

COMMISSION APPROVED



Federal Trade Commission

Atlanta Regional Office

Room 1000
1718 Peachtree St., N.W.
Atlanta, Georgia 30309
(404) 881-4836

January 16, 1986

Senator John E. Amari
Alabama State Senate
9636 Parkway E.
Birmingham, Alabama 35215

Dear Senator Amari:

The Federal Trade Commission's Atlanta Regional Office¹ is pleased to respond to your invitation to comment on the proposed Funeral Bill to be considered by the Alabama legislature this session. In these comments, we discuss the following two issues: (1) the effect on consumers and competition of the restrictions on the sale of funeral goods and services; and (2) the impact of the bill on the requirements of the Commission's Trade Regulation Rule Concerning Funeral Industry Practices ("Funeral Rule").

The Federal Trade Commission ("Commission") seeks to promote competition among members of the professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the effects of restrictions on the business practices of professionals, including optometrists, dentists, lawyers, physicians and others. Our goal is to identify and seek the removal of such restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

As you may be aware, the Commission recently completed extensive rulemaking proceedings with respect to the funeral industry that led to the adoption of the Trade Regulation Rule Concerning Funeral Industry Practices, 16 C.F.R. Part 453,

¹ These comments represent the views of the Atlanta Regional Office and of the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

which became effective in full on April 30, 1984. (A copy of the Funeral Rule is attached to this letter.) The purpose of the Funeral Rule is to promote increased competition and consumer choice in the funeral industry by facilitating informed purchasing decisions by consumers. The Funeral Rule requires the disclosure of detailed information about prices and legal requirements to purchasers of funeral goods and services.

As we understand it, the Funeral Bill to be proposed in the 1986 Session of the Alabama legislature would impose restrictions on the sale of funeral goods and services by permitting only licensed funeral establishments to make such sales. The bill could also apparently create a potential conflict of interest in determining the person who is permitted to make certain decisions affecting a funeral home's obligations under the Commission's Funeral Rule. We believe that the following comments, in which we discuss in general the restrictions contained in the bill, will be of some assistance to you in evaluating the bill's possible effect upon competition and consumers and upon compliance with the Commission's Funeral Rule.

I. Restrictions on the Sale of Funeral Goods and Services

Section 4A of the proposed bill requires that any entity selling a pre-need² funeral contract must have a valid certificate of authority. Section 5B(1) requires that an applicant for such a certificate must show that it is a licensed funeral establishment. This bill would thereby prohibit anyone other than a licensed funeral home from selling any funeral goods or services on a pre-need basis.³

In addition, Section 15 seems to prohibit any entity other than a licensed funeral home from selling any funeral

² "Pre-need" means that someone is planning a funeral before a death has occurred. "At-need" means that a death has occurred when the purchase of goods and services is made.

³ Section 16 exempts cemeteries from the provisions of this act, but only as to burial goods and burial services. Although there is no definition of "burial goods and burial services," Section 34-13-1(a)(6) of the Alabama Code permits cemeteries to sell vaults (outer burial containers), urns, and cemetery-related items such as crypts and markers.

goods, whether the sale is by means of pre-need contracts⁴ or on an at-need basis. (In the bill, the phrase "selling or providing under a pre-need contract or otherwise" is used. [Emphasis added.]) This section explicitly covers caskets and any equipment normally required or used for the preparation of human remains for disposition. This language could be interpreted to cover any type of funeral good or merchandise.

Finally, Section 16 seems to state that only licensed funeral directors may sell pre-need funeral contracts. This section, therefore, appears to prohibit pre-need sales by employees of licensed funeral homes who are not themselves licensed funeral directors. This section also appears to prohibit pre-need sales by individuals who are employed by other business organizations but who are not licensed funeral directors.

The restrictions in the above-mentioned sections of the proposed bill may impede the development of new providers of funeral goods and services that may be more efficient and offer lower-cost alternatives to traditional funeral home

⁴ Because payment for pre-need arrangements is typically made well in advance of death, some states have adopted regulatory measures, e.g., trust requirements, to protect consumers from fraud and other abuses. Although these comments do not address the particular trust requirements set forth in the proposed Alabama bill, we do wish to note that when legislators adopt such measures in order to protect the consumer's investment or prevent abuses, they should at the same time be cognizant that certain types of trust requirements may have anticompetitive consequences that can cause injury to consumers. The cost of financing a new funeral home or launching a pre-need marketing program would be higher if the new entrant could not make use of a certain percentage of the funds.

All consumers who purchase pre-need funerals in their homes are protected by the Federal Trade Commission's Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. Part 429, which requires that the seller give the consumer a notice of the consumer's right to rescind the door-to-door sale within three days. These comments do not address what additional consumer protection measures, if any, may be appropriate in the area of pre-need sales.

providers.⁵ These new providers could include cemeteries, manufacturers of funeral goods, and independent retailers. For example, cemeteries sell burial plots on both a pre-need and an at-need basis; if they were to sell other funeral goods and services as well, they might provide consumers with alternatives that consumers might find valuable. Governmental restrictions on such rivalry between traditional and non-traditional providers can eliminate some innovations and alternatives desired by consumers.⁶ Innovations and alternatives could lead to reduced prices for funeral goods and services.

Thus, it is likely that Alabama consumers of funeral goods and services could be harmed if restrictions on the identity of sellers of these goods and services were imposed.

II. Impact of the Proposed Bill on the Requirements of the Commission's Funeral Rule

Section 2F of the proposed bill appears to be intended to identify the person authorized under state law to be responsible for the funeral arrangements described in the pre-need contract. We applaud the efforts of the Alabama legislature to define the person who may be authorized to make funeral arrangements under state law. As you may know, Section 453.5(a) of the Commission's Funeral Rule prohibits charging a fee for embalming that is not required by state law unless approval is obtained from a family member or other

⁵ State regulation of certain aspects of the funeral industry -- such as public health standards for handling human remains -- may protect consumers and may benefit competition as well. Regulations that restrict the ability of non-traditional entities to provide certain other types of funeral goods and services, however, may stifle competition without providing any countervailing protections to consumers. For example, a regulation that would prevent a casket manufacturer from selling its product at retail to consumers would stifle competition without providing any apparent benefits to consumers.

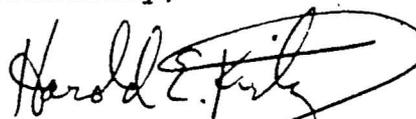
⁶ Innovation is an important facet of competition. Competitive forces in an industry can continually provide new and better ways of producing goods and services. One form of innovation is "product extension." When producers of some goods and services begin offering other related goods and services, the result can be lower prices, better products, and better ways of providing goods and services. The extension of cemeterians into the sale of funeral goods, for instance, would be one form of innovation.

"authorized person." In the Commission staff's view, the question of who is an authorized person is governed by state law. Therefore, the type of clarification proposed by Section 2F would be of great assistance to funeral providers, to consumers, and to law enforcement officials. However, the proposed definition of "funeral authority" in Section 2F may create a potential conflict of interest. According to this provision, the funeral authority can be the funeral home if the following people fail to exercise such responsibility: the person named in the pre-need contract as having authority, the surviving spouse, the adult children, the personal representative, and the heirs. Although the likelihood of the funeral home becoming the funeral authority may not be great, it is nonetheless a situation that warrants further attention.

Section 9C allows the funeral home, if it is the funeral authority, to direct funeral arrangements that may be inconsistent with the purchaser's directions in the pre-need contract. Section 7 provides the most extreme example of this conflict of interest by permitting a funeral home that is the funeral authority to cancel the pre-need contract.⁷ Thus, the funeral home could cancel or reinterpret the contract despite the arrangements agreed to by both the funeral home and the purchaser in the Statement of Funeral Goods and Services Selected, a document required by the Funeral Rule that lists the goods and services purchased by the pre-need contract purchaser and to be provided by the funeral home. The language of the proposed bill should make clear that if the funeral home is the funeral authority, the funeral home must carry out the pre-need contract as agreed to by the purchaser.

We hope that our comments concerning the possible anticompetitive effects of restrictions on the sale of funeral goods and services and concerning the possible conflict with the Funeral Rule will be of assistance to you in your deliberations on the proposed bill. We appreciate the opportunity to present our views for your consideration.

Sincerely,



Harold E. Kirtz
Assistant Director

Attachment

⁷ However, under Section 7B of the proposed bill, the purchaser has the ability to assure that the funeral home will not cancel the contract if the funeral contract issuer and the purchaser make the contract irrevocable.