



DEPARTMENT OF JUSTICE

Antitrust Division

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January 13, 1999

Michael P.A. Cohen, Esq.
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Dear Mr. Cohen:

This is in response to your request on behalf of the NSM Purchasing Association (“the Association”) for the issuance of a business review letter pursuant to the Department of Justice’s Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department of Justice’s antitrust enforcement intentions with respect to a proposal to establish the Association as a joint purchasing agent for privately-owned funeral homes.

NSM is a trade association of some 865 privately-owned funeral homes who account for 6.3 percent of funeral home locations in the United States. It seeks to form a joint purchasing entity that would aggregate the casket purchases of NSM’s members so that they could obtain the type of quantity discounts (up to 40 percent) that you say the casket manufacturers are currently offering to the larger corporate providers of funeral services.

Your application asserts that independent family-owned funeral homes have faced increased price competition in recent years as a result of several different trends. The most important, you suggest, has been acquisition consolidation that has allowed the largest corporate funeral service providers to reduce their cost structures by obtaining purchasing discounts and other economies of scale and scope. In addition, you note that during the 1990s the family-owned funeral homes have also faced significant pricing pressures because of the increased use of crematoria. Between 1990 and 1995 the share of total funeral services provided by cremation rather than traditional burial increased from 17 percent to 21 percent, in large part because of the former’s significantly lower costs.

Finally, you indicate that competition in the funeral service business has been increased by new entry from cemeteries and direct selling casket retailers.

The proposal to establish the NSM Purchasing Association is designed to allow NSM's members to pool their casket purchases so that they can obtain the volume discounts of up to 40 percent that you say are currently available to their larger rivals. This reduction in their casket purchase costs would allow NSM's members to compete more effectively for price-sensitive customers since casket costs accounted for 16.91 percent of an adult funeral's cost in 1997.

The proposed joint purchasing entity will be operated in a manner designed to reduce competitive risk. Its business will be conducted by a full-time buying agent and staff that are not employed by NSM or any member thereof. The independent buying agent will keep all competitively sensitive information confidential, *i.e.*, it will not disseminate any such information among its members. Use of the joint purchasing agent will be available to any family or privately-owned funeral home in the United States, not just to NSM members. It will not be available, however, to the large corporate funeral service providers who already are getting the large volume discounts that are the goal of the joint purchasing arrangement. The Constitution and By-Laws of the Association will cap membership to prevent it from exceeding 35 percent of United States casket purchases. Members will remain free to purchase outside of the joint venture. Legal counsel will be present at all meetings of the joint venture and acceptance of an antitrust compliance policy will be a condition of membership in the joint venture.

On the basis of the information and assurances that you have provided us, it does not appear that the Association's joint purchasing proposal is likely to have an anticompetitive effect in either the casket or funeral services market. The relatively small share of casket purchases accounted for by NSM's members, the ratio of casket costs to funeral service prices, and the prophylactic measures that will be adopted to reduce antitrust risk lead us to conclude that NSM's proposal should not harm any seller or consumer interest. Moreover, to the extent that the proposed joint purchasing reduces NSM members' costs and such savings are shared with consumers, the proposal could have a procompetitive effect.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against NSM's proposal. This letter, however, expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future if the actual operation of the proposed joint purchasing program proves to be anticompetitive in any purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within

30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

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JOEL I. KLEIN
Assistant Attorney General