

B. The Bureau's Analysis of the Trustor's Termination Requests is Incorrect

The trustors submit their termination requests to the funeral establishment with whom they contracted for preneed services. Then, the request can be forwarded to Comerica or EPG. The funeral establishment can also obtain the trustor's balance and issue a check. The time limitation required by this section does not start running until Comerica or EPG actually receives the request. Therefore, the Bureau's analysis in this finding is incorrect and cannot be enforced against FDSC and Comerica.

II. The Bureau's Interpretation of Code of Regulations §1264 is an "Underground Regulation."

The Bureau's interpretation that FDSC and Comerica violated Code of Regulations §1264 and its enforcement of said interpretation constitutes an "Underground Regulation." [See legal argument made in Response to Audit Finding Number One, Section II on page 10, starting with "The Bureau is authorized to enforce. . ." and ending on page 11 with the sentence: "These procedurally deficient regulations are void for failing to comply with the APA. (*Tidewater Marine Western, Inc. v. Bradshaw*, at 576)," which argument is incorporated herein by reference as though fully set forth.]

Code of Regulation §1264 does not delineate who the revocation request must be delivered to in order to trigger the 15 day time limit. It specifies that the time limitation is not triggered until receipt of the request. The Bureau has based its analysis on the date of the request. This is incongruent with the "receipt" requirement of the regulation. This is a general application by the Bureau to multiple revocations which are not independently analyzed. This standard has not been promulgated through the procedures required by the APA; the "receipt" requirement has been promulgated through the APA procedures. Therefore, the Bureau's application of Code of Regulations §1264 is an "underground regulation" and is void.

III. FDSC and Comerica's Proposed Resolution to Disputed Finding No. 8

On a going forward basis, and without conceding in any aspect that the CMT in the past has not returned the trustors' funds within the 15 day time limit in Code of Regulations §1264, FDSC and Comerica agree to continue this practice and are willing to provide further examples of their compliance if so requested by the Bureau.

9. RESPONSE TO AUDIT FINDING NUMBER NINE: Failure to maintain preneed trust records in California in violation of CCR §1267

Pursuant to Regulations, complete financial records of all preneed contracts and arrangements with the CMT are maintained in California. (Code of Reg. tit. 16, § 1267.) Comerica, the trustee of the CMT, maintains a complete copy of the financial records of all preneed contracts and arrangements at its corporate office located at 25 Lytho Avenue, Palo Alto, California. Each individual funeral establishment participating in the CMT Program is also required under the program to maintain copies of these documents on the premises of their

funeral establishments. The FDSC has retained Essential Planning Group (hereinafter "EPG") to provide services in regards to the CMT. EPG maintains an additional copy of almost all the records held by Comerica and the funeral establishments. EPG does not maintain a copy of all the trades performed by the investment managers on a daily basis, but Comerica, as custodian of assets for the CMT, maintains those documents.

In this finding, the Bureau contends that FDSC and Comerica have violated Code of Regulations §1267. The Bureau bases its contention on the allegations that Comerica as trustee does not maintain complete financial records in California for the CMT because FDSC, through EPG, maintains a copy of almost all records, as well as archived documents, outside of California, in Oregon. Additionally, the Bureau alleges because one funeral establishment did not maintain the records listed below, the CMT is in violation of Code of Regulation §1267.

One funeral establishment's records were examined in the Audit. The Bureau claims that it did not possess all the records required by the regulation. The records absent from that funeral establishment's files are the following:

1. Request for proposals and responses. When the trustees place a contract out for bid, such as for the bookkeeping services in which CMA won the contract.
2. All account correspondence between the trustor and CMA.
3. Vendor contracts with FDSC to provide services for the trust.
4. Records of administrative costs.
5. Records of administrative costs allocated to FDSC, Comerica Bank, Mechanics Bank, Argent Financial Services, ARC, EPG, CMA and CFDA.
6. Disparity resolution plan.
7. Action plan.
8. Cash receipts, journal or cash disbursements journal (CCR 1267, (c) & (d)).
9. General ledger (CCR 1267, (f)).
10. Portfolio of the trust investments (CCR 1267 (g)).

The Bureau has sent several requests to FDSC and Comerica regarding the documentation they each maintain. The Bureau has also visited the offices of Comerica to view the documents held by Comerica. Comerica disclosed boxes of documents to the Bureau in that meeting. FDSC and Comerica have disclosed all documents in their possession which were requested during these different inquiries. Some documentation requested by the Bureau no longer existed. Other documentation requested by the Bureau was never created since Comerica and FDSC were not involved in the transactions to which those documents pertained. Additionally, the documents held by EPG in Oregon are either duplicates of the documents that are maintained according to Code of Regulation §1267 or are documents which because of their age are no longer required to be maintained in California for the CMT.

I. FDSC, Comerica and Their Agents have Complied with Code of Regulations §1267.

"Each funeral establishment charged with the reporting of preneed funds hereunder shall at all times maintain or cause the trustee of the preneed

trust to maintain in California and make available for inspection by the Board during reasonable working hours, complete financial records of all preneed contracts and arrangements which records shall be established and maintained in accordance with generally accepted accounting principles. Such records shall include the following; provided, however, that records may otherwise be established and maintained in accordance with generally accepted accounting principles:

- (a) An individual trustor contract, plan or agreement.
- (b) An individual trustor or beneficiary ledger account which shall set forth the amount of the contract, all payments received, all income prorated in accordance with the ratio which the trust corpus of the account bears to the entire corpus invested as set forth in Section 1265.
- (c) A cash receipts journal which shall show each payment received and shall be totaled monthly.
- (d) A cash disbursement journal which will show each withdrawal for an investment in compliance with 1263 and each disbursement to the funeral establishment for a serviced account or to the individual trustor on a cancelled account, and all withdrawals for documented expenses.
- (e) In the case where a checking account is used to deposit payments received or disbursements to the funeral establishment and/or the funeral director, a trustor or an investment, it shall be designated as a trust fund account, and be reported as such. It shall be reconciled each month with the balance shown in the trust account by accounting for checks not yet presented and outstanding, bank deposits not shown on the bank statements, and other adjustments required.
- (f) A general ledger which shall be posted monthly with respect to all accounts controlling the fiduciary relationship with the individual trustee. Such postings shall occur within 90 days after the close of each business month.
- (g) A portfolio of all investments related to the trust funds.
- (h) Records for serviced accounts shall include but not be limited to:
 - (1) A copy of the death certificate or other satisfactory evidence of the death; copies of all documents required as specified under Sections 7685 and 7685.2, Division 3,

Chapter 12, Article 5.5 of the Business and Professions Code; a copy of the final arrangements (itemized); and a copy of the final statement to the family.

- (2) All monies received from the trust; all monies received from the family; and all monies received from the Veterans Administration or Social Security or any other source to be applied to the final bill.
- (3) A record showing credit for each of the above.

(i) Records for cancelled accounts shall include but not be limited to:

(1) A record of all income earned and documented expenses taken including a revocation fee as stated in Section 7735, Division 3, Chapter 12, Article 9, of the Business and Professions Code.

(2) A copy of the final accounting to the family with the canceled check or withdrawal slip showing the amount refunded to the trustor.

- (j) All of the foregoing records shall be retained for a period of one year after the account has been canceled or serviced and audited by the State Board and compliance with all recommendations made and audit exceptions resolved [f]or 7 years from the date of service or cancellation, whichever comes first. “ (Code Reg. tit. 16 § 1267.)

Pursuant to the regulation FDSC or Comerica is required to maintain complete financial records of the preneed trusts. Comerica maintains a complete copy of the financial records at its office in Palo Alto, California. The auditor for the Bureau had a meeting with the representatives of Comerica wherein he was offered and given any record he requested. Therefore, FDSC and Comerica are compliant with Code of Regulations §1267.

The Bureau claims that FDSC and Comerica were not compliant with Code of Regulations §1267 because one funeral establishment that it inspected did not maintain certain documents the Bureau requested. The documents that were absent from that inspection are listed above and the categories are listed 1-10. The last three categories cite the specific subsection of Code of Regulations §1267 that correspond to each respective category. The other 7 categories

are not listed in Code of Regulations §1267. Those 7 categories of documents are not required to be maintained under Code of Regulations § 1267.

II. The Bureau's Interpretation of the CMT's Financial Records is an "Underground Regulation."

The Bureau's interpretation of the CMT's "Financial Records" and its enforcement of said interpretation constitute an "Underground Regulation." [See legal argument made in Response to Audit Finding Number One, Section II on page 10, starting with "The Bureau is authorized to enforce. . ." and ending on page 11 with the sentence: "These procedurally deficient regulations are void for failing to comply with the APA. (*Tidewater Marine Western, Inc. v. Bradshaw*, at 576)," which argument is incorporated herein by reference as though fully set forth.]

The categories of documents listed under items 1- 7 above are not required to be maintained under Code of Regulations §1267. No other regulation under Title 16 of the Code of Regulations or under Division 3, Chapter 12, Article 9 of the Business & Professions Code require FDSC, Comerica or funeral establishments participating the CMT Program to maintain the documents categorized under items 1-7. Regulations have not been passed to require the maintenance of these documents in regards to the CMT, so this rule has not been promulgated pursuant to the APA. Therefore, the requirement that the categories of documents listed in items 1-7 are underground regulations and are void. The Bureau even admits this by citing the subsections of Code of Regulations §1267 that each of the last three categories of documents fit within, and failing to do so on the other 7 categories.

III. FDSC's Proposed Resolution to Disputed Finding No. 9

FDSC and Comerica have maintained all records required under Code of Regulations §1267 (a)-(j). FDSC and Comerica will continue said practice and maintain all records according to Code of Regulations §1267 (a)-(j) and make those records available upon request.

10. RESPONSE TO AUDIT FINDING NUMBER TEN: Records not made available for inspection by the Bureau in violation of CCR §1267

The trustee of the CMT, Comerica, maintains copies of the complete financial records of all preneed contracts and arrangements. Each individual funeral establishment participating in the CMT Program is also required under the program to maintain copies of these documents. The FDSC has retained EPG to provide services in regards to the CMT. EPG maintains a copy of almost all records held by Comerica and the funeral establishments.

The Bureau sent several requests to FDSC and Comerica regarding the documentation that each maintained. The Bureau has also visited the offices of Comerica to view the documents held by Comerica. Comerica handed over boxes of documents to the Bureau in that meeting. FDSC and Comerica have disclosed all documents in their possession that were requested during these different inquiries. Some documentation requested by the Bureau no longer existed, but those documents are not required to be maintained under Code of Regulations §1267. Other

documentation requested by the Bureau was never created since Comerica and FDSC were not involved in the transactions to which those documents pertained. Additionally, the documents held by EPG in Oregon are either duplicates of the documents that are maintained according to Code of Regulation 1267 or are documents which because of their age are archival documents no longer required to be maintained for the CMT.

The Bureau contends that FDSC and Comerica have violated Code of Regulations §1267. It bases that contention on its allegation that Comerica and FDSC did not make available certain documents it requested in prior written requests. Those documents are as follows:

1. The work papers of the independent auditors hired by FDSC and Comerica.
2. Trial balances prepared for the independent audit reports of the CMT.
3. Account Statements that the Bureau claims were not present in the documents disclosed that covered a 25 month period sometime between January 1, 2000 and August 31, 2009.
4. The Disparity Resolution Plan.
5. The Promissory Note that corresponds to the Disparity Resolution Plan.
6. A report dated April 10, 2001 prepared by High Country Capital Management.
7. Documents that Support the Disparity Resolution Income.
8. The Disparity Resolution Plan binder.
9. Any past and present contracts with FDSC to support its trust administration costs.

FDSC and Comerica did produce the following documents that correspond to items 4-6, all of which pertain to item 7 respectively:

- a. A copy of the Disparity Resolution Plan with a description of Exhibit B thereto.
- b. The Note Receivable which is the Promissory Note for the Disparity Resolution Plan.
- c. The Draft Report prepared by High Country Capital Management, as a final report was never prepared for the CMT.

FDSC and Comerica produced a large amount of documentation in response to the requests of the Bureau. FDSC and Comerica could not respond to all the requests of the Bureau because some of the request sought documents from FDSC or Comerica for transactions that did not take place or did not involve the CMT.