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WASHINGTON, D.C. 20580

Division of  
Marketing Practices

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Re: Amended Funeral Rule and Guidelines Issues

Dear Scott:

I have reviewed your May 5, 1994 and July 22, 1994 letters to Sally Forman Pitofsky. As you know, attorney Mary S. Feinstein and I have succeeded Sally as the Funeral Rule enforcement staff. I am sorry for the extreme delay in responding to your letters.

In your May 5 letter, you asked whether it is permissible for a funeral provider to discount the non-declinable service fee for those consumers who also purchase a casket from the funeral provider.

No; this practice would be impermissible under the Funeral Rule. Section 453.2(b)(4)(iii)(C)(2) of the Rule, which allows funeral providers the option of including the basic services fee in the casket prices and stating so on the general price list ("GPL"), explicitly requires that the specific dollar amount of the non-declinable fee be the "same," whether the consumer buys the casket at the funeral home (fee built in to casket price) or from a third party (fee added on to total cost of arrangements). The Commission has thus taken the position that the non-declinable fee (when included in the price of caskets) must be the same amount for both consumers who purchase a casket from the funeral provider and consumers who provide their own casket. In order to be consistent with this Commission position, staff believes that the non-declinable fee likewise must be the same for casket purchasers and non-casket purchasers under Section 453.2(b)(4)(iii)(C)(1), which allows funeral providers the option of stating the basic services fee separately on the GPL together with a list of services provided for that price.

Furthermore, your proposed discounted non-declinable fee for casket purchasers would effectively become the actual fee. The higher non-declinable fee for non-casket purchasers would then effectively be the actual fee plus a surcharge or penalty for not

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purchasing a casket. This surcharge or penalty is prohibited by Section 453.4(b)(1)(ii) of the Rule.

Contrary to your assertions, the May 28, 1991 Final Staff Recommendations on the Mandatory Review of the Funeral Rule (which are not binding on the Commission) do not state that discounting the non-declinable fee is permissible under the Rule. Those recommendations (p. 39) simply state that providers may encourage consumers to purchase caskets through an offer to discount the price of caskets, package services (see footnote 76), or both. With respect to staff's reference to the Eyes I Rule (p. 40), the key phrase is "discounts offered by funeral providers to all consumers." Casket discounts are offered to all consumers; discounts on packages, all of which may include caskets, are offered to all consumers. However, a discount on the non-declinable fee for casket purchasers only is by definition not offered to all consumers.

As the United States Court of Appeals for the Third Circuit recognized in its recent opinion denying the challenge to the casket handling fee ban, there is a difference between consumers choosing a package that includes a casket and getting a discount, and funeral providers forcing non-casket buyers to pay a higher non-declinable fee than casket buyers. The former is a pro-competitive method to encourage consumers to buy their caskets from funeral homes, while the latter is an anti-competitive penalty that essentially requires consumers to buy their caskets from funeral homes, or else pay for it anyway by paying a higher non-declinable fee than casket purchasers pay. Pennsylvania Funeral Dirs. Assn., Inc. v. FTC, 1994-2 Trade Cas. (CCH) ¶ 70,748 (3d Cir. Oct. 17, 1994).

In sum, the difference in price between the non-declinable fee paid by casket purchasers and the non-declinable fee paid by non-casket purchasers would effectively be the casket handling fee banned by Section 453.4(b)(1)(ii) of the revised Rule. Therefore, the non-declinable fee may not be discounted for casket purchasers.

In your July 22 letter, you raise four issues on which you disagree with the Compliance Guidelines' interpretation of the amended Funeral Rule. You seek clarification on these issues. I shall address these issues in the order in which you presented them:

1. If a consumer deviates from one of the four minimal services packages, by ordering one of them and also ordering additional goods and services, may the funeral director inform the consumer that the alternative service package is not available and that the consumer must pay the basic service fee?

No; this practice would be impermissible under the Funeral Rule. The Rule enables consumers to comparison shop and to purchase, on an itemized basis, only the goods and services they want. If the consumer wants one of the four minimal service packages, and additional goods and services, then the consumer must be allowed that choice, regardless of the fact that it deviates from the minimal service package offered. The only exception would be if the additional goods or services selected bring the desired minimal service outside of its Rule definition. For example, if the consumer selected a minimal service such as direct cremation or immediate burial, and then selected an additional good or service that is specifically excluded in the definition of direct cremation or immediate burial, such as formal viewing or visitation, then the consumer by definition would no longer be purchasing a direct cremation or immediate burial. In addition, the Rule requires that charges for direct cremations, immediate burials, and forwarding or receiving remains must include the fee that the funeral provider will charge for the basic services of funeral director and staff, and the required disclosure about the basic services fee must inform the consumer of this fact. 16 C.F.R. §453.2(b)(4)(iii)(C)(1). Therefore, if a funeral director believes that consumers' selection of goods or services in addition to a minimal service package is an avoidance of the regular basic services fee, then the funeral director should simply increase the basic services fees included in the minimal service package charges.

2. Can a funeral director charge one fee for the funeral service regardless of whether it is conducted at his facilities or elsewhere?

The issue here is not whether this fee must be the same, higher or lower than the fee for off-site visitations and funerals, but that off-site services should be listed separately, regardless of whether the cost is the same or different than on-site services. As you point out, a funeral director may, in his business judgment, decide to charge the same amount for off-site services as for on-site services, because the off-site savings of no facilities costs are cancelled out by other additional costs. On the other hand, a funeral director may decide to charge more or less for off-site services than for on-site services, depending on whether and how much additional personnel must be hired. He may thus charge the same, more or less for off-site services than for on-site services, as long as he lists a separate fee for the off-site services provided. Listing these fees separately enables consumers to comparison shop and to purchase only the goods and services they want.

3. Can funeral directors require families to purchase washing and disinfection of unembalmed bodies if the funeral home personnel will have to handle the body?

No; this practice is impermissible under the Funeral Rule. The basic services fee is the only fee permitted to be non-declinable, unless otherwise required by law. 16 C.F.R. § 453.2(b)(4)(iv). Furthermore, it is unlawful to condition the furnishing of any funeral good or service upon the purchase of any other funeral good or service, except as required by law or as otherwise permitted by the Rule, or to charge any fee as a condition to furnishing any funeral goods or services, other than the fees for: (1) services of funeral director and staff; (2) other goods and services selected by the purchaser; and (3) other goods or services required to be purchased, as explained on the itemized statement. 16 C.F.R. § 453.4(b)(1). Therefore, requiring consumers to purchase "Other preparation of the body," including washing and disinfection, if they decline embalming violates the Rule, by making this item nondeclinable for those consumers who decline embalming. Staff have provided this same opinion on several previous occasions. See Staff Opinion Letters in Public Record File XXVIII, Letter Nos. 12, 31, 33, 49 and 56.

4. What is the basis for staff's statement that funeral directors who have refrigeration available may be required to take more steps to contact the family and to obtain embalming authorization than if no refrigeration is available (Guidelines at 33)?

This statement does not mean that funeral directors with refrigeration have to unnecessarily delay embalming. If they have exhausted all means known to contact the family, given the time constraints, and have no reason to believe that the family does not want embalming performed, then they may embalm and obtain subsequent approval, and charge a fee if the family expressly approves embalming or chooses a funeral where embalming is required. 16 C.F.R. § 453.5. While refrigeration may give the funeral director more time to contact the family, changes over time in a refrigerated body which can lead to an unsatisfactory embalming would also be a valid "time constraint" to consider in the exercise of "due diligence" under this Rule provision.

I hope that this information answers the questions raised in your letters. Please note that the views expressed in this letter are those of staff only. They have not been reviewed, approved or adopted by the Commission, and they are not binding on the Commission. They do, however, reflect the opinions of the staff charged with enforcement of the Funeral Rule.

Very truly yours,

  
Thomas A. Cohn

Funeral Rule Enforcement Staff