FUNERAL INDUSTRY PRACTICES

MANDATORY REVIEW
16 CFR Part 453

FINAL STAFF REPORT

TO THE

FEDERAL TRADE COMMISSION

With Proposed Amended Trade Regulation Rule

BUREAU OF CONSUMER PROTECTION
JUNE 1990

Funeral Industry Practices

Mandatory Review
16 CFR Part 453

Final Staff Report to the Federal Trade Commission and Proposed Amended Rule

BUREAU OF CONSUMER PROTECTION

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This report, required by Section 1.13(f) of the Commission's Rules of Practice, contains the staff's analysis of the record and its recommendations as to the form of the final, amended Rule. The report has not been reviewed or adopted by the Commission. The Commission's final determination in this matter will be based upon the record taken as a whole, including the staff's report, the report of the presiding officer under Section 1.13(g) of the Rules, and comments upon these reports received during the 60-day comment period after the presiding officer's report is placed on the rulemaking record.

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* Barry J. Cutler, Director, and Gloria Cordes Larson, Deputy Director, are recused from participation in this matter.

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College student interns Thomas Letsos and Antonio Gracias willingly engaged in the unenviable, but necessary, task of cite-checking the report. We thank them for their perseverance.

EXPLANATION OF REFERENCES

Footnotes in this staff report refer to the materials on the rulemaking record or subject to official notice. Citations to the rulemaking record use the Presiding Officer's classification system, which is reproduced below. Materials are cited, for example, as R-B-2, and may include their short title in parenthesis for source classification, such as R-B-2 (Replication Study).

Category	
A	Public notices, petitions, motions and other documents not specifically referred to in other categories.
B	The initial Commission staff report, memoranda and other relevant documents assembled prior to the commencement of the proceeding.
C	Additional staff submissions.
D	Comments of funeral providers, funeral directors and their employees.
E	Comments of cemeterians, crematories, retail casket sellers and other marketers of ancillary goods or services.
F	Consumer comments.
G	Comments of funeral trade associations.
H	Comments of consumer and public interest organizations.
I	Comments of federal, state and local government entities and officials.
J	Comments from other sources.
L	Public hearing transcripts.
M	Rebuttal submissions, and submissions of proposed findings of fact, conclusions of law, and recommended decisions.

Citations to the public hearing transcripts (Category L) cite the volume and page number, as follows: the Washington, D.C. hearing is Volume I, the Chicago hearing is Volume II, and the San Francisco hearing is Volume III (e.g., Tr. Vol. I, 333).

GUIDE TO CITATIONS

Many of the significant documents in this proceeding are cited in this report in an abbreviated form. For readers' convenience, this table provides a guide to the most frequently cited documents.

Citation Form	Record Cite	Description
Statement of Basis and Purpose or SBP	R-B-5	The Commission's official publication of the Funeral Rule and its rationale, 47 Fed. Reg. 42260 (Sept. 24, 1982)
Notice of Proposed Rulemaking or NPR	R-A-1	The Commission's notice initiating the review proceeding, 53 Fed. Reg. 19864 (May 31, 1988)
1988 Staff Report	R-B-1	Staff's initial report recommending initiation of the review proceeding
Replication Study ("RS")	R-B-2	1988 FTC study (Market Facts, Inc.) of 1,004 funeral arrangers (Dec. 1986 - June 1987)
Baseline and Follow-up Studies ("BLS")	R-B-3	1982 FTC-sponsored study of 1,200 funeral arrangers (Nov. 1980 - May 1981)
BE Report or Daniel analysis	HX-122	February 1989 Bureau of Economics staff report analyzing expenditure, selection and compliance data from the 1988 FTC study
Gallup Study	HX-66	1988 AARP-sponsored study of 675 recent funeral arrangers (April 1987 - Oct. 1988)
Compliance Guidelines	R-B-6	1985 Staff publication assisting funeral providers in Rule compliance
NFDA/NSM proposed findings	R-M-9	Proposed findings of fact, Conclusions of Law and Recommended decision jointly submitted by the NFDA and NSM
AARP Proposed Findings	R-M-11	Proposed findings of fact, Conclusions of Law and Recommended decision submitted by the American Ass'n of Retired Persons

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E. Notice of Proposed Rulemaking

INTRODUCTION AND SUMMARY

This report contains the staff's summary of the evidence and recommendations for Commission action in the rulemaking amendment proceeding mandated by § 453.10 of the Funeral Rule. The staff in this introduction summarizes the Commission's purpose in mandating the review, as well as the Commission's findings in 1982 concerning the Rule's expected impact on the funeral market, the staff's evidentiary findings based on its review of the record, and staff's recommendations.

The Commission's Findings in 1982

The Commission's purpose in requiring this unique review was to determine, at an early date: (1) whether the Rule is operating as expected in reducing barriers to price competition and increasing informed consumer choice, or whether some modification is necessary to facilitate those benefits; and (2) whether there is a need to continue the Rule after it has had an opportunity to work in the marketplace; termination would be considered if increased competition has largely corrected the problems addressed by the Rule.[1]

The Commission determined, however, that the Rule's effects on the funeral market may be evidenced more slowly than in other industries due to factors it found unique to the funeral transaction. One of those factors was simply that many consumers would not have exposure to the Rule-required price lists and other provisions for many years because purchases of funerals are infrequent. Unlike other situations, consumers also are unusually susceptible to influence from the funeral director's advice because of the unique combination of emotional stress, lack of experience and information, and tight time constraints. The Commission predicted as a result that the initial stimulus for price competition would likely come from existing or new providers that begin to advertise and otherwise compete on the basis of price, rather than from consumers. The Commission concluded that it could not say how quickly the Rule's competitive impact would begin to be felt in light of traditional industry constraints on price competition and barriers to entry.[2]

The Commission nonetheless predicted that the Rule could provide economic benefits for consumers in various ways. When competition induced by the greater availability of price information does emerge, for example, it could work to reduce actual prices and overall consumer expenditures for funerals, or at least retard their rate of growth, as consumers' price-sensitivity is increased and as some consumers shift from higher to lower-priced providers. Expenditures might also be reduced as consumers decline items previously required in packaged funerals, and as a result of the elimination of misrepresentations and failures to disclose material facts that induced consumer purchases. Finally, the Commission determined that mandatory price itemization was warranted even if some consumers knowingly chose to buy more than they would have under

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[1] R-B-5 (Statement of Basis and Purpose, or "SBP") at 42261, 42299.

[2] *Id.* at 42299.

package-only pricing, because others would have the right to choose less; the purpose of the Rule is to enhance consumer choice.[3]

The Commission finally determined that, while competition induced by the Rule could reduce price levels, mandatory itemization presented opportunities for providers to voluntarily raise prices. Providers could choose to raise itemized prices or the price for the lowest-priced funeral, for example, in order to increase profits or account for increased consumer declinations of certain items. The Commission reasoned, however, that itemization does not require those results because it does not preclude traditional industry pricing methods, such as package pricing and "graduated recovery" of proportionately more overhead from higher-priced funerals, and imposes minimal compliance costs. The Commission further concluded that providers may not be able to simply raise prices to recoup lost revenue or increase profits as price competition increases under the Rule.[4]

Legal Standard of Review

The staff in Section I.C. of this report discusses in detail the legal standard of review necessary for the Commission to retain, modify or repeal the Funeral Rule. Briefly stated, the Rule having been duly promulgated is presumptively valid, and may be changed or repealed based upon a reasoned analysis supported by reliable, substantial evidence in the rulemaking record taken as a whole. Although the Commission as a legal matter thus need not base a decision to retain the Rule on substantial evidence, the staff in analyzing the record evidence has asked the question whether the Rule and its individual provisions have provided or will provide benefits to consumers that exceed their costs. The staff in its report has, accordingly, presented and responded to evidence on both sides of that question.

The Rulemaking Record

The record evidence reviewed in this report includes numerous survey, statistical and related testimonial data presented by virtually all of the interested parties and other participants. The record contains three national surveys of actual funeral arrangers, conducted in 1981, 1987 and 1988. The 1981 study conducted for the Commission was conceived as a baseline for later comparison with the 1987 replication study presented by the staff. The Gallup Organization conducted the third study for the AARP. Viewed together, those three surveys represent the most reliable and comprehensive systematic data available on consumer experiences under the Rule in shopping for and choosing funeral goods and services, and of industry Rule compliance.

Statistical data and testimony presented by an independent firm that provides financial and business consulting services to 1,500 independent funeral homes in 30 states, representing about 10% of all funerals, afforded the most reliable evidence on changes in funeral home costs of operation and prices under the Rule. A 1988 national survey of 500 funeral directors presented by the AARP provided similar evidence. The staff's 1987 survey of state laws regulating the funeral transaction is also part of the record, as is the 1984 survey of NFDA members regarding

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[3] *Id.* at 42297.

[4] *Id.* at 42296-42298.

changes in provider practices under the Rule. The record further contains two national opinion surveys concerning consumers' views about, and knowledge of, various Rule requirements, and five other surveys of cemeterians, cremationists, monument builders and memorial societies conducted by interested groups on specific, Rule-related issues.

Finally, 83 public hearing witnesses and 189 commenters on the Notice of Proposed Rulemaking ("NPR") provided testimonial and other evidence on that survey data and many other issues noticed in the NPR. Those participants represented a broad spectrum of funeral service groups, state entities, and funeral consumers.

The Staff's Findings

The staff from its review of the record evidence draws the following overall conclusions regarding the Rule's effects to date:

(1) The Rule does not appear to be sufficiently "in place" in the market to permit a full assessment of the Rule's potential benefits.

The empirical survey evidence indicates that the Rule has not had the "opportunity to work in the marketplace" presumed necessary by the Commission to fully gauge its effects. That evidence shows that about half of providers appear to be complying with most of the Rule's provisions individually, but that overall, simultaneous industry compliance with four of the Rule's most important provisions is low. The empirical evidence indicates, for example, that about half of providers give timely casket and outer burial container price lists, request prior approval for embalming, and provide the affirmative telephone price disclosure required by the Rule; 62% appear to give consumers an itemized final statement, and the great majority provide the price information that consumers request over the telephone. Compliance with the general price list requirement, however, is considerably lower according to the evidence. About half of funeral consumers report receiving a GPL before they select caskets, but 23% say that they get the GPL at or near the outset of arrangements discussions, as the Rule requires.

The empirical evidence also indicates that simultaneous industry compliance with the general price list ("GPL"), itemized final statement, and misrepresentation provisions concerning embalming and caskets for cremation -- four of the Rule's key requirements -- is 31%. That compliance level drops to 15% when the GPL timing requirement is viewed strictly (consumers got the GPL at or near the "beginning of discussions" rather than "before selection of the casket"). The empirical data further indicate that simultaneous industry compliance may even be viewed as 9% or lower when several other Rule provisions are added to the analysis. It is important to know that some providers are complying with individual provisions of the Rule. However, in the staff's view, the overall level of industry compliance with the Rule's provisions simultaneously is the more appropriate compliance measure for assessing the Rule's overall market impact because many of the Rule's key provisions work in tandem to ensure that consumers receive the intended informational benefits; high levels of compliance with certain individual provisions may thus be of minimal analytical value in reviewing the Rule's performance if a minority of providers comply with others. The Rule's overall impact on the funeral market is likely dependent on the degree to which it is fully complied with.

Although we would not expect 100% compliance under any circumstances, that evidence of 31% overall compliance, or less, with four of the Rule's provisions suggests that other empirical data indicating that overall consumer expenditures for funerals have not fallen since 1981, or that consumers who receive "partial compliance" spend no less than those who do not get that level of compliance, may be of very limited value in assessing the Rule's impact on consumers because the data do not capture the effects of a fully complied-with Rule.

Little, if any, record evidence further indicates that traditional funeral providers have begun to price advertise or otherwise compete on the basis of price. The few, independent "low cost" funeral homes that have entered the market appear to be operated by former, traditional funeral directors or cemeterians who are considered by the funeral industry as a whole to be "mavericks." The evidence further indicates that funeral providers generally do not support unfettered competition in the sale of pre-need funeral services, and that many respond to potential price competition from third-party casket sellers where it arises by imposing so-called "casket handling fees" on consumers who purchase caskets from those non-funeral home sources. The purpose of those non-declinable fees, which average $300-$500, appears to be to recoup the profit and overhead lost on the casket sale, and not to cover actual services rendered.

Finally, the empirical data and other record evidence establishes that consumers' familiarity with the funeral transaction is increasing under the Rule, but that the great majority are still largely unaware of the Rule or their rights under the Rule, or of funeral prices, options, and requirements. Other empirical evidence indicates that consumers' "experience" with funerals is low by any measure and that, regardless of their level of experience, consumers are not "familiar" with the funeral transaction. Empirical evidence indicates, for example, that consumers' knowledge of funeral requirements and goods and services, at least to date, does not increase as prior involvement in making funeral arrangements increases.

Given the low levels of simultaneous industry compliance, price competition and consumer awareness to date, the record indicates that one can not expect the Rule to have affected a substantial change in consumer behavior and expenditures in the short time since its promulgation. Most rulemaking participants concluded that the Rule's benefits have not been fully realized because the Rule has not been in place long enough.

(2) The market appears to be price-sensitive for the selection of funeral providers, types of service, and individual goods and services, particularly caskets, when price and options information is readily available as a factor in the selection decision.

The empirical evidence indicates that consumers value and use price information they receive early in selecting a funeral home and funeral goods and services. Survey respondents who received price information early in the funeral transaction spent significantly less for their arrangements than those who did not get that timely information; the earlier respondents received price information, the more likely they were to consider the information important to their choices in making funeral arrangements. A majority of survey respondents, when asked, also said that they considered price very important in their funeral home and casket selections, although other factors appeared to be more important.

Other evidence indicates that consumers in increasing numbers are using "low-cost" funeral homes where they exist as a direct result of those providers' competitive pricing practices and the

availability of comparative price information. Similarly, still other evidence reveals that consumers will attempt to purchase competitively-priced caskets from third-party sellers when they are available. Finally, empirical evidence shows that an increasing proportion of consumers are purchasing the significantly less-expensive cremation alternative, that consumers are purchasing fewer caskets and embalming for cremation than in 1981, and that at least some consumers are declining items that used to be included in funeral "packages."

(3) Despite the low overall levels of industry compliance, price competition and consumer knowledge demonstrated by the record, pro-competitive and informational benefits attributable at least in part to the Rule appear to be manifesting in the market and are likely to increase over time.

Uncontroverted, testimonial evidence establishes that the Rule's anti-tying and price disclosure provisions have facilitated the entry of third-party casket sellers and some low-cost funeral homes and helps them compete by prohibiting tying practices and making comparative price data available. Consumers increasingly use that data to select those lower-cost funeral providers and purchase caskets from third-party sellers where they exist. However, "casket handling fees" imposed by providers on consumers who attempt to purchase caskets from third parties appear to obstruct third-party casket sales because they eliminate any savings that could result from competitive pricing.

Other testimonial evidence presented by the industry's largest financial and business consulting firm suggests that the ready availability of the GPL has raised the industry's "price consciousness," and may as a result be partly responsible for the tempering of increases in non-declinable funeral service fees in recent years. Empirical data also establishes that, although overall prices and consumer expenditures for funerals have increased since 1981 by more than the rate of inflation for the general economy, that increase is comparable to the increase in service prices. That is, compared to other industries also classified as "service" industries, funeral prices and expenditures in the period 1981-1987 have not increased above the rate of inflation.

The empirical evidence does not establish a direct link between receipt of the Rule-required price lists and lower, overall consumer expenditures. Substantial evidence, however, including empirical survey evidence and industry statistical data, does indicate that some consumers are buying fewer funeral items and less-expensive services than they did before the Rule's mandatory itemization and disclosure requirements. That evidence shows that consumers increasingly choose less-expensive cremation services, and purchase fewer caskets and embalming for those cremations than in 1981, including "unneeded" caskets and embalming. Since 1981, substantially more consumers also report receiving some form of price information early in the transaction; consumers use that information to spend less for their arrangements. Generally, some consumers appear to be declining items once included in packaged funerals. Substantial evidence also shows that a significant number of consumers call and choose low-cost funeral homes where comparative prices are advertised and purchase caskets competitively offered by third-party providers where they are available. Finally, empirical survey data indicates that consumer knowledge regarding embalming requirements and the preservative value of sealed caskets has increased slightly since 1981.

The evidence suggests, on balance, that the Rule's itemization and disclosure requirements have contributed to those results by increasing at least some consumers' awareness of prices and

options, as well as industry's attempts to expand its marketing of alternative goods and services. The great preponderance of testimonial evidence suggests that those benefits will tend to increase over time as compliance with, and consumer awareness of, the Rule increase.

(4) The Rule overall appears to impose minimal compliance burdens on providers that do not significantly raise their business costs or contribute to increased prices, or reduce consumers' overall satisfaction with the funeral services they receive.

Uncontroverted, empirical evidence demonstrates that the Rule's requirements have not measurably contributed to increases in funeral home costs of doing business or funeral home prices, or to any reduction of overall consumer satisfaction with funeral service. Business expense data for 1,500 independent funeral homes, representing about 10% of all funerals conducted in the years 1984-1987, indicate that funeral home costs arguably most related to the Rule (such as legal, accounting and consulting) have increased in recent years at lower rates than other expenses (such as depreciation and casket cost), and that overall cost and price increases have resulted more from a general increase in all business expenses than from a dramatic increase in any one expense category.

Record analysis of that data also indicates that funeral homes' personnel expense as a proportion of overall business expense has not significantly changed in many years, including the period covered by the Rule, and that salary expense as a proportion of personnel cost has likewise remained stable. The industry consultant who presented the underlying data for that analysis reported that significant changes in those areas should have occurred if the Rule were significantly increasing funeral homes' personnel costs. Other empirical evidence shows that, although the length of arrangements conferences since the Rule may have increased for many providers, the majority of providers have not raised their prices as a result of the Rule and its disclosure requirements. Substantial evidence, including survey data, thus demonstrates that the Rule has played a very minor role in business expense and price increases, which the evidence attributes generally to inflation and independent funeral home business decisions.

The evidence also shows, however, that many providers' most salient concerns about the Rule relate to compliance difficulties associated with the requirements to make the affirmative telephone disclosure that price is available, give the GPL at the outset of "funeral arrangements" discussions, and seek express, prior approval for embalming. Providers are concerned that these requirements can make what is already a delicate transaction even more awkward and offensive to consumers. Substantial evidence also indicates, however, that at least some of that concern regarding the GPL and prior embalming approval may be caused by providers' misinterpretation of, or overreaction to, the Rule's actual obligations.

The evidence indicates, however, that the actual or potential offense to consumers and providers imposed by the affirmative telephone provision is not outweighed by its benefits to consumers. The evidence indicates that consumer shopping among funeral homes is infrequent, and, although it is likely to increase as Rule compliance and consumer awareness increase, consumers' increased price-sensitivity will likely lead those consumers interested in price-shopping to call funeral homes or other sources of price information and request that information. The evidence shows that consumers do so now where "low-cost" funeral homes or comparative price information is available.

In any case, other empirical evidence demonstrates that, although most consumers report "satisfaction" with their arrangements under any survey conditions, the proportion of 1987 consumers reporting satisfaction steadily increases as simultaneous provider compliance with the Rule's provisions increases. The results of the one reliable survey of consumer satisfaction with funeral service conducted before and after the Rule suggests no diminution in satisfaction with Rule-related services.

In light of that and other substantial evidence, the staff is not persuaded by arguments that the overall change in the level of consumer expenditures is the sole test of the Rule's benefits, even if compliance were higher and consumer expenditures still remained unchanged. The evidence shows that overall consumer expenditures may rise, even when some consumers purchase less, as a result of price increases related to funeral homes' fixed costs that are not associated with Rule compliance. The record evidence indicates, in fact, that Rule compliance has not increased funeral providers' costs or prices, that consumer expenditures and funeral prices, when compared to other service industries, have not increased above inflation, and that an industry "price consciousness" induced by the availability of the GPL may have tempered some price increases. That evidence could lead one to conclude that the Rule's mandatory itemization and disclosure requirements may have helped retard the growth of funeral prices and consumer expenditures, a benefit predicted by the Commission.

(5) Most states have not adopted laws similar to the Rule in scope and coverage, and such action is unlikely in the near future.

The record contains little, if any, evidence that the level of state regulation of the funeral transaction has substantially changed, or will likely change, from that documented by the staff's 1987 survey. That review of the states' funeral industry statutes, regulations and rules revealed that ten states have incorporated the Rule by reference into their laws or adopted provisions similar to six of the Rule's "core" requirements. Six others have enacted at least four of those provisions, and, overall, thirteen to twenty-five states have laws that include one or more provisions similar to the Rule. The record contains no evidence that additional states have adopted relevant funeral laws or, with the possible exception of Texas, that existing laws have been significantly strengthened.

The evidence indicates that, although the Rule has helped stimulate the enactment of similar funeral industry laws in several states, such reform is unlikely in other states because of industry opposition. Those state representatives that appeared during the proceeding concluded that the Funeral Rule needs to be retained as a result, and is beneficial to consumers, funeral providers, and state enforcement officials.

(6) Sellers of funeral goods or services not covered by the Rule do not appear to be engaging in the practices it addresses.

Record evidence does not establish that sellers of funeral goods or services, particularly cemeteries and crematories that do not sell funeral goods, are engaged in widespread abuses addressed by the Rule, namely, lack of price disclosure, forced "bundling," and misrepresentation of funeral goods and services. The services generally provided by those sellers are not comparable to funeral home services, because they do not include a similar wide variety of different services and goods that are "packaged" into a single "funeral." The "bundling" issue that

is the primary practice addressed by the Funeral Rule is thus not apparent in those industries, at least in the same magnitude, as it is in the funeral home industry.

The evidence indicates generally that cemeteries itemize and disclose prices for outer burial containers, the primary merchandise sold in competition with funeral homes, and caskets, which several cemeteries offer on a pre-need basis. The evidence also shows that the overwhelming majority of consumer complaints to the Commission, the AARP, and state and industry regulators about cemetery practices do not relate to bundling, lack of price disclosure, or misrepresentation, but to such things as gravesite maintenance and liquidation of cemetery property.

Complaints and other evidence regarding alleged cemetery practices of exclusive sale and installation of monuments and markers, and excessive installation and inspection fees when the marker is installed by third parties, also do not reliably establish that those practices are widespread, or that current industry guidelines and federal court decisions prohibiting most of the alleged practices do not sufficiently address any problems.

Substantial evidence also establishes that most crematories do not deal directly with the public, and the record contains little, if any, evidence that those crematories that do deal with consumers fail to disclose prices or misrepresent their goods and services.

The record contains evidence on three other "expansion" issues raised by interested rulemaking parties -- minimum standards for the cremation process, pre-need contract standards, and the removal or modification of state pre-need trusting and other laws that allegedly restrict competition in the sale of funeral goods and services. Those issues were excluded from the NPR by the Commission because, though they may warrant attention, they are ancillary to the primary purpose of the review. The staff in this report nonetheless discusses the evidence presented on the state law issue because of the allegation made during the review that unnecessarily restrictive laws limit the Rule's ability to increase competition in the funeral market. The staff in this report, however, makes no recommendation on that issue.

Staff Recommendations

The staff makes the following three major recommendations for Commission action based on its review of the record evidence and its resulting evidentiary findings: (1) that the Commission retain the Rule without repeal or major, substantive modification of the Rule's primary itemization, price and other disclosure requirements; (2) that the Commission refrain from expanding the Rule at this time to cover sellers of funeral goods or services not presently included; and (3) that the Commission repeal § 453.2(b)(1)(i) of the Rule, the affirmative telephone disclosure provision.

The staff recommends overall retention based primarily on its conclusion that the Rule appears to be providing some actual pro-competitive and informational benefits to consumers that far outweigh its costs to providers, and that those benefits, but not costs, are likely to increase over time if the Rule remains in place. The low levels of overall industry compliance, price competition and consumer awareness demonstrated by the evidence are insufficient, in the staff's view, to permit full realization of those benefits. Those findings appear to make premature any firm conclusions about the extent of the Rule's benefits over time that is based primarily on evidence of consumer behavior since 1984; given those results, it would appear that one can not

reasonably expect consumer behavior or expenditures to have substantially changed in the short time since the Rule's promulgation.

The staff further concludes that, if the Rule's only benefit were to increase informed consumer choice (without imposing substantial costs on industry), even though some chose to spend more for their arrangements than they would have without itemization, that benefit would justify retention of the Rule's itemization requirements because other consumers would have the right to choose to spend less. The Commission so stated the purpose of itemization when it promulgated the Rule. The record evidence in fact strongly indicates that many consumers will spend less as a result of informed choice, and that the Rule does not impose compliance costs that result in increased funeral prices or consumer expenditures.

The staff recommends against Rule expansion simply because the evidence does not appear to justify it. Little, if any, systematic or otherwise reliable evidence in the record documents industry-wide deceptive or unfair practices concerning Rule-related issues by cemeteries, crematories that do not sell funeral goods, or other sellers of funeral goods or funeral services not presently subject to the Rule.

The staff, however, recommends repeal of the affirmative telephone disclosure requirement because its costs appear to outweigh its actual and potential benefits. The evidence indicates that the affirmative telephone disclosure is an inartful and unnecessary signal to consumers about the availability of price information that is unlikely, over time, to provide substantial benefits to consumers not afforded by the Rule's other price disclosure provisions. The evidence indicates that the Rule is contributing now to increased consumer "price- sensitivity" that results in at least some consumer shopping for lower-cost providers and services. In the staff's view, the provision's potential to benefit additional consumers is unlikely, and does not justify the imposition of undue awkwardness and potential offense in what is otherwise an extremely delicate business, social and moral transaction. The staff is convinced that the integrity of the Rule's price disclosure requirements will be maintained by retention of the requirement to provide price and other readily-available information over the telephone on request.

The staff also makes a variety of minor, "fine-tuning" recommendations in light of the evidence on industry compliance. Those recommendations are designed to clarify the Rule's requirements and reduce actual or potential compliance burdens in order to increase provider compliance with, and consumer understanding of, the Rule's disclosures. Those recommendations, which do not alter providers' basic obligations or consumers' rights under the Rule, concern the GPL timing and disclosure requirements, the casket and outer burial container price list disclosures, and the general anti-tying provision.

One recommendation concerning that last provision warrants particular mention because of its high visibility during the proceedings. The staff recommends that the Commission add a clarifying provision to the Rule's anti-tying requirement that prohibits providers from charging any fee as a condition to furnishing funeral goods and services that is not otherwise permitted by the Rule. The proposed amendment is designed to eliminate so-called, non-declinable "casket handling fees," which frustrate the Rule's basic "unbundling" requirement by denying consumers who attempt to purchase caskets from third parties the right to decline caskets sold by the funeral home. Those fees, as well as the emergence of third-party casket sellers, have developed in the market since the Rule's promulgation.

Finally, the staff makes recommendations for technical Rule amendments that appear necessary to correct inconsistencies or unnecessary language in certain provisions, or to compliment other recommended amendments.

The staff's recommended Rule with proposed amendments is attached to this report as Appendix A. Appendix B. compares in one document the recommended Rule with the current Rule, and Appendix C. is the existing Funeral Rule.

Organization of the Report

The remainder of this memorandum contains the staff's final report on the Funeral Rule Review and its specific recommendations for Commission action. Section I. provides a background discussion of the Rule, its history, and the legal standard of this review, and presents a brief profile of the industry and the level of state regulation of the funeral transaction extant in 1987. The staff in Section II. presents the evidence and staff's conclusions on the overall impact of the Rule to date on consumers, funeral providers and states, including separate discussions of the adequacy of the review period and industry compliance to assess the Rule's costs and benefits, and of the evidence to support overall retention or repeal of the Rule. Section III. contains the staff's analysis of the Rule's current provisions and various alternative amendments that were the primary focus of the proceeding in light of the record evidence on their costs and benefits, and includes discussion of technical amendment issues. The staff provides in APPENDICES A.- E. its proposed, amended Rule, a document comparing the recommended Rule with the existing Rule, the current Rule and Commission Statement of Basis and Purpose, the ANPR, and the NPR.

I. Background

A. The Funeral Rule: Requirements and Purpose

1. Requirements

The Funeral Rule declares it an unfair or deceptive act or practice for funeral providers to: (1) fail to furnish price information to funeral consumers; (2) require consumers to purchase items they do not desire to buy; or (3) embalm deceased human remains for a fee without authorization. The Rule further declares it a deceptive practice for funeral providers to misrepresent: (1) requirements for embalming, cremations, and grave vaults or grave liners, (2) legal and cemetery requirements, (3) preservation and protection capabilities of funeral goods and services, or (4) cash advance charges for items arranged for by the funeral provider on the consumer's behalf.

To prevent those practices and to correct consumers' misimpressions, the Rule contains several remedial requirements. The Rule requires that funeral providers: (1) affirmatively disclose to telephone callers who inquire about funeral "terms, prices or conditions" that price information is available over the telephone, and disclose specific price information over the telephone to persons who call and request it; (2) disclose written price information by means of a general price list ("GPL"), casket price list ("CPL"), and an outer burial container price list ("OBC-PL") to persons who inquire in person about funeral arrangements or the prices of funeral goods and services;[5] (3) give purchasers a written statement, after they have selected funeral goods and services, containing the prices for each of the items selected, the total price for the funeral arrangements selected, price estimates or actual costs, if known, for cash advance items, and any legal, cemetery or crematory requirements that compel the purchase of any items or services for the particular funeral; (4) make truthful representations about legal and other requirements that compel the purchase of particular items or services; (5) allow consumers to select and purchase only those goods and services they desire (instead of offering goods and services only in predetermined packages); (6) seek express approval before embalming the deceased for a fee; (7) make truthful representations about the preservative and protective value of funeral goods and services; (8) disclose that they charge a fee for obtaining cash advance items, if that is the case; and (9) make unfinished wood boxes or alternative containers available for direct cremation, if the provider offers direct cremation.

The Funeral Rule also requires that the Commission begin a rulemaking amendment proceeding four years after the effective date of the Rule to assess whether the Rule should be modified or repealed.[6]

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[5] The Rule permits providers to incorporate the information from the casket and outer burial container price lists in the general price list. This combined list also must be offered to persons who inquire in person about funeral arrangements or the prices of funeral goods and services.

[6] This provision, set forth in Section 453.10 of the Rule, states:

No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) [of the FTC Act] to determine whether the rule should

(continued...)

2. Purpose

The Commission in its SBP stated that the essential purpose of the Rule is to lower barriers to price competition in the funeral market and facilitate informed consumer choice. The Rule thus seeks to ensure that consumers have access to sufficient information to permit informed purchase decisions, that consumers are not required to purchase items they do not want and are not required by law to purchase, and that misrepresentations are not used to influence consumer purchase decisions.[7]

The Commission acknowledged that the Rule would achieve this goal only if: (1) a significant percentage of the industry complied with Rule;[8] (2) consumers considered price in their purchase decisions;[9] and (3) the Rule "operated as expected" in reducing barriers to price competition and increasing informed consumer choice.[10]

B. History of the Proceeding

1. The Initial Promulgation

Following the staff investigation and several years of hearings, the Commission tentatively approved a Funeral Rule on March 23, 1979. That version of the Rule never became effective, however, as events in Congress and in the federal courts compelled changes in the tentatively-approved Rule.

Prior to the Rule's promulgation, Congress enacted the FTC Improvements Act of 1980, which, for a three year period, limited the Commission's authority to regulate the funeral industry by placing restrictions on what provisions the Commission could include in any Funeral Rule it might adopt.[11]

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[6](...continued)
be amended or terminated.

This provision also required the Commission to make a final decision on the recommendations of this proceeding no later than eighteen months after the initiation of the proceeding. The Commission recently deleted that requirement, however, and directed staff to complete the review proceeding expeditiously. 54 Fed. Reg. 19359 (May 5, 1989).

[7] R-B-5 at 42260.

[8] Clearly, the degree of compliance will affect the Rule's impact on the market.

[9] R-B-5 at 42272, col. 2.

[10] R-B-5 at 42299, col. 3.

[11] Section 19(c)(1) of the Act allowed the Commission to expend funds for fiscal years 1980, 1981 or 1982 to issue and enforce the Funeral Rule only to the extent that the Rule:

(A) requires persons, partnerships, and corporations furnishing goods and services relating to funerals to disclose the fees or prices charged for such goods and services in a manner prescribed by the Commission; and

(continued...)

In addition, the United States Court of Appeals for the Second Circuit in *Katherine Gibbs School, Inc.*, v. *FTC*, 612 F.2d 658 (2d Cir. 1979), held that the Magnuson-Moss Act required the Commission to include in the text of a trade regulation rule a description of the unfair or deceptive acts or practices the rule addresses. In several provisions of the tentatively-adopted Funeral Rule that had not been done.

Accordingly, the Commission directed the staff to conform the tentative Rule to the requirements of the Improvements Act and the Court's construction of the statute.

Following that process, the Commission issued the present Funeral Rule on September 24, 1982, making it fully effective on April 30, 1984. The Commission's decision to promulgate the Rule was appealed, however, and was subsequently affirmed in *Harry & Bryant Co.* v. *FTC*.[12] On July 9, 1985, the staff issued Final Compliance Guidelines to assist providers in their efforts to comply with the Rule.[13] Although the Commission's initial efforts to encourage industry compliance were primarily educational, the Commission to date has filed twelve federal district court cases seeking injunctive relief and civil penalties against individual providers for their alleged violation of the Rule.

2. The Mandatory Review

On December 9, 1987, the Commission issued an Advance Notice of Proposed Rulemaking ("ANPR") describing the planned review of the Funeral Rule.[14] Although the ANPR did not formally commence the review, it notified the Congress and the public that the Commission intended to conduct the rulemaking. In addition, the ANPR solicited comments from the public

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[11](...continued)
(B) prohibits or prevents such persons, partnerships, and corporations from --

(i) engaging in any misrepresentation;
(ii) engaging in any boycott against, or making any threat against any other person, partnership, or corporation furnishing goods and services relating to funerals;
(iii) conditioning the furnishing of any such goods or services to a consumer upon the purchase by such consumer of other such goods or services; or
(iv) furnishing any such goods or services to a consumer for a fee without obtaining the prior approval of such consumer.

[12] 726 F.2d 993 (4th Cir. 1984), *cert. denied*, 469 U.S. 820 (1984). The Court held that the Funeral Rule did not, as alleged, exceed the Commission's authority under §§ 5 and 18 of the FTC Act and did not violate funeral directors' First Amendment rights of commercial free speech.

[13] R-B-6 (50 Fed. Reg. 28062).

[14] 52 Fed. Reg. 46706.

on many of the key Rule-related issues.[15] Over 350 persons responded to the request for public comment.[16] The majority of the commenters recommended retention or expansion of the Rule.

On May 31, 1988, following a review and assessment of the comments, the Commission published a Notice of Proposed Rulemaking ("NPR") initiating the proceeding.[17] The Commission in the NPR established a schedule for three public hearings to be held in Washington, Chicago and San Francisco, and requested comment on a number of questions set out in the notice. In all, 189 individuals or groups submitted comments.[18]

Based on requests from interested parties who wished to participate and question witnesses at the public hearings, the Presiding Officer designated four groups for the purpose of the examination of public hearing witnesses: Group 1: Consumer Interest Group, including the American Ass'n of Retired Persons ("AARP") and the Continental Ass'n of Funeral and Memorial Societies ("CAFMS"); Group 2: Funeral Director Group, including the National Funeral Directors Ass'n ("NFDA") and the National Selected Morticians ("NSM")[19]; Group 3: Crematory and Prearrangement Group, including the Cremation Ass'n of North America ("CANA") and the Pre-Arrangement Ass'n of America ("PAA"); and Group 4: Special Cemetery Group, including the American Cemetery Ass'n ("ACA").[20] The Presiding Officer established the last Group 4. for the limited purpose of conducting examination on whether the Rule should be expanded to include cemeteries.

The public hearings commenced in Washington, D.C., at which 21 witnesses presented testimony from November 7-10, 1988. An additional 21 witnesses appeared at the Chicago hearings, from December 5-9, 1988. In seven days of hearings in San Francisco from January 9-18, 1989, 39 witnesses appeared. Finally, the Presiding Official conducted an additional hearing in Washington, D.C. on February 3, 1989, at which three economists, representing the AARP, the NFDA, and the Commission's Bureau of Economics, presented their views on the empirical evidence contained in the record.[21]

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[15] The ANPR contained 44 questions concerning consumer and funeral provider experiences, the scope of the Rule, compliance, various Rule provisions, regulatory flexibility and the paperwork burden imposed by the Rule.

[16] Comments were submitted by diverse groups and individuals, including 131 consumers, 134 funeral directors, 46 memorial societies, and approximately 20 trade associations and related industries.

[17] R-A-1 (53 Fed. Reg. 19864).

[18] Comments were received from two funeral directors, six cemetery/crematory/third-party casket sellers, six funeral director trade associations, 147 consumers, 27 consumer/memorial society groups, one federal official and one state group.

[19] That group also included the Hursen Funeral Home, and its owner, William Pierson, the Illinois Funeral Directors Ass'n, and the Conference of Funeral Service Examining Boards ("CFSEB").

[20] *See* R-A-37.

[21] Testimony was received from sixteen funeral directors, five monument builders, one vault seller, sixteen cemeterians/cremationists, one individual who provides business and consulting services to industry members, seven state officials, twenty consumer advocates, nine consumers/ clergy/counselors, and eight economists/ survey experts or consultants (one economist testified twice).

Seven Rebuttal Submissions were filed in April, 1989. In addition, in response to a request from the Presiding Official, six of the interested parties filed Proposed Findings of Fact, Conclusions of Law and Recommended Decision in May, 1989.

3. The Baseline Study ("BLS")

Prior to the promulgation of Funeral Rule, the Commission's Impact Evaluation staff and the funeral industry project staff contracted with Market Facts, Inc. for a survey of individuals who had recently arranged a funeral. The staff developed the study to provide "baseline" statistics on the incidence of those funeral industry practices that were to be addressed by the proposed Funeral Rule.[22]

The staff intended to conduct a replication of the BLS at a later date to measure the impact of the Rule on consumer and industry behavior.[23] Some of the results of the BLS were surprising, however, because they appeared to contradict evidence presented in the rulemaking hearings.[24]

Because of this conflicting evidence, the staff contracted with Market Facts, Inc. to conduct a validation follow-up to the BLS.[25] Upon review of the BLS and the validation results, the staff

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[22] The Baseline Study consisted of a national sample of persons who participated in making funeral arrangements between November 1980 and May 1981. Respondents for the study were drawn from the population of Market Facts' Consumer Mail Panel, a national sample of more than 100,000 households who had agreed to respond to mail questionnaires, telephone surveys, and other tests on a continuing basis. From a total pool of available households, balanced samples were drawn to parallel census data with respect to selected social and demographic factors. Persons recently arranging funerals were located by screening through a brief mail questionnaire. A demographically-balanced national sample of 55,000 mail-panel households was identified, 1,767 of whom were found to be qualified for participating in the survey proper. Pretested questionnaires were then mailed to a randomly selected sample of 1,600 of the eligible households; the first 1,200 usable replies were accepted. Information from these returned questionnaires constituted the data base for the analysis.

[23] The Replication Study was conducted by Market Facts, Inc. in the Summer of 1987. The results are discussed throughout the remainder of this memorandum.

[24] *See, e.g.*, R-B-70 (Memorandum from Funeral Rule Staff to Commission, "Impact Evaluation Survey, Funeral TRR," July 15, 1982). The BLS data suggested that in 1981-1982 funeral providers: (1) seldom refused to give price information over the telephone; (2) often provided consumers who made arrangements ~~at the~~ funeral home with some written price information; (3) made extensive use of some form of itemized pricing in the arrangements statement; and (4) sought authorization to embalm the deceased with relative frequency. *See* R-B-75 (Final Staff Report, Part II, 187-407) and R-B-74 (Presiding Officer's Report, 50-52, 91-110).

[25] *See* R-B-3 (Baseline and Follow-up Study Report) at 4-9. The follow-up study consisted of telephone interviews with a non-random sample of 250 respondents to the original mail survey. To the extent possible, persons who had responded in the mail survey to the questions on telephone price information, availability of written itemized price disclosures and authorization for embalming were surveyed in the telephone follow-up. The purpose of this follow-up interview was to probe key issues more deeply and to provide a data base for investigating the reliability of selected baseline questions. An analysis of both the baseline data and the follow-up data was conducted by Dr. J. Paul Peter of the University of Wisconsin. The staff chose Dr. Peter because he is an acknowledged expert in survey analysis. Dr. Peter concurred in the staff's conclusion that, aside from the data concerning the receipt price information in person and over the telephone, the degree of itemization on the bill, and the degree to which funeral providers sought prior authorization for embalming, the baseline data were reliable.

(continued...)

concluded that, in most respects, the BLS and the validation study provided information that was cumulative and consistent with much of the materials already on the rulemaking record. However, the validation study revealed that in four specific areas -- consumers' receipt of telephone price information, written itemized price information and itemized statements, and requests for permission to embalm -- the baseline data were subject to qualification and differing interpretation.[26]

4. The Replication Study ("RS")

As part of its preparation for the review of the Rule's performance for the period 1984-1988, the staff commissioned the "Replication Study"[27] to measure consumers' experiences in arranging at-need purchases of funeral goods and services. The staff planned to compare the study results with those from the BLS conducted in 1981. The staff hoped that this comparison would illuminate any changes in the funeral market during the first years that the Rule was in effect.

Under contract with the Commission, Market Facts, Inc. in 1987 conducted a national mail-panel survey of 1,004 consumers who had or shared primary responsibility for making funeral arrangements between December 1986 and June 1987.[28] The primary purpose of the Replication Study was to update the data produced by the Baseline Study so that comparisons could be made between 1981 and 1987 concerning: (1) consumer purchasing behavior and expenditures for funerals; (2) consumer knowledge of the funeral market; and (3) industry practices and prices. In this way, inferences could be drawn about the Funeral Rule's impact on the funeral market.

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[25](...continued)

The telephone interview results showed less than a 55% consistency response rate to the following questions: (1) whether advance permission to embalm was requested; (2) whether prices or arrangements were discussed by telephone; and (3) whether the participants in the study received itemized prices and fully itemized statements.

[26] *See supra* n. 24, staff memorandum dated July 15, 1982 at 2. After reviewing the staff's analysis, a majority of the Commission voted against reopening the rulemaking record to consider the baseline results. During the appeal of the Rule, the Court examined the question whether the Commission's decision not to reopen the rulemaking record to include the baseline study was an abuse of discretion. The Court held that "[i]n light of the abundance of information on accessibility of price information already in the record, reopening was clearly not warranted." *Harry & Bryant Co.* v. *FTC*, 726 F.2d 993, 998 (4th Cir. 1984).

[27] R-B-2 ("Report on the Survey of Recent Funeral Arrangers," Market Facts, Inc., Report to the Federal Trade Commission, April 1988).

[28] Respondents for the study were drawn from the population of Market Facts' Consumer Mail Panel ("CMP"), a national sample of more than 200,000 households that have agreed to respond to mail questionnaires, telephone surveys, and other tests on a continuing basis. From a total pool of available households balanced samples were drawn to parallel census data with respect to selected social and demographic factors. Persons recently arranging funerals were located by screening through a brief mail questionnaire. A demographically-balanced national sample of 55,000 CMP households was identified, 1,710 of whom were found to be qualified for participating in the survey proper. Pretested questionnaires were then mailed to a randomly selected sample of 1,648 of the eligible households. 1,240 questionnaires were returned, a 75% response rate. 236 of those 1,240 returns were not usable because the respondents failed to requalify on the date of the funeral or were involved in funerals that had not yet occurred. Information from the remaining 1,004 returned questionnaires constitute the data base for the analysis.

The staff designed the Replication study to preserve, as much as possible, similarity to the BLS questionnaire,[29] while seeking to avoid the problems identified in a few areas of the baseline questionnaire.[30] To address those flaws, the funeral project staff made several changes in the questions seeking data on: (1) shopping behavior;[31] (2) telephone price information;[32] (3) in-person written price disclosures;[33] and (4) embalming authorization.[34]

C. Legal Standard of Review

The Commission's authority to substantively modify, or repeal, its trade regulation rules is the same as its authority to promulgate them. Thus, to the extent the decision to modify or repeal is based on factual conclusions, the Commission must have the same support for those conclusions as if it were promulgating a new rule.[35]

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[29] In some situations, comparison to the baseline questionnaire is not useful because: (1) few respondents answered the questions; (2) the baseline question is inaccurate or vague; or (3) the particular question is new. In those situations, comparability with the baseline results was clearly not an important consideration.

[30] The staff also invited comments on the draft Replication Study questionnaire from the major industry and consumer groups that had participated in the original rulemaking proceeding. (Staff provided copies of the draft questionnaire to and sought comments from the following trade groups: NFDA, NSM, IOGR, CANA, PAA and FFDA; and consumer groups: AARP, CAFMS, and CU.) Although several of those groups responded, the National Funeral Directors Association provided the most substantial comments. The staff made several significant changes to the questionnaire in response primarily to the NFDA's input. For example, the staff at NFDA's suggestion added a question about consumer's overall satisfaction with the goods and services provided by the funeral home (Question 9a). The NFDA's first recommendation was that no changes be made to the draft questionnaire, but suggested in the alternative many modifications. *See* R-B-13. To the extent possible, the staff accommodated the NFDA's concerns.

[31] The staff added questions to elicit data on the extent to which consumers contacted more than one funeral home before making arrangements. The original baseline questionnaire had one question on the number of funeral homes contacted. The replication questionnaire has 11 shopping questions.

[32] The validation study indicated that the baseline questionnaire did not elicit responses on the specific price information that the respondents got over the telephone. For example, question 22 on the baseline questionnaire asked whether any funeral provider refused to give price information over the telephone. The answer to such a question would not reveal whether the price information provided was very general (e.g., "We have funerals from $500 to $5,000, come in if you want more specific information.") or specific (e.g., "We have funerals from $500 to $5,000, would you like more specific information?"). The replication questionnaire has 5 questions to probe the type of price information the respondent sought and the response the funeral provider gave.

[33] One of the criticisms of the baseline questionnaire was that it did not help the respondents distinguish between a general price list and the statement of funeral goods and services selected by the consumer. The wording of the replication questionnaire was modified in an attempt to help respondents distinguish between the two documents.

[34] The validation study suggests that the baseline results concerning whether the funeral provider sought pre-authorization for embalming may not be reliable (i.e., less that 50% of the respondents in the validation study gave consistent answers to this question). To address that concern, the embalming authorization questions in the replication questionnaire were augmented and modified to elicit who gave the permission and probe whether or not the request for embalming permission was express, as required by the Rule.

[35] Section 18(d)(2)(B) of the FTC Act sets forth the standard to be applied in an amendment proceeding. It states that a substantive amendment to or repeal of a rule shall be prescribed, and subject to judicial review, in the same manner as if the rule were being first promulgated.

Although the Courts have found that the standard of review for a deregulatory action is the same as when a regulation is initially promulgated, "the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and, accordingly, it may be easier for an agency to justify a deregulatory action..."[36] In fact, an agency's decision to modify a rule may be based on the same facts as its original decision to issue the Rule.[37] Of course, in such a case the agency must carefully explain why it is reaching a different conclusion; if the decision is based on new data, the agency must explain why that new data is more persuasive than facts already on the record.[38]

Even without a change in circumstances, an agency may also modify or repeal a rule because its view of the public interest has changed. To justify such a modification, an agency need not affirmatively demonstrate that the "status quo" (i.e., the Rule's existence) is wrong or that the current Rule harms the public interest; it may also demonstrate that there is no cause to believe that the "status quo" is right or that the public interest is benefitted by the Rule.[39] Indeed, uncertainties may be a basis for repeal if supported by the record and reasonably explained.[40]

In their proposed findings of fact, the NFDA and NSM take the position that, because the mandatory review is subject to the same standards and procedures as a *de novo* rulemaking, the Commission must base any decision, including retention of the Funeral Rule, on substantial evidence in the rulemaking record taken as a whole.[41]

The AARP disagrees with the funeral directors on that burden issue, asserting that the Commission must presume that the Rule is valid and must continue the Rule in the absence of good reasons in the record for its modification or repeal.[42]

In *State Farm*, the Supreme Court noted that, in a repeal or amendment proceeding, the existing rule should be treated as the "status quo" and an agency is obligated to supply a reasoned analysis for any change to overcome the "presumption" against changes in current agency policy. At issue in that case was the propriety of a Department of Transportation decision to rescind a

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[36] *Motor Vehicle Manufactures Association v. State Farm Mutual Automobile Insurance Co., et al.*, 463 U.S. 29, 42 (1983).

[37] *See Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (evidence may provide substantial evidence for either of two inconsistent conclusions).

[38] *See Public Citizen v. Steed*, 773 F.2d 93, 102 (D.C. Cir. 1984).

[39] *State Farm* at 57. *See Center for Auto Safety v. Peck*, 7651 F.2d 1336, 1349 (D.C. Cir. 1985) (court upheld agency modification of rule where agency was no longer able to conclude rule achieved certain safety goals); *Center for Science v. Treasury*, 797 F.2d at 1003 (court upheld agency modification of rule where agency was no longer able to conclude benefits outweighed costs).

[40] *State Farm* at 51-52.

[41] R-M-9 at 213-214.

[42] R-M-11 at 143-144.

regulation requiring automobile manufacturers to install passive restraints in new vehicles. The Court held that the agency did not present an adequate basis and explanation for the rescission.[43] The Court further stated that revocation of an extant regulation is substantially different from a failure to issue a regulation. Rather, revocation constitutes a reversal of the agency's former views as to the proper course. A presumption exists that the agency's policies will be best carried out if the settled rule is adhered to. Thus, an agency that changes its course by rescinding a regulation must supply a reasoned analysis for the change beyond that which is required when an agency does not act in the first instance.[44]

As a legally promulgated rule, the Funeral Rule is a settled course of action within the framework of *State Farm*. As such, presumptive validity would require the Commission, in the staff's view, to articulate a reasoned basis for repealing or modifying it. That basis could be on factual or policy grounds, and could include a reasoned judgment that the Rule, or parts of it, no longer serve the public interest.

However, the staff does not agree with the NFDA and NSM to the extent they argue that, to retain the Rule and each of its provisions, the Commission must find that there is substantial evidence supporting their continuation. Should the Commission decide to retain the Funeral Rule or certain of its provisions unchanged, it would not change a settled course of action. Rather, the Commission would be maintaining the "status quo." Thus, under *State Farm*, it would not need to base a decision to retain the Rule or any of its individual provisions on substantial evidence.

Of course, if there is evidence in the record that seriously calls into question whether the Rule or any of its particular provisions should be retained, then, in the staff's view, the Commission should consider that evidence and indicate why that evidence does not require repeal or narrowing of the Rule.

D. Profile of the Funeral Industry

1. Overview

Overall, consumers spend about 5.8 billion dollars a year[45] for funeral services at approximately 21,000 funeral establishments in the United States.[46] In 1988, the average adult

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[43] *State Farm* at 34.

[44] *State Farm* at 41-42.

[45] This estimate is conservative because it includes Internal Revenue Service data for only about 14,000 of the 21,000 existing funeral homes. The dollar estimate is based on the U.S. Dept. of Commerce, Bureau of Labor Statistics' 1987 Service Annual Survey. Table 1. (Standard industrial classification 7261. This includes establishments primarily engaged in preparing the dead for burial, conducting funerals, and cremation.) This estimate excludes most cemeteries and monument retailers.

[46] Survey of June, 1989, Kates-Boylston Publications, N.Y., N.Y. Kates-Boylston is the publisher of the *American Funeral Director* magazine.

(continued...)

funeral cost almost $3000, excluding cemetery charges.[47] With the number of deaths in the United States around two million a year, each funeral home averages less than one hundred transactions a year.[48] With this relatively small demand for services, the industry acknowledges that the number of funeral homes may be greater than the market for funeral services would appear to support. The NFDA and the NSM assert, for example, that such "excess capacity" is necessary because of consumers' special needs for personalized and immediate service.[49]

In the initial Funeral Rule proceeding, the Commission reported that a large percentage of funeral providers were sole proprietorships.[50] That is still the case today.[51] Current information from the Census Bureau states that over eighty-six percent of all funeral establishments have 9 or fewer employees.[52] According to the 1985 NFDA "census" of its membership, 75% of providers operate one facility, and 60% have their main facility in rural areas.[53] Seventy-six percent of funeral providers responding to an NFDA survey reported in 1984 that they had four or fewer competitors in their community or market area.[54]

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[46](...continued)
A funeral establishment is a physical plant from which funeral goods and services are sold. A funeral provider is a person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public. A funeral provider may operate more than one funeral establishment. The number of funeral establishments appears to be relatively stable. In 1982, the Commission estimated that there were approximately 22,000 funeral establishments in the United States. R-B-5 at 42263.

[47] Hahn, HX-49 at 3, Tr. Vol. II, 668. Mr. Wendell Hahn is the President of Federated Funeral Directors of America, Inc., a firm that provides accounting and other financial services to 1,500 independent funeral homes in 30 states. The figure cited in the text is based on FFDA's review of arrangements documents representing nearly 10% of the funerals conducted in 1988 in the United States.

[48] *See* R-B-5 at 42263; R-B-14 ("Findings of the FTC Survey," V. Pine study of NFDA members, 1985) at 4 (median number of death calls was 94). This would average out to less than two a week. The 1985 NFDA "Census" of its membership showed that the median number of funerals conducted was 75. R-B-63 at 3, 7. The staff notes that some funeral homes handle over a thousand cases a year while others conduct fewer than ten.

[49] R-M-9 at 33-35 ("It is necessary to have a certain amount of excess capacity built into the [funeral home] facility so that [the provider] can provide satisfactory service during peak demand times"). *See also* R-B-64 (1985 NFDA Financial Operations Survey) at 32 (smaller funeral homes have greater excess capacity).

[50] R-B-5 at 42263 (based on 1972 Census of Selected Industries, Vol. I at 7).

[51] Mr. Alan Odendalh of the Small Business Administration stated that, according to information supplied to SBA from the U.S. Census Bureau, in 1982 the SBA would have classified 99.7% of the funeral establishments and crematories in the United States as small businesses (less than $3.5 million gross income per year).

[52] 1986 County Business Patterns, U.S. Census Bureau. Fifty-eight percent of funeral establishments have four or fewer employees. *Id.*

[53] R-B-63 at 2.

[54] R-B-14 at 3-4.

Vertical and horizontal integration is nonetheless occurring in the funeral industry, typified by the recent and rapid growth experienced by Service Corporation International, Inc.[55] There are several other large-scale operations in the industry.[56]

2. Growth of Pre-need

According to many funeral service professionals and academicians, future growth in the funeral service industry will be largely in the sale of funerals before the time of need ("pre-need" funerals).[57] The experience of SCI, the largest funeral provider, illustrates the industry's increased emphasis on pre-need marketing. According to the corporation's annual report of fiscal 1987, arrangement of pre-need contracts has increased dramatically over the last few years, with the following total annual face values (millions of dollars): $41.9 in 1983, $72.2 in 1984, $90.9 in 1985, $107.5 in 1986, and $154.8 in 1987.[58] Hillenbrand Industries, the largest manufacturer of caskets, reportedly estimates that the funeral industry arranged 22,000 pre-need funerals in 1960 and 600,000 in 1985. Paul Showalter, a journalist and industry observer, reported that a Hillenbrand official concluded that pre-need is the only means at present for funeral marketers to increase market share.[59]

In response to this trend, the National Selected Morticians, the International Order of the Golden Rule, the National Funeral Directors Association and several state associations have recently established pre-need marketing programs. One analyst estimated that, with the increase in pre-need selling (approximately 10 new sellers of pre-need contracts in 1987 alone) and

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[55] Unfortunately, SCI did not submit comment or otherwise participate in the Review proceeding. SCI is the largest corporate funeral provider. It had approximately 280 funeral homes and 22 cemeteries when the Funeral Rule was promulgated in 1982, and now owns 372 funeral homes, 92 cemeteries, 72 flower shops, 44 crematories and the second largest casket manufacturing company in the United States. SCI's operations cover 289 cities in 32 states. SCI recently acquired the second largest chain, Morlan Industries, which was less than one sixteenth SCI's size. According to industry analysts, SCI is not the only multi-national and multi-state funeral provider. In recent years, several other chains have emerged. *See* R-B-9 (P. Showalter, "The Business of Death," *Venture Magazine*, January 1987) at 30-36.

[56] *See* R-B-5 at 42263-64; R-B-7 ("Funeral Service in the Year 2000" (parts 1 & 2), *American Funeral Director*, January 1988 and February 1988, respectively); R-B-8 ("The Cemetery Industry in the Year 2000" (parts 1 & 2), *American Cemetery*, January 1988 and February 1988, respectively).

Several multi-state chains have emerged in the funeral industry in recent years. Dr. Joe Adams, director of the National Foundation of Funeral Service, estimates that chain operations constitute 3% of the market and are growing. Some providers have also moved into the cemetery, crematory and pre-need business. An indication of the trend to diversification is the Commission's recent intervention efforts to encourage state legislatures to permit combined ownership of mortuaries and cemeteries. Also, the Pre-Arrangement Association of America, formerly open exclusively to cemeteries, permitted funeral directors to join in 1987. Similarly, the Cremation Association of North America recently opened membership to funeral directors.

[57] *See, e.g.*, R-B-10 (Dr. Joe Adams, "Preneed, Megatrend of Funeral Service," *American Funeral Director* 18, July 1986); R-B-7 at 30.

[58] SCI annual report for fiscal 1987 at 10.

[59] R-B-9 at 30-36.

indications that venture capitalists are showing interest in funeral marketing, pre-need is likely to continue to grow in the next few years.[60]

3. Increase in Choice of Cremation

In addition to the growth in pre-need sales, consumers are increasingly selecting cremation as the means for disposition of the remains of a loved one. In 1970, the cremation rate in the United States was 4.58%; by 1980 it had risen to 9.74%. Cremation continues to grow at a steady rate; in 1987 it accounted overall for over 14% of all final dispositions, and was significantly higher than that in many states.[61] The Cremation Ass'n of North America predicts that the rate will be between 23 and 25% in the year 2000.[62]

In 1986, 879 crematories in the United States handled 300,587 cremations.[63] The Replication Study data indicates that cremations cost, on average, approximately 37% of the cost of a "traditional" funeral.[64]

E. State Regulation of the Funeral Industry

1. Background

The Commission in its Statement of Basis and Purpose recognized that state action to correct existing industry abuses, if such action were taken, could have significant benefits over regulation at the federal level.[65] The Commission concluded, however, that it could not rely on action at the state level to eliminate the need for a federal rule because state regulation in the past had not addressed the problems that the Funeral Rule is designed to correct. The Commission noted that a review of state law submitted to the Commission in 1976, and another review conducted in 1980, indicated that most states had not moved to establish requirements comparable to those that the Commission adopted, particularly in the area of price disclosure.[66]

2. State Law Survey Results

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[60] *Id.*

[61] R-B-20 (CANA Comment on the ANPR) at Exhibits 2-4. In Florida and California, for example, the cremation rate is significantly higher and in the Mid-West it is lower.

[62] R-M-1 (CANA Proposed Findings) at 22.

[63] R-B-20 at Exhibit 3.

[64] *See* Daniel, HX-122 (BE Staff Report) at Table III, p. 7.

[65] R-B-5 at 42289 ("First, it would allocate all funeral industry regulation to one level of government (i.e., the state), potentially allowing economies in the cost of enforcing regulations. Second, it could simplify the compliance burden on funeral providers, by giving them a single source of guidance for answers to their questions about their regulatory obligations. Third, state regulators should be able better than the Commission to keep abreast of non-compliance in local areas, and thus should be better able to enforce rule provisions with maximum effectiveness").

[66] *Id.*

The staff in 1987, as part of its preparation for the review, surveyed the states' funeral industry statutes, rules and regulations to discern whether state law had changed significantly since 1980.[67] The results indicated that, although a few additional states had adopted regulations conceptually similar to the Commission's Funeral Rule, the majority of the states had not imposed specific requirements on funeral providers that were comparable to the requirements of the Funeral Rule.[68]

In 1987, five states -- Oregon, Tennessee, Vermont, Virginia, and Wisconsin -- had incorporated by reference the Commission's Funeral Rule into their laws. Wyoming had incorporated the Funeral Rule's itemized pricing requirements only.

In addition, four states -- Florida, New Jersey, New York and Texas -- at the time of the staff's survey had requirements similar to those of the Commission's Rule; that is, state law: (1) required an itemized price list; (2) imposed an anti-tying provision; (3) required approval for embalming; (3) provided for the availability of price information over the telephone; (4) required an itemized arrangements statement; (5) prohibited requiring caskets for cremation; and (6) had at least one prohibition against certain misrepresentations.[69] A fifth state, Arizona, had similar regulatory requirements, and was granted a partial exemption from the Funeral Rule. Arizona does not, however, have an anti-tying provision similar to the Rule's requirement.

An additional six states in 1987 -- California, Indiana, Minnesota, New Mexico, Washington, and West Virginia -- had at least four of the requirements described above.

Several other states by 1987 had enacted various individual requirements also imposed by the Rule. In summary: (1) seventeen states required funeral providers to have an itemized pre-sale price list; (2) twenty-one states required funeral providers to give consumers a written final agreement; (3) twenty states required funeral providers to seek express permission to embalm; (4) thirteen states required funeral providers to give consumers price information over the telephone; (5) sixteen states prohibited tying arrangements; and (6) twenty-five states prohibited misrepresentations of legal and cemetery requirements.

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[67] The staff between April and June 1987 contacted each state board and requested a copy of the state laws regulating the funeral transaction. This review is based on an analysis of those materials.

[68] The staff in performing this analysis did not apply the stringent examination required to determine whether particular state laws warrant statewide exemption from the Funeral Rule. The staff thus does not intend to infer that a particular state has or has not met the criteria for exemption.

[69] The misrepresentation provisions we checked for were: (1) legal and cemetery requirements, (2) preservative and protective value of goods and services, and (3) prices and services generally.

II. Impact of the Rule

A. Sufficiency of Review Period and Industry Compliance to Fully Assess the Rule's Costs and Benefits

1. Time Period

The Commission in its Notice of Proposed Rulemaking initiating this review proceeding sought public comment on the question whether there has been adequate time to fully assess the Rule's impact on the funeral market.[70] The NPR highlighted that threshold issue for consideration because of the Commission's determination when it promulgated the Rule that its effects may be evidenced more slowly than in other industries.[71] The Commission stated its basis for that determination as follows:

> As discussed previously, the purchase of a funeral is infrequent. Consequently, many consumers will not have exposure to price lists or other provisions of the rule for many years. Thus, the stimulus for price competition, at least initially, is likely to come from sellers rather than buyers. The extent to which new entrants begin to compete on the basis of price, or which existing sellers begin to compete or advertise prices, is likely to determine how quickly competition begins to affect the marketplace. Considering the industry's traditional opposition to price advertising, and other constraints on price competition and barriers to entry, it is difficult to predict how quickly such competition will emerge.[72]

The Commission thus could not say when the Rule's impact would begin to be felt, but predicted based on the record that industry's response to the Rule would likely provide the initial impetus for increased competition more quickly than would consumers' response. Conversely, if the initial stimulus for price competition were to come from consumers, and not providers, the Rule might take longer to affect the funeral market.[73]

The Commission also recognized that the extent to which consumer behavior under the Rule would impact the funeral market is clearly dependent on consumers' actual use of the Rule-required information given to them by providers.[74] In this regard, the Commission found that two general factors peculiar to the funeral transaction limited consumers' ability to affect the market through informed decision-making: (1) consumer purchases of funerals were infrequent;

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[70] R-A-1 at 19869, Question 5.

[71] R-B-5 at 42299.

[72] *Id.* at n. 396.

[73] The Commission nevertheless announced its commitment to review, at an early date, whether the Rule "appears to be operating as expected [in reducing barriers to price competition and increasing consumer choice] or whether some modification is required," and to consider repeal at that time "if the marketplace problems addressed by the rule appear to be largely solved by increased competition." R-B-5 at 42260, 42299.

[74] *See* R-B-5 at 42272.

and (2) unlike other situations, consumers were unusually susceptible to influence from the funeral director's advice because of the unique combination of emotional stress, lack of experience and information, and tight time constraints.[75] The Commission further determined that a major contributor to this latter vulnerability was the fact that consumers who went to a funeral home prior to the Rule were not aware of prices charged (by particular funeral homes or by funeral homes generally), the range of available goods and services, or that choices were available at all; as a result of funeral provider practices, consumers were unfairly denied the opportunity to take these factors into account in making decisions about funeral arrangements.[76]

Consumers' ability to use the Rule-required information to select a funeral home or individual goods and services as intended by the Commission would clearly be affected, at a minimum, by the degree of full industry compliance with the Rule.[77] Given the extent of funeral consumers' vulnerability and their general lack of familiarity with the funeral transaction found by the Commission, consumers' ability to inquire about or use the Rule-required information also might depend on their current degree of knowledge about their rights under the Rule, and about funeral prices and options generally.[78] The staff can thus measure, at least to some degree, consumers' ability to exercise their rights and options under the Rule by assessing the record evidence on the degree of consumer awareness of those rights and options and the degree of industry Rule compliance.

The record evidence may suggest that we can not expect consumer behavior in the review period to have changed substantially due to low consumer awareness, low industry compliance, or some combination of those two factors. In that case, we would be obliged to weigh accordingly the record evidence of the Rule's current impact on consumer behavior in assessing how the Rule is operating and in projecting how the Rule, if retained, would impact consumer behavior in the future.[79] If we can expect consumer behavior to have changed as a result of the operation of the Rule, on the other hand, then staff would place greater weight on the face value of that evidence.

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[75] *Id.* at 42266. The Commission in making this finding also noted the results of research by experts in the field suggesting that "many consumers feel guilt with respect to the deceased, and view the funeral as the final opportunity to 'do right' by the deceased." *Id.*

[76] *Id.* at 42267, 42269. The Commission found that providers' practices injured consumers, in part, because they denied consumers itemized price information that consumers desired in making funeral arrangements. *Id.* at 42269.

[77] Consumers, for example, clearly would not be able to use the General Price List in choosing funeral goods and services unless they received it before making those decisions, as required by the Rule.

[78] We might not be surprised to find, for example, that consumers' purchase of embalming has not significantly declined since promulgation if consumers do not know that, under the Rule, they can decline to purchase that service or believe that embalming is always required by law (particularly if the Rule-required embalming disclosures are not made before consumers choose embalming, or if embalming misrepresentations prohibited by the Rule still occur).

[79] Of course, staff in assessing how the Rule is operating will review record evidence on measures of the Rule's overall impact on the funeral market, including measurable costs and benefits of the Rule to consumers and funeral homes (sections II.B - C, *infra*), the extent of price competition in the market (section II.C.1, *infra*), and the degree to which consumers value the Rule-required information (sections II.B.1, *infra*).

In either case, whether the Rule has had an opportunity to significantly change consumer behavior in the four-year review period[80] presents a threshold issue that must be resolved, if possible, prior to the staff's analysis of record evidence concerning such major issues as repeal or modification of the Rule or its specific provisions. The staff in this subsection of its Report discusses the record evidence on consumer knowledge and on the adequacy of the review period generally, and addresses the degree of industry compliance with the Rule in the next subsection.

Position of the Interested Parties[81]

The AARP in its Comment and Proposed Findings argues that sound decisions about the Rule's relative costs and benefits can not be made at this time because: (1) consumers are largely unaware of their rights under the Rule; (2) consumers are less likely to seek and use effectively information they are unfamiliar with, even when it is available or provided to them; (3) the Rule's benefits would increase if consumers were more aware of their rights under the Rule; and (4) the Rule's benefits as a result have not been fully realized, particularly with respect to Rule provisions intended to permit substantial changes in consumer behavior, such as the required provision of itemized price information over the telephone and in-person to facilitate comparison shopping and informed consumer choice.[82] The AARP presented empirical research as well as expert and lay testimonial evidence to support its position. The staff discusses that evidence below.

The NFDA and NSM in their Proposed Findings, in contrast, state that the Rule's impact can be assessed now on the basis that: (1) most funeral arrangements involve knowledgeable consumers who have prior experience arranging funerals; (2) consumers are generally aware of their rights under the Rule; and (3) the Commission assumed that the Rule's benefits would be felt by this time, so that any suggestion that adequate time has not elapsed to gauge the Rule's

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[80] The relevant time period is substantially less than four years for the Replication Study respondents, most of whom arranged funerals less than three years after the Rule's effective date, and significantly less than two years after publication of the Final Staff Compliance Guidelines on July 9, 1985. About 72% of the study respondents arranged a funeral between December 1986 and April 30, 1987, and about 85% did so between December 1986 and June 30, 1987. *See* Maronick, HX-13 at 11, Table 1 and R-B-2 data tapes.

[81] These relative views concern the degree of consumer knowledge about the funeral transaction under the Rule, and the resulting impact on the adequacy of the review period to assess the Rule's effect on the market; they do not address the impact of the degree of industry compliance on that question, which staff addresses in the next subsection of the report.

[82] *See* R-H-17 (Comment) at 4, 27 and 30; R-M-6 (Rebuttal) at 19 and 51; and R-M-11 (Proposed Findings) at 12, 68-70 and 103.

impact is inappropriate.[83] The NFDA and NSM presented some testimonial evidence and otherwise examined evidence presented by others to support their views.

Evidence on the Extent of Consumer Knowledge

The rulemaking record contains empirical survey evidence as well as expert and lay testimonial evidence on the degree of consumer knowledge about the Rule, its provisions, and various aspects of the funeral transaction generally.

Witnesses for the AARP presented the results of two national, consumer opinion telephone surveys conducted in June and November 1988 concerning, among other things, consumers' awareness of the Rule and its provisions.[84] When asked whether they were "familiar with the FTC's Funeral Rule and what it requires," 90% of the 782 respondents aged 45 and above surveyed in the first of these "Excel" surveys said "no" and 10% answered "yes."[85] Dr. Gary Ford, Professor of Marketing at American University, in the NFDA-NSM rebuttal submission questioned the reliability of this Excel survey result because the question asked failed to define the terms "FTC" and "familiar." Dr. Ford stated that the survey as a result may substantially under-estimate the proportion of consumers who are aware of their specific substantive rights under the Rule, and advocated that a better approach would be to ask consumers about the substantive requirements of the Rule.[86]

The second Excel survey of 916 consumers aged 21 and over posed eight declarative statements about various funeral director obligations and funeral consumer rights, and then asked respondents to answer whether each obligation or right was "required by federal law or not."[87]

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[83] *See* R-M-9 at 1-4 and 164-167; *see also* R-G-5 (Funeral Director Services Association ("FDSA") Comment), at 10; and R-G-1 (Ninker Comment, Illinois Funeral Directors Ass'n) at 3.

The NFDA-NSM position, however, does not appear to accurately reflect the Commission's stated purpose in mandating an early review proceeding. The Commission announced that it could not put a time frame on exactly when the Rule would begin to impact the funeral market, and instead predicted that the Rule would take longer to do so than in other industries. The Commission nonetheless mandated the early review to assess whether the Rule is "operating as expected" in reducing barriers to price competition and increasing informed consumer choice, or whether Rule modifications are necessary to facilitate those benefits.

[84] Both surveys were conducted for the AARP by International Communications Research, Inc. ("ICR"), a market research firm, as part of ICR's ongoing Excel National Telephone Omnibus Study ("Excel Survey"). Questions included in these Excel surveys for the AARP were part of a larger series of unrelated questions asked during various "waves" of the Excel survey. Respondents were drawn from one or two samples of 1,000 individuals (500 male and 500 female), using a stratified, single-stage random-digit dialing sample of telephone households. *See* McFadden, HX-8 at Exhibit C; and Soulas, HX-76 at Exhibit C.

[85] McFadden, HX-8 at 3 and Exhibit B, Table 001.

[86] R-M-3 at 22. Dr. Nelson, Director of the AARP Program Department, testified that consumers' knowledge of their specific rights under the Rule is more important than a general knowledge that the Rule exists, but cited this Excel survey result as evidence for his statement that comparatively few consumers know anything about the Funeral Rule and the benefits it provides. Tr. Vol. I, 29-30, HX-1 at 9.

[87] Soulas, HX-76 at Exhibit D (Questionnaire).

Five of the eight statements paraphrased Rule requirements; the remaining three did not, apparently as a "control."[88] A majority of respondents (54%-75%) said that, to the best of their knowledge, federal law does not require the rights and obligations actually mandated by the Funeral Rule or said that they do not know.[89] Interestingly, respondents reported very similar levels of "knowledge" concerning the three obligations not required by the Rule -- respondents' "yes" answers to those requirements, of course, were incorrect.[90] These latter results lead the staff to question whether the survey and questionnaire design suggested "yes" answers, which would overstate consumers' actual knowledge of their rights under the Rule.[91]

One question in a third telephone survey conducted in July 1988 for the AARP asked funeral directors whether consumers "who call or visit your facility [are] aware of the Funeral Rule and its provisions."[92] Two-thirds of the respondents answered "yes" to that question.[93] Ms. Rebecca

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[88] *Id.* Questions 2,3,4,6, and 7 concerned, respectively, telephone price disclosures on request, the provision of price information about goods and services before consumer decisions are made, the provision of written price lists when consumers go to the funeral home to make arrangements (this question did not ask whether price lists had to be provided at certain times in the transaction, as required by the Rule, and did not distinguish among the required general, casket and outer burial container price lists), cash advance mark-up disclosures, and the use of alternative containers for direct cremations, all Rule-required rights. Questions 1, 5 and 8, however, related to obligations or rights that are not afforded by the Rule -- mailing written price lists on request, disclosure of an extra fee for consumer-supplied caskets, and consumers' ability to cancel their pre-paid funeral contracts without penalty.

[89] Telephone price disclosures (24% - "yes", 43% - "no" and 32% - "don't know"); receipt of price information before decisions are made (40% -"yes", 29% - "no" and 30% - "don't know"); receipt of written price lists at the funeral home (45% - "yes", 25% - "no" and 28% - "don't know"); cash advance mark-up disclosure (29% - "yes", 38% - "no" and 32% - "don't know"); and use of an alternative container for direct cremations (30% - "yes", 32% - "no" and 36% - "don't know"). Soulas, HX-76 at 3.

The survey results also provided evidence that older consumers (aged 65 or over) are significantly less likely to be aware of the Rule's protections than are younger consumers (aged 18-34. *Id.* at Exhibit B, tables 002-004, 006-007.

[90] Receipt of written price lists by mail (28% - "yes", 38% - "no" and 33% - "don't know); disclosure of an extra fee for consumer-supplied caskets (24% - "yes", 37% - "no" and 38% - "don't know"); and ability to cancel pre-paid contracts without penalty (26% - "yes', 34% - "no" and 39% - "don't know"). *Id.*

[91] Several aspects of the questionnaire design, in the staff's view, might cause this result: (1) the questionnaire introduction read to each respondent told them that they would be asked "about rights and protections for consumers when they make funeral arrangements", which could suggest to some consumers that such rights exist; (2) each question used the compound phrase "is that required by federal law or not" (emphasis added); and (3) question three, which asked whether consumers have the right to receive price information before they make decisions, may have influenced respondents' answers to the next question, number four, which asked whether consumers have the right to receive written price lists when they go the funeral home to make arrangements.

On the other hand, Mr. Soulas, who presented the study for the AARP, stated that a respondent who was sure a law existed but was unsure whether or not the law was federal would likely say "no" or "don't know" to a question "whether or not" a federal law existed. Soulas, Tr. Vol. III, 292. Mr. Soulas also testified, however, that he did not detect any confusion on the part of respondents as to whether it was a federal law that the questionnaire was addressing. *Id.*

[92] Ayers, HX-108 at Exhibit D, Questionnaire, Q. 3 ("Ayers Survey"). This telephone survey of funeral directors representing 500 funeral homes nationwide was conducted for the AARP by National Research, Inc. The sample of funeral homes was drawn randomly for the AARP from a list of over 23,000 homes compiled from Yellow Pages and

(continued...)

Ayers, however, who presented the survey results for the AARP, testified that she was "surprised" by that result because it appeared to be inconsistent with other survey evidence and her personal knowledge that the general public is relatively unaware of the Rule. Ms. Ayers suggested that funeral directors "may have misinterpreted that question and answered based on whether or not people were made aware of the Funeral Rule [by the funeral director] when they called upon them."[94]

Regardless of consumers' knowledge about the existence of "federal law," the Replication Study of 1,004 funeral consumers provided specific empirical evidence of the degree of consumer knowledge about certain legal requirements for funerals and about funeral goods and services in general.[95] When asked whether caskets are required by law when the body is to be cremated, 13% of the study respondents answered incorrectly that this was definitely or probably true.[96] Half of the study respondents incorrectly said, when asked, that embalming is always required as a public health measure.[97] Finally, a similar proportion of respondents -- 42% -- reported incorrectly that the statement that a sealed casket (or grave vault) preserves remains for an indefinite period of time was definitely or probably true.[98]

A comparison of those results with the Baseline data, however, indicated that consumers' knowledge of those aspects of the funeral transaction has increased somewhat since 1981. The BLS results were that, in 1981, 19% of respondents thought that caskets were required for cremation (vs. 13% in 1987), 61% said that embalming was always required (vs. 50% in 1987), and 60% believed that a sealed casket preserved remains for an indefinite time (vs. 42% in 1987).[99]

The results of two "focus group" studies[100] contained in the record provided further

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[92](...continued)
Trade Directories. Interviewers asked each funeral director ten questions about their experiences under the Funeral Rule and its impact on their respective funeral practices. *See* HX-108 at 1-2 and Exhibits C-D, HX-109; and Ayers, Tr. Vol. III, 1368.

[93] HX-108 at 3.

[94] Ayers, Tr. Vol. III, 1368-1369.

[95] The Replication Study surveyed the experiences and views of funeral arrangers ~~who~~ arranged a funeral in the six months preceding the study, and not those of the general public. The results thus may not represent the degree of knowledge of the population as a whole.

[96] R-B-2 at Table III-54, p. III-85.

[97] *Id.*

[98] *Id.*

[99] R-B-3 (Baseline Study Report) at Table 9, p. 32.

[100] A "focus group" study explores in depth consumers' attitudes, beliefs and experiences about a particular subject by conducting an informal, open-ended discussion among a small number of people (typically 10-15 consumers unknown to each other) moderated by an unbiased observer who leads (or "focuses") the discussion within a pre-planned outline.
(continued...)

information about consumer knowledge of the Rule or of funeral embalming requirements. In one such study of 50 senior citizens recently conducted in the Detroit area, one person of the fifty had heard of the Funeral Rule or knew of its existence or the protections it provides to consumers.[101] The 30 respondents in the other study, conducted for the Commission in November 1988 in Baltimore, could not reach a consensus on whether embalming was an available option or was mandatory in all cases; most respondents believed that the law required them to have the deceased embalmed.[102]

In addition to this body of empirical data, numerous witnesses provided testimonial evidence based on their knowledge and experience concerning the extent of consumers' knowledge of their rights under the Rule and the impact that the degree of that knowledge has had on funeral consumer and industry behavior under the Rule.

Dr. Michael Mazis, a consumer behavior/marketing research expert,[103] presented testimonial evidence for the AARP on the particular difficulties funeral consumers face in attempting to seek and use the "new" price information provided by the Funeral Rule. In brief, Dr. Mazis testified that funeral consumers are likely distracted from seeking or using price information,[104] even when they are exposed to that information, by the "internal" pressures of time, grief, and embarrassment about considering cost, and the "external" pressure of a lack of awareness of price information availability caused by industry's failure to price advertise. Consumers as a result will instead settle for other factors in making funeral arrangement decisions, Dr. Mazis continued. Dr. Mazis predicted, however, that consumer search for, and use of, funeral price information will likely increase, albeit slowly, as their knowledge of prices and price information availability increases, that is, as funeral consumers develop a "frame of reference" for using that information.[105] Dr. Mazis concluded that consumers need to be better "educated" about the Funeral Rule than they are now before they will use its required information in making funeral arrangements.[106]

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[100](...continued)
The results are not statistically projectable to the population at large because the respondents are not chosen at random. However, the results are typically used to develop hypotheses that may be accepted or rejected on the basis of experience, knowledge or independent quantitative data. Focus groups are thus widely used in market research to develop ideas or hypotheses about a particular topic.

[101] R-H-19 (Greater Detroit Memorial Society Comment) at 1.

[102] Schwarcz, Opinion Centers America, Inc., HX-83 at 14, Tr. Vol. III, 460-461.

[103] Dr. Mazis is Chairman, Department of Marketing, The American University. *See* HX-91 at 1-2 for a synopsis of Dr. Mazis' qualifications as an expert.

[104] Staff discusses the record evidence concerning the importance of cost to funeral consumers in section II.B.1, *infra*.

[105] HX-91 at 12-15, 17, 20-23; Tr. Vol. III, 814, 820.

[106] Tr. Vol. III, 853.

Many witnesses expressed agreement with Dr. Mazis' position that consumer awareness of their rights under the Rule, prior to the arrangements conference, is necessary for consumers to fully exercise those rights. Some witnesses testified that consumers fear, or are embarrassed to initiate, price discussions or negotiations about alternative arrangements unless they know in advance that the law stands behind them.[107] The testimony of these and other witnesses suggests that prior knowledge may be necessary for informed consumer choice, even assuming full industry compliance with the Rule, because consumers tend to follow funeral directors' advice;[108] this is particularly true, witnesses testified, if consumers are made to feel "guilty" in the funeral home because they want something less than traditional funeral arrangements.[109]

Many of these and other participants further stated based on their knowledge and experience that few consumers have any knowledge of their rights under the Rule,[110] or of funeral prices or available options in making arrangements.[111] Some witnesses further suggested that this lack

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[107] *See, e.g.*, Karklin, funeral consumer, Tr. Vol. I, 546; Dr. Reveley, former funeral director, Tr. Vol. III, 874; Brownstein, CAFMS, Tr. Vol. I, 172-173); Comm'r. Jones, Older Womens' League ("OWL"), Tr. Vol. I, 265; Dr. Nelson, AARP, Tr. Vol. I, 29-30; Showalter, funeral industry analyst/hospice counselor, Tr. Vol. II, 144, 151; Purdy, CANA, Tr. Vol. III, 166; Snyder, West Coast Director, Consumers Union ("CU"), Tr. Vol. III, 1262; Clark, Arkansas Attorney General, Tr. Vol. III, 38-39; Wertheimer, Nat'l Academy for Elder Law Attorneys ("NAEL"), Tr. Vol. III, 984; Giesberg, Nat'l Ass'n of Consumer Agency Administrators ("NACAA"), Tr. Vol. III, 1140-1141; and Sommer, Professor of Psychology and Director, Center for Consumer Research, Univ. of Cal. at Davis, Tr. Vol. III, 657.

[108] *See, e.g.*, Karklin, Tr. Vol. I, 544-545 (would have followed funeral director's suggestions without prior knowledge of rights); Keith, funeral director (for NFDA), Tr. Vol. III, 1487 (consumers assume funeral director will pick-and-choose from price list); Krause, funeral director, Tr. Vol. II, 21 (funeral directors make the choices for families); and Bates, Exec. Dir., NSM, Tr. Vol. I, 666 (consumers tend to avoid dealing with the mechanics of burial; funeral director could, if he chose, take advantage of consumers in process of selecting funeral goods and services). *But see* Neel, cemeterian/funeral director, Tr. Vol. I, 631 and Prof. Sommer, Tr. Vol. III, 647-648 (said "yes" when asked on cross-examination by industry counsel whether Rule isn't "self-enforcing" so that consumers' prior knowledge of the Rule, or their rights thereunder, are unnecessary to receipt of its benefits).

[109] *See, e.g.*, Karklin, Tr. Vol. I, 538, 534; Dr. Reveley, former funeral director, Tr. Vol. III, 881; and Showalter, Tr. Vol. II, 151.

[110] *See, e.g.*, Messer, trade embalmer, R-F-60 (Comment) at 1; Carlson, author/lecturer, HX-22 at 7 (most of the 100 audiences spoken to never heard of the Rule); Blake, Memorial Society of Door County, Wisconsin, Tr. Vol. II, 1119; Rouillard, Calif. Rural Legal Assistance Foundation ("CRLAF"), Tr. Vol. III, 1343-1344); Rev. Wasielewski, Inter-Faith Funeral Information Committee, Phoenix, Tr. Vol. III, 1619; Klein, consumer member, New York State Funeral Directing Advisory Board ("NYSFDAB"), Tr. Vol. II, 1060 (consumers don't expect a GPL at the beginning of arrangements or know that it's required); Botimer, Phoenix funeral director, Tr. Vol. III, 1283; Barr, Kansas state representative, Tr. Vol. III, 1537; Klugman, President, California Fed'n of Funeral and Memorial Societies, Tr. Vol. III, 924, 931; Rev. Bell, Inter-Faith Ministries of Wichita, Tr. Vol. III, 232, 247-248 (consumers and clergy are unaware); Clark, Ark. A.G., Tr. Vol. III, 38 (most consumers are uneducated about the Rule, and are surprised that they can get price information over the phone); Rev. Dr. Biddle, Tr. Vol. III, 312, 337 (even "informed" consumers are unaware); Elvig, California State Cemetery Board, Tr. Vol. III, 439; Dr. Reveley, former funeral director, Tr. Vol. III, 879; Showalter, Tr. Vol. II, 105; Neel, Pittsburgh funeral director/cemeterian, Tr. Vol. I, 631; and CAFMS, R-H-12 (Comment) at 2.

[111] *See, e.g.*, Hennessy, FDSA, Tr. Vol. II, 994 (options); Showalter, Tr. Vol. II, 105, 107, 126-127 (prices/options - consumers don't have basic knowledge to discriminate between products and services or know what to ask, or that a funeral is an item that one can price-shop for); SW Florida Funeral and Memorial Society, R-F-64 at 6

(continued...)

of awareness leads to low compliance levels,[112] increased expenditures,[113] and low levels of shopping.[114] Many witnesses and other rulemaking participants concluded that, as a result of

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[111](...continued)
(purchase/embalming options and availability of published price data); Neel, funeral director/cemeterian, R-E-1 at 1 (options); Carlson, author, Tr. Vol. I, 516, 524 (options - consumers are dissatisfied when they learn that they had a choice); Nelson, PAA, Tr. Vol. II, 228, 233 (prices/options, especially the less expensive options); Prof. Sommer, Center for Consumer Research, Tr. Vol. III, 617, 624, 628-629 (local or national prices because no published price data/prices); Schwarcz, focus group, Tr. Vol. III, 460 (embalming option); Blake, memorial society, Tr. Vol. II, 1109, 1119, 1131 (options generally/cremation options/declination options); Wertheimer, NAEL, Tr. Vol. III, 964 (options - consumers blame their inexperience for lack of knowledge); Clark, Ark. A.G., Tr. Vol. III, 38; Buchanan, President, CAFMS, Tr. Vol. III, 1107 (options); Dr. Biddle, Tr. Vol. III, 347 (options); Klein, NYSFDAB, Tr. Vol. II, 1066, 1082 (don't' know what to ask over the phone/memorial societies exist to increase consumers' awareness of funeral options); Graf, cemeterian, Tr. Vol. II, 625 (don't know they can move the remains if they wanted to); Snyder, CU, Tr. Vol. III, 1261 (options); Botimer, funeral director, Tr. Vol. III, 1284, 1289, 1311 (price variance/options); Rev. Wasielewski, Tr. Vol. III, 1620, 1634-1635 (casket prices/price variance); Bejarno, funeral consumer, Tr. Vol. III, 1588, 1597 (price variance); and Dr. Reveley, former funeral director, Tr. Vol. III, 898 (options/cremation options). *But see* Yurs, funeral director (for NFDA), Tr. Vol. II, 559 (consumers with prior experience will have some idea of funeral costs); and Hahn, Federated Funeral Directors of America ("FFDA"), Tr. Vol. II, 709 (consumers are no more aware of prices because they don't price shop).

[112] Messer, trade embalmer, R-F-60 at 1 (and erroneous impression that compliance has been successful); Memorial Society of Northern Virginia (compliance will occur when consumers are aware enough to demand it); Brownstein, CAFMS, Tr. Vol. I, 165 (consumers can not demand information ahead of time when they are unaware of their rights); Klein, NYSFDAB, Tr. Vol. II, 1049 (uneducated consumers do not expect it); Showalter, Tr. Vol. II, 102, 105, 151; and Karklin, funeral consumer, Tr. Vol. I, 536 (got GPL because she asked for it).

[113] Karklin, Tr. Vol. I, 538, 544-545 (without knowing rights, will yield to funeral director pressure to spend more); Dr. Reveley, Tr. Vol. III, 881 (funeral director pressure when consumer desires less than the traditional service); Showalter, Tr. Vol. II, 151 (funeral director pressure); Nelson, PAA, Tr. Vol. II, 189, 232-233 (air of "emotional overspending prevails in 95% of arrangements; knowledge of less expensive alternatives necessary to resist funeral directors' offer of "the finest"); and Botimer, funeral director, Tr. Vol. II, 1268, 1288 (funeral directors don't correct consumers' misimpression from telephone inquiries that the "service charge" represents the entire funeral cost; consumers are "programmed" to believe "decent" funerals have to be expensive); and Bejarno, funeral consumer, Tr. Vol. III, 1588, 1597 (lack of knowledge of price variance led to expensive pre-need purchase).

[114] *See, e.g.*, Showalter, Tr. Vol. II, 126 (consumers don't think that funerals can be price-shopped); Nelson, PAA, 197, 218, 230; Rev. Wasielewski, Tr. Vol. III, 1634 (consumers will not shop if they don't know that prices vary); and Bejarno, Tr. Vol. III, 1594.

these factors, more time is needed to fully assess the Rule's potential benefits,[115] and that those benefits will likely increase over time as consumers' knowledge increases.[116]

The NFDA and NSM in their Proposed Findings argue that consumers' knowledge about funeral arrangements is enhanced because many consumers have prior arrangements experience or are accompanied by others who may have such experience when they make arrangements.[117] The NFDA and NSM cite in support of their point the Replication Study findings that 63% of respondents reported prior arrangements experience and that two-thirds of arrangements involve three or more consumers.[118]

The reliable record evidence, however, appears to support opposite conclusions -- that consumer "experience" in making funeral arrangements is still low by any measure, and that, regardless of the level of experience, that experience does not necessarily translate into consumer "familiarity" with the funeral transaction (or with the information required by the Rule).[119] Thirty-six percent of the Replication Study respondents reported that they had no prior experience arranging funerals. Another 30% said that they had participated in planning

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[115] *See, e.g.*, Comm'r Jones, OWL, Tr. I, 264-265; Klein, NYSFDAB, HX-63 at 8; Consumers Union, R-H-21 (Comment) at 2-5; Snyder, CU, Tr. Vol. III, 1221-1222, 1245 (much longer period of time is necessary, like 12-year state sunset laws); Rouillard, CRLAF, Tr. Vol. III, 1343-1344; Giesberg, NACAA, Tr. Vol. III, 1163-1164; Groenenboom, funeral consumer, R-F-64 at 4; Blake, memorial society, Tr. Vol. II, 1115; Rev. Bell, Tr. Vol. III, 232; CAFMS, R-H-12 (Comment) at 2; Neel, funeral director, Tr. Vol. I, 567 (will take 5-10 years before Rule actually takes effect); Barr, Kansas state representative, Tr. Vol. III, 1512 (state sunset is 7 years; review of Funeral Rule should be longer than that - another seven years); Dr. Reveley, Tr. Vol. III, 873, 879, 887 (consumers unaware of aspects of Texas' Funeral Rule ten years later; will take more than four years to dispel myths that caskets and embalming preserve the body); Wertheimer, NAEL, Tr. Vol. III, 984 (Rule's impact is just beginning); Giesberg, NACAA, Tr. Vol. III, 1136 ("preventive nature of the Rule is hampered by the lack of visibility of the issue" prior to need); Dr. Biddle, Tr. Vol. III, 310, 331; and Prof. Sommer, Tr. Vol. III, 639 (infrequency of purchase and taboo/repression about death increases the time necessary for consumers to benefit from the Rule). *But see* FDSA, R-G-5 at 10 (6 million funerals since promulgation, media publicity and funeral home compliance makes enough time to judge the Rule's impact); Ninker, Ill. Fun. Dir. Ass'n, R-G-1 at 3; Peirson, funeral director, R-D-1 at 1; and Topinka, Illinois state senator, Tr. Vol. II, 83.

[116] *See, e.g.*, Dr. Barnow, economist (for AARP), Tr. Vol. I, 882; Rev. Bell, Tr. Vol. III, 239; Klein, NYSFDAB, Tr. Vol. II, 1061); Brownstein, CAFMS, Tr. Vol. I, 172-173; Dr. Nelson, AARP, Tr. Vol. I, 16; Snyder, CU, Tr. Vol. III, 1225, 1248; Clark, Ark. A.G., Tr. Vol. III, 9; and Prof. Sommer, Tr. Vol. III, 628-629.

[117] *See* R-M-9 at 1-3.

With regard to group arrangements, the Commission when it decided to issue the Rule recognized that funeral arrangements are typically made in groups, but concluded that, while that fact may make the arrangements experience less difficult, the other group members are likely to be as emotionally distressed and disadvantaged as the person with primary responsibility for making the arrangements decisions. *See* R-B-5 (SBP) at 42265, n. 59.

[118] *See* R-M-9 at 1-2, Findings #2 and #4.

[119] As the staff discussed earlier in this section, however, consumer knowledge of funeral requirements and the value of funeral goods has increased somewhat under the Rule.

arrangements once before. The remaining third said they had done so twice before or more.[120] Those results also tell us little about the depth of respondents' prior experience. The study question simply asked how many other times respondents "participated in planning funeral arrangements," and did not ask what that participation involved.[121] We do not know as a result whether respondents' prior experience involved making many or few of the required arrangements decisions, or whether respondents actually participated in a funeral arrangements conference with the funeral director. The Excel study results indicate, as one might expect, that still fewer consumers -- about 15.5% -- have made arrangements for a funeral or burial since promulgation of the Rule.[122]

Analysis of that empirical evidence concerning the experience of funeral consumers also demonstrates that, at least to date, funeral arrangers with one, two or even four prior experiences in planning funerals do not necessarily gain increased levels of knowledge about the funeral transaction. Recall that 50% of the Replication Study respondents, all of whom had arranged a funeral at least once, reported incorrectly that embalming was always required as a public health measure. And 42% of the respondent arrangers said incorrectly that a sealed casket/vault preserves remains for an indefinite time. Similarly, a large majority of the Excel study respondents reported their lack of knowledge that the Rule's protections are required by federal law, although some of those respondents had arranged funerals under the Rule.

Finally, Bureau of Economics staff performed an analysis of the Replication Study data to determine whether there was any link between respondents' degree of experience in making funeral arrangements (Question 10. of the study) and their level of knowledge about the funeral transaction (Question 55).[123] BE staff divided respondents into two categories -- those with arrangements experience prior to the one surveyed and those without such prior experience. BE staff then performed a chi-squared statistical test to determine whether there was any relationship between those two categories and their answers to Question 55. BE staff found no link between the degree of respondents' reported prior experience and their level of knowledge.[124]

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[120] Eighteen percent said twice, 8% three times, and 7% four or more times. R-B-2 at III-9, Table III-7. The staff notes that because the RS surveyed recent funeral arrangers, and not the general public, the level of respondents' prior experience may not be representative of the population as a whole. The Commission found, for example, that, at the time it promulgated the Rule, about 50% of the adult population had never arranged a funeral and another quarter had done so only once. *See* R-B-5 (SBP) at 42265. The record does not contain a current survey of the general public's degree of experience in making funeral arrangements.

[121] R-B-2, Appendix, Questionnaire (Question 10.)

[122] *See* Soulas, HX-76 at 3. About 4% of respondents also said that they had made arrangements for a cremation in the last four years, but the staff can not add that proportion to the 15.5% who said they arranged funerals/burials because it is not clear from the results that different respondents answered the two questions.

[123] Question 55 was the question that asked respondents to report, among other things, whether embalming is required by law and whether a sealed casket/vault preserves remains indefinitely.

[124] R-B-2 data tapes; for one question involving whether a grave liner prevents the ground from sinking, those with prior experience were more likely to say "definitely true" or "definitely false" -- they were more certain but not more correct than those without that experience. *See also* Drs. Nelson, Tr. Vol. I, 41 and Mazis, HX-91 at 20-22, who testified that the two to four times that most people make funeral arrangements does not provide a high degree of experience,

(continued...)

Staff Conclusion

The staff concludes from its review of the record evidence that consumers' knowledge of their rights under the Rule and of prices, price variance and funeral options generally has not substantially changed. The evidence, on balance, demonstrates that consumers overall are still unfamiliar with the funeral transaction, although their knowledge of casket for cremation and embalming requirements has increased slightly since 1981. That finding is consistent with the Commission's prediction that the Rule may take longer to affect the market than in other industries because funerals are an infrequent purchase.

The evidence demonstrating that consumers generally are not familiar with their rights under the Funeral Rule indicates a clear need for consumer education. The staff thus recommends that the Commission increase its consumer education efforts regarding the Rule, and intends to assist the Divisions of Marketing Practices and Consumer and Business Education in those efforts.

As discussed at the outset of this section, the extent to which we can expect significant changes in this market is also necessarily dependent on the degree of full industry compliance with the Rule. The staff addresses that issue below.

2. Industry Compliance

Introduction

The Commission mandated this early review "to ensure that there is a need to continue the rule after it has had an opportunity to work in the marketplace. If the rule operates as expected, there should be increased competition in the market which may obviate the need for continued federal intervention."[125] The staff presumes that the Commission in so defining the review's purpose assumed that the Rule would require some reasonable level of industry compliance in order to accomplish its goal -- to reduce existing barriers to price competition and facilitate informed consumer choice.

At the time that the Commission issued the NPR, however, the initial BCP and BE staff reports had presented empirical evidence from the Replication Study data indicating that 31% (and perhaps less) of funeral providers are simultaneously complying with four of the Rule's most important requirements. Those Rule provisions require the provision of a timely General Price List and a properly itemized statement of items selected ("final statement"), and prohibit misrepresentations about embalming and casket for cremation requirements. The data also indicated that, although two-thirds of consumers receive a GPL sometime in the transaction, about one-quarter of consumers get the GPL at the beginning of funeral arrangements

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[124](...continued)
and that consumers often take considerable time to develop the "frame of reference" they need for using new information, even when exposed to it.

[125] R-B-5 at 42299.

discussions, as required by the Rule.[126] The GPL is the key Rule-required document for implementing the Rule's remedial price and information disclosure provisions.

The Commission in the NPR subsequently stated that, in judging whether the Rule warrants repeal or retention, it would consider "whether the Rule itself is sufficiently in place in the market" to permit a full assessment of the Rule's costs and benefits.[127] The Commission thus sought specific comment on whether the Replication Study data accurately reflects the actual level of industry compliance, and, if so, whether that level is sufficient to fairly evaluate the Rule's impact on funeral consumers and funeral providers.[128]

The staff in this section of its Report reviews the record evidence on those compliance questions to determine the degree to which the Rule has had the opportunity to benefit consumers, the degree to which funeral providers have provided a stimulus for increased competition by complying with the Rule, and whether funeral provider compliance is sufficient to permit sound judgments about the Rule's costs and benefits to consumers and funeral providers.

Replication and Gallup Study Data

The Replication Study[129] and the AARP's Gallup Study[130] provide the most comprehensive and reliable record evidence on the degree of industry compliance with the Funeral Rule.[131] The results of these two surveys represent the only systematic, empirical data available on the level of industry compliance nationwide. The Replication Study surveyed the experiences of 1,004 consumers who arranged funerals in the period December, 1986 - June,

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[126] *See* R-A-1 (NPR) at 19868. As noted in the initial staff report and discussed *infra*, the overall 31% industry compliance figure reported in the NPR necessarily overstates compliance because it does not consider all of the Rule's provisions. The 31% compliance level (with four of the Rule's "core" provisions), for example, drops to 15% when compliance with the GPL timing provision is viewed strictly -- when respondents reported that they received the GPL at or near the beginning of arrangements discussions, the time specifically required by the Rule, as opposed to "early" in the discussions (at the beginning of or sometime after discussions had begun but before selection of the casket/container).

[127] R-A-1 at 19868.

[128] *Id.* at 19869, Question 4.

[129] The staff discusses in detail the purpose and design of the Commission's Replication Study in Section I.B, *supra*.

[130] The Gallup Organization ("Gallup") Study in 1988 surveyed a representative national sample of 675 adults residing in telephone households with someone 45 or older who arranged a funeral within the 18 months preceding the October 12-November 1 survey. Like the Replication Study, the Gallup Study surveyed consumer experiences under the Rule in shopping for and choosing funeral goods and services, including the extent of industry compliance. The survey sample was drawn from a proportionate, stratified random-digit-dial telephone sample of all telephone exchanges in the continental U.S., and from a second representative sample of telephone numbers of households where someone age 45 or older had been previously interviewed by Gallup during 1988 for one of Gallup's political polls. Dr. Diane Colasanto, a Sociologist and Senior Vice-President of Gallup, supervised the development and implementation of the survey and presented the results for the AARP at the hearings. Colasanto, HX-66 at Exhibit B, pp. 1, 23-25, and Questionnaire.

[131] The Gallup Study is less comprehensive than the Replication Study because it did not include questions concerning funeral provider compliance with the Rule's telephone provisions or those provisions that prohibit misrepresentation of embalming and casket for cremation requirements.

1987. The Gallup Study surveyed similar experiences of 675 funeral arrangers for the period April, 1987 - October, 1988. The staff below reviews the study data first in terms of providers' compliance with individual provisions of the Rule, and then in terms of the overall level of industry compliance with the various Rule provisions simultaneously (i.e., "Rule compliance").

Industry Compliance With Individual Provisions

Results from the Replication[132] and Gallup Studies provided largely similar, systematic evidence of industry compliance with the Rule's provisions individually. About two-thirds of the respondents in both studies reported receiving a GPL sometime during the arrangements at the funeral home.[133] Of those RS respondents who received a GPL, however, 62% said, when asked, that the provider offered them the GPL "to keep;"[134] 42% of the RS respondents (68% x 62%) thus reported that providers gave them a GPL for retention, as the Rule requires. More importantly, the RS data provided evidence that 23% of RS respondents received a GPL at the outset of funeral arrangements discussions, in accordance with the Rule's requirements.[135]

With respect to the Casket Price List ("CPL"), 50% of the Gallup Study respondents who purchased a casket reported that they were "shown or given a written price list for caskets" before they looked at the ones on display, as the Rule requires.[136] Similarly, of those RS respondents who bought a casket, 70% reported receiving itemized casket price information in some form, but 47% of those who said they were shown a "separate" CPL reported seeing it before they were shown the caskets; about half said that they saw a GPL, which may include the CPL in lieu of a separate list, before they selected a casket.[137] Of those RS respondents who purchased an outer burial container (a grave liner or burial vault), 67% reported receiving itemized container price information as part of the GPL or separately, but 65% who said that they were shown a

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[132] The Replication Study compliance results are reported in the Market Facts Report (R-B-2) for the full study sample and in the BE staff's revised report (HX-122) for those respondents who said that they went to the funeral home to make arrangements (868 of 1,004 consumers). The staff cites both sources as appropriate in the discussion below.

[133] HX-122 at 19 (68% compliance, 23% non-compliance); Colasanto, HX-66, Exhibit B, Tabulations, at 27 (64% comply, 31% non-comply).

[134] R-B-2 at IV-4. The Gallup study did not ask this question.

[135] HX-122 at Table VIII, p. 20. Another 26% reported that they got the GPL after discussions had begun but before selection of the casket or container. *Id.*

[136] HX-66, Ex. B, Tabs, p. 35; Colasanto, Tr. Vol. III, 57 (45% said they did not receive a CPL at that time). The Rule requires that providers give the CPL to consumers "at the beginning of discussion of, but in any event before showing caskets." The required casket price list may be included in the GPL, contained in a separate list, or displayed clearly and conspicuously in notebooks, binders, or charts.

[137] HX-122 at Table VIII, p. 20, 22; R-B-2 at IV-5. BE staff suggests that the CPL compliance results understate actual compliance because it is not clear that the Replication Study respondents included CPLs contained in binders or notebooks in responding to the question whether they were shown a "separate list" of casket prices. Daniel, Tr. Vol. I, 1004. The Gallup Study results, however, which also evidenced 50% compliance with the CPL provision, appears to provide increased reliability to the RS finding because they coincide with the RS results.

"separate" price list for containers said they saw it before being shown the containers, in compliance with the Rule.[138]

Both studies also reported similar results regarding the final statement of goods and services and selected. Eighty percent of the RS respondents and 82% of the Gallup respondents reported receiving a written final statement at the end of the arrangements conference.[139] Seventy-seven percent of the Gallup respondents, when asked, further said that the statement was itemized for each service selected.[140] However, 62% of those RS respondents who purchased on an item-by-item basis received such an itemized final statement, in compliance with Rule.[141]

Fifty percent of the RS respondents and 47% of the Gallup respondents who purchased embalming services said that the funeral provider asked them for prior embalming permission, as required by the Rule.[142] Of those RS respondents who were asked, 58% said that the funeral director used the term "embalm(ing)" in making the request, in compliance with the Rule, and 26% said that more general terms were used.[143] Overall, 63% of the RS respondents who said that the deceased was embalmed reported giving authorization for that procedure sometime in the transaction.[144]

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[138] HX-122 at 22; R-B-2 at IV-6. The Gallup Study did not contain a question on the timing of the outer burial container price list, but 80% of the respondents who bought a container reported receiving a price list for those items sometime in the transaction. HX-66, Ex. B, Tabs, p.47.

[139] HX-122 at Table 9, p. 23 (13% did not get a final statement); HX-66, Ex. B, Tabs, p. 59 (15% did not receive compliance).

[140] *Id.* at 61.

[141] HX-122 at Table X, p. 24 (30% did not get that degree of compliance). The Gallup data was not similarly refined to permit this further analysis.

[142] R-B-2 at IV-7; HX-66, Ex. B, Tabs, p. 57. Twenty-six percent of the RS respondents and 37% of the Gallup respondents said that they were not asked, and, respectively, 24% and 17% of the respondents could not remember; actual compliance with this provision could thus be substantially higher or lower than these figures suggest.

BCP Office of Impact Evaluation staff, however, provided evidence suggesting that consumer recall on this issue was not inaccurate due to the length of time between the survey and respondents' funeral arrangements. Dr. Maronick's "Table 2" in his prepared statement revealed that RS respondents' answers to the question whether funeral directors requested prior embalming permission do not significantly change when respondents who answered within 3 months of their arrangements are compared with those who answered within 9 months. HX-13 at Table 2, p. 14. Calculations based on the study data tapes show that none of the differences in any of the response categories reported in that Table 2 are statistically significant. R-B-2 data tapes.

These data, like those regarding compliance with telephone price disclosures, price lists, and statements of items selected, are not compared to the related Baseline Study results because those latter results have been seriously questioned as an indicator of industry practices in 1981-82. *See* the staff's discussion of this issue in Section I.B., *supra*.

[143] R-B-2 at IV-7.

[144] *Id.* at Table III-42, p. III-68 (11% did not give authorization, and 26% could not remember). The Rule permits a provider to charge for embalming if prior permission can not be obtained after exercising due diligence, the provider has no reason to believe that the family does not want embalming, and the provider obtains subsequent authorization.

The Replication and Gallup Studies also provided systematic evidence on industry compliance with different Rule provisions prohibiting misrepresentations about funeral goods and services. With respect to embalming representations, 16% of those RS respondents who went to the funeral home and purchased embalming reported receiving one or more of the following three representations prohibited by the Rule: (1) embalming is always required by law; (2) embalming is required by law to protect the funeral home staff from disease; and (3) embalming is required by the funeral home.[145] Six percent of the respondents also said that they were told that embalming would preserve the body for a long or indefinite time.[146] The RS results further indicate that as many as 12% of the respondents may have received one or more misrepresentations concerning embalming requirements prior to cremations.[147] Eighteen percent of the RS respondents also said that funeral directors claimed that an outer burial container was required by law, in apparent violation of the Rule.[148] Finally, of those RS respondents who purchased cremations, 7% said that providers they used stated that a casket was required.[149]

The Gallup Study asked respondents several questions concerning information they received from the funeral provider on the protective features of caskets and outer burial containers.[150] Thirty percent of those 471 respondents who purchased a casket and were given that information reported that they were told that the casket would help preserve the body indefinitely. Similarly,

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[145] R-B-2 data tapes, Question 39; R-B-2 at IV-8. BE staff used these three response categories in its "COMPLY 1 and 2" indices of compliance discussed later in this section of the Report.

Ten percent of the 1981 BLS respondents said that they received one of the first two misrepresentations listed above. R-B-3 at 58, Table 25. Comparison of the RS and BLS data on this compliance issue is difficult because the questions in the two surveys are not entirely comparable on the issue of whether embalming was discussed; the RS asked what the funeral director said about whether embalming "was or was not required," whereas the BLS asked what the director said concerning whether embalming "is or is not required by law in your state."

[146] *Id.*

[147] The study subjects reported that providers made the following four types of prohibited representations concerning that issue: (1) embalming is always required by law (4%); (2) embalming is required by law to protect the funeral home staff from disease where cremation does not occur until after a viewing (2%); (3) embalming is required by the funeral home (4%); and (4) embalming is required by the funeral home to which the body is to be shipped (2%). R-B-2 data tapes, Question 54; R-B-2 at IV-8. Ten percent of the BLS respondents gave these answers, but the two questions again differed in the same manner as the general embalming question, discussed at note 145, *supra*.

[148] R-B-2 data tapes, Question 49. Thirteen percent of the BLS respondents answered that way. R-B-3 at 73, Table 33 A. Again, the two survey questions were not entirely comparable. The RS asked what the director said about the "properties/capabilities of the vault/liner," whereas the BLS asked what was said "about the vault/liner."

No state or local requirements for outer burial containers exist in most areas of the country, but most cemeteries ask that a container be used to keep the surface of the grave from sinking.

[149] R-B-2 at IV-8. While 26% of the 1981 BLS respondents reported that apparent Rule violation, that figure may be overstated because, unlike the RS, the BLS question did not include a response category permitting the compliant statement that an unfinished wood box (an alternative container that is arguably a type of casket) was required. Eleven percent of the 1987 respondents answered the question that way.

[150] *See* HX-66, Exhibit B, Questionnaire (Qs. 20-22 and 26-27.

33% of those 319 respondents who purchased an outer burial container and were provided such information said that they were told that the container would help preserve the body indefinitely.[151]

Finally, the Replication Study data provided some evidence on industry compliance with the Rule's telephone disclosure provisions. Market Facts cautioned in its report, however, that "care must be exercised in interpreting the results," because the number of respondents who reported discussing price information over the telephone is small.[152] About half (49)% of the 93 RS respondents who called the funeral home and asked about funeral "prices, terms, or conditions" reported that the provider disclosed that price information was available over the phone, or offered to discuss funeral prices without being asked to do so, in compliance with the Rule.[153] Of the 82 instances where respondents specifically asked the funeral home used (52 arrangers) or another home (16 "shoppers") for certain price information, respondents reported that they did not receive the requested information 6% of the time (5 of 82).[154] BE staff concluded from this data that, the small sample sizes notwithstanding, the results suggest high compliance with the Rule's telephone provisions.[155]

The rulemaking record contains much other evidence on the level of industry compliance with the Rule's individual provisions that, viewed as a whole, suggested a fairly high degree of compliance with the telephone price request disclosure provision and varying rates of compliance with the price list and other provisions.[156] That evidence, however, is largely anecdotal or

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[151] Colasanto, HX-66, Exhibit B, Tabs, pp. 43, 53; Tr. Vol. III, 58.

[152] R-B-2 at III-25, III-31.

[153] R-B-2 at Table III-26, p. III-36; 22% reported that they did not receive this disclosure, and 29% could not remember. *Id.*

Using a slightly different data base, BE staff found that 51% of respondents received compliance, 20% did not, and 31% did not recall. BE staff further concluded that excluding from the analysis those who could not recall increases the compliance rate to about 72%. HX-122 at 16-17.

[154] HX-122 at 17.

[155] *Id.*

[156] *See, e.g.*, Consumers Union, R-H-21 at 15-16 (1988 "undercover" survey by Univ. of Texas marketing class of compliance with Texas and FTC Rules suggested at least one violation overall by 22% of homes contacted and by 57% of homes "visited"); Dr. Nelson, AARP, Tr. Vol. I, 49-50 (1984-85 AARP/CAFMS surveys indicating high compliance with telephone price request and GPL provisions); Hennessy, Tr. Vol. II, 980-981 (1985 survey of association members suggested 50% compliance with price list content provisions); Denenberg, R-C-1 at 1 (1987 "undercover" shopper survey of 11 Delaware Valley funeral homes indicated none gave timely GPL and all misrepresented embalming requirements); CAFMS, R-H-12 at Ex.1; Brownstein, CAFMS, Tr. Vol. I, 166-167 (1988 survey of 139 memorial society officials suggesting varying degrees of compliance problems, in descending order, with showing least expensive casket, giving the GPL, truthfully disclosing legal requirements, and making telephone price disclosures); Showalter, journalist, Tr. Vol. II, 101, 138, 142 (two surveys for the *Kansas City Times* in 1984 and 1985 suggested most complied with telephone price request disclosure, and lower GPL compliance in '85 than in '84 -- one-third of Kansas City providers surveyed could not readily find their GPL); Klein, NY State Funeral Directing Advisory Board, Tr. Vol. II, 1090 (1984 memorial society survey of Rochester funeral homes indicated many directors filled in the GPL prices only when a GPL was requested);

(continued...)

contains the results of various surveys that included obvious methodological flaws, lacked underlying data, or were limited in scope of questions asked or markets surveyed. The staff as a result does not rely on that evidence to draw inferences about the extent of industry-wide compliance with the Funeral Rule.[157]

Overall Industry Compliance

The staff recognizes the importance of knowing the degree to which providers are complying with individual provisions of the Rule. Any analysis of overall industry compliance must begin with that data. The level of compliance with individual Rule provisions may also signal problem areas that warrant attention in the form of increased enforcement efforts or Rule modifications to reduce unnecessary compliance burdens that may result from provider misunderstanding of their obligations.

However, in the staff's view, the overall level of simultaneous industry compliance with the Rule's provisions is the more appropriate measure in assessing the Rule's overall market impact. Many of the Rule's key provisions work in tandem to ensure that consumers receive the intended informational benefits. The itemized general price list and final statement requirements, for example, work together to ensure that consumers can decline unwanted items and are charged only for those items selected. The misrepresentation provisions also ensure that consumers can use the information provided by the GPL and final statement without deceptive representations about funeral requirements. High levels of compliance with the final statement obligation may thus be of little analytical value in reviewing the Rule's overall impact if a minority of providers give consumers a timely GPL, or if consumers receive misrepresentations. The Rule's ability to effect changes in the funeral market is thus likely dependent, at the least, on the degree to which there is overall industry compliance with the Rule's principal requirements simultaneously.

"Indices" of Overall Compliance

Two approaches for measuring the degree of overall industry compliance with the Rule were presented for the record. The first was provided by the Bureau of Economics staff in its analysis of the Replication Study data. BE staff constructed and used a "comply" variable ("COMPLY 2")

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[156](...continued)
Schwarcz, Opinion Centers America, Tr. Vol. III, 461 (many of 30 focus group members shown a GPL did not remember seeing one at their recent arrangements, but did recall receiving final statement); Perguson, memorial society, Tr. Vol. III, 1217 (1987 survey of Seattle funeral homes found 1 of 8 did not give sufficient price information over the telephone); Pierson, R-D-1 at 4, Botimer, Tr. Vol. III, 1290-1291, and Hennessy, Tr. Vol. II, 1022, funeral directors (embalming consent is implied by type of service selected, without seeking express prior permission); Franzen, Wisconsin Funeral Directors Ass'n, Tr. Vol. II, 798 (some funeral homes misrepresent burial container requirements and durability); Blake, memorial society, Tr. Vol. II, 1100, 1108 (misrepresentations about casket for cremation requirements are occurring); Messer, trade embalmer, R-F-60 at 2-3 (marketing of financial security substitutes for GPL discussion in pre-need trust sales); and Tampa Memorial Society, R-F-98 at 1 (several county funeral homes refuse to give the GPL).

[157] The staff discusses in section III.C, *infra*, evidence regarding industry compliance with the Rule's anti-tying provision, including the prevalence and effects of so-called "casket handling fees" imposed by providers on funeral arrangers who purchase a casket from a third-party seller.

to assess the overall level of simultaneous industry compliance with key provisions of the Rule.[158] Consumers who said that they received the following three types of information at the funeral home[159] were considered to have received "compliance" with the Rule: (1) an "early" General Price List (received at or near the beginning of discussion of funeral arrangements or before the selection of a casket); (2) a statement of funeral goods and services selected that included the total price for the arrangements and itemized prices for each item and service selected (received at the end of the arrangements conference); and (3) no misrepresentations concerning casket for cremation and embalming requirements.[160]

Using that COMPLY 2 variable, BE staff reported that 31% of the RS respondents received "compliance" with the Funeral Rule.[161] An additional BE compliance measure added to the analysis the requirement that price information, in some form, was received in writing ("COMPLY 1"), and another dropped the misrepresentation requirements ("COMPLY 3"). BE staff reported the following results using those alternative variables: (1) COMPLY 1 = 29% compliance; and (2) COMPLY 3 = 36% compliance.[162] The COMPLY 2 result of 31% compliance, however, was cited in the NPR and otherwise used most often by rulemaking participants to reflect the BE compliance analysis because it was based only on those Replication Study questions that are directly related to the Rule's GPL, final statement, and two key misrepresentation provisions, four of the Rule's "core" requirements.[163]

The Gallup Study asked arrangers who went to the funeral home four questions about aspects of "compliance" that were very similar to those used in BE staff's COMPLY 3 index. Those questions related to: (1) timing of receipt of price information; (2) receipt of a written price list;

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158 BE staff also used this variable to help determine the Rule's overall effects on consumer expenditures, which staff addresses in Section II.B.4, *infra*.

159 The BE analysis used as a base figure only those study respondents who reported that they went to the funeral home to make arrangements (868 of 1,004).

160 Daniel, HX-122 at 25.

161 *Id.* at 26 (60% received "non-compliance" and 9% were "ambiguous"). BE staff used the "ambiguous" category to distinguish between study respondents whose answers to compliance questions clearly qualify them for the "non-compliance" category and those whose missing and/or "don't remember" answers create an ambiguity as to whether they belong in the "comply" or "non-compliance" categories. *Id.* at 26, n. 33. As discussed more fully later in this section of the report, deleting from the analysis all of the ambiguous responses increases the level of "non-compliance" more than it does "compliance."

162 *Id.* at 25-27 (62% non-compliance, and 9% ambiguous for COMPLY 1, and 53% non-compliance, and 10% ambiguous for COMPLY 3).

163 BE staff also used a fourth "COMPLY 4" variable that measured whether respondents received itemized price information sometime during the funeral transaction. The staff does not include COMPLY 4 in its discussion here because it is not a measure of simultaneous compliance with various Rule provisions. *See* HX-122 at 27, Daniel, Tr. Vol. I, 369 (80% of respondents reported receiving either a GPL sometime in the transaction or an itemized final statement; 12% said that they did not get either of those Rule-required documents).

(3) receipt of a final statement; and (4) receipt of an itemized final statement.[164] Based on the Gallup respondents' answers to those questions, BE staff earlier in the proceeding calculated the overall level of "compliance" received by the Gallup Study respondents. That level of compliance is 36% -- the same result reported by BE staff for COMPLY 3 using the Replication Study respondents' answers to very similar questions.[165]

The BE COMPLY 1-3 and Gallup indices measured overall industry compliance with Rule provisions relating to the GPL, the final statement, and misrepresentations concerning embalming and casket for cremation requirements. The Replication Study data, however, included answers to other compliance questions concerning: (1) affirmative telephone disclosures; (2) receipt of requested price information over the telephone; (3) prior permission to embalm; (4) funeral directors' use of the term "embalm" in their request for permission; (5) receipt of the GPL to keep; (6) receipt of a casket price list; and (7) receipt of an outer burial container (vault/grave liner) price list.[166]

BE staff earlier in the proceeding calculated the incremental effect on overall compliance of adding each of those Rule provisions to the compliance analysis, beginning with BE staff's COMPLY 1 result of 29%. The results were that simultaneous compliance with several of the Rule's provisions falls from a "high" of 29% starting with COMPLY 1 to a "low" of 9% when all of the Rule provisions surveyed in the Replication Study are added to the analysis.[167]

The staff also notes that the BE staff's COMPLY 1-3 definition of an "early" GPL does not contain a strict interpretation of the Rule's key requirement that the GPL be provided to consumers "upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services." Replication Study respondents under the COMPLY 1-3 variables were considered to have received "compliance" if they reported receipt of the GPL after

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[164] Compare Colasanto, HX-66, Ex. B, at 36, Questions 13, 14, 31, and 32 with R-B-2 (Market Facts Report), at APPENDIX: Questionnaire, Questions 27, 28, 32, and 32a).

[165] *See* R-M-5 (Staff Rebuttal) at 25, Table 7.

[166] R-B-2, at APPENDIX: Questionnaire, Qs. 23a, 23d, 37, 38, 28b, 28d, 29, and 30).

[167] *See* R-M-5 at 27, Table 8.

These data highlight the appropriateness of BE staff's reasoning in using "comply" variables that did not attempt to include all, or even some, of these other compliance factors. Variables that did so might have proven less useful as an analytical tool, because the proportion of consumers receiving compliance might have been too low to generate statistically significant results concerning the effects of Rule compliance on consumer expenditures. The staff discusses that BE analysis separately, *infra*. It also could be argued that a funeral provider who complies with the two provisions included in the Comply 3 definition (an "early" GPL and a properly itemized final statement) will have provided the essence of what the Rule requires: itemized, timely price information. The staff notes, however, that these variables could not take into account whether the GPL and itemized final statement that were received by any of the study respondents were actually in compliance with the Rule's content requirements, other than by virtue of respondents' recalling that the latter statements were sufficiently itemized.

discussions had begun but before selection of a casket or other container.[168] The Bureau of Economics staff at the rulemaking staff's request re-computed the COMPLY 1-3 indices using the Rule's definition of when a GPL must be given to consumers. The results for COMPLY 1-3, respectively, were that compliance falls from 29%, 31% and 36% to 14%, 15% and 18%.[169] Substituting each of these levels of compliance for the COMPLY 1 figure of 29%, overall, simultaneous compliance continues to drop as other Rule provisions are added to the analysis.

NFDA-NSM Criticism of the BE "Indices" of Compliance

Dr. Fred McChesney and other NFDA and NSM representatives provided testimonial evidence that BE staff's "COMPLY 1-3" indices are invalid because they seriously understate industry compliance by: (1) erroneously counting "ambiguous" answers (missing answers and "don't remembers") as non-compliance, when they should have been deleted from the analysis; (2) failing to take account of faulty consumer recall resulting from the length of time since the funeral, failure of some respondents to use their final statement in answering the Replication Study questionnaire, and lack of major responsibility for specific arrangements decisions as defined in Question 11. of the Replication Study questionnaire; and (3) failing to take account of respondents' reported instances of compliance with the individual compliance measures included in COMPLY 1-3.[170] The staff reviews the evidence on those issues below.

Treatment of "Ambiguous" Answers

Dr. Tim Daniel of the BE staff explained in his report and prepared testimony that respondents' answers defined as "ambiguous" were only those that did not clearly indicate that the respondent received "compliant" or "non-compliant" treatment; respondents left at least one of the relevant questions blank or marked "I do not remember."[171] Dr. Daniel further stated in his report that he considered it important to create an "ambiguous" category for the "COMPLY" indices to

> [d]istinguish between respondents whose responses clearly qualify them for the "non-compliance" category, and those whose missing values and/or don't remembers create an ambiguity as to whether they belong in the "comply" or "non-compliance" categories.[172]

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[168] *See* HX-122 at v, n. 3. BE staff reported that they used that liberal view of GPL compliance based on its analysis indicating that there is no statistical difference in funeral expenditures between respondents who reported receiving the GPL at the outset of discussions and those who said they received the GPL "early" in the discussions (before selection of the casket/container). HX-122 at 20, n. 30.

[169] The analysis used the Replication Study raw data, contained in the R-B-2 (Market Facts Report) data tapes.

[170] *See* McChesney, HX-126-A at 64-69, 71-72 and Table V-3; R-G-3 (NSM Comment) at 6-7, 21-23; R-G-6 (NFDA Comment) at 14-15, 18; and R-M-9 (NFDA-NSM Proposed Findings) at 150-156. The staff addresses separately the last point concerning reported "instances of compliance," because it refers to the second approach to assessing overall industry compliance.

[171] Daniel, HX-15, at 5; HX-122 at n. 33, p.26.

[172] HX-122 at n. 33, p. 26.

In other words, if every respondent who provided an "ambiguous" answer on one element of "compliance" were deleted, the level of non-compliance would be understated by deleting any respondent who clearly indicated in other answers that he or she had received non-compliant treatment.

BE staff earlier in the proceeding recalculated the COMPLY 1-3 indices by deleting the overall category of "ambiguous" answers, as suggested by funeral industry representatives. The results were that deletion of the "ambiguous" responses increased the levels of "compliance" for COMPLY 1-3 very slightly, by 2%-4%, and increased the levels of "non-compliance" even more -- by 6%-7%.[173]

Effects of Consumer Recall

(1) Length of time

In response to the NFDA-NSM assertion that consumer recall difficulties noted in the Baseline Study Report apply as well to the Replication Study,[174] Dr. Thomas Maronick of the Commission's Office of Impact Evaluation and the BLS Report itself provided evidence that all of the RS respondents answered the survey questionnaire many months before potential recall problems are considered by experts to be of serious concern. Dr. Maronick and Ms. Diane Colasanto, through the Gallup Study conducted for the AARP, also provided empirical evidence that changes in consumer recall over time regarding funeral "compliance" issues did not significantly affect the results -- respondents' answers did not significantly change as the length of time between the survey and respondents' funeral arrangements increased. That evidence is discussed below.

Dr. Maronick in his prepared statement provided a Table that shows that 99.2% of the Replication Study respondents answered the survey within 9 months of their funeral arrangements; 72% responded within 7 months.[175] Dr. Maronick's prepared statement and the Baseline Study Report contained evidence that concerns about consumer recall outlined in the Baseline Study Report were related to the 15-month time period that had elapsed between the arrangements surveyed in the Baseline Study and some responses to the Baseline's telephone follow-up study, which was conducted 6 months after the Baseline Study itself. Dr. J. Paul Peter, the consumer survey expert who reviewed the Baseline Study and its follow-up survey, raised no concerns about consumer recall based on the maximum time period of 9 months between the Baseline itself and the funeral arrangements, as suggested by funeral industry representatives.[176]

Dr. Maronick's "Table 2" in his prepared statement presented further evidence that Replication Study respondents' answers to the question whether funeral directors requested prior embalming permission do not significantly change when respondents who answered within 3

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[173] *See* R-M-5 (Staff Rebuttal) at 16, Table 3.

[174] R-M-9 at 146.

[175] Maronick, HX-13 at Table 1, p. 11.

[176] *See* HX-13 at n. 2, p. 5 and p. 11; R-B-3 (Baseline and Follow-up Study Report).

months of their arrangements are compared with those who answered within 9 months.[177] Dr. Maronick's calculations based on the study data tapes indicated that none of the differences in any of the response categories reported in that Table 2 is statistically significant.

Ms. Colasanto presented data from the Gallup Study that similarly provided evidence that survey respondents' recall in answering "compliance" questions did not significantly change over time. Data from the Gallup Study indicated that responses of consumers who answered various questions on compliance within 7 months of their arrangements never differed by more than 8.4 percentage points from those who answered between 7 and 12 months after their arrangements; responses to questions relevant to Dr. Daniel's COMPLY indices regarding the receipt of required price list information never differed by more than 7.5 points, with reported compliance actually increasing in the later time period.[178]

(2) Use of final statement

The testimony of Dr. Maronick and BE staff calculations based on the Replication Study data provided evidence that restricting the compliance analysis to those who used their final statement in answering the Replication survey, as suggested by Dr. McChesney, necessarily biases the COMPLY indices, and that, in any case, whether or not respondents used the statement does not significantly change the results.

Dr. Maronick testified that using the final statement should have no effect on answering the non-price (compliance) questions because the statement contains little, if any, information on whether the respondent received "compliant" treatment as defined in the COMPLY indices.[179]

The definition of BE staff's COMPLY indices also provides evidence that the compliance analysis should not be restricted to those who used the final statement. A necessary individual measure of compliance for COMPLY 1-3 is that respondents received a properly itemized final statement.[180] Restricting the analysis to those respondents who used their statements, as suggested by funeral industry representatives, by definition biases the results and overstates compliance by automatically excluding from the analysis all respondents who did not receive any final statement -- in effect removing one of the criteria for compliance.

Nevertheless, BE staff earlier in the review recalculated the COMPLY 1-3 indices by limiting the analysis to those who used their final statements. The results indicated that "compliance" for COMPLY 1-3 increases very slightly -- by 2%-4%.[181] Another recalculation limiting the

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[177] HX-13 at Table 2, p. 14.

[178] Colasanto, HX-66, Exhibit B, Tabulations, at 25 (timing of price information received), 27 (receipt of written price list), 53 (preservative capability of sealed casket), 57 (prior permission to embalm), and 59 (receipt of final statement).

[179] Tr. Vol. 1, 320.

[180] HX-122 at 25-27.

[181] *See* R-M-5 at 19, Table 4.

analysis to those who did not use the final statement resulted in similarly small differences -- compliance decreases by only 4%.[182]

(3) Level of responsibility for arrangements decisions

Question 11. of the Replication Study questionnaire asked respondents to describe their level of responsibility for the following arrangements decisions: selection of the funeral home; whether to have a burial or cremation; whether to have a viewing; whether to embalm the body; selection of a casket/cremation container; whether to ship the body from one funeral home to another; which cemetery to use; whether to buy a vault/grave liner; and selection of incidentals such as flowers/obituary notices.[183] The NFDA, NSM and Dr. McChesney argued during the review that RS respondents who did not have major responsibility for those decisions should be deleted from the compliance analysis because they were not principally involved in making the funeral arrangements.[184]

Record evidence provided by Drs. Maronick, Daniel and McChesney and based on the Replication Study data indicated, however, that there is little, if any, justification for deleting from the BE staff compliance analysis various categories of respondents who did not have major responsibility for certain arrangements decisions defined in Question 11. of the Study. That evidence further suggested that even if deletions should be made, doing so has no significant effect on Dr. Daniel's COMPLY 1-3 results.

Dr. Daniel's COMPLY indices were based on respondents' answers to very different questions than those asked in RS Question 11. Data from the following questions were included in the COMPLY indices: (1) when price information was first received (Q. 27); (2) whether written price information was received (Q. 27a); (3) whether a general price list was shown (Q. 28); (4) whether a properly itemized final statement was received (Qs. 32, 32a); (5) whether the funeral director misrepresented embalming requirements (Q. 39); and (6) whether the funeral director misrepresented casket for cremation requirements (Q. 52). It appears from this comparison that none of the arrangements decisions involved in Question 11. was directly related to respondents' "compliance" answers. The only possible exception to that conclusion is the decision regarding whether to embalm the body.

Dr. Maronick testified, particularly with regard to that exception regarding the embalming decision, that restricting the compliance analysis to only those respondents with major responsibility for the various decisions defined in Question 11. may in effect eliminate relevant compliance data, because those respondents may nonetheless have received compliant or non-compliant treatment as defined by Dr. Daniel.[185] Dr. Maronick further testified that one should rely on the fact that all respondents included in the study had reported on the screener

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[182] *Id.* at 20, Table 5.

[183] *See* R-B-2 at APPENDIX: Questionnaire.

[184] *See, e.g.*, R-M-9 at 154 and n. 170, *supra*.

[185] Tr. Vol. 1 at 318-319 (speaking specifically of the decision whether to embalm).

questionnaire preceding the survey that they had major responsibility for the funeral arrangements.[186]

Dr. Daniel in his testimony agreed that all 868 Replication Study respondents who reported going to the funeral home had sufficient involvement in the arrangements for inclusion in his compliance analysis, and that 868 was therefore the appropriate number to use.[187]

Dr. Daniel also provided his conclusion based on the empirical Replication Study evidence that "the compliance figures are essentially unchanged when the analysis is restricted to respondents who indicated that they arranged the funeral alone."[188] That analysis thus indicated that deletion of all respondents who may have had less than major responsibility for particular arrangements decisions does not significantly change BE staff's levels of reported compliance.

BE staff earlier in the review provided more specific findings on the effects of restricting the compliance analysis to those who reported that they had major responsibility for the selection of the funeral home, whether to embalm the body, selection of incidentals, and selection of a casket/cremation container. Those data suggested that none of the deletions increases the levels of "compliance" by more than 3% for COMPLY 1-3.[189]

Finally, Dr. McChesney's calculation provided further evidence that deleting from the compliance analysis those who did not have major responsibility for selection of the funeral home raises the level of reported compliance by less than 1%.[190]

Reported "Instances" of Compliance

The NFDA, NSM and Dr. McChesney provided the second approach to assessing the overall level of industry Rule compliance. Those participants asserted that the "true level of compliance" is 75%-80% or more when the BE COMPLY data is recalculated by adding each instance of reported compliance with each individual COMPLY measure and dividing that number by the total possible number of instances of compliance (i.e., 6 requirements for COMPLY 1 times 868 respondents = 5,208 instances of possible compliance; 3,915 reported instances of compliance divided by 5,208 = 75% compliance).[191] The staff reviews the record evidence on the merit of that argument below.

Criticism of the NFDA-NSM "Instances" of Compliance

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186 *Id.* at 316-317.

187 Tr. Vol. 1, 391-392; HX-15 at 6.

188 HX-122 at n. 16, p. 10.

189 *See* R-M-5 at 23, Table 6.

190 HX-126-A at Table V-3.

191 *See* McChesney, HX-126-A at 72-74 and Table V-4; R-M-9 (Proposed Findings) at 156-160.

Dr. McChesney's prepared statement and the testimony of Dr. Daniel indicate that the NFDA-NSM alternative compliance analysis, by definition, is a measure that assesses compliance with each component of BE staff's COMPLY indices separately, and not simultaneous compliance with more than one Rule provision.[192]

That evidence indicates that the NFDA-NSM analysis measures only the degree of partial compliance with some of the Rule's provisions, as if each provision were a separate and distinct Funeral Rule. The staff notes that, as a result, the NFDA-NSM approach does not provide evidence on the degree to which any particular provider is complying with more than one Rule provision at a time, and the approach tells us little about situations where low compliance with certain Rule provisions may be particularly important. Mr. Bates, for example, the Executive Director of the National Selected Morticians, testified that in his view a funeral home that complied with all other Rule provisions but failed to give consumers a General Price List would not be in "compliance" with the Rule.[193]

Record evidence cited above concerning the NFDA-NSM definition of "compliance" also demonstrates that the NFDA-NSM's use of the BE staff COMPLY components separately to draw conclusions about the overall level of compliance with the Rule was inappropriate. As explained below, three of the components used by Dr. Daniel relating to the General Price List are not measures of compliance with any specific Rule provision when viewed separately, and may in fact include many instances of actual non-compliance. Two other components relating to misrepresentations are measures of "non-compliance" as used by Dr. Daniel, and not measures of "compliance"; the data reveal such low levels of non-compliance for those components that using them to count total "instances" of compliance, as the NFDA-NSM do, necessarily overstates compliance.

The first three measures of the NFDA-NSM compliance definition are: (1) whether consumers received oral or written price information in some form "early" in the arrangements conference; (2) whether they got that information in writing; and (3) whether they received a General Price List sometime in the funeral transaction.[194] The Rule does not require any of those provider actions as stated individually -- it requires that providers give consumers a written GPL at the outset of arrangements discussions. As a result, those three measures must be viewed together, as Dr. Daniel did in his analysis, in order to measure compliance with the Rule's GPL provision; study respondents received "compliance" if they reported that they received written price information early in the transaction in the form of a GPL.

When viewed separately, as the NFDA-NSM did in their alternative compliance analysis, those three individual components by definition also may include many instances of actual non-compliance. Consumers who said that they received "compliance" with component (1) above, for

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[192] McChesney, HX-126-A, at 72-74 and Table V-4; Daniel, Tr. Vol. 1, 397 ("it's a measure of compliance that looks at each component separately"). Dr. Daniel further testified that he would not include the "instances" of compliance analysis in his report as an alternative approach to assessing overall compliance, and expresses his "lack of total endorsement for it." Tr. Vol. I, 1023.

[193] Tr. Vol. 1, 690.

[194] *See* HX-126-A at Table V-2, p. 64; Daniel, HX-122 at 25.

example, may have received oral price information, or price information in a form other than a GPL, and consumers who said they got "compliance" with component (3) may have received the GPL late in the arrangements conference, in violation of the Rule. The NFDA-NSM use of those components separately to count the total number of "instances" of compliance thus means that their overall compliance result also includes instances of non-compliance.

The two measures of the NFDA-NSM definition relating to whether respondents were told that caskets for cremation and embalming were required when in fact that was not the case do not measure "compliance" in a technical sense, and instead assess whether respondents received misrepresentations, or "non-compliant" treatment.[195] The staff believes that the distinction is important because of the divergent effects the data has on the BE and NFDA-NSM analyses.

Respondents included in the BE staff's COMPLY indices did not report "compliance" regarding what they were told about casket for cremation and embalming requirements, because the compliance measures used by BE staff do not assess whether respondents were told the truth about casket for cremation and embalming requirements -- they only assess whether funeral directors failed to comply with the Rule by making those misrepresentations. Dr. Daniel thus appropriately used in his analysis only those affirmative responses clearly indicating "non-compliance." Because the actual number of reported misrepresentations, or "non-compliance," was relatively low, those measures had little effect on Dr. Daniel's compliance analysis -- they removed very few respondents from the category qualifying for "compliance." However, because by definition the number qualifying for "compliance" would be very high if those misrepresentation measures were viewed as measures of "compliance,"[196] their use has a substantial effect on Dr. McChesney's compliance analysis.

The staff earlier in the review recalculated the level of "compliance" as defined by Dr. McChesney by removing the misrepresentation measures from the analysis and including only "actual" measures of compliance used by Dr. Daniel -- provision of an "early" GPL and a properly itemized final statement. The level of "instances of compliance" reported by Dr. McChesney under these conditions dropped from 75%-79% to 58%-62%.[197]

In addition to this empirical evidence, several consumer witnesses testified that they did not receive overall industry Rule compliance in terms of price/options itemization before they made arrangements decisions.[198]

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[195] *Id.*

[196] 86%-97% according to Dr. McChesney's Table V-2, HX-126-A at p. 64.

[197] *See* R-M-5 at 29; HX-126-A at Table V-4.

[198] *See* Stone, R-F-57 at 1 (small town funeral home did not comply, but urban home was better); Groenenboom, R-F-54 at 1 (no itemization of any kind); Rev. Bennett, Tr. Vol. I, 30 (no price disclosure); Carlson, author, Tr. Vol. I, 516 (many funeral arrangers among the 100 audiences she has lectured before did not know they had a choice of arrangements/prices); Wertheimer, NAEL, Tr. Vol. III, 972 (clients did not get compliance); and Schwarcz, Opinion Centers America, Tr. Vol. III, 461 (many of 30 focus group members did not remember receiving a discussion of prices or the GPL).

Staff Conclusion Regarding Overall Compliance

Based on the record data summarized above, the staff on balance concludes that: (1) the Bureau of Economics COMPLY indices (29-36% compliance) provide reliable estimates of actual simultaneous compliance with those Rule provisions measured, particularly in view of the more recent Gallup Study data that shows precisely the same level of compliance as COMPLY 3 -- 36%; (2) the BE COMPLY indices of 29%, 31%, and 36% overall compliance drop, respectively, to 14%, 15%, and 18% when the Rule's GPL timing requirement is viewed strictly (respondents reported receiving the GPL at or near the beginning of arrangements discussions); (3) the Bureau of Economics COMPLY indices necessarily overstate actual compliance with the Rule -- the level of compliance for COMPLY 1 falls incrementally to a level of 9.3% when the remaining compliance data from the Market Facts' Replication Study is added to the analysis (and still lower when the Rule's actual GPL timing requirement is used); and (4) the BE approach to assessing the level of overall industry compliance is far superior to that advocated by the NFDA and NSM, because the latter analysis does not speak to the proportion of funeral homes that are simultaneously complying with key provisions of the Rule, and the results appear to overstate even the overall level of partial compliance with the Rule.

Sufficiency of Overall Compliance to Fully Assess Rule Effects

Many rulemaking participants expressed their views concerning whether a 30% overall industry compliance level with the Rule would be sufficient to permit a full assessment of the Rule's potential impact on the funeral market.[199]

Most participants said, when asked, that a 30% compliance level would be insufficient to fully gauge the Rule's benefits for various reasons. These parties included state officials,[200] consumer advocates,[201] consumer/funeral industry researchers,[202] memorial society

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[199] At the time of the NPR and public hearing stages of the proceeding, most rulemaking participants assumed for purposes of discussion that the BE staff COMPLY 2 estimate of 31% overall compliance was the most reliable estimate available. The COMPLY 2 index included Replication Study responses to the questions most directly related to the GPL, final statement and embalming/casket for cremation misrepresentation provisions of the Rule. Record evidence now demonstrates that COMPLY 2 is a reliable compliance estimate for the Rule provisions it measures, but that the actual overall level of industry Rule compliance when other Rule provisions are added may be significantly lower than 31%.

[200] Klein, New York State Funeral Directing Advisory Board, Tr. Vol. II, 1048, 1090 (too early to judge impact because of low compliance such a short time after promulgation); Farrow, Exec. Dir., Texas Funeral Service Comm'n, Tr. Vol. III, 590 (insufficient to measure benefits); and Clark, Arkansas Attorney General, Tr. Vol. III, 43 (no honest assessment because no benefits when 7 of 10 do not comply).

[201] Dr. Nelson, AARP, Tr. Vol. I, 80 (hard to measure benefits when compliance is low); Snyder, Consumers Union, Tr. Vol. III, 1257 (would make no sense to repeal the Rule because of the industry's intractability); Baskin, Tr. Vol. III, 145 (30% insufficient); Giesberg, Nat'l Ass'n Consumer Agency Administrators, Tr. Vol. III, 1140, 1163 (creates problem with visibility of the Rule; 30% plus low consumer awareness means review time is insufficient); and Wertheimer, NAEL, Tr. Vol. III, 983 (insufficient).

[202] Showalter, journalist/hospice funeral counselor, Tr. Vol. II, 136 (awfully low to judge effects after 4 years); Mazis, for AARP, Tr. Vol. III, 859 (whole analysis appears premature if no compliance); and Prof. Sommer, Center for

(continued...)

officials,[203] and funeral directors.[204] Those who offered views on an adequate level of compliance necessary to fully assess the Rule's performance generally suggested levels exceeding 50%.[205]

The major rulemaking participants offered opposing views about the adequacy of industry compliance to fully gauge the Rule's impact. The AARP in its Comment stated that low compliance means that the Commission can not accurately judge the Rule's long-term benefits, especially when a majority of funeral homes fail to provide consumers with timely written price information.[206] The AARP concluded in its Proposed Findings that the Rule's benefits have not been fully realized in the review period due to low industry compliance and low consumer awareness.[207] The NFDA, in contrast, suggested that one would expect to see at least some of the Rule's perceived benefits even with a 30% compliance level, and that the entire issue of the level of compliance is moot because those 30% of the Replication Study respondents who received compliant treatment reaped no benefits (i.e., spent no less for arrangements than those who did not receive compliance).[208] The NFDA concluded that "the issue of compliance can not serve as a scapegoat for the ineffectiveness of the Rule."[209]

The two economics experts who testified on this overall compliance issue appeared to agree that the compliance level necessarily affects any data analysis. Dr. Barnow, appearing on behalf of the AARP, asserted that the degree of Rule compliance must be taken into account in order to gauge the costs and benefits of a "fully implemented" Rule. The low level (29-36%) of compliance evidenced by analysis of the RS data, Dr. Barnow continued, "means that any pre-post

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[202](...continued)
Consumer Research, Univ. of Cal-Davis, Tr. Vol. III, 629-630 (insufficient; can not base analysis only on experience of informed consumers).

[203] Perguson, Tr. Vol. III, 1212; and Klugman, Tr. Vol. III, 927 (memorial societies' purpose is to redress imbalance in a market where the ordinary law of supply and demand does not apply).

[204] Pierson, R-D-1 at 1 (rule means nothing until 100% compliance from all providers); Simms, for NFDA, Tr. Vol. II, 460 (agreed when asked that one can not say that, with 30% compliance, the Rule has been integrated into funeral home practice, but it's progress); and Peebles, Tr. Vol. III, 1561.

[205] Dr. Nelson, AARP, Tr. Vol. I, 16, 30 ("very high degree"); Carlson, author, Tr. Vol. I, 505, 525 (100%); Pierson, funeral director, R-D-1 at 1 (100% necessary); Snyder, Consumers Union, Tr. Vol. III, 1245-1246 (above 80%); Blake, memorial society, Tr. Vol. II, 1116 (100% should be goal); Klein, NYSFDAB, Tr. Vol. II, 1048 (90%); Peebles, funeral director, Tr. Vol. III, 1561 (over 50% necessary); Clark, Ark. A.G., Tr. Vol. III, 44 (should be 100%); Prof. Sommer, Center for Consumer Research, Tr. Vol. III, (above 98%); and Topinka, Illinois state senator, Tr. Vol. II, 84 (50% at least).

[206] R-H-17 at 18-19, 27.

[207] R-M-11 at 145.

[208] R-G-6 at 19-20. The logical implication of the NFDA's suggestion is that an analysis of the experience of those 30% of respondents who received compliant treatment, as "compliance" was defined by BE staff's COMPLY 2 index, can and should serve as a substitute for an assessment of a more fully complied-with Rule. The staff addresses issues concerning the Rule's impact on consumer expenditures in section II.B.4, *infra*.

[209] *Id.* at 22.

time series analysis will fail to capture the effect of the rule because the rule was not being complied with substantially in 1987."[210] In other words, assuming that the primary benefit of the Rule is reduced consumer expenditures (for less expensive providers or individual goods and services) through informed decision-making and the resulting increased price competition, then, low compliance means that most consumers are not making informed choices in a competitive market, and can not as a result reap the Rule's intended benefits. Dr. Barnow concluded that the BE staff's time-series analysis using pre-rule (the BLS) and post-rule (the RS) observations, addressed in section II.B.4. of this report, "cannot be used to assess the impact of the rule [on expenditures]."[211] Dr. Daniel of the BE staff agreed in principle, testifying that the higher the compliance level, the more one can compare the 1981 pre-Rule and 1987 post-Rule time periods.[212] Dr. Daniel further stated that he conducted a cross-section "comply" analysis (also discussed in section II.B.4., and comparing expenditures of those 31% of respondents who received "compliance" with those who did not) in addition to the time-series because of the overall compliance level finding -- in order to combine the two results to help pick up in the analysis the effects of Rule compliance.[213]

Dr. Barnow also advocated that, because BE staff's COMPLY 1-3 indices only measure partial Rule compliance (i.e., industry compliance with only four of the Rule's many requirements), even the cross-section results comparing consumer expenditures for those who did and did not receive "compliance" will fail to identify the effects of a fully complied-with Rule.[214] Dr. Barnow agreed that, given the overall compliance level, the cross-section analysis is preferable to the time-series for evaluating the effects of the Rule, but cautioned against drawing conclusions about the potential impact of the Rule because the cross-section results could change over time as the degree of partial compliance changes.[215]

3. Staff Conclusion

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[210] HX-118 at 5-6, 15.

[211] *Id.* at 3.

[212] Tr. Vol. I, 986 (but the time-series results "can begin to answer the questions of interest" even though compliance appears to be about 30%).

[213] *Id.*

[214] HX-118 at 6, 24.

Dr. Barnow's points could lead one to argue as well that the level of compliance with individual Rule provisions might affect the reliability/projectability of evidence that consumers do not use the Rule-required information they receive to reduce their expenditures. One might question, for example, whether the finding that receipt of the GPL does not reduce expenditures should be taken at face value when only 23% of RS respondents said that they got that document at the time required by the Rule.

[215] Tr. Vol. I, 881. Dr. Barnow also suggested that one or more relevant explanatory variables, such as religion and wealth of the consumer, that likely influence consumer expenditures on funerals is missing from the cross-section analysis, so that the resulting regression results may be biased in an unknown direction. HX-118 at 24. *See also* Mazis, Tr. Vol. III, 860 (exercise caution regarding the cross-section results because it is not known whether the two groups of consumers are really equivalent).

The question presented by this section of the report was whether the review period and industry Rule compliance are sufficient to fully assess at this time the Rule's potential impact on the funeral market. More specifically, the staff asked whether we can expect the Rule to have effected a substantial change in funeral consumers' behavior since the Rule's promulgation based on the current degree of consumer knowledge about the funeral transaction and the level of industry compliance.

The staff answers "no" to that question. The Commission acknowledged that this Rule might take longer to affect the funeral market than rules in other industries, and the record evidence appears to confirm that prediction. Consumers' knowledge about the funeral transaction from all sources, though somewhat improved, is still lacking. At best, the evidence demonstrates that a large majority of funeral providers have not given funeral consumers the opportunity to increase their knowledge, and thus change their behavior if they so choose, by fully complying with the Rule. The evidence also indicates that over 75% of providers have not complied with the GPL requirement -- the cornerstone of the Rule. Under these conditions, the staff concludes that it is not yet possible to make definitive judgments about the Rule's impact based on consumers' behavior in making funeral arrangements decisions.

Although the staff would not expect 100% compliance under any circumstances, the evidenced 31%, at best, overall industry compliance level in 1987 appears, in the staff's view, to render any comparative, time-series analysis with the 1981 survey of very limited value in assessing the Rule's actual benefits to date, or its potential benefits over time, because that analysis could not capture the full effects of a complied-with Rule. That is, the Rule's intended benefit of reduced consumer expenditures through informed decision-making and increased price competition can not be realized because low compliance means that most consumers are not making informed decisions in a competitive market, as the Rule intended. The staff also concludes, on balance, that any cross-section analysis comparing expenditures of those who received only partial compliance with those who did not may also be of very limited value for the same reason, and the results may change over time. Dr. Barnow, for example, suggested that increased compliance would increase benefits from several sources, particularly from increased consumer awareness of their rights under the Rule.[216]

The evidence indicates, on the other hand, that staff can make several valuable judgments about the Rule's costs to providers based on their level of compliance with individual provisions to date, and about actual short-term or potential long-term costs and benefits of the Rule and some of its provisions. Overall, however, the staff does not believe that the Rule has yet had the "opportunity to work in the marketplace" envisioned by the Commission in mandating this review proceeding. Accordingly, the staff does not recommend repeal of the Rule, or propose any substantial substantive amendment to the Rule's major provisions. Rather, most of the staff's recommendations are designed to clarify the Rule's requirements and otherwise reduce alleged compliance burdens in order to increase the level of industry compliance.

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[216] The staff notes that, at the time that Market Facts conducted the Replication Study in the summer of 1987, three Rule enforcement actions had been filed. Most of the study respondents had made their arrangements prior to those actions. The Rule thus did not enjoy an increased degree of "visibility" resulting from Commission enforcement at the time the RS respondents made funeral arrangements. The Commission to date has filed a total of fifteen enforcement actions.

B. Impact of the Rule on Consumers

1. Consumers Value Itemized Price Information

Introduction

The rationale underpinning the Funeral Rule is that, but for the deficiencies in the funeral market, consumers would act reasonably to avoid injury and maximize benefits.[217] That expectation is sound only to the extent that consumers consider the cost of funeral goods and services important. Thus, a preliminary consideration in measuring the impact of the Rule on consumers is whether consumers are sensitive to cost considerations. The Commission determined in 1982 that consumers desire itemized price information in making funeral arrangements,[218] and that many consumers who paid "supracompetitive" prices were not dissatisfied with their arrangements because they were unaware of their options. That lack of awareness of injury explained the dearth of consumer complaints.[219]

The Commission further recognized that price was not necessarily the most important concern for funeral consumers, but concluded that consumers had unfairly been denied access to itemized price information for services that were consumers' third largest purchase -- after a home and a car.[220] The Commission thus intended that the Rule would ensure consumer access to itemized price information sufficient to make informed selections.[221] The staff below examines the record evidence on the importance that consumers attach to price information.

Position of the Parties

The NFDA and NSM maintain that price is not important to consumers in the selection of the funeral provider or the type of disposition.[222] However, those groups assert that price plays a role in the selection of specific goods and services.[223] The AARP, in contrast, argues that consumers care about prices but that low compliance with, and consumer awareness of, the Rule inhibit consumers' search for, and effective use of, price information in making funeral arrangements.[224]

Evidence that Price is Important to Consumers

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[217] R-B-5 (SBP) at 42260, 42292-96.

[218] *Id.* at n. 97 and accompanying text.

[219] *Id.* at 42271.

[220] *Id.* at 42260. In 1988, the average adult funeral cost almost $3000. Hahn, HX-49 at 3, Tr. Vol. II, 668.

[221] R-B-5 at 42260.

[222] R-M-9 at 8, 10, 14, 17.

[223] *Id.* at 20.

[224] R-M-11 at 111-112, 116.

Empirical data contained in the Market Facts and accompanying BE Report and the NSM's Family Follow-up Survey provided systematic evidence concerning the value consumers' place on receiving price information early in the funeral transaction. That evidence indicated that: (1) consumers who received funeral price information early in the funeral transaction spent less for their arrangements than those who did not; (2) significantly more consumers received early price information in 1987 than in 1981; and (3) consumers consider that information important in selecting a funeral home and individual funeral goods and services.

BE staff's analysis of the 1987 Replication study results indicated that consumers who received some form of funeral price information "early" in the arrangements conference spent significantly less -- $252 -- for their funeral purchases than those who did not receive that type of information.[225] Dr. Barnow, an economist appearing on behalf of the AARP, in his testimony referred to this finding as "the only solid result that seems consistent in the work that Tim Daniel has done and that I have done."[226] BE staff's comparison of the Baseline and Replication Study results further revealed that 7% more consumers received price information early in 1987 than in 1981.[227]

Still other BE staff analysis of the RS data indicated that the earlier consumers receive price information, the more likely they are to consider that information important to their choices in making funeral arrangements. That analysis indicated generally that the proportion of study respondents who said that price information was very or somewhat important in making arrangements decisions increased as their reported first receipt of that information approached the beginning of discussions.[228]

Survey data provided by the NSM spoke to consumers' views about the importance of price in selecting the funeral home they use. Members of the NSM regularly poll their clients after providing services on attitudes toward the funeral establishment and the recently-conducted funeral.[229] Results of that NSM "Family Follow-up" survey for all participating providers for the years 1983-1988 indicated that, although price was apparently less important than other factors (such as funeral home reputation), on average, over half (52%) of the consumers in those

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[225] HX-122 at Table XI, p. 38 ("pinferly").

[226] Tr. Vol. I, 893.

[227] HX-122 at vi (68% in 1987 versus 61% in 1981).

[228] The percentage of consumers reporting that price was very or somewhat important at five time periods during which they said the information was received was as follows: (1) "at beginning" - 76%; (2) "before casket selection" - 75%; (3) "when finalizing arrangements" - 62%; (4) "after decisions had been made" - 67%; and (5) "no discussion of price" - 53%. In the first three periods above, 41%, 31%, and 22% of respondents, respectively, said that price information was "very" important. The analysis is based on consumers' answers to RS questions 27 (when price information was first received) and 35(c)(5) (importance of price information in arranging the funeral). R-B-2 at APPENDIX: Questionnaire, and data tape. *See also* R-M-5 (Staff Rebuttal) at 6-7.

[229] Roper, HX-29 at 3.

years (with little variation in each year) considered price "very important" in their selection of the funeral home; 19% considered price unimportant.[230]

The NSM Survey results are remarkably similar to those of the Replication Study concerning the importance of price. The Replication data indicate that 56% of the survey respondents reported that the cost of funeral arrangements was "very" or "somewhat" important in their decision to select the funeral home they used; 15% reported that cost was somewhat or very unimportant.[231]

The record contains other empirical evidence on the degree to which consumers generally consider price important in making arrangements decisions. The Replication study data indicated that: (1) 73% of those respondents who received a GPL considered the list "very" (34%) or "somewhat" (39%) important in their selection of funeral items and services,[232] and 87% of those respondents who were offered the GPL to keep took it with them;[233] (2) 79% of the respondents considered the price of the casket to be very or somewhat important to the selection of the casket,[234] and 79% of those respondents who received a casket price list also thought that the list was very (39%) or somewhat (40%) important in their casket selection;[235] 79% of consumers took the CPL with them when it was offered;[236] (3) 72% of the respondents reported that information on prices of items and services was somewhat or very important in their selections;[237] (4) 77% of those respondents who received a price list for outer burial containers kept the list;[238] and (5) respondents reported that the five most important factors in selecting funeral items and services generally were: wishes of the family (44%), wishes of the deceased (40%), information on prices (7%), funeral director's recommendation (6%), and religious concerns (3%).[239]

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[230] The analysis is based on R-J-11, NSM Summary sheets, Question 1.f. *See also* R-M-5 at 7-8.

[231] R-B-2 at Table III-28, p. III-39, and data tapes.

[232] R-B-2 at Table III-32, p. III-45.

[233] *Id.* at III-46.

[234] R-B-2 at Table III-45, p. III-72. Respondents rated the five most important factors in their casket selection as: family wishes (31%), appearance (19%), wishes of the deceased (19%), price (14%), and protection and preservation of the remains (8%). *Id.*

[235] R-B-2 at Table III-34, p. III-49.

[236] *Id.* at III-50.

[237] R-B-2 at Table III-41, p. III-65.

[238] R-B-2 at Table III-35, p. III-53.

[239] R-B-2 at Table III-41, p. III-65.

The staff notes that these data do not account for the extent to which, if at all, the response categories "wishes of the family" and "wishes of the deceased" also include price considerations.

The Gallup Study of 675 recent funeral arrangers provided very similar evidence. The results indicated that: (1) 82% of those respondents who were given a general price list took it with them; (2) 80% of the respondents who selected a casket found the price list to be very helpful in making their casket selection; and (3) 74 percent of respondents found the grave liner or burial vault price list to be very helpful.[240]

The Gallup Study further asked respondents:

> Some people find it helpful when funeral directors give them information about the cost of funeral services when they first begin making arrangements. Other people are offended that funeral directors bring up the subject of costs during their time of grieving. Which of these views comes closer to your own?

Eighty-three percent of the respondents stated that they find cost information to be helpful.[241]

The Omnibus Opinion, or "Excel," Survey also conducted for the AARP showed that most consumers (86%) think that funeral homes should disclose price information in advance, and 57% said that providers should be required to provide that information over the telephone.[242]

In addition to the survey evidence on consumer sensitivity toward price information, several interested parties offered their views during the informal public hearings. Clifford Brownstein, Executive Director of the CAFMS, testified that memorial societies represent 350,000 persons who are concerned about prices.[243] William Klein, a consumer member of the New York State Funeral Directing Advisory Board, asserted that in general consumers want price information in advance.[244] The Los Angeles Funeral Society commented that a 1984 survey of its membership by the Center for Consumer Research at the University of California-Davis found that the most important motives for people joining were the desire for inexpensive arrangements, avoidance of high-pressure sales talks for survivors, and reduced responsibility for survivors.[245] The Greater Detroit Memorial Society submitted focus group results of 50 seniors from the Detroit area that showed that those who received price lists saw them, on the whole, as helpful, and that most want to comparison shop.[246] The President of the Peoples Memorial Association of Seattle, Washington reported that the society's log revealed that approximately 50% of all calls

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[240] Colasanto, Tr. Vol. III, 55-56.

[241] *Id.* at 55. Five percent thought that discussing costs is offensive; nine percent volunteered to the interviewer that it didn't make any difference one way or the other; and four percent responded that they didn't know which came closer to their own view.

[242] McFadden, HX-8 at 3 and Ex. B, Tables 012-013.

[243] Tr. Vol. I, 179.

[244] Tr. Vol. II, 1061.

[245] R-H-27 at 1.

[246] R-H-19 at 1.

are for information about prices.[247] The Reverend Henry Wasielewski, who provides comparative, funeral price information over a telephone "hotline" in Phoenix, Arizona, testified that:

> [o]ur telephone lines were jammed from morning to night for two to three weeks straight, talking with the people who wanted to know about prices ....[248]

Former FTC Commissioner Mary Gardiner Jones, appearing on behalf of the Older Womens' League, also testified on consumers' desire for price information, stating that:

> Our founder was a woman by the name of Tish Summers. In July of 1985 she wrote a letter to our members talking about her own oncoming death and the needs to make advance planning .... She got about 2,000 letters back from our various constituents asking for additional information on all of those aspects of her letter.[249]

A "low-cost" funeral home director who conducts about 1,000 funerals annually in Phoenix reported that, based on the surveys his firm conducts, 85% of his clients choose his funeral home because of his low prices.[250] Another discount funeral provider in Phoenix commented that his mortuary had received some sixty to seventy calls about funeral pricing.[251] Paul Showalter, a journalist and industry analyst, asserted that two funeral homes have captured 10% of the market in Phoenix, even though there are some 50 homes in that area, because they offer "traditional" funerals for less than $1,200.[252]

The Attorney General of Arkansas stated that, in his experience, funeral consumers are very price-conscious.[253] A representative of the National Association of Consumer Agency

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[247] Perguson, Tr. Vol. III, 1178 ("We have estimated that at least one thousand two hundred calls a year are requests for price information. The mortuary with which our Association has had its contract for forty-eight years estimates its office receives between 800 and 1,000 calls per year requesting price information... I frequently hear the comments from the senior citizens that they do not want their children spending a great deal of money on a funeral").

[248] Tr. Vol. III, 1609-1610 ("Every time a public service announcement is made on TV, every time there's a mention on a TV program, news program, articles in the newspapers, we immediately get another flood of phone calls [about funeral price information"]).

[249] Tr. Vol. I, 262.

[250] Botimer, Tr. Vol. III, 1269, 1325.

[251] Peebles, Tr. Vol. III, 1551 ("We do this quite frequently, and it does account for the major share of our business. We have had calls from families that have been to other funeral establishments and we have gone to other funeral establishments and picked up remains because of the pricing and the price structure that we have").

[252] Tr. Vol. II, 130. Mr. Showalter was referring to the Botimer Family Mortuary, represented at the hearing by Mr. Botimer, and the Greer Chapel and Mortuary.

[253] Tr. Vol. III, 33.

Administrators stated that consumers balance their need for funeral service against the cost of that service.[254]

Some rulemaking parties disagreed with the view that price information is important to consumers. In addition to the NFDA's conclusion discussed earlier, Dr. McChesney, an economist appearing on behalf of the NFDA, offered testimonial evidence that the provision of price information over the telephone or early in the arrangements discussion is costly and not valuable to consumers in selecting the funeral home or funeral goods and services.[255] Dr. McChesney stated, for example, that:

> Price information is more helpful--and thus should be given--once purchasers have some idea of the type and quality of the services to be provided. Until customers know what they are buying and how well it will be provided, price information is meaningless at best, and will often be misleading. ...Thus, it is dubious that mandatory disclosure of price information over the telephone or early in discussions is of particular value to consumers.[256]

The Conference of Funeral Service Examining Boards commented that the market for funeral services is not price-driven, but is initially based on: (1) knowledge of funeral director or funeral home reputation; (2) prior experience with the funeral home; and (3) location; price becomes of concern to consumers after a provider has been selected.[257] The staff witness on the Commission-sponsored focus group study disclosed that he got the distinct feeling from the focus groups that cost was not a factor in the selection of the funeral director; cost was important, however, when consumers considered options.[258] An AARP witness echoed that view.[259] Several funeral providers reported that calls from consumers seeking price information are rare or infrequent.[260]

Evidence that Consumer Awareness of Price Information is Low

The record contains much testimonial evidence to the effect that consumers' do not consider price information to the extent that one would expect because of their vulnerability and lack of awareness of price information availability.

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[254] Giesberg, Tr. Vol. III, 1153.

[255] HX-126-A at 25-27.

[256] *Id.* at 26-27.

[257] R-J-1 at 3.

[258] Schwarcz, Tr. Vol. III, 476.

[259] Nelson, Tr. Vol. I, 83 ("While price may not be the primary determinant in selecting a funeral home, once you get to that funeral home, there is tremendous interest in price on the part of the consumer").

[260] *See, e.g.*, Hennessy, Tr. Vol. II, 1003 ("In our community it hasn't become a big factor. I've had one call that I'm directly aware of that the person asked for [prices]").

The staff earlier in its Report presented the testimonial evidence offered by many witnesses that consumers generally are unaware of funeral prices charged by funeral homes generally or by particular providers.[261] Mr. Showalter, an industry analyst and hospice counselor, testified that consumers do not even think that a funeral is an item that one can price-shop for.[262] Attorney General Steve Clark asserted that consumers are intimidated by funeral providers from seeking price information.[263] Ms. Susan Giesberg of the NACAA noted that consumers are often reticent to ask for price information.[264] According to Dr. Mazis, an AARP witness, many consumers associate a certain stigma with actually asking for price information. That stigma makes it difficult for consumers to raise the issue of price when a loved one has died.[265] Dr. Thomas Nelson added that consumers need to be aware of the fact that they can call funeral homes and get prices.[266] The AARP's "Excel" Study found that 75% of the respondents were unaware that federal law requires providers to give price information over the telephone.[267] Two witnesses, a "low-cost" funeral provider and a director of a price information "hotline," testified that consumers need to be made aware of price differences among funeral homes before they will price-shop.[268] Finally, Dee Perguson, a memorial society president, opined that if people find out that they can get information, it's easier to go to the next place to get information, and that's the only way they can do comparative shopping.[269]

Staff Conclusion

The staff concludes based on its review of the evidence that the funeral transaction is an emotional as well as business experience and that many factors affect consumer decisions. Many consumers, at least to date, are not necessarily motivated solely, or even principally, by cost. That appears particularly true when consumers must select the provider of services immediately after the death of a loved one.

The staff further concludes, however, that the evidence provided by both industry and consumer participants provides a substantial basis to conclude that consumers value price

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[261] *See* n. 111, *supra*.

[262] Tr. Vol. II, 126-127.

[263] Tr. Vol. III, 38 ("So, if they know that there is a rule or regulation or a law that backs them up, and an agency that will make sure it is enforced, it makes a marked difference in both their willingness to call and inquire and to their courage to not be intimidated when someone is a little bit gruff or a little bit less than pleasant in dealing with them").

[264] Tr. Vol. III, 1152.

[265] Tr. Vol. III, 812.

[266] Tr. Vol. I, 29-30.

[267] Soulas, HX-76 at 3.

[268] Botimer, Tr. Vol. III, 1289; Rev. Wasielewski, Tr. Vol. III, 1634-1635 (shopping will increase as consumer awareness of price differences increases).

[269] Tr. Vol. III, 1188.

information in selecting funeral providers and funeral goods and services, and that many consumers use that information to lower their overall funeral expenditures. Survey respondents who received price information early in the funeral transaction spent significantly less for their arrangements than those who did not get that timely information; the earlier respondents received price information, the more likely they were to consider the information important to their choices in making funeral arrangements. A majority of survey respondents, when asked, also said that they considered price very important in their funeral home and casket selections, although other factors appeared to be more important.

Other evidence indicates that consumers in increasing numbers are using "low-cost" funeral homes where they exist as a direct result of those providers' competitive pricing practices and the availability of comparative price information. Similarly, still other evidence discussed in section III.C. of this Report reveals that consumers will attempt to purchase competitively-priced caskets from third-party sellers when they are available. Finally, empirical evidence addressed in section II.B.3. below shows that an increasing proportion of consumers are purchasing the significantly less-expensive cremation alternative, that consumers are purchasing fewer caskets and embalming for cremation than in 1981, and that at least some consumers are declining items that used to be included in funeral "packages."

2. Shopping Behavior

Introduction

The Rule's goal is to lower barriers to price competition and facilitate informed consumer choice, by ensuring that: (1) consumers have sufficient access to itemized price information to make informed selections about the goods and services they want, (2) consumers can decline goods and services they do not want, or do not need as a matter of law, and (3) misrepresentations are not used to influence consumers' selections.[270] The Rule's major requirements were thus designed to assist consumers in selecting funeral goods and services at the funeral home, after selection of the provider. The GPL is the key Rule-required document implementing those requirements.[271]

The Commission also determined that another purpose of the Rule was to facilitate comparison shopping among providers, even at the point of need. The Commission designed two Rule provisions -- the telephone disclosure provisions -- primarily for that purpose, reasoning that consumers' greater access to price information would increase their level of comparison shopping, which, in turn, might create pressure for increased competitive pricing in the industry.[272]

The Commission recognized, however, that comparison shopping by a significant number of consumers at the time of need was unlikely. The Commission reasoned that: (1) consumers' need to make difficult and costly arrangements decisions under severe emotional and time constraints

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[270] R-B-5 at 42260.

[271] *Id.* at 42272.

[272] *Id.* at 42272-42273, 42292. The Commission also reasoned that the market should respond even if only some consumers shopped. *Id.* at 42272.

renders shopping substantially more difficult;[273] (2) consumers traditionally select providers on the basis of factors other than price as a result of their lack of experience and the absence of price advertising;[274] and (3) consumers' choice of providers may be limited.[275] The Commission concluded that consumers were unlikely to use GPLs to price-shop in person, and that, although the telephone provisions would make shopping easier, many consumers might still continue to select a provider without first searching for price information.[276] The staff below examines the record evidence on whether, and to what extent, the Rule has facilitated consumer shopping in the funeral market.

Position of the Parties

The NFDA and NSM assert in their Proposed Findings that the Rule has failed to provide its promised benefits because comparison shopping has decreased since the Rule -- the opposite of the impact predicted by the Commission. Consumers, those groups argue, continue to select a provider based primarily on reputation, prior relationship with the funeral director, prior experience with the funeral home, and location.[277]

The AARP, in contrast to the NFDA-NSM position, argues that the low level of comparison shopping is likely attributable to low consumer awareness of their rights under the Rule and to low industry compliance, and not to consumers' lack of interest in price information. Rather, the AARP concluded, the record shows that consumers value price information and use it in choosing among funeral options.[278]

Evidence on Shopping Behavior

Evidence discussed in the preceding section of the report indicated that a majority of consumers consider price information important in selecting a provider, but still rate other, non-price factors more important to that choice.

The empirical evidence indicates that consumers seldom comparison shop by contacting funeral providers directly, although that evidence does not clarify whether the level of direct shopping on the specific basis of price has changed since the Rule's implementation.[279] Defined in the Baseline Study as "contacting more than one funeral home," 7.2% of the

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[273] *Id.* at 42265.

[274] *Id.* at 42267, n. 74.

[275] *Id.* at 42281, n. 221 (evidence indicated that 70% of providers had 4 or fewer competitors in their market area).

[276] *Id.* at 42273, n. 140.

[277] R-M-9 at 48-54.

[278] R-M-11 at 100-103, 109-112, 150-151.

[279] Consumers who "comparison shop" might be concerned about one or more of several factors, including, among others, offerings, convenience, payment terms, and prices.

respondents comparison shopped in 1981.[280] Using that same shopping definition, the 7.2% figure dropped to 4.2% in the 1987 Replication Study results,[281] but increased to 11% in the 1988 Gallup Study results.[282] The staff finds no reliable basis in the record to support one of those post-Rule findings over the other, except to note that the Gallup Study includes arrangements made up to 16 months after those in the RS. The empirical evidence is thus mixed concerning whether overall comparison shopping has increased or decreased under the Rule. In either case, shopping by contacting funeral providers directly appears to occur infrequently. Industry groups and an AARP representative agreed with that conclusion.[283]

The staff notes, however, that the survey evidence does not tell us whether the proportion of consumers who seek specific price information from more than one provider before selection has changed over time. The 1987 RS specifically asked shoppers whether they requested price information from the funeral home.[284] Thirty-eight percent (16 respondents) of the shoppers did so.[285] The 1981 BLS did not contain a separate question on whether shoppers asked for price information.

Two industry surveys of funeral directors also provided mixed results on the level of telephone inquiries since the Rule's adoption. One survey of NFDA members conducted in 1984 indicated that over 80% of the respondents said that phone inquires had not increased since the Rule's effective date.[286] Another survey conducted in 1985 in four midwestern states by the Funeral Directors Services Ass'n, however, showed that half of the respondents reported increased telephone inquiries since May 1984.[287]

The testimony of three providers who operate "low-cost" funeral homes provided evidence that consumers readily inquire about price information when prices are advertised. One funeral director who conducts about 1,000 funerals annually in the Phoenix area reported that, based on the surveys his firm conducts, 85% of his clients choose his funeral home because of his low

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[280] HX-122 at Table VI, p. 14.

[281] *Id.* (42 of 991) Eighty-five percent of respondents had already decided on a funeral home before contacting any. R-B-2 at Table III-18, p. III-24. Eighty-two percent of those who had not decided on a particular funeral home contacted only one funeral home. *Id.* at III-25.

Market Facts in its report stated that these results "must be viewed with extreme caution" because so few respondents (43) contacted multiple funeral homes and even fewer (35) contacted any by telephone. *Id.*

[282] Colasanto, HX-66 at Ex. B, p. 7 and Tabs, p. 19 (68 of 607).

[283] R-M-9 at 52; Dr. Nelson, AARP, Tr. Vol. II, 191 ("Consumers don't really price-shop in an at-need situation").

[284] R-B-2 at APPENDIX: Questionnaire, Q. 21.

[285] R-B-2 at Table III-21, p. III-29, and R-B-2 data tapes.

[286] R-B-14 at 5-6.

[287] R-G-5 at 149, 151.

prices.[288] Another discount funeral provider in Phoenix commented that price inquiries account for a major share of his business.[289] Ernest Heffner testified that annual funeral calls at the low-cost funeral home he has operated since 1984, in York, Pennsylvania, have increased 400% due to his price advertising.[290] Paul Showalter, a journalist and industry analyst, further asserted that two funeral homes have captured 10% of the market in Phoenix, even though there are some 50 homes in that area, because they offer "traditional" funerals for less than $1,200.[291]

Finally, the "Excel" Survey conducted for the AARP indicated that almost 50% of consumers over the age of 45 would consider phoning or visiting one or more funeral homes to make price comparisons, and 57% thought that price information should be available over the telephone.[292]

Consumer Awareness of Price Information Availability

Consumer and industry witnesses testified that consumers will engage in price-shopping to the extent that funeral home prices vary and to the degree that consumers are aware of that fact. Dr. McChesney, an economist appearing for the NFDA-NSM, opined that consumers will benefit from price shopping to the extent there are real differences in funeral prices available in a given market area, and that increased shopping should be observed as the potential benefits of doing so increase.[293] Two other witnesses, a "low-cost" funeral provider and a director of a price information "hotline," asserted that consumers need to be made aware of those price differences among funeral homes before they will price-shop.[294]

Concerning price differences in the market generally, the NFDA stated in its Comment that the Rule has not changed the state of competition in the funeral industry.[295] Testimony by several industry observers, discussed later in section II.C.1, indicates that little, if any, price competition occurs among providers.

The staff in the prior subsection of its report and in section II.A.1. presented evidence that consumers' knowledge is low concerning: (1) prices charged by providers in general and by

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[288] Botimer, Tr. Vol. III, 1269, 1325.

[289] Peebles, Tr. Vol. III, 1551 ("We do this quite frequently, and it does account for the major share of our business. We have had calls from families that have been to other funeral establishments and we have gone to other funeral establishments and picked up remains because of the pricing and the price structure that we have").

[290] HX-33 at 11 and Exhibit T.

[291] Tr. Vol. II, 130. Mr. Showalter was referring to the Botimer Family Mortuary, represented at the hearing by Mr. Botimer, and the Greer Chapel and Mortuary.

[292] MacFadden, HX-8 at Ex. B, Tables 011, 013, pp. 14, 16.

[293] Tr. Vol. I, 1098, 1102-1103.

[294] Botimer, Tr. Vol. III, 1289; Rev. Wasielewski, Tr. Vol. III, 1634-1635 (shopping will increase as consumer awareness of price differences increases).

[295] R-G-6 at 5.

particular funeral homes; and (2) the availability of price information. The AARP's "Excel" Study, for example, found that 75% of the respondents were unaware that federal law requires providers to give price information over the telephone.[296] Mr. Showalter testified that consumers do not even think that a funeral is an item that can be price-shopped.[297] Dr. Mazis, a marketing expert appearing on behalf of the AARP, testified that he expects that consumers will slowly increase their use of telephone price shopping as a diffusion of knowledge about prices occurs among the general population.[298]

Alternative Shopping Methods

Although the empirical evidence shows that consumers seldom shop by contacting providers directly, the record contains evidence that some consumers resort to other shopping means, in part because of the traditional lack of price availability.

Mr. Showalter commented that:

> [i]n the absence of any real price information in the market, the consumers have to seize upon something to make a selection, and so they take the second best and they make decisions on information (reputation, location, religion) that is not very helpful to them ....[299]

Harry Snyder of the Consumers Union observed that consumers are not currently used to comparison shopping, as they will be in the future, because the industry does not aggressively advertise its prices on a competitive basis.[300]

Consumer witnesses offered several examples of alternative shopping methods that they say consumers have adopted. In all of these cases, comparative price information is available from a non-industry source. Rev. Wasielewski, who disseminates that information for Phoenix consumers by means of a telephone "hotline," testified that his service has received 9,000 consumer calls since 1983.[301] Dee Perguson, whose Seattle memorial society periodically conducts funeral price surveys, testified that approximately 50% of all calls his organization receives are for information

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[296] Soulas, HX-76 at 3.

[297] Tr. Vol. II, 126.

[298] Tr. Vol. III, 814.

[299] Tr. Vol. II, 166.

[300] Tr. Vol. III, 1248.

[301] Tr. Vol. III, 1609-1610 ("Every time a public service announcement is made on TV, every time there's a mention [about his price information service] on a TV program, news program, articles in the newspapers, we immediately get another flood of phone calls").

about prices, and that such telephone shopping has increased in recent years.[302] Representatives of the Continental Ass'n of Funeral and Memorial Societies testified that member societies routinely receive consumer calls for funeral prices.[303] The Attorney General of Arkansas stated that, after adoption of the Rule, his office observed that the number of funeral complaints diminished dramatically, and the nature of consumer calls changed from complaints to information inquiries.[304] Finally, a provider and pre-need seller asserted that consumers are increasingly shopping on a pre-need basis.[305]

Staff Conclusions

The record evidence establishes that consumers who must make at-need funeral arrangements generally know which funeral provider they will use, and seldom price-shop by contacting funeral homes directly. The staff concludes from its review of the evidence, however, that consumers' lack of direct shopping at the time of need is not surprising in light of the substantial evidence that price competition generally, and consumer awareness of prices charged, is still low. In the staff's view, one can not expect consumer behavior to have significantly changed since the Rule's implementation under those circumstances.[306] Still, the most recent empirical evidence indicates that direct shopping may have increased somewhat since 1981.

The staff further concludes that, although few consumers shop for funeral providers by calling them directly, consumers will respond favorably to price advertising when it occurs. In those areas in which some providers have aggressively competed on price, many consumers have inquired about prices, and have substantially increased the business of "low-cost" providers. The evidence further indicates that consumers increasingly seek price information from memorial societies and other entities that gather comparative price information and publicize its availability. On balance, the evidence indicates that consumer price-shopping will increase as price competition, and consumer awareness of that competition, increases.

3. Purchase Behavior

Introduction

The Commission intended that the Rule's disclosure requirements would enable consumers save money on funeral expenses by allowing them to pick-and-choose among types of funerals and particular goods and services. The Rule's "unbundling" requirement and GPL price and

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[302] Tr. Vol. III, 1178; HX-104 at 3-4 ("We have estimated that at least twelve hundred calls a year are requests for price information. The mortuary with which our Association has its contract, and has had for forty-eight years, estimates its office receives between 800 and 1,000 calls per year requesting price information").

[303] Buchanan, President, CAFMS, Tr. Vol. III, 1131; Brownstein, CAFMS, Tr. Vol. I, 192.

[304] Clark, Arkansas Attorney General, Tr. Vol. III, 8, 31-32.

[305] Neel, R-E-1 at 3.

[306] As was the case in 1982, consumers' choice of providers is still limited; empirical evidence indicates that 76% of provider-respondents in one survey of NFDA members reported that they compete with four, or fewer, providers in their community or market area. R-B-14 at 3-4.

information disclosures were specifically designed for that purpose.[307] The Commission reasoned, for example, that the GPL would be "present for consultation" while consumers were considering what to purchase.[308] The Rule thus requires that providers give the GPL at the beginning of arrangements or selection discussions.

The Commission acknowledged, however, that some consumers might use the Rule's itemized information to buy more than they would have under the pre-Rule package-pricing system. The Commission responded that the Rule's purpose is to enhance consumer choice, so that it would not be concerned if some consumers chose to buy more as long as it was based on a clear knowledge of the price consequence; other consumers would have the right to choose less.[309] The staff below presents the record evidence on consumers' purchasing decisions under the Rule.

Position of the Parties

The NFDA and NSM argue that the Rule has not benefitted consumers because consumers purchase no fewer items and no different types of service than they did before the Rule. Those groups thus conclude that consumers have not declined items that were previously sold only in pre-bundled packages, the opposite of the result predicted by the Commission.[310] The AARP, however, asserts that the Rule's full impact has not yet been felt because of low industry compliance and low consumer awareness of the Rule's provisions. Nonetheless, the AARP concludes, the Rule has benefitted consumers, who purchase fewer items and receive more price information early in the transaction than they did before the Rule; consumers use that price information to spend significantly less for their arrangements.[311]

Evidence on Consumer Purchasing

Comparative data from the Baseline and Replication Studies provided the only systematic, empirical evidence on changes in consumer purchase behavior since implementation of the Rule.

With respect to the types of funerals purchased, BE staff analysis of that BLS and RS data indicated that about two-thirds of respondents in both years purchased open-casket, ground-burial services (the "traditional" funeral service). That analysis also showed, however, that cremation selections increased from 11% in 1981 to 14% in 1987 (140 of 991 respondents in 1987), while open and closed-casket burials declined by a total of 5% in that period.[312] BE staff's analysis

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[307] R-B-5 at 42272, 42292, 42297.

[308] *Id.* at 42272.

[309] *Id.* at 42297.

[310] R-M-9 (Proposed Findings) at 57-60, 216-220; R-G-6 (Comment) at 5, 115-117.

[311] R-M-11 at 85-86, 88, 94, 145.

[312] Daniel, HX-122 at Table II, p. 6. BE staff noted that the survey results' close proximity with cremation statistics provided by the CANA suggests that the BLS and RS are representative of the national population. *Id.* at n. 9.

further indicated that the average cost of cremation services to 1987 respondents was about one-third that of open-casket funerals ($1,054 vs. $2,818).[313]

Concerning consumer selections of individual funeral items, the BE staff analysis of the BLS an RS data further revealed that respondents' purchases of caskets and embalming[314] have decreased somewhat since 1981 as a result of the increase in cremation selections; once cremations are deleted from the analysis, the proportion of casket and embalming choices were the same in both years.[315] BE staff concluded from its analysis that "the surveys do not provide evidence that the Funeral Rule has influenced the proportion of purchasers who choose to include embalming and caskets in the funerals they helped to arrange."[316]

The staff notes with respect to that conclusion that, for those two-thirds of 1981 and 1987 respondents who arranged open-casket funerals, it is logical that the Rule would not cause a change in casket and embalming selections over time because those items are "practical necessities" for open-casket funerals. A casket is also necessary for those additional 16% of 1987 respondents who arranged closed-casket funerals, as is embalming in many cases.

The staff further notes that, because cremation purchasers can and do select caskets and embalming for various reasons,[317] a separate question not addressed by the BE analysis is whether the level of those purchases has changed since 1981. A comparison of the BLS and RS data shows that those selections have declined significantly. In 1981, 34 percent of cremation buyers also purchased caskets, and 35 percent bought embalming services.[318] Those selections dropped in 1987 to 19% (caskets) and 25% (embalming).[319]

Other survey data confirmed the reduction in cremation buyers' selection of caskets. A member survey conducted by the CANA indicated that, although selection of an alternative container was clearly the dominant choice of those selecting cremation in both 1983 and 1987, there has been a statistically significant increase from approximately 66 percent to approximately 74 percent in the purchase of alternative containers during that period, coincident with a

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[313] *Id.* at Table III, p. 7.

[314] BE staff could not draw conclusions from the data about whether consumer purchases of other goods and services increased or decreased since 1981 because of differences in the two survey questions regarding those selections; both surveys contained separate and comparable questions about the purchase of caskets and embalming. HX-122 at 9-10.

[315] *Id.* at Table IV, p. 10. Casket purchases declined from 88.8% to 85%, and embalming selections fell from 83.4% to 81%; the drop in consumers' casket choices was statistically significant.

[316] *Id.* at 10.

[317] Cremation can be preceded by an open or closed-casket service, or, as the Commission found in 1982, some consumers who choose cremation may also select caskets or embalming as a result of provider misrepresentations or lack of knowledge about cremation requirements.

[318] R-B-3 at Table 3, p. 23.

[319] R-B-2 at Table III-44, p. III-71 (caskets) and Table III-42, p. III-67 (embalming).

reduction in the purchase of caskets from 22% to 17%.[320] The CANA attributed that change to the Rule.[321]

Other data from the BLS and RS results further indicates that cremation purchasers in 1987 purchased fewer "unneeded" caskets and embalming than in 1981. That data show that 84 consumers in 1981 and 98 people in 1987 purchased a cremation without a viewing of the deceased or other casket service. The purchase of a casket and embalming services for such "direct cremations" would appear to be unnecessary because the body is not present during the service (making embalming unnecessary) and is not buried (making a casket unnecessary). Nonetheless, the record shows that, in those cases, 15 consumers purchased embalming and 9 purchased caskets in 1981; in 1987, 9 purchased embalming and 2 purchased caskets. Thus, in 1981 15 of 84, or 18%, of "direct cremation" purchasers appear to have bought unneeded embalming services, and 9 of 84, or 11%, appear to have purchased unneeded caskets. Those figures declined in 1987 to 9% (unneeded embalming) and 2% (unneeded caskets) respectively.[322]

The BE staff further suggested that the slight, overall drop in casket and embalming purchases for all survey respondents was not due to any contribution of the Rule to the increase in cremation purchases. BE staff reasoned that the increase in the national cremation rate began in the early 1970's, before the Rule, and that the rate has not increased since the Rule's implementation.[323]

Although BE staff is correct regarding the cremation rate, other evidence indicates that the Rule has influenced, and continues to influence, consumers' increasing selection of cremations. The Cremation Ass'n of North America concluded in its ANPR comment that:

> Consumer recognition of cremation as a legitimate alternative to traditional burial seems to be attributable to the publicity about the Rule, and this recognition, in turn, has fueled the already increasing trend toward cremation.[324]

The CANA further concluded in its Proposed Findings that the cremation marketing efforts of all segments of the death-care industry have increased since the Rule's enactment.[325] Ellsworth

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[320] Kelsey, Tr. Vol. II, 310-312.

[321] "It is quite clear that the funeral rule and the disclosures contained in it have been one of the major factors resulting in the increased use of the alternative containers." Purdy, Tr. Vol. III, 158.

[322] R-M-5 at 9; R-B-2 and R-B-3 data tapes. The decline in unneeded casket purchases is statistically significant.

Record data also indicate that those arguably "unneeded" casket purchases occurred in many cases as a result of funeral director misrepresentations. Those data show that in all but one case consumers who were told that a casket was required in an inappropriate cremation instance purchased one -- 8 of 9 in 1981 and 2 of 2 in 1987. *Id.*

[323] Daniel, HX-122 at n. 16. p. 10.

[324] R-B-20 at 11.

[325] R-M-1 at 22.

Purdy, the immediate past-President of the CANA, asserted that, in addition to sociological factors, the Funeral rulemaking proceedings may have contributed to the rise in cremation purchases.[326] Those proceedings began in 1972. Dee Perguson, President of the Peoples Memorial Society in Seattle, asserted that cost is the major reason why 91% of his members choose cremation; the society gathers and disseminates price information and contracts for cremation services at reduced prices.[327]

Finally, BE staff analysis of the BLS and RS data revealed that the proportion of consumers who received some form of itemized price information "early" in the funeral transaction (before selection of the casket) and who used that information to spend significantly less for their arrangements increased by 7% since 1981.[328] Those consumers spent $252 less for their selections than consumers who did not receive that early price information.[329] BE staff concluded that the Rule may have contributed to lower funeral expenditures to the extent that it accounts for the 7% increase in the receipt of early price information.[330]

Wendell Hahn, who provides accounting services to 1,500 independent funeral providers in 30 states, presented additional evidence that the Rule has caused a decline in industry profits because some consumers are declining individual components of a funeral that previously were included in packaged funerals.[331] Mr. Hahn stated that, under the Rule, declinations for which consumers expect a credit have increased.[332] As a result, providers' after-sale expenses, which include "discounts on sales" (and "bad debts"), have increased by about 35% during the period 1983-1987, before correcting for inflation.[333]

Other testimonial evidence detailed in the prior subsection of the report and in section II.C.1. reveals that consumers have responded positively to competitive pricing and the availability of less-expensive funeral alternatives facilitated by the Rule's disclosure provisions. That evidence shows that substantial numbers of consumers choose "low-cost" providers and attempt to purchase caskets from third-party sellers where those entities exist.

Evidence on Consumer Awareness, Compliance and Price Competition

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[326] Tr. Vol. III, 183.

[327] Perguson, Tr. Vol. III, 1178-1179.

[328] Daniel, HX-122 at vi, 37. The price information those respondents said they received was in a form other than a GPL.

[329] *Id.* at 37 and Table XI, p. 38 ("pinferly").

[330] *Id.* at n. 5, p. vi.

[331] Tr. Vol. II, 684-685.

[332] *Id.* at 690.

[333] Hahn, HX-49 at Exhibits "MOE" and "OC."

The Rule's primary requirement intended to facilitate informed consumer choice in purchasing funerals and individual items is the general price list, which must be given to consumers at the beginning of arrangements discussions. The empirical data presented in section II.A.2. of the report shows that 23% of providers are complying with that obligation. The Rule's final statement requirement is intended to compliment the GPL by allowing consumers to change their initial selections once they see the total price and individual selections together. The compliance data shows that 62% of providers are giving consumers as itemized final statement. That data also show that 36% of providers are simultaneously giving consumers an "early" GPL and an itemized final statement; that figure drops to 18% when the GPL is given at the outset of discussions, the time required by the Rule.

Other evidence outlined in sections II.A.1. and II.C.1. of the report demonstrate that consumers are still largely unfamiliar with the funeral transaction and unaware of their rights under the Rule, and that little overt price competition exists in the funeral industry.

Staff Conclusions

The staff concludes based on its review of the evidence that consumers are buying fewer funeral items and less-expensive services than they did before the Rule's mandatory itemization and disclosure requirements. That evidence shows that consumers increasingly choose less-expensive cremation services, and purchase fewer caskets and embalming for those cremations than in 1981, including "unneeded" caskets and embalming. Since 1981, substantially more consumers also report receiving some form of price information early in the transaction, which information consumers use to spend less for their arrangements. According to the industry's largest accounting firm, consumers generally appear to be declining some items once included in packaged funerals. Substantial evidence also shows that a significant number of consumers call and choose low-cost funeral homes where comparative prices are advertised and purchase caskets competitively offered by third-party providers where they are extant.

The evidence indicates, on balance, that the Rule's itemization and disclosure requirements have contributed to those results by increasing consumers' awareness of prices and options, as well as industry's attempts to expand its marketing of alternative goods and services. The evidence further suggests that those benefits are not greater because of low overall levels of industry compliance, price competition and consumer familiarity with the funeral transaction. In the staff's view, that data supports a conclusion that one can not yet expect substantial changes in consumer purchase behavior. As the Commission acknowledged, the Rule may take longer to affect the funeral market than in other industries. The great preponderance of testimonial evidence suggests that those benefits will tend to increase over time as compliance with, and consumer awareness of, the Rule increase.

4. Consumer Expenditures and Funeral Prices

Introduction

The Commission in its Statement of Basis and Purpose anticipated that the Rule would effect consumer expenditures and funeral prices in several ways. The Commission reasoned that competition induced by greater price information could work to reduce actual funeral prices and overall consumer expenditures, or at least retard their rate of growth, as consumers' price

sensitivity is increased and as some consumers shift from higher to lower-priced providers. Expenditures might also be reduced, the Commission continued, because several individual Rule provisions would eliminate the industry misrepresentations and failure to disclose material facts that induced consumers to purchase certain goods and services. The Commission concluded that these and other practices were responsible for substantial industry revenues that would be lost under the Rule; those lost revenues, or consumer savings, would more than offset any price increases that might result directly from Rule compliance.[334]

The Commission also recognized, however, that the Rule's mandatory itemization requirement presented "opportunities" for increased prices and consumer expenditures, but determined that it does not, by itself, compel those results.[335] The Commission identified and responded to the following six alleged ways in which prices and expenditures could increase under itemization: (1) some consumers might choose to buy more than they would if the items had been packaged;[336] (2) providers in compiling a new price list (the GPL) might choose to raise prices after examining their costs and pricing structure;[337] (3) compliance costs could be passed on to consumers;[338] (4) alleged provider ability to offer package prices that are necessarily lower than itemized prices (i.e., "economies of packaging") could result in higher costs for itemized goods and services;[339] (5) consumer declination of items usually included in a package might lead providers to raise other prices in order to maintain revenues and profit levels;[340] and (6) providers might raise

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[334] R-B-5 (SBP) at 42297.

[335] *Id.*

[336] The Commission responded that the Rule's purpose is to enhance consumer choice, so that it would not be concerned if some consumers chose to buy more as long as it was based on a clear knowledge of the price consequence; other consumers would have the right to choose less. *Id.*

[337] The Commission concluded that providers' voluntary business decisions to increase prices would certainly not be a necessary result of the Rule because they are free to do that at any time; the Rule only requires providers to think about prices in compiling the GPL. *Id.*

[338] The Commission determined that providers' increased business expenses caused by the direct costs of compliance would be minimal (and mostly one-time), so that any resulting price increases should be correspondingly modest; potentially ongoing compliance costs only would include updating the price lists, providing the GPL to consumers for retention, and retaining records for one year. *Id.* at 42296, 42298. The Commission in making this finding relied, in part, on the fact that two of the major industry trade groups that had proposed an alternative rule virtually identical to the one promulgated by the Commission (except for an alternative price disclosure scheme) said in their proposal that the alternate rule would not be unduly burdensome to funeral providers. *Id.* at 42296-42297.

[339] The Commission responded that significant economies of packaging do not appear to be extant in funerals because, unlike some other industries, the business cost of providing a set of funeral goods and services is much the same whether the items are offered separately or together; the great majority of funeral home costs are fixed costs for overhead that would not vary with the pricing method. The Commission further stated that, even if there were modest cost differences, only those consumers who chose to do so would spend somewhat more for itemized purchases because the Rule permits package pricing in addition to itemization. The Commission concluded that consumers' ability to decline unwanted items might more than offset any increase in price for the total package. *Id.* at 42298.

[340] The Commission reasoned in response to this argument that, although the Rule does not regulate how providers set or shift prices, the long-term competitive effect of itemization might not permit providers to recover lost revenue from

(continued...)

prices of the lowest-price funerals because itemization precludes the industry's "graduated recovery" method of package pricing.[341] The Commission, in sum, expected that some funeral providers would increase prices after mandatory itemization while others would not, but concluded that any significant increases would not be a necessary result of the Rule.[342]

The Commission in the NPR thus sought comment on whether consumer expenditures, funeral prices, and providers' costs of doing business have changed since the Rule's promulgation, the reasons for any such changes, and what role, if any, the Rule has played in those changes.[343] The staff in this section of the report reviews the evidence on those issues.

Position of the Rulemaking Parties

The NFDA and NSM concluded in their Proposed Findings of Fact that the Rule's costs clearly outweigh its benefits because: (1) the primary predicted benefit of the Rule was reduced prices and consumer expenditures through increased price competition; overall consumer expenditures under the Rule have not decreased, as promised, but have increased 9% above the rate of inflation since 1981; (2) consumers who received the Rule-required price lists and disclosures spent no less for their funeral arrangements than those who did not get that information; (3) no record evidence attributed to the Rule any increase in the availability to consumers of "early" price information, even though the proportion of consumers who received some form of oral or written price information early in the arrangements conference and who spent substantially less for their arrangements significantly increased since 1981; and (4) the Rule has imposed on providers a variety of increased costs, most notably for personnel as a result of a 23-minute average increase in the duration of the arrangements conference, and for business

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[340](...continued)
declinations simply by raising prices. In the short term, some consumers might spend more and some less than they would under a package pricing scheme if providers actually raise prices for items consumers are less likely to decline in order to recoup revenue lost on items consumers are more likely to decline. *Id.*

The staff notes that the NFDA and others similarly suggested in this review that providers would be forced to raise, or shift, prices if the Commission were to prohibit so-called "casket handling fees," which some providers charge to consumers who decline to purchase caskets from providers, but obtain them from third-party sellers. The staff discusses that issue in section III. C, *infra*.

[341] The Commission recognized that providers might choose to raise the prices of the lowest-priced funeral, but determined in response that itemization does not preclude providers from recovering a greater proportion of overhead from purchasers of higher-priced funerals than from buyers of lower-priced funerals ("graduated recovery"). The Commission reasoned that the Rule permits providers to achieve that effect by: (1) disclosing different prices to different consumers for the same items; (2) appropriately pricing the alternative format involving a single price quotation for professional services and caskets; and (3) appropriately pricing caskets. The Commission concluded that the impact of any voluntary price increases for the lowest-priced package funeral might be offset or blunted by the savings resulting from declination and by the pressure generated from increased price competition to keep prices down. *Id.* at 42298-42299.

[342] *Id.* at 42299.

[343] R-A-1 at 19869-19870 (Questions 6 and 16).

expenses such as printing, accounting and legal services;[344] and (5) these costs have been passed on to consumers in the form of higher prices, particularly for professional services.[345]

The AARP advocated, in contrast to the NFDA view, that no reliable evidence attributed any significant increase in consumer expenditures, funeral home business costs, or funeral prices to the Rule. To the extent that expenditures and prices have increased, the AARP continued, those increases have resulted largely from inflation. The AARP further argued that expenditures, in fact, have not increased above inflation, or have declined slightly, when the appropriate consumer price index for services excluding medical is used to deflate the raw, empirical data.

According to the AARP, the Rule has benefitted consumers (helped reduce expenditures) by contributing to: the increase in the proportion of consumers since 1981 who received price information early in the funeral transaction and who spent less for their arrangements; funeral home restraint in raising prices; consumer declinations under itemization; and reduced purchases of "unneeded" goods and services for cremation.[346] The AARP concluded that, in any event, consumers' funeral purchase decisions are influenced by several factors in addition to price; as a result, the key issue in assessing the Rule's impact is the degree of informed consumer choice, and not necessarily the level of expenditures.[347]

The RS and BLS Data: Change in Expenditures and Prices Since the Rule

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[344] "Personnel" costs as defined by the FFDA and used here by the NFDA refer to owners' and employees' salaries, retirement plan expenses, payroll taxes and insurance, and in-house professional services and casual labor. "Business" costs refer to accounting, consulting and legal services, postage, office supplies and printing. *See* Hahn, HX-49, Ex. "OC".

[345] *See* R-M-9 at 62-76, 89-96 and Dr. McChesney, HX-126-A at 52-53, 86-89. *See also* R-G-6 (NFDA Comment) at 34-35, 90-92, and R-G-3 (NSM Comment) at 24-27, 52-53 (rule also put upward pressure on prices of the lowest-priced funerals by eliminating the industry's "graduated recovery" of costs pricing method). The FDSA in its comment seconded the NFDA-NSM position. R-G-5 at 24-25.

[346] The staff in section II.B.3, *supra*, reviewed the evidence indicating that consumers' appear to be purchasing fewer or less expensive items under the Rule.

[347] *See* R-M-11 (Proposed Findings) at 71-95, R-H-17 (Comment) at 6-7, 29.

Many individual participants and groups agreed with the AARP's concluding point that informed choice is the Rule's primary intended benefit. *See, e.g.*, Prof. Sommer, Center for Consumer Research, U. Cal-Davis, Tr. Vol. III, 628, 644; Wertheimer, NAEL, Tr. Vol. III, 964; Dr. Barnow, ICF/Lewin, Tr. Vol. I, 865, HX-118 at 7 (consumers may find price information valuable even if they do not select less expensive items); Rouillard, CRLAF, Tr. Vol. III, 1352; Klein, NYSFDAB (consumer member), Tr. Vol. II, 1083; Dr. Biddle, clergy, Tr. Vol. III, 338; Dr. Nelson, AARP, Tr. Vol. I, 15, R-H-17 (Older Womens' League Comment) at 2-3 (repeal based on fact that consumers may not have immediately used the Rule's information to spend less denies the Rule's basic thrust -- to remove package-only pricing and provide consumer choice); R-H-12 (CAFMS Comment) at 2-3 (informed consumers may spend more or less; it's irrelevant that those who get price lists may not spend less); R-H-21 (Consumers' Union Comment) at 5; and R-H-5 (Mem. Soc'y of N. Va. Comment) at 3.

The most reliable and comprehensive record evidence on the Rule's impact on overall consumer expenditures[348] for funerals was provided by BE staff's analysis of the Replication and Baseline data. BE staff performed a "time-series" analysis of the change in total consumer expenditures for funerals reported by 1981 BLS and 1987 RS respondents, holding constant many factors other than the Rule that might influence funeral expenditures (such as income, degree of urbanization and education, and type of funeral selected).[349] BE staff by means of that multi-variate regression analysis found that average "real" expenditures, after controlling for inflation, were $223 (or about 9%) higher in 1987 than in 1981.[350]

BE staff stated in its report, however, that the finding that real expenditures have increased does not mean that the Rule caused that result, because other factors not accounted for in the analysis could have influenced expenditures. Among others, BE staff reported, those factors include significantly increased funeral home costs in providing funerals not associated with Rule compliance.[351] Still, BE staff concluded that the strong regression finding suggests that it is unlikely that the Rule has contributed to a decrease in overall funeral expenditures.[352] BE staff also concluded that it could not determine from the survey data the degree to which higher real prices or an increase in the quantity (or quality) of goods and services purchased, or some combination of those two factors, explains the finding of increased real expenditures.[353]

BE staff also conducted a "cross-section" regression analysis using only the 1987 RS data to examine whether respondents who received the Rule-required documents and disclosures spent less for their overall arrangements, on average, than those who did not get that information. BE staff reported its finding that those respondents who received "compliance" (an "early" GPL, a properly itemized final statement, and no misrepresentations about embalming or casket for cremation requirements)[354] spent no less for funerals than those who did not get that level of

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[348] The evidence reviewed here speaks to overall consumer expenditures, and not prices of individual funeral goods and services. Often used interchangeably by various participants, these two terms when used to compare two time periods generally refer to different measures and need to be properly distinguished. Consumer expenditures, for example, might increase over time as a result of increased funeral home prices, or as a result of increases in the amount or quality of funeral items purchased, or some combination of those factors. Similarly, expenditures might remain stable if prices increased and the quantity purchased decreased. Expenditures can only be properly characterized as "prices" over time when the components included in the analysis do not change and the quality of the goods and services provided remains constant. Statistical data provided by Wendell Hahn of the FFDA on the cost over time of a "regular adult funeral" comes closest to the definition of prices.

[349] *See* HX-122 at APPENDIX A, pp. 51-54 for definitions of the variables included in the analysis.

[350] HX-122 at 46 and Table XIII, p. 47 (expenditures = "d"). BE staff used the Consumer Price Index for all urban consumers ("CPI-U") to deflate the unadjusted survey expenditure data.

[351] HX-122 at 46 and n. 54; Tr. Vol. I, 1006, 1026.

[352] HX-122 at 50.

[353] *Id.* at 13.

[354] This definition is BE staff's "COMPLY 2" index discussed earlier in the report; 31% of RS respondents who went to the funeral home to make arrangements received that level of compliance.

compliant treatment.[355] Similarly, BE staff reported that RS respondents who said they received a GPL sometime in the transaction, a final statement, a casket price list, and an outer burial container price list, respectively, spent no less for their arrangements than those who did not report receiving those documents.[356] Finally, BE staff in a separate analysis found that those respondents who reported receiving a GPL "early" (after arrangements discussions had begun but before selection of a casket) spent no less than those who said they got the GPL later in the arrangements conference or did not get a GPL at all.[357] BE staff concluded that the RS data do not provide evidence that consumers who receive the Rule-required documents use that information to reduce their funeral expenditures.[358]

BE staff also reported cross-section results, however, indicating that RS respondents who said they received some form of oral or written price information "early" in the arrangements conference (other than a GPL)[359] spent significantly less ($252, or 7.7%) for funerals than those who did not get that "early" information.[360] According to BE staff, the receipt of early price information had the same effect of reducing expenditures in 1981, but a significantly greater proportion of consumers (7% more) reported receiving that early information in 1987 than in 1981.[361]

BE staff concluded that the Rule may have contributed to lower expenditures for funerals to the degree that it caused the increase in the proportion of consumers who received price information early. BE staff could not, however, determine the extent to which, if at all, that increase can be attributed to the Rule's impact.[362] BE staff also could not explain the apparently anomalous regression findings that the receipt of an "early" GPL does not appear to result in lower funeral expenditures while the receipt of some other form of written price information early does.[363]

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[355] HX-122 at 42 and Table XII, p. 43 ("comply"). Dr. Barnow (ICF/Lewin economist for the AARP) confirmed this result. Tr. Vol. I, 966.

[356] *Id.* at 37, 41 and Table XI, p. 38 ("gpldum" and "fsdum"); and n. 47, p. 40.

[357] *Id.* at n. 46, p. 40.

[358] *Id.* at 44.

[359] The RS questionnaire asked consumers when they first received oral or written price information while meeting with the funeral director and whether they were shown a GPL during that meeting in two separate questions -- Questions 27 and 28, respectively. *See* R-B-2 at APPENDIX, Questionnaire.

[360] *Id.* at 37 and Table XI, p. 38 ("pinferly"); and n. 46, p. 40.

[361] *Id.* at 15 and Table VI, p. 14.

[362] *Id.* at 15.

[363] BE staff concludes that the relationship between funeral expenditures and the receipt of a GPL and other forms of price information received early is "somewhat puzzling." *Id.* at 40.

Dr. Barnow, an economist appearing on behalf of the AARP, confirmed BE staff's finding concerning the expenditure-reducing effects of receiving price information early, and concluded that this finding is "the only solid result that seems consistent in the work that [BE staff] and I have done."[364] Dr. Barnow further testified that the price information early result "would seem to indicate that there is a decrease in expenditures that might be related to the Rule."[365]

Other empirical evidence discussed earlier in section II.B.3. of this report indicates that consumers are increasingly purchasing the less expensive cremation alternative and chose fewer caskets and embalming for cremations in 1987 than 1981. That evidence also shows that some consumers are declining items once included in funeral packages, and choose lower-cost funeral homes and competitively-priced caskets offered by third-party sellers where they are available.[366]

BE staff's analysis of the RS and BLS data also provided nationally-projectable, empirical data on whether or not real prices for individual funeral items have increased since promulgation of the Funeral Rule. BE staff concluded that "the itemized price information contained in the two surveys do not provide evidence that real prices for individual funeral goods and services were significantly different in 1987 than they were in 1981."[367] The analysis did show that real prices for caskets in 1987 were virtually unchanged compared to 1981 (while real wholesale casket prices increased), and that real prices for professional services of the funeral director have increased significantly since 1981.[368] Both Dr. Daniel of the BE staff and Mr. Hahn of the FFDA attributed that latter increase to an industry-wide decision to shift some overhead costs and profit margins ("markups") from caskets to professional service fees.[369] Mr. Hahn provided further evidence on this point in his testimony, asserting that funeral homes refrained from increasing prices for professional services even more than they did as a result of a "price consciousness" generated by the availability of the Rule-required GPL.[370]

Other Evidence: the Rule has not Increased Expenditures or Prices

Dr. Barnow on behalf of the AARP presented evidence that BE staff's time-series and cross-sectional "comply" results concerning expenditures may be of minimal value in determining the

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[364] Tr. Vol. I, 893.

[365] *Id.* at 923-924.

[366] The last two conclusions are based on evidence addressed in sections II.B.2. and II.C.1. of the report.

[367] HX-122 at 13; Tr. Vol. I, 989 (the data do not reveal a trend about prices for individual funeral goods and services).

[368] HX-122 at 13 and Table V, p. 12.

[369] *Id.* at 13, Tr. Vol. I, 1016 (the price increase for professional service fees is not a cost of the Rule); Hahn, HX-49 at 2, Tr. Vol. II, 677-678. *See also* Showalter, journalist/industry analyst, Tr. Vol. II, 121, 148 (providers made this switch because they feared a change in consumer buying habits under the Rule, so that the charges would be non-declinable under the Rule); and Pierson, funeral director, R-D-1 at 4.

[370] Tr. Vol. II, 678.

benefits of the Rule over time. Dr. Barnow testified that the degree of Rule compliance must be taken into account in order to gauge the costs and benefits of a "fully implemented" Rule. The low level (29-36%) of compliance documented by analysis of the RS data, Dr. Barnow continued, "means that any pre-post time series analysis will fail to capture the effect of the rule because the rule was not being complied with substantially in 1987."[371] Dr. Barnow concluded that the time-series analysis using pre-rule and post-rule observations "cannot be used to assess the impact of the rule [on expenditures]."[372]

Dr. Daniel of the BE staff agreed with Dr, Barnow in principle, testifying that he conducted the cross-section "comply" analysis in addition to the time-series because of the overall compliance level finding -- in order to combine the results to help pick up in the analysis the effects of Rule compliance.[373]

Dr. Barnow also advocated that because BE staff's compliance indices ("COMPLY 1-3") only measure partial Rule compliance, even the cross-section results comparing consumer expenditures for those who did and did not receive "compliance" will fail to identify the effects of a fully complied-with Rule.[374] Dr. Barnow agreed that, given the overall compliance level, the cross-section analysis is preferable to the time-series for evaluating the effects of the Rule, but cautioned against drawing conclusions about the Rule's potential impact because the cross-section results could change over time.[375]

Dr. Barnow provided further evidence that real consumer expenditures have not increased since 1981, or decreased slightly, when the consumer price index ("CPI") more appropriate for comparative purposes than that used by BE staff is used to deflate the unadjusted RS data. Dr. Barnow noted that the CPI-U (for all urban consumers) used by BE staff in its time-series analysis reflects average price increases for all goods and services (the "general economy"), and is therefore the most widely used measure of increases in consumer prices generally.[376] However,

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[371] HX-118 at 5-6, 15.

[372] *Id.* at 3.

[373] Tr. Vol. I, 986 (but the time-series results "can begin to answer the questions of interest" even though compliance appears to be about 30%).

[374] HX-118 at 6, 24.

Dr. Barnow's points could lead one to argue as well that the level of compliance with individual Rule provisions might affect the reliability/projectability of evidence that consumers do not use the Rule-required information they receive to reduce their expenditures. One might question, for example, whether the finding that receipt of the GPL does not reduce expenditures should be taken at face value when only 23% of RS respondents said that they got that document at the time required by the Rule.

[375] Tr. Vol. I, 881. Dr. Barnow also suggested that one or more relevant explanatory variables, such as religion and wealth of the consumer, that likely influence consumer expenditures on funerals is missing from the cross-section analysis, so that the resulting regression results may be biased in an unknown direction. HX-118 at 24. *See also* Dr. Mazis, Tr. Vol. III, 860 (exercise caution regarding the cross-section results because it is not known whether the two groups of consumers are really equivalent).

[376] HX-118 at 20 and n. 10, p. 11.

Dr. Barnow continued, prices change at different rates in different sectors of the economy, and the funeral home industry is classified as a "service" industry by the U.S. Dept. of Commerce under the standard industrial classification (SIC) scheme.[377] Dr. Barnow thus concluded that it is more appropriate to compare increases in funeral expenditures with increases in the service sector of the economy, as opposed to the general economy, to determine whether they have increased more than prices in comparable industries.[378] That analysis indicated that BE staff's unadjusted expenditure increase of about 37% since 1981 was higher than price increases for the economy as a whole (CPI-U = 28%), as BE staff reported, but lower than price increases for the service sector (CPI-S excluding medical = 40%).[379]

BE staff and Dr. Barnow did not attribute the resulting real increase in consumer expenditures for funerals to the Rule even when the RS data is compared to price increases for the general economy. Mr. Wendell Hahn, who provides accounting services to 1,500 independent funeral home clients, during his testimony also stated that prices [actually speaking of gross funeral home sales, or expenditures] have increased faster than the CPI [for all urban consumers] because of increases in a variety of "fixed costs of funeral service," and not because of the Funeral Rule.[380] Mr. Hahn provided further testimony in his interview with the *American Funeral Director* magazine that "increases in the average adult funeral selection are largely attributed to inflation."[381] Individual funeral director witnesses agreed with Mr. Hahn's last point.[382]

These and other witnesses provided further evidence that the Rule has not caused any significant increase in funeral prices. Dr. Barnow expressed his expert view that any increase in professional time devoted to the arrangements conference does not necessarily lead to increased prices if there is "slack time" in that professional's daily schedule.[383] Similarly, Mr. Hahn testified that any such increased professional time has not resulted in additional funeral home

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377 The funeral industry, like other "service" industries, sells goods as well as services.

Both Dr. McChesney, the economist representing the funeral industry at the public hearings in this matter, and Wendell Hahn, the "accountant" for some 1,500 funeral homes in 30 states, repeatedly referred in their respective testimony to the funeral industry as a "service" industry. Dr. McChesney further compared funeral directors to doctors, lawyers and other professionals included in the service industry sector. McChesney, HX-126-A at 17, 26, 34; Hahn, Tr. Vol. II, 679, 703. Mr. Hahn, in an interview with the *American Funeral Director* magazine, also reported that the declining percentage of casket cost to selling price indicates "an increasing emphasis on the services rather than the goods that the funeral director provides." R-C-7 at 3. *See also* Yurs, appearing on behalf of the NFDA, Tr. Vol. II, 519 (the key to the funeral industry is service).

378 HX-118 at 20-21.

379 *Id.* at 21 and Exhibit 4, p. 22. The results were the same using FFDA statistical data in the record on sales of "regular adult funerals" by FFDA's 1,500 funeral home clients; the raw increase was also about 37% since 1981. *Id.* at Exhibit 1, p. 10.

380 Tr. Vol. II, 678-680.

381 R-C-7 at 3.

382 *See, e.g.*, Krause, Tr. Vol. II, 24; and Longmire, R-D-2 at 5.

383 Tr. Vol. I, 867-868.

hiring of personnel.[384] Finally, the National Research study of 500 funeral directors, conducted for the AARP, found that, although a majority (59%) of funeral directors said arrangements time increased since the Rule went into effect, similar majorities reported that the Rule and its disclosure requirements have not caused them to increase funeral prices overall (59%) or prices for professional services (54%).[385]

Substantial record evidence provided by Mr. Hahn, Dr. Barnow and several funeral industry members appearing on behalf of the NFDA and the NSM also indicates that the Rule has not significantly contributed to funeral home costs of operation. Mr. Hahn testified, based on statistical FFDA data that he provided,[386] that the Rule may have contributed 10% of the $16.80 unadjusted rise in funeral home business costs (such as forms, printing and paperwork) since 1983 -- a "minor" contribution of $1.68, and may account for a "very minor" portion of the unadjusted $196 rise in personnel costs "because the staff is already there."[387] Mr. Hahn further stated that the Rule has increased funeral homes' "after-sale" expense somewhat because providers have felt obliged to give "discounts" to families who, under the Rule, are declining items for which credits may not have been given under the pre-rule package-pricing scheme.[388] Mr. Hahn concluded that, overall, the Rule has had no pronounced effect on funeral home costs, and thus has not been the primary factor in increased funeral home costs of operation in recent years.[389] Still, Mr. Hahn reported, funeral home costs have increased by more than the average adult funeral selection since 1983, and by 9% more since 1977.[390]

In addition, HX-50, prepared by BE staff and based on the cost data provided by Mr. Hahn, reveals that, since 1984, there has been a very slight shift of funeral home costs into personnel, and that personnel as a percent of overall funeral home expense has not significantly changed in a decade. HX-50 similarly revealed that salary as a percent of overall personnel expense has not significantly changed in many years. As Mr. Hahn further testified, significant changes in those areas should have occurred if the Rule were significantly increasing funeral homes' personnel costs.[391]

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[384] Tr. Vol. II, 684.

[385] Ayers, HX-108 at 3. *See also* Daly, Tr. Vol. III, 694 (has not raised prices at cemetery/mortuary facility as a result of the Rule's administrative costs); and Daniel, FTC, Tr. Vol. I, 1016 (23-minute increase in arrangements time might account for a small part of the increased real expenditures, but not for $200).

[386] Federated Funeral Directors of America (FFDA) processes records from 1,500 funeral home clients in 30 states that conduct about 181,000 funerals a year, representing just under 10% of all deaths. FFDA is the largest company of its type in the country. Hahn, Tr. II, 662-663.

[387] Tr. Vol. II, 683-684; HX-49, Ex. "MOE". Mr. Hahn also testified that "any additional cost from the FTC Rule can not be related, we don't think, to personnel." Tr. Vol. II, 690.

[388] *Id.* at 684-685.

[389] *Id.* at 681, 689.

[390] Tr. Vol. II, 708; R-C-5 (FFDA Statistical Supplement for 1987) at "Trends in the Last Twenty Years."

[391] Tr. Vol. II, 688.

Dr. Barnow also stated for the record, after reviewing the cost data provided by Mr. Hahn, that "[I]t is difficult to see how many of the [cost] items that account for a substantial portion of the increase in the average retail price [regular adult funeral selection] might be associated with the FTC rule."[392] Dr. Barnow reported, for example, that accounting, consultants and legal costs, arguably Rule-related, were responsible for 2.6% of the real increase in overall funeral home costs since 1981, whereas depreciation and casket cost respectively accounted for 14.9% and 9.3% of the real increase in costs.[393] Overall, Dr. Barnow agreed with Mr. Hahn that the cost data do not appear to suggest that the Rule was largely responsible for price increases to consumers, but that "the costs of most funeral components increased since 1981 by varying amounts, with no single category responsible for the bulk of the increase."[394] Finally, Dr. Barnow stated that increased compliance would not substantially increase the Rule's costs, because there are no identifiable, major costs imposed by the Rule now on providers.[395]

Funeral industry witnesses Timothy Simms and Richard Yurs appearing on behalf of the NFDA testified that the Rule has not appreciably increased funeral homes' costs of operation.[396] Fred Bates and Charles Roper appearing for the NSM testified that increased arrangements time was a positive result of the Rule[397] and has not appreciably increased funeral home costs of operation.[398] Several other funeral director participants agreed that the Rule has not significantly increased their costs of providing funeral services.[399]

Finally, substantial testimonial evidence indicates that price increases have occurred on the basis of independent funeral home business decisions, and not costs associated with the requirements of the Rule. A quote from *Business Trend Analysts* contained in Dr. McChesney's prepared testimony states, for example:

> When first proposed, many believed the Funeral Rule would lower funeral and cremation service prices because lower-priced options would be made known to the consumer. However, when put into effect, the Funeral Rule caused funeral directors to examine

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[392] HX-118 at 14.

[393] *Id.* at 14 and Exhibit 2, pp. 12-13.

[394] HX-118 at 14. Dr. Berry, an economist appearing on his own behalf, agreed that the Rule has had no influence on funeral home costs. Tr. Vol. I, 151.

[395] Tr. Vol. I, 880, 883.

[396] Simms, Tr. Vol. II, 504; Yurs, Tr. Vol. II, 534, 562.

[397] Bates, Tr. Vol. I, 677-678, 697 (and no support for claim that Rule imposes increased costs for management personnel time and legal expenses).

[398] Roper, Tr. Vol. I, 723.

[399] *See, e.g.*, Krause, Tr. Vol. II, 47; Botimer, Tr. Vol. III, 1302; Longmire, R-D-2 at 5; Ninker, R-G-1 at 5; Farrow, Exec. Dir., Texas Funeral Service Commission, Tr. Vol. III, 588-589; and Franzen, Tr. Vol. II, 823. *See also* Klein, consumer member, New York Funeral Directing Advisory Board, Tr. Vol. II, 1065; and Clark, Attorney General of Arkansas, Tr. Vol. III, 30 (funeral home chain owner reported to him that the Rule has not resulted in additional business costs that have changed profitability).

their costs. In doing so, many realized that they had been "giving away" some services. In effect, funeral directors became more business-oriented as a result of the FTC rulings, and found that they could actually raise prices.[400] (emphasis added)

Funeral director participants agreed with that analysis.[401] Views expressed by consumer representatives/journalists and other rulemaking participants also suggested that increased prices are based more on the individual business decisions of funeral homes than on costs associated with Rule compliance.[402]

Staff Conclusion

The staff concludes from its review of the record evidence that, on balance, the Rule to date has not directly resulted in increased consumer expenditures or funeral prices, but appears to have contributed to reduced expenditures for some consumers. At the least, the Rule may have helped retard the growth of expenditures and prices. No substantial record evidence, including the BE staff analyses, reliably attributed any significant increases in expenditures, prices or funeral home costs to the Funeral Rule. Rather, substantial evidence indicates that: (1) consumer expenditures and prices, when compared to other service industries, have not increased above the rate of inflation;[403] (2) the Rule's presence may have tempered price increases and reduced some consumers' expenditures overall, or for certain items, by making consumers and funeral providers more price-sensitive; and (3) price increases have largely resulted from inflation and individual funeral home business decisions unrelated to Rule compliance.

The record evidence, however, also does not support the conclusion that overall consumer expenditures have fallen as a result of the Rule or its individual provisions. The staff does not view that finding as terribly surprising. The evidence suggests that one can not reasonably expect overall consumer behavior or expenditures to have substantially changed in the short time since the Rule's inception, given the low levels of overall industry compliance, price competition, and consumer knowledge documented earlier in the report. That overall compliance level, as well as

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[400] HX-126-A at 53.

[401] Pierson, R-D-1 at 2; Ninker, R-G-1 at 3; Davis, Illinois FDA, R-G-2 at 1; Botimer, Tr. Vol. III, 1292; and FDSA of Chicago, R-G-5 at 25. *See also* Hahn, Tr. Vol. II, 678-679, 683, 688-689, 709 (the largest single-year price increase since 1981 was in 1983, before the Rule, when many directors who were otherwise making price adjustments decided to hedge against the Rule's expected costs; the Rule increased funeral providers' price awareness and led to independent price choices in the '80's).

[402] Brownstein, CAFMS, Tr. Vol. I, 171; Showalter, journalist/industry analyst, Tr. Vol. II, 121, 148 (providers increased professional service fees, which consumers cannot decline, so that prices are increasing while consumers are buying less); Snyder, CU, Tr. Vol. III, 1123, 1247 (providers used the Rule as an opportunity to raise prices); Blake, memorial society, Tr. Vol. II, 1123, 1125 (lack of price competition permits inefficient providers to keep prices high, so that consumers can choose less, such as cremation or cheaper caskets, while providers can increase prices to keep profits up; providers fear peer reaction if they contract with memorial societies for lower-priced funerals); Carlson, author, Tr. Vol. I, 520; Berry, economist, Tr. Vol. I, 151 (providers increased prices when they realized their costs were not covered); Buchanan, CAFMS, Tr. Vol. III, 1104; and Dr. Barnow, ICF/Lewin for AARP, HX-118 at 10-14.

[403] Industry data published in March 1989 reveals that, in 1988, consumer expenditures and prices increased by less than the rate of inflation for the general economy (CPI-U), suggesting a reversal of the trend extant in the early and middle 1980's toward increased prices. *See Funeral Service Insider*, March 20, 1989, at 2.

compliance with the Rule's individual provisions, also indicates that BE staff's time-series and cross-section analyses may be of minimal value in assessing the Rule's potential benefits because the analyses did not capture the full effects of a complied-with Rule.[404]

Even if compliance were higher, the overall level of consumer expenditures would not appear to be the sole test of the Rule's benefits, given the evidence that consumers have purchased less under the Rule while prices have increased largely as a result of voluntary funeral home business decisions. The record evidence here indicates that consumer expenditures and funeral prices, when compared to other service industries, have not increased above inflation. That evidence could lead one to argue that the Rule may have helped retard the growth of funeral consumer expenditures, a goal fully intended by the Commission.[405]

Finally, if the Rule's only benefit were to increase informed consumer choice (without imposing substantial costs on industry), regardless of whether some chose to spend more for their arrangements than they would have without the Rule, that benefit would justify retention of the Rule because other consumers would have the right to choose to spend less. The Commission in its Statement of Basis so stated the Rule's purpose.[406] The record evidence in fact indicates that many consumers will spend less for their arrangements as a result of informed choice.

C. Impact of the Rule on Funeral Homes

1. Price Competition

Introduction

The Commission intended that the Rule would help reduce existing barriers to price competition in the funeral market.[407] The Commission, however, forestalled predicting when price competition would emerge, noting the industry's historical opposition to price advertising and the natural barriers to entry that discouraged low-cost providers.[408] The Commission

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[404] Staff in the compliance section of the report concludes that overall compliance with four of the Rule's key provisions is 15%, and that no evidence reliably indicates that compliance with any of the Rule's individual provisions is greater than 50% other than for the itemized statement (62%) and the telephone price request disclosure provisions (over 90% but small cell sizes make strong conclusions problematic); compliance with the GPL provision is 23%. The staff also notes its concern about relying on the cross-section "compliance" results when that analysis could not have been performed at all if all of the compliance data were taken into account -- BE and rulemaking staff analysis of that data indicates that simultaneous compliance with all of the provisions surveyed in the Replication Study can be viewed as 9% or lower.

[405] *See* R-B-5 (SBP) at 42297.

[406] *Id.*

[407] R-B-5 at 42260.

[408] R-B-5 at 42266, 42270-42271, 42299. The Commission explained that the industry is characterized by a lack of price competition largely because consumers' at-need demand for funerals is inelastic, so that price competition would result in a loss of total industry revenues. The industry's preference for avoiding price competition is made easier, the Commission concluded, because most providers have very limited competition (fewer than four competitors). In addition, (continued...)

nonetheless concluded that the initial stimulus for price competition would likely come from the industry, and not from consumers.[409]

The staff below reviews the record evidence on the Rule's impact on competition among funeral providers. Many participants offered testimonial evidence concerning whether and how the Rule has affected funeral marketing practices. Much of that evidence involves the extent of price competition generally, and the competitive effects of alternative marketing strategies by discount funeral homes, pre-need sellers, and third-party casket retailers that have increased in recent years.

Evidence on Price Competition Generally

The NFDA and NSM asserted in their Comments and Proposed Findings that the Rule has failed to change the "state of competition in the funeral industry," implying that providers compete on the basis of service quality, and not on a price basis, because consumers do not demand price information.[410] Those groups argued, however, that price competition has emerged in response to consumer demand in certain transient areas of the country, such as the sunbelt states, where family ties are attenuated.[411] Individual providers who addressed the issue agreed with the NFDA and NSM that overall competition among funeral homes has not increased.[412] A 1984 survey of the NFDA membership indicated that most providers still have very limited competition -- 76% of the provider respondents reported that they have four or fewer competitors in their market area or community.[413]

Third-party casket retailers, pre-need sellers, and discount providers, however, testified that, when they attempted to interject price competition into the market, funeral providers and suppliers responded with disparagement, anticompetitive state and local restrictions, surcharges ("handling fees") and secondary boycotts.[414] For example, Rev. Henry Wasielewski, who runs a

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[408](...continued)
the ability of a new entrant to build a clientele is uncertain, at best, given the large number of small providers and significant consumer loyalty.

[409] *Id.* at 42299, n. 396.

[410] R-G-6 at 5, 109-110, 113-114; R-M-9 at 8-9, 31, 17-19, 199-200, 202-204.

[411] R-M-9 at 193-196 (In those areas, according to the NFDA and NSM, transient consumers have little need of the memorialization process and thus elevate price concerns).

[412] Krause, Tr. Vol. II, 12-13 (majority of Wisconsin providers do not compete); Nelson, PAA, Tr. Vol. II, 178, 180 (no competitive environment for caskets in Tennessee). *See also* Hahn, FFDA, Tr. Vol. II, 709 (no more competition today than before the Rule; Rule has made providers "more aware" of what other providers are doing); R-M-7 (PAA Rebuttal) at 21 (entry in the funeral market is virtually unheard of without a prior affiliation with a funeral home or cemetery, or the entrant is chain-related).

[413] R-B-14 at 3-4.

[414] *See, e.g.*, Neel, casket retailer, Tr. Vol. I, 567, 571, 583 ("[W]e got the word back, if you [casket suppliers] sell caskets to Harry Neel, we [providers] boycott you and you are out of business;" "We have had casket sales canceled by
(continued...)

funeral price "hotline" in Phoenix, Arizona, testified that some funeral providers have not advertised with his hotline for fear of reprisal from other funeral providers.[415]

Consumer advocates and industry observers concurred with industry members that there is little price competition in the funeral market.[416] Nonetheless, some of those witnesses asserted that price competition is increasing.[417] One industry observer explained that consumers do not compel funeral providers to compete on prices because many consumers are unaware that prices differ among funeral providers.[418] Another opined that consumers do not even think that a funeral is an item that can be price-shopped.[419] The testimony of many witnesses, presented earlier in section II.B.1, establishes that consumers have low awareness of the funeral prices charged by providers generally or by particular funeral homes.

Discount Retailing

The Commission contemplated that, despite natural barriers to entry in the funeral market, the Rule would help consumers to seek out discount providers if they emerged.[420] Several

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[414](...continued)
consumers because of bad mouthing and horror stories told to them by funeral directors"); Teck, casket retailer, Tr. Vol. II, 832 (A casket company said that it would suffer a boycott if it was known in their market area that they sold to third-party sellers); Drozda, casket retailer, Tr. Vol. II, 897, 900 ("Since we began our sales program, 45 consumers have canceled contracts with us. We estimate that approximately two-thirds of those cancellations were due to disparaging remarks made about our operation or merchandise by [funeral directors]"); Barr, Kansas state representative, Tr. Vol. III, 1500, 1513 ("Kansas Funeral Directors had introduced legislation that would have required a hundred percent funding for all funeral merchandise [sold pre-need], including caskets. The reason was to prohibit cemeteries from selling caskets [on a pre-need basis]"); Krause, pre-need funeral provider, Tr. Vol. II, 13 (may not continue pre-need fight if adverse publicity against his firm continues); Botimer, discount provider, Tr. Vol. III, 1558 (suffered harassment by the state mortuary board for discounting funerals); and Perguson, memorial society, Tr. Vol. III, 1206 (funeral provider that contracted with society to provide lower cost services was ostracized by the industry).

[415] Tr. Vol. III, 1613 ("One mortician who wanted to be on the tape, later called me back and said don't put me on the tape. I said, what's the problem? He says, well, some other morticians have told me I had better not put our name on your tape").

[416] Showalter, Tr. Vol. II, 165 ("The funeral industry is maybe the last market to become competitive, and it's happening right now. It was encouraged by the Funeral Rule, and I think that it's unstoppable, but it will certainly be hurt if the Funeral Rule is repealed"); Dr. Berry, economist, Tr. Vol. I, 133-134, 136, 145 (no competition other than non-price); Dr. Nelson, AARP, Tr. Vol. I, 37 (no price competition except in certain areas, but price dispersion exists); Blake, memorial society, Tr. Vol. II, 1123 (efficient firms need not have lower prices because inefficient ones need high prices to profit); Rev. Wasielewski, Tr. Vol. III, 1615 (no price competition; in no other industry can unneeded facilities stay in business); and Snyder, CU, Tr. Vol. III, 1240, 1248 (competition for clients exists, but not for best goods/services at lowest price; price competition will increase under the Rule).

[417] Showalter, Tr. Vol. II, 160; Snyder, Tr. Vol. III, 1248.

[418] Professor Sommer, Tr. Vol. III, 617 (The absence of published price information has left consumers in the dark in regard to funeral prices locally and nationally).

[419] Showalter, Tr. Vol. II, 126. *See also* Snyder, Tr. Vol. III, 1248 (consumers are not used to comparison shopping, as they will be in the future, because the industry does not price advertise).

[420] R-B-5 at 42292-42293.

rulemaking participants offered evidence on the role of discount funeral providers in the market and how the Rule has affected them.

Dr. Tom Nelson of the AARP identified four regions of the country where at least some funeral providers price advertise and otherwise compete on the basis of price.[421] The NFDA and NSM acknowledge that discount funeral providers exist in those markets.[422]

Although the record contains little information on the prevalence of, or Rule effects on, funeral provider discounters nationally, two "low-cost" providers from the Phoenix, Arizona market and one from York, Pennsylvania testified at the public hearings. Jack Botimer, who conducts about 1,000 funerals annually in Phoenix, reported that, based on the surveys his firm conducts, 85% of his clients choose his funeral home because of its low prices.[423] L.E. Peebles, also of Phoenix, similarly stated that the majority of his customers come to his funeral home because of its competitive prices.[424] Ernest Heffner testified that annual funeral calls at the firm he recently purchased in York have increased 400% as a result of his discount price advertising.[425] Paul Showalter, a journalist and industry analyst, asserted that two discount funeral homes have captured 10% of the market in Phoenix, even though there are some 50 homes in that area, because they offer "traditional" funerals for less than $1,200.[426]

Both Phoenix providers advertise their prices primarily through the Inter-Faith Funeral Information Committee ("IFIC"), a service that collects comparative price information from all Phoenix providers by telephone and GPLs, and then disseminates that information to the media, hospitals and service groups, as well as to consumers through a 24-hour telephone "hotline."[427] Rev. Wasielewski, who directs the IFIC, asserted that consumers in Phoenix receive the benefits of competition largely through that media price advertising.[428] Mr. Botimer stated that since he began to market low cost funerals, five other firms in his area have also began to offer discount

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[421] Tr. Vol. I, 37-38 (the areas were southern California, southern Florida, Phoenix, Arizona, and Seattle, Washington).

[422] R-M-9 at 193-199.

[423] Tr. Vol. III, 1269, 1325.

[424] Tr. Vol III, 1551-1552.

[425] HX-33 at 11 and Ex. T.

[426] Tr. Vol. II, 130. Mr. Showalter in making that statement was referring to the Botimer Family Mortuary, represented at the hearing by Mr. Botimer, and the Greer Chapel and Mortuary.

[427] Botimer, Tr. Vol. III, 1270, 1277-1278; Peebles, Tr. Vol. III, 1552, 1555. *See also* Rev. Wasielewski, Tr. Vol. III, 1615; R-H-17 (AARP Comment) at 36 and Ex. 8.

[428] Tr. Vol. III, 1619.

funerals.[429] Mr. Peebles further testified that the increased competition fostered by discount providers has lowered funeral prices for Phoenix consumers.[430]

Those providers and others offered evidence that the Rule has benefitted the discount funeral market. The Phoenix providers testified that their listing with the IFIC has significantly helped their business.[431] Rev. Wasielewski asserted that the Rule has made it easier for the IFIC to collect the underlying comparative price information, which was difficult to get before the Rule.[432] Mr. Peebles further stated that, after the Rule, providers became willing to respond to price requests.[433] Finally, Paul Showalter, a journalist and funeral industry analyst, testified that repeal of the Rule would be a setback for competition, because the Rule created the opportunity for low-cost funeral homes to enter the business; the Rule helps discounters because it facilitates price-shopping.[434]

Consumer advocates testified that more consumers will seek out discount funeral providers as they become more aware of price information in the market. Dr. Michael Mazis, for example, a marketing expert appearing on behalf of the AARP, testified that he expects that consumers will slowly increase their use of telephone price shopping as a diffusion of knowledge about prices occurs among the general population.[435] Rev. Wasielewski attempted to explain why consumers may not comparison shop:

> I don't go shopping for milk from store to store, because I figure milk varies a little bit here and there, a few cents here and there, and it's not worth the bother of charging from store to store. If I ever found out that milk at one place was a dollar and all the other stores it was ten cents, I would change in a hurry.[436]

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[429] Botimer, Tr. Vol. III, 1558. Mr. Botimer further testified that he intends to open additional discount funeral firms in Phoenix. *Id.* at 1336.

[430] Tr. Vol. III, 1558.

[431] Botimer, Tr. Vol. III, 1277-1278, 1287; Peebles, Tr. Vol. III, 1552, 1555 ("We are listed with the Inter Faith Information Committee, in the mortuary price guide, and we receive calls from this mainly due to their hotline").

[432] Tr. Vol. III, 1620.

[433] Tr. Vol. III, 1559.

[434] Tr. Vol. II, 131-132, 163 ("[W]ith the advent of the low-cost funeral home in these markets and price competition, funeral homes will not be able to set prices at will; and that's when real competition is going to happen in this business, because we've already demonstrated in a few markets, particularly Phoenix, that the public will go to a low-cost funeral provider. This is going to put the squeeze on independent funeral homes, and they will have to become efficient operators; they'll have to lower their prices;" "Obviously, people need to be able to make price comparisons and to do price-shopping for low-cost funeral providers to do their best work").

[435] Tr. Vol. III, 814. *See also* Snyder, Tr. Vol. III, 1248.

[436] Tr. Vol. III, 1634.

Rev. Wasielewski explained that his funeral price "hotline" has received nine thousand calls since 1983.[437] Dr. Reveley, a former funeral discounter, testified that his discount funeral establishment was contacted consistently by people who wanted price information and who had seen his price advertisements.[438]

Pre-need Retailing

The Commission during the initial rulemaking proceeding focused on the at-need funeral market.[439] Arguably, the problems of time constraints, grief, and guilt are diminished in some pre-need transactions that occur substantially before a death. However, consumers may be as inexperienced and vulnerable in the pre-need market as in the at-need market.

Funeral service professionals and academicians have stated that future growth in the funeral service industry will be largely in the sale of funerals before the time of need ("pre-need" funerals).[440] A Hillenbrand (a major casket manufacturer and pre-need marketer) official reportedly stated that pre-need is the only means at present for funeral marketers to increase market share.[441] Accordingly, one trend in pre-need appears to be the marketing of pre-need programs on a nation-wide scale.[442] Hillenbrand, the National Selected Morticians, the International Order of the Golden Rule, the National Funeral Directors Association and several state associations have recently established pre-need marketing programs. These programs market pre-need funeral plans through national television advertising, magazines, telemarketing, direct mail, and funeral establishments.[443] Paul Showalter, an industry analyst, testified that pre-need is marketed primarily by medium-size funeral homes and large chains, which are often in the upper third in price in a particular market.[444] Mr. Showalter further stated that the growth of pre-need over time may cause some inefficient funeral homes to exit the industry.[445]

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[437] *Id.* at 1610, 1633.

[438] Tr. Vol. III, 896.

[439] R-B-5 at 42260.

[440] *See, e.g.*, R-B-10 (Dr. Joe Adams, "Preneed, Megatrend of Funeral Service," *American Funeral Director* 18, July 1986); and R-B-7 ("Funeral Service in the Year 2000," 30, February 1988).

[441] *Id.* at 34.

[442] R-G-6 at 95.

[443] *Id.*

[444] Showalter, Tr. Vol. II, 131.

[445] *Id.* at 131, 167 ("[i]ndependent funeral homes are being squeezed by the pre-need business. They can't keep up. They're faced with seeing their business whittled away little by little each year. Even if they join the pre-need bandwagon and try to sell, they will not keep up. The long-term prospect is they won't be able to stay in business. They have been able to fall back on the notion, 'since there is no real competition, we'll raise our prices to compete.' A funeral home with 30 funerals a year is still profitable because they set prices at will").

Several funeral providers and pre-need sellers, however, provided evidence that few individual funeral providers actively sell pre-need funerals, and that the funeral industry in general has attempted to discourage third parties, such as cemeteries, from entering the pre-need market. The results of the 1985 "Census" of the NFDA membership, for example, indicated that, on average, individual providers annually conduct 12 pre-need funerals, and one in five actively solicits pre-need sales.[446] Wendell Hahn, who provides financial consulting services to 1,500 independent providers in 30 states, testified that, at most, a small proportion of providers employ salespersons to offer pre-need funerals.[447] Funeral provider witnesses echoed the conclusions of the NFDA Census report and Mr. Hahn.[448] These and other provider witnesses further asserted that the industry as a whole has taken various steps to actively discourage pre-need sales, particularly sales by cemeteries, including support for 100% pre-need "trusting" laws that leave the pre-need seller without funds to pay for the expenses associated with active pre-need sales.[449]

In response to those trusting laws, the AARP has drafted model pre-need legislation that has a 90 percent trusting requirement.[450] One pre-need seller remarked that, in Tennessee, pre-need marketers for the last 20 years have trusted only the cost of the undelivered merchandise, and that has been sufficient to guarantee provision of consumers' selected funeral services.[451]

Some participants maintained that the pre-need market is less intimidating to the consumer than the at-need market. One reason offered was that consumers are far more capable and willing to "shop" in a pre-need than in an at-need transaction.[452] Funeral director

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[446] R-B-63 at 5-6.

[447] Tr. Vol. II, 730.

[448] *See, e.g.*, Heffner, Tr. Vol. I, 846 (providers' involvement in selling pre-need is negligible); Krause, Tr. Vol. II, 20 (funeral directors in rural areas or in a "two-funeral director-town" have no need to offer pre-need because they are not faced with competition); and Starks, Tr. Vol. II, 411 (very few funeral directors actively offer pre-need funerals).

[449] *See e.g.*, Krause, Tr. Vol. II, 8, 13, 31, 34 (Wisconsin providers will not provide money or support for his attempt to offer pre-need options to consumers, but support 100% trusting, which removes all potential profit); Starks, Tr. Vol. II, 362-363, 367 (Michigan Funeral Directors Ass'n has done everything it can to discourage pre-need sales, including support for restrictive trusting laws and the existing state ban on mortuary/cemetery combinations); Graf, Tr. Vol. II, 593, 649 (75% of providers are hostile to competition from pre-need sales by cemeteries; Pennsylvania funeral directors encouraged a 100% trusting law, which favors at-need and discourages pre-need sales); Nelson, Tr. Vol. II, 180 (no competition from pre-need casket sales by cemeteries in Tennessee because state law bans casket sales by anyone other than funeral directors; 100% trusting laws where they exist effectively eliminates pre-need); and Barr, Kansas state representative/cemeterian, Tr. Vol. III, 1513 (Kansas funeral directors advocated 100% trusting to eliminate competition from pre-need cemetery sellers).

[450] Nelson, AARP, Tr. Vol. I, 72-73 (the 90 percent protects the consumer; the 10 percent permits the marketer to recoup costs for processing).

[451] Nelson, for PAA, Tr. Vol. II, 210.

[452] Brownstein, CAFMS, Tr. Vol. I, 207-208; Comm'r Jones, Tr. Vol. I, 279; Prof. Sommer, Tr. Vol. III, 657; Rep. Barr, Tr. Vol. III, 1528; and Snyder, Consumers Union, Tr. Vol. III, 1239-1240.

representatives agreed with that conclusion.[453] Another benefit attributed to pre-need was that, during a pre-need sales presentation, the family is usually in their own home and has time to price-compare, consult with others, and reflect on what they really want.[454]

The available empirical evidence, however, indicates that pre-need purchases are not necessarily more cost-effective. BE staff's analysis of the RS data found that consumers who made arrangements on a pre-need basis spent no less for those funerals than consumers who made at-need arrangements.[455] One pre-need marketer observed that families who purchased pre-need burial vaults in the 1960's saved money because they paid about $175 to $210 for the vaults, which sold for $600-$700 in the 1980's.[456] The same witness remarked that the major value of pre-need is not money savings, but the peace of mind in knowing that the family has accomplished something important.[457]

The staff concludes from its review of the record that the growth in pre-need funeral marketing has accelerated industry competition for funeral consumers. The evidence, however, does not appear to support a conclusion that price competition among providers has dramatically increased as a result.

Casket Retailing

Traditionally, there are two major parties to a funeral transaction -- the purchaser and the funeral provider. With the implementation of the Funeral Rule, however, a third party has emerged -- the casket retailer. A PAA representative estimated that there are between 100 and 200 casket retailers in the country.[458] In response to the Rule's anti-tying provision, which permits consumers to decline to purchase caskets from funeral providers, casket retailers entered the market to compete for a share of funeral providers' exclusive casket sales. Due to funeral providers' traditionally high markup on caskets,[459] third-party sellers were able to underprice funeral providers and still profit.[460]

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[453] R-G-6 at 97-98; R-G-3 at 54-55; and Hennessy, FDSA, Tr. Vol. II, 968 (there is slightly more price shopping in pre-need transactions than in at-need).

[454] Graf, pre-need seller, Tr. Vol. II, 606.

[455] Daniel, HX-122 at 41 and Table XI, p. 38 ("arngedum").

[456] Graf, Tr. Vol. II, 603.

[457] *Id.*

[458] Radovich, Tr. Vol. II, 1057. The estimate is based on responses to a survey mailed to the 450 members of PAA. Thirty of the 90 respondents were third-party casket sellers.

[459] According to Mr. Hahn of the FFDA, the average wholesale cost of caskets in 1988 was $517; the average retail price was $1,338. HX-49 at 2.

[460] Family First, one of the earliest casket retailers, reportedly sold caskets at approximately half the price charged by funeral homes, and advertised aggressively. Showalter, Tr. Vol. II, 146. *See also* Drozda, funeral director/cemeterian, Tr. Vol. II, 936 (pre-need casket prices offered by third-parties, on average, are less than the average funeral home prices for (continued...)

Third-party retailers of caskets and other goods assert that they have responded to the Commission's call for marketers to interject price competition into the retail funeral market.[461] The PAA, whose membership comprises most casket retailers, asserts that third-party casket sellers have entered the market as a direct result of the Funeral Rule.[462]

Casket retailers claim that funeral providers have resorted to unfair measures to resist competition from third-party casket retailers.[463] The most harmful measure that funeral providers use to stifle competition, according to casket retailers, is the growing practice of assessing consumers a non-declinable "handling fee," averaging between $300 and $500, for accepting a consumer-supplied casket purchased from a third-party.[464] A casket retailer testified, for example, that "funeral directors have added casket handling charges to discriminately punish consumers for being prudent."[465] Another casket seller explained that a legitimate handling fee would compensate the funeral provider for receiving the third-party casket and getting it ready for use. He claimed, however, that the funeral provider refuses to handle the casket at all when it comes from a casket retailer; the retailer has to make sure that the casket is placed where the funeral provider wants it, inspect it and get it ready for use.[466]

Casket retailers further assert that casket manufacturers would like to sell to them, but fear retaliation from funeral directors.[467]

Staff Conclusions

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[460](...continued)
the same or similar caskets); Radovich, funeral director/cemeterian, Tr. Vol. III, 1060 (casket prices are a "little less" than funeral home prices).

[461] Drozda, Tr. Vol. II, 894 ("Sale of caskets through cemeteries is a relatively recent innovation. Prior to the enactment of the Funeral Rule in 1984, we were hardly aware of any cemeteries that sold caskets on their own because of the difficulty in obtaining a funeral home which would accept them and provide funeral services").

[462] Radovich, PAA, Tr. Vol. III, 1026, 1029 (virtually no third-party casket sellers existed before the Rule; casket retailers owe their existence primarily to the enactment of the Funeral Rule, which effectively allows the consumer to use a casket from an outside source).

[463] Teck, Tr. Vol. II, 83 ("We have had casket sales canceled by consumers because of bad mouthing and horror stories told to them by funeral directors"); Drozda, Tr. Vol. II, 898 ("Since we began our sales program, 45 consumers have canceled contracts with us. We estimate that approximately two-thirds of those cancellations were due to disparaging remarks made about our operation or merchandise by a funeral provider"); and Heffner, Tr. Vol. I, 831 (About 15 percent of the contracts we write will fall into a cancellation situation because of the interference by a funeral director).

[464] The staff in section III.C, *infra*, discusses in detail the evidence concerning the prevalence and effects of so-called "casket handling fees."

[465] Heffner, Tr. Vol. I, 820.

[466] Drozda, Tr. Vol. II, 951.

[467] Teck, Tr. Vol. II, 862; Neel, Tr. Vol. I, 583.

The staff concludes from its review of the evidence that the overall level of price competition in the funeral industry has not changed significantly, but that the Rule has facilitated an increase in price competition by encouraging low-cost providers and third-party casket sellers to enter the market. Most providers still have very limited competition (fewer than four competitors). Although providers who wish to avoid price competition thus still appear able to do so, the evidence suggests that price competition is likely to increase as consumers' awareness of prices charged by existing providers and new entrants increases.

Substantial record evidence supports the conclusion that, where discount retailers have emerged, consumers have patronized them. The evidence further indicates that the Rule has helped discount funeral providers compete by giving competitors, consumer advocates and consumers easy access to price information.

The evidence in the record indicates that the recent acceleration in the pre-need market characterizes providers' increased competition for clients, but not necessarily increased price competition. Providers, as a whole, appear reluctant to engage in active pre-need marketing, and many have acted to discourage pre-need sales by cemeteries and others. Consumers may increasingly comparison shop on a pre-need basis, however, as marketers make price information available and consumers' awareness of prices increases. The Rule's ability to impact that process may currently be limited, however, because the emergence of active pre-need marketing appears to have spawned regulatory measures, such as 100 percent "trusting" laws, that may impede competition in that market unnecessarily.[468]

Finally, the record evidence demonstrates that the anti-tying provision of the Rule has widened the funeral market by fostering the emergence of a new class of retailers -- casket retailers -- who are aggressively competing with funeral providers on the basis of price. The evidence also indicates, however, that the competition spawned by these third-party sellers is severely impeded by funeral providers' growing practice of charging consumers a non-declinable "casket handling fee" for exercising their right under the Rule to purchase a casket from a third-party seller. The evidence further suggests that casket manufacturers are reluctant to sell caskets to third-party sellers because of a fear of funeral providers' response.

In sum, substantial evidence indicates that the Rule has begun to foster price competition in the funeral market, despite the low overall level of compliance documented earlier in this report and consumers' reluctance to overtly consider cost in making funeral arrangements.

2. Reputation and Consumer Satisfaction

The NFDA and NSM in their Proposed Findings contend that the Funeral Rule has injured the reputation of funeral directors and lowered the level of consumer satisfaction by inhibiting funeral directors' ability to provide caring, compassionate and courteous service.[469] Those

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[468] Although the issue of anticompetitive state and local laws may warrant Commission attention, that issue exceeds the scope of this proceeding. Accordingly, the staff does not include in this report a recommendation that the Commission address that matter in its consideration of this review, but presents in section III.B.2, *infra* the available evidence on the extent and effects of such laws.

[469] R-M-9 at 135-140.

groups attribute those effects to the fact that the Rule is based on the faulty premise that a funeral purchase is simply a business transaction.[470] The NFDA and NSM conclude that the Rule creates the impression among consumers that funeral directors are dishonest and need government regulation.[471]

Funeral directors complain, for example, that the requirements of the Rule have forced them to insensitively provide information at awkward and often anguishing moments.[472] They allege that consumers as a result are less satisfied with their professional and personal relationships with funeral directors,[473] and that, in turn, the industry's reputation has suffered.[474]

Funeral directors certainly must act sensitively in an emotionally charged environment. Illinois State Senator Judy Topinka testified, however, that experienced funeral directors deal on a near continual basis with grieving families, and can as a result sensitively handle Rule obligations such as providing information about prices and obtaining permission to embalm.[475] William Krause, a funeral director, opined that, in his experience, the Rule does not portray funeral directors as dishonest, and does not interfere with funeral directors' ability to serve consumers.[476]

In response to the argument that the Rule does not permit funeral directors to flexibly provide comfort and support to grieving clients, Royal Keith, a funeral director appearing on behalf of the NFDA, asserted that only five to ten licensed funeral directors in the country have credentials as grief counselors.[477] According to Dr. James Reveley, a former funeral director, an NFDA booklet entitled "The Funeral Director and His Role as Counselor" discussed how funeral directors should serve customer's "needs," as opposed to "wants." Dr. Reveley stated that the booklet defined funeral consumers' "needs" as the entire elaborate funeral espoused by the industry.[478]

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[470] Simms, HX-42 at 10-11 ("the funeral is not simply a business transaction. It is not a routine consumer purchase").

[471] R-M-9 at 135-36. *See also* Yurs, HX-43 at 10-11.

[472] R-M-9 at 139-40; Simms, Tr. Vol. II, 463 (the GPL and prior approval for embalming requirements cause damage to the reputation of funeral directors and anguish to families); Yurs, HX-33 at 10-11 ("I am being rude, unkind, and unprofessional to people at a time when they depend on me for comfort and support").

[473] R-M-9 at 138.

[474] Simms, HX-42 at 8 (the Rule requires "tactless behavior" to grieving families and conduct which gives the funeral director the reputation as a "death merchant").

[475] Tr. Vol. II, 94.

[476] Tr. Vol. II, 23.

[477] Tr. Vol. III, 1451.

[478] Tr. Vol III, 871. *See also* Perguson, memorial society official, Tr. Vol. III, 1191 (discussing a presentation before a senior citizen's group where a funeral director showed a film indicating how one should honor the deceased:

(continued...)

Empirical record evidence further shows, in contrast to industry arguments, that consumer satisfaction increases as compliance with the Rule increases. An empirical analysis conducted by the BE staff[479] charted the actual number and percentage of Replication Study respondents who reported "satisfaction" as funeral directors comply with one, and then two, and finally all five individual BE compliance measures for BE's "COMPLY 2" index. The analysis demonstrated that, although "satisfaction" is over 80% even when consumers report no compliance with individual measures, the proportion of satisfied consumers increases steadily as compliance with the Rule increases.[480] That evidence indicates that the Funeral Rule has benefited consumers by increasing their satisfaction, and that satisfaction might continue to increase if compliance with the Rule were greater.

The NFDA cites to a consumer "satisfaction" survey conducted by Robin Petersen for the conclusion that, since the promulgation of the Rule, there has been a decrease in courteous service, efficient service, convenience, assortment of services and credit arrangements.[481] Mr. Petersen suggested in the introduction to his report that "it is possible that funeral home directors may have diverted their attentions to carefully pursuing the dictates of the regulations and, in the process, devoted less attention to consumer satisfaction via these services."[482] The results of a subsequent and broader Petersen study of consumer satisfaction levels shows, however, that satisfaction within a year after implementation of the regulations had not changed significantly from pre-Rule levels.[483]

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[478](...continued)

"[T]he way to honor the deceased was to include everything that you could possibly get into the package. No mention was made of a memorial service. No mention was made of simplicity. It was the whole works. And it was really beautiful, but to those who think that constitutes beauty. But, there was no options presented at all. You do this, you'll feel better, the whole family will feel better, the grieving will take place more easily. It was really embarrassing, especially since a lot of these people were not well-off senior citizens").

[479] HX-125. This chart was submitted by the rulemaking staff in response to Dr. McChesney's original, but subsequently withdrawn, Tables V-6 and V-7 (HX-123), which purported to show that the probability of consumer satisfaction declines as actual compliance with the Rule increases.

[480] This is the opposite conclusion from that suggested by Dr. McChesney's original tables. Dr. McChesney submitted a new Table V-6 after the close of the public hearings. It was thus not subjected to cross examination. The new Table appears to indicate that the receipt of early price information and of a properly itemized final statement have a positive effect on consumer satisfaction. More importantly, the Table as constituted does not allow one to assess the relationship between any broader measure of compliance, or overall compliance, and consumer satisfaction. *See* R-M-5 (Staff Rebuttal) at 4.

[481] R-M-9 at 138.

[482] R-B-15 at 7. This survey measured the experiences of consumers from two cities--Las Cruces, New Mexico and El Paso, Texas. The study divided consumers into two groups, those who had arranged funerals up to a year before implementation of the Rule and those who had arranged funerals within a year of the Rule taking effect. The study suffers, however, from the fact that the state of Texas has, since 1973, had a regulatory scheme similar to the Funeral Rule. Thus, Texas might not represent a typical pre-Funeral Rule market to measure pre-Rule satisfaction levels.

[483] R-B-11 at 25 (consumers were significantly less satisfied after the Rule than before it on ten criteria, and were significantly more satisfied after the Rule on 5 criteria. Five of the ten less-satisfied responses, however, are based on (continued...)

Several witnesses testified, however, that there is no realistic way to measure consumer satisfaction in the funeral market. Professor Robert Sommer, Director of the Center for Consumer Research at the University of California-Davis, discounted the fact that few consumers complain about the funeral industry. He and other participants argued that two factors contribute to this silence. The first, according to Prof. Sommer, is repression;[484] consumers experience shock and sorrow and do not want to relieve the experience or to call attention to what they may consider to be their mistake,[485] or they may just want to believe what they are being told.[486]

Professor Sommer described the second factor that inhibits consumer complaints as a lack of a basis for comparison. The PAA in its proposed findings concurred with Professor Sommer:

> As few consumers are aware of alternatives that are available to them regarding the purchase of funeral goods and services in a given market area (if, in fact, there even are any viable alternatives in that market area), there is no realistic way to measure whether consumers are truly satisfied with the particular combination of goods and services, price and quality that is currently being offered by the funeral industry status quo.[487]

Other witnesses for the Older Womens League and the AARP testified that, without an awareness of alternatives, consumers who claim to be satisfied may mean only that they received the dignified services they wanted;[488] it does not necessarily mean that consumers received compliant treatment under the Funeral Rule, or that consumers got the best price.[489]

Dr. Burt Barnow, an economist appearing for the AARP, further opined that relying on consumer responses about satisfaction thus will not provide insights into whether those consumers would have been more or less satisfied were the Rule completely complied with.[490] Dr. Barnow concluded that it is quite possible for a consumer who was very satisfied with his funeral service to

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[483](...continued)
criteria that can not be attributed to the Rule because they involve questions about inventory, quality and credit. The results show that consumer responses were equally divided on questions of satisfaction when those categories are removed from the analysis).

[484] Tr. Vol. III, 638.

[485] Graf, PAA, Tr. Vol. II, 599, 637. *See also* Wertheimer, Tr. Vol. III, 964 ("they don't even see it as possibly being an unfair business practice, but they see it as being [due to] their lack of experience in making these kinds of decisions and knowing what to do").

[486] Rouillard, CRLAF, Tr. Vol. III, 1341.

[487] R-M-12 at 15.

[488] Comm'r Jones, Tr. Vol. I, 268 ("...and yet they still may not have enough of the choices they needed...[or] enough information for an informed choice").

[489] Dr. Barnow, economist for the AARP, Tr. Vol. I, 863 ("If they were required to buy a package, they might be paying more, and in that case they might think, well, that's life. They might not realize they're paying more than they have to").

[490] *Id.* at 860-61.

have been deceived without knowing that he was deceived.[491] Ms. Lisa Carlson, an author on funeral self-help issues, explained that a high percentage of consumers claim to be satisfied or very satisfied with the funeral services they receive because they did not know they had a choice. She stated that "when they are aware that they have a choice, they suddenly become dissatisfied."[492]

Staff Conclusion

The staff concludes based on its review of the evidence that the NFDA-NSM contention that the Rule has decreased consumer satisfaction with the funeral industry and injured the reputation of funeral directors is not supported by the record evidence. No reliable evidence indicates that funeral directors' reputation have suffered from implementation of the Rule, or that the Rule has adversely affected consumer satisfaction with funeral service. Empirical evidence indicates that the level of consumer "satisfaction" rises as compliance with the Rule increases. Finally, the staff concludes that it is not yet possible to meaningfully measure consumer satisfaction in a context where consumers do not realize the extent of their choices and alternatives. To the extent that its enforcement guarantees that consumers will receive a certain minimum of information about prices and alternatives, the Funeral Rule is necessary to enable consumers to make their own informed judgements about their level of satisfaction with the funeral industry.

D. Impact On States

The Commission in its Statement of Basis and Purpose considered relying on state rather than federal action to regulate the funeral industry.[493] The Commission recognized that state action to correct industry abuses had several potential benefits over federal regulation, but determined that:

> state regulation in the past has not addressed the problems which the Commission's Rule is designed to correct. A review of state law submitted to the Commission in 1976, and another review conducted in 1980, indicated that, while there have been some changes at the state level since the proceeding commenced, most states had not moved to establish requirements comparable to those which the Commission adopted, particularly in the area of price disclosures.[494]

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[491] *Id.* at 862. *See also* Nelson, AARP, Tr. Vol. I, 87:

"In many instances, consumers are not going to be aware of the fact that something was misrepresented to them. Consumers are not going to be aware that claims were made about the protective capacities of a casket or consumers may well not be aware that an embalming took place without their authorization. So, I think it has a lot to do with the level of consumer awareness. Consumers may not be aware that they are being victimized."

[492] Tr. Vol. I, 516.

[493] R-B-5 at 42288-42289. The staff presents the Commission's reasoning in full in section I.E, *supra*.

[494] *Id.*

The record contains the testimony of four state officials and other interested parties on the issue of state regulation, as well as the results of the staff's 1987 survey of state laws. Finally, the Conference of Funeral Service Examining Boards submitted a written comment. The staff below reviews the evidence concerning the effects of the Rule on state funeral regulation.

Steve Clark, the Attorney General of Arkansas, testified that it is the federal law which has enabled his office to take actions for providers' failure to give price information to grieving consumers. He would have liked, but was unable, to take these actions prior to the promulgation of the Rule.[495] Gen. Clark added that the Rule provides him with the leverage he needs to protect consumers, because his office now can threaten to "breath down the back of those not in compliance."[496]

Two state legislators from Illinois and Kansas spoke of the difficulty of regulating the funeral industry on a state level. According to their testimony, the influence of the funeral industry is such that, if the Rule were repealed, states would be unable to provide a similar level of protection to the consumers.[497]

State Representative Ginger Barr further expressed her preference, as a general rule, for state regulation over that of the federal government, but concluded that the Funeral Rule is necessary for the protection of consumers of funeral goods and services, given the states' recalcitrance to regulate thoroughly.[498]

Other testimony provided evidence that the Rule has affected the attitudes of some state board officials. For example, Dr. Biddle asserted that the Rule has raised state boards' sense of accountability in promoting the interest of the funeral consumer.[499] Other witnesses variously described the Rule as providing the industry with the sense that someone is looking over its shoulder,[500] and as a specter hanging over the industry members of the state boards.[501] Larry Farrow, Executive Director of the Texas Funeral Service Commission, testified that the Rule has

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[495] Tr. Vol. III, 36. *See also* Barr, Kansas state representative, Tr. Vol. III, 1502 (prior to the Rule, there was no particular type of regulation except that which regulated basic business practices as enforced by the attorney general).

[496] Tr. Vol III, 34, 37 ("We can tell [consumers] that ... [funeral directors] must give price information over the phone and if they have a problem obtaining information to call us back. That is the leverage that we have").

[497] Topinka, Illinois General Assembly, Tr. Vol. II, 58, 64; Barr, Kansas state representative, Tr. Vol III, 1504-1505 (In the "real world" of politics, on the state level funeral directors are too strong and therefore consumer's interests are unprotected). *See also* Buchanan, CAFMS, Tr. Vol. III, 1126; and Giesberg, NACAA, Tr. Vol. III, 1149 (the influence of the funeral industry is substantial and to start from scratch in many of these states and pursue the kinds of protections that are already afforded by the Rule is really inappropriate).

[498] Tr. Vol III, 1537 ("Even though I'm basically a state's righter and really don't like the federal government involved, but because of the practices I've seen, we need help to protect the consumer").

[499] Tr. Vol. III, 316 ("just having that threat over them that they know the Commission can be called in and that they are being called to more accountability").

[500] Rep. Barr, Tr. Vol. III, 1506.

[501] Baskin, former consumer member of Texas mortuary board, Tr. Vol. III, 134.

provided the impetus for the Funeral Service Commission to seek greater regulatory authority and to more aggressively monitor and regulate the industry.[502] Although Mr. Farrow added that the Rule has now become redundant and unnecessary in Texas, he further asserted that "it would be a good thing" if the Rule provided a similar impetus for strengthening laws and enforcement by state funeral boards in other states.[503]

Other evidence provided by the PAA and other parties suggested that reliance on state boards dominated by funeral providers to effectively regulate the funeral industry and promote competition is unwarranted.[504]

The Conference of Funeral Service Examining Boards ("CFSEB") in its Comment, however, advocated repeal of the Rule as unnecessary federal regulation. The CFSEB reasoned that the licensed profession of funeral directing is best understood and regulated at the state level because of the longstanding and local system of checks and balances, including regulations against deception and the need for providers to maintain "goodwill," that serve to protect consumers' interests.[505]

The 1987 staff survey discussed earlier in section I.E. of this report provides the most up-to-date information available on the overall level of state funeral regulation. That survey indicates that ten states have incorporated the Rule by reference into their laws or adopted provisions similar to six of the Rule's most salient requirements. Six others have enacted at least four of those provisions, and, overall, thirteen to twenty-five states have laws that include one or more provisions similar to the Rule.[506] The record contains no evidence that additional states have adopted relevant funeral laws or, with the possible exception of Texas, that existing laws have been significantly strengthened.

The evidence indicates that, although the Rule has helped stimulate the enactment of similar funeral industry laws in several states, such reform is unlikely in other states, in part because of industry opposition. Those state representatives that appeared during the proceeding concluded

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[502] Tr. Vol. III, 550.

[503] Tr. Vol. III, 556.

[504] Topinka, HX-35 at 9 (when "a board comprised of funeral directors, or any other board comprised primarily of industry members [is allowed] to regulate themselves...[i]n virtually all such situations, the public is guaranteed to be the loser"), Tr. Vol. II, 63 (all but one consumer member of the Illinois funeral director and embalmers licensing board are licensed funeral directors and have the power to veto the movements of the Director of the Department of Professional Regulation); Baskin, Tr. Vol. III, 135 (violations not enforced; unrealistic to rely on a state board comprised primarily of licensed funeral directors to effectively regulate the industry and to promote competition); Dr. Biddle, Tr. Vol. III, 304 (boards should consist of a majority of non-industry related persons); and R-M-12 (PAA Findings) at 53, 55 ("It is in the consumers' interest to have significant, not token, consumer representation on state funeral director licensing boards;" state funeral director licensing boards are, as a general rule, comprised of and controlled by licensed funeral directors).

[505] R-J-1 at 4-6. The CFSEB is an association comprised of the funeral directing licensing boards in every jurisdiction except California, Hawaii, and the District of Columbia.

[506] *See* R-C-12 for the detailed results of the staff's survey.

that the Funeral Rule needs to be retained as a result, and is beneficial to consumers, funeral providers, and state enforcement officials.

Several witnesses, including state officials, concluded that repeal of the Rule would leave consumers unprotected in the vast majority of states.[507]

E. The Case for Repeal vs. Retention and Staff's Conclusion

Introduction

The Commission mandated this early review "to ensure that there is a need to continue the rule after it has had an opportunity to work in the marketplace."[508] The Commission reasoned that "[i]f the rule operates as expected, there should be increased competition in the market which may obviate the need for continued federal intervention."[509] The Commission thus concluded that it would consider repeal of the Rule if the marketplace problems it was designed to remedy "appear to be largely solved by increased competition."[510]

The NPR initiating this review thus specifically sought comment and debate on whether the Rule should be retained as is, modified, or repealed.[511] The staff earlier in this report presented the legal standard of review that is required for the Commission to take one of those actions -- having been duly promulgated, the Rule is presumptively valid, and may be changed or repealed based upon a reasoned analysis supported by reliable, substantial evidence in the rulemaking record taken as a whole.[512] Although the Commission as a technical, legal matter thus need not base a decision to retain the Rule on substantial evidence, the staff in analyzing the record evidence has asked the question whether the Rule has provided or will provide benefits to consumers that exceed its costs.

The staff below presents a brief discussion of the rulemaking participants' views on the question of repeal, a summary of its evidentiary findings concerning the Rule's impact on the

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[507] *See, e.g.*, Giesberg, NACAA, Tr. Vol. III, 1137 ("Abdication by the Commission of any authority or standards in this area would leave little consumer protection. Many states did not pursue consumer protection authority in this area because the Commission had laid the foundation for needed protection"); Rep. Barr, Tr. Vol. III, 1502 ("Again, based on my knowledge of the funeral industry, I'm of the opinion it is laughable to assume consumers would receive basically the same disclosures if the rule were not in effect"); Clark, Ark. A.G., Tr. Vol. III, 36 ("If the rule were repealed, consumer protection efforts in my state would be hampered"); Peebles, funeral director, Tr. Vol. III, 1562 ("if Rule were repealed, states would not have the personalities to provide the same level of protection to consumers").

[508] R-B-5 (SBP) at 42297.

[509] *Id.*

[510] *Id.* The Commission further recognized that the initial stimulus for price competition would likely come from funeral providers in response to the Rule-required price disclosures, and not from funeral purchasers. *Id.* at n. 396.

[511] R-A-1 at 19869, Questions 1-2.

[512] *See* the discussion at section I.C., *supra*.

funeral market to date, and its conclusion on whether the record evidence warrants repeal or retention of the Rule at this time.

Position of the Rulemaking Parties

The vast majority of rulemaking participants supported retention or expansion of the Funeral Rule. Of the 189 NPR commenters and 83 public hearing witnesses, only eight unequivocally advocated repeal of the Rule;[513] another four suggested repeal unless the Commission makes various substantive amendments, or because existing state laws were deemed adequate to protect consumers.[514]

The NFDA, the largest association of funeral industry firms, was the major proponent of repeal.[515] The NFDA argues in its Comments and Proposed Findings that repeal is warranted because the Rule has imposed significant costs but failed to provide its promised benefits of increased competition and altered patterns of consumer behavior. According to the NFDA, the evidence shows that consumers in selecting funeral providers and types of funeral service still

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[513] Those eight were: NFDA (R-G-6, R-M-9); Funeral Directors Service Ass'n (R-G-5)(repeal or sunset); Ninker, funeral director (R-G-1); Conference of Funeral Service Examining Boards (R-J-1); Nat'l Concrete Burial Vault Ass'n (R-E-2); Hahn, Federated Funeral Directors of America, Tr. Vol. II, 674-675, 678 (because the marketplace will not change significantly as a result, even though the Rule has made providers more aware of their cost components and those few consumers who are interested more aware of funeral prices); Yurs, funeral director, Tr. Vol. II, 554; and Illinois Funeral Directors Ass'n (R-G-2).

[514] NSM (R-G-3; R-M-9 at 224)(repeal unless major amendments are adopted as proposed and a "sunset" date of Dec. 31, 1990 is mandated); NYS Funeral Directors Ass'n (R-G-4)(Rule is redundant to New York law); Hocker, President, NFDA, Tr. Vol. III, 1399, 1400, 1444-1445 (NFDA advocates repeal, but his objections are limited to three areas -- affirmative telephone disclosure, GPL timing and distribution, and prior permission to embalm; otherwise, the Rule has educated consumers about the funeral process and many providers say they are not overly burdened by the Rule); and Farrow, Exec. Dir, Texas Funeral Service Commission, Tr. Vol. III, 550-551, 573 (Rule is unnecessary in light of Texas funeral law, which is patterned after the Rule and benefits consumers).

[515] An interesting issue that surfaced during the proceedings was whether individual members of the NFDA or other trade groups agree that the Rule warrants repeal. Several surveys and other evidence introduced into the record indicated that many funeral directors may not wholly agree with the NFDA view. *See, e.g.*, HX-32 (*American Funeral Director* magazine survey asked its funeral director readers "how would you recommend that the NFDA deal with the Funeral Rule during the forthcoming Review?" -- 70% responded that the Rule should be accepted as is or partially modified, 12% suggested substantial modification, and 20% advocated repeal; 88% of firms represented by respondent funeral directors were NFDA members); Hocker, President, NFDA, Tr. Vol. III, 1400 (many funeral directors say they are not overly burdened by the Rule); Hunter, President, NSM, Tr. Vol. I, 790-791 (majority of NSM members do not advocate repeal; parts of it have been very helpful); Ayers, HX-103 at 3 (68% of 500 funeral directors surveyed agreed that the Rule's required information was beneficial to consumers); R-G-5 at 149, 152 (1985 FDSA survey in four midwestern states showed that 60% of provider respondents said consumers under the Rule better understand their pricing); and individual funeral director comments/testimony: Pierson, R-D-1 at 2, 4 (Rule-required documents not unreasonable; do not repeal because some directors do not comply); Krause, Tr. Vol. II, 27, 41, 47 (consumers need protection); Drozda, Tr. Vol. II, 924 (providers would revert to old practices if repealed); Franzen, Tr. Vol. II, 790, 798 (Rule should not be dismissed; providers would revert to false statements); Peebles, Tr. Vol. III, 1562-1563 (in consumers' interest to retain the Rule); Botimer, Tr. Vol. III, 1305 (Rule no interference at all); Radovich, Tr. Vol. III, 1035-1036 (lack of industry competition warrants Rule retention); Reveley, former funeral director, Tr. Vol. III, 870-871, 899 (providers would revert to old practices if repeal; transition from consumers' wanting a simple service to something more elaborate happens at the funeral home); Hennessy, FDSA, Tr. Vol. II, 991 (Rule is working); and Longmire, R-D-2 at 1, 5 (retain rule -- it's the reason price information is available).

place, and will continue to place, a higher importance on social, moral and practical factors (such as provider reputation and quality of service) than they do on price.[516] The NFDA concluded that the evidence logically demonstrates that consumers under the Rule spend no less for funeral arrangements, comparison shop no more, and purchase no fewer items and no different types of service than they did before the Rule. The Rule, however, has imposed various monetary costs on providers that have been passed on to consumers in the form of higher prices, as well as non-monetary costs that interfere with providers' ability to give caring, quality service. The NFDA thus concluded that the Rule's costs far outweigh its benefits and should be repealed in its entirety.[517]

The AARP, in contrast, provided the most vigorous support for retention (and expansion) of the Rule.[518] The AARP in its rebuttal statement advocated that a decision to repeal the Rule must be founded on substantial evidence demonstrating that: (1) the acts and practices addressed by the Rule are no longer prevalent; (2) the harm resulting from those practices has been removed; (3) repeal would not permit the return of that harm; and (4) the benefits of repeal exceed the costs of continuing the Rule.[519] According to the AARP, those questions can not be answered and the Rule's full impact can not be assessed because the record evidence reveals unacceptably low levels of industry compliance, consumer awareness of the Rule's provisions, and agency Rule enforcement.[520] Because the Rule's full impact can not be gauged, the AARP concluded, repeal is unwarranted at this time.[521] The AARP also argued that the evidence indicates that the Rule has not increased funeral providers' costs, funeral prices, or consumer expenditures, but has begun to provide a variety of consumer benefits. The AARP thus further concluded that substantial evidence exists to justify retention of the Rule because the Rule's benefits exceed its costs.[522]

Summary of Record Evidence on Rule's Impact

The evidence on the Funeral Rule's market impact to date indicates, on balance, that: (1) the Rule does not appear to be sufficiently "in place" in the market to permit a full assessment of the Rule's potential benefits; (2) the market appears to be increasingly price-sensitive for the selection of funeral providers, types of service, and individual goods and services, particularly

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[516] However, the NFDA suggests that price plays a greater role in consumers' selections of individual items involved in the funeral, such as caskets and outer burial containers. R-M-9 at 20.

[517] *See, e.g.*, R-G-6 (Comment) at 5-7, 35, 114-121 and R-M-9 (Proposed Findings) at 216-220, 224.

[518] The other major rulemaking parties and consumer groups that addressed the issue all supported retention as well. These groups included the Pre-Arrangement Ass'n. of America, the Cremation Ass'n. of North America, the Continental Ass'n. of Funeral and Memorial Societies, and Consumers Union.

[519] R-M-6 at 10.

[520] *Id.* at 12-13, and R-M-11 (Proposed Findings) at 144-145.

[521] R-M-6 at 14.

[522] R-M-6 at 13 (but the Commission need not meet this evidentiary burden on order to retain the Rule); R-M-11 at 85-95 (specific findings as to benefits), 145.

and now decline items once included in packaged funerals, and consumers are increasingly choosing less-expensive cremation alternatives.[525]

Other, empirical evidence indicates that, since 1981, the proportion of consumers who receive price information early in the funeral transaction and use that information to spend less for their arrangements has significantly increased, consumer purchases of "unneeded" caskets and embalming for cremation has decreased, as have provider misrepresentations about casket requirements, and consumer knowledge regarding embalming requirements and the preservative value of sealed caskets has increased slightly. The great majority of rulemaking participants expressed the view that the actual and potential Rule benefits just enumerated will tend to increase over time, as compliance with, and consumer awareness of, the Rule increases.

While the Rule has begun to provide benefits to consumers, uncontroverted, empirical evidence demonstrates that its requirements have not measurably contributed to increases in funeral home costs of doing business or funeral home prices, or to any reduction of overall consumer satisfaction with funeral service. Statistical business expense data for the years 1977-1987 presented by Mr. Hahn of the FFDA and analyzed by Dr. Barnow and BE staff indicates that funeral home costs arguably most related to the Rule (such as legal, accounting and consulting) have increased at lower rates than other expenses (such as depreciation and casket cost), and that overall cost increases have resulted more from a general increase in all business expenses than from a dramatic increase in any one expense category. Mr. Hahn further testified that the Rule has played a very minor role in business expense and price increases, which he and other witnesses attributed generally to inflation and individual funeral home business decisions.

Further record analysis of the FFDA statistical data by BE staff indicates that funeral homes' personnel expense appears to have increased very slightly since 1984, but that personnel expense as a proportion of overall business expense has not significantly changed in many years, including the period covered by the Rule. Similar analysis shows that salary expense as a proportion of personnel cost has likewise remained stable. Finally, other empirical evidence based on the RS data and BE staff's COMPLY indices indicates that the proportion of consumers reporting satisfaction with their arrangements steadily increases as simultaneous provider compliance with the Rule's provisions increases.

The rulemaking record finally documents that most individual states appear to favor the existence and enforcement of the Funeral Rule to protect funeral consumers over comprehensive, state-specific legislation. A 1987 staff survey of the states' funeral industry statutes, regulations and rules revealed that ten states have incorporated the Rule by reference into their laws or adopted provisions similar to six of the Rule's most salient requirements; six have enacted at least four of those provisions, and, overall, thirteen to twenty-five states have laws that include one or

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[525] The evidence is mixed concerning the Rule's effect on the cremation rate. The NFDA argues that the Rule has not played an important role in the steadily increasing cremation rate, because the increase began in the early 1970's and is based primarily on changing social and moral values, as well as on the wishes of the deceased, and not on price concerns. The CANA and the AARP assert that the Funeral Rule proceedings, which also began in the early 1970's, as well as the Rule itself, substantially increased publicity about the cremation alternative, and that many consumers do choose cremation based on price and other considerations. The CANA also provided evidence that the marketing of cremation options has dramatically increased since the Rule's inception. The staff concluded that the process of implementing the Rule, and its continuing presence, has contributed to the increase in cremation selections.

more provisions similar to the Rule. No party presented evidence during the review that additional states have adopted relevant funeral laws or that existing laws have been significantly strengthened.

Testimonial evidence presented by state legislators and officials further indicates that, although the Rule has helped stimulate the enactment of similar funeral industry laws in several states, such reform is unlikely in their or other states because of industry opposition. Those witnesses expressed their views that the Funeral Rule needs to be retained as a result, and is beneficial to consumers, funeral providers, and state enforcement officials.

Staff Conclusion

The staff concludes based on its review of the record and its resulting evidentiary findings that repeal or sunset of the Funeral Rule or major modification of its primary requirements is not warranted at this time. Substantial, reliable evidence on the record supports the overall conclusion that the Rule appears to be providing some actual pro-competitive and informational benefits to consumers that outweigh its costs to providers, and that those benefits, but not costs, are likely to increase over time if the Rule remains in place.

The staff draws that conclusion from the record evidence despite its finding that industry compliance with, and consumer awareness of, the Rule are insufficient to permit a full cost-benefit analysis of its potential impact. That latter finding, in the staff's view, makes premature any firm conclusions about the extent of the Rule's benefits over time that is based primarily on evidence of consumer behavior since 1984. Given the low levels of overall industry compliance, price competition and consumer knowledge documented in the record, it would appear that one can not reasonably expect overall consumer behavior or expenditures to have substantially changed in the short time since the Rule's promulgation.

Under those conditions, for example, evidence from the RS data and BE report that overall consumer expenditures have increased, or have not fallen, since the Rule's inception may be of minimal value in assessing its potential benefits because the analysis could not capture the full effects of the Rule. Even if compliance were higher and consumer expenditures still remained unchanged, the staff is not persuaded by arguments that the level of expenditures is the sole test of the Rule's benefits. BE staff stated in its report, for example, that expenditures may rise as a result of price increases related to funeral homes' fixed costs that are not associated with Rule compliance. The record evidence indicates, in fact, that Rule compliance has ~~not~~ increased funeral providers' costs or prices, that consumer expenditures and funeral prices, when compared to other service industries, have not increased above inflation, and that an industry "price consciousness" induced by the availability of the GPL may have tempered price increases. That evidence could lead one to conclude that mandatory itemization may have helped retard the growth of funeral prices and consumer expenditures, a goal fully intended by the Commission.[526]

Finally, if the Rule's only benefit were to increase informed consumer choice (without imposing substantial costs on industry), regardless of whether some chose to spend more for their

[526] *See* R-B-5 (SBP) at 42297.

caskets, when price and options information is readily available during the selection process; (3) despite a documented, low overall compliance level, pro-competitive and informational benefits attributable at least in part to the Rule appear to be manifesting in the market and are likely to increase over time; (4) the Rule overall appears to impose minimal compliance burdens on providers that do not significantly raise their business costs or prices, or reduce consumers' overall satisfaction with the funeral services they receive; and (5) most states have not adopted laws similar to the Rule in scope and coverage, and such action is not likely in the near future.

Substantial evidence indicates that the Rule has not had the "opportunity to work in the marketplace" presumed necessary by the Commission to gauge its effects. Systematic, empirical data from two surveys shows that simultaneous industry compliance with the Rule's GPL and itemized final statement provisions is 36%. Using the RS results, that overall level drops to 31% when misrepresentation provisions concerning embalming and casket for cremation requirements are added to the analysis, and to 15% or lower when the GPL timing requirement is viewed strictly and several other Rule provisions are considered. Most rulemaking participants proffered the view that a 30% level of compliance would be insufficient to fully assess the Rule's benefits over time.

Compliance issues aside, empirical and other record evidence also demonstrates that funeral providers have not voluntarily provided the initial stimulus for price competition considered necessary by the Commission in the short term. The few new funeral home entrants documented in the record that aggressively compete on price appear to be former funeral directors who are considered to be "mavericks" by the funeral industry as a whole. More traditional funeral homes, by industry representatives' own admission, generally do not price advertise or otherwise compete on price. The evidence further indicates that funeral providers generally do not support unfettered competition in the sale of pre-need funeral services, and that many affirmatively attempt to discourage potential price competition from third-party cemeteries and other non-funeral home retailers who sell caskets on a pre-need basis, by imposing so-called "casket handling fees" averaging $300-$500 on consumers who patronize those sellers.

Finally, the preponderance of the empirical and other record evidence documents that the great majority of consumers exhibit low levels of awareness concerning their rights under the Rule, funeral prices and options, funeral requirements, and the value of funeral goods and services as a result of a general lack of "visibility" of the Rule and of readily-available, comparative price information. Other evidence indicates that consumers' "experience" with funerals is low by any measure and that, regardless of their level of experience, consumers are not "familiar" with the funeral transaction. Most rulemaking participants concluded that the documented low levels of overall industry compliance and consumer knowledge, viewed together, means that the Rule has not been in place long enough to adequately assess its potential impact on the funeral market. The evidence, however, does speak to the Rule's potential to affect competition over time.

Consumers' demand for funerals, of course, is price inelastic. Substantial record evidence indicates, however, that consumers' selections for individual funeral providers, overall types of funeral service, and individual funeral goods and services are price-sensitive. The empirical evidence shows that consumers value and use price information they receive early in selecting a funeral home and funeral goods and services. Fifty-two percent of NSM survey respondents in the years 1983-1988 said that they considered price very important in their funeral home selection, although other factors appeared to be more important. RS respondents who received price

information early in the transaction spent significantly less for their arrangements than those who did not get that timely information; the earlier respondents received price information, the more likely they were to consider the information important to their choices in making funeral arrangements.

Other evidence demonstrates that the business of three "low-cost" funeral homes has increased substantially in recent years as a direct result of their competitive pricing practices. Similarly, other evidence reveals that many consumers will purchase competitively-priced caskets from third-party sellers when they are available. Finally, empirical evidence from the Replication Study, from CANA's annual statistical data, and from industry cost data presented by Mr. Hahn shows that an increasing proportion of consumers are purchasing the significantly less-expensive cremation alternative, and that consumers are purchasing fewer caskets and embalming for cremation than in 1981 and are declining items that used to be included in funeral packages.

Despite the overall industry compliance level and the lack of price competition among funeral homes documented in the record, substantial evidence also indicates that competitive and informational benefits that are at least partially attributable to the Rule have begun to manifest in the funeral market. Testimonial evidence established that the Rule's anti-tying and price disclosure provisions have encouraged third-party casket sellers and low-cost funeral homes to enter the market and have helped them compete, in part because the GPL and telephone disclosure requirements permit non-industry entities to gather and publish comparative price data.[523] Many consumers use that data to select those lower-cost funeral providers and purchase caskets from third-party sellers where they exist.

Other testimonial evidence presented by Mr. Hahn, who provides financial and accounting services to 1,500 independent funeral home clients in 30 states, indicates that the Rule has raised the industry's "price consciousness," which may be partly responsible for the tempering of price increases in recent years. Statistical data provided by Mr. Hahn and the Replication Study and analyzed by Dr. Barnow and BE staff also establishes that although overall prices and consumer expenditures for funerals increased since 1981 by more than the general price level, the increase was comparable to the increase in service prices. That is, compared to other service industries,[524] funeral prices and expenditures in the period 1981-1987 did not increase above the rate of inflation. In 1988, in fact, expenditures and prices increased by less than the rate of inflation for the general economy (the "CPI-U").

Other, substantial evidence in the rulemaking record suggests that the Rule has helped increase consumers' awareness of prices and options as factors in funeral purchase decisions. Many consumers choose low-cost funeral homes and caskets competitively offered by third-party providers. Consumers in 1987 purchased fewer caskets and embalming for cremation than in 1981

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523 Memorial society members, journalists and others testified that collecting comparative funeral price data was, at best, a difficult task before the Rule.

524 The funeral home industry is classified by the U.S. Dept. of Commerce in the standard industrial classification scheme (SIC) as a "service" industry, because, like other service industries, it sells services as well as goods. [SIC code 7261]

arrangements than they would have without the Rule, that benefit would justify retention of the Rule because other consumers would have the right to choose to spend less. The Commission in its Statement of Basis so stated the Rule's purpose.[527] The record evidence in fact indicates that many consumers will purchase fewer funeral items or less-expensive services as a result of informed choice.

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[527] *Id.*

III. Record Analysis of Rule Provisions and Proposed Alternatives

A. Introduction

The staff in this section presents the record evidence on the impact of various Rule provisions to determine whether they warrant repeal, retention or modification. Several rulemaking participants, most notably the NFDA and NSM, advocated repeal or modification of several Rule provisions, if the Rule as a whole is retained.[528] The AARP recommended other amendments, and, together with those groups and the CANA and PAA, also suggested expansion of the Rule in various ways to include additional acts or practices or entities not addressed or covered by the current Rule.[529] The staff in this section also addresses those proposals and makes recommendations to the Commission concerning their merit, based on the record evidence. Finally, the staff makes recommendations for technical Rule amendments that appear necessary to correct inconsistencies or unnecessary language in certain provisions, or to complement other recommended amendments.

The staff in the prior report section discussed its overall evidentiary findings that the Rule appears to be providing pro-competitive and informational benefits to consumers that outweigh its costs, but that industry compliance with and consumer awareness of the Rule appear to be insufficient to permit an adequate assessment of the Rule's potential impact on the funeral market. The evidence, however, does permit the staff to make some judgments about the actual short-term or potential long-term costs and benefits of some of the Rule's individual provisions as currently written.

The staff as a result of those findings makes no recommendation for major modification of any of the Rule's individual provisions, but recommends "fine tuning" of several of the Rule's definitional and preventive requirements. Those recommendations are designed to clarify the Rule's requirements and otherwise reduce alleged compliance burdens in order to increase the level of industry compliance and consumer awareness.[530] The one exception to that general rule is the staff's recommendation to repeal the affirmative telephone disclosure provision, which action the staff concludes is warranted, on balance, by the record evidence.

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[528] *See* R-M-9 (NFDA-NSM Proposed Findings) at 224-231.

[529] *See* R-M-11 (AARP Proposed Findings) at 148-157; R-M-1, Section III (CANA Proposed Findings) at 34-41; and R-M-12 (PAA Proposed Findings) at 90-96.

[530] The staff notes the NFDA-NSM assertion in their findings that <u>any</u> <u>change</u> in the Rule's requirements (other than repeal) must be based on a finding that current practices are unfair or deceptive, in accordance with the Commission's regulatory authority. R-M-9 at 220-221. The staff certainly agrees with that industry position as it applies to proposals to <u>expand</u> the Rule's coverage to additional acts or practices or to other sellers, such as suggestions to cover cemetery or crematory practices not addressed by the current Rule. The staff concludes, however, that the NFDA-NSM position is simply incorrect in advocating that the Commission must find an unfair or deceptive act or practice before it can amend an existing preventive requirement of the Rule (or clarify a definitional provision). The Commission when it promulgated the Rule determined that the covered practices were unfair or deceptive. Preventive requirements designed to remedy those practices may be modified based on a reasoned analysis supported by substantial evidence in the record. One purpose of this review was to determine whether the Rule is operating as expected in reducing barriers to price competition and increasing consumer choice, or whether some modification is necessary to facilitate those benefits. R-B-5 (SBP) at 42299.

covered under the Rule.[536] The proposed recommendations would expand the Rule's coverage to all retailers of funeral goods or funeral services.

The staff also notes that, in 1979, the staff conducted an investigation of the cemetery industry to ascertain whether members of the industry regularly engaged in acts or practices that violated any of the statues enforced by the Commission.[537] The investigation was closed in the same year for lack of evidence of widespread violations.

Several ANPR commenters alleged that limiting the Rule to funeral homes placed those providers at a competitive disadvantage by inhibiting a "level playing field" among retailers. Commenters further claimed that cemeteries, crematories and other funeral industry retailers do not provide consumers with pre-purchase price information and engage in other unfair or deceptive acts or practices. The Commission in the NPR thus sought public comment on whether: (1) limiting the Rule to retailers of both funeral goods and services unfairly places providers at a competitive disadvantage to retailers that market only funeral goods or funeral services; and (2) providers not subject to the Rule engage in unfair or deceptive acts or practices.[538]

Section 18 of the FTC Act requires the Commission to specifically define the unfair or deceptive acts or practices that are addressed in a trade regulation rule, such as the Funeral Rule.[539] The Commission's own rulemaking policy criteria further require that, whenever possible, it answer the question whether those practices are prevalent.[540] The Commission

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[536] These parties are subject to the Rule if they sell both funeral goods and services. For example, crematories that sell urns are subject to the Rule because they sell funeral goods (urns) and funeral services (preparing the remains for cremation). Cemeteries are not subject to the Rule because they arrange, but do not prepare the deceased for, the final disposition. R-B-5 at 42285.

[537] FTC File No. CA9-0002.

[538] R-A-1 at 19867-19868, 19870 (Question 11).

[539] Section 18 of the FTC Act codifies the rulemaking requirements of the Magnuson-Moss Warranty - FTC Improvements Act, Pub. L. No.93-637, 88 Stat. 2183 (1975). In *Katharine Gibbs School, Inc.* v. *Federal Trade Commission*, 612 F.2d 658, 664 (1979) the Second Circuit held that the Magnuson-Moss Act requires the Commission to support its determination that a practice is unfair or deceptive by substantial evidence in the rulemaking record taken as a whole.

[540] The Commission articulated those criteria in its SBP for the Credit Practices Rule, stating that, before promulgating a rule to correct a market failure, the public interest requires answers to the following four questions:

(1) Is the act or practice prevalent?
(2) Does a significant harm exist?
(3) Will the proposed rule reduce that harm? and
(4) Will the benefits of the rule exceed its costs?

SBP for Credit Practices TRR, 49 F.R. 7740, 7742 (Mar. 1, 1984) (text and n. 4). In addition, the Commission has articulated its policy criteria for evaluating the evidence that is placed on the rulemaking record. The Commission has indicated that methodologically sound quantitative studies are the preferred type of evidence. In the absence of such evidence, the Commission may rely on expert testimony. Anecdotes may be useful as indications that some harm exists,

(continued...)

The staff also notes its recommendation to prohibit providers' use of so-called "casket handling fees," or other non-declinable fees not otherwise permitted by the Rule. Those fees are not charges for goods or services provided, but are charges imposed on consumers for exercising their right under the Rule to decline to purchase caskets from funeral providers. Although the current anti-tying provision of the Rule prohibits such "tying" arrangements generally, it does not specifically address "casket handling fees" because they have developed since the Rule's implementation. The staff thus recommends an amendment to clarify that the anti-tying provision prohibits conditioning the furnishing of goods and services on the payment of such fees.

B. Expansion of the Rule

1. To Cover Other Sellers

Introduction

The staff in this section addresses recommendations made by several parties, including the NFDA, NSM, AARP, and CANA, that the Commission expand the Funeral Rule to apply to entities and transactions not currently subject to the Rule.[531]

The Commission in the SBP unambiguously established that funeral director practices were the focus of the rulemaking proceeding.[532] The Commission also necessarily limited the final Rule to funeral homes because the FTC Improvements Act of 1980 prohibited the Commission from expending funds (during fiscal years 1980-1982) to promulgate a rule that, *inter alia*, applied to persons that sold funeral goods <u>or</u> funeral services. The Funeral Rule thus applies to "funeral providers" -- persons who offer or sell both funeral goods <u>and</u> funeral services to the public.[533] Funeral goods are items sold directly to the public for use in a funeral.[534] Funeral services are any services used to: (1) care for and prepare deceased human remains for burial, cremation, or some other final disposition; and (2) arrange, supervise or conduct the funeral ceremony or the final disposition of the remains.[535] Funeral home operators typically are the only segment of the retail funeral market that offer both funeral goods and services. Most funeral providers are thus funeral home operators. Retailers that market only cemetery plots, cremation, grave markers or caskets are unlikely to offer both funeral goods and funeral services, and thus generally are not

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[531] Generally, the suggestions in the record pertain to expanding the Rule to cemeteries, crematories, and third-party casket sellers. These entities are not subject to the Rule unless they operate funeral homes, or are crematories that market funeral goods, such as urns.

[532] R-B-5 at 42261-42262, 42285.

[533] *See* § 453.1)j). Section 453.4(a) prohibits funeral providers *and crematories* from requiring a casket for a direct cremation. Section 453.1(g), however, defines a crematory as any person, partnership or corporation that performs cremation <u>and</u> sells funeral goods.

[534] *See* § 453.1(i).

[535] *See* § 453.1(k).

must adhere to these standards in order to expand the Funeral Rule to additional retailers in the funeral market. The Commission thus needs to determine that: (1) cemeteries, crematories, and casket retailers (and various other sellers that market any funeral goods or any funeral services) are engaging in the unfair or deceptive acts or practices addressed by the Rule; (2) those practices are prevalent; and (3) a trade regulation rule is the appropriate remedy to correct the problem. The staff below addresses the record evidence on those issues.

Position of the Parties

The NFDA and NSM argue that the Rule places funeral directors at an unfair disadvantage in the marketplace because directors already are extensively regulated at the state and local level, whereas their competitors -- cemeteries, memorial societies, casket retailers, pre-need marketers, and direct disposition companies -- are unregulated. Those groups further contend that such disparate treatment is arbitrary because there is no evidence that funeral directors engage in the practices prohibited by the Rule in greater numbers than other funeral industry retailers.[541] To correct this situation, the NFDA and NSM recommend that the Rule's definition of "funeral provider" be amended to cover all sellers of funeral goods or funeral services.[542] Those groups provided testimonial evidence in support of their position.

Consumer groups and other review participants also called for an extension of the Rule to other retailers, primarily based on principles of "fairness" and the potential for abuse.[543] The AARP submitted survey evidence indicating that most consumers would support a requirement that cemeteries and crematories provide consumers with price information in advance of purchase.[544]

The Monument Builders of North America ("MBNA")[545], participated in the review proceeding primarily to offer evidence of cemetery practices that MBNA believes are unfair or

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[540](...continued)
but the Commission has noted that anecdotal evidence is rarely sufficient to provide the substantial and reliable evidence necessary to support the promulgation of a rule. *Id.*

[541] R-M-9 at 205-207. *See also* R-G-3 at 12-13; R-G-6 at 54-56.

[542] *Id.* at 226. Other industry representatives concurred with the NFDA and NSM. *See* R-G-5 (FDSA Comment) at 5; Hocker, NFDA President, Tr. Vol. III, 1427; Johnson, Tr. Vol. I, 754; Bates, Tr. Vol. I, 702; Longmire, R-D-2 at 2; and Krause, Tr. Vol. II, 25.

[543] *See, e.g.*, R-M-11 (AARP Findings) at 131-133, 154; R-H-21 (Consumers Union) at 6; R-H-12 (CAFMS) at 4; R-H-16 (OWL) at 3; R-F-84 (Grieshaber) at 1; R-F-65 (Tweed) at 1; R-F-64 (SW Fla. Fun & Mem. Soc.) at 1; R-E-2 (Nat'l Concrete Burial Vault Ass'n) at 3; R-F-54 (Groenenboom) at 1; R-F-11 (Oeinck) at 1; R-H-25 (Springfield Mem. Soc.) at 1; and Wertheimer, NAEL, Tr. Vol. III, 965.

[544] Seventy-eight percent of respondents stated that cemeteries and crematories should be required to provide this information over the phone, and 10 percent answered "no." McFadden, HX-3 at 3.

[545] MBNA represents 1,250 retail, wholesale, manufacturing and supply firms of the monument industry. MBNA members make, install and engrave monuments and markers made principally of granite, marble, or bronze. R-E-5 at 1-2.

deceptive, including withholding price information from consumers and charging excessive fees for the installation of third-party monuments, thereby "tying" the purchase of monuments to the purchase of grave plots. The MBNA recommends that the Commission expand the Rule to cemeteries, crematories and sellers of grave lots, burial vaults, monuments and markers.[546] The MBNA further offered specific amendments to add several alleged unfair or deceptive cemetery practices to the Rule's coverage.[547]

Cemetery, crematory and casket retailer representatives oppose the Rule's expansion to other sellers. The American Cemetery Ass'n. ("ACA") argues against extension of the Rule to cemeteries on the grounds that: (1) no record evidence documents that providers are competitively disadvantaged under the Rule; (2) consumer complaints about cemeteries are unrelated to price disclosure issues; and (3) cemeteries routinely disclose price information on request and over the telephone, and the practice of "bundling" claimed by the MBNA is outlawed by federal court decisions.[548]

The PAA concurs with the ACA regarding cemetery practices, and further contends that no record evidence supports a conclusion that third-party casket sellers (who largely are cemeteries) fail to provide price information to consumers.[549] Finally, the CANA argues that the record does not support extending the Rule to cover crematories because: (1) most crematories do not deal directly with the public; and (2) those that do market their services to the public already are covered by the Rule because they offer both goods and services, or actively price advertise.[550]

Evidence of Competitive Disadvantage

Several witnesses testified that cemeteries compete with funeral providers principally in the sale of burial vaults, and, in limited areas, the sale of caskets on a pre-need basis.[551] Two third-

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[546] R-E-5 at 3, 7-15. The MBNA stated in its Comment that cemeteries frequently sell monuments and installation at a package price, which the cemetery discounts when the consumer purchases the monument from the cemetery. When the consumer buys the monument from a monument retailer, the MBNA contended, the cemetery charges the consumer the full installation fee. The MBNA concluded that the consumer is thus penalized for not buying the monument from the cemetery. The MBNA further argues that consumer purchases of cemetery lots and related memorialization products and services are also generally made at times of emotional distress, and should be covered like funeral goods and services.

[547] Dianis, HX-84 at 19-20 (the Rule should make it an unfair or deceptive practice for cemeteries to: (1) fail to furnish cemetery rules, regulations and price information disclosing the cost to the consumer for each good and service used in connection with the disposition of deceased human bodies or in connection with the placement of monuments, markers or other memorialization goods; (2) condition the furnishing of any site, product or service upon the purchase of any other product or service; (3) require consumers to pay the cemetery for services it does not actually render or arrange for others to provide; and (4) fail to provide price information over the telephone or in person).

[548] R-M-10 (Findings) at 3-4, 6-8, 13.

[549] R-M-12 at 74-76, 88, 90.

[550] R-M-1 (Findings) at 3, 22-24; *see also* Purdy, HX-70 at 10, Tr. Vol. III, 152, 169-70.

[551] Neel, Tr. Vol. I, 633, Heffner, Tr. Vol. I, 835-836; Graf, Tr. Vol. II, 647-649; and Radovich, Tr. Vol. III, 1074.

party casket retailers, Duke Radovich and Ernest Heffner, asserted that they attempt to collect providers' price lists in order to compete with the listed prices, but Mr. Radovich further stated that providers' casket price lists are generally unavailable to competitors because the lists are included in binders, and thus are available only to those who make funeral arrangements at the funeral home.[552] The NFDA and NSM argue that the availability of price lists is a competitive disadvantage.[553] Dr. Fred McChesney, an economist appearing for the NFDA and NSM, further testified that funeral directors are competitively injured because, unlike retailers of only goods or only services, they must bear the cost of complying with the Rule.[554]

Cemeterians (who own and operate cemeteries) provided testimonial evidence that there is little direct competition between funeral homes and cemeteries concerning Rule-related funeral merchandise. David Daly, appearing for the ACA, asserted that outer burial containers are the only merchandise that funeral directors must list on the Rule-required GPL that cemeteries also offer. There is an important distinction even with respect to OBCs, Mr. Daly continued, because cemeteries sell OBCs on a pre-need basis, whereas funeral homes sell them on an at-need basis. Mr. Daly concluded that the argument that the Rule places providers at a competitive disadvantage can not be supported, because cemeteries and funeral homes do not substantially compete in the sale of funeral goods listed on the GPL.[555] Mr. Daly further contended that most of the nation's 7,500 commercial cemeteries are regulated in some way at the state or local level, in contrast to the NFDA-NSM allegation that they are unregulated.[556]

Provider and consumer groups offered no evidence to rebut Mr. Daly's testimony. The ACA thus concluded in its Rebuttal comment that the record contains no substantiating evidence to show that funeral directors suffer a competitive disadvantage because cemeteries are not covered by the Rule. Although the ACA conceded that the revenue from outer burial containers (and caskets, if cemeteries' pre-need sales of caskets are included in the analysis) may be substantial, it further noted that the Rule was designed to protect consumers, and not providers' income.[557]

Staff Conclusions on Competitive Disadvantage

The staff concludes from its review of the evidence that the record contains no reliable or substantial support for the proposition that limiting the Rule to providers of funeral goods and

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[552] Radovich, Tr. Vol. III, 1036, 1059; Heffner, Tr. Vol. I, 842.

[553] R-M-9 at 206.

[554] HX-126-A at 99.

[555] Tr. Vol. III, 665-667 (cemeteries traditionally sell outer burial containers, lots, community mausoleum spaces, columbarium niches, family mausoleums, markers, monuments and memorials; they also provide installation services for markers, monuments and memorials, opening and closing services, special lot and marker care services, and floral arrangements).

[556] Tr. Vol. III, 687. There are 13,000 active cemeteries in the country, according to Mr. Daly, 5,500 of which are religious, municipal or fraternal. *Id.* at 660, 679, 680.

[557] R-M-4 at 4-10.

services places them at a distinct competitive disadvantage vis-a-vis other sellers of funeral goods or funeral services.

Providers allege that the Rule disadvantages them because third-party retailers have access to their price lists and thus can undersell them. However, the record contains no reliable evidence that third-party retailers withhold price information or that funeral directors do not have equal access to retailers' prices. The staff notes that competitive industries are characterized by ready access to price information; if third-parties are underselling funeral directors, that is a benefit of the Rule, and not a fault.[558]

Providers further argued that regulating only funeral directors is illogical because they are already extensively regulated, whereas other retailers are not. The staff's 1987 survey, however, showed that no more than ten states have regulations comparable to at least six of the Rule's key requirements.[559] The record also contains no evidence to rebut the cemeterians' claim that commercial cemeteries are regulated at the state level.

Providers further assert that they are disadvantaged by the added costs of complying with the Rule. The staff concluded in section II.A.2. of this report, however, that the Rule has not significantly increased providers' costs of doing business.

Even if the record indicated that the Rule's definition of the term "funeral provider" caused a discernable disadvantage to funeral directors, Section 18 of the FTC Act would not permit the Commission to extend the Rule to other industries without a substantial basis in the record that those parties engage in the types of unfair or deceptive acts or practices specified in the Rule. The staff below addresses the evidence on that issue.

Evidence of Unfair or Deceptive Practices in Other Industries

The record contains little evidence that third-party casket sellers[560] or crematories not subject to the Rule fail to provide price or other Rule-related information to consumers. Consumer advocates and the President of the NFDA could not identify such problems in the casket retailing industry.[561] Casket retailers testified that they knew of no reason why the Rule

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[558] Some funeral directors during the initial rulemaking proceeding argued that price lists would encourage price-fixing. The Commission responded that the disclosure of prices to competitors would more likely stimulate competition than price- fixing. R-B-5 at 42274.

[559] R-C-12; R-B-1 at 67-68. This finding was not rebutted.

[560] All of the casket retailers that testified during the review proceeding are also cemeterians; they own or operate cemeteries. Some casket retailers also own or operate funeral homes.

[561] *See* Klugman, memorial society, Tr. Vol. III, 1007-1008; Snyder, Consumers Union, Tr. Vol. III, 1236; and Hocker, NFDA, Tr. Vol. III, 1427.

should be extended to them.[562] One retailer, however, testified that it would be fair for the Commission to extend the Rule to all providers of funeral goods or services.[563]

Similarly, consumer advocates testified that they have not experienced price disclosure problems with crematories not subject to the Rule, and that, if anything, Rule expansion should account for other problems in the cremation industry, such as the use of inadequate alternative containers and commingling of remains.[564] Ellsworth Purdy, the immediate past-President of the CANA, asserted that Rule expansion to all crematories would be inappropriate because the great majority of crematories do not deal directly with the public, but offer their services exclusively to funeral directors. Mr. Purdy further testified that those direct disposition companies that do deal with consumers aggressively advertise their prices or are already covered because they sell funeral goods (urns).[565]

MBNA Survey

The MBNA provided the results of a survey of its members concerning the prevalence of alleged unfair or deceptive practices by cemeteries.[566] John Dianis, who presented the survey for the MBNA, testified as to the results: (1) two-thirds of respondents reported that cemeteries in their area will not allow monument retailers to install monuments in their cemeteries; (2) when retailers install monuments, the consumer often has to pay an installation fee to the cemetery; (3) many cemeteries charge excessive installation fees; and (4) nearly half of the respondents reported that one or more cemeteries failed to regularly provide rules, regulations and prices on request.[567]

Criticisms of the MBNA Survey

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[562] Drozda, Tr. Vol. II, 903; Rep. Barr, Tr. Vol. III, 1518; and Neel, Tr. Vol. I, 587.

[563] Teck, Tr. Vol. II, 853.

[564] *See, e.g.*, Carlson, author/lecturer on self-help issues, Tr. Vol. I, 534; Dr. Nelson, AARP, Tr. Vol. I, 66; and Klugman, memorial society, Tr. Vol. III, 944.

[565] Tr. Vol. III, 169-170, HX-70 at 10; *see also* Dr. Nelson, Tr. Vol. I, 69; and Klugman, Tr. Vol. III, 931.

[566] MBNA mailed the one-page survey to 711 members in 45 states and the District of Columbia (members in the five remaining states were omitted from the mailing because, by law, cemeteries may not sell monuments in those states). Responses were received from 175 members in 40 states. The questionnaire, entitled "Survey of Cemetery Practices," asked respondents to answer nine questions and provide current copies from its files of all rules, regulations and prices. The staff notes that a possible bias in the responses may have been caused by a cover letter that accompanied the questionnaire on MBNA letterhead. The letter informed the respondents that their answers would be used by MBNA "in commenting to the [Commission] regarding its continuance of the [Rule] and extension to cover cemetery operations." *See* Dianis, Tr. Vol. III, 492, HX-84 at 1.

[567] HX-84 at 3-4.

Several criticisms of the MBNA survey cast some doubt on the usefulness of its results.[568] For example, the survey did not measure the prevalence of certain practices that MBNA alleged were widespread. Approximately half of the respondents reported that one or more cemeteries in its area failed to regularly provide rules, regulations and prices upon request. The survey did not indicate, however, how many cemeteries were in the respondent's marketing area and what percentage engaged in the practice.[569] Similarly, when asked about cemeteries' refusal to provide price information, Mr. Dianis replied that he had no data on the number of consumers who had requested copies of cemetery rules for monuments and were unable to obtain them.[570] Mr. Dianis also testified that the MBNA was unable to tell whether respondents had included a memorial care fund charge in their response to questions 4 and 5 concerning excessive installation fees, thereby conceding that the answers to those questions may be misleading.[571] The MBNA also did not indicate what an excessive fee is, or how prevalent that practice is. Finally, Mr. Dianis agreed that 53 of the 175 respondents did not respond to question 6 concerning cemetery fees for installing monuments.[572]

Another MBNA representative stated that the MBNA did not have any data as to the percentage of cemeteries that require consumers to purchase a memorial from the cemetery, and acknowledged that the incidence of cemeteries requiring that the monument be purchased from the cemetery is not prevalent.[573] Mr. Dianis also testified that the MBNA did not have any data on: (1) the percentage of cemeteries that require consumers to purchase installation services from the cemetery; (2) the proportion of cemeteries that refuse to provide consumers or monument dealers with specific installation fees, separate and apart from the cemetery's purchase price for monuments; and (3) the number of monument dealers who have asked cemeteries in their areas to allow them to install the monuments or markers that they sold and were refused.[574]

ACA Survey

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[568] The MBNA reported, for example, that it did not survey its members in five states because those states prohibit cemeteries from selling monuments. However, some of the survey questions addressed issues relevant in all states, such as cemetery installation practices, inspection fees and cemeteries' willingness to give consumers price information.

[569] Dianis, Tr. Vol. III, 496.

[570] Tr. Vol. III, 503, 521.

[571] *Id.* at 521. Question 4 asked how many cemeteries charge an installation fee even when the monument retailer installs the monument. Question 5 asked the respondents to state the amounts of the fees charged by cemeteries identified in question 4. The possibility that the respondents may have included a memorial fund fee as an installation fee in the answers to question 5 casts doubt on the accuracy of the responses. The data thus may not support the conclusion that cemeteries assess unearned fees.

[572] *Id.* at 522.

[573] Alford, Tr. Vol. I, 444.

[574] Tr. Vol. III, 445.

The ACA presented the results of a survey of its members' monument policies concerning the allegations made by the MBNA.[575] James Watkins presented the following survey results for the ACA: (1) 99% of the respondent cemeteries stated that they have a policy of providing all price information in advance of need; (2) 95% indicated that they have a policy of providing all price information over the telephone; (3) 99% reported that they offer cemetery property in advance of need; (4) 82% indicated that the majority of their sales were pre-need; three percent claimed an equal volume of pre-need and at need sales; (5) nearly 80% said that they allowed monument dealers to perform memorial installations in their cemeteries; the majority of the remaining respondents indicated that they had no official policy because the question was a non-issue in their area; (6) 62% of the respondents said that the majority of monument dealers in their area relied upon the cemetery to install dealers' markers; (7) although 23% of the respondents said that they do not allow monument dealers to install monuments in their cemetery, in many cases the policy may be due to union restrictions; (8) 74% of the respondents reported that they assess inspection fees when monument dealers perform the installation, but 65% indicated that the fees were based on the cemetery's actual labor costs, 9% indicated that the fees were set by state law, and 20% stated that the question did not apply.[576]

Criticisms of the ACA Survey

During cross-examination, Mr. Watkins provided background information about the handling of the survey that might diminish its reliability. For example, Mr. Watkins acknowledged that: (1) the ACA sent its members a copy of the MBNA survey in the same mailing as its own survey; (2) the ACA included a cover letter with the survey informing the respondents that the ACA intended to use the results of the survey to rebut the position of the MBNA; and (3) the ACA informed the respondents that their answers and identities would be placed on the rulemaking record.[577]

Other Evidence

Cemeterians further argued that the very nature of pre-need marketing of grave sites, vaults and caskets requires cemeteries to freely disclose and discuss price information with consumers.[578] John Gill, Executive Director of the California Cemetery Board, testified that cemeteries in California, and in most states, are required to itemize prices.[579] Mr. Gill added that the Funeral Rule would not benefit cemetery consumers in California, because the problems

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[575] Watkins, HX-90, Exhibit B; Tr. Vol. III, 750-778 (ACA mailed the survey to all of its 1,500 members and received responses from 471 for a 30% response rate).

[576] Watkins, Tr. Vol. III, 750-751, 768.

[577] *Id.* at 772, 778.

[578] Elvig, Tr. Vol. III, 412 ("In order to determine what kind of marker you are going to select, you are going to see the prices because you have the option of companion markers or a single marker, a marker with a vase or without a vase. And so the very nature of your inquiry is going to cause the cemetery to disclose to you prices and options"); Watkins, Tr. Vol. III, 753.

[579] Tr. Vol. III, 739.

they have with cemeteries largely concern cemetery maintenance, and do not relate to the Rule.[580]

Concerning consumer complaints generally, the ACA in its Rebuttal statement asserted that only the AARP offered evidence of consumer complaints to support Rule coverage -- 63 complaints from 30 million members, but that none of those complaints related to price disclosure or any other Rule provision. The ACA concluded that the AARP failed to present evidence to show how expanding the Rule to cemeteries would prevent or remedy most cemetery complaints, which related to gravesite maintenance, liquidation of unwanted property, and misunderstanding of cemetery regulations.[581]

E. Laux, President of the Cemetery Consumer Service Council ("CCSC"),[582] testified that most of the complaints that the CCSC receives concern cemetery maintenance (such as cutting of the grass, trimming and pruning); other complaints involve misunderstandings of cemetery rules, lack of communication between cemetery staff and consumers, and the liquidation of unwanted cemetery property.[583] Mr. Laux further related that it is rare for the CCSC to receive a complaint involving a lack of price disclosure or a forced purchase of a package contract.[584] Although he acknowledged that the CCSC's only remedy is to notify the parent association when a cemetery does not cooperate with a CCSC inquiry, Mr. Laux testified that he was not aware of any disciplinary action having been taken by one of the member organizations against any cemetery for failing to comply with CCSC proceedings.[585]

Existing Regulation

The court in *Rosebrough Monument Co.* v. *Memorial Park Cemetery*[586] prohibited as illegal cemetery practices of prohibiting or impeding monument retailers from installing monuments in cemeteries. *Rosebrough* held that, with the exception of an inspection fee based on actual labor charges, assessing fees such as clerical fees, road use fees, post-inspection fees and institutional service fees is an unfair competitive practice. *Rosebrough* also held that cemeteries could not tie the purchase of a grave plot to the purchase of a monument. One MBNA witness stated that "we still have some cemeteries who try to reserve the exclusive right of sale of memorials, but ever

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[580] *Id.* at 713, 725.

[581] *See* R-M-4 at 17-20.

[582] The Cemetery Consumer Service Council is a private agency that seeks to resolve disputes between consumers and cemeteries. The ACA, PAA and CANA established the CCSC in 1979. Participation by cemeteries and consumers is voluntary. *See* R-B-26 (Exhibit IV).

[583] Tr. Vol. III, at 354, 371, 388.

[584] *Id.* at 355.

[585] *Id.* at 371-372. The CCSC also informs consumers that they still retain all of their legal rights to pursue action through a private attorney or through governmental agencies, according to Mr. Laux. *Id.* at 353.

[586] 666 F.2d 1130 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

since the *Rosebrough* case, there has been a much smaller percentage requiring that now than there used to be."[587]

Subsequently, the ACA and the MBNA in 1986 agreed to compromise "Recommended Installation Guidelines" that affirm consumers' right to purchase memorials and installation services from monument retailers and permit cemeteries to charge an inspection fee based on actual labor costs when a retailer installs a memorial.[588] The ACA represents 1,500 of the 7,500 commercial cemeteries in the nation.[589]

Arguments for a Separate Proceeding

Some cemeterians argued that the Commission should commence a separate investigation of cemeteries if it intends to regulate them, and not lump cemeteries into the Funeral Rule.[590] Paul Elvig, a California Cemetery Board official, stated that the Funeral Rule would impose financial strains on small cemeteries.[591] Kansas State Representative Ginger Barr, who is also a cemeterian, testified that "I don't have any problem with that [regulation] if it is shown that there is truly a problem out there."[592]

Staff Conclusions on Expansion to Other Industries

The staff concludes from its review of the record that the evidence does not establish that sellers of funeral goods or services, particularly cemeteries and crematories that do not sell funeral goods, are engaged in the type of abuses addressed by the Rule (lack of price disclosure, forced bundling of goods and services and misrepresentations of funeral goods and services). The services generally provided by those sellers are not comparable to funeral home services, because they do not include a similar wide variety of different services and goods that are "packaged" into a single "funeral." The "bundling" issue that is the primary practice addressed by the Funeral Rule is thus not apparent in those industries, at least in the same magnitude, as it is in the funeral home industry.

The evidence indicates generally that cemeteries itemize and disclose prices for outer burial containers, the primary merchandise sold in competition with funeral homes, and caskets, which several cemeteries offer on a pre-need basis. The evidence also shows that the overwhelming

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[587] Rex, Tr. Vol. I, 459.

[588] *See* R-E-5 at 16, Exhibit 6; Dianis, Tr. Vol. III, 520.

[589] Daly, Tr. Vol. III, 660, 679-680.

[590] Drozda, Tr. Vol. II, 933-934 ("I wouldn't be opposed, but I would like to see it -- if we are going to have a rule that includes cemeteries, to have it specifically called the "Cemetery Rule" and have it apply specifically to cemetery things"); Neel, Tr. Vol. I, 587 ("I did not say that I agreed that you could extend the Funeral Rule over cemeteries. What I said was that if the FTC feels that cemeteries need to be regulated, then they have to go back to square one and design a rule that encompasses our [practices] and regulate us under that rule").

[591] Tr. Vol. III, 413.

[592] Tr. Vol. III, 1518.

majority of consumer complaints to the Commission, the AARP, and state and industry regulators about cemetery practices do not relate to bundling, lack of price disclosure, or misrepresentation, but to such things as gravesite maintenance and liquidation of cemetery property.

Complaints and other evidence regarding alleged cemetery practices of exclusive sale and installation of monuments and markers, and excessive installation and inspection fees when the marker is installed by third parties, also did not reliably establish that those practices are widespread, or that current industry guidelines and federal court decisions prohibiting most of the alleged practices do not sufficiently address any problems.

The MBNA survey did not provide enough reliable data to permit the staff to conclude that a significant number of cemeteries prevent third-party monument retailers from installing monuments in their cemeteries, charge excessive inspection fees, or charge discriminatory installation fees. Even if the MBNA survey had indicated that such practices were prevalent, the staff would be concerned that the survey cover letter could have biased the results by disclosing to the respondents that the survey would be used to persuade the Commission to regulate the competitive practices of cemeteries.

Substantial evidence does establish that most crematories do not deal directly with the public, and the record contains little, if any, evidence that those crematories that do deal with consumers are not currently subject to the Rule or fail to disclose prices or misrepresent their goods and services.

2. To Remove Restrictive State Laws

During the hearings, the PAA and several witnesses provided evidence that a myriad of state laws exist that unnecessarily restrict competition in the funeral industry.[593] The PAA argues that those restraints limit the Funeral Rule's ability to affect price competition in the industry.[594] A few witnesses asserted, for example, that state laws prohibiting joint ownership of funeral homes and cemeteries raise consumer costs and provide no benefits.[595] One witness stated that consumers would save approximately $500 if he were able to build a joint operation.[596] Those witnesses asserted that state laws prohibiting joint ownership are

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[593] *See generally* R-M-12 (PAA Findings) at 36-62, summarized at 84-86.

[594] *Id.* at 89, 95.

[595] Graf, Tr. Vol. II, 594; Nelson, Tr. Vol. II, 193; and Daly, Tr. Vol. III, 677 ("Our combined operating costs are substantially lower than the two operations standing independently, particularly in the funeral home operation. At Evergreen-Washelli, our average adult standard funeral in 1988 was less than 1,800 dollars").

[596] Starks, Tr. Vol. II, 367.

anticompetitive and are fostered by funeral industry members.[597] Consumer witnesses expressed similar concerns.[598]

Pre-need sellers also provided evidence that state laws requiring 100% trusting of pre-need funds restrict competition, because they remove funds necessary to finance an active pre-need marketing program.[599] The PAA in its Proposed Findings asserts that 100% trusting laws are commonplace throughout the country.[600] These and other interested parties also stated that the various state laws that restrict the marketing of funeral services or merchandise to licensed funeral directors are anticompetitive.[601] Illinois State Senator Topinka, who has also been involved in pre-need funeral marketing, testified that: "One doesn't need to be a licensed funeral director to sell a casket or discuss a family's preference for funeral arrangements in advance of need. I mean, basically it's a sales job, and a salesman is a salesman no matter what the business."[602]

Staff Conclusion

The staff recognizes that whether certain pre-need trusting and other state laws have an anticompetitive impact greater than their benefits to consumers is an important issue.[603] The Commission also has often expressed its commitment to fostering a climate of fair competition. The Commission, however, did not intend that this review would be the forum for judging the competitive impact of pre-need trusting or other state laws that address issues beyond those contained in the Funeral Rule. The staff believes that the prevalence and impact of those laws warrant further inquiry, but concludes that the issue would be better explored separately.

C. Casket Handling Fees

Introduction

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[597] Starks, Tr. Vol. II, 370; Neel, Tr. Vol. I, 567; Krause, Tr. Vol. II, 13; Elvig, Tr. Vol. II, 443; Graf, Tr. Vol. II, 598; and Watkins, Tr. Vol. III, 798.

[598] Snyder, Consumers Union, Tr. Vol. III, 1233 (self-imposed restraints that tend to restrict competition are almost universally aimed at industry, and not consumer, protection).

[599] *See e.g.*, Rep. Barr, Tr. Vol. III, 1513 ("If you gave me $1,000 for the [pre-need] funeral plan, and I had to put a $1,000 into a trust, I would not be able to take any of that money to help pay for the lights, or telephone, or pay a person a commission or a salary to sell the product to you, and therefore, I get into a negative cash flow, I can't financially do it. The only way I could perhaps do it is raise my prices on an at-need situation, gouge the consumers there to not have a negative cash flow"); and Nelson, PAA, Tr. Vol. II, 178, 181.

[600] R-M-12 at 84.

[601] Nelson, Tr. Vol. II, 180; Carlson, Tr. Vol. I, 504.

[602] Tr. Vol. II, 61.

[603] The staff has expressed such concerns in its Competition Advocacy Program. *See, e.g.*, Letter from the FTC Bureau of Competition to House of Delegates, General Assembly of Virginia, February 9, 1989.

One benefit the Commission ascribed to the Rule was that "the greater availability of price information may encourage entry into the funeral market of new competitors seeking to attract business by offering lower prices."[604] That prospective benefit was important to the Rule's remedial intent, because the Commission found that the funeral industry had historically opposed price advertising.[605] The Commission concluded that, as a result of that reluctance to make price information readily available, consumers purchased unwanted items and paid higher than competitive prices for items they selected.[606]

The Commission further recognized that easy access to the market and a fair chance to compete were prerequisites to the entry of new retailers into the funeral market.[607] The Rule's general anti-tying provision, § 453.4(b), afforded that opportunity to new entrants by removing the primary industry restraint on consumer choice -- package-only pricing.[608] The Commission found that, by "tying" all funeral goods and services in a package, providers had monopolized the funeral transaction with the consumer.[609] A "tying" arrangement occurs when a retailer agrees to sell one product only if the consumer agrees to buy another, thus "tying" the two products together in the sale. Section 453.4(b) of the Rule prohibits funeral providers from conditioning ("tying") the furnishing of one product upon the purchase of another product unless the tie-in is required by law or is a "practical necessity."[610]

Some ANPR commenters asserted that funeral providers, in response to emerging competition from third-party casket sellers, charge high "casket handling fees" for arrangements where consumers supply their own caskets purchased from those third parties.[611] The Commission in the NPR thus sought comment on the prevalence and impact of so-called "casket

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[604] R-B-5 at 42293.

[605] *Id.* at 42266.

[606] *Id.* at 42269.

[607] The original rulemaking record contained evidence that funeral providers directed boycotts and other concerted activity at entities attempting to enter the funeral market. In response to section 19(c)(1)(B)(ii) of the FTC Improvements Act of 1980, however, which limited the Commission to proscribing the use of threats or boycotts by funeral providers against other funeral providers, the Commission decided to proceed on an ad hoc basis against alleged boycotts, blacklists and other restraints. R-B-5 at 42291.

[608] The Commission's major finding in the original proceeding was that funeral providers had denied consumers the privilege of freely choosing the goods and services they wanted by tying their funeral offerings together in pre-determined packages; consumers' only choice was between packages. R-B-5 at 42260, 42279-42282.

[609] *Id.* at 42281.

[610] An example of a tie-in required by law is when state law requires embalming for interstate shipping. In that case, the funeral provider may require the purchase of embalming as a condition of shipping the remains. An example of a tie-in that is a "practical necessity" is where the consumer wants a viewing of the remains for several days and the funeral provider reasonably determines that embalming is needed to help preserve the remains. The funeral provider may thus require the purchase of embalming as a condition of arranging the visitation.

[611] *See* R-A-1 at 19867.

handling fees," and on whether, and how, the Rule should address that practice.[612] The staff addresses those issues below.

Position of the Rulemaking Parties

The Pre-Arrangement Ass'n. of America ("PAA"), which includes many cemeteries that also offer caskets on a pre-need basis, was the major opponent of "casket handling fees" during the proceeding. The PAA argues that the vast majority of funeral providers have responded to competition from third-party casket sellers by imposing costly, non-declinable "casket handling fees" on consumers who purchase caskets from those sellers. Those fees do not relate to the time spent "handling the casket," the PAA continues, which is insignificant and the same regardless of who supplies the casket. Rather, the fees are assessed to recoup providers' profit and overhead costs that are lost due to the lost casket sale.

The PAA further asserts that "casket handling fees" are discriminatory, because they are imposed only on consumers who arrange "traditional" funerals and who purchase the casket from a competing third-party seller; the fees are not assessed on all types of funeral service where the provider fails to supply the casket, such as in "ship-ins" (where the casket is typically supplied by an out-of-state provider). As a result, the PAA argues, "casket handling fees" discourage competition in the casket market and penalize consumers who choose to buy caskets from third-party sellers. Market forces, the PAA further asserts, have not regulated the amount of "casket handling fees." The PAA concludes that providers' imposition of "casket handling fees" effectively thwarts the Rule's purpose to lower barriers to price competition and violates several of its provisions, including the anti-tying provision. The PAA recommends that the Commission clarify the Rule's anti-tying provision to prohibit "casket handling fees," but continue to permit funeral providers to restructure their prices to recover profits and overhead costs lost on third-party casket sales.[613]

The NFDA and NSM do not dispute that "casket handling fees" are used to recoup profits and overhead costs lost to third-party casket sales, but defend that purpose on several grounds.[614] Those groups assert that the imposition of "casket handling fees" is an isolated, non-discriminatory practice that fairly allocates providers' overhead costs and profits; the purpose

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[612] *Id.* at 19870 (Question 14.)

[613] R-M-1 at 18-35, 82-83 (summary of findings), 91; R-E-4 at 19-20, 45-51. The AARP and other participants concurred with the PAA's casket handling fee analysis. *See, e.g.*, R-M-11 (AARP Findings) at 139-142, 154 (summary), and R-H-17 (Comment) at 14; R-B-27 (CAFMS ANPR Comment) at 5; Showalter, Tr. Vol. II, 122-123; Radovich, HX-101 at 25; and Drozda, HX-59 at 5.

[614] The NFDA and NSM do not argue that "casket handling fees" are imposed for services rendered in "handling" consumer-supplied caskets. Many witnesses, including funeral directors, testified that providers incur no additional labor or insurance costs when third-party sellers provide a casket, and that the actual labor time spent handling any casket is minimal; the cost for that service is normally included in the non-declinable professional services fee. *See* R-M-9 at 182; Hahn, FFDA, Tr. Vol. II, 692-693; Bates, NSM Executive Director, Tr. Vol. I, 706-708; Simms, funeral director, R-J-9 (supplementing HX-42); Dr. Nelson, AARP, Tr. Vol. I, 77-78; Showalter, industry analyst, Tr. Vol. II, 116-117, 120-122; Graf, Tr. Vol. II, 652; Hennessy, funeral director, Tr. Vol. II, 1009-1014; Radovich, funeral director/casket retailer,Tr. Vol. III, 1044-1045; Starks, funeral director, HX-41 at 11, Tr. Vol. II, 369; and Drozda, funeral director/casket retailer, Tr. Vol. II, 897.

of the fee is to obtain from consumers who buy third-party caskets consumers' proportionate share of providers' costs and profits for rendering the funeral service. Providers' only alternative to handling fees, the NFDA and NSM argue, would be to raise service fees charged to all consumers, which, in effect, would require regular clients who purchase providers' caskets to subsidize the funerals of consumers who purchase their caskets elsewhere.

Providers' limited responses to third-party casket sales arise, the NFDA and NSM continue, due to the industry's long-standing tradition of recovering much of its costs and profits through the casket mark-up, and not by increasing service fees; low service fees allow funeral homes to provide full service funerals to those who might not otherwise be able to afford them. Although providers in recent years have shifted some of that casket mark-up to service fees, the shift has been very gradual. As a result, the NFDA and NSM conclude, providers who lose casket sales to third parties must still forego the recovery of much of their costs and profits that would have been included in the casket sale.

Those groups further assert that handling fees are not assessed for ship-ins, outer burial container sales traditionally lost to competing cemeteries, or for direct cremation/immediate burials where the consumer supplies the alternative container because, unlike the unexpected loss of a casket sale to a third-party seller, providers set prices for those services with the knowledge that they will not make a sale in those cases. Finally, the NFDA and NSM conclude that the amount of "casket handling fees" is sufficiently regulated by the market, because providers that charge unreasonably high fees will offend consumers and lose market share.[615]

1. Prevalence and Impact

Evidence on Prevalence and Amount of Casket Handling Fees

The PAA asserts that the emergence of third-party casket sellers is directly attributable to the Funeral Rule's anti-tying provision; those sales were virtually non-existent before the Rule.[616] Duke Radovich, who presented the results of a PAA membership survey ("PAA Survey") on handling fee issues, estimated that there are between 100 and 200 casket retailers in the country.[617] Mr. Radovich reported that the thirty-one casket retailers who responded to the PAA Survey are located in Florida, Illinois, Iowa, Maryland, Michigan, Mississippi, Nebraska, Ohio, Pennsylvania and Wisconsin; 74% of those sellers exist in Pennsylvania, Michigan, and Ohio.[618]

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[615] R-M-9 at 181-189; R-G-6 at 80-83. Individual providers agreed with the NFDA and NSM position. *See* Hocker, HX-111 at 13; Franzen, Tr. Vol. II, 819-820, Tr. Vol. III, 1408; Hennessy, Tr. Vol. II, 997-998; Keith, Tr. Vol. III, 1419; Yurs, Tr. Vol. II, 530, 563; and Nilsen, Tr. Vol. III, 1414-1415. *See also* Hahn, FFDA, Tr. Vol. II, 692-694.

[616] R-M-9 at 18, 82. *See also* Radovich, Tr. Vol. III, 1029 (Casket retailers owe their existence primarily to the enactment of the Funeral Rule, which allows the consumer to use a casket from an outside source); and Drozda, Tr. Vol. II, 894 (few casket retailers before the Rule because providers would not accept the outside casket and provide funeral service).

[617] *Id.* at 1057 (31 of the 90 survey respondents were active third-party casket sellers; PAA sent the survey to its 450 members).

[618] *Id*; HX-101 at Exhibit "A-3."

The PAA Survey also provided empirical evidence on the prevalence and amount of "casket handling fees," as reported by the respondent retailers. Eighty-six percent of the respondents said that at least 60% of the funeral homes in their market area assess handling fees, about two-thirds said that 80% to 100% charge the fees, and one-quarter reported that all of the homes impose the casket handling fee.[619] Mr. Radovich concluded that a substantial number of providers assess "casket handling fees" wherever third-party sellers exist.[620] Individual casket retailers agreed with that finding,[621] and further testified that funeral providers began using handling fees and other anticompetitive practices when third-party casket sellers entered the market.[622] One funeral provider witness who does not presently charge handling fees stated on the record that, if he got competition from casket retailers, he would begin to assess fees.[623]

Concerning the amount of "casket handling fees" assessed, 81% of the PAA Survey respondents said that the average handling fee was over $300; 74% reported an average fee between $300 and $500.[624] 62% of the PAA Survey respondents further reported that the highest fee charged was over $500; 35% said that the largest fee was over $700.[625] The staff notes that a handling fee of $500 is nearly equal to the average wholesale cost of a casket in 1988 ($517) and 60% of the average casket mark-up in that year ($821); by definition, a handling fee must be "high" if its purpose is to recoup overhead costs and profit lost on the casket sale.[626] Wendell Hahn, the accountant for 1,500 providers in 30 states, testified that handling fees are assessed because providers, who typically charge service fees "hundreds of dollars" below their true operation cost, will try to recoup those costs that are lost by the third-party casket sale. Mr. Hahn concluded that handling fees are thus roughly equal to the amount that providers' service fees are underpriced.[627]

Several local surveys conducted by individual casket retailers provided further evidence on the range of "casket handling fees" in given market areas. Those surveys found that handling fees

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619 Radovich, HX-101 at 17 and Ex. B, p. 5.

620 *Id.* at 12, 17, 20.

621 *See* Neel, HX-25 at 4 and Exhibit 2; Teck, HX-58 at 5-6 and Ex. B; and Heffner, HX-33 at 8 and Ex. J-1.

622 Graf, Tr. Vol. II, 647; Neel, Tr. Vol. I, 582-584; and Teck, Tr. Vol. II, 861-862. *See also* Showalter, Tr. Vol. II, 118.

623 Hennessy, Tr. Vol. II, 997. *See also* Hahn, industry accountant, Tr. Vol. II, at 720 (agreed that funeral homes are unlikely to assess a "casket handling fee" unless they are faced with competition from third-party sellers in their market area).

624 Radovich, HX-101 at 18 and Ex. B, p. 6.

625 *Id.*

626 Wendell Hahn of the FFDA, which provides accounting services for 1,500 providers, presented systematic data showing that the average wholesale cost of a casket in 1988 was $517, and that the average retail casket price was $1338. *See* HX-49 at 2. The average mark-up is thus $821, or 158% of cost.

627 Tr. Vol. II, 692-693.

ranged from: (1) $100 to $700 in Chicago;[628] (2) $150 to $1000 in Greater Pittsburgh;[629] and (3) $100 to $800 in Detroit, Michigan.[630] Wendell Hahn of the FFDA reported six instances among a sampling (100) of the 12,000 funeral home records he reviewed for the month of August 1988 where handling fees ranging from $75 to $480 were disclosed on providers' GPLs.[631]

Three other witnesses, including two funeral directors, testified about the range of handling fees prices. Paul Showalter,[632] an industry analyst, stated that he had read of casket handling fees as high as $1,000 to $2,500.[633] Robert Starks, a funeral director, testified that handling fees in Detroit were as high as $700.[634] Finally, Joseph Drozda, a funeral director and casket retailer, stated that the provider that handles half of the funerals in Kalamazoo, Michigan charges a $425 handling fee.[635]

Evidence on Impact of Casket Handling Fees

The PAA Survey and the testimony of several casket retailers and other interested parties provided evidence that "casket handling fees" prevent price competition and reduce consumer choice. Ninety-two percent of the casket seller respondents to the PAA Survey reported that their casket sales have declined since the imposition of handling fees; about one-third said that they have reduced or eliminated their casket marketing efforts as a result of those fees.[636] Mr. Showalter, an industry observer, testified that "casket handling fees" have caused the exit from the casket market of five small businesses who thought that they could gain market share by offering

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[628] DeSoto, R-B-42; and Hennessy, HX-61 at 8.

[629] Neel, HX-25, Exhibit 2 at 1.

[630] Teck, HX-58, Exhibit A.

[631] HX-49 at 5, Tr. Vol. II, 673, 719-720. The staff does not believe that the incidence of GPL casket handling fee disclosures (taken from a sampling of 100 transactions across the country) can be viewed as reliable evidence on the prevalence of those fees. The evidence indicates that those fees can be, and are, assessed at the time of need, without prior disclosure, when a third-party casket is actually delivered to a funeral home, or when a consumer verbally informs the provider that the casket has been purchased elsewhere on a pre-need basis. The evidence also establishes that casket retailers, and thus handling fees, occur on a regional basis, so that the incidence and range of the disclosed fees found by Mr. Hahn among his clients in 30 states provides little reliable evidence of the prevalence and amount of those fees in any particular market area where casket retailers operate; Mr. Hahn provided no specific survey data on those questions.

[632] Mr. Showalter is a financial and consumer writer who has published several articles and conducted several surveys on funeral industry issues.

[633] Tr. Vol. II, 120; HX-36, at 17, citing an open letter from Steve Shurden, President of the Oklahoma Funeral Directors Association, printed in *The Oklahoma Director*, Vol. XV, No.9 (Sept. 1985) at 1.

[634] Tr. Vol. II, 412.

[635] Tr. Vol. II, 896-897.

[636] Radovich, HX-101 at 20-22 and Ex. B, pp. 8-9 (sales decreased by 20% for 54% of respondents, by 40% for 29% of sellers, and by 80% for 13% of respondents; although other market factors could have contributed to the decreases, the PAA attributes them to handling fees).

third-party caskets at lower prices.[637] Several casket retailers and others also asserted that handling fees impede price competition by removing consumers' incentive to price-shop for less costly caskets, and penalize consumers who do shop.[638]

Casket retailers and others also provided some evidence that many third-party sellers offer caskets at prices lower than those charged by funeral homes. About half of the seventeen PAA Survey respondents who answered the survey's price question said that their price for the "same or similar" casket was at least $250 less than funeral home prices in their market area. About one-quarter said that their prices were between $100 and $250 less, and another quarter said that their prices were comparable (within $100).[639] One retailer who commented on the ANPR reported that a small casket manufacturer in Chicago was selling 90% of its retail caskets on an at-need basis, charging about half that of Chicago funeral homes -- $250 for a cloth-covered casket and $650 for a sealed, metal casket.[640] Mr. Showalter said that one of the earliest casket retailers sold caskets at "half-price."[641] Mr. Drozda reported that the competition from third-party casket sellers appears to be reducing the average price of funeral home caskets in Florida, where one provider reduced his casket price by $150 to match the retailer's price.[642]

Finally, third-party sellers provided testimonial evidence that market forces will not effectively regulate "casket handling fees," and that the elimination of those discriminatory fees would result in increased competition in the sale of caskets and reduced casket prices.[643] Royal Keith, a provider appearing for the NFDA, when asked on cross-examination about the effect of market forces on handling fees, responded that he was not aware of any cases where market forces have successfully reduced the amount of handling fees charged in a particular area.[644]

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[637] Tr. Vol. II, 107-108.

[638] *See e.g.*, Teck, Tr. Vol. II, 867 (several pre-need casket contracts cancelled because clients said that the provider told them that they would be charged a handling fee); Neel, Tr. Vol. I, 568, 572-573, 615 (casket sales to date would have been double or more without casket handling fees; they remove price savings to consumer and thus circumvent the Rule's intent to stimulate competition); Drozda, Tr. Vol. II, 923, 944 (casket handling fee financially penalizes the consumer who buys a third-party casket); Radovich, Tr. Vol. III, 1063 (handling fee is a surcharge on consumer, as if the U.S. placed a surcharge on all cars bought from Japan because U.S. makers were losing sales); Showalter, Tr. Vol. II, 109, HX-36 at 16-17 (providers adopted handling fees to eliminate competition from third-party sellers; casket fees are unfair because they are not imposed on ship-ins or military cases where the casket is supplied by another provider); and R-B-27 (CAFMS Comment on the ANPR) at 5 (handling fees negate any consumer savings, and thus remove consumers' incentive to shop for less expensive goods).

[639] Radovich, HX-101 at Ex. B, p. 10.

[640] DeSoto, R-B-42.

[641] Tr. Vol. II, 146.

[642] Tr. Vol. II, 899, 918, 936.

[643] Teck, Tr. Vol. II, 872-873 (retailer can do nothing to combat a provider that charges high handling fees); Drozda, Tr. Vol. II, 944, 974 (consumer who purchases a third-party casket is penalized by handling fees no matter what the retailer does).

[644] Tr. Vol. III, 1422.

Proponents of handling fees did not provide evidence to refute that offered by casket retailers and others on the purpose, prevalence and impact of casket handling fees on the casket market. Providers argue that, if they could not use handling fees, they would have to recoup the revenue lost to third-party sales by unilaterally increasing their non-declinable professional service fees. That response, they assert, would penalize consumers who purchase a casket from the funeral home; they would pay the mark-up on the casket as well as the higher service fee that would result from other consumers supplying their own caskets.[645]

Enforcement Staff's Position on Handling Fees

The staff charged with enforcing the Funeral Rule has addressed the handling fee issue in informal staff opinion letters.[646] Initially, the staff took the position that the Rule permits handling fees so long as the fee is not a "penalty."[647] The staff reasoned that it should not presume that all handling fees are a subterfuge for penalizing consumers who exercise their right to purchase goods from third parties. Later, the staff concluded that the Funeral Rule does not address the prices a funeral provider sets for any good or service, and thus does not govern the amount of handling fees.[648] Subsequently, the enforcement staff determined that it would be inappropriate for it to reassess the 1986 staff position on handling fees because the issue was designated for review in this rulemaking proceeding.

Staff Conclusion

The staff concludes from its review of the record that substantial "casket handling fees" are imposed by a significant proportion of providers wherever third-party casket sellers exist, and, as a result, impede emerging competition in the sale of caskets fostered by the Funeral Rule. Some evidence suggests that providers are forced to impose handling fees because of their competitive reluctance to shift overhead costs and profit from the casket mark-up to service fees.[649] Other evidence indicates that casket handling fees are a direct response to third-party competition. In either case, the issue is whether the Rule should allow providers to condition consumers' right under the Rule to obtain funeral service with a consumer-supplied casket upon the payment of a

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[645] R-M-9 at 183; R-G-6 at 82-83.

[646] Informal staff opinion letters represent the interpretations of the staff only and are not reviewed, approved or binding on the Commission.

[647] *See* Staff Opinion Letter to Clark & Eyrich Co., L.P.A., dated September 3, 1985, FTC Public File 215-46, Category XXVIII-238; Staff Opinion Letter to Family First, dated September 3, 1985, FTC Public File 215-46, Category XXVIII-239.

[648] *See* Staff Opinion Letter dated January 21, 1986, to Mark W. Kevaly, FTC Public File 215-46, Category XXVIII-258; Staff Opinion Letter to Family First dated January 24, 1986, FTC Public File 215-46, Category XXVIII-262. Staff Opinion Letter to Holmes Funeral Care dated January 24, 1986, FTC Public File 215-46, Category XXVIII-261.

[649] The staff disagrees with arguments made earlier in the proceeding that regulation of handling fees would amount to "price regulation;" the issue is the propriety of the handling fee profit adjustment that penalizes consumers who shop for less expensive caskets, and not the amount of the handling fee.

fee, or whether the Rule should require providers to recoup costs and profits in other ways.[650] The staff concludes that the latter course is warranted to affirm the Rule's intent to reduce barriers to price competition.

The staff believes that Section 453.4(b) of the Funeral Rule was intended to address the "tying" arrangement imposed on consumers by casket handling fees. Under that provision, consumers have the right to decline the purchase of a casket from a funeral provider, and may elect to supply their own. That right, however, is illusory if funeral providers can condition consumers' choice on the payment of a fee; the fee, in any amount, penalizes consumers for exercising their choice afforded by the Rule.[651]

Substantial evidence demonstrates that "casket handling fees" require consumers to pay two substantial mark-ups, one on the casket they purchase from the third-party seller, and another on the casket they did not buy from the funeral provider. The evidence indicates that handling fees average between $300 and $500, and often are higher. That burden, the evidence shows, effectively removes consumers' economic incentive to purchase a casket from anyone but the funeral provider; casket sales by third parties have declined as a result, and several retailers have curtailed their marketing efforts or withdrawn from the market. Handling fees thus frustrate the purpose of the Funeral Rule -- to ensure informed consumer choice and foster a competitive funeral market. The staff thus concludes that casket handling fees are unfair conditions on consumers' right to decline unwanted items they may wish to purchase elsewhere, in violation of the spirit, if not the letter, of § 453.4(b).

The Rule's anti-tying provision, however, does not specifically address "casket handling fees" because those fees have developed since the Rule's implementation. The staff thus concludes that casket handling fees need to be addressed in the Rule. The staff below reviews the regulatory alternatives for that purpose.

2. Alternative Remedies

Required Disclosure of Handling Fees

The staff considered recommending that the Funeral Rule require funeral providers to disclose the existence and amount of "casket handling fees" on the general price list, and to more accurately label the fee as a "profit recovery fee." One might argue that, as long as a funeral provider does not monopolize a market, disclosure of a high handling fee would allow consumers

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650 The evidence establishes that providers do not impose "handling fees" to recoup lost costs and profits in the case of ship-ins, outer burial container sales lost to competing cemeteries, and direct cremations/immediate burials where consumers supply their own container. Providers evidently have restructured their prices to account for those losses or have lost profits.

651 Section 453.4(b)(ii) of the Rule permits providers to refuse a request for goods and services that would be "impossible, impractical, or excessively burdensome" to provide. That provision, however, does not permit a funeral provider to refuse service to a consumer because the consumer supplied the casket. *See, e.g,* Staff Opinion Letter to George W. Lemke, Executive Director, Casket Manufacturers Ass'n of America, dated March 18, 1985, FTC File No. 215-46, No. XXVIII-211.

to seek a funeral provider who does not exact a surcharge for consumer-supplied goods. The staff however, concludes that permitting handling fees if they are disclosed on the GPL would sanction a violation of the existing Rule, and sees the following additional problems with this approach: (1) disclosing handling fees would not remove the harm to consumers and competition caused by the practice of charging consumers a fee for seeking discounts; (2) record evidence indicates that handling fees tend to be prevalent wherever third-party casket sellers emerge; consumers thus may not have suitable alternative providers; (3) consumers in an at- need situation, when handling fees may be imposed, usually do not have the time or inclination to shop, and thus would be subject to whatever fee the provider might impose; and (4) disclosing handling fees on the price list may encourage funeral providers to impose those fees on all consumers because they may believe that the Funeral Rule requires them to charge handling fees. Accordingly, the staff does not believe that disclosure of handling fees would be an effective remedy.

Prohibition of "Penalties"

The staff also considered an "anti-penalty" provision that would prohibit funeral providers from imposing penalties on consumers who supply some of their own items for use in a funeral. This approach, however, would suggest that some handling fees are "penalties" while others are not. Such a provision would require the Commission and the courts to delineate which handling fees are penalties and which are handling fees. The staff does not endorse this approach because: (1) the handling fees described in this record, in the staff's view, are impermissible under the existing Rule, because they impose a non-declinable tying arrangement, in addition to the basic services fee permitted under the Rule, that does not compensate funeral providers for actual services performed; (2) a "penalty" prohibition approaches the type of price regulation that the Commission expressly denounced in its Statement of Basis and Purpose; and (3) distinguishing unacceptable from acceptable handling fees would subject the Commission to problematic enforcement burdens.

Prohibition of Handling Fees

Many review participants recommended that the Rule be amended to prohibit "casket handling fees." The staff has concluded that handling fees for consumer-supplied caskets (or other funeral merchandise), in effect, unfairly coerce consumers into purchasing caskets from the funeral provider; they condition the exercise of consumers' right to buy a casket from a third party on the payment of a profit recovery fee. The evidence shows that handling fees are not legitimate charges for services performed. Rather, those fees are additional revenues some funeral providers charge consumers who have not bought profitable merchandise. In effect, handling fees in the funeral market thus present a direct challenge to the Commission's goal of fostering free consumer choice and open competition. The staff concludes that the prohibition of handling fees is the only effective means to preserve the Rule's ability to provide consumer choice and increase competition in the sale of caskets.

The Commission prohibits fees that are similar in purpose to "casket handling fees" in its Advertising of Ophthalmic Goods and Services Trade Regulation Rule, 16 CFR Part 456. That Rule requires eye doctors to give consumers a copy of their eyeglass prescription, so that consumers can shop for eyeglasses. Section 456.7(c) of that Rule further prohibits eye doctors from charging consumers a fee "as a condition for releasing the prescription," other than the examination fee. The section thus prevents eye doctors from charging a fee for goods and

services not provided that, in effect, would penalize consumers who wish to comparison shop for ophthalmic goods. A provision prohibiting "casket handling fees" would have the same purpose -- to prevent funeral providers from penalizing consumers who wish to shop for caskets.[652]

Providers argue that the impact of a ban on casket handling fees would be increased service fees to all consumers. The staff notes that the industry made the same argument in the original proceeding regarding the effect of consumer declinations caused by Rule-required itemization. As the Commission reasoned at that time, providers under the Rule can set or shift prices as they wish, but the long-term competitive impact of the Rule's price availability provisions might not permit providers to recover lost revenue from casket declinations simply by raising service fees. In the short-term, some consumers might spend more and some less than they would without the right to decline if providers actually raise service fees in order to recoup revenue lost to third-party casket sales. The evidence in this proceeding, however, indicates that providers are reluctant to raise service fees even under current competitive conditions. The evidence also indicates that the impact of a ban on handling fees would more likely be increased competition in the sale of caskets, and, in turn, an overall reduction in casket prices over time.

3. Staff Recommendation

The staff recognizes the desire of funeral industry members to recover overhead costs and realize a profit. The staff also notes that the Rule permits consumers to select and buy only the items wanted unless state or local law require otherwise. The Funeral Rule allows funeral providers to have one non-declinable fee to recover general overhead costs -- the fee for the basic services of funeral director and staff. Permitting funeral providers to have additional surcharges, whether they are called "handling fees," "basic facilities fees," or something else, would frustrate the Rule's aim to promote full itemization and informed consumer choice. In order to prevent that result and clarify the current requirements of the Rule, the staff thus recommends that the Commission amend Section 453.4(b) of the Rule to add the following section (b)(ii):

> [It is an unfair or deceptive act or practice for a funeral provider to]: (ii) Charge any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral other than the fees for: (1) services of funeral director and staff, permitted by § 453.2(b)(4)(iii)(C); (2) other funeral services and funeral goods selected by the purchaser; and (3) other funeral goods or services required to be purchased, as explained on the itemized statement in accordance with section 453.3(d)(2).

This proposed amendment would prohibit all so-called "handling fees" that do not compensate providers for services rendered, but would permit funeral providers to recover overhead in the two ways currently permitted by the Rule -- by marking up the items offered for sale to the public, or by having the non-declinable fee permitted by § 453.2(b)(4)(iii)(C) of the Rule. The proposed amendment, in the staff's view, would not impede funeral providers from recovering costs and earning profits from their operations. Efficient providers can structure their prices charged to all consumers to recover the revenue lost to third-party casket (or other merchandise) sales. The evidence indicates that providers have so adjusted their pricing structure to account

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[652] Although prescription release and casket handling fees are significantly different in absolute amounts, both fees are substantial in terms of the respective, overall cost of the eye exam and funeral transaction.

for consumer-supplied caskets (in ship-in cases), outer burial containers, and alternative containers. To the extent that increased competition fostered by the Rule prevents those price increases, the Rule will have further benefitted consumers.

Rather than amend the Rule as recommended by the staff, the Commission could direct the staff responsible for Rule enforcement to interpret the current anti-tying provision, section 453.4(b), as prohibiting all "tying" arrangements that involve a non-declinable fee charged only to consumers who purchase merchandise from third parties, included so-called "casket handling fees." The staff does not recommend that course of action as the best remedy because, in the staff's view, a Commission intent to eliminate unfair casket handling and other discriminatory fees that violate the current Rule would be far better expressed in a Rule provision than in a staff interpretation.

D. Price Disclosures

1. Telephone Provisions

Introduction

A key objective of the Funeral Rule is to facilitate consumers' access to funeral price and options information, so that they can make informed selections when arranging a funeral.[653] To that end, the Rule has provisions that guarantee consumers' right to obtain accurate information over the telephone.[654] Rule section 435.2(b)(1)(ii) thus requires funeral providers to give telephone callers who ask about offerings or prices any accurate information from the Rule-required price lists and any other requested information that is readily available and reasonably answers the question. Section 435.2(b)(1)(i) further requires funeral providers to affirmatively tell persons who call the funeral provider's place of business and ask about the "prices, terms or conditions" of arranging a funeral that price information is available over the telephone. The Commission included that provision to alert consumers, before they select a provider, that price information is available.[655] The staff in this section of its report reviews the record evidence on the impact of these telephone provisions on the funeral market, and on whether proposals to amend or repeal them are warranted.

a. Answering Price Requests

Introduction

The Commission in its SBP found that funeral providers had unfairly required consumers to come to the funeral home to receive price information, rather than initially providing that

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[653] R-B-5 at 42260.

[654] The Commission in its SBP determined that funeral providers often failed to provide price information over the telephone when asked, and that the telephone, in many cases, is the only practical means for consumers acting under severe time constraints to gather and compare price information before selecting a funeral provider. R-B-5 at 42260, 42268-42269, 42273-42274.

[655] R-B-5 at 42273.

information over the telephone.[656] The Commission deemed this practice particularly pernicious because consumers, under severe time constraints, typically are unable to visit multiple providers, and thus are likely to use the first one they visit;[657] once the consumer selects a funeral provider, many options are foreclosed.[658] The Commission concluded that the telephone often is the only practical means available for consumers who wish to shop for a provider.[659] To remedy the unfair practice of denying callers price information over the telephone, § 453.2(b)(1)(ii) requires funeral providers to answer a caller's price inquiry over the telephone.

The Commission in fashioning this provision of the Rule recognized that many consumers do not seek price information by telephone prior to selecting a funeral provider.[660] The Commission, however, also determined that other "shoppers," including consumer groups and state officials, had also found difficulty obtaining price information over the telephone.[661] The Commission thus crafted the telephone provision to ensure that providers would give price information to <u>any</u> caller who requests it.[662]

The Commission in the NPR sought public comment on the costs and difficulties, if any, associated with providing price information over the telephone, and on whether consumers would continue to receive price information if the Commission repealed the provision.[663] The staff below reviews the evidence on those issues.

Position of the Parties

The NFDA and NSM advocated repeal of the telephone disclosure provision on the bases that: (1) although providers have complied by answering phone requests, consumers' price-shopping has decreased since 1981; and (2) consumers do not use the telephone to seek price information because price is not an important factor in their selection of a provider, and because consumers know that the telephone is unsuitable for discussing prices.[664] The NSM also argued

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[656] R-B-5 at 42260, 42268.

[657] *Id.* at 42268.

[658] *Id.* at 42260, 42272-42273. The Commission found that consumers are not likely to remove the body of the deceased from the funeral provider who first acquires possession. *Id.* at 42281.

[659] *Id.* at 42268.

[660] *Id.* at 42268, n. 83.

[661] *Id.* at 42268, n. 85 and accompanying text.

[662] *Id.*

[663] R-A-1 at 19869 (Question 8).

[664] R-M-9 at 50-55; R-G-3 (NSM Comment) at 8, 27-28, 30-32; R-G-6 (NFDA Comment) at 41-43. Other industry groups and two individual providers concurred with the NFDA and NSM recommendation. *See* R-G-5 (FDSA) at 4; R-G-1 (Illinois Funeral Directors Ass'n) at 1, 4; R-D-1 (Pierson) at 2; and Roper, Tr. Vol. I, 715-716.

that the provision imposes substantial, but non-quantifiable, costs because it requires continuing training and supervision of personnel.[665] The NSM further suggested that, if the provision is not repealed, it should be amended to give providers the option to provide requested information over the phone, in person, or by mail, as follows:

> 453.2(b)(1) Telephone Price Disclosures
> (i) ... that such information, at the option of the funeral provider, will be made available either by telephone, by written communication, in person at the funeral provider's place of business, or at the caller's residence or place of business (remainder of the section unchanged).[666]

The AARP, however, urged retention of § 453.2(b)(1)(ii) based on its findings that: (1) providers do not oppose giving requested price information over the telephone; (2) it is premature to expect consumers to use the telephone to seek price information, given its historical unavailability and consumers' lack of awareness about prices and price availability; (3) consumers increasingly use the phone to get price information from memorial societies, and those groups as well as reporters use the telephone provision to collect and disseminate price data; (4) consumers want the availability of price information over the phone; (5) telephone price information is a necessity for disabled and elderly consumers, as well as for those making out-of-state arrangements; and (6) telephone disclosures impose minimal costs on providers.[667]

Evidence on Effects

The empirical data in the record provided evidence that, to date, few consumers use the telephone to "shop" for a provider or otherwise seek price information from them directly. The BLS and RS results indicated that 5% of respondents in 1981 and 3.5% in 1987 contacted more than one funeral home by telephone.[668] The RS data further showed that 9.2% of the 1987

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[665] R-G-3 at 30.

[666] *Id.* at 29. The FDSA agreed with that alternative recommendation. R-G-5 at 4-5.

[667] R-M-11 at 97-105; R-H-17 at 33. Many participants, including some individual funeral providers, agreed that the telephone provision should be retained. *See, e.g.*, R-H-15 (National Consumers League) at 3, 7; R-H-21 (CU) at 5; Prof. Sommer, U. Cal-Davis Consumer Research Center, Tr. Vol. III, 635; Willis, hospice director, Tr. Vol. III, 1545; Klein, consumer member, NYSFDAB, Tr. Vol. II, 1050; Perguson, memorial society president, Tr. Vol. III, 1189; Giesberg, NACAA, Tr. Vol. III, 1152; Wertheimer, NAEL, Tr. Vol. III, 966; Longmire, funeral director, R-D-2 at 3 (arguments to repeal because few consumers use the phone is like saying Mr. Bell should not have invented it because there was no demand); Peebles, funeral director, Tr. Vol. III, 1581 (repeal would not benefit consumers); and Krause, funeral director, Tr. Vol. II, 42 (benefits consumers who wish to shop).

[668] R-B-3 (BLS) at 43, Table 16 and R-B-2 (RS) at Table III-20, p. III-27. The data, however, do not reveal whether the proportion of "shoppers" who specifically sought price information from multiple providers changed over time, because the BLS did not ask that question; 38% of the RS shoppers asked for price information. R-B-2 at Table III-21, p. III-29.

respondents telephoned a funeral establishment and asked about or discussed "prices, terms or conditions" for making funeral arrangements, and 5.5% requested specific price information.[669]

Two industry surveys of funeral directors also provided mixed results on the level of telephone inquiries since the Rule's adoption. Over 80% of the respondents to a 1984 survey of NFDA members said that phone inquires had not increased since the Rule's effective date.[670] Another survey, however, conducted in 1985 in four midwestern states by the Funeral Directors Services Ass'n, showed that half of the respondents reported increased telephone inquiries since May 1984.[671]

Substantial evidence presented earlier in section II.B.2, however, indicated that consumers readily use the telephone to seek price information, particularly comparative information, where price advertising by "low-cost" funeral homes or the collection and dissemination of comparative information by consumer organizations exists.[672] Many witnesses testified that the Rule's telephone provision facilitates that process by making it easier for consumer and media groups to obtain price information from providers; many of those entities use the telephone for that purpose.[673] Other witnesses asserted that the availability of price information over the telephone is a necessity for disabled and elderly consumers, and for those who must make out-of-state funeral arrangements.[674] The staff concluded in section II.B.2. that consumer price-shopping will increase as price competition, and consumer awareness of that competition, increases.

The staff in sections II.A.1. and B.1. further presented evidence that consumers' knowledge is low concerning: (1) prices charged by providers in general and by particular funeral homes; and

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[669] Daniel, HX-122 at 16 and R-B-2 at Table III-26, p. III-36. BE staff and Market Facts analysis of that data indicated that respondents received the requested information in over 90% of the cases. *Id.* at 17 and R-B-2, Table III-27, p. III-37.

[670] R-B-14 at 5-6. *See also* Hennessy, Tr. Vol. II, 1003 (consumer calls about prices are infrequent).

[671] R-G-5 at 149, 151.

[672] *See, e.g.*, Rev. Wasielewski, Tr. Vol. III, 1609-1610 (9,000 consumers since 1983 have called Phoenix "hotline" to obtain comparative funeral price information); and Perguson, Tr. Vol. III, 1178 (50% of all calls to Seattle memorial society, or 1,200 per year, are for price information).

[673] Carlson, author/lecturer, Tr. Vol. I, 502 (telephone crematory study made possible by Rule); Brownstein, CAFMS, Tr. Vol. I, 192; Showalter, journalist/hospice counselor, Tr. Vol. II, 107, 116 (published comparative price information for 500,000 readers through 40 calls to providers; Rule helps get prices to hospice families); Botimer, funeral director, Tr. Vol. III, 1277-1278 (Phoenix telephone "hotline" helped his low-cost business a great deal); Perguson, memorial society, Tr. Vol. III, 1174, 1195, 1216 (rare to get complete information before the Rule, now it's easier); Bejarno, consumer, Tr. Vol. III, 1589 (media report on prices saved her thousands of dollars on arrangements); Willis, hospice, Tr. Vol. III, 1547-1549 (consumers use Phoenix "hotline" to shop); Klein, NYSFDAB, Tr. Vol. II, 1065 (phone disclosure useful for memorial societies); CAFMS, R-H-12 at 2-3 and Exhibits I-IIA; AARP, R-H-17 at 36 and Exhibits 8-9; Rev. Wasielewski, Tr. Vol. III, 1620; and Clark, Arkansas A.G., Tr. Vol. III, 32 (consumers, particularly the elderly, call about price information).

[674] Snyder, CU, HX-105 at 5; Showalter, HX-36 at 12-13; Prof. Sommer, Tr. Vol. III, 635; Dr. Nelson, Tr. Vol. I, 16; and Wertheimer, NAEL, Tr. Vol. III, 966.

(2) the availability of price information. The AARP's "Excel" Study, for example, found that 75% of the respondents were unaware that federal law requires providers to give price information over the telephone.[675] Paul Showalter, an industry analyst and hospice counselor, testified that consumers do not even think that a funeral is an item that can be price-shopped.[676] Dr. Mazis, a marketing expert appearing on behalf of the AARP, testified that consumers' lack of price awareness means that they are unlikely to seek it, but that consumers will slowly increase their use of telephone price shopping as a diffusion of knowledge about prices occurs among the general population.[677] Several consumer representatives concluded that it is premature to expect that consumers will seek telephone price information, given its historical unavailability and consumers' lack of awareness.[678] The evidence indicates that many consumers do desire that information, however, and would comparison shop if they knew it was readily available. In a recent study conducted for the AARP, 57% of the respondents said that price information should be available over the telephone, and, when asked whether they would phone or visit various providers to take advantage of price differences, 50% indicated their willingness to do so.[679]

Concerning costs imposed on providers by the Rule's telephone provision, the NFDA asserted that no additional costs have been incurred because providers gave price information over the telephone before, as well as after, the Rule.[680] The author of a membership study conducted for the NFDA in 1984 also concluded that the telephone provisions had little impact on providers because they received few calls.[681] The Funeral Directors Service Association of Greater Chicago explained that, after the initial training of staff and the need to have appropriate price information close to the phone, there are no significant costs involved in compliance with the telephone provisions of the Rule.[682] Wendell Hahn, who provides financial services to 1,500 providers, testified that the Rule as a whole has not significantly increased funeral providers' personnel, or other, costs.[683] Individual providers generally agreed that the telephone provision does not impose substantial costs.[684]

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[675] Soulas, HX-76 at 3.

[676] Tr. Vol. II, 126.

[677] HX-91 at 4, Tr. Vol. III, 814.

[678] Snyder, CU, HX-105 at 5; Klugman, memorial society, Tr. Vol. III, 952-953; Klein, NYSFDAB, Tr. Vol. II, 1065-1066, HX-63 at 10; Wertheimer, NAEL, Tr. Vol. III, 969-970; and Rouillard, CRLAF, HX-107 at 2-3.

[679] McFadden, HX-8 ("Excel Study") at Exhibit B, pp. 14, 16.

[680] R-G-6 at 42.

[681] R-B-14 at 5-6.

[682] R-G-5 at 13. *See also* Krause, Tr. Vol. II, 44; and Hennessy, Tr. Vol. II, 983.

[683] Tr. Vol. II, 683.

[684] Simms, Tr. Vol. II, 503; Longmire, R-D-2 at 3 (no costs because 24-hour telephone coverage is necessary regardless of the nature of the call). *But see* Johnson, Tr. Vol. I, 757 (necessity of 24-hour personnel is burdensome).

The NPR also asked whether consumers or funeral providers have encountered problems as a result of the Rule's telephone provision. The testimonial evidence presented on that issue was mixed. Some providers said that they do not oppose giving price information over the phone on request, and that doing so presented no problems for them.[685] Rev. Wasielewski, who provides comparative funeral price information to consumers through a telephone "hotline," testified that communicating that information over the phone presents no problems for him or for consumers.[686] Other providers and two consumer representatives stated that funeral service is too complex for consumers to discuss in detail over the telephone, and that price information may be misleading due to differences in how some providers quote service fees.[687]

Finally, the NPR asked whether funeral providers would continue to freely answer telephone inquiries if the Commission repealed the telephone provision requiring that activity. The NFDA and NSM maintained that there is no reason to believe that funeral providers would not continue their longstanding business practices and begin to refuse to provide price information over the phone; providers who refuse requests will lose clients[688]. Consumer representatives, however, disagreed with those groups. Dee Perguson, president of a Seattle memorial society, testified that memorial society members and consumers in general would have more difficulty obtaining price information from funeral providers.[689] Consumers Union expressed its doubt that, based on funeral providers' ANPR comments and "history," providers would continue to disclose prices over the phone if the Commission repealed the provision.[690]

Staff Conclusions and Recommendations

The staff concludes from its review of the evidence that retention of the telephone provision contained in section 453.2(b)(1)(ii) is warranted, without modification. Substantial record evidence indicates that retention of the provision will ensure consumers' access to meaningful price and other funeral information over the telephone, without imposing significant costs on funeral providers.

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[685] Bates, NSM Executive Director, Tr. Vol. I, 697; Hocker, NFDA President, Tr. Vol. III, 1401, 1464; Johnson, NSM, Tr. Vol. I, 763; Roper, NSM, Tr. Vol. I, 722; Hennessy, Tr. Vol. I, 999; Hunter, Tr. Vol. III, 605; Yurs, Tr. Vol. II, 557-558; and Botimer, Tr. Vol. III, 1286-1287. *See also* Neel, casket retailer/cemeterian, Tr. Vol. I, 589, 593 (no difficulty obtaining or giving telephone price information); and Perguson, memorial society, Tr. Vol. III, 1217 (no problems in getting price information from providers).

[686] Tr. Vol. III, 1622.

[687] Johnson, NSM, Tr. Vol. I, 755-756 (service fee differences make phone comparisons impossible); Graf, cemeterian, Tr. Vol. II, 641 (comparisons difficult); Perguson, memorial society official, Tr. Vol. III, 1182 (average consumer won't ask about details); Klein, consumer member, NYSFDAB, Tr. Vol. II, 1065 (consumers don't know what to ask); Starks, Tr. Vol. II, 387, 423 (GPLs differ on service fees); and Pierson, R-D-1 at 2 (GPL too complicated; knows many providers who intentionally "low-ball" telephone shoppers simply to get them into their establishments"). *See also* Schwarcz, Opinion Centers America, Tr. Vol. III, 473 (focus group members felt telephone arrangements were too impersonal).

[688] R-G-6 at 43; R-G-3 at 31.

[689] Perguson, Tr. Vol. III, 1189.

[690] R-H-21 at 5.

The record contains substantial evidence that memorial societies, consumer groups and other agencies use the telephone to obtain comparative price information, which they pass on to consumers. The evidence shows that the Rule's telephone provision has facilitated that activity by requiring providers to answer all requests, whether by consumers or entities like memorial societies. Other evidence indicates that the telephone is an indispensable link for many consumers and organizations to obtain funeral price information.

The record does not contain substantial evidence supporting repeal of the telephone provision. The strongest argument for repeal is that few consumers seek price information directly from funeral providers over the telephone, and that those who do usually get it. Substantial evidence in the record establishes, however, that consumers increasingly use the telephone to obtain price information from providers where overt price competition exists, and from non-industry sources who collect and disseminate that information. The staff further notes that the principal funeral trade associations advocate repeal of the telephone provision, or that funeral providers should have the right to require consumers to come to the funeral home for price information; support in the industry for a Commission-imposed requirement to disclose information over the telephone is thus far from universal. Repeal of the telephone provision may signal funeral providers that the Commission no longer believes that consumers can insist on price information over the telephone.

There is no reliable evidence in the record that the telephone provision has raised funeral providers' costs significantly. Industry and consumer groups substantially agree that the telephone provision has not raised industry costs significantly. According to the NFDA and NSM, this provision did not impose new responsibilities on the industry because funeral providers freely answered telephone inquiries before the Rule. Systematic industry data also show that the Rule as a whole has not raised significantly any of the providers' costs of doing business.

The staff recommends against amendment of the current telephone provision to allow providers to respond to telephone requests by mail or in person, as suggested by the NSM. The telephone may be the only practical means by which state agencies, memorial societies, and disabled or elderly consumers can seek pre-purchase price information. The NSM provided no evidence to show that the change would benefit consumers or lower the impact of the regulation on the industry. The Commission in its SBP rejected industry's argument that funeral arrangements are too complicated for funeral providers to answer consumers' inquiries over the telephone.[691] No reliable evidence in the record refutes that position. On balance, the evidence supports the conclusion that repeal of § 453.2(b)(1)(ii) would harm consumers without benefiting the industry, and that consumers' use of the telephone to seek price information will increase over time as price competition, and consumer awareness of that competition, increases.

b. Affirmative Telephone Disclosure

Introduction

The Commission determined in its SBP that, at the time of the initial rulemaking proceeding, the typical funeral arranger was hampered from making cost-effective, informed purchase

[691] R-B-5 at 42268, n. 84 and accompanying text.

decisions by several factors. The Commission found that consumers arranging funerals usually are: inexperienced, unfamiliar with the funeral market, emotionally distraught, and constrained by too little time to make prudent funeral arrangements.[692] The Commission also found that, due to prevailing market conditions, consumers did not think to request price information over the telephone and tended to feel that initiating cost discussions with funeral providers was callous. To assist consumers, the Commission thus included a Rule provision to signal consumers, at the critical moment when the consumer has first contacted the funeral provider, that price information is available. That provision, § 453.2(b)(1)(i), requires funeral providers to affirmatively tell persons who call and ask about the "terms, conditions, or prices" at which funeral goods or funeral services are offered that price information is available over the telephone.

The Commission designed this provision to help consumers in two ways. First, it would alert them to the availability of price information over the telephone, and, second, it might diminish consumers' reluctance to seek such information. The Commission intended that the affirmative disclosure provision would facilitate comparison shopping for a provider.[693]

Empirical evidence presented by the Replication Study, however, indicated that few consumers comparison shop before selecting a provider. The Commission in the NPR thus requested public comment on whether: (1) consumers are aware of their right to seek price information over the telephone; (2) compliance with this provision is costly; and (3) it should retain the affirmative telephone disclosure provision in view of the study results.[694] The staff below presents the evidence on those issues.

Position of the Parties

The NFDA and NSM argued that the affirmative disclosure provision should be repealed because it has failed to provide its promised benefits. Those groups based that conclusion on their findings that: (1) comparison shopping has decreased, the opposite of the intended effect; (2) consumers do not use the telephone to select providers on the basis of price because price is not an important factor in that decision, and not because they are unaware that price information is available over the telephone; and (3) the affirmative disclosure is offensive to consumers.[695]

The AARP, in contrast to the NFDA and NSM, urged retention of the affirmative disclosure provision because it is too soon to judge its impact, particularly in view of the funeral industry's pre-Rule failure to provide price information over the telephone. The AARP reasoned that: (1) consumers are unaware of telephone price availability; (2) consumers' use of the telephone for comparison shopping is increasing; (3) compliance data concerning the affirmative disclosure provision is inconclusive; (4) the provision imposes no costs on providers; and (5) the provision

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[692] R-B-5 at 42265-42266.

[693] *Id.* at 42273.

[694] R-A-1 at 19869 (Question 7).

[695] R-M-9 at 50-55, 108-111; R-G-6 at 37; R-G-3 at 17.

benefits consumers who can not make in-person price inquiries.[696] The AARP further recommended expansion of the provision to require that providers tell all callers that price information is available over the phone, and not just those that ask about "terms, conditions or prices." That change, the AARP argued, would ensure that all consumers who call providers are aware of their right to ask for and receive price information.[697]

Evidence on Effects

Empirical and other record evidence provided insights into the delicate relationship between consumers and funeral providers that appears to affect the degree to which consumers seek price information directly from providers. The BLS, RS and Gallup results indicated that consumers seldom seek price information or comparison shop by calling providers directly. In 1981, 7.2% of the BLS respondents comparison shopped by contacting more than one funeral home;[698] 4.2% of the 1987 RS respondents did so,[699] and 11% of the 1988 Gallup Study consumers contacted more than one provider.[700]. Most 1987 RS respondents knew which funeral provider they intended to use,[701] and those who had not decided on a funeral provider usually contacted only one at the time of need.[702] In the initial telephone contact, RS consumers asked about "prices, terms or conditions" only 9.2% of the time.[703]

Evidence presented earlier in sections II.A.1 and II.B.1-2. indicated that both consumers and providers are reluctant to initiate price discussions during funeral arrangements; consumers recoil

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[696] R-M-11 at 97-105; R-M-6 at 46, 50-51.

[697] R-M-6 at 46. Two consumer representatives concurred with the AARP's expansion recommendation. *See* Giesberg, NACAA, Tr. Vol. III, 1137; and R-H-15 (National Consumers League) at 5.

[698] HX-122 at 14, Table VI.

[699] *Id.* (42 of 991) Eighty-five percent of respondents had already decided on a funeral home before contacting any. R-B-2 at Table III-18, p. III-24. Eighty-two percent of those who had not decided on a particular funeral home contacted only one funeral home. *Id.* at III-25.

Market Facts in its report stated that these results "must be viewed with extreme caution" because so few respondents (43) contacted multiple funeral homes and even fewer (35) contacted any by telephone. *Id.*

[700] Colasanto, HX-66 at Ex. B, p. 7 and Tabs, p. 19 (68 of 607).

[701] R-B-2 at Table III-18, p. III-24 (85% had already selected the provider).

[702] *Id.* at III-25 (95% of the respondents who had not decided on a funeral provider before contacting one still contacted only one).

[703] Daniel, HX-122 at 16.

from the social stigma attached to price concerns after the death of a loved one,[704] and providers fear that price issues will offend grieving consumers.[705]

Other, substantial evidence presented earlier in sections II.B.1.- 3. of the report, however, indicated that consumers' price-sensitivity is increasing, and that consumers who want price information as a result will affirmatively use the telephone to seek such information from providers who advertise prices, or to engage in alternative shopping methods, such as calling memorial societies, media price "hotlines," or state agencies that make comparative price information available. The staff concluded in that section that consumers will increasingly seek price information as their awareness, and the availability, of comparative price information increases.

Several provider witnesses further testified that the affirmative telephone disclosure has offended callers, who interpret the disclosure as an indication of the funeral provider's preoccupation with the consumer's ability to afford services.[706] For example, James Hunter, Chairman of the Texas Funeral Service Commission, offered his view of the problems caused by the affirmative telephone disclosure provision:

> They call the funeral director and say, 'Harry, I know you got mom there. We need to make some calls out of town. What does your schedule look like for a 2:00 o'clock service Thursday afternoon at the First Baptist Church?' I would submit to you that he must respond, 'Jane, price information is available over the telephone.' She says, 'Harry, don't worry about that. We are going to take care of the fee. We just wonder if that time is okay.'[707]

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[704] None of the systematic evidence addressed whether the unsolicited disclosure during the initial telephone discussion that price information is available was offensive or confusing to consumers. The Gallup results, however, indicated that most arrangers (83%) are not offended "when funeral directors give them information about the cost of funeral services when they first begin making arrangements." *See* Colasanto, HX-66 at Appendix B, Tabulations, p. 24.

[705] *See, e.g.*, Hocker, Tr. Vol. III, 1435; Johnson, Tr. Vol. I, 744; Starks, Tr. Vol. II, 402-403; and Hennessy, Tr. Vol. II, 1024.

The empirical data on compliance with the Rule's affirmative telephone disclosure provision is inconclusive. Although the RS data shows that about half of the respondents who called providers and asked about "prices, terms or conditions" said that they were told that price information is available over the telephone, 29%-31% could not recall, and Market Facts cautioned that the results should be viewed with extreme caution because of the small cell sizes. Excluding from the analysis those who could not recall increases the compliance rate to about 72%. *See* R-B-2 at III-36, Table III-26; Daniel, HX-122 at 16-17 (compliance results); R-B-2 at III-25, III-31 (Market Facts concern).

[706] Hocker, Tr. Vol. III, 1400-1401 ("It's very difficult sometimes to tell people price information is available on the telephone when they don't ask for it and when it's the furthest thing from their mind. It creates a real awkwardness for us. There are many times people want to have an idea of when they can have the service, how long they can wait, Joey's in Germany in the service and he has to come back home, and to tell them that price information is available on the telephone is sometimes an intrusion when it's not called for"). *See also* Nilsen, Tr. Vol. III, 1482; and Keith, Tr. Vol. III, 1459.

[707] Tr. Vol. III, 603-604.

Mr. Hunter further observed that, at the very moment that the client expects an empathic response, the funeral director's uninvited statement that price information is available is offensive to the consumer and resentful to the funeral provider.[708] Another funeral director testified that: "it just simply makes it look to callers that instead of caring individuals we're money-hungry professional or business people out there; that's what it does to the consumer at that point in time."[709] Funeral director representatives concluded that providers' goodwill is harmed as a result of the offense generated by the unsolicited affirmative disclosure, which providers under the Rule must make during the initial telephone contact.[710] Other providers distinguished between the accepted practice of giving price information that is requested and the difficulty of telling the caller who has not requested it that the funeral provider is prepared to talk about prices.[711]

Other empirical data indicates that the disclosure, at least to date, does not affect consumers' expenditures for funeral arrangements. BE staff's analysis of the RS data indicated that those consumers who called the provider and received the Rule-required affirmative disclosure spent no less for their arrangements than other respondents.[712]

Empirical data presented by the AARP, however, indicated that consumers are not aware of their right to obtain price information over the telephone. The "Excel" Study results indicated that 75% of the consumer respondents were unaware that federal law requires providers to give telephone price information.[713] Several participants agreed with that finding.[714]

Staff Conclusion and Recommendation

The staff concludes that, on balance, the record warrants repeal of the affirmative telephone disclosure provision because its costs outweigh its actual and potential benefits to consumers.

The evidence indicates that, unlike a visit to the funeral home, where the general price list facilitates the actual review of services and merchandise, the offer to discuss prices over the

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[708] *Id.*

[709] Nilsen, Tr. Vol. III, 1482.

[710] *See, e.g.*, Hennessy, HX-61 at 7-8; Farrow, HX-85 at 4; and Johnson, Tr. Vol. I, 748.

[711] Keith, Tr. Vol. II, 1459 ("We're objecting to the disclosure at that moment, that triggering event, not to the disclosure of the prices over the telephone upon request"); and Hocker, Tr. Vol. III, 1464, 1480 ("I would rather not have to make an affirmative statement unless people asked for price information, and then you know that they're interested in it, and so there's no problem").

[712] Daniel, HX-122 at 17.

[713] Soulas, HX-76 at 3. Of course, this data does not address the question whether consumers are aware that they can request price information over the telephone, irrespective of federal law.

[714] NCL, R-H-15 at 5; Brownstein, CAFMS, Tr, Vol. I, 168-69; Taylor, Mem. Society of N.Va., R-H-5 at 3; Klugman, Cal. Federation of Mem. & Funeral Societies, Tr. Vol. III, 931; Groenenboom, R-F-54 at 3; Blake, Wisconsin memorial society, Tr. Vol. II, 1119; Klein, NYSFDAB, Tr. Vol. II, 1060; Bejarno, consumer, Tr. Vol. III, 1597; Attorney General Clark, Tr. Vol. III, 38; and Dr. Barnow, for AARP, Tr. Vol. I, 923.

telephone is helpful only if the consumer is prepared to do so. The weight of the evidence demonstrates that the initial telephone contact is a tentative encounter in which the consumer is relying on the funeral provider to set the tone of the interaction. The funeral provider at that delicate time, however, reasonably wishes to avoid the appearance of insensitivity by raising price issues when the typical subject of the conversation is whether and how to arrange the funeral.

The evidence further shows that providers experience difficulty in understanding their obligation under § 453.2 (b)(1)(ii). Under the affirmative disclosure provision, a funeral provider must choose between telling every caller that price information is available, and deciding whether an inquiry concerns a "term" or "condition," thus triggering the disclosure. The Staff Compliance Guidelines illustrate that problem; the Guides tell funeral providers that a call asking whether the provider will perform a funeral for a particular religion does not trigger the disclosure, whereas a call asking whether the provider will remove the deceased from a hospital does.[715] The difficulty of determining whether an inquiry concerns a "term" or "condition" thus places a clear burden on the provider, without a commensurate benefit to the caller. The staff concludes that the burden also raises evident enforcement difficulties.

The staff, however, does not recommend modification of the affirmative disclosure provision to require funeral providers to inform all callers that price information is available over the telephone, as suggested by the AARP. The record contains substantial evidence that some consumers would be offended unnecessarily by such unsolicited remarks, and that substantial harm to funeral providers' reputation could occur, without significant consumer benefit. These possibilities, also extant under the current provision, may also increase the likelihood of non-compliance, which the evidence suggests may be no greater than 50% at this time. The staff concludes that, on balance, ensuring that those callers who seek price information can obtain it would better assist consumers in making informed selections.

In sum, the evidence indicates that the affirmative telephone disclosure is an inartful and unnecessary signal to consumers about the availability of price information that is unlikely, over time, to provide substantial benefits to consumers not afforded by the Rule's other price disclosure provisions. The evidence indicates that the Rule overall is contributing now to increased consumer "price-sensitivity" that leads at least some consumers to use the telephone to shop for lower-cost providers and services, or to seek comparative price information from non-industry sources. The staff further concludes that the fact that most consumers do not seek price information directly from providers likely stems from their reluctance to do so, as well as their lack of awareness about prices charged by providers, and not from a conviction that price information can not be requested over the telephone.

In the staff's view, the provision's potential to benefit additional consumers is unlikely, and does not justify the imposition of awkwardness and potential offense in what is otherwise an extremely delicate business, social and moral transaction. The staff concludes that the integrity of the Rule's price disclosure requirements will be maintained by retention of § 453.2(b)(1)(ii), the requirement to provide price and other readily-available information over the telephone on request.

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[715] R-B-6 at 28062, 28064 (Illustrations #2 and #6).

The staff however, recognizes that whether the record warrants repeal of the affirmative telephone disclosure is a close question. Based on the record evidence demonstrating low levels of industry Rule compliance, consumer awareness of the Rule, and price competition, one might argue that repeal of the one Rule provision designed to inform consumers that price information is available, before they select a provider, may be premature. Despite the staff's belief that consumers do not think that price information is unavailable over the telephone, one might say that the affirmative disclosure, at least in some form, is still necessary to overcome consumers' reluctance to ask for it. That reluctance partly stems from providers' historical practices in denying consumers access to itemized price information. The staff thus particularly seeks public comment on its recommendation to repeal the Rule's affirmative telephone disclosure requirement.

In the event that the Commission does not adopt the staff's recommendation to repeal § 453.2(b)(1)(i), the staff recommends that the Commission modify the provision to permit providers to use a less strident oral disclosure. Rather than requiring that the provider state cryptically that "price information is available," the Rule might permit providers to simply inquire whether the caller would like price information over the telephone. That amendment would allow the funeral provider to choose the appropriate expression and would substitute a simple inquiry by the provider in place of the current notice. Accordingly, the staff recommends in the alternative that section 453.2(b)(1) be amended to read as follows:

> (1) Telephone price disclosures. (i) Ask persons who call the funeral provider's place of business and ask about the offerings of funeral goods or funeral services whether they would like price information over the telephone.

2. General Price List

a. Requirements and Purpose

Sections 453.2(b)(2)-(4) of the Rule require that funeral providers offer three written price lists to all consumers who inquire in person about funeral arrangements or the prices of funeral goods and services. The three lists include: a casket price list ("CPL"), an outer burial container price list ("OBC-PL"), and a general price list ("GPL"). Section 453.2(b)(5) further provides that each person who arranges a funeral or other disposition of human remains must be provided with an itemized statement describing the goods and services selected. The statement must include the price for each selection as well as their total cost.

The GPL must be offered "upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services." It must contain several disclosures concerning consumers' rights to select only those items they desire and must include the retail prices for seventeen specified items, if offered for sale. In addition, the list must specify its effective date and identify the funeral provider. The funeral provider must give the consumer the GPL, together with an itemized statement of the goods and services selected; consumers have the right to retain these documents if they so choose.

The purpose of the GPL requirement is "to address the funeral market's failure to provide price information on the components of a funeral package."[716] The Commission intended that the GPL would serve several functions. First, it would enable consumers to weigh the costs and benefits of various alternatives to a "traditional" funeral, as well as of individual items that they might select for use with that type of arrangement. Second, it was intended to provide relatively standardized price information so that consumers could understand their options and comparison shop if they wished to, while allowing providers to give any other price information they desired. Third, the GPL was intended to provide ready price information for consultation while consumers are considering what goods and services to purchase, before they make selections. Finally, the GPL was intended, through written disclosures it contains, to inform purchasers that they need only select items they desire, and that certain purchases are not always necessary.

Although one purpose of GPL is to facilitate price comparisons, the Commission's primary rationale for the GPL requirement was to enable consumers who have selected a provider to make more informed decisions about what funeral goods and services to purchase.[717] The telephone price disclosure requirement, rather than the GPL, was the provision primarily designed to facilitate comparison shopping.[718]

b. Required GPL Itemization

Introduction

Sections 453.2(b)(4)(ii) and (iii) of the Rule require providers to give consumers a GPL containing an itemized listing of prices for at least seventeen specified goods and services, if those items are offered for sale. The GPL is intended to provide consumers with relatively standardized price information, while still allowing providers to give any additional price information they wish to.[719]

The Commission determined that package-only pricing injured consumers because it denied consumer choice.[720] The Commission thus intended that required itemization of specific funeral goods and services would remedy the industry's failure to provide timely price information on the components of a funeral package, and would facilitate informed consumer choice among available funeral options and funeral providers.[721] The Commission in mandating the specific GPL price disclosures considered and rejected industry arguments that the price list would: (1)

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[716] R-B-5 at 42272.

[717] *Id.*

[718] *Id.* at 42272-42273.

[719] *Id.* at 42272.

[720] *Id.* at 42269.

[721] *Id.* at 42272-42273, 42291-42292. The Commission intended that the itemized GPL would facilitate comparison shopping among providers by ensuring that relatively standardized price information would be provided to consumers over the telephone or in person. However, the Rule provisions primarily designed to permit consumers to "shop" for providers were the telephone price disclosure provisions. *Id.*

drive up funeral costs by requiring price itemization; (2) unduly lengthen the arrangements conference; and (3) increase funeral home costs by requiring expensive preparation and duplication of GPL forms.[722]

The staff notes that the rulemaking record focuses more on the effects of the Rule's itemization requirements viewed as a whole than on the costs and benefits of the specific mandate to list the prices for certain, specified goods and services. The arguments for, and evidence in support of, repeal or retention of the specific GPL itemization requirements thus largely reiterate those views and data that support repeal or retention of the Rule as a whole. The staff in the discussion below therefore summarizes views and evidence addressed more fully in prior sections of its Report concerning the adequacy of the review period (II.A.1.), repeal of the Rule (II.E.), industry compliance (II.A.2.) and the Rule's impact on consumer purchase behavior and expenditures (II.B.1-4).

Position of the Rulemaking Parties

The NFDA and NSM in their Proposed Findings advocated deletion of the requirement to list the prices for seventeen specified funeral goods and services, if the Rule is retained.[723] Those groups asserted that consumer expenditures have increased and comparison shopping has decreased under the Rule, the opposite of the Commission's predicted benefits of itemization if package pricing was forcing consumers to buy unwanted items.[724]

The NFDA and NSM also argued that the required GPL listing represents "over-itemization" because it: (1) confuses consumers; (2) prevents providers from giving "courtesy" items, such as acknowledgment cards; (3) includes unnecessary items that consumers do not want, such as immediate burials; (4) unfairly attempts to encourage lower-priced services by mandating a listing for direct cremation/immediate burial package prices; and (5) has caused funeral prices for lower-priced funeral packages to increase.[725]

The NFDA and NSM in conclusion recommended that, in lieu of the specific GPL itemization requirements, the Rule should include a provision that would "simply require funeral

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[722] The Commission responded that any price increases would be the result of funeral home business decisions, and are not compelled by itemization, that any increased time spent by consumers in considering options was an intended effect, and that GPL compliance costs would be minimal. R-B-5 at 42272-73, 42296-99. The staff in section II.B.4, *supra*, reviewed the record evidence on those issues and concluded that the Rule has not increased funeral home prices or costs of operation.

[723] R-M-9 at 225.

[724] *Id.* at 65-74, 217-218.

[725] *Id.* at 124-128. The NFDA and NSM nonetheless advocated that the GPL should include a listing for a non-declinable, "basic facilities fee" for care and custody of the body. *Id.* The staff discusses that suggestion in subsection 2.d, *infra*.

providers to list, clearly and conspicuously, the items of merchandise and service for which a charge is made."[726]

The AARP, in contrast, advocated retention of the itemization requirement on the basis that it does not appear to be sufficiently in place in the market to adequately gauge its effects. The AARP also asserted that the record contains credible evidence that itemization provides useful benefits to consumers that may increase as consumer awareness and industry Rule compliance increase.[727]

The AARP based those conclusions on its findings that: (1) there is little record data on actual GPL itemization compliance, but the empirical evidence indicates that compliance with the GPL timing and distribution provisions overall is quite low; (2) comparison shopping may have increased slightly since 1981; (3) a majority of consumers are unaware of their right to obtain a GPL; (4) the proportion of consumers who received some form of itemized price information early in the funeral transaction and who used that information to spend significantly less for their arrangements has increased since 1981; (5) some of the documented increase in consumer purchases of cremations may be attributable to the Rule; (6) consumers desire itemized price information; and (7) the itemization requirement has not increased providers' costs or administrative burdens, but may have contributed to providers' decisions to temper price increases.[728]

Staff Conclusion

The staff concludes based on its review of the record evidence, summarized earlier in this report, that deletion of the Rule's GPL itemization requirements is not warranted. The evidence indicates that the levels of industry Rule compliance (particularly with the GPL provision), price competition and consumer knowledge concerning their rights under the Rule are low. The evidence further demonstrates that fewer than one in four providers may be giving the GPL at the time required by the Rule, and at least a majority of consumers do not appear to know that they are entitled to see a GPL at all. Under those conditions, it would appear premature to expect consumer behavior or expenditures to have substantially changed since 1984 as a direct result of the specific GPL itemization requirements, or to assess the potential impact of itemization; those estimates would not capture the full effects of the Rule.[729]

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[726] *Id.* at 225-226. The NFDA and NSM provided no explanation, however, as to how their suggested alternative would operate in practice. *See also* R-G-3 (NSM Comment) at 14-16; R-G-6 (NFDA Comment) at 49-51, 107-119. The NFDA also asserted in those comments that itemization is fully in place in the funeral market. R-G-6 at 112-119.

[727] R-M-11 at 114.

[728] *Id.* at 107-114.

[729] The staff notes that these conclusions could apply as well to the evidence on the extent of consumer shopping for a provider, although that evidence strongly suggests that shopping is infrequent in the funeral market. The empirical evidence, however, is mixed concerning whether the proportion of consumers that shopped by contacting more than one funeral home has changed since 1981. The BE staff's analysis of the BLS and RS data suggests that shopping decreased from 7.2% in 1981 to 4.2% in 1987. HX-122 at 15 and Table VI, p. 14. The results of the Gallup study, in contrast, indicate that 11.2% of funeral arrangers in 1987-1988 contacted more than one funeral home before selecting one.

(continued...)

The staff also is not persuaded by arguments that the overall level of consumer expenditures is the sole test of the Rule's itemization benefits, even if compliance were higher and consumer expenditures still remained unchanged. BE staff stated in its report, for example, that expenditures may rise as a result of price increases related to funeral homes' fixed costs that are not associated with Rule compliance. The record evidence indicates, in fact, that Rule compliance has not increased funeral providers' costs, that consumer expenditures and funeral prices, when compared to other service industries, have not increased above inflation, and that an industry "price consciousness" induced by the availability of the GPL may have tempered price increases. That evidence could lead one to conclude that mandatory itemization may have helped retard the growth of funeral prices and consumer expenditures, a benefit predicted by the Commission.[730]

The staff further concludes that, if itemization's only benefit were to increase informed consumer choice (without imposing substantial costs on industry), even though some chose to spend more for their arrangements than they would have without itemization, that benefit would justify retention of the itemization requirement because other consumers would have the right to choose to spend less. The Commission so stated the purpose of itemization when it promulgated the Rule.[731]

The record evidence in fact indicates that many consumers will spend less as a result of informed choice. Although the empirical evidence does not establish a direct link between receipt of the Rule-required GPL and lower expenditures, it does indicate that some consumers are buying fewer funeral items and less-expensive services than they did before mandatory itemization. That evidence shows that consumers purchase fewer caskets and embalming for cremation than in 1981, decline items once included in packaged funerals, increasingly choose less-expensive cremation services, and, since 1981, receive more price information early in the transaction; consumers use that information to spend less for their arrangements. The evidence indicates, on balance, that the Rule's itemization requirements have contributed to those results by increasing consumers' awareness of prices and options and industry's attempts to increase its marketing of alternative goods and services. Finally, the great preponderance of testimonial evidence suggests that those benefits will tend to increase over time as compliance with, and consumer awareness of, the Rule increase.

With respect to industry arguments concerning the benefits of package pricing over itemization, the Commission determined that itemization does not burden consumers who prefer packaged funerals. Consumers under the Rule are free to ignore itemized prices and base their decisions on the total price of all components, and providers are free to include package prices on

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[729](...continued)
Colasanto, HX-66, Exhibit B at 1 and Tabs, p. 90. The record contains no reliable evidence to support one of those findings over the other. In any case, the GPL itemization requirement was not primarily intended to increase comparison shopping among funeral homes, as the Commission noted in its Statement of Basis and Purpose. R-B-5 at 42272-42273.

[730] *See* R-B-5 at 42297.

[731] *Id.*

the GPL.[732] The Commission also concluded that itemization provides opportunities for providers to choose to raise prices, but does not compel that result.[733] The Replication Study data indicated that 31% of RS respondents reported purchasing funerals on a package basis in 1987, and that those consumers spent no less for their arrangements than those who arranged on an item-by-item basis.[734] Other empirical evidence established that funeral home price increases do not appear to be attributable to the Rule, but to inflation generally.

The NFDA and NSM, however, advocated repeal of the requirement to list package prices for direct cremations and immediate burials, asserting that they represent an unfair attempt to encourage those lower-priced services.[735] The staff notes in response that providers are free under the Rule to include package prices for other types of traditional or alternative arrangements, including more costly cremations or immediate burials with a memorial or funeral service. The Rule also does not require providers to list package prices for any type of arrangement that they do not offer.

Finally, the NFDA-NSM suggestion to replace itemization of specified goods and services with a requirement to list "the items of merchandise and service for which a charge is made" would not appear to solve those groups' concerns. With the exception of items provided at "no charge," that change would appear to require a longer listing than that mandated by the Rule, which is limited to seventeen items. One might also argue, however, that the suggested substitute would permit a return to package-only pricing. At the least, a general requirement to list prices for goods and services offered, without any required language or specificity, would effectively eliminate the relatively standardized price information that consumers now receive under the Rule. Because the NFDA and NSM provided no evidence or explanation as to how their suggested provision might operate in practice, the staff can not evaluate further the potential costs and benefits of the proposal. The staff thus concludes that the proposed NFDA-NSM amendment is not supported by the record.

The staff concludes for the reasons discussed above that the record evidence warrants retention of the GPL itemization requirements. The staff agrees with the NFDA and NSM, however, that some fine tuning is necessary to reduce any burdens associated with lengthy and unnecessary GPL price disclosures. The staff thus recommends in section III.D.2.f. below regarding "no charge" items that the Commission delete as unnecessary the requirement to list "acknowledgment cards" on the GPL, as suggested by the NFDA and NSM. The staff also recommends removal of "other automotive equipment" (flower car/~~family car~~) from the required listing to shorten the GPL disclosures. Providers can include that item on the GPL if they so desire. Finally, the staff in section III.D.2.d. below recommends replacement of the currently-required listing for "other use of facilities" with two, more specific items in order to avoid confusion and potential deception regarding non-declinable service fees.

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[732] *Id.* at 42271.

[733] *Id.* at 42271, 42296-42299. *See also* the discussion of the Rule's effects on funeral prices in section II.B.4, *supra*.

[734] Daniel, HX-122 at n. 12, pp. 9-10, Table XI at 38 ("packdum"), and p. 41.

[735] R-M-9 at 228.

c. Change Timing and Distribution Requirements

Introduction

The NFDA and the NSM during the proceeding suggested several changes to § 453.2(b)(4)(i), if the Rule is retained. That section contains the Rule's GPL timing and distribution requirements. The staff addresses all of those proposed changes in this section of its report.

Section 453.2(b)(4) now requires providers to give for retention a GPL to persons who inquire in person about funeral arrangements or the prices of funeral goods and services. The GPL must contain, among other things, several disclosures about consumers' right to select only those items they desire and the retail prices for 17 specified items, if offered for sale. Providers must offer the GPL "upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services." (emphasis added)

The Commission intended that the GPL requirement address the funeral market's failure to provide timely price information on the components of a funeral package.[736] The Commission thus determined that the GPL would serve several necessary functions, three of which relate directly to consumers' need for information, once they have selected a funeral home, concerning the various prices and options of available funeral goods and services. First, the GPL would enable consumers to weigh the costs and benefits of various alternatives to a "traditional" funeral, as well as of individual items that they might select for use with that type of arrangement. Second, it would provide ready price information for consultation while consumers are considering what goods and services to purchase, before they make selections. Finally, the GPL would inform purchasers, through written disclosures, that they need only select items they desire, and that certain purchases are not always necessary or required by law. The fourth function served by the GPL would be to provide relatively standardized price information that some consumers might use to comparison shop among funeral homes, before selecting a particular funeral home.

The NFDA and NSM raised three closely-related issues concerning exactly when, where and how funeral providers must offer the GPL to consumers. The first issue relates to the "timing" of the GPL -- when during the funeral transaction it must be provided under the Rule. The question presented by the funeral director groups appears to be whether the term "funeral arrangements" should be replaced by a more precise term, such as "prices", or specifically defined in the Rule itself to mean the formal arrangements conference. Those groups argued that the imprecision of the term "funeral arrangements" leads funeral providers unnecessarily to appear insensitive by offering the GPL to consumers at inappropriate times in the funeral transaction.[737]

The second issue raised by funeral director groups follows from the first -- whether the requirement to give the GPL "upon the beginning of discussion of funeral arrangements..." also forces providers needlessly to offer the GPL during "preliminary" discussions away from the

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[736] R-B-5 at 42272.

[737] *See, e.g.*, R-B-17 (NFDA Comment on the ANPR) at 51; R-B-18 (NSM Comment on the ANPR) at 30-31; and R-M-9 (NFDA-NSM Findings) at 112-124.

funeral home premises that do not involve price, such as during removal of the body for transportation to the funeral home. The question presented is whether funeral director contacts with clients away from the funeral home premises that do not involve an arrangements conference should be exempt from the GPL distribution requirement.[738]

The final availability issue concerns whether the Rule should be relaxed to require providers to give the GPL for retention only to those consumers who make known their desire to retain it. The NSM suggested in its Comment that providers should not be obligated under the Rule to "force" consumers to keep the list when consumers may not wish to do so.[739]

Evidence Supporting Rule Change

The NFDA and NSM presented testimonial evidence on these timing and availability issues through several funeral director witnesses appearing on their behalf.[740] Those and other funeral director witnesses made the general point that compliance with the Rule's current GPL requirements interferes with providers' ability to establish a rapport with consumers at the outset of funeral arrangements, and as a result often offends some clients who may not wish to discuss prices at that time.

More specifically, funeral director witnesses testified that, in practice, funeral providers understand and interpret differently the triggering term "funeral arrangements," which is a broad term not defined in the Rule.[741] Funeral providers, these witnesses stated, often lose the opportunity to first offer compassion and support to grieving families who come to the funeral home to make arrangements, because the Rule appears to require them to offer consumers the GPL immediately upon beginning any discussion of "funeral arrangements," including, for example, preliminary discussions of death certificates, veterans' benefits, or, in the case of an out-of-town death, the location of the deceased.[742] Similarly, witnesses said, providers during removal of remains must under the Rule offer the GPL to grieving consumers who ask about the availability of funeral home facilities.[743] As a result, the testimony continued, providers appear callous and

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[738] *Id. See also* R-G-3 at 42; and R-G-6 at 60-62, 65.

[739] R-G-3 at 42; *see also* R-G-5 (FDSA) at 20.

[740] William Hocker, Royal Keith, Morris Nilsen, Timothy Simms, and Richard Yurs, all funeral directors, presented testimony at the public hearings for the NFDA based on their experience and knowledge in the funeral industry. Similarly, Fred Bates, Fred Hunter, Russell Johnson and Charles Roper presented their views for the NSM.

[741] *See, e.g.*, F. Hunter, HX-31 at 14-15, Tr. Vol. I, 786, 801; Johnson, Tr. Vol. I, 743-744, 747; Nilsen, Tr. Vol. III, 1433; and Keith, Tr. Vol. III, 1430, 1450; *see also* R-G-3 (NSM Comment) at 41-42; R-G-5 (FDSA) at 19; and R-M-9 at 119.

[742] Hocker, Tr. Vol. III, 1431-1432; Yurs, Tr. Vol. II, 515; Johnson, Tr. Vol. I, 744; Starks, Tr. Vol. II, 426-427; Franzen, Tr. Vol. II, 818; J. Hunter, Tr. Vol. III, 581-582; Hahn, Tr. Vol. II, 672-673; and Davis, R-G-2 (Comment) at 3.

[743] *See, e.g.*, Simms, Tr. Vol. II, 448, 450-453, 470-471, 473; Nilsen, Tr. Vol. III, 1432-1433; Hocker, Tr. Vol. III, 1402-1403, 1479; Johnson, Tr. Vol. I, 744; Franzen, Tr. Vol. II, 818; and Hennessy, Tr. Vol. II, 1025-1027.

insensitive when they give the GPL at these times because price is not yet a subject of discussion, and some consumers view its introduction as offensive.[744]

The following statements by provider representatives of the NSM, NFDA, and the Texas Funeral Service Commission illustrate the concerns just discussed and expressed by other provider witnesses during the review proceeding:

> Does preliminary discussion, for example, of death certificates, veterans' benefits, location of deceased (where death occurred in another city), or the like, constitute a discussion of "funeral arrangements"? If so, the forced handing over of a price list at this stage, when prices are not yet the subject of discussion in the arrangements conference, is both insensitive and inapposite. When I have done this, members of the family have been surprised, puzzled and shocked.[745]

> Where we take exception with the rule is that, to the letter of the rule, at the initiation of any discussions concerning funeral arrangements, it would trigger the presentation of pricing documents at that point in time. It has been our experience, via consumer complaints, that it has unfolded that many client-family buyers are offended by the presentation of documents at the very outset of discussion of funeral plans. There hasn't been enough interaction or interplay between the two parties to permit a settling of the grief and being at the funeral home to make arrangements. So, it is a timing issue.[746]

> The problem is the timing of the presentation of the General Price List, and the first part is when you make a home removal or a hospital removal and the family says something that triggers presentation of the General Price List, and once again it can be very awkward and insensitive, because from a funeral director's point of view we develop a relationship of trust with a family and a relationship of caring for them, and when that's injected into the relationship sometimes it can be very awkward and very insensitive, because it more or less changes the relationship and reduces it to sort of a matter of dollars and cents, which it certainly is not.[747]

The NFDA in its Comment suggested that these GPL timing difficulties stem from the fact that funeral directors interpret the industry term "funeral arrangements" to mean the arrangements conference where consumers select specific goods and services, after the funeral home has custody of the remains, and, when desired, after embalming. According to the NFDA, "funeral arrangements" as used in § 453.2(b)(4)(i) is overly broad and ambiguous because it implies that "arrangements" may mean something other than the formal arrangements conference in the funeral home, including during removal of remains when the consumer makes a comment about what services they desire (or when the funeral director requests prior permission to embalm

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[744] *Id. See also* Yurs, HX-43 at 9; Hocker, Tr. Vol. III, 1463, 1477-1478; Johnson, Tr. Vol. I, 744; Davis, R-G-2 (Comment) at 3; R-G-3 (NSM Comment) at 41; and Farrow, Tr. Vol. III, 580.

[745] F. Hunter, President, NSM, HX-31 at 14-15.

[746] J. Hunter, Chmn., Texas Funeral Service Commission, Tr. Vol. III, 582.

[747] Hocker, President, NFDA, Tr. Vol. III, 1402-1403.

the body).[748] Funeral providers, presumably, thus may strictly interpret the Rule to require that the GPL be given at the beginning of preliminary discussions of veterans' benefits, for example, before the formal selection process begins, or during removal whenever a family member initiates discussion of potential funeral arrangements.[749]

The NFDA, NSM and other funeral director witnesses testified that the GPL "timing" requirement also presents problems for another reason. According to these witnesses, funeral directors themselves find it difficult to raise price issues at sensitive times during the funeral transaction unless they know that consumers are ready to discuss prices, because doing so may be offensive.[750] The following statements by Russell Johnson and William Hocker, respectively representing the NSM and the NFDA, illustrate this concern:

> There may be some general pattern, but it is very difficult to know precisely when is really the correct, sensitively correct, time to begin talking about price.[751]

> Sometimes just the immediacy of, you know, trying to establish a rapport, and stick to the dollars and cents when you're sitting across the table from a family that is devastated, it is, as somebody mentioned, a highly charged atmosphere, and it's very uncomfortable for the funeral director too, you know.[752]

> If I'm called to a home...there's really no problem with giving price information either if it's asked for, or if it's indicated that people want it. See, our objection is having to force the price issue before people are even concerned or even ask for it, that's the whole point.[753]

To remedy their expressed GPL timing and distribution difficulties, individual funeral director witnesses in their testimony suggested one or more of the following changes to § 453.2(b)(4)(i), if the provision or the Rule is not repealed: (1) clarify the Rule to specifically permit preliminary discussions in the funeral home concerning such things as death certificate information, list of survivors, veterans' benefits, and location of the deceased;[754] (2) exempt from the GPL requirement in-person funeral director contacts with consumers away from the

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[748] R-G-6 at 58-60; R-M-9 at 112-114.

The Rule's GPL distribution requirements are currently not limited to arrangements made in the funeral home. *See* R-B-6 (Final Staff Compliance Guidelines) at 28078 (Illustration #8).

[749] The NSM in its Comment voiced similar concerns. *See* R-G-3 at 41-42.

[750] *See, e.g.*, Hocker, Tr. Vol. III, 1435; Johnson, Tr. Vol. I, 744; Starks, Tr. Vol. II, 402-403; and Hennessy, Tr. Vol. II, 1024.

[751] Johnson, Tr. Vol. I, 744.

[752] Hocker, Tr. Vol. III, 1435.

[753] *Id.* at 1482.

[754] Hocker, Tr. Vol. III, 1431, 1478-1479 (unless consumers ask for prices); Yurs, Tr. Vol. II, 561.

funeral home premises, including provider requests for prior embalming authorization;[755] (3) permit the funeral director to determine in each case the proper time to present the GPL;[756] (4) require that providers offer the GPL prior to consumers' selection of individual funeral goods and services, such as the casket and burial vault;[757] and (5) require that the GPL only be given when consumers specifically ask about price information.[758]

The NFDA proposed a more formal amendment to section 453.2(b)(4)(i) that appears to incorporate most, if not all, of those changes proffered by individual provider witnesses.[759] The NFDA recommended that, if the Rule is not repealed in its entirety, § 453.2(b)(4)(i) should be amended to read as follows:

453.2(b)(4) General Price List

(i) Make available a printed or typewritten price list to: (A) any person who inquires in person at the funeral provider's place of business about the price of funeral goods or funeral services; and (B) any person present at the funeral arrangement conference. In this latter case, the price list is to be made available prior to the selection of specific funeral goods and funeral services or the discussion of the prices of funeral goods or funeral services. The funeral provider shall permit all such persons to retain the price list.[760]

The NFDA proposed in conjunction with that amendment that the following definition of "funeral arrangement conference" be added to § 453.1 of the Rule:

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[755] F. Hunter, Tr. Vol. I, 786-787 (embalming requests); Simms, Tr. Vol. II, 474; Franzen, Tr. Vol. II, 818; R-G-1 (Comment of Mr. Ninker, Illinois Funeral Directors Ass'n.) at 5.

Exemption from the GPL requirement of in-person contacts away from the funeral home would, by definition, exempt in-person provider requests for prior embalming permission made during removal of remains.

[756] Hocker, Tr. Vol. III, 1431, 1463; Yurs, Tr. Vol. II, 519.

[757] F. Hunter, Tr. Vol. I, 801 ("as long as before they sign the contract, before they look at the caskets and select the vault and the exact kind of funeral"); J. Hunter, Tr. Vol. III, 604-605 ("after we have discussed some basic funeral plans, when the arranger has determined a feel for the families' wishes and desires, and prior to the selection of any services and/or goods"); Pierson, R-G-1 at 2-3; Starks, Tr. Vol. II, 402; Franzen, Tr. Vol. II, 818.

[758] Starks, Tr. Vol. II, 402-403; Hennessy, Tr. Vol. II, 1025.

The NSM and the FDSA proposed another remedy mentioned earlier in this section, namely, to change the current "give for retention" standard in offering the GPL to an "on request" standard -- consumers who wish to keep the GPL must so request before the provider is required to give the GPL for retention.

[759] The NFDA in its Comment recommended repeal of this GPL provision, and amendment if it is retained. *See* R-G-6 at 65.

[760] R-M-9 at 227.

The 'funeral arrangement conference' is an in-person meeting between the funeral provider and the funeral consumer at which the selection of the goods and services comprising the funeral takes place.[761]

The NSM proposed a slightly different amendment, if the provision is retained:

453.2(b)(4) General Price List

(i) Make available a printed or typewritten price list to persons who inquire about funeral arrangements or prices either in person at the funeral provider's place of business or other location where the funeral arrangements conference is held. The funeral provider must offer them the list prior to discussion of the prices of funeral goods or funeral services or the selection of funeral goods or services, whichever discussion occurs first. If the person asks to keep the list, when it is offered, the funeral provider shall give the person a copy of the list for retention.[762]

The NFDA proposal would appear to effect the following substantive changes in the Rule's GPL timing and distribution requirements: (1) timing - providers would make a GPL available to consumers sometime in the formal arrangements conference before consumers' actual selection of specific goods and services or before the discussion of the prices of goods or services, but not necessarily when the selection discussion begins, or when selection of the overall type of funeral service takes place, and the GPL need not be physically given to consumers; (2) distribution - (a) all contacts, inquiries and arrangements made away from the funeral home premises would be exempt from the GPL requirement unless the formal arrangements conference is held there; (b) in-person inquiries at the funeral home about the home's offerings would be exempt unless there is also a "price" inquiry; and (c) providers need not give the GPL to consumers for their retention unless the consumer so requests.

The NSM proposal would appear to have much the same effect as that of the NFDA, with the following differences: (1) timing -providers' obligation to offer the GPL is not limited to consumers' selection of specific goods and services, and the GPL must be offered prior to discussion of the selection of goods or services or the prices of those items, whichever discussion occurs first; and (2) distribution - the availability of the GPL is not limited to in-person price requests at the funeral home, but includes inquiries about "funeral arrangements" made at the funeral home or wherever the arrangements conference takes place.

Evidence Opposing Rule Change

A cross-section of witnesses testified, in response to this evidence and to these proposals, that in their experience: (1) consumers generally are not offended by providers' introduction of the GPL or other price discussions during funeral arrangements; (2) consumers want itemized price information; and (3) consumers find it difficult or embarrassing to initiate price discussions

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[761] *Id.*

[762] *Id.*

with funeral providers. These witnesses included clergy/funeral counselors,[763] consumers/consumer group representatives,[764] consumer marketing experts,[765] funeral and memorial society representatives,[766] and funeral directors.[767]

Witnesses generally advocating retention of the GPL timing requirements, including a former funeral director, also voiced their opposition to the proposal to change the GPL "give for retention" requirement to an "on request" standard, citing various ways that such an amendment would weaken the Rule.[768]

Similarly, these and other witnesses expressed their objections to the proposal to exempt from the GPL requirement any contacts between providers and consumers away from the funeral home premises, suggesting generally that consumers as a result would lose the benefits of early price

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[763] Showalter, Tr. Vol. II, 133 (hospice consumers/families want price information and have no hostility to price discussions); Bennett, Tr. Vol. I, 353-354, 357 (consumers and funeral directors welcome the GPL as a vehicle to discuss price issues "up front"); Dr. Biddle, Tr. Vol. III, 327 (consumers are "shocked, not offended," by price information because they did not plan ahead); and Bell, Tr. Vol. III, 241-242 (receipt of price list is not personally offensive if service is to be provided).

[764] Dr. Nelson, AARP, Tr. Vol. I, 86 (price discussions not offensive; older consumers are the most eager for price information); Comm'r. Jones, Older Womens' League, Tr. Vol. I, 263 (price issues not offensive to consumers); Wertheimer, NAEL, Tr. Vol. III, 969 (consumers embarrassed to bring up price, but would welcome it if raised by funeral directors); Consumers Union, R-H-21 at 6 (receipt of the GPL after goods are shown, or some arrangements made, even if before prices are discussed, prevents informed consumer choice); Karklin, consumer, Tr. Vol. I, 554 (GPL should be given after salutations); and Rouillard, CRLAF, Tr. Vol. III, 1349 (the earlier the GPL is given the better for informed consumer choice).

[765] Prof. Sommer, Center for Consumer Research, University of California-Davis, Tr. Vol. III, 624, 642 (some consumers may not like price introduction because of the taboo/repression about death issues, but it's not offensive if tastefully raised by providers; consumers fear raising price because it might look like they did not love the deceased); Dr. Mazis, for AARP, Tr. Vol. III, 812, 853 (social stigma makes it difficult for consumers to raise price issues when a loved one has died).

[766] Perguson, Tr. Vol. III, 1180, 1186 (GPL eases the job of raising cost issues -- consumers appreciate cost information, especially if raised by providers, because it embarrasses them); Blake, Tr. Vol. II, 1120 (price information not offensive to consumers); and Greater Detroit Memorial Society, R-H-19 at 1 (most of 50 senior focus group participants said that they wanted price lists).

[767] Neel, Tr. Vol. I, 603-603 (price introduction by providers is not easy, but it also is not offensive -- consumers expect it); Krause, Tr. Vol. II, 24 (consumers do not resent price lists -- they want the perception that price information is available); Botimer, Tr. Vol. III, 1281, 1314 (consumers appreciate price information, are not offended, and the GPL helps the funeral director discuss prices); Hennessy, Tr. Vol. II, 1025 (no problem giving the GPL when consumers discuss arrangements); Nilsen, Tr. Vol. III, 1460 (the GPL is not necessarily offensive at the arrangements conference); and Peebles, Tr. Vol. III, 1585-86 (minimal problem giving consumers the GPL away from the funeral home premises).

[768] Rouillard, CRLAF, Tr. Vol. III, 1350; Klein, consumer member, NYSFDAB, Tr. Vol. II, 1068 (GPL's usefulness in comparing selections with the final bill/itemized statement would be impaired); Giesberg, NACAA, Tr. Vol. III, 1147; Dr. Mazis, Tr. Vol. III, 867 (change would defeat comparison shopping and seriously weaken the Rule); Dr. Reveley, former funeral director, Tr. Vol. III, 871 (change would legalize industry's right to hide the GPL; providers will not present the GPL unless forced to do so by law); and Dr. Nelson, AARP, Tr. Vol. I, 91-92 (responsibility to offer the GPL for retention should rest with the funeral director because consumers will not think of it necessarily).

Other results from the Gallup survey, the Baseline and Replication studies, and the NSM client survey, discussed at length earlier in this report, provided empirical evidence that consumers value price information they receive early in selecting a funeral home and funeral goods and services.[773] The Replication and Gallup study reports also presented evidence that recent funeral arrangers who received a GPL considered it important in the selection of funeral items and services,[774] and that most consumers who received a GPL kept it.[775]

The Replication and Gallup studies and the BE Report also presented empirical evidence on the level of funeral provider compliance with the current GPL timing and distribution requirements during actual arrangements made in the funeral home.[776] That evidence, discussed more fully in Section II.A.2. of this report, suggests that: (1) about two-thirds of those funeral consumers who went to the funeral home were shown or received a GPL sometime during the transaction;[777] (2) 62% of those consumers who were shown a GPL at the funeral home were offered it to keep;[778] and (3) about one-quarter of those consumers who went to the funeral home received a GPL at or near the beginning of the funeral arrangements discussion, as required by the Rule.[779]

Finally, various empirical study reports and witnesses presented evidence that at least a majority of consumers before the time of need are largely unaware of the Funeral Rule and their

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[773] *See* section II.B.1, *supra*.

[774] Seventy-three percent of Replication study respondents said that they considered the GPL very (34%) or somewhat (39%) important in their selection of funeral goods and services. R-B-2 at Table III-32, p. III-45.

[775] Eighty-seven percent of RS respondents and 82% of Gallup respondents who were offered a GPL to keep said that they took it with them. R-B-2 at Table III-32, p. III-46, and HX-66, Ex. B, p. 7 and Tabulations, p. 29.

[776] The Rule also requires providers to give a GPL for retention to: (1) persons who inquire in person about arrangements or prices in the funeral home, whether or not actual arrangements are made; and (2) persons who engage in funeral arrangements or price discussions with providers at places away from the funeral home. These data do not provide evidence on GPL compliance in those two situations because the studies only involved actual funeral arrangers who made arrangements in person at the funeral home or over the telephone (the Rule does not require providers to give a GPL to consumers who arrange funerals solely by telephone).

[777] HX-122 at Table VII, p. 19 (23% of the Replication Study respondents said that they did not receive a GPL; this BE analysis calculated compliance with the GPL provisions using only those respondents who said they went to the funeral home to make arrangements); HX-66, Ex. B. at 1 and Tabs, p. 27 (31% of the Gallup respondents said they did not receive a GPL, but it is unclear how many of these respondents actually went to the funeral home to make arrangements because that question was not asked).

[778] R-B-2 at Table III-32, p. III-46. Combining this result and the previous number of 67.9% (about two-thirds) who said that they received a GPL, the empirical evidence on the record suggests that 42% of providers gave consumers a GPL for retention, as required by the Rule.

[779] HX-122 at Table VIII, p. 20. BE staff reported that another one-quarter of those consumers who made arrangements at the funeral home received a GPL after the arrangements discussion had begun, but before the selection of a casket or other container. *Id.*

and options information before they make selections of goods and services.[769] Several funeral directors and other witnesses presented testimonial evidence, based on their experiences, that at least some funeral "arrangements" (selections of funeral goods and services) can, or do, occur with some frequency during funeral director-consumer meetings away from the funeral home, such as at the hospital after a death or during removal of the remains.[770] Empirical evidence from the Replication Study on that issue indicated that 14% of consumers said that in-person arrangements discussions took place at a hospital or nursing home, or at the home of the respondent, the deceased, or a relative.[771]

In addition to this testimonial evidence, a representative of the Gallup Organization appearing on behalf of the AARP presented empirical survey evidence on the GPL timing issue. She testified that, when asked the question

> Some people find it helpful when funeral directors give them information about the cost of funeral services when they first begin making arrangements. Other people are offended that funeral directors bring up the subject of costs during their time of grieving. Which of these views comes closer to your own?

83% of the respondent funeral arrangers said that they find cost information helpful, and 5% said that discussing costs is offensive.[772]

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[769] Dr. Nelson, Tr. Vol. I, 91; Klein, Tr. Vol. II, 1067; Buchanan, Tr. Vol. III, 1130; Wertheimer, Tr. Vol. III, 987; Dr. Mazis, Tr. Vol. III, 867; and Peebles, Tr. Vol. III, 1563. *See also* R-M-6 (AARP Rebuttal) at 62.

[770] Hennessy, funeral director, Tr. Vol. II, 1026-1027 (timing of visitation and service often likely to be among first topics of concern to a family during removal); Hunter, Tx. Funeral Service Comm'n, Tr. Vol. III, 602-603 (very common practice); Johnson, NSM, Tr. Vol. I, 744 (conversations away from the funeral home border on making funeral arrangements); Simms, NFDA, Tr. Vol. II, 452, 470-471, 473 (various arrangements discussions during removal have occurred); Hocker, NFDA, Tr. Vol. III, 1402, 1479 (problem during removal when the family says something like "can we have the funeral on Wednesday" that triggers presentation of the GPL); Dr. Nelson, AARP, Tr. Vol. I, 91 (preliminary arrangements can occur in consumers' homes where their concept of the funeral may be discussed and formed); and Klein, NYSFDAB, Tr. Vol. II, 1067 (not all arrangements are made in the funeral home).

[771] R-B-2 at Table III-24, p. III-33. The extent to which some of those respondents may also have participated in discussions at the funeral home is not clear from the data.

[772] Colasanto, Tr. Vol. III, 55; HX-66 at Exhibit B, p. 45 (Questionnaire, Q.12) and Tabulations, p. 23. The Gallup Study, as described earlier, was a telephone survey of a representative national sample of 675 adults in telephone households with someone 45 years of age or older who arranged funerals in the last eighteen months (April 1987 through October 1988).

Cross-examination of Ms. Colasanto raised the question whether the survey results regarding Q.12 reliably speak to consumers' taking offense at the introduction of the GPL at the outset of arrangements, because the question does not appear to be "parallel" -- the term "helpful" is associated with the beginning of arrangements, but the term "offended" appears to be associated with the "time of grieving." When asked whether the results might be different, for example, if the question had asked whether consumers are offended if funeral directors initiated price discussions before consumers asked anything about prices, Ms. Colasanto answered that she did not know. *See* Colasanto, Tr. Vol. III, 84-85. The record, however, contains no evidence presented by any survey or marketing expert, or other party, that the results of Q.12 are unreliable.

specific rights under the Rule, or of funeral prices, price variances between funeral homes, or funeral service options. That evidence is discussed at length earlier in this report.[780]

In addition to the evidence just described, the testimonial evidence presented by funeral directors in support of changes to the GPL distribution requirements appears to suggest that providers may be interpreting the Rule to require provision of the GPL at certain "inappropriate" times in the funeral transaction, when in fact it does not. Funeral directors raised three primary concerns about the GPL distribution requirements --that providers must: (1) give the GPL during preliminary discussions that do not involve prices or the selection of goods or services; (2) give the GPL to consumers who ask about the availability of funeral home facilities during contacts with providers away from the funeral home premises; and (3) force consumers to take or keep the GPL once providers offer it. These concerns already appear to have been specifically accommodated in the Final Staff Compliance Guidelines, issued in 1985.

First, the Guidelines contain the following illustration regarding provision of the GPL during preliminary discussions in the funeral home:

> Illustration #19: A family arrives at the funeral home. The discussion concerns the final illness, information for the death certificate, and social security benefits. Must the General Price List be given to the family at this point in the discussions?
>
> No. At this point, the discussion has not concerned funeral arrangements or the prices of any funeral goods or services. Therefore, the requirement to offer the General Price List has not been triggered. However, a General Price List must be offered when the discussion concerns funeral arrangements or the prices of any funeral goods or services (emphasis added).[781]

This illustration appears to clarify the Rule to exempt from the GPL requirements preliminary discussions of the type raised by funeral director witnesses and trade associations. Given adequate education about the Rule's specific requirements, one would expect funeral directors to be aware of this clarification because the NFDA specifically requested that the content of Illustration #19 be added to the Guidelines.[782]

Second, the Guidelines inform funeral directors of the following GPL exemption during contacts away from the funeral home:

> Illustration #17: You are a funeral provider who is called to a nursing home for removal of a body. When you arrive the family inquires whether your establishment is available at a specified time. Does the Rule require the funeral provider to present the family with a General Price List at that time?

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780 *See* section II.A.1, *supra*.

781 R-B-6 at 28071.

782 *Id.* at 28089, n. 82 and accompanying text.

No. The Rule only requires funeral providers to offer the General Price List when people inquire in person about funeral arrangements. However, if the family wants to reserve your facilities and you are willing to make these arrangements at this time, then the family is entitled to receive a General Price List.[783]

The Guidelines further explain that providers need only give consumers a GPL in the described situation if the provider is willing at that time to make arrangements (reserve the facility) at the family's request

> [b]ecause they inquired about a specific funeral good. Under this approach, funeral providers would not be placed in the uncomfortable position of presenting a price list and appearing concerned about money at an awkward time unless they were willing to make specific arrangements. In addition, consumers would be ensured of receiving a price list before they made any specific arrangements.[784]

This illustration appears to clarify the Rule to exempt from the GPL requirements contacts away from the funeral home unless funeral providers are willing to make firm arrangements at those times. The NFDA in its Comment raised the concern that funeral directors do not understand the distinction made between consumers asking a question about availability and funeral providers agreeing, in response, to reserve facilities or provide requested services.[785] The testimonial evidence discussed above suggests that some funeral directors do perceive the Rule to require provision of the GPL as soon as consumers raise questions about the availability of funeral home facilities. Again, however, one would expect funeral directors to be aware of the distinction made in Illustration #17 because the enforcement staff also added it to the Guidelines at the NFDA's request to help avoid the awkward situations funeral director witnesses now attribute to the Rule.[786]

Finally, the Guidelines include the following illustration concerning the GPL "give for retention" requirement:

> Illustration #5: A family enters your establishment to discuss funeral arrangements for a relative. At that time you offer them your General Price List but the family refuses to accept it. Does the Rule require you to take any further steps to force the family to accept the list?
>
> No. The Rule merely requires that you offer it to consumers. If they do not wish to accept it or look at it, you are not required to take any further action.[787]

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[783] *Id.* at 28071.

[784] *Id.* at 28088.

[785] R-G-6 at n. 32, p. 59.

[786] R-B-6 at 28088, n. 80 and accompanying text.

[787] *Id.* at 28070. The Rule does require providers to "offer" the GPL by physically giving it to consumers, as opposed to verbally disclosing that the GPL is available. *Id.* at Illustration #4.

This illustration clarifies that the Rule does not require providers who offer the GPL to force or require consumers to accept or take it when they do not wish to do so.

Staff Recommendation

On balance, the staff concludes from its review of the record that the preponderance of the evidence does not support the sweeping amendments to, or repeal of, § 453.2(b)(4)(i) proposed by the NFDA and the NSM. The staff makes that conclusion particularly in light of the empirical evidence on providers' compliance with the current GPL requirements and the evidence that consumers want price and options information about funeral goods and services and value price information they receive early in the funeral transaction. On the other hand, the staff is persuaded by that compliance evidence (and by the fact that the Staff Compliance Guidelines evidently have not adequately clarified the Rule's requirements) that some fine tuning is necessary to promote increased compliance, thereby enhancing the Rule's opportunity to provide benefits to consumers. The staff's recommendation would thus remove apparent ambiguities and unnecessary rigidity in § 453.2(b)(4)(i) that appears to cause funeral directors to misinterpret their obligations under that provision.[788]

The NFDA-NSM proposals would, in view of the record evidence, unacceptably narrow the circumstances in which providers would be required to provide a GPL to consumers. First, the suggestion that providers "make available" a GPL could be tantamount to effective repeal of the entire GPL requirement if it means something other than physically giving the GPL to consumers.[789] Consumers would receive no GPL disclosures about funeral service prices or options, or concerning their rights in the funeral transaction under the Rule or other laws, unless they asked to see the GPL and providers voluntarily complied with their request. The staff concludes that such a change is not warranted, given record evidence on compliance and other evidence that consumers are reluctant to discuss price issues after the death of a loved one, that consumers desire price and options information, and that consumers benefit from price information they receive early in the funeral transaction.

Second, the NFDA suggestion that providers need only give a GPL to persons who inquire in person about the "price" of funeral goods or services would eliminate the current obligation to give a GPL to those who ask about prices or "funeral arrangements."[790] In light of the evidence just mentioned, this narrowing of the GPL distribution requirement is not supported by the record. Although one of the Rule's goals is to increase price competition, and, in turn,

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[788] Funeral providers' misinterpretation of the Rule's GPL requirements may be associated to some extent with the reported GPL compliance level, as well as with reported consumer expenditures. Providers may feel obliged to present the GPL with some "negative" comment about their duty under the Rule, or present the GPL later in the transaction, if at all, if they believe that they must give consumers the GPL in extremely awkward situations before price or selection discussions begin, and that giving the GPL at those times seriously offends consumers. Consumers as a result may lose the opportunity to use the GPL information in making selections of funeral goods and services.

[789] The NFDA and NSM do not in their Comments or Proposed Findings specifically explain or define the term "make available," or how this and their other suggested amendments would change the current requirements of § 453.2(b)(4)(i). Both groups in their Proposed Findings changed their suggested amendments from those contained in their comments on the NPR. Compare R-G-3 at 43 and R-G-6 at 66 with R-M-9 at 277.

[790] The NSM proposal does not suggest this change.

reduce overall consumer expenditures, the Commission also intended the provision of itemized price information to alert consumers to their various options and to permit them to select only those items they desired, whether or not expenses would be reduced as a result.[791] Lacking record evidence to support a change, consumers who inquire about providers' offerings, and not their prices, should thus be entitled to receive a GPL.

Third, the NFDA proposal that providers make the GPL available at the funeral arrangements conference before "specific" funeral goods and services are selected or prices discussed would remove the existing requirement that providers give the list at the beginning of arrangements discussions, wherever they take place.[792] Record evidence shows that consumers benefit from price and options information, including the GPL, they receive early in selecting funeral goods and services, and that at least some funeral arrangements, short of a formal "arrangements conference," often can and do occur away from the funeral home premises. Other evidence demonstrates that consumers' knowledge generally about the funeral transaction, although somewhat improved, is still relatively low. As a result of adopting the NFDA suggestion, consumers' opinions about the overall type of funeral service or individual items could thus be formed, or actual selections made, without the benefit of the GPL disclosures concerning prices, options and consumer rights under the Rule. In that event, the preponderance of the record evidence supports the conclusion that the GPL's purpose to provide ready price and options information for consultation while consumers are considering what goods to purchase, before they make selections, would be unnecessarily defeated.

Finally, The NFDA-NSM proposal that the GPL's "give for retention" requirement be changed so that only consumers who request to keep the GPL may do so is not supported by the record. The evidence indicates that most consumers value the GPL enough to keep it when it is offered for retention. The staff might not disagree with the NFDA suggestion if there were evidence that consumers are aware of their right under the Rule to retain the GPL. The record does not contain that evidence, however, and instead shows that consumers generally are unaware of their rights under the Rule.[793] There is thus no record basis from which to conclude that consumers would think to ask to retain the GPL. Consumers as a result would be denied the

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[791] R-B-5 at 42297.

The staff notes that virtually every funeral director who advocated a change in the GPL timing requirements expressed concern about when in the arrangements discussions might be the sensitively correct time to discuss "price" with consumers, and none spoke of the correct time to provide or discuss information about funeral service "options" and their relative cost. The record evidence, however, suggests that because price issues may not specifically arise early in the transaction due to mutual provider and consumer reluctance, consumers may choose particular types of arrangements, or specific items, without the benefit of information about the available alternatives unless they receive a timely GPL.

[792] The NSM proposal requires provision of the GPL prior to the discussion of selection or prices, whichever occurs first.

[793] A majority of consumer respondents to the AARP's "Excel" Study even were unaware that providers are required to give consumers written price lists when they come in to make arrangements. *See* Soulas, HX-76 at 3.

opportunity to use the GPL to comparison shop in at-need or pre-need situations,[794] or to compare authorized selections with final funeral home charges.

The staff, in contrast to the NFDA-NSM proposals to narrow the GPL timing and distribution requirements, recommends changes to remedy providers' stated concerns that do not so limit consumers' ability to effectively use the information provided by GPL disclosures. Based on its review of the evidence, the staff thus recommends that the Commission amend the preventive requirements of § 453.2(b)(4)(i) to read as follows:

(4) General Price List

(i) Give a printed or typewritten price list for retention to persons who inquire in person about the prices or the selection of funeral goods or funeral services. The funeral provider must offer the list upon beginning discussion either of prices or of the selection of any funeral goods or funeral services, including the overall type of funeral service or disposition, whichever discussion occurs first. This requirement applies whether the discussion takes place in the funeral home or elsewhere. Provided, however, that when the deceased is removed for transportation to the funeral home, an in-person request at that time for authorization to embalm, required by §453.5(a)(2), does not, by itself, trigger the requirement to offer the general price list if the provider in seeking prior embalming approval discloses that embalming is not required by law except in certain special cases. Any other discussion during that time about price or the selection of funeral goods or services triggers the requirement that providers give consumers the GPL.

The staff's recommended amendment would effect two changes to the existing requirements of § 453.2(b)(4)(i). First, the amendment would clarify the GPL "timing" requirements by breaking down the term "funeral arrangements" into its component parts, namely, discussions of "prices" or of the "selection" of funeral goods or services, including selection of the overall type of funeral service or disposition. This proposed change would eliminate the apparent provider misinterpretation that the GPL must be given immediately upon initiation of preliminary arrangements discussions that do not involve price or specific goods or services. It clarifies, however, that discussions about the overall type of service do trigger the GPL requirement, and that providers must give the GPL at the beginning of discussion of prices or selection, whichever discussion occurs first; record evidence indicates that some providers construe "selection" to mean choosing individual items, such as the casket or vault, and that other providers are reluctant to discuss the GPL until price issues are raised.

Second, the proposal would clarify the GPL "distribution" requirement now contained in a Guidelines interpretation that providers must give consumers the GPL whether price or selection discussions occur in the funeral home "or elsewhere." Record evidence shows that arrangements may occur away from the funeral home premises. However, the proposed amendment would exempt from the GPL requirement in person provider requests for prior embalming authorization

[794] The staff in section II.B.2, *supra*, discusses the record evidence that consumers may increase their comparison shopping before selecting a funeral provider as the marketing of pre-need funeral services increases.

if the provider makes essentially the same GPL disclosure required by § 453.3(a)(1)(ii) of the Rule concerning the legal necessity for embalming.[795]

Record evidence indicates that providers often may be placed in the uncomfortable position of responding to consumers' requests to discuss selections during removal of remains. If providers are willing to commit consumers to financial obligations at that time by making arrangements, record evidence supports consumers' right to receive a GPL. Record evidence discussed above and later in this report[796] also shows, however, that giving the GPL during removal may simply be awkward, offensive, and unnecessary if no other arrangements discussions occur at that time. That evidence further indicates that a provider's request for prior embalming authorization, by itself, may be the most potentially offensive situation for both consumers and funeral directors, because it is a request to perform an intrusive procedure so soon after the survivors' loss.

The Rule currently solves the issue for embalming requests made over the telephone by not requiring any disclosure in that case. But the GPL must be given if the request is made in person.[797] If no other selections are made when the provider seeks prior permission, arguably the most important information consumers need to make an informed response at that time concerns whether embalming is necessary. The proposed disclosure that embalming is not required by law except in certain special cases should trigger that discussion if the consumer so desires. The Rule's embalming provisions are predicated on that basis. The staff's proposal would simply substitute the disclosure of that information for provision of the entire GPL to reduce the burden on providers and consumers and to promote compliance with the Rule. Providers under the staff's proposed amendment would be in compliance if they either provided a GPL when seeking prior permission or made the required embalming disclosure.

d. Separate Basic (Non-declinable) and Other Professional Service Fees

Introduction

Section 453.4(b) of the Rule imposes the general legal requirement that consumers' selection of funeral goods and services be permitted on an itemized basis. However, § 453.4(b)(2)(i)(A) permits an exception to that general right to select. Under that provision, consumers may not decline the basic services of the funeral provider if the provider so requires. The provision in that event further requires that providers place on the GPL the statement that "However, any funeral arrangements you select will include a charge for our services." Providers under section 453.2(b)(4)(iii)(C) must also place the following disclosure on the GPL in conjunction with the price for the services of funeral director and staff, if the fee can not be declined: "This fee for our services will be added to the total cost of the funeral arrangements you select (This fee is already included in our charge for direct cremations, immediate burials, and forwarding or receiving remains)."

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[795] Any other discussion during that time about price or the selection of funeral goods or services would trigger the requirement that providers give consumers the GPL.

[796] *See* the discussion at Section III.G, *infra*.

[797] *See* R-B-6 at 28078 (Illustration #8).

The Commission in promulgating that exception reasoned that the process of selection itself involves use of the provider's services, irrespective of the actual goods and services chosen by consumers. The Commission thus permitted providers to make the services of the funeral provider non-declinable.[798]

The Commission also intended that the non-declinable fee for professional services would include only the charge for providers' basic services in arranging and planning the funeral, and not charges for services associated with providing any of the other sixteen items for which itemization is required on the GPL. The Commission, for example, specifically used the term "basic services" in referring to those services that consumers could not decline under § 453.2(b)(4)(iii)(C) (the GPL service fee disclosure requirement).[799] The Commission further described the Rule's definition of non-declinable "services of funeral director and staff" as those services used "in arranging the funeral, including such services as conducting the arrangements conference or planning the funeral services. It does not include services otherwise listed in [the GPL itemization requirements] such as embalming, transferring remains to the funeral home, etc."[800] The definition itself states that the services of funeral director and staff "are the services, not included in prices of other categories in Section 453.2(b)(4) which may be furnished by a funeral provider in arranging and supervising a funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits and placing obituary notices."[801]

The Commission, however, did not codify in the Rule its intent regarding basic services other than in the definition. No substantive Rule provision thus clarifies that providers in disclosing itemized fees on the GPL must separate "basic," non-declinable services from services associated with providing the other, declinable GPL goods and services, including such items as "use of facilities for viewing," and "use of facilities for funeral ceremony." The Final Staff Compliance Guidelines as a result contain lengthy interpretations of the Rule on that issue, concluding that the non-declinable fee for "services of funeral director and staff" may not include a charge for those services involved in providing any of the other items required to be separately listed on the GPL. Charges for those services, the Guidelines state, must be included in the price for each of those items. The Guidelines further conclude that the non-declinable fee for services may include the services listed in the Rule's definition of "services of funeral director and staff."[802]

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[798] *See* R-B-5 at 42282.

[799] *Id.*

[800] *Id.* at 42285.

[801] Section 453.1(o).

[802] R-B-6 at 28068-28069, 28076, and 28087.

The only fees permitted by the Rule to be non-declinable at the outset of the funeral transaction are the charges for "services of funeral director and staff" and items that are required by law.[803]

Several participants during the proceeding suggested that the Rule be amended to clarify that the GPL disclosures regarding professional services must be separated into the basic, non-declinable services and other services as intended by the Commission. The NFDA and NSM also asserted that the Rule should permit a non-declinable "basic facilities fee" in addition to the current non-declinable fee for professional services. The staff discusses those suggestions and the relevant evidence below, and makes appropriate recommendations concerning their merit.

Evidence Supporting Rule Changes

William Klein, a consumer member of the New York State Funeral Directing Advisory Board, suggested during the public hearings that the Rule's professional services fee disclosure should be further itemized. Mr. Klein suggested that it is unfair to require the provider to develop a single fee for those services when the provider does not know, in advance, exactly what combination of services he or she will be called upon to provide. Mr. Klein thus advocated that the Rule break down the current services fee into a non-declinable "Basic Arrangements" fee and a second fee for "Supervision" of particular arrangements chosen by consumers.[804]

Other witnesses expressed their view that the current services fee disclosure requirement may include items of service that all consumers do not receive with their arrangements, so that consumers may be paying for services not received.[805] These and other witnesses further suggested that consumers are unaware of that potential overpayment problem.[806]

Still other witnesses identified another problem with the current services fee disclosure. Those participants testified that, although consumers who "shop" among providers rely on quotes for service fees as a basis for comparison, providers in fact appear to include different items in

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[803] *Id.* at 28077 (Illus. #12). Cemetery or crematory requirements, embalming as a "practical necessity," and requests that are "impossible, impractical or excessively burdensome" to provide may result in "non-declinable" charges under certain conditions. Generally, however, those items are not considered "non-declinable" in the sense that consumers, at the outset of planning arrangements, have no choice but to purchase them.

[804] Tr. Vol. II, 1040, 1062. Several witnesses agreed with that proposal or made their own, similar suggestion. *See* Morrison, industry observer, Tr. Vol. II, 771, 778; Carlson, author, Tr. Vol. I, 500-502; Snyder, West Coast Director, Consumers Union, Tr. Vol. III, 1252-1253; Perguson, Seattle memorial society, Tr. Vol. III, 1219; and Blake, Wisconsin memorial society, Tr. Vol. II, 1121.

[805] Morrison, Tr. Vol. II, 771, 778; Karklin, consumer, Tr. Vol. I, 553; Carlson, Tr. Vol. I, 501-502; Snyder, Tr. Vol. III, 1252; Perguson, Tr. Vol. III, 1180; and Showalter, journalist/hospice counselor, Tr. Vol. II, 121, 148.

[806] *See, e.g.*, Bennett, clergy, Tr. Vol. I, 355; Carlson, Tr. Vol. I, 500-501; and Snyder, Tr. Vol. III, 1252.

their service fee charges. Price comparison among funeral homes is difficult as a result.[807] The record contains no evidence or views specifically controverting that just described.

Regarding facilities fees, the NFDA and NSM in their Proposed Findings asserted that the exclusion of a non-declinable "facilities fee" from the required GPL listing misinforms consumers about the cost of funeral services.[808]

The record contains little evidence on the facilities fee issue presented by the NFDA, but four witnesses expressed relevant views. Russell Johnson, President of the NSM, testified that a non-declinable facilities fee is a legitimate charge to inform consumers that they are purchasing the use of a facility to shelter and care for the remains.[809] Similarly, Wendell Hahn, who provides accounting services to 1,500 funeral home clients, asserted that providers' inclusion of the cost of providing a special-purpose facility in other charges, rather than showing it separately, violates proper accounting practice and may be deceptive pricing. Mr. Hahn concluded that the Rule should permit a separate basic facility charge that is non-declinable.[810] Robert Starks, a Michigan funeral director, appeared to say in his testimony that some funeral providers currently include items on their GPLs that could be viewed as non-declinable facility fees, such as fees for "parking lot use."[811]

Finally, Mr. Hahn and a witness appearing on behalf of the NFDA suggested that providers generally desire to keep their services fees low because of competitive or social concerns.[812]

Staff Conclusions and Recommendations

Based on its review of the evidence and the Rule, the staff agrees that the current requirements for the disclosure of the non-declinable and other service charges likely are causing compliance difficulties for some providers and informational problems for consumers.

The evidence indicates that some providers on their GPLs may not be fully separating non-declinable services from services associated with providing other items on the GPL. To the extent that is occurring, consumers that decline other items may be purchasing more services than they actually receive. Other consumers may be "double charged" for some services if providers,

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[807] Simms, funeral director, Tr. Vol. II, 495 (consumers rely on professional service price); Johnson, funeral director, Tr. Vol. I, 755-756; Botimer, funeral director, Tr. Vol. III, 1287; Starks, funeral director, Tr. Vol. II, 423-424); and Perguson, Seattle memorial society, Tr. Vol. III, 1177, 1180, 1219 (1987 Seattle survey for publication showed "services" vaguely and variously described).

[808] R-M-9 at 128.

[809] Tr. Vol. I, 745-746, 759.

[810] Tr. Vol. II, 671.

[811] Tr. Vol. II, 424.

[812] Hahn, FFDA, Tr. Vol. II, 678 (providers have not increased their services fee further because of an increased "price consciousness"); and Nilsen, funeral director, Tr. Vol. III, 1414-1415 (service fees are set on consumers' overall "ability to pay" -- some consumers could not afford a full pro-rated share of overhead costs).

confused about which services are declinable and which are not, include some portion of the services associated with declinable items, such as "use of facilities for viewing," in that charge as well as the non-declinable services fee. Still other consumers, or groups such as memorial societies that obtain and publish comparative price data, who attempt to comparison shop may not readily be able to do so.

Even if those problems are not occurring on a widespread basis, the staff concludes that the service disclosure requirements need to be clarified to fully implement the Commission's intent in permitting a non-declinable services fee.

The staff, however, concludes that amendment of the Rule to permit a non-declinable "basic facilities fee" charge is not warranted by the evidence or current Rule requirements. The Rule's core purpose is to permit itemization so that consumers may select only the funeral items they desire and decline unwanted items. The Rule currently allows providers to recover overhead for facilities by allocating a portion of those costs to each item offered or by including them in the non-declinable services fee. A second, non-declinable fee would, in the staff's view, signal a return to package pricing, where all consumers would pay for the use of all facilities irrespective of the degree to which consumers choose to use them. Itemization permits consumers to decline the use of various provider facilities. The testimony of at least one funeral director suggests, however, that some providers currently may be imposing in some form a "non-declinable" facilities fee on consumers, in apparent violation of the Rule.

Accordingly, the staff recommends with respect to service fees and non-declinable charges that the Commission amend the Rule to:

(1) revise the definition of "services of funeral director and staff" in § 453.1(o) to read: "The 'services of funeral director and staff' are the basic services, not included in prices of other categories in § 453.2(b)(4), that are furnished by a funeral provider in arranging any funeral, such as conducting the arrangements conference, planning the funeral, and obtaining necessary permits." (emphasis added to identify new language);

(2) add the term "basic" before the word "services" where the latter term appears in §§ 453.2(b)(4)(iii)(C)(1) and (2) and 453.4(b)(2)(i)(A), so that all GPL disclosures regarding the non-declinable service fee refer to "basic services" rather than simply "services";

(3) add the phrase "and staff" after the phrase "use of facilities" to §§ 453.2(b)(4)(H) and (I), so that providers are required to disclose the prices for use of facilities and staff for viewing and a funeral ceremony;

(4) replace the "other use of facilities" price disclosure requirement, § 453.2(b)(4)(J), with the more specific disclosures "use of facilities and staff for memorial service" and "use of equipment and staff for graveside service";

(5) add the following definitions to § 453.1 to distinguish memorial services and funeral ceremonies -- "A 'memorial service' is a ceremony without the body present," and "A 'funeral ceremony' is a service with the body present";

(6) add the language "The statement shall include the phrase 'and overhead' after the word 'services' if the fee includes a charge for the recovery of unallocated funeral provider overhead" to the disclosure requirements of §§ 453.2(b)(4)(iii)(C)(1) and (2) and 453.4(b)(2)(i)(A), so that disclosures regarding non-declinable services fees refer to "basic services and overhead," if appropriate; and

(7) add the following § 453.2(b)(4)(iii)(C)(3) to make clear that the Rule permits only one non-declinable fee: "The services fee permitted by §453.2(b)(4)(iii)(C)(1) or (C)(2) is the only funeral provider fee for services, facilities or unallocated overhead permitted by this part to be non-declinable, unless otherwise required by law."

Those recommended changes will clarify the Commission's intent and providers' obligations in distinguishing non-declinable service fees from other service charges associated with providing separately listed, declinable goods and services. The proposed changes are designed to promote industry compliance and consumer understanding of the services they must purchase and those they may decline, without substantially altering providers' existing obligations. The staff further recommends removing the service "placing obituary notices" from the definition of "services of funeral director and staff," because that service is already listed and considered as a "cash advance item" under
§ 453.1(c) of the current Rule. Finally, the recommendation to add "and overhead" to the non-declinable service fee disclosure responds to industry's stated concern that consumers may be deceived by service fee price disclosures that fail to disclose a charge for overhead, and clarifies for providers that the non-declinable fee can include overhead not allocated to other charges.

e. Standardized Price List

The Commission in the NPR sought comment on whether the adoption of a standardized price list ("SPL") would benefit consumers.[813] The AARP in its comment advocated standardization of the GPL, and several commentators suggested specific SPLs to be adopted.[814] The AARP argued that an SPL would facilitate price comparisons among funeral homes and simplify consumers' decisions by making the GPL easier to read.[815]

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[813] R-A-1 at 19869-70 (Question 10).

[814] Morrison, Tr. Vol. II, 771-775 (his model form solves what he perceives to be the biggest flaw in the FTC model form, namely that the definition of professional fees and services includes items which not all consumers receive in funerals. His form provides a lettering system whereby items which are matters of "practical necessity" are marked with the letter N. He testified that his form is simple to read as it is written for those with a 6th grade reading ability). *See also* Klein, NYSFDAB, HX-63 at 3-5, Exhibit I (proposing an SPL that lists direct cremation and immediate burial separately under the category of "Alternate Services." Service fees are divided between "Basic Arrangements" and "Supervision" and placed forward on the list; he also would require an urn price list).

[815] R-H-17 at 45-46.

The primary argument advanced for SPLs is that they would facilitate price comparison between funeral homes.[816] An SPL, they argued, would "enable consumers to compare competing funeral homes on the same criteria and would therefore stimulate competition within the industry."[817] The AARP argued that the "current failure of the Rule to mandate a standardized version of the GPL continues to inhibit price comparisons by even informed consumers."[818] Standardization of the price list, the AARP continued, would break down "one of the largest barriers to consumer shopping among funeral providers that currently persists."[819] Some consumer letters received by the AARP suggested that consumers have difficulty price-shopping due to varying, non-standardized GPLs.[820] Wendell Hahn, President of the largest industry accounting firm, testified that only merchandise such as caskets and outer burial containers may be safely compared between firms.[821]

Although one might argue that fully standardized price lists might facilitate consumers' use of the GPL to comparison shop, the GPL was not primarily intended for that purpose. Rather, the telephone price disclosure provisions directly address the problems associated with comparison shopping. Nonetheless, although the GPL is not completely standardized in terms of format and language, the Rule already requires a GPL that is relatively standardized; all GPL's must include a price listing for seventeen specified options and twelve specifically-worded disclosures concerning consumers' rights and options. In addition, the evidence indicates that thousands of funeral homes are already using one of several existing standardized GPL formats distributed by a number of companies.[822]

The AARP's second argument for SPLs more directly addresses the purpose for which the GPL was required. The AARP contends that increased standardization would "reduce current consumer confusion about funeral costs and requirements."[823] Paul Showalter, a newspaper reporter who conducted an informal survey by collecting some forty GPLs from Kansas City providers, concluded that he was "unable with any of those price lists to compute the price of a

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[816] Several participants in addition to the AARP raised this argument. *See, e.g.*, Buchanan, CAFMS, Tr. Vol. III, 1105, 1117; Brownstein, CAFMS, Tr. Vol. I, 167; Blake, Mem Soc'y, Tr. Vol. II, 1130; Geisberg, NACAA, Tr. Vol. III, 1137, 1146; Groenenboom, R-F-54 at 3; Klein, NYSFDAB, Tr. Vol. II, 1036; Klugman, Mem. Soc'y, Tr. Vol. III, 953; Memorial Society of Sarasota, R-F-143 at 1; Rouillard, CRLAF, Tr. Vol. I, 1354; and Tjardes, consumer, R-F-144 at 1.

[817] Consumer's Union, R-H-21 at 6.

[818] R-M-6 at 68.

[819] *Id.*

[820] R-H-17 at 53, Ex. 6.

[821] Tr. Vol. II, 621 ("and even some would say that's difficult").

[822] AARP, R-H-17 at 46-47 (the forms are prepared by: FFDA (with 1,500 clients) (Ex. 27); FDSA (300 members) (Ex. 28); Abigail Press in New York City and Peachtree Press in Atlanta; SCI (Ex. 29); New York State Funeral Board (2,000 providers) (Ex. 30); Mass. FDA (Ex. 31); and two pre-need insurance companies Forethought (Hillenbrand Industries) and Family Service Life Insurance (of SCI) (Ex. 32); *See also* Keith, NFDA, Tr. Vol. III, 1493.

[823] R-M-6 at 62-63; Dr. Nelson, AARP, Tr. Vol. I, 25 ("SPL would ensure price lists provided by funeral directors are in fact as usable as possible and, if you use the current phrase, as user-friendly as possible").

funeral just from the price list and to know with any certainty that [he] was correct."[824] William Klein, a consumer member of the New York Funeral Directing Advisory Board, testified that some funeral directors include "so much verbiage and puffery in their general price list that consumers tend to dismiss the GPL out of hand."[825] Dr. Mazis asserted that GPL layout and print size may vary, making it difficult for consumers, particularly the elderly, to read the information.[826] The AARP also argued that consumers may not understand from the current disclosure language precisely which funeral items are non-declinable.[827] Finally, Fred Bates of the NSM testified that consumers could confuse a Rule-required GPL with editorial and argumentative statements added by a provider to the required GPL language.[828]

Funeral directors, however, expressed concerns that an SPL would limit the expression of the creativity and individuality of funeral directors.[829] William Peirson, a funeral director, testified that he had worked hard to make his own GPL "a tool that the family will appreciate rather than some government mumbo-jumbo."[830] Another funeral director, L.E. Peebles, testified that funeral directors need to express their own personality in the pricing structure.[831]

The NFDA argued that a standardized price list would not be workable because it "would be impossible to obtain meaningful industry consensus on what terminology should be used, what services should be offered, and what listing priority should be given on such a list."[832] The NFDA was joined by the NSM and FDSA in asserting that funeral terminology and custom differs on a regional basis and varies significantly among different ethnic groups.[833] The FDSA concluded that the differences would render any uniform, standardized price list overly confusing.[834]

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[824] Tr. Vol. II, 137.

[825] Tr. Vol. II, 1036.

[826] Tr. Vol. III, 838.

[827] R-H-17 at 45 (model GPL should be tightened to ensure that the only non-declinable item is the funeral director service fee).

[828] Tr. Vol. I, 695-97 (discussing the GPL of Striffler Community Funeral Homes).

[829] Ninker, R-G-1 at 4 ("model GPL would take away more individual freedoms of small businesses and would dampen innovative approaches").

[830] R-D-1 at 3.

[831] Tr. Vol. III, 1560.

[832] R-G-6 at 48.

[833] R-G-3 at 37-38; R-G-5 at 16.

[834] R-G-5 at 16 ("the standard format would bring confusion because different areas of the country have their own style and terminology; 'hearse' may be 'funeral coach,"main stateroom' would not be used in Chicago. Ethnic customs, volume of cremation, and individual business practices all have an impact on the GPL format").

Although the staff does not necessarily find persuasive the concerns that custom and regional terminology will render an SPL unworkable,[835] the confusion cited by the AARP can be eliminated in a manner less intrusive than by dictating the precise form of the GPL. For example, some of the instances of confusing price lists cited as supporting the adoption of an SPL may constitute Rule violations. To remedy those that do not violate the Rule, the staff recommends two additions to the clear and conspicuous standard, discussed later in section III.I. of the report. The staff thus recommends against an amendment standardizing the GPL, which seems unwarranted in light of the evidence.

f. "No Charge" Items

The Rule currently requires a price to be listed for those items specifically mandated by § 453.2 to be on the GPL.[836] The NSM and NFDA asserted in their Proposed Findings that this requirement unnecessarily raises costs to consumers and harms funeral providers' goodwill. Those groups thus propose that the Rule be amended to allow funeral providers to provide consumers with complimentary goods and to list such "no charge" items on the GPL.[837]

In support of that conclusion, funeral industry representatives testified that, prior to the Rule, they routinely gave acknowledgment cards away free of charge as a courtesy to their customers.[838] Funeral providers suggest that, since the Rule requires that the cards be listed on the GPL, and that a charge be assessed for the cards if they are selected by the consumer, the Rule results in consumers paying for an item that they previously received for free. This results, providers say, in ultimately damaging their reputations by giving consumers the impression they are interested only in making money.[839]

Others testified that the listing of such an inconsequential item to the funeral arrangement as acknowledgment cards serves only to confuse consumers by making the GPL longer and more difficult to understand.[840]

The staff is sympathetic to the concerns raised by the NSM and NFDA, at least as they apply to acknowledgment cards. The purpose of the GPL generally is to notify consumers of the price of the more expensive funeral items. The cost of acknowledgment cards, however, is generally

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[835] New York State regulations, for example, require funeral homes to use a standard format for the GPL and itemized statement. 10 NYCRR 79.4(e), 78.2. *See also* NYS FDA, R-G-4 at 1 ("format has been flexible enough to allow distinctions between funeral homes' services and goods, which is necessary"); Dr. Nelson, AARP, Tr. Vol. I, 88 ("if you can come up with a format that will work in New York State, with all the diversity in that state, you can come up with one that can work just about anywhere").

[836] *See also* R-B-6 (Staff Compliance Guidelines) at 28087.

[837] R-M-9 at 225-226.

[838] Hunter, Tr. Vol. I, 779-780; *see also* Perguson, Tr. Vol. III, 1208.

[839] Hunter, Tr. Vol. I, 780.

[840] Showalter, Tr. Vol. II, 117; Johnson, Tr. Vol. I, 760.

only $5.00 to $8.00 per box.[841] To the extent the Rule's listing provision has caused providers to charge for an item that was previously provided free of charge, the Rule may have had the unintended result of contributing, at least in some small sense, to increased consumer costs. To the extent that the costs are recouped elsewhere, those costs appear to be so incidental as to be tangential to the Rule's primary purpose. In either case, the benefits of requiring acknowledgment cards on the GPL appear to be outweighed by the harm to funeral providers' reputations and consumer satisfaction. The staff thus concludes that the better course is to remove the provision from the Rule. The staff recommends that § 453.2(b)(4)(ii)(N), which requires providers to list acknowledgment cards on the GPL, be deleted. This recommendation would permit providers to provide complimentary acknowledgment cards.[842]

There is no record evidence to support, however, a general right for the provider to list any of the other items now required to be on the GPL as "no charge" items. The staff is concerned, for example, that if the Rule were to permit the listing of embalming or transportation as "no charge" items, their costs, which can amount to several hundreds of dollars, would be recovered in the prices of other items.[843] As a result, consumers would, in effect, not have the opportunity to decline the costs associated with important items. Such a change could thus result in the diminution of itemization and the return of package-only pricing, which the Rule was primarily designed to prevent.

g. Other Suggested Alternatives

Review participants made two other suggestions concerning the GPL. William Klein, a nine-year member of the New York State Funeral Directing Advisory Board, suggested that the GPL include cremation urns,[844] and three private or state consumer representatives suggested that the Rule require funeral providers to mail the GPL to requestors, for which providers could charge a fee.[845]

Cremation Urns

Cremation purchases have steadily increased since the Rule took effect. Currently, cremation accounts for over 14% of all deaths, and is expected to account for almost 25% of all deaths by the year 2000.[846] Of those people responsible for making cremation arrangements, 78%

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[841] Hunter, Tr. Vol. I, 779.

[842] The Compliance Guidelines note that the Rule does not prevent a funeral provider from providing complimentary items, as long as those items are not required to appear on the GPL by § 453.2.

[843] Of course, this might also be true for acknowledgment cards.

[844] Tr. Vol. II, 1041; HX-63 at 5. New York does not require an urn listing, but does require that providers disclose on the GPL the price of all additional goods and services routinely offered with an explanation of what is included. Official Compilation of Codes, Rules and Regulations of New York, Title 10, Part 79.4(e)(9).

[845] Giesberg, NACAA, Tr. Vol. III, 1161-1162; Dr. Mazis, AARP, Tr. Vol. III, 815; Snyder, CU, Tr. Vol. III, 1264.

[846] R-B-20 (CANA Comment) at Ex. 2-4; Purdy, HX-70 at 5.

purchase an urn.[847] However, the CANA argued that many consumers who select cremation do not purchase urns because they mistakenly believe that cremation is a form of final disposition, and thus are unaware that the cremated remains ("cremains") must be disposed of in some fashion. In support of this view, they assert that many cremains have been unclaimed at funeral homes.[848] The CANA attributes part of this problem to the funeral director's failure to discuss final disposition with the consumer.[849] Thus, the CANA concludes, requiring the listing of urns on the GPL might serve to alert some consumers to the fact that some form of disposition is necessary for the cremains.

However, the CANA did not suggest why requiring urns to be listed on the GPL is necessary to solve its perceived problem in the current market. Although such a requirement may help consumers become more aware of prices and options available, there is little evidence in the record to indicate that consumers are not receiving this information now. If providers offer cremation urns, presumably they would already have sufficient incentive to disclose the availability, and purpose, of urns.

On balance, the record does not contain sufficient evidence to justify expansion of the preventive requirement to require the listing of urns on the GPL.

GPL Mailing

Some consumer representatives also advocated that the Rule require a funeral provider to mail a price list to a consumer upon request. The funeral provider would be free to charge the consumer a fee for that service. They argue that such a requirement would result in greater public dissemination of important price information concerning the funeral transaction and make comparison shopping more likely to occur.[850]

Although one goal of the Rule is to facilitate comparison shopping, the Commission in its SBP recognized that widespread comparison shopping may not occur in at-need situations because decisions must be made quickly, usually within 24 to 48 hours.[851] As a result, mailing a price list may not be of much help to a consumer in an at-need situation; most funeral decisions would more than likely have been made by the time it was received.[852]

In contrast, evidence was presented indicating that pre-need consumers could benefit from a mailing requirement because they have the luxury of time and are more likely to engage in

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[847] Klein, Tr. Vol. II, p. 1041; HX-63, p. 5, citing the *American Funeral Director*, April 1988, p. 7.

[848] R-B-20 at 22-23; Purdy, Tr. Vol. II, 173; HX-70 at 24-25, 27. Of course, it is possible that some portion of those consumers simply do not wish to make decisions regarding the disposition of cremains.

[849] Purdy, Tr. Vol. III, 193-194.

[850] Snyder, Tr. Vol. III, 1264; Giesberg, Tr. Vol. III, 1162.

[851] R-B-5 at 5.

[852] Dr. Mazis, Tr. Vol. III, 815; CAFMS, R-H-5 at 3.

comparison shopping.[853] However, there is little evidence in the record to indicate that a funeral provider, if asked, would refuse to mail a price list to a potential customer. The AARP did offer survey evidence that purported to show a failure to mail out price lists when requested. Lee Norrgard, an Investigative Analyst for the AARP, acknowledged, however, that the low response by funeral homes to his survey request for price lists, made on behalf of the AARP, could be attributed to fears that any information provided might be used to bolster the AARP's position in the upcoming rule review proceeding.[854]

On balance, there does not appear to be sufficient evidence to justify the further intrusion of the Rule into funeral providers' business practices that a mailing requirement would impose.

3. Casket Price List

Introduction

Section 453.2(b)(2)(i) of the Rule requires that providers give a casket price list ("CPL") to consumers before showing caskets. The list must contain the retail prices of all caskets and alternative containers offered that do not require special ordering, the effective date of the list, and "enough information to identify each" casket and container.[855] The provision does not specify precisely what identifying information needs to be included in the list. As the staff discussed earlier in the report, the Rule's price list provisions were intended to address the funeral market's failure to provide itemized price information on the components of a funeral package. The lists generally were designed to provide ready price information for consultation while consumers are considering purchases of goods and services, before they make selections, and to facilitate comparison shopping if consumers so desired by providing relatively standardized price information.[856]

One commenter on the ANPR advocated that the CPL needs to include the manufacturer's name and model number for each casket offered to facilitate consumers' comparison of casket prices among funeral homes.[857] The staff determined to explore that issue in the proceeding because a casket typically is the most costly individual component of a funeral, and because other evidence provided in response to the ANPR suggested that consumer shopping for caskets may be increasing, at least on a pre-need basis, as a result of attempts by third-party casket sellers to compete with funeral homes. Those indications led the staff to consider that comparison shopping for caskets might substantially increase in the future. The staff below reviews the

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[853] *Id.* at 815, 817; Brownstein, Tr. Vol. I, 207-208; Perguson, Tr. Vol. III, 1204-1206; Karklin, Tr. Vol. I, 560.

[854] Norrgard, Tr. Vol. III, 910. He also conceded that he might have had more success if he had contacted the NFDA and asked for its support. *Id.* at 917.

[855] The Rule permits providers to incorporate the casket price list information in the general price list, thus using one combined list. The casket price list may also be presented to consumers in formats other than written lists, such as notebooks, brochures, or charts maintained at the funeral home. Unlike the general price list, the Rule does not require that the CPL be given to consumers "for retention."

[856] *See* R-B-5 at 42272.

[857] Longmire, R-B-61 at 3.

evidence provided on the issue of casket names and model numbers, and makes an appropriate recommendation.

Evidence Supporting or Refuting Rule Change

Rulemaking participants presented little specific evidence on the casket name and model number issue, largely because so many broader issues regarding the Rule occupied much of their efforts. Although § 453.2(b)(2)(i) does not specify what information is necessary to comply with the requirement to provide on the CPL "enough information to identify each" casket, most participants presumed that information about the casket's composition and exterior appearance (type of wood, metal and gauge, and color), exterior trim, and interior fabric would satisfy providers' obligation. The Final Staff Compliance Guidelines suggest that the described information would constitute compliance, and that providers could provide other information as well, including photographs or model numbers.[858] The record, however, contains no evidence that providers routinely include manufacturers' names or model numbers on their casket price lists.

Eight witnesses provided testimonial evidence based on their experiences in the industry. The Reverend Henry Wasielewski, who directs a group that gathers and publishes comparative funeral home price data in the Phoenix area, provided the most extensive views. He testified that currently there is no information generally available to consumers that would allow them to compare the various casket offerings of different funeral homes, because a casket can not be adequately described by consumers based on its appearance. Rev. Wasielewski also asserted that to be so even though all Phoenix providers deal with the same four or five casket manufacturers. The only way to compare caskets, he continued, is on the basis of their name and model number. Funeral directors, he testified, have said to him that only a provider can match caskets from different funeral homes based on currently available information. Rev. Wasielewski further stated that his group obtains casket names and model numbers from area providers, and advises consumers to compare casket offerings on that basis. Rev. Wasielewski concluded that, because one of the Rule's goals is to facilitate comparison shopping, the Rule should require the manufacturer's name and model number for each casket so that consumers have the means to do so.[859]

Four funeral directors also expressed their views on the name and model number issue. M.H. Longmire, who first suggested the Rule change in his ANPR comment, asserted that the current descriptions on casket price lists are inadequate for comparative purposes because they are "generic," and that the addition of the manufacturer's name and model number would thus help standardize the CPL descriptions to facilitate comparisons.[860] Jack Botimer, a "low-cost" provider in the Phoenix area who serves about a 1,000 funeral clients annually, supported the

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[858] R-B-6 at 28065 (sec. c. Illus. #1).

[859] Tr. Vol. III, 1627, 1650-1653.

[860] R-B-61 at 3; R-D-2 (NPR Comment) at 4-5.

proposed requirement to list each casket name and number, stating in addition that the information would not confuse consumers or burden his business.[861]

Duke Radovich, in contrast to that testimony, testified that consumers choose caskets at his facilities based on appearance and protective capabilities, and that consumers do not look at model numbers. Mr. Radovich also asserted, however, that consumers are unaware of model numbers, and that their disclosure by providers would assist competitors.[862] Similarly, Dr. James Reveley, a former funeral director, asserted his view that information concerning casket body style, color and gauge of metal is sufficient information for consumers, and that the addition of manufacturer name and model number would be confusing. Dr. Reveley further testified, however, that providers generally stock the same caskets that they acquire from shared wholesalers.[863]

The remaining witnesses supported the proposed name and model number change for various reasons. William Klein, a consumer member on the New York State Funeral Directing Advisory Board, suggested that the additional information might not mean much to consumers, but would help comparisons and facilitate consumers' knowledge that they received the casket they selected.[864] John Buchanan, President of the CAFMS, expressed his view that casket names and prices are important because of the expense involved and the existing price dispersion for caskets.[865] Finally, a California memorial society official stated his support for the addition of manufacturers' names and model numbers on the CPL, and testified that, to his knowledge, providers typically offer the same line of caskets.[866]

The NFDA and NSM concluded from the information just described that the record contains insufficient evidence to support the proposed addition to the CPL because no showing has been made that the change would benefit consumers.[867]

Staff Conclusion and Recommendation

The staff concludes that, on balance, the required addition of the manufacturer's name and model number for each casket listed on the CPL is warranted by the record evidence viewed as a whole. The evidence indicates that consumers' interest in shopping for caskets is increasing, but that comparisons among providers' casket offerings are difficult, if not impossible, on the basis of casket descriptions currently provided on the casket price lists. The evidence further indicates

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[861] Tr. Vol. III, 1285-1286, 1336 (Mr. Botimer stated that his CPL contains listings for 50 caskets).

[862] Tr. Vol. III, 1037-1038, 1060.

[863] Tr. Vol. III, 885-886.

[864] Tr. Vol. II, 1042, 1063.

[865] Tr. Vol. III, 1119.

[866] Tr. Vol. III, 935.

[867] R-M-9 at 210-212.

that the manufacturer's name and model number would be the most objective and easily compared information available to consumers who wish to shop.

One might argue, however, that given the record evidence that shopping in this market appears to be infrequent, at least on an at-need basis, the addition of CPL information for comparative purposes would not appear to offer significant benefits for many consumers. The staff responds that the record evidence discussed elsewhere in this report indicates that: (1) consumers are increasingly price-sensitive for the selection of caskets; and (2) since the Rule's promulgation, consumers appear to be choosing competitively-priced caskets offered by "low-cost" funeral homes or third-party pre-need sellers, in numbers sufficient to pose substantial competition to more traditional funeral homes. That evidence indicates, in the staff's view, that consumer shopping for caskets is likely to increase over time. The staff concludes that the addition of the manufacturer's name and model number identifying each casket listed on the CPL is likely to provide pro-competitive benefits to consumers by facilitating those comparisons. The Commission stated that one purpose of requiring the itemized, casket price list information was to "provide a relatively uniform format for the information which will be given to consumers over the telephone, further facilitating comparison shopping."[868]

The staff further concludes that the proposed manufacturer name and model number requirement would not impose substantial, additional costs on providers. The NFDA, NSM and other funeral trade groups and members provided uncontroverted evidence that most providers use looseleaf notebooks or binders, as opposed to printed price lists like the GPL, to satisfy the Rule's casket price list obligation.[869] Those alternative formats, they revealed, permit frequent changes and are far more detailed than separate, summary lists.[870] Mr. Botimer, a funeral director who conducts about 1,000 funerals annually, testified that casket manufacturers provide the notebooks for all the caskets he offers.[871] Providers thus likely have names and model numbers available already, and merely would need to revise the notebooks by substituting casket descriptions that include the manufacturers' names and model numbers for the current descriptions. The Commission in its SBP stated that this flexibility minimizes the burdens imposed by the CPL requirement on provides when they need to change their casket inventory.[872]

Accordingly, the staff recommends that the Commission amend section 453.2(b)(2)(i) by adding the phrase "including the casket manufacturer's name and model number for each listed casket" in the third sentence of that section, between the phrase "enough information to identify each," and the phrase "and the effective date for the price list."

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[868] R-B-5 at 42292.

[869] R-G-6 (NFDA Comment) at 101-102; R-G-3 (NSM Comment) at 56; R-G-4 (New York State Fun. Dir. Ass'n. Comment) at 2; R-G-5 (FDSA of Chicago Comment) at 26; Radovich, PAA, Tr. Vol. III, 1059; and R-D-2 (Longmire Comment) at 5.

[870] R-G-6 (NFDA) at 101-102; R-G-3 (NSM) at 56; R-G-5 (FDSA) at 26.

[871] Tr. Vol. III, 1309, 1336.

[872] R-B-5 at 42273.

E. Misrepresentations and Disclosure Provisions

1. Requirements and Purpose

Section 453.3 of the Rule currently requires funeral providers to make specific written disclosures on the price list and the itemized statement of goods and services selected. The Commission in its Statement of Basis and Purpose determined that, due to funeral providers' false claims or failure to disclose accurate information, many consumers erroneously believed that certain procedures (such as embalming) or particular goods (such as caskets for cremation and outer burial containers) were required purchases not subject to individual choice, and that goods and services had certain protective and preservative qualities when such was not the case.[873] Although the record did not contain evidence that certain misrepresentations (such as the protective and preservative claims of goods and the requirement of a casket for cremation) were widespread, the Commission determined that their inclusion in the Rule was necessary because of their pernicious nature, or because of the substantial, potential cost that could be incurred by consumers who make purchase decisions based upon incorrect assumptions of material facts.[874]

Section 453.3 thus declares that it is a deceptive act or practice for funeral providers to misrepresent: embalming requirements, casket for cremation requirements, outer burial container requirements, legal and cemetery requirements, preservative and protective value of funeral goods and services, and cash advance charges. The provisions of § 453.3 are designed to prevent those deceptive practices and to correct consumers' misconceptions by requiring written disclosures on both the price lists and the itemized statement.

Section 453.3(a) prohibits misrepresentations about the necessity for purchasing embalming services and requires a written disclosure on the general price list. The disclosure informs consumers that embalming is generally not required by law, but that it can be necessary for certain funeral arrangements. The statement also tells consumers that they can usually select an arrangement that does not require embalming.

Section 453.3(b) prohibits provider misrepresentations that a casket is required for a cremation. This section prohibits any representation that a casket, other than an unfinished wood box, is required for cremations by law or otherwise, and requires a written disclosure on the general price list that informs consumers that they can buy an unfinished wood box or alternative container for direct cremation. The companion section 453.4(a)(2) requires providers who arrange direct cremations to "make available" unfinished wood boxes or alternative containers so that consumers will not have to buy a casket for that purpose.

Section 453.3(c) was intended to prevent providers' representations that legal or cemetery requirements oblige consumers to purchase outer burial containers, particularly relatively expensive grave vaults, when such is not the case. The provision is designed to correct consumers' resultant lack of awareness that outer burial containers might not be required by law, and that, if they are required by cemetery regulations, less expensive grave liners would satisfy

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[873] R-B-5 at 42274-42279.

[874] *Id.* at 42276-42278.

that requirement. The section thus prohibits those misrepresentations and requires a written disclosure on the outer burial container price list, or if appropriate, on the general price list. The disclosure tells consumers that, in most areas of the country, there are no laws that require outer burial containers. The statement also informs consumers that cemeteries may require such containers to prevent the grave from sinking, and that either a vault or a grave liner will satisfy that purpose.

Section 453.3(d) complements §§ 453.3(a)-(c) by generally prohibiting representations that the law or particular cemeteries or crematories require the purchase of any funeral goods or services when such is not the case. This section also requires providers who represent that such a requirement exists to identify and describe it in writing on the statement of goods and services selected provided to consumers at the end of the arrangements conference.

Section 453.3(e) is intended to prevent provider misrepresentations found to exist about the preservative or protective value of certain goods (caskets and outer burial containers) and services (embalming). The section simply prohibits misrepresentations about the ability of any funeral goods or services to preserve the body for a long time or to protect it from gravesite substances.

Section 453.3(f) prohibits misrepresentations about consumers' cost of cash advance items and requires a written disclosure on the general price list that a provider charges for services in buying those items, if that is the case.

2. Repeal or Modify Required Disclosure Language

The NFDA and NSM proposed that the Rule be amended to delete the twelve affirmative disclosures just described.[875] Those groups argued that the disclosures are unnecessary because the record shows that they have not had the desired effect of reducing consumer spending. Some witnesses attributed that result, in part, to the fact that consumers in an at-need situation are unwilling or are unable to assimilate the information presented by the disclosures.[876]

Other evidence, however, indicates that the Rule's misrepresentation and disclosure provisions are providing consumer benefits. For example, the Replication Study results show that purchases of unnecessary caskets and embalming for cremation arrangements have declined since the Rule took effect. Those purchases were likely unnecessary because, in a cremation service with or without a memorial service, the body is not present during the service and is cremated rather than buried. The BLS and RS data, however, indicate that the number of consumers who bought unneeded embalming as part of their cremation service declined from 18% in 1981 to 9% in 1987. The data also show that the number of consumers who purchased an unneeded casket for cremation also declined from 11% in 1981 to 2% in 1987.[877] Of those consumers in both years

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[875] R-M-9 at 225; R-G-6 at 67.

[876] Prof. Sommer, consumer researcher, Tr. Vol. III, 628, 641; Blake, memorial society representative, Tr. Vol. III, 1120; Yurs, funeral director, Tr. Vol. II, 517.

[877] R-B-2 and R-B-3 data tapes, Qs. 36 and 40. *See also* R-M-5 (Staff Rebuttal) at 9.

who purchased an unnecessary casket for cremation, all but one appear to have done so because they were told by the funeral director that a casket was required.[878]

The evidence also shows that consumers' knowledge about caskets for cremation, embalming requirements, and the preservative abilities of sealed caskets has increased since 1981 by 6%, 11%, and 18%, respectively.[879] Although some misrepresentations by funeral directors have decreased and consumer knowledge has increased somewhat, the empirical evidence indicates that misrepresentations still occur.[880] Consumers who are knowledgeable about funeral requirements and products, or who do not receive misrepresentations, are far less likely to buy unnecessary items.

The NSM has argued throughout the proceedings that the affirmative disclosures should be repealed because they are an unreasonable restriction on the industry's right to free speech, in violation of the First Amendment.[881] The staff notes, however, that the Court in *Harry & Bryant Co.* v. *FTC*, resolved that issue, holding that the Funeral Rule did not violate funeral directors' First Amendment rights of commercial free speech.[882]

In the alternative, funeral industry representatives suggested that funeral providers be allowed the flexibility of presenting the disclosures using their own words.[883] Individual providers argued that the required language is too rigid and can confuse or mislead consumers, because the required terminology may not be common to the locale or because of differing legal requirements among the states. Providers concluded that the disclosures should contain essential information, but be tailored to the idiosyncrasies of the locale and its state regulation.[884]

Consumer representatives expressed opposition to any Rule amendment that would allow providers to present the disclosures in their own words. Standardized language, they asserted, helps to ensure compliance by eliminating intentional or unintentional confusion and misrepresentations. Those witnesses concluded that allowing providers to use their own language could harm consumers by increasing the risk of consumers receiving incorrect information, or no information at all.[885] Two funeral directors concurred with that finding.[886]

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[878] *Id.* (Q. 52) *See also* MacKenzie, R-F-39 at 1 (mortuary insisted $800 casket was necessary if cremation was to be performed).

[879] *Compare* R-B-3 (BLS) at Table 9, p. 32 *with* R-B-2 (RS) at Table III-54, p. III-85.

[880] *See* the compliance discussion in section II.A.2, *supra*, and the discussion below regarding individual disclosure requirements, at sections III.E.3-7, *infra*.

[881] R-G-3 at 47-48; R-M-9 at 221-223.

[882] 726 F.2d 993 (4th Cir.), *cert. denied*, 469 U.S. 820 (1984).

[883] R-G-6 (NFDA) at 78-79; R-G-3 (NSM) at 45; R-G-5 (FDSA) at 21.

[884] Johnson, HX-30 at 8-9; Farrow, Tr. Vol. III, 581, 587-587; Yurs, HX-43 at 4-5; and Hunter, Tr. Vol. I, 784.

[885] Wertheimer, NAEL, Tr. Vol. III, 988; Dr. Mazis, AARP, Tr. Vol. III, 867; Klein, NYSFDAB, Tr. Vol. II, 1066; Dr. Nelson, AARP, Tr. Vol. I, 88; Giesberg, NACAA, Tr. Vol. III, 1148; and Consumers Union, R-H-21 at 7.

The staff concludes that, on balance, the record does not provide a substantial basis to repeal the twelve affirmative disclosures. Although the empirical data indicate that consumers' knowledge has increased somewhat under the Rule, and that some misrepresentations have declined, the data also show that misrepresentations are still occurring, particularly in areas where consumer knowledge is still low, such as embalming. The evidence further demonstrates that consumer knowledge of funeral requirements and products is still at a minimal level. Viewed together, those facts warrant the continuation of the disclosure provisions.

In addition, there does not appear to be sufficient evidence to warrant an amendment allowing funeral providers to use their own disclosure language. That change would make it more difficult for the enforcement staff to monitor compliance. Standardized language ensures that all consumers are receiving identical information. The staff is aware, however, that the language of several of the disclosures has created some problems and confusion for funeral providers. The staff is therefore recommending changes to some of the disclosure provisions in order to clarify the Rule's scope and requirements, or to reduce potential disclosure burdens. Based on record evidence, the staff is recommending modifications to § 453.3(a) (embalming), § 453.3(b) (casket for cremation), § 453.3(c) (outer burial containers), and § 453.3(f) (cash advances). The staff discusses those recommendations below in §§ III.E.3-5 and 8.

3. Embalming Disclosure

Introduction

Rule section 453.3(a) prohibits: (1) representations that embalming is required by law when that is not true, or is required for direct cremation, immediate burial, a funeral using a sealed casket, or a closed casket funeral without viewing or visitation when refrigeration is available and embalming is not otherwise required by law; and (2) the failure to disclose that embalming is not required by law, except in certain special cases. That section requires the following written disclosure on the GPL informing consumers that embalming is optional, and may depend on the type of arrangements selected:

> Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement that does not require you to pay for it, such as direct cremation or immediate burial.

Section 453.3(a) works in tandem with § 453.5(b), which requires a disclosure on the final bill or agreement informing consumers of their right to decline payment for embalming under certain conditions, and that a written explanation will appear on the bill if a fee for embalming is charged.

The Commission included those sections in the Rule to correct widespread consumer misimpressions that embalming is required by law or by funeral home policy in all cases. That misinformation, the Commission found, was caused by provider misrepresentations and omissions

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[886](...continued)
[886] Peirson, R-D-1 at 3; and Longmire, R-D-2 at 5.

of material fact, and resulted in consumer purchases of embalming services in cases where the service might not otherwise be purchased.[887]

The NFDA and NSM during the proceeding recommended repeal of the affirmative embalming disclosure, or, if the provision is retained, an amendment to shorten the disclosure. The Casket Manufacturers Association ("CMA") in its comment further suggested removal in § 453.3(a)(2)(i) of the prohibition against representations that embalming is required for a funeral using a sealed casket.[888] The staff below discusses those proposals and the relevant evidence, and makes recommendations based on its review.

Evidence Supporting or Refuting Rule Changes

The NFDA and the NSM in their proposed findings asserted that the affirmative embalming disclosure regarding the legal and practical requirements of embalming gives consumers incomplete and potentially misleading information, citing the testimony of two witnesses discussed below.[889] Those groups also determined that the Rule's affirmative disclosures, including the embalming disclosure, have had no effect in reducing consumers' funeral expenditures or purchases of embalming services.[890] The NFDA and NSM on that basis recommended repeal of the embalming disclosure or, if the provision is retained, the following amendment to reduce its complexity and fully inform consumers:

> 453.3(a) Embalming Provisions
>
> (2)(ii) Place the following disclosure on the general price list required by Section 453.2(b)(4), in immediate conjunction with the price shown for embalming: In many cases, embalming is not required by law. In some situations, however, embalming may be required. If embalming is not desired you may choose an arrangement which does not require embalming. [changes underscored].[891]

Relevant empirical evidence in the record indicates that: (1) misrepresentations concerning embalming requirements are still occurring; (2) consumer knowledge about those requirements, although somewhat improved, is still low; (3) consumers appear to be purchasing fewer embalming services for cremation than in 1981, including "unneeded" embalming; (4) industry compliance with the Rule's requirements to give consumers a timely GPL, which contains the embalming disclosure, appears to be low; about half request prior approval for embalming, as required; and (5) a majority of surveyed funeral directors agree with the general proposition that the Rule-required information is beneficial to consumers.

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[887] R-B-5 at 42276.

[888] R-E-6 at 3.

[889] R-M-9 at 130.

[890] *Id.* at 113; R-G-6 (NFDA Comment) at 69, 74.

[891] *Id.* at 229; R-G-3 (NSM Comment) at 48.

Sixteen percent of those RS respondents who went to the funeral home and purchased embalming reported receiving one or more of the following three representations prohibited by the Rule: (1) embalming is always required by law; (2) embalming is required by law to protect the funeral home staff from disease; and (3) embalming is required by the funeral home.[892] Respondents also said that they were told that embalming would preserve the body for a long or indefinite time in 6% of the cases.[893] The results further indicate that as many as 12% of the respondents may have received one or more misrepresentations concerning embalming requirements prior to cremations.[894]

Regarding consumer knowledge, half of the 1987 RS respondents incorrectly said that embalming is always required as a public health measure; 61% answered that way in 1981.[895] The thirty respondents in a "focus group" study, conducted for the Commission in November 1988 in Baltimore, could not reach a consensus on whether embalming was an available option or was mandatory in all cases; most respondents believed that the law required them to have the deceased embalmed.[896]

Comparison of the Replication and Baseline Studies further shows that cremation purchasers in 1987 selected fewer embalming services than in 1981, including "unneeded" services. Those results indicate that cremation buyers' overall choice of embalming services declined from 35% in 1981 to 26% in 1987.[897] The analysis also shows that 84 consumers in 1981 and 98 people in 1987 purchased a cremation with or without a memorial service. The purchase of embalming services in these circumstances would appear to be unnecessary because the body is not present during the service and is cremated rather than buried. Nonetheless, in those cases 15 people in 1981 and 9 in 1987 bought embalming services.[898] Thus, in 1981, 15 of 84, or 18%, of those consumers who purchased cremation services for which embalming should not have been required purchased that service. That figure declined in 1987 to 9%.

Results from the 1987 Replication and 1988 Gallup Studies provided similar, systematic evidence of industry compliance with the Rule's GPL and prior embalming approval provisions. The GPL contains the affirmative embalming disclosure. About two-thirds of the respondents in both studies said that they received a GPL sometime during the arrangements at the funeral

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[892] R-B-2 data tapes, Question 39; R-B-2 at IV-8.

[893] *Id.*

[894] The study subjects reported that providers made the following four types of prohibited representations concerning that issue: (1) embalming is always required by law (4%); (2) embalming is required by law to protect the funeral home staff from disease where cremation does not occur until after a viewing (2%); (3) embalming is required by the funeral home (4%); and (4) embalming is required by the funeral home to which the body is to be shipped (2%). R-B-2 data tapes, Question 54; R-B-2 at IV-8.

[895] R-B-2 (Market Facts Report) at Table III-54, p. III-85; R-B-3 (Baseline Study Report) at Table 9, p. 32.

[896] Schwarcz, Opinion Centers America, Inc., HX-83 at 14, Tr. Vol. III, 460-461.

[897] R-B-2 at Table III-42, p. III-67; R-B-3 at Table 3, p. 23.

[898] R-M-5 (Staff Rebuttal) at 9 (B-2 and B-3 data tapes, Qs. 9, 36 and 40).

home.[899] Of those RS respondents who received a GPL, however, 62% said that the provider offered them the GPL "to keep;"[900] forty-two percent of the RS respondents (68% x 62%) thus reported that providers gave them a GPL for retention, as the Rule requires. More importantly, the RS data provided evidence that 23% of respondents received a GPL at the outset of funeral arrangements discussions, in accordance with the Rule's requirements.[901]

Concerning prior approval, 50% of the RS respondents and 47% of the Gallup respondents who purchased embalming services said that the funeral provider asked them for prior embalming permission, as required by the Rule.[902] Of those RS respondents who were asked, 58% said that the funeral director used the term "embalm(ing)" in making the request, in compliance with the Rule, and 21% said that more general terms were used.[903] Overall, 63% of the RS respondents who said that the deceased was embalmed reported giving authorization for that procedure sometime in the transaction.[904]

Four individual witnesses provided testimonial evidence relating specifically to the affirmative embalming disclosure. Larry Farrow, Executive Director of the Texas Funeral Service Commission, expressed his concern that the disclosure language implying that embalming may be required in some circumstances is inconsistent with, and less stringent than, Texas law; that law does not require embalming at any time.[905] Richard Yurs, a funeral director appearing on behalf of the NFDA, testified that consumers in his experience have not selected alternative dispositions to avoid embalming costs, and that the required disclosure is confusing and incomplete because it does not explain what embalming is or the circumstances in which it is required.[906] In contrast, Paul Showalter, a journalist and hospice counselor, stated for the record that some consumers do want the knowledge and opportunity to decline embalming because of the cost.[907] Finally, the immediate past-president of the NSM, Mr. Fred Hunter,

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[899] Daniel, HX-122 at 19 (68% compliance, 23% non-compliance); Colasanto, HX-66, Exhibit B, Tabulations, at 27 (64% comply, 31% non-comply).

[900] R-B-2 at IV-4.

[901] HX-122 at Table VIII, p. 20. Another 26% reported that they got the GPL after discussions had begun but before selection of the casket or container. *Id.*

[902] R-B-2 at IV-7; HX-66, Ex. B, Tabs, p. 57. Twenty-six percent of the RS respondents and 37% of the Gallup respondents said that they were not asked, and, respectively, 24% and 17% of the respondents could not remember; actual compliance with this provision could thus be substantially higher or lower than these figures suggest.

[903] R-B-2 at IV-7.

[904] *Id.* at Table III-42, p. III-68 (11% did not give authorization, and 26% could not remember). The Rule permits a provider to charge for embalming if prior permission can not be obtained after exercising due diligence, the provider has no reason to believe that the family does not want embalming, and the provider obtains subsequent authorization.

[905] Tr. Vol. III, 552, 586-587.

[906] HX-43 at 4-5.

[907] Tr. Vol. II, 145.

asserted that consumers should be informed about arrangements for which embalming is not required.[908]

The record contains little evidence concerning the merits of deleting the prohibition of representations, contained in § 453.3(a)(2)(i), that embalming is required for a funeral using a "sealed" casket. The CMA in its Comment asserted that a sealed casket is not designed to contain odors associated with body decomposition, so that odors would escape during a funeral in the absence of embalming or refrigeration. The CMA thus concluded that, in the absence of refrigeration, embalming is a "practical necessity" even where a closed, sealed casket is used with the funeral.[909] A representative of Hillenbrand Industries, a major casket manufacturer, provided similar statements for the record.[910] Dr. James Reveley, however, a former funeral director and embalmer, testified that recognized methods of short-term preservation other than embalming are available, even without refrigeration, that could make embalming unnecessary for a closed-casket funeral.[911] The final witness, a memorial society official, testified that embalming is unnecessary where a closed casket is used, even though odors may escape.[912]

Staff Conclusions and Recommendations

The staff concludes based on its review of the record evidence and the relevant Rule provisions that repeal or modification of the affirmative embalming disclosure and misrepresentation provisions, as suggested by the NFDA, NSM and CMA, is not warranted. However, some "fine-tuning" of those provisions, and simple editing, does appear warranted to reduce unnecessary compliance burdens and facilitate the enforcement of disclosure laws in states that do not require embalming under any conditions.

Empirical, record evidence indicates that the affirmative disclosure provision is providing benefits to some consumers who appear to be purchasing fewer embalming services for cremation and whose knowledge about embalming requirements has increased since the Rule's promulgation. The evidence further shows that those benefits appear to be accruing to consumers even though providers may be giving timely disclosures through provision of the GPL only about 25% of the time, and may be requesting prior embalming approval in about half of the cases. That evidence thus demonstrates that the benefits of disclosure may increase over time as compliance with, and consumer knowledge of, embalming requirements increase. The empirical evidence further indicates that retention of the affirmative disclosure is necessary because embalming misrepresentations, though not widespread, are still occurring at least 16% of the time.

The empirical evidence also reveals, however, that the embalming rate for funerals with a burial has not changed since 1981. That is a logical result, in the staff's view, given that about

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[908] Tr. Vol. I, 799.

[909] R-E-6 at 3.

[910] Koepcke, HX-110 at 1-2.

[911] Tr. Vol. III, 901.

[912] Blake, Tr. Vol. II, 1104-1105.

two-thirds of the survey respondents in 1981 and 1987 purchased open-casket funerals, arrangements that typically require embalming as a practical necessity. The staff also notes, however, that the surveys also documented a 3% increase in cremation purchases and a corresponding decline in open-casket and closed-casket burial arrangements since 1981. That change in consumer behavior, coupled with the described reduction in embalming selections for cremation, was responsible for an overall decrease in embalming selections of 2.4% since 1981.[913] The staff concludes that one could not expect much further decline in embalming since the Rule's inception in light of the low overall levels of industry compliance with, and consumer knowledge of, the Rule's embalming requirements demonstrated in the record.

The staff further concludes that the modification to the affirmative disclosure language suggested by the NFDA is unwarranted. That language, although it would shorten the disclosure, appears to reverse the substantive implication contained in the current disclosure that embalming is generally not required. By stating that embalming is not required "in many cases," the suggestion, in the staff's view, is that embalming is also required in many cases. The remainder of the proposed language appears far less informative than the existing disclosure, and potentially misleading, because it does not specify any of the arrangements that might or might not require embalming, and because it implies that consumers may always choose an arrangement that does not require it. As the current disclosure implies, consumers in fact may not have a choice in cases where embalming is required by law or is a practical necessity.

The staff thus recommends that the Commission retain the affirmative disclosure provision, but make the following amendments to reduce potential compliance burdens, and accommodate state laws that do not require embalming under any conditions:

(1) Add at the end of § 453.3(a)(2)(ii) the sentence: "The phrase 'except in certain special cases' need not be included in this disclosure if state or local law in the area(s) where the funeral provider does business does not require embalming under any circumstances."; and

(2) Add at the end of § 453.3(a)(1)(ii) the phrase "if any", to acknowledge in the definitional section that state or local law may not require embalming.

With respect to the sealed casket issue raised by the CMA, the staff concludes that the record contains insufficient evidence supporting removal of the phrase "a funeral using a sealed casket" from § 453.3(a)(2)(i) of the Rule. The Commission determined when it promulgated that section, in contrast to the CMA's assertion, that embalming was not a practical necessity when sealed caskets are used.[914] The CMA states as much in its Comment, when it asserts that embalming is necessary in the absence of refrigeration. The evidence also indicates that methods other than embalming are available that will preserve the body long enough to prevent potential problems in a closed-casket funeral.

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[913] *See* Daniel, HX-122 at Table IV, p. 10.

[914] *See* R-B-5 at 42276.

The staff, however, recommends rephrasing that section to correct awkward wording and promote providers' understanding of their compliance obligations. The staff thus proposes that the Commission change that language to read:

> (i) Not represent that a deceased person is required to be embalmed for: (1) direct cremation; (2) immediate burial; (3) a funeral using a sealed casket; or (4) a closed casket funeral without viewing or visitation when refrigeration is available and when state or local law does not require embalming. (new phrasing emphasized).

4. Casket for Cremation Disclosure

   a. Treatment of "Unfinished Wood Box"

Introduction

Section 453.3(b) prohibits representations that a casket, other than an "unfinished wood box," is required for cremations by law or otherwise, and requires the following written disclosure on the general price list informing consumers that they can use an "unfinished wood box" or alternative container for direct cremation:

> If you want to arrange a direct cremation, you can use an unfinished wood box or an alternative container. Alternative containers can be made of materials like heavy cardboard or composition materials (with or without an outside covering), or pouches of canvas.

The companion, anti-tying section 453.4(a)(2) requires that providers who arrange direct cremations make available an "unfinished wood box" or alternative container for those dispositions so that consumers will not have to buy a casket *de facto*.

The Commission included the term "unfinished wood box" in the Rule to accommodate a concern raised by consumer groups and other participants in the original proceeding that the traditional low-cost container extant at that time, the "plain pine box," might be considered a casket or an alternative container.[915] The Commission thus defined an "unfinished wood box" as a type of casket,[916] but treated it for purposes of the Rule like an alternative container. That treatment thus required the references to an "unfinished wood box" in the definitional and disclosure provisions of § 453.3(b) and in § 453.4(a)(2) of the Rule.

ANPR commenters, however, presented information that the disclosure required by § 453.3(b)(2) may be confusing and inapposite where providers do not stock unfinished wood boxes, but offer other containers as permitted by the Rule. To correct that situation, one ANPR commenter suggested deleting the reference to an "unfinished wood box" so that no distinction is made, for purposes of the Rule, between an "unfinished wood box" and other types of alternative

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[915] R-B-5 at 42285 and n. 265.

[916] The Rule in § 453.1(p) defines an "unfinished wood box" as an "unornamented casket made of wood which does not have a fixed interior lining."

containers available for use in direct cremations. The Commission so summarized that information in the Notice of Proposed Rulemaking.[917]

Evidence to Support Rule Modification

Several rulemaking participants provided testimonial evidence that the required reference to an "unfinished wood box" in the casket for cremation disclosure is outdated and may cause unnecessary consumer confusion and expense. Funeral director witnesses testified that "unfinished wood boxes" (or plain pine boxes) are difficult to obtain and more costly than other alternative containers because they are custom-made.[918] Funeral directors as a result generally do not recommend or offer unfinished wood boxes for use in direct cremations, these witnesses stated, but provide other, less-expensive containers.[919] Those participants concluded that the Rule's requirement that providers make reference to wood boxes on their GPLs thus causes confusion and the potential for unnecessary consumer expenditures, and should be deleted.[920] The Casket Manufacturers Ass'n. similarly suggested that an "unfinished wood box" should be contained within the Rule's definition of an "alternative container," because the wood box is an alternative container, and is not recognized as a casket by any segment of the funeral industry.[921] No rulemaking party presented evidence disputing the evidence or suggestions just described.

The NFDA and NSM in their Proposed Findings thus proposed that, if the Rule is retained, the casket for cremation disclosure required by Rule section 453.3(b)(2) be amended to read as follows:

> If you want to arrange a direct cremation, we can provide you with a suitable alternative container. The alternative containers we can provide include
> _____.[922]

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[917] R-A-1 at 19867.

[918] Yurs, HX-43 at 5-6, Tr. Vol. II, 517; Dr. Reveley, Tr. Vol. III, 873, 892 (costs more than the minimal coffin because it is custom made); and Kroboth, container expert for CANA, Tr. Vol. I, 483-484 (wood boxes are the most costly of alternative containers for use in direct cremation).

[919] *Id. See also* R-G-3 (NSM Comment) at 47; and R-G-6 (NFDA Comment) at 123-124. Those other containers are typically constructed of fiberboard (heavy cardboard) or composition materials, as currently described in the casket for cremation disclosure. *See, e.g.*, Inman, shipper/embalmer, Tr. Vol. II, 253; and Hunter, NSM, Tr. Vol. I, 815-816.

[920] *Id.* Mr. Hunter of the NSM suggested that the same reasoning applies to the requirement to list "canvas pouches" in the casket for cremation disclosure, which type of container he does not, and is not required to, offer. HX-31 at 11-12.

[921] R-E-6 (CMA Comment) at 1-2. The least expensive caskets offered by providers would not be considered an "unfinished wood box" because they are "finished" and have interior linings. The CMA also suggested substituting "corrugated fiberboard" for "heavy cardboard" in the definition of "alternative container," because the former term is the correct industry description for those containers. *Id.*

[922] R-M-9 at 229. *See also* Hunter, NSM, Tr. Vol. I, 817-818.

That proposal would remove the reference to an "unfinished wood box," as well as the description of various alternative containers, and would require that providers list the types of alternative containers they actually offer for use in direct cremations.[923]

Staff Recommendations

The staff concludes from its review of the evidence and the Rule provisions that the NFDA-NSM-CMA position has merit and that § 453.3(b)(2) should be amended. The Rule currently permits providers to make unfinished wood boxes or other types of alternative containers available for use in direct cremations. The Rule only makes that distinction because the Commission at the time it promulgated the Rule relied on evidence that a wood box might be confused with a casket, which could not be required for direct cremations under the Rule. Currently, however, the industry apparently does not view the "unfinished wood box" as a type of casket, and providers generally do not appear to offer that type of container for direct cremation because they are more expensive than other, more readily-available containers. The staff thus concludes in light of the evidence that there is no need to distinguish, for purposes of the Rule, between an "unfinished wood box" and other alternative containers, and that deletion of the former term from the required disclosure would benefit both consumers and providers.

The staff, however, does not recommend that the Commission amend the casket for cremation disclosure to delete the language generally describing the types of alternative containers, as suggested by the NFDA-NSM proposal. The purpose of that language is to distinguish alternative containers from caskets to further insure that consumers are aware of their right under the Rule to use less expensive alternatives to a casket for direct cremations they choose. No party presented evidence for the record that the casket for cremation disclosure burdens providers or consumers in ways other than those mentioned above. Record evidence discussed earlier in the Report indicates that, overall, the casket for cremation provisions of the Rule provide benefits to consumers by increasing their knowledge of casket for cremation requirements, reducing the level of misrepresentations, and contributing to consumers' purchase of fewer caskets for cremation.[924]

The staff thus recommends that the Commission amend § 453.3(b)(2) of the Rule to: (1) delete the required reference to an "unfinished wood box;" (2) include the types of containers the provider can make available, as suggested by the NFDA and NSM; and (3) substitute "fiberboard" for "heavy cardboard" in the description of containers (and in the alternative container definition). As proposed, § 453.3 (b)(2) would read as follows:

> If you want to arrange a direct cremation, you can use an alternative container. Alternative containers encase the body and can be made of materials like fiberboard or

[923] Mr. Kroboth, appearing on behalf of the CANA, agreed that there should be a disclosure of the type of container providers make available to prevent direct or implied misrepresentations about how the remains will be handled. Tr. Vol. I, 480, 494-495. *See also* Springer, CANA, Tr. Vol. II, 350.

[924] *See* the discussion in section III.E.2, *supra*.

composition materials (with or without an outside covering). The containers we provide are (specify containers).[925]

That recommendation necessitates other, complimentary proposals to conform related Rule sections -- references to an "unfinished wood box" in §§ 453.1(p) (definition), 453.3(b), and 453.4(a) would also be deleted, and "unfinished wood box" would be added to the definition of an "alternative container" (§ 453.1(b)). That definition would then state:

(a) Alternative container. An "alternative container" is an unfinished wood box or other non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of fiberboard, pressed-wood, composition materials (with or without an outside covering) or like materials.[926]

b. Treatment of "Pouches of Canvas"

Introduction

Rule section 453.3(b)(2), requiring a disclosure about alternative containers for cremation, and section 453.1(b), defining those containers, include a description of the types of alternative containers available. That description contains a reference to "pouches of canvas," one type of alternative container generally available when the Rule was promulgated. Section 453.4(a) further requires that providers make available an alternative container. Those provisions, however, do *not* require that providers who arrange direct cremations offer any particular type of alternative container, or that any specific one actually be used, or that consumers use any container at all for direct cremations.

The Commission purposefully left to the industry any decisions about specific requirements for alternative containers. Providers or crematories, for example, could under the Rule require that consumers purchase a "rigid" container as a condition for arranging a direct cremation.[927] The descriptions contained in the Rule sections mentioned above are only examples of containers used to help consumers and providers distinguish the term "alternative container" from a casket -- providers can offer and consumers can use containers not mentioned in the description.[928]

Position of the CANA

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[925] The staff's recommendation to delete all references to "pouches of canvas" is discussed fully below.

[926] *Id.*

[927] The CANA had suggested in the original proceeding that crematories should be allowed to require the use of caskets for safety-related reasons, arguing that "rigid" containers facilitate the handling of remains, and that CANA members require the use of rigid, opaque and safely combustible containers. *See* R-B-5 at n. 216 and accompanying text.

[928] *See* R-B-5 at 42281; and R-B-6 (Staff Compliance Guidelines) at 28090.

Section 453.2(b)(4)(ii)(C)(1) of the Rule also gives notice that consumers may use an alternative container obtained from a third party -- it requires providers to list a separate price for direct cremations where the purchaser supplies the cremation container.

The CANA asserted in its Rebuttal comment and Proposed Findings that the Rule should be amended to require mandatory minimum standards for alternative containers for direct cremation. The CANA reasoned that the Rule's current definition of "alternative container" permits funeral providers to use, and crematories to accept, containers that are undignified and unsanitary, and that do not meet industry standards.

The CANA based that conclusion on its findings that: (1) the use of alternative containers has increased since the Rule took effect; (2) many containers currently used meet the Rule's existing definition, but fail to fully encase the body, allow for the leakage or spillage of body fluids, and are not sufficiently rigid to permit placement of the body in the cremation chamber in a proper and dignified manner; (3) these inadequate containers pose health hazards for crematory personnel, cause undignified transportation and cremation of remains, and contribute to misrepresentation to consumers who assume that the remains will be handled in a proper and dignified manner; (4) the Rule is partially responsible for these problems because it has contributed to the increases in the cremation rate and the use of alternative containers, because its references to inadequate alternative containers ["pouches of canvas"] adds the "appearance of legitimacy" to those types of containers, and because it does not require disclosure of the type of container selected; (5) minimum container standards can not be effectively imposed on a voluntary basis because crematories are under competitive pressures to accept inadequate containers; and (6) although most crematories impose some minimum container standards, a substantial portion of those standards do not address all the requirements necessary for adequate containers.[929]

To remedy its concerns, the CANA recommended that the Rule's definition of the term "alternative container" be amended to read:

> a non-metal receptacle or enclosure, without ornamentation or fixed interior lining, which is designed for the encasement of human remains and which meets the following minimum requirements: (1) is able to be closed in order to provide a complete covering for the human remains; (2) is resistant to leakage and spillage; (3) is rigid enough for handling with ease; and (4) is able to provide for the health, safety and personal integrity of crematory personnel.[930]

The CANA also suggested that three other amendments be added to insure that providers and crematories can not avoid the requirement for minimum containers. Two of those proposed amendments would make it an unfair practice for a provider to deliver or for a crematory to accept or cremate remains in an alternative container that does not meet the minimum standards for alternative containers set forth in the revised definition. The final amendment would delete the reference to "pouches of canvas" contained in the Rule's casket for cremation disclosure.[931]

Evidence to Support Rule Modification

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[929] R-M-1 (Rebuttal and Proposed Findings) at 10-21, 24-27. Mr. Hunter, President of the NSM, agreed with the CANA's assessment of the inadequate container problem. Tr. Vol. I, 784-785, 815-818.

[930] R-M-1 at 39.

[931] *Id.* at 39-40.

The CANA presented empirical and testimonial evidence to support its position through several witnesses appearing on its behalf. Jack Springer and Bret Kelsey presented the results of a CANA survey of 920 crematories concerning the types of alternative containers they accept for cremation and sell to consumers.[932] Those witnesses stated in their combined report that the use of alternative containers for all cremations reported by survey respondents increased about 9% between 1983 and 1987, from 65.6% to 74.3%; the use of caskets declined about 5% in the same period, from 22% to 17%.[933]

Messrs. Springer and Kelsey also reported that, with the exception of the requirement that the receptacle be leakproof, the survey results indicate that the great majority of crematories now impose container requirements comparable to those proposed by the CANA, and that the great majority of containers purchased from crematories are already in compliance with the CANA's proposed amended definition.[934] Messrs. Springer and Kelsey concluded in their report that the CANA's proposed amendment to the Rule's definition of "alternative container" is thus intended to "help bring the small percentage of industry crematories that do not already comply with these standards up to what is a generally accepted industry level."[935] The average wholesale and retail cost of those acceptable alternative containers, according to the CANA report, is $13.90 and $21, respectively.[936]

Several witnesses appearing for the CANA also provided testimonial evidence on the points raised by CANA in its findings. Those participants asserted that: (1) many inadequate containers that meet the Rule's definition of "alternative container" are currently used;[937] (2) the Rule

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[932] The CANA sent the survey to 450 CANA members and 520 non-members. The results represent the analysis of those 372 crematories that responded. Springer/Kelsey, HX-40 at 9.

[933] *Id.* at 14-15.

[934] *Id.* at 17, 20. Specifically, the following percentages of respondents said that they require that the container be: (1) rigid (86%); (2) leakproof (48%); (3) capable of fully enclosing the body (80%); and (4) combustible (86%). *Id.* at 16-17 and Tables 21-25. Similarly, the following proportions of the crematories surveyed reported that the type of container most frequently selected was: (1) rigid (84%); (2) leakproof (39%); (3) capable of fully enclosing the body (78%); and (4) combustible (90%). *Id.* at 19 and Tables 33-36. Finally, the following percentages of respondents said that they would not accept a body for cremation that was delivered to their facility in a: (1) cloth or plastic sheet (75%); (2) plastic or canvas pouch (69%); (3) receptacle that did not fully enclose the body (76%); and (4) unlined, non-rigid cardboard box (52%). *Id.* at 17-18 and Tables 26-29.

[935] *Id.* at 8. The staff notes, however, that Messrs. Springer and Kelsey in their report asserted that, as a greater number of crematory operators become more aware of the health hazards that are posed by the leakage of body fluids from alternative containers, the percentage of crematories that require that the container be leakproof will increase significantly and reach a level more comparable to the other requirements. *Id.* at 17.

[936] *Id.* at 23.

[937] Kroboth HX-17 at 3, Tr. Vol. I, 466 (about 400 of the 1800 containers used at his crematory, or 22%, are inadequate); Purdy, President, CANA, HX-70 at 16 (has seen use of opaque plastic sheeting, which has FTC Rule approval), Tr. Vol. III, 176-177; Springer, CANA Executive Director, Tr. Vol. II, 314-315, 348; Inman, shipper/embalmer, Tr. Vol. II, 243-246; and Kroboth, HX-17 at 3.

promotes the use of inadequate alternative containers for direct cremation;[938] (3) containers that are not rigid and leakproof pose serious health hazards to crematory technicians, principally from fluid contamination, and permit undignified handling of remains;[939] and (4) competitive pressures do not permit many crematories to impose acceptable standards.[940]

Staff Conclusion and Recommendation

The staff recognizes the CANA's legitimate concerns for the health of crematory workers and the dignity of deceased human remains. The staff, however, concludes that the record evidence does not support imposition by the Commission of a mandatory standard for alternative containers, as suggested by the CANA. No party presented empirical evidence that the proportion of unacceptable containers, as opposed to alternative containers generally, has increased since the Rule took effect, or that the use of those types of containers is directly attributable to the Rule. The Funeral Rule did not enlarge the definition of alternative containers extant in 1984, and, purposefully, did not restrict crematories from requiring rigid, leakproof and closed containers. The CANA nonetheless suggests that the Rule should be amended to correct the problem, even if it is not the source of that problem.[941]

The evidence does establish that the use of containers generally has increased, and that the industry standard concerning acceptable containers has changed since 1983. The documented increase in the use of alternative containers for cremation, at the expense of caskets, appears to be a clear benefit of the Rule. The Commission in the SBP noted the CANA's assertion that its members at that time required "rigid, opaque and safely combustible" containers. The industry standard now evidently includes an additional criterion -- that the container be leakproof. The evidence, on balance, indicates that the leakproof requirement has been added in order to protect crematory personnel from contamination by expelled bodily fluids. That type of change concerning what the industry considers an acceptable container is precisely why the Commission left to the industry the ability to establish specific container requirements.

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[938] Kroboth, Tr. Vol. I, 488 (Rule "opened the door" to allow a sheet or canvas/plastic pouch as an alternative container); Springer/Kelsey, HX-40 at 6 (Rule partly to blame due to inadequate definition and disclosures that promote sheets and pouches); Springer, Tr. Vol. II, 348, 352-353 (no one really thought of the alternative container being a sheet or a plastic bag until the FTC published the definition of what was acceptable as an alternative container); and Kelsey, Tr. Vol. II, 314 (Rule allows use of various inadequate containers).

[939] Kroboth, Tr. Vol. I, 468 (alternative containers as defined by the current Rule offer no protection to cremation technicians in the event fluid is expelled from the dead human remains; in cases where death was attributed to an infectious or contagious disease, embalming most likely did not occur, and the cremation technician may not be fully aware of the danger to which he or she may be exposed when handling the dead human remains); Landrum, HX-39, Tr, Vol. II, 285-286, 293; Inman, Tr. Vol. II, 245, 254-255, 272-273; and Springer, Tr. Vol. II, 305. *See also* R-B-20 (CANA Comment) at 20; and Hennessy, funeral director, Tr. Vol. II, 1006-1008.

[940] Kroboth, Tr. Vol. I, 467, 488-489 (Rule put the crematory operator into a position where the facility had to accept non-rigid containers because of competitive practices); Springer, Tr. Vol. II, 308 (some crematories have had to lower their standards to compete); and Inman, Tr. Vol. II, 242-243, 254-255, 274, 277.

[941] R-M-1 at 10.

Regardless of the industry standard, the empirical evidence presented by the CANA clearly demonstrates that the great majority of crematories presently require containers that substantially meet the CANA's proposed standard. Although half of all crematories appear to require a "leakproof" container, CANA's Executive Director testified that the CANA expects that proportion to increase significantly as crematories' awareness of the health hazards posed by inadequate containers increases.

The staff reasons that, if the CANA's concern about inadequate containers is primarily one of a lack of adequate health and safety standards (without a showing that unfair or deceptive practices exist), as suggested by its Executive Director,[942] then amendment of the Rule to mandate an alternative container standard is beyond the scope of this proceeding, and probably that of the Commission's rulemaking authority. If the CANA's concern is misrepresentation to consumers, it would appear reasonable to delete the Rule's references to "pouches of canvas" or require that providers disclose the types of containers they offer, as the staff recommended above. The CANA in its Rebuttal statement discounted disclosure as an adequate remedy because consumers probably would not actually see the container they chose, and would likely continue to assume that the remains of their loved one are being handled with more dignity and propriety than they actually are.[943] The CANA's own survey evidence, however, indicated that only 7%-11% of consumers who are given the opportunity to view the container before or after the body is placed inside it choose to do so.[944]

The staff thus concludes that the evidence does not warrant amendment of the Rule to require that providers offer, and crematories accept, a standardized alternative container for direct cremation. Nonetheless, the staff believes that the current definition should be changed to more accurately describe the types of alternative containers generally available and accepted by crematories in the current market in order to prevent any confusion or potential, implied misrepresentation concerning handling of the remains that the current definition might cause. Accordingly, the staff recommends that the Commission amend the definition of the term "alternative container" and the casket for cremation disclosure to delete references to "pouches of canvas," and reiterates its recommendation to require that providers list in the casket for cremation disclosure the types of containers they offer. Those recommendations are included in the revised sections described above in subsection a.

5. Outer Burial Container Disclosure

Introduction

Section 453.3(c)(2) of the Rule requires a written disclosure on the outer burial container price list, or, if appropriate, the general price list. The disclosure informs consumers that, in most areas of the country, no laws require that they purchase an outer burial container ("OBC"), but that many cemeteries require such a container to prevent the collapse of the grave space. The

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[942] Springer, Tr. Vol. II, 351 (the alternative container issue is basically a moral issue and a health issue).

[943] R-M-1 at 20.

[944] Springer/Kelsey, HX-40 at 21-22 and Tables 38-39.

statement must also inform consumers that "either a grave liner or a burial vault will satisfy these requirements."

This provision was adopted to prevent funeral directors from misrepresenting to consumers the state law or cemetery requirements regarding the necessity of purchasing outer burial containers.[945] The provision also serves to reverse consumers' general lack of awareness that outer burial containers may not be required and that grave liners, rather than the substantially more costly burial vaults, would adequately satisfy any such requirement.[946]

Modify Required Disclosure Language

The NFDA and NSM advocated repeal of the outer burial container affirmative disclosure, or, in the alternative, deletion of the language that any OBC requirement would be satisfied by either grave liners or burial vaults.[947] In support of these proposals, those groups argue that the OBC disclosures are unnecessary. The disclosure informing consumers about legal requirements, they argue, is immaterial to purchase decisions because nearly all cemeteries require outer burial containers;[948] the disclosure alerting consumers to the availability of grave liners has had no effect on the volume or quality of OBCs or grave liners purchased by consumers.[949] The NSM and NFDA thus concluded that the information provided by these disclosures is not material to the consumer's purchase decision; consumers were purchasing these goods and services because they desired them, not because they erroneously believed that they were required by law.[950]

The NFDA and NSM cite to the testimony of Richard Wehman to support the argument that the grave liners disclosure should be repealed because it has resulted in no benefits to the consumer. Mr. Wehman appeared on behalf of Doric, Inc., one of the three or four largest manufacturers of OBCs in the United States.[951] Mr. Wehman testified to the results of surveys taken in 1984 and 1988 among Doric franchisees.[952] According to these surveys, OBC sales among a majority of Doric franchisees nationwide have increased from 1984 to 1988, as has the

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[945] R-B-5 at 42277 ("Some funeral directors, however, have told consumers that state law required the purchase of an outer burial container or have misrepresented cemetery requirements regarding burial vaults").

[946] *Id.* ("...many consumers may purchase a burial vault in the erroneous belief that there are no alternatives").

[947] R-M-9 at 230. The submitted alternative to current §453.3(c) would replace the disclosure about grave liners with the following language: "We will be glad to check with the cemetery at your request to ascertain its requirements, if any."

[948] *Id.* at 131.

[949] *Id.* at 132.

[950] *Id.* at 219.

[951] *Id.* at 82-83.

[952] Wehman, HX-44 at 1-2.

quality of merchandise sold in that period.[953] Based on that data, the NFDA asserts that consumers under the Rule have not switched from the expensive burial vaults to the relatively inexpensive grave liners.[954]

The Wehman data is limited, however, to one of several OBC providers. That evidence regarding the effect of the disclosure requirement on the quantity of OBCs purchased is thus inconclusive. In the staff's view, however, it would not be surprising if the level of OBC purchases had not changed significantly since the passage of the Rule. Less than a majority of providers may be complying with those sections of the Rule requiring provision of the OBC disclosures.[955] Those statistics also do not reflect the efforts of some providers who, according to testimony, may deny consumers access to information about less-expensive grave liners.[956]

Other evidence indicates that provider misrepresentations may also lead consumers to buy unnecessary OBCs, or to purchase the outer burial vaults rather than the less expensive grave liners. Empirical evidence from the Gallup Study further indicates that a third of those respondents who purchased OBCs and who were given information about protective features of grave liners or burial vaults were told that those protective features would help preserve the body indefinitely.[957] The Replication Study results further show that 18% of respondents reported being told that OBCs were required by law.[958] Finally, a cemeterian testified that funeral providers may still misrepresent the preservative and protective value of the more expensive vaults.[959]

Staff Recommendation

In light of the overall staff conclusion that compliance with the Rule provisions and the level of consumer knowledge about the Rule are low, it is not surprising that the level of consumer

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[953] *Id.* at Exhibit B at 1-3. These results led Wehman to conclude that:

"...I see no evidence that the enactment of the Funeral Rule in 1984 has adversely affected either the volume of burial vault sales or the level of quality of burial vault sales." *Id.* at 2.

[954] R-G-6 at 71.

[955] R-B-2 at IV-5 - IV-6 (33% of consumers responded that they were not shown prices for vaults or liners in any form. Sixty-seven percent of the RS respondents reported receiving itemized container information as part of the GPL or separately, but 65% of those who said they were shown a separate OBC-PL reported that they saw it before being shown the grave vaults or liners).

[956] Nelson, PAA, Tr. Vol. II, 238-39 (A consumer going through the showroom will probably not even see a grave liner; he will see and be offered only an expensive vault); Showalter, Tr. Vol. II, 151 (relaying a story of a consumer who was shown only a vault although she specifically asked to see a grave liner; and concluding that "funeral homes are undermining the process of selection and steering consumers into more expensive purchases").

[957] Colasanto, Tr. Vol. III, 58.

[958] R-B-2 at Table III-50, p. III-79.

[959] Nelson, PAA, Tr. Vol. II, 239 (providers may suggest that vaults offer some additional protection for the deceased and consumers pay money to get this additional protection).

expenditures on OBCs may not have fallen since 1984. Record evidence also shows that misrepresentations regarding the need for OBCs are still occurring, and that some funeral providers still misrepresent the preservative and protective value of those containers. The staff thus concludes that, on balance, the record evidence supports retention of the OBC disclosure provision.

In order to make the Rule read more easily and to prevent unnecessary confusion, however, the staff recommends that the wording of the Rule be altered slightly and that a sentence be added to the provision to permit providers to delete the phrase "in most areas..." if no state or local law requires the OBC.[960] The modified disclosure provision would read as follows:

> To prevent this deceptive act or practice, funeral providers must place the following disclosure on the outer burial container price list, required by §453.2(b)(3)(ii), or, if the prices of outer burial containers are listed on the general price list, required by §453.2(b)(4), in immediate conjunction with those prices: "In must areas of the country, state or local law does not require that you buy a container to surround the casket in the grave. However, many cemeteries require that you have such a container so that the grave will not sink in. Either a grave liner or a burial vault will satisfy these requirements." <u>The phrase "in most areas of the country" need not be included in this disclosure if state or local law in the area(s) where the funeral provider does business does not require a container to surround the casket in the grave.</u> (new sentence underscored).

6. Legal and Cemetery Requirements

Section 453.3(d) of the Rule prohibits funeral providers from making misrepresentations to consumers that there are legal requirements making the purchase of goods and services a necessity. This section also applies to any misrepresentations concerning alleged requirements of cemeteries or crematories for the purchase of merchandise or services. A violation of this section would occur, for example, if a funeral provider told a consumer that state law requires embalming or a casket for cremation where it does not, or that a cemetery requires an outer burial container when such is not the case. In order to deter this type of conduct, this section requires a provider to describe any requirement to purchase any funeral goods or services because of a legal, cemetery, or crematory requirement in writing on the statement of goods and services selected provided to the consumer at the arrangements conference.

No rulemaking party presented evidence for the record suggesting changes to § 453.3(d). The record does contain evidence, however, that these types of misrepresentations still occur. For example, 7% of the 1987 RS respondents who bought a casket for cremation said that they were told the purchase was a necessity, and 16% of the respondents reported that the provider may have made various misrepresentations concerning the necessity for embalming.[961] The RS data further indicates that 18% of the respondents were told that an outer burial container was

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[960] This addition is similar to the change made to the embalming disclosure provision; *see* III.E.3, *supra*.

[961] R-B-2 data tapes. The RS results also indicate that almost all of the consumers who were told that embalming or caskets were required for a cremation did make those purchases. *Id.*

required by law.[962] An AARP analysis of 210 consumer complaints filed with the FTC found that 6% of these complaints concerned possible misrepresentation of legal requirements.[963]

In light of the available evidence indicating the continuation of misrepresentations of legal, cemetery, or crematory requirements, the staff can find no basis for repeal or modification. The staff therefore recommends no changes to § 453.3(d).

7. Preservative and Protective Value Claims

Section 453.3(e) of the Rule prohibits funeral providers from representing that certain funeral goods and services, such as caskets, outer burial containers, or embalming, have protective or preservative qualities that will delay natural decomposition of the body for a long-term or indefinite time. Providers are also prohibited from claiming that these goods and services will protect the body from gravesite substances, when such is not the case.

No rulemaking party presented evidence for the record suggesting that changes to § 453.3(e) are necessary. Empirical evidence, however, shows that the misrepresentations prohibited by this provision are still occurring. The Gallup Study results indicate that 30% of the survey participants who purchased a casket and received product information reported that they were told by the funeral director that the casket had protective features that would help preserve the body indefinitely;[964] about 30% who purchased a liner or vault and received product information also reported they were told that the grave liner or burial vault would help preserve the body for an indefinite time.[965]

The staff concludes in light of the evidence that there is no record basis to warrant the amendment or repeal of § 453.3(e).

8. Cash Advance Disclosure Language

Introduction

Section 453.2(b)(4)(i)(D) of the Rule requires that funeral providers disclose on their GPLs the fact that those lists do not include prices for various "cash advance"[966] items that providers

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[962] R-B-2 at Table III-50, p. III-79.

[963] R-H-17 at 21.

[964] Colasanto, HX-66 at Exhibit B, p. 2; Tr. Vol. III, 58.

[965] *Id.*

[966] Section 453.1(c) of the Rule presently defines "cash advance items" as:

any item of service or merchandise described to a 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, the

(continued...)

often obtain from third parties on the consumer's behalf.[967] The required disclosure further states that prices for those items will be listed on the provider's bill or the statement of goods and services selected. Section 453.3(f)(2) further requires that providers who charge for or receive a rebate, commission or trade discount for obtaining a third-party item disclose the following statement on the GPL immediately after the cash advances disclosure just mentioned: "We charge you for our services in buying these items."

These required GPL disclosures were intended to serve the purpose of alerting consumers to undisclosed mark-ups of items obtained by providers from third parties when consumers believe that those items are provided at no cost.[968]

Repeal or Modify Disclosure Language

In its initial report, the staff recognized that it could be beneficial to make some changes in the Rule regarding cash advance disclosures. Specifically, the staff found that:

> No evidence has yet been received to indicate that this type of disclosure regarding third-party items is less important now than when the Rule was promulgated. [citation omitted] However, based on our overall review of the Rule's provisions, the utility of these provisions requiring such disclosure on the GPL may be questioned as unnecessarily contributing to the lengthy and potentially confusing array of information on the GPL. Estimated prices for cash advance items must currently be included on the statement of goods and services selected; it may be sufficient to protect consumers to require that the disclosure that providers mark-up those items be placed on that statement as well.[969]

The staff also saw some merit in changing the mark-up disclosure to read: "We charge you for our services in obtaining (specify items)," as opposed to "We charge you for our services in buying these items."[970]

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[966](...continued)
following items: Cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurse; obituary notices; gratuities and death certificates.

[967] This section currently provides that the GPL must contain the following information:

(D) In immediate conjunction with the price disclosures required by paragraph (b)(4)(ii) of this section, the statement: "This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services, flowers, and newspaper notices. The prices for those items will be shown on your bill or the statement describing the funeral goods and services you selected."

[968] R-B-5 at 42278-79.

[969] R-B-2 at 101.

[970] *Id.* at 108.

The NFDA advocates repeal of these provisions.[971] The NFDA argues that the provisions were based on the theory that, if consumers were informed about mark-ups, they would refuse to buy cash advance items. THe NFDA asserts, however, that "the level of cash advances has increased, not decreased, thereby showing that consumers are not affected one way or the other by the disclosure."[972]

Alternatively, if the cash advance provisions are not repealed, the NFDA supports the staff's suggested modifications of the Rule to move the § 453.3(f)(2) mark-up disclosure from the GPL to the final statement with the amendment that it need only list those items that are actually marked up. "If not repealed, it makes sense to place the disclosure on the itemized statement rather than on the GPL, and the items should be specifically listed. . ."[973] According to the NFDA, having the disclosure on the GPL implies that funeral directors charge for all such items when, in fact, many funeral directors will only charge for obtaining certain goods or services.[974]

The record contains little evidence on the effects of the cash advance disclosures. The NFDA provided no statistical or testimonial evidence to support its recommendation for repeal. The results of one survey submitted for the record, however, indicate that 69% of consumers reported their belief that federal law does not require providers to inform consumers that they charge a mark-up for cash advance items.[975] The staff, however, is sympathetic to the burden imposed on providers by the requirement to disclose more information on the GPL than necessary, and to concerns that the required mark-up language unnecessarily may lead consumers to misunderstand what items are marked-up or providers to charge mark-ups on all items.

The disclosure required by §453.2(b)(4)(i)(D) that the GPL does not include listings for cash advance items seems unnecessary, in the staff's view, because the prices (or price estimates) for those items first appear on the final statement under the Rule. Deleting that disclosure and moving the mark-up disclosure required by § 453.3(f)(2) to the final statement would thus appear to give consumers adequate notice of mark-ups so that consumers could still arrange for cash advance items if they so choose. Given evidence that providers do not mark up all cash advances, changing the language of the mark-up disclosure would alleviate the concern that the current disclosure is misleading and may cause unnecessary across-the-board mark-ups for cash advances.

The staff thus recommends that the Commission delete § 453.2(b)(4)(i)(D) and amend § 453.3(f)(2) to read as follows:

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[971] R-G-6 (Comment) at 72-73.

[972] *Id. See also* R-M-9 (Findings) at 132 ("The cash advance disclosure has had no effect on the level of cash advance purchases that consumers make through funeral directors").

[973] R-G-6 at 123.

[974] *Id.*

[975] Soulas, HX-76 at 3.

To prevent these deceptive acts or practices, funeral providers must place the following sentence in the itemized statement of funeral goods and services selected, in immediate conjunction with the list of itemized cash advance items required by § 453.2(b)(5)(i)(B): "We charge you for our services in obtaining or arranging for (specify cash advance items)," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item. (new language emphasized)

In addition, the current definition of a cash advance item does not include all cash advance transactions that may include undisclosed price mark-ups. To close this unintentional gap, the staff further recommends that the definition of a cash advance item in § 453.1 (c) be extended to include the following language:

> . . . A cash advance item is also any item obtained from a third party by the funeral provider on the purchaser's behalf, or arranged for by the funeral provider to be directly supplied by a third party to the purchaser, whether paid for by the funeral provider or the purchaser. . . . (new language emphasized).

This proposed extension of the definition of cash advance item addresses the situation where a funeral director acts as a conduit between the third party and the consumer and serves to prevent price mark-ups in those situations from escaping the Rule's disclosure requirements.

F. Tying Arrangements

Introduction

One of the major findings during the initial rulemaking proceeding was that funeral providers, through tying arrangements, unfairly denied consumers the opportunity to freely choose the goods and services they desired.[976] By offering to make funeral arrangements only in pre-determined packages, funeral providers tied their offerings together, thus denying consumers a meaningful choice among available offerings.[977]

Section 453.4 of the Rule codifies the Rule's anti-tying requirements. Section 453.4(b) prohibits funeral providers from conditioning the purchase of any item on the purchase of another item, unless the condition is imposed by law or permitted by the Rule.[978] Section 453.4(a) prohibits funeral providers who arrange direct cremations and crematories that sell funeral goods from requiring consumers to purchase a casket for a direct cremation.[979]

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[976] R-B-5 at 42260.

[977] *Id.* at 42279-42282.

[978] Generally, the Rule permits funeral providers to condition purchases on: (1) the payment of a professional service fee (§ 453.2(b)(4)(iii)(C)); and (2) the selection of embalming, when it is a "practical necessity" (§ 453.3(a)(2)(i)).

[979] Section 453.1(g) defines a crematory as any person, partnership or corporation that performs cremation and sells funeral goods.

Most of the participants that offered specific evidence on this provision of the Rule centered their concerns on so-called "casket handling fees," an issue addressed separately in section III.C. of this report. This section thus briefly summarizes the evidence presented earlier in the report on whether the Rule's general itemization and casket for cremation provisions warrant retention or repeal.

1. General Anti-tying Provision

Introduction

Section 453.4(b) of the Rule is a general tying arrangement prohibition. It prohibits funeral providers from conditioning (tying) the furnishing of one product upon the purchase of another product, unless the tie-in is required by law or is a practical necessity.[980] The Commission designed this provision to arrest the industry practice of marketing funeral goods and services only in packages or bundles.[981] The Commission determined that a significant number of funeral providers required consumers to purchase, and pay for, a full package funeral service even though they may not have wanted or used all of the purchased items.[982] The purpose of this provision is to permit consumers to purchase only those items they want or need.[983] To prevent such tying arrangements, and to inform consumers of their options, § 453.4(b)(2) requires funeral providers to disclose in the GPL and the statement of funeral goods and services selected that consumers need only choose and pay for those items that they desire or that are required.

Position of the Parties

Participants in the mandatory review spent little time discussing the merits of the general anti-tying provision. None of the major participants claimed that significant numbers of funeral providers continue to require consumers to purchase funeral goods and services in pre-bundled packages. However, the NFDA and NSM argued that the general tying provision is not needed because it provides no benefits to consumers; those groups maintained that consumers who opt for burial, as opposed to cremation, appear to purchase the same quantity of goods now that they purchased prior to the Rule, and that consumers have not spent less under the Rule.[984] The NSM further argued that the itemization requirement has precipitated substantial costs because

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[980] An example of a tie-in required by law is when state law requires embalming for interstate shipping. In this situation, the funeral provider may require the purchase of embalming as a condition of shipping the remains. An example of a tie-in that is a practical necessity is where the consumer wants a viewing of the remains for several days and the funeral provider reasonably determines that embalming is needed to help preserve the remains. In this situation, the funeral provider may require the purchase of embalming as a condition of arranging the visitation.

[981] R-B-5 at 42281.

[982] *Id.*

[983] *Id.* at 42279.

[984] R-M-9 at 57-58, 65-66; R-G-6 at 69, 112-119.

funeral providers must hire accountants to track the costs of components, hire attorneys to review lists, and train staff.[985]

The AARP, in contrast to the industry group position, urged that the Commission maintain the itemization requirement. The AARP makes that recommendation based on its findings that: (1) compliance with, and consumer awareness of, the Rule's itemization requirements is low; (2) consumers value itemized price information; and (3) itemization imposes minimal costs on providers. The AARP concluded that itemization benefits consumers, but is not sufficiently in place in the market to fully realize its effects; those benefits will increase over time as compliance and consumer awareness increase.[986]

Evidence on Effects of Itemization

Empirical and testimonial evidence presented earlier in this report indicates, on balance, that the Rule's "unbundling" requirement appears to be providing pro-competitive and informational benefits to consumers that outweigh the Rule's costs, and that those benefits are likely to increase over time as industry compliance with, and consumer awareness of, the Rule's requirements increase.[987]

That evidence does not support a conclusion that receipt of the Rule-required price lists directly results in reduced consumer expenditures. The evidence, however, does establish that a significantly greater proportion of consumers since 1981 are receiving some form of price information early in the funeral transaction; consumers use that information to spend less for their arrangements. The evidence further shows that at least some consumers are purchasing fewer funeral items and less-expensive services than they did before mandatory itemization, and that consumers are increasingly choosing low-cost providers where they exist and seeking comparative price information where it is available. The evidence further indicates that those benefits may not be greater at this time due to low overall industry Rule compliance, price competition and consumer awareness of the funeral transaction. Other evidence indicates that the Rule has directly encouraged cemeteries and other third-party casket sellers to enter the market in competition with existing funeral providers, and that many consumers will purchase competitively-priced caskets from those sellers where they are extant. The evidence indicates that the emerging competition in the casket market is impeded by many providers' imposition of so-called "casket handling fees" on consumers who purchase third-party caskets.

Staff Conclusions

The Commission designed the price lists, telephone disclosures and written disclosures to foster informed consumer choice. The foundation of consumer choice under the Rule is the right to purchase only those items the consumer wants or needs, and to decline other items. Thus, for

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[985] R-G-3 at 53.

[986] R-M-11 at 106-114.

[987] *See* the discussion at sections II.A-C.1, and III.C, *supra*.

any of the Rule's features to work, consumers must be assured that they can decline unwanted items. It seems clear that the "unbundling" requirement of § 453.4 is the crux of the Rule.

The staff concludes based on its review of the evidence that the anti-tying provision is essential to the operation of the Rule and warrants retention.

The evidence on compliance and the imposition of so-called "casket handling fees" demonstrate that industry practices that hinder consumer choice in this market persist. Opponents of itemization proclaim that "forced unbundling" has provided no benefits. However, the record contains evidence that at least some consumers are buying less than they did before mandatory itemization, and that the Rule has spawned at least some increased price competition in the sale of caskets. Given the low overall compliance with key provisions of the Rule documented in the record, the staff finds that it would be premature to conclude that consumers will not continue to benefit from itemization. On that basis, the staff recommends that the Commission retain Section 453.4(b) of the Rule.

The staff also recommends a slight modification to a provision designed to enforce the Rule's anti-tying provisions. Section 453.4(b)(2)(i)(B) requires that a funeral provider:

> [p]lace the following disclosure on the statement of funeral goods and services selected, required by § 453.2(b)(5)(ii): "Charges are only for those items that are used. If we are required by law to use any items, we will explain the reasons in writing below."

The purpose for this provision was to inform consumers, before they sign the funeral contract, that they may only be charged for those items selected or for items that are required by law. If purchases are required by law or otherwise, this provision further provides consumers with an explanation in writing, together with the reason the requirement applies to their selections. The provision should provide consumers with a final reminder that they need only pay for items that they have selected.[988]

The staff recommends that the language of the required disclosure be modified slightly in order to clarify that purpose. As modified, the provision would read:

> [p]lace the following disclosure in the statement of funeral goods and services selected, required by § 453.2(b)(5)(ii): "Charges are only for those items that you selected or that are required. If we are required by law or by a cemetery or crematory to use any items, we will explain the reasons in writing below. (new language emphasized)

This proposed change would clarify for consumers the original purpose of the provision. It alerts consumers that they may only be charged for the goods and services that they choose or that are required.

2. Caskets for Cremation

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[988] R-B-5 at 42292 ("Section 453.4(b), the 'optional purchase' provision, ensures that consumers can make use of such price information by making a decision to decline items which they do not wish to purchase").

Introduction

Section 453.4 of the Funeral Rule addresses the funeral industry practice of requiring consumers to purchase funeral goods and services in pre-arranged packages. Section 453.4(a)(1) is a specific tying provision. It prohibits funeral providers and crematories from requiring that consumers purchase a casket other than an unfinished wood box for use in a direct cremation. Section 453.4(a)(2) of the Rule requires funeral providers who arrange direct cremations to offer for sale unfinished wood boxes or alternative containers for use in direct cremations. The Commission designed these Rule provisions to shield consumers from having to purchase finished caskets for direct cremation simply because inexpensive alternatives are unavailable at the funeral home.[989] Participants in the proceeding did not offer much written or oral evidence on whether the Commission ought to repeal or modify the casket for cremation provision. The NFDA commented, however, that "forced unbundling" has failed to provide benefits because consumers have not purchased unneeded caskets for cremation as a result of misrepresentation or otherwise.[990]

Evidence on Casket for Cremation Purchases

Empirical record evidence indicates that consumers purchased fewer caskets for cremation in 1987 than in 1981, including "unneeded" caskets for cremation, and that most purchases of those unneeded caskets in both years were probably caused by provider misrepresentations.

Comparison of the Baseline and Replication Study data indicate that the proportion of cremation buyers selecting a casket declined from 34% in 1981 to 19% in 1987.[991]

That data also establishes that "unneeded" purchases of caskets for cremation occurred in both 1981 and 1987, but that the proportion of those unnecessary selections declined in 1987. Eighty-four consumers in 1981 and 98 people in 1987 purchased a cremation with or without a memorial service.[992] The purchase of a casket in these circumstances would appear to be unnecessary because the body is not present during the service and is cremated rather than buried. Nonetheless, the data shows that in these cases 9 consumers purchased caskets in 1981 and 2 got caskets in 1987.[993] Thus, in 1981, 9 of 84, or 11%, purchased caskets for cremation

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[989] R-B-5 at 42281. The Commission reasoned that few consumers would remove the deceased from a funeral home because the funeral provider does not offer alternative containers. Even if funeral providers did not require consumers to purchase caskets for direct cremation, if the only containers that providers sold were caskets consumers would be compelled to purchase them. To ensure that alternative containers are available, the Commission mandated that funeral providers who offer direct cremation also offer an alternative container or unfinished wood box.

[990] R-M-9 at 80-82; R-G-6 at 111-112.

[991] *Compare* R-B-3 at Table 3, p. 23 *with* R-B-2 at Table III-44, p. III-71.

[992] R-B-2 and R-B-3 data tapes, Q. 9.

[993] *Id.* at Qs. 36 and 40.

(continued...)

services that should not have required that item. That figure declined in 1987 to 2%, and the difference is statistically significant.[994]

Finally, those data also show that in all but one instance consumers who were told by the provider that a casket was required for cremation, in an inappropriate cremation case, purchased one -- 8 of 9 in 1981 and 2 of 2 in 1987.[995]

Staff Conclusion

The staff concludes based on its review of the evidence that Section 453.4(a) of the Rule warrants retention because it has provided significant benefits to consumers. Substantial empirical evidence indicates that consumers are purchasing fewer caskets for cremation, including "unneeded" caskets, than they did prior to the Rule, and further shows that casket for cremation misrepresentations that resulted in unnecessary casket purchases have declined in that period. No party presented evidence that the casket for cremation provision imposes undue costs on providers, other than that associated with the requirement to disclose to consumers that "unfinished wood boxes" may be used for cremation when they may be unavailable. The staff in section III.E.4. has recommended Rule amendments to alleviate that burden.

G. Embalming Without Prior Approval

Purpose and Requirements

The Rule's general embalming requirement prohibits funeral providers from embalming for a fee without obtaining prior express approval from a family member or other authorized person.[996] That provision does not prohibit unauthorized embalming per se, but precludes

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[993](...continued)
The NFDA and NSM in their Proposed Findings dispute that finding on the ground that the numbers indicated do not match the reported instances of casket for cremation purchases in the 1981 study. R-M-9 at 82. However, analysis of that argument by the BE staff shows that the NFDA and NSM analysis is incorrect because they failed to check whether the respondents who said that they "arranged" a cremation with a casket service also reported that they "purchased" a casket. The result is that of those 44 cremation buyers in 1981 who said that they bought a casket, only 35 reported that they purchased a casket for a cremation service that involved one, leaving nine casket purchases for those who arranged simpler cremations that should not have required a casket, as stated in the text.

[994] *See* R-M-5 (Staff Rebuttal) at 9.

[995] R-B-2 and R-B-3 data tapes, Question 52.

[996] §§ 453.5(a)(2) (providers must use the terms "embalm" or "embalming" in seeking consumers' prior approval).

The Commission recognized that the majority of consumers want embalming because of their intent to have a traditional funeral with viewing and visitation, which arrangements require embalming as a practical necessity. It thus cast the unfair acts or practices in the alternative: embalming for a fee is unfair unless at least one of the three listed conditions is met. R-B-5 at 42284.

providers from charging a fee for such services.[997] Section 453.5(a)(1) excepts providers from this basic requirement if state or local law requires embalming in a particular case, such as where death occurs from certain communicable diseases, or removal of the body involves interstate transportation. Section 453.5(a)(3) further excepts providers who exercise "due diligence," but who are unable to contact the family or an authorized person before embalming is performed, if the provider has no reason to believe that the family does not want embalming and the provider obtains subsequent approval. That section also requires providers who seek such approval to first disclose that embalming (expressly so described) has been performed, but that no fee will be charged if an arrangement that would not require embalming, such as direct cremation or immediate burial, is selected. The Rule permits providers to infer approval and charge a fee if the family then selects an arrangement requiring embalming.

Section 453.5(b) is designed to help prevent charges for embalming where the Rule prohibits them by requiring providers to place a disclosure on the final bill or agreement. The disclosure informs consumers of their right to decline payment for embalming established by § 453.5(a) of the Rule. The disclosure also must state that if a fee is charged for embalming, a written explanation will appear on the final bill.

These Rule provisions are designed to prevent substantial economic and emotional injury to consumers who might decline embalming services if they were given an informed choice. The provision is based on the Commission's conclusions (as well as industry's acknowledgment) that providers generally did not seek prior approval before they performed embalming, and that a substantial number of consumers would have declined the service on personal or religious grounds, or from a desire for a less elaborate or less expensive funeral service that would not necessarily have required embalming.[998]

The Commission in drawing those conclusions rejected funeral provider arguments that consumers virtually always desire embalming, and that it would be offensive to ask a family about embalming because the subject is repulsive to them. The Commission found that many consumers who do not want embalming would decline it given the option, and that many consumers do not give "implied" embalming permission by authorizing removal of the deceased. The Commission further determined that it is unreasonable to expect consumers to affirmatively decline embalming during the initial contact with the funeral home, given their lack of prior experience with, and knowledge about, the funeral transaction.[999] Finally, the Commission concluded that consumers generally are able and willing to give express permission to embalm, and that, even if some

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[997] The Commission stated in the SBP that "charging a buyer for goods and services which the buyer did not agree to buy plainly violates established principles of public policy found in fundamental levels of contract law." R-B-5 at 42284.

[998] R-B-5 at 42282-83. The Commission found that embalming is the "necessary predicate" to the sale of a "traditional funeral" (viewing with an open-casket funeral service involving a casket, burial clothes and other services and facilities of the funeral home). *Id.* at 42283.

[999] *Id.* at 42284.

consumers might be offended, that is not a justifiable basis to refuse to ask the question at all -- others who would decline if asked would thereby be subjected to the embalming expense.[1000]

Some ANPR commenters, however, advocated eliminating the prior embalming approval requirement because it is often difficult to comply with. The Commission in the NPR thus sought comment on the degree and prevalence of those alleged difficulties, and whether, if at all, they have adversely affected the provision of funeral goods and services to consumers.[1001] The staff in this section of its report reviews that and other evidence to determine whether the requirement that providers seek to obtain express prior approval for embalming services warrants retention, repeal or modification.

Position of the Rulemaking Parties

The NFDA and NSM in their Proposed Findings advocated that the requirement that providers' must seek to obtain express prior permission for embalming in all cases harms consumers without providing the economic benefits predicted by the Commission. Those groups reasoned that: (1) no record evidence indicates that the Rule influences consumers to decline embalming services, or that consumers suffer emotional injury from unwanted embalming; (2) civil law and marketplace forces protect consumers from unwanted embalming; (3) the requirement's inflexibility in mandating that providers seek permission in all cases causes unnecessary emotional distress for many consumers and can result in unsatisfactory embalming services because of the resulting delays; and (4) the requirement's "due diligence" (exigent circumstances) exception is not commonly understood by providers and does not provide enough flexibility to avoid compliance or satisfactory embalming difficulties.[1002] The NFDA and NSM concluded that, if the Rule is retained, its requirement to obtain prior embalming permission should be modified to require that permission be obtained "either prior or subsequent to the embalming."[1003] The groups thus suggested that the provision be amended to read as follows:

453.5 <u>Services provided without prior approval</u>

(a) Unfair or Deceptive Acts or Practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any funeral provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make, or

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[1000] *Id.*

[1001] R-A-1 at 19870 (Question 15.).

[1002] R-M-9 at 85-88, 96-108. *See also* R-G-3 (NSM Comment) at 50-51 and R-G-6 (NFDA Comment) at 85-89. The FDSA of Chicago in its Comment mirrored the NFDA-NSM concerns and recommendation, as did Mr. Hahn of the FFDA. R-G-5 at 22-23; and Hahn, Tr. Vol. II, 670 (requirement should be removed because there were very few complaints about it before the Rule, but there are now).

[1003] R-M-9 at 230.

(2) Approval for embalming (expressly using the word "embalming") has been obtained from a family member or other authorized person. In seeking approval, the funeral provider must disclose that embalming is among the goods and services for which a charge is made.[1004]

The AARP, in contrast to the industry view, argued that the record evidence does not support repeal or revision of the Rule's prior approval requirement. The AARP reached that determination based on its findings that industry compliance with that provision and consumers' awareness of their ability to decline embalming appear to be low, and that consumers' sensitivity to, and providers' burden associated with, express prior permission are not as great as that alleged by the NFDA and NSM. The AARP thus concluded that it is premature to judge the costs and benefits of the prior approval provision, and that removal of that provision would result in increased unauthorized embalming and irreversible consumer loss.[1005]

Evidence of Compliance Difficulties

Funeral director witnesses for the NFDA, NSM and other provider groups offered testimonial evidence that the requirement to seek prior approval in all cases can cause unnecessary consumer distress and dissatisfaction with embalming services. Some of these witnesses stated that requesting embalming permission soon after a death can be particularly upsetting to consumers, because of the use of the term "embalming," or because the request interferes with consumers' common first reaction to death -- denial.[1006] These and other witnesses testified that delays in embalming, caused by providers' inability to locate the family or their election not to seek permission at late night hours, may cause unsatisfactory cosmetic embalming results, consumer dissatisfaction and health problems; embalming shortly after death, usually within six hours, is necessary to avoid these difficulties where refrigeration is unavailable.[1007] Although

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[1004] *Id.* at 230-231.

[1005] R-M-11 at 121-126, 152-153; R-H-17 at 52 and Exhibit 2.

[1006] *See, e.g.*, Hennessy, FDSA, Tr. Vol. II, 986-987, 1027 (a lot of families do not know why they are being asked about "embalming"); Simms, for NFDA, Tr. Vol. II, 449-450, (disclosure that the FTC Rule required asking for embalming permission angered and stressed mother shortly after her child was hit by a car); Yurs, for NFDA, Tr. Vol. II, 520-522 (time of denial is not when you want to ask about embalming because families are too emotional to comprehend); Ninker, Illinois FDA, R-G-1 at 1, 5 (difficult to ask for and obtain permission because it's so soon after death); and Franzen, Wisc. FDA, Tr. Vol. II, 819 (unwieldy to get permission immediately after death).

[1007] Hocker, President, NFDA, HX-111 at 8-9, Tr. Vol. III, 1404 (consumer dissatisfaction results from less than satisfactory embalming services, which sometimes has to be done immediately, or at least within three hours or so, to achieve most effective cosmetic results); Simms, HX-42 at 8-9, Tr. Vol. II, 467-468 (telephone calls to request permission from the elderly at 2:00 a.m. are difficult and often ill-advised, but embalming within six hours is necessary for competent embalming and avoidance of bacterial problems); Yurs, Tr. Vol. II, 514-55, 521-522 (embalming within six hours is required to avoid bacterial problems, discoloration and possibility of swelling, but often can not locate family to request permission, and must wait for them to contact provider); and Hennessy, Tr. Vol. II, 999-1000 (professional opinion that the sooner embalming is performed the better the results).

refrigeration avoids embalming difficulties caused by delays, witnesses continued, those facilities generally are not available to providers in rural, or even urban, areas.[1008]

Those and other witnesses also provided testimonial evidence that the compliance difficulties just described occur with some frequency. Timothy Simms, appearing on behalf of the NFDA, testified that members of the Illinois Funeral Directors Ass'n. unanimously responded at various meetings that the prior approval requirement is an "undue burden on the funeral industry."[1009] Wendell Hahn, in summarizing comments received from his provider clients and their customers, stated that "both funeral providers and families have remarked to us how 'unprofessional and untimely' such [prior approval] requests have been" due to the cause, time and place of death, as well as the difficulty of locating the proper relative for permission.[1010] William Hocker, the NFDA President, also suggested that there are "a significant amount of times when it gets very difficult to get prior permission to embalm that causes us a good deal of discomfort."[1011]

Finally, provider witnesses offered testimonial evidence that those compliance problems are largely unnecessary, but are unavoidable under the Rule. Morris Nilsen and Mr. Hocker testified to the potentially greater civil liability facing providers for unwanted embalming services.[1012] Mr. Hocker and other funeral directors also stated that providers in many cases need not even raise the subject of embalming directly because they will know from the family's choice of funeral service whether embalming is desired.[1013] Several funeral director witnesses concluded, however, that the Rule's "due diligence" (exigent circumstances) exception to the prior approval

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[1008] Yurs, Tr. Vol. II, 513, 561 (refrigeration for 24 hours generally will not create embalming problems, but many hospitals in small communities do not have such facilities); Simms, Tr. Vol. II, 455 (none of the funeral homes and one of three hospitals in Rockford, Ill, pop. 150,000, have refrigeration); Dr. Reveley, former funeral director, Tr. Vol. III, 891 (few providers have refrigeration, though more now than five years ago); Farrow, Exec. Dir., Tx. Funeral Service Commission, Tr. Vol. III, 583 (refrigeration often unavailable in very small, rural communities); and Hennessy, HX-61 at 9 (refrigeration not widely used in Chicago metro area).

Refrigeration is a commercially-available technology for the short-term preservation of remains, widely used by coroners' offices. Whether or not funeral homes make refrigeration available appears to be an individual business decision.

[1009] Tr. Vol. II, 464.

[1010] Tr. Vol. II, 669-670. Mr. Hahn remarked that FFDA receives about 53,000 of these "Family Survey" instruments annually, but provided no figures or documentation concerning the survey or the number of provider or family "complaints" he referred to in his testimony.

[1011] Tr. Vol. III, 1404.

[1012] Nilsen Tr. Vol. III, 1465-1467 (very large civil liability, and not loss of fees under the Rule, is the deciding factor in whether a provider can embalm remains); and Hocker, HX-111 at 9, Tr. Vol. III, 1404 (providers will seek prior permission in cases where they can not otherwise determine that consumers want embalming or that the law requires it because of the liability they face if an unwanted embalming results in emotional injury).

[1013] HX-111 at 8; Hennessy, HX-61 at 9, Tr. Vol. II, 1022; Pierson, R-D-1 at 4; Botimer, Tr. Vol. III, 1290; and FDSA, R-G-5 at 23.

requirement does not give them sufficient flexibility to avoid unnecessary offense to families and delays in embalming.[1014]

Funeral providers, consumer representatives, state officials and other witnesses provided contrary testimonial evidence that the Rule's prior approval provision does not raise legitimate or prevalent compliance concerns, as suggested by the evidence just summarized. Several funeral providers, including many of those mentioned above, agreed with the principle that the decision to embalm should be made by the funeral consumer.[1015] Similarly, funeral directors and other witnesses stated for the record that providers' obligation to request prior approval for embalming does not offend consumers generally and does not unduly burden a significant number of funeral directors.[1016] Empirical evidence presented by the AARP further indicated that 75% of the 782 "Excel" survey respondents reported that providers should be required to obtain permission from the family before embalming.[1017]

[1014] Simms, Tr. Vol. II, 454, 475, 508 (can not determine whether "diligent efforts" means provider can decline to seek permission at 2:00 a.m. in order to embalm as soon as possible or can embalm for a fee when no one is available for 18-20 hours after a death); Hocker, Tr. Vol. III, 1490-1491 (provision does not help in providers' decision whether or not to embalm when the family is unavailable; would help a lot if Rule permitted embalming for a fee without prior approval where the provider made diligent efforts to obtain it but was unsuccessful); Yurs, Tr. Vol. II, 561-562 (provision creates problems because it requires that providers seek permission immediately upon death, but the sensitively proper time to do so may be later); Johnson, NSM, Tr. Vol. I, 749 (needs to be some consideration of the fact that the Rule is inflexible in requiring that providers seek prior permission in all cases, even though embalming is a delicate matter); Hennessy, Tr. Vol. II, 1002 (Rule does not give much latitude where family can not be reached for 15 hours; we probably take more latitude than we are allowed to); and Franzen, Tr. Vol. II, 818-819 (need to take account of the fact that permission should be obtained as soon as practicable, but not necessarily immediately).

[1015] Hocker, Tr. Vol. III, 1404, 1490-1491 (but certain situations are difficult); Simms, Tr. Vol. II, 465 (except in "extraordinary cases"); Yurs, Tr. Vol. II, 558; Franzen, Tr. Vol. II, 818; Johnson, Tr. Vol. I, 749; and Hunter, Chmn, Texas Funeral Service Commission, Tr. Vol. III, 582, 584.

[1016] *See, e.g.*, funeral directors: Hocker, Tr. Vol. III, 1404 (many NFDA members, the witness included, do not find compliance difficult; really have to ask anyway to avoid civil liability); Hennessy, Tr. Vol. II, 1001 (if can not get prior verbal permission, then checks records for past family choices, makes a professional decision, and gets written authorization later or does not charge a fee); Nilsen, Tr. Vol. III, 1466 (just waits to call the next day for permission when there's a death late at night; requirement protects providers from liability and is a good business practice); Botimer, Tr. Vol. III, 1318 (has no problem obtaining prior permission with over 600 embalmings annually); Krause, Tr. Vol. II, 23-24, 46 (difficult at first to learn how to ask, but no problem now); Peebles, Tr. Vol. III, 1560 (consumers not offended when request is done properly); Starks, Tr. Vol. II, 389 (no problem with requirement, but is uncomfortable with it); Purdy, CANA, Tr. Vol. III, 173-174 (though it can be difficult, it's a good business practice and no great problem at his 21 funeral homes and should be retained); and Longmire, R-D-2 at 5 (no problem during home removal, and many hospitals require embalming authorization on their body release); others: Barnow, ICF/Lewin, for AARP, HX-118 at 14, Tr. Vol. I, 873-874 (prior approval requirement imposes no economic costs on providers); Karklin, funeral consumer, Tr. Vol. I, 553 (requirement should stand; regrets mother's embalming even though she authorized it); Baskin, consumer advocate/former Texas Mortuary Board member, Tr. Vol. III, 144 (consumers not offended); Showalter, journalist/hospice counselor, Tr. Vol. II, 133-134 (request not offensive to families; providers can be overly aggressive, and not reluctant, in getting permission); Klein, consumer member, NYSFDAB, Tr. Vol. II, 1069 (no complaints from providers because requirement protects them from liability); Rep. Barr, Tr. Vol. III, 1519 (not offensive); Buchanan, CAFMS, Tr. Vol. III, 1115-1116 (some might be offended because of grief, but concern is overblown and not generally true, particularly of members); Carlson, author/lecturer, Tr. Vol. I, 526 (not offensive); Bennett, clergy, Tr. Vol. I, 354 (death is the real intruder, not embalming permission); and Wertheimer, NAEL, Tr. Vol. III, 982 (not offensive in general).

[1017] McFadden, HX-8 (ICR Study) at 4 and Exhibit B, Table 016).

Other provider witnesses, including a recognized embalming expert, offered testimonial evidence that embalming immediately (within three or six hours) after a decease generally is not necessary for public health or cosmetic appearance reasons. Mr. Robert Inman, appearing for the CANA, is recognized by the funeral industry in this country and abroad as an expert in embalming and the handling of remains.[1018] Mr. Inman testified that embalming should be performed within 18-24 hours after death where refrigeration is unavailable to avoid bacterial and cosmetic problems; after that time, distention (swelling) of the remains would make embalming difficult.[1019] Similarly, Mr. Inman stated for the record that, with the normal skill of an embalmer, waiting until morning to embalm under most conditions after a death at night would have no effect on embalming or the resulting cosmetic appearance of the body, even without refrigeration.[1020] Finally, Mr. Inman suggested that providers in many cases know that they must wait until the next day to embalm because most large hospitals and coroners' offices in metropolitan areas will not release remains until morning for security reasons; these entities as a result have refrigeration and storage facilities.[1021]

Jack Botimer, a funeral director who performs about 600 embalmings annually, also testified that proper embalming and health concerns do not require that he perform the procedure immediately or obtain permission in the middle of the night.[1022] He reported that families typically give prior permission the next day at the funeral home, or even the day after that when shipping is involved.[1023] Dr. James Reveley, a former funeral director and cremationist, further reported that the National Centers for Disease Control position is that there is no public health aspect to embalming.[1024] Dr. Reveley also expressed his personal conclusion that, as a matter

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[1018] Mr. Inman, Secretary of CANA and NFDA member, reported that he is the largest shipper of remains in North America, with 8,000 calls annually (each call typically involves removal, embalming, and transportation to the airport). In addition to that shipping activity, Mr. Inman conducts or supervises 800-900 embalmings per year for local, northern Ohio funeral home clients. He has conducted hundreds of embalming seminars for funeral director associations in this country and abroad, and has authored many articles for funeral publications on proper embalming techniques and handling of remains, including an embalming "protocol" for funeral home personnel. *See* Inman, HX-38 at 1, Tr. Vol. II, 263-264, 267. No other recognized embalming expert participated in the proceeding.

[1019] Tr. Vol. II, 260, 269-270. According to Mr. Inman, prior permission in most cases can be obtained within that period of time. *Id.* at 262.

[1020] *Id.* at 271.

[1021] *Id.* at 266-267. As mentioned earlier, funeral providers agree that refrigeration generally eliminates embalming difficulties caused by delays.

Mr. Inman stated that about 50% of local deaths occur in hospitals, while 75% of deaths that involve shipping happen there, and further suggested that funeral directors in rural communities may not have access to refrigeration. *Id.* at 260, 264-265.

[1022] Tr. Vol. III, 1318-1320.

[1023] *Id.*

[1024] Tr. Vol. III, 889. Dr. Reveley stated that he was reporting the substance of two conversations he had one week prior to his testimony with a Dr. Keiley, chairman of the CDC's Department of Biosafety.

(continued...)

of public health, embalming presents more of a health problem than the unembalmed body, because the procedure exposes funeral home staff and the public to health hazards contained in the remains.[1025]

Evidence of Economic and Non-Economic Effects

Empirical data from the Baseline and Replication studies provided evidence that consumers purchased slightly less embalming services in 1987 than in 1981. BE staff analysis of the BLS and RS results indicated that fewer consumers in 1987 selected embalming than in 1981 as a result of a 3% increase in the purchase of cremation dispositions (cremations are less likely to involve embalming than ground burials).[1026] BE staff, however, did not attribute the rise in the cremation rate to the Rule, and so concluded that the data do not provide evidence that the Rule has affected consumers' embalming selections.[1027] Other evidence discussed earlier in Section II.B.3, however, suggests that the Rule may have contributed to the increase in cremations.[1028]

Whether or not the Rule contributed to the overall increase in cremations, the study data also revealed that the proportion of cremation buyers who select embalming has also declined since 1981. That data indicated that 35% (45 of 130) of cremation purchasers in 1981 chose embalming, whereas 26% (36 of 140) did so in 1987.[1029] The study data further demonstrated that cremation buyers' "unneeded" expenses for embalming have declined since 1981. Eighty-four consumers in 1981 and 98 people in 1987 purchased a cremation with or without a memorial

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[1024](...continued)
The Commission in its Statement of Basis and Purpose recognized that there is "considerable dispute over the necessity and effectiveness of embalming to prevent the spread of disease." R-B-5 at 42275, n. 155.

[1025] *Id.* at 889-890. Dr. Reveley suggested that the best way to avoid health problems is to bury or cremate the undisturbed remains. *Id.*

[1026] HX-122 at Tables II and IV, pp. 6, 10. Eighty-three percent and 81%, respectively, of study respondents purchased embalming services in 1981 and 1987.

[1027] *Id.* at n. 16, p. 10. The staff notes that one would not expect embalming selections to decline for those two-thirds of the study respondents who purchased open-casket funerals, because embalming is usually a "practical necessity" for those traditional funeral arrangements.

[1028] The evidence is mixed concerning the Rule's effect on the cremation rate. The NFDA argued that the Rule has not played an important role in the steadily increasing cremation rate, because the increase began in the early 1970's and is based primarily on changing social and moral values, as well as on the wishes of the deceased, and not on price concerns. The CANA argues, in contrast, that the Funeral Rule proceedings, which also began in the early 1970's, as well as the Rule itself, substantially increased publicity about the cremation alternative, and that many consumers do choose cremation based on price and other considerations. The CANA also provided evidence that the marketing of cremation options has dramatically increased since the Rule's inception. The CANA concluded that the Rule has contributed to the increase in cremation generally and to the variations in cremation services currently being offered. *See, e.g.*, R-B-20 (CANA Comment) at 7-8, 10-11; and R-M-1 (CANA Rebuttal Comment and Proposed Findings) at 2, 22.

[1029] R-B-2 (Market Facts Report) at Table III-42, p. III-67, R-B-3 (Baseline Report) at Table 3, p. 23, and R-B-2, R-B-3 data tapes, Questions 36 and 33, respectively.

service.[1030] The purchase of embalming services in these circumstances would appear to be unnecessary because the body is not present during the service and is cremated rather than buried. Nonetheless, the data showed that in these cases 18% (15 of 84 people) bought embalming services in 1981; that figure dropped to 9% (9 of 98 buyers) in 1987.[1031]

As the staff discussed earlier regarding overall consumer behavior, it is important in assessing the Rule's effect on consumers' selection behavior concerning embalming services to also review the evidence of industry compliance with, and consumer knowledge of, the Rule's embalming provisions. The degree of compliance and extent of consumer knowledge can affect the extent to which the Rule's prior approval provision benefits consumers.

The Replication and Gallup studies provided the only systematic, empirical data on the degree of overall industry compliance with the Rule's prior embalming approval requirements. Half of the RS respondents and 47% of the Gallup respondents who purchased embalming services said that the funeral provider asked them for prior embalming permission, as required by the Rule.[1032] Of those RS respondents who were asked, 58% said that the funeral director used the term "embalm(ing)" in making the request, in compliance with the Rule, and 26% said that more general terms were used (such as "taking care of the body").[1033] Combining those two results, the data indicated that consumers reported 29% compliance with the Rule's prior approval provision (58% of 50% who were asked).[1034] Overall, 63% of the RS respondents who said that the deceased was embalmed reported giving authorization for that procedure sometime in the transaction.[1035] As mentioned above, some providers also may still believe

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[1030] B-2 and B-3 data tapes, Question 9.

[1031] B-2 and B-3 data tapes, Qs. 36 and 37, respectively.

[1032] R-B-2 at Table III-42, p. III-67 and IV-7; Colasanto, HX-66, Ex. B, Tabs, p. 57. Twenty-six percent of the RS respondents and 37% of the Gallup respondents said that they were not asked, and, respectively, 24% and 17% of the respondents could not remember; actual compliance with this provision could thus be substantially higher or lower than these figures suggest.

The staff notes that these data, like those regarding compliance with telephone price disclosures, price lists, and statements of items selected, are not compared to the related Baseline Study results because those latter results have been seriously questioned as an indicator of industry practices in 1981-82. *See* the staff's discussion of this issue in Section I.B., *supra*.

[1033] R-B-2 at Table III-42, p. III-67 and IV-7. Twelve percent of respondents could not remember how they were asked.

[1034] That figure increases to 38% when those respondents who could not remember whether they were asked are deleted from the calculation. The staff would add the caveat that these compliance figures relate only to those respondents who were available to grant permission, because the Rule only requires providers to exercise due diligence in seeking to obtain prior approval if they charge a fee for embalming -- it does not require that it be obtained absolutely in all cases.

[1035] *Id.* at Table III-42, p. III-68 (11% did not give authorization, and 26% could not remember). The Rule permits a provider to charge for embalming if prior permission can not be obtained after exercising due diligence, the provider has no reason to believe that the family does not want embalming, and the provider obtains subsequent authorization. The 63% authorization figure does not provide a measure of compliance with the prior approval

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that embalming approval involves a "negative option" or "implied consent." The staff also notes that the RS data indicated that providers gave consumers a timely GPL 23% of the time.[1036] The GPL contains the earliest Rule-required disclosure to consumers that embalming may not be a necessary purchase.[1037]

The Replication Study of 1,004 funeral consumers provided specific empirical evidence of the degree of consumer knowledge about embalming requirements. Half of the study respondents incorrectly said that embalming is always required as a public health measure.[1038] That degree of consumer knowledge, however, represented a slight increase over the 61% of respondents who answered that way in 1981.[1039]

Other witnesses provided additional evidence that many consumers may not be aware that embalming is an optional expense. The 30 respondents in the Opinion Centers America "focus group" study, conducted for the Commission in November 1988 in Baltimore, could not reach a consensus on whether embalming was an available option or was mandatory in all cases; most respondents believed that the law required them to have the deceased embalmed.[1040] Other witnesses testified that they, or consumers in general, do not know that embalming is not always necessary, but that consumers' knowledge appears to be increasing.[1041]

Finally, many participants expressed their view that repeal of the prior approval requirement would lead to increased unauthorized embalmings, resulting in economic and non-economic consumer injury.[1042]

[1035](...continued)
provision, however, because it does not reveal whether or not providers first sought permission before embalming, as the Rule requires.

[1036] Daniel, HX-122 at Table VIII, p. 20.

[1037] Two consumer participants also testified that they did not receive requests for prior approval for embalming. *See* Oeinck, R-F-11 at 1; and Bennett, Tr. Vol. I, 329-330 (was informed that embalming had already begun because the death was in a "desert" community and the provider said he knew that a viewing was desired).

[1038] R-B-2 at Table III-54, p. III-85.

[1039] R-B-3 (Baseline Study Report) at Table 9, p. 32.

[1040] Schwarcz, HX-83 at 14, Tr. Vol. III, 460-461.

[1041] Snyder, CU, Tr. Vol. III, 1232 (consumers in many cases are not aware that it's not required and so purchase embalming); Buchanan, CAFMS, Tr. Vol. III, 1134 (consumers do not understand when asked that "taking care of the body" means embalming); Bell, clergy, Tr. Vol. III, 234 (understood that phrase "take care of the body" meant removal to the funeral home and storage until arrangements were made); Karklin, consumer, Tr. Vol. I, 552 (many funeral consumers spoken with after her experience were shocked to realize they had a right to decline embalming); and Dr. Reveley, former funeral director, Tr. Vol. III, 887, 889 (general public believes that embalming will preserve body almost indefinitely, but people are beginning to realize that embalming is not a long-term or public health measure).

[1042] Barnow, ICF/Lewin, for AARP, Tr. Vol. I, 867, 874 (requirement fosters informed decision-making and prevents non-economic, but unfair, consumer "welfare losses"); Mazis, American Univ, for AARP, Tr. Vol. III, 868 (consumers would tend not to decline embalming after the fact); Wertheimer, NAEL, Tr. Vol. III, 982 (consumers would
(continued...)

Staff Conclusion

The staff concludes that, on balance, the evidence warrants retention of the prior approval provision as is because its actual and potential benefits appear to outweigh its costs. The record indicates overall that one can not expect a substantial reduction in consumer embalming selections in the short time since the Rule's promulgation, given the empirical evidence that half of all funeral arrangers mistakenly believe that embalming is always required and that 29%-38% of providers may be complying with the prior approval requirement. Despite that finding, substantial evidence indicates that fewer consumers appear to be selecting embalming services for funeral arrangements that do not require embalming as a practical necessity, and substantially more consumers overall are choosing less expensive cremation dispositions that generally do not require embalming. The evidence indicates that these economic benefits are, at least in part, attributable to the Rule's effects, and that they will likely increase over time as consumers' price-sensitivity, awareness of embalming as an option, and cremation selections increase.

The preponderance of the evidence also indicates that the prior approval requirement does not impose substantial costs on a significant number of funeral providers. No party presented statistical or other reliable data that providers must bear significant economic costs as a result of the obligation to seek prior approval. The evidence further shows, on balance, that any compliance difficulties caused by the prior approval provision do not appear to be widespread among providers, or to hinder the provision of funeral goods and services to consumers. To the extent such problems occur, they appear to be the result of some providers' reluctance to request express approval, or to make professional "judgment calls" about whether to embalm where the family is unavailable to grant permission, or because consumers do not know that embalming may not be required in all cases. The Rule, however, does not penalize providers who make incorrect decisions as long as they make a good faith attempt to contact the family prior to embalming and obtain subsequent approval. The staff notes that, typically, permission could be requested during the "first call," when the provider is asked to pick up the remains. No party presented evidence that providers do not or can not request permission at that time. In any case, all funeral providers who addressed the subject agreed that the decision whether to embalm should be made by the consumer.

In view of the evidence just summarized, the NFDA-NSM proposal to repeal the prior approval requirement appears to be unwarranted. Repeal would return funeral consumers to the "negative option" situation they faced before the Rule. As the Commission noted in promulgating the Rule, the evidence indicates that it is unreasonable to expect consumers to decline embalming

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[1042](...continued)
not decline without the prior option to do so); Giesberg, NACAA, Tr. Vol. III, 1149 (prior option necessary for consumers); Krause, funeral director, Tr. Vol. II, 46 (he requests prior approval because the Rule requires it, and not because it's consumers' right); CU, R-H-21 at 7 (embalming is a major cost with questionable benefits, and some oppose it for religious reasons); Dr. Reveley, former funeral director, Tr. Vol. III, 872 (embalming is the key to the elaborate funeral; repeal will mean consumers again will be induced to spend more than necessary); Klein, NYSFDAB, Tr. Vol. II, 1068-1069 (unauthorized embalming would traumatize consumers who oppose it on philosophical or religious grounds); Inman, shipper/embalmer, Tr. Vol. II, 259 (retain prior approval because increased cremations led to unnecessary embalming before the Rule, when embalming was standard procedure); Showalter, journalist/hospice counselor, Tr. Vol. II, 145 (consumers whose primary interest is cost want the opportunity to decline embalming); and Dr. Nelson, AARP, Tr. Vol. I, 89-90 (even if no economic harm, family should decide about such a major procedure on a loved one, particularly because providers have a strong economic incentive to proceed).

after the fact given their low degree of knowledge and experience. The fairly low degree of industry compliance documented here adds to that reasoning. Even if the prior approval requirement provided no economic benefits, the staff concludes that the provision warrants retention because common law principles of marketplace fairness dictate that consumers should not be required to pay for services they did not choose, particularly where that service involves a major, intrusive procedure on the remains of a loved one. The Commission in promulgating this section of the Rule stated that "charging a buyer for goods and services which the buyer did not agree to buy plainly violates established principles of public policy found in fundamental levels of contract law."[1043] The twenty states that also require prior approval for embalming provide confirming evidence that unauthorized embalming is unjustifiable and injurious.[1044]

The staff makes one technical recommendation to remove the inconsistency apparent in the embalming disclosure required by § 453.5(b). The disclosure required by that section states, in part, that "If you selected a funeral that requires embalming, such as a funeral with viewing, you may have to pay for embalming." That phrase implies that embalming is always necessary with a viewing. Embalming, however, may not be necessary for a viewing where refrigeration is available, for example. The embalming disclosure required by § 453.3(a)(2)(ii) thus states that embalming "may be necessary" with a viewing. The staff thus recommends that the Commission replace the term "requires" in § 453.5(b) with the phrase "may require" to make the Rule's embalming requirements parallel.

H. Retention of Documents

Section 453.6 requires that funeral providers retain copies of the Rule-required price lists and of the individual statement of funeral goods and services selected by the consumer for one year from the date the price lists were last distributed or the statements were "signed." In addition, funeral providers must produce those records for inspection by Commission officials upon request. The purpose of this recordkeeping requirement is to help ensure compliance with the substantive provisions of the Rule.[1045]

No rulemaking party presented evidence for the record suggesting that changes to § 453.6 are necessary. The staff, however, recommends a technical change to clarify the requirements of this provision. This section currently requires the funeral provider retain a copy of the "signed" statement of goods and services selected. The Rule, however, does not contain any express requirement that the final statement be signed, either by the consumer or the provider. The Commission in its Statement of Basis and Purpose made no mention of the signature requirement. Earlier drafts of the Rule included a requirement that the funeral provider ask the consumer to sign the itemized statement, but it was not adopted in the final version. The "signed" language of Section 453.6 was apparently inserted to complement the earlier version of the Rule that contained the itemized statement requirement; however, when the signature requirement was deleted, the language of § 453.6 was inadvertently left intact. This language, however, is

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[1043] R-B-5 at 42284.

[1044] *See* the staff's enumeration of state funeral requirements in section I.E, *supra*.

[1045] R-B-5 at 42285.

susceptible to different interpretations, and may lead some funeral providers to believe they must obtain the signature of the consumer on the statement.

The staff therefore recommends that the language of § 453.6 be amended by deleting the phrase "on which the statement was signed" and substituting the phrase "of the arrangements conference," so that the final phrase of the section reads: "for at least one year from the date of the arrangements conference."

I. Comprehension of Disclosures

Section 453.7 of the Rule requires that all required disclosures be made in "a clear and conspicuous manner." Several commentators, however, raised concerns that the price lists supplied by some funeral providers may comply with the Funeral Rule as drafted, and yet still be difficult and confusing for consumers to read. Such concerns were primarily raised by those who advocated the adoption of a standardized price list.[1046] Paul Showalter, for example, a journalist who conducted an informal survey by collecting some forty GPL's from Kansas City funeral providers, concluded that the lists were so confusing that he was "unable with any of those price lists to compute the price of a funeral just from the price list and to know with any certainty that [he] was correct."[1047] The AARP staff conducted their own review of several hundred GPLs from various locations and reported that they varied widely in length, format and use of terminology.[1048] Based upon its review, the AARP concluded that, "together with a low level of knowledge about funeral purchases, [these differences] make current price lists likely to confuse consumers and hinder their ability to select only those items desired."[1049]

William Klein, a consumer member of the New York Funeral Directing Advisory Board, testified that some funeral providers include "so much verbiage and puffery in their general price list that consumers tend to dismiss the GPL out of hand."[1050] In addition, there were specific complaints that lay-out and print size may vary, making it difficult for consumers, and for elderly consumers in particular, to read the information.[1051] One commentator, Russell Berry, found problematic the quantity of "fine print" included in many GPLs. He testified that one of the largest funeral homes in South Dakota, with over 600 funerals a year, "has a six and a half page price list that is single-spaced and with quarter inch margins. You toss that out to a grieving person and say this is the way to choose, we are required to give you this; it baffles them."[1052]

[1046] *See, supra,* section III.D.2.e.

[1047] Showalter, Tr. Vol. III, 137 ("I always called the funeral home and had them walk through the price list with me, and I found so many difficulties in knowing: What are we talking about here? Is there a charge in this case or is there not? The price lists were too confusing").

[1048] R-H-17 at 39-40.

[1049] *Id.*

[1050] Tr. Vol. II, 1036.

[1051] Dr. Mazis, AARP, Tr. Vol. III, 838.

[1052] Tr. Vol. I, 154.

In light of the evidence that some price lists are difficult to read, or contain language inserted by the provider that unnecessarily detracts from the Rule-required information, the staff recommends that an additional requirement and a prohibition be added to this section of the Rule to clarify how disclosures are to be made "clear and conspicuous" and to prevent violations of that standard. Specifically, the staff recommends that, to avoid the "fine print" and detraction problems, the following sentence be added to the current "clear and conspicuous" language:

> The casket price list, outer burial container price list, and general price list, required by §§ 453.2(b)(2)-(4), must be printed or typewritten in at least nine-point type size, and nothing contrary to, inconsistent with, or in mitigation of the information required by the Rule to be included in those price lists shall be used in them.

The staff further concludes that the minimum type-size requirement will impose little, additional compliance costs on funeral providers. The evidence indicates that many providers obtain price list forms from trade groups and other outside sources at minimal cost.[1053] The requirement also will obligate only those few providers who currently use "fine print," in apparent violation of the Rule's current "clear and conspicuous" standard, to use revised forms. Finally, nine-point type size is slightly smaller than normal type produced by most typewriters, and is a standard type size used by the Government Printing Office and the Federal Register for textual material. This report is printed in eleven-point type size. Some of the Rule-required price list disclosures, however, reasonably may need to be in a slightly smaller type size than this report in order to avoid lengthy price lists.

The proposed prohibition of contrary, inconsistent, or mitigating statements in the price lists is intended to prevent non-price language inserted by the provider concerning the value of the price lists' information that may cause consumers to avoid using the lists. The evidence indicates that those practices are occurring to some degree. The Commission has included similar prohibitions in consent agreements involving required disclosure language for certain safety claims.[1054] The Commission in its Used Motor Vehicle Trade Regulation Rule, 16 CFR Part 455, also included a similar provision, § 455.4, that prohibits used car dealers from making any oral or written statements that alter or contradict the Rule-required disclosures.[1055]

J. Declaration of Intent

The Commission included § 453.8 to clarify the scope of the Rule and the obligations it imposes. The Commission makes clear in § 453.8 that a Rule violation occurs if either the Rule's definitional provisions declaring certain acts or practices unfair or deceptive or its remedial provisions preventing those acts or practices are violated. The Commission also declares in § 453.8 that the Rule's provisions are separate and severable from each other -- if a court holds one

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[1053] *See* the discussion at section III.D.2.e, *supra*.

[1054] *See, e.g., In re: Puritan-Bennett Aero Systems Co.*, 110 F.T.C. 86 (1987) (consent order).

[1055] Although § 455.4 primarily was intended to complement other Rule sections that prohibit oral misrepresentations of warranty coverage, the provision is broadly drafted to prevent any statements that contradict the Rule's required disclosures. The amendment proposed by the staff has the same purpose. *See* 49 Fed. Reg. 45692, 45711 (Statement of Basis and Purpose) (November 19, 1984).

section to be invalid, then the remaining sections will continue in effect. Finally, the Commission includes in this section the caveat that the Rule is inapplicable to the business of insurance.[1056]

No rulemaking party presented evidence for the record suggesting that changes to § 453.8 are necessary and staff recommends no modifications to this section.

K. State Exemptions

Section 453.9 of the Rule allows a state to petition the Commission for an exemption from the Rule. The Commission may grant an exemption if the state has requirements in effect that ensure consumers a level of protection at least as great as the Rule. If an exemption is granted, the Rule ceases to have effect in that state as long as the state effectively administers and enforces its requirements. The purpose of § 453.9 is to "encourage federal-state cooperation by permitting appropriate state agencies to enforce their own state laws that are equal to or more stringent than the trade regulation rule."[1057]

To date, Arizona and Texas have petitioned the Commission for exemptions. Arizona's petition was granted in part and became effective October 1, 1987. Texas' original petition was denied;[1058] it has recently submitted a new petition that is pending at the Commission.[1059]

No evidence was presented at the hearings that called for changes to the state exemption section. The staff thus recommends that § 453.9 be retained without modification. In response to the ANPR, one commenter had suggested that the standards the Commission generally uses in evaluating petitions for an exemption be changed.[1060] As the staff noted in its April 1988 report, and continues to believe today, this individual proceeding was an inappropriate forum to consider any changes to the Commission's state exemption process, at least as that process applies to all rulemakings.[1061]

L. Mandatory Review

The Commission, by including § 453.10 in the Funeral Rule, committed itself to begin a rulemaking amendment proceeding, within four years after the effective date of the Rule, to assess whether the Rule should be amended or terminated. The Commission in promulgating this provision acknowledged that the Rule's effects may be evidenced more slowly than in other

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[1056] The Commission explained this provision in its Statement of Basis and Purpose. *See* R-B-5 at 42286.

[1057] R-B-5 at 42287.

[1058] 51 Fed. Reg. 43746 (December 4, 1986).

[1059] The Executive Director of the Texas Funeral Service Commission presented testimony expressing the view that it is the state's responsibility to regulate the funeral industry, and that the Funeral Rule provided Texas officials and legislators with the impetus to strengthen its regulation and increase enforcement, thereby making the federal rule unnecessary in Texas. Farrow, Tr. Vol. III, 550.

[1060] The Conference of Funeral Service Examining Boards, R-B-44 at 3-5.

[1061] R-B-1 at 23. The Commission indicated its agreement with staff's position at the time it published the NPR.

industries; it nonetheless decided to require an early review to determine whether the Rule was still needed after it had an opportunity to work in the marketplace, or whether modifications were necessary.[1062]

The requirements of § 453.10, by definition, must be deleted from any amended Rule because the required review will have been completed. Several rulemaking participants raised the question, however, whether any amended Rule should also include a provision for an additional review procedure. The NSM and other funeral providers, in particular, suggested that if the Rule is not repealed, it should include a sunset provision terminating the Rule on December 31, 1990, unless substantial evidence supported its retention.[1063]

As staff discussed earlier in Section I.C., well-settled case law holds that validly promulgated federal agency rules, like the Funeral Rule, are presumptively valid. A sunset provision of the type proposed by the NSM would reverse that presumption by shifting the burden of proof to the Commission to justify the Rule's continuance. The staff concluded in Section II.E. that the record evidence does not support repeal of the Rule. That same evidence does not provide a basis for the staff to conclude that the Rule's effects are likely to change significantly over the next year and a half so as to justify the early termination of the staff's proposed, amended Rule, as suggested by the NSM.[1064] The staff has also concluded that the Rule's benefits are likely to increase over time, so that a sunset provision dated at some specific time in the future does not appear warranted by the evidence.

Nor does the staff believe that the evidence warrants another mandatory review, particularly one so soon after the completion of this proceeding, in light of the nominal costs the Rule appears to be imposing on funeral providers. Of course, the staff's recommendation that inclusion of a sunset or mandatory review provision is unwarranted at this time does not mean that the amended Rule will go unreviewed. The Commission regularly examines its trade regulation rules pursuant to the Regulatory Flexibility Act.[1065] The Act requires a rule to be reviewed within ten years of its effective date.[1066] Although, in the staff's view, this Funeral Rule Review proceeding satisfied the Act's requirement with respect to the Rule promulgated by the Commission in 1982,[1067] a substantively amended Rule issued by the Commission also will require, under the Act, a review within ten years of its effective date.[1068] In addition, the Commission has the authority to initiate, at any time, an amendment or repeal proceeding if it

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[1062] R-B-5 at 42299. The staff in the Introduction to this report discusses in more detail the purpose of § 453.10.

[1063] R-M-9 (NFDA and NSM Proposed Findings) at 224; Hunter, Tr. Vol. I, 788; FDSA, R-G-5 at 28-29.

[1064] The staff is also concerned that such a change would establish an unwarranted precedent for all FTC Rules.

[1065] 5 U.S.C. §§ 601-612 (1982).

[1066] *Id.* at § 610.

[1067] The staff of the Office of the General Counsel agrees with the rulemaking staff's view.

[1068] 5 U.S.C. § 610.

becomes aware of evidence suggesting that the Rule is not providing benefits to consumers or competition.

The staff thus recommends that § 453.10 be deleted as unnecessary, and not be replaced by a new section mandating either sunset of the Rule or the initiation of another review proceeding.

M. Technical Definitional Amendments

Technical changes to three of the Rule's current definitions in § 453.1 are warranted to clarify their scope and requirements.

Section 453.1(a) contains a definition for "accounting year", even though the phrase appears nowhere else in the Rule. The staff recommends that the definition be deleted.

Section 453.1(d) contains a definition of what will be considered a casket for purposes of the Rule. The definition notes that a casket "is usually constructed of wood, metal, or like material." The Casket Manufacturers Association of America suggests that the term "fiberglass" be added to the description in the definition, because fiberglass caskets represent a significant portion of caskets produced in the market today.[1069] No objections to this suggestion were made by review participants. The staff thus recommends that § 453.1(d) be amended to include "fiberglass" to more accurately reflect the types of materials used in the construction of the caskets in the market today.

Section 453.1(k) contains a definition of "Funeral services." The staff recommends a minor grammatical change to that definition to make it clear that, in order to come within the purview of the Rule, a funeral service requires both the preparation of remains and the supervision of disposition. The revised definition would read:

> "Funeral services" are any services which may be used to: (1) care for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) arrange, conduct or supervise the funeral ceremony or the final disposition of deceased human bodies.

N. Pre-need Sales of Funeral Goods and Services

Introduction

The NSM in its ANPR comment suggested that the original rulemaking record may not authorize the regulation of pre-need sales.[1070] That is not the case. The Rule covers both the pre-need and at-need sale of funeral goods and services.[1071]

[1069] R-E-6 at 2.

[1070] R-B-18 at 19-20.

[1071] The PAA, an association of major pre-need sellers, nonetheless suggests that the Funeral Rule be altered to make it more clear that its coverage extends to the pre-need sale of funeral goods and services. R-M-12 at 90 [Recommendation 2].

By definition, the pre-need sales industry consists of that part of the industry[1072] that sells and promotes funeral related goods and services prior to the time of death.[1073] Payment is often made in advance for those goods and services that the buyer has selected and specified in a pre-need contract.[1074] The Rule currently makes no distinction in its coverage of pre-need sales and at-need sales. By its terms, its coverage extends to funeral providers, who are defined as "any person, partnership or corporation that sells or offers to sell funeral goods and services to the public."[1075] Thus, the Rule is not confined to at-need sales. The Staff Compliance Guidelines also expressly provide for coverage of pre-need sales contracts.[1076] In addition, the Commission has enforced the Rule against several providers of pre-need as well as at-need funeral goods and services.[1077]

Evidence on Continued Coverage of Pre-need Sales

The only suggestion to alter the current coverage of the Funeral Rule to exclude pre-need funeral arrangements came from the American Cemetery-Mortuary Council ("ACMC").[1078] The ACMC's position turns on whether the rationale and purpose supporting the Funeral Rule extends to pre-need sales. The ACMC argues that pre-need and at-need consumers are readily distinguishable,[1079] and that the characteristics that differentiate at-need from pre-need

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[1072] Twenty-three percent of the BLS and RS respondents made some pre-arrangements with funeral homes. Daniel, HX-122 at Table VI, p. 14.

[1073] R-B-5 at 42264. The PAA proposed a definition for pre-need as "the selection and contracting for funeral services and/or burial space and merchandise by a consumer prior to death or impending death with some provision for payment by the purchaser in consideration for the binding obligation on the seller to provide such merchandise and services." R-M-12 at 10.

[1074] Although such plans may be marketed by insurance companies, funeral homes and cemetery operators, the Funeral Rule does not apply to pre-arranged funerals governed by burial insurance. R-B-5 at 42286.

[1075] R-B-5 at 42300.

[1076] R-B-6 at 28063 (illustrations), 23082.

[1077] All of the following cases involved pre-need as well as at-need sales and have resulted in consent agreements with civil penalties: *U.S.* v. *Troy Suggs Funeral Home*, No. CA3-87-1258-G (N.D. Tex., May 20, 1987); *FTC* v. *Crane Rhoton Services Corporation*, No. CA-3-87-1545-T (N.D. Tex., June 13, 1988); *U.S.* v. *Ware Crest, Inc.*, No. CA4-88-437-K (N.D. Tex., July, 11, 1988); *U.S.* v. *Funeral Corporation Texas*, No. CA4-8929 E (N.D. Tex., January 11, 1989); *FTC* v. *Niday Funeral Home, Inc.*, No. H-88-2808 (S.D. Tex., November 1, 1989). In one case in which a substantial portion of the alleged violations involved pre-need transactions, the district court granted the FTC's motion for summary judgment, awarding a permanent injunction and a civil penalty of $80,000. *FTC* v. *Dudley M. Hughes Funeral Co.*, 710 F. Supp. 1524 (N.D. Tex. 1989), *appeal dismissed*, 891 F.2d 589 (5th Cir. 1990). When the Commission determined to pursue these cases, it unequivocally demonstrated that the Commission will prosecute pre-need as well as at-need transactions that allegedly violate the Funeral Rule.

[1078] R-B-45.

[1079] *Id.* at 3 (the distinction is relatively easy to determine based on one factor: pre-need consumers usually make funeral arrangements on their own behalf).

consumers are just those characteristics that provided the initial basis and purpose for the Rule.[1080] According to this argument, the Rule's purpose is to correct for the handicapped bargaining position of funeral purchasers, who are pressured by emotional trauma and time pressure.[1081] The ACMC argues, however, that pre-need consumers are under no time constraints and are not suffering from emotional distress. The ACMC thus concludes that a revised Funeral Rule should recognize these distinctions and relate exclusively to at-need transactions.[1082] The ACMC, however, offered no evidence to support its position.

The view that the Rule should not cover pre-need sales is not shared by a majority of funeral directors. According to a telephone survey of 500 funeral directors conducted by National Research, Inc. for the AARP, over two-thirds of those funeral directors polled expressed the belief that the Rule should cover pre-need as well as at-need sales.[1083] In addition, funeral directors, state officials and representatives of funeral and cemetery associations testified that the Rule should continue to cover pre-need.[1084]

Several arguments were presented in favor of maintaining the Rule's coverage of pre-need sales contracts. First, a CAFMS witness testified that pre-need sales are not free of the pressures associated with at-need sales but are, in fact, marketed by salespeople working for high commissions[1085] who adopt a very aggressive sales technique.[1086] Robert Starks, a funeral director, testified that, although it is easy to get consumers to agree that it would be advantageous to purchase pre-need, actually completing a sale requires very aggressive tactics because "[n]obody wants to buy their own funeral."[1087] Robert Franzen, another funeral director, also testified

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[1080] *Id.* at 1-3.

[1081] *Id.* at 2.

[1082] *Id.* at 3.

[1083] Ayres, HX-108 at Exhibit D, Questionnaire, Q.2. The actual question asked on the survey was: "Should the funeral rule be expanded to apply to pre-need and at-need sales?" To this question, 66.8% responded yes, 24.6% responded no, and 8.6% responded that they did not know. Although the question as worded incorrectly asserts that the Rule would need to be expanded to incorporate pre-need sales, the high number of responses from funeral directors willing to change the Rule in order to cover pre-need indicates more forcefully the support for maintaining pre-need coverage.

[1084] Brownstein, CAFMS, Tr. Vol. I, 163; AARP, R-H-17 at 53-56; Greater Detroit Memorial Society, R-H-19 at 2 (study of 50 seniors from Detroit); S.W. Fla. Funeral & Memorial Society, R-F-64 at 3; Scotland City Memorial Society, R-H-10 at 1; Pittsburgh Memorial Society, R-H-9 at 1; Krause, funeral director, Tr. Vol. II, 3; Nelson, PAA, Tr. Vol. II, 235; Topinka, Illinois state senator, Tr. Vol. II, 94; Starks, PAA, Tr. Vol. II, 355; Snyder, Consumers Union, Tr. Vol. III, 1262; Barr, Kansas state representative, Tr. Vol.III, 1518; Geisberg, NACAA, Tr. Vol. III, 1137; Buchanan, CAFMS, Tr. Vol. III, 1105; Wertheimer, NAEL, Tr. Vol. III, 1002. *But see* NFDA, R-G-6 at 96-97 (pre-need eliminates many of the perceived problems that resulted in the Rule).

[1085] Starks, PAA, Tr. Vol III, 381 (frequently the commissions are as high as 20%).

[1086] Brownstein, Tr. Vol. I, 209-10 (complaints of door-to-door sales, badgering phone calls from salespeople without the best of intentions who try to sell to the uninformed).

[1087] Tr. Vol II, 306, 408; *but see* Graf, PAA, Tr. Vol. II, 604 (easy to sell pre-need without being very aggressive).

that creating demand for pre-need sales requires heavy selling to get purchasers to pay for something so far in the future.[1088] Harry Snyder, the West Coast Director of Consumers Union, referred to the taboos in our society regarding death and explained that, in pre-need sales that take place in the consumer's home,[1089] it is relatively easy to play on the emotional nature of the subject and to oversell funeral goods and services.[1090] Dr. James Reveley, a former funeral director, described the ease with which salespeople can sit down in a consumer's home to sell pre-need and "play [the family members] one off the other."[1091] According to Dr. Reveley, pre-need funeral sales create a "very, very difficult consumer situation."[1092] That pre-need sales are subject to some of the same pressures associated with at-need sales is supported by the Bureau of Economics analysis, which found "no relationship between funeral expenditures and making specific arrangements with the funeral home in advance."[1093]

A witness representing a national association of consumer agencies testified that the basic funeral sale, whether pre-need or at-need, is an area in which consumers have little or no experience.[1094] As a consequence, she asserted, consumers often do not know what questions to ask, even when they have the time to ask questions.[1095] Mr. Snyder testified that traditional societal taboos concerning discussions of funeral costs, and consumers' general lack of awareness of funeral goods and options, adversely affect consumers regardless of whether they purchase in a grieving at-need situation or pre-need; that stigma makes consumers less likely to affirmatively seek information and price disclosures.[1096] The AARP concluded that consumers' hesitancy to inquire, together with the growth of pre-need funeral contracts, the lack of price list

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[1088] Tr. Vol. II, 801 (speaking of sales pitches that would "make your hair stand on end;" to say that consumers are not pressured during these sales is to belie what is going on).

[1089] One funeral director found that 85-90% of his pre-need sales occur in the consumer's home. Radovich, PAA, Tr. Vol. III, 1038.

[1090] Tr. Vol. III, 1261.

[1091] Tr. Vol. III, 899.

[1092] *Id.* at 900.

[1093] Daniel, HX-122 at 41, 38, Table XI ("arngedum"); *see also* Dr. Reveley, former funeral director, Tr. Vol. III, 899 (pre-need funerals not necessarily any cheaper); Botimer, funeral director, Tr. Vol. III, 1283 ("I think pre-need, the expense goes sky high for a family because of your super salesmen"). *But see* Heffner, PAA, Tr. Vol. I, 821 (consumers tend to select lower-cost merchandise on a pre-need basis than at time of need); Neel, funeral director, Tr. Vol. I, 569 ("We found on a pre-arrangement basis the public seemed to spend considerably less than I see go through my chapel"); Nelson, PAA, Tr. Vol. II, 189 (when people sit down in a normal frame of mind without emotional stress, they always decide on a more reasonable amount of money to spend, more reasonable merchandise and other services; the cost is lower).

[1094] Geisberg, NACAA, Tr. Vol. III, 1137.

[1095] *Id.*

[1096] Tr. Vol. III, 1262.

standardization, and the various methods of arranging and paying for pre-need funerals, contribute substantially to consumer confusion and the potential for industry abuse.[1097]

The second argument advanced in favor of maintaining Rule coverage of pre-need funeral sales stems from the difficulty of drawing a firm line to distinguish pre-need from at-need sales. Were the Rule not to apply in the case of lingering, expected deaths, for example, consumers would be denied information for what amounts to, in some sense, nothing more than the technicality of being pre-need. According to Charles Nelson, a cemeterian appearing on behalf of the PAA, such cases are better classified as "near-need;"[1098] Mr. Nelson testified that this grey area between pre-need and at-need accounts for a significant percentage of pre-need sales.[1099]

Still other evidence indicates that pre-need funerals are marketed largely to elderly consumers. One funeral director asserted that pre-need is encouraged in retirement complexes.[1100] According to the AARP, 65% of pre-need contracts are sold to people over 60.[1101] Consumer and funeral director witnesses spoke of the particular vulnerability of the elderly in such sales contexts.[1102] Dr. Reveley found that, when selling pre-need to elderly consumers in retirement homes, "it is just as easy under those circumstances to sell them a big service."[1103]

Finally, several participants asserted that no reason exists to differentiate between pre-need and at-need consumers, because both benefit from the receipt of as much information as

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[1097] R-H-17 at 53-56.

[1098] Tr. Vol. II, 234.

[1099] *Id.* (Consumers come to purchase pre-need because they anticipate a problem in the family. But the sale may occur 3 months, 6 months or 3 days before death).

[1100] Yurs, NFDA, Tr. Vol. II, 532.

[1101] R-H-17 at 53-56 (65% of the 700,000 pre-need funeral contracts sold in 1987 were sold to persons over the age of 60).

[1102] *See, e.g.*, Klugman, California Fed. of Funeral and Memorial Societies, Tr. Vol III, 937; Dr. Reveley, former funeral director, Tr. Vol. III, 899.

[1103] Tr. Vol. III, 899.

possible.[1104] Others argued that pre-need consumers are in the best position to get the most benefit from the Rule's protections, particularly the information requirements.[1105]

Staff Conclusion

The Rule is intended to increase informed consumer choice by ensuring consumers' access to itemized price and options information at a time when it can be useful in making decisions--before those decisions are made.

Whether pre-need sales continue to be covered by the Rule is an increasingly important question. Although there is no reliable evidence to support a prediction about the growth rate of pre-need sales, it is clear from the evidence presented that pre-need will become a larger and more important component of the funeral market over time.[1106] The staff concludes from its review of the evidence that no need exists to change the coverage of the Rule. Although the emotional trauma of the consumer may not be as acute in the pre-need area as it is in the at-need setting, pre-need sales nonetheless require consumers to make decisions in an area where they have little awareness and are subject to emotional and social obstacles that make obtaining and effectively using information difficult, at best. Pre-need sales thus fit squarely within the basis and purpose of the Funeral Rule. In the staff's view, attempts to draw a bright line between pre-need and at-need consumers, in many cases, would be arbitrary or impossible, and would result in problematical enforcement issues.

[1104] Peirson, R-D-1 at 1 (no reason to treat pre-need and at-need differently); CAFMS, R-H-12 at 3 (the planner must be protected just as one who invests in an IRA or pension plan is protected from illegal operators); Starks, PAA, Tr. Vol. II, 355 (if the FTC is concerned about freedom of choice, it definitely should apply the Rule to pre-need sales); Perguson, Peoples Memorial Assoc., Tr. Vol. III, 1176 (it is desireable to require providers to show price lists so pre-need can have a general idea about what they should prepay); Wertheimer, NAEL, Tr. Vol II, 1002 (it is important for pre-planners to have as much information as they can).

[1105] Starks, Tr. Vol. II, 356 (Rule would be more effective in a pre-need situation); Dr. Mazis, AARP, Tr. Vol. III, 844 (pre-needs would benefit the most from the information requirements of the Rule); Graf, PAA, Tr. Vol. II, 616 (education as to all the available options can be better understood pre-need than at-need).

[1106] Dr. Nelson, AARP, HX-1 at 27 ("Annual sales are projected to reach 2,000,000 by the year 2000."); NFDA, R-G-6 at 98 (the number of pre-need transactions will soon surpass at-need ones); Krause, funeral director, Tr. Vol. II, 17 (nationwide there is a growth in the pre-need market); Nelson, AARP, Tr. Vol. I, 44 (the number of pre-need sales is increasing over time); Hahn, FFDA, Tr. Vol. II, 707 (there will be an increasing number of funeral directors that will be actively involved in pre-need).

APPENDIX A

Staff's Recommended Rule with Proposed Amendments

PART 453-FUNERAL INDUSTRY PRACTICES

Sec.

453.1 Definitions.
453.2 Price disclosures.
453.3 Misrepresentations.
453.4 Required purchase of funeral goods or funeral services.
453.5 Services provided without prior approval.
453.6 Retention of documents.
453.7 Comprehension of disclosures.
453.8 Declaration of intent.
453.9 State exemptions.

Authority: Sec. 6(g) 38 Stat. 721 (15 U.S.C. 46(g); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552).

Source: 47 FR 42299, Sept. 24, 1982, unless otherwise noted.

§453.1 Definitions

(a) Alternative container. An "alternative container" is an unfinished wood box or other non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of fiberboard, pressed-wood, composition materials (with or without an outside covering) or like materials.

(b) Cash advance item. A "cash advance item" is any item of service or merchandise described to a purchaser as a "cash advance," "accommodation," "cash disbursement," or similar term. A cash advance item is also any item obtained from a third party by the funeral provider on the purchaser's behalf, or arranged for by the funeral provider to be directly supplied by a third party to the purchaser, whether paid for by the funeral provider or the purchaser. 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.

(c) Casket. A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, fiberglass, or like material, and ornamented and lined with fabric.

(d) Commission. "Commission" refers to the Federal Trade Commission.

(e) Cremation. "Cremation" is a heating process which incinerates human remains.

(f) Crematory. A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.

(g) Direct cremation. A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

(h) Funeral goods. "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

(i) Funeral provider. A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

(j) Funeral services. "Funeral services" are any services which may be used to: (1) care for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

(k) Immediate burial. An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

(l) Memorial service. A "memorial service" is a ceremony without the body present.

(m) Funeral ceremony. A "funeral ceremony" is a service with the body present.

(n) Outer burial container. An "outer burial container" is any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

(o) Person. A "person" is any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

(p) Services of funeral director and staff. The "services of funeral director and staff" are the basic services, not included in prices of other categories in §453.2(b)(4), that are furnished by a funeral provider in arranging any funeral, such as conducting the arrangements conference, planning the funeral, and obtaining necessary permits.

§453.2 Price Disclosures

(a) Unfair or Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) Preventive Requirements

To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §453.4(b)(1), funeral providers must:

(1) Telephone Price Disclosure

Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists in paragraphs (b)(2) through (4) of this section and any other readily available information which reasonably answers the question.

(2) Casket Price List

(i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the 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, including the casket manufacturer's name and model number, and the effective date for the price list. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, that funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information required by this paragraph.

(ii) Place on the list, however produced, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) Outer Burial Container Price List

(i) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information required by this paragraph.

(ii) Place on the list, however produced, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) General Price List

(i) Give a printed or typewritten price list for retention to persons who inquire in person about the prices or the

selection of funeral goods or funeral services. The funeral provider must offer the list upon beginning discussion either of prices or of the selection of any funeral goods or funeral services, including the overall type of service or disposition, whichever discussion occurs first. This requirement applies whether the discussion takes place in the funeral home or elsewhere. Provided, however, that when the deceased is removed for transportation to the funeral home, an in-person request at that time for authorization to embalm, required by §453.5(a)(2), does not, by itself, trigger the requirement to offer the general price list if the provider in seeking prior embalming approval discloses that embalming is not required by law except in certain special cases, if any. Any other discussion during that time about prices or the selection of funeral goods or services triggers the requirement to give consumers a general price list. This list must contain at least the following information:

(A) The name, address, and telephone number of the funeral provider's place of business;

(B) A caption describing the list as a "general price list"; and

(C) The effective date for the price list;

(ii) Include on the 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:

(A) Forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(B) Receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(C) The price range for the direct cremations offered by the funeral provider, together with: (1) a separate price for a direct cremation where the purchaser provides the container; (2) separate prices for each direct cremation offered including an alternative container; and (3) a description of the services and container (where applicable), included in each price;

(D) The price range for the immediate burials offered by the funeral provider, together with: (1) a separate price for an immediate burial where the purchaser provides the casket; (2) separate prices for each immediate burial offered including a casket or alternative container; and (3) a description of the services and container (where applicable) included in that price;

(E) Transfer of remains to funeral home;

(F) Embalming;

(G) Other preparation of the body;

(H) Use of facilities and staff for viewing;

(I) Use of facilities and staff for funeral ceremony;

(J) Use of facilities and staff for memorial service;

(K) Use of equipment and staff for graveside service;

(L) Hearse; and

(M) Limousine.

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b)(2)(i) of this section; and

(B) Either of the following:

(1) The price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b)(3)(i) of this section; and

(C) Either of the following:

(1) The price for the basic services of funeral director and staff, together with a list of the principal basic services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our basic services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)". The statement shall include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead; or

(2) The following statement: "Please note that a fee for the use of our basic services is included in the price of our caskets. Our services include (specify)." The statement shall include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead. The statement must be placed on the general price list together with the casket price range, required by paragraph (b)(4)(iii)(A)(1) of this section, or together with the prices of individual caskets, required by (b)(4)(iii)(A)(2) of this section.

(3) The services fee permitted by §453.2(b)(4)(iii)(C)(1) or (C)(2) is the only funeral provider fee for services, facilities or unallocated overhead permitted by this part to be non-declinable, unless otherwise required by law.

(5) Statement of Funeral Goods and Services Selected

(i) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human

remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(B) Specifically itemized cash advance items. (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 be given and a written statement of the actual charges shall be provided before the final bill is paid.); and

(C) The total cost of the goods and services selected.

(ii) The information required by this paragraph (b)(5) may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.

(6) Other Pricing Methods

Funeral providers may give persons any other price information, in any other format, in addition to that required by § 453.2(b)(2), (3), and (4) so long as the statement required by § 453.2(b)(5) is given when required by the rule.

§453.3 Misrepresentations

(a) Embalming Provisions

(1) Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases, if any.

(2) Preventive requirements

To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§453.4(b)(1) and 453.5(2), funeral providers must:

(i) Not represent that a deceased person is required to be embalmed for: (1) direct cremation; (2) immediate burial; (3) a funeral using a sealed casket; or (4) a closed casket funeral without viewing or visitation when refrigeration is available and when state or local law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by §453.2(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement that does not require you

to pay for it, such as direct cremation or immediate burial." The phrase "except in certain special cases" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require embalming under any circumstances.

(b) Casket for Cremation Provisions

(1) Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires a casket for direct cremations;

(ii) Represent that a casket is required for direct cremations.

(2) Preventive Requirements

To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §453.4(a)(1), funeral providers must place the following disclosure in immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an alternative container. Alternative containers encase the body and can be made of materials like fiberboard or composition materials (with or without an outside covering). The containers we provide are (specify containers)." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(c) Outer Burial Container Provisions

(1) Deceptive Acts or Practices

In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;

(ii) Fail to disclose to persons arranging funerals that state law does not require the purchase of an outer burial container.

(2) Preventive Requirement

To prevent this deceptive act or practice, funeral providers must place the following disclosure on the outer burial container price list, required by §453.2(b)(3)(i), or, if the prices of outer burial containers are listed on the general price list, required by §453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, state or local law does not require that you buy a container to surround the casket in the grave. However, many cemeteries require that you have such a container so that the grave will not sink in. Either a grave liner or a burial vault will satisfy these requirements."

The phrase "in most areas of the country" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require a container to surround the casket in the grave.

(d) General Provisions on Legal and Cemetery Requirements

(1) Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that federal, state, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

(2) Preventive Requirements

To prevent these deceptive acts or practices, as well as the deceptive acts or practices identified in §§453.3(a)(1), 453.3(b)(1), and 453.3(c)(1), funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by §453.2(b)(5)) any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) Provisions on Preservative and Protective Value Claims

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) Cash Advance Provisions

(1) Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) Preventive Requirements

To prevent these deceptive acts or practices, funeral providers must place the following sentence in the itemized

statement of funeral goods and services selected, in immediate conjunction with the list of itemized cash advance items required by §453.2(b)(5)(i)(B): "We charge you for our services in obtaining or arranging for: (specify cash advance items)," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item.

§453.4 Required Purchase of Funeral Goods or Funeral Services.

(a) Casket for Cremation Provisions

(1) Unfair or Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket be purchased for direct cremation.

(2) Preventive Requirement

To prevent this unfair or deceptive act or practice, funeral providers must make an alternative container available for direct cremations, if they arrange direct cremations.

(b) Other Required Purchases of Funeral Goods or Funeral Services

(1) Unfair or Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to:

(i) Condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part;

(ii) Charge any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral, other than the fees for: (1) services of funeral director and staff, permitted by §453.2(b)(4)(iii)(C); (2) other funeral services and funeral goods selected by the purchaser; and (3) other funeral goods or services required to be purchased, as explained on the itemized statement in accordance with §453.3(d)(2).

(2) Preventive Requirements

(i) To prevent this unfair or deceptive act or practice, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by §§453.2(b)(4)(ii) and (iii): "The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected."

Provided, however, that if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our basic services" between the second and third sentences of the statement specified above herein. The statement shall include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead; and

(B) Place the following disclosure in the statement of funeral goods and services selected, required by §453.2(b)(5)(i): "Charges are only for those items that you selected or that are required. If we are required by law or by a cemetery or crematory to use any items, we will explain the reasons in writing below."

(ii) A funeral provider shall not violate this section by failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

§453.5 Services Provided Without Prior Approval

(a) Unfair or Deceptive Acts or Practices

In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(3) The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) Preventive Requirement

To prevent these unfair or deceptive acts or practices, funeral providers must include on the itemized statement of funeral goods and services selected, required by §453.2(b)(5), the statement: "If you selected a funeral which may require embalming, such as a funeral with viewing, you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

§453.6 Retention of Documents

To prevent the unfair or deceptive acts or practices specified in §453.2 and §453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in §453.2(b)(2) through (4), as applicable, for at least one year after the date of their last distribution to customers, and a copy of each statement of funeral goods and services selected, as required by §453.2(b)(5), for at least one year from the date of the arrangements conference.

§453.7 Comprehension of Disclosures

To prevent the unfair or deceptive acts or practices specified in §453.2 through §453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner. The casket price list, outer burial container price list, and general price list, required by §§453.2(b)(2)-(4), must be printed or typewritten in at least nine-point type size, and nothing contrary to, inconsistent with, or in mitigation of the information required by the Rule to be included in those price lists shall be used in them.

§453.8 Declaration of Intent

(a) Except as otherwise provided in §453.2(a), it is a violation of this rule to engage in any unfair or deceptive acts or practices specified in this rule, or to fail to comply with any of the preventive requirements specified in this rule;

(b) The provisions of this rule are separate and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.

§453.9 State Exemptions

If, upon application to the Commission by an appropriate state agency, the Commission determines that:

(a) There is a state requirement in effect which applies to any transaction to which this rule applies; and

(b) That state requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule;

then the Commission's rule will not be in effect in that state to the extent specified by the Commission in its determination, for as long as the State administers and enforces effectively the state requirement.

APPENDIX B

The Recommended Rule Compared with the Current Rule

N.B.: This document shows the changes between the original text of the Funeral Rule and the revised text proposed by the staff. The deletions are struck through and the additions are bolded.

PART 453-FUNERAL INDUSTRY PRACTICES

Sec.

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453.9 State exemptions.
~~453.10 Mandatory review.~~

Authority: Sec. 6(g) 38 Stat. 721 (15 U.S.C. 46(g); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552).

Source: 47 FR 42299, Sept. 24, 1982, unless otherwise noted.

§453.1 Definitions

(a) ~~Accounting year. "Accounting year" refers to the particular calendar year or other one year period used by a funeral provider in keeping financial records for tax or accounting purposes.~~

~~(b)~~ Alternative container. An "alternative container" is ~~a~~ **an unfinished wood box or other** non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of ~~cardboard~~ **fiberboard**, pressed-wood, composition materials (with or without an outside covering) or ~~pouches of canvas or other~~ **like** materials.

~~(c)~~(b) Cash advance item. A "cash advance item" is any item of service or merchandise described to a 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, **or arranged for by the funeral provider to be directly supplied by a third party to the purchaser, whether paid for by the funeral provider or the purchaser.** Cash advance items may include, but are not limited to~~, the following items: Cemetery~~: **cemetery** or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.

~~(d)~~(c) Casket. A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, **fiberglass**, or like material, and ornamented and lined with fabric.

~~(e)~~(d) Commission. "Commission" refers to the Federal Trade Commission.

~~(f)~~(e) Cremation. "Cremation" is a heating process which incinerates human remains.

~~(g)~~(f) Crematory. A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.

~~(h)~~(g) Direct cremation. A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

~~(i)~~(h) Funeral goods. "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

~~(j)~~(i) Funeral provider. A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

~~(k)~~(j) Funeral services. "Funeral services" are any services which may be used to: (1) care for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

~~(l)~~(k) Immediate burial. An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

(l) Memorial service. A "memorial service" is a ceremony without the body present.

(m) Funeral ceremony. A "funeral ceremony" is a service with the body present.

(n) Outer burial container. An "outer burial container" is any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

~~(n)~~(o) Person. A "person" is any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

~~(o)~~(p) Services of funeral director and staff. The "services of funeral director and staff" are the basic services, not included in prices of other categories in §453.2(b)(4) ~~which may be~~, that are furnished by a funeral provider in arranging ~~and supervising a~~ any funeral, such as conducting the arrangements conference, planning the funeral, and obtaining necessary permits. ~~and placing obituary notices.~~

~~(p) Unfinished wood box. An "unfinished wood box" is an unornamented casket made of wood which does not have a fixed interior lining.~~

~~[49 FR 563, Jan. 5, 1984]~~

§453.2 Price ~~disclosures.~~ Disclosures

(a) Unfair or ~~deceptive acts or practices.~~ **Deceptive Acts or Practices**

In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish **accurate** price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) Preventive ~~requirements.~~ **Requirements**

To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(b)(1), funeral providers must:

(1) **Telephone Price Disclosure** ~~price disclosures. (i) Tell persons who call the funeral provider's place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services are offered, that price information is available over the telephone.~~

~~(ii)~~

Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists in paragraphs (b)(2) through (4) of this section **and any other readily available information** which reasonably answers the question ~~and any other information which reasonably answers the question and which is readily available~~.

(2) Casket ~~price list.~~ **Price List**

(i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the 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, **including the casket manufacturer's name and model number,** and the effective date for the price list. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, ~~That~~ **that** funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information ~~which is~~ required by this paragraph~~(b)(2)(i) of this section~~.

(ii) Place on the list, ~~whether a printed or typewritten list or other format is used~~ **however produced,** the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) Outer ~~burial container price list.~~ Burial Container Price List

(i) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, ~~That~~ that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information ~~which is~~ required by this paragraph~~(b)(3)(i) of this section~~.

(ii) Place on the list, ~~whether a printed or typewritten list or other format is used~~ however produced, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) General ~~price list.~~ Price List

(i) Give a printed or typewritten price list for retention to persons who inquire in person about ~~funeral arrangements~~ the prices or the ~~prices~~ selection of funeral goods or funeral services. ~~When people inquire in person about funeral arrangements or the prices of funeral goods or funeral services, the~~ The funeral provider must offer ~~them~~ the list upon beginning discussion either of ~~funeral arrangements~~ prices or of the selection of any funeral goods or funeral services, including the overall type of service or disposition, whichever discussion occurs first. This requirement applies whether the discussion takes place in the funeral home or elsewhere. Provided, however, that when the deceased is removed for transportation to the funeral home, an in-person request at that time for authorization to embalm, required by §453.5(a)(2), does not, by itself, trigger the requirement to offer the general price list if the provider in seeking prior embalming approval discloses that embalming is not required by law except in certain special case~~s,~~ if any. Any other discussion during that time about prices or the selection of funeral goods or services triggers the requirement to give consumers a general price list. This list must contain at least the following information:

(A) The name, address, and telephone number of the funeral provider's place of business;

(B) A caption describing the list as a "general price list"; and

(C) The effective date for the price list;~~ and~~

~~(D) In immediate conjunction with the price disclosures required by paragraph (b)(4)(ii) of this section, the statement: "This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services,~~

~~flowers, and newspaper notices. The prices for those items will be shown on your bill or the statement describing the funeral goods and services you selected."~~

(ii) Include on the 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:

(A) Forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(B) Receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(C) The price range for the direct cremations offered by the funeral provider, together with: (1) ~~A~~ **a** separate price for a direct cremation where the purchaser provides the container; (2) separate prices for each direct cremation offered including an ~~unfinished wood box or~~ alternative container; and (3) a description of the services and container (where applicable), included in each price;

(D) The price range for the immediate burials offered by the funeral provider, together with: (1) ~~A~~ **a** separate price for an immediate burial where the purchaser provides the casket; (2) separate prices for each immediate burial offered including a casket or alternative container; and (3) a description of the services and container (where applicable) included in that price;

(E) **Transfer of remains to funeral home;**

(F) **Embalming;**

(G) Other preparation of the body;

(H) Use of facilities **and staff** for viewing;

(I) Use of facilities **and staff** for funeral ceremony;

(J) ~~Other use of facilities, together with a list~~ **Use** of facilities ~~provided~~ **and staff for** ~~any quoted price;~~ **memorial service;**

(K) ~~Hearse;~~ **Use of equipment and staff for graveside service;**

~~(L) Limousine;~~

~~(M) Other automotive equipment, together with a description of the automotive equipment provided for any quoted price~~**(L) Hearse**; and

~~(N) Acknowledgment cards~~**(M) Limousine.**

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b)(2)(i) of this section; and

(B) Either of the following:

(1) The price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b)(3)(i) of this section; and

(C) Either of the following:

(1) The price for the basic services of funeral director and staff, together with a list of the principal basic services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our basic services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)". **The statement shall include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead** ; or

(2) The following statement: "Please note that a fee for the use of our basic services is included in the price of our caskets. Our services include (specify)." **The statement shall include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead. The statement** must be placed on the general price list together with the casket price range, required by paragraph (b)(4)(iii)(A)(1) of this section, or together with the prices of individual caskets, required by (b)(4)(iii)(A)(2) of this section.

(3) The services fee permitted by §453.2(b)(4)(iii)(C)(1) or (C)(2) is the only funeral provider fee for services, facilities or unallocated overhead permitted by this part to be non-declinable, unless otherwise required by law.

(5) Statement of ~~funeral goods and services selected.~~ Funeral Goods and Services Selected

(i) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(B) Specifically itemized cash advance items. (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 be given and a written

statement of the actual charges shall be provided before the final bill is paid.); and

(C) The total cost of the goods and services selected.

(ii) The information required by this paragraph (b)(5) ~~of this section~~ may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.

(6) Other ~~pricing methods.~~ **Pricing Methods**

Funeral providers may give persons any other price information, in any other format, in addition to that required by § ~~paragraphs (b) (2)~~ **453.2(b)(2)**, (3), and (4) ~~of this section~~ so long as the statement required by § ~~paragraph (b)(5) of this section~~ **453.2(b)(5)** is given when required by the rule.

§453.3 Misrepresentations~~.~~

(a) Embalming Provisions~~-~~

(1) Deceptive ~~acts~~ **Acts** or ~~practices.~~ **Practices**

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that ~~State~~ **state** or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases, **if any**.

(2) Preventive requirements

To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§453.4(b)(1) and 453.5(2), funeral providers must:

(i) Not represent that a deceased person is required to be embalmed for: (1) direct cremation~~,~~; (2) immediate burial~~,~~; (3) a funeral using a sealed casket~~, or if~~; **or (4) a closed casket funeral without viewing or visitation when** refrigeration is available and ~~the funeral is without viewing or visitation and with a closed casket when State~~ **when state** or lo~~cal~~ law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by §453.2(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement ~~which~~ **that** does not require you to pay for it, such as direct cremation or immediate burial." **The phrase "except in certain special cases" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require embalming under any circumstances.**

(b) Casket for ~~cremation provisions-~~**Cremation Provisions**

(1) Deceptive ~~acts~~ Acts or ~~practices.~~ Practices

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that ~~State~~ state or local law requires a casket for direct cremations;

(ii) Represent that a casket ~~(other than an unfinished wood box)~~ is required for direct cremations.

(2) Preventive ~~requirements.~~ Requirements

To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(a)(1), funeral providers must place the following disclosure in immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an ~~unfinished wood box or an~~ alternative container. Alternative containers encase the body and can be made of materials like ~~heavy cardboard~~ fiberboard or composition materials (with or without an outside covering)~~, or pouches of canvas~~. The containers we provide are (specify containers)." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(c) Outer ~~burial container provisions~~ Burial Container Provisions

(1) Deceptive ~~acts~~ Acts or ~~practices.~~ Practices

In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that ~~State~~ state or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;

(ii) Fail to disclose to persons arranging funerals that ~~State~~ state law does not require the purchase of an outer burial container.

(2) Preventive ~~requirement.~~ Requirement

To prevent ~~these~~ this deceptive ~~acts~~ act or ~~practices~~ practice, funeral providers must place the following disclosure on the outer burial container price list, required by § 453.2(b)(3)(i), or, if the prices of outer burial containers are listed on the general price list, required by §453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, ~~no State~~ state or local law ~~makes~~ does not require that you buy a container to surround the casket in the grave. However, many cemeteries ~~ask~~ require that you have such a container so that the grave will not sink in. Either a grave liner or a burial vault ~~or a grave liner~~ will satisfy these requirements."
The phrase "in most areas of the country" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require a container to surround the casket in the grave.

(d) General ~~provisions on legal and cemetery requirements.~~ **Provisions on Legal and Cemetery Requirements**

(1) Deceptive ~~acts~~ **Acts** or ~~practices.~~ **Practices**

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that ~~Federal, State~~ **federal, state,** or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

(2) Preventive ~~requirements.~~ **Requirements**

To prevent these deceptive ~~act~~ **acts** or practices, as well as the deceptive acts or practices identified in §§453.3(a)(1), 453.3(b)(1), and 453.3(c)(1), funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by §453.2(b)(5)) any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) Provisions on ~~preservative and protective value claims.~~ **Preservative and Protective Value Claims**

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) Cash ~~advance provisions.~~ **Advance Provisions**

(1) Deceptive ~~acts~~ **Acts** or ~~practices.~~ **Practices**

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) Preventive ~~requirements.~~ **Requirements**

To prevent these deceptive acts or practices, funeral providers must place the following sentence in the ~~general price list, at the end of the cash advances disclosure, required by 453.2(b)(4)(ii)(C)~~ **itemized statement of funeral goods and services selected, in immediate conjunction with the list of**

itemized cash advance items required by §453.2(b)(5)(i)(B): "We charge you for our services in ~~buying these items,~~ **obtaining or arranging for: (specify cash advance items),"** if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item. ~~[49 FR 563, Jan. 5, 1984]~~

§453.4 Required ~~purchase of funeral goods or funeral services~~ **Purchase of Funeral Goods or Funeral Services**.

(a) **Casket for** ~~cremation provisions~~ **Cremation Provisions**

(1) **Unfair or** ~~deceptive acts or practices.~~ **Deceptive Acts or Practices**

In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket ~~other than an unfinished wood box~~ be purchased for direct cremation.

(2) **Preventive** ~~requirement.~~ **Requirement**

To prevent this unfair or deceptive act or practice, funeral providers must make an ~~unfinished wood box or~~ alternative container available for direct cremations, if they arrange direct cremations.

(b) **Other** ~~required purchases of funeral goods or funeral services~~ **Required Purchases of Funeral Goods or Funeral Services**

(1) **Unfair or** ~~deceptive acts or practices.~~ **Deceptive Acts or Practices**

In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to ~~condition~~:

(i) **Condition** the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part;

(ii) Charge any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral, other than the fees for: (1) services of funeral director and staff, permitted by §453.2(b)(4)(iii)(C); (2) other funeral services and funeral goods selected by the purchaser; and (3) other funeral goods or services required to be purchased, as explained on the itemized statement in accordance with §453.3(d)(2).

(2) **Preventive** ~~requirements.~~ **Requirements**

(i) To prevent this unfair or deceptive act or practice, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by §§453.2(b)(4)(ii) and (iii): "The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any

items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected."

Provided, however, ~~That~~ **that** if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our **basic** services" between the second and third sentences of the statement specified above herein. **The statement shall include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead;** and

(B) Place the following disclosure ~~on~~ **in** the statement of funeral goods and services selected, required by §453.2(b)(5)(i): "Charges are only for those items that ~~are used~~ **you selected or that are required.** If we are required by law **or by a cemetery or crematory** to use any items, we will explain the reasons in writing below."

(ii) A funeral provider shall not violate this section by failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

§453.5 Services ~~provided without prior approval.~~ Provided Without Prior Approval

(a) Unfair or Deceptive Acts or ~~practices.~~ Practices

In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(3) The funeral provider is unable to contact a family member or other authorized person after exercisi~~ng~~ due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) Preventive ~~requirement.~~ Requirement

To prevent these unfair or deceptive acts or practices, funeral providers must include on the ~~contract, final bill, or other written evidence of the agreement or obligation given to the customer~~ **itemized statement of funeral goods and services selected, required by §453.2(b)(5),** the statement: "If you

selected a funeral which ~~requires~~ **may require** embalming, such as a funeral with viewing, you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

§453.6 Retention of ~~documents.~~ **Documents**

To prevent the unfair or deceptive acts or practices specified in §453.2 and §453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in §453.2(b)(2) through (4), as applicable, for at least one year after the date of their last distribution to customers, and a copy of each statement of funeral goods and services selected, as required by §453.2(b)(5), for at least one year from the date ~~on which the statement was signed~~ **of the arrangements conference** .

§453.7 Comprehension of ~~disclosures.~~ **Disclosures**

To prevent the unfair or deceptive acts or practices specified in §453.2 through §453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner. **The casket price list, outer burial container price list, and general price list, required by §§ 453.2(b)(2)-(4), must be printed or typewritten in at least nine-point type size, and nothing contrary to, inconsistent with, or in mitigation of the information required by the Rule to be included in those price lists shall be used in them.**

§453.8 Declaration of ~~intent.~~ **Intent**

(a) Except as otherwise provided in §453.2(a), it is a violation of this rule to engage in any unfair or deceptive acts or practices specified in this rule, or to fail to comply with any of the preventive requirements specified in this rule;

(b) The provisions of this rule are ~~sparate~~ **separate** and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.
~~[49 FR 564, Jan. 5, 1984]~~

§453.9 State ~~exemptions.~~ **Exemptions**

If, upon application to the Commission by an appropriate ~~State~~ **state** agency, the Commission determines that:

(a) There is a ~~State~~ **state** requirement in effect which applies to any transaction to which this rule applies; and

(b) That ~~State~~ **state** requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule;

then the ~~commission's~~ **Commission's** rule will not be in effect in that ~~State~~ **state** to the extent specified by the Commission in its determination, for as long as the State administers and enforces effectively the ~~State~~ **state** requirement.
~~[49 FR 564, Jan. 5, 1984]~~

~~453.10 Mandatory review.~~

~~No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceeding.~~

APPENDIX C

PART 453-FUNERAL INDUSTRY PRACTICES

Sec.

453.1 Definitions.
453.2 Price disclosures.
453.3 Misrepresentations.
453.4 Required purchase of funeral goods or funeral services.
453.5 Services provided without prior approval.
453.6 Retention of documents.
453.7 Comprehension of disclosures.
453.8 Declaration of intent.
453.9 State exemptions.
453.10 Mandatory review.

Authority: Sec. 6(g) 38 Stat. 721 (15 U.S.C. 46(g); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552).

Source: 47 FR 42299, Sept. 24, 1982, unless otherwise noted.

§453.1 Definitions.

(a) Accounting year. "Accounting year" refers to the particular calendar year or other one year period used by a funeral provider in keeping financial records for tax or accounting purposes.

(b) Alternative container. An "alternative container" is a non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of cardboard, pressed-wood, composition materials (with or without an outside covering) or pouches of canvas or other materials.

(c) Cash advance item. A "cash advance item" is any item of service or merchandise described to a 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, the following items: Cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; music~~ians~~ or singers; nurses; obituary notices; gratuities and death certificates.

(d) Casket. A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, or like material, and ornamented and lined with fabric.

(e) Commission. "Commission" refers to the Federal Trade Commission.

(f) Cremation. "Cremation" is a heating process which incinerates human remains.

(g) Crematory. A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.

(h) Direct cremation. A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

(i) Funeral goods. "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

(j) Funeral provider. A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

(k) Funeral services. "Funeral services" are any services which may be used to care for and prepare deceased human bodies for burial, cremation or other final disposition; and arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

(l) Immediate burial. An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

(m) Outer burial container. An "outer burial container" is any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

(n) Person. A "person" is any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

(o) Services of funeral director and staff. The "services of funeral director and staff" are the services, not included in prices of other categories in §453.2(b)(4) which may be furnished by a funeral provider in arranging and supervising a funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits and placing obituary notices.

(p) Unfinished wood box. An "unfinished wood box" is an unornamented casket made of wood which does not have a fixed interior lining.

[49 FR 563, Jan. 5, 1984]

§453.2 Price disclosures.

(a) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) Preventive requirements. To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §453.4(b)(1), funeral providers must:

(1) Telephone price disclosures. (i) Tell persons who call the funeral provider's place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services

are offered, that price information is available over the telephone.

(ii) Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists in paragraphs (b)(2) through (4) of this section which reasonably answers the question and any other information which reasonably answers the question and which is readily available.

(2) Casket price list. (i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the 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. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. Provided however, That funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is required by this paragraph (b)(2)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) Outer burial container price list. (i) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. Provided however, That funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is required by this paragraph (b)(3)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) General price list. (i) Give a printed or typewritten price list for retention to persons who inquire in person about funeral arrangements or the prices of funeral goods or funeral services. When people inquire in person about funeral arrangements or the prices of funeral goods or funeral services, the funeral provider must offer them the list upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services. This list must contain at least the following information:

(A) The name, address, and telephone number of the funeral provider's place of business;

(B) A caption describing the list as a "general price list";

(C) The effective date for the price list; and

(D) In immediate conjunction with the price disclosures required by paragraph (b)(4)(ii) of this section, the statement: "This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services, flowers, and newspaper notices. The prices for those items will be shown on your bill or the statement describing the funeral goods and services you selected."

(ii) Include on the 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:

(A) Forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(B) Receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(C) The price range for the direct cremations offered by the funeral provider, together with: (1) A separate price for a direct cremation where the purchaser provides the container; (2) separate prices for each direct cremation offered including an unfinished wood box or alternative container; and (3) a description of the services and container (where applicable), included in each price;

(D) The price range for the immediate burials offered by the funeral provider, together with: (1) A separate price for an immediate burial where the purchaser provides the casket; (2) separate prices for each immediate burial offered including a casket or alternative container; and (3) a description of the services and container (where applicable) included in that price;

(E) Transfer of remains to funeral home;

(F) Embalming;

(G) Other preparation of the body;

(H) Use of facilities for viewing;

(I) Use of facilities for funeral ceremony;

(J) Other use of facilities, together with a list of facilities provided for any quoted price;

(K) Hearse;

(L) Limousine;

(M) Other automotive equipment, together with a description of the automotive equipment provided for any quoted price; and

(N) Acknowledgment cards.

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b)(2)(i) of this section; and

(B) Either of the following:

(1) The price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b)(3)(i) of this section; and

(C) Either of the following:

(1) The price for the services of funeral director and staff, together with a list of the principal services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)"; or

(2) The following statement: "Please note that a fee for the use of our services is included in the price of our caskets. Our services include (specify)." The statement must be placed on the general price list together with casket price range, required by paragraph (b)(4)(iii)(A)(1) of this section, or together with the prices of individual caskets, required by (b)(4)(iii)(A)(2) of this section.

(5) Statement of funeral goods and services selected. (i) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(B) Specifically itemized cash advance items. (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 be given and a written statement of the actual charges shall be provided before the final bill is paid.); and

(C) The total cost of the goods and services selected.

(ii) The information required by this paragraph (b)(5) of this section may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.

(6) Other pricing methods. Funeral providers may give persons any other price information, in any other format, in addition to that required by paragraphs (b) (2), (3), and (4) of this section so long as the statement required by paragraph (b)(5) of this section is given when required by the rule.

§453.3 Misrepresentations.

(a) Embalming Provisions-(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that State or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases.

(2) Preventive requirements. To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§453.4(b)(1) and 453.5(2), funeral providers must:

(i) Not represent that a deceased person is required to be embalmed for direct cremation, immediate burial, a funeral using a sealed casket, or if refrigeration is available and the funeral is without viewing or visitation and with a closed casket when State or local law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by §453.2(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement which does not require you to pay for it, such as direct cremation or immediate burial."

(b) Casket for cremation provisions-(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that State or local law requires a casket for direct cremations;

(ii) Represent that a casket (other than an unfinished wood box) is required for direct cremations.

(2) Preventive requirements. To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §453.4(a)(1), funeral providers must place the following disclosure in immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an unfinished wood box or an alternative container. Alternative containers can be made of materials like heavy cardboard or composition materials (with or without an outside covering), or pouches of canvas." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(c) Outer burial container provisions-(1) Deceptive acts or

practices. In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that State or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;

(ii) Fail to disclose to persons arranging funerals that State law does not require the purchase of an outer burial container.

(2) Preventive requirement. To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by §453.2(b)(3)(i), or, if the prices of outer burial containers are listed on the general price list, required by §453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, no State or local law makes you buy a container to surround the casket in the grave. However, many cemeteries ask that you have such a container so that the grave will not sink in. Either a burial vault or a grave liner will satisfy these requirements."

(d) General provisions on legal and cemetery requirements-(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that Federal, State, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

(2) Preventive requirements. To prevent these deceptive act or practices, as well as the deceptive acts or practices identified in §§453.3(a)(1), 453.3(b)(1), and 453.3(c)(1), funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by §453.2(b)(5)) any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) Provisions on preservative and protective value claims. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) Cash advance provisions-(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) Preventive requirements. To prevent these deceptive acts or practices, funeral providers must place the following sentence in the general price list, at the end of the cash advances disclosure, required by §453.2(b)(4)(ii)(C): "We charge you for our services in buying these items," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item.

[49 FR 563, Jan. 5, 1984]

§453.4 Required purchase of funeral goods or funeral services.

(a) Casket for cremation provisions-(1) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket other than an unfinished wood box be purchased for direct cremation.

(2) Preventive requirement. To prevent this unfair or deceptive act or practice, funeral providers must make an unfinished wood box or alternative container available for direct cremations, if they arrange direct cremations.

(b) Other required purchases of funeral goods or funeral services-(1) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part.

(2) Preventive requirements. (i) To prevent this unfair or deceptive act or practice, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by §453.2(b)(4)(ii) and (iii): "The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected."

Provided, however, That if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our services" between the second and third sentences of the statement specified above herein; and

(B) Place the following disclosure on the statement of funeral goods and services selected, required by §453.2(b)(5)(i): "Charges are only for those items that are used. If we are required by law to use any items, we will explain the reasons in writing below."

(ii) A funeral provider shall not violate this section by

failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

§453.5 Services provided without prior approval.

(a) Unfair or Deceptive Acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(3) The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) Preventive requirement. To prevent these unfair or deceptive acts or practices, funeral providers must include on the contract, final bill, or other written evidence of the agreement or obligation given to the customer, the statement: "If you selected a funeral which requires embalming, such as a funeral with viewing you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

§453.6 Retention of documents.

To prevent the unfair or deceptive acts or practices specified in §453.2 and §453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in §453.2(b) (2) through (4), as applicable, for at least one year after the date of their last distribution to customers, and a copy of each statement of funeral goods and services selected, as required by §453.2(b) (5) for at least one year from the date on which the statement was signed.

§453.7 Comprehension of disclosures.

To prevent the unfair or deceptive acts or practices specified in §453.2 through §453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner.

§453.8 Declaration of intent.

(a) Except as otherwise provided in §453.2(a), it is a violation of this rule to engage in any unfair or deceptive acts or

practices specified in this rule, or to fail to comply with any of the preventive requirements specified in this rule;

(b) The provisions of this rule are sparate and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.

[49 FR 564, Jan. 5, 1984]

§453.9 State exemptions.

If, upon application to the Commission by an appropriate State agency, the Commission determines that:

(a) There is a State requirement in effect which applies to any transaction to which this rule applies; and

(b) That State requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule;

then the commission's rule will not be in effect in that State to the extent specified by the Commission in its determination, for as long as the State administers and enforces effectively the State requirement.

[49 FR 564, Jan. 5, 1984]

§453.10 Mandatory review.

No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceeding.

APPENDIX C

federal register

Friday
September 24, 1982

Part III

Federal Trade Commission

Funeral Industry Practices; Trade Regulation Rule

FEDERAL TRADE COMMISSION

16 CFR Part 453

Trade Regulation Rule; Funeral Industry Practices

AGENCY: Federal Trade Commission.

ACTION: Final Trade Regulation Rule.

SUMMARY: The Federal Trade Commission issues a final Rule, the purpose of which is to provide detailed information about prices and legal requirements to persons arranging funerals. The Rule will require disclosure of itemized price information, both over the telephone and in writing; prohibit misrepresentations about legal, crematory and cemetery requirements pertaining to disposition of human remains and prohibit certain unfair practices, such as embalming for a fee without prior permission or requiring consumers to purchase caskets when they intend to cremate the remains, or conditioning the purchase of any funeral goods and services on the purchase of any other funeral goods and services.

This notice contains the Rule's Statement of Basis and Purpose, the text of the Rule and a Regulatory Analysis relating to the final rule.

EFFECTIVE DATE: The Rule will become effective three months after the conclusion of Congressional review. The Commission will publish a further notice of effective date in the **Federal Register.**

ADDRESS: Requests for copies of the Rule, the Statement of Basis and Purpose, and the Regulatory Analysis should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW, Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: Erica L. Summers, Division of Service Industry Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580 (202) 523-3413.

SUPPLEMENTARY INFORMATION: This Rule is being submitted to the Congress for review in accordance with Section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. 57a-1. Under that section, a Rule becomes effective unless both Houses of Congress disapprove the Rule within 90 calendar days of continuous session after the Rule is submitted. The present legislative review provision is scheduled to terminate on September 30, 1982. Assuming that a new legislative review process will be implemented after that date, the Commission has determined that the Rule should become effective three months after the conclusion of Congressional review. The Commission will publish a further notice of effective date in the **Federal Register** as soon as possible thereafter.

List of Subjects in 16 CFR Part 453

Funeral homes, Price disclosure, Trade practices.

By direction of the Commission, Chairman Miller dissenting.

Dated: September 20, 1982.

Carol M. Thomas,

Secretary.

Funeral Rule Statement of Basis and Purpose and Regulatory Analysis

I. Introduction

A. *Need for and Objectives of Rule.* Arranging a funeral plainly involves emotional, religious, and other important social considerations. At the same time, a funeral is more than a social ritual: it is also an expensive consumer purchase. In fact, the purchase of a funeral is the third largest single expenditure many consumers will ever have to make, after a home and a car. Although funeral costs vary substantially among funeral homes and among different kinds of dispositions and ceremonies, price surveys have found that the average funeral, which includes embalming, viewing, a ceremony with the body present and a procession to the cemetery followed by ground burial, costs the consumer between two and three thousand dollars. In recent years there have been approximately 1.9 million deaths annually, bringing the total amount which consumers spend on funeral and burial arrangements to over $5.2 billion per year.

While the arrangement of a funeral is clearly an important financial transaction for consumers, it is a unique transaction, one whose characteristics reduce the ability of consumers to make careful, informed purchase decisions. Decisions must often be made while under the emotional strain of bereavement. In addition, consumers lack familiarity with the funeral transaction: close to fifty percent of all consumers have never arranged a funeral before, while another twenty-five percent have done so only once. Further, consumers are called upon to make several important and potentially costly decisions under tight time constraints. Within hours of death, consumers must make arrangements to have the body of the deceased removed from the place of death and taken to a funeral home. Within at most 24 to 48 additional hours all additional decisions must be made concerning the form of disposition desired.

Under any circumstances, giving careful consideration to financial matters while arranging a funeral would be difficult. This difficulty is exacerbated, however, by several practices used by funeral providers which limit the consumer's ability to make informed, independent choices. The evidence indicates that a significant number of funeral providers:

(1) Require that consumers purchase "prepackaged" funerals, which may include goods and services which the consumers would not otherwise purchase;

(2) Misrepresent, either directly or by the failure to disclose material information: (a) that the law requires the purchase of embalming, a casket for cremation services, or grave liners and burial vaults; (b) the extent to which funeral goods and services have a preservative and protective value; and (c) that a mark-up is being charged on items such as flowers and obituary notices, commonly termed "cash advance" items;

(3) Require that consumers who wish to arrange direct cremation services purchase a casket for use in those cremations;

(4) Embalm the body of the deceased without first obtaining specific authorization to do so; and

(5) Refuse to discuss or fail to disclose price information over the telephone.

The Commission has concluded that these acts and practices are unfair or deceptive within the meaning of Section 5 of the Federal Trade Commission Act. Section II of this Statement contains a more detailed description of these acts and practices, as well as a discussion of the frequency with which they occur. The rule promulgated by the Commission prohibits these acts and practices and includes requirements designed to prevent their recurrence. The rule's goal is to lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice. The rule will help achieve these goals by ensuring that: (1) Consumers have access to sufficient information to permit them to make informed decisions about which goods and services they wish to purchase; (2) consumers are not required to purchase goods and services which they do not want and are not required by law to purchase; and (3) misrepresentations are not used to influence consumers' decisions on which goods and services to purchase.

Under the provisions of the rule, funeral providers must give consumers a written list, prior to any arrangements discussion, containing the prices of the

funeral goods and services on an itemized basis. At the choice of the funeral provider, separate price lists may also be used to disclose the prices of caskets and outer burial containers. The rule also requires that funeral providers give price information to consumers who call on the telephone and ask about the terms, conditions, or prices at which funeral goods or services are offered by that funeral home. While the rule requires that price information be given to consumers in a relatively standardized, itemized format, it in no way interferes with the ability of funeral directors to offer their goods and services for sale in additional forms (*e.g.*, funeral packages).

To ensure that funeral consumers have the ability to select only the goods and services they want to purchase, the rule generally requires funeral providers to "unbundle" the goods and services they offer for sale and offer them on an itemized basis. Funeral providers may, however, continue to offer "package funerals" for sale as an alternative to itemized purchasing. The rule simply ensures that the consumer has the ability to make an itemized selection.

In addition to the general right to select goods and services on an individual basis, there are two other related provisions that concern items which funeral providers often have required consumers to purchase. First, the rule requires that funeral providers obtain express permission from a family member or representative before embalming is performed, except under special circumstances. This requirement is designed to ensure that consumers do not have to pay for enbalming which they neither asked for nor wanted. Second, the rule prohibits funeral providers from requiring that consumers purchase a casket for use in a direct cremation service. The rule requires funeral providers to offer an unfinished wood box or other alternative to a traditional casket for use in this form of direct disposition.

Finally, the rule prohibits several specifically described misrepresentations concerning legal requirements for burial, or cremation, and misrepresentations about the existence of mark-ups on cash advance items. To implement these prohibitions, the rule requires funeral providers to include several short disclosures on the general price list which they provide to consumers. These disclosures simply inform consumers of their legal rights and purchase options.

The rule also contains a provision which requires the Commission to start a rule amendment proceeding to review the effect and operation of the rule no later than four years after it becomes effective. This mandatory review will enable the Commission to determine whether the rule has worked as expected and will require the Commission to decide whether the rule should be modified or terminated within eighteen months after the proceeding has started. If the rule has been successful in stimulating price competition by that time, the Commission will decide whether the rule is still needed in light of the marketplace changes. This provision ensures that the Commission will decide whether there is a continuing need for regulation of the funeral industry at an early date and in a proceeding open to public participation.

This overview has highlighted the central elements of the rule. Virtually all of its other provisions, including certain definitions, are designed to ensure the integrity of this disclosure scheme and to prohibit misrepresentations of material information. The rule promulgated today is substantially more limited than that which the Commission originally proposed. These modifications are the result of the Commission's careful consideration of the extensive testimony and comments submitted on three different occasions, as well as Congressionally-mandated limitations (discussed below) on the rule's subject matter. The Commission believes that this rule will effectively curb many of the unfair or deceptive practices identified in the rulemaking record with minimal intrusion into the business operations of funeral providers.

B. *History of the Proceeding.* In December of 1972, at the direction of the Commission, the Commission's Bureau of Consumer Protection began an initial investigation of practices in the funeral industry.[1] During the initial investigation, the Commission's staff interviewed consumers, funeral directors, memorial society members, attorneys, state officials and others, and also visited funeral homes. These efforts led the staff to conclude that a more detailed examination of the industry's practices was warranted. The staff made this recommendation in June, 1973, in a 239 page planning report to the Commission.[2] The Commission subsequently approved a full industry-wide investigation and authorized the use of compulsory process.

An Initial Staff Report by the staff of the Bureau of Consumer Protection based on the industry-wide investigation was published in August, 1975. In that report, the staff recommended that the Commission initiate a rulemaking proceeding pursuant to its authority under Sections 5 and 18 of the Federal Trade Commission Act.[3] The Initial Staff Report described practices relating to the purchase of funeral goods and services which may have violated Section 5 of the Act.

After reviewing the Initial Staff Report, the Commission published an Initial Notice of Proposed Rulemaking ("Initial Notice") on August 29, 1975.[4] It contained the text of a proposed rule, a statement of the Commission's reasons for issuing it, and an invitation to comment on the proposal.

Written comments on the Initial Notice were received through March 6, 1976. More than 9,000 separate documents were received, comprising approximately 20,000 pages. Numerous comments were made by individual funeral industry members, state and national funeral trade associations, individual consumers, consumer groups, state regulatory boards, state and local government officials, representatives of funeral-related industries including florists, cemetery operators, and casket and vault manufacturers, memorial societies, clergymen, academics, and other interested parties.

On February 20, 1976, the Final Notice of Rulemaking ("Final Notice") was published by the Presiding Officer in the funeral proceeding.[5] The Final Notice set out thirty disputed issues of fact to serve as the focus for the public hearings on the proposed rule.[6] Public hearings were

[1] The proposal for a limited initial investigation stemmed from an internal staff analysis suggesting a potential for abuse in the funeral transaction, given the unique disadvantages of the funeral purchaser. While few consumer complaints had been received at the time, the potential for consumer injury had been documented by hearings chaired by Senator Phillip Hart in 1964. *Antitrust Aspects of the Funeral Industry: Hearings Pursuant to S.R. 262 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964) (hereinafter cited as *Antitrust and Monopoly Subcomm. Hearings*). This policy planning approach to identifying areas of potential consumer injury was a direct response to criticism made by the American Bar Association in the late 1960s that the Commission relied too heavily on consumer complaints and consequently chose trivial cases for investigation.

[2] Division of Evaluation, Bureau of Consumer Protection, *Unfair Practices in the Funeral Industry: A Planning Report to the Federal Trade Commission*, June 29, 1973.

[3] 15 U.S.C. 45, 57.

[4] 40 FR 39901 (1975).

[5] 41 FR 7787 (1976).

[6] Prior to the hearings, the National Funeral Directors Association sought to enjoin the hearings in federal court, alleging a number of procedural improprieties and Commission action in excess of its statutory authority. The court denied the injunction. *NFDA* v. *FTC*, 76-0615 (D.D.C., filed April 14, 1976).

held in six cities from April 20 through August 6, 1976.[7] In all, 52 days of hearings were held during which 315 witnesses presented testimony and exhibits and were subject to cross-examination by the various participating parties. The six hearings produced 14,719 pages of transcript and approximately 4,000 additional pages of exhibits.

At the conclusion of the public hearings, a final opportunity for comment was offered the public to rebut any data or views which had previously been submitted into evidence. Forty-seven separate rebuttal submissions were filed by the Commission staff and various parties to the proceeding.

At the conclusion of the public hearing process, reports to the Commission based on the rulemaking record were prepared by the Presiding Officer,[8] who made findings on the issues which had been designated by the Commission for the public hearings, and by the Commission staff,[9] who analyzed the record evidence and made recommendations to the Commission for final action. The Presiding Officer found that the funeral transaction has several characteristics which place the consumer in a disadvantaged bargaining position relative to the funeral director, leave the consumer vulnerable to unfair and deceptive practices, and cause consumers to have little knowledge of legal requirements, available alternatives respecting disposition of the dead, and funeral homes' offerings and prices. The Presiding Officer also found that some funeral providers fail to disclose relevant purchase information to consumers while some other funeral providers affirmatively misrepresent legal, public health and/or religious requirements to customers. The staff, after reaching similar conclusions,[10] recommended a revised trade regulation rule which differed from the initial proposed rule in several respects.

Following publication of these reports, the Commission commenced a comment period to permit the public to comment on the reports of the Presiding Officer and the staff.[11] This comment period was originally scheduled to close after 60 days; however, the Commission extended it for 30 days to afford a greater opportunity to comment.[12] Over 1300 separate comments were received during the comment period. To assist the Commission in reviewing them, the Commission's staff prepared a summary, which accompanied the comments to the Commission. This summary[13] essentially indexed the comments filed, identifying each issue of fact, law or policy raised in the comments. The summary was made available to the Commission as well as to outside parties. On February 2, 1979, the Commission's staff forwarded to the Commission their final recommendations.

On February 27 and 28, 1979, the Commission heard oral presentations from selected rulemaking participants who had been invited to present their views directly to the Commission as provided in § 1.13(i) of the Commission's Rules, 16 CFR 1.13(i).[14]

On March 23, 1979, the Commission met in open session, tentatively approved a final funeral rule and directed the staff to prepare the necessary legal memoranda to implement it. The tentative final rule adopted by the Commission was substantially more limited than the one which the Commission had originally proposed. It required that price information be made available over the telephone, that funeral goods and services be sold on an individual basis enabling consumers to decline goods and services which they did not want, that prior permission be obtained for embalming, and that consumers not be required to purchase caskets for use in cremation. The rule also included a prohibition on deceptive claims and representations concerning legal and cemetery requirements. However, several other major provisions contained in the proposed rule were dropped.[15]

Prior to promulgation, however, Congress adopted the FTC Improvements Act of 1980.[16] Section 19 of that Act imposed a set of procedural and substantive limitations on the Commission's authority to promulgate a rule regulating practices within the funeral industry.[17] Procedurally, Section 19(c)(2)(A) required the Commission to republish a proposed rule in the **Federal Register** for public comment before the Commission could promulgate a final rule.[18]

During the hiatus in the rulemaking proceeding which attended Congressional consideration and subsequent enactment of the Improvements Act of 1980, a second event occurred which necessitated a revision of the rule. In December of 1979, the United States Court of Appeals for the Second Circuit issued its opinion on the Commission's trade regulation rule concerning practices in the proprietary vocational school industry.[19] In adopting

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[7] Hearings were held in Atlanta, Chicago, Los Angeles, New York City, Seattle and Washington, D.C.

[8] Report of the Presiding Officer on Proposed Trade Regulation Rule Concerning Funeral Industry Practices (16 CFR Part 453), July 1977 (hereinafter cited as "Report of the Presiding Officer").

[9] Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and proposed Trade Regulation Rule (16 CFR Part 453), June 1978 (hereinafter cited as "1978 Staff Report").

[10] There were several areas of disagreement between the Presiding Officer and the rulemaking staff. For example, the Presiding Officer, in contrast to staff, found insufficient evidence of consumer injury in the rulemaking record to warrant promulgation of a rule provision prohibiting unauthorized removal of remains. *See* Report of the Presiding Officer, *supra* note 8, at 57. The Presiding Officer also concluded that several practices, such as refusal to release remains or requiring a casket for cremation, were not prevalent, although sufficiently harmful when they occurred to warrant prohibition in the rule. *Id.* at 59, 64. Finally, the Presiding Officer felt that there was insufficient evidence on the rulemaking record to make a finding on the prevalence of certain practices, including misrepresentation of cash advance charges and misrepresentation of legal, public health, and/or religious requirements. *Id.* at 68, 73. The staff disagreed with this assessment and reviewed the record evidence in detail in their report. 1978 Staff Report, *supra* note 9, at 251–258, 289–294.

[11] 43 FR 26588 (1978).

[12] 43 FR 34500 (1978).

[13] Summary of Post-Record Comments on the Funeral Industry Practices Rule, January 25, 1979, XIV–1368.

[14] The participants were U.S. Congressman Marty Russo; National Retired Teachers Association and American Association of Retired Persons; National Selected Morticians; International Order of the Golden Rule; U.S. Small Business Association; New York State Consumer Protection Board; Cremation Association of North America; Americans for Democratic Action and National Council of Senior Citizens; National Funeral Directors Association; Continental Association of Funeral and Memorial Societies; National Funeral Directors and Morticians Association; New York State Public Interest Research Group; Pre-Arrangement Interment Association of America; and California Citizens Action Group.

[15] For example, the Commission eliminated provisions which would have prohibited unauthorized removal of or refusal to release remains, as well as provisions which would have set restrictions on the manner in which funeral providers could display caskets. See Section III(B), *infra*.

[16] Public Law 96–252, 94 Stat. 391.

[17] The substantive limitations imposed by Section 19(c)(1), and the manner in which the rule complies with them, are discussed in Part I(C), *infra*.

[18] The text of Section 19(c)(2)(A), 15 U.S.C. 57a note, states:

"(2)(A) The Commission, before issuing the funeral trade regulation rule in final form—

"(i) shall publish in the **Federal Register** for public comment a revised version of the funeral trade regulation rule which contains the provisions specified in subparagraph (A) and subparagraph (B) of paragraph (1);

"(ii) shall allow interested persons to submit written data, views, and arguments relating to such revised version of the funeral trade regulation rule, and make all such submissions publicly available; and

"(iii) may permit interested persons or as appropriate, a single representative of each group of such persons having the same or similar interests with respect to such revised version of the funeral trade regulation rule, to present their position orally.

[19] Proprietary Vocational and Home Study Schools Trade Regulation Rule, 16 CFR Part 438.

the rule, the Commission had defined and described the underlying unfair and deceptive acts and practices which were the predicate for the final rule in the Statement of Basis and Purpose which accompanied the rule. Within the text of the rule itself, the Commission included only the remedial requirements designed to prevent the unfair acts and practices from recurring.

In *Katharine Gibbs School, Inc.* v. *FTC*, 612 F.2d 658 (2d Cir. 1979) (hereinafter *"Gibbs"*) the Second Circuit held that the Magnuson-Moss Act requires the Commission to include in the actual text of a rule a description of the underlying unfair or deceptive acts or practices which serve as its basis.[20] The version of the funeral rule pending before the Commission in 1979 had been drafted in the same manner as the Vocational School Rule, *i.e.*, in several provisions only the remedial language was actually included in the rule.

On December 17, 1980, the Commission met to consider revisions of the proposed funeral rule in light of Section 19 of the FTC Improvements Act of 1980 and the *Gibbs* decision. At this meeting, the Commission voted to publish for public comment a revised version of the funeral rule. The Commission published a notice on January 22, 1981,[21] which contained the text of the revised version of the funeral rule and set forth a sixty-day written comment period. The Commission also provided for a rebuttal period in which parties could respond to comments submitted by other interested parties concerning the revised rule.

On July 7 and 8, 1981, the Commission heard oral presentations from several major participants in the funeral rule proceeding.[22] On July 22, 1981, the Commission met in open session and approved language of the funeral rule for purposes of submitting the rule's recordkeeping requirement to the Office of Management and Budget (OMB) for review. On June 7, 1982, OMB approved the recordkeeping requirement. After careful consideration and review of the rulemaking record taken as a whole, the Commission has voted to promulgate a trade regulation rule concerning funeral industry practices.

C. *Consistency With Applicable Law.* The funeral rule is being issued under the authority granted the Commission by Section 18 of the FTC Act,[23] as limited by Section 19 of the FTC Improvements Act of 1980.[24] Section 18 of the FTC Act permits the Commission to issue rules defining with specificity acts or practices which are unfair or deceptive under Section 5 of the FTC Act.[25] The Commission further is authorized to include in its rules provisions designed to prevent the defined unfair or deceptive acts or practices. The rule being issued today prohibits and prevents practices which are unfair, deceptive, or both.[26] As such, it is within the Commission's authority under Section 18 of the FTC Act.

The funeral rule, as issued, also complies with the restrictions imposed by Section 19 of the FTC Improvements Act of 1980. Section 19(c)(1) allows the Commission to expend funds to issue and enforce the funeral rule only to the extent that the rule:

"(A) requires persons, partnerships, and corporations furnishing goods and services relating to funerals to disclose the fees or prices charged for such goods and services in a manner prescribed by the Commission; and

"(B) prohibits or prevents such persons, partnerships, and corporations from—

"(i) engaging in any misrepresentation;

"(ii) engaging in any boycott against, or making any threat against any other person, partnership, or corporation furnishing goods and services relating to funerals;

"(iii) conditioning the furnishing of any such goods or services to a consumer upon the purchase by such consumer of other such goods or services; or

"(iv) furnishing any such goods or services to a consumer for a fee without obtaining the prior approval of such consumer.[27]

The Commission has revised the rule to ensure that it falls within the substantive limits imposed by Section 19. Thus, § 453.2 of the rule requires price disclosures, as permitted by Section 19(c)(1)(A). Section 453.3 of the rule prohibits misrepresentations, as permitted by Section 19(c)(1)(B)(i). Section 453.4 prohibits funeral providers from requiring a casket for cremation or from conditioning the furnishing of any funeral goods and services upon purchase of any other funeral good or funeral service. These provisions are permitted by Section 19(c)(1)(B)(iii). Finally, § 453.5 of the rule prohibits funeral providers from embalming for a fee without prior approval, as permitted by Section 19(c)(B)(iv).

D. *The Funeral Service Industry.*—1. *The Funeral Home.* In the United States today there are over 22,000 funeral homes, 50,000 licensed funeral directors and embalmers, and over 400 crematories.[28] In recent years the number of deaths has approached two million per year.[29] The average annual number of deaths per funeral establishment has been about 94.[30] Actual case volume at each funeral establishment varies greatly. Various industry sponsored studies indicate that 50% to over 75% of all funeral homes perform fewer than 100 funerals per year.[31]

The funeral industry is generally composed of small businesses. One report states that 80% of all funeral homes have fewer than seven employees;[32] another report found that 42.9% of the firms in the industry were individual proprietorships[33] and that

[20] 612 F.2d at 662.

[21] 46 FR 6976 (1981). During the written comment period, the National Selected Morticians and the National Funeral Directors and Morticians Association submitted in their comments a modified rule ("NSM/NFDMA proposal") for Commission adoption in lieu of the rule published in the Federal Register. The NSM/NFDMA proposal is discussed in Part III(B)(4), *infra*.

[22] The selected participants were National Funeral Directors Association; National Retired Teachers Association and American Association of Retired Persons; National Funeral Directors and Morticians Association; National Selected Morticians; Continental Association of Funeral and Memorial Societies; Pre-Arrangement Interment Association of America; Cremation Association of North America; New York Public Interest Research Group; National Council of Senior Citizens and Consumer Affairs Committee of Americans for Democratic Action; Conference of Funeral Service Examining Boards; International Order of the Golden Rule; New York State Funeral Directors Association; Congressman Marty Russo; and Congressman Andy Ireland.

[23] 15 U.S.C. 57.

[24] 15 U.S.C. 57a note.

[25] Section 5(a)(1) of the FTC Act declares unlawful "unfair or deceptive acts or practices in or affecting commerce" through trade regulation rules. The Commission has concluded that it has jurisdiction over funeral providers because their business is "in or affecting commerce." For example, funeral providers sell a variety of merchandise which is shipped in interstate commerce. Many also ship human remains across state lines for funeral purposes. For discussion of these and other bases of the Commission's jurisdiction over funeral providers, *see* 1978 Staff Report, *supra* note 9, at 468–73.

[26] The Commission's reasons for defining practices as unfair or deceptive are set forth in Part II (A)(I), *infra*.

[27] 15 U.S.C. 57a note.

[28] 1972–73 American Bluebook of Funeral Directors; 1978 U.S. Industrial Outlook 463; V. Pine, Caretaker of the Dead 21 (1973).

[29] In 1972, the death rate was calculated at approximately 90 per 1,000 or over 1.9 million. Public Health Service, U.S. Dep't. of HEW, 1972 Vital Stat. of the United States: Mortality, Volume II, Part A, at Table 1–1.

[30] *Hearings on Regulations of Various Federal Agencies and Their Effect on Small Business, Before the Subcomm. on the Activities of Regulatory Agencies of the House Small Business Comm. (Part III)*, 94th Cong., 2d Sess. at 65, 75–76 (1975–1976). (Attachment to testimony of H. Raether) (hereinafter cited as *"House Small Business Subcomm. Hearings"*).

[31] *See, e.g.*, V. Pine, A Statistical Abstract of Funeral Services Facts and Figures, 1976, D.C. Ex. 4, at 3 (hereinafter cited as "1976 Statistical Abstract").

[32] U.S. Dept. of Commerce, (1973) Country Business Patterns, at 28.

[33] 1972 Census of Selected Service Industries, Volume I, at 7.

most of the rest operate as partnerships or private corporations.[34] The industry also is characterized by low rates for entry and exit,[35] with most funeral homes operating in local markets. Recently, however, there has been a slight trend toward the development of funeral home chains.[36] The largest chain is Service Corporation International and the second largest is International Funeral Services. These firms have expanded by purchasing existing funeral homes around the country.[37] Recently these two funeral chains merged.

2. *State Licensure.* The first formal instructional programs for the American funeral industry began with a few trade schools which taught embalming, sanitation, anatomy and other related subjects in a program of short duration.[38] Today there are approximately thirty vocational and college level programs accredited at the state level. The curriculum in these educational programs includes instruction in management principles, merchandising techniques, accounting, public speaking and grief counseling as well as in embalming and restorative arts.[39]

State regulation of the industry began in the latter half of the nineteenth century and arose due both to the public's growing concern over sanitation and the efforts of funeral directors to achieve greater professional stature.[40] Today virtually all states license embalmers and/or funeral directors. Generally, state licensing standards require completion of a nine month to one year vocational training program in mortuary science followed by a period of apprenticeship varying from one to three years in length before qualifying to take the state board examination.[41]

3. *Trade Associations.* The development of the funeral industry as a state-licensed occupation occurred along with the formation of a variety of state and national trade associations. The largest of the national funeral trade associations is the National Funeral Directors Association (NFDA) with 14,000 members who conduct approximately 70% of the nation's funerals.[42] The National Funeral Directors and Morticians Association (NFDMA) is the association of black funeral directors and, with over 4,000 members, is the second largest national trade association.[43] National Selected Morticians (NSM) is a national trade group with slightly over 800 member firms.[44] Unlike NFDA, NSM is an association of funeral home firms and not individual funeral directors.[45] Another national trade group is the Order of the Golden Rule (OGR) with 1400 members.[46] A number of smaller organizations serving limited memberships also exist. Two examples are the Jewish Funeral Directors Association (JFDA) and the Pre-Arrangement Interment Association of America (PIAA). JFDA has approximately 200 members,[47] and PIAA has approximately 700 members dedicated to the promotion and sales of the pre-financed funeral.[48] In addition to these national trade associations, all states except Alaska have funeral trade associations. In all but one of these states, membership in the state association brings concurrent membership in NFDA.

State and national funeral trade associations provide a wide range of services to members—newsletters, journals, national and regional meetings, informational and educational programs, consultants, and the collection of statistical information. A number of trade associations also have enacted codes of ethics which set forth conduct which is considered to be unprofessional.

4. *Pre-need Sales Industry.* This segment of the funeral industry is involved in the promotion and sale of funeral-related goods and services prior to the time of death. In this type of arrangement, payment is made to the funeral seller in advance of death and the particular goods and services selected by the buyer are specified in a pre-need contract.[49] Pre-need plans are marketed by insurance companies, funeral homes, and cemetery operators of cemetery lots, vaults, monuments, and crypts.

5. *Immediate Disposition Companies.* In some areas of the country, immediate disposition companies compete with full service funeral homes. These companies provide a single service—direct disposition of human remains by cremation. They generally do not provide facilities for viewing the body or conducting services, nor do these companies attempt to sell merchandise such as caskets or services such as embalming. Immediate disposition companies offer the service of picking up the body, delivering it to the crematory and returning the ashes. The disposition fee in 1977 was generally less than $300.[50]

6. *Memorial Societies.* Memorial societies are non-profit consumer cooperatives organized for the purpose of providing information and assistance to their members concerning funeral arrangements. They do not sell funeral goods and services. Some not only provide information on funeral arrangements to their members, but also enter into agreements with cooperating morticians to obtain specified services for their members at prices determined in advance.[51] The major organization representing the 140 member societies and over 500,000 individual members in the United States is the Continental Association of Funeral and Memorial Societies (CAFMS). These societies are staffed primarily by volunteers and pay operating expenses from membership

[34] *Id. See also.* Blackwell, "Price Levels in the Funeral Industry," 7 *Q. Rev. of Econ. and Bus.*, VI-A-2, at 75-76 (1976) (hereinafter cited as "Blackwell article").

[35] Blackwell article, *id.* at 77; G. Kissel, An Analysis of the Market Performance of the Funeral Home Industry of Philadelphia (1970) (Wharton School M.B.A. Project), VI-D-23, at 57, 59, 62-65, 70 (hereinafter cited as "Kissel").

[36] Kollat, D.C. Ex. 8, at 13 and Table 8.

[37] 1978 Staff Report, *supra* note 9, at 85, n. 238.

[38] *See* R. Habenstein and W. Lamers, The History of American Funeral Directing 510 (1962) (hereinafter cited as "The History of American Funeral Directing").

[39] Funeral Service: Meeting Needs * * * Serving People, (NFDA pamphlet), Hausman Ex. 1 (N.Y.), at 5.

[40] The History of American Funeral Directing, *supra* note 38, at 450-551.

[41] *See, e.g.*, Tenn. Code Ann. § 62-514(6) (1976); N.M. Stat. Ann. § 67-20-17 (1974 Supp.); Fla. Stat. Ann. § 470.08(1) (1978 Supp.); Va. Code § 54-280.70 (1974). Other states require some college work. *See, e.g.*, Mont. Rev. Code § 66-2706 (1977 Supp.); North Dakota State Board of Embalmers, "Laws, Rules, and Regulations," Rule 43-10-04(3) (1972).

[42] *See House Small Business Subcomm. Hearings (Part III), supra* note 30, at 64 (testimony of H. Raether). NFDA has apparently doubled its membership since 1936. The History of American Funeral Directing, *supra* note 38, at 534.

[43] *House Small Business Subcommittee Hearings (Part IV), supra* note 30, at 24 (testimony of R. Miller, Exec. Dir., NFDMA).

[44] The American Blue Book of Funeral Directors 779 (1976-77).

[45] The History of American Funeral Directing, *supra* note 38, at 537.

[46] American Blue Book of Funeral Directors 785 (1978-79).

[47] American Blue Book of Funeral Directors 778 (1976-77).

[48] *See* PIAA Comment on Revised Rule, XVI-77, at 1.

[49] The seller may be an individual funeral home which makes specific, prepaid arrangements with consumers or a company which specializes in selling prepaid funeral contracts. During the rulemaking proceeding, the sellers of prepaid funeral arrangements have been generally represented by the Pre-Arrangement Interment Association of America (PIAA), which participated as an interested party under Section 1.13(d)(3) of the Rules of Practice. *See generally* PIAA, Proposal Identifying Issues of Fact, II-C-246; Rebuttal of PIAA, X-6. The seller of funeral contracts acts as a broker between buyers and cooperating funeral homes. *See* P. Butler, Exec. Vice Pres., Funeral Security Plans, Inc., D.C. Stmt.

[50] 1978 Staff Report, *supra* note 9, at 82.

[51] *See* Handbook for Funeral and Memorial Societies, D.C. Ex. 39, at II-1 and Appendix; R. Cohen, Exec. Sec., CAFMS, Tx 14.207-10.

fees (usually $5 to $15), contributions and bequests, fundraising events and interest on reserve funds.[52]

E. The Funeral Consumer. Perhaps the most important element in understanding the nature of the problems which have arisen in the funeral market is a thorough understanding of the funeral consumer—the person called upon to make the arrangements for burial or cremation of a spouse, parent, child, other relative or friend. The arrangement of a funeral is often a very expensive transaction. In 1977, annual payments by consumers to funeral homes and crematories exceeded $3.4 billion.[53] A variety of related expenditures such as cemetery charges, flowers and obituary notices represented an additional expenditure of approximately $1.8 billion, bringing the total amount which consumers spent on funeral related expenses to an estimated $5.2 billion.[54] Reducing these numbers to a more personal basis, the average expenditure for a funeral was approximately $2360.[55]

Despite the magnitude of the financial commitment consumers are called upon to make in arranging a funeral, several factors limit their ability to make a carefully considered decision. The funeral transaction is one with which most consumers are unfamiliar. Studies show that over 50% of the adult population, although having attended prior funerals, have never been called upon to arrange one. Yet another 25% of the adult population have only arranged one prior funeral.[56] Thus, close to three-fourths of the population is either wholly inexperienced, or has had only one such experience. Unlike some transactions where consumers will have repeat encounters with sellers in the marketplace, the funeral consumer's purchase decisions are often once-in-a-lifetime decisions, or extremely infrequent ones.

In any transaction where consumers without substantial experience are called upon to make purchase decisions which carry with them substantial price tags, the potential for abuse exists. Other characteristics of the funeral consumer exacerbate this potential for marketplace problems. As discussed below, the two most important of these characteristics are the time-frame in which consumers must act and the psychological state of the persons who must make these important decisions.

While there is no such thing as an "average" or "typical" funeral consumer, some general findings can be made on their mental and emotional state. Often the funeral consumer is grief-stricken, particularly where a close relative or friend is involved; shock and confusion also attend such a death. Research by experts in the field suggests that many consumers feel guilt with respect to the deceased, and view the funeral as the final opportunity to "do right" by the deceased.[57] Others noted the characteristics of dependency and suggestibility following a death.[58] While funeral purchasers are far from helpless, such emotional strains make careful, rational decisions far more difficult than in the typical consumer purchase. In no other situation is a consumer called upon to make decisions about such an expensive purchase under such difficult emotional circumstances.[59]

The need to make prompt decisions about removing the body of the deceased from the place of death and selecting the form of disposition to be employed also serve to distinguish this transaction from other consumer transactions. Where the arranger selects direct cremation or immediate burial, final disposition typically occurs within 24 hours of death. Even in the more traditional funeral setting, involving viewing and ceremony, the necessary decisions still must be made under tight time strictures, normally 24–48 hours from death.[60] Comparison shopping by consumers is not impossible under these circumstances—indeed, one goal of the rule is to facilitate this type of shopping even at the point of need. But under any objective evaluation, comparison shopping is rendered substantially more difficult.

Perhaps the most critical decision which a bereaved consumer must make, and the decision with the tightest time strictures, is whom to contact to remove the body from the place of death. The evidence shows that once a funeral home has been given possession of the body, rarely, if ever, will a consumer move that body to another funeral home in the same community.[61] Thus, in many situations, a consumer may be called upon to select a funeral home on extremely short notice, wholly unexpectedly. The consumer has no time to plan or to arrange finances, or to put the purchase off until a better time. If the home selected does not offer the particular goods or services desired by

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[52] *Id.*

[53] U.S. Dep't. of Commerce, 1977 U.S. Industrial Outlook with Projections to 1985, at 498–99.

[54] *See* 1978 Staff Report, *supra* note 9, at 153–54, which lists related charges equal to $968 per funeral, or approximately $1.8 billion per year.

[55] *Id.*

[56] M. Simmons, A Comparison of Knowledge and Opinions of the Funeral Industry Held by Urban and Rural Consumers in Central New York State 39 (Table 3) (Jan. 1975), VI–D–4. Another survey by Dr. Richard Kalish, commissioned by the FTC staff, found similar results: 48% of the respondents had never before made funeral arrangements; another 29% only once before. D.C. Ex. 24, Table 7 (hereinafter cited as "Kalish Survey"). The evidence further shows that most consumers, even those who have arranged funerals, lack knowledge about prices and legal requirements. For example, in one survey of persons who had arranged funerals, 75% did not know about the legal requirements for embalming. *See* Maryland Citizens Consumer Counsel, D.C. Ex. 36, at 1–2. Similarly, in a 1965 survey, 78% of the respondents gave no response when asked what the average price of a funeral was in their community. An even higher percentage, 91%, gave no response when asked what the national average price of a funeral was. *See* R. Fulton, *Attitudes of the American Public Toward Death*, in Death and Identity 95 (1965). Other surveys also support the conclusion that consumers lack knowledge about funeral arrangements. *See, e.g.*, Dr. C. Collette-Pratt, Sea. Ex. 1, Tx 5237–44 (survey of 400 persons shows little knowledge of what constitutes funeral or what alternatives are); M. Stillwell, Tx 6032–33 (analysis of 139 responses shows general lack of knowledge about funerals by public).

[57] *See, e.g.*, Rabbi E. Grollman, Industry Consultant, Tx 840; Sister J. Corcoran, Tx 7208–09; Dr. M. Bluebond-Langner, Ass't Prof. of Anthropology, Rutgers Univ., Tx 2372; J. Hammon, New York minister, Tx 463; P. Leslie, California minister, II–C–1221. *See also* W. Brown, Ohio Attorney General, II–C–1229; Dr. M. Blum, The Attitudes and Reactions of a Limited Sample of South Dade County Residents Toward Funeral Arrangements, D.C. Ex. 11, at 16 (hereinafter cited as "Blum Study"); Pine & Phillips, The Cost of Dying: A Sociological Analysis of Funeral Expenditures, 17 Social Problems 405, 413 (1970), VI–D–64.

[58] The testimony of experts describes the "hypersuggestibility" of bereaved individuals and their tendency to rely on the funeral director. *See, e.g.*, Dr. N. Humphrey, President of the California Chapter of the National Association of Social Workers, D.C. Ex. 45, at 4; Dr. C. Wahl, psychiatrist psychoanalyst, Southern California Psychoanalytic Institute, Tx 8481; Dr. J. Quint Benoliel, Professor, University of Washington School of Nursing, Tx 5297 (citing I. Glick, R. Weiss, and C. Parkes, *The First Year of Bereavement* 104 (1975)); R. Ebeling, Tx. 6825.

[59] In the majority of cases, a person arranging a funeral is accompanied by another person, most frequently a member of the immediate family. Dr. R. Blackwell, Funeral Services Attitudinal Survey, D.C. Ex. 29 (hereinafter cited as "Blackwell Survey") (nearly 65% of the persons making arrangements were accompanied by one or more persons; 90% were members of the immediate family.) While support from the family members may help make arranging a funeral less difficult, other members of the immediate family are likely to be under much of the same emotional stress and other disadvantages as the person with primary responsibility for making the arrangement decisions.

[60] Several of the surveys asked consumers why they did not "shop around" before making a decision. Insufficient time was cited by 36% of the respondents in one (*see* D.C. Ex. 45, at A–6), 21% in another (Cohen, Consumer Questionnaire Form A, D.C. Ex. 39, at A–6 (hereinafter cited as "CAFMS Survey"), and between 15–28% in another (D.C. Ex. 11, at 47).

[61] *See, e.g.*, R. Harmer, Bd. member, CAFMS, Prof., California State Poly. U., D.C. Ex. 7, at 6; D. Cornett, California funeral industry sales representative, X–1–124; L. Bowman, The American Funeral 52 (paperback ed. 1964). In addition, a family is likely to be in a very fragile emotional state in the first few hours after death so that any problem in locating or moving the body can cause additional anguish.

the consumer, essentially all options have been foreclosed.

Thus, the funeral transaction possesses some unique characteristics which differentiate it from most, if not all, other consumer transactions. The combination of emotional stress, lack of experience, lack of information and tight time strictures results in the funeral consumer being very susceptible to influence from the funeral director's advice and counsel.[62]

In the sections which follow, the specific unfair and deceptive practices which the Commission has found to occur in this market will be discussed together with an analysis of the Rule provisions adopted by the Commission to address them.

II. The Rule Provisions

A. *Section 453.2—Price Disclosure.* Section 453.2(a) of the rule defines as an unfair act or practice the failure of a funeral provider to furnish information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies. There is substantial evidence in the rulemaking record that funeral providers have frequently failed to provide consumers with sufficient information about the prices of funeral goods and services. The record shows that funeral providers generally do not advertise prices, usually do not provide price information over the telephone, and usually do not provide consumers with information on the price of specific items of funeral merchandise and services. As we discuss below, this lack of information, particularly with respect to prices, restricts the consumer's ability to make an informed choice and impairs the efficient operation of the funeral market. The rule is designed to address these problems by requiring funeral providers to give consumers the information necessary for them to make an informed purchase decision.

1. *Unfair Acts or Practices.* Section 453.2 is being issued pursuant to the Commission's authority under Sections 5 and 18 of the Federal Trade Commission Act to proscribe unfair acts or practices. Section 18(a)(1) of the FTC Act states:

> The Commission may prescribe * * * rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of * * * Section 5(a)(1)).

In December of 1980, the Commission prepared a formal statement analyzing the legal basis for the exercise of its Section 5 consumer unfairness jurisdiction. That document, prepared in response to a request from the Senate Commerce Committee,[63] reviewed the Commission's prior exercise of its unfairness jurisdiction, and clarified the criteria under which this authority will be exercised in the future.[64]

Consumer injury is the focus of the consumer unfairness doctrine. In its recent statement, the Commission observed that:

> Unjustified consumer injury is the primary focus of the FTC Act * * *. By itself it can be sufficient to warrant a finding of unfairness.
>
> * * * The independent nature of the consumer injury criterion does not mean that every consumer injury is legally "unfair," however. To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[65]

Earlier articulations of the consumer unfairness doctrine have also focused on whether "public policy" condemned the practice in question.[66] In its December, 1980 statement, the Commission stated that it relies on public policy to help it assess whether a particular form of conduct does in fact tend to harm consumers.

2. *The Unavailability of Price Information.*—a. *Price Advertising.* The organized funeral industry has historically opposed price advertising; indeed, the first NFDA code of ethics adopted in 1884 included a provision which prohibited newspaper advertising.[67] Moreover, state legislatures were encouraged by the industry to enact statutes or regulations prohibiting price advertising.[68] The National Funeral Directors Association (NFDA) and its state affiliates condemned price advertising in their codes of ethics. Two of the reasons cited for the prohibition were explained by NFDA's Executive Director in 19[illegible]:

> * * * Said funeral director advertising does not create new markets or expand old ones. It does not lower the cost of the "unit" to the public. At best, it shifts the market or helps firms maintain their position thereof. NFDA has more than one member in most communities. How can it comply with the objectives of its constitution and "safeguard the common interests of its members" by fostering competitive weapons?
>
> * * * * *
>
> Price ads put the emphasis on price disregarding the most important values and inner meaning of the funeral and the funeral director's role in American Society.[69]

Historically, funeral providers have not engaged in price advertising. This tradition has continued despite the elimination of most formal restraints. In 1968, the NFDA settled an antitrust suit brought by the Department of Justice and agreed to refrain from enforcing provisions against advertising in its own code of ethics and discontinuing its affiliation with state associations that had similar restrictions in their own codes.[70] Most states have eliminated legal prohibitions on price advertising of funerals. Moreover, to the extent that any such laws totally ban truthful advertising they are clearly violative of the first amendment.[71]

Nonetheless, there remains strong sentiment throughout the industry against price advertising. The opposition to price advertising expressed by many industry leaders during the rulemaking hearings suggests that considerable peer pressure exists to discourage price advertising.[72] Even in the absence of

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[62] *See* text and accompanying note 58, *supra*.

[63] *See* Letter to the Commission, from the Honorable Wendell H. Ford and the Honorable John C. Danforth, Consumer Subcomm., Senate Comm. on Commerce, Science, and Transportation (June 13, 1980).

[64] *See* Letter from the Commission, to the Honorable Wendell H. Ford and the Honorable John C. Danforth (Dec. 17, 1980) (hereinafter cited as "Commission Unfairness Statement"). *See also Horizon Corporation*, 97 F.T.C. 464 (1981).

[65] *See* Commission Unfairness Statement, *id.*

[66] *See generally* FTC v. R. F. Keppel Bros., 291 U.S. 304, 313 (1934); Statement of Basis and Purpose, Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 *Fed. Reg.* 8324, 8355 (1964) [hereinafter cited as Cigarette Rule SBP]; All State Industries of N.C., Inc., 75 FTC 465, 491 (1969); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 n. 5 (1972) (citing Cigarette Rule SBP). Statement of Basis and Purpose, Preservation of Consumers' Claims and Defenses, 40 *Fed. Reg.* 53506, 53522 (1975); Spiegel, Inc., 86 FTC 425, 443 (1975), *aff'd in part*, 540 F.2d 287 (7th Cir. 1976); Statement of Basis and Purpose, Advertising of Ophthalmic Goods and Services, 43 *Fed. Reg.* 23992, 24000 (1978) [hereinafter cited as "Eyeglasses I SBP"].

[67] *See* The History of American Funeral Directing, *supra* note 38, at 475–76.

[68] As recently as 1978, two states still had absolute prohibitions on price advertising, and four more had burdensome restrictions on it. *See* 1978 Staff Report, *supra* note 9, at 429, nn. 88–89.

[69] *See Antitrust and Monopoly Subcomm. Hearings*, *supra* note 1, at 244–46. Such ethical proscriptions of price advertising have been found in other contexts to violate the FTC Act. *See, e.g.*, Eyeglasses I SBP, *supra* note 66.

[70] United States v. National Funeral Directors Ass'n, 1968 Trade Reg. Rep. (CCH) 72,529 (E.D. Wis. 1968).

[71] *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

[72] *See, e.g.*, S. Waring, Treasurer, NFDA, Massachusetts funeral director, Tx 671–672; A. Hornberg, President, Funeral Directors Services Ass'n of Greater Chicago, Tx 4827; J. Curran, Pres., New York FDA, Tx 121; N. Greene, member, Virginia Board of Funeral Directors and Embalmers, Tx 14,184; C Swartz, District Governor of Pennsylvania FDA, Tx 13,954; J. Couch, Illinois State Board of Examiners, Tx 2928; R. Ebeling, former

formal restraints, the rulemaking record indicates only a small amount of price advertising in a few areas of the country.[73]

b. *Failure to Disclose Prices for Individual Items.* Most consumers do not have information on costs when they go to the funeral home to make arrangements.[74] Even at the funeral home, however, many consumers do not receive detailed price information because of the pricing methods which prevail in the industry.

Statistics from funeral trade associations demonstrate that over half of all funeral providers use some form of package or lump-sum pricing.[75] Two variations of packaging are "unit" pricing, in which a consumer is quoted a single price for a complete package of goods and services, and "bi-unit" pricing, in which the casket is priced separately from the other goods and services. Under the unit pricing system, the funeral provider quotes a single price for a package of services, merchandise and facilities which he or she has pre-selected for the consumer. Thus, a $1200 funeral may include transporting the remains, embalming and other preparation, a casket, use of the funeral home facilities for one day of viewing, a ceremony, use of automotive equipment, the services of the funeral director, a guest book and acknowledgment cards. The key feature of the unit pricing scheme is that all of these goods and services are part of a pre-selected package for which there is a fixed price; none of the components is priced separately. The bi-unit method is similar, except that the cost of the casket is separate. Where either method is used, it is usually impossible for consumers to learn the cost of any of the individual components of the funeral package and to select individual items after considering their relative costs.

Under either form of package pricing, a significant number of funeral directors will not reduce the package price if any services or merchandise are unwanted or unused.[76] While some industry members reduce the price if the buyer does not want a part of the package,[77] even those funeral directors who do give credits upon request usually do not disclose to consumers, prior to making a purchase decision, their option to decline services for a reduction in price.[78]

In addition, surveys indicate that consumers are often unaware of the range of goods which are theoretically available. For example, a number of surveys on the rulemaking record show that funeral directors do not display their least expensive caskets in the same selection room as their higher priced units.[79] The evidence also shows that when such merchandise is not displayed, consumers usually are unaware that it is available and usually do not ask about it.[80]

Further, while some funeral providers do quote prices on a more detailed basis,[81] many of them supply such information only after the purchasing decisions have been made, in the form of an itemized agreement or bill.[82] In

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managing editor of Mortuary Management, Tx 6860; L. Peake, past Pres., Oregon FDA, Tx 5705; A. Mamary, Pres., Pennsylvania FDA, Tx 12, 883.

[73] *See* 1978 Staff Report, *supra* note 9, at 98, 412–413.

[74] Due to the absence of price advertising and the lack of previous experience, most consumers do not have prior knowledge about the prices charged either by particular funeral homes or by funeral homes generally. (*See* discussion in Section I(E), *supra*.) For example, one survey showed that consumers' estimates of the price for a standard adult funeral ranged from $300 to $10,000. Maryland Citizens Consumer Council, D.C. Ex. 36, at 3. These findings are confirmed by industry studies. *See, e.g.*, Blackwell & Talarzyk, *American Attitudes Toward Death and Funerals* 34 (1974), VI–D–17 [hereinafter cited as "Blackwell & Talarzyk"].

Further, most consumers do not get specific price information before choosing a funeral home. In some instances, consumers felt that time constraints prevented them from getting comparative price information. See note 60, *supra*. In other instances, consumers attempted to get price information by telephone, but had difficulty in doing so, as discussed in section II(A)(2)(c), *infra*. But in most instances, consumers simply do not try to get price information. Instead, they choose a funeral home on the basis of factors other than price. Some of the more important factors are location and convenience, general reputation, ethnic or religious affiliation, knowing the funeral director personally, and recommendations of friends. Blackwell Survey, *supra* note 59. The same study showed that a majority (55%) of consumers already know which funeral home they would call in the event of a death.

Finally, in other instances, price information is irrelevant in choosing a funeral home, as in the case where there is only one funeral director in the community.

[75] 1976 Statistical Abstract, *supra* note 31, at 64–94 (approximately 65% are priced on a unit or bi-unit basis). *See also* Statement of R. Cohen, Exec. Secretary, CAFMS, D.C. Ex. 39, at 22 [hereinafter cited as "Cohen Statement"] (1968 figures compiled by Batesville Casket Co. indicate that 64% of firms use unit pricing and 9% use bi-unit); R. Bishop, Director, Florida Consumer Services, Atl. Stmt., App. A, at 4 (Florida survey in 1974 found that 52% of funeral directors use unit or bi-unit pricing).

The widespread use of package pricing is partly explained by the industry's belief that it is simpler for consumers to use, that it is easier for funeral directors to use in determining prices, and that it enables funeral directors to make full traditional funerals available at a lower price. These asserted benefits are discussed in detail in the text, *infra*, II(A)(3)(d).

[76] *See, e.g.*, California Funeral Director Association, L.A. Ex. 23 (survey of 291 funeral directors revealed that 15 percent do not deduct the embalming charge when the service is declined); A. Nix, Pennsylvania funeral director, Tx 12,922; W. Holman, Oregon funeral director, Tx 12,161; R. Lackey, Pres., Alabama chain of funeral homes, II–A–146, at 4. Surveys confirmed that no credit is given for declined services. L. Speer, Director, CalCAG, Tx 7693; C. Skeels, CAMP Consumer Action Project, Tx 6020 (6 of 10 funeral homes make no price reduction); State of Arkansas Office of the Attorney General, Funeral Survey, VI–D–12, at 4–5 (32 of 104 respondents would not make price reductions for declined services); Delaware Div. of Consumer Affairs, Press Release, VI–D–9 (small deductions are given but do not reflect savings to funeral director). Chosen Statement, *supra* note 75, at 25 (20 out of 101 respondents reported paying for services, merchandise or facilities they didn't want). *See also* Blackwell Survey, *supra* note 59 (3.7% of the consumers surveyed were required to pay for services which they did not want).

[77] *See, e.g.*, State of Arkansas Office of the Attorney General, Funeral Survey, VI–D–12, at 4–5 (72 out of 104 firms provide discounts for unused items); Delaware Div. of Consumer Affairs, Survey of the Funeral Industry in Delaware, VI–D–9, at 2 (15 out of 25 firms allow price adjustments for declined items); H. Coates, State Bd. of Embalmers and Funeral Directors of Kentucky, Tx 3983–84; N. Heard, Pennsylvania funeral director, Tx 13,181; J. Kerr, Sec'y-Treas., Kentucky FDA, Tx 3024; R. Coats, Pres., Michigan FDA, Tx 3771; F. Walterman, Pres., Indiana FDA, Tx 5006; N. Greene, owner of Virginia funeral home, Tx 14,188; J. Altmeyer, West Virginia funeral director, Tx 11,775; B. Hirsch, Pennsylvania funeral director, Tx 12,536; A. Leak, Illinois funeral director, Tx 3875.

[78] While NFDA and NSM apparently recognized the right of the consumer to get a credit for an unwanted item, they do not suggest that such credits be disclosed affirmatively and in advance. *See* T. Clark, General Counsel, NFDA, VI–C–6, at 6; NSM Code of Ethics, D.C. Ex. 20. The proposed Guides submitted to the Commission by the major trade associations in 1980 were similarly vague on the funeral director's obligation to disclose all available credits in advance of any purchase decision.

Several funeral directors testified that they will reduce the price for unwanted items if asked, but that they do not inform consumers of this option. *See, e.g.*, N. Greene, Virginia funeral director, Tx 14,188; E. Fitzgerald, New Mexico funeral director, Tx 6246; R. Ninker, Executive-Director, Illinois FDA, Tx 2687–88; B. Hirsch, Pennsylvania funeral director, Tx 12,533; H. Burton, Pres., consultant in before-need memorial estate planning, Tx 6680; R. Johnson, Indiana funeral director, Tx 12,652.

[79] *See, e.g.*, Comments of Maine PIRG, II–C–1400, at 2 (one-third of 116 funeral homes failed to display least expensive casket); FTC Survey of Funeral Prices in the District of Columbia, VI–D–4, at 16 (14 out of 36 funeral homes did not display least expensive casket).

[80] *See* New York PIRG, Ex. 1 (N.Y.), at 8 (out of 127 respondents, only 28 realized there might be caskets other than those displayed; only 7 of the 28 asked if anything less expensive was available).

[81] A 1976 study of funeral homes indicates that 28% of 151,943 funerals included in the results involved a multiunit form of pricing and 7% of the funerals were priced on a triunit basis. *See* 1976 Statistical Abstract, *supra*, note 31, at 64, 74, 84, 94.

[82] The regulations of several states which require itemization specify only that itemized price information be given "at the time of arrangements." These regulations do not specifically direct that consumers be given itemized price information before they decide what to buy. *See, e.g.*, New Jersey State Board of Mortuary Science, Rule 76(a): "Any person engaged in the practice of mortuary science shall, *at the time funeral arrangements are made*, compile a specific itemization of the charges which will be made for such arrangements." (emphasis added); New York State Department of Health, Rule 78.1(a): "Every person licensed pursuant to article 34 * * * shall furnish *at the time funeral arrangements are made* for the care and disposition of the body of a deceased person * * *

such cases, the consumer agrees to buy each item, but is still not given the prices associated with each item at the time he or she must decide whether or not to buy it.

(c) *Failure to Disclose Prices Over the Telephone.* The time constraints in arranging a funeral after a death has occurred make it difficult for consumers to get price information before choosing a funeral home. The initial call to a funeral provider to pick up the body of the deceased from the place of death necessarily must occur within several hours of death. Thus, in many instances, at least where death has not been anticipated, all efforts to get price information must occur in an extremely short time span.

Under these circumstances, the gathering of price information by telephone may often constitute the only practical way in which price information can be obtained before a funeral provider is selected.[53] The record reveals, however, that funeral providers often fail to provide price information over the telephone when asked. Individual consumers and consumer groups complained about difficulties they had experienced when they called a funeral home and asked about costs.[54] Consumer groups and state officials in numerous states reported substantial resistance or flat refusals when they attempted to gather price data by telephone for survey purposes.[55]

After the record was closed in this proceeding, data became available which suggested that only a small percentage of funeral directors refuse to answer requests for price information over the telephone.[56] The data seemed to suggest either that the findings of the studies contained in the record were in error, or that funeral directors had substantially changed their practices.[57] After a thorough review of the data, and a presentation of differing staff opinions, the Commission decided not to reopen the record to include the data.[58] The data were not sufficiently reliable to require the Commission to reopen the record at this stage of the proceeding.[59] Further, the data confirmed that some funeral directors refuse to provide price information over the telephone on request.[60] Perhaps more importantly, the data confirmed the basic finding that the vast majority of consumers do not get price information over the telephone before choosing a funeral home.[61] One of the major purposes of the rule is to signal to those consumers who did not think to ask or were inhibited from asking, that price information is available at this critical moment of decision. That disclosure, and the requirement that price information be given, is part of the remedial scheme which the Commission has chosen to

an itemized list of the services and merchandise to be furnished." (emphasis added); Virginia Board of Funeral Directors and Embalmers, Article XVII, Paragraph 3.A: "Every funeral service licensee * * * shall furnish to the party contracting for such funeral arrangements, *at the time such arrangements are made* if such party be present * * * a written itemized statement of any and all charges." (emphasis added).

[53] Of course, many consumers do not try to get price information by telephone prior to choosing a funeral home. *See* discussion at note 74, *supra*. And it is reasonable to believe that funeral directors who refuse to provide price information when asked, as discussed in text and accompanying notes 84–85, are not likely to volunteer this information.

[54] *See, e.g.*, L. Pratt, Washington consumer, II–B–1153; J. Pagdin, Florida consumer, II–B–1534; S. Flanders, Illinois consumer, Tx 4668; E. Sheehan, District of Columbia consumer, Tx 14,666–67; L. MacDonald, NRTA/AARP, Tx 2847. Also, several memorial society representatives cited consumer experiences of unsuccessful attempts to obtain information by the telephone. E. Knapp, Pres., Memorial Society of Metropolitan Washington, II–C–909; L. Tolliver, Pres., Blackhawk Memorial Society, X–1–82.

A number of funeral directors and industry leaders testified that the reason funeral directors could not give information over the telephone was that such information would be confusing, misleading, and deceptive. *See, e.g.*, C. Lightner, former Pres., NFDMA, Tx 10,391; H. Mayes, Oklahoma Funeral Directors Association, Tx 8895; A. Leak, Ill. funeral director. *See also* NFDA Post-Record Comment, XIV–848, at 9.

[55] *See, e.g.*, D. Hoskins, Chairman, Pennsylvania Ass'n of Funeral and Memorial Societies, Tx 13,988; L. Speer, Director, California CAG, Tx 7,717–18; R. Nesoff, Director of Investigation, State Temporary Comm'n on Living Costs and the Economy, Tx 329 (investigator posed as consumer calling for price information but funeral homes refused); M. Edelstein, attorney, New York City Dep't of Consumer Affairs, Tx 163 (three of twelve mortuaries called would not provide price information); R. Pooler, Executive Director, New York State Consumer Protection Bd., Tx 38 (found price information is rarely given on the telephone); NYPIRG Ex. 1 (N.Y.), at 2 (testimony of B. Kronman, research associate) (two-thirds of sixty funeral homes called refused or were uncooperative when asked for price information); Indiana PIRG Reports, A Death in the Family, VI–D–8 at 1; Maine PIRG, II–C–1400, at 4; O. Matthews, Maryland Citizens Consumer Council, Tx 14,053; S. Chenoweth, Director, Minnesota Office of Consumer Services, Tx 3123–24; J. Brown, Assoc. Director, Center for Consumer Affairs of the University of Wisconsin Extension, Tx 4306–07.

One possible factor influencing the funeral directors' response is the advice given by NFDA's General Counsel to its state affiliates that funeral directors not cooperate with any price surveys during the pendency of the Commission's rulemaking proceeding. NYPIRG Ex. 3 (N.Y.). While this advice apparently affected returns on written price surveys, *see* Staff Report, *supra* note 9, at 342–344, its effect on telephone price requests is clear because it would not necessarily be apparent to the funeral director that the questions were part of a price survey.

[56] In 1979, the staff, as part of an on-going program intended to measure the impact of trade regulation rules, began work on an impact evaluation baseline study ("BLS"). The BLS was not intended to be part of the rulemaking record, but was rather intended to gather pre-rule data which could be used as a basis for comparison with a future study to be conducted after the rule had gone into effect. The study was a survey of a national mail panel of consumers, asking for information about funerals that they had arranged in the last year. The data instrument was designed by Market Facts, an independent consultant, along with Commission staff, and information was collected by Market Facts. Due to various delays in the final promulgation, the data from the BLS became available shortly before the Commission's final consideration of the rule. The BLS, and all staff memoranda regarding its findings, were made available to the public but were not made part of the rulemaking record.

[57] The BLS suggested that only 6 percent of the requests for price information over the telephone were rejected.

[58] At its public meeting on July 28, 1982, the Commission heard presentations and considered five memoranda from different staff members, all of which presented different positions. Some staff felt that the record did not need to be reopened because the data were unreliable and did not contradict the record. Other staff felt that the data were reliable and called into question findings of the rulemaking record. All of these staff memos were made available to the public.

[59] The specific questions in the questionnaire were ambiguous, and it was impossible to determine whether all the respondents understood the questions and responded in the same way. A subsequent validation study, for example, showed significant variations with the results found in the original baseline survey, suggesting confusion on the part of respondents. The Commission agreed with the staff analysis that it was impossible to draw any firm conclusions from the study. Indeed, the very breadth of staff opinion on the reliability of the data strongly suggested that the questions of ambiguity and meaning could not be satisfactorily answered by further public comment.

Generally, the Commission is not required to consider relevant evidence that may be generated after the close of the rulemaking record, for the reason that administrative proceedings would otherwise never end. Vermont Yankee Nuclear Power Corp. v. NRD, 435 U.S. 519, 554–555 (1978) (quoting ICC v. New Jersey, 322 U.S. 503, 514 (1944)). The Commission is required to reopen the record for new evidence only when there has been a change in circumstances that is "not merely 'material' but rises to the level of a change in the 'core' circumstances, the kind of change that goes to the very heart of the case." American Optometric Association v. FTC, 626 F. 2d 896, 907 (D.C. Cir. 1980), (quoting Greater Boston Television Corp. v. FCC, 463 F.2d 268, 283 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972)).

The data above, in the Commission's consideration, does not challenge the findings of the record because it lacks the requisite certainty needed to rebut the record. While relevant, the serious questions about its reliability render the data less material than otherwise would be the case.

[60] The BLS suggested that a minimum of 6% of funeral directors refused to answer requests for price information. While that finding was a lower figure than that found in the record, the record also showed that a significant number of funeral directors did provide price information on request. *See, e.g.*, NYPIRG, Ex. 1 (N.Y.) (⅓ of sixty funeral homes gave price information).

[61] The data indicated that at the very most, some 35% of those telephoning either asked or were offered price information of some sort over the telephone. (Out of 377 persons who telephoned a funeral home, 72 asked for information on arrangements and prices, while 61 had this information offered to them by the funeral director.)

induce greater price competition and consumer choice in this marketplace.

3. *Consumer Injury Due to Inadequate Price Information.* The failure of funeral providers to furnish basic price information results in substantial economic injury to funeral purchasers. This economic injury takes two related forms: consumers purchase items that they may not want or use, and they pay higher than competitive prices for items they purchase.

(a) *Paying for Unwanted Items.* Package pricing leads consumers to buy items they may not want or use in several ways. As noted above, many funeral directors do not reduce the price of a package even when a consumer asks to have items dropped from the package. By bundling all of the pre-selected goods and services together, the funeral provider is effectively forcing the consumer to buy items as a condition of providing a necessity that only he can provide: disposition. This injury, however, stems less from the lack of price disclosure than from the funeral director's refusal to unbundle the package. Consequently, it is discussed in more detail in Section II(C), *infra.*

Even when funeral directors are willing to unbundle the package upon request, package pricing still causes consumer injury because it denies consumer choice. When a funeral director is willing to give a reduction in price for unwanted goods included in the package, quoting a single price for the full package obscures the fact that the package actually consists of components which may be individually chosen. Further, by the funeral provider's failing to disclose that unwanted components may be declined, consumers are simply likely to assume that the package is not subject to negotiation because all items are necessary or required.[92] Given the funeral purchaser's lack of prior experience and knowledge, and the emotional and time pressures attending the decision, the Commission believes that many funeral purchasers will simply not think to ask whether the package can be broken into parts or to question aggressively the funeral director's offerings.[93] Consequently, consumers are injured in the absence of a disclosure that parts are declinable because they are likely to assume that there are no choices to be made. As a result, they buy the pakages, including items that they would not have bought had they been given information that purchasing the components was optional. In addition, denying consumers information on the *prices* of the parts further injures consumers because they have no idea how much can be saved by declining the components. Lacking such price information, consumers cannot make an informed purchase decision.

Direct evidence of the extent of this injury, through consumer complaint surveys, is difficult to obtain precisely because consumers are often not aware that they had any choice to make.[94] Further, any systematic observation of consumer behavior related to pre-sale itemized disclosures has not been possible, primarily because so few funeral homes provide such information.[95]

Nevertheless, the record establishes significant consumer injury. Some indication of the extent of the injury can be ascertained from attitudinal studies and other surveys, and comments and testimony from individual consumers, consumer groups and experts indicating that, given price and option information, a significant number of consumers would use such information to make informed choices and would often choose to decline items usually included in the package funeral.[96]

A number of consumer surveys show that consumers find cost to be highly important in making funeral arrangements.[97] It is not surprising, then, that large majorities of consumers want detailed price information about funerals [98] and want funeral prices to be quoted on an itemized basis.[99] Consumers believe that such detailed price information will be useful to them in making funeral arrangements.[100]

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[92] J. Todd, Arkansas Funeral Director, Tx 8753: "Why must a package funeral be bought if you only want to be cremated immediately?" E. Given, Michigan consumer, II-B-150. In addition, since many consumers are ignorant of the laws and cemetery requirements applicable to funeral arrangements, they are likely not to question the inclusion of certain items in a package. For example, according to one study, 51% of the consumers surveyed believed embalming was required by law. The Central Area Motivation Program, Consumer Action Project Survey, Sea. Ex. 14 (hereinafter cited as "CAMP Survey"). It can be inferred from this that many of these consumers would, therefore, not think to question the inclusion of embalming in a funeral package.

[93] *See generally* Section I(E), *supra;* Dr. J. Quint Benoliel, Professor, Univ. of Washington School of Nursing, Tx. 5297, citing L. Glick, R. Weiss, & C. Parkes, *The First Year of Bereavement* (1975). A study of the funeral industry in Minnesota revealed that only consumers who aggressively questioned funeral directors about the availability of limited services were likely to be informed of all the available options. S. Chenoweth, Director, Minn. Office of Consumer Services, Tx. 3116.

[94] Nevertheless, a number of consumers recite instances in which they were aware that they were being required to pay for goods or services (such as limousines, visitation rooms, and use of the chapel) that were either not wanted or not used. *See e.g.,* Comments in category II-B at 54, 164, 366, 496, 829, 1048, 1108, 1266, 1404, 1486, 1893, 1967, 1984, 2003, 2013, 2034, 2240, 5967, and testimony, S. Ross, Washington consumer, Tx 5274-75.

[95] At the time the hearings were conducted, only four states had enacted laws or regulations requiring mandatory price itemization. *See* 1978 Staff Report, *supra* note 9, at 357, n. 77. (Three other states required itemization to be given only on request, and one other state required only a limited breakdown on the package price.) But even in these four states, the funeral director was not required to give consumers the price disclosures *before* the decisions were made, but only a written record of what had been agreed to. As a consequence, no state had a regulatory price disclosure scheme similar to the FTC's proposed rule.

Since that time, a number of states and localities have passed regulations which are more similar to the FTC's proposed rule and which might be suitable for comparative studies. While such studies might be helpful, the Commission believes that the additional time and expense which would be required to conduct such studies and reopen the rulemaking record is not justified and would not add substantially to the record. The Commission is not required to reopen the record to consider relevant evidence which has become available after the record has closed. ICC v. New Jersey, 322 U.S. 503, 514, (1944), unless the evidence suggests a "change of circumstances" going "to the very heart of the case." American Optometric Association v. FTC, 626 F.2d 896, 907 (D.C. Cir. 1980).

Comments submitted by interested parties in 1979 and 1981 offered parties an opportunity to bring to the Commission's attention any such fundamental change since the hearings conducted in 1976. Comments submitted at that time indicated that no significant changes had taken place.

[96] Many consumers, of course, want the package funeral and are not interested in the prices of the parts of the package. Such consumers are not injured by the funeral director's failure to disclose that components of the package are optional and the price of those components, but only because their wants happen to coincide with the funeral director's offering.

[97] *See, e.g.,* Blum Study, *supra* note 57; CAMP Survey, *supra* note 92.

[98] *See, e.g.,* CAFMS Survey which found that a large majority of consumers surveyed supported required price disclosures. CAFMS Survey, *supra* note 60, at A-7 (Form A, Question 22). A survey of over 1000 consumers sponsored by the Casket Manufacturers Ass'n revealed that two-thirds of consumers responding indicated a preference for detailed funeral price quotation. Blackwell and Talarzyk, *supra* note 74, at 34. While these and other surveys on the record have methodological limitations which prevent projection to the national population, these surveys, combined with others and the extensive written comments and oral testimony, show that consumers typically desire more information.

The desire for more detailed price information also was expressed by a great many individual consumers during the rulemaking proceeding. *See, e.g.,* Comments, in category II-B at 97, 240, 305, 529, 541, 597, 706, 726, 738, 780, 798, 916, 1191, 1316, 1562, 1565, 1571, 1589, 1599, 1823, 1834, 1850, 2042 and 2080; and Testimony, *see, e.g.,* W. London, American Legion, Tx 3465.

[99] *See, e.g.,* Blackwell and Talarzyk, *supra* note 74, at 34-35 (CMA survey revealed that two-thirds of respondents preferred pricing quotation that provides some detail on individual components and over one-half of respondents expressed preference for itemization); Blum Study, *supra,* note 57 (survey of South Florida residents indicated that over 90% of respondents favored regulation requiring a funeral director to provide specific information about the price of each item of service and merchandise); Cohen Statement, D.C. Ex. 39, *supra* note 75 (94% of consumers surveyed desired funeral prices to be quoted on an itemized basis).

[100] *See* Blum Study, *supra* note 57; CAMP Survey, *supra* note 92; Humphreys, D.C. Ex. 45.

Evidence shows that, if given the choice, consumers would not buy various parts of the "average" package funeral ranging from rates of 10 percent (for embalming) to 43 percent (for the use of another family car).[101] Many industry leaders expressly opposed itemization at least in part for the fear that consumers, if given the choice, would not buy items usually included in the package.[102]

The aggregate injury caused by consumers purchasing items that they do not want and would not buy if not required to do so, or if they had itemized pre-sale price information, is substantial. Evidence on the record shows that various optional items included in the funeral package are expensive: for example embalming ($50–$150),[103] and limousines ($15–$75).[104]

(b) *Paying Supracompetitive Prices.* The second source of consumer injury is that the lack of adequate price information may be causing consumers to pay higher than competitive prices for funerals.

Information from a variety of sources has led the Commission to conclude that this economic injury exists. Included in these sources are economic studies of the funeral market, which suggest the existence of consumer injury, because of "a striking absence of price competition in the funeral industry." [105] Industry members have also admitted that funeral directors do not compete on the basis of price at the point of sale.[106] Economic analyses on the record have concluded that price competition in the funeral market is severely inhibited because consumers do not have adequate access to price information.[107] Without the pressure of active price competition, prices for funeral services can be set higher than a competitive equilibrium price.[108]

Information plays an important role in the operation of an efficient market. In particular, the significance of price information to a competitive market is well-documented in the economic literature.[109] Consumer ignorance about prices will permit sellers to charge higher than competitive prices, even in a market with numerous sellers.[110] The reason for this result is that sellers will gain few customers by lowering prices if consumers have difficulty obtaining price information. Inadequate price information, therefore, serves to give even a large number of small sellers a degree of market power. These theoretical observations have been confirmed by a number of empirical studies in other markets.[111]

Exactly why the market has failed to generate price information is impossible to say with certainty. Evidence in the record suggests that some of the unique structural and demand characteristics of this industry may provide some explanations.

First, there is the tradition of restraints on price advertising noted above.[112] Although formal restrictions against price advertising have generally been eliminated, many industry leaders and members continue to view price advertising as unprofessional. Thus, industry custom and substantial peer pressure serve to inhibit competition by advertising.

The second factor which may operate to distort normal market incentives is the nature of demand in the industry. Total demand for disposition is a function of the death rate. Economists studying the funeral industry point out that total demand for disposition in all forms is extremely inelastic, i.e., the number of funerals is not responsive to changes in price.[113] The demand for the services of any individual funeral home or for particular forms of disposition, however, may be price-elastic, thereby giving each firm an incentive to lower prices to increase sales. Lower prices and aggressive marketing, however, will not expand the number of consumers in the market; a funeral home can increase the number of funerals it performs only by taking business away from its competitors. Since competing firms are likely to respond with lower prices, the result is that prices are reduced and sales do not increase, thereby reducing total revenues. The funeral home is better off, therefore, avoiding price competition. One economic analysis of the funeral industry concluded that "the funeral director's awareness of the effects of price competition in this demand-inelasti : industry" is a major reason for the la « of price advertising.[114] This finding can be contrasted with the experience in professional markets where advertising has flourished after the removal of formal price advertising restraints. For example, studies in the optical market, where perhaps the most professional advertising has occurred, show that demand is price-elastic.[115]

In addition to these two factors which blunt funeral providers' incentives to provide price information, certain aspects of the market make it difficult for new firms to enter and compete. The evidence suggests that a variety of nonprice factors influence a consumer's choice of funeral provider, such as family tradition, religious or ethnic affiliation, and reputation of the firm.[116] These consumer preferences give established firms in the market a distinct advantage over potential entrants. In an industry with a large number of small sellers and significant consumer loyalty, the prospects for attracting a large enough clientele may appear uncertain at best. As a result,

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[101] Blackwell Survey, *supra* note 59.

[102] *See, e.g.*, H. Coates, member, State Bd. of Embalmers and Funeral Directors of Kentucky, Tx 3981; C. Nichols, Director, Nat'l Foundation of Funeral Service, X-24, at 5–6.

[103] *See* text and accompanying note 340, *infra*.

[104] *See* M. Lennon, Tennessee consumer, II-B-3346; FTC Survey of Funeral Prices in the District of Columbia, IV-D-3, at 27 (1973).

[105] Blackwell article, *supra* note 34, at 78.

[106] D. Rollings, Executive Director, OGR, XIX, at 80 (1981 oral arguments).

[107] *See, e.g.*, A. Rappaport, An Analysis of Funeral Service Pricing and Quotation Methods (1971), III-I-2, at 4–5 (hereinafter cited as "Rappaport").

[108] Some commentators see evidence of supracompetitive prices in the excess capacity of the industry. *See, e.g.*, Blackwell article, *supra* note 34, at 82; Rappaport, *supra* note 107; Kissel, *supra* note 35.

[109] *See, e.g.*, Scitorsky, *Ignorance as a Source of Oligopoly Power*, 40 Am. Econ. Rev. 48 (1950); Stigler, *The Economics of Information*, 69 J. of Political Economy 213 (1961); Salop, *Information and Monopolistic Competition*, 66 Amer. Econ. Rev. 240 (1976).

[110] *See, e.g.*, Salop, *Information and Monopolistic Competition*, 66 Am. Econ. Rev. 240 (1976); Grossman and Stiglitz, *Information and Competitive Price Systems*, 66 Am. Econ. Rev. 246 (1976).

[111] *See, e.g.*, J. Begun, "Professionalism and the Public Interest: Price and Quality in Optometry" (Ph. D. dissertation, University of North Carolina, June, 1977); Bureau of Economics, Federal Trade Commission, Economic Report—Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (Sept. 1980); J. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs*, (American Enterprise Institute for Public Policy Research, Center for Research on Advertising, Domestic Affairs Study 44, 1976); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & Econ. 337 (1972); Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421 (1975) (hereinafter cited as "Regulating Through the Professions").

[112] *See* Part II(A)(2)(a), *supra*.

[113] *See, e.g.*, Kissel, *supra* note 35, at 23.

[114] *Id.* at 41. The ability of funeral directors to enforce an informal understanding not to compete on the basis of price is made easier by the fact that most funeral homes have very limited competition. Nearly 70% of all funeral homes have fewer than 4 competitors. V. Pine, Findings of the Professional Census (1971), D.C. Ex. 4.

[115] *See* Regulating Through the Professions, *supra* note 111, at 436–440. *See also* FTC Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry 31 (1980).

[116] Various consumer surveys on the record examined this issue. *See, e.g.* N.Y. Ex. 1(I) (N.Y.); Kalish Survey, *supra* note 56, at Table 8; "Funeral Services Attitudinal Survey," D.C. Ex. 29 (Odesky) at Question 3; G. Refsland Prof. of Sociology, Montana State Univ., D.C. Stmt. at 4. Funeral industry spokesmen also have pointed to the relatively low priority of price as a factor in selecting funeral homes. *See e.g.*, R. Blackwell, Tx 13,707.

entry by low-cost providers is discouraged.[117]

(c) *Injury is Unavoidable.* The consumer injury caused by the lack of adequate price information—paying for items which consumers may not want, and paying for funerals at supracompetitive prices—are harms which are not reasonably avoidable. A consumer can only avoid paying for items in a package he does not want if he or she is knowledgeable enough to ask whether they are optional. In the funeral transaction, it is not reasonable to put that burden on the funeral. consumer, who typically lacks prior experience and prior knowledge about laws and options, and who must decide under circumstances of limited time and emotional strain.

The only way a consumer could avoid such harm would be to compare prices and offerings before choosing the funeral home. Yet, because of time constraints and other factors, most people do not get such information. Further, the record indicates that even where some consumers have tried to get price information over the telephone, they had difficulty in obtaining it.

Finally, it appears that the market forces are insufficient to generate the needed price information. Due to some unique structural and demand characteristics of this market, there appear to be significant obstacles to price competition. Further, the usual market discipline is lacking. In most cases, consumers who have unnecessarily bought items because they lacked sufficient price information will not be dissatisfied because they will not know that sucn choices were denied. Given these factors, it is unlikely that the market will correct the failure to provide sufficient price information by itself.

(d) *Countervailing Benefits.* In considering whether a practice is unfair, the Commission must determine that there is net injury, *i.e.*, that the injury caused by the practice is not outweighed by countervailing benefits.[118] Many funeral providers and the major trade associations believe that package pricing has important benefits.[119]

One suggested benefit is that package pricing is easier for most consumers to use, since most consumers are interested only in the full traditional funeral and how much the total will cost.[120] Undoubtedly, many consumers will not be interested in declining parts of the traditional funeral package, and those consumers would be interested primarily in the fotal cost in choosing which funeral package to buy. Itemization, however, does not impose any burdens on such consumers. If consumers are not interested in choosing individual components, they are free simply not to use the price information and to select on the basis of the total cost for all of the components. Further, the rule also allows funeral providers to offer package prices. While itemization thus does not interfere with the ability of those consumers who are interested only in packages to choose the funeral package they want based on the total cost, package pricing, in contrast, precludes consumers who are *not* interested in the full funeral from making informed choices.

Funeral providers also argue that package pricing, as an accounting method, is an easier method to use than itemization for setting prices. Since itemization is a more complex accounting system, funeral directors may be required to seek accounting assistance and to spend more time in tracking costs and in setting prices.[121] These increased costs, it is suggested, will be passed on in the form of higher prices to consumers. The Commission considers the arguments that the rule will increase costs, and thereby raise consumer prices, in detail in Section IV, *infra*. There, the Commission determines that, while the rule will impose some compliance costs, those costs are modest and are outweighed by the benefits of the rule.

By far the most strongly pressed argument in favor of package pricings, however, is the contention that package pricing enables funeral providers to offer funerals at lower prices than they would be required to charge under itemization.[122] The various arguments that itemization will lead to higher prices are discussed in detail in Section V(B). As noted there, the Commission finds that, while itemization provides an opportunity for funeral directors to choose to raise their prices, there is no reason why prices would necessarily be lower under package pricing than under itemization.

The Commission finds that the countervailing benefits of package pricing are not significant. While package pricing is probably a less costly accounting method than itemization, the increased costs caused by switching to itemization, as discussed in detail in Section V(B)(2), *infra*, are modest and outweighed by the far greater benefits expected by increased price competition and greater consumer choice.

(e) *Public Policy.* Finally, as discussed in Section II(A)(1), *supra*, the Commission also looks to established public policy for confirmation (or denial) of its finding that a practice is unfair. While the primary focus of the Commission's decision will usually be a direct analysis of the injury caused by a challenged practice, the decisions of other public bodies addressing similar issues will also be taken into account.

In this case, there is clearly no public policy *against* the disclosure of itemized price information.[123] to the extent that there is any clear public policy at all, as evidenced by recent state laws and legislation, it appears to support the Commission's decision.[124] While this might not be sufficient to rest a finding of unfairness on public policy alone, it provides some support for the Commission's own analysis of the consumer injury.

(f) *The Failure to Disclose Itemized Information is an Unfair Practice.* Based on the above evidence, the Commission concludes that the failure of funeral providers to furnish information on the prices of specific funeral goods and services is an unfair practice in violation of Section 5 of the FTC Act. We find that the practice imposes substantial unjustifiable consumer injury.

(g) *Remedial Requirements.* To remedy the unfair and deceptive failure of funeral providers to furnish information on the price of specific funeral goods and services, § 453.2(b) of the rule requires funeral providers to: (1) Provide price information over the

[117] The difficulty of building a clientele has been cited as the primary barrier to entry in the funeral industry. *See* Kissel, *supra* note 35, at 23. While all states require licensure for morticians, there is no evidence to suggest that the entry barriers posed by those licensure schemes serve to exclude new entrants.

[118] Commission Unfairness Statement, *supra* note 64.

[119] As noted previously, however, most trade associations recognize that consumers are entitled to a "reasonable adjustment" when they decline items; only a few funeral providers defend the required purchase of all parts of the funeral package as being beneficial. *See, e.g.*, D. Hanks, Missouri funeral director, II–B 5159; I. Fisher, Mass. funeral director III–H–15, (suggesting that package pricing, as an accounting method, does not permit them to deduct charges for unwanted items).

[120] *See, e.g.*, NFDA Post-Record Comment, XIV–848, at 70, 79, 482; NSM Post-Record Comment, XIV–849, at 93, 96.

[121] *See, e.g.*, NFDA Post.-Record Comment, XIV–848, at 488.

[122] *See, e.g.*, NFDA Post-Record Comment, XIV–848, at 488–493; NSM Post-Record Comment, XIV–849, 95–107.

[123] Indeed a policy against disclosure would be hard to reconcile with the general public policy favoring informed consumers and the efficient operation of the free market. See Trade Regulation Rule concerning the Labeling and advertising of Home Insulation, 16 CFR Part 460.

[124] See Fla. Stat. Ann. § 470.035 (West 1979); *see also* note 82, *supra*.

telephone; (2) furnish consumers with a written price list containing prices of the various individual items and services offered; and (3) give purchasers a written statement indentifying the goods and services selected and their individual prices.

The remedies selected by the Commission to cure the lack of price information must bear a "reasonable relationship" to the unfair practice found to exist. In *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946), the Supreme Court set forth the standard for review of remedial provisions of Commission adjudicative orders: "[T]he courts will not interfere except where the remedy selected has no reasonable relationship to the unlawful practices found to exist." Periodically the Supreme Court has reaffirmed the Commission's remedial discretion and the limited role of the reviewing Court. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC* v. *National Lead Co.*, 352 U.S. 419, 428–30 (1956); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392–95 (1965).

In exercising this remedial authority, the Commission has not been limited to proscribing only the precise practices found to exist, but rather has been free to "close all roads to the prohibited goal." *Ruberoid, supra*, 343 U.S. at 473; *Colgate-Palmolive, supra*, 380 U.S. at 395. *Cf. International Salt Co.*, v. *United States*, 332 U.S. 392–400 (1947); National Soc'y of Professsional Engineers v. *United States*, 435 U.S. 679, 698 (1978).

The Commission's discretion to formulate an appropriate means of preventing the unfair or deceptive acts or practices found to exist also takes into account the nature of rulemaking, which involves "prediction[s] based upon pure legislative judgment" [125] and "judgmental or predictive" [126] determinations such as those involved in fashioning remedies. In making such determinations, the Commission is "entitled to rely on its judgment, based on experience" [127] as to the appropriate remedy to impose in the rule.

The Commission has designed the remedial requirements in § 453.2(b) to restore consumer choice, enhance the operation of market forces and cure the market failure which has occurred in the funeral industry. In the Commission's judgment, the requirements will achieve this result by giving consumers access to price information at a time and in a form which will permit them to consider price when making purchase decisions. Increasing the ability of consumers to locate funeral services whose mix of price and quality they prefer and to express those preferences in the market gives sellers an incentive to compete.

The itemized price list addresses the failure of a substantial portion of the industry to provide information on the prices of components of a funeral package. It will enable consumers to weigh the costs and benefits both of the various alternatives to a traditional funeral and of the individual items which they might select for use with a traditional funeral. The itemized list also will provide consumers with relatively standardized price information, while still allowing funeral providers to provide any additional price information they wish to. The second disclosure requirement, the telephone price disclosure requirement, addresses directly the record evidence that funeral directors have failed to respond to telephone inquiries about prices. Consumers will thus have the ability to call several funeral homes and compare their offerings before deciding where to purchase. In this manner search costs can be significantly reduced. In many instances, obtaining price information by telephone represents the only practical opportunity for comparison shopping, since many options are foreclosed once the funeral home is closed. The third disclosure requirement, the itemized statement of services selected, is designed to complement the price list by ensuring that consumers are not charged for items they did not select.

The effectiveness of the rule is clearly dependent on the extent to which consumers actually use the information provided to them. This does not mean, however, that all consumers must comparison shop in order for the market to realize the benefits of price competition. Economic theory indicates that consumers who seek and use price information will benefit uninformed consumers.[128] Thus, as long as some consumers comparison shop, the market should respond. The discussion which follows will describe in more detail how the remedial requirements in the rule will assist consumers during selection of a funeral home and while comparing alternative funeral arrangements in the funeral home.

(1) *Operation of Price Lists.* At the funeral home, consumers will receive one or more price lists. The rule itself identifies three separate lists. One is a "general price list", specified by § 453.2(b)(4). The second is a "casket price list", specified by § 453.2(b)(2). The third is an "outer burial container price list," specified by § 453.2(b)(3). However, the rule also permits funeral providers to merge either or both of the latter two lists with the general price list, if this is more convenient and if the information provided is the same.

In any event, consumers would have to be given the general price list for retention upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services. The list would be present for consultation while the consumers were considering what to purchase. It would show them the prices for 16 basic goods and services which they might wish to use.[129] The general price list would have to be printed or typewritten so that it would be available for retention by consumers.

In addition to the general price list, there would be two other price lists containing information on specific merchandise. The casket price list would show the retail prices of all caskets and alternative containers offered which did not require special ordering. The outer burial container price list would provide similar price information about burial vaults and grave liners. Each of these lists would have to be given to consumers upon beginning discussion of, but in any event before showing the merchandise they list. Unlike the general price list, these lists would not have to be offered to consumers if caskets or outer burial containers happened not to be discussed or shown. Similarly, the lists do not have to be printed or typewritten in a manner which enables them to be given to consumers for retention. Rather, the rule only requires that they be available in the funeral home. Because of this, funeral providers would be free to use alternative formats, such as charts or notebooks.[130]

The principal concern expressed about the operation of these lists was that they would drive up funeral costs because they require funeral directors to itemize prices.[131] For reasons discussed extensively in Part V of this Statement, the Commission has concluded that this would not be the case.

[125] *Bradford Nat'l Clearing Corp.* v. *SEC*, 590 F. 2d 1085, 1103 (D.C. Cir 1978) (quoting *Industrial Union Dept.* v. *Hodgson*, 499 F. 2d 467, 474 (D.C. Cir. 1974)).

[126] *FCC* v. *National Citizens Comm. for Broadcasting, supra*, 436 U.S. at 813.

[127] *Id.* at 797.

[128] *See, e.g.*, Salop, *Information and Monopolistic Competition*, 66 Amer. Econ. Rev. 240 (1976).

[129] The list might not always be this long. All 16 items have to be listed only if the funeral provider offers them for sale. Moreover, the rule does not prohibit listing other items which the funeral provider might offer for sale in addition to those specified.

[130] If the funeral provider merges these lists with the general price list, the combined list would have to be prepared in a format which consumers could retain.

[131] *See* discussion in Part V(B), *infra*.

Several other concerns were also expressed, however. First, some funeral providers stated that use of an itemized price list would force funeral providers to take more time explaining funeral arrangements and thus substantially lengthen the arrangements conference.[132] Other persons testified, however, that itemized price lists either took no longer to explain or shortened the length of the arrangements conference.[133] To the extent that the time involved in the arrangements conference was lengthened because consumers more carefully review their options and select only those items they desire, such an effect is intended.

A second concern was directed at the casket price list. Some funeral providers suggested that the requirement to have the list reflect all caskets offered would be particularly burdensome in light of the fact that a different casket is sold each time a funeral is arranged.[134] Although the rule does require the casket price list to be kept current, this should not impose a substantial burden. Many funeral providers replace the casket they sell with an identical, comparably priced unit.[135] Whenever this happened, no revision of the casket price list would be necessary. The rule requirement also has been written to minimize the burden which would be imposed on funeral providers when they change their inventory. The casket price list does not have to be prepared as a printed or written list. Instead, it may be displayed in other formats, such as a looseleaf notebook with a page for each casket. If the funeral provider elects to use such a format, revising the list would only require removing one description and replacing it with another. Given this sort of flexibility, the requirement should not be unreasonably burdensome.

A third concern expressed was that the general price lists would be expensive to prepare and duplicate.[136] However, funeral directors who currently provide itemized price information testified that the printed forms do not cost more than a few cents each to obtain.[137] Neither does the evidence suggest that itemization, as an accounting method, is significantly more complicated or substantially more expensive than the methods currently used by many funeral providers.[138]

(2) *Statement of Goods and Services Selected.* In addition to the price lists, persons making funeral arrangements in the funeral home would receive a "Statement of Funeral Goods and Services Selected." The statement, required by § 453.2(b)(5), would be given to people at the conclusion of the arrangements conference. Its purpose is to combine in one place the prices of the individual items the person is considering for purchase, as well as their total price, so that a final decision on whether to add or subtract particular items can be based on a review of the total cost of the arrangements.

To help ensure that the total cost of the funeral is disclosed on the statement, funeral providers are required to show prices of cash advance items, if known, or to give a good faith estimate of their cost if the actual price is unavailable. To simplify the operation of the rule and avoid unnecessary paperwork, § 453.2(b)(5) permits funeral providers to combine the information required for the "statement" on any contract, statement, or other document which they currently provide at the conclusion of the arrangements conference.[139]

(3) *Telephone Price Disclosure.* The rule provision primarily designed to help consumers obtain price information for use in selecting a funeral home is the provision requiring telephone price disclosures.[140] The section imposes two obligations on funeral providers. First, they must affirmatively inform people who call their place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services are offered, that price information is available over the telephone. In other words, the provision requires that funeral providers make an oral disclosure letting persons who call know that they can receive price information over the telephone. This provision is intended to inform the large number of consumers who first contact the funeral home by telephone that price information can be obtained before the selection of the funeral home is made. Many consumers who may be interested in price are not presently getting price information because they do not know enough to ask for it, and funeral providers do not volunteer it. Since options may be foreclosed, even under the rule, once a home is selected, this information will help alert consumers to the importance of price at a time when their choices are still open.

If the person calling is not interested in such information, the funeral provider has no further obligations under § 453.2(b)(1). However, if the caller requests price information, the second requirement of the section is triggered. That requirement is to disclose to persons who make telephone inquiries about the funeral provider's offerings or prices any accurate information from the price lists in § 453.2(b)(2) through (4) which reasonably answers the question and any other information which is readily available. The consumer can use this information to compare the prices of different funeral providers in deciding which one to select.

While the Commission believes that the telephone price disclosure provisions will impose a minimal compliance burden on funeral providers, several concerns about the provisions' operation were expressed during the funeral rule proceedings. One was that the provisions would necessitate the hiring of additional personnel to provide the required information.[141] It was argued that many funeral providers currently staff their phones during off-hours with an answering service or with unlicensed employees who lack detailed information about the provider's offerings and prices. Such a concern apparently is based on the view that the rule would require specific price information to be given by the first person answering the phone. However, this view is not the case. To the extent that a funeral home uses a telephone answering service during non-business hours, that service is not subject to the provisions of the rule. While the rule

[132] *See, e.g.*, A. Anderson, Pres., Utah FDA, Tx 6176. *See also* R. Thompson, Connecticut Funeral Director, Tx. 2023–24.

[133] *See, e.g.*, S. Hausmann, Exec. Director, New Jersey FDA, Tx 537 (he currently discusses itemization form as an integral part of the arrangements conference); C. Kleiber, researcher, Tx 5745 (student researcher who visited several funeral homes found that the itemized price list actually saved time in explaining of charges).

[134] *See, e.g.*, L. Peak, Pres., Oregon FDA, Seattle Stmt. at 5–7; C. Geer, Ohio funeral director, II–A–479, at 1.

[135] *See*, e.g., F. Galante, funeral director, Tx 1749.

[136] *See, e.g.*, NFDA Post-Record Comment, XIV–159, at 476.

[137] *See, e.g.*, F. Walterman, Tx 4985 (after basic charge of $80, forms can be printed for three cents each). P. Farmer, Tx 2354 (purchases itemization forms for twenty five cents each).

[138] *See* discussion in Part V(B), *infra;* 1978 Staff Report, *supra* note 9, at 405–06.

[139] The major concerns raised about the statement—the cost of preparing itemized price information—has been discussed above, in conjunction with the description of how Sections 453.2(b) (2) through (4) (price lists) operate.

[140] Theoretically, consumers also would be able to go to different funeral homes and obtain their price lists, then compare these. However, substantial time constraints and emotional barriers to in-person shopping make it unlikely that consumers will avail themselves of this opportunity. While this provision makes it easier for consumers to obtain price information before choosing a funeral home, many consumers may still continue to choose a funeral home without first searching for price information. *See* discussion of the funeral consumer in Part I(E), *supra.*

[141] *See, e.g.*, Dr. V. Pine, NFDA, statistical consultant, Tx 10,827; W. Chasen, Illinois funeral director, II–A–705, at 3.

does cover funeral providers, their employees and agents, the Commission does not construe the rule as reaching entities as far removed as a telephone answering service. Second, to the extent that the concern is that not all employees would possess the substantive knowledge to respond to phone inquiries, the uninformed employees could simply refer calls to someone who was familiar with prices. Moreover, the vast majority of information would be available on the price lists themselves, and thus likely could be given out even by part-time or unknowledgeable employees.

Another concern raised was the possibility that the availability of telephone price information could lead to bait-and-switch practices by funeral providers.[143] Such practices are always a potential problem. However, any funeral providers who gave out false or misleading information over the telephone or engaged in bait-and-switch tactics would be engaged in practices which violate Section 5 of the FTC Act and the laws of virtually every state. Nothing in the rule encourages such deception, nor does the rulemaking record suggest that the practice would be engaged in by the majority of ethical funeral directors.[143]

Third, some funeral providers suggested that the funeral transaction is too complex to explain over the telephone and that telephone price information would tend to confuse consumers.[144] In the Commission's judgment, the informational disclosures which the rule requires can be readily understood and used by the majority of consumers. To the extent that individual consumers find this information too complex, they would always be free, as they now are, to visit the funeral home either to obtain it or any other information which was available. Even if all of the details are not provided over the telephone, general comparisons can be useful.

Fourth and finally, funeral providers suggested that the provision might lead to price fixing because funeral providers would be forced to disclose their prices to competitors. Carried to its logical conclusion, this argument would suggest that price conspiracies are likely in any industry where firms have ready access to competitors' prices. However, access to price information tends to be easiest in precisely those markets where price competition is most intense. Obvious examples are food retailing and new and used car sales. Thus, the ready availability of price information is by no means a cause or a symptom of cartel behavior.

In the funeral market, moreover, where services currently tend to be sold as a fixed package and where little entry by new providers has occurred, funeral homes may already have acquired a fairly accurate knowledge of their competitors' prices. The problem is that *buyers* are currently unable to gather comparative price information efficiently and exert the kind of competitive pressure that would discipline the market. Thus, the Commission has concluded that the rule's price disclosure provisions are much more likely to stimulate competition than to serve as an instrument for policing pricing agreements.

B. *Section 453.3—Misrepresentations.*—1. *Introduction.* Section 453.3 addresses six types of misrepresentations which have occurred in funeral transactions.[146] These misrepresentations concern: (1) Embalming; (2) caskets for cremation; (3) outer burial containers; (4) other legal and cemetery requirements; (5) preservative and protective value claims; and (6) cash advances. To remedy certain of these misrepresentations the rule requires funeral providers to disclose several items of information on the price list which consumers receive at the beginning of the funeral transaction.

The Commission's authority to prevent consumer deception in the marketplace has been well-established through an extensive body of Commission and court cases. Section 5 is violated whenever a seller misrepresents or fails to disclose to a purchaser facts that are material to the consumer's purchasing decision.[146]

A statement is deceptive under Section 5 of the FTC Act if it actually misleads consumers, or has the tendency or capacity to deceive a substantial segment of the purchasing public in some material respect.[147] Thus, Section 5 prohibits not only outright falsities, but also statements which, while literally true, are deceptive in their overall impression.[148] Because deceptive information distorts the marketplace, false or misleading statements are unlawful regardless of whether the seller intends to deceive.[149] In determining whether a claim is deceptive, the seller's claim must be considered in its entirety and evaluated in light of the reasonable expectation or understanding of the expected consumer audience.[150] The deceptive quality of a statement may be shown by evidence of actual deception, or the likelihood of deception can be inferred by the Commission by an examination of the claim itself and on the basis of its accumulated expertise.[151]

Section 5 prohibits not only affirmative misstatements of facts but also the failure to disclose material facts even where the seller has made no representations. In the cases where a failure to disclose material information was found to be deceptive, the Commission has looked to the reasonable assumption which consumers make concerning a product or service based on the product's nature, appearance or intended use.[152] Where

[143] *See, e.g.*, R. Goodwin, Texas funeral director, Atl. Stmt. at 7; A. Rayner, Illinois funeral director, Tx 4276.

[143] *See* Report of the Presiding Officer, *supra* note 8, at 95.

[144] *See, e.g.*, R. Grayson, Minnesota FDA, Tx 3378; C. Swartz, Pennsylvania funeral director, Tx 13,948; Oklahoma FDA, Tx 8895.

[146] As originally proposed, the rule addressed these misrepresentations through a general provision prohibiting misrepresentations of legal, public health, religious and cemetery requirements. *See* 40 FR 39901, at 39902 (August 29, 1975). The final rule addresses specific misrepresentations (*i.e.*, misrepresentations regarding the legal necessity for embalming, caskets, and outer burial containers) in order to achieve greater specificity in defining the prohibited conduct. This was necessitated by the *Katharine Gibbe* decision. (*See* Part I (B), *supra*). In addition, the Commission has retained a general prohibition against misrepresentations of legal, cemetery, or crematory requirements to prevent misstatements aside from those specifically defined.

The disclosure requirements associated with the misrepresentation provisions also have been modified in the final rule so as to minimize the paperwork burden on funeral providers. The rule proposed in 1975 mandated more detailed information on the legal requirements concerning disposition of dead bodies and provided that separate documents containing disclosures on legal requirements be given in addition to written price lists.

[147] Firestone Tire and Rubber Co., 81 F.T.C. 398 (1972) *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973), *remanded in part*, 492 F.2d 1333 (2d Cir. 1975); Cigarette Rule SBP, *supra* note 66, at 8350; FTC v. Raladam, 316 U.S. 149 (1942); FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934); FTC v. Royal Milling Co., 288 U.S. 212, 216–217 (1933).

[147] FTC v. Colgate Palmolive Co., 380 U.S. 374 (1965); FTC v. Standard Education Society, 302 U.S. 113 (1937); J.B. Williams v. FTC, 381 F.2d 884, 889 (6th Cir. 1967); Montgomery Ward v. FTC, 379 F.2d 666, 669 (7th Cir. 1967); Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960); Materiality is defined as the capacity to affect purchasing decisions. FTC v. Colgate Palmolive, *supra*.

[148] J.B. Williams v. FTC, 381 F.2d 884, 889 (6th Cir. 1967); Carter Products Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963).

[149] *See* FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934).

[150] J. B. Williams v. FTC., 381 F.2d 884, 889 (6th Cir. (1967); Carter Products Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963); Peacock Buick, Inc., 86 FTC 1532, 1555 (1975). A claim is not deceptive if it is likely to mislead only an insignificant and unrepresentative segment of the class of persons to whom the claim is made. Universe Co., 63 FTC 1282, 1290 (1963).

[151] FTC v. Colgate Palmolive Co., *supra* note 147, at 391–92.

[152] Past Commission cases have held that it is a deceptive act or practice to fail to disclose such

the effect of nondisclosure is to deceive a substantial segment of the buying public with respect to a material fact by exploiting the reasonable expectations of consumers, the failure to disclose constitutes a violation of Section 5.[153]

Where proof can be shown that a claim is deceptive, no evidence need be shown as a matter of law that consumers were in fact misled by the claim. Rather, the Commission can make a determination based on its experience, as to what the reasonable expectations of consumers were under the circumstances and hold that the failure to disclose the information in question resulted in harm.[154]

The impact of specific failures to disclose are described below. However, it is the Commission's general finding that, in all these specific cases, many consumers have reasonably believed there were legal or cemetery requirements relating to the disposition of remains. Because the consumers were unfamiliar with the precise nature of the requirements, a significant number of consumers made incorrect assumptions about them. Thus, as we discuss below, many consumers reasonably believe that certain procedures (such as embalming) or particular goods (such as caskets or outer burial containers) are required and, therefore, not subject to individual discretion. Resulting purchase decisions are due, at least in part, to incorrect assumptions by consumers about material facts. Funeral providers have failed to disclose correct information about such facts and have, in some cases, made false claims about them.

2. *Section 453.3(a)(1)—Embalming.*—(a) *Evidence.* Only in exceptional circumstances does state law absolutely require embalming. The two most common occasions are those situations where the body must be transported interstate (where embalming prevents decomposition during transport) and where death has occurred from one of several communicable diseases.[156] Since embalming is not generally required by law, consumers usually have the right to decline to have a body embalmed if they wish. Consumers may wish to decline embalming services because of personal or religious beliefs or in order to avoid the expense of embalming. The record shows, however, that most funeral directors do not disclose that embalming is optional. It is common practice in the industry to embalm without specifically requesting permission.[158] Indeed, industry members stated in comments filed in this proceeding that embalming should be performed unless specificallly rejected by the consumer.[157] The Presiding Officer found that prior express permission for embalming is rarely obtained.[158]

In addition to the widespread failure to disclose that embalming is not required by law, a significant number of funeral providers have affirmatively misrepresented state laws regarding embalming. While such affirmative representations do not appear to be the norm, the record documents numerous instances in which consumers were told that the law required embalming when in fact it did not.[159] In other cases consumers were led to believe that embalming was a legal requirement by statements that embalming is "required" or "necessary."[160] While embalming is a practical necessity where there is viewing for several days before disposition,[161] references to the "necessity" of embalming may mean that the funeral provider requires embalming in all cases. In any event, such representations have generated substantial confusion among consumers as to what the law requires.

The Commission finds that the failure to disclose to consumers that embalming is usually not required as a matter of law is a deceptive act or practice within

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material facts as: 1) the rayon content in rayon clothing, which is indistinguishable from silk or wool: Mary Muffet, Inc. v. FTC, 194 F.2d 504, 505 (2d Cir. 1952); Seymour Dress & Blouse Co., 49 F.T.C. 1278, 1282 (1953); Academy Knitted Fabrics Corp., 49 F.T.C. 697, 700–01 (1952); 2) the true composition of base metal watchcases where the watchcases look like precious metal: Theodore Kagen Corp. v. FTC, 283 F.2d 371 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 843; 3) whether a book being sold is an abridged or condensed version: Bantam Books, Inc. v. FTC, 275 F.2d 680, 682 (2d Cir 1960); 4) a policy of assigning consumers' notes of indebtedness to third parties against whom the consumer may not be able to raise claims or defenses based on the sales contract: All-State Industries, Inc. v. FTC, 75 F.T.C. 465 (1960), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S 828 (1970); 5) that a prescription drug used by a weight loss clinic was not approved by the Food and Drug Administration; and Simeon Management Corp. v. FTC, 579 F.2d 1137 (9th Cir. 1978).

[153] Cigarette Rule SBP, *supra* note 66; Statement of Basis and Purpose, Trade Regulation Rule, Labeling and Advertising of Home Insulation, 44 FR 50217, 50223 (1979); Statement of Basis and Purpose, Trade Regulation Rule: Care Labeling of Textile Wearing Apparel, 36 FR 119 (1971), 16 CFR Part 423.

[154] *See e.g.*, All-State Industries, Inc. v. FTC, *supra* note 152; Simeon Management Corp. v. FTC, *supra* note 152.

[155] Although there is considerable dispute over the necessity and effectiveness of embalming to prevent the spread of disease, many states require embalming under these circumstances. *See, e.g.*, Rules and Regulations of the State Board of Embalming of the State of Kansas Relative to Embalming, Art. III, §§ 63–3–10 to 63–3–16 (1976); N. H. Rev. Stat. Ann. § 325:40–a (Supp. 1975); Colo. Rev. Stat. § 12–54–112(4) (1973). *See also* CFA, Analysis of State Statutes, Rules, and Regulations Affecting the Funeral Practices Industry, Atl. Stmt. at 18–22 (June 22, 1976).

[156] A number of funeral directors testified during the proceedings that they engage in this practice. Several further felt qualified to describe it as a common practice in their community. *See, e.g.*, W. Rill, Pres., Washington FDA, Tx 5583; F. Noland, Pres., Idaho FDA, Tx 5836; J. Page, California mortician, Tx 7373; L. Ruffner, past Pres., Arizona FDA, Tx 7851; N. Heard, Pennsylvania funeral director, Tx 13,150; V. Polli, Sec.-Treas., Vermont FDA., Tx 2198; R. Murphy, Pres., NSM, Tx 12,596; R. Johnson, Indiana funeral director, Tx 12,595; J. Kaster, Texas State Representative, Tx 6119; S. Waring, Treas., NFDA, Tx 665; R. Thompson, member, Conn. State Board of Examiners of Embalmers and Funeral Directors, Tx 2034. The results of informal surveys of funeral directors also found that a high percentage routinely embalm without seeking permission. *See, e.g.*, CFDA FTC and You, Questionnaire Results, L.A. Ex. 23 (CFDA survey revealed that half of the funeral directors responding do not obtain permission for embalming); S. Chenoweth, Director, Minnesota Office of Consumer Services, II–C–61, at 5–6; H. Sandhu, President, The Memorial Association of Central New Mexico, Inc., II–C–1280. Similarly, a survey of consumers found that embalming took place in 98% of the cases where the respondents had not requested it. P. Sperlich, Ph.D., CalCAG, Tx 7410.

[157] Funeral providers take the position that most consumers expect that funeral directors will immediately embalm the body, and consequently give implied permission to embalm when they authorize the funeral director to pick up the body. They also assert that placing the burden on the consumer to tell the funeral director not to embalm best serves most consumers, because most consumers choose a funeral with viewing, and embalming must be done quickly after a death to ensure the best cosmetic results. *See, e.g.*, B. Hotchkiss, California funeral director, Tx 8520–21; J. Altmeyer, West Virginia funeral director, Tx 11,735–36; G. Brown, Vermont funeral director, Tx 12,058; C. Lightner, past Pres., NFDMA, Tx 10,417; J. Wright, Mississippi funeral director, Tx 9466–67; H. Ruidl, counsel and Exec. Sec., Wisconsin FDA, Chi. Stmt. at 1–2; T. J. Proko, past Pres., Wisconsin FDA, Tx 4186–87; J. Curran, Pres. New York FDA, Tx 90. *See also* L. Frederick and C. Strub, The Principles and Practice of Embalming 191 (1967) (the act of handing over a dead body carries with it an implied permission to embalm).

[158] Report of the Presiding Officer, *supra* note 8, at 54.

[159] Statement, New York Public Interest Research Group, (NYPIRG), Ex. J at 3 (18% of respondents told that embalming was specifically required by law); Survey, Funerals in Minnesota: Customer Experiences conducted by Minnesota Office of Consumer Services, XI–592, at 27 (hereinafter cited as "Minnesota Survey") (22% of respondents told that embalming is always required by law); Survey, Continental Association of Funeral and Memorial Societies, Inc., D.C., August 5, 1976; (28% of respondents who used embalming told it was required by law). *See* also the following consumer complaints in Category II–B (4, 379, 417, 893, 1080, 1114, 1256, 1534, 1801, 3495, 3621).

[160] Consumer complaints in Category II–B (432, 453, 375, 740, 1863) and Category X (1–77).

[161] Embalming is the only means by which decomposition can be halted temporarily for viewing for more than a day or so. Refrigeration retards decomposition, but does not provide the cosmetic effects of embalming and is not practical when the body is on view for more than several hours. L. Frederick & C. Stub, The Principles and Practices of Embalming (1967). However, where disposition does not involve viewing (e.g., closed casket, direct dispostion), the temporary preservation of the body and the cosmetic effects of embalming are not necessary, although some consumers may still desire them.

the meaning of Section 5 of the FTC Act. The evidence discussed above demonstrates that this practice is widespread in the industry, causing many consumers who in fact believe that embalming is required by law, *i.e.*, that it is not an option, to be misled.[162] In addition, the Commission finds the making of affirmative mistatements about legal requirements for embalming to be a deceptive act or practice in violation of Section 5 of the FTC Act. The evidence further indicates that such misinformation causes some consumers to purchase embalming services in situations where the services might otherwise not be purchased.[163] Since embalming generally costs $50 to $150,[164] consumer injury resulting from the misrepresentation is clear.

(b) *Rule Provisions.* Therefore, in § 453.3(a)(1) of the rule, the Commission defines as deceptive: (1) False or misleading statements that state or local law requires that a deceased person be embalmed; and (2) the failure to disclose that embalming is not usually required by law. section 453.3(a)(2) imposes two remedial requirements on funeral providers. First, it prohibits representations that a body must be embalmed in certain specified situations in which embalming is unnecessary, such as direct cremation or immediate burial. Second, it requires that the general price list mandated by § 453.2(b)(4) contain a disclosure concerning embalming requirements. The disclosure informs consumers that embalming is generally not required by law, but that it is usually necessary for certain funeral arrangements, for example, a funeral with viewing. It also states that consumers can usually select an arrangement which does not require embalming.

These requirements are designed to prevent not only the misrepresentations defined in § 453.3(a)(1), but also the acts defined in § 453.4(b)(1). Under that provision, funeral providers may not require consumers to purchase certain goods or services as a condition to obtaining others. Thus, funeral providers may not condition the availability of their services or offerings on agreement by the consumer to purchase embalming. The general rule, accordingly, is that a funeral provider may not require that consumers purchase embalming services as a matter of funeral home policy. There are two exceptions to this. First, in some cases embalming may be required as a matter of law. Second, for certain types of funeral arrangements embalming is a practical necessity because of the natural decomposition of the body. Funeral director are not prohibited from requiring embalming in these instances. Accordingly, § 453.3(a)(2)(i) prohibits statements that a body must be embalmed for specified arrangements for which embalming is not a practical necessity, for example, direct cremations. A funeral director may require embalming for arrangements not listed in § 453.3(a)(2)(i), such as a funeral with a viewing.

2. *Section 453.3(b)(1)—Casket for Cremation.*—(a) *Evidence.* A second misrepresentation identified in the rulemaking record concerns representations by funeral providers that state law requires consumers to purchase caskets to have the deceased cremated. Currently, no state has such a requirement.[165] In the absense of any disclosure to the contrary, many consumers believe that there are no alternatives to caskets or that state and local laws require the use of a casket.[166] Yet few funeral directors provide such a disclosure.[167] Moreover, some funeral providers affirmatively misrepresent the legal requirements for cremation through claims to consumers that state or local law mandates the purchase of a casket. While the evidence suggests that such affirmative misrepresentations are not typical, the record contains consumer testimony and letters which reveal that a number of funeral providers have falsely informed consumers that state law required a casket for direct cremation services,[168] and consumer group representatives have attested that misrepresentations about a casket for cremation requirements are a significant problem.[169] In addition, some funeral directors misrepresent that crematories require the purchase of a casket when such is not the case.[170] Funeral directors also inform consumers who desire direct cremation that a casket is "required" or "necessary" or what they "have to" purchase a casket.[171] There is some evidence to suggest that consumers often interpret these statements to mean that the law requires purchase of a casket [172] and in any event, it is clear that these consumers were not told that the caskets were not legally required.

The misrepresentations by funeral providers regarding legal requirements for cremations result in consumers purchasing caskets when they do not need to and otherwise might not. There are many different types of alternative containers suitable for holding and transporting remains, and for use in

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[162] One study showed that where consumers arranging funerals were unaware that embalming was not legally required, embalming took place in 68.1% of the cases. On the other hand, where consumers were aware that embalming was not legally required, embalming took place in only 58.5% of the cases. Sperlich, L.A. Ex. 17. *See also* Minnesota Survey, *supra* note 159, at 27; CAFMS Survey, D.C. Ex. 39; CAMP Survey, *supra* note 92; *see also* statements of individual consumers, *supra* note 160.

[163] *See, e.g.*, Blackwell Survey, *supra* note 59 (NFDA-sponsored survey of 400 consumers found that only 60% of respondents would definitely choose embalming, 9.5% would not, and 25% were undecided); D. Daley, Seattle funeral director, Tx 5933 (funeral home which presents embalming as true option reports 30% declination rate); CAMP Survey, *supra* note 92 (less than half of those who had purchased embalming expressed a preference for it).

[164] 1978 Staff Report, *supra* note 9, at 196, n. 94.

[165] *See* "Funeral Practices, Survey of State Laws and Regulations," CAFMS, XVI–118, Appendix III–C (hereinafter cited as "CAFMS Survey of State Laws and Regulations").

[166] Surveys show consumer misunderstanding of state laws. *See, e.g.*, M. Stillwell, CAMP, Tx 6032 (49% of respondents thought a casket was required or didn't know); Blum Study, *supra* note 57, at Short Form (42% of respondents did not know if casket required for cremation or thought one is); CAFMS Survey, D.C. Ex. 39, at Ex. 2 (40% of respondents believed caskets required by state law). Other evidence indicates that consumers are unaware of alternatives to traditional caskets. *See, e.g.*, M. Fought, Ohio consumer, II–C–58; E. Klein, Vice President, CAFMS, Klein Ex. 1 (NY) at 2–3; K. Marsh, California mortician, Tx 6801; C. Moles, Iowa consumer, II–B–318; N. Kobernuss, Arkansas consumer, II–B–657.

[167] Surveys offer proof that consumers are often unaware that state laws do not require caskets even after they have been involved in a funeral transaction. *See, e.g.*, Blum Study, *supra* note 57. This evidence suggests that funeral providers are not disclosing to consumers that caskets are not necessary. Moreover, a number of consumers complained about having to buy caskets for cremation. *See, e.g.*, consumer complaints in category II–B (16, 18, 24, 439, 1087, 1152, 1464, 2174). These complaints indicate that the funeral directors probably did not disclose that state law did not require a casket.

[168] *See, e.g.*, Consumer complaints in Category II–B (271, 346, 417, 458, 602, 719, 1165, 1379, 1444, 1474, 1561, 5753, 6749), Category X–1 (66, 99, 24), written comments and testimony; Comments of NRTA/AARP, II–C–1516, at App. 2 (sample letter 6, #5); J. Berk, Cal. NRTA/AARP, L.A. Ex. 2, at 6–8; W. Bowles, Ark. consumer, Tx 9257–58; K. Marsh, Cal. funeral director, Tx. 6749; C. Crawford, Tex. consumer, Tx. 6634; Judy, Chicago Statement #51; D. Nugent, Ill. consumer, Chicago Statement #12.

[169] *See* G. Richardson, Tx 1387 and Richardson, N.Y. Ex. 1 (NY) at 3; S. Cook, Pres., Council Memorial Society, Coinnecticut, Tx 1459; R. Haynes, Pres. Memorial Society of Eastern Oklahoma, II–C–1230; E. Knapp, Federation of Funerals and Memorial Societies of Greater Washington, D.C., D.C. Ex. 14, at 2.

[170] *See* F. Sweeton, East Tennessee Memorial Society, Tx 9576–77. *See also* A. Vickery, Conn. consumer, II–C–45.

[171] *See, e.g.*, D. Pritt, Pa. consumer, II–B–4; Oklahoma consumer, VII–8; A. Garries, Wash. consumer, II–B–1030; L. McCoach, Fla. consumer, II–B–982; M. Carpenter, N.Y. consumer, II–B–1863; B. Larratt, Maine consumer, X–1–64; W. Coleman, Ark. consumer, II–B–740; R. McGuire, Tex. consumer, X–1–55; M. Heptonstall, Tex. consumer, II–B–34; W. Pirnack, Tex. consumer, II–B–136; Comments of NRTA/AARP, II–C–1516, at App. 2 (sample letter 1 and 2); F. Fought, Ohio consumer, II–C–58; M. Kent, Michigan consumer, X–1–77.

[172] *See* L. MacDonald, Illinois, NRTA/AARP, Tx 2840; H. Wienerman, NY NRTA/AARP, Tx 233–34.

cremation. Examples of these containers include unfinished wood boxes and a variety of non-metal receptacles designed for the encasement of human remains, such as containers made of cardboard, pressed-wood or composition materials. In addition, pouches of canvas or other materials (such as polyethylene) can be used for direct cremation. Record evidence suggests that substantial numbers of consumers, possibly as many as 25%, would decline to purchase a casket when presented with an option to do so.[173]

(b) *Rule Provisions.* In response to these problems, § 453.3(b)(1) of the rule defines it as a deceptive act or practice for funeral providers either to represent the law as requiring a casket for cremation or otherwise to represent that a casket (other than an unfinished wood box) is required for cremation. These claims clearly cause harm to the extent that they induce consumers to purchase caskets, where they otherwise would not. Accordingly, in § 453.3(b), the Commission prohibits funeral providers from telling consumers that, by law, a casket must be purchased when the remains are going to be cremated. To prevent this deceptive practice, § 453.3(b)(2) requires that funeral providers who arrange direct cremations place on the general price list an affirmative disclosure concerning casket-for-cremation requirements. This disclosure would inform consumers that they can purchase an unfinished wood box or alternative container for direct cremation. It also describes the construction of various types of alternative containers.

The disclosure requirement is intended to prevent the misrepresentations defined in § 453.3(b)(1) and also the unfair or deceptive acts defined in § 453.4(a)(1). Section 453.4(a)(1) prohibits funeral providers from requiring consumers to purchase a casket, other than an unfinished wood box, for direct cremation. The disclosure required by § 453.3(b)(2) prevents funeral providers from requiring caskets for direct cremation by insuring that consumers are aware of their right to select an alternative.

3. *Section 453.3(c)—Outer Burial Containers.*—(a) *Evidence.* Outer burial containers, used to prevent collapse of grave space, are not required by state law.[174] Many cemeteries, however, do require some form of outer burial container, but generally this requirement may be satisfied by a simple grave liner rather than a more expensive burial vault.[175] Some funeral directors, however, have told consumers that state law required the purchase of an outer burial container or have misrepresented cemetery requirements regarding burial vaults.[176]

Additionally, survey evidence shows that many consumers believe that a burial vault or some form of outer burial container is required by law.[177] The rulemaking record also reveals that consumers are generally unaware of the existence and availability of grave liners, and that funeral providers have failed to disclose this information. As a result, many consumers may purchase a burial vault in the erroneous belief that there are no alternatives.[178] Because the cost of burial vaults tends to be substantially higher than that of liners,[179] the monetary injury to consumers from unnecessary purchase of these items can be substantial.

(b) Rule Provisons. In § 453.3(c) of the rule, the Commission defines as deceptive (1) false or misleading representations that state law or individual cemeteries require the use of outer burial containers, and (2) the failure to disclose that state law does not require the purchase of an outer burial container. To prevent these practices, § 453.3(c)(2) requires that a written disclosure appear on the outer burial container price list. The disclosure explains that state law does not require the use of outer burial containers, that outer burial containers are sometimes required by cemeteries to prevent the grave from sinking in and that either a burial vault or grave liner will satisfy this purpose.

4. *Section 453.3(d)—Legal and Cemetery Requirements Generally.*—(a) *Evidence.* As discussed above in connection with § 453.3(a)–(c), the rulemaking record reveals that funeral directors have misrepresented legal, cemetery or crematory requirements regarding the need for embalming, caskets for cremation and outer burial containers. In addition, the record indicates that there are other misrepresentations which have been made to persons purchasing funerals. For example, some funeral providers have told consumers that cremated remains must be buried or that state law required the use of a sealed casket.[180] All of these representations can result in the purchase of unwanted and unnecessary items.

(b) *Rule Provisions.* In § 453.3(d)(1) of the rule, the Commission declares that it is deceptive to misrepresent that federal, state or local laws or particular cemeteries or crematories require the purchase of funeral goods or services. As a remedy, § 453.3(d)(2) provides that a funeral provider who tells a consumer that a legal, cemetery, or crematory requirement mandates the purchase of funeral goods or services must describe that requirement on the statement of funeral goods and services selected, required by § 453.2(b)(5).

The remedial requirement in § 453.3(d)(2) is intended not only to provide consumers with information, but also to aid enforcement of the prohibitions on affirmative misrepresentations. Prohibitions on oral misrepresentations are extremely difficult to police. The requirement of § 453.3(d)(2) serves to document the representation that has been made to the consumer. Since § 453.6 of the rule provides that a copy of the statement of services must be retained for one year, evidence of violations will be preserved.[181] The requirement will

[173] A funeral home chain which operates 27 funeral homes in Oregon, Washington and Arizona advises its customers that a casket purchase is an option. The chain offers its customers minimal body containers in lieu of a casket, or permits them to select no container whatsoever. The president of the chain testified, in analyzing 1,142 cases, that 73.5% of his clients chose some type of casket, 14.9% chose the body container, and 9.1% rejected any container. *See* E. Purdy, Sea. Ex. 3, at 20.

[174] The Commission is aware of only one local jurisdiction in the country which requires use of an outer burial container, and it permits either a grave liner or a burial vault to be used. *See* 1979 Oral Presentations, XV–1, at 151–52 (Statement of Thomas Clark).

[175] *See* Memorandum from N. Norvold, Legislative Research Analyst, to B. Morrision, Arizona State Senator, re: Cemeteries that require vaults, L.A. Ex. 16; Wycoff, President, George Washington Memorial Park, Tx 940.

[176] *See, e.g.*, F. Sweeton, President, East Tennessee Memorial Society, Tx 9577; M. Siegel, Illinois consumer, Tx 2957; E. Sheehan, Washington, D.C. consumer, Tx 14,668; E. Sloan, Director, D.C. Office of Consumer Protection, Tx. 13,874; R. Mee, casket manufacturer, III–F–16; W. Heller, Alabama consumer, X–1–74; B. Reeves, past president of Georgia Cemetery Association, Tx 10,209.

[177] *See* CAMP Survey, *supra* note 92; CAFMS Survey, D.C. Ex. 39, at Ex. 2.

[178] *See, e.g.*, W. Cushman, Maine consumer, Tx 1360–61. B. Reeves, President, Southeastern Advertising and Sales System, Tx 10,209; W. Heller, Alabama consumer, X–1–74–, at 3,6. The National Concrete Burial Vault Association opposed this provision in part because of the fear that consumers would purchase fewer vaults if they were given the proposed disclosures. Arnold Vice-President, National Concrete Burial Vault Association, Tx 11,538–40.

[179] Testimony show that liners range in price from approximately $55, (T. Sampson, Tx 970), to $180, (M. Arnold, Vice-President, National Concrete Burial Vault Ass'n, Tx 11,524), and that vaults range from $190, (T. Sampson, Tx 970) to $1500, (Comments of CFA, II–B–1518, at 40).

[180] *See, e.g.*, J. Fanagan, CAFMS, Atl. Ex. 9, at 3; M. Kent, Michigan consumer, X–1–77, D. Davis, Mississippi consumer, II–B–417.

[181] A funeral provider intending to make a misrepresentation might well choose not to write it

significantly aid the Commission in detecting and proving violations and creates an additional incentive to comply with the rule. This is particularly important in view of the large number of funeral providers throughout the country.

The Commission has included § 453.3(d) in the final rule to deter future misrepresentations not otherwise specifically proscribed by the rule. The Commission's authority to impose fencing-in requirements in adjudicatory proceedings has been confirmed by the Supreme Court.[183] The rationale for fencing-in is equally applicable to rulemaking proceedings, especially, as here, where the provision imposes a minimal cost burden. The reasonableness of a fencing-in provision is to be judged, therefore, in light of the evidence regarding the similar illegal conduct which forms the basis for the fencing-in provision.

5. *Section 453.3(e)—Preservative and Protective Value Claims.*—(a) *Evidence.* While it is possible briefly to delay decomposition of a deceased body, funeral goods and services such as embalming or sealed caskets do not preserve human remains for long periods of time.[184] However, the record indicates that some funeral providers affirmatively misrepresent the preservative value of embalming[184] and burial vaults.[185] Moreover, both funeral providers and manufacturers often make protective value claims with regard to certain funeral goods, such as caskets and burial vaults,[186] stressing that certain products are airtight, watertight, or offer special protection against the elements. It is impossible to estimate how often such claims are false, because consumers are unable to discover whether protective claims are inflated without exhuming the body. There are, however, reports of instances in which exhumation revealed that the casket had failed to protect the remains, despite claims made by manufacturers.[187]

(b) *Rule Provisions.* While the evidence clearly establishes that false claims of this nature have been made, it does not indicate that these claims are widespread. The Commission has, nonetheless, concluded that a prohibition on such false claims is warranted. Claims concerning the ability of a product to protect the body of a close friend or relative can have a significant capacity to induce the purchase of items which otherwise would not be purchased. Indeed, claims that a product or service will protect the integrity of the body of a deceased person are among the most pernicious made for they directly appeal to the vulnerable emotional state of the consumer. Accordingly, the Commission has chosen to include a provision addressing this practice. Section 453.3(e) prohibits representations that funeral goods or services will delay natural decomposition of the body for an extended period of time. It also prohibits false or misleading claims that caskets, burial vaults or other funeral goods will protect the body from gravesite substances.

6. *Section 453.3(f)—Cash Advances.*—(a) *Evidence.* In a typical funeral transaction, the consumer often pays the funeral provider for so-called "cash advance" items. These items are goods and services which the funeral provider arranges to purchase but which are actually provided by a third party, *e.g.*, flowers, obituary notices, limousine rentals. Many funeral providers charge a markup on these items, or they may simply charge consumers the full price for the cash advance item and receive a rebate or volume discount from the supplier for the cash advance item.[188]

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. Moreover, it is clear that the services or goods being received by consumers, (*e.g.*, flowers, obituary notices etc.) are goods which they do wish to purchase. If, with knowledge that the funeral provider will profit from ordering flowers or arranging obituary notices, a consumer chooses to use the services of a funeral provider, a charge for that service should be anticipated. However, the undisclosed charging of a markup for cash advance items is deceptive because consumers believe that items labeled "cash advances," "accommodation" or "cash disbursement" 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.[189]

In spite of this, the evidence demonstrates that many individual funeral providers do charge markups 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.'"[190] NFDA's annual survey of funeral

down. However, the disclosure form which is given to consumers informs them that if state law requires the purchase of goods or services, a written explanation will be provided. Thus, if an oral representation is made, and no disclosure is made of the requirement, the consumer is at least on notice that something may be wrong.

[183] The Court noted in *FTC* v. *Ruberoid*, 343 U.S. 470, 473 (1951): Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.

[184] *See* L. Frederick and C. Strub, The Principles and Practice of Embalming 131–32, 238–41 (1967).

[184] Several funeral directors commented that embalming does preserve the body, or that they were taught to say it does. *See, e.g.*, J. Todd, co-owner and manager of an Arkansas funeral home, Tx 8752; Ill. F.D.A. XVI–12, at 2; C. Ronald Savage, Oklahoma funeral director, XVI–162, at 2.

[185] *See, e.g.*, O. Matthews, Maryland Citizens Consumer Council, Tx 14,054 (in surveys of Maryland funeral homes, two funeral directors stated that vaults preserved the body); Rev. D. Haun, Oklahoma clergy, Tx 9935.

[186] *See*, J. Harris, Utah consumer, Tx 8092; G. Derrick, Illinois consumer, Chi. Stmt. at 2; C. Gladys, Michigan consumer, Tx 3857–58; B. Hughey, District of Columbia consumer, Tx 10,368–69; M. Blackburn, Florida consumer, VII–176; R. Nesoff, former Director of Investigation, New York State Temporary Commission on Living Costs and the Economy, Tx 345; T. Kuhn, *Undertakers Press Customers to Hike Bills, Reporter Finds*, Arizona Republic September 14, 1975, and articles that follow, VI–D–49, at A–20. (Caskets are often represented as airtight and waterproof). Companies refer to their caskets and vaults with names which imply long-term protections or preservatives, *e.g.*, "Invincible" (Boyertown), X–1–93. *See also* M. Siegel, Illinois consumer, Tx 2957; O. Adams, Michigan consumer, II–B–2119.

[187] New York State Temporary Commission on Living Costs and the Economy, Investigation into the Practices of the Funeral Industry, VI–D–16.

[188] *See, e.g.*, G. Marshall, Massachusetts, clergy, Tx 1194 (clergy honoraria); S. Fritchman, California clergy, Tx 6515 (clergy honoraria); Dr. J. Marcelli, member, New York Funeral Directing Advisory Board, Tx 579–80 (florist fees and obituary notices). *See also* J. Todd, Arkansas funeral director, Tx 8754; N. Gregory, former California funeral director, Tx 8645; G. Brown, Vermont funeral director, Tx 12,067; R. Mee, owner of Wisconsin Casket Co., III–F–16; B. Bennett, Florida funeral director, II–A–518; H. Senison, New York funeral director, I–A–145.

[189] Consumer testimony and letters support this conclusion, since a number of consumers complained about having to pay an additional fee for cash advances. *See, e.g.*, L. Shirk, Tex. Consumer, II–B–1210; D. Bailey, Maryland consumer, II–B–353; Maryland consumer, VII–101. Moreover, testimony and statements by industry members support the conclusion that the practice of adding undisclosed markups to cash advance items is deceptive. Two of the major trade associations, NFDA and OGR, agreed that funeral directors should not profit on cash advances. *See* Comments of NFDA, II–A–659, at 52; Comments of OGR, II–A–666, at 16. Counsel for another trade association, NSM, testified that funeral providers should pass along any rebates they receive on items represented as cash advances. *See* Statement of D. Murchison, Tx 12,606.

[190] California Funeral Directors Ass'n Questionnaire, "The FTC and You," L.A. Ex. 23. Considering the fact that many leaders of the industry believe that any mark-up on cash advances is deceptive, see note 189, *supra*, the 12% response is probably understated since many respondents would not want to admit using a deceptive practice.

homes indicates that, on a national level, funeral homes are receiving a 5% mark-up on cash advance items, amounting to $18,000,000 annually.[191] In addition, there is evidence from industry members,[192] consumers,[193] and businesses which provide cash advance items [194] that funeral directors charge more than they pay for items generally considered to be cash advances.[195]

Similarly, the failure to disclose that a markup will be included on a cash advance item misleads consumers who rely on their reasonable expectations. In ordinary usage, terms such as "cash advance," "accommodation items" or "cash advanced for your convenience" imply that the consumer is being charged only for the actual cash outlay. The use of this term in connection with items such as flowers, obituary notices, etc., which the consumer 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.[196] Given this expectation, the failure to disclose the existence of a markup is a deceptive practice.

(b) *Provisions.* Section 453.3(f) defines as deceptive: (1) affirmative misrepresentations that the price charged for a cash advance item is the same as the funeral provider's cost; and (2) the failure to disclose to consumers that a markup is being charged on a cash advance item. In order to prevent these practices, § 453.3(f)(2) requires that funeral providers who charge a markup on cash advances disclose this fact on the general price list. It is important to note that this rule provision covers only those situations where the funeral provider makes an affirmative representation that an item is a cash advance, accommodation, cash disbursement item, or any term of similar import. While it may be true that some items are viewed by consumers as inherently "cash advances," the record in this proceeding does not warrant such a finding.

The Commission believes that requiring a disclosure that a markup is being used is a sufficient remedy in light of the evidence discussed below. Prior versions of the rule would have totally prohibited a profit on such items.[197] The Commission has rejected such a remedy because it views the remedy it has selected as being sufficient to correct the identified abuse, while constituting the minimum intrusion into the business practices of the providers.

C. *Section 453.4—Required Purchases of Goods and Services.*—1. *General Discussion.* When the death of a friend or relative occurs, the persons who will ultimately be charged with arranging the funeral will often not have determined what type of services they wish, nor may they be aware of the deceased's wishes concerning the form of disposition. In other instances death may be anticipated, as in the case of prolonged illness, and the preferred form of disposition selected.

When death is anticipated, market-oriented remedies, such as the provision of information through price lists, can serve to facilitate informed comparison shopping. For example, if consumers knew in advance that they would be called upon to arrange a direct cremation, they could select a provider who offered alternative containers for sale. In this manner, the expense of a casket could be avoided by the consumer, if he or she were so inclined. In many cases, however, the ultimate form of disposition simply has not been selected at the time death occurs. Thus, the person charged with contacting a funeral provider to pick up the body of the deceased may simply be unable to select a funeral provider on the basis of what goods or services they sell, or in what combinations those goods and services are offered for sale.

The fact that the funeral provider may, in many cases, receive the body before the form of final disposition has been selected by the consumer creates a situation with the inherent potential to diminish severely a consumer's ability to select only those goods and services desired. The evidence establishes that once a funeral home is in possession of a body, seldom is it removed to another funeral home.[198] As representatives of the funeral industry have acknowledged, competition in the sale of funeral goods and services does not exist at the point of sale.[199] If consumers are to have the ability to select the goods and services they want, and concomitantly to decline those they do not want, some intervention is necessary at the point of sale to eliminate prevailing industry practices which deny that choice.

Accordingly, in § 453.4 of the rule, the Commission prohibits funeral providers from requiring that consumers who are arranging funerals purchase goods or services which they do not want, as a condition of purchasing those which they do want. As discussed above,[200] many funeral industry members have offered their goods and services for sale only in predetermined packages, thereby denying consumers any ability to decline unwanted items. Section 453.4(a) of the rule prohibits funeral providers from requiring that consumers who wish to arrange direct cremations purchase a traditional casket, other than an unfinished wood box, for that cremation. Section 453.4(b) contains the general prohibition on funeral providers conditioning the sale of any goods or services on the required purchase of other goods or services.

2. *Section 453.4(a)—Casket for Cremation.*—(a) *Evidence.* A direct cremation is one which occurs without any intervening viewing, visitation, or ceremony with the body present.[201] Cremation, as an alternative to traditional burial, is increasing both in terms of the absolute numbers performed, as well as the percentage of all dispositions. Statistics indicate that approximately 3.9% of all dispositions in 1975 were direct dispositions, with the trend toward increasing numbers of such dispositions.[202] The evidence in the

[191] V. Pine, A Statistical Abstract of Funeral Service Facts and Figures 38 (1977) (hereinafter cited as "1977 Statistical Abstract"). The average cash advance charge is $185; average cost of cash advances is $175, representing about a 5% mark-up. If multiplied by two million deaths annually, a 5% overcharge would amount to $18,000,000.

[192] *See* note 188, *supra*. *See also* H. Gutterman, Funeral Director, Tx 1876; R. Thompson, Embalmer & Connecticut Funeral Director, Tx 2034; R. Ebeling, Former Managing Editor, Mortuary Management, Tx 6883–84; N. Gregory, former Calif. funeral director, Tx 8645; J. Page, Owner, Mortuary school, Tx 7386.

[193] *See, e.g.*, D. Bailey, Maryland consumer, II–B–358 (25% markup on obituary notice); M. Martin, California consumer, II–B–1695 (overbilled $62.75 on crematory charge); Cohen Statement, *supra* note 75, at 9 (crematory and newspaper overcharges); *Pittsburg Post-Gazette*, April 10, 1972, at 8, VI–D–38 (death notices); L. Shirk, Texas consumer, II–B–1210 (clergy honoraria).

[194] G. Marshall, Massachusetts clergy, Tx 1194; S. Fritchman, Calif. clergy, Tx 6515; T. Fulton, Wisconsin florist, II–B–234; L. Abbott, New York florist, II–C–82; C. Harness, Indiana hairdresser, X–1–16. *See also* H. Dailey, Missouri florist, II–B–297; D. Johnson, Oklahoma florist, II–C–15.

[195] In none of these instances is it clear whether the items were specifically labeled cash advances. However, they are of a type that are traditionally considered cash advance items.

[196] *See* evidence cited in note 189, *supra*.

[197] *See, e.g.*, 1978 Staff Report, *supra* note 9, at Appendix B, § 453.2(e).

[198] R. Harmer, Bd. member, CAFMS, Prof., California State Poly. U., D.C. Ex. 7, at 6; D. Cornett, California funeral industry sales representative, X–1–124; L. Bowman, The American Funeral 52 (paperback ed. 1964). *See* discussion in Section I(E), *supra*.

[199] D. Rollings, Executive Director, OGR, XIX, at 80 (1981 oral presentations).

[200] *See* Section II(A)(2)(c), *supra*.

[201] *See* discussion of the term "direct cremation" in Section II(E)(3), *infra*.

[202] Am. Funeral Director, June 1977, at 53. *See also* T. Sherrard, General Counsel, Telophase Society, Tx. 7966. Indicative of the increasing trend in direct dispositions is the increase in cremation rates. Cremation amounted to 9.7% of all dispositions in 1980, *see* Funeral Service Insider, Vol. 5, No. 49 (Sept. 14, 1981), up from 6.55% in 1975 (Cremation Association of North America, Post-Record Comment, XIV–247, at 6 and Exhibit 1). While not all cremations are direct cremations, a substantial percentage are.

record suggests that consumers seek direct cremations for diverse reasons, including simple personal preference and lower cost.[203]

Because cremation reduces a body to ashes, there is no need as there is in ground burial for a permanent container for the body. All that is needed is a container to transport the body to the crematory. If there is to be a viewing before the body is cremated, consumers may prefer to buy a casket to display the body.

The evidence suggests that a significant number of funeral directors require consumers to purchase caskets as a condition of supplying cremation services. Consumer complaints,[204] various surveys,[205] and testimony of funeral directors [206] all suggest that many funeral directors require caskets to be purchased when cremation is desired.

Requiring a consumer to purchase an expensive casket that is unnecessary and unwanted imposes significant consumer injury. While casket prices vary substantially, even the least expensive casket typically carried by a funeral home generally costs substantially more than a non-casket alternative. Although some industry representatives testified that caskets can be purchased by consumers for as low as $65,[207] the evidence indicates that the lowest priced caskets generally available to consumers arranging cremations generally fall in the range of $200 to $250.[208]

There are, however, containers which cost substantially less than even the least expensive casket. These containers, defined as "alternative containers" in the rule,[209] are generally constructed of cardboard, composition board, or are opaque pouches.[210] The record evidence shows that these products sell at retail for anywhere from $20 to $65.[211] Even taking the lowest end of the spectrum of casket prices, a funeral provider imposed requirement that consumers purchase a casket to obtain direct cremation services causes consumers to spend substantial additional money. The extent of this expenditure increases as the minimum price of the caskets offered for sale increases. Thus, a provider-imposed requirement that consumers purchase caskets for any form of disposition imposes a significant cost on those consumers which they might otherwise choose not to assume. As noted in the beginning of this section, this injury is not reasonably avoidable.

In weighing whether a practice is "unfair" under Section 5, the Commission must also consider any countervailing benefits to determine whether the practice imposed net injury. No testimony or comments provided any evidence of countervailing benefits. Indeed, funeral industry representatives agreed that there was "no justification" for requiring the purchase of a casket for direct cremation.[212]

Finally, in assessing a practice's unfairness, the Commission also looks to public policy as expressed in the decisions of other public bodies. No testimony or comments suggested that there was any public policy favoring the requirement of a casket for direct cremation, and at least nine states have actually prohibited such requirements.[213] Thus, to the extent that there is any public policy at all on this point, it clearly supports the Commission's position.

(b) *Rule Provisions.* Section 453.4(a)(1) defines it as unfair or deceptive for a funeral provider or a crematory to require that a casket other than an unfinished wood box be purchased for direct cremation.[214] The prohibition on requiring the purchase of a casket for a direct cremation extends to all funeral providers who arrange direct

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[203] Cremation Association of North America, Post-Record Comments, XIV–897, at 6 and Exhibits; 1978 Staff Report, *supra* note 9, at 216–18.

[204] *See e.g.*, over one hundred written consumer complaints in Category IIB (4, 16, 18, 24, 34, 136, 280) and X (34, 46, 55, 61, 64) and individual consumer testimony (C. Crawford, PhD, Tx 6634). In many of the written comments, it is not clear whether the complaints concern cremations other than direct cremations, in which caskets might be desirable for viewing purposes. In any event, it is clear that consumers resent being required to purchase caskets when they do not want to buy them.

[205] G. Richardson, Memorial Society of New England (43 out of 141 members returning replies reported encountering casket for cremation requirements); Rochester Memorial Society, Sampling of Funeral Directors on Use of Simpler Container for Cremation (1975), Klein, Ex. 2(3) (N.Y.) (eight out of fifteen local funeral directors required a casket for cremation); R. Fox, Ass't Attorney General, Vermont, Chi. Statement (survey by Vermont Attorney General's Office showed that over one-half of the state's funeral homes required a casket for cremation).

[206] While no funeral director testified that they personally required consumers to purchase expensive caskets if they wanted cremation, a number of funeral directors indicated that they required consumers to buy the least expensive casket they sold. *See, e.g.*, J. Curran, Pres., New York FDA, Tx 119; V. Polli, Secretary-Treasurer, Vermont FDA, Tx 2186; J. Wright, Mississippi funeral director, Tx 9450. This was confirmed by several other sources. Division of Consumer Affairs, Department of Community in Delaware 5 (1974), VI–D–9. However, in some instances the least expensive casket could be expensive. *See* notes 207–208, and accompanying test, *infra*.

[207] *See, e.g.*, A. Dunn, Secretary, Okla. FDA, Tx 8924.

[208] *See, e.g.*, D. Boyd, New Hampshire consumer, Tx 1690; R. Coates; Pres., Michigan FDA, Tx 3783; New York consumer complaint, VII–104; B. Kronman, A Death in the Family: A Guide to the Cost of Dying in New York City, Nassau and Suffolk (Sept. 1974). However, in some instances a wider range of prices was available . NYPIRG Ex. 6(C) (N.Y.), at 6 (cost survey reporting that least expensive caskets ranged from $70 to $385); Chenoweth, Minnesota Office of Consumer Services, 1972 Funeral Homes Study, Chi. Ex. 43, at 6–7 (Table I reporting that the cost of the least expensive caskets ranged from $67 to $220 at funeral homes surveyed).

[209] *See* discussion in Section II(E)(1), *infra*.

[210] S. Waring Treasurer, NFDA, Massachusetts funeral director, Tx 674 (containers available for $25–$35 wholesale charge); T. Sampson, Pres. Massachusetts FDA, Tx 966–67 (unfinished particle board casket offered for $50–$75, but most Massachusetts funeral directors don't stock alternative containers); M. Waterson, Minnesota funeral director, Tx 3716 (cremation containers wholesale for less than $10). *See also* A. Dunn, Secretary, Oklahoma FDA and past Pres., NFADA, Tx 8924 (pine boxes available for $65); E. Purdy, *There Must be a Better Way*, Mortuary Management, Oct. 1976, at 34; W. Kinder, President, Minnesota FDA, Tx 3303 ($50 cardboard box on display); N. Heard, NFDA, Tx 13,154 (cardboard container available for $50–$85); E. Wright Pres., South Dakota State Board of Funeral Service, Tx 4704; L. Ruffner, past Pres., Arizona FDA, Tx 7873; C. Denning, Ph.D., Neptune Society, Tx 7762–64; Humphrey Co. Advertisement, X–1–14; Cohen Statement, *supra* note 75, at 7; E. Newcomer, Progessive Mortuary Methods, March, 1976, II–A–860, at 7–8;

[211] *See* note 210, *id.*

[212] *See, e.g.*, Comments of National Selected Morticians, II–A–661, at 20.

[213] Prohibitions on requiring caskets for cremation are effective in Arizona, California, Colorado, Florida, Maryland, Minnesota, New Mexico, Wisconsin and Wyoming. CAFMS Survey of State Laws and Regulations, *supra* note 165, at Appendix III–C.

[214] The cost of a provider-imposed requirement that a casket be purchased, and the resulting consumer injury, is the same whether the form of disposition chosen is direct cremation, immediate burial, or cremation or burial after a service with the body present. At this time, however, the Commission has required that alternative containers be offered only for direct cremations. The evidence in the rulemaking record supports a finding that consumers have sought the option of employing alternative containers for use in direct cremations. *See, e.g.*, E. Purdy, Oregon funeral director, Sen. Ex. 3, at 20. There is little evidence, however, that consumers have sought out these alternatives for other forms of disposition. A distinction can be drawn between traditional burials and cremations on the one hand, and direct cremations on the other. In the former types of disposition, consumers may be able to secure alternative containers from other sources if the funeral provider they have selected does not offer them. Direct cremations, however, have much tighter time strictures, and minimize the ability to secure such a container from a third party. Immediate burials pose much the same, if not identical, problems which attend direct cremations. The record, however, is silent on whether consumers who employ this form of disposition would seek to use alternative containers. Thus, the Commission has declined at this time to extend the protections of this section to immediate burials. The Commission anticipates that where providers arrange direct cremations, and thus note the availability of alternative containers for use in direct cremations on their price lists, those containers will be offered for sale to all consumers, regardless of the type of disposition desired.

cremations, and to all crematories.[215] Some commentors in this proceeding argued that crematories should be permitted to require the use of caskets for safety-related reasons.[216] It was claimed that rigid containers facilitate the handling of the body. The rule accommodates this concern. Funeral providers and crematories are not prohibited from requiring that an unfinished wood box (which is defined as a "casket") or a rigid "alternative container" (*e.g.*, a heavy cardboard container) be purchased as a condition of arranging a direct cremation.

The requirements of this section work in tandem with the requirements of § 453.3(b) of the rule, which prohibits misrepresentations of legal or crematory requirements for purchasing a casket to obtain direct cremation services. In that section the Commission not only proscribes the making of such misrepresentations, but requires that a simple affirmative disclosure be placed on the price lists given to consumers informing them about the existence of alternatives to caskets for use in direct cremations.

The Commission has determined, however, that it is not sufficient simply to prohibit funeral directors from requiring a casket for cremation and to require a disclosure that alternatives for caskets are available. In addition, remedial steps also must be taken to ensure that, at point of sale, consumers retain the ability to decline the purchase of a casket. As we discussed above, in those situations where consumers have anticipated a death and have selected the form of disposition, pre-need comparison shopping can occur. In those instances, prohibiting funeral providers from requiring the purchase of caskets will enable consumers either to seek out a provider who makes alternative containers available, or to make the necessary arrangements to purchase such a container from a third party for use at a funeral home which does not offer them for sale.

As indicated previously, however, many consumers choose a funeral home without obtaining prior information about prices and offerings, some because they have a limited choice, and others for a variety of reasons previously noted. Given the tight time strictures surrounding a direct cremation and the fact that consumers will not remove the body of a deceased from the provider who first acquires possession, a simple prohibition on required purchases of caskets and a disclosure of the availability of alternatives may be insufficient to ensure that consumers do not have to, *de facto*, purchase a casket. For example, a funeral provider might not require the consumer to purchase a casket, but if the provider only sells caskets, consumers must either forgo their desire to employ a direct cremation without a casket, or purchase the only available container—a casket.

The Commission therefore finds it necessary to adopt the remedial requirement, found in § 453.4(a)(2), that funeral providers who arrange direct cremations make unfinished wood boxes or alternative containers available for such services. The rule provision adopted by the Commission does not require funeral providers to maintain an inventory of alternative containers. Rather, the rule requires that providers *make* available either a simple wood box, or some form of alternative container. This distinction is an important one, because it significantly reduces any burden which the provision might otherwise impose. Funeral providers need not maintain a current inventory of alternative containers. Rather, they need only be able to secure one such container, on request, and make it available for use in a direct cremation. Moreover, to the extent that some providers might, because of geographic location or other considerations, feel compelled actually to stock an alternative container, the evidence indicates that containers are available which, because of their construction or size, can be easily stored.[217]

It should be stressed that the rule does not require funeral providers to make a range of alternative containers available to consumers. The rule permits the funeral provider to offer any alternative container for sale—wholly within the discretion and business judgment of the provider. Indeed, in lieu of offering an alternative container, a provider can opt to offer only a plain wood box, which is a form of a casket.

3. *Section 453.4(b)—Other Required Purchases.*—(a) *Evidence.* The record reveals that most funeral providers, in excess of 65%, do not sell their goods and services on an itemized basis.[218] Rather, the industry norm is to offer complete "package funerals" for sale, with all of the items included in the packages having been preselected by the funeral provider.[219] While some industry members reduce the price if the buyer does not want a part of the package, if asked, many funeral providers do not reduce the price of a package funeral even where a consumer asks to have items dropped from the package.[220] By "bundling" all of the preselected goods and services together, the funeral provider is effectively forcing the consumer to buy items he or she doesn't want as a condition of providing a necessity that only he can provide: Disposition of the body. This injury cannot be reasonably avoided. As previously noted, even if the person arranging the funeral is dissatisfied with the terms of this offer, once the funeral home has taken possession of the body, for all practical purposes the consumer will not go somewhere else.[221] The evidence suggests that a significant number of consumers are required to pay the full package price, and that many are thereby required to pay for items they do not want or use.[222]

In weighing this injury to consumers, the Commission must also consider any countervailing benefits that such packaging might create. The only significant benefit advanced by funeral providers is that packaging permits the funeral director to offer lower prices to consumers. That arrangement is considered in detail in Section V(B)(4), *infra*. There, the Commission finds that, while itemization presents opportunities for funeral directors to raise prices, packaging does not inherently permit lower prices for consumers. Therefore, the Commission finds that the injury to consumers is not offset by any savings made possible by packaging.

The Commission also notes that the major trade associations recognize the basic unfairness in requiring buyers of

[215] *See* Section II(E)(3) and (4), *infra*.

[216] *See* B. Bruce, Past Pres., CANA, Tx 10.708–09. CANA crematories require a rigid, opaque, and safely combustible container. *Id.* at Tx 10.689–90.

[217] *See* 1978 Staff Report, *supra* note 9, at 245.

[218] *See* Section II(A)(2)(b) at note 75, *supra*.

[219] *Id.*

[220] *See* discussion in Section II(A)(2)(b), *supra*, and note 76.

[221] *See* discussion in Section I(E), *supra*. Further, for those consumers served by only one funeral director, which may be nearly one in four, there is no other place to go. And nearly 70% of all funeral homes have less than 4 competitors, suggesting that the choice may be limited in any event. *See* note 114, *supra*.

[222] Evidence of consumers being aware that they were required to pay for items they did not want comes from consumers complaints from across the country, (*see, e.g.*, the following complaints in category II–B: 54, 164, 366, 498, 528, 829, 1048, 1108, 1266, 1404, 1488, 1893, 1967, 1984, 2003, 2013, 2034, 2240, 5987), testimony (S. Ross, Tx. 5274–75; Msgr. R. O'Keefe, Arizona St. Bd. of Funeral Directors and Embalmers, Tx. 7064–7065); and surveys (Cohen, D.C. Ex. 39 (20 out of 101 respondents reported paying for services, merchandise, or facilities they didn't want); Blackwell Survey, *supra* note 59 (3.7% reported paying for services they did not want)). For a number of reasons discussed in the text, *infra*, these results probably underrepresent the number of consumers who bought items that they would not have bought had they been aware of their prices and the fact that they were optional.

funerals to purchase items that they do not want. Both associations take the position that consumers are entitled to a "reasonable adjustment" of the package price when the consumer asks if credits are available for unwanted items.[223] While the problems with that industry position have been discussed above,[224] the industries view seems to confirm that refusing to give any discount for unwanted items takes unfair advantage of funeral purchasers.

(b) *Rule Provisions.* Accordingly, in § 453.4(b) of the rule, the Commission finds that it is an unfair act or practice in violation of Section 5 for funeral providers to require that consumers purchase unwanted goods and services, as a condition of obtaining those which they do want. Section 453.4(b)(2), requires funeral providers to place a disclosure on the general price lists which they must deliver to consumers, informing them of their option to make an itemized selection of goods and services with certain exceptions discussed below. The disclosure imposes the legal requirement that selection be permitted on an itemized basis.

After the effective date of the rule, it will be an unfair act or practice for any funeral provider to require consumers to purchase goods or services which they do not wish to purchase. This does not mean, however, that funeral providers will not be prohibited from offering prearranged packages for sale. So long as they comply with the required form of itemized pricing, and permit consumers to select from those itemized lists, providers may, *in addition*, continue to offer packaged funerals for sale. Consumers may continue to select these packages if they desire to do so. The rule simply prohibits the imposition of packages by the provider.

There are several important exceptions to this general right to select requirement. First, consumers may not decline the basic services of the funeral provider.[225] Irrespective of the combination of goods and services which a consumer may choose to select, the very process of selection itself will involve use of the funeral provider's services. Accordingly, the Commission has made the services of the funeral provider non-declinable. This may be done in one of two ways. On the general price list, which informs consumers of their general right to select goods and services on an itemized basis, the funeral provider must disclose either that: (1) The service charge will be added to the cost of the goods and services;[226] or (2) the service fee has been added to the casket price.[227]

The second major exception to this provision concerns embalming. As we discuss in the next section, the selection of certain forms of disposition, primarily those with a viewing, makes embalming a practical necessity.[228] Thus, funeral providers are permitted to require that embalming be selected by a consumer for all dispositions other than direct cremation and immediate burial.

Third, the Commission also was concerned that § 453.4(b) might be viewed as preventing funeral providers from refusing to deal with consumers who make impractical or idiosyncratic purchase requests.[229] Consequently, the Commission has added a provision in § 453.4(b)(2)(ii) which indicates that the rule does not force funeral providers to comply with a request for a combination of goods which would be impossible, impractical, or excessively burdensome to provide.[230]

It is the Commission's judgment that the remedies it has selected in § 453.4(b) are the least intrusive remedies which will serve to correct the pervasive abuses documented in the record.[231] In the Commission's view, the remedies chosen bear a close relationship to those abuses. Thus, the Commission has not prohibited funeral providers from selling their goods and services in prearranged packages if those sellers view the alternative as desirable in their business judgment. Rather, the rule only prohibits them from imposing that determination on the consumer, in view of the unique characteristics of the funeral transaction.[232]

D. *Section 453.5—Services Provided Without Prior Approval.*—(1) *Description of the Evidence.* The record shows that funeral directors customarily embalm a body without obtaining express authorization from the family to do so. Support for this finding comes from testimony of individual funeral directors stating that they do not attempt to obtain authorization from the family prior to embalming,[233] testimony

[223] *See* note 78, *supra*.

[224] *See* Section II(A)(2)(b), *supra*.

[225] *See § 453.2(b)(4)(iii)(C)*.

[226] Section 453.2(b)(4)(iii)(C)(aa).

[227] Section 453.2(b)(4)(iii)(C)(bb).

[228] *See* Section II(D), *infra*.

[229] The Commission therefore specifically asked for comment from interested parties on the question of whether the rule provisions could be reworded to avoid creating technical rule violations in the case of aberrant selections, without vitiating the goals of the rule's itemized selection provisions. *See* 46 FR 6081 (Jan. 22, 1981) (Question 9). Few comments were received. Of those comments, none provided the Commission with any evidence that such idiosyncratic selection behavior either has occurred in states requiring itemization, or would be likely to occur.

[230] For example, the Commission would not consider it a violation of § 453.4(b) for a funeral provider to refuse doing business with a consumer who said "We have our own casket, transportation, flowers, etc., but wish to use your viewing facilities for two hours next Monday." The Commission wishes to stress, however, that this provision does not give funeral providers the option to reject arrangements which are practical to provide but which do not comport with the provider's judgment of what is appropriate under the circumstances.

[231] *See* Section II(A)(3)(g), *supra*, for a discussion of the legal standards applicable to remedial requirements in Commission rules.

[232] The rule does not affect, of course, other rights that the funeral director may have under law to refuse to deal with certain consumers or certain requests. Section 453.4(b)(2)(ii) is only intended to clarify the extent of obligation which may be created by the operation of § 453.4(b)(2).

[233] W. Rill, Pres., Washington FDA, Tx 5563; F. Noland, Pres., Idaho FDA, Tx 5836; J. Page, California mortician, Tx 7373; D. Deaton, Chairman, Alabama Funeral Service Board, Tx 9986; L. Ruffner, past Pres., Arizona FDA, Tx 7851; N. Heard, Pennsylvania funeral director, Tx 13,150; M. Chabot, Minnesota funeral director, II–C–66; R. Mee, former owner of Wisconsin Casket Co., III–F–16; T. Kimche, Oregon funeral director, Tx 5388; R. Myers, Chairman, Utah Funeral Directors and Examining Board, Tx 8284; A. Dunn, Oklahoma funeral director, past Pres. NFDA, Tx 8922–23; C. Austin, Kentucky funeral director, II–A–6; F. Galante, New Jersey funeral director and past Pres., NFDA, Tx 1741; V. Polli, Sec.-Treas., Vermont Funeral Directors and Embalmers Assoc., Tx 2197–98; B. Hirsch, Vice-Chairman, Pennsylvania State Board of Funeral Directors, Tx 12,533; A. Nix, Pennsylvania funeral director, Tx 12,926–27; N. Greene, member, Virginia Board of Funeral Directors and Embalmers, Tx 14,186.

[234] R. Johnson, Indiana funeral director, Tx 12,595; R. Shackelford, Tennessee funeral director, Tx 8987; J. Kaster, Texas State Representative, Tx 6119; N. Gregory, former California funeral director, Tx 8666; S. Waring, member, Massachusetts FDA, Treas., NFDA, TX 665; R. Thompson, member, Connecticut State Board of Examiners of Embalmers and Funeral Directors, Tx 2034; Dr. E. Jindrich, Coroner, San Rafael, Calif., L.A. Ex. 28.

[235] CFDA, FTC and You, Questionnaire Results, L.A. Ex. 23 California Funeral Directors Association survey revealed that half of the funeral directors responding do not obtain permission for embalming); S. Chenoweth, Director, Minnesota Office of Consumer Services, II–C–51, at 5–6; H. Sandhu, Pres., The Memorial Association of Central New Mexico, Inc., II–C–1280; F. Schneier, Yale student's survey, Schneier, Ex. 1 (N.Y.), at 3; 1972, Study on Funeral Homes by Minnesota Office of Consumer Affairs, Chi. Ex. 43, at 36 (14 of 33 funeral homes surveyed embalm automatically upon arrival of the body).

[236] *See, e.g.*, consumer complaints in category II–B (423, 536, 1107, 1156, 1206, 1302, 1862, 2038, 5055), in category X–1 (108) and testimony (Tx 1419, 9256).

[237] O. Matthews, Maryland Citizens Consumer Council, Tx 14,054; H. Drinkwater, Education Director, Hanover Consumer Cooperative Society, II–C–668; T. Pearson, Memorial Society of New Hampshire, N.Y. Stmt. at 6.

[238] Fuller, *State Study Assails Some Funeral Home Actions*, Minneapolis Tribune, Jan. 7, 1973, at 1A, attached to VI–D–14; S. Chenoweth, Director, Minnesota Office of Consumer Services, Tx 3121–22; New York Temporary State Commission on Living Costs and the Economy, Hearings, Practices of the Funeral Industry, Oct. 17, 1974, VI–D–1, at 15; Investigation by the New York State Temporary Commission on Living Costs and the Economy into the Practices of the Funeral Industry in the State of New York, VI–D–16, at 16.

[239] N. Dunlop, Memorial Society of Maine, II–B–11; E. Lohof, Memorial Society of Montana, II–C–63; R.

of funeral industry trade association representatives and state licensing board representatives,[234] informal surveys of morticians in various parts of the country,[235] individual consumers,[236] consumer group representatives,[237] state agencies,[238] memorial societies,[239] and consumer surveys.[240]

Indeed, while some funeral providers testified to the contrary,[241] the industry acknowledges that express prior permission is not usually sought. Instead, embalming is considered to be a negative option; the consumer must affirmatively state that embalming is not to be done or the process will be automatically performed.[242] The funeral industry contends that funeral directors receive implied permission to embalm from the authorization to pick up the body.[243] Authorization to embalm is also inferred from circumstances, such as from having handled the funeral of another member of the family in question in which embalming was requested[244] or from general authorization "to take care of the preparation" without any specific mention of the embalming process.[245]

The evidence reveals that, contrary to the funeral industry's assumption, a substantial portion of consumers do not in fact intend to authorize embalming by giving the funeral director limited authority to pick up the body.[246] While a precise estimate is not possible, surveys conducted by both industry and consumer groups suggest that a substantial number of funeral consumers would decline embalming if offered an informed choice.[247] This group would include those who object to embalming on a personal or religious basis, as well as many others who simply desire a less elaborate or less expensive funeral service.

Some caution is warranted in projecting what percentage of consumers would actually decline embalming when making an informed choice. It is possible that some consumers who indicate in the abstract that they would decline embalming might actually purchase such services in order to arrange a funeral with a viewing or visitation. Nonetheless, as the limited purchase data show, a substantial number of consumers do decline embalming when presented with the option in a real purchase situation.[248]

While some consumers may not be injured if a funeral director embalms without obtaining authorization,[249] many other consumers suffer substantial economic and emotional injury from unauthorized embalming. In terms of the economic injury, there is a charge for embalming, ranging from $50 to 150,[250] which a consumer interested in a simple, direct or less expensive disposition might not wish to spend. Beyond the actual charge for the service itself, embalming is a necessary predicate to selling techniques which encourage the purchase of higher priced goods and services. Embalming is a practical necessity if there is to be a viewing and an open casket funeral service which normally requires the purchase of a casket, burial clothes, and other servicesand facilities of the funeral home.[251]

Unauthorized embalming may result in substantial emotional injury to the family of the deceased, as well. For some funeral purchasers, personal convictions may dictate that embalming is not appropriate. For others, embalming may be incompatible with religious beliefs. Orthodox Judaism, for example, forbids embalming as a desecration of the body.[252] A funeral director who has performed embalming without prior approval has inflicted substantial, irremediable emotional injury upon the survivors of the deceased. That the funeral director may voluntarily forego his or her embalming

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Haynes, Memorial Society of Eastern Oklahoma, II-C-1230; A. Stensland, Board Member, Minnesota Memorial Society, Chi. Ex. 6, at 2.

[240] P. Sperlich, Ph.D., CalCAG, Tx 7410. The study indicated that "where respondents did not ask for embalming, embalming took place in 98% of the cases * * *". The study also found that 69.6% of 400 respondents said they received embalming but did not ask for it. In the midwest, an informal mail survey conducted by the *Louisville Times* found that the question of embalming was not even raised by funeral ddirectors in approximately two-thirds of the instances. *Cashing in on Grief? Study Reveals Little Exploitation*, The Louisville Times, July 19, 1978, at 6, col. 1, D.C. Ex. 34. *See also* Cohen Statement, *supra* note 75, at 4 (30% of those interviewed said embalming was performed before the funeral director spoke to them about embalming).

[241] Several providers indicated that they did not embalm without permission and expressed doubt about how widespread unauthorized embalming is. G. Primm, New York funeral director and Pres., Empire State FDA, Tx 271; L. Jones, Pres., NFDMA, Tx 9810; A. Juska, Vice-Pres., New Jersey FDA, Tx 2381; R. Miller, Exec. Sec., NFDMA, Tx 3612; M. Waterston, Minnesota funeral director, Tx 3736; H. Coates, member, Kentucky State Board of Embalmers and Funeral Directors, Tx 3985; M. Damiano, past Pres., New Jersey FDA, Tx 1309; P. Farmer, New Jersey funeral director, Tx 2315-18; C. Buell, Oregon funeral director, II-A-765, at 1; M. Russell, Oregon funeral director, II-A-782; G. Heller, Ohio funeral director, II-A-286; S. Fulford, Georgia funeral director, II-C-730. Others felt such a practice would be unfair and even "grossly unethical." J. Broussard, counsel and Pres., Texas FDA Tx 9351; R. Hodge, Sec., New Jersey State Board of Mortuary Science, Tx 2058; M. Damiano, past Pres., New Jersey FDA, Tx 1299; C. Hite, Dean, Simmons School of Mortuary Science, Tx 1523.

[242] According to National Selected Morticians, one of the two major trade associations: Preparation and preservation of a dead human body are standard procedures in funeral service unless there are instructions to the contrary during the initial death call because of religious beliefs or known requests for immediate disposal. Comments of NSM, II-A-661, at 21.

[243] For example, the President of the New York Funeral Directors Association testified that funeral directors often assume the authority to embalm simply because the services of that provider were retained: There has always been an inherent assumption when a funeral director was engaged by a family for one of its members that all necessary authority flows from that engagement. J. Curran, Pres., New York FDA, Tx 90.

Indeed, basic textbooks used in mortuary school instruct that turning a body over to a funeral home authorizes embalming. L. Frederick and C. Strub, The Principles and Practice of Embalming 191 (1967) states: the act of handing over a dead body * * * carries with it an implied permission to embalm that individual.

But see H. Raether and R. Slater, The Funeral Director and His Role as A Counselor (1975). In this book by Howard Raether, Executive Director of the National Funeral Directors Association, and Robert Slater, Director of the Department of Mortuary Science, University of Minnesota the authors advise funeral directors to seek explicit permission to embalm.

[244] J. Proko, past Pres., Wisconsin FDA, Tx 4148.

[245] R. Thompson, Sec., Connecticut State Board of Examiners of Embalmers and Funeral Directors, Tx 1982-83; Anderson, Pres., Utah FDA, Tx 6145; B. Hirsch, Vice-Chairman, Pennsylvania State Board of Funeral Directors, Tx 12,533.

[246] In the consumer complaints set out in note 236, *supra*, the consumer typically complained that by the time he or she reached the funeral home, often only shortly after the death, the embalming had already been performed.

[247] *See, e.g.*, Blackwell Survey, *supra* note 59. (NFDA-sponsored survey of 400 consumers found that only 9.5% of respondents would decline embalming in an "average" funeral home, 25% were undecided, and 60% would not decline embalming). In one study, 88.1% of respondents had embalming when they were unaware that embalming was not legally required while only 58.5% of respondents who knew embalming was optional had embalming done. Sperlich, CalCAG, L.A. Ex. 17.

[248] D. Daley, Seattle funeral director, Tx 5933 (funeral home which presents embalming as true option reports 30% declination rate); CAMP Survey, *supra* note 92 (less than half of those who had purchased embalming expressed a preference for it).

[249] *E.g.*, consumers who would have chosen a funeral in which embalming is required as a practical necessity or those who would have been required by law to embalm.

[250] J. Lyon, Washington consumer, II-B-1100; *House Small Business Subcomm.* (Part III), *supra* note 30, at 91, 329; Funeral Prices, Pricing Policies and Procedures in Florida, VI-D-6, at Question 13; Arkansas Attorney General Study, VI-D-12, at 5; Delaware Consumer Affairs Survey, VI-D-9, at 2; R. Mee, former Wisconsin funeral director, III-F-16.

[251] Recent editions of a basic textbook on the subject state that embalming is the "basis for the sale of profitable merchandise." L. Frederick & C. Strub, The Principles and Practice of Embalming 2 (1967). Another reference book puts it in the following way: "The foundation of the funeral service profession is embalming and the basis of financial profit is merchandising." E. Martin, The Psychology of Funeral Service viii (1970).

[252] *See* M. Tendler, New York, Rabbi, Tx 855; E. Grollman, Massachusetts Rabbi, Tx 830; A. Schneider, New York Rabbi, Tx 1009; S. Applebaum, New York Rabbi, Tx 1049; Comment of the Washington Board of Rabbis, D.C. Stmt. at 4-5.

fee is likely to be of little or no consolation to the family.

The Commission finds that unauthorized embalming results in substantial consumer injury, both in economic and non-economic terms. The test for unfairness, however, requires that the Commission balance against the harmful effects of conduct, the benefits which may flow from the practice in question. In essence, the unfairness of a practice must be measured by its net effects. Funeral providers have advanced two arguments to support "routine" embalming or embalming predicated on general expression of authority: First, embalming is virtually always desired by funeral consumers; and second, the subject of embalming is repulsive to people and therefore it would be offensive to ask a family about embalming. The record demonstrates, however, that many consumers do not in fact want embalming and would decline it given an option, and that many consumers do not give permission to embalm by authorizing the funeral director to pick up the body.[253] Given consumers' lack of prior experience and knowledge, it is unreasonable to expect that consumers will affirmatively decline embalming in the first telephone contact with the funeral home.

The response to the second argument is twofold. First, evidence suggests that many if not most consumers would not be uncomfortable in giving express permission to embalm. Two surveys of consumer attitudes found that four out of five consumers favor the idea of requiring funeral directors to obtain embalming permission.[254] In addition, the numerous consumer complaints received on the subject of embalming suggest that funeral purchasers are able and willing to address this subject. Furthermore, several funeral director witnesses testified that the subject of embalming did not offend their consumers.[255]

Second, and perhaps more fundamental, the speculative concern of funeral providers that some consumers will be offended by the simple question "May we embalm?," is simply not a justifiable basis for refusing to ask the question at all, thereby imposing the expense of embalming on that segment of the population that would decline if asked.

The Commission finds that consumers cannot readily avoid the harm caused by this practice, since it often occurs at the point of initial contact with the funeral home. To protect themselves from this harm, consumers would have to know that they must affirmatively instruct the funeral provider not to embalm at the moment the pick-up call is placed, or else embalming will be performed. Such knowledge is highly unlikely, given consumers' lack of prior experience with arranging funerals. Further, as discussed in Section II(B)(2)(a), *supra*, the evidence shows that many consumers believe that embalming is legally required and that they may have no choice.

Charging a buyer for goods or services which the buyer did not agree to buy plainly violates established principles of public policy found in fundamental levels of contract law. The common law insists on mutual consent for there to be a binding contract.[256] While consent may be reasonably implied in some circumstances, courts have also made it clear that acceptance cannot be implied where the offeror knows, or should have known, that the offeree does not understand the terms of the offer. In such cases, clear expressions of acceptance are required.[257] For that reason, the Commission and Congress have, in other contexts, reined in marketing schemes which relied upon unknowing or ambiguous consent on the part of consumers.[258] In addition, seven states have enacted provisions which specifically require funeral directors to receive express permission before embalming,[259] confirming the conclusion that such practices are unjustifiable and injurious.

(2) *Rule Provisions.* Accordingly, § 453.5(a) of the rule defines it as unfair for any funeral provider to embalm a deceased human body for a fee without prior approval from a family member or other authorized person, except in certain unusual circumstances.

In determining which practices to proscribe in the rule, however, the Commission is cognizant of the fact that in virtually all instances where disposition does not occur within a very short time span, (*e.g.*, 24 hours) either embalming must be performed or the body refrigerated to delay decomposition. Concerns were raised in the rulemaking proceeding that if prior approval for embalming were required, funeral providers would be unable to embalm in those situations where the family or legal representative of the deceased could not be immediately contacted. Unless embalming were performed, it was argued, decomposition would begin thereby precluding the possibility of a traditional funeral.[260]

The Commission recognizes that the majority of consumers arranging funerals, according to all survey evidence, do want embalming because of their intent to have a traditional funeral with viewing and visitation. Thus, the Commission has cast the unfair acts and practices proscribed by § 453.5(a) in the alternative. As noted above, the general rule adopted by the Commission prohibits funeral providers from embalming for a fee[261] without obtaining prior approval from the family or authorized representative of the deceased.[262] Excepted from this general rule are two situations. First, if state or local law require embalming in certain situations, such as where death has occurred from certain communicable diseases or where the body will be transported interstate,[263] the funeral provider must follow the applicable law.

Second, the provision allows for certain exigent circumstances by providing that if the funeral director is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe that the family does not want embalming performed, and obtains subsequent approval from the family, the funeral director may charge for embalming without violating the rule.[264] In seeking subsequent approval, the funeral director must first disclose that embalming has been performed, but that no fee will be charged if the family selects a funeral arrangement which would not require embalming, such as direct cremation or immediate burial. If the family then selects a funeral arrangement which would require embalming, such as a funeral with viewing, visitation, or the body present, subsequent approval may be inferred and a fee charged.

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[253] *See* discussion at note 246, *supra*.

[254] CalCAG Study, *supra* note 247, at 20; CAMP Survey, *supra* note 92, at 5.

[255] D. Deaton, Chairman, Alabama Funeral Service Board, Tx 9997; L. Jones, Pres., NFDMA Tx 9612; G. Brown, Chairman, Vermont Board of Funeral Service, Tx 12.059.

[256] *See, e.g.*, Corbin on Contracts § 55 (1963); Restatement (Second) of Contracts § 17 (1979).

[257] *See, e.g.*, Corbin on Contracts § 95, §107 (1963); Restatement (Second) of Contracts § 18 (1979).

[258] *See, e.g.*, Postal Reorganization Act, 39 U.S.C. 3009 (Prohibiting charging consumers for unordered mail merchandise); Trade Regulation Rule on the Use of Negative Option Plans by Sellers in Commerce; 16 CFR § 425 *et seq.* (1975).

[259] CAFMS Survey of State Laws and Regulations, *supra* note 165, at Appendix III–C.

[260] *See* NFDA Comments on Revised Rule, XVI–112, at 11.

[261] Section 453.5(a)(2).

[262] If the funeral director is unable to locate an appropriate family member, the rule permits the required authorization to come from a local official who has legal authority to make such a decision. This may be, depending on the circumstances and the state law, a coroner, sheriff, public health official, a judge, or one expressly authorized to direct disposition of the dead.

[263] Section 453.5(a)(1).

[264] Section 453.5(a)(3).

To help prevent a funeral director from charging for embalming in those situations where the rule does prohibit it, § 453.5(b) of the rule requires funeral directors to place a written disclosure on the final bill or agreement given to customers informing them of their right not to pay for embalming performed without prior approval unless they select a type of funeral which would require embalming. Moreover, the disclosure must state that if a fee is charged for embalming, a written explanation will appear on the final bill or agreement given to a customer.

E. *Section 453.1—Definitions.* In § 453.1, the Commission defines several terms of particular importance in the rule. Some of these terms such as "Commission," "cremation" and "person" require no elaboration. Others, which raise significant issues about the scope and coverage of the Commission's rule are discussed below. We have placed this discussion after the discussion of the substantive provisions of the rule to facilitate understanding of the issues they raise.

1. *Section 453.1(a), (c), and (o)—Definitions of "alternative container," "casket," and "unfinished wood box".* The rule defines three categories of receptacles for human remains: Caskets, alternative containers, and unfinished wood boxes. These terms are used in § 453.4(a) which ensures the consumer's right to use an alternative to a traditional casket when choosing a direct cremation. Caskets are defined generally as containers made of wood or metal, ornamented and lined with fabric. An alternative container, on the other hand, is non-metal, without ornamentation or fixed interior lining, and may be made of a variety of materials, such as cardboard, pressed wood or canvas.

The term "unfinished wood box," has been included in the rule because of a concern that what is perhaps the traditional low cost container, *i.e.*, the plain pine box, could fall within either the definition of casket or that of alternative container.[265] The Commission, therefore, has defined an unfinished wood box as a particular type of casket—one which is made of wood and without lining or ornamentation. Under the rule, an unfinished wood box is treated like an alternative container; that is, a funeral provider may satisfy the requirement in § 453.4(a) to offer an alternative to a casket for use in direct cremations by offering an unfinished wood box.

2. *Sections 453.1 (i), (j), and (k)—Definitions of "funeral goods," "funeral provider," and "funeral services".* The definitions of "funeral goods," "funeral provider" and "funeral services" in § 453.1 (i), (j) and (k) are critical because they define the scope of the rule's coverage. Only those persons who fall into the class of "funeral provider" are subject to the rule, and in order to do so a person must sell both "funeral goods" and funeral "services." "Funeral goods," under § 453.1(i), consist of all products sold to the public for use in connection with funeral services. Thus, the definition of "funeral services" is the core on which the definitions of both "funeral provider" and "funeral goods" are based.

Two types of functions come under the definition of "funeral services" in § 453.1(k): (1) Those services used to care and prepare human bodies for burial or other disposition and (2) those services used to arrange, supervise or conduct the funeral or disposition. Both the preparatory and the supervisory types of functions must be performed in order to come within the definition of "funeral services."

A "funeral provider" under § 453.1(j) must sell both "funeral goods" and "funeral services." In order to be classified as a "funeral provider", a person must perform both types of functions listed in § 453.1(k). A cemetery, therefore, would generally not be considered a "funeral provider" under the rule because it only arranges or conducts final dispositions. It does not prepare human remains for burial or other dispositions.[266]

3. *Sections 453.1(g) and (l)—Definitions of "direct cremation" and "immediate burial".* The rule prohibits funeral providers from requiring that consumers choosing direct cremation purchase a casket.[267] In addition, consumers choosing immediate burial or direct cremation may not be required by funeral providers to purchase embalming services.[268] The terms "direct cremation" and "immediate burial" refer to forms of direct disposition of human remains which take place without formal viewing, visitation, or ceremony with the body present.[269] The definitions of these terms do not prescribe a precise time period between death and disposition of the body, but rather refer to the lack of ceremony surrounding the cremation or burial.

4. *Section 453.1(g)—Definition of "crematory".* The definition of "crematory" in Section 453.1(g) includes only those persons, partnerships and corporations that both perform cremations and sell funeral goods. The Commission is aware that some crematories do not sell funeral goods and therefore would not fall within this definition. However, the Commission believes that § 453.1(g) is consistent with Section 19 of the 1980 Improvements Act which limits the rule's coverage to persons who sell both funeral goods and funeral services.[270]

5. *Section 453.1(m)—Definition of "outer burial container".* Burial vaults, grave boxes and grave liners are terms commonly used by funeral providers and refer to containers designed for placement in the grave around the casket. The Commission has used the single term "outer burial container" to include the various types of containers which may be used.

6. *Section 453.1(o)—Definition of "services of funeral director and staff".* This term refers to the services which may be furnished by a funeral provider in connection with the arranging of a funeral, including such services as conducting the arrangements conference or planning the funeral services. It does not include services otherwise listed in § 453.2(b)(4), such as embalming, transferring remains to the funeral home, etc.

F. *Section 453.6—Retention of Documents.* Section 453.6 of the rule requires funeral providers to retain a copy of certain documents which must be provided to consumers under the substantive provisions of the rule. Specifically, the retention of documents provision requires funeral directors to retain copies of the price lists required by the rule, and copies of each individual statement of services selected by the consumer for each funeral for a period of one year. Funeral directors would also be required to make these records available to FTC officials upon request for inspection.

The Commission's goal in adopting a recordkeeping requirement is to help ensure compliance with the substantive provisions in the rule. As part of its enforcement program, the Commission will check the records of individual funeral homes to ensure that the price lists and statements required by the rule are complete. Since most of the

[265] *See, e.g.*, Rebuttal Comments of NCSC/ADA/CAFMS, XVII-16, at 64-68.

[266] Of course, those cemeteries which do prepare human remains for burial would be considered "funeral providers" and therefore covered under the rule.

[267] *See* Section 453.4(a).

[268] *See* Sections 453.4(b) and 453.3(a)(2).

[269] Except perhaps for a brief graveside service in the case of immediate burial.

[270] *See* Section 19(c)(1)(A) (the Commission has authority over persons "* * * furnishing goods and services relating to funeral"), 15 U.S.C. 57a note.

formation which the rule requires be ven to consumers will be contained on e price lists and statement of services elected, availability of those documents r inspection will make it feasible to etect rule violations efficiently and ius to enforce the rule effectively. The ecordkeeping provision will thereby eter potential violators and help revent the unfair and deceptive ractices defined by the rule.

During the rulemaking proceeding everal concerns were expressed about e operation of this provision. Some of e most frequent were: (1) That the equirement was burdensome because uneral providers would be required to tore large numbers of documents in rder to comply with the rule;[271] (2) that he time period for retention of records vas unreasonably long and should be ubstantially reduced;[272] and (3) that the equirement would unreasonably invade he privacy of persons arranging unerals.[273] The Commission has considered each of these criticisms and ias been as responsive as possible, consistent with the goal of efficient enforcement of the rule.

When compared with the version of he rule first published for public comment in 1975,[274] the version which he Commission has now approved has a recordkeeping requirement which substantially reduces the paperwork storage burden on funeral providers.[275]

In response to concerns that the period for record retention was too long, the Commission reduced the period from three years to one year. A one-year record retention period will be less useful than a three-year period in helping identify funeral providers who are engaging in a pattern of rule violations or in identifying all consumers who would be entitled to redress under Section 19 of the FTC Act.[276] The Commission has nonetheless concluded that a one-year record retention period will provide an adequate incentive for funeral providers to comply with the rule's substantive provisions and has, accordingly, revised the rule to reduce the burden on funeral providers.

The recordkeeping requirement has not been revised, however, in response to the concern that it would constitute an unwarranted invasion of the privacy of the persons arranging funerals. The Commission views this concern as unfounded. The rule does not require funeral providers routinely to submit records for examination by Commission officials. To the extent that Commission officials obtain any information from the records of funeral providers as part of an investigation, such information would be subject to the provisions of the Privacy Act [277] and Section 21 of the FTC Act,[278] which provide guarantees against unwarranted disclosure of personal information.

G. *Section 453.7—Comprehension of Disclosures.* The Commission has included a requirement in the rule that the disclosures which funeral providers must provide to consumers must be made in a manner which is clear and conspicuous. The Commission's goal is to ensure that the information provided under the rule will be presented in a manner readily discernible by consumers.

H. *Section 453.8—Declaration of Commission Intent.* In § 453.8 of the rule the Commission clarifies three issues with respect to how it interprets its rule on funeral practices. The Commission has included these statements within the rule itself rather than only in the Statement of Basis and Purpose to assist those persons who are covered by the rule in understanding the scope of the rule and the obligations it imposes.

First, the Commission declares its intent that a violation of either the definitional provisions or the remedial provisions of the rule constitutes a violation of the rule, unless otherwise stated. In each provision of the rule, the Commission first describes with particularity the acts or practices which have occurred in the past which the Commission finds to be unfair or deceptive acts or practices. Thereafter, the rule describes what remedial provisions, if any, must be complied with. This format is necessitated by the decision of the Second Circuit in *Katharine Gibbs.*[279]

An example of where a violation of either the definitional or remedial sections would be a violation of the rule is found in § 453.3 concerning misrepresentations. If a funeral provider makes the disclosure required by the rule concerning caskets for cremation (*i.e.*, the remedial provision, § 453.3(b)(2)), but continues to make false claims that the law requires a casket for direct cremation (*i.e.*, the definitional provisions, § 453.3(b)(1)), the funeral provider would be in violation of the definitional section and this would constitute a violation of the rule.

Section 453.2(a) dealing with price disclosure is the one exception to the general standard that a violation of either the definitional or remedial sections constitutes a violation of the rule. In § 453.2(a) the Commission explicity states that a funeral provider who complies with the remedial requirements concerning price disclosure in § 453.2(b) is not engaged in the unfair or deceptive acts or practices as defined in § 453.2(a).

Second, the Commission states its intent that each of the provisions of the rule are separate and severable from one another. If one or more parts of the rule are found to be invalid by a reviewing court, the Commission intends that the other portions of the rule will continue in effect.

The third issue addressed by this section concerns the effect of the rule on burial insurance and the rule's consistency with the exemptions for the business of insurance embodied in the McCarran-Ferguson Act [280] as restated in Section 5 of the FTC Improvements Act of 1980.[281] This section declares the Commission's intent that the rule be inapplicable to the business of insurance or to acts in the conduct thereof. This explicit declaration was included in the rule in response to several comments questioning the effect of the proposed rule on prearranged funerals governed

[271] *See* Comments, Other Groups, XIV-867; ndividual Funeral Industry Member, XIV-739; State or Local Agency or Official, XIV-678; U.S. Small Business Administration, XIV-819; Individual Funeral Industry Member, XIV-20.

[272] *See* Post-Record Comments, Other Groups, XIV-867.

[273] *See id.*

[274] *See* 40 FR 33901 (1975).

[275] The most significant change in this connection is the elimination of the requirement that funeral providers give to each customer (and, therefore, retain a copy) a separate "Statement of Funeral Goods and Services Selected" required by § 453.2(b)(5). The information which formerly would have appeared on the Statement may be incorporated onto the final contract, bill, or other document which the funeral provider already uses to memorialize sales agreements with customers. Since such documents would ordinarily be retained as business records or for tax purposes, the additional burden imposed by the Commission is minimal.

Two other changes in the final rule have significantly reduced the burden imposed by the recordkeeping requirement. First, as published in 1975, the rule required that funeral providers give out a separate sheet describing the legal requirements which a funeral provider claimed required consumers to purchase goods or services. Those disclosures have now been incorporated onto the price lists and statement of services selected, eliminating the need to keep separate records showing compliance with the provision. Second, the rule now permits funeral providers to consolidate certain price information onto one document, *i.e.*, the general price list. Thus, funeral providers may choose to list prices for caskets and outer burial containers on one list, rather than to prepare three separate documents.

[276] 15 U.S.C. 57b.

[277] 5 U.S.C. 552a, *et seq.*

[278] 15 U.S.C. 57b-2.

[279] *See* Section I(B), *supra*, at note 18.

[280] 15 U.S.C. 1011, *et seq.* (1976).

[281] Public Law 96-252, 94 Stat. 391.

by burial insurance.[282] The Commission's declaration of intent is included to address these concerns and clarify that the rule does not apply to such arrangements and other areas involving the business of insurance.

I. *Effect of the Rule on State Law—Section* § 453.9. In § 453.9 of the rule, the Commission has specified a process by which the states may obtain exemptions from part of all of the rule's requirements. The purpose of this section is to encourage federal-state cooperation by permitting appropriate state agencies to enforce their own state laws that are equal to or more stringent than the trade regulation rule.[283] To the extent specified by the Commission, the rule will not be in effect in a state obtaining an exemption. Otherwise, any state laws which conflict with this rule after its effective date are preempted to the minimum extent necessary to resolve that conflict.[284] The following discussion first sets out the basis for the Commission's preemptive authority and then describes how that authority affects existing state laws.

1. *Preemptive Authority.* In general, federal authority to preempt or override state law stems from the Supremacy Clause of the United States Constitution.[285] The Supreme Court of the United States has clearly established the principle that "state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."[286] The Court has also made clear that this principle applies to federal agency regulations which have the force and effect of law as well as to acts of Congress.[287]

More specifically, the courts have recognized that federal law may preempt state laws or regulations to the extent that the federal provision requires or authorizes conduct which is inconsistent with state law.[288] This form of preemption is referred to as "conflict" or "inconsistency" preemption.[289] In *Katharine Gibbs*, the United States Court of Appeals held that Magnuson-Moss trade regulation rules promulgated by the Commission preempt inconsistent state law under traditional notions of "conflict" preemption.[290]

2. *Effect of Rule on State Law.* Every state regulates the licensing of funeral directors and funeral establishments, including such subjects as the educational, apprenticeship and examination requirements for licensees and public health standards for handling human remains. This entire area of state regulation remains intact because it does not conflict with or frustrate the purposes of the rule. The rule also specifically recognizes state regulatory limitations imposed on licensees for public health reasons with respect to embalming.[291]

Some states also have enacted certain protections for funeral consumers which appear similar to those in the rule.[292] State laws exist for example, which prohibit funeral directors from embalming remains without permission (Section 453.5(a)(2))[293] or requiring a casket for cremation (Section 453.4(a)).[294] At least one other state has enacted into law a provision which appears similar to an earlier proposed version of the rule's requirements concerning pre-selection disclosure of itemized prices.[295] Since such provisions do not conflict with the rule, they are not preempted or affected in any way. A violation of such provisions would simply be a violation of both the rule and state law.

Other states have enacted provisions which are directed at the same practices as the rule but appear not to address these problems in a manner similar to the rule. For example, several states require that funeral providers disclose their prices, but require less disclosure than would occur under the rule's itemization requirement.[296] The rule would not conflict with and preempt such regulations either, because a funeral provider complying with the rule also could comply with the more permissive state law provisions. However, in such cases, funeral directors must also comply with the additional requirements of the rule.

While the Commission is aware of no state laws which are in conflict with the rule, individual states may wish to exercise their right, under § 453.9, to exempt their laws entirely from the rule. Under § 453.9, the rule will not be in effect in a state to the extent specified by the Commission where: (1) Application for an exemption is made by a state; (2) there is a state requirement in effect which applies to any transaction to which the rule applies; and (3) the state requirement provides an overall level of protection which is as great as, or greater than, the protection afforded by the rule. If an exemption is granted, it shall be in effect only for as long as the state administers and enforces effectively the state requirement.

The Commission here offers no opinion as to whether existing state laws or regulations provide a level of protection as great as or greater than that provided by the analogous rule provisions. As set forth in § 453.9, the Commission will instead determine the appropriate relationship between the rule and state law on a case-by-case basis in the context of an exemption proceeding conducted pursuant to § 1.16 of the Commission's Rules of Practice. The Commission will evaluate appropriate petitions for exemption made by state governmental agencies to determine the overall level of protection to consumers and whether the state regulation is administered and enforced effectively. Factors which will be considered by the Commission in determining whether an exemption is warranted include such things as the means available to the state to enforce its provisions, the existence of any private rights of action by an aggrieved consumer, and the scope and format of

[282] Comments on Revised Rule, Academic Group, XVI-171, at 1; Other Groups, XVI-60, at 1.

[283] This provision is in accord with a parallel provision in Section 19(d) of the FTC Improvements Act of 1980. *See* 15 U.S.C. 57a note.

[284] The Commission is unaware of any state laws which would be preempted by the rule. *See* discussion in Section II(I)(2), *infra*.

[285] U.S. Constitution, Art. VI, cl. 2 states that: This Constitution and the laws of the United States which shall be made in pursuance thereof, * * *, shall be the supreme law of the land * * *, anything in the Constitution or laws of any state to the contrary notwithstanding."

[286] Perez v. Campbell, 402 U.S. 637, 652 (1971).

[287] *See, e.g.*, Nash v. Florida Industrial Commission, 389 U.S. 235, 240 (1967); Public Utilities Commission v. United States, 355 U.S. 534, 540–546 (1957). *See also* Jones v. Rath Packing Co., 430 U.S. 519, 526–533 (1977).

[288] *See, e.g.*, Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954).

[289] A federal law may also explicitly preempt an entire area covered by state law, in which case the federal statute is viewed as having "occupied the field." *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). The funeral rule does not contemplate this type of preemption.

[290] 612 F.2d at 667. At issue in that appeal were provisions of the Commission's Vocational School Trade Regulation Rule (16 C.F.R. Part 438) which imposed obligations on private parties that conflicted with the requirements imposed by the states.

[291] *See* Sections 453.3(a)(2)(i) and 433.5(a)(1).

[292] *See* 1978 Staff Report, *supra* note 9, at 123, n. 85 and accompanying text.

[293] *See, e.g.*, Wash. Rev. Code Ann. § 19.39.215 (1982 Supp.); Ind. Code Ann. (Burns 1982) § 25–15–1–11.1(b)(14); and W. Va. Board of Embalmers and Funeral Directors, Rules 10 (A) and (C).

[294] *See, e.g.*, Md. Ann. Code art. 43, § 367A (Supp. 1981); Minn. Stat. Ann. § 149.09(3) (West Supp. 1978).

[295] Fla. Stat. Ann. § 470.035 (West 1979).

[296] For example, most states only require a written agreement; they do not require price lists. The written agreements usually may be in the form of a single (package) price for all of the funeral homes customary charges, with separate prices only for cash advance items and supplemental items. *See* "CAFMS Survey of State Laws and Regulations," *supra* note 165, at Appendix III–C. Any funeral provider itemizing to comply with the rule also would provide the disclosure required by these states.

required price disclosures to funeral consumers.

Only state governmental entities may request exemptions from the Commission's rule under § 453.9. Funeral providers may not use this process. The determination to grant an exemption to state law will necessarily place the primary enforcement burden back onto the state to enforce its provision. Such a decision should be made solely by the state entity involved.

III. Alternatives Considered

During the course of this proceeding the Commission carefully considered several alternatives to the final rule ultimately adopted by the Commission. These options fall into three general categories: (1) Alternatives to the adoption of any rule; (2) specific rule provisions which were ultimately rejected by the Commission in any form; and (3) variations of rule provisions which were included in the final rule. The most significant of those alternatives considered which fall into the third category have been discussed in Part II of this Statement.[297]

The alternatives to the adoption of any final rule which were considered by the Commission include: (1) Taking no action; (2) issuing a nonbinding industry guide; and (3) issuing a model state law for consideration by the states. The alternative requirements which the Commission considered but did not include in the final rule were: (1) Prohibiting funeral providers from removing the remains of a deceased without authorization, or refusing to release the remains of the deceased; (2) prohibiting funeral providers from employing certain techniques and sales practices to steer consumers away from inexpensive funeral merchandise; (3) prohibiting funeral providers from engaging in concerted activity through threats or boycotts aimed at other funeral providers; and (4) permitting funeral providers to use a form of package pricing with declination credits in lieu of itemized pricing. Each of these alternatives will be discussed below.

A. *Alternatives to Any Commission Rule.*—1. *Take No Action.* Throughout the course of the funeral rule proceeding, one option considered by the Commission was that of taking no action, *i.e.*, terminating the proceeding without issuing a rule or other guidelines. This approach would essentially have maintained the status quo. Thus, the principal benefit of adopting this option is that it would impose no compliance costs on funeral providers, since they could continue their existing practices without change. In addition, this course would not have required the expenditure of any funds to enforce a rule.

The Commission has concluded, however, that these benefits are substantially outweighed by the costs to consumers arising from the unfair and deceptive practices currently engaged in by funeral industry members, costs which would continue unabated if the status quo were maintained in this market. The practices described in detail in Section II of this Statement cause consumers to pay higher prices for funeral goods and services because funeral providers are insulated from the need to set prices competitively, and cause consumers to purchase and pay for items which funeral providers misrepresent as being required by law or cemetery regulations. These and other practices prohibited by the rule result in substantial injury to consumers, injury which can be eliminated at minimal compliance costs under the provisions of the rule.[298] The Commission has concluded, therefore, that there will be a significantly greater net benefit to society if it issues the rule than if it takes no action.

2. *Rely on Industry Guides.* Under this option, the Commission would issue voluntary trade practice guides instead of a binding rule. This option was first considered by the Commission in 1976, when two industry trade associations petitioned the Commission to convert the rulemaking proceeding into one for the consideration of guides.[299] The Commission rejected this petition, declining to decide what type of action, if any, was warranted until it had an opportunity to review the evidence in the rulemaking proceeding and make findings based on that evidence.[300]

In passing the FTC Improvements Act of 1980, Congress permitted the Commission to issue a funeral rule but specifically encouraged the Commission to consider whether the goals of the rule could be achieved through voluntary guidelines.[301]

After reviewing the rulemaking record, the Commission has concluded that voluntary industry guides are not an appropriate solution to existing problems. If guides containing the rule's substantive provisions were adopted and complied with by the industry, essentially the same compliance costs would be imposed on the industry as would be imposed by the promulgation of a rule. The major "benefit" in such an instance would be the public savings which would accrue from not having to expend resources to enforce a rule.[302] Adoption of this approach, however, would not ensure that funeral providers would comply with the guides, and the benefits to consumers would be reduced by non-compliance. Clearly, if all providers complied with guidelines, consumers would receive the same benefits that the rule will provide. There is no assurance, though that voluntary guides would substantially alter the business practices of this market, since comments by industry members on the rulemaking record clearly show that there is no consensus among funeral providers on the need to revise their current sales techniques.[303] It is the Commission's judgment that voluntary guides, absent such a consensus, would not be complied with by significant numbers of funeral providers.[304] The guides would, therefore, not provide the net benefits to consumers which would be provided by issuance of a rule.

Guides might also offer the benefit of some flexibility, giving opportunities for experimentation with, among other things, different disclosure formats. Given the lack of industry consensus on the basic issue of the fairness of several major industry practices, however, this approach does not seem practical.

3. *Rely on State Action to Correct Abuses.* A third approach to correcting funeral industry abuses would be to await action at the state level, rather than to issue a federal rule. This alternative has been suggested repeatedly during the rulemaking proceeding, usually in conjunction with the expression of beliefs that existing state regulation is adequate to correct

[297] *See* Section II, *supra*

[298] The benefits and costs of issuing a rule are described in some detail in Section IV, *infra* (Benefits, and costs, and Other Effects of Rule Provisions). The reasons why existing practices cause consumer injury are described in detail in Section II, *supra*.

[299] Petition of National Selected Morticians, I-A-22. The petition was joined by the National Funeral Directors Association.

[300] Letter from Charles A. Tobin to David D. Murchison, Attorney for National Selected Morticians (April 10, 1976). *See* Binder 215-46-1-1.

[301] Statement of Congressman Brovhill, 126 Cong. Rec. H3850 (daily ed May 20, 1980)

[302] This savings would be offset somewhat, however, by the costs attributable to guideline self-enforcement by industry members. In light of this, the Commission has concluded that there would not be a significant reduction in net enforcement costs to society if the guides are enforced actively.

[303] *See, e.g.*, Summary of Post-Record Comments on Funeral Industry Practices rule, XV, at 160-164 (comments in opposition to mandatory itemization).

[304] The result might be to give an unfair competitive advantage to funeral providers who chose not to comply with the guidelines.

whatever abuses might exist.[306] A proposal to the Commission by several major industry trade associations in 1980 also reflected preference for state level regulation. That proposal consisted of a set of model laws which the proposers suggested be issued by the Commission for voluntary adoption by the states.[306]

The Commission recognizes that state action to correct existing industry abuses, if such action were taken, would have significant benefits over regulation at the federal level. First, it would allocate all funeral industry regulation to one level of government (*i.e.*, the state), potentially allowing economies in the cost of enforcing regulations. Second, it would simplify the compliance burden on funeral providers, by giving them a single source of guidance for answers to their questions about their regulatory obligations. Third, state regulators should be able better to keep abreast of non-compliance in local areas than the Commission, and thus should be better able to enforce rule provisions with maximum effectiveness.

The Commission is concerned, however, that state regulation in the past has not addressed the problems which the Commission's rule is designed to correct. A review of state law submitted to the Commission in 1976 [307] and another review conducted in 1980 [308] indicate, while there has been some improvement at the state level since the proceeding commenced, that most states have not moved to enact requirements comparable to those which the Commission is adopting, particularly in the area of price disclosure.[309] The failure of state funeral licensing boards to enact regulations requiring itemized price disclosure is not surprising, given the fact that most state licensing boards are dominated by funeral directors who are likely to share the traditional view of the major trade associations that package pricing is a perfectly permissible practice.[310] Reliance on state laws would, therefore, not fully correct the significant problems identified in the record in this proceeding. Nor is there any evidence that states will be likely in the near future to enact such provisions. The Commission thus rejects the notion that promulgation of any rule should be delayed pending action by the states. The effects of current industry practices on funeral consumers are sufficiently serious that action is warranted now.

It should be noted, however, that the rule provisions presently being adopted by the Commission can serve as a model state law. Where states act to pass laws which meet the minimum level of protection for the funeral consumer established by the rule, states may secure exemptions from the operation of the rule. Section 453.9 of the rule establishes criteria which, if met, would enable states to obtain exemptions from the rule.[311] Once the exemption is received, the Commission's rule will not be in effect in that state as long as the criteria continue to be met.

B. *Alternative Rule Provisions.* The version of the funeral rule published in the initial notice of rulemaking contained four sets of provisions which the Commission has considered and decided not to incorporate in the final version of the funeral rule. Those provisions are described here, with an explanation of the Commission's reasons for deciding against their issuance.

1. *Unauthorized Removal of Remains and Refusal to Release Remains.* In the rule originally proposed by the Commission, funeral providers would have been prohibited from obtaining custody of deceased human remains without permission from a family member or other legally authorized person. They also would have been required to release remains to a family member or other legally authorized person upon request, whether or not they were owed money for services provided.[312] Both provisions were proposed to address practices which take advantage of consumers' strong reluctance to move a body once it is in a particular funeral home, even if the consumer might prefer to do business with a different funeral provider.[313]

In recommending that the Commission prohibit the unauthorized removal of remains from the place of death, the rulemaking staff cited instances in which funeral providers acquired possession of a body from a hospital or nursing home without permission from the relatives, obtained a body because the provider also served as the coroner, or because a provider misinterpreted a call for information as authorization to pick up the body.[314]

The prohibition on unauthorized removal of remains was intended to ensure that the funeral provider who received the body initially was one who was acceptable to the family or their representative. The prohibition on refusal to release remains was intended to ensure that a funeral director could not prevent dissatisfied customers from moving the body to a competitor, should they so desire.

The Commission has concluded, however, that the practices described above are not widespread and that there are sufficient safeguards in state law to protect consumers for these practices. Unlike other practices addressed by the rule, these practices are widely condemned by the industry and contrary to law in most states.[315] They are the type of conduct which consumers are likely to complain about, and consequently trigger state enforcement action. Barring such practices in the rule would contribute little, if anything, to deterring such conduct. Consequently, in

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[306] *See, e.g.*, Summary of Post-Record Comments, XV, at 125–29 (adequacy of existing state regulation).

[306] Proposed "Guides" [model law] and transmittal letter (Oct. 8, 1980), VI–7.

[307] *See* Consumer Federation of America, State Statutes, Rules and Regulations Affecting Funeral Practices, Atl. Ex. 7 (1976).

[308] *See*, CAFMS Survey of State Laws and Regulations, *supra* note 165, at Appendix III–C. The CAFMS study is based, in part, on a survey of state laws conducted by the rulemaking staff in 1980 and submitted for the record in *Funeral Industry: FTC Proposed Rulemaking: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 141–144 (1980).

[309] *See* text and accompanying note 95, *supra*.

[310] Until recently, virtually all of the state licensing board members were licensed funeral directors. Consumer Federation of American, State Statutes, Rules and Regulations Affecting Funeral Practices, Atl. Ex. 7. In the last several years, the Conference of Funeral Service Examining Boards has been encouraging the appointment of "lay" members to funeral boards. As a result, most state licensing boards now have "lay" representatives, although only two states have licensing boards where funeral directors are not the controlling majority. *See Hearings on Funeral Industry, supra* note 308, at 258–260 (testimony of Royal Keith, Past Pres., NFDA).

Members of state licensing boards are, in many instances, chosen because they are respected industry leaders in their communities and states. As a result, they also tend to be active in trade associations: Funeral directors who have served as officers of state and national funeral trade associations have also served as state licensing board members. *See* 1978 Staff Report, *supra* note 9, at 132–138. While peer review is not inherently a conflict of interest or necessarily bad policy, it does suggest that the state boards are likely to share many of the basic values and opinions of the industry itself. While state boards are thus likely to be active in enforcing regulations against conduct or practices which the industry also condemns (*e.g.*, refusal to release a body, obtaining possession of body without permission, or misrepresentation), it is unlikely to be active in identifying as consumer problems those practices which the industry as a whole condones.

[311] Section 453.9 and the exemption process it establishes are discussed in more detail in Section II(I)(2), *supra*.

[312] The provisions are set out at 40 *Fed. Reg.* 39901 (1975) (Notice of Proposed Rulemaking, Section 453.2(b)) and were supported by the staff, after minor revisions, in the rule version appearing in the 1978 Staff Report, *supra* note 9, at 176–88 and 208–14.

[313] *See* discussion in Part II(A), *supra*.

[314] 1978 Staff Report, *supra* note 9, at 176–77, 208–09

[315] *See* Report of Presiding Officer, *supra* note 8, at 54–59.

view of the small number of abuses and the availability of other adequate remedies, including such provisions in the rule is not warranted.

2. *Merchandise and Service Selection Techniques.* The Commission has considered and rejected a number of related recommendations of the rulemaking staff [316] which were intended to reduce funeral industry abuses by regulating the manner in which funeral providers presented caskets, as well as other merchandise and services. These provisions would have required that funeral providers:

(i) Display their three least expensive caskets in the same general manner as their other caskets are displayed; [317]

(ii) Disclose that their three least expensive caskets are available in different colors and arrange to obtain caskets in those colors upon customer request, if the caskets can be obtained within 12 hours; [318]

(iii) Not discourage a customer's selection of less expensive merchandise by disparaging its quality, misrepresenting its availability, offering defective or soiled merchandise for sale, or suggesting that a customer's concern for price reflects lack of respect for the deceased.[319]

(iv) Refrain from using any sales plan or compensation method which discourages salespersons from selling any goods or services which are offered for sale.[320]

The purpose of these provisions was to prohibit sales techniques which attempt to exploit a customer's grief or desire to show affection for the deceased in order to manipulate the customer into the purchase of more expensive merchandise. The Commission has concluded, however, that the provisions would not necessarily provide consumers with significant benefits above and beyond those provided by the information disclosure provisions in the rule. Those provisions require full information about a funeral provider's offerings and prices to be disclosed on a general price list, casket price list, and outer burial container price list. Such disclosures would let consumers know what merchandise and services the funeral providers sell, including the three least expensive caskets. The Commission was concerned that the provisions seeking to regulate oral representations would be difficult to enforce.[321] In addition, the Commission felt that the provisions singling out a funeral provider's three least expensive caskets for special treatment could result in significant compliance costs without ensuring that the goals of the provision were met. In particular, the provisions could have the adverse effect of funeral providers choosing not to sell certain low-price caskets which they currently made available to customers. The Commission has concluded, therefore, that reliance on rule provisions designed to stimulate information disclosure is the most effective way to ensure that consumers have a *bona fide* opportunity to purchase low-cost caskets and other merchandise if they so desire.

3. *Market Restraints.* As originally proposed,[322] the market restraints provision would have made it a rule violation for funeral providers to prohibit, hinder, or restrict other persons from (i) offering inexpensive funerals; (ii) entering into contracts with groups (called "memorial societies") which assist their members in making funeral arrangements; or (iii) price advertising. The provision also would have required funeral providers to place a notice in any advertising or promotional materials advising readers that funeral home prices vary considerably and that price information is available over the phone. The intent of the provision was to eliminate practices designed to stifle vigorous price competition.

The Commission has determined not to include a market restraints provision in the funeral rule. Any such provision would have to fall within the limitations specified by Section 19(c)(1)(B)(ii) of the FTC Improvements Act of 1980.[323] Section 19 permits the Commission only to prohibit or prevent the use of "threats or boycotts" by funeral providers against other funeral providers. In 1981, the Commission published a revised version of the provision which was so limited.[324] To comply with Section 19, the 1981 version of the rule did not contain prohibitions on the use of disparagement or blacklists, or the misuse of state administrative or judicial processes. Moreover, Section 19 limited such a provision to acts and practices directed against funeral providers. The scope of Section 19 did not extend to other persons who could be affected by funeral providers' market restraining practices,[325] such as casket wholesalers or body pick-up services.

After receiving comment on the midified version of the market restraints provision proposed in 1981, the Commission has decided that its inclusion in the rule is not warranted.

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[316] The provisions were set out at 40 FR 39902 (1975) (Notice of Proposed Rulemaking, § 453.4), and except for one noted below, were also proposed, with some revisions, in the 1978 Staff Report, *supra* note 9, at 301–339.

[317] The provision was directed at the practice of funeral homes not displaying their least expensive casket(s) in the same selection room as most other caskets to discourage purchase of such merchandise by all but the most persistent consumers. A number of surveys, and other evidence, showed that inexpensive caskets are often not shown in the main selection room. *See, e.g.*, Comments of Maine PIRG, II–C–1400, at 2 (one-third of 118 funeral homes failed to display least expensive casket); FTC Survey of Funeral Prices in the District of Columbia (1974) VI–D–3 (14 out of 36 funeral homes failed to display least expensive casket); H. Buckingham, Maryland consumer, II–B–1159; H. Staples, Florida consumer, II–B–1444. The evidence also indicated that this practice will be successful in preventing most consumers from purchasing the least expensive casket. A NYPIRG survey of 127 consumers found that only 28 realized that there might be caskets available besides those they saw, and only 7 of those respondents asked if anything less expensive was available. NYPIRG Ex. 1 (N.Y.), at 8.

[318] There was some evidence of funeral providers intentionally displaying inexpensive caskets in a damaged condition to discourage their purchase. Instances were cited of inexpensive caskets with nails showing, straw sticking out, and with linings that were worn or ripped. *See* J. Page, California funeral home employee, Tx 7375–77. *See also* R. Mee, former Wisconsin casket salesman, III–F–16, at 5. *But see* Rebuttal of NSM, X–8 (Q–R); Rebuttal of NFDA, X–9 (20).

[319] A number of reports on the record indicate that purchase of inexpensive caskets has been discouraged by referring to them as "welfare" caskets, or "pauper's boxes." *See, e.g.*, J. Greyson, Indiana consumer, II–B–1436; W. Troemel, New Jersey consumer, II–B–438; J. Sagan, Massachusetts consumer, II–B–2239 at 3; C. Moles, Iowa consumer, II–B–318. Similarly, funeral directors appear to have attempted to discourage cremation by referring to that form of disposition as "disposals." *See* L. Smith, California student, VI–D–54, at 7; E. Morgan, author, Tx 9883. The various ways in which concern for price might be discouraged by funeral providers are described generally in the 1978 Staff Report, *supra* note 9, at 320–25.

[320] The evidence indicated that a few of funeral homes in different parts of the country used compensation systems which linked pay to the size of funeral sales. *See* J. Page, California funeral home employee, Tx 7348; K. Marsh, California funeral director and attorney, Tx 6757; H. Senison, New York funeral director, II–A–145. However, staff deleted the provision from their 1978 recommended rule based upon their view that the limited incidence of the practice and the lack of evidence that it produced significant consumer injury did not warrant the provision's inclusion in the rule. *See* 1978 Staff Report, *supra* note 9, at 337. The Commission also finds that the provision is not appropriate for inclusion in the rule.

[321] The provisions banning the disparagement of merchandise or a concern for costs were not based on deception, but unfairness. As a result, it was not possible to prevent the abuse through affirmative disclosures, as was the case with other oral misrepresentations addressed by the rule. *See* Section II(B), *supra*. Enforcement would have depended solely upon consumer complaints, which would have made enforcement difficult. Further, the scope of the provisions was so vague as to raise serious questions whether funeral providers would have an adequate understanding of the conduct proscribed by the rule.

[322] *See* 40 *Fed. Reg.* 39904 (1975) (Notice of Proposed Rulemaking, Section 453.6).

[323] Public Law 92–252, 97 Stat. 391, 15 U.S.C. 57a note.

[324] *See* 46 FR. 6979 (1981) (Notice of Publication of Revised Proposed Rule and Notice of Opportunity to Comment, Section 453.4).

[325] *See* Section 19(c)(1)(B)(ii), 15 U.S.C. 57a note.

One reason is that the conduct proscribed in the provision was, as limited, already against the law. Since the Commission has the authority to bring individual actions against such violations of the antitrust law, adding such provisions to the rule would be superfluous. In addition, much of the evidence to support earlier version related to abuses which could no longer be covered by the rule under Section 19. It related to activities which are not "threats" or "boycotts" or to activities directed against persons or entities other than funeral providers.[326] The Commission finds that the acts and practices described in the record which fall within the limitations of Section 19 do not warrant a rule provision.

While the Commission has chosen not to include a "market restraints" provision in the final rule, it wishes to make clear its resolve to proceed on a case-by-case basis against any such future activities. The record contains allegations that boycotts and other concerted activity may have been directed at entities attempting to enter the funeral market and offer non-traditional services, such as direct disposition.[327] The Commission encourages industry members, consumers, and others to bring such incidents to its attention.

4. *Nonitemized general price list.* In 1981 the Commission received a proposal from two funeral director trade associations for an alternative version of the rule which would be acceptable to their memberships.[328] The proposal was not accepted, however, by NFDA, the largest funeral trade association. The proposal was supported by some of the Commission's staff.[329] A central feature of the proposal was its price disclosure provision, which gave funeral providers the option not to quote separate prices for the individual goods and services they sell.

Under this proposal, funeral providers would have had the option of listing their funeral arrangements by packages, with each package stating a price and including a description of every funeral good or service it contained. Funeral providers who chose this option also would have had to prepare a credit list, which would have separately indentified the funeral goods and services in the packages and would have shown a dollar amount which would be subtracted from the package price if a consumer declined a particular funeral good or funeral service included in that price. This "package with credits list" proposal would have affirmatively informed consumers of their right to decline.

In opposing this alternative disclosure format, many consumers and consumer groups argued that sanctioning package pricing would encourage consumers to continue purchasing packages;[330] indeed, some contended that the alternative would have the effect of establishing the so-called "traditional" funeral as the standard or norm.[331]

After careful consideration, the Commission rejected the proposal and adopted itemization instead. While the Commission is aware that the proposal would have ensured significantly greater opportunity for choice than present industry practices permit, the Commission was concerned that placing the burden on consumers to affirmatively reject goods and services "bundled" by funeral providers was inappropriate given the consumer's unique vulnerability and dependence on the funeral director for guidance. The "package with credits list" format suggests that the consumer who wants less than a full funeral must choose something other than "normal," whereas the itemization format legitimizes the concept that each part of the funeral is something that is affirmatively chosen by a consumer. Further, in view of the traditional reluctance to "bargain" or "negotiate" prices when arranging a funeral, stemming in part from natural reservations about the propriety of price concerns when arranging a funeral for a loved one, putting the consumer in the position of deciding how to *save* money, rather than deciding how to *spend* money, is likely to have very different results. In short, the Commission decided that it was necessary, in light of the consumer's unique position and past industry sales practices, to remove any vestiges of "packaging" which would suggest to consumers what was appropriate.

In addition, allowing alternative formats would inhibit the consumer's ability to compare prices, one of the goals of the rule. Under the itemization proposal adopted by the Commission, every funeral director is required to have a relatively standardized price list, which can be used to give prices over the telephone or which consumers can obtain from different homes.[332] Under the package with declination proposal, some funeral directors would have itemized lists, while others would have package-with-credits lists, making comparison shopping more difficult.

Finally, itemization is more consistent with the trend in state laws and with trends in the industry itself.[333]

The primary benefit of the alternative price list would be a possible reduction in compliance costs to funeral providers. This reduction might be possible because it would take less time for those funeral providers who currently quote package prices to prepare the alternative price list than to prepare a list with separate prices. However, it is the Commission's judgment that the burden of preparing itemized price lists is itself quite low[334] and that the incremental savings in compliance costs from allowing use of an alternative price list would be minimal.[335]

The trade associations supporting the proposal also believed that the "package with credits" proposal would enable funeral providers to continue using a "graduated recovery"[336] approach, thereby avoiding the itemization's alleged effect of raising prices for low-cost package funerals. As discussed in more detail in Section V(B), *infra*, itemization does not preclude "graduated recovery" and it will not necessarily result in higher prices for low-cost package funerals.

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[326] *See* 1978 Staff Report, *supra* note 9, at 409–425.

[327] *See* 1978 Staff Report, *supra* note 9, at 420–28.

[328] Letter and attached Comment, David C. Murchison and Daniel P. Oppenheim, attorneys for National Selected Morticians and Larry C. Williams, Sr., attorney for National Funeral Directors and Morticians Association, XVI–59 (March 23, 1981).

[329] Staff recommendations on the funeral rule, XVIII–1 (June 28, 1981); Letter of Albert H. Kramer, Director, Bureau of Consumer Protection (March 19, 1981), XVI–59, Ex. A. *But see* Memorandum from L. Dorian, Deputy Director, Bureau of Consumer Protection (June 29, 1981), XVIII–2 (recommending that the Commission not adopt the proposal).

[330] *See, e.g.*, Rebuttal Comment of NRTA/AARP, at XVII–23 (May 13, 1981); Rebuttal Comment of NCSC/ADA/CAFMS, XVII–16, at 30, 32 (May 13, 1981).

[331] *See, e.g.*, Rebuttal Comment of NRTA/AARP, *supra* note 330, at 16.

[332] Of course, funeral directors may offer packages *in addition to* itemized price lists, as discussed, *infra*.

[333] Possibly as a result of the increasing number of state and localities who are requiring itemization, *see* note 95, *supra*, the percentage of funeral directors using itemization has increased over the last fifteen years. For example, in 1971, 74% of funeral directors used unit or bi-unit pricing. *See* 1971 Professional Census, *supra* note 114. In 1975 the number of funeral directors using unit or bi-unit pricing had dropped to 65%. *See* 1976 Statistical Abstract, *supra* note 31.

[334] *See* discussion of costs and benefits for price disclosure provisions of rule in Section IV, *infra*.

[335] The proponents of the alternative price list also suggested that it would benefit consumers through lower costs for funeral arrangements. However, this "benefit" is based upon the view that itemized prices are higher than package prices. The Commission rejects such a view for the reasons stated in Section V, *infra*.

[336] For a more detailed discussion of "graduated recovery" see Section V(B)(6), *infra*.

IV. Analysis of Projected Benefits, Costs, and Effects of Funeral Rule

This section provides a summary analysis of the costs and benefits of the individual provisions of the funeral rule. Each provision of the rule is designed to address particular abuses reflected in the rulemaking record. As a result, the provisions of the rule are largely segregable from each other for purposes of analyzing its projected benefits, costs, and effects.

The costs and benefits of certain provisions are interrelated, however. The interrelated provisions are:

1. Section 453.2 which requires the disclosure of prices on an itemized basis and § 453.4(b) which ensures that consumers can purchase on an itemized basis;

2. Section 453.3(a) which prohibits misrepresentations concerning when embalming is required and § 453.5 which requires funeral providers to obtain prior approval for embalming;

3. Section 453.3(b) which prohibits misrepresentations concerning the legal requirements for purchasing a casket for cremation and § 453.4(a) which prohibits funeral providers from imposing that requirement themselves;

4. Sections 453.3 (c) through (f) which address other misrepresentations; and

5. Section 453.6 which imposes a recordkeeping requirement.

The costs and benefits of these five groups of provisions will be discussed together.

A. *Section 453.2 (price disclosures) and § 453.4(b) (optional purchases).* These portions of the rule address funeral industry practices which prevent consumers from selecting a funeral home on the basis of the prices it charges and from selecting different options for funeral arrangements once at the home. Most consumers do not get price information over the telephone, and in some instances, consumers cannot get price information over the telephone even when they ask.[337] Yet choosing a funeral home is a serious financial decision, since consumers will not change funeral homes once the funeral director has taken possession of the body. If price information is to be obtained prior to selecting a home, it must be obtained quickly since the body must be moved soon after death.

The record also indicates that after consumers have chosen a particular funeral provider, the practice of "package pricing" makes it difficult or impossible for consumers to select the type of funeral option which most suits their needs. The package price does not disclose the individual prices of the arrangement's components, or even that the arrangement consists of discrete components.[338] Many funeral providers refuse to sell other than a complete funeral package and refuse to give consumers a discount even if the consumer desires not to purchase all items in the package.[339]

The fact that consumers fail to obtain detailed price information before selecting a funeral provider and often cannot get such information even at the funeral home tends to insulate individual funeral providers from price competition. The lack of competition suggests that the overall level of prices in the funeral industry are higher than they otherwise would be in a properly functioning competitive market. Moreover, the refusal to sell on an item-by-item basis in the funeral home limits consumers' options and forces them to pay for items which they might refuse to purchase if given the opportunity to do so.[340]

1. *Benefits.* The rule benefits consumers by reducing the economic injury resulting from the aforementioned practices. It does so through a twofold approach. First, it alerts consumers that price information is relevant and available at the critical moment of choosing a funeral provider, and ensures that consumers can obtain sufficient price information to comparison shop among different funeral providers. The telephone price disclosure provision (Section 453.2(b)(1)) requires that funeral providers make price information available over the telephone. The provisions requiring itemized information on a general price list (Section 453.2(b)(2)), casket price list (Section 453.2(b)(2)), and outer burial container price list (Section 453.2(b)(3)), provide a relatively uniform format for the information which will be given to consumers over the telephone, further facilitating comparison shopping. Comparison shopping will help stimulate price competition among funeral providers, thereby better enabling consumers to get the maximum benefit for their money.

Second, the rule gives consumers in the funeral home an opportunity to consider various options and purchase only those items they desire. The itemized price lists disclose the costs of different goods and services, making such comparisons possible. Itemized information also would be made available on the itemized statement required by § 453.2(b)(5). This information would allow consumers to see the total cost of the items they tentatively have decided to purchase for a given funeral and to evaluate them in conjunction with each other. Section 453.4(b), the "optional purchase" provision, ensures that consumers can make use of such price information by making a decision to decline items which they do not wish to purchase.

The Commission anticipates that these provisions will reduce economic injury through both a short term and a long term effect. In the short term, the greater ease with which consumers will be able to obtain price information for purposes of comparison shopping should substantially increase the number of consumers who do so.[341] This in turn, will create a pressure on funeral providers to price their products at competitive levels in order to continue receiving business from consumers who comparison shop. Even consumers who do not comparison shop will benefit from this overall tendency toward lower prices. In addition, all consumers will have the opportunity in the funeral home to purchase only the items they want and to pay accordingly. This will provide them with another opportunity to exercise their choice and save money.[342] Such an opportunity will be the only one directly available to consumers who are unable to comparison shop among funeral homes.

In the long term, increased competition may further benefit consumers by changing the structure of the funeral industry. As prices decrease, the principal way by which existing funeral providers will be able to keep up their profit margins will be by lowering their costs per funeral. This should give at least some firms an incentive in the long term to become more efficient, possibly by adapting their physical plant and marketing strategies or providing more specialized services at greater volume.

[337] *See* discussion in Part II(A), *supra*.

[338] *Id.* at note 75 and accompanying text.

[339] *Id.* at note 76 and accompanying text.

[340] *Id.* at notes 92–102 and accompanying text.

[341] Surveys of consumer attitudes and other evidence on the rulemaking record suggest that a substantial number of consumers would use such information. *See* 1978 Staff Report, *supra* note 9, at 510–11. For example, a 1974 survey sponsored by The Casket Manufacturers Association reported that 95% of the respondents felt that such information was "somewhat" or "very helpful."

[342] A trade association survey revealed that from 10% to 40% of consumers responding would not use such services as embalming (9.5%), other care of the body (9.7%), visiting hours (20.9%), funeral services in the funeral home (11.4%), family car (29.1%), and other automobiles (40.6%). Moreover, in every one of these categories, another one-quarter to one-third of the respondents were undecided. The survey received these responses based on questions which quoted specific dollar amounts for the services in question. Blackwell Survey, *supra* note 59, at Question 6.

In addition, greater availability of price information may encourage entry into the funeral market of new competitors seeking to attract business by offering lower prices. Such potential competitors appear to be inhibited from entry into the market in most areas of the country by existing practices which make price comparisons difficult and which, thereby, decrease the likelihood that consumers will comparison shop.[343] This decreases the pool of potential customers for any new venture and increases the likelihood that the venture will fail.

2. *Costs.* The Commission believes that the price disclosure provisions will result in two types of compliance costs to funeral providers. First, most funeral providers will be faced with the initial cost of revising their method of quoting prices so as to come into compliance with the rule. Second, they will incur some ongoing costs as they remain in compliance with the rule.

The most substantial initial compliance cost which faces funeral providers will be that falling on those funeral providers who do not currently quote their prices in an itemized manner, approximately 65%.[344] These individuals will be required to produce price information in a format different from that which they currently use.

The Commission estimates that the compliance costs for these funeral providers to revise their pricing formats will be relatively low. One reason is that the preparation of itemized price information will not require that most funeral providers search out new cost data. Rather, the basic data which they will need to use is already available to them and, in fact, is currently used by them, albeit in a different format. Most funeral directors who presently use package pricing also offer credits for unwanted items, and such credits can be a basis for the itemized prices. For others, a number of business texts provide basic "do it yourself" methods for determining prices under an itemization system.[345] It can also be expected that state and national associations will assist in giving advice, and that the experience of funeral providers who have been required to switch to itemization under state law will be useful.

In addition to this cost, which only some funeral providers will incur, all providers will be required to prepare the printed papers, notebooks, charts, or other forms which are the tangible medium on which price lists and statements will be shown to consumers. The time involved in designing the lists also will be minimized, however, through availability from the Commission and other sources of model forms.[346] Funeral providers will be able to convert the model forms into actual price lists and statements simply by inserting in appropriate places the necessary information (such as name, address, and prices) for their particular business.

Besides these initial costs, there will be three relatively minor ongoing costs of complying with the price disclosure provisions. One will be the increased time spent explaining prices over the telephone as more consumers use the telephone to comparison shop. The absolute amount of additional time spent answering price questions over the phone would be minimal, however, given that the prices which are listed on the general price list are basic and relatively few in number and given that, for the most part, the funeral provider need only read these few prices (or a subset of them, if only that is requested) over the phone.

The second ongoing cost would be the cost of reproducing the price lists and statements so that copies of the forms could be made available to consumers. This cost would be nominal for the casket and outer burial container price lists, which do not have to be given to consumers for retention. It also would be negligible for the statement, since it can be merged with forms which funeral providers already use. The marginal cost therefore would be small. The only potentially significant cost would be that of reproducing the general price list, which must be provided to consumers for retention. Given that the average funeral provider conducts 94 funerals a year, however,[347] even in this case the actual number of forms given out would be small and the cost of complying with the provision would be only a few dollars a year.[348]

The third ongoing compliance cost would be the time involved in updating the price lists as the funeral provider's prices or offerings change. However, the incremental burden imposed by the rule in this connection would be small, since funeral providers are already obliged to recalculate their prices whenever their costs or offerings change, irrespective of the pricing method they currently use. If any additional effort were imposed by the rule, it would be time involved in transposing these prices to the price lists required by the rule.

B. *Section 453.3(a) (embalming misrepresentations) and Section 453.5 (prior permission for embalming).* Section 453.3(a) prohibits funeral providers from representing that embalming is required by law when it is not or failing to disclose to consumers that embalming is not required by law except in certain special cases. To prevent such practices, the provision requires that consumers be given a written disclosure advising them of their right, except in special cases, to select arrangements which do not require embalming. The purpose of § 453.3(a) is in short, to ensure that consumers know that embalming is an option.

Section 453.5 works together with § 453.3 by requiring funeral providers in most instances to obtain permission before embalming. Section 453.5 also requires that funeral providers give consumers a disclosure advising them that they have the right not to pay for embalming performed without their prior permission if they select arrangements which do not require embalming. Thus, § 453.5 ensures that most consumers will have the opportunity to exercise a choice in deciding whether or not embalming should be performed.

1. *Benefits.* A significant benefit of these provisions will be to end practices which deceive consumers into purchasing embalming through misrepresentations of those instances where providers embalm without permission. Where embalming would be prevented through the operation of the rule, a savings of the cost of embalming, which amounts to between $50 and $150 per arrangement, will result.[349] The rulemaking record suggests that a substantial percentage of consumers would decline embalming if offered a true choice, possibly as many as thirty percent.[350] While it is impossible to

[343] *See* discussion in Part II(A), *supra*, at notes 98–103.

[344] *Id.* at note 83.

[345] *See, e.g.*, Blackwell, Talamzyk and Seaver, A Manual for the Return-on-Investment Approach to Professional Funeral Pricing (1976); Pine and Pine, Adaptive Funeral Pricing and Quotation (1975).

[346] In addition, the model price lists and statement which the Commission is publishing simultaneously with the rule provide simple, basic guidance on the type of prices which funeral providers must use.

Shortly after the funeral rule was proposed, the National Funeral Directors Association distributed model price disclosure forms. Similarly, state trade associations have helped their members by providing sample forms in states which have enacted itemization requirements. *See* 1978 Staff Report, *supra* note 9, at 488, n. 40. The Commission anticipates similar trade association activities in helping funeral providers comply with the rule.

[347] *See* 1978 Staff Report, *supra* note 9, at 85.

[348] The rulemaking record indicates, of course, that one effect of the rule will be to encourage consumers to contact two or more funeral providers before deciding with whom to make arrangements. Most such contacts will be by phone, however, and would not involve handing out price lists.

[349] *See* discussion in Part II(D), *supra*, at note 248.

[350] *Id.* at notes 247–248.

predict with certainty the number of consumers who will decline embalming given a choice, even a relatively small percentage of declination can amount to large savings. The total benefit to consumers from these provisions alone, therefore, could be expected to equal millions of dollars a year in savings.[351]

2. *Costs.* The provisions will result in minimal initial and ongoing compliance costs for funeral providers. The only initial costs will be those involved in preparing the disclosures required by §§ 453.3(a) and 453.5. There disclosures can be copied verbatim from the model general price list and model statement of funeral goods and services selected which the Commission is publishing along with the rule.

In addition to these initial costs there will be minimal ongoing compliance costs. The only such costs of significance are attributable to § 453.5, and are the costs of the time involved in obtaining prior permission for embalming. These costs should be negligible, however, since approval may be obtained either orally or in writing, and in whatever manner is most expeditious under the circumstances. Typically, permission could be requested of the family during the "first call", when the funeral provider is asked to pick up the body, or during the funeral arrangements conference if that conference is held within a few hours of death. Moreover, § 453.5 has a built-in limitation to ensure that costs of seeking prior permission do not become excessive in extraordinary cases. The Section specifically permits embalming without prior permission if the funeral provider is unable to contact a family member or other authorized person after exercising due diligence (and has no reason to think that the family does not want embalming performed). Thus, the cumulative burden of obtaining prior permission for embalming should be minimal.

C. *Section 453.3(b) (casket for cremation misrepresentations) and § 453.4(a) (alternative container requirements).* The rulemaking record indicates that consumers seeking to arrange direct cremations want to buy inexpensive cremation containers in lieu of an ornamented, and correspondingly more expensive, casket.[352] Sections 453.3(b) and 453.4(a) of the rule are intended to eliminate two related practices. Section 453.3(b) prohibits funeral providers from representing that the law requires a casket for cremation. Section 453.4(a) correspondingly prohibits funeral providers from imposing that requirement themselves. The provision further requires that funeral providers who arrange direct cremations make simply constructed body receptacles (unfinished wood boxes and alternative containers) available to consumers desiring to use such items for direct cremations. Finally, § 453.3(b) requires that funeral providers give consumers a written disclosure to inform them of their right to purchase merchandise other than ornamented caskets for direct cremations.

1. *Benefits.* These provisions will enable persons desiring low-cost, simple dispositions to obtain unfinished wood boxes or alternative containers. The benefit to consumers will be a savings in their total funeral costs. As is the case with embalming, discussed above, these economic savings can be substantial. For example, cardboard, composition, and wooden alternative containers typically cost no more than $20 to $65 at retail, while ornamented metal or solid wood caskets sell for at least $150 to $250.[353] The total savings, of course, would depend on the rate at which consumers will choose to buy such containers in lieu of caskets. While a precise prediction of the rate is impossible, even a modest rate could result in significant aggregate savings.[354]

2. *Costs.* The only potentially significant compliance costs imposed by either § 453.3(b) or § 453.4(a) will be imposed by § 453.4(a). Section 453.3(b) will result in some very minor initial compliance costs, because it requires funeral providers to place a written disclosure on the general price list. However, this can be done quickly and simply by copying the disclosure appearing on the model general price list which accompanies the rule.

On the other hand, the requirement in § 453.4(a) that unfinished wood boxes or alternative containers be "made available" to customers arranging direct cremations could impose somewhat more significant costs on some funeral providers. Even so, these would be negligible for the great majority of funeral providers because the Commission deliberately has drafted § 453.4(a) only to require that unfinished wood boxes or alternative containers be "made available" to customers. Most funeral providers, therefore, would not have to stock such items, since the items could be made available to customers from the stock of the casket wholesaler with whom the funeral provider normally does business. Consequently, most funeral providers would not have inventory or storage costs; the item would be bought only after being ordered by a consumer. The Commission thus anticipates that most funeral providers will be able to comply with § 453.4(a) without any special expenditure of time or money.

A relatively small number of funeral providers, such as those in isolated rural areas, would have to stock unfinished wood boxes or alternative containers so that they would be available to customers arranging direct cremations. For such funeral providers, the compliance burden would be inventory and storage costs. None of these costs should be substantial, however. Funeral providers would only be required to stock a sufficient number of containers to meet expected demand. An average funeral home might arrange 3 or 4 direct dispositions per year.[355] Of course, funeral directors can rely on their experience in predicting the demand for such items in their own community. Inventory costs, then, will be low: for most homes having to stock them, having one or two such unfinished wood boxes or alternative containers would be sufficient. The record shows that such containers have a wholesale cost of as little as $5.[356] Storage costs are also minimal, since many types are collapsible, thereby minimizing storage problems.[357] It is the Commission's

[351] Approximately 1.9 million funerals are arranged per year. An NFDA-sponsored survey indicated that 9.5% of consumers would decline embalming in an "average" funeral home, while 24.7% more were undecided. Taking a hypothetical declination rate of 10% and an embalming cost of $75, the total savings to them would be over $14 million. Blackwell Survey, *supra* note 59, at Question 6.

[352] *See* Section II(B)(2)(a), *supra*.

[353] 1978 Staff Report, *supra* note 9, at 239, nn. 110, 112. The rule does not, of course, require that funeral providers charge $20–$65, or any other prices for unfinished wood boxes or alternative containers. However, the rule does require that the items be constructed of a limited range of typically inexpensive materials. This will make it difficult for funeral providers to sell such merchandise at an abnormal mark-up.

[354] In 1977, the direct disposition rate was approximately 4.5%. Where cremation is the form of direct disposition, caskets would be unnecessary and consumer could save from $70 to $200 (the difference between the price of alternative containers and the least expensive casket.) If 70% of direct dispositions are cremations, and if only 10% of those consumers choose to save the minimum amount ($70), total aggregate savings would be $418,950. On a high range, if 90% of the consumers buying direct cremation save the maximum amount ($200), total consumer savings would be $10,733,000. In one chain of funeral homes which disclosed that caskets are optional, nearly 15% of the *total* dispositions (including burials and full funerals) involved the purchase of a minimal container. Purdy, Oregon funeral director, See. Ex. 2.

[355] Based on an average 94 funerals per year and a 4.5% direct disposition rate. *House Small Business Comm. Hearings, supra* note 30.

[356] Progressive Mortuary Methods, 1976, II–A–860, at 8.

[357] *See* Staff Report, *supra* note 9, at 245.

conclusion that the direct compliance costs will be relatively minor.

One indirect effect of this Section of the rule may also impose costs on consumers. Some funeral directors may find it more profitable to stop offering cremation altogether, rather than offer cremation with alternative containers. While this possibility exists, the Commission believes that several factors make such an outcome unlikely. A funeral director who does not offer cremation at all is likely to lose some customers to other funeral homes who do offer it or, in some areas of the country, to immediate disposition firms. While a direct cremation may not be as profitable as a full funeral, it is more profitable than losing a customer altogether. Since many funeral homes operate barely over break-even points,[358] many funeral directors may be reluctant to take the risk of losing even several customers who will make at least some contribution to fixed costs while paying variable costs.[359] Finally, the price lists required by the rule and the telephone price information requirement will make it easy for consumers to determine whether a funeral home offers cremation. To the extent the rule encourages such shopping, it is unlikely that the overall availability of cremation will decline even if individual firms decide to stop offering it.

D. *Sections 453.3(c)–(f) (misrepresentations other than embalming or casket for cremation).* These provisions address a variety of factual misrepresentations and failures to disclose material information. Specifically:

(i) Section 453.3(c) prohibits funeral providers from claiming that laws or cemetery regulations require the purchase of outer burial containers if they do not. The section also requires that funeral providers disclose this information to consumers by means of a statement on the outer burial container price list.

(ii) Section 453.3(d) is a general prohibition against misrepresentations of requirements imposed by federal, state, or local laws or by cemetery or crematory regulations. To decrease the frequency of such misrepresentations, the provision requires that funeral providers briefly describe in writing any requirements orally represented to a customer.[360]

(iii) Section 453.3(e) prohibits two types of false claims about product characteristics. First, it prohibits funeral providers from claiming that funeral goods or services can delay decomposition for a long-term or indefinite time. Second, it prohibits claims that funeral goods (primarily caskets and outer burial containers) will protect the body from gravesite substances (such as water) if they cannot.

(iv) Finally, § 453.3(f) prohibits funeral providers from claiming that they are billing their customers at cost for items purchased for the customer from other persons ("cash advance items"), *e.g.*, flowers or obituary notices, if this is not the case. Correspondingly, the Section requires that funeral providers disclose in writing that they charge for their services in obtaining cash advance items if they do.

Unlike the three sets of provisions described in the immediately preceding sections, these provisions do not address interrelated problems. However, these provisions operate in similar ways to address their discrete problems. For this reason, their benefits and costs can be described together.

1. *Benefits.* With the partial exception of the provision on cash advance items, all of the misrepresentation provisions produce benefits in identical ways: They reduce the economic injury which consumers suffer when misrepresentations or failures to disclose material information induce consumers to purchase unnecessary products. Such losses can be substantial. For example, burial vaults range in price from $190 to $1,500.[361] If a consumer is told falsely that such items are required by law or cemetery regulations, the economic injury can thus be considerable. Even if the cemetery does, in fact, require use of some sort of outer burial container, misrepresentations about such requirements can still cause substantial economic losses to consumers. Cemeteries do not require use of burial vaults *per se*. They permit, alternatively, the use of grave liners, which range in price from $55 to $180. *See* Part II(B)(3)(a), *supra*, at note 175. The difference between this price and the price of a burial vault represents economic injury to a consumer who would have purchased a grave liner if told of the option to do so. Similarly, a consumer who purchases a "sealer" casket (one which keeps out water and other gravesite substances) in the mistaken believe that such a casket will preserve the body may pay $300 to $500 above the price for comparable caskets which are not sealers.[362] However, the merchandise will not perform the function for which a premium price was paid. By preventing misrepresentations and providing accurate information to consumers through disclosures, § 453.3(c)–(e) help ensure that consumers only pay for items which are truly necessary or desired by the consumer for the arrangements selected or which have a genuine ability to perform in the manner described.

The provision on cash advance items also can save consumers money, although in a slightly different manner. Section 453.3(f) helps ensure that consumers are told if they are being charged an amount above and beyond the funeral provider's stated fee for professional services to obtain cash advance items. The consumers then may elect to obtain the items directly and save on the service fee. While these savings would vary depending on the amount of the funeral provider's surcharge, they could be substantial.[363]

2. *Costs.* With the exception of § 453.3(d) the costs of these provisions are virtually nonexistent. They impose only two types of obligations on funeral providers. First, most provisions require that funeral providers prepare standard preprinted (or written) disclosures for inclusion on one of the price lists or the statement which the rule requires. However, these disclosures simply can be copied from the Commission's model forms. Second, the provisions require that funeral providers cease to make certain misrepresentations. This does not require funeral providers to take any affirmative steps or to incur corresponding compliance costs.

Section 453.3(d) is somewhat different from the rest of the provisions because it also requires that funeral providers briefly describe in writing any legal or cemetery requirements which they represent orally to a customer. The amount of time to do so can be expected to vary from one arrangement to another. However, it will be largely

[358] Blackwell, Appendix B of prepared stmt. D.C. Ex. 29.

[359] *Cf.* S. Shavell, Pro. Economics, Tx 11, 909, 11,924.

[360] Of course, funeral providers desiring to make misrepresentations without detection might consider simply not writing such misrepresentations down. However, the rule requires a preprinted disclosure on the statement of goods and services selected informing consumers that oral claims about legal or cemetery requirements also will be noted in writing. If this does not occur, that fact alone would serve to alert consumers that something was amiss.

[361] *See* Part II(B), *supra*, at note 179.

[362] *See* 1978 Staff Report, *supra* note 9, at 292.

[363] The National Funeral Directors Association's 1977 annual survey of funeral home economic data revealed a 5% difference between the reported income attributable to cash advance items and the corresponding expense figure. This statistic suggests an average national service charge equal to 5% of the cost of cash advance items. The total mark-up amounts to nearly $16,000,000. 1977 Statistical Abstract, *supra* note 191.

within the funeral provider's own control, since statements need not be described in writing unless the funeral provider elects to make them orally in the first place. At most, it might involve a brief description of an embalming regulation and a cemetery requirement. In many situations it would not even be necessary to describe the cemetery requirement, if the customer expressed a desire to purchase an outer burial container for other reasons. Thus, the overall time necessary to comply with § 453.3(d) should be small.

E. *Section 453.6 (recordkeeping requirement).* Section 453.6 of the rule requires that funeral providers keep a copy of each nonidentical casket price list, outer burial container price list, and general price list disseminated to customers as well as a copy of each statement disseminated to customers. The provision does not directly remedy specific abuses. Rather, it is a remedial requirement which will help end the unfair and deceptive practices identified in § 453.2 and § 453.3 of the rule. It will simplify rule enforcement by enabling Commission staff to examine written records rather than having to conduct more time-consuming oral interviews to detect rule violations.

1. *Benefits.* As noted above, the recordkeeping provision will benefit consumers by helping to ensure compliance with the substantive provisions of the rule. As part of its enforcement program, the Commission will check the records of individual funeral homes to ensure that the price lists and statements required by the rule are complete. Since most of the information which the rule requires be given to consumers will be contained on the price lists and statement of services selected, availability of those documents for inspection will make it possible to detect rule violations efficiently and thus to enforce the rule effectively. The recordkeeping provision will thereby have substantial deterrent value.

The principal alternative to a recordkeeping provision would be to use consumer complaints to detect rule violations. However, evidence on the rulemaking record shows that the frequency with which consumers complain about problems in this area does not appoach the frequency with which they occur.[364] In part, this absence of complaints is attributable to the fact that the experience of making funeral arrangements is unpleasant, so that consumers are anxious to put the experience behind them rather than to relieve it by registering a complaint. In part, the lack of complains also is attributable to the fact that consumers are not sufficiently informed to be aware that any improper practices have occurred.

To a considerable extent, therefore, the Commission will need to rely on its own resources to monitor compliance with the rule. The recordkeeping requirement significantly increases the effectiveness of such monitoring by requiring that a substantial majority of the information which the rule requires to be disclosed is readily available for examination by Commission officials.

2. *Costs.* The compliance burdens attributable to Section 453.6 are the tasks of: (1) Storing forms; and (2) removing forms from storage. The amount of time which would be required to perform these functions would depend on the number of funerals arranged yearly by a funeral provider. However, the Commission estimates that the amount of time required to comply with the provision will average under one hour per year for individual funeral providers.[365]

V. Other Economic Issues Raised in the Proceeding

In this section of the regulatory analysis, the Commission discusses two economic issues not specifically addressed in the analysis of the costs and benefits for particular rule provisions. One issue is the general effect of the rule on consumers and small businesses. The other issue is whether or not itemization will cause funeral prices to rise.

A. *Effects of the rule on small businesses and consumers.* There are approximately 22,000 funeral providers in the United States.[366] A 1973 report by the U.S. Department of Commerce indicates that most have a small payroll, with 80% employing seven or fewer persons.[367] Trade association statistics show that in 1972, the average number of deaths per funeral establishment was ninety-four,[368] or fewer than two a week, although actual case volume varies greatly.[369] These statistics and others are consistent with a conclusion that funeral establishments are primarily small businesses.

Thus, it is evident that the primary impact of the rule will be on small businesses. The Commission anticipates that the impact of the rule will be primarily manifest in three areas. First, compliance costs will slightly increase funeral providers' business expenses. The review of the rule's costs and benefits in Part IV indicates, however, that compliance costs will not be significant. Most would be one-time costs attributable to initial preparation of the price lists and "statements of funeral goods and services selected" required by the rule. The only potentially ongoing compliance costs would be those involved in updating the price lists, providing the general price list for retention to customers, and retaining records for a period of one year. There is no reason, however, to believe that these costs would be anything more than minor.

Indeed, evidence on the rulemaking record confirms the fact that compliance costs would be negligible.[370] For example, a survey on the subject of compliance costs,[371] authorized by the Commission, concluded that the cost of complying with the rule would not be significant. These results derived from direct queries to funeral providers about the difficulty they would have had complying with the 1975 version of the funeral rule. In-depth interviews were conducted at a variety of different funeral homes in the Atlanta area, including urban and rural, large and small firms. Compliance costs for the 1975 rule version, according to the survey, were not significant for the industry members surveyed. Even so, the Commission has subsequently revised the rule to futher reduce compliance costs.

Additional evidence that the rule would not be burdensome comes from the expressed views of two of the major funeral trade associations. These associations proposed an alternative rule virtually identical to the final rule promulgated by the Commission with

[364] *See, e.g.*, 1978 Staff Report, *supra* note 9, at 452–60.

[365] The calculations which resulted in this figure are described in a "Supporting Statement" which the Commission submitted to the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980. *See* Letter from the Commission, to the Honorable David A. Stockman, (March 8, 1982).

[366] 1978 U.S. Industrial Outlook 463.

[367] U.S. Department of Commerce, [1973] Country Business Patterns, VI–A–45, at 28.

[368] *See House Small Business Subcomm. Hearings, supra* note 30, at 65, 75–76 (testimony of H. Raether).

[369] *See, e.g.* Kissel, *supra* note 35, at 47–49 (25–500 funerals per year); and F. Bates, National Selected Morticians, Tx 12,580 (75–5,000 funerals per year).

[370] In reaching this conclusion, the Commission is mindful that some participants felt compliance costs would be significant. Thus, trade associations and individual funeral providers typically expressed concern about compliance costs. *See, e.g.*, National Funeral Directors Association, Post-Record Comment, XIV–848, at 609. On the other hand, consumer groups and individual consumers expressed views that compliance costs would not be substantial. *See, e.g.*, Post-Record Comment, Consumer Federation of America, XIV–869, at 3. The Commission has considered all such views in reaching its own determination.

[371] R. Perry, MacFarlane & Co., Tx 9,148.

the exception of a provision for use of an alternative price disclosure system.[372] In submitting their proposal, the trade associations noted that such a rule would not be unduly burdensome to funeral providers.[373]

The second effect of the rule upon small businesses will be increased price competition, which could have a positive impact on prices in several ways. First, competition induced by greater price information could serve actually to reduce prices as price sensitivity by funeral consumers is increased—or, at least, competitive pressures could place a downward pressure on future price increases. Second, greater price information may serve to shift some consumers away from higher priced sellers to lower priced providers, thereby reducing overall consumer expenditures (and consequently the mean price). Both of these predicted results have in fact occurred in other markets where the Commission has acted to infuse greater price information.[374] Given the relatively fixed demand for funeral services, increased competition will likely lead to an actual reduction in total funeral expenditures, or at least a substantial reduction in the rate of growth. Third, several individual rule provisions will eliminate practices which induce consumers to purchase certain goods and services through misrepresentations or failures to disclose material facts. All of this will mean a loss of revenues to funeral providers. Such revenues are, however, attributable to deceptive practices or to practices which foster noncompetitive market conditions. The loss of such revenues to funeral providers will enable the economy to allocate them to more productive users.

Indeed, these lost industry revenues represent the principal benefit which the rule will provide to consumers. As the discussion in Part IV indicates, the total revenues generated by unfair and deceptive industry practices are substantial. Thus, the Commission anticipates that the rule will produce significant benefits to consumers by allowing them to save on expenses. These savings will much more than offset any price increase which might be attributable to the costs of complying with the rule.

In the Commission's view, these are the only principal effects which the rule will produce for consumers and funeral providers. In concluding this, the Commission rejects the view expressed during the rulemaking proceeding that the rule will cause the funeral industry to become dominated by large firms or chains.[375] Those firms which meet a specific demand—such as serving a small community or a particular racial, ethnic, or religious group—are unlikely to lose business because of generally increased competition.[376] The Commission does recognize, however, that there may be some increase in concentration within the industry resulting from the increased competition. The evidence suggests that there is substantial unused capacity in the funeral market. Notwithstanding this excess capacity and low utilization rates, the absence of competition has permitted inefficient sellers to remain in the market. To the extent that the rule achieves its intended effect, inefficient providers will have to change their operations to become more efficient or risk going out of business. It would be expected, therefore, that some inefficient businesses, including inefficient small businesses, will suffer an adverse competitive impact.

B. *The Effects of "Itemization" Upon Funeral Prices.* One of the designated issues discussed during the rulemaking proceeding was whether mandatory itemization forces up prices.[377] After reviewing the evidence, the Commission concludes that mandatory itemization presents opportunities for raising prices but that it does not, by itself, require funeral directors to raise prices.

The Commission has discerned six different arguments presented in support of the view that itemization would raise prices. Each is discussed below.

1. *Consumers will choose more.* Some funeral providers and others commented or testified that itemization will raise prices because consumers will buy more. It was suggested that when consumers see items broken out on a list, they find the prices so reasonable that they end up choosing more than they would if the items had been packaged.[378]

The record contains no empirical evidence supporting or refuting this claim. However, even if itemization had the effect of allowing consumers to choose more than they would have under itemization, that result would not be a reason not to require itemization. It is evident that such a result would be the operation of consumer choice, not any result of increased costs or marketplace distortions introduced by the rule. The purpose of the rule is to enhance consumer choice. If some consumers choose to buy more, with a clear understanding of the price associated with that choice, that is not a concern to the Commission. Other consumers will have the right to choose less.

2. *Prices will be changed.* Other funeral directors testified that if they were required to examine their pricing structure as a result of having to compile a new price list, many would decide that the prices that they had been charging in the past were too low and that the prices ought to be raised.[379]

Again, such an argument is not of concern to the Commission. The argument is not that the rule will impose costs which must be passed on to consumers in the form of higher prices, but simply that funeral directors have decided to increase profits by raising prices. Funeral directors are, of course, perfectly free to do that at any time. The rule has nothing to do with such a decision other than the fact that it requires funeral directors to think about prices in compiling a new price list. While funeral directors may choose to raise their prices in order to increase their profits, it is certainly not a necessary result of the rule.

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[372] This alternative is discussed in Part III(B)(4), *supra*.

[373] Letter of D. Murchison to A. Kramer, XVI-159, at 60. The principal difference between the rule and the proposal of the trade associations is that their proposal permitted a package price with disclosed discounts for parts of the package not selected.

[374] Following promulgation of the Commission's trade regulation rule on the Advertising of Ophthalmic Goods and Services, 16 CFR Part 456, (permitting price advertising) available evidence indicates that the rate of inflation for eyeglasses and eye examinations has been substantially lower than other medical care services and other consumer goods and services, and in some categories, such as soft contact lenses, average prices have actually declined.

For example, in the year following promulgation of the Eyeglasses rule, prices for soft contact lenses actually decreased from a 1978 average of $256 to a 1981 average of $204. (Includes full package price for eye exam, lenses, fitting, care kit and follow-up care. Source: Health Products Research, Inc., Morristown, N.J.; Prices are those collected in an annual consumer survey.) From October, 1978 to October, 1979, the unadjusted percentage price increase for eyeglasses (6.5), was less than for all consumer goods (12.2), durable goods (9.6), or medical care (9.4). [U.S. Department of Labor, Bureau of Labor Statistics, CPI Detailed Report (Oct. 1979)].

[375] *See, e.g.*, R. Sargent, New Hampshire funeral director, II-A-437; J. Couch, Illinois funeral director, Tx 2.931-32; J. Kerr, Jr., Sec'y-Treas., Kentucky FDA, Tx 3.036; R. Coats, Pres., Michigan FDA, Tx 3.755.

[376] *See, e.g.*, S. Shavell, Prof. Economics, Tx 11.882-83.

[377] 41 FR 7789 (1976) (Final Notice of Rulemaking, Designated Issue 28).

[378] *See, e.g.*, NSM, "Progressive Mortuary Methods," D.C. Ex. 20; NSM, "Itemization May Increase Your Total Profit Margin," D.C. Ex. 20.

[379] *See, e.g.*, Anderson, Pres., Utah FDA, Tx 6149; "The Folly of Itemization," *Mortuary Management*, Jan. 1976, at 6, III-I-113; Oral Presentation of Tom Clark, general counsel of NFDA, Feb. 28, 1979 (154; 158-159); NFDA Post-Record Comments, XIV-848, at 490; Report of the Presiding Officer, *supra* note 8, at 101.

3. *Compliance Costs.* Some funeral providers [360] commented that the direct compliance costs imposed by the rule will be passed on in the form of higher prices to the consumer.

For the reasons discussed above, the Commission believes that the direct compliance costs will be minimal. While such costs will undoubtably be passed on to consumers, rather than absorbed by funeral homes,[361] such increases should be as modest as the compliance costs themselves.

4. *The "economies of packaging argument".* Other funeral providers appear to argue that an identical set of goods and services will inherently cost more on an itemized basis than on a packaged basis and that the higher cost will be passed on in the form of higher prices to consumers. In other words, the argument is that there are "economies of packaging" which result in a lower cost for packaged services and merchandise. The analogy is often made to the "blue plate special" versus the "a la carte" menu.[362]

There are economies of packaging for many goods and services in our economy. Some products can be offered more cheaply to consumers by being packaged because it costs less to produce them in a packaged form than in an unpackaged form.[363]

There is no evidence to suggest, however, that there are any significant economies of packaging in funerals. The cost to the funeral director of offering a set of goods and services is much the same whether the parts are offered separately or together. The only potential savings in packaging is the savings in time that it may take to discuss individual requests under itemization.[364]

Even if there were modest cost differences, however, the rule expressly permits funeral directors to offer packages as long as they also offer goods and services on an itemized basis. Therefore, if there are any savings in packages, they can be passed on to those consumers who are interested in package prices. Consumers who are not interested in packages may have to pay somewhat more in order to buy on an itemized basis, but that is their choice. Further, any increase in price for the total package may be more than offset by the consumer's ability to decline unwanted items.

5. *The effect of declination.* The remaining arguments do not claim that itemization will affect the funeral director's cost, but instead recognize that itemization may result in a shift of prices presently charged. The arguments assume that overall revenues and overall profits will remain unchanged.[365]

Some funeral providers and others argued that if a substantial number of consumers decline items that would ordinarily be included in the package, in order to retain the same revenue and profit level, other prices would have to be increased to make up for the lost revenue.[366]

The rule does not regulate how funeral directors determine prices. Consequently, funeral directors may shift prices and set prices for parts of the funeral which they believe are appropriate. Some funeral directors may well choose to charge more for items which consumers are less likely to decline in order to make up for revenue lost on items consumers are more likely to decline. Other pricing strategies are also possible. As a resut, in the short term, there is the possibility that some consumers will be paying more, while others are paying less, than they would under a package pricing scheme.

The argument that some prices will go up depends, however, on the assumption that funeral directors will simply be able to recover any lost revenue simply by raising prices. As price competition increases, such a strategy may not be possible. Instead competition will generate pressure on funeral directors to become more efficient and to cut costs as the primary means of retaining profitable levels, rather than by raising prices. Further, to the extent that itemization allows consumers to choose less than traditional funerals, the increased demand for less than full funerals may stimulate innovative new services and allow the market to respond. As a result, the long run effect of itemization is expected to drive all prices down to the competitive level.

6. *The effect of itemization on the lowest-priced package funeral.* The major argument advanced by funeral providers and trade associations however, is that itemization will necessarily cause the price of the lowest-priced package funerals to increase. Again, the argument assumes that revenue and profitability will remain the same: therefore, the argument also assumes that the price of the *average* package funeral will stay the same, while the price of the highest-priced package funeral will actually decrease.[367]

Under the present system of package pricing, many funeral directors apparently determine prices using a "graduated recovery" approach.[368] Basically, this method means that packages are priced so that buyers of higher-priced funerals are contributing proportionately more to overhead and fixed costs than are buyers of lower-priced package funerals. Since the only variable between a higher-priced funeral and a lower-priced funeral is the casket selected,[369] another way of explaining this method is that buyers of the low-priced funerals are paying more than the buyer of the low-priced funeral for the identical services. "Graduated recovery" therefore allows the funeral provider to lower the price of the package funeral on the low-price end since any loss is made up by raising prices on the high-priced end.[370] In essence, buyers of higher-priced package funerals are subsidizing buyers of lower-priced package funerals.[371]

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[360] *See, e.g.*, R. Dyer, New York Funeral Director, Tx 1570–71; J. Caran, Pres., New York FDA, Tx 132.

[361] Profit margins in the funeral industry are general small and demand is not sensitive to price. Blackwell, Comprehensive Outline, D.C. Ex. 29, at 14, 20. As a result, any increases in costs will undoubtedly be fully passed on to consumers.

[362] In fact, the "economies of packaging" argument is never made explicitly, but only by analogy to situations in which such economies exist, *e.g.*, the blue plate special. *See, e.g.*, *House Small Business Subcomm. Hearings*, *supra* note 30, at 71 (testimony of H. Raether, Exec. Dir. NFDA).

[363] To take an obvious example, it is often cheaper to buy a radio on a car when it comes as standard equipment than to order it separately, since the manufacturer can cut costs by simply including a radio in every car. The manufacturer can buy the radios at a lower price because it is buying them in greater volume and can cut labor costs by installing radios on all cars rather than on some cars but not on others.

[364] The record shows that the great majority of the costs of funeral homes are fixed costs for overhead which will not vary whether funerals are offered on a package basis or an itemized basis. *See, e.g.*, Blackwell, D.C. Ex. 29, Appendix B, Exhibits 5–7.

[365] Blackwell, D.C. Ex. 29, Comprehensive Outline, Exhibits 6–8.

[366] NFDA Post-Record Comment, XIV–646; *id.*

[367] Dr. Alfred Rappaport "The Expected Impact of Fragmented Quotation on Funeral Service Prices," III–1–3; NSM Post-Record Comment, XIV–[illegible], at [illegible] 107.

[368] *Id.*

[369] 1978 Staff Report, *supra* note 9, at 393.

[370] Some funeral providers indicated that the desire to create subsidized low-priced funerals stemmed from the funeral director's belief that a full package funeral should be affordable even in the low income range, so that everyone can afford a full, dignified funeral. *See, e.g.*, NFDA Post-Record Comment, XIV–646. Other commentators note however, that such a pricing strategy could increase profits. *See, e.g.*, Dr. Michael Lawson, D.C. Ex. 22, at 14; Shavell, D.C. Ex. 13, at 18.

[371] Some have suggested that this undisclosed subsidy is improper in that buyers are not paying the "the true cost" for the items bought. Others have suggested that it is not the funeral director's role to re-allocate income by subsidizing the funerals of lower-income consumers with the funerals of high-income consumers. And others have commented that even if such a goal is appropriate, there is no guarantee that graduated recovery achieves that result. Poorer consumers may often be the consumers who buy the more expensive funeral. (Evidence in the record supports the claim for example, that blacks buy more expensive funerals

The rule requires the prices of each part of the package to be disclosed separately. Funeral providers argue that this means that they will be required to charge all buyers the same price for the same services.[302] Since this would prevent funeral directors from charging buyers of higher-priced package funerals more than buyers of the lower-priced funeral for the same item, it would end the present subsidy of the buyers of the lower-priced funeral. As a consequence, it is argued that the prices of the lowest-priced funerals would have to increase.

The Commission recognizes that funeral directors may chose to respond to the rule by raising the prices of the lowest-priced funeral. The Commission does not believe, however, that this result is required by the rule. The rule does not preclude the use of "graduated recovery." Under one alternative format, for example, funeral directors may quote a single price for professional services and caskets. That price can be structured to achieve a graduated recovery effect. Even under the alternative list, funeral directors can price caskets to achieve the same result.

Nevertheless, some funeral directors may choose to raise the prices of the lowest-priced package funeral. The impact of this change, however, may not be great for two reasons. First, such increases may be offset by savings which consumers can achieve by declining unwanted items. Second increased price compatition will generate pressure to keep prices down. Finally, nothing in the rule will prevent funeral directors from meeting any perceived social responsibility to make services available at nominal charges for welfare cases or from charging special lower prices for infant deaths or other special cases.

The evidence submitted during the rulemaking proceeding is consistent with the Commission's finding that while itemization presents opportunities for funeral providers to raise prices, which some funeral directors have in fact done, it is not necessarily required by the rule itself. Many funeral directors testified that prices increased after itemization,[303] while others testified that their prices did *not* increase.[304]

VI. Other Matters

A. *Effective Dates.* Because of the legislative review provisions set forth in Section 21 of the FTC Improvements Act of 1980, the effective date of this rule is most appropriately tied to the conclusion of the legislative veto period.[305] Under the terms of the statute, that period runs for ninety calendar days of continuous legislative session.

Industry members have been on notice since July, 1981, of the terms of the rule. In addition, the rule and this statement will be available during the legislative review process, which is likely to take at least four months. We have determined that the rule should become effective three months after conclusion of Congressional review. We believe that three months is a sufficient amount of time both the industry and consumers to become familiar with the requirements of the rule given the opportunity to become familiar with the rule during the legislative review. The Commission will accept petitions for exemption, pursuant to § 453.9 of the rule, during this period.

B. *Mandatory Review.* Section 432.10 requires the Commission to initiate a rulemaking amendment proceeding, pursuant to Section 18(d)(2)(B) of the Federal Trade Commission Act, within four years after the effective date of this rule, to determine whether the rule should be amended or terminated. Under the terms of Section 18(d)(2)(B) and the Commission's rules of practice, an amendment proceeding will provide full opportunity for all interested parties to provide data and views on the question of whether the rules should be modified or terminated, and will include the rights available under a Magnuson-Moss proceeding to limited cross-examination.

In addition, the Commission is required to decide, within eighteen months after the rulemaking amendment proceeding has been initiated, whether the rule should be modified or terminated.

The Commission has established this early review procedure to ensure that there is a need to continue the rule after it has had an opportunity to work in the marketplace. If the rule operates as expected, there should be increased competition in the market which may obviate the need for continued federal intervention. Requiring an early amendment proceeding commits the Commission to conducting a public proceeding, open to full participation, to review the operation of the rule and its effect. At this time, the Commission expects to have data from its own internal impact evaluation to aid in the consideration of these issues. The Commission will consider whether the rule should be modified or terminated at that time.

While the rule is expected to increase price competition, the Commission cannot say on the basis of the present record when the rule's impact will begin to be felt. For a number of reasons, the effect of the rule may take longer than in other industries.[306] Nevertheless, the Commission is committed to reviewing, at an early date, whether the rule appears to be operating as expected or whether some modification is required. If the marketplace problems addressed by the rule appear to be largely solved by increased competition, the Commission will consider terminating the rule at that time.

Accordingly, Title 16 of the Code of Federal Regulations is amended by the addition of new Part 453.

PART 453—FUNERAL INDUSTRY PRACTICES

Sec.

453.1 Definitions.

453.2 Price disclosures.

453.3 Misrepresentations.

than educated white consumers, *see* CalCAG Study, *supra* not 247, at 30–31).

The Commission does not suggest that such subsidization is improper, nor does it believe that it is the Commission's function to judge the social value of such a pricing scheme. The Commission recognizes that many items in our economy have a pricing structure in which some items contribute proportionately more to profit than to other items.

[302] This result does not follow directly from the rule, but from the funeral director's reluctance to disclose different prices to different people for the same items. A Rappaport, III–I–111, at 10–11; Oral Presentation of Tom Clark, GC, NFDA, at 154.

[303] *See, e.g.*, F. Galante, New Jersey funeral director, Tx 1734–35; T. Sheehan, Pres., New Jersey FDA, Tx 456–57; R. Johnson, Indiana funeral director, Tx 12,464–66; J. Wylie, Exec. Director, Florida FDA, Tx 8714–17; H. Coates, member, State Bd. of Embalmers and Funeral Directors of Kentucky, Tx 3978–79; M. Heitner, Minnesota funeral director, Tx 3340–41. *See also*, NSM comment on Revised Rule, XVI–159, at Appendix B.

[304] *See, e.g.*, G. Primm, Pres., Empire State FDA (NY), Tx 284; N. Panepinto, Director, New York, Bureau of Funeral Directing, Tx 300; S. Hausmann, Exec. Director, New Jersey FDA, Tx 533; M. Damiano, New Jersey funeral director, Tx 1311; C. Whigham, New Jersey funeral director, Tx 768; M. Waterston, Minnesota funeral director, Tx 3745–46; W. Kinder, Pres., Minnesota FDA, Tx 3282; P. Hultquist, California FDA, Tx 7602. *Cf.* J. Wylie, Exec. Director, Florida FDA, Tx 9723–24.

[305] The present legislative review provision is scheduled to terminate on September 30, 1982. If no other legislative review process applies after that date, the legislative review process will be considered concluded for the purposes of determining the effective date of the rule.

[306] As discussed previously, the purchase of a funeral is infrequent. Consequently, many consumers will not have exposure to price lists or other provisions of the rule for many years. Thus the stimulus for price competition, at least initially, is likely to come from sellers rather than buyers. The extent to which new entrants begin to compete on the basis of price, or which existing sellers begin to compete or advertise prices, is likely to determine how quickly competition begins to effect the marketplace. Considering the industry's traditional opposition to price advertising, and other constraints on price competition and barriers to entry, it is difficult to predict how quickly such competition will emerge.

ec.
53.4 Required purchase of funeral goods or funeral services.
53.5 Services provided without prior approval.
53.6 Retention of documents.
53.7 Comprehension of disclosures.
53.8 Declaration of intent.
53.9 State exemptions.
53.10 Mandatory review.

Authority: Sec. 6(g) 38 Stat. 721 (15 U.S.C. 6(g); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552).

453.1 Definitions.

(a) *Accounting year.* "Accounting year" refers to the particular calendar year or other one year period used by a funeral provider in keeping financial records for tax or accounting purposes.

(b) *Alternative container.* An "alternative container" is a non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of cardboard, pressed-wood, composition materials (with or without an outside covering) or pouches of canvas or other materials.

(c) *Cash advance item.* A "cash advance item" is any item of service or merchandise described to a 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, the following items: Cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.

(d) *Casket.* A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, or like material, and ornamented and lined with fabric.

(e) *Commission.* "Commission" refers to the Federal Trade Commission.

(f) *Cremation.* "Cremation" is a heating process which incinerates human remains.

(g) *Crematory.* A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.

(h) *Direct cremation.* A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

(i) *Funeral goods.* "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

(j) *Funeral provider.* A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

(k) *Funeral services.* "Funeral services" are any services which may be used to care for and prepare deceased human bodies for burial, cremation or other final disposition; and arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

(l) *Immediate burial.* An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

(m) *Outer burial container.* An "outer burial container" is any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

(n) *Person.* A "person" is any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

(o) *Services of funeral director and staff.* The "services of funeral director and staff" are the services, not included in prices of other categories in § 453.2(b)(4) which may be furnished by a funeral provider in arranging and supervising a funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits and placing obituary notices.

(p) *Unfinished wood box.* An "unfinished wood box" is an unornamented casket made of wood which does not have a fixed interior lining.

§ 453.2 Price disclosures.

(a) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) *Preventive requirements.* To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(b)(1), funeral providers must:

(1) *Telephone price disclosures.* (i) Tell persons who call the funeral provider's place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services are offered, that price information is available over the telephone.

(ii) Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists in paragraph (b)(2) through (4) of this section which reasonably answers the question and any other information which reasonably answers the question and which is readily available.

(2) *Casket price list.* (i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the 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. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. *Provided however,* that funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is required by this paragraph (b)(2)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) *Outer burial container price list.* (i) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In

lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. *Provided however*, that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is required by this paragraph (b)(3)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) *General price list.* (i) Give a printed or typewritten price list for retention to persons who inquire in person about funeral arrangements or the prices of funeral goods or funeral services. When people inquire in person about funeral arrangements or the prices of funeral goods or funeral services, the funeral provider must offer them the list upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services. This list must contain at least the following information:

(A) The name, address, and telephone number of the funeral provider's place of business;

(B) A caption describing the list as a "general price list";

(C) The effective date for the price list; and

(D) In immediate conjunction with the price disclosures required by paragraph (b)(4)(ii) of this section, the statement: "This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services, flowers, and newspaper notices. The prices for those items will be shown on your bill or the statement describing the funeral goods and services you selected."

(ii) Include on the 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:

(A) Forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(B) Receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(C) The price range for the direct cremations offered by the funeral provider, together with: *(1)* A separate price for a direct cremation where the purchaser provides the container; *(2)* separate prices for each direct cremation offered including an unfinished wood box or alternative container; and *(3)* a description of the services and container (where applicable), included in each price;

(D) The price range for the immediate burials offered by the funeral provider, together with: *(1)* A separate price for an immediate burial where the purchaser provides the casket; *(2)* separate prices for each immediate burial offered including a casket or alternative container; and *(3)* a description of the services and container (where applicable) included in that price;

(E) Transfer of remains to funeral home;

(F) Embalming;

(G) Other preparation of the body;

(H) Use of facilities for viewing;

(I) Use of facilities for funeral ceremony;

(J) Other use of facilities, together with a list of facilities provided for any quoted price;

(K) Hearse;

(L) Limousine;

(M) Other automotive equipment, together with a description of the automotive equipment provided for any quoted price; and

(N) Acknowledgment cards.

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b)(2)(i) of this section; and

(B) Either of the following:

(1) The price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b)(3)(i) of this section; and

(C) Either of the following:

(1) The price for the services of funeral director and staff, together with a list of the principal services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)"; or

(2) The following statement: "Please note that a fee for the use of our services is included in the price of our caskets. Our services include (specify)." The statement must be placed on the general price list together with casket price range, required by paragraph (b)(4)(iii)(A)*(1)* of this section, or together with the prices of individual caskets, required by (b)(4)(iii)(A)*(2)*.

(5) *Statement of funeral goods and services selected.* (i) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(B) Specifically itemized cash advance items. (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 be given and a written statement of the actual charges shall be provided before the final bill is paid.); and

(C) The total cost of the goods and services selected.

(ii) The information required by this paragraph (b)(5) of this section may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.

(6) *Other pricing methods.* Funeral providers may give persons any other price information, in any other format, in addition to that required by paragraph (b) (2), (3), and (4) of this section so long as the statement required by paragraph (b)(5) of this section is given when required by the rule.

§ 453.3 Misrepresentations.

(a) *Embalming Provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§ 453.4(b)(1) and 453.5(2), funeral providers must:

(i) Not represent that a deceased person is required to be embalmed for

direct cremation, immediate burial, a funeral using a sealed casket, or if refrigeration is available and the funeral is without viewing or visitation and with a closed casket when state or local law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by § 453.2(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement which does not require you to pay for it, such as direct cremation or immediate burial."

(b) *Casket for cremation provisions.* (1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires a casket for direct cremations;

(ii) Represent that a casket (other than an unfinished wood box) is required for direct cremations.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(a)(1), funeral providers must place the following disclosure in immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an unfinished wood box or an alternative container. Alternative containers can be made of materials like heavy cardboard or composition materials (with or without an outside covering), or pouches of canvas." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(c) *Outer burial container provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;

(ii) Fail to disclose to persons arranging funerals that state law does not require the purchase of an outer burial container.

(2) *Preventive requirement.* To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by § 453.2(b)(3)(ii), or, if the prices of outer burial containers are listed on the general price list, required by § 453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, no state or local law makes you buy a container to surround the casket in the grave. However, many cemeteries ask that you have such a container so that the grave will not sink in. Either a burial vault or a grave liner will satisfy these requirements."

(d) *General provisions on legal and cemetery requirements.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that federal, state, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the deceptive acts or practices identified in § 453.3(a)(1), § 453.3(b)(1), and § 453.3(c)(1), funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by § 453.2(b)(5)) any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) *Provisions on preservative and protective value claims.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) *Cash advance provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, funeral providers must place the following sentence in the general price list, at the end of the cash advances disclosure, required by § 453.2(b)(4)(ii)(C): "We charge you for our services in buying these items," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item.

§ 453.4 Required purchase of funeral goods or funeral services.

(a) *Casket for cremation provisions.*—(1) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket other than an unfinished wood box be purchased for direct cremation.

(2) *Preventive requirement.* To prevent this unfair or deceptive act or practice, funeral providers must make an unfinished wood box or alternative container available for direct cremations, if they arrange direct cremations.

(b) *Other required purchases of funeral goods or funeral services.*—(1) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part.

(2) *Preventive requirements.* (i) To prevent this unfair or deceptive act or practice, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by § 453.2(b)(4)(ii) and (iii): "The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected."

Provided, however, That if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our services" between the second and third sentences of the statement specified above herein; and

(B) Place the following disclosure on the statement of funeral goods and services selected, required by § 453.2(b)(5)(ii): "Charges are only for

those items that are used. If we are required by law to use any items, we will explain the reasons in writing below."

(ii) A funeral provider shall not violate this section by failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

§ 453.5 Services provided without prior approval.

(a) *Unfair or Deceptive Acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(3) The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) *Preventive requirement.* To prevent these unfair or deceptive acts or practices, funeral providers must include on the contract, final bill, or other written evidence of the agreement or obligation given to the customer, the statement: "If you selected a funeral which requires embalming, such as a funeral with viewing you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

§ 453.6 Retention of documents.

To prevent the unfair or deceptive acts or practices specified in § 453.2 and § 453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in § 453.2(b) (2) through (4), as applicable, for at least one year after the date of their last distribution to customers, and a copy of each statement of funeral goods and services selected, as required by § 453.2(b) (5) for at least one year from the date on which the statement was signed.

§ 453.7 Comprehension of disclosures.

To prevent the unfair or deceptive acts or practices specified in § 453.2 through § 453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner.

§ 453.8 Declaration of intent.

(a) Except as otherwise provided in § 453.2(a), it is a violation of this rule to engage in any unfair or deceptive acts or practices specified in this rule, or to fail to comply with any of the preventive requirements specified in this rule;

(b) The provisions of this rule are sparate and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.

§ 453.9 State exemptions.

If, upon application to the Commission by an appropriate state agency, the Commission determines that:

(a) There is a state requirement in effect which applies to any transaction to which this rule applies; and

(b) That state requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule;

then the commission's rule will not be in effect in that state to the extent specified by the Commission in its determination, for as long as the State administers and enforces effectively the state requirement.

§ 453.10 Mandatory review.

No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceeding.

Dissenting Statement of James C. Miller III, Chairman, Federal Trade Commission on Funeral Rule

I cannot in good conscience go along with a final rule affecting the funeral industry at this time. I do not oppose a rule in principle. Indeed, I've always said that this is an area worthy of Commission investigation. But for the reasons set forth below, I believe that action at this time is ill-advised.

Furthermore, I want to make it clear that I respect the views held by my colleagues on the Commission. This is neither a Republican nor a Democratic issue. It is neither conservative nor liberal. The question is whether the action taken today can be defended. I believe it cannot.

The basic reason for my opposition to today's action is the lack of evidence in the record. That record is woefully inadequate for a proceeding that has lasted 10 years. In my view, the Commission does not have a reliable description of the industry, much less a working knowledge of how it operates. The facts presented are often contradictory, are heavily anecdotal, and may not be representative of industry practices. From what description can be gleaned from the record, two theories seem to fit equally well: (a) That the industry is operating quite effectively, and (b) that the industry is vitiated with market imperfections crying out for governmental intervention.[1]

Nor do we have any basis in the record to conclude that the rule approved today will adequately deal with alleged market imperfections, *assuming* they exist. For example, the requirement that services be "unbundled" can easily be circumvented by funeral directors' simply charging higher prices for services a' la carte. (The point about the price of a new automobile's being far less than the summed prices of all new parts is particularly relevant here.)

Moreover, certain provisions may actually harm consumers. For example, the only empirical evidence we have of the effects of forced unbundling (in Minnesota) suggests increased costs to consumers. Also, the requirement of prior authorization before embalming may well raise costs to consumers, diminish their satisfaction with the overall service, or have both effects.

Because of the paucity of evidence in the record, I believe it is likely the courts would sustain a legal challenge to the rule. This risk could have been mitigated if the Commission had taken my recommendation and had reopened the rulemaking record for the submission of additional evidence. The Commission's own "baseline" study, in particular, should have been entered into the record, even if this would have meant a few months delay while the Commission accepte public comment on it.

Portions of the baseline study seriously challenge the theory of market imperfections that is implicit in the Commission's action. For those who think the baseline study actually supports the Commission's rule, it is ironic that by refusing to admit it into evidence the Commission forgoes the opportunity to use the study's results to support the rule, but enable anyone to use it in challenging the Commission's action.

Beyond the integrity and sufficiency of the formal record—on which of course the Commission's decision must be based—there is one other matter I wish to touch upon

[1] The memoranda of Timothy J. Muris, Director of the Bureau of Consumer Protection, and Robert D. Tollison, Director of the Bureau of Economics, disclose in detail these deficiencies in the record.

briefly. I believe that the Commission's action today will make it considerably more difficult to resist efforts by the "learned professions" to obtain exemption from FTC laws concerning unfairness and deception, and from FTC enforcement of the antitrust laws. Indeed, there is a plausible argument that the objects of the Commission's action—funeral directors—would be exempt under the language already adopted by the Senate Commerce Committee ("Federal Trade Commission Amendments Act of 1982").

In conclusion, I fear that the Commission has deceived a very vulnerable segment of American consumers. The Commission's action is deceptive because it raises expectations of lower prices for funerals and better service, when in fact we have little evidence to believe the rule would have these effects. It is also deceptive because the rule may well be reversed in the courts. As if this were not enough, the Commission's action places in further jeopardy a much more important matter—the Commission's efforts to police anticompetitive, unfair, and deceptive practices in the professions.

In view of the inadequacy of the record, I respectfully dissent from the Commission's action. In the larger view of all that is at stake, I fear that in this case the Commission is showing signs of returning to its errant past of regulating first and asking the right questions later.

[FR Doc. 82-26351 Filed 9-23-82; 8:45 am]

BILLING CODE 6750-01-M

APPENDIX D

federal register

Wednesday
December 9, 1987

Part II

Federal Trade Commission

16 CFR Part 453

Trade Regulation Rule; Funeral Industry Practices; Advance Notice of Proposed Rulemaking

FEDERAL TRADE COMMISSION

16 CFR Part 453

Trade Regulation Rule; Funeral Industry Practices

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission announces its intention to begin a rulemaking amendment proceeding for the trade regulation rule concerning funeral industry practices ("Funeral Rule" or "Rule"). The Funeral Rule requires that the Commission initiate a rulemaking amendment proceeding four (4) years after the effective date of the Rule. The proceeding will address whether the Funeral Rule should remain in effect without changes, or should be amended or repealed. The Commission invites public comment on how the Funeral Rule has affected consumers, funeral providers and others, and what changes, if any, should be made to the Rule.

DATES: Written comments will be accepted until January 25, 1988.

ADDRESS: Written comments should be addressed to the Secretary, Federal Trade Commission, 6th and Pennsylvania Avenue, NW., Washington, DC 20580. All comments should be captioned: "Comment on Advance Notice of Proposed Rulemaking—Funeral Rule, FTC File No. 215-66."

FOR FURTHER INFORMATION CONTACT: Ra'ouf M. Abdullah, Attorney, (202) 326-3024, Service Industry Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Part A—Background Information

This notice is being published pursuant to section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a *et. seq.*, the provisions of Part 1, Subpart B of the Commission's Rules of Practice, 16 CFR 1.7, and 5 U.S.C. 551, *et. seq.* This authority permits the Commission to promulgate, amend and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting Commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45. The Funeral Rule declares that it is an unfair or deceptive act or practice for funeral providers to: (1) Fail to furnish price information to purchasers; (2) require consumers to purchase unwanted and unnecessary items; and (3) embalm a deceased human remains for a fee without authorization. In addition, the Funeral Rule declares it is a deceptive act or practice for a funeral provider to misrepresent: (1) Embalming requirements; (2) cremation requirements; (3) grave vault or grave liner requirements; (4) legal and cemetery requirements; (5) preservation and protective value features of funeral goods and services; and (6) cash advance charges for items paid for by the funeral provider on the consumer's behalf. The Rule sets forth the following remedial measures that must be taken by funeral providers to avoid engaging in the unfair or deceptive acts or practices described above.

Under the Funeral Rule, funeral providers must: (1) Disclose price and other information over the telephone to persons who call the funeral home and inquire about the offerings or prices of funeral goods and services; (2) disclose written price information in the form of a general price list, a casket price list and an outer burial container price list to persons who inquire in person about funeral arrangements or the prices of funeral goods and services;[1] (3) give customers a written statement, after the selection of funeral goods and services, showing prices of each of the items selected, the total price for the funeral, cash advance estimates or actual costs, if known, and any legal, cemetery and crematory requirements that compel the purchase of any items or services for the particular funeral; (4) make truthful representations regarding legal and other requirements that compel the purchase of particular items or services; (5) permit consumers to select and purchase only those goods and services they desire (instead of offering goods and services only in predetermined packages); (6) seek to obtain express permission before embalming the deceased for a fee; (7) refrain from misrepresenting the protective and preservative value of funeral goods and services; (8) disclose whenever they charge a fee for arranging cash advance purchases; and (9) make unfinished wood boxes or alternative containers available for direct cremation, if the funeral provider offers direct cremation.

The Funeral Rule was promulgated on September 24, 1982,[2] and became fully effective on April 30, 1984.[3] A unique feature of the Funeral Rule is its requirement that the Commission initiate a rulemaking amendment proceeding four (4) years after the effective date of the Rule. This provision, set forth in § 453.10 of the Rule, states:

> No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) [of the FTC Act] [4] to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceedings.[5]

Having been duly promulgated, the Rule enjoys a presumptive validity and the Commission need not develop additional evidence to justify retaining the Rule. However, the Commission would require substantial evidence in the rulemaking record to justify amending or repealing the Rule.

Part B—Objectives

The objective of this rulemaking amendment proceeding is to determine whether the Commission's Funeral Rule

[1] The Rule allows funeral providers to place the information from the casket and outer burial container price lists on the general price list. This combined list must be offered to persons who inquire in person about funeral arrangements or the cost of funeral goods and services.

[2] 47 FR 42760 (Sept. 24, 1982).

[3] The Funeral Rule had two effective dates. Those portions of the Funeral Rule that prohibit certain oral or written representation became effective on January 1, 1984. 48 FR 45537 (Oct. 6, 1983). The remainder of the Rule—the portions that impose affirmative obligation on funeral providers—became effective April 30, 1984. *Id.*

N.B. The effective date of § 453.3(b)(1)(ii) of the Rule was changed from January 1, 1984, to April 30, 1984. 49 FR 564 (Jan. 5, 1984).

Because the recordkeeping and disclosure requirements of the Funeral Rule include information collection requirements as defined by the Office of Management and Budget's ("OMB") Paperwork Reduction Act implementing rules, 5 CFR Part 1320, the Commission submitted the Rule to OMB for review. The Funeral Rule's information collection requirements were reviewed and approved by the OMB on December 18, 1984.

At that time the Commission estimated that the Rule imposed a reporting and recordkeeping burden of 177,000 hours on some 22,000 firms. The burden estimate is based on the assumption that each firm that must comply with the Rule would spend approximately seven hours per year making disclosures and 1 hour per year keeping records required by the Rule. These estimates do not include amounts of time and effort by funeral providers that would be spent making disclosures or keeping records that would be done in the ordinary course of business in the absence of any rule.

[4] Section 18(d)(2)(B) of the FTC Act states, in part:

> A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection * * *.

[5] In the Statement of Basis and Purpose for the Funeral Rule ("SBP"), 47 FR 42280, 42299 (Sept. 24, 1982) the Commission states that the early review procedure is designed to ensure that there is a need to continue the Funeral Rule after the Rule has had an opportunity to correct the market defects the Commission identified.

should be continued without change, amended or repealed. To assist the Commission in reaching its determination, the Commission will seek evidence on the following factual issues: (1) Whether the benefits of the Funeral Rule are greater than its costs; (2) whether the present funeral market is sufficiently self-regulating, in conjunction with state and local law, so that the Rule is no longer needed; (3) whether the Rule has operated as expected; and (4) whether the Rule has contributed to an increase in competition in the funeral industry.

Part C—Alternative Actions

The Commission will consider a number of alternatives to leaving the Funeral Rule in effect as it is. This part of the notice discusses several alternatives. One possible alternative would be to repeal the Rule and allow the performance of the funeral industry to be guided by competitive forces and state and local authorities. Another alternative would be to amend or repeal specific provisions of the Rule. A third alternative would be to expand the Rule to cover funeral transactions by persons not presently subject to the Funeral Rule or to cover additional substantive areas. A fourth alternative would be to limit the Rule's coverage to at-need transactions and exclude pre-need arrangements from coverage. In connection with the at-need—pre-need issue, the Commission is considering whether the two markets can be readily distinguished.

At this time, the Commission has not determined whether changes to the Rule are warranted. The following is a list of some of the possible modifications to the Funeral Rule that the Commission will likely consider.

Telephone Disclosure Requirements

The Rule requires funeral providers to disclose that price information is available over the telephone to persons who telephone and ask about prices, terms or conditions. In addition, funeral providers must provide over the telephone any price information requested that is readily available. The Commission anticipated that these provisions would make price information more available to consumers. The Commission is considering whether these provisions have been effective and whether it should amend or repeal the telephone disclosure requirements.

Embalming Provisions

The Rule requires funeral providers to seek to obtain prior, express approval before charging consumers for embalming. Funeral providers are also required to refrain from misrepresenting the need for embalming and must disclose in writing the reasons it is necessary if they represent to consumers that embalming is non-declinable. The Commission is considering whether these provisions have been effective or whether it should consider amending or repealing these embalming provisions.

Anti-Tying Provisions

The Rule prohibits funeral providers from requiring consumers to purchase unwanted items as a condition of purchasing desired items, except as required by law or permitted by the Rule.[6] This provision permits consumers to purchase caskets from providers other than the one performing the funeral. To cover the costs associated with handling consumer-supplied merchandise, some funeral providers charge handling fees. These charges are not prohibited by the Rule. The Commission is considering whether the anti-tying provisions have been effective in preventing consumer injury and fostering competition. For example, the Commission is considering whether, in certain situations, handling fees are being used to unreasonably restrict consumers' right to obtain caskets elsewhere and, thus, to prevent price competition in the marketing of caskets. The Commission is also considering whether it should otherwise amend or repeal the anti-tying provisions.

Written Price Disclosures

The Rule requires funeral providers to give consumers one or more price lists that show the itemized prices of the following funeral goods and services: Acknowledgment cards, automobile equipment usage, caskets and alternative containers, embalming, outer burial containers, preparation of the body, professional services of the funeral director and staff, use of facilities, and transportation of the deceased. In addition, the lists disclose potentially important consumer rights. The Rule does not mandate a specific format for the price lists. These lists must be given to consumers prior to the showing of the goods and, in some cases, the consumers can retain the lists. The Commission is considering whether these provisions have been effective, whether it should amend or repeal these provisions or whether it should consider changing the timing for the disclosure of the lists, the information disclosed on the lists, or the persons entitled to receive the lists. The Commission is further considering whether funeral providers should be required to use a standard format to display these prices.

Misrepresentations

The Funeral Rule prohibits funeral providers from misrepresenting that state or local law requires consumers to purchase embalming, caskets for cremation, grave liners or grave vaults, or any other funeral goods or funeral services. In addition, the Rule prohibits funeral providers from misrepresenting the preservative or protective features of funeral goods and services and misrepresenting whether the consumer will be charged for the service of procuring cash advance items.

The Commission is considering whether it should amend or repeal the misrepresentation provisions or the provisions requiring written and oral disclosures that are intended to prevent misrepresentations.

Definition of Funeral Provider

The Funeral Rule applies only to "funeral providers." The Rule defines a funeral provider as any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public. The Rule defines funeral goods as the goods sold directly to the public for use in connection with funeral services. The Rule defines funeral services as: (1) Those services used to care for and prepare deceased human bodies for burial, cremation, entombment or other final disposition; and (2) those services used to arrange, supervise or conduct a funeral ceremony or the final disposition of deceased human bodies. Persons that sell or offer to sell only funeral goods or only funeral services are not considered funeral providers for the purposes of the Rule and thus, are not subject to its provisions.

Thus, for example, parties that sell only caskets or outer burial containers (grave liners and vaults) are not subject to the requirement under the Rule to disclose price information. The Commission is considering whether there is a basis for extending the Rule to persons that sell or offer to sell funeral goods *or* funeral services, or specifying that certain transactions of funeral providers would or would not be covered by the Funeral Rule.

State Exemption Petitions

The Rule permits any state to petition the Commission for statewide exemption from the Rule. Such petitions are granted if the Commission

[6] The anti-tying provisions also require that those funeral providers that offer direct cremation must offer unfinished wood boxes or alternative containers for use in direct cremations.

determines that: (a) The state has a requirement in effect that applies to the same transactions as the Funeral Rule and (b) the state requirement offers consumers an equivalent or greater overall level of protection. The exemption exists in that state as long as the state administers and enforces its requirements effectively. The consequence of an exemption is that the Rule no longer applies in the state. The Commission is considering whether it should modify the provision, or more clearly define terms such as "overall level of protection," and "effectively."

Pre-Need and Prearranged Funerals

The Rule applies to funeral transactions whether those transactions are entered into at the time of need or prior to any perceived need on the part of the consumer. At the time of need, consumers may be mourning the death of a loved one and have limited time to make arrangements. These conditions may not exist in a pre-need market. However, pre-need consumers may not have access to information about prices, legal requirements, and the right to select only those goods and services they want in an unregulated market. The Commission is considering whether the Rule should continue to cover funeral transactions that are made prior to the time of need. The Commission is also considering whether there are, in fact, important differences between the pre-need and the at-need markets and whether funeral providers can readily distinguish between a pre-need and an at-need consumer.

Part D—Request for Comments

Members of the public are invited to comment on any issues or concerns they believe are relevant or appropriate to the Commission's review of the Funeral Rule.[7] In this section, the Commission identifies a number of issues on which it solicits public comment. The identification of issues is designed to assist the public in commenting on relevant matters and should not be construed as a limitation on the issues on which public comment is sought.

In addition, the Commission solicits public comment on related issues of public interest involving the Rule's effect on small entities and the paperwork burden it imposes.

[7] Comments to this notice need not adhere to any particular standard. However, in preparing comments to the Notice of Proposed Rulemaking, which should be published in the Spring of 1988, interested parties ought to review the evidentiary criteria articulated by the Commission in the Statement of Basis and Purpose for the Credit Practices Rule, 49 FR 7740, 7742 (Mar. 1, 1984) (text and n. 4).

Thus, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* the Commission solicits comments and data on whether, and the extent to which, the Funeral Rule has had a significant economic impact on small entities, and if it has, whether and how the Rule should be amended to minimize such economic impact.

Finally, pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501–3518, the Commission seeks public comment on the information collection requirements of the Rule to determine whether the Rule imposes unnecessary recordkeeping and disclosure requirements.

Recommendations to Commenters

A comment that includes the reasoning or basis for a proposition will likely be more persuasive than a comment without supporting information. Accordingly, commenters are asked to explain their answers and provide any supporting evidence. The Commission requests that factual data upon which the comments are based be submitted with the comments.

Note to Commenters: Please indicate the question number to which each comment refers, if any.

Consumer Experiences

(1) How, if at all, has the Rule affected: (a) The relative proportion of consumers who prearrange funerals; or (b) pre-need funeral marketing by funeral providers?

(2) How, if at all, has the Rule affected the relative proportion of consumers who contact more than one funeral home before deciding which one to use?

(3) How, if at all, has the Rule benefited consumers by: (1) Alerting consumers to the importance of price information and ensuring they obtain information at the critical point of choosing a provider; (2) providing information about different purchase options; (3) protecting consumers from injurious misrepresentation; (4) providing written statements of itemized charges, total charge and items selected at the conclusion of the discussion of the arrangement; (5) requiring authorization prior to embalming; and (6) prohibiting providers from conditioning the purchase of a wanted item on the purchase of an unwanted item? (b) What costs, if any, has the Rule imposed on consumers?

Funeral Industry and Marketing

(4) How have prices changed (in total and for specific funeral goods and services) since the Funeral Rule commenced in 1984? To what extent, if at all, are any such changes in the total prices or individual prices for funeral goods and services attributable to the Rule? To the extent possible in your answer, please provide specific information on the total and individual prices of funeral goods and services prior to and after the commencement of the Rule.

(5) (a) How, if at all, have the relative proportions of the following types of funerals changed since the Rule commenced: (1) Ground burials; (2) cremations; (3) above ground entombment; or (4) other dispositions? (b) To what extent are any changes attributable to the Rule?

(6) (a) How, if at all, have the relative proportions of the following types of services or dispositions changed since the Rule commenced: (1) Funerals that included embalming; (2) cremations that utilized caskets; or (3) funerals that included any other specific funeral goods or services (for example—a hearse, viewing room, flower car or family car)? (b) To what extent, if at all, are any such changes attributable to the Rule?

(7) (a) How, if at all, since the Rule commenced have the following factors changed: (1) The number and sizes of funeral homes in the industry; (2) the ability of new funeral homes to enter the industry; (3) mergers in the funeral industry; (4) profits of funeral providers? (b) To what extent, if at all, are any such changes listed above attributable to the Rule?

(8) What costs attributable to the Rule have funeral providers incurred in: (a) Discussing funeral prices, terms, and conditions over the telephone with consumers; (b) arranging funerals; (c) obtaining prior permission to embalm; (d) providing price information to consumers who request it in person; or (e) providing written statements of itemized charges to consumers at the time arrangements are made?

(9) Are any of the Rule's provisions especially costly or difficult to comply with?

(10) How, if at all, has the Rule benefited funeral providers?

Scope of the Rule's Coverage

(11) (a) Should the Rule's definition of a funeral provider as: "any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public" be changed? (b) If so, how should it be changed? (c) Are funeral homes that compete with sellers of only funeral goods or only services (which are not covered by the Rule) placed at a competitive disadvantage because the funeral homes must comply

with the Rule? (d) Are consumers being injured by the fact that the Rule covers only sellers of funeral goods and services?

(12) (a) Should the Rule apply to pre-need or prearranged funeral contracts? (b) Why should pre-need and at-need consumers be treated differently? (c) Can a funeral provider readily distinguish between a pre-need and an at-need customer or will this complicate compliance with the Rule?

(13) (a) Should the Rule be expanded to cover additional areas that are not currently subject to the Rule? (b) If so, what additional areas should the Rule address?

(14) (a) How, if at all, has the Rule affected the cremation industry? (b) Should the Commission amend the Rule to include within its scope unfair and deceptive practices by crematories, if any, that are not currently covered by the Rule?

Compliance

(15) To what degree have funeral providers complied with the Rule's:

(a) Telephone disclosure provisions;

(b) Price list provisions;

(c) Misrepresentation provisions;

(d) Anti-tying provisions;

(e) Embalming provisions;

(f) Cremation provisions; and

(g) Clear and conspicuous disclosure provisions;

(16) (a) Please specify what difficulties, if any, funeral providers have encountered in complying with the Rule. (b) What effect have any such difficulties had on funeral providers': (1) Ability to provide consumers with funeral goods and services; (2) costs of providing consumers with funeral goods and services; or (3) ability to compete with one another and with others?

Disclosure Requirements

(17) (a) Should the Commission amend or repeal the Rule's requirements that: (1) Funeral providers tell persons who telephone the funeral home and inquire about prices, terms or conditions, that price information is available over the telephone; and (2) funeral providers provide price and other readily available information over the telephone to persons who request it? (b) How, if at all, should they be changed?

(18) Should the Commission amend the Funeral Rule to require that all funeral providers adopt a standard format for the information required on the general price list?

(19) (a) Should the Commission amend or repeal the list of items disclosed on the general price list? (b) How, if at all, should the list be changed?

(20) (a) Should the Commission amend or repeal the requirement that funeral providers give consumers the price lists at the beginning of any discussion of prices or arrangements? (b) How, if at all, should the requirement be changed?

Misrepresentation Provisions

(21) (a) Should the Commission amend or repeal the subjects (legal, cemetery and crematory requirements, cremation requirements, cash advance charges, embalming requirements, product and service performance claims) covered by the misrepresentation provisions of the Rule? (b) What changes, if any, should be made?

Anti-Tying Provisions

(22) How, if at all, have handling fees for consumer-supplied merchandise affected consumer choice and price competition in the funeral industry?

(23) Should the Commission repeal or amend the requirement that funeral providers: (a) Allow consumers to purchase only those goods and services they want; (b) make unfinished wood boxes or alternative containers available for direct cremations?

Embalming Authorization

(24) (a) Should the Commission amend or repeal the requirement that funeral providers seek to obtain prior express approval before embalming deceased human remains for a fee? (b) How, if at all, should that requirement be amended?

Clear and Conspicuous Disclosure Requirement

(25) (a) Should the Commission amend or repeal the language of the Rule's requirement that funeral providers make all disclosures required by the Rule in a clear and conspicuous manner? (b) How, if at all, should that provision be amended?

General Issues

(26) Should the Commission retain the Rule unchanged?

(27) Should the Commission repeal the Rule? If your answer supports repeal, please provide a statement of the costs and benefits to consumers and funeral providers that you reasonably expect will result from repeal of the Rule.

State Exemptions and State Law

(28) Under what circumstances or situations, if any, should the Commission grant partial exemptions from trade regulation rules?

(29) (a) When evaluating the overall level of protection provided by a state law that is the basis of a petition for exemption from the Rule, should the Commission's consideration be limited to those state laws that are similar to Funeral Rule provisions (*e.g.*, price disclosure requirements), or should the Commission also consider the protection afforded by state law provisions that do not parallel Funeral Rule provisions (*e.g.*, bonding or escrow requirements)? (b) Should the Commission's determination of the overall level of protection afforded by state law be based on a provision-by-provision comparison of individual state and Funeral Rule requirements, or should the state requirements and Funeral Rule be considered as a whole? (c) How, if at all, should the state's administration and enforcement of its requirements affect the Commission's determination of the overall level of protection afforded to consumers by the State?

(30) When the Commission denies an exemption petition, both the Funeral Rule and state law usually remain in effect. What if the Commission has considered and rejected a requirement imposed by a state? If the Commission concludes that a state requirement fails to provide an equivalent "overall level of protection" to consumers because it is too burdensome, is that state requirement preempted because it conflicts with the Funeral Rule?

(31) How has the Rule affected state or local laws and regulations that cover the practices of funeral providers? Specifically, how, if at all, has the Rule: (a) Created conflicts or difficulties with existing state or local laws and regulations; (b) hampered enforcement of such laws; (c) affected the rights and obligations of consumers or funeral providers under such laws; or (d) affected compliance by funeral providers with such laws?

(32) Have there been changes in state or local laws or regulations that have affected the need for the Funeral Rule?

(33) What other modifications of or issues related to the Funeral Rule would you want the Commission to consider in this review proceeding?

Regulatory Flexibility

(34) How, if at all, has the Funeral Rule affected small businesses and the relative proportion of small businesses in the industry?

(35) Has the Rule had a significant economic impact (whether cost or benefit) on a substantial number of small entities? Please describe in detail any such significant impact, whether you believe it is beneficial or detrimental. For example, please state how many small entities have been substantially impacted; how and why they constitute a substantial number of

small entities; and explain how and why such economic impact is significant.

(36)(a) What burdens, if any, does compliance with the Rule place on small entities? (b) To what extent are the burdens (referred to in part (a) above) ones that small entities would also experience under standard and prudent business practice (such as normal competition for business)?

(37) What changes to the Rule, if any, would minimize the economic effect on small entities?

(38) To what extent does the Rule overlap, duplicate or conflict with other federal, state or local government rules?

(39) Have technology, economic condition, or other factors changed in the area affected by the Rule (the offering and selling of funeral goods and services to the public) since the Rule's promulgation in 1982? If so, what have been the changes and what effect do such changes have on the Rule, its continued need, its enforcement, funeral providers' compliance, and on the persons subject to the Rule?

Paperwork Burden Reduction

(40) Approximately how many hours per year have funeral providers spent making disclosures required by the Rule that would not be spent in the ordinary course of business absent the Rule?

(41) Approximately how many hours per year have funeral providers spent keeping records required by the Rule that would not be kept in the ordinary course of business absent the Rule?

(42) Could the Rule's requirements be changed to accomplish its disclosure goals at a reduced paperwork burden? Please explain how the Rule could be changed and provide a rationale for the change.

(43) Could the Rule's requirements be changed to accomplish its recordkeeping goals at a reduced paperwork burden? Please explain how the Rule could be changed, provide a rationale for the change and provide any supporting information.

(44) Are there any provisions of the Rule that preclude funeral providers from using developing technologies (e.g., office automation) to assist in complying with its requirements? Please explain which provisions have this effect, how they have this effect, and how it can be remedied.

List of Subjects in 16 CFR Part 453

Funerals, Trade practices.

By direction of the Commission.

Emily H. Rock,

Secretary.

[FR Doc. 87-28140 Filed 12-8-87; 8:45 am]

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Tuesday
May 31, 1988

Part III

Federal Trade Commission

16 CFR Part 453

Funeral Industry Practices Trade Regulation Rule; Notice of Proposed Rulemaking

FEDERAL TRADE COMMISSION

16 CFR Part 453

Funeral Industry Practices Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice announces the Commission's decision to initiate the rulemaking proceeding to review the Funeral Industry Practices Trade Regulation Rule, 16 CFR Part 453 (the "Funeral Rule" or "Rule"), mandated by § 453.10 of the Rule. That section states that the Commission shall initiate a rulemaking amendment proceeding, four years after its effective date, to address whether the Funeral Rule should remain in effect unchanged, or should be amended or repealed. The Commission has made no determination on these issues; all of the Rule's requirements will be reexamined during the proceeding.

This notice sets out the rulemaking procedures to be followed, reference to the legal authority under which this amendment proceeding is proposed, a statement of the Commission's reasons for proposing this review, a list of specific questions and issues upon which the Commission particularly desires written and oral comment, an invitation for written comments, and instructions for prospective witnesses and other interested persons who desire to present oral statements or otherwise participate in this proceeding.

DATES: Written comments must be submitted on or before August 30, 1988.

Notification of interest in questioning witnesses must be submitted on or before July 30, 1988.

Prepared statements of witnesses and exhibits, if any, must be submitted on or before October 3, 1988 for witnesses at the Washington, DC hearings, November 1, 1988 for witnesses at the Chicago, Illinois hearings and December 1, 1988 for witnesses at the San Francisco, California hearings.

Public hearings commence at 9:30 a.m. on November 7, 1988 in Washington, DC, at 9:30 a.m. on December 5, 1988 in Chicago, Illinois and at 9:30 a.m. on January 9, 1989 in San Francisco, California.

ADDRESSES: Written comments, notifications of interest, prepared statements of witnesses and exhibits should be submitted in five copies to Henry B. Cabell, Presiding Officer, Federal Trade Commission Washington, DC, 20580, 202-326-3642. The public hearings will be held in Room 332 Federal Trade Commission Building, 6th Street and Pennsylvania Avenue NW., Washington, DC, in Room 1437 Chicago Regional Office of the Federal Trade Commission, 55 East Monroe Street, Chicago, Illinois and in Room 570 San Francisco Regional Office of the Federal Trade Commission, 901 Market Street, San Francisco, California.

FOR FURTHER INFORMATION CONTACT: Matthew Daynard, Ra'ouf M. Abdullah, or Richard Kelly, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC, 20580, 202-326-3291, 202-326-3024, or 202-326-3304.

SUPPLEMENTARY INFORMATION: The Funeral Rule declares it an unfair or deceptive act or practice for funeral providers to: (1) Fail to furnish price information to funeral consumers; (2) require consumers to purchase items they do not desire to buy; or (3) embalm deceased human remains for a fee without authorization. The Rule further declares it a deceptive practice for funeral providers to misrepresent: (1) Requirements for embalming, cremations, and grave vaults or grave liners; (2) legal and cemetery requirements; (3) preservation and protection capabilities of funeral goods and services; or (4) cash advance charges for items obtained by the funeral provider on the consumer's behalf. To prevent these practices and to correct consumers' misimpressions, the Rule sets forth the following remedial requirements.

The Rule requires that funeral providers: (1) Disclose price and other information over the telephone to persons who call the funeral home and ask about its offerings or prices of funeral goods and services; (2) disclose written price information by means of a general price list ("GPL"), casket price list ("CPL"), and an outer burial container price list ("OBC-PL") to persons who inquire in person about funeral arrangements or the prices of funeral goods and services;[1] (3) give purchasers a written statement, after they have selected funeral goods and services, containing the prices for each of the items selected, the total price for the funeral arrangements selected, price estimates or actual costs, if known, for cash advance items, and any legal, cemetery or crematory requirements that compel the purchase of any items or services for the particular funeral; (4) make truthful representations about legal and other requirements that compel the purchase of particular items or services; (5) allow consumers to select and purchase only those goods and services they desire (instead of offering goods and services only in predetermined packages); (6) seek to obtain express approval before embalming the deceased for a fee; (7) make truthful representations about the preservative and protective value of funeral goods and services; (8) disclose that they charge a fee for obtaining cash advance items, if that is the case; and (9) make unfinished wood boxes or alternative containers available for direct cremation, if the provider offers direct cremation.

The Funeral Rule was promulgated on September 24, 1982, and became fully effective on April 30, 1984.[2] The Commission's decision to promulgate the Rule was subsequently affirmed in *Harry & Bryant Co. v. FTC.*[3] Having been duly promulgated, the Funeral Rule enjoys a presumptive validity. The Commission would require substantial evidence in the rulemaking record to justify a determination to amend or repeal the Rule.[4]

[1] The Rule permits providers to incorporate the information from the casket and outer burial container price lists in the general price list. This combined list also must be offered to persons who inquire in person about funeral arrangements or the prices of funeral goods and services.

[2] The Rule had two effective dates. Those portions of the Rule that prohibit certain oral or written representations became effective on January 1, 1984. 48 FR 45537 (Oct. 6, 1983). The remainder of the Rule—the portions imposing affirmative obligations on funeral providers—became effective on April 30, 1984. Id.

N.B. The effective date of § 453.3(b)(1)(ii) of the Rule was changed from January 1, 1984 to April 30, 1984. 49 FR 564 (Jan. 5, 1984).

[3] 726 F.2d 993 (4th Cir. 1984), *cert denied*, 469 U.S. 820 (1984). The Court held that the Funeral Rule did not, as alleged, exceed the Commission's authority under sections 5 and 18 of the FTC Act and did not violate the funeral directors' First Amendment rights of commercial free speech.

[4] Under the requirements of section 18 of the FTC Act, 15 U.S.C. 57a and the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* and 701 *et seq.*, the existence of a duly promulgated rule reflects the status quo, and any change must be justified by a reasonable basis in the record. See *Motor Vehicle Mfrgs. Ass'n. v. State Farm Mut.*, 463 U.S. 29, 40-45 (1984) (the APA requires an administrative agency to provide a reasoned analysis for adopting, modifying or rescinding a regulation); *Ass'n of National Advertisers, Inc. v. FTC*, 617 F.2d 611, 614-615 (D.C. Cir. 1979) (section 18 rulemaking requirements complement, and, to an extent, modify the APA requirements); *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973) (once an agency has settled on a course of action such as a regulation, the agency must set forth a reasonable basis in the rulemaking record for departing from it); *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1343 (D.C. Cir. 1985) (the same standard applies whether the agency is enacting a new rule, or revoking or modifying an old one).

The evidence gathered to date in anticipation of this review is reported in two staff reports to the Commission, dated April 7, 1988 ("BCP Staff Report") and April 1988 ("An Analysis of the Funeral Rule Using Consumer Survey Data on the Purchase of Funeral Goods and Services", or "BE Staff Report") and in two published reports of consumer surveys—a 1981 "baseline" study and a 1987 "replication" study—conducted at staff's request.

Copies of the BCP and BE Staff Reports, the baseline and validation study reports (entitled "FTC, Baseline and Follow-up Studies for Evaluating the Effect of the Funeral rule, Final Report," July 1982) and the replication study report (entitled "Report on the Survey of Recent Funeral Arrangers" FTC, April 1988) may be obtained in person or by mail free of charge from: Public Reference Room (Room 130), Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580.

Section A. Statement of the Commission's Reasons for the Proposed Review

Section 453.10 of the Funeral Rule requires the Commission to initiate this review proceeding. That section states:

> No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(b) (of the FTC Act) [5] to determine whether the rule shall be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceedings.

The Commission announced in its Statement of Basis and Purpose for the Funeral Rule ("SBP") that the purpose of this unique provision was to determine, through an early review, whether there is a need to continue the Rule after it has had a fair opportunity to correct the industry problems it was adopted to remedy.[6] The Commission recognized that the Rule's effects may be evidenced more slowly than in other industries, because a funeral is an infrequent consumer purchase.[7] The Commission nonetheless determined that an early review was necessary to consider (a) whether the Rule appears to be working as expected in reducing barriers to price competition and increasing consumer choice, (b) whether some modification to the Rule is necessary to facilitate those benefits, and (c) whether repeal is warranted as a result of substantially reduced marketplace problems.[8]

At this time, the Commission has not determined whether any changes to the Rule are warranted, or whether the Rule should be retained as is or repealed. Instead, all of the Rule's provisions, including the issue of repeal, are open to debate and inquiry during the rulemaking proceeding. The Commission's decision on these issues shall be based on the rulemaking record viewed as a whole. At this time, the staff reports present evidence that, if the Rule overall warrants retention, several of its provisions may warrant additional scrutiny and may need to be changed. However, the Commission is required to demonstrate that any changes (or revocations) are based on substantial evidence in the rulemaking record.

To assess the Rule's market impact, Commission staff has to date gathered and reviewed information from the following primary sources. In 1981, staff requested Market Facts, Inc., an independent market research organization, to conduct a "baseline" survey ("BLS") of persons who had recently arranged a funeral. The study, which measured purchasers' knowledge of the funeral market and gauged their experience in arranging the recent funeral, was designed to provide "baseline" data on the incidence of those funeral industry practices addressed by the Funeral Rule.[9] In 1987, Market Facts conducted a "replication" study ("RS") of recent funeral arrangers designed to permit comparisons with the earlier study so that the impact of the Rule on consumers' purchasing behavior and knowledge of the funeral market, their funeral expenses, and industry practices and prices could be assessed. Commission staff has reviewed and analyzed the data from these two surveys, which, to our knowledge, comprise the only systematic, empirical information available on the impact of the Rule nationwide.[10]

Staff has also reviewed the responses to the Commission's Advance Notice of Proposed Rulemaking ("ANPR"), which was published in the Federal Register on December 9, 1987.[11] The ANPR sought public comment on how the Rule has affected consumers, funeral providers and others, and on what changes, if any, should be made to the Rule. During the comment period, 324 comments were received from consumers and consumer groups, industry members and observers, and state officials. Commission staff also has reviewed current and prior state laws regulating the funeral transaction to assess whether states have, over time, adopted the protections afforded by the Funeral Rule. The following discussion sets forth the most salient information presented in the staff reports, including suggestions for changes to the Rule made by ANPR commenters.

1. Overall Survey Results

The staff reports present evidence, based on the consumer surveys, that suggests that the Funeral Rule's requirements have not increased consumer shopping or reduced overall consumer expenditures for funerals, although the reports do indicate that more consumers are selecting cremation as the final form of disposition. The reports also present evidence that a majority of funeral providers are complying with most of the Rule's individual requirements, but are not simultaneously complying with three of the Rule's most important provisions.[12]

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[5] Section 18(d)(2)(B) of the FTC Act states, in part.: A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection * * *.

[6] 47 FR 42260, 42299 (Sept. 24, 1982).

[7] *Id.*

[8] *Id.*

[9] Market Facts also conducted a validation follow-up study of 250 respondents to the baseline study because it appeared that the baseline study results contradicted much of the rulemaking evidence presented by consumer groups, consumers, and industry members in three areas: (1) Consumers' receipt of funeral price information over the telephone; (2) consumers' receipt of itemized prices and final statements at the funeral home; and (3) consumers' receipt of requests for advance permission to embalm. The follow-up results showed less than a 55% consistency response rate to the key questions in those three areas, and much higher rates in all other areas of the study that were re-tested. Upon its review of the baseline and validation results, the Commission staff, in conjunction with an independent survey analysis expert, concluded that the baseline results in those three areas were subject to serious qualification and differing interpretation. See Memorandum from Funeral Rule Staff to Commission, "Impact Evaluation Survey, Funeral TRR" (July 15, 1982). The Commission upon its review of staff's analysis decided not to reopen the rulemaking record to consider the baseline results; its decision was subsequently upheld in *Harry & Bryant Co. v. FTC* against a challenge of abuse of discretion. 726 F.2d 993, 998 (4th Cir. 1984).

[10] Respondents for these studies were drawn from the popuation of Market Facts' Consumer Mail Panel, a national sample of more than 220,000 (155,000 in 1981) households that have agreed to respond to mail questionnaires, telephone surveys, and other tests on a continuing basis. From a total pool of available households, balanced national samples were drawn to parallel census data with respect to selected social and demographic factors.

[11] 52 FR 46706 (1987).

[12] Those provisions require funeral providers to: (1) Provide a general price list at the beginning of discussion of funeral arrangements or the selection of funeral goods and services; (2) give consumers a

Continued

The study results further indicate that: (1) Consumers who patronize funeral providers who comply with the Rule spend no less on their funeral arrangements; (2) consumers who receive the Rule-required price lists spend no less on funerals; (3) the proportion of consumers receiving some form of timely price information at the funeral home has increased; (4) purchasers who receive timely price information at the funeral home (but not necessarily a Rule-required price list) spend significantly less on funeral arrangements; and (5) funeral home misrepresentations have decreased somewhat and consumer knowledge about funeral requirements and about funeral goods and services has increased slightly. The Commission will consider these results in assessing whether the Rule should be repealed or retained. Comment on the study findings in requested below.

2. Evidence on Specific Rule Requirements

Telephone Disclosure Requirements

The Rule requires funeral providers to tell persons who call and ask about prices, terms or conditions of funeral arrangements or specific goods and services that price information is available over the telephone. The Rule further requires that providers must give any price information requested that is readily available. The purpose of these provisions was to ensure that consumers could obtain price information easily before selecting a funeral provider.

Some ANPR comments suggest that telephone disclosures are unnecessary and impractical, and the telling consumers that price information is available over the telephone offends some consumers. One industry trade group suggests that the Rule should allow funeral providers to respond to telephone requests for price information by means other than over the telephone, such as by mail, if they choose. Staff, on the other hand, believes that these suggestions for changes to the telephone disclosure provisions require an evaluation of whether individual consumers are generally aware of their right to ask for and receive price information over the telephone. The Commission seeks further comment on this question. The BLS and RS data present evidence that few individual consumers use the telephone to comparison shop among funeral homes or to seek price information. The study results also provide evidence that those consumers who do request price information over the telephone generally receive it.

Other ANPR commenters indicate that various consumer organizations and news reporters rely on the Rule's requirement that price information be given over the telephone to compile and publish comparative reports of local funeral home prices. Another commenter suggests that the telephone is unsuitable for discussions about funeral prices, and that providers should be permitted to provide requested price information by means other than over the telephone, such as by mail, if appropriate. The Commission seeks comment on whether the Rule's affirmative telephone disclosure requirement is accomplishing its intended purposes. In particular, if this provision is not accomplishing its purposes, the Commission solicits comments on whether the provision should be modified or repealed.

Written Price Disclosure Requirements

The Rule requires funeral providers to give consumers who inquire in person about funeral arrangements or prices one or more price lists that show the itemized prices for the following goods and services: direct cremation, immediate burial, forwarding/receiving remains, acknowledgment cards, use of automobile equipment, caskets and alternative containers, embalming, outer burial containers, preparation of the body, professional services of the funeral director and staff, use of facilities, and transportation of the deceased. The Rule does not require a specific format for these lists. Providers must offer these lists to consumers upon beginning discussion of funeral arrangements or the selection of funeral goods and services (general price list) or before the goods are shown (casket and outer burial container price lists). Consumers can keep the general price list.

The lists must also contain several disclosures regarding consumers' right to purchase only those goods and services they desire, and concerning the need for embalming and other potentially required goods and services. A principal purpose of all of these requirements is to avoid economic injury that consumers might incur as the result of either purchasing items or services they may not want or use or paying higher than competitive prices for those items and services.

The BE staff report indicates that the 1987 RS results provide no evidence that the offering to consumers of the rule-required price lists reduce consumers' overall expenditures for funerals.[13] That data indicate that consumers who received the lists spent no less on their arrangements than those who did not receive them. In addition, the results also provide evidence that purchasers who received timely price information that was not necessarily a rule-required price list spent significantly less for their arrangements; comparison with the 1981 BLS results indicates that the proportion of consumers receiving some type of oral or written price information early at the funeral home has increased. The RS results also present evidence that most consumers who receive the price lists say they are important in making selections of goods and services, and that most consumers keep the lists when they are offered by providers.

Some ANPR commenters say that price lists may not be useful to consumers because they are confusing. Several commenters suggest that the Rule should require a standard format for the general price list to correct that problem. Other commenters suggest that the timing, availability and itemization requirements regarding the general price list pose difficulties for providers, particularly because the offering of price lists may offend consumers who do not wish to discuss prices at the time the list is given to them. Two commenters suggest that, to remedy these alleged problems, providers should only be required to make the general price list available at the funeral home upon beginning discussion of prices or the selection of goods and services; consumers who make known to the provider their desire to keep the list would be able to do so. Several commenters further suggest that the Rule should permit providers to include a separate, non-declinable basic facilities charge on the general price list. Still other ANPR commenters raise the question whether the Rule's listing requirements cause providers to charge for items they might provide to consumers at no cost. The Commission is particularly interested in receiving comment on issues related to the efficacy of the required price lists, and poses several questions in Section C. below to help focus that comment.

Misrepresentation Provisions. The Rule prohibits funeral providers from misrepresenting that state or local law requires consumers to purchase embalming, caskets for cremation, grave

sufficiently itemized statement of goods and services selected at the end of the arrangements conference; and (3) make no misrepresentations about casket for cremation or embalming requirements.

[13] The Commission takes no position at this time on the findings in the BE Staff Report and particularly requests comment on that Report.

liners or grave vaults, or any other funeral goods or funeral services. The Rule also prohibits providers from misrepresenting the preservative or protective value of funeral goods and services and from misrepresenting whether consumers will be charged for services in obtaining cash advance items. The Rule requires written and oral disclosures intended to prevent misrepresentations and to correct consumers misimpressions.

The BLS and RS results present evidence that misrepresentations prohibited by the Rule cause consumers to purchase goods and services they otherwise might not buy. This survey data also indicate that provider misrepresentations, which the results do not show to be currently widespread, have decreased and consumers' knowledge about funerals and funeral goods and services has increased somewhat. On the other hand, the survey results and other information in the ANPR comments present evidence that some proscribed misrepresentation is still occurring, and that many consumers still incorrectly believe that embalming is always required by law and that sealed caskets preserve human remains for an indefinite time. The Commission seeks comment on whether the misrepresentation provisions of the Rule should be modified or repealed.

Other information presented by the ANPR comments indicates that the disclosure regarding direct cremations, required by § 453.3(b)(2) of the Rule, may be confusing and inapposite where the provider does not stock unfinished wood boxes, but offers other alternative containers for use in direct cremations as permitted by the Rule. One ANPR commenter suggests that, to correct this situation, the disclosure should delete references to an unfinished wood box so that no distinction is made, for purposes of the Rule, between an unfinished wood box and other types of alternative containers.

Anti-Tying Provisions. The Rule prohibits funeral providers from requiring consumers to purchase unwanted goods and services as a condition of obtaining other items, except as required by law or permitted by the Rule. The Rule also requires itemization of funeral components and forbids providers from requiring finished caskets for cremation. The Rule further requires providers who arrange direct cremations to make available unfinished wood boxes or alternative containers for use in those dispositions.

The 1987 study results discussed earlier in the section regarding price lists provide no evidence that the specific, rule-required itemization reduces consumers' total funeral bill. The results do present evidence, however, that consumers spend less when they receive timely price information in other forms. And the results provide further indication that consumers find the price lists helpful and keep them when they are offered. The BCP staff report presents evidence that the proportion of cremation purchasers buying caskets has significantly decreased since 1981. Also, the 1987 results indicate that consumers are more knowledgeable about casket for cremation requirements.

Also, the BCP staff report discusses some evidence presented in the ANPR comments suggesting that the effectiveness of the anti-tying provisions may be weakened by some providers who charge high handling fees when consumers supply their own merchandise, such as caskets purchased from third-party casket sellers. Other ANPR commenters state that handling fees are necessary for providers to recoup overhead costs and profits lost on the sale of the casket. The Commission seeks comment below on the handling fee and other issues concerning the rule's anti-tying provisions.

Embalming Provisions. The Rule requires funeral providers to seek to obtain prior, express approval before charging consumers for embalming services. The Rule further prohibits providers from misrepresenting the need for embalming and requires them to disclose in writing the reasons why it is necessary if they represent to consumers that embalming is non-declinable.

The BCP staff report presents some evidence from the RS study that providers request prior approval for embalming in about half of the cases, and that about two-thirds of consumers who purchase embalming authorize it at some point in the transaction. The RS results, when compared to the BLS results, further suggest that embalming in arguably inappropriate cases—direct cremations or cremations with services where the body is not present—have decreased since 1981.

The BCP staff report discusses the views expressed by some ANPR commenters that the prior approval provision is difficult and impractical for providers, and that efforts to obtain approval can often be upsetting to consumers, particularly where the provider is removing the body from a hospital or nursing home. Two commenters suggest that, to remedy those alleged problems, the Rule should be changed to require only that providers obtain approval, before or after the service is performed, in order to charge a fee. Some information is presented in the comments that such a change may not result in economic injury to consumers, but might cause potentially severe emotional injury to religious groups or others who may not want embalming performed under any circumstances. The Commission is particularly interested in receiving comment on this issue.

Definition of Funeral Provider. The Rule covers only "funeral providers," defined in the Rule as any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public. The Rule defines funeral goods as those goods sold directly to the public for use in connection with funeral services. The Rule defines funeral services as: (1) Those services used to care for and prepare deceased human bodies for burial, cremation, entombment of other final disposition; and (2) those services used to arrange, supervise or conduct a funeral ceremony or the final disposition of human bodies. Persons or firms that sell or offer to sell only funeral goods or only funeral services are not considered funeral providers for purposes of the Rule and thus are not subject to its requirements and prohibitions. For example, parties that sell only caskets or outer burial containers (grave liners and vaults) are not required under the Rule to disclose price information because they are not subject to its provisions.

The BCP staff report discusses some ANPR comments reporting alleged unfair or deceptive acts or practices by cemeteries, crematories and other sellers of funeral goods or funeral services not currently subject to the Rule. Other ANPR commenters suggest that funeral providers covered by the Rule may be placed at a competitive disadvantage because their actual or potential competitors are not subject to the Rule's requirements. Several ANPR commenters suggest that, to remedy this reported situation, the Rule's coverage should be expanded to include all providers that sell either funeral goods *or* funeral services. The Commission requests comment on the extent to which these reported practices are occurring and whether the Rule should cover these other providers.

The BCP Staff Report considered suggestions made in the ANPR comments that the rulemaking should include issues concerning minimum standards for pre-need contracts and cremation practices, and state pre-need regulations. The staff recommended against inclusion of these issues in the rulemaking as beyond the scope of the

mandate set forth in § 453.10 of the Funeral Rule. The Commission concurs with this recommendation and, therefore, has not included those issues in the questions for comment.

Funeral Expenses and Funeral Prices. The BE staff report presents evidence, based on the BLS and RS, that consumers' total expenditures for funerals have increased more than the general rate of inflation ("real expenses") between 1981 and 1987, by as much as 9%. BE staff reports, however, that the study data cannot resolve whether that increase is due to an increase in real prices for funeral goods and services, or to an increase in the quantity (or quality) of items purchased, or some combination of those factors.

The ANPR comments present other information, based on data compiled by the Federated Funeral Directors of America, that real prices for funerals may have increased by as much as 4.2%–7.6% since December, 1983. Several ANPR commenters presented views and some data that funeral prices have increased since the Rule's promulgation; some attribute the price rise to the Rule, while others suggest that it may be due, at least in part, to the fact that providers may be "trading up" consumers so that purchasers buy additional or more expensive items. Other commenters present views that price increases are not harmful, because consumers are now exercising their informed choice. The Commission in its Statement of Basis and Purpose for the Funeral Rule recognized that funeral providers might decide to raise prices in response to the Rule's itemization requirements.[14] The Commission is particularly interested in receiving comment on the relation between any increases in real expenses for funerals and real funeral prices.

Compliance Issues. In judging whether the Funeral Rule warrants retention or repeal, the Commission will consider whether the Rule itself is sufficiently in place in the market. That is, are enough providers substantially complying with the Rule's requirements to permit accurate judgments about the costs and benefits of the Rule?

The staff reports present evidence from the 1987 RS data that 31% (and perhaps less) of funeral providers are *simultaneously* providing a general price list early in the arrangements conference and a sufficiently itemized statement of items selected, and making no misrepresentations about embalming and casket for cremation requirements, in accordance with the Rule. Viewing each Rule provision individually, the data also indicate that a majority of funeral providers are complying with most of the Rule's individual requirements. The data further indicate, however, that about one-quarter of providers may be giving the general price list to consumers at the beginning of discussion of funeral arrangements, as required by the Rule. Other, less formal surveys presented in the ANPR comments suggest varying rates of provider compliance with individual Rule provisions. The Commission seeks comments below on whether the 1987 replication study data accurately reflect the actual level of industry compliance with the Rule, and on what level of compliance is sufficient to permit judgments about the costs and benefits of the Rule.

State Regulations. The Commission recognizes that state action to prevent any industry abuses may have benefits over regulation at the Federal level. However, when the Commission considered promulgation of the Rule in 1982, few states had adopted any of the individual provisions contained in the proposed Rule, and it appeared that no state had enacted a regulatory price disclosure scheme similar to the proposed Rule.[15] Staff has conducted a review of current state regulations to determine whether any significant changes in state regulation have occurred since that time. Staff reports that, although as many as thirteen (13) to twenty-five (25) states have adopted at least one of the Rules salient provisions, the majority of the states still have not incorporated into their laws a regulatory scheme similar to the Funeral Rule.

Conclusion. The Commission has carefully considered the staff reports and the comments received in response to the Advance Notice of Proposed Rulemaking. Based on § 453.10 of the Funeral Rule and the evidence presented to date, the Commission believes that the initiation of a rulemaking amendment proceeding would be in the public interest.

The public is advised that the Commission has not adopted any findings or conclusions of the staff. All findings in this proceeding shall be based solely on the rulemaking record. Accordingly, the Commission invites comment on the issues raised by the staff reports and the evidence presented to date.

The Commission's Rules of Practice shall govern the conduct of the rulemaking proceeding, except that to the extent that this notice differs from the Rules of Practice, the provisions of this notice shall govern. This alternative form of proceeding is adopted in accordance with § 1.20 of those rules (16 CFR 1.20).

Section B. Invitation to Comment

All interested persons are hereby notified that they may submit data, views, or arguments on any issue of fact, law or policy which may have bearing upon the Rule review. Such comments may be either in writing or orally. Written comments will be accepted until August 30, 1988 and should be addressed to Henry Cabell, Presiding Officer, Federal Trade Commission, Washington, DC 20580, 202 326–3642. To assure prompt consideration, comments should be identified as "Funeral Rule Review Rulemaking Comments." Please furnish five copies of all comments. (Instructions for persons wishing to present their views orally are found in Sections E. and F. of this notice).

While the Commission welcomes comments on any issues which you feel may have bearing upon the proposed Rule review, questions on which the Commission particularly desire comments are listed in Section C. below. All comments and testimony should be referenced specifically to either the Commission's questions or the section of the Funeral Rule being discussed. Comments should include reasons and data for the position. Comments opposing retention of the Rule or specific provisions should, if possible, suggest a specific alternative. Proposals for alternative regulations should include reasons and data that indicate why the alternatives would better serve consumers than the Funeral Rule. Comments should include a full discussion of all the relevant facts and be based directly on firsthand knowledge, personal experience or general understanding of the particular issues addressed by the proposed Rule review.

The Commission emphasizes that the purpose of soliciting comments on the various issues is to determine whether the provisions of the Rule are operating as expected, and whether they have achieved the objectives and benefits envisioned by the Commission at the time they were enacted. Accordingly, the Commission requests commenters to provide information and data in the form of surveys, expert testimony, or anecdotal experience that reflects actual experience with the operation of the provisions of the Rule. Comment on the BE Staff Report's econometric analysis would particularly be appreciated.

[14] SBP at 42281.

[15] SBP at 42269, n. 95.

Section C. Questions and Issues

The Commission has decided to employ a modified version of the rulemaking procedures specified in § 1.13 of the Commission's Rules of Practice, proceeding with a single Notice of Proposed Rulemaking and the "no designated issues" format. Set forth below is a list of specific questions and issues upon which the Commission particularly desires comment and testimony. The list of questions is not intended to be a list of "disputed issues of material fact that are necessary to resolve," and any right to cross-examine will be determined with reference to the criteria set forth in the Commission's Rules of Practice.

Interested persons are urged to consider carefully the following questions. The Commission retains its authority to promulgate a final rule which differs from the current Rule in ways suggested by these questions and based upon the rulemaking record.

1. Should the Commission retain the Rule unchanged? Should the Commission retain the Rule but change some of its provisions? If so, which of its provisions should be changed, and how should they be changed? Whether you support or oppose retention, the Commission will give more weight to those comments that provide a statement of the costs and benefits to consumers and funeral providers that could reasonably be expected to result from retention or alteration of the Rule.

2. Should the Commission repeal the Rule? Whether you support or oppose repeal, the Commission will give more weight to those comments that provide a statement of the costs and benefits that could reasonably be expected to result from repeal of the Rule.

3. The replication study asked consumers who had arranged funerals whether, and at what time in the funeral transaction, they received information on prices and arrangements from the funeral provider. What are the advantages and disadvantages of relying on consumer recall and assessing the degree of compliance with the Rule and the Rule's impact on the funeral market? What evidence is there that consumers might not accurately report their experiences?

4. The replication study suggests that: (1) Approximately half of funeral providers give purchasers a general price list early in their meetings at the funeral home (before selection of a casket); (2) a majority of funeral providers give purchasers a properly itemized, written final statement at the conclusion of their arrangements conferences; (3) a majority of funeral providers do not misrepresent casket for cremation or embalming requirements; and (4) a minority (about 30%) of funeral providers are simultaneously complying with all of three of the preceding provisions of the Rule. Do these fundings accurately reflect the level of industry with these Rule provisions? What other evidence exists on the level of industry compliance with these, and other, provisions of the Rule? Are these levels of compliance sufficient to permit accurate judgments about the impact of the Rule on funeral consumers and funeral providers? If not, what level of compliance would be sufficient?

5. Most of the replication study respondents made funeral arrangements about three years after the Rule took effect. What are the advantages and disadvantages of reviewing the Rule after that time? In particular, has there been adequate time to assess accurately the impact of the Rule on the funeral market?

6. The survey evidence suggests that consumers' total expenditures on individual funeral arrangements, adjusted for inflation, have increased over time. Still, that evidence cannot establish whether the increase in expenditures was due to an increase in the real prices of individual funeral goods and services, and increase in the quantity (or quality) of funeral goods and services purchased, or some combination of the two. What other evidence exists on the changes in real consumer expenditures and real funeral prices since promulgation of the Rule? To the extent such changes have occurred, what are the reasons for those changes? Could increases in funeral providers' costs of doing business be an explanation? (See Question 16 also). Are there studies or other analyses of real consumer expenditures and real funeral prices that show the effects of the Rule by isolating them from the effects of other factors?

7. The replication study results suggest thatm few consumers use the telephone to comparison shop among funeral providers or to seek price information. If this is the case, is there any reason to retain the Rule's affirmative telephone disclosure requirement that providers tell callers who inquire about the prices, terms, or conditions of funeral arrangements that price information is available over the telephone? Are consumers generally aware of their right to ask for and receive price information for funeral goods and services over the telephone? What other evidence exists on the extent to which consumers comparison shop before selecting a funeral home? Is compliance with the telephone provisions of the Rule costly?

8. The Rule requires providers to reasonably answer, from the price lists and other readily available information, consumers' telephone requests for information about providers' funeral offerings or prices. Have any substantial costs arisen from this provision? If so, how do these costs compare to the provision's benefits? What problems, if any, have providers or consumers encountered as a result of this requirement? Is there any reason to believe that providers would not continue to provide requested price information over the telephone if the provision were repealed?

9. The preliminary analysis of the 1987 survey evidence indicates that: (1) Purchasers who received the price lists and the final statement required to be given or shown to consumers by the Rule spent no less on their funerals than purchasers who did not receive those documents; and (2) purchasers who received other forms of price information early in their arrangements conferences spent less on their funerals than individuals who did not receive that information early. Is this analysis correct? (To the extent feasible, the public is urged to comment on the underlying assumptions used in the analysis and on the validity of the econometric model itself.) What other evidence exists on the effects of the documents required to be given to consumers by the Rule on consumer expenditures and consumer choices? What other evidence exists on the effects of the provision of price information other than the documents required by the Rule on consumer expenditures and consumer choices?

10. Do consumers use the general price list in their selection of funeral goods and services? How do they use it? Do general price lists currently used by providers vary significantly in length, format, or the use of terminology? Would the adoption of a required standard format for the general price list change the way consumers or funeral providers use the lists in the funeral transaction? If so, how would their use change? The model general price list reproduced at the end of this section is intended to help focus your answer. Would such a required format impose any additional costs on providers? If so, what costs? What costs, if any, would be imposed on consumers? What, if any, are the benefits of a standardized format for the general price list, assuming that few consumers currently use the general price list to comparison

shop? (See "Model General Price List," which appears following Question 18.

11. Many ANPR commenters suggested expanding the Rule's scope of coverage to all providers of funeral goods *or* services. Staff has received few complaints about the practices of cemeteries, crematories, or other sellers of funeral goods or funeral services currently not subject to the Rule. What evidence exists on the extent to which unfair or deceptive acts or practices proscribed by the Rule are committed by providers not currently subject to the Rule? What, if any, competitive disadvantage do providers covered by the Rule experience because actual or potential competitors not subject to the Rule engage in the provision of funeral goods and services covered by the Rule?

12. Some commenters suggest that the Rule should require that funeral providers offer the general price list upon beginning discussion of "prices or the selection of goods and services" instead of upon beginning of discussion of "funeral arrangements or the selection." Those commenters state that strict compliance with the term "funeral arrangements" can result in the GPL being offered at moments when consumers may not wish to discuss funeral arrangements, such as during removal of the body from the place of death. Would the suggested change alter in any material way the obligations of funeral providers or the rights of consumers under the Rule? If so, how? Is there any evidence that funeral providers have different interpretations of the term "funeral arrangements?" If so, please provide that evidence.

13. The Rule requires that the general price list that must be given to consumers contain several affirmative statements that provide detailed information concerning the goods and services offered. In each case, the exact language to be used is specified. Is there a need to retain the precise language currently required by the Rule for those disclosures? Should the Rule permit providers to use alternative language of their choosing, as long as the language discloses the substance of the information now required by the Rule? What are the costs and benefits of such a change?

14. Some commenters suggest that providers may charge high handling fees for arrangements where consumers supply their own caskets purchased from third-party casket sellers. How prevalent is this practice? What evidence is there that handling fees are necessary for providers in such cases to recoup fixed and overhead costs or profits lost on the sale of the casket? Should the Rule address this practice? Is so, how?

15. Some commenters suggest eliminating the requirement that providers obtain *prior* approval for embalming, stating that it is often difficult to comply with. What difficulties have providers encountered in seeking prior approval and how often have those difficulties occurred? What adverse effects, if any, have those difficulties had on the provision of funeral goods and services to consumers?

16. How have funeral providers' costs changed since the promulgation of the Rule? To what extent can these changes be attributed to the Rule?

17. Considerable time has passed since the close of the record on which the Rule was based. What studies, expert opinion, or anecdotal evidence exists concerning the relative degree of pre-purchase funeral information that is now available to consumers? To what extent, if any, does the availability of such information obviate the need for the Rule or any of its provisions?

18. To what extent do funeral providers comply with the casket and outer burial container price disclosure provisions by: (1) Preparing separate price lists that individuals can take with them when they leave the funeral home? (2) including detailed casket and outer burial container price information on the general price list? (3) preparing notebooks or binders that purchasers can review at the funeral home? What are the advantages and disadvantages of permitting funeral providers flexibility in complying with the provisions relating to casket and outer burial container price information?

Model General Price List (See Question 10)

ANY NAME FUNERAL HOME

100 Main Street
Yourtown, USA
(123) 456-7891

GENERAL PRICE LIST

(These Prices are Effective as of Month, Day, Year)

The goods and services shown below are those we can provide to our customers. *You may choose only those items you desire.* [However, any funeral arrangements you select will include a charge for our services.] If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected.

This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services, flowers, and newspaper notices. The prices for these items will be shown on your bill or the statement describing the funeral goods and services you selected. [We charge you for our services in buying these items.]**

Forwarding of remains to another funeral home ..... $____
This charge includes:
*removal of remains
*services of staff
*necessary authorizations
*embalming
*local transportation (but not shipping charges)

Receiving of remains from another funeral home ..... $____
This charge includes:
*services of staff
*care of remains
*transportation of remains to cemetery or crematory

Direct cremations: $____ to $____
Our charge for a direct cremation (without ceremony) includes
*removal of remains and transportation to crematory
*cremations
*necessary services of staff and authorizations

If you want to arrange a direct cremation, you can use an unfinished wood box or an alternative container. Alternative containers can be made of materials like heavy cardboard or composition materials (with or without outside covering), or pouches of canvas.

1. Direct Cremation with container provided by purchaser ..... $____
2. Direct Cremation with alternative container ..... $____
3. Direct Cremation with unfinished pine box ..... $____

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*If a consumer may not decline a charge for the services of funeral director and staff this sentence must be included here. Please see the compliance guides for a further explanation.

**This sentence should be omitted if the funeral director does not make a service charge or does not receive and retain a rebate, commission or trade or volume discount upon a cash advance item.

Immediate burials: $____ to $____
Our charge for an immediate burial (without ceremony) includes:
*removal of body
*local transportation to cemetery
*necessary services of staff and authorizations

1. Immediate burial with container provided by purchaser ..... $____
2. Immediate burial with unfurnished pine box ..... $____
3. Immediate burial with beige cloth-covered soft wood casket with beige interior ..... $____

Funeral arrangements:
Transfer of Remains to Funeral Home (within 50 mile radius) ..... $____
Embalming ..... $____

Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement which does not require you to pay for it, such as a direct cremation or immediate burial.

Other Preparation of Body ..... $____

Use of Facilities for Viewing:

Main Stateroom (per day) ..... $____

Smaller Stateroom (per day) ..... $____

Use of Facilities for Funeral Ceremony:

Chapel ..... $____

Smaller Stateroom ..... $____

Other Use of Facilities:

Tent and chairs for graveside service ..... $____

Hearse ..... $____

Limousine ..... $____

Other Automotive Equipment:

Flower car ..... $____

Family car ..... $____

Acknowledgement Cards ..... $____

Caskets ..... $____ to $____

(a complete price list will be provided at the funeral home.)

Outer Burial Containers ..... $____ to $____

(A complete price list will be provided at the funeral home.)

Other:

Pallbearers (6) ..... $____

Burial clothing ..... $____ to $____

Service of Funeral Director and Staff ... $____

Our charge includes arrangement of funeral and consultation with the family and clergy, preparation and filing of necessary notices, and authorizations and consents. This fee for our services will be added to the total cost of the funeral arrangements you select. (Such a fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)

Section D. Public Hearings

Three sets of public hearings will be held on this proposed trade regulation rule review. The first will commence on November 7, 1988 at 9:30 a.m. in Room 332, 6th Street and Pennsylvania Avenue NW., Washington, DC. The second will commence on December 5, 1988 at 9:30 a.m. in Room 1437, 55 East Monroe Street, Chicago, Illinois. The third will commence on January 9, 1989 in Room 570, 901 Market Street, Suite 570, San Francisco, CA. Tentatively scheduled are 7 days of public hearings at each site.

Persons desiring to present their views orally at the hearings should advise Henry Cabell, Presiding Officer, Federal Trade Commission, Washington, DC 20580, 202-326-3642, as soon as possible.

The Presiding Officer appointed for this proceeding shall have all powers prescribed in 16 CFR 1.13(c), subject to any limitations described in this notice.

Section E. Instruction to Witnesses

1. Advance Notice

If you wish to testify at the hearings, please notify the Presiding Officer immediately by letter or telephone of your desire to appear and file with him your complete, word-for-word statement no later than October 3, 1988 for witnesses at the Washington, DC hearings, November 1, 1988 for witnesses at the Chicago, Illinois hearings and December 1, 1988 for witnesses at the San Francisco, California hearings. [You may testify at only one of the hearings.] This advance notice is required so that other interested persons can determine the need to ask you questions and have an opportunity to prepare. Any cross-examination that is permitted may cover any of your written testimony, which will be entered into the record exactly as submitted. Consequently, it will not be necessary for you to repeat this statement at the hearing. You may simply appear to answer questions with regard to your written statement or you may deliver a short summary of the most important aspects of the statement within time limits to be set by the Presiding Officer. As a general rule, your oral summary should not exceed twenty minutes.

Prospective witnesses are advised that they may be subject to questioning by designated representatives of interested parties and by members of the Commission's staff. Prospective witnesses are also advised that they may be questioned about any data they have that supports or was used as a basis for general statements made in their testimony. Such questioning will be conducted subject to the discretion and control of the Presiding Officer and within such time limitations as he may impose. In the alternative, the Presiding Officer may conduct such examination himself or he may determine that full and true disclosure as to any issue or question may be achieved through rebuttal submissions or the presentation of additional oral or written statements. In all such instances, the Presiding Officer shall be governed by the need for a full and true disclosure of the facts and shall permit or conduct such examination with due regard for relevance to the factual issues raised by the proposed rule and the testimony delivered by each witness.

2. Use of Exhibits

Use of exhibits during oral testimony is encouraged, especially when they are to be used to help clarify technical or complex matters. If you polan to offer documents as exhibits, file them as soon as possible during the period of submission of written comments so that can be studied by other interested persons. If those documents are unavailable to you during this period you must file them as soon as possible thereafter and not later than the deadline for filing your prepared statement. Mark each of the documents with your name, and number them in sequence, (e.g., Jones Exhibit 1). Please also number all pages of each exhibit. The Presiding Officer has the power to refuse to accept for the rulemaking record any hearing exhibits that you have not furnished by the deadline.

3. Expert Witnesses

If you are going to testify as an expert witness, you must attach to your statement a curriculum vitae, biographical sketch, resume or summary of your professional background and a bibliography of your publications. It would be helpful if you would also include documentation for the opinions and conclusions you express by footnotes to your statements or in separate exhibits. If your testimony is based upon or chiefly concerned with one or two major research studies, copies should be furnished. The remaining citations to other works can be accomplished by using footnotes in your statement referring to those works.

4. Results of Surveys and Other Research Studies

If in your testimony you will present the results of a survey or other research study, as distinguished from simple references to previously published studies conducted by others, you must also present as an exhibit or exhibits all of the following information that is available to you.

(a) A complete report of the survey or other research study and the information and documents listed in paragraphs (b) through (e) below if they are not included in the report.

(b) A description of the sampling procedures and selection process, including the number of persons contacted, the number of interviews completed, and the number of persons who refused to participate in the survey.

(c) Copies of all completed questionnaires or interview reports used in conducting the survey or study if respondents were permitted to answer questions in their own words rather than required to select an answer from one or more answers printed on the

questionnaire or suggested by the interviewer.

(d) A description of the methodology used in conducting the survey or other research study including the selection of and instructions to interviewers, introductory remarks by interviewers to respondents, and a sample questionnaire or other data collection instrument.

(e) A description of the statistical procedures used to analyze the data and all data tables which underlie the results reported.

Other interested persons may wish to examine the questionnaires, data collection forms and any other underlying data not offered as exhibits and which serve as a basis for your testimony. This information, along with computer tapes that were used to conduct analyses, should be made available (with appropriate explanatory data) upon request of the Presiding Officer. The Presiding Officer will then be in a position to permit their use by other interested persons or their counsel.

5. Identification, Number of Copies, and Inspection

To assure prompt consideration, all materials filed by prospective witnesses pursuant to the instructions contained in paragraphs 1 through 4 above should be identified as "Funeral Rule Review Rulemaking Statement" ("and Exhibits," if appropriate), submitted in five copies when feasible and not burdensome, and should include the name, title, address, and telephone number of the prospective witness.

6. Reasons for Requirement

The foregoing requirements are necessary to permit us to schedule the time for your appearances and that of other witnesses in an orderly manner. Other interested parties must have your expected testimony and supporting documents available for study before the hearing so they can decide whether to question you or file rebuttals. If you do not comply with all of the requirements, the Presiding Officer has the power to refuse to let you testify.

7. General Procedures

These hearings will be informal and courtroom rules of evidence will not apply. You will not be placed under oath unless the Presiding Officer so requires. You also are not required to respond to any question outside the area of your written statement. However, if such questions are permitted, you may respond if you feel you are prepared and have something to contribute. The Presiding Officer will assure that all questioning is conducted in a fair and reasonable manner and will allocate time according to the number of parties participating, the legitimate needs of each group for full and true disclosure, and the number and nature of the factual issues discussed. The Presiding Officer further has the right to limit the number of witnesses to be heard if the orderly conduct of the hearing so requires.

The deadlines established by this notice will not be extended and hearing dates will not be postponed unless hardship can be demonstrated.

Section F Notification of Interest

If you wish to avail yourself of the opportunity to question witnesses you must notify the Presiding Officer by July 30, 1988 of your position with respect to the proposed rulemaking proceeding. Your notification must be in sufficient detail to enable the Presiding Officer to identify groups with the same or similar interests respecting the general questions and issues provided in Section C. of this notice. The Presiding Officer may require the submission of additional information if your notification is inadequate. If you fail to file an adequate notification in sufficient detail, you may be denied the opportunity to cross-examine witnesses.

Before the hearings commence, the Presiding Officer will identify groups with the same or similar interests in the proceeding. These groups will be required to select a single representative for the purpose of conducting direct or cross-examination. If they are unable to agree, the Presiding Officer may select a representative for each group. The Presiding Officer will notify all interested persons of the identity of the group representatives at the earliest practicable time.

Group representatives will be given an opportunity to question each witness on any issue relevant to the proceeding and within the scope of the testimony. The Presiding Officer may disallow any questioning that is not appropriate for full and true disclosure as to relevant issues. The Presiding Officer may impose fair and reasonable time limitations on the questioning. Given that questioning by group representatives and the staff will satisfy the statutory requirements with respect to disputed issues, no such issues will be designated by the Presiding Officer.

Section G. Post-Hearing Procedures

The Presiding Officer will establish the time that you will be afforded after the close of the hearings to file rebuttal submissions, which must be based only upon identified, properly cited matters already in the record. The Presiding Officer will reject all submissions which are essentially additional written comments rather than rebuttal. The rebuttal period will include the time consumed in securing a complete transcript.

Within a reasonable time after the close of the rebuttal period, the staff shall release its recommendations to the Commission as required by the Commission's Rules of Practice. The Presiding Officer's report shall be released not later than 30 days thereafter and shall include a recommended decision based upon his or her findings and conclusions as to all relevant and material evidence. Post record comments, as described in § 1.13(h) of the Rules of Practice, shall be submitted not later than 60 days after the publication of the Presiding Officer's report.

Section H. Rulemaking Record

In view of the substantial rulemaking records that have been established in prior trade regulation rulemaking proceedings (and the consequent difficulty in reviewing such records), the Commission urges all interested persons to consider the relevance of any material before submitting it for the rulemaking record.

While the Commission encourages comments on its proposed review of the Funeral Rule, the submission of material that is not generally probative of the issues posed by the review merely overburdens the rulemaking record and decreases its usefulness, both of these reviewing the record and to interested persons using it during the course of the proceeding. The Commission's rulemaking staff has received similar instruction.

Material that the staff has obtained during the course of its investigation prior to the initiation of the rulemaking proceeding but that is not placed in the rulemaking record will be made available to the public to the extent that it is considered to be nonexempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

The rulemaking record, as defined in 16 CFR 1.18(a), will be made available for examination in Room 130, Public Reference Room, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW, Washington, DC.

Section I. Preliminary Regulatory Analysis

I. Need for, and Objectives of, the Proposed Review

Section 453.10 of the Federal Trade Commission's (FTC) Funeral Industry Practices Trade Regulation Rule ("Funeral Rule" or "Rule") require the FTC to conduct a rulemaking amendment proceeding to determine whether the Rule should be retained as is, amended, or repealed. That section states:

> No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceeding.

The current Rule essentially requires funeral providers to: (1) Disclose prices, available options and other information regarding funeral arrangements to consumers in person and over the telephone; (2) make truthful representations regarding legal and other requirements concerning funeral arrangements; (3) permit consumers to select and purchase only those goods and services they desire; (4) seek to obtain express permission before embalming the deceased for a fee; (5) make truthful representations about the preservative and protective value of funeral goods and services; and (6) disclose whether they charge a fee for arranging cash advance purchases. The Commission has authorized publication of a Notice of Proposed Rulemaking, which appears in the Federal Register concurrently with this preliminary regulatory analysis.

The FTC proposes to review whether the Funeral Rule appears to be working as expected in reducing barriers to price competition and increasing consumer choice in the funeral market, whether some modification is necessary to facilitate those benefits, and whether repeal is warranted as a result of substantially reduced marketplace problems. The Commission has decided to leave all of the Rule's requirements, including the issue of repeal, open to question during the rulemaking proceeding. This decision is based on the fact that, unlike other proposed rulemaking proceedings, this amendment proceeding is mandated by the Funeral Rule itself. Detailed information regarding the evidence collected and reviewed in anticipation of this review proceeding is contained in sections of the Notice of Proposed Rulemaking that precede this document and that is incorporated by reference into this analysis, in two survey reports entitled "FTC, Baseline and Follow-up Studies for Evaluating the Effect of the Funeral Rule, Final Report" (July 1982) and "Report on the Survey of Recent Funeral Arrangers," Market Facts, Inc., Report to the FTC (April 1988) and in two staff reports to the Commission dated April 7, 1988 and April 1988, which have been placed on the rulemaking record. This body of information presents evidence on the Rule's market impact that will be considered by the FTC in conjunction with all other evidence contained in the rulemaking record as a whole.

II. Legal Authority

The Commission has reason to believe that the amendment proceeding is in the public interest and proposes to review the Funeral Rule in accordance with section 18 of the Federal Trade Commission Act. 15 U.S.C. 57a.

III. Alternatives Considered by the Commission

The Commission can take several different forms of action. It can repeal the Rule, modify or repeal specific Rule provisions, or retain the Rule unchanged. The Commission discusses below the costs and benefits of repeal and no action. It is not able at this time to discuss the costs and benefits of each possible modification to the Funeral Rule's many provisions, because the available information presents some evidence to support and refute arguments that certain provisions' costs outweigh their benefits, and because it is unclear at this time whether the Rule is sufficiently in place in the market to permit accurate judgments about costs and benefits. Of course, the Commission shall consider those costs and benefits when it takes final action on this review.

1. Repeal the Rule

Under this option, the Commission would delete the Funeral Rule from the Body of trade regulation rules currently contained in the Code of Federal Regulations.

2. Take No Action

Under this option, the existing Rule would remain unchanged.

IV. Cost-Benefit Analysis

The two major groups that would be affected by repeal of the Funeral Rule are the funeral consumers who use the services and goods of funeral providers to make funeral arrangements, and the funeral providers themselves.

The funeral industry is a major industry in the United States, composed primarily of small businesses. According to industry estimates, there are currently slightly less than 22,000 funeral homes in the nation, about 50,000 licensed funeral directors and embalmers, and several hundred crematories geographically dispersed throughout the country. The number of deaths is about two million annually, and individual funeral homes conduct on average about 94 funerals a year. Consumers' current annual expenditures for funeral services is estimated by industry observers at approximately $4 billion, not including other funeral-related expenditures, such as cemetery charges and incidental items purchased for most individual funerals from third parties. These latter costs may raise consumers' funeral costs by as much as $2 billion or more. The Rule does not currently cover cemeteries that do not also operate funeral homes, sellers of only funeral goods, such as retail sellers of caskets, or sellers of only funeral services, such as direct cremation firms that do not sell funeral goods. The Rule's beneficiaries are consumers who use the services of funeral homes and crematories that provide services *and* sell funeral goods directly to the public.

A. Repeal the Current Rule

The Commission has considered the issue of repeal, and has decided to leave the issue open to question during the proceeding. The benefits of repealing the Rule are the savings incurred by avoiding the costs of the Rule's continued implementation, and the cost of repealing it equals the lost benefits from continued implementation.

Projected Benefits—1. *Benefits to Funeral Providers:* If the Rule is rescinded, providers may be able to realize savings from elimination of certain expenses associated with compliance with the Rule. These costs fall primarily into five categories.

a. *Making Telephone Disclosures.* The Rule requires providers to provide telephone callers with readily available information that answers callers' requests for price information. To the extent the Rule causes increased telephone requests for price information, it thus results in increased time spent by funeral home personnel in giving that information. If the Rule does not cause more such requests, it does not impose any excess personnel costs.

b. *Recordkeeping Costs.* The Rule requires providers to retain for one year copies of general price lists distributed to consumers and copies of required statements of items selected given to consumers for each funeral. The Rule thus imposes increased management

and labor costs associated with maintaining those files.

c. *Reproduction Costs.* The Rule requires providers to give the general price list to consumers for their retention. It therefore imposes copying costs that permit copies of the lists to be provided to consumers.

d. *Updating Price Lists.* Providers must, under the Rule, update the rule-required price lists as their prices or offerings change. To the extent that providers already recalculate their prices whenever their costs or offerings change, the Rule imposes only those costs associated with the time necessary to transpose those prices to the price lists.

e. *Seeking Embalming Approval.* The Rule requires providers to seek to obtain express prior approval from a family member or other authorized person before embalming deceased human remains for a fee. To the extent the Rule causes providers to spend additional time seeking embalming authorization, it imposes the costs of that additional time.

2. *Benefits to Consumers:* Because any increased cost of doing business under the Rule is passed on to the consumer, the cost savings to providers from the Rule's repeal (discussed above) may benefit the consumer in the form of lower prices or improved services.

Costs and Adverse Economic Effects

1. *Cost to Providers:* No costs or adverse economic effects to providers would be expected from repeal of the Rule.

2. *Costs to Consumers:* Repeal of the Funeral Rule would eliminate any economic or emotional benefits that consumers presently derive from the Rule. Assuming that the Rule is operating as the Commission expected in promulgating it, the Rule generates two types of benefits for consumers.

a. *Price Competition Benefits.* The Rule is designed to alert consumers that price information is relevant and available at the critical moment of choosing a funeral provider, and to ensure that consumers can obtain sufficient price information to comparison shop among different funeral providers. Comparison shopping, by individual consumers or by groups such as memorial societies on consumers' behalf, may stimulate price competition among funeral providers so that consumers are better able to get the maximum for their money.

b. *Itemization Benefits.* The Rule is designed to give consumers, once they have selected a provider, the opportunity to consider various options and purchase only those items they desire.

B. Take no Action

The Commission could choose to take no action and leave the current Rule unchanged. In this case, the costs and benefits currently generated by the Rule would continue. The costs of the Rule are described in the previous section discussing the benefits of repeal. The benefits of the Rule are described in the previous section discussing the costs of repeal.

V. Summary and Explanation of Why the Commission Proposes to Review the Rule

The Commission has considered the options summarized in Part III of this analysis, and the costs and benefits of each. The Commission has concluded, based on the unique mandate of § 453.10 of the Rule, that a rulemaking amendment proceeding leaving all issues open to question would best serve the public interest by facilitating further exploration of these and any other options available in determining whether the Rule should be retained, amended, or repealed.

List of Subjects in 16 CFR Part 453

Funeral homes, Price disclosure, Trade practices.

By direction of the Commission.

Emily H. Rock,

Secretary.

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