



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

Division of Marketing Practices

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Pamela D. Griebel  
Assistant Attorney General  
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Hoover Bldg.  
Des Moines, IA 50319

Dear Ms. Griebel:

You have requested our views on funeral providers offering discounts only to clients who purchase a package of funeral goods and services that includes a casket. You specifically ask whether such packages may discount the basic services fee that covers the services of the funeral director and staff, and may include the funeral provider's overhead.

As your inquiry notes, staff stated its view in Opinion 97-3 that the basic services fee may *not* be discounted.<sup>1</sup> We have considered the arguments of the National Funeral Directors Association ("NFDA") challenging this staff opinion, and find no reason to alter this long-standing interpretation of the Funeral Rule ("Rule") for the reasons which follow.

First, contrary to the NFDA's contention, the Commission's confirmation last year at the conclusion of its rule review that the Rule should be retained without proposing any of the amendments sought by interested parties does not compel a different result.<sup>2</sup> In particular, the Commission's decision not to propose an amendment to the Rule that would regulate the offer of discount funeral packages was based in large part on "insufficient evidence to show a prevalent practice of funeral providers offering discount packages in a manner that unfairly interferes with consumers' ability to provide their own caskets."<sup>3</sup> In retaining the Rule, the Commission simply preserved the *status quo*, and did nothing to alter prior Rule interpretations. In fact, the Commission not only cited, but expressly *approved* Opinion 97-3, noting that "funeral homes

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<sup>1</sup> Staff Opinion 97-3 (Apr. 16, 1997), *available at* <http://www.ftc.gov/bcp/online/edcams/funerals/opinions/opinion97-3.pdf> (concluding that only funeral goods and services that must be itemized on a funeral provider's General Price List ("GPL") may be discounted).

<sup>2</sup> 73 Fed. Reg. 13740 (Mar. 14, 2008).

<sup>3</sup> *Id.* at 13748.

may encourage consumers to purchase a casket from their organization by offering discounts on services or items *except for* a non-declinable Basic Services Fee.”<sup>4</sup>

Second, a close reading of the precedent on which NFDA relies does not support a different conclusion. In its report recommending the 1994 Rule amendments,<sup>5</sup> staff did not state or imply that the Rule permits funeral providers to discount the basic services fee in addition to other fees for goods and services that the Rule requires or permits to be itemized in the GPL, as NFDA contends. On the contrary, the report contemplated that funeral providers could discount only fees for “the *itemized* charges required by the Rule.”<sup>6</sup> Similarly, the Third Circuit’s decision upholding the 1994 Rule amendment banning casket handling fees presumes that the basic services fee will be the same for all of a funeral provider’s clients, and that only the fees for products and services itemized on the GPL may be discounted.<sup>7</sup>

Third, although not contesting the conclusion in Opinion 97-3 that funeral providers may not discount *only* the basic service fee, NFDA contends that the opinion does not cite any basis for its determination that when the basic services fee is combined with the fees for other funeral goods and services in a discount package, it also may not be discounted. While we think that Opinion 97-3 provided a clear basis for that conclusion, some elaboration may be helpful.

The basic services fee provisions of the Rule make it clear that this fee is to be the same for each of a funeral provider’s clients. Each client must receive a GPL, and unless the basic services fee is included in the price of the funeral provider’s caskets or is declinable, the GPL must include the following statement: “This fee for our basic services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding and receiving remains.)”<sup>8</sup> Likewise, if the basic services fee is included in the price of a funeral provider’s caskets, the GPL must include a similar statement indicating that all of the provider’s clients must pay the same fee: “Please note that a fee of (*specify dollar amount*) for the use of our basic services is included in the price of our caskets. This *same* fee shall be added to the total cost of your funeral arrangements if you

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<sup>4</sup> *Id.* at n.93 (emphasis added).

<sup>5</sup> Final Staff Recommendations on the Mandatory Review (May 28, 1991).

<sup>6</sup> *Id.* at 39 (emphasis added).

<sup>7</sup> *See Pa. Funeral Dir.s Ass’n v. FTC*, 41 F.3d 81, 89 (3d. Cir. 1994) (noting that funeral providers can assure that consumers who buy third party caskets pay their fair share of the provider’s overhead costs by recouping those costs in the basic services fee that “they are permitted to charge everyone,” rather than in a casket handling fee).

<sup>8</sup> 16 C.F.R. § 453.2(b)(4)(iii)(C)(1). If the basic services fee is non-declinable, the rule also requires a disclosure at the beginning of the GPL that “any funeral arrangement you select will include a charge for our basic services.” 16 C.F.R. § 453.4(b)(2)(i)(A).

provide the casket.”<sup>9</sup> Thus, the Rule requires that all of a funeral provider’s clients pay the same basic services fee that is disclosed in its GPL.

Because the basic services fee disclosed in a funeral provider’s GPL must be the same for all its clients, this fee may not be discounted.<sup>10</sup> The Rule’s definition of “services of funeral director and staff,” or basic services fee, provides additional support for this conclusion. As we have noted in a prior opinion,<sup>11</sup> the definition limits the services that may be included in this fee to those “that are furnished by a funeral provider in arranging *any* funeral,” and may not include services “included in prices of other categories in § 453.2(b)(4) [*i.e.*, itemized services required or permitted to be disclosed in the GPL].”<sup>12</sup> Likewise, it is only “*unallocated* funeral provider overhead” – *i.e.*, overhead not attributable to the itemized services required or permitted to be disclosed in the GPL – that the Rule permits funeral providers to include in the basic services fee.<sup>13</sup>

Thus, if the basic services fee could be discounted as part of a discount funeral package, a funeral provider’s clients would not bear an equal share of the costs common to “any” funeral, as the Rule plainly requires. Moreover, if such a discount package were made available only to clients who purchase a casket from the funeral provider, clients who elect to purchase a casket from a third party and are not eligible to receive the discount package would pay a higher basic services fee than everyone else. The difference between such a discounted basic services fee paid by clients who purchase a casket from the funeral provider, when subtracted from the full basic services fee paid by those who purchase a casket from a third party, can only be regarded as an indirect casket handling fee. Casket handling fees, whether direct or indirect, are expressly prohibited by the Rule.<sup>14</sup>

Fourth, contrary to NFDA’s apparent impression, Opinion 97-3 is not inconsistent with the Commission’s position, when it adopted the amendment banning casket handling fees, that the Rule permits a funeral provider to offer discount funeral packages that are available only to clients who purchase one of its caskets. As the Third Circuit noted, “the FTC distinguishes

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<sup>9</sup> 16 C.F.R. § 453.2(b)(4)(iii)(C)(2) (emphasis added).

<sup>10</sup> The rule does permit a funeral provider, in limited situations, to provide to members of specified groups (*e.g.*, children and infants, memorial society members) a separate, complete GPL that may contain fees that are less than those listed in the GPL it provides to consumers who are not members of such a group. *Complying with the Funeral Rule*, FTC (June 2004) p. 13, available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus05.pdf>.

<sup>11</sup> Staff Opinion 07-2 (March 21, 2007), p. 2.

<sup>12</sup> 16 C.F.R. § 453.2(p) (emphasis added).

<sup>13</sup> 16 C.F.R. § 453.2(b)(4)(iii)(C)(1) and (C)(2),

<sup>14</sup> 16 C.F.R. § 453.4(b)(1)(ii).

direct casket handling fees from offering discounts to people who buy caskets from the funeral home,” because “[t]he former is an anti-competitive penalty (the fee) and the latter is . . . a [pro-competitive] way to *encourage* consumers to buy their caskets from funeral homes.”<sup>15</sup> Since that time, the Commission has stated consistently that the Rule permits discount packages conditioned on the purchase of a casket from the funeral provider, provided that the basic services fee is not discounted, because of the pro-competitive benefits such packages provide.<sup>16</sup>

To comply with the Funeral Rule, a funeral provider must include its full basic services fee in the price of any discount funeral package offered, and discount only the prices itemized in its GPL for the goods or services that are included in the package. Although nothing in the record retention provision of the Rule requires funeral providers to create or retain a record of what is discounted in their discount packages,<sup>17</sup> neither does the Rule prevent providers from maintaining such records, if they wish, in order to protect themselves from any suggestion that they are improperly discounting the basic services fee. Funeral providers could also discourage any such claim by including in the description of their discount funeral packages a truthful statement that the price of their packages includes the full basic services fee.

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. 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

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<sup>15</sup> 41 F.3d at 90 (emphasis in original).

<sup>16</sup> 73 Fed. Reg. at 13748 & n.93 (noting that “[t]o the extent consumers wish to purchase a combination of the goods and services a funeral provider offers, bundling of discount packages likely confers benefits,” and citing staff opinion 97-3 with approval for its statement that “funeral homes may encourage consumers to purchase a casket from their organization by offering discounts on services or items except for a non-declinable Basic Services Fee.”).

<sup>17</sup> See 16 C.F.R. § 453.6.