



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

Division of Marketing Practices

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August 21, 2007

Meredyth P. Partridge, President  
Regulatory Support Services, Inc.  
P.O. Box 83  
Manakin-Sabot, VA 23103-0083

Dear Ms. Partridge:

You have requested a staff opinion on the circumstances, if any, under which the FTC Funeral Rule (“Rule”) requires a funeral provider to treat embalming as a “cash advance” item. In particular, you ask whether a funeral provider that charges a purchaser the embalming fee listed on the funeral provider’s General Price List (“GPL”) must list embalming as a “cash advance” item when the embalming is performed by a third party who charges the funeral provider less than the funeral provider charges the ultimate purchaser. Your request states that this issue may arise when a funeral provider receives embalmed remains from another funeral provider, or when the funeral provider obtains embalming services from a third party.

Your question arises because of the difference in the Rule’s requirements for cash advance items and non-cash advance items. As you know, the Rule treats the two types of items differently because Section 453.3(f) requires a funeral provider who is charging a customer more for a cash advance item than the funeral director paid for it to disclose that material fact.<sup>1</sup> This disclosure must appear in writing on the Statement of Funeral Goods and Services Selected (“Statement”) that a funeral provider must give to a consumer at the conclusion of the discussion of funeral arrangements.<sup>2</sup>

The Rule requires no similar disclosure for non-cash advance items. In fact, Section 453.2(b)(4)(ii) of the Rule expressly mandates a disclosure in a funeral provider’s GPL of “the *retail* prices” of specified goods and services offered for sale by a funeral provider that are

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<sup>1</sup> 16 C.F.R. § 453.3(f). Only the existence of the mark-up must be disclosed, not the amount.

<sup>2</sup> 16 C.F.R. §453.3(f)(2). In addition, any “cash advance item” must be “specifically itemized” as a “cash advance item” in the Statement. 16 C.F.R. § 453.2(b)(5)(i)(B).

typically non-cash advance items.<sup>3</sup> Section 453.2(b)(4)(ii)(A) expressly requires such a separate retail price disclosure in the GPL for “embalming.”<sup>4</sup> Like all other for-profit businesses, a funeral provider’s “retail prices” for the funeral goods and services it sells include a sufficient mark-up over cost to provide a profit.

A good or service offered by a funeral provider is not a cash advance item unless it meets one of the two tests provided by the definition of a cash advance item in Section 453.1(b) of the Rule:

A ‘cash advance item’ is any item of service or merchandise described to a purchaser as a ‘cash advance,’ ‘accommodation,’ ‘cash disbursement,’ or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser’s behalf.<sup>5</sup>

The first sentence of the definition specifies that a funeral good or service is a “cash advance item” if a funeral provider expressly represents to a consumer that it is a “cash advance” item or uses similar terms to describe it. This test is based on the Commission’s finding during the rulemaking that, in describing a particular item to a customer, a funeral provider’s use of the term “cash advance item,” or such alternative formulations as “accommodation” or “cash disbursement,” leads reasonable consumers to believe that the item will be provided at cost.<sup>6</sup> Thus, in cases where a funeral provider describes an item in this manner, yet charges a consumer more for it than the provider paid, the Commission requires a corrective disclosure to prevent the deception.

The test in the second sentence of the definition is designed to prevent funeral providers from evading the cash advance disclosure requirement by avoiding express representations that an item is a “cash advance item” but implying that they are providing the item at their cost when that is not the case.<sup>7</sup>

Thus, in the absence of either an express representation that a funeral good or service is a “cash advance item” or similar term, or an implied representation that the funeral provider will obtain an item on behalf of a particular consumer at the funeral provider’s cost, a funeral good or

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<sup>3</sup> 16 C.F.R. § 453.2(b)(4)(ii) (emphasis added).

<sup>4</sup> 16 C.F.R. § 453.2(b)(4)(ii)(A).

<sup>5</sup> 16 C.F.R. § 453.1(b) (omitting examples).

<sup>6</sup> 47 Fed. Reg. 42278-42279 (Sept. 24, 1982).

<sup>7</sup> See FTC, Letter to The Hon. Dan Flynn (July 7, 2005), at 5, available at <http://www.ftc.gov/os/2005/07/050707funeralruleadvopin.pdf>.

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Regulatory Support Services, Inc.  
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service is a non-cash advance item. In that case, the Rule permits a funeral provider to charge a retail price that includes a mark-up over cost without disclosing that fact.

Since whether a funeral good or service is a “cash advance item” depends on a funeral provider’s express or implied representations about the item, any determination that an item is a “cash advance item” requires an analysis of the facts of a particular transaction. The mere fact that a funeral good or service is initially obtained from a third party does not turn that item into a cash advance item. Indeed, as previously noted, the Rule assumes that funeral providers who offer embalming as one of their services ordinarily charge consumers a “retail price” for that service. Of course, there could be specific circumstances in which a funeral provider makes an express or implied representation that leads consumers acting reasonably under the circumstances to understand that embalming will be provided at cost. Under these circumstances, the funeral provider must list embalming as a “cash advance item” in the Statement provided to consumers at the conclusion of the arrangements conference. In addition, if a funeral provider must list embalming as a cash advance item, and the price charged by the funeral provider for embalming exceeds the funeral provider’s cost, the Statement must include the disclosure required by Section 453.3(f)(2).

As you know, the views expressed in this letter are those of 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. Staff Funeral Rule opinions are routinely posted on the FTC website at <http://www.ftc.gov/bcp/online/edcams/funerals/staffopinions.shtm>.

Sincerely,

/s/

Craig Tregillus  
Funeral Rule Coordinator