

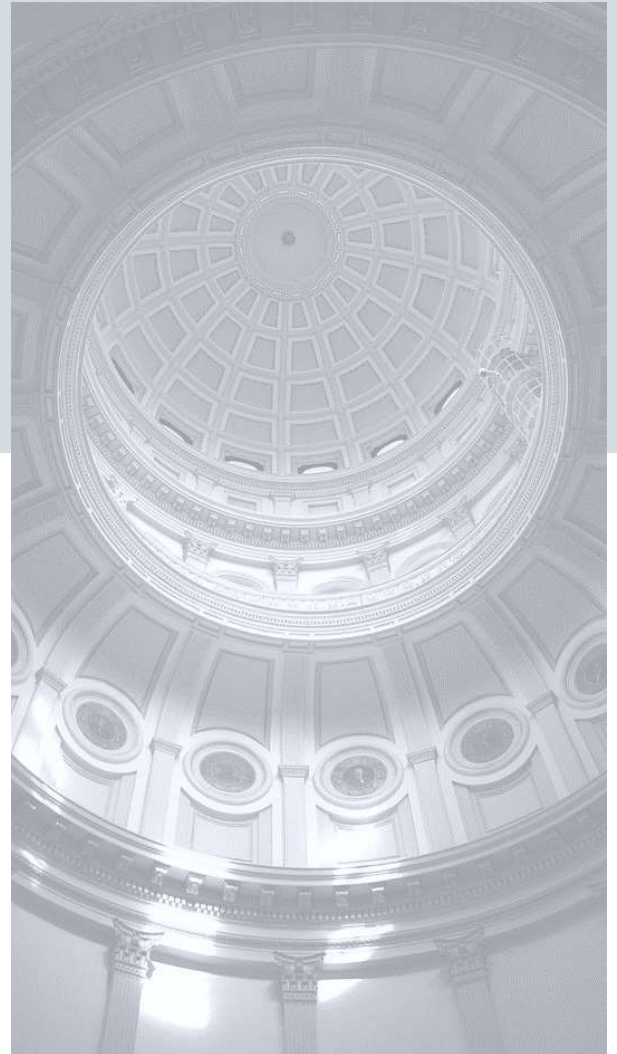


**COLORADO**  
**Department of**  
**Regulatory Agencies**

Colorado Office of Policy, Research &  
Regulatory Reform

# 2021 Sunset Review

## Preneed Funeral Contracts



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October 15, 2021



**COLORADO**

**Department of  
Regulatory Agencies**

Executive Director's Office

October 15, 2021

Members of the Colorado General Assembly  
c/o the Office of Legislative Legal Services  
State Capitol Building  
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Pursuant to section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) at the Department of Regulatory Agencies (DORA) undertakes a robust review process culminating in the release of multiple reports each year on October 15.

A national leader in regulatory reform, COPRRR takes the vision of their office, DORA and more broadly of our state government seriously. Specifically, COPRRR contributes to the strong economic landscape in Colorado by ensuring that we have thoughtful, efficient and inclusive regulations that reduce barriers to entry into various professions and that open doors of opportunity for all Coloradans.

As part of this year's review, COPRRR has completed an evaluation of the preneed funeral contracts program. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2022 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Article 15 of Title 10, C.R.S. The report also discusses the effectiveness of the Commissioner of Insurance in carrying out the intent of the statutes and makes recommendations for statutory changes for the review and discussion of the General Assembly.

To learn more about the sunset review process, among COPRRR's other functions, visit [coprrr.colorado.gov](http://coprrr.colorado.gov).

Sincerely,

Patty Salazar  
Executive Director





**COLORADO**

Department of  
Regulatory Agencies

Colorado Office of Policy, Research &  
Regulatory Reform

October 15, 2021

# FACT SHEET

## Sunset Review: Preneed Funeral Contracts

### Background

#### *What is regulated?*

In Colorado, the preneed funeral contract statute (Statute) provides regulatory oversight of preneed funeral contract sellers. Preneed funeral contracts are agreements where individuals prepay for funeral goods and/or services they wish to receive upon their death.

#### *Why is it regulated?*

The Statute was created to provide protection to consumers who utilize preneed funeral contracts from financial harm, including theft of funds.

#### *Who is regulated?*

At the end of fiscal year 20-21, the Commissioner of Insurance (Commissioner) licensed 70 preneed funeral contract sellers.

#### *How is it regulated?*

The Commissioner provides regulatory oversight of preneed contracts sellers who utilize either trust accounts or life insurance policies to fund preneed funeral contracts.

#### *What does it cost?*

In fiscal year 19-20, the Commissioner expended \$19,732 and allotted 0.25 full-time equivalent employees to provide administrative functions related to preneed funeral contracts.

#### *What disciplinary activity is there?*

During the period covered for this sunset review, fiscal years 15-16 through 19-20, there were 79 complaints filed, and 10 disciplinary actions were taken against preneed funeral contract sellers.

### Key Recommendations

- Continue the regulation of preneed funeral contract sellers for seven years, until 2029.
- Require the Division of Professions and Occupations (Division) to require funeral home registrants to attest as to whether they utilize preneed funeral contracts and require the Division and the Commissioner to enter into a memorandum of understanding to facilitate the exchange of that information.
- Repeal the net worth and bond requirements from the statute and direct the Commissioner to establish them by rule.

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## Background

### Sunset Criteria

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are guided by statutory criteria and sunset reports are organized so that a reader may consider these criteria while reading. While not all criteria are applicable to all sunset reviews, the various sections of a sunset report generally call attention to the relevant criteria. For example,

- In order to address the first criterion and determine whether a particular regulatory program is necessary to protect the public, it is necessary to understand the details of the profession or industry at issue. The Profile section of a sunset report typically describes the profession or industry at issue and addresses the current environment, which may include economic data, to aid in this analysis.
- To ascertain a second aspect of the first sunset criterion--whether conditions that led to initial regulation have changed--the History of Regulation section of a sunset report explores any relevant changes that have occurred over time in the regulatory environment. The remainder of the Legal Framework section addresses the third sunset criterion by summarizing the organic statute and rules of the program, as well as relevant federal, state and local laws to aid in the exploration of whether the program's operations are impeded or enhanced by existing statutes or rules.
- The Program Description section of a sunset report addresses several of the sunset criteria, including those inquiring whether the agency operates in the public interest and whether its operations are impeded or enhanced by existing statutes, rules, procedures and practices; whether the agency performs efficiently and effectively and whether the board, if applicable, represents the public interest.
- The Analysis and Recommendations section of a sunset report, while generally applying multiple criteria, is specifically designed in response to the tenth criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

These are but a few examples of how the various sections of a sunset report provide the information and, where appropriate, analysis required by the sunset criteria. Just as not all criteria are applicable to every sunset review, not all criteria are specifically highlighted as they are applied throughout a sunset review. While not necessarily exhaustive, the table below indicates where these criteria are applied in this sunset report.

Sunset Criteria	Where Applied
(I) Whether regulation by the agency is necessary to protect the public health, safety, and welfare; whether the conditions that led to the initial regulation have changed; and whether other conditions have arisen that would warrant more, less, or the same degree of regulation;	<ul style="list-style-type: none"> <li>• Profile.</li> <li>• Legal Framework.</li> <li>• Recommendations 1 - 3.</li> </ul>
(II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms, and whether agency rules enhance the public interest and are within the scope of legislative intent;	<ul style="list-style-type: none"> <li>• Legal Framework.</li> <li>• Recommendations 3 and 4.</li> </ul>
(III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters;	<ul style="list-style-type: none"> <li>• Legal Framework.</li> <li>• Program Description</li> <li>• Recommendation 5.</li> </ul>
(IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;	<ul style="list-style-type: none"> <li>• Program Description.</li> </ul>
(V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;	<ul style="list-style-type: none"> <li>• Not Applicable.</li> </ul>
(VI) The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;	<ul style="list-style-type: none"> <li>• Not Applicable.</li> </ul>
(VII) Whether complaint, investigation, and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;	<ul style="list-style-type: none"> <li>• Program Description.</li> </ul>
(VIII) Whether the scope of practice of the regulated occupation contributes to the optimum use of personnel and whether entry requirements encourage affirmative action;	<ul style="list-style-type: none"> <li>• Program Description.</li> </ul>
(IX) Whether the agency through its licensing or certification process imposes any sanctions or disqualifications on applicants based on past criminal history and, if so, whether the sanctions or disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subsection (5)(a) of this section must include data on the number of licenses or certifications that the agency denied based on the applicant's criminal history, the number of conditional licenses or certifications issued based upon the applicant's criminal history, and the number of licenses or certifications revoked or suspended based on an individual's criminal conduct. For each set of data, the analysis must include the criminal offenses that led to the sanction or disqualification.	<ul style="list-style-type: none"> <li>• Program Description.</li> </ul>

Sunset Criteria	Where Applied
(X) Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.	• Recommendations 1 - 6.

## Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR’s website at [coprrr.colorado.gov](http://coprrr.colorado.gov).

The functions of the Commissioner of Insurance (Commissioner), as enumerated in Article 15 of Title 10, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2022, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the preneed funeral contracts program pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation should be continued and to evaluate the performance of the Commissioner and the Division of Insurance (DOI) staff. During this review, the Commissioner must demonstrate that the program serves the public interest. COPRRR’s findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

## Methodology

As part of this review, COPRRR staff interviewed stakeholders, reviewed records, interviewed officials with state and national professional associations, reviewed Colorado statutes and rules, and reviewed the laws of other states.

The major contacts made during this review include, but are not limited to:

- Colorado Funeral Directors Association
- Division of Insurance
- Division of Professions and Occupations

In the spring of 2021, COPRRR staff conducted a survey of all preneed funeral contract sellers who are licensed by the Division of Insurance. The survey was sent to 58 preneed funeral contract sellers; 6 emails were returned as undeliverable. The survey received 20 responses, which is a 38.46 percent response rate. Survey results can be found in Appendix A.

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## Profile of the Profession

In a sunset review, COPRRR is guided by the sunset criteria located in section 24-34-104(6)(b), C.R.S. The first criterion asks whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation.

In order to understand the need for regulation, it is first necessary to understand what the profession does, where they work, who they serve and any necessary qualifications.

The average cost of a funeral in Colorado is approximately \$7,000.<sup>2</sup> The cost of a funeral can increase substantially depending on the goods and services a person chooses to obtain. For instance, embalming services, an elaborate casket, extensive transportation, flowers, death notices and other incidentals may substantially increase the cost of a funeral.

Since funeral expenses can be costly, some people choose to utilize preneed funeral contracts. Preneed funeral contracts are agreements where individuals prepay for funeral goods and/or services they wish to receive upon their death.<sup>3</sup> Consumers who use a preneed funeral contract are able to purchase merchandise and services at the current market rate, with the guarantee that their funeral expenses, once paid with a formally executed contract, will remain fixed, regardless of the time of death or length of time from the execution of the contract.

A preneed funeral contract can be backed by either a trust, in which case funds are held in a trust account until such time as they are needed, or by a life insurance policy, in which case the life insurance policy is accessed when the beneficiary passes and the funds are needed to cover the arranged-for funeral expenses.

Those who sell preneed funeral contracts to consumers are required to obtain a license from the Commissioner of Insurance (Commissioner). Licensees may be a funeral home, brokers or life insurance producers (agents). Importantly, a licensed preneed funeral contract seller must be part of the transaction but need not sell the contract directly. That is, multiple individuals can work under the authority of a single preneed funeral contract license.

For example, if a funeral director at a funeral home holds a preneed funeral contract seller license, other employees at the funeral home can prepare preneed funeral contracts for consumers. If a violation of the statute occurs, however, the person who possesses the license is subject to discipline by the Commissioner.

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<sup>2</sup> USFuneralsOnline. *What to Consider When Arranging a Funeral or Cremation in Colorado*. Retrieved June 29, 2021, from <https://www.us-funerals.com/funeral-guide/colorado/#.YNtGuvlKjIU>

<sup>3</sup> AARP. *Estate Planning: Preneed Funeral and Burial Agreements*. Retrieved June 29, 2021, from <https://www.aarp.org/money/estate-planning/info-1999/aresearch-import-195-FS76.html>



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For those preneed funeral contracts backed by trusts, the licensee deposits consumers' funds into a trust account, for which there must be a trust agreement, until the beneficiary passes and the funds are needed to pay for the agreed-upon merchandise and services for a funeral.

Prenneed contract sellers who deposit funds into trusts must deposit at least 75 percent of the contract price with a trustee, and they may keep 25 percent of the total contract price. For example, if a preneed buyer pays \$10,000 for goods and services in a preneed funeral contract, the preneed seller may keep \$2,500 and the remaining \$7,500 must be placed into a trust account. Once the trust balance increases to \$10,000, the preneed seller is entitled to collect and retain the earnings accrued from the trust.

Additionally, preneed funeral contracts may be backed by life insurance policies, which requires an insurance producer license. This option entails consumers working with a producer to assign life insurance benefits to pay for all or part of the merchandise and services that are included in the preneed funeral contract.

Once a preneed funeral contract is executed by a life insurance producer, the funds are placed into an insurance policy. Funds can either be paid up front or the buyer may choose to pay in installments. Upon the beneficiary's death, the insurance policy is utilized to obtain the merchandise and services agreed upon in the preneed funeral contract.

Consumers may also utilize brokers to obtain preneed funeral contracts. In addition to the licensing requirement, brokers must utilize the services of a general provider (funeral home), under a general provider agreement, to fulfil the terms of the preneed contract.

All preneed funeral contract licensees are responsible for complying with the law and, among other things, providing an annual report to the Commissioner detailing all outstanding preneed funeral contracts.

There is no limit on how long a preneed funeral contract may be in effect.

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## Legal Framework

### History of Regulation

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first sunset criterion questions whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen that would warrant more, less or the same degree of regulation.

One way that COPRRR addresses this is by examining why the program was established and how it has evolved over time.

House Bill 53-121 created regulatory oversight of preneed funeral contracts. The bill authorized the Insurance Department (now known as the Division of Insurance) to supervise, audit and examine the funds derived from prepaid or prearranged funeral contracts. House Bill 53-121 also authorized the Commissioner of Insurance (Commissioner) to institute civil action or apply for injunctive relief.

The COPRRR has completed three sunset reviews of the Division of Insurance (DOI) in 1996, 2001 and, most recently, 2016. The regulation of preneed funeral contracts was included for analysis in each of the aforementioned sunset reviews.

The 2016 sunset review of the DOI identified several areas where the preneed statute needed to be updated or amended to provide protection to consumers. In fact, the 2016 DOI sunset report included six recommendations. The six recommendations were:

- Repeal preneed funeral contract licensing fees from statute and authorize the DOI to set fees administratively based on the cost of regulating the industry;
- Require any interest and other earnings from a preneed trust account to remain with the principal;
- Authorize the Commissioner to conduct examinations of preneed sellers periodically or as often as the Commissioner deems necessary;
- Require the Commissioner to conduct examinations of preneed sellers with DOI staff if the company is located in Colorado;
- Repeal the surety bond requirement for preneed sellers and instead create a preneed recovery fund; and
- Require preneed sellers to transfer trust funds to the Unclaimed Property Trust Fund in case the funds are never used for the contracted funeral goods and services.

The six recommendations were ultimately removed by the General Assembly from the DOI sunset bill. Instead, a sunset date was created in the preneed funeral contracts statute to enable a sunset review to be completed separate from the entire DOI sunset

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review. As such, this is the first sunset review of the preneed funeral contracts statute.

## Funeral Rule

In order to facilitate transparency and enhance consumer protection for funeral goods and services, the Federal Trade Commission created the Funeral Rule in 1984 and amended it effective 1994.<sup>4</sup> The Funeral Rule entitles consumers to the following:<sup>5</sup>

- Buy only funeral arrangements the person wants to buy;
- Obtain price information over the phone;
- Obtain written, itemized price list when visiting a funeral home;
- Review a written casket price prior to viewing caskets;
- Review an outer burial container price list;
- Receive a written statement highlighting the goods and services that have been chosen before payment is initiated;
- Receive an explanation in a written statement from the funeral home describing any legal cemetery or crematory requirements;
- Use of an “alternative container” rather than a casket is authorized;
- Provide the funeral home with a casket or urn that was purchased elsewhere; and
- Make funeral arrangements without embalming.

## Legal Summary

The second and third sunset criteria question

Whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms, and whether agency rules enhance the public interest and are within the scope of legislative intent; and

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters.

A summary of the current statutes and rules is necessary to understand whether regulation is set at the appropriate level and whether the current laws are impeding or enhancing the agency’s ability to operate in the public interest.

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<sup>4</sup> Federal Trade Commission. *The Funeral Rule*. Retrieved June 29, 2021, from <https://static.fmgsuite.com/media/documents/53e4a4ba-3b12-4034-89b4-2c2f5575d72a.pdf>

<sup>5</sup> Federal Trade Commission. *Consumer Information: The FTC Funeral Rule*. Retrieved June 29, 2021, from <https://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule>

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Section 10-15-101, *et seq.*, Colorado Revised Statutes (C.R.S.), provides regulatory oversight of preneed funeral contracts. The Commissioner is vested with providing the oversight.

Preneed funeral contracts are defined as,<sup>6</sup>

Any written contract, agreement, or mutual understanding or any security or other instrument that is convertible into a contract, agreement, or mutual understanding, whereby, upon death of the preneed contract beneficiary, a final resting place, merchandise, or services are provided or performed in connection with the final disposition of the beneficiary's body. Consideration for a preneed funeral contract is funds, deposits or the assignment of life insurance benefits.

A preneed funeral contract can be backed by either a trust, in which case funds are held in a trust account until such time as they are needed, or by a life insurance policy, in which case the life insurance policy is accessed when the beneficiary passes and the funds are needed to cover the arranged-for funeral expenses.

Those who sell preneed funeral contracts to consumers are required to obtain a license from the Commissioner. Licensees may be a funeral home, brokers or life insurance producers (agents). Importantly, a licensed preneed funeral contract seller must be part of the transaction but need not sell the contract directly. That is, multiple individuals can work under the authority of a single preneed funeral contract license.

For example, if a funeral director at a funeral home holds a preneed funeral contract seller license, other employees at the funeral home can prepare preneed funeral contracts for consumers. If a violation of the statute occurs, however, the person who possesses the license is subject to discipline by the Commissioner.

For those preneed funeral contracts backed by trusts, the licensee deposits consumers' funds into a trust account, for which there must be a trust agreement, until the beneficiary passes and the funds are needed to pay for the agreed-upon merchandise and services for a funeral.

Additionally, preneed funeral contracts may be backed by life insurance policies, which requires an insurance producer license. This option entails consumers working with a producer to assign life insurance benefits to pay for all or part of the merchandise and services that are included in the preneed funeral contract.

Once a preneed funeral contract is executed by a life insurance producer, the funds are placed into an insurance policy. Funds can either be paid up front or the buyer may choose to pay in installments. Upon the beneficiary's death, the insurance policy is

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<sup>6</sup> § 10-15-102(13)(a), C.R.S.

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utilized to obtain the merchandise and services agreed upon in the preneed funeral contract.

Consumers may also utilize brokers to obtain preneed funeral contracts. In addition to the licensing requirement, brokers must utilize the services of a general provider (funeral home), under a general provider agreement, to fulfil the terms of the preneed contract.

All preneed funeral contracts must include the following:<sup>7</sup>

- A statement saying, “This preneed funeral contract is not insurance; however, preneed funeral contracts and licensees are subject to regulation by the [DOI]”;
- The name and address of the principal office of the licensee;
- Identify the contract buyer and preneed funeral contract beneficiary;<sup>8</sup>
- State the terms and conditions for cancellation by the consumer within seven days of their signature to the contract;
- Provide that the consumer may cancel the preneed funeral contract at any time after the seven-day period;
- Contain a provision expressing the right of the licensee to perform under the preneed contract if the heirs, assigns or duly authorized representatives of the preneed funeral contract beneficiary have not canceled the contract within 168 hours after death of the beneficiary or if previously authorized to perform prior to such 168 hours;
- Specify the services and/or merchandise to be provided, and clearly indicate that the licensee guarantees and will fully pay for each service and/or item of merchandise when it is provided;
- Contain a provision stating that the licensee must provide merchandise as described in the preneed contract or merchandise of equivalent quality;
- Each preneed funeral contract must clearly state the terms of the consideration between the licensee and consumer;
- Language indicating that the consumer is responsible for paying any unpaid balance of the preneed contract price;
- Where the consideration is an assignment of life insurance benefits, any unpaid balance must not exceed the price of the services or merchandise provided at the time of death of the preneed funeral contract beneficiary; and
- Contain a provision stating that the licensee is responsible for furnishing the merchandise and services expressed in the preneed funeral contract, unless the consumer is in default or the contract is canceled.

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<sup>7</sup> § 10-15-105(4), C.R.S.

<sup>8</sup> A preneed funeral contract buyer may be the beneficiary or others may be a beneficiary including, but not limited to: a spouse, child or grandparent.

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Upon entering into a preneed funeral contract, the licensee is required to furnish an accurate copy of the contract to the consumer.<sup>9</sup>

If a licensee enters into a contract where life insurance benefits are utilized, the contract must state that all or part of the funds must be paid to funeral home to pay for the services or merchandise included in the preneed funeral contract.

In order to provide preneed funeral contracts to consumers, a person must obtain a license from the Commissioner. Applicants are required to complete a licensing application and pay a \$500 licensing fee.<sup>10</sup>

Applicants must also provide either:<sup>11</sup>

- A current balance sheet, income statement, and statement of cash flow to demonstrate that the business has a net worth of at least \$10,000 signed by a certified public accountant, or if prepared by the applicant or a public accountant, accompanied by a current tax return; or
- A surety bond of at least \$10,000.

Applicants are also required to complete a fingerprint-based criminal history background check.<sup>12</sup>

Once licensed, a licensee is required to keep accurate accounts, books, and records of all transactions, copies of all preneed contracts, dates and amounts of payments made and accepted. Licensees must maintain the names and addresses of each preneed funeral contract buyer, copies of all annual reports, and the name of the preneed funeral contract beneficiaries. Licensees are required to maintain the name of the trustee holding the trust funds.<sup>13</sup>

Licensees must maintain the aforementioned records for five years after:<sup>14</sup>

- The death of the preneed funeral contract beneficiary,
- The removal of the funds from the trust, or
- The termination of the assignment of life insurance benefits.

Preneed funeral contract sellers who utilize trusts to deposit funds must deposit 75 percent of the funds with a trustee.<sup>15</sup>

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<sup>9</sup> § 10-15-105(1)(c), C.R.S.

<sup>10</sup> § 10-15-103(1)(a), C.R.S.

<sup>11</sup> §§ 10-15-103(1)(a)(I) and (II), C.R.S.

<sup>12</sup> § 10-15-103(1)(b)(I), C.R.S.

<sup>13</sup> § 10-15-103(3)(a), C.R.S.

<sup>14</sup> § 10-15-103(3)(b), C.R.S.

<sup>15</sup> § 10-15-107(1), C.R.S.

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Upon a receiving a complaint or an indication of non-compliance, the Commissioner is authorized to investigate the books, records and accounts of a licensee to ensure that trust funds, preneed funeral contracts and preneed insurance policies comply with the statute.<sup>16</sup>

Additionally, licensees are required to file an annual report with the Commissioner detailing the amount of funds deposited with a trustee and the name of each trustee.<sup>17</sup>

The Commissioner is authorized to revoke, refuse to renew, suspend, place on probation, and fine up to \$1,000 per violation (fines collected go to the General Fund), licensees after an investigation, and a hearing in compliance with the Administrative Procedures Act, if a licensee has:<sup>18</sup>

- Failed to comply with or has violated any provision of the statute governing preneed funeral contracts or any regulation or order lawfully made pursuant to and within the authority of the preneed funeral contract statute;
- Used false or misleading advertising or made any false or misleading statement or concealment in the licensing application;
- Employed any device, scheme or artifice which results in defrauding consumers;
- Disposed of, concealed, diverted, converted or otherwise failed to account for any funds or assets related to preneed funeral contracts;
- Committed any act that constitutes a violation of the Colorado Consumer Protection Act;
- Been convicted of, or any officer, director or controlling shareholder has been convicted of a crime involving fraud or misappropriation or misuse of funds; or
- Failed to provide appropriate records requested by the Commissioner as part of an investigation of a complaint filed with the Commissioner.

Further, the Commissioner may issue letters of admonition to licensed preneed funeral contract sellers for violation of the statute or rules.<sup>19</sup>

The Commissioner is also authorized to issue cease and desist orders and apply for an injunction through the court.<sup>20</sup>

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<sup>16</sup> § 10-15-103(4)(a), C.R.S.

<sup>17</sup> § 10-15-104, C.R.S.

<sup>18</sup> § 10-15-114(1), C.R.S.

<sup>19</sup> § 10-15-114(1), C.R.S.

<sup>20</sup> § 10-15-115(1), C.R.S.

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## Program Description and Administration

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The third and fourth sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures practices and any other circumstances, including budgetary, resource and personnel matters; and

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

Section 10-15-101, *et seq.*, Colorado Revised Statutes (C.R.S.), provides regulatory oversight of preneed funeral contracts. The Commissioner of Insurance (Commissioner) is vested with providing the oversight. The Commissioner is responsible for, among other things, rulemaking, policymaking and, when necessary, imposing formal discipline on preneed funeral contract sellers.

Table 1 highlights the total expenditures and Division of Insurance (DOI) staff dedicated to the regulation of preneed funeral contract sellers in fiscal years 15-16 through 19-20.

**Table 1**  
**Total Program Expenditures**

Fiscal Year	Total Expenditures	FTE
15-16	\$18,087	0.25
16-17	\$31,854	0.38
17-18	\$32,543	0.38
18-19	\$18,844	0.25
19-20	\$19,732	0.25

The increase in total expenditures in fiscal years 16-17 and 17-18 is attributable to research concerning the preneed portion the 2016 DOI sunset review and producing a report related to preneed compliance and preneed stakeholder meetings.

The 2017 DOI sunset legislation, Senate Bill 17-249, was amended to require the DOI to conduct a study to determine whether all preneed funeral contract sellers are in compliance with the preneed funeral contracts statute and to identify strategies to gain compliance with preneed funeral contract sellers who are not in compliance.



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The DOI, among other things, held stakeholder meetings. The strategies that were identified to improve compliance with the preneed funeral contracts statute were:

- Mandate all registered funeral homes also be licensed as preneed funeral contract sellers.
- Register all preneed contract sellers and agents.
- Establish a preneed funeral consumer relief fund.

The strategies highlighted above were not adopted by the General Assembly.

In fiscal year 20-21, the DOI devoted 0.25 full-time equivalent (FTE) employees to provide administrative functions for the Commissioner related to preneed funeral contracts. The FTE are as follows:

- Rate and Financial Analyst IV—0.025 FTE is responsible for, among other things, overseeing insurance producer licensing, investigations and enforcement, which includes preneed funeral insurance-related complaints.
- Criminal Investigator I—0.05 FTE is responsible for, among other things, conducting investigations into allegations of insurance producer misconduct and unauthorized insurance-related issues, including preneed contracts.
- Administrative Assistant III—0.025 FTE is responsible for performing intake of complaints and creating electronic files for investigators.
- Financial/Credit Examiner IV—0.05 FTE is responsible for the overall management of preneed funeral contract sellers licensing matters.
- Financial/Credit Examiner I—0.10 FTE is responsible for compiling annual report reconciliations.

## Licensing

The eighth sunset criterion questions whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

In order to provide preneed funeral contracts to consumers utilizing trusts, a person must obtain a preneed funeral contract seller license from the Commissioner. Applicants are required to complete a licensing application and pay a \$500 licensing fee.<sup>21</sup> Applicants must also provide either:<sup>22</sup>

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<sup>21</sup> § 10-15-103(1)(a), C.R.S.

<sup>22</sup> §§ 10-15-103(1)(a)(I) and (II), C.R.S.

- A current balance sheet, income statement, and statement of cash flow to demonstrate that the business has a net worth of at least \$10,000 signed by a certified public accountant, or if prepared by the applicant or public accountant, accompanied by a current tax return; or
- A surety bond of at least \$10,000.

Applicants are also required to complete a fingerprint-based criminal history background check.<sup>23</sup>

Table 2 shows the total number of licensed preneed funeral contract sellers in fiscal years 15-16 through 19-20.

**Table 2  
Licensed Preneed Funeral Contract Sellers**

Fiscal Year	Original	Renewal	Total Number of Licensees
15-16	2	76	78
16-17	2	73	75
17-18	0	73	73
18-19	0	70	70
19-20	3	65	68

As Table 2 indicates, the total number of preneed funeral contract sellers has remained fairly constant.

In fiscal year 20-21, the fee for a preneed funeral contract license varied depending on the aggregate preneed contract price of all contracts outstanding at the end of each calendar year. The fee schedule is highlighted below, as well as the number of licensees for each tier:<sup>24</sup>

- \$100,000 or less the licensing fee is \$100 - 8 licensees;
- \$100,001 to \$500,000 the licensing fee is \$200- 12 licensees;
- \$500,001 to \$1,000,000 the licensing fee is \$500 - 14 licensees;
- \$1,000,001 to \$5,000,000 the licensing fee is \$1,000 - 21 licensees;
- \$5,000,001 to \$10,000,000 the licensing fee is \$1,500- 6 licensees; and
- \$10,000,001 or more the licensing fee is \$2,000 - 6 licensees.

As of December 31, 2020, the total amount of outstanding preneed contracts where funds were deposited into trusts and life insurance policies was \$246,535,326.

<sup>23</sup> § 10-15-103(1)(b)(I), C.R.S.

<sup>24</sup> § 10-15-103(5)(b), C.R.S.

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## Complaint and Disciplinary Activity

The seventh sunset criterion requires COPRRR to examine whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Anyone can file a complaint against preneed funeral contract sellers.

Table 3 delineates the nature of complaints filed with the Commissioner in fiscal years 15-16 through 19-20.

**Table 3**  
**Nature of Complaints Filed Against Preneed Funeral Contract Licensees**

Nature of Complaints	FY 15-16	FY 16-17	FY 17-18	FY 18-19	FY 19-20
Practicing without a License	1	0	0	1	0
Standard of Practice	0	0	0	1	1
Fee Dispute	0	0	0	2	3
Scope of Practice	0	0	0	0	1
Theft	1	60	5	2	0
Felony Conviction	0	0	1	0	0
<b>Total</b>	<b>2</b>	<b>60</b>	<b>6</b>	<b>6</b>	<b>5</b>

As Table 3 indicates, a majority of complaints were related to theft. In fact, in fiscal year 16-17, there were 60 complaints related to theft stemming from one insurance producer who stole money from 60 individuals who entered into preneed funeral contracts. The insurance producer was ultimately convicted of the theft.

One standard of practice complaint was for a funeral home failing to submit an annual filing to the DOI to ensure that the funds received for preneed funeral contracts were properly trusted.

The other standard of practice complaint was related to a funeral home that failed to locate the preneed funeral contracts after the death of the funeral home owner.

Additionally, Table 4 illustrates the total number of disciplinary actions the Commissioner imposed on preneed funeral contract sellers in fiscal years 15-16 through 19-20.

**Table 4  
Final Agency Actions**

Type of Action	FY 15-16	FY 16-17	FY 17-18	FY 18-19	FY 19-20
Suspensions	0	1	0	1	0
Probation/Practice Limitation	0	1	0	0	0
Letter of Admonition	0	0	1	0	0
License Denied	0	0	0	1	0
Fines	2	1	0	0	1
Voluntary Surrender /Relinquishment of License	0	1	0	0	1
<b>Total Disciplinary Actions</b>	<b>2</b>	<b>3</b>	<b>1</b>	<b>2</b>	<b>2</b>
Dismissals	0	3	1	1	0
<b>Total Dismissals</b>	<b>0</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>0</b>

As highlighted in Table 4, there were relatively few disciplinary actions imposed by the Commissioner in the past five fiscal years. Most commonly, discipline was imposed for theft of funds. For example, in fiscal year 19-20, an insurance producer’s license was revoked for the theft of preneed funeral contract funds. The insurance producer was also assessed a civil penalty and was required to pay restitution.

### **Financing Activity**

The seventh sunset criterion requires COPRRR to examine whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

The Commissioner also has the authority to impose fines on preneed funeral contract sellers for violations of the statute or applicable rules. As highlighted in Table 5, there were four fines imposed by the Commissioner on preneed funeral contract sellers in the past five fiscal years.

**Table 5**  
**Total Number of Fines Imposed and Collected**

Fiscal Year	Number of Fines Imposed	Total Value of Fines Imposed	Total Value of Fines Collected
15-16	2	\$112,000	\$0
16-17	1	\$10,000	\$10,000
17-18	0	\$0	\$0
18-19	0	\$0	\$0
19-20	1	\$33,000	\$0

The fines imposed by the Commissioner were for theft of funds. For example, in fiscal year 15-16, a husband and wife owned a funeral home and offered preneed funeral contracts to their customers. The couple failed to put the funds in a trust and ultimately spent the consumers' funds. As a result, the husband and wife were fined \$56,000 each. The couple moved out of state and never paid the assessed fine.

In fiscal year 19-20, a preneed funeral contract seller's license was revoked for theft of funds and was assessed a fine of \$33,000. The fine was never paid.

Importantly, if the people referenced above ever seek to become licensed again in the State of Colorado, the failure to pay their respective fines would be considered when evaluating qualifications for licensure.

Section 24-34-108, C.R.S., established the Consumer Outreach and Education Cash Fund (Outreach Fund) to develop, implement, and maintain the Consumer Outreach and Education Program within the Department of Regulatory Agencies (DORA). Further, the statute authorizes the Executive Director of DORA to collect a surcharge for fines imposed for violations of various statutes, including the Act, to be credited to the Outreach Fund.

## **Audits/Inspections**

The seventh sunset criterion requires COPRRR to examine whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Section 10-15-103(4)(a), C.R.S., authorizes the Commissioner to investigate the books,

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records and accounts of preneed funeral contract sellers to ensure that trust funds, and preneed insurance policies are in compliance with the statute. Additionally, the Commissioner is authorized to examine the books, records and accounts of preneed funeral contract sellers as often as necessary upon receiving a complaint or indication of non-compliance with the statute.

According to DOI staff, the Commissioner did not investigate or examine the books, records and accounts of preneed funeral contract sellers in the past five fiscal years.

### **Collateral Consequences -Criminal Convictions**

The ninth sunset criterion requires COPRRR to examine whether the agency under review, through its licensing processes, imposes any sanctions or disqualifications based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Section 10-15-114(1)(f), C.R.S., authorizes the Commissioner to issue a letter of admonition, deny, revoke, or suspend a preneed funeral contract seller's license if he or she is convicted of, or any officer, director or controlling shareholder has been convicted of, a crime involving fraud or misappropriation or misuse of funds.

In fiscal years 15-16 through 19-20, the Commissioner did not deny, revoke or suspend place on probation, issue letters of admonition or fine the license of any preneed funeral contract sellers based on past criminal history.

### **COVID-19 Response**

The COVID-19 pandemic placed extraordinary pressures on the citizens of Colorado, the Colorado economy and Colorado state government. As a result, COPRRR asked the DOI to summarize any measures the agency may have implemented in response to the COVID-19 pandemic, the results of those efforts and any lessons learned. This section of the report is intended to provide a high-level summary of those responses.

The DOI took a number of steps over 2020 and 2021 in responding to the COVID-19 pandemic. Many of these were focused on health insurance and the costs of treatment of COVID-19 and the administration of the vaccine. The DOI also took steps that addressed property and casualty insurance, as well as insurance producers (agents) licensed in Colorado.

However, none of the steps taken to address COVID-19 specifically addressed the regulatory oversight of preneed funeral contract sellers.

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## Analysis and Recommendations

The final sunset criterion questions whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. The recommendations that follow are offered in consideration of this criterion, in general, and any criteria specifically referenced in those recommendations.

### **Recommendation 1 - Continue the regulation of preneed funeral contract sellers for seven years, until 2029.**

Since funeral expenses can be costly, some people choose to utilize preneed funeral contracts. Preneed funeral contracts are agreements where individuals prepay for funeral goods and/or services they wish to receive upon their death.<sup>25</sup> That is, consumers who use a preneed funeral contract are able to purchase goods and services at the current market rate, which then guarantees that their funeral expenses, once paid with a formally executed contract, will remain fixed, regardless of the time of death or length of time from the signing/execution of the contract.

A preneed funeral contract can be backed by either a trust, in which case funds are held in a trust account until such time as they are needed, or by a life insurance policy, in which case the life insurance policy is accessed when the beneficiary passes and the funds are needed to cover the arranged-for funeral expenses.

Those who sell preneed funeral contracts to consumers are required to obtain a license from the Commissioner of Insurance (Commissioner). Licensees may be a funeral home, brokers or life insurance producers (agents). Importantly, a licensed preneed funeral contract seller must be part of the transaction but need not sell the contract directly. That is, multiple individuals can work under the authority of a single preneed funeral contract license.

For example, if a funeral director at a funeral home holds a preneed funeral contract seller license, other employees at the funeral home can prepare preneed funeral contracts for consumers. If a violation of the statute occurs, however, the person who possesses the license is subject to discipline by the Commissioner.

For those preneed funeral contracts backed by trusts, the licensee deposits consumers' funds into a trust account, for which there must be a trust agreement, until the beneficiary passes and the funds are needed to pay for the agreed-upon merchandise and services for a funeral.

Additionally, preneed funeral contracts may be backed by life insurance policies, which requires an insurance producer license. This option entails consumers working with a producer to assign life insurance benefits to pay for all or part of the merchandise and services that are included in the preneed funeral contract.

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<sup>25</sup> AARP. *Estate Planning: Preneed Funeral and Burial Agreements*. Retrieved June 29, 2021, from <https://www.aarp.org/money/estate-planning/info-1999/aresearch-import-195-FS76.html>

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Once a preneed funeral contract is executed by a life insurance producer, the funds are placed into an insurance policy. Funds can either be paid up front or the buyer may choose to pay in installments. Upon the beneficiary's death, the insurance policy is utilized to obtain the merchandise and services agreed upon in the preneed funeral contract.

Consumers may also utilize brokers to obtain preneed funeral contracts. In addition to the licensing requirement, brokers must utilize the services of a general provider (funeral home), under a general provider agreement, to fulfil the terms of the preneed contract.

The Commissioner is responsible for providing regulatory oversight of preneed funeral contract sellers. Additionally, the Commissioner is responsible for, among other things, rulemaking, policymaking and, when necessary, imposing formal discipline on preneed funeral contract sellers.

The first sunset statutory criterion asks whether regulation is necessary to protect the health, safety and welfare of the public. As highlighted in the Program Description section of this report, there were several complaints filed against licensed preneed funeral contract sellers. The most common complaint filed by consumers was the theft of funds, which is important because preneed funeral contract sellers who utilize trusts may hold the monies for many, many years before the beneficiary dies and the heirs must utilize those funds.

Also, the formal discipline (including fines) imposed by the Commissioner was related to theft of funds by preneed funeral contract sellers. Since there were instances where consumers' funds were compromised, the continued regulatory oversight of preneed funeral contract sellers is necessary.

Additionally, many licensed preneed funeral contract sellers possess large sums of money related to preneed funeral contracts. The following information highlights the aggregate preneed contract price of all preneed contracts held in trusts or through life insurance benefits outstanding on June 30, 2021, as well as the number of licensees in each category:

- \$100,000 or less - 8 licensees;
- \$100,001 to \$500,000 - 12 licensees;
- \$500,001 to \$1,000,000 - 14 licensees;
- \$1,000,001 to \$5,000,000 - 21 licensees;
- \$5,000,001 to \$10,000,000 - 6 licensees; and
- \$10,000,001 or more - 6 licensees.

As the information above suggests, there are large amounts of consumers' funds dedicated to preneed funeral contracts, so the potential for financial harm to consumers is high.



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Consumers who choose to utilize preneed funeral contracts to pay for services and merchandise prior to their death may have the contract for years. It is important to ensure that these funds are properly invested in trusts and life insurance policies. Doing so ensures that the funds are available for consumers upon their death.

As such, the General Assembly should continue the preneed funeral contracts statute for seven years, until 2029. Doing so will provide an avenue to formally discipline practitioners for violations of the statute, and further ensure that consumers' funds are properly maintained and secured. Also, the seven-year continuation will enable the changes recommended below to be fully implemented.

**Recommendation 2 - Require the Division of Professions and Occupations to require funeral home registrants to attest as to whether they utilize preneed funeral contracts and require the Division of Professions of Occupations and the Commissioner to enter into a memorandum of understanding to facilitate the exchange of that information.**

Currently, it is unclear how many preneed funeral contracts are written annually in Colorado. There are approximately 260 funeral homes that are registered with the Division of Professions and Occupations (DPO) within the Department of Regulatory Agencies. In fiscal year 19-20, there were only 68 preneed funeral contract sellers licensed by the Commissioner, although some licenses include multiple funeral homes.

Consequently, the Commissioner may be unaware of many funeral homes that are offering preneed funeral contracts to consumers. Since it is unclear how many funeral homes are offering preneed funeral contracts to consumers, there could be millions of dollars in these contracts without regulatory oversight, which could compromise consumer protection.

In order to adequately protect consumers, DPO should, upon renewal of funeral homes' registration (biennially), require the registrant to attest as to whether the funeral home is offering preneed funeral contracts to consumers. Doing so is also consistent with one of the strategies recommended by the DOI to the General Assembly in the study results that stemmed from Senate Bill 17-249.

Importantly, funeral homes that do not honestly attest to whether they are providing preneed funeral contracts could be subject to formal discipline by the Director of DPO.

DPO and the Commissioner should also enter into a memorandum of understanding (MOU) to share the information funeral homes supply in their registration renewal as to whether they are offering preneed funeral contracts to their customers. Doing so will enable the Commissioner to more accurately determine the funeral homes that are providing preneed funeral contracts to consumers. Once the funeral homes that are providing this service are identified, the Commissioner can reliably inform the funeral homes that they are required to obtain a license when providing preneed funeral

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contacts or work with a licensed preneed funeral contract seller. It will also allow the Commissioner to issue cease and desist orders to funeral homes that fail to obtain a license or utilize a licensed preneed funeral contract seller but continue to offer preneed funeral contracts to consumers without a license.

Importantly, the 2017 DOI sunset legislation, Senate Bill 17-249, was amended to require the DOI to conduct a study to determine whether all preneed funeral contract sellers are in compliance with the preneed funeral contracts statute and to identify strategies to gain compliance with preneed funeral contract sellers who are not in compliance. One of the strategies was to mandate that all funeral homes be licensed as preneed funeral contract sellers, which is the rationale behind this recommendation. The General Assembly did not adopt this strategy.

However, requiring all funeral homes to obtain a license to sell preneed funeral contracts could be overly burdensome, since it is likely that not all of them do so. Therefore, this recommendation simply advocates that funeral homes make an attestation at the time of their existing registration renewal with DPO. This is a less restrictive alternative, yet it achieves the same goal of identifying which funeral homes are offering preneed funeral contracts. This approach is consistent with the second sunset criterion which asks whether regulation is the least restrictive consistent with the public interest.

The first sunset criterion asks whether regulation is necessary to protect the public. As evidenced in this sunset report, there were instances when consumers were harmed financially due to the actions of preneed funeral contract sellers. As a result, regulation of preneed funeral contract sellers is necessary. Importantly, as this recommendation suggests, all preneed funeral contract sellers should be required to obtain a license from the DOI in order to provide these contracts to consumers.

As a result, the General Assembly should amend the statute to require DPO and the Commissioner to enter into a MOU to share information related to funeral homes that attest as to whether they are offering preneed funeral contracts to consumers. Doing so will enable the Commissioner to provide regulatory oversight for all funeral homes providing these services.

**Recommendation 3 - Repeal the net worth and bond requirements from the statute and direct the Commissioner to establish them in rule.**

Currently, applicants for a preneed funeral contract license must provide either:<sup>26</sup>

- A current balance sheet, income statement, and statement of cash flow to demonstrate that the business has a net worth of at least \$10,000 signed by a certified public accountant, or if prepared by the applicant or a public

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<sup>26</sup> §§ 10-15-103(1)(a)(I) and (II), C.R.S.

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- accountant, accompanied by a current tax return; or
  - A surety bond of at least \$10,000.

The purpose of the net worth or bond requirement for preneed funeral contract sellers is to provide at least a portion of recoverable monies in the event that a licensee does not or cannot fulfill his or her financial obligation to consumers.

Additionally, the bond requirement serves as a *de facto* credit check on licensees to ensure that their financial status is solid enough to receive a surety bond, which adds another layer of protection for consumers.

The \$10,000 bond requirement was enacted by the General Assembly via Senate Bill 95-038. This amount has been set in statute since at least 1995 and should be increased to more closely approximate the potential losses caused by the unscrupulous actions of licensed preneed funeral contract sellers. When looking at inflation alone, \$10,000 in 1995 dollars is equivalent to \$18,077 in today's dollars.<sup>27</sup>

According to DOI staff, in fiscal year 19-20, 26 of the 68 total licensees utilized the \$10,000 bond requirement to fulfill the requirements for licensure.

The following information highlights the aggregate preneed contract price of all preneed contracts outstanding on June 30, 2021, as well as the number of licensees in each category:

- \$100,000 or less - 8 licensees;
- \$100,001 to \$500,000 - 12 licensees;
- \$500,001 to \$1,000,000 - 14 licensees;
- \$1,000,001 to \$5,000,000 - 21 licensees;
- \$5,000,001 to \$10,000,000 - 6 licensees; and
- \$10,000,001 or more - 6 licensees.

As highlighted above, many licensees hold hundreds of thousands and even millions of dollars in preneed funeral contracts in trusts and life insurance policies. In cases such as theft of funds, the \$10,000 net worth or possessing a \$10,000 bond would be wholly inadequate to provide monies to consumers who were victims of fraud.

The first sunset statutory criterion asks whether regulation is necessary to protect the public. Again, the purpose of the net worth or bond requirement for preneed funeral contract sellers is to provide at least a portion of recoverable monies in the event that a licensee does not or cannot fulfill his or her financial obligation to consumers.

Additionally, the 2017 DOI sunset legislation, Senate Bill 17-249, was amended to require the DOI to conduct a study to determine whether all preneed funeral contract

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<sup>27</sup> These figures were calculated using the Consumer Price Index Inflation Calculator provided by the Federal Bureau of Labor Statistics. Retrieved on July 22, 2021, from <https://data.bls.gov/cgi-bin/cpicalc.pl>

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sellers are in compliance with the preneed funeral contracts statute and to identify strategies to gain compliance with preneed funeral contract sellers who are not in compliance. One of the strategies identified was to establish a preneed funeral consumer relief fund (fund). Such a fund would have enabled consumers to access lost funds if a preneed funeral contract seller engages in unscrupulous actions, such as theft of funds. Licensed preneed funeral contract sellers who use trusts would contribute to the fund. However, the General Assembly did not adopt this strategy.

The second sunset criterion asks whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest. Amending the bond and net worth requirements in the statute are less restrictive than creating a fund and the administrative apparatus that would be necessary to administer it.

The minimum net worth or bond should be updated and indexed to the aggregate amount of what preneed contract licensees are responsible for annually. For example, a licensee that possess \$10 million worth of preneed funeral contracts should be required to possess a greater net worth or secure a higher bond than a licensee that possesses an aggregate amount of \$10,000 of preneed funeral contracts.

The updated indexed net worth and bond requirement should be established via the formal rulemaking process, which would enable members of the regulated community and the public to participate. Increasing the new net worth and bond requirements would enhance consumer protection.

Importantly, the rulemaking process should also establish an updated minimum level of net worth or bond requirement for original applicants for licensure.

As such, the General Assembly should repeal the net worth and bond requirements from the statute and direct the Commissioner to establish them in rule.

#### **Recommendation 4 - Amend the conditions under which the Commissioner may investigate the books, records and accounts of contract sellers.**

Currently, section 10-15-103(4)(a), C.R.S., enables the Commissioner to investigate the books, records and accounts of a contract seller to ensure that trust funds, preneed contracts and preneed insurance policies comply with the statute. However, the statute limits the Commissioner's authority to do so only when the DOI has received a complaint or there is an indication of non-compliance.

The statute is too restrictive concerning the investigative authority of the Commissioner related to preneed funeral contract sellers. The licensing information provided for this sunset review suggests that there is a large amount of preneed funeral contract funds held in trust and life insurance policies. The following information highlights the aggregate preneed contract price of all preneed contracts outstanding on June 30, 2021, as well as the number of licensees in each category:

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- \$100,000 or less - 8 licensees;
  - \$100,001 to \$500,000 - 12 licensees;
  - \$500,001 to \$1,000,000 - 14 licensees;
  - \$1,000,001 to \$5,000,000 - 21 licensees;
  - \$5,000,001 to \$10,000,000 - 6 licensees; and
  - \$10,000,001 or more - 6 licensees.

Since there are a great deal of preneed funds in trusts and life insurance policies (as of December 31, 2020, there were \$246,535,326), the Commissioner should have unfettered access to investigate whether the funds are properly maintained and secured. Doing so will ensure that consumers' funds are secure. This is consistent with other entities that are regulated by the Commissioner. For example, the Commissioner is authorized to investigate and examine the books and records of insurance companies at any time, not based on a complaint only.

Importantly, according to DOI staff, the Commissioner did not investigate or examine the books, records and accounts of any preneed funeral contract sellers in the past five fiscal years. It is unclear as to why because there were, in fact, complaints filed against licensees for issues such as theft of funds.

Perhaps one explanation for the absence of investigations is the fact that the Commissioner lacks the resources. Investigating and litigating cases is time-consuming and costly. Licensure should cover the cost to investigate and litigate these cases in addition to managing the other duties with which the Commissioner is tasked. Currently, the Commissioner lacks the resources because the current licensing fees are set in statute.

In order to effectively provide financial protections to consumers, the Commissioner should have unfettered access to investigate the books, records and accounts of preneed funeral contracted sellers as often as necessary.

The second sunset statutory criterions asks whether the current statute and regulations establish the least restrictive form of regulation consistent with the public interest. Maintaining the current requirement, where the Commissioner is authorized to initiate an investigation only upon receiving a complaint or an indication of non-compliance is overly restrictive and is not consistent with the public interest.

Conducting investigations would ensure that all of the preneed funeral contract funds that are required to be in a trust are trusted properly. This would ensure that consumers who utilize preneed funeral contracts to pre-purchase funeral merchandise and services will have the funds available to ultimately receive the agreed upon services upon death.

In order ensure that consumers are effectively insulated from financial harm, the Commissioner and DOI staff must conduct the examinations. As such, the General Assembly should amend the statute to authorize the Commissioner

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to investigate the books, records and accounts of preneed funeral contract sellers as often as necessary. Doing so would provide effective financial protection to consumers who utilize preneed funeral contracts.

**Recommendation 5 - Repeal preneed funeral contract licensing fees from the statute, and authorize the Commissioner to set fees administratively based on the cost of regulating the industry.**

Currently, section 10-15-103(5)(b), C.R.S., establishes the annual licensing fee for preneed funeral contract sellers based on the aggregate preneed funeral contract price of all preneed funeral contracts outstanding at the end of each calendar year. As such, in fiscal year 20-21, the fee to obtain a preneed funeral contract license varied depending on the aggregate preneed contract price of all contracts outstanding at the end of each calendar year. The fee schedule is highlighted below, as well as the number of licensees for each tier:<sup>28</sup>

- \$100,000 or less the licensing fee is \$100 - 8 licensees;
- \$100,001 to \$500,000 the licensing fee is \$200- 12 licensees;
- \$500,001 to \$1,000,000 the licensing fee is \$500 - 14 licensees;
- \$1,000,001 to \$5,000,000 the licensing fee is \$1,000 - 21 licensees;
- \$5,000,001 to \$10,000,000 the licensing fee is \$1,500- 6 licensees; and
- \$10,000,001 or more the licensing fee is \$2,000 - 6 licensees.

As highlighted above, in fiscal year 20-21, the total for licensing fees collected from licensees by the Commissioner was \$52,200.

As of December 31, 2020, the total amount of outstanding preneed contracts held in trusts and life insurance contracts was \$246,535,326.

The licensing fee for the initial application is \$500.<sup>29</sup>

Since the fees are established in statute, the Commissioner does not have any authority to increase fees to cover the cost of regulation when the funds are insufficient. However, the Commissioner is authorized to reduce the fees if there is a surplus of uncommitted reserves in the fund.<sup>30</sup> The Commissioner is currently charging the maximum allowable fee highlighted in the statute.

Establishing a fee schedule with more flexibility may enable the Commissioner to engage in investigations of the books, records and accounts of preneed funeral contract sellers, which would enhance consumer protection.

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<sup>28</sup> § 10-15-103(5)(b), C.R.S.

<sup>29</sup> § 10-15-103(1)(a), C.R.S.

<sup>30</sup> § 10-15-103(6), C.R.S.

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The third sunset statutory criterion asks whether the agency operates in the public interest. In a regulatory program, the licensing fees should pay for the cost of regulation, and establishing the fee schedule in statute is too restrictive and may not serve in the public interest. To address this issue, the fee schedule should be removed from statute, and instead, fees should be established administratively. Doing so would provide greater flexibility to establish fees for preneed funeral contract sellers, which could enable the Commissioner to investigate the books, records and accounts as often as necessary.

The potential for fraud and misappropriation in preneed funeral sales is high. The average cost of a funeral in Colorado is approximately \$7,000.<sup>31</sup> The cost of a funeral can increase substantially depending on the goods and services a person chooses to obtain. For instance, embalming services, an elaborate casket, extensive transportation, flowers, obituary notices and other incidentals may substantially increase the cost of a funeral. People typically plan for their funeral near the end of their life, so many preneed buyers are older and at risk of financial exploitation. As evidenced by the licensing fee information, some preneed sellers have millions of dollars in preneed contracts.

Consumers pay for their funeral in advance so that they will have peace of mind for themselves and their loved ones. The death of a family member is often a difficult time, so when family members discover the money set aside to pay for the funeral has been lost, mismanaged or stolen, it can be devastating.

Recall that the Commissioner did not investigate the books, records or accounts of any licensees in the past five fiscal years. Perhaps one explanation for the absence of investigations is that investigating and litigating cases is time-consuming and costly. Licensure should cover the cost to investigate and litigate these cases in addition to managing the other duties with which the Commissioner is tasked.

Regulation of preneed sellers is necessary to protect preneed buyers from unscrupulous or irresponsible preneed sellers, and an effective regulatory program is beneficial for the industry as well as consumers. When preneed sellers mismanage preneed trust funds, they not only harm consumers, but also diminish the reputation of the funeral industry. As such, all preneed funeral contract sellers have a vested interest in ensuring that the licensing fees are adequate to support an effective regulatory program.

Therefore, the General Assembly should repeal preneed licensing fees from statute and authorize the Commissioner to establish fees administratively based on the cost of regulating the industry and the outstanding preneed contract obligations of the sellers. Also, establishing licensing fees administratively is consistent with many other practice acts in Colorado.

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<sup>31</sup> USFuneralsOnline. *What to Consider When Arranging a Funeral or Cremation in Colorado*. Retrieved June 29, 2021, from <https://www.us-funerals.com/funeral-guide/colorado/#.YNtGuvlKjIU>

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**Recommendation 6 - Require preneed funeral contract sellers to transfer trust funds to the state's Unclaimed Property Trust Fund when the funds are not utilized for the contracted merchandise and services.**

Currently, the preneed funeral contracts statute is silent on what licensees are to do with funds that are held in trust and never claimed. The absence of a provision in the statute related to unclaimed funds is problematic.

In a hypothetical situation, a person who lives alone in Colorado may choose to enter into a preneed funeral contract to pay for his or her funeral merchandise and services. Upon his or her death, the family members may not know that the person had a preneed funeral contract in place. As such, the family, presumably, would pay for funeral expenses, possibly at a different funeral home.

The purpose of depositing preneed funeral contract funds into a trust is to provide a guarantee that the funds would be available when the contract needs to be fulfilled. "A trust is a fiduciary arrangement that allows a third party, or trustee, to hold assets on behalf of a beneficiary."<sup>32</sup> However, if the family was unaware of the existing preneed funeral contract, funds could remain in the trust earning interest, which the preneed funeral contract licensee keeps, in perpetuity.

As such, a reasonable amount of time should be established to determine whether preneed funeral contracts are fulfilled. For example, a timeframe could be established where licensees are required to review contracts periodically to ensure that beneficiaries are still alive.

After the licensee performs a reasonable search and if the licensee is unable to establish contact with the beneficiary of the preneed funeral contract, the licensee should be required to notify the trustee and request that the funds be placed in Colorado's Unclaimed Property Trust Fund (Fund) within the Colorado Department of the Treasury. Funds could be claimed by the beneficiary, or more likely, the beneficiary's heirs, if any, of the account. There is no time frame for filing a claim with the Fund.

The tenth sunset statutory criterion asks whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. Amending the statute to require unclaimed preneed funeral contract funds be deposited into the Fund will enhance the public interest because it will enable heirs of the beneficiary to access any money in the Fund. Currently, there is not a process for heirs to access unused preneed funeral contract funds, and instead, those funds could remain in the trust in perpetuity. Anyone can search the Fund to see if they or others, including the beneficiary of a preneed funeral contract, has any property, whereas consumers, presumably, would not know where to look for any existing trust funds.

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<sup>32</sup> Fidelity. *What is a Trust?* Retrieved August 12, 2021, from <https://www.fidelity.com/life-events/estate-planning/trusts>



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Therefore, the General Assembly should amend the statute to require preneed funeral contract licensees to transfer unused preneed funeral contract funds to the Fund in the Colorado Department of Treasury. Doing so will provide an avenue for heirs of the beneficiary to access those funds.

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## Appendix A - Customer Service Survey

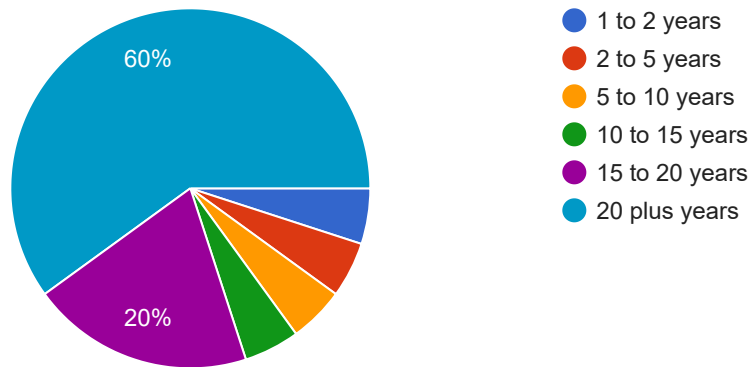
In the spring of 2021, Colorado Office of Policy, Research and Regulatory Reform staff conducted a survey of all preneed funeral contract sellers who are licensed by the Division of Insurance. The survey was sent to 58 preneed funeral contract sellers; 6 emails were returned as undeliverable. The survey received 20 responses, which is a 38.46 percent response rate. Survey results can be found on the pages that follow.

# Customer Service Survey for Pre-need Funeral Contract Sellers

20 responses

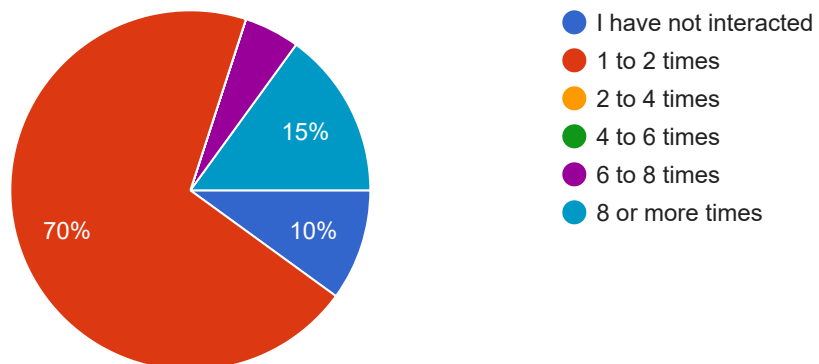
If you are a funeral home or funeral director that is regulated by Division of Insurance to sell pre-need funeral contracts, please indicate your years of experience.

20 responses



In the past year, how many times have you interacted with Division of Insurance. Please count all forms of interaction (telephone, e-mail, internet or website, regular mail, in person).

20 responses



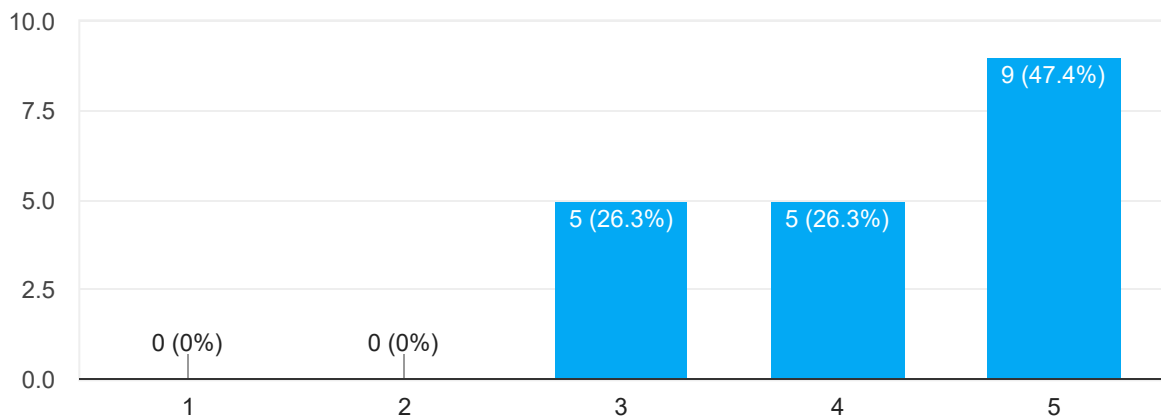
### What was your primary purpose in interacting with the Division of Insurance?

18 responses

- licensing or registration - 72.2%
- to learn about the requirements for pre-need funeral contract sellers - 11.1%
- inspection, audit or examination - 5.6%
- to obtain help with an issue - 5.6%
- respond to a complaint - 5.6%

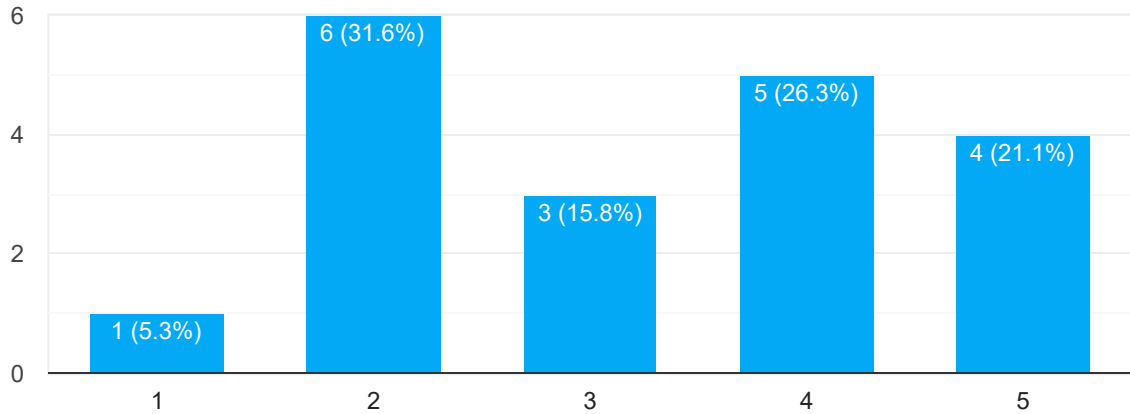
Overall please rate the service provided by the Division of Insurance on a scale of 1 to 5 with 1 being unacceptable and 5 being very acceptable.

19 responses



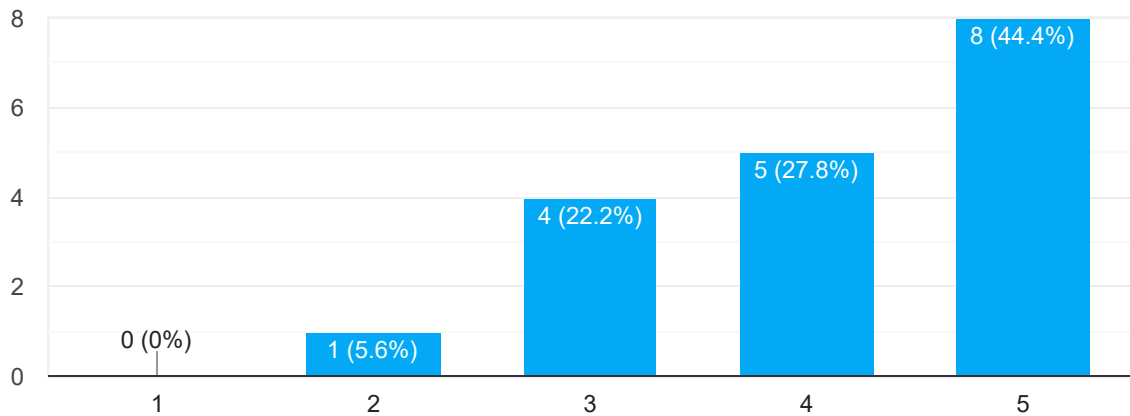
Please rate the the usefulness of the Division of Insurance's website in answering your questions or providing needed information on a scale of 1 to 5 with 1 being not very useful and 5 being very useful.

19 responses



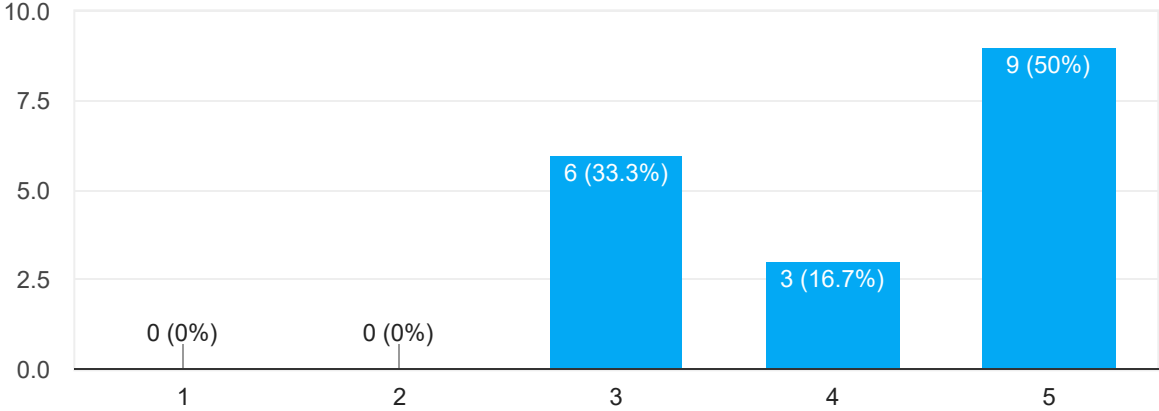
Please rate the the usefulness of the Division of Insurance's communications in answering your questions or providing needed information on a scale of 1 to 5 with 1 being not very useful and 5 being very useful.

18 responses



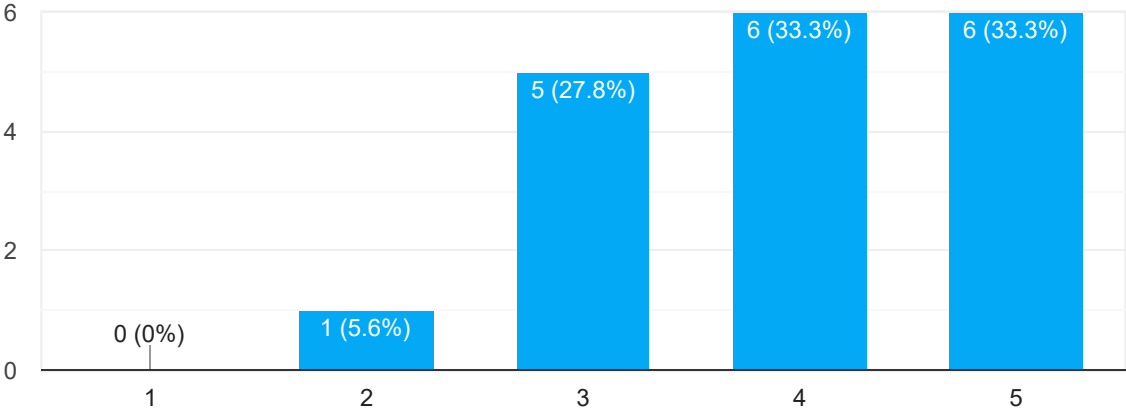
Regardless of the outcome of your most recent issue, do you feel the Division of Insurance listened to your concerns? Please use a scale of 1 to 5, with 1 being none of my concerns were heard and 5 being all of my concerns were heard.

18 responses

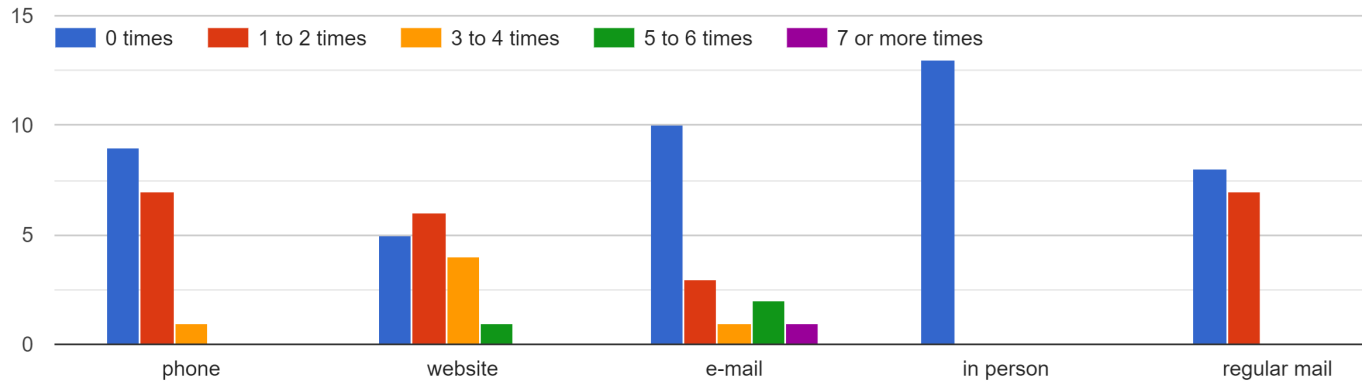


Please rate the timeliness of the Division of Insurance in responding to your issues on a scale of 1 to 5 with 1 being very untimely and 5 being very timely.

18 responses

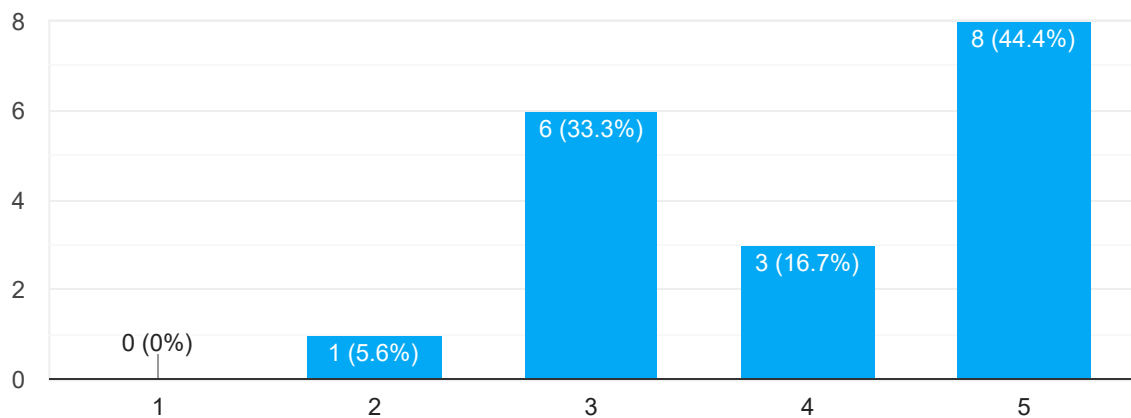


Please provide the number and types of interactions that were required to resolve or address your most recent issue. (Please select all applicable types of interactions used AND the number times for each type interaction selected.)



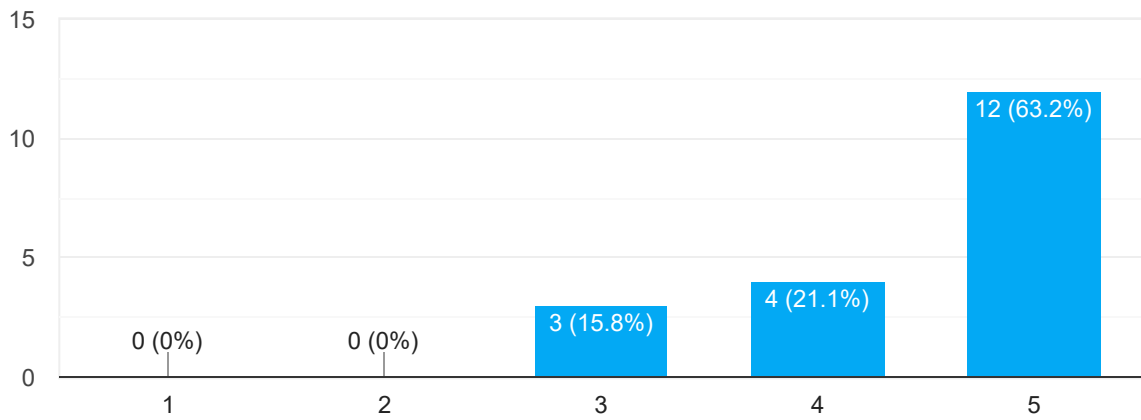
Please rate the helpfulness of the Division of Insurance in resolving your issue or need with 1 being not very helpful and 5 being very helpful.

18 responses



Please rate the professionalism of the program's staff on a scale of 1 to 5 with 1 being very unprofessional and 5 being very professional.

19 responses



On a scale of 1 to 5 please rate the accuracy of information provided by the division with 1 being not very accurate and 5 being very accurate.

19 responses

