



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

Division of Marketing Practices

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Ms. Lynne Nelson, Compliance and Education Manager  
Oregon Mortuary & Cemetery Board  
800 Oregon St., #430  
Portland, OR 97232

Dear Ms. Nelson:

You have asked whether the Funeral Rule permits a funeral home to include a non-declinable charge on its General Price List and Statement of Funeral Goods and Services Selected for disinfecting, washing and dressing remains in connection with an “identification viewing” when state law does not require such a viewing. The purpose of this viewing is for a family member to confirm the identity of the deceased prior to direct cremation or immediate burial of the remains.

Section 453.4(b)(1)(ii) of the Rule prohibits a funeral provider from charging “any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral other than the fees for (1) services of funeral director and staff, permitted by § 453.2(b)(4)(iii)(C) (the “basic services fee”); (2) other funeral services and funeral goods selected by the purchaser; and (3) other funeral goods or services required to be purchased, as explained on the itemized statement in accordance with § 453.3(d)(2).”<sup>1</sup> 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.”<sup>2</sup>

Section 453.3(d)(2), in turn, requires a funeral provider to “identify and briefly describe in writing on the statement of funeral goods and services selected . . . any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.”<sup>3</sup> This affirmative disclosure is required by the Rule to prevent any misrepresentation prohibited by Section 453.3(d)(1) “that federal, state or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.”<sup>4</sup>

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

<sup>2</sup> 16 C.F.R. § 453.2(b)(4)(iv).

<sup>3</sup> 16 C.F.R. § 453.3(d)(2).

<sup>4</sup> 16 C.F.R. § 453.3(d)(1).

These provisions clearly prohibit a second, non-declinable fee for any purpose, including an identification viewing, unless applicable law or the particular cemetery or crematory to be used imposes such a requirement.<sup>5</sup> As we understand your inquiry, no such external requirement exists that would permit charges for disinfecting, washing and dressing remains in connection with an identification viewing before a direct cremation or immediate burial.<sup>6</sup>

The National Funeral Directors Association argues that a funeral provider should be able to charge a non-declinable fee for disinfecting, washing and dressing remains in connection with an identification viewing before a direct cremation or immediate burial because it is a “practical necessity” for funeral providers to protect themselves from liability for cremating or immediately burying the wrong body, or because it would be “excessively burdensome” to be prevented from doing so.<sup>7</sup> We do not find these arguments persuasive given the ready availability of reasonable alternatives to such a requirement.<sup>8</sup>

For example, a funeral provider could protect itself from liability in a variety of ways depending on the circumstances, including providing families with a digital photograph of the deceased for identification purposes,<sup>9</sup> requiring families to provide a recent photograph to permit

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<sup>5</sup> Staff has previously stated that a non-declinable charge for an identification viewing would likely violate Section 453.4(b)(1) of the Rule if not required by law. Staff Opinion 97-4 (Oct. 31, 1997) available at <http://www.ftc.gov/ftc/funerals/opinions/opinion97-4.pdf>.

<sup>6</sup> This opinion does not address the situation in many states and localities where a law, regulation, or requirement of a cemetery or crematory imposes a duty on the funeral provider to conduct an identification viewing.

<sup>7</sup> Section 453.4(b)(2)(ii) states that a funeral provider may “fail[] to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.” 16 C.F.R. § 453.4(b)(2)(ii). The Final Staff Compliance Guidelines for the original Rule read this provision to allow a funeral provider to require and charge for embalming – even in the absence of any state law embalming requirement – for a funeral with a formal public viewing in hot weather because such a viewing would be impractical absent the availability of reasonable alternatives, such as refrigeration or the use of a sealed casket. 50 Fed. Reg. 28062, 28072-73 (July 9, 1985); see also FTC, *Complying with the Funeral Rule* (June 2004) 24, available at <http://business.ftc.gov/documents/bus05-complying-funeral-rule.pdf>.

<sup>8</sup> Although the Rule does not address identification practices, the availability of a variety of reasonable identification alternatives is highly relevant to the issues of practical necessity and excessive burden.

<sup>9</sup> The NFDA and other experts have acknowledged that a digital photograph of the decedent that is positively identified by a family member is sufficient to protect a funeral provider from liability for negligence.

employees to conduct and document the identification,<sup>10</sup> or securing an identification waiver and indemnification from family members.<sup>11</sup> The availability of such alternatives undermines any argument that disinfecting, washing and dressing remains in connection with an identification viewing before a direct cremation or immediate burial is a practical necessity. For the same reason, the Rule prohibition of a separate non-declinable charge for those services cannot be excessively burdensome.<sup>12</sup>

It is therefore staff's opinion that under the Funeral Rule a funeral provider may not require and impose a separate special charge for disinfecting, washing and dressing remains in connection with an identification viewing before a direct cremation or immediate burial absent a state law, cemetery or crematory requirement that is disclosed in writing on the provider's statement of funeral goods and services selected. We note, however, that nothing in the Rule prevents a funeral provider from offering and charging clients for services that go beyond an identification viewing, such as a private family viewing rather than a formal public viewing, so long as that service is entirely optional and listed on the provider's General Price List.

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. Staff Funeral Rule opinions are now routinely posted on the FTC website at <http://business.ftc.gov/content/funeral-rule-opinions>.

Sincerely,

/s/

Craig Tregillus  
Funeral Rule Coordinator

(Revised: 12/18/12)

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<sup>10</sup> This alternative may suffice, for example, in cases where there are readily identifiable distinguishing features such as scars or tattoos.

<sup>11</sup> A waiver and indemnification may be sufficient whenever a family member is present with the deceased at the time of removal.

<sup>12</sup> Nothing in the Rule prevents funeral providers from adding the cost of verifying and documenting the identity of the deceased before a direct cremation or immediate burial to the basic services fee included in their prices for those two specialized services because identification is equally important to "virtually all," if not all, of those two services. See Staff Opinion 07-2 (Mar. 21, 2007) at 2, available at <http://www.ftc.gov/ftc/funerals/opinions/opinion07-2.pdf>. Staff has previously determined that providers may reduce their standard basic services fee for direct cremation and immediate burial to reflect the proportionate reduction for each of those services in the actual professional services they provide and the accompanying overhead. Staff Opinion 09-6 (Nov. 24, 2009), available at <http://ftc.gov/bcp/edu/microsites/funerals/opinions/opinion09-6.pdf>. Thus, a funeral provider may recover its identification costs simply by adding them to the reduced basic services fee that it includes in its prices for direct cremation and immediate burial.

