

Pursuant to the authority vested in the Commissioner of Health by section 3401 of the Public Health Law, sections 77.5, 78.1 and 79.4 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York are amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Paragraph (6) of subdivision (c) of section 77.5 is amended as follows:

(6) Food and beverages. The provision of space, facilities, equipment, accommodations or supplies for, or the preparation, sale, service or distribution of, or the consumption of, food or nonalcoholic beverages [in any part of a funeral establishment] to or by friends, relatives, mourners, family, visitors or next of kin of any deceased person in the funeral establishment is [prohibited.] permitted, but not required to be offered. Food or nonalcoholic beverages may also be provided by a third-party catering service, provided that such catering service is not owned by or affiliated with the funeral firm engaged in funeral directing at the funeral establishment. This paragraph is subject to the following conditions:

(i) the preparation and serving of food and nonalcoholic beverages in the funeral establishment shall be limited to arranging, opening, displaying, and assembling items for consumption, and does not include cooking or heating of food items with the exception of hot beverages such as coffee, tea or similar items;

(ii) food items must be limited to incidental refreshments such as baked goods, sandwiches, snacks, platters, pre-packaged food items and items which may be required

by the religious practices of the family members, mourners, visitors or friends of the deceased;

(iii) the preparation and serving of any food and beverages shall be prohibited in the: preparation area as defined in section 77.5(d)(3) of this Part; and the chapel or repose room as defined in section 77.5(d)(1) of this Part, whenever there is deceased person present for a viewing, visitation or funeral services.

(iv) any separate charges for the use of facilities for the serving of food and nonalcoholic beverages (a) shall be charged only for a specifically dedicated food and beverage service area, (b) shall be stated clearly on the General Price List, and (c) shall include any charges for cleaning, equipment or the like, as required by section 79.4(e)(6).

Subparagraph (iii) of paragraph (4) of subdivision (b) of section 78.1 is amended as follows:

Charges for additional services and merchandise selected by the customer, which the funeral firm purchases for the customer, such as hairdressing, flowers, death notices, pallbearers, clothing or burial garments, musicians and watcher, catering services, food, and nonalcoholic beverages, shall be specifically described and may be made either as a "Funeral Home Charge" under the section "Additional Services and Merchandise Selected," if the funeral firm charges for its services in purchasing these items, or as a "Cash Advance," if the funeral home does not charge the customer in excess of the amount advanced to a third party. If the funeral firm charges more than it advances to a third party or receives and retains a rebate, commission, trade or volume discount or other

benefit, the items must be listed under the heading "Additional Services and Merchandise Selected."

Paragraph (9) of subdivision (e) of section 79.4 is amended as follows:

(9) Additional services and merchandise.

(i) The price of acknowledgment cards, catering services, food, nonalcoholic beverages, [and] or any additional services and merchandise routinely offered by the funeral firm must be stated with an explanation of what is included.

(ii) If the funeral firm offers to purchase additional merchandise or services and charges more than the actual cost or receives and retains a rebate, commission, trade or volume discount or other benefit, the firm must include a statement under this heading that it will purchase additional merchandise and services for the customer. In immediate conjunction with this statement must be the sentence, "The prices in this section include a charge for our services in buying these items."

REGULATORY IMPACT STATEMENT

Statutory Authority:

Paragraph 1 of Public Health Law section 3401 provides that the Commissioner “may from time to time, make and adopt such rules and regulations not inconsistent with law as may be necessary (a) in the performance of his duties and in the administration of the provisions of this article; and (b) to govern and regulate the conduct and transaction of the business and practice of funeral directing, undertaking and embalming.”

Legislative Objectives:

Public Health Law Article 34 was recently amended to add section 3444 to give funeral firms the option to offer food and nonalcoholic beverages in their funeral establishment and to allow the services of a caterer. It was the legislative intent to address the changing expectations and preferences concerning funeral or memorial services that have made for longer visiting or calling hours.

This law allows funeral firms to provide on site food and nonalcoholic beverages to the family of the deceased during services and calling hours. The proposed regulation removes language that prohibits the serving of food or beverages in the funeral establishment.

Needs and Benefits:

The current Department regulations prohibit funeral firms from serving food or beverages in the funeral establishment. However, in the past, visitations traditionally took place from 2 p.m. to 4 p.m. and resumed at 7 p.m. to 9 p.m, leaving family and callers a three-

hour meal period. As demographics have changed, family and callers often must travel long distances to attend a visitation. For this reason, today visitations are more commonly consolidated into a longer block of time, usually from 4 p.m. to 8 p.m., to allow for travel time. This can make it difficult for family to find an opportunity for refreshment. The changes to this rule will bring Title 10 in alignment with the new statute.

The proposed changes address how the food and nonalcoholic beverages can be prepared, what items may be served, where they may be served, and who may serve them. It addresses the preparation of the food and nonalcoholic beverages in accordance with the statute, and it specifically excludes the cooking or heating of foods by the funeral firm. Following the language of the statute, the second subparagraph specifies the types of food items allowed and includes food required by religious practices.

Next, the proposed changes prohibit the preparation and serving of food in the chapel or reposing room, the arrangement office and in the preparation area. There is a limitation on the activities of the funeral firm employees and any catering employees to serving the food and preparing and serving nonalcoholic beverages.

The statute's prohibition of funeral establishments owning or being affiliated with a catering business is reinforced in the proposed changes clarifying how funeral firms may charge for the use of a caterer while complying with the Federal Trade Commission (FTC) and the corresponding state regulations (10 NYCRR section 79.4) regarding to

General Price Lists, Statement of Goods and Services, and cash advance items. This underscores the requirement that the funeral firm serving food or reselling pre-packaged food item and platters, must continue to follow the pricing and business regulations as stated above.

Finally, the proposed changes ensure that families who provide their own food and beverages are aware that the funeral home may charge for “use of facilities” in a manner consistent with section 79.4(e)(6).

Costs: Costs to State and Local Government:

The rule will not increase costs to State or local governments.

Costs to Private Regulated Parties:

Because funeral firms are not required to permit service of food and nonalcoholic beverages, the changes to the regulation would not incur any expense.

Costs to the Regulatory Agency:

The Bureau of Funeral Directing would have jurisdiction over consumer complaints and enforcement of the new statute and the changes to the regulations. However, it is not expected that there would be any associated expense with these activities.

Local Government Mandates:

The statute specifies that a funeral firm that elects to provide food service will not be considered a “food service establishment,” thus making it clear there is no mandate for any local Health Department oversight. Local fire codes and zoning regulations will not be affected.

Paperwork:

This rule will not impose any additional paperwork for the funeral establishments which opt to serve refreshments.

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

The rule must be changed to conform to the new statute.

Federal Standards:

The Code of Federal Regulations (CFR) Title 16, Chapter 1, Subchapter D, Part 453 (“Funeral Industry Practices”) does not include provisions regarding the service of food or nonalcoholic beverages in a funeral establishment. However, section 453.1(h) defines “funeral goods” as any items “which are sold or offered for sale directly to the public for use in connection with funeral services” and are, therefore, required to be listed on the General Price List. The proposed changes to the regulations are consistent with this rule.

Compliance Schedule:

Because permitting service of food and nonalcoholic beverages is voluntary, no compliance schedule is required.

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REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

Effect of Rule:

Approximately 1,800 businesses in New York are registered as funeral firms with the Department of Health, Bureau of Funeral Directing. The rule will affect only the funeral firms that elect to allow refreshments to be available. The rule does not impose any adverse economic impact, compliance requirements, or implementation or administration costs on local governments.

Compliance Requirements:

The rule reflects the statutory amendments enacted by the Legislature. The service of food and nonalcoholic beverages in the funeral home will be voluntary and will not require any special documentation for the Department of Health, form of application or permit. The Bureau anticipates covering the new regulation extensively in various venues during the presentation of required law segments for continuing education.

Professional Services:

The rule itself imposes no requirements upon the funeral firm concerning professional services. The rule allows the funeral firm to use a professional catering service if the family is given proper disclosures of expenses by the funeral firm. Alternatively, the family may hire a catering service that is independent of the funeral firm.

Compliance Costs:

Since the decision to allow a family to have incidental refreshments would be a decision entirely under the prerogative of the funeral firm, the rule imposes no compliance costs.

Economic and Technological Feasibility:

The rule does not impose any economic or technological compliance burdens on the funeral homes.

Minimizing Adverse Impact:

Since the decision to allow a family to have incidental refreshments would be a decision entirely under the prerogative of the funeral firm, the rule imposes no impact.

Small Business and Local Government Participation:

The New York State Funeral Directors Association (the Association), which represents approximately half of all funeral firms in New York State, was given the opportunity to comment directly on the proposed regulations. Members of the Association were given the opportunity to provide input through a survey developed by the Bureau of Funeral Directing and distributed at the Association's annual convention in August 2016, as well as at other venues such as the Capital District Funeral Directors Association meeting in September 2016. Representatives of Service Corporation International, which owns and operates 80 funeral homes in New York also worked with the Association in several meetings with the Department. In addition, the Funeral Directing Advisory Board, which is specifically tasked by statute (Public Health Law § 3402) to "recommend to the

Commissioner the promulgation of rules and regulations” has had several discussions regarding the regulations and have given their input to the Department of Health during their meeting.

**STATEMENT IN LIEU OF
RURAL AREA FLEXIBILITY ANALYSIS**

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

ASSESSMENT OF PUBLIC COMMENT

Public comments were submitted to the NYS Department of Health (DOH) in response to the proposed regulation. The public comment period for this regulation ended on January 22, 2018. The Department received a total of four comments from representatives of the funeral directing community, including the New York State Funeral Directors Association, Service Corporation International which operates approximately 80 funeral firms in New York State, and two licensed, registered funeral directors.

COMMENT: Three of the four commenters expressed a similar concern, stating that the proposed language in §77.5(c)(6)(iii) is too restrictive, insofar as it prohibits funeral firms from giving refreshments to families in the arrangement office during the arrangement conference.

RESPONSE: The intent of this regulation is to permit the service of food and beverages in funeral establishments except in areas where a deceased person may be present. In light of the comments received, the Department has made technical amendments to clarify that food and beverages may be served in a funeral establishment's arrangement office, in accordance with this intent. The changes protect the sanctity of the deceased and the public health, while allowing for the service of refreshments to families while making the funeral arrangements, as well as during visitations or calling hours where the chapel is being used for a memorial service in circumstances where the deceased person is not present (for example, when only a cremation urn is present).

COMMENT: One commenter supported the amended regulation with a general, positive statement about the allowance of food and beverages in funeral establishments.

RESPONSE: The Department notes the comment in support of this amendment. No change was made to the regulation in response to this comment.