



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Marketing Practices
Craig Tregillus
ctregillus@ftc.gov

Direct Dial: (202) 326-2970
Facsimile: (202) 326-3395

March 21, 2007

Mr. Joshua Slocum, Executive Director
Funeral Consumers Alliance, Inc.
33 Patchen Rd.
South Burlington, VT 05403

Dear Mr. Slocum:

You have requested a staff opinion on two questions relating to the basic services fee that the FTC Funeral Rule ("Funeral Rule" or "Rule") requires funeral providers to itemize separately in their General Price List ("GPL"): (1) "Whether funeral providers may routinely charge a fee for the refrigeration of bodies that is separate from the non-declinable basic services fee"; and (2) "Whether funeral providers may charge a fee for the use of an automobile to procure necessary permits, separate from the non-declinable basic services fee." You contend that charging separate fees for either of these services would amount to double-billing, because both should be included, in your view, in the basic services fee.

1. The Basic Services Fee

Before addressing the questions raised by your inquiry, it is useful to review the role the basic services fee plays within the framework of the Funeral Rule. Section 453.2(b)(4)(iii)(C) of the Rule requires funeral providers to list the price of the "services of funeral director and staff" in the GPL they must give to consumers. 16 C.F.R. § 453.2(b)(4)(iii)(C). Section 453.1(p) defines "services of funeral director and staff" as "the basic services, not to be included in prices of other categories in § 453.2(b)(4),¹ that are furnished by a funeral provider in arranging any

¹ Section 453.2(b)(4)(ii) requires funeral providers to include in the GPL "in any order, the retail prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified below *for at least each of the following items* [identified in Section 453.2(b)(4)], if offered for sale." 16 C.F.R. § 453.2(b)(4)(ii) (emphasis added). This provision allows funeral providers to add charges to the GPL for funeral goods or services they offer that are not identified in Section 453.2(b)(4), and that are not included in their basic services fee.

funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits, and placing obituary notices.” 16 C.F.R. § 453.1(p).

In requiring disclosure of the “basic services fee” in the GPL, Section 453.2(b)(4)(iii)(C) gives funeral providers the option of including the fee in their casket prices, and disclosing that fact, 16 C.F.R. § 453.2(b)(4)(iii)(C)(2), or listing the fee separately from their casket prices, 16 C.F.R. § 453.2(b)(4)(iii)(C)(1). In either case, the amount of the basic services fee must be disclosed, together with a list of the “principal basic services provided” and included in the fee.

If the basic services fee is listed separately from the funeral provider’s casket prices, the provider has the option of marking the basic services fee declinable or non-declinable by the consumer. 16 C.F.R. § 453.2(b)(4)(iii)(C)(1). If the basic services fee is not declinable, it must be included in the funeral provider’s charges for direct cremation, immediate burial, and forwarding or receiving remains, and must include “all charges for the recovery of unallocated funeral provider overhead.” 16 C.F.R. § 453.2(b)(4)(iii)(C)(1). Section 453.2(b)(4)(iv) emphasizes that the basic services fee “is the only funeral provider fee for services, facilities or unallocated overhead permitted by this part to be non-declinable, unless otherwise required by law.”

Because the basic services fee may be (and often is) non-declinable, and thus must be paid regardless of the funeral arrangements a consumer selects and receives, staff has interpreted the provision with care to ensure that it includes only costs common to “any funeral.” 16 C.F.R. § 453.1(p) (emphasis added). Thus, the discussion of the basic services fee in the FTC’s compliance guidelines for funeral providers, *Complying with the Funeral Rule* (“Compliance Guide” or “Guide”), states:

This basic services fee should include *services that are common to virtually all forms of disposition or arrangements that you offer*, such as conducting the arrangements conference, securing the necessary permits, preparing the notices, sheltering of remains, and coordinating the arrangements with the cemetery, crematory, or other third parties.²

Our focus on whether particular services are “common to virtually all forms of disposition or arrangements” offered by the funeral provider is evident in a note in the Guide that discusses the sheltering of remains, which you cite in your request:

Note: You should include any charges for the ordinary sheltering of remains by your funeral home in this basic services fee. However, you can list a separate

² Compliance Guide, p. 11.

charge for sheltering of remains if: 1) a significant percentage of your customers do not use the funeral home to hold the remains at any point, or 2) you receive a request to hold the remains for an unusually long period of time.³

It is apparent from this discussion that charges for sheltering of remains are to be included in the basic services fee when they are “common to virtually all forms of disposition or arrangements” offered by a funeral home, and that sheltering of remains may be listed as a separate charge only if this service is not “common.” It is this principle that continues to guide staff’s interpretation of what should and should not be included in the basic services fee.

2. Refrigeration Charges

Your request argues, in effect, that refrigeration is a kind of “sheltering of remains,” and that sheltering is a service “common” to all funeral arrangements, because no funeral provider can arrange for the disposition of a body without taking custody of it and holding it somewhere. You contend that placing the body in a refrigeration unit is simply an alternative to holding the body elsewhere in the funeral home, and thus the cost of refrigeration should be included in the basic services fee.

However, funeral homes may refrigerate some bodies and not others. For example, some funeral homes may not make it a practice to refrigerate bodies that will be embalmed, buried or cremated shortly after death. Consequently, including a charge for refrigeration in the non-declinable basic services fee could force consumers who choose embalming, immediate burial or cremation to pay for a service they do not use.

For these reasons, it is staff’s opinion that if refrigeration of remains for some period of time is “common to virtually all forms of disposition or arrangements” offered by a funeral provider, refrigeration charges for that period of time *should* be included in the basic services fee. However, if a funeral provider refrigerates remains in fewer than virtually all dispositions or arrangements, refrigeration charges *should not* be included in the basic services fee, but should be listed on the GPL as a separate service for which the provider may assess a separate charge.

In your letter you assert that some funeral homes are assessing a separate, non-declinable charge for refrigeration. For funeral providers that offer refrigeration as a separate service because refrigeration is *not* “common to virtually all” their dispositions or arrangements, the question then becomes under what circumstances such a charge can be non-declinable.

³

Id.

As a general rule, consumers have the right under the Funeral Rule to select and pay for only those funeral goods and services they want. As explained in the Compliance Guide, there are only three exceptions to this right: (1) The non-declinable basic services fee, 16 CFR § 453.2(b)(4)(iii)(C)(1); (2) Items required by law, 16 CFR § 453.2(b)(4)(iv), or by particular cemeteries or crematories, 16 CFR § 453.3(d); and (3) Requests that are impossible, impractical or excessively burdensome. 16 CFR § 453.4(b)(2)(B)(ii).⁴

Thus, where refrigeration is not part of the basic services fee, a provider can only assess a non-declinable charge for refrigeration where refrigeration is required by law, by a particular cemetery or a crematory, or where leaving a body unrefrigerated would be impossible, impractical, or excessively burdensome under the circumstances.

We note that the Compliance Guide provides an instructive example of what would constitute an “impossible, impractical or excessively burdensome request.” The Guide states that a provider can refuse to provide arrangements without embalming when a family requests a delay of five days for a funeral in July when the provider has no refrigeration facilities.⁵ Although refrigeration is addressed only indirectly in the example, it is staff’s view that the same analysis should apply to refrigeration, and that under such circumstances, the Rule should also be interpreted to allow a provider to refuse to provide arrangements, unless the family consents to embalming or an immediate burial, or pays for refrigeration.

3. Charges for Use of a Vehicle To Obtain Death Certificates

Your request also argues that a separate itemized charge in a GPL for the use of a vehicle to obtain required permits and death certificates constitutes a second, non-declinable fee in violation of Section 453.2(b)(4)(iv) of the Rule. You note that, at least with respect to required permits, Section 453.1(p) specifically cites “obtaining necessary permits” as an example of “basic services . . . furnished by a funeral provider in arranging any funeral” that should be included in the basic services fee. In your view, charges for the use of a vehicle to obtain death certificates should be treated in the same way.

The services listed in Section 453.1(p) are meant to be illustrative, not exclusive nor necessarily inclusive, of all services “common to virtually all forms of disposition or arrangements” offered by a funeral provider, and therefore properly included in the basic services fee. Thus, it is staff’s opinion that if using an automobile to obtain necessary permits and death certificates is common to virtually all forms of disposition or arrangements, then the charge for

⁴ Compliance Guide at 24.

⁵ *Id.*

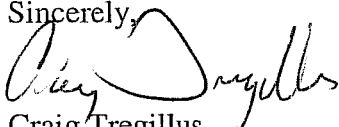
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that service should be part of the basic services fee. If using an automobile to obtain necessary permits and death certificates is *not* common to virtually all forms of disposition or arrangements offered by a provider, those charges cannot be included in the basic services fee.

We would note that, in addition to disclosing the existence of the basic services fee, funeral providers are required to disclose the “principal basic services provided” in return for the basic services fee. 16 CFR § 453.2(b)(4)(iii)(C)(1). This information about what services are included in the basic services fee allows consumers to make informed decisions about whether there are additional services they may want to purchase from the funeral provider or obtain from other sources.

As you know, the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding on the Commission or any individual Commissioner. However, they do reflect the views of FTC staff charged with enforcement of the Funeral Rule.

Sincerely,



Craig Tregillus
Funeral Rule Coordinator