and Gain Economic Self-Sufficiency program or Medicaid. Once the contract is signed, it cannot be canceled and refunded. It is a means for a person or family to set aside a portion of their assets for future burial and funeral services. The amount of the irrevocable contract will not be counted as an asset when the person applies for aid,²³ which protects the recipient from exceeding income eligibility thresholds and becoming disqualified from the public benefits.
 - In some instances, a purchaser enters into an irrevocable preneed contract for an amount in excess of what the heirs ultimately use for burial, internment, etc., after the purchaser dies. In cases of closed estates or very small estates that do not warrant full probate administration, the funeral home is left holding the remaining funds with no clear process of disposing of the funds that originated from SSI, Medicaid, or other specified public benefit.

²¹ DFS DIVISION OF FUNERAL, CEMETERY, & CONSUMER SERVICES, *Claims Against the Consumer Protection Trust Fund*, <http://www.myfloridacfo.com/Division/FuneralCemetery/Consumers/PreneedClaims.htm> (last visited Nov. 24, 2015). Whether such a claim will be paid, and how much will be paid on such a claim, is controlled by s. 497.456, F.S., and rule 69K-10.002, F.A.C.

²² Under current law and in the bill, these three different types of items trigger different trust deposit requirements.

²³ DFS DIVISION OF FUNERAL, CEMETERY & CONSUMER SERVICES, *Consumer Tips: Preneed Contracts*, at <http://www.myfloridacfo.com/Division/FuneralCemetery/Consumers/ConsumerFAQ.htm> (last visited Nov. 25, 2015).

- Section 22 of the bill amends s. 497.459(6), F.S., to provide that preneed contracts cannot restrict any purchaser who is also the *beneficiary* and qualified applicant/recipient of benefit funds from making her or his contract irrevocable. Additionally, the bill clarifies that a preneed contract made irrevocable pursuant to this section cannot be canceled during the life or after the death of the contract purchaser or beneficiary.²⁴
 - This ensures that the financial eligibility for the specified public benefits remain with the person as long as they receive benefits.
 - Additionally, the bill requires unexpended monies spent on an irrevocable contract to be remitted to the Agency for Health Care Administration (AHCA) for deposit into the Medical Care Trust Fund after the beneficiary's final disposition.²⁵ This ensures that the state and federal governments recover their respective shares of the unexpended monies of the irrevocable contract.
- *Repeal of Surety Bonding & Letters of Credit as Security for Preneed Contracts:* All preneed contracts must be secured by one of the following, and must specify the method of security utilized by the company: (1) A trust account, (2) A letter of credit (LOC) or surety bonding, or (3) An individual insurance policy.

According to the DFS, trust funding and insurance funding are the long-term proven and safe methods for securing performance of preneed contracts. Since approximately 2004, there have been only two methods actually used by preneed licensees to secure performance of preneed contracts: (1) trust deposit of proceeds of the preneed contracts or (2) funding by life insurers licensed in Florida.²⁶

Section 497.461, F.S., allows additional surety bonding, “and other forms of security or insurance.” Section 497.462(2), F.S., allows letters of credit as an alternative form of security. To the best of the Division’s knowledge, these alternatives have not been used in recent years, and are vague, untested, subject to abuse, unnecessary, and potentially dangerous to consumers.

The letter of credit provision, s. 497.462(2), F.S., relates primarily to surety bonding of preneed sales. The Legislature has previously amended s. 497.462, F.S., by adding subsection (11), which effectively prohibited use of surety bonding under s. 497.462, F.S., for new preneed contracts written after December 31, 2004. It is believed that the Legislature intended to entirely prohibit use of s. 497.462(2), F.S., as to preneed contracts written after 2004, but by oversight, subsection (11) only refers to bonding.

The Division believes the LOC concept is far inferior to trust deposits and even surety bonding. The LOC concept utilizes a body of law the Division and Board have no expertise in. The idea of using a LOC to secure obligations that may not come due for decades is loaded with potential dangers in the Division's opinion. The LOC option has never been used, and deleting the concept is advisable in the Division's opinion.

As such, the Division recommends repealing these alternatives to trust deposits. Section 24 of the bill repeals s. 497.461, F.S., regarding surety bonding as an alternative to trust deposits. Section 25 of the bill contains a savings clause for a preneed licensee who elected to maintain a surety bond in lieu of depositing funds into a trust as of July 1, 2016. Sections 26 and 27 of the bill likewise eliminate the letter of credit as an alternative to trust deposits in s. 497.462, F.S., and cross-references in s. 497.464(1), F.S., respectively.

²⁴ Section 1 of the bill creates definitions of “purchaser” and “beneficiary” in s. 497.005, F.S.

²⁵ Section 497.005(32), F.S., defines “final disposition” as the final disposal of a dead human body by specified means, excluding cremation. AHCA administers the Medical Care Trust Fund, which consists of federal grants and is used to provide health care services to individuals eligible for Medicaid and Medicare. s. 20.425(4)(a), F.S.

²⁶ DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, pp. 24-25 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff.

- *Inactive Preneed Licensees*: If a preneed licensee elects to surrender his or her license or the licensing authority does not receive the required renewal application and fees, the licensee becomes inactive and is then prohibited from engaging in preneed sales with the public. Prior to becoming inactive, he or she must collect and deposit into trust all of the funds *paid toward* preneed contracts sold. Additionally, the licensing authority has rulemaking authority to review and investigate such inactive licensees to protect the preneed customers, including requiring the submission of unaudited or audited financial statements.
 - Section 28 of the bill amends s. 497.465, F.S., to provide that upon becoming inactive, the licensee shall cease all preneed sales to the public and deposit into the trust all funds it receives from preneed contracts on or after the date on which it becomes inactive from preneed contract sales sold prior to inactivity. This change is intended to clarify that the licensee cannot retain any of the funds and must put them into the trust account in their entirety. Additionally, the bill removes the qualifier “unaudited or audited” from financial statements.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill's requirement that cemetery companies remit unexpended irrevocable preneed contract funds to the AHCA for deposit into the Medical Care Trust Fund after the beneficiary's final disposition has an indeterminate, yet positive impact on state government.

2. Expenditures:

According to the DFS, the bill will not result in increased costs. However, the bill has the potential to reduce some operational costs to the DFS, particularly the provisions relating to use of email for license renewal and other communications with licensees. The DFS projects an estimated recurring savings to be in the range of \$20,000 per year.²⁷

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The unitrust proposal may provide a benefit to cemetery licensees in the form of increased annual distributions to licensed cemeteries to defray cemetery care and maintenance expenses; however, the Division states there is too little experience among other state funeral and cemetery regulators with the concept to make specific projections.

The requirement for annual trustee reports to the DFS may increase costs to the approximately 370 preneed licensees in the state. The costs would be in the form of increased fees charged by preneed trustees to preneed licensees. The DFS believes the cost will be relatively insignificant, because the

²⁷ Florida Department of Financial Services, Agency Analysis of 2016 House Bill 473, p.3 (Dec. 11, 2015).

trustees already have and provide the information to the preneed licensees. The DFS believes the recurring cost might be in the range of \$250 per licensee per year.²⁸

D. FISCAL COMMENTS:

None.

²⁸ *Id.*