



SECRETARY OF STATE
Division of Securities and Business Regulation

POLICY STATEMENT

TO: Staff of the Securities and Business Regulation Division

FROM: J. Steven Parker
Director, Securities and Business Regulation Division

RE: Use of Certificates of Deposit for Funding the Purchase of Preneed
Funeral Services and Merchandise

DATE: November 1, 2002

I. Introduction

A practice has developed among funeral homes whereby the funeral home will require a customer to purchase a certificate of deposit (CD) in order to fund the purchase of funeral services or merchandise. There are some variations on the arrangement. The CD may be titled in the name of the customer, the funeral home, or the customer and funeral home jointly. The funeral home may or may not require the customer to execute a payable-upon-death designation in favor of the funeral home. Typically, the arrangement calls for the CD to be renewed periodically, so that part or all of its value will be available at the time of death to pay for funeral services or merchandise. The funeral home does not establish a preneed escrow account, and does not deposit or maintain the CD in an existing escrow account.

Three questions have been presented to the Securities and Business Regulation Division (hereinafter "the Division") on numerous occasions regarding this practice, namely:

- (1) whether it violates O.C.G.A. § 10-14-7 (a) (1);
- (2) whether a funeral home that utilizes this funding method exclusively must register as a preneed dealer pursuant to O.C.G.A. § 10-14-4 (a) (3); and

(3) whether the amount of the CD which exceeds the contracted-for price at the time of death must be refunded to the customer's representative.

This policy statement sets forth the Division's informal interpretation of the Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et. seq. ("the Act") as it relates to the three questions presented above.

II. Discussion

(A). Applicability of O.C.G.A. § 10-14-7 (a) (1)

O.C.G.A. Section 10-14-7 (a)(1) provides:

Each preneed dealer which sells burial or funeral merchandise on a preneed basis or preneed burial or funeral services shall establish and maintain a preneed escrow account.

With limited exceptions, O.C.G.A. § 10-14-7 also requires a preneed dealer to deposit 100% of the sales price of funeral services and merchandise into the escrow account. O.C.G.A. § 10-14-7 (a)(2) & (a)(3).

A person is a preneed dealer if he engages in the retail business of selling funeral services or merchandise that is "not delivered at the time of sale." O.C.G.A. § 10-14-3 (31). Therefore, the question at hand is whether the time of sale is the time of payment to purchase the CD or the time of liquidation of the CD and payment to the funeral home. Because the time of "sale" is defined as the time at which merchandise or services are disposed of "for value," the answer to the question turns upon whether the payment to purchase the CD constitutes the exchange of value. See O.C.G.A. § 10-14-3 (33). Whether the sale or disposition is "for value" depends upon whether the consumer has paid money to the funeral home or has relinquished any substantial rights relating to the use or control of money or other property to the funeral home or to a third party at the direction of the funeral home. See Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E. 2d 766 (1940); Carr v. Rawlings, 158 Ga. 619, 123 S.E. 2d 875 (1924).

Applying this test, a customer who allows the CD to be titled, either solely or jointly, in the name of the funeral home, or who has made an irrevocable payable-upon-death designation in favor of the funeral home, has relinquished sufficient control over the use of funds so as to constitute the rendering of value. In such a case (hereinafter referred to as a "Dealer-Owned CD"), the funeral home must establish and maintain a preneed escrow account as required by the Act. The examples listed above are for purposes of illustration only and should not be interpreted as limiting the circumstances in which the disposition will be deemed to have been "for value."

The Dealer-Owned CD must be held in escrow as an asset of the account and will be subject to the requirements of the Act with regard to the account, including the

reporting and refund requirements. Nothing in the Act would prohibit each CD from constituting a separate escrow account titled in the name of the Escrow Agent.

On the other hand, if the CD is titled in the name of the customer only and no irrevocable payable-upon-death designation is made, the arrangement will not be deemed to be for value in the absence of other factors. In such a case (hereinafter referred to as a "Customer-Owned CD"), the customer's continuing unfettered control over the funds negates the necessity of subjecting the funds to the escrow requirements of the Act. A requirement by the funeral home that a revocable payable-upon-death designation be made does not alone render the transaction one for value as long as the circumstances surrounding the manner in which the revocability is communicated to the customer do not impair the customer's right to revoke the designation.

In the case of a Customer-Owned CD, the cost of the CD should be paid directly to the financial institution. If a funeral home takes possession of or accumulates funds for the purpose of purchasing the CD on the customer's behalf, that would render the transaction a preneed sale. Similarly, if a funeral home takes possession of any CD which by its terms is payable to the bearer rather than to the order of the customer, that would constitute a preneed sale.

(B). Necessity of Registration as a Preneed Dealer

It follows from the discussion above that a funeral home which uses Customer-Owned CDs as its exclusive method of funding funeral services or merchandise is not required to register as a preneed dealer pursuant to O.C.G.A. § 10-14-4 (a)(3).

(C). Refunds

In the case of a Dealer-Owned CD, O.C.G.A. § 10-14-17 (a)(3) governs refunds. In order to be entitled to a refund of funds escrowed for funeral merchandise, the request for refund must be made prior to the earlier of the delivery of the merchandise or services or the death of the person for whom the merchandise or service is to be used. The amount to be refunded is to be determined by reference to Secretary of State Rule 590-3-4-.06, and shall not be limited by any restrictions or penalty upon redemption of the CD.

(D). Use of Proceeds of CD at Time of Need.

The contract should always specify how the proceeds of the CD will be applied or used at the time of need. The failure of the contract to do so may, depending on the circumstances, constitute a deceptive practice within the meaning of O.C.G.A. § 10-14-17 (b).

The funeral home is entitled to retain at need such amount as the parties may by contract agree, whether that be the entire amount on deposit or some lesser amount such as the at-need price of the funeral service or merchandise.

In the case of a Customer-Owned CD without a payable-upon-death designation, the funds resulting from the liquidation of the CD belong to the customer only, and it is left entirely to the discretion of the customer's representative whether to use such proceeds to pay for the funeral services and merchandise at the time of need. As discussed above, the funeral home may request or require that the customer designate the funeral home as the payee upon death, as long as such a designation is revocable. If the customer has made a revocable payable-upon-death designation in favor of the funeral home, which designation is in effect at the time of death, then the funds resulting from the liquidation of the CD belong to the funeral home, which is entitled to retain such amount as the parties by contract agreed.

This policy statement is issued pursuant to Secretary of State Rule 590-4-1-.03(3) and is effective immediately.