

The Honorable Dan Flynn
Texas State Representative
House District 2
P.O. Box 2910
Austin, TX 78768-2910

Dear Representative Flynn:

This responds to your letter dated April 12, 2005, in which you request a Commission opinion on the lawful construction of the term “cash advance item” as used in the FTC’s Funeral Rule, 16 C.F.R. § 453.1(b) (“the Funeral Rule” or “the Rule”). Specifically, you question whether a Texas trial court is correct in ruling that “all goods or services purchased from a third-party vendor, even though not included on the contract, are ‘cash advances’” under the Funeral Rule.¹ Correct interpretation of the

¹ It is our understanding that your request is prompted by the May 2004 decision granting partial summary judgment in *Hijar v. SCI Texas Funeral Services, Inc.*, No. 2002-740, Order Granting Plaintiff’s Motion for Partial Summary Judgment and Establishing Issues Under Rule 166a(e), T.R.C.P. and Denying Defendants’ Second Motion for Summary Judgment (County Court at Law No. 3, El Paso, May 21, 2004), in which the court held that the defendant violated the cash advance disclosure provision of the Funeral Rule by failing to disclose each fee charged to the plaintiff for the cost of advancing funds on behalf of the plaintiff for goods and services purchased from third parties and resold to plaintiff. The Court in *Hijar* based its holding on an interpretation of the term “cash advance item” that would include the following items, when purchased from a third party and resold to persons arranging funerals: “direct cremation; immediate burial; forwarding remains; receiving remains; embalming; refrigeration; other preparation; transportation; casket/cremation casket; alternative container; outside enclosure; clothing/shroud; memorial booklet; service folders/prayer cards; acknowledgment cards; flowers;

term “cash advance item” is important because it determines the breadth and impact of certain substantive provisions of the Funeral Rule that employ that term.

The Commission believes that the court is incorrect in ruling that *all* goods or services purchased from a third-party vendor are cash advance items. This interpretation sweeps far too broadly, potentially bringing within its scope every component good or service that comprise a funeral. This was not and is not the Commission’s intention in the “cash advance” provisions of the Rule. In our opinion, the term “cash advance item” in the Rule applies only to those items that the funeral provider represents expressly to be “cash advance items” or represents by implication to be procured on behalf of a particular customer and provided to that customer at the same price the funeral provider paid for them. This conclusion is based on the analysis set forth below.

Analysis

The Funeral Rule² defines the term “cash advance item” as follows:

[a]ny item of service or merchandise described to a

shipping container; crematory services; crucifix; escorts; certified copies; public transportation; outside funeral director’s expense; vault installation; clergy/religious facility; musicians or singers; hairdressing; and permits.”

² The Commission promulgated the original Funeral Rule on September 24, 1982, making it fully effective on April 30, 1984. 47 Fed. Reg. 42260 (Sept. 24, 1982). The Commission amended the Rule in 1994, following a lengthy review proceeding, and that 1994 amended Rule continues to be in effect. 59 Fed. Reg. 1592 (Jan. 11, 1994). All references to “the Funeral Rule” or “the Rule” are to the 1994 amended Rule, currently in effect. References to the 1982 Rule are to “the original Rule.”

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. Cash advance items may include, but are not limited to: cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities; and, death certificates. 16 C.F.R. § 453.1(b).

The first sentence of this definition quite clearly states that any item a funeral provider describes expressly using the words “cash advance” item (or similar words or phrases) is, in fact, a cash advance item for purposes of the Funeral Rule. The second sentence broadens the definition to cover situations when a funeral provider purports to act “on behalf” of a particular customer, more as that customer’s procurement agent rather than as a retailer serving the general public. The third sentence merely provides an illustrative list of the various types of goods or services that funeral providers typically may treat as cash advance items.

Certain substantive provisions in the Funeral Rule employ the defined term “cash advance item.” Specifically, §§ 453.3(f)(1)(ii) and 453.3(f)(2) require 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 (*i.e.*, the existence of a mark-up, but not the amount) to the customer on the statement of funeral goods and services selected by the customer.³

³ Also, the statement of goods and services that the funeral provider must give to the customer at the conclusion of the discussion of funeral arrangements must itemize any cash advance items that are part of the agreed-upon funeral arrangements, and must state the price, or if not known, the estimated price, of those items. The Rule states: “(These prices must be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall

The Commission included these “cash advance” disclosure provisions in the Rule to address a practice in the marketplace that the Commission had identified as being harmful to consumers. Specifically, some funeral providers misrepresented that they would obtain goods or services for their customers at cost, when in fact these funeral providers profited by marking up the price of the items.⁴ The Final Staff Report on the original Funeral Rule, which is part of the rulemaking record on which the Commission relied in adopting the Rule, succinctly describes the problem:

Cash advance charges are completely separate from, and additional to, the funeral director’s own charges. They usually appear on the funeral bill under such headings as

be given and a written statement of the actual charges shall be provided before the final bill is paid.)” 16 C.F.R. § 453.2(b)(5)(i)(B).

⁴ This mark-up was achieved both directly and indirectly. As noted in the Final Staff Report, “[s]ometimes, [the mark-up] has been accomplished by simply inflating the amount of the charge on the customer’s bill. In other instances, the same effect has been achieved by the funeral home securing some form of kickback or rebate from the supplier of the cash advance item after charging the customer the full price.” Final Staff Report (June 1978) at 249. Marking up cash advance items was not an uncommon practice. The Commission noted, in adopting the original Rule, that “the evidence demonstrates that many individual funeral providers do charge mark-ups for cash advances. In a 1976 survey of California funeral directors, 12% of the 291 respondents admitted charging ‘in excess of the amount actually advanced for any items of service labeled as ‘cash advances’ or ‘accommodation items.’ [The National Funeral Directors Association’s] annual survey of funeral homes indicates that, on a national level, funeral homes are receiving a 5% mark-up on cash advance items. . . .” 47 Fed. Reg. 42279 (Sept. 24, 1982).

“accommodations,” “cash disbursements,” and “cash advanced for your convenience.” This terminology clearly indicates the basic conception, both by the funeral home and the consumer; that is, that the family is simply reimbursing the funeral director for cash outlays. The traditional use of such terms, as well as the obvious fact that these items are being provided by the third party, create the expectation that the amount billed is the same as that paid or owed. . . . Our investigation revealed, however that some funeral homes have generated extra revenues by charging their customers more for cash advance items than the funeral home actually paid out.⁵

Based on the record evidence of this problem, as summarized and analyzed in the Final Staff Report, the Commission adopted § 453.3(f) to remedy it. As noted in the Statement of Basis and Purpose issued by the Commission when it adopted the original Rule, § 453.3(f) is intended to prevent consumers from being led to believe, incorrectly, that the cost to the consumer for a particular item is the same as the cost to the funeral provider:

[C]onsumers believe that items labeled “cash advances” . . . are being provided at cost. There is an implicit representation that the cash advance transaction involves merely a forwarding of cash by the funeral provider and a subsequent dollar-for-dollar reimbursement by the consumer The use of this term in connection with items such as flowers, obituary notices, etc., which the consumers could easily obtain from a third party, creates the expectation that the amount billed the consumer is the same as the amount paid by the funeral provider. Given this expectation, the failure to disclose the existence of a mark-up is a deceptive practice.⁶

⁵ Final Staff Report (June 1978) at 249.

⁶ 47 Fed. Reg. 42278-42279 (Sept. 24, 1982).

The Commission found that, in describing a particular item to a customer, a funeral provider's express use of the term "cash advance item" (or alternative formulations such as "accommodation" or "cash disbursement") implies that the cost to the customer for that item is the same as the cost to the funeral provider. Thus, in cases where a funeral provider describes an item in this manner, yet charges the customer more for it than the funeral provider paid for it, the Commission requires a corrective disclosure to prevent the customer from being deceived. Specifically, in such a circumstance, the Funeral Rule requires that the following disclosure be placed on the statement of funeral goods and services selected: "We charge you for our services in obtaining: (specify cash advance items)."⁷ This is the scenario addressed by the first sentence in the "cash advance item" definition.

The second sentence of the definition, indicating that "[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," is in the nature of a "fencing-in" provision.⁸ The Commission's intention in including this sentence is to bring within the ambit of § 453.3(f) any situation where a funeral provider might, without using the specific term "cash advance," offer to obtain an item for a particular customer that the customer could obtain on her own – purporting to act "on behalf" of that customer, more as that customer's procurement agent than as a retailer serving the general public. Specifically, the purpose of this fencing-in aspect of the definition is to deter the less scrupulous funeral provider from evading the Rule by eschewing express description of an

⁷ 16 C.F.R. § 453.3(f)(2). The Rule also specifically prohibits this type of affirmative misrepresentation. 16 C.F.R. § 453.3(f)(1)(i).

⁸ Under the "fencing-in" doctrine, the FTC may frame a remedy which extends beyond the precise illegal conduct found. *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 561 (2d Cir. 1984).

item as a “cash advance item” (or alternative formulations), yet nevertheless conveying to a customer acting reasonably under the circumstances that obtaining the item involves merely a forwarding of cash by the funeral provider and a subsequent dollar-for-dollar reimbursement by the customer. The Commission’s intention, in sum, is that this part of the “cash advance item” definition function to foreclose funeral providers from attempting to sidestep the strict letter of the Rule by using implied misrepresentations rather than express ones.

In the absence of either the funeral provider’s express representation that an item is a “cash advance item” or implied representations that the item is procured for a particular customer at the funeral provider’s cost, a consumer, acting reasonably under the circumstances, would not believe that the amount he or she is billed for an item is the same as the amount the funeral provider pays its supplier. Indeed, such a belief would be contrary to a reasonable consumer’s most elementary experience in the everyday marketplace. In these circumstances, the funeral provider is generally acting like any retailer who purchases goods or services from third parties for resale to consumers.

The Commission believes that reasonable consumers generally understand that the price charged by a retail seller – including funeral providers – includes profit.⁹ Thus, the corrective disclosure about cash advance items that § 435.3(f)(2) requires is unnecessary when the funeral provider does not mislead the customer through either express representations that the item is a “cash advance item” (or alternative formulations), or implied representations that the customer is paying no more for an item than the amount the funeral provider paid for it.

⁹ As the Commission noted in the Statement of Basis and Purpose for the original Rule, “The Commission does not suggest that it is improper for funeral providers to profit on items obtained from third parties. It is clear that it is wholly proper for providers to do so.” 47 Fed. Reg. 42278 (Sept. 24, 1982).

It is worth noting that the text and structure of the Rule overall reflect the fundamental distinction between cash advance items and non-cash advance items. For items that are typically non-cash advance items, the Rule requires disclosure of the *retail* price of specified goods and services offered for sale by a funeral provider.¹⁰ An obvious example is the Rule's treatment of caskets, for which it requires a separate price list containing only the funeral provider's *retail* price.¹¹ Therefore, items that must appear on a funeral provider's price list¹² would not trigger

¹⁰ Funeral providers must "[i]nclude on the [general] price list, in any order, the *retail* prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified below for at least each of the following items, if offered for sale" The rule then lists: forwarding of remains to or receiving remains from another funeral home; direct cremation; immediate burial; transferring remains to the provider's premises; embalming and other preparation of the body; use of the provider's facilities and staff for viewing, for a funeral ceremony, or for a memorial service; use of the provider's equipment and staff for a graveside service; the use of the provider's hearse or limousine; and the provider's basic services fee. 16 C.F.R. § 453.2(b)(4). (Emphasis supplied.)

¹¹ "The funeral provider must offer the [casket price] list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the *retail* prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list." 16 C.F.R. § 453.2(b)(2)(i). (Emphasis supplied.)

¹² Section 453.2(b)(4)(i)(C) of the Rule sets forth the minimum information that must be included on a funeral provider's general price list. These items include: caskets; outer burial containers; forwarding of remains to or receiving remains from another funeral home; direct cremation; immediate burial;

the cash advance disclosures unless the funeral provider expressly represents the items as “cash advance items” (or alternative formulations) or represents by implication that items can be procured on behalf of the particular customer and provided at the same price the funeral provider paid for them.

Accordingly, the Commission wishes to be clear that the term “cash advance item” does not apply to *every* good or service that a funeral provider obtains from a third party. This overbroad interpretation, which potentially brings within its scope every component good or service of a funeral, does not comport with the Commission’s intention in promulgating the “cash advance” provisions of the Rule. Rather, based on a review of the original Rule and the rulemaking record, the Commission finds that the term “cash advance item” in the Rule applies only to those items that the funeral provider represents expressly to be “cash advance items” or represents by implication to be procured on behalf of a particular customer and provided to that customer at the same price the funeral provider paid for them.

transferring remains to the provider’s premises; embalming and other preparation of the body; use of the provider’s facilities and staff for viewing, for a funeral ceremony, or for a memorial service; use of the provider’s equipment and staff for a graveside service; the use of the provider’s hearse or limousine; and the provider’s basic services fee.