

FUNERAL INDUSTRY PRACTICES

Proposed Trade Regulation Rule

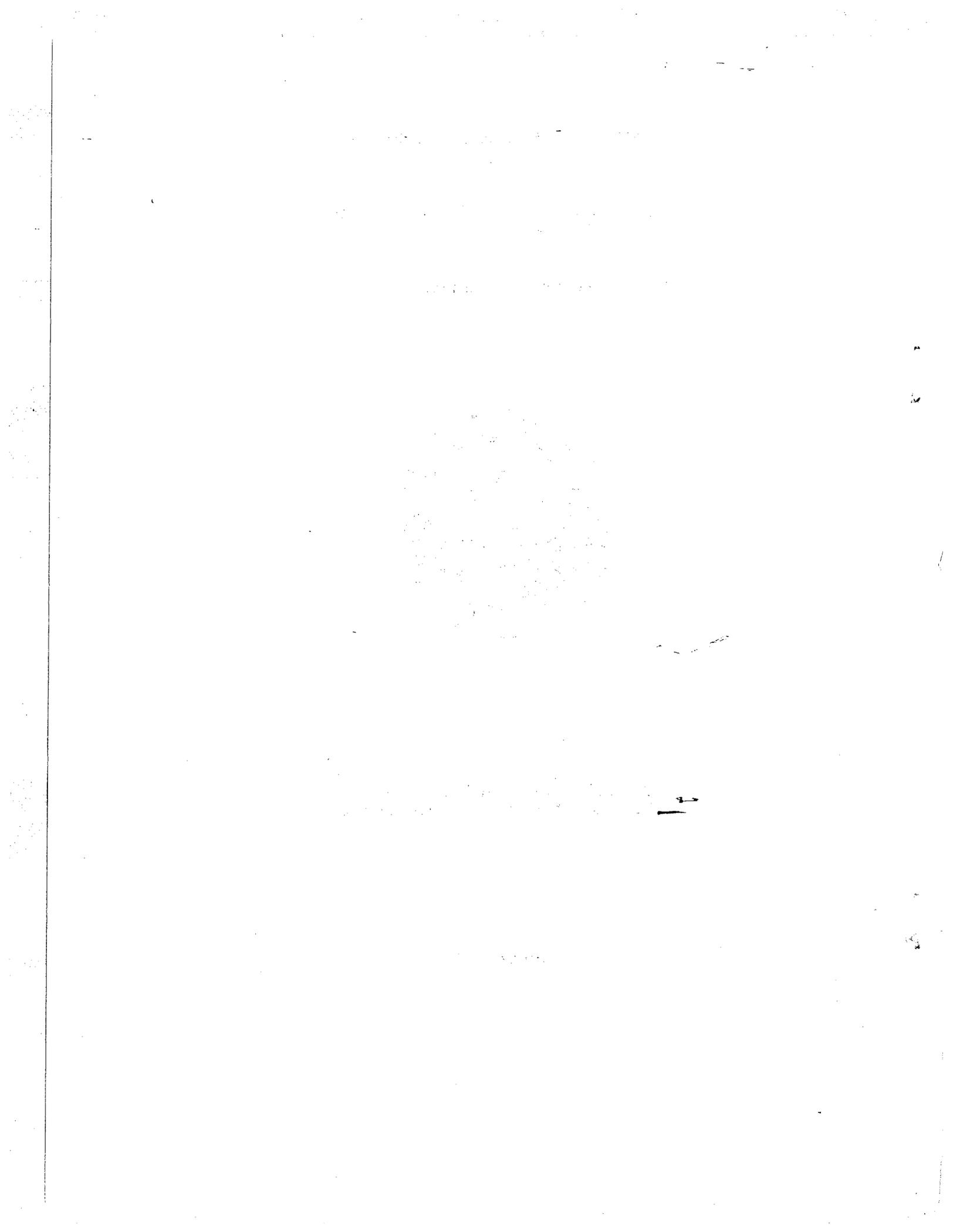
and

Staff Memorandum



Division of Special Projects
Bureau of Consumer Protection

August, 1975



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Proposed Trade Regulation Rule

and

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This memorandum was prepared by the staff of the Commission's Bureau of Consumer Protection, Division of Special Projects. The Commission has not adopted any findings or conclusions of the staff.

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UNITED STATES GOVERNMENT

Memorandum

TO : Commission

DATE: August 20, 1975

FROM : Division of Special Projects
Bureau of Consumer Protection

SUBJECT: Funeral Industry - File 732 3057 (Program I-12)
Proposed Trade Regulation Rule

INTRODUCTION

This memorandum supports the Funeral Industry Practices Trade Regulation Rule which has been proposed to correct the unfair and deceptive practices identified in the course of the staff's investigation. These abuses are industry-wide, and staff is convinced that a Trade Regulation Rule is the most direct and efficient way to eliminate them.

The staff formally proposed the funeral investigation to the Commission in July, 1973 after several months of preliminary investigation into industry conditions and consumer abuses. Staff's 239 page planning memo to the Commission 1/ described, in considerable detail, the industry and a number of consumer problems, and forms part of the basis for the rule we are proposing.

Following Commission approval of the formal industry-wide investigation, the staff initiated, in October, 1973 a pilot funeral price survey in the District of Columbia, the results of which were released in February, 1974. The D.C. survey was the first systematic effort to get hard data on funeral prices and practices in a particular area, and to make that data available to the public. ~~The D.C. survey~~ produced much useful information. 2/ It also inspired a number of similar surveys all over the country--by state and

1/ Division of Evaluation, Bureau of Consumer Protection, Unfair Practices in the Funeral Industry: A Planning Report to the Federal Trade Commission, June 29, 1973 [hereinafter cited as F.T.C. Funeral Investigation Planning Memo].

2/ DIVISION OF SPECIAL PROJECTS, BUREAU OF CONSUMER PROTECTION, U.S. FED. TRADE COMM'N, SURVEY OF FUNERAL PRICES IN THE DISTRICT OF COLUMBIA (1974) [hereinafter cited as D.C. FUNERAL SURVEY].



local governments, 3/ consumer groups, 4/ and newspapers 5/ -- which have likewise yielded valuable data.

In addition to the price survey, the staff has obtained information from funeral directors, visits to funeral homes, industry employees and ex-employees, casket manufacturers, memorial society members, consumer interviews and complaint letters, trade journals, scholarly papers, and magazine and newspaper articles.

The information gathered by the investigation confirms the view expressed in our initial report that there are many serious abuses of consumers by large numbers of the nation's 22,000 funeral homes 6/ and consequently an urgent need exists for remedial action by the Commission.

Each year, millions of families are forced by the death of a relative 7/ to make one of the largest consumer

3/ E.g., Arkansas; Delaware; Florida; Iowa City, Iowa; Massachusetts; Minnesota; and Syracuse, New York.

4/ E.g., Indiana Public Interest Research Group; New York Public Interest Research Group; Consumer Action of Kansas City, Missouri.

5/ Newspaper surveys have been conducted by the San Bernadino Sun-Telegraph, San Bernadino, CA; St. Petersburg Times, St. Petersburg, FL; The Cincinnati Enquirer, Cincinnati, OH; The Louisville Courier-Journal, Louisville, KY; and the Northern Virginia News, Vienna, VA.

6/ The precise number of funeral establishments is not entirely clear. The most recent figures from the Department of Commerce, Social and Economic Statistics Administration indicate that there were 20,854 funeral service and crematory establishments operating in 1972. U.S. DEP'T OF COMMERCE, SUMMARY REPORT OF THE 1972 CENSUS OF SELECTED SERVICE INDUSTRIES. The industry's largest trade association, the National Funeral Directors Association has used the figure 22,500. NATIONAL FUNERAL DIRECTORS ASSOCIATION, FUNERAL SERVICE 13 (1974). The Labor Department has quoted a figure of 23,000 and has calculated that there were 45,000 licensed funeral directors and embalmers in 1972. U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 174 (1974-75).

7/ There were 1,977,000 deaths in the United States in 1973. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S., 51 (1974).

purchases, 8/ under severe handicaps of time pressures, emotional distress and lack of information or experience. 9/ As an FTC hearing examiner noted long ago, there are few, if any industries where the ultimate consumer is so disadvantaged or where his normal bargaining power is so diluted in a situation of such immediate need. 10/

The need for protections for funeral buyers is particularly acute because the funeral director plays two conflicting roles. His public relations image emphasizes his duties as a professional serving people at a time of particular desperation. His economic self-interest puts him in a different role: he is a salesman of goods and services to these same people; and, if he wants to prosper or even to survive, he must move his high profit lines.

This conflict is exacerbated because the image of disinterested professionalism makes the funeral director a more effective merchandiser. The more the public accepts the professional role, the less it will inquire, shop, or bargain, and the greater the opportunity for high mark-ups,

8/ Based on the D.C. funeral survey and similar surveys across the country, consumers pay funeral directors an average of \$1100 to \$1400. Cemetery and related expenses bring the average total for funeral and burial expenses to approximately \$2000. See sources cited in notes 2-5, supra; FFDA Statistical Survey Shows Few Ratio Changes, AMERICAN FUNERAL DIRECTOR 22 (July, 1975) (1974 average funeral director charge of \$1287).

Gross receipts for funeral homes and crematories have been estimated at \$1.91 billion for 1973, \$2.00 billion for 1974, \$2.12 billion for 1975, and are projected to reach \$2.80 billion by 1980. U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK WITH PROJECTIONS TO 1980, 480 (1975).

Outlays for items such as flowers (approximately \$800 million, annually), cemetery expenses (approximately \$735 million, annually), monuments and markers (approximately \$450 million, annually), and burial vaults (approximately \$305 million, annually), bring the total annual expenditures for funeral related items to approximately \$4.2 billion. See MEDIA AND CONSUMER 14 (June, 1974).

9/ The disadvantaged position of the consumer in the funeral transaction was discussed, in detail, in the planning memorandum at 64-78. See note 1 supra.

10/ See In re Casket Mfrs. Assn., 52 F.T.C. 958, 971 (1954).

unnecessary services and unscrupulous practices. Consequently, the industry tends to promote the professional image and fight anything that would interfere with it or that would permit other than disinterested organizations to come between it and the consumer. The industry is well organized in terms of state boards of regulation and trade associations 11/ and uses its advantages to limit price disclosure, low cost disposition, pre-need arrangements, and price advertising, all in the name, of course, of professional ethics and good practice.

Once the consumer comes to the funeral home, a number of sales techniques of varying unsavoriness are used to increase the amount he spends. Some of these methods are common to many industries, and normally we rely on the forces of competition and the good sense of consumers to punish those who use them and reward those who do not. This does not work for funerals because the bereaved purchaser is not emotionally able to bargain 12/ and is seldom even aware that he is being deceived or exploited.

The nature of the funeral transaction and the incentives operating in the industry have been discussed extensively in prior memoranda, and need not be reiterated in detail here. It is enough to say that the general marketing strategy of much of the industry seems to follow the following precepts:

1. Eliminate low cost alternatives to the standard funeral through control of laws, regulations, and codes of ethics.
2. Use of any means possible - laws and regulations, propaganda, refusal to deal - to stunt the development of memorial societies or pre-need societies which can bargain on behalf of the customer in a non-emotional context.
3. Make it as difficult as possible for the consumer to obtain price information in advance of need or without coming to the funeral home.

11/ The anticipated argument that the Commission should not take action against abuses because of the presence of state regulatory boards is particularly hollow in the case of the funeral industry. See F.T.C. Funeral Investigation Planning Memo 17-30. One particularly revealing illustration is the fact that the general counsel (an active policy-maker) for the industry's largest trade association, NFDA, is also the general counsel to the conference of state regulatory boards, which proposes state regulations.

12/ Moreover, once the body is in the hands of a funeral director, the consumer is unlikely to take his business elsewhere.

4. When the purchaser comes to the funeral home, keep him confused about prices and options. Tie products together so he buys things he would not want if he thought about it. Sell him up the price line, and suggest that any thought of economy is inappropriate.

5. Because the funeral business depends heavily upon personal referrals, it is important that the confusion be total but subtle. The consumer must be confused about prices, options and requirements, but he must not be able to discern that he is being confused deliberately.

The rule proposed here attacks every part of this strategy. It is designed to provide the consumer with substantially more information on prices and choices, eliminate the devices used to obtain unfair leverage over the consumer, abolish the outright frauds and deceptions that have been structured into the industry, and free up the market so that the dealings between funeral director and customer will be more fair, and the growth of memorial societies and pre-need arrangements more possible.

Since the Improvements Act expanded the FTC's jurisdiction to cover practices that "affect" commerce as well as those "in" commerce, the Commission's authority to promulgate Trade Regulation Rules 13/ with respect to funeral abuses is beyond serious question.

Almost every funeral home has sufficient involvement in one or more of the following activities to satisfy the statutory jurisdictional prerequisites: 14/

13/ The Commission's authority to issue Trade Regulation Rules defining certain practices as unfair or deceptive has been explicitly recognized by case. See Nat'l Petroleum Refiners Assn. v. F.T.C., 482 F.2d 672 (D.C. Cir. 1973), cert denied, 415 U.S. 951 (1974), rev'g 340 F. Supp. 1343 (D.D.C. 1972). More recently, the Commission has received explicit rulemaking authority by statute (Magnuson-Moss Warranty/FTC Improvement Act, P.L. 93-637, Sec. 202 (Jan 4, 1975)).

14/ No specific amount of sales in or affecting commerce is required; only that the amount is not de minimis. In NLRB v. Inglewood Park Cemetery Association, 355 F.2d 448 (9th Cir. 1966), the Ninth Circuit held that \$3,086.31 in out-of-state purchases (out of \$500,000 in sales receipts) was not de minimis. The Seventh Circuit has held that \$2,000 is not de minimis. NLRB v. Aurora City Lines, Inc., 299 F.2d 229, 231 (7th Cir. 1962). In Surrey Sleep Products, the Commission rejected, as clearly without merit, the argument that \$5,000 in interstate sales was de minimis. See 73 F.T.C. 523, 553 n. 3 (1968).

- purchase from out-of-state suppliers of caskets, burial vaults, and other funerary merchandise sold to customers and purchase of equipment used; 15/
- use of media and interstate communications, including the United States mail and the telephone, in connection with the arrangement and sale of and collection for funeral services and merchandise;
- sale of funeral services and merchandise to customers from different states;
- advertising in newspapers or magazines with interstate circulation, in radio broadcasts transmitted to potential customers in different states, or on billboards located on interstate highways; and
- shipment of deceased human bodies by common carrier across state lines to funeral directors located in different states and receipt for burial or other final disposition of bodies shipped across state lines from funeral directors located in other states.

15/ Out-of-state shipment of caskets and other funerary merchandise was accepted as a sufficient basis for both "in" and "affecting" commerce jurisdiction in an antitrust action decided by a United States District Court in California. See Cathay Mortuary-Wah Sang v. Funeral Directors of San Francisco, 1965 Trade Cas. Paragraph 71, 505 (N.D. Cal.). But cf. Kalin Funeral Home v. Fultz, 313 F. Supp. 435 W.D. WA 1970), aff'd 442 F.2d 1342 (9th Cir. 1971). In Cathay it was alleged that 60% of all caskets used in San Francisco came from outside the state. The staff believes that the amount of interstate shipment of caskets would be equally high in most areas of the country.

The Cathay and Kalin decisions and the Commission's jurisdiction over funeral homes are discussed in greater detail in a 16 page memo from Arthur Angel to J. Thomas Rosch dated Jan. 17, 1975 (on file).

Given the existence of funeral problems throughout the country and the magnitude of the federal government's payments 16/ to the funeral industry, funeral practices are clearly a proper concern of the federal government.

The proposed rule is directed solely to practices of funeral directors (with the exception of the section against caskets for cremation, which must also be directed against crematories, and the section preventing interference with the market, which is directed at trade associations and others beside funeral directors).

The rule does not deal with a number of related but distinguishable consumer problems encountered in our investigation which involve funeral supply companies (casket and vault manufacturers) and cemeteries.

It is possible that some of these other kinds of problems (e.g., casket and vault warranties and manufacturer's promotional materials) can be adequately resolved by negotiation or other means short of Commission Trade Regulation Rules or lawsuits. The staff has confined its proposals to practices of funeral directors because we believe they are the most serious abuses, because we do not yet have sufficient information on cemetery and allied manufacturer practices, and because attempting to include cemetery and manufacturer abuses at the same time would make the proceedings cumbersome, overburdened and time-consuming. At some later date the staff may offer additional recommendations to deal with these other issues.

16/ Veterans' burial benefits payments totalled for fiscal year 1975, an estimated \$134,944,000. VETERANS ADMINISTRATION, GENERAL OPERATING EXPENSES, BENEFIT APPROPRIATIONS AND FUNDS 1976 Fiscal Year, vol. 1 at 5. Social security and other governmental benefits bring the federal government's annual funeral-related expenditures to nearly \$500 million.

FUNERAL INDUSTRY PRACTICES
Proposed Trade Regulation Rule

§ 453.1 Definitions.

For the purpose of this part, the following terms and definitions shall apply:

(a) Funeral service industry member. A "funeral service industry member" is any person, partnership or corporation, or any employee or agent thereof, engaged in the business of selling or offering for sale, directly to the public, funeral services and merchandise; of preparing deceased human bodies for burial, cremation or other final disposition; or of conducting or arranging funerals.

(b) Funeral services. "Funeral services" consist of services performed incident to: (1) the care and preparation of deceased human bodies for burial, cremation or other final disposition; (2) the arrangement, supervision or conducting of the funeral ceremony and the final disposition of the deceased including, but not limited to, transporting the remains, securing necessary permits, embalming, arranging for death notices and other funeral-related items.

(c) Funeral merchandise. "Funeral merchandise" consists of articles and supplies sold or offered for sale, directly to the public, or used by funeral directors incident to: (1) the care and preparation of deceased human bodies for burial, cremation or other final disposition; (2) the arrangement, supervision or conducting of the funeral ceremony.

(d) Person, partnership or corporation. The term "person, partnership or corporation" refers to any party, other than a state, over which the Federal Trade Commission has jurisdiction, and may include in appropriate circumstances, but is not limited to, individuals, groups, organizations, trade associations, and professional societies.

(e) Customer. A "customer" is any person, association, or other entity who purchases, attempts to purchase or seeks information regarding possible future purchase of funeral services and/or merchandise, without intention of resale.

(f) Immediate cremation. An "immediate cremation" is a disposition of human remains which includes reduction of the remains by a heating process and which does not involve formal viewing or a prior funeral ceremony with the body present.

(g) Outer interment receptacle. An "outer interment receptacle" is any container or enclosure which is placed in the grave around the casket to protect the casket and/or to prevent the collapse of the grave including, but not limited to, receptacles commonly known as burial vaults, grave boxes or grave liners.

(h) Casket. A "casket" is a rigid container which is designed for the encasement and burial of human remains and which is usually constructed of wood or metal, ornamented, and lined with fabric.

(i) Suitable container. A "suitable container" is any receptacle or enclosure other than a casket which is of sufficient strength to be used to hold and transport human remains including, but not limited to, cardboard, pressed-wood or composition containers and canvas or opaque polyethelene pouches.

(j) Crematory. "Crematory" refers to an establishment which reduces human remains by a heating process.

(k) Defacing. "Defacing" consists of deliberate efforts to make merchandise appear unattractive to customers including, but not limited to, displaying broken, soiled or defective merchandise.

(l) Accounting year. "Accounting year" refers to the particular one year period, which may but need not necessarily correspond to the calendar year, utilized by a funeral home in keeping financial records for tax or accounting purposes.

(m) Adult funeral services. "Adult funeral services" refers to funeral services which are provided, at retail prices, for adults, and does not include services provided for infants or small children.

(n) Standard funeral service package. A "standard funeral service package" is defined to include at least the following: removal of remains to funeral home; preservation, restoration, and dressing of remains; use of funeral home facilities and equipment for viewing and the funeral service; arranging for obituary notices, church services, burial permits, and transcripts of death certificates; arranging and care of flowers; use of hearse; arranging for veteran, social security, fraternal, labor union, and/or life insurance burial benefits, arranging for pallbearers; other services of funeral director and staff; and casket.

(o) Offered for sale. "Offered for sale" refers to making available for purchase or suggesting the availability of merchandise or services for purchase by use of any of the following: media advertising; promotional materials, including brochures, handbills or calendars; the display or stocking for sale of merchandise; or expressions, direct or indirect, of a willingness to furnish services and/or merchandise to the public for a retail price.

(p) Memorial society. A "memorial society" is a non-public membership association which assists members in obtaining and making arrangements for funerals, cremations, or other methods of disposition.

§ 453.2 Exploitative practices.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral services industry member:

(a) [Embalming without permission] to furnish embalming, other services or merchandise without having first obtained written or oral permission from a family member or other person authorized by law to make funeral arrangements for the deceased. Provided that embalming without permission to satisfy requirements of state or local laws shall not be considered a violation of this provision.

(b) [Pick-up and release of corpses] (1) to obtain custody of a deceased human body without having first received written or oral authorization from a family member or other person authorized by law to make funeral arrangements for the deceased. Provided that obtaining custody of human remains without authorization from a family member or other person authorized by law to make funeral arrangements to satisfy requirements of state or local laws shall not be considered a violation of this provision.

(2) to refuse to release a deceased human body to a family member or other person authorized by law to arrange disposition of the body, including any funeral director acting on directions of a family member or other authorized person, when requested to do so, whether or not money is owed for services already rendered. Provided, however, that this provision shall be subject to any valid state or local laws respecting release or transportation of deceased bodies.

(c) [Casket for cremation] who arranges cremation services, (1) or any crematory to require customers who express interest in immediate cremation of deceased human remains to purchase a casket or to claim directly or by implication that a casket is required;

(2) to fail to make available to any customer expressing an interest in immediate cremation of deceased human remains a suitable container, as defined by this part.

(d) [Profit on cash advances] (1) to charge in excess of the amount advanced, paid or owed to third parties on behalf of customers for any items of service or merchandise described as "cash advances", "accommodations" or words of similar import on the contract, final bill, or other written evidence of agreement or obligation furnished to customers.

(2) to charge customers more than the amount advanced, paid or owed to third parties on behalf of customers for:

- cemetery or crematory charges.
- pallbearers.
- public transportation charges.
- flowers.
- clergy honoraria.
- musicians or singers.
- nurses.
- obituary notices.
- gratuities.

(3) to fail to pass on to customers the benefit of any rebates, commissions or trade or volume discounts received on any items enumerated in paragraph (d)(2). If the net cost to the funeral director for an item cannot be ascertained at the time of a particular sale, determination of the charges to the customer (the net charges paid by the funeral director) may be based on the adjustments, discounts, or rebate figures for the preceding accounting year.

(4) to misrepresent to a customer in any respect the amount advanced, paid or owed to third parties on behalf of the customer for services or merchandise to be furnished to such customer.

§ 453.3 Misrepresentations.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral service industry member:

(a) [Misrepresentation of law, public health necessity, and religious customs] (1) to make any statements or claims, written or oral, which expressly or implicitly contradict, mitigate or detract from the printed disclosures which are required by paragraph (a)(2) or which are false, misleading or unsubstantiated, regarding (i) the legal necessity for embalming, a casket, or an outer interment receptacle; (ii) public health hazards associated with the failure to utilize embalming, a casket, or an outer interment receptacle; or (iii) religious requirements or customs.

(2) to fail to furnish, to each customer who inquires in person about the arrangement, purchase and/or prices of funeral merchandise or services, the following printed or typewritten statement, in clearly legible type:

[Name of funeral home]

"To avoid purchase decisions based on misconceptions about legal or public health requirements, the following statements are provided for your information. Please ask for an explanation of any statement which is not clear.

- (i) Embalming is not required by law except in limited circumstances. It is not to be performed without authorization from a legally responsible individual except in those instances where it is required by law.
- (ii) A casket is not required for immediate cremation. In lieu of caskets, this funeral home has available containers suitable for cremation for \$ _____.
- (iii) Purchase of a casket or of a special form of casket, such as a "sealer casket," is not required by law except in limited circumstances, but may be required by cemetery rule.

- (iv) Outer interment receptacles (burial vaults or grave liners) are not required by law except in limited circumstances, but may be required by cemetery rule.

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UPON REQUEST, YOUR FUNERAL DIRECTOR WILL PROVIDE A BRIEF WRITTEN OR PRINTED EXPLANATION OF LEGAL REQUIREMENTS, INCLUDING PUBLIC HEALTH REGULATIONS, WHICH NECESSITATE THE USE OF ANY SERVICES OR MERCHANDISE."

(3) to fail to furnish, upon customer request, a brief written, typewritten or printed explanation of legal requirements, including public health regulations, which necessitate the use of any services or merchandise.

(b) [Preservative value claims] (1) to claim, directly or by implication, that decomposition or decay of a deceased human body can be prevented by the use or purchase of:

(i) embalming; or

(ii) a casket, unsealed or sealed; or

(iii) a burial vault or other outer interment receptacle, unsealed or sealed.

(2) to make false, misleading or unsubstantiated claims, directly or by implication, of watertightness or airtightness for caskets or vaults, whether sealed or unsealed;

(3) to misrepresent the preservative or protective utility of caskets, burial vaults or embalming.

§ 453.4 Merchandise and service selection.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral service industry member:

(a) [Display of least expensive caskets] whose establishment contains one or more casket selection rooms, to fail to display therein the three least expensive caskets offered for sale for use in adult funeral services, in the same general manner as other caskets are displayed. Provided, that if fewer than twelve (12) caskets are displayed, only one of the three least expensive caskets must be displayed.

(b) [Availability of other colored caskets] to fail to inform customers, by means of a prominently displayed written notice, that displayed caskets can be obtained in other colors, or to fail to provide caskets in other colors to customers who so request, provided that such caskets in other colors can be obtained from regular commercial suppliers upon twelve (12) hours notice.

(c) [Interference with customer's selection of offered items] (1) to represent, directly or indirectly, orally, visually, or in writing, that any funeral merchandise or service is offered for sale when such is not a bona fide offer to sell said product or service;

(2) to make representations, directly or indirectly, orally, visually, or in writing, purporting to offer any funeral merchandise or service for sale when the purpose of the representation is not to sell the offered merchandise or service but to obtain leads or prospects for the sale of other funeral merchandise and/or services at higher prices;

(3) to discourage the purchase, by customers, of any funeral merchandise or service which is advertised or offered for sale by:

(i) disparaging the quality, appearance or tastefulness of any such merchandise or service which is advertised or offered for sale;

(ii) suggesting that such merchandise or service is not readily available or can only be obtained after an appreciable delay, when such is not the case;

(iii) defacing any merchandise carried for sale; or

(4) to use any policy, sales plan, or method of compensation for salespersons which has the effect, in any manner, of discouraging salespersons from selling, or has the effect of penalizing salespersons for selling, any funeral merchandise or service which is advertised or offered for sale.

(d) [Disparagement of concern for price] to suggest, directly or by implication, to any customer in any manner that the customer's expressed concern about prices, inexpensive services or merchandise or an expressed desire to save money by the customer is improper, inappropriate or indicative of a lack of respect or affection for the deceased.

§ 453.5 Price disclosures.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral service industry member:

(a) [Price information over telephone] to fail to provide by telephone, upon customer request, accurate information regarding the funeral service industry member's retail prices of funeral products and services, including caskets, vaults, basic services and cremation services, if offered.

(b) [Casket price list] (1) to fail to furnish to each customer, before discussion about caskets offered for sale or the customer's selection of a casket, a printed or typewritten document which lists, in ascending order of price, the prices of all caskets available for purchase without requiring special ordering by the customer, together with sufficient information about each casket to enable the customer to locate and identify a casket among the others on display. The document shall also bear an effective date for prices listed thereon.

(2) to fail to include, on the printed or written list required by paragraph (b)(1) in clearly legible type, the following heading:

Casket Price List For [Name of funeral home]
"Listed below, in order, are the prices of the caskets offered by this funeral home together with information to help you locate and identify particular caskets which are displayed. If you are interested in any of the caskets which are included on this list but are not on display, please inquire."

(3) to represent to a customer that a casket on the list is not available, when such is not the case.

(c) [Display of casket prices] (1) to fail to display prominently in or on the caskets on display the price of such caskets by card, sign or other means.

(2) to fail to display prominently prices on any casket photographs shown to customers and on any caskets shown to customers in display rooms maintained by casket manufacturers or wholesalers.

(d) [Vault disclosure and price list] (1) to fail to furnish to customers, at the time they are shown or informed as to the availability of outer interment receptacles, before such a customer has made his or her selection, the following printed or typewritten notice:

"Some cemeteries require that an outer enclosure be placed around the casket in the grave, while others do not. Where such a requirement exists, it can usually be satisfied by either a burial vault or a grave liner, which is usually less expensive than a burial vault. Outer interment receptacles are often sold by cemeteries as well as by funeral homes. Before selecting any outer enclosure you may want to determine any applicable cemetery requirements as well as the offerings of your cemetery and funeral home."

(2) to fail to include on the printed statement required by paragraph (d)(1), in clearly legible type, the price for each outer interment receptacle available from the funeral home for purchase by the customer, together with a brief description of each enclosure, and an effective date for the prices specified.

(e) [Price list] (1) to fail to furnish to each customer who inquires in person about the arrangement, purchase, and/or prices of funeral goods or services, prior to any agreement on such arrangement or selection by the customer or to any customer who by telephone or letter requests written price information, a printed or typewritten price list, which the customer may retain, containing the prices (either the retail charge or the price per hour, mile or other unit of computation) for at least each of the following items:

- transfer of remains to funeral home.
- embalming.
- use of facilities for viewing.
- use of facilities for funeral service.

- casket (a notation that a separate casket price list will be provided before any sales presentation for caskets is made).
- hearse.
- limousine.
- services of funeral director and staff.
- outer interment receptacles (if outer interment receptacles are sold, a notation that a separate outer interment receptacle price list will be provided before any sales presentation for such items is made).

Provided, however, that the list may include total or package prices for any standard adult funeral service package under \$ _____. The items covered by any such single quoted price shall be specified, but need not be separately priced. However, if a customer wishes to decline one or more items, the price shall be reduced by at least the amount of savings accruing to the funeral home from the declination.

(2) to fail to include, on the printed price list specified in paragraph (e)(1), directly above the price listings, in clearly legible type, the following:

(i) the name, address, and telephone number of the funeral home;

(ii) an effective date for the prices listed thereon;

(iii) the statement "You are free to select only those items of service and merchandise you desire. You will be charged for only those items you select. In some instances, depending on the circumstances of death and/or the type of service you select, some additional services or merchandise may become necessary. If you are required to pay for certain services or merchandise you have not selected, because they are required by other factors, an explanation shall be provided in writing by the funeral director on the memorandum of funeral services selected which you will receive."

(f) [Memorandum of funeral service selected] (1) to fail to furnish to each customer making funeral arrangements, on a written memorandum of the funeral service selected, a list, in at least the following categories, of the services and merchandise selected by the customer together with a price for each item:

- embalming.
- other preparation of the body.
- use of facilities for viewing.
- use of facilities for funeral service.
- other services of funeral director and staff.
- casket, as selected.
- other specifically itemized merchandise.
- specifically itemized transportation charges.
- specifically itemized charges for any special services required.
- specifically itemized cash advances or expenditures.

Provided, however, that there may be single prices quoted for each standard adult funeral service package whose total price is below \$ _____, if the services and merchandise included for the package price are specified, and if the listed price reflects appropriate adjustments for any items declined by the customer, as set forth in paragraph (e)(1).

(2) to fail to include on the written memorandum, required by paragraph (f)(1), in clearly legible boldface type the following:

(i) the name, address, and telephone number of the funeral home;

(ii) the disclosure required by paragraph (e)(2)(iii);

(iii) the statement "no substitutions of agreed-upon merchandise shall be made, unless agreed to in advance, by both parties;"

(iv) the statement "I have read and understood the above statements. I have also received written information regarding the prices of caskets and other merchandise and services."

(v) immediately below the statements required by paragraph (f)(2)(iii) and (iv), the signatures of the customer and the funeral service industry member, or an authorized representative, and the date signed.

§ 453.6 Interference with the market.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral service industry member:

(a) [Offering of inexpensive funerals] or any person, partnership, or corporation, directly or indirectly, to prohibit, hinder or restrict, or attempt to prohibit, hinder, or restrict: (1) the offering, or advertising of the availability of, low-cost funerals, immediate cremation or other forms of disposition, or arrangements for funeral services in advance of need by any funeral director, memorial society, or other person, partnership or corporation;

(2) contracts or arrangements between memorial societies and any funeral director or other person, partnership or corporation providing services for the disposition of deceased human bodies.

(b) [Price advertising] or any other person, partnership or corporation, directly or indirectly, to prohibit, hinder or restrict, or attempt to prohibit, hinder or restrict, the disclosure of accurate price information regarding funeral merchandise or services by any funeral director, memorial society, or other person, partnership or corporation offering services for the disposition of deceased human bodies, whether such disclosure is made by means of advertisements in print media or broadcast media, or in any other manner.

(c) [Reliance on price advertising restrictions] to change, restrict, make or fail to make any disclosure of accurate price information about any funeral merchandise or service by print media, broadcast media, telephone, leaflets, mailings, or in any other way, because of or in connection with any law, rule, regulation or code of conduct of any non-federal legislative, executive, regulatory or licensing entity or any other entity or person whatsoever, including but not limited to professional associations.

(d) [Price availability notice] to fail to display prominently, in any advertising or promotional materials in print or broadcast media of funeral merchandise or services, the following notice:

"Funeral home prices vary substantially.
For information on our prices for funeral
merchandise and services, call:
[Telephone number]."

§ 453.7 Retention of documents.

To assure compliance with the provisions of this part and prevent future use of the unfair and deceptive practices it prohibits, all funeral homes subject to the provisions of this part shall be required to retain and to make available for inspection by Federal Trade Commission officials, upon request, true and accurate copies of the written disclosures or price lists required by § 453.3 (a)(2) and § 453.5 (b)(1), (d)(1), and (e)(1), and all revisions thereof, for at least three years after the date of their last distribution to customers, and a copy of each selection memorandum signed by a customer, as required by § 453.5 (f)(1), for at least three years from the date on which the memorandum was signed.

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Discussion of Proposed Trade Regulation Rule

Section 453.2 Exploitative Practices

Several practices dealt with by Section 453.2 are unfair more than deceptive. The first two of these concern things which are not only unfair themselves but which are used by the funeral industry to gain leverage over the consumer and to support other unfair or deceptive practices described in later sections of this memorandum. These include: embalming without obtaining permission from next of kin, obtaining custody of the remains without permission or refusing to release the remains on request. The last two sections cover particularly outrageous practices: profiting on items the consumer thinks are cash advances; and requiring purchase of a casket (which often turns out to be an expensive one), which will only be cremated with the remains.

(a) Embalming Without Permission

The Practice

In the words of a basic text on the subject, "Embalming forms the foundation for the entire funeral service structure. It is the basis for the sale of profitable merchandise." 17/

Embalming is vital because the funeral industry makes its money from the sale of ornate caskets with silk linings, satin pillows, and Beautyrest mattresses; burial clothes and shoes; and a variety of other goods and services, all of which depend upon open-casket viewing of the remains. Viewing, in turn, depends upon embalming and cosmetology to make the remains appear lifelike and attractive.

Embalming is also important to a funeral director because starting the process locks the consumer into dealing with the particular funeral home. It is difficult enough for a consumer to order the body transported to another place because he is not satisfied with the terms offered by the first funeral home; it is almost impossible if the first home has actually started work on the remains. By starting the process immediately, without asking the customer, the home is insuring that in no event will the customer take his business elsewhere.

17/ L. FREDERICK & C. STRUBB, THE PRINCIPLES AND PRACTICE OF EMBALMING 2 (1959) [hereinafter cited as THE PRINCIPLES AND PRACTICE OF EMBALMING].

Because embalming is such an essential part of lucrative undertaking, funeral directors have labored for decades to establish it as common practice. Today, the overwhelming majority of funeral homes perform embalming as a matter of course, often without even asking the family whether embalming is desired. 18/ Even at one of the most prestigious funeral homes in the country the manager admitted that embalming is routinely done without asking permission. 19/ Moreover, staff has clear evidence that some funeral homes have a policy of routine embalment without permission even when serving clientele such as orthodox Jews, who almost certainly will not want the service. 20/

Embalming without permission is sometimes defended on the grounds that almost everyone uses the service. While it is true that the practice is almost universal, this acceptance is based, in large part, on a number of misconceptions. Most people, when they request or acquiesce to embalming, are under the vague impression that it preserves the remains for a long time. It is not the Commission's business, of course, to judge the feelings people do or should have toward the dead, and, if such preservation is the desire of the bereaved, it is their right to have it. However, modern embalming practice is not directed at the long or even intermediate term preservation of the body. Such preservation is possible if large amounts of highly concentrated embalming fluid are used, but this technique has a disadvantage; it makes the skin of the corpse appear leathery and unnatural. If less concentrated

18/ See Hearings on Practices of the Funeral Industry Before the N.Y. Temporary State Comm'n on Living Costs & the Economy, New York, N.Y., Oct. 17, 1974, (transcript) at 15 [hereinafter cited as Stein Commission Transcript]; The American Way of Death Revisited; (Interview with Jessica Mitford), Chicago Tribune, Dec. 14, 1974, sec. 1, at 9; Long, The Oak Ridge-Knoxville Way of Death -- pt. 4, The Oak Ridger (Tenn.), Aug. 29, 1974, at 6; interview with former casket wholesaler, Nov. 14, 1973.

19/ Transcript of Investigational Hearing, File No. 752-3053 Washington, D.C., Aug. 16, 1974, at 288-89 [hereinafter cited as Transcript of Investigational Hearing, Aug., 1974].

20/ E.g., the staff has on file a Jan. 19, 1973 memo instructing the employees of a large funeral home, in Forest Hills, N.Y., to embalm all bodies, even orthodox Jews.

fluid is used, the corpse appears much more lifelike, and is thus better suited to open-casket viewing. The universal practice in this country is to embalm lightly to enhance the funeral. In fact, funeral homes are often concerned whether the lightly embalmed body will hold up for the two or three days prior to disposition. 21/

Some people do not want embalming because it may result in an additional expense (of \$50 to \$200 or more) which is considered unnecessary; others find the nature of the embalming personally offensive; for others, such as orthodox Jews, embalming is prohibited by religious law. Whatever the reasons, such persons have the right to not have their wishes foreclosed by the funeral home. They also have the right to the truth about embalming, a problem addressed by Section 453.3 of the rule.

The Rule

(a) Embalming Without Permission

to furnish embalming, other services or merchandise without having first obtained written or oral permission from a family member or other person authorized by law to make funeral arrangements for the deceased. Provided that embalming without permission to satisfy requirements of state or local laws shall not be considered a violation of this provision.

Effect of the Rule

The rule provides a simple, direct solution to the problem of funeral directors embalming without permission by requiring them to obtain permission from the family or other person legally authorized to make funeral arrangements.

The rule permits funeral directors to obtain permission orally, rather than insisting on written authorization, because there are usually severe time pressures and often the family is far away from the decedent and difficult to reach. The staff recognizes that permitting oral authorization presents additional enforcement problems. However, it would be wholly infeasible to require only written permission. Further, since Section 453.3(a)(2) requires that

21/ JESSICA MITFORD, THE AMERICAN WAY OF DEATH 64 (1963)
[hereinafter cited as THE AMERICAN WAY OF DEATH].

the family receive a printed disclosure that embalming is not to be performed unless permission has been given, the funeral director can be expected to think twice before going ahead with embalming without first checking with the family.

This provision is in accord with a similar requirement of written or oral permission before embalming which has been included in a series of amendments to the District of Columbia's funeral regulations recommended to the Mayor by a study committee he appointed. The recommendations are still pending before Mayor Washington. Likewise, Indiana regulations prohibit embalming without permission. 22/

(b) Pickup and Release of Corpses

The Practice

The corpse is not only the center of attention during the funeral process, but also the greatest bargaining asset. 23/ Usually, once the funeral director has possession

22/ Rules and Regulations of the Indiana State Board of Embalmers & Funeral Directors, Rule 17(f) (1974).

23/ Leroy Bowman has written regarding the corpse as a bargaining asset:

Before the customer sits down with the undertaker to determine style of the funeral and to agree on costs, he has already given up the greatest bargaining asset that the buyer possesses in any transaction, namely, the privilege of declining all offers and seeking another seller. When he turned over the body to the funeral director he practically limited himself to that one practitioner. Seldom, if ever, is a body taken by the family from one establishment to another because of dissatisfaction or disagreement over terms. Moving the body to the funeral parlor in the first place is done by the undertaker as a matter of course. The procedure is accepted by the family because of, first, its reliance on him for the proper steps to be taken and, second, because of the almost universal desire to have the body out of the living quarters. By the time the representative of the family meets with the funeral director in the office of the latter, the preparation of the body has begun. The customer finds himself practically bound

(footnote 23 continued on next page)

of the corpse he can expect to conduct the funeral service and sell his merchandise. 24/ Body "grabbing" and body "holding" are practices which, although generally viewed with disapproval by most of the funeral industry, do occur with some frequency and are clearly unfair as well as emotionally distressing to the bereaved consumer.

The inelastic nature of the potential demand for the funeral director's goods and services may cause an undertaker to resort to questionable practices to obtain customers. 25/ Two of the most serious consumer complaints brought before the New York State Temporary Commission which investigated funeral practices involved the unauthorized pickup of bodies and the subsequent refusal by the funeral director to release the remains when requested to do so by the family. 26/ An undercover investigator for the same commission found that a particular New York funeral home, owned by the nation's second largest funeral home conglomerate, was extremely persistent in trying to learn the location of the remains so

23/ cont.

to find within the offerings made to him one that he will accept. This constitutes the major advantage secured by the funeral director: gaining possession of the body before coming to agreement on costs and style of funeral.

L. BOWMAN, THE AMERICAN FUNERAL 52 (Paperback Lib, ed. 1964) [hereinafter cited as BOWMAN].

24/ Mr. Stanton Flanders, as a representative of a Jewish burial society has stated that in his dealings with Chicago funeral directors, he has found that once the funeral director has the body, negotiations are meaningless. Interview with Stanton Flanders, Temple Solel, in Chicago, Ill., Jan. 10, 1975.

25/ As one example, a recent complaint received by the Continental Association of Funeral and Memorial Societies, alleged that the ambulance drivers of a particular ambulance company operated by a funeral director, were more interested in making an unauthorized pick-up of a corpse at the scene of an accident than in aiding the injured.

26/ McPolin and Lamantia testimony concerning the Esteben Funeral Home. Stein Commission Transcript, supra note 18, at 27-33, 127-59; N.Y. TEMPORARY STATE COMM'N ON LIVING COSTS AND THE ECONOMY, AN 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 9 (R. Nesoff, director of investigations) [hereinafter cited as Nesoff Report].

that the funeral home could proceed to remove the corpse. 27/ While many states have direct prohibitions against the solicitation or steerage of bodies by funeral directors or their agents, problems continue to surface. The staff believes that the remedy to "body grabbing" lies in requiring the funeral director to obtain direct authorization in every case from the individual responsible for making funeral arrangements, prior to obtaining custody of the remains. 28/ Since possession of the remains constitutes the initial and most important step in contracting with a funeral director for his services, consumers need the protection inherent in the mandatory authorization requirement of Section 453.2(b).

As previously mentioned, consumers encounter problems not only in the unauthorized pick-up of corpses but also in the refusal by funeral directors to release the remains when requested to do so by a duly authorized person. 29/ Families may have any number of reasons for requesting such a release and it is unquestionably an unfair practice to use the body in what may be viewed as an essentially extortionate manner. 30/ It might be argued that the

27/ Nesoff Report, supra note 26, at 5.

28/ A recent trade journal article indicated NFDA's support for obtaining authorization prior to picking up remains as well as before performing embalming. CASKET AND SUNNYSIDE 22 (May, 1975).

29/ Drummey v. State Bd. of Funeral Directors & Embalmers, 13 Cal.2d 75, 87 P.2d 848 (Cal. 1939), recounts an incident where the first funeral director who received the body refused to release it to a second undertaker when requested to do so by the family. This is similar to the difficulties encountered by the consumer in the Lamantia case referred to above, note 26, supra. The staff has received information that funeral directors can and have resorted to a variety of means ranging from stating that state law prohibits moving a body to blocking the family physically as they attempt to remove the corpse themselves. The emotional trauma for a family unable to obtain the remains of a loved one needs to be underscored.

30/ A consumer wrote to the Commission in August, 1973, regarding the need to resort finally to a court order to obtain release of a body, after the funeral director changed his quoted price for goods and services upon learning that the survivors had additional assets to pay for the funeral. File No. 732 3057, Complaint No. 21.

funeral director's refusal to release the remains has, in some instances, been occasioned by the fact that goods or services have been provided and that release will not be made until payment is made. The staff believes that such a "body attachment" lien is totally unjustified. 31/

The Rule

(b) Pick-up and Release of Corpses

(1) to obtain custody of a deceased human body without having first received written or oral authorization from a family member or other person authorized by law to make funeral arrangements for the deceased. Provided that obtaining custody of human remains without authorization from a family member or other person authorized by law to make funeral arrangements to satisfy requirements of state or local laws shall not be considered a violation of this provision.

(2) to refuse to release a deceased human body to a family member or other person authorized by law to arrange disposition of the body, including any funeral director acting on directions of a family member or other authorized person, when requested to do so, whether or not money is owed for services already rendered. Provided, however, that this provision shall be subject to any valid state or local laws respecting release or transportation of deceased bodies.

Effect of the Rule

Section 453.3(b) prohibits the unauthorized pick-up of human remains and the refusal to release remains when requested to do so by the family. It seeks merely to insure that the wishes of the bereaved consumer will be carried out and that the funeral director will be unable to use the corpse as a bargaining advantage. The staff recognizes that it will be in the best interest of both the consumer and the funeral director to permit verbal as well

31/ Courts have held for decades that funeral directors can be civilly liable for refusing to surrender corpses until payment was made for services rendered. See, e.g., Bonaparte v. Fraternal Funeral Home, 206 N.C. 652, 175 S.E. 137 (1934); Sworski v. Simons, 208 Minn. 201, 293 N.W. 309 (1940).

as written authorization, and the rule has been drafted accordingly. 32/

(c) Casket for Cremation

The Practice

While the vast majority of funeral services involve ground burial, a small but growing percentage of customers-- approximately 119,000 in 1974 -- 33/ opt for cremation. 34/ Some choose cremation because it can be much less expensive than a complete funeral. Immediate cremations (without embalming or viewing of the remains) can be obtained in various parts of the country for \$250-\$350 (sometimes for less than \$200), while total funeral and burial expenses average \$2,000 plus. Others choose a cremation because they regard it as a simpler, less ostentatious means of disposing of the dead, or because they prefer to commemorate the dead with a memorial service without the remains, rather than make the body of the deceased the controlling object of a funeral service.

Funeral directors view the growing interest in cremation as a significant threat to the institution of the full-dress American funeral and to their livelihood. They recognize

32/ It may at times be impossible to obtain prompt written authorization, if, for example, the family of the deceased is in another part of the country or is too distraught to deal with the undertaker in person immediately after the death.

33/ According to figures released by the Cremation Association of America. AMERICAN FUNERAL DIRECTOR, 36 (July, 1975).

34/ In 1960, 3.5% of the total number of deaths involved cremations. By 1970, the figure had grown to 4.5% (85,683 cremations). Roberts, Cremation Gaining Favor in U.S., New York Times, Dec. 6, 1970, sec. 1, at 1. In the last ten years, cremations in the U.S. and Canada have increased 74%, according to Thomas O. Hornstein, Vice President of the Cremation Association of America. McConnell, Cremation Prices Vary Widely, Pittsburgh Post-Gazette, Nov. 20, 1974. In a 1974 survey of attitudes about death and funerals, a study sponsored by the Casket Manufacturers Association found that, nationally 15% of those surveyed indicated a preference for cremation for themselves and 8% for others. Preferences ranged from 1.7% in the East-South-Central states to 20.6% in the Pacific states. R. BLACKWELL & W. TALARZYK, AMERICAN ATTITUDES TOWARD DEATH AND FUNERALS.

that they must provide cremation services if the public wants them, but try to discourage purchase of cremations or to increase the profit on them.

One way to accomplish both these objectives is to require families who desire a cremation to purchase a casket. Sometimes funeral directors falsely claim that purchase of a casket is required by law. At times, they tell families that the crematories require purchase of a casket. (In some instances this is true, because crematories try to help funeral directors sell caskets to cremation customers by enacting a casket requirement as a crematory regulation.) In some jurisdictions a "suitable container" is required by a state funeral board or an individual crematory regulation. While this can be satisfied by a pressed wood, fiber-board, composition, cardboard, or simple wood container, many funeral directors tell families that this language mandates a casket. Sometimes, the family is simply told that purchase of a casket for a cremation is required by the funeral home as a matter of its own policy.

In these and other variations on the basic themes, the forced purchase of caskets for cremations appears to be a significant problem, judging by consumer complaint letters, 35/ newspaper articles, 36/ and information from funeral directors and other sources. 37/

35/ The staff has received more complaints about caskets being required for cremations, by funeral homes and by crematories, than any other kind of funeral complaint. See, e.g., complaints #8, #9, and #161, File No. 732-3057.

36/ E.g., Bonin, Ashes to Ashes or Dust to Dust?, Miami Herald, April 21, 1974 (Tropic Magazine), at 19; Voelker, Can You Afford to Die?, Pittsburgh Post-Gazette, April 13, 1972, at 4; Mooney, It's Your Funeral, Washington Star-News, Sept. 30, 1973 (Magazine), at 9; Funeral Director Profits on Return of Plain Pine Box, Washington Post, Feb. 23, 1975, at C2; Huard, Cremation: Even Cheapest Costs from \$300 to \$500, Lawrence Eagle-Tribune (Mass.), April 30, 1974, at 19.

37/ E.g., interview with funeral director, in Washington, D.C., Aug. 9, 1973; interview with former casket wholesaler, supra note 18; Transcript of Investigational Hearing, Aug. 1974. The D.C. Funeral Price Survey discovered four funeral homes which mistakenly indicated that a casket was required pursuant to crematory rule or otherwise. D.C. FUNERAL SURVEY 22. See also the proposed New Jersey statute discussed infra at 31-32.

A number of different injuries to consumers can result from imposition of a requirement that a casket be purchased. Even if the consumer purchases the least expensive casket carried by the funeral home, there is economic injury which may be measured by the difference between the price of the least expensive (usually between \$80 and \$250) and the price of a suitable container (which ranges from under \$10 for certain cardboard or knock-down wood containers to \$40 or \$50 for various pressboard, fiberboard, or composition containers) which could have been used, but for the casket requirement.

Often, however, funeral directors will lever a casket requirement into a sale of an elaborate casket, adding \$300 to \$800 or more to the cost of cremation. Another kind of consumer injury can be inflicted when the funeral director persuades a family to forego cremation entirely and to buy a complete funeral service. He stresses that as long as a casket must be purchased, the family might as well pay a little bit more and get a full service and a "nice" casket.

Some funeral directors argue that requirement of a casket for cremation is a matter falling within the prerogatives of each individual entrepreneur. Each funeral director, they argue, has a right to determine what he will and will not offer, and a funeral director who thinks that encasing a body to be cremated in a non-casket container is undignified has a right to require a casket. After all, no one tells a Rolls Royce dealer that he must offer Volkswagens.

The difference is, however, that a consumer who buys a Rolls Royce does so because he wants to, even though he knows that he could buy a Volkswagen at a far lower price. A funeral buyer and a cremation buyer purchase out of necessity, not out of choice, and do not have either full information respecting the choices which could adequately serve their needs or the respective prices.

Moreover, requiring consumers who desire a cremation to purchase a casket is very much in the nature of a tie-in sale. The casket is definitely a separate product and is distinguishable from the services involved in disposition of the remains. It is capable of being sold separately and of being replaced by a less elaborate and less expensive container. The funeral director possesses substantial market power over the funeral buyer. If he has possession of the body he is, for all practical purposes, a monopolist. The buyer is bereaved, often unsure and disoriented; he is ill-informed about legal requirements and available options and anxious to conclude funeral arrangements quickly. The funeral director, in contrast, is experienced at selling

to the bereaved for profit, more aware of legal requirements, and aware of the weaknesses and vulnerabilities of bereaved buyers. The funeral director ought not to be allowed to utilize his superior bargaining power to tie purchase of a casket to a service the customer needs -- disposition of the remains.

At least seven states 38/ have enacted laws prohibiting requirement of a casket for cremation. Enforcement of such laws is, however, spotty, as is illustrated by the fact that some of the consumer complaints received about required caskets emanate from these states.

In some other states the applicable regulations promote the wrong. For example, in Michigan, the crematory standards are established by the Cemetery Commission, whose regulations require that a body be received at a crematory "suitably casketed". The Michigan funeral board indicated to the staff that the intent was to exclude plastic bags and the like, and that any firm container is acceptable. 39/ There is nothing to assure that families will be so informed, however, since the language of the regulation makes it relatively easy for funeral directors to conclude that they are acting in accordance with state law if they require a casket. A Massachusetts regulation specifies that "In all cases of cremation a suitable casket must be used." 40/

The inadequacy of existing laws to deal with the casket requirement problem and the need for protections for buyers are highlighted by a law which was proposed in New Jersey. The law would have required funeral directors to provide a "casket" (more akin to what is here termed a "suitable container") of fiberboard, pressed wood or similar material unless the consumer specifically requests otherwise in writing. 41/ Before any other casket could be sold to a customer, the customer would have to be informed, in writing, of the availability and price of the pressed wood or fiber-

38/ California, Florida, Maryland, Maine, Minnesota, New Mexico and Wisconsin. E.g., Wisconsin's Health and Social Services regulations require funeral directors to inform families that purchase of a casket is not required, but do permit crematories to require a suitable container. Wis. Health and Social Service Regs. ch. 16 H, § 16.13(6) (1974).

39/ Letter from Barbara L. Robinson, Mich. State Bd. of Examiners in Mortuary Science to Arthur Angel, Jan. 8, 1974.

40/ Rules & Regulations of Mass. State Bd. of Registration in Embalming and Funeral Directing, Rule 39 (1974).

41/ N.J. Gen. Ass. 1679 (introduced May 2, 1974).

board. The statement of the necessity for and purpose of the proposed bill aptly summarizes the problems of caskets being required for cremation:

The purpose of this bill is to reduce the cost of cremations in New Jersey by requiring funeral directors to use caskets of fiberboard, pressed wood or other similar material, as authorized by the State Board of Mortuary Science, unless the purchaser specifically and in writing requests and decides otherwise...

This measure is necessary because of the present practice of cremating human bodies in expensive caskets, and charging survivors commensurately. 42/

The Rule

(c) Casket for Cremation

who arranges cremation services, (1) or any crematory to require customers who express interest in immediate cremation of deceased human remains to purchase a casket or to claim directly or by implication that a casket is required;

(2) to fail to make available to any customer expressing an interest in immediate cremation of deceased human remains a suitable container, as defined by this part.

Effect of the Rule

The rule contains two subsections. Subsection (1) prohibits funeral directors, as well as crematories, from requiring customers who desire an immediate cremation to purchase a casket. The prohibition must, of necessity, be directed to crematories as well as funeral directors because many crematories have already demonstrated their willingness to help funeral directors sell caskets by requiring them. The rule is designed to override any conflicting state laws or regulations which require a casket for cremation. The staff believes that a state's legitimate interests in protecting the public health, safety and welfare are amply protected by a "suitable container" requirement and that state regulations mandating the use

42/ Id.

of caskets must yield to the inherent unfairness in requiring consumers to purchase unnecessary merchandise. According to our present information, Massachusetts is the only state with such an explicit legal requirement. 43/

Paragraph (2) requires the funeral director to make an inexpensive, suitable container available to any customer who desires an immediate cremation service. The staff believes that it is imperative that funeral directors be required to furnish alternative, less expensive containers to break up the casket tying arrangement. 44/

(d) Profit on Cash Advances

The Practice

A substantial segment of the funeral industry routinely overstates the amounts advanced on the customer's behalf for various services and merchandise. Such items, often listed on the bill as "cash advances" or "accommodations", include:

1. crematory charges
2. cemetery charges
3. flowers
4. obituary notices
5. limousines
6. pallbearers
7. clergy honoraria
8. musicians
9. nurses
10. shipping cases
11. public transportation
12. markers
13. vaults
14. death certificate copies
15. memorial cards

43/ Note 40 supra. But see the discussion of the Michigan Regulation at 46 supra.

44/ § 453.3(a)(2) requires a written disclosure that caskets are not required for immediate cremation and a statement disclosing the prices at which other available containers are sold.

We estimate, very roughly, that such overcharges average \$20 per funeral. Since there are about 2,000,000 funerals annually, the total overcharge on cash advance items alone is approximately \$40 million per year.

Much of the overcharge results from the clearly deceptive mark-up of third party charges. There is ample evidence that such direct mark-ups are used widely on a variety of cash advance items. 45/ For example, seven D.C. funeral homes indicated on their special report forms that they were charging customers in excess of what they were paying for crematory charges. 46/ Many Miami mortuaries do likewise. 47/

Staff also has evidence of use of direct mark-ups of the clergyman's honorarium, 48/ flowers, markers, gratuities, limousines, pallbearers, 49/ and vaults. 50/ In addition, two computer printouts of income and expenses have been received for two funeral homes owned by the nation's two largest funeral home chains. Both documents contain line items which appear

45/ See, e.g., The End Game, Los Angeles Times, Oct. 8, 1972 (West Magazine), at 24-25; Nesoff Report, supra, note 26, at 22; interview with industry informant, Los Angeles, Cal., Dec. 28, 1973; interview with members of funeral employees union, Dec. 12, 1973; interview with funeral home manager, Miami, Fla., June 19, 1975.

46/ As noted in the D.C. survey, local crematories charged, at the time of the survey, between \$50 and \$75 for cremation. The amounts charged to customers for the crematory fee by various D.C. mortuaries included: \$90 (one funeral home), \$110 (three funeral homes), \$125 (two establishments) and \$195 (two mortuaries). D.C. FUNERAL SURVEY 21.

47/ Interview with funeral home manager, supra note 45; memo to File No. 732 3057 on visit to funeral home in Miami, Fla., June 19, 1975; telephone calls to funeral homes in Miami, Fla., June 19, 1975.

48/ The End Game, supra note 45, interview with union members, supra note 45.

49/ Interview with union members, supra note 45.

50/ See interview with union members, supra note 45; interview with Michael Hirsh, Executive Producer, Chicago Public Television (WTTW TV), in Chicago, Ill., Dec. 13, 1975. Other information has been received from a preliminary investigation conducted by the Chicago Regional Office.

to be annual cash advance profits: \$5,595 for the 250 funerals conducted by one home and \$5,493 for the 749 funerals conducted by the other establishment.

A large portion of the \$40 million overcharge, perhaps \$18 million, is attributable to overcharges on flowers and obituary notices. While some funeral homes apply a direct mark-up on these items, the form of the overcharge often consists of failure to pass along to consumers trade discounts received for large volume orders. Since flowers and obituary notices are typically listed in the "cash advance" or "accommodations" category with the other cash advance items which may have been marked up directly, the deception to the consumer is basically the same. The consumer is led to believe that the funeral director is seeking reimbursement for his out-of-pocket expenditures on the customer's behalf, while the funeral director is actually collecting more than he paid out. Some have attempted to justify not passing along trade discounts on grounds that the amount pocketed compensates the funeral director for his services in handling arrangements for the obituary notices or flowers. This is spurious, because the funeral director is paid directly for professional services which consist, in large part, of arranging for various cash advance items. Having set and received a fee which ostensibly compensates him for his services, it is unfair as well as deceptive to charge the consumer again for the same services under the guise of reimbursement for monies advanced.

Another defense of the practice applies to the failure to pass on trade discounts. Since the consumer could not get the volume discount the mortuary gets if he made the arrangements himself, it is argued that the consumer is not hurt by the overcharge. However, implicit in the consumer's retention of the mortician as his agent is the understanding that the mortician will make the best arrangements he can for the consumer and give him the benefit of those arrangements. That understanding is, after all, one reason why a consumer hires a mortician, and the fact that the consumer could not do as well on his own is immaterial.

The impropriety of funeral directors' failure to pass on trade discounts has even been acknowledged by the industry's major trade association, the National Funeral Directors' Association (which has traditionally been the trade association most firmly opposed to price advertising, itemization, treatment of funeral directors as businessmen rather than professionals, etc.). The NFDA has stated, in writing, that its position is that "the family shall benefit

in toto from all discounts and rebates from [such] cash advances." 51/

The Rule

(d) Profit on Cash Advances

(1) to charge in excess of the amount advanced, paid or owed to third parties on behalf of customers for any items of service or merchandise described as "cash advances", "accomodations" or words of similar import on the contract, final bill, or other written evidence of agreement or obligation furnished to customers.

(2) to charge customers more than the amount advanced, paid or owed to third parties on behalf of customers for:

- cemetery or crematory charges.
- pallbearers.
- public transportation charges.
- flowers.
- clergy honoraria.
- musicians or singers.
- nurses.
- obituary notices.
- gratuities.

(3) to fail to pass on to customers the benefit of any rebates, commissions or trade or volume discounts received on any items enumerated in paragraph (d)(2). If the net cost to the funeral director for an item cannot be ascertained at the time of a particular sale, determination of the charges to the

51/ Letter from Thomas H. Clark, General Counsel, NFDA, to Richard A. Givens, FTC, N.Y. Regional Office, Dec. 17, 1974.

At the same time the state boards have been urged to adopt (and a score have adopted) a regulation regarding profits on cash advance items. The regulation is inadequate because it only prohibits funeral directors from charging families more than amounts actually paid out for items described as cash advances. It deliberately leaves funeral directors free to profit on cash advances if they use a different label, and it does not deal with trade discounts.

customer (the net charges paid by the funeral director) may be based on the adjustments, discounts, or rebate figures for the preceding accounting year.

(4) to misrepresent to a customer in any respect the amount advanced, paid or owed to third parties on behalf of the customer for services or merchandise to be furnished to such customer.

Effect of the Rule

The rule provision covering profits on cash advances has four paragraphs. The first paragraph makes it clear that a funeral director may not charge customers more than the actual sums paid out for any items described as "cash advances", "accommodations" or words of similar import. The language "advanced, paid or owed" has been used to indicate that the provision applies whether the funeral director has already advanced the money when the customer is billed, or has incurred an obligation to pay in the future based on a periodic, or other billing system.

Paragraph (2) prohibits funeral directors from charging families more than they pay out for any of the enumerated items, whether or not the items are listed on the customer's bill under a "cash advance" or "accommodation" heading. Some funeral directors might try to get around paragraph (1)'s prohibition by listing the enumerated items under a heading such as "other charges", "additional services rendered on your behalf", or with no heading at all. Paragraph (2) closes that loophole.

Paragraph (3) explicitly requires that funeral directors pass on to customers the benefits of any trade discounts received and clarifies the procedure to be used if the precise amount of the rebate or discount is not known at the time the customer is billed.

Paragraph (4) is a general prohibition against misrepresentation of amounts advanced, paid or owed on behalf of the customer for cash advance items. This provision is designed to reach other possible ways by which some ingenious funeral directors might circumvent the specific provisions of paragraphs (1), (2) and (3).

Once overcharges on cash advance items are prohibited, some funeral homes are likely to try to regain the lost revenues by increasing their professional service charges. The staff believes this reaction will be limited because

comparative price data will be more accessible and competition improved. Other funeral homes are likely to absorb some of the loss while increasing their service charges somewhat less than the amount lost. Many homes would simply do without this extra revenue which previously had been "icing on the cake". The staff believes that the net effect of the rule provision would be to eliminate, for the future, cash advance overcharges and save consumers most of the \$40 million they are now overcharged annually.

Section 453.3 Misrepresentations

One effective merchandising technique is to tell the customer that he has no choice except to purchase the offered goods or services. In the funeral industry, one way this is achieved is through misrepresentations about legal requirements, about public health needs, and about religious customs and practices. Funeral directors have also misrepresented the preservative capabilities of embalming, caskets and vaults in order to induce bereaved customers to purchase such items.

(a) Misrepresentation of Law, Public Health Needs and Religious Practices

Earlier the point was made that embalming is the key to effective merchandising in the funeral business. It should not be surprising, then, that the legal requirement of embalming is the subject of widespread misrepresentation. ^{52/} The general public has a misconception that embalming is a legal necessity when in fact it is required only under limited circumstances ^{53/} which vary greatly from state to state. For example, some states require embalming if the death is due to certain contagious diseases. In other instances, embalming is required prior to shipment by common carrier. Given the general desire to embalm the body, however, it is not surprising that many funeral directors give in to the temptation to tell the next of kin that it is a legal requirement.

^{52/} See interview with industry informant, supra note 18; interview with industry informant, supra note 45; interview with Allace Kunz, President, California Federation of Funeral and Memorial Societies, in Midway City, Cal., Jan. 3, 1973; interview with Sydney Bleifeld, President, Los Angeles Memorial Society, in Los Angeles, Cal., Jan. 5, 1973; interview with consumer, Dec. 13, 1972; Nesoff Report, supra note 26, at 4; Stein Commission Transcript, supra note 18, at 95; REPORT OF THE SPECIAL COMMITTEE ON FUNERAL PRICES, PRICING POLICIES AND PROCEDURES IN FLORIDA (1974) [hereinafter cited as FLORIDA FUNERAL PRICE SURVEY].

^{53/} ARK. ATT'Y GEN., FUNERAL SURVEY 11 (1974) (hereinafter cited as ARK. FUNERAL SURVEY). See also M. Simmons, A Comparison of the Knowledge and Opinions of the Funeral Industry Held by Urban and Rural Consumers in Central New York State, Jan. 6, 1975 (Cornell University Master of Science thesis), at 40.

Even more serious are misrepresentations concerning the funeral homes' compliance with the dictates of the religion of the deceased. 60/ For example, orthodox Judaism requires that no metal devices be used in a casket. Yet informants have told us that at least one large New York home uses countersunk screws hidden under wooden dowels. Of course, the family is assured that all-wood construction has been used and is charged accordingly. 61/

This class of misrepresentations often results in an additional expense for the consumer, in an unwitting violation of religious law, or in an unwarranted limitation of options available to the consumer.

The Rule

(a) Misrepresentations of Law, Public Health Necessity and Religious Customs

(1) to make any statements or claims, written or oral, which expressly or implicitly contradict, mitigate or detract from the printed disclosures which are required by paragraph (a)(2) or which are false, misleading or unsubstantiated, regarding (i) the legal necessity for embalming, a casket, or an outer interment receptacle; (ii) public health hazards associated with the failure to utilize embalming, a casket, or an outer interment receptacle; or (iii) religious requirements or customs.

(2) to fail to furnish, to each customer who inquires in person about the arrangement, purchase and/or prices of funeral merchandise or services, the following printed or typewritten statement, in clearly legible type:

[Name of funeral home]

"To avoid purchase decisions based on misconceptions about legal or public health requirements, the following statements are provided for your information. Please ask for an explanation of any statement which is not clear.

60/ Id.

61/ Interview with union members, supra note 45.

- (i) Embalming is not required by law except in limited circumstances. It is not to be performed without authorization from a legally responsible individual except in those instances where it is required by law.
- (ii) A casket is not required for immediate cremation. In lieu of caskets, this funeral home has available containers suitable for cremation for \$_____.
- (iii) Purchase of a casket or of a special form of casket, such as a "sealer casket," is not required by law except in limited circumstances, but may be required by cemetery rule.
- (iv) Outer interment receptacles (burial vaults or grave liners) are not required by law except in limited circumstances, but may be required by cemetery rule.

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UPON REQUEST, YOUR FUNERAL DIRECTOR WILL PROVIDE A BRIEF WRITTEN OR PRINTED EXPLANATION OF LEGAL REQUIREMENTS, INCLUDING PUBLIC HEALTH REGULATIONS, WHICH NECESSITATE THE USE OF ANY SERVICES OR MERCHANDISE."

(3) to fail to furnish, upon customer request, a brief written, typewritten or printed explanation of legal requirements, including public health regulations, which necessitate the use of any services or merchandise.

Effect of the Rule

Section 453.3(a) not only prohibits all misrepresentations of law, public health necessity, and religious custom or law (paragraph (1)), but also requires that a printed

affirmative disclosure statement be given to every customer (paragraph (2)). 62/

The affirmative disclosure statement is intended to alert customers to the general absence of legal or public health requirements for embalming, caskets (or a particular type of casket), a casket for immediate cremation, or outer interment receptacles. The disclosure is drafted so as to place the burden of proof on the undertaker who asserts that there is such a requirement in the circumstances of the particular case, by requiring him to furnish, upon customer request, a written explanation as to the legal or public health requirements 63/ of any goods or services. The staff realizes that the funeral director does not (or at least, should not) hold himself out to be qualified to interpret the law. However, since the choice is between oral or written representation of requirements, the staff believes that written representation is preferable since it will cause the funeral director to be more cautious, and will also make compliance checks easier. 64/

The staff is concerned about bureaucratic overkill and the problem of overwhelming the bereaved consumer with paper and information. That is why the affirmative disclosures

62/ Any doubts that may ever have existed with respect to the inclusion in trade regulation rules of such affirmative disclosure provisions designed to prevent future unfair or deceptive practices, were eliminated by the FTC Improvement Act's inclusion of a sentence in Section 18(a)(1)(B) of the FTC Act which states: "Rules under this subparagraph may include requirements prescribed for the purpose of preventing such [unfair or deceptive] acts or practices." P.L. No. 93-637, § 202 (Jan. 4, 1975).

63/ It is unrealistic to expect the funeral director to be able to provide written explanations regarding myriad religious requirements.

64/ The funeral director is required by § 453.7 to retain a copy of affirmative disclosure statements and any revisions in same for a period of not less than 3 years.

have been kept concise and easily understandable. 65/ Further, the more detailed written explanation of specific requirements will be furnished upon request only to those consumers who in arranging for a funeral, find that particular circumstances (e.g., death from a contagious disease) necessitate the purchase of certain services or merchandise. 66/

The affirmative disclosure statement (and the available explanations) will not only inform consumers about legal requirements and possible cemetery regulations; it also will disclose information related to other rule provisions. 67/

The statement that a casket for immediate cremation is not required by law reflects the staff's intention to override explicitly contrary state law (Section 453.2(c)(1)). 68/ This elimination of the casket for cremation tie-in is supplemented

65/ It can be anticipated that state trade associations or retail form sellers will probably undertake to prepare printed forms which the funeral director can furnish to the customer. The affirmative disclosures have been drafted so as to be specific enough to provide the consumer with useful information while at the same time being general enough to have widespread applicability. It would be impossible and unwise to attempt to specify the particular circumstances when, for example, embalming is required. The variations are far too great from state to state to permit the drafting of a proscribed disclosure. It is preferable to phrase the disclosure in the negative--"embalming is not required by law"--and place the burden of proof ("except in limited circumstances") on the mortician.

66/ The funeral director will also be required to briefly note on the memorandum of funeral services selected the reason for use of any services or goods not selected by the customer but required by other factors (§ 453.5(e)(2)(iii) and (f)(2)(iii)).

67/ These disclosures will insure that provisions of the rule will function as intended. For example in the embalming disclosure, consumers will be told that embalming is not to be performed unless it is authorized by someone responsible for making funeral arrangements. The staff believes such a disclosure will reinforce the prohibition on embalming without permission (§ 453.2(a)). The funeral director will be reluctant to embalm without permission knowing that the customer will later receive the written notice.

68/ See text at note 43 supra.

by the requirement (Section 453.2(c)(2)) that funeral directors stock alternative containers (heavy duty cardboard or polyethelene). On the affirmative disclosure statement, the availability and price of such a container will be disclosed to all customers.

The staff has included a separate disclosure on the "sealer" casket because it is felt that any representations accompanying a purportedly "sealed" casket may not only play upon the consumer's emotional anxiety but also may result in the consumer spending several hundred additional dollars for a product of highly questionable value.

The final statement concerns outer interment receptacles and follows the pattern of earlier disclosures requiring the funeral director to provide, upon request, explanation for those instances where a vault or liner is required by law.

The affirmative disclosure and the general prohibition of misrepresentations, including the prohibition on preservation claims (paragraph (b)), will greatly benefit consumers, both in dollars saved and in the freedom to make a selection without a mistakenly imposed limitation on options.

(b) Claims Concerning Preservation of the Remains

The Practice

Many purchasers of funeral services place a high value on protecting the remains of the deceased from decomposition. Whether this desire is sensible or good is not the business of the Federal Trade Commission, but the way the desire is misleadingly encouraged and then exploited is.

Two distinct classes of misrepresentations are involved here. The first is the impression fostered by the industry that modern funeral "science" can prevent decomposition of the body through embalming plus the use of the sixteen gauge steel "sealer" casket enclosed in an asphalt vault. This is simply not so. The effects of embalming as practiced in the United States have already been discussed; it is simply not intended to promote long-term preservation. And if the purchaser wants to prevent decomposition because he cannot bear the thought of the disfigurement of the remains of a relative or friend, sealing the remains in an airless, watertight environment does not achieve his goal. In The American Way of Death, Jessica Mitford recounts her

conversation with Dr. Jessie Carr, Chief of Pathology at San Francisco General Hospital:

"If you seal up a casket so it is more or less airtight, you seal in the anaerobic bacteria-the kind that thrive in an airless atmosphere, you see. These are the putrefactive bacteria, and the results of their growth are pretty horrible." He proceeded to describe them rather vividly, and added, "You're a lot better off to be buried in an aerobic atmosphere, otherwise the putrefactive bacteria take over. In fact, you're really better off with a shroud, and no casket at all." 69/

Other authorities agree. 70/

Nonetheless, promotional phrases such as "enduring protection," 71/ or "the Invincibles, they have withstood the test of time" 72/ are used to market millions of dollars in merchandise and services every year. 73/

One can argue that the purchaser is not trying to guard against decomposition but simply against the exposure of the body to the elements. That is, some people may willingly accept the idea that a corpse will decompose but dislike the thought of its being exposed to the earth and water. These people also provide a market for expensive caskets and vaults.

69/ THE AMERICAN WAY OF DEATH 68.

70/ See letter from Dr. Bruce Dull, supra note 57; E. Ives, The Sanitary Use of Embalming, 1959 (unpublished University of Saskatchewan dissertation).

71/ Promotional materials for a vault manufacturer. See also THE AMERICAN FUNERAL DIRECTOR, May, 1974, at 20.

72/ Promotional materials for a casket company. See also CASKET AND SUNNYSIDE, Jan., 1974, at 25.

73/ According to one periodical, over \$300 million was spent on burial vaults and grave liners in 1973. During the same period, the wholesale value of caskets sold totalled over \$350 million. MEDIA AND CONSUMER, June, 1974.

While a solid bronze sarcophagus with a sealer is more watertight and airtight than a pressed wood casket, there is substantial doubt that any casket or vault provides long-term protection against air and water. ^{74/} Even if the consumer has this more limited goal, he may be misled about its feasibility.

The Rule

(b) Preservative Value Claims

(1) to claim, directly or by implication, that decomposition or decay of a deceased human body can be prevented by the use or purchase of:

(i) embalming; or

(ii) a casket, unsealed or sealed; or

(iii) a burial vault or other outer interment receptacle, unsealed or sealed;

(2) to make false, misleading or unsubstantiated claims, directly or by implication, of watertightness or airtightness for caskets or vaults, whether sealed or unsealed,

(3) to misrepresent the preservative or protective utility of caskets, burial vaults or embalming.

Effect of the Rule

The rule prohibits all misrepresentations or unsubstantiated claims regarding the capabilities of embalming, caskets, or burial vaults to provide long-term preservation or protection of the corpse. The staff does not believe that it would be useful or appropriate to include a written disclosure regarding preservative capabilities. A statement that decomposition of the body is inevitable would be likely to upset bereaved consumers and would not be particularly helpful.

^{74/} Interview with cemetery administrator, in Arlington, Va., October 10, 1974; Nesoff Report, supra note 26 at 15.

Section 453.4 Merchandise and Service Selection

Concealing the price is not the only way to push the consumer towards the high-priced merchandise. The funeral director can also make the lower-priced goods either unavailable or unattractive, physically or psychologically. He can mislead the consumer as to the qualities and virtues of the expensive merchandise, or he can play upon people's feelings of guilt and remorse about the dead. Section 453.4 of the proposed rule concerns the most common of these deceptions and manipulative sales tactics.

As usual, much of the problem here revolves around selection of the casket. As will be discussed in connection with the requirement that casket prices be clearly disclosed, there is minimal profit to the funeral director in selling the cheaper end of the line. Selection room technique is designed to encourage the purchase of the high-priced merchandise, particularly caskets, and to discourage selection of the low-priced. The discouragement can take the form of non-display of inexpensive caskets, failure to inform customers that a less expensive casket is available, deliberate limitations of colors, physical defacement or disparagement of the low price units, or variations on the bait-and-switch theme. It can also take the form of disparaging the customer's choices as being indicative of a lack of affection or respect for the deceased, a technique used for all aspects of the funeral transaction.

(a) Display of Least Expensive Caskets

The Practice

Failure to display the least expensive casket is a widespread practice. The 1973 Washington, D.C. price survey found that 14 of the 36 funeral homes with casket display rooms failed to display their least expensive casket available for use in a standard adult funeral. ^{75/} At an investigational hearing in August, 1974 the manager of one of Washington's largest and most prestigious funeral homes admitted that his home did not display the least expensive casket because it was financially advantageous to limit its sale. ^{76/} Dr. Charles Nichols, Director of the National Foundation of Funeral Service, the industry's center for advanced management and merchandising training, indicated

^{75/} D.C. FUNERAL SURVEY 16-17.

^{76/} Transcript of Investigational Hearing 100, 107, 144 (Aug. 1974).

during a recent television documentary interview that he would remove a less expensive casket from the display room if it sold too well. 77/ The principle is also taught in the Foundation's courses. A September, 1974 report by a Florida state special committee, 78/ which surveyed all funeral directors in the state, noted that 23% of the state's funeral homes do not display the least expensive casket available for use in the "Standard/Traditional Adult Service". In some funeral homes the inexpensive caskets are in a limbo state between display and non-display. Kept in a separate room or behind closed curtains, their existence may be disclosed only if it becomes evident that the customer is not going to purchase a more expensive casket. 79/

The Rule

(a) Display of Least Expensive Caskets

whose establishment contains one or more casket selection rooms, to fail to display therein the three least expensive caskets offered for sale for use in adult funeral services, in the same general manner as other caskets are displayed. Provided, that if less than twelve (12) caskets are displayed, only one of the three least expensive caskets must be displayed.

77/ Since the American Way of Death: A Chicago Public Television Investigative Report, WTTW-TV, Chicago, (Television Documentary, December, 1974) [hereinafter Chicago Funeral Documentary] (transcript), at 2. See also the discussion of concealment of least expensive caskets in CORIOLIS, DEATH HERE IS THY STING (1967) at 93.

78/ FLORIDA FUNERAL PRICE SURVEY, supra note 52.

79/ The staff has visited several large funeral homes where the least expensive caskets are displayed behind closed doors. See also interview with industry informant, supra note 18, in which it is stated that it is a common practice in a large metropolitan area to place the low end units in a separate display room.

See also Stein Commission Transcript, supra note 18, at 21-22 (testimony of Henry P. Lipscomb, Ass't Att'y General, State of New York); Hearings on Practices of the Funeral Industry Before the N.Y. Temporary State Comm'n on Living Costs & the Economy, New York, N.Y., Oct. 17, 1974 (appendix to testimony of Barbara Kronman, New York Public Interest Research Group); interview with Stanton Flanders, supra note 24.

Effect of the Rule

The rule provision will require the funeral director not only to display his three least expensive caskets, but also to display them in an equitable manner. ^{80/} The funeral director is not required to display the containers which he offers for use in immediate dispositions (in accord with Section 453.2(c)(2)) or shipping cases, but only those caskets offered for use in the adult funeral service.

The staff recognizes that some funeral directors may attempt to circumvent the intent of the rule by simply eliminating the low-end caskets rather than displaying them. Several factors tend to make this response less likely. The increased availability of prices and increased competition that will result from the rule will make funeral directors more fearful that elimination of low-priced caskets will drive customers to competitors. A more horrifying possibility is the loss of customers to direct cremation companies because of the marked price differences. This will make funeral directors think twice about removing their less - expensive caskets. Thus, as competition and price information become realities in the industry, funeral directors will not only have to meet the needs of those who desire inexpensive caskets and funerals, but may even have to court their business.

It would be unfair to require funeral directors who display fewer than twelve caskets to display all three of their inexpensive caskets (25% or more of their total display). Therefore, a provision was included which permits the funeral director with a small selection room to display only one of his three least expensive caskets.

(b) Availability of Other Colored Caskets

The Practice

One of the most prevalent and effective ways to steer the consumer to an expensive casket is to display the cheaper ones in colors selected because they are known to be unattractive, even repulsive, to consumers. Questions regarding the color of caskets are not left to haphazard guessing. Several national studies have been conducted to determine that people

^{80/} The issues of disparagement are discussed in relation to paragraph (c)(3); however, paragraph (a) provides a general prohibition against disparagement and defacement of the three least expensive caskets.

employing some sales technique or merchandising tactic designed to discourage such a purchase and lead the customer to expensive and profitable items. Such offers cannot be viewed as bona fide offers to sell and, in some instances, are tantamount to classic bait-and-switch practices. 85/ Although the customer is usually not drawn to the funeral home by an enticing ad but rather by necessity, he may see and hear about low-cost options only to find them disparaged, defaced, unavailable, or "inappropriate" - all classic tactics of the bait-and-switch sale.

Customers are vulnerable not only to these techniques but also to the added threat that funeral home salespersons may be working under a direct (and undisclosed) incentive system which rewards the individual who sells expensive funerals and penalizes the one who sells inexpensive funerals. 86/ Such compensation plans are an additional incentive for the salesperson to undermine the customer's exercise of a free choice.

85/ The funeral director usually does not need to offer bait to work the switch. However, one example of a complete bait-and-switch operation is a large California cemetery-mortuary operation, which widely advertised, "Undertaking \$149 [later \$199] - Complete." When the consumer inquired about the advertised funeral, the funeral director would condescendingly refer to it as the "Chinaman's Funeral" or "Pauper's Funeral", telling the consumer that what he really needs is a funeral more in keeping with his love and respect for the deceased. Interview with Ruth Harmer, author, in Washington, D.C., Jan. 17, 1973.

86/ Documents recently obtained from a large California mortuary demonstrate its present use of a compensation system which penalizes salespersons for low-priced sales and rewards them for high-priced ones.

One of New York's most prestigious mortuaries distributes monthly summaries of individual sales totals to all sales staff. Even where sales totals are not directly used to compute compensation, they can be used to apply peer group pressure and to reinforce the threat of employer reprisals for too-low sales.

One funeral home ex-employee told the staff that his former employer transferred low-selling employees to full-time embalming work. Fearing transfer to "the pit" one elderly salesman aggressively pushed expensive caskets to maintain his sales quota. Interview with funeral director informant, supra note 59.

The Rule

(c) Interference With Customer's Selection of Offered Items

(1) to represent, directly or indirectly, orally, visually, or in writing, that any funeral merchandise or service is offered for sale when such is not a bona fide offer to sell said product or service;

(2) to make representations, directly or indirectly, orally, visually, or in writing, purporting to offer any funeral merchandise or service for sale when the purpose of the representation is not to sell the offered merchandise or service but to obtain leads or prospects for the sale of other funeral merchandise and/or services at higher prices;

(3) to discourage the purchase, by customers, of any funeral merchandise or service, which is advertised or offered for sale by:

(i) disparaging the quality, appearance or tastefulness of any such merchandise or service which is advertised or offered for sale;

(ii) suggesting that such merchandise or service is not readily available or can only be obtained after an appreciable delay, when such is not the case;

(iii) defacing any merchandise¹ carried for sale; or

(4) to use any policy, sales plan, or method of compensation for salespersons which has the effect, in any manner, of discouraging salespersons from selling, or has the effect of penalizing salespersons for selling, any funeral merchandise or service which is advertised or offered for sale.

Effect of the Rule

Under Section 453.4(c) of the proposed rule, the practices described above would be declared unlawful under Section 5 of the Federal Trade Commission Act. The most commonly used

methods by which sales of inexpensive caskets are discouraged are prohibited by paragraph (3): disparagement, misrepresentations about availability, and defacement. Under paragraph (3)(i), suggestions or statements that a particular item or type of funeral is inappropriate due to its inferior quality, appearance, or social acceptability will constitute rule violations. Deliberate attempts to alter the appearance of a casket will violate paragraph (3)(iii), while misstatements about the availability of any goods or services will contravene paragraph (3)(ii).

Paragraphs (1) and (2) address traditional bait-and-switch abuses and are based on provisions frequently incorporated in cease and desist orders in such cases. ^{87/} Although price advertising in the funeral industry is scant, there have been some reports of bait-and-switch abuses. ^{88/} Moreover, these provisions are related to other sections of the proposed rule concerning dissemination of price information and elimination of restrictions on price advertising, so that increased disclosure of price information will not result in the unchecked use of bait-and-switch tactics. Price quotations or ads for products and services which are seldom or never available, and offers which draw prospective customers who are quickly steered into higher-priced selections would fall within the scope of these provisions.

Employee compensation plans and sales policies have been associated with bait-and-switch schemes and have been responsible for the disparagement of lower-priced goods in other contexts. There have been allegations that similar devices have been used in the funeral industry. ^{89/} Paragraph (4) is based on Commission orders which have included such a provision to remove any incentive for unlawful disparagement. ^{90/} Sales quotas or similar policies which effectively discourage sales of low-cost caskets or funeral services would be declared unfair acts by this part of Section 453.4(c).

^{87/} E.g., Joseph R. Horvath (d/b/a/ Sew Rite), No. 8999 (F.T.C., June 17, 1975), Tru-View Plastics, Inc., No. C-2603 (F.T.C., Nov. 19, 1974) (consent agreement).

^{88/} See, e.g., Note 85 supra.

^{89/} Note 85 supra, and accompanying text. Cf. A 1972 merchandising manual prepared by a large funeral home chain for use in training employees is in accord.

^{90/} E.g., Joseph R. Horvath (d/b/a Sew Rite), No. 8999 (F.T.C., June 17, 1975).

(d) Disparagement of Concern for Price

The Practice

Even when the low-priced merchandise is displayed, there are ways to make the purchaser reluctant to choose it. Funeral industry exposes from all parts of the country indicate that disparagement of lower-priced caskets and other merchandise is common. ^{91/} Cheaper caskets are referred to as "tin cans" or "boxes", while less costly arrangements may be termed "welfare funerals". ^{92/} By subtle appeals to guilt feelings or by outright chastisement, funeral directors convey the message to survivors that selection of a funeral at a price below what the family can afford, or even at a price that is the most they should afford, is a sign of disrespect or lack of affection for the deceased. Sometimes, even an expression of concern about price by the consumer will be treated as if it were a shocking breach of good taste and proper respect.

"It is the inner drive, however, which responds most compulsively when the undertaker accuses the clients, by word or implication, of little love for the dead if the funeral falls short of the most expensive outlay the family can scrape together." ^{93/}

Consumers have told the staff that many funeral directors are adept at shaming customers into spending more for the funeral than the customer had originally intended.

The Public Television documentary Since the American Way of Death ^{94/} included a discussion of such sales

^{91/} Madden, Cost of Dying in Rhode Island Spirals Upward, Providence (R.I.) Journal, Nov. 2, 1969; The End Game, supra note 45, at 25; Wilensky, The High Cost of Dying, St. Louis Post-Dispatch, Nov. 11, 1973, at 2-H; Voelker, supra note 36, at 1; Long, The Oak Ridge-Knoxville Way of Death - pt. 4, The Oak Ridger (Tenn.), Aug. 29, 1974, at 6; Chicago Funeral Documentary, supra note 77, at 2; INDIANA PUBLIC INTEREST RESEARCH GROUP, A DEATH IN THE FAMILY 14 (1974) [hereinafter cited as INDIANA PIRG REPORT]. See generally BOWMAN; THE AMERICAN WAY OF DEATH; R. HARMER, THE HIGH COST OF DYING (1963) [hereinafter cited as HIGH COST OF DYING].

^{92/} Madden, supra note 91; Wilensky, supra note 91, at 2-H; INDIANA PIRG REPORT 6.

^{93/} BOWMAN 41.

^{94/} Chicago Funeral Documentary, supra note 77, at 2.

tactics, specifically the use of such phrases as "this is the last thing you can do for your mother", or (it would not) "look right...(to be) buying a cheap funeral". These phrases and a host of others are geared, as one reviewer of the program stated, to "play on guilt feelings to get consumers to spend more." ^{95/} An industry source reports that it is common to discourage interest in inexpensive caskets by use of a comment such as "Do you really want to put her in that?" ^{96/}

Clearly, such merchandising techniques can range from the subtlest glance of disapproval to a direct statement that a certain selection is inappropriate and disrespectful. The staff realizes that it is impossible to specify the content of sales presentations or to regulate facial expressions. However, it is possible to take some steps to prohibit disparagement of a customer's interest in price, and the staff believes that the proposed rule provision will largely eradicate disparagement of concern for price.

The Rule

(d) Disparagement of Concern for Price

to suggest, directly or by implication to any customer in any manner that the customer's expressed concern about prices, inexpensive services or merchandise or an expressed desire to save money by the customer is improper, inappropriate or indicative of a lack of respect or affection for the deceased.

Effect of the Rule

Although enforcement of this provision may encounter difficulties, it nevertheless establishes a standard for unacceptable behavior in salesmanship. A pattern of complaints about the use of such tactics by a funeral industry member or indications that price concerns are disparaged pursuant to company policy (e.g., instructional manuals or staff memoranda) will constitute evidence that the rule has been violated.

^{95/} WTTW Takes a Hard Look at the Funeral Business, Chicago Daily News, Dec. 11, 1974, at 45.

^{96/} Nesoff Report, supra note 26, at 2.

Section 453.5 Price Disclosures

One technique which has helped stifle competition and has forced the funeral consumer to make funeral purchase decisions in ignorance and to spend more money has been the systematic denial of access to price information. Prices are rarely advertised, and often they will not be revealed by telephone. Even when the consumer goes to the funeral home to discuss arrangements it is difficult for him to obtain information on the prices of the components involved. This hinders the consumer in making a price-informed decision and prevents him from putting together his own funeral package of desired components.

The provisions of Section 453.5 of the rule mandate price disclosures at a number of critical places in the transaction. Paragraph (a) requires disclosure by telephone in response to consumer inquiries. Paragraphs (b) and (d) require price lists for the caskets and vaults offered for sale. Paragraph (c) requires prices on caskets on display in the funeral home; in a manufacturer's showroom, if caskets are shown there; or on casket pictures, which are sometimes used instead of actual displays. Paragraph (e) requires a price list of the core services and merchandise which all consumers need in order to make informed selections. Paragraph (f) details what must be included on the memorandum describing what the customer has selected and the funeral director has agreed to furnish. At present, some type of memorandum of agreement is usually provided by funeral directors as written evidence of the contract and is, in fact, required by statute or regulation in 32 states. The rule assures, however, that the memorandum will itemize prices and will clearly inform the consumer of the right to select only the services desired and to be consulted before any substitutions are made. It will dissuade funeral directors from deliberately changing what the consumer chooses and avoid innocent misunderstandings over what has been selected.

Together, these price disclosure requirements can achieve a number of consumer and competitive benefits, all of which will serve to improve the honesty and the fairness to consumers of the funeral transaction and to make the transaction approximate more closely the way the market is supposed to operate. Each of the disclosures provides different material information and each is needed.

Requiring disclosure of the prices of caskets, vaults and services will prevent funeral directors from continuing their past success at denying consumers this information and keeping it out of the consumer's decision-making process.

Providing consumers with this information will assure better-informed and less-manipulated purchase decisions. Arming consumers with information on prices and available alternatives will enable them to better protect themselves against exploitation. It will also help them withstand the various sales techniques used so effectively by funeral directors to push more expensive merchandise and services that are unnecessary or unwanted.

The availability of price data will also spur competition, which has been so feeble in the funeral industry. The tying of services and merchandise, which has been successfully used to make customers buy unnecessary items and pay higher prices, will no longer be allowed. The price disclosure requirements will make it easier for consumers who are so inclined to obtain the prices of several different funeral homes before they commit themselves to one in particular. Knowing that this option will be open, funeral directors will be less able to price as individual monopolists, passing on all their costs with reckless abandon, but will instead have to pay greater attention to cutting their costs to bring their prices down closer to competitive levels.

In addition, regularizing the flow of price information to consumers will help remove the social taboo against consideration of price, a norm which funeral directors have nurtured so well. The taboo has operated along with the simple expedient of refusing to divulge price information to prevent the dynamics of competition from taking hold in the funeral marketplace.

(a) Price Information Over Telephone

The Practice

The pilot FTC survey of funeral prices in the District of Columbia found wide variations in the least expensive and the average prices of D.C. funeral homes. ^{97/} Other surveys by state and local governments, newspapers, and consumer groups ^{98/} have found similar variations all across the

^{97/} The price of the least expensive funeral offered varied between B.F. Taylor's minimum \$210 and Magruder's \$900 minimum, while average prices varied between Vann's \$500 average and Gawler's \$1830 average. D.C. FUNERAL SURVEY 6, 13-14.

^{98/} Notes 3-5 supra.

country. One reason these wide variations exist is that the funeral directors know that the vast majority of consumers have practically no conception of funeral costs 99/ when it comes time to make funeral arrangements. Further, most consumers do not comparison shop among funeral homes. It is difficult because of time and other factors, and perhaps emotionally impossible, for a bereaved family member making funeral arrangements to go into a funeral home and get information on prices, then walk out to visit other funeral homes for comparison. An obvious alternative source of price information, price advertising in newspapers, magazines or broadcast media, has not been used by most funeral directors. The only realistic way consumers can obtain the information which would allow them to compare prices before making a commitment to a particular funeral home is by telephone. A substantial segment of the funeral service industry has, however, successfully closed off this useful source of price information by the simple expedient of refusing to disclose prices by telephone.

In a survey by the New York Public Interest Research Group, two-thirds of the funeral homes contacted by telephone for price information refused to cooperate or cooperated with extreme reluctance. 100/ A similar survey by the Indiana Public Interest Research Group found that 63% of the funeral homes surveyed refused to give price information over the telephone. 101/

Another survey of 125 funeral homes by the Stein Commission in New York found more than half would not give price information by telephone, 102/ and a report by an investigator for the Stein Commission found that there was general reluctance to disclose price information, except in

99/ For example, in a survey by Dr. Robert Fulton, an industry consultant, people were asked "What would be the average price for a funeral in your community, in your state or in the United States?" For the community, 78% of those surveyed gave no response; for the state, 90%; and for the United States, 91%. R. FULTON, A COMPILATION OF STUDIES OF ATTITUDES TOWARD DEATH, FUNERALS AND FUNERAL DIRECTORS 15 (1967) [hereinafter cited as STUDIES OF ATTITUDES TOWARD DEATH, FUNERALS AND FUNERAL DIRECTORS].

100/ B. KRONMAN, A DEATH IN THE FAMILY 2 (New York Public Interest Research Group, 1974).

101/ INDIANA PIRG REPORT 1.

102/ N.Y. Temporary State Comm'n on Living Costs and the Economy, Press Release, May 3, 1974.

a face-to-face encounter, throughout the industry. 103/ Newspaper surveys of funeral prices in such diverse locations as San Bernardino, California, 104/ and Lawrence, Massachusetts 105/ found an almost total refusal to disclose prices by telephone on the part of local funeral directors.

This widespread refusal to quote prices by telephone continues despite the fact that several of the major trade associations, such as the National Selected Morticians and National Funeral Directors Association, ostensibly favor disclosure of price information.

The justification for refusing to quote price information by telephone is that it would be "undignified", or "misleading", or that there are too many variations in family circumstances or desires to permit concise and accurate price disclosure by telephone. Nonetheless, within the same community, some funeral homes refuse to disclose prices, while others with similar pricing methods and subject to the same laws can and do quote prices forthrightly. 106/

The Rule

(a) Price Information Over Telephone

to fail to provide by telephone, upon consumer request, accurate information regarding the funeral service industry member's retail prices of funeral products and services, including caskets, vaults, basic services and cremation services, if offered.

103/ Nesoff Report, supra note 26, at 2.

104/ Telephone interview with Rosemary McClure, reporter, San Bernardino Sun Telegram, Dec. 13, 1973.

105/ Huard, The Funeral: What Should It Cost?, Lawrence (Mass.) Eagle-Tribune, April 29, 1974, at 1.

106/ For example, a staff telephone check of several Miami mortuaries found that some flatly refused to reveal prices by telephone. By contrast, several others promptly and cheerfully disclosed, over the telephone, the basic service charge, the price range of the caskets and vaults (including specifying the prices of several of the least expensive offerings), and the prices for an immediate cremation or a cremation with viewing. Memo to File No. 732-3057, June 18, 1975.

Effect of the Rule

This simple, straightforward rule provision will break down the taboo funeral directors have attempted to erect regarding disclosure of price information by telephone. The staff has deliberately refrained from attempting to spell out in great detail every item of price information which must be disclosed or a specified format for the disclosure, in recognition of the fact that there are variations in offerings, conditions and other applicable factors which would affect how price data can most accurately and efficiently be conveyed by telephone. The staff also wants to avoid straightjacketing funeral directors unnecessarily. While there is some risk that some funeral directors might not disclose every bit of price data that they should, the staff believes that the general rule provision will have the desired effect of making telephone price data available to inquiring consumers.

Moreover, it is possible that oral or written comments on the rule can sufficiently identify the practical problems to permit a detailed and precise formulation of feasible disclosure formats.

(b) Casket Price List

The Practice

As the late Wilbur Krieger, one of the most influential forces in funeral directing over the past 50 years, proclaimed, "Merchandising is the lifeblood of funeral service." 107/ The principal object of the funeral director's merchandising is the casket, the most important and expensive funeral product to be selected by the customer and a crucial determinant of the total price of the funeral.

Among the basic principles which guide funeral directors in determining the stock and arrangement of caskets in the selection room are cautions against displaying too many caskets in the low end of the price range (because customers may select them) and against displaying caskets in order of price (because customers may make direct price-value comparisons). 108/ In fact, years ago Wilbur Krieger developed

107/ W. KRIEGER, A COMPLETE GUIDE TO FUNERAL SERVICE MANAGEMENT 47 (1962).

108/ Id. at 54.

a precise formula for determining the best percentage of caskets displayed from each of the four price quartiles: 10% in the cheapest quartile, 27% in the second, 40% in the third, and 23% in the most expensive quartile. 109/ This formula is still commended to funeral directors in "How To" trade manuals. 110/ The price differences, colors, and materials in the casket line offered by a funeral home, the arrangement of caskets in the selection room, and the sales presentation used by a funeral director are all broadly aimed at getting most customers to buy caskets in the third quartile.

Staff's visits to approximately 30 casket selection rooms, examination of trade publications, and interviews with funeral directors and customers all indicate that the overwhelming majority of funeral homes in the country establish their casket offerings and arrange their casket display rooms in accordance with the principles advocated by Krieger and his disciples. 111/

When the customer goes into the typical casket display room he is confronted by some 16-30 caskets which are not arranged according to price, characteristics (wood or metal, sealed or non-sealed, etc.) or color. The less expensive caskets are scattered in different locations across the room. In some funeral homes, the cheapest caskets are concealed from customers--in a distant corner, in a different

109/ Id. at 55.

110/ See, e.g., Griffin and Slater, Casket Selection Room Evaluation, in H. RAETHER, SUCCESSFUL FUNERAL SERVICE PRACTICE 75 (1971).

111/ "It is always good practice to show ~~more~~ caskets slightly above the median (the price at which the greatest number of caskets were sold during the preceding year) if one wants to increase his per case average." IDEAS TODAY, (July-Aug., 1974), at 31.

The National Foundation of Funeral Service (which was founded by Krieger in 1945) functions as a training center for funeral directors from all over the country. The foundation offers seminars in merchandising, pricing techniques, casket selection, management methods and the like, and has model casket selection rooms (based on the Krieger principles), nine different lighting techniques and other guides to successful and profitable funeral directing. Chicago Funeral Documentary, supra note 77.

room behind a closed door, or in a basement or storeroom. 112/ In some funeral homes, there are price cards inside each casket, but some or all of the lids are kept closed. 113/ Even if the lids are open, the arrangement of the caskets makes it difficult for the consumer to comprehend different prices, to remember the prices of the less expensive units, or to correlate quality and price differentials.

The physical impediments to identification and comparison of casket prices imposed by selection room arrangements can be buttressed by maneuvers of the funeral director. He can guide the customer to the more expensive units, look disapprovingly if the customer closely examines a low-priced unit, or shield the less expensive units from the customer's view.

Used in varying combinations, these selection room techniques have the overall effect of preventing consumers from obtaining full information on the caskets available for sale (even after the funeral director has influenced the consumer's choice somewhat by the way he has composed his casket line) and from objectively comparing casket offerings before making their selection.

Furthermore, as observed in the pilot D.C. Funeral Survey Report, many consumers do not realize that the casket is usually the only difference between a home's \$800 and \$1800 funerals; the same basic services are supplied regardless of the casket selected. 114/

Given the vulnerable condition of bereaved buyers, the general lack of knowledge about the prices of caskets and other goods and services, and the variety of techniques used to make it difficult for consumers to learn what caskets are available and to compare their prices, there is a need for additional protections to help the consumer through the selection room process.

112/ Staff members have observed these conditions first-hand at funeral homes in Washington, D.C., New York City, and Miami Beach, Florida. Other sources confirm the widespread prevalence of such practices. See, e.g., interview with a funeral director informant, supra note 59; Stein Commission Transcript, supra note 18 at 16, 21; File No. 732-3057, complaint #97.

113/ E.g., interview with consumer in Chicago, Ill., Feb. 7, 1975.

114/ D.C. FUNERAL SURVEY 41.

The Rule

(b) Casket Price List

(1) to fail to furnish to each customer, before discussion about caskets offered for sale or the customer's selection of a casket, a printed or typewritten document which lists, in ascending order of price, the prices of all caskets available for purchase without requiring special ordering by the customer, together with sufficient information about each casket to enable the customer to locate and identify a casket among others on display. The document shall also bear an effective date for prices listed thereon.

(2) to fail to include, on the written list required by paragraph (b)(1) of this section, in clearly legible type, the following heading:

Casket Price List For [Name of Funeral Home] "Listed below, in order, are the prices of the caskets offered by this funeral home together with information to help you locate and identify particular caskets which are displayed. If you are interested in any of the caskets which are included on this list but are not on display, please inquire."

(3) to represent to a customer that a casket on the list is not available, when such is not the case.

Effect of the Rule

As with other services and merchandise, the starting point for assistance is clear disclosure of price. 115/ Paragraph (b) of Section 453.5 requires not only a listing of the caskets available for purchase in ascending order of price but also a disclosure which instructs the customer to inquire about any casket listed on the price schedule but

115/ Section 453.4 deals directly with selection room practices and proposed remedies.

not displayed. Paragraph (b)(3) prohibits a funeral director from falsely claiming that a casket is not available. This is one obvious way a funeral director could discourage purchase of less expensive units. Section 453.7 of the rule will require funeral directors to retain copies of the dated casket price list for not less than three years to facilitate compliance checks.

Other possible solutions to the problems of impediments to discovery of casket offerings, prices and selection room manipulations include a requirement that caskets be arranged in order of price or that customers be given a selection room map or schematic diagram showing the locations and prices of the caskets offered. The staff believes, however, that such measures pose additional practical problems and would be more distasteful to funeral directors. The casket list is the least restrictive alternative that will still protect consumers from egregious abuses by assuring that they receive basic retail price data in a usable form.

Some negative consequences could result from the rule. Faced with having to fully disclose to consumers the prices of all caskets carried for sale, a number of funeral directors might choose to eliminate entirely some of the less expensive caskets heretofore available at least to persistent consumers who managed to identify and hold out for the least expensive offerings. Staff thinks that increased competition, greater price disclosure and comparison shopping will prevent this result. Because of the itemization requirement, funeral directors will have to rely less heavily on the casket as the principal determinant of profit, decreasing some of the incentive to prevent customers from purchasing the less expensive casket. In addition, the availability of prices for caskets and services to consumers will cause funeral directors to think twice about eliminating less expensive units, for they will face a real danger of losing customers to competitors. There are also peer group and community pressures forcing funeral directors to offer a full range of casket prices. It is also possible that casket manufacturers might be persuaded to stop manufacturing or uglify less expensive caskets, as may have happened in the past. ^{116/} However, their fear of the antitrust laws should prevent this. Improved competition resulting from the rule and shifts in consumer attitudes will increase the probability that some funeral director or casket manufacturer would step in to fill any void created at the low end of the casket line. Also, elimination of the least expensive caskets

^{116/} Cf. Casket Manufacturers Association, 52 F.T.C. 958 (1954) (complaint ultimately dismissed after evidence was destroyed).

would widen the gap between funeral and cremation prices and cause more consumers to purchase simple cremation services. This result is terrifying to funeral directors and even more distasteful than selling increased numbers of the less expensive caskets.

(c) Display of Casket Prices

The Practice

The casket selection room is where the funeral director, using a large repertoire of psychological merchandising tactics, traditionally makes both his hard sell and his high profit. Bereaved customers are intentionally confused and harassed, and their wishes are foiled by the funeral director and his marketing skills. While the casket price list required by paragraph (b) will provide the customer with a comprehensible price-ordered list of the caskets available for purchase and will serve as an effective remedy to many selection room practices, as a practical matter the consumer needs casket price information in a supplemental form. A casket selection room can be a confusing and, for the bereaved consumer, an emotionally overwhelming place. Faced with the necessity of having to select a casket, the consumer should at least be able to identify the respective prices.

The Rule

(c) Display of Casket Prices

(1) to fail to display prominently in or on the caskets on display the price of such caskets by card, sign or other means.

(2) to fail to display prominently prices on any casket photographs shown to customers and on any caskets shown to customers in display rooms maintained by casket manufacturers or wholesalers.

Effect of the Rule

Prominently 117/ displayed price cards will assist the customer in his selection as he wanders around a casket

117/ Prices need to be prominently displayed, for, as one consumer told the staff, price cards at the funeral home with which he dealt were inside closed caskets. Interview with consumer, supra note 113. The staff has visited other funeral homes where casket prices were similarly "displayed".

display room with, perhaps, as many as 35 caskets to choose from. The display of casket prices will of course serve to prevent funeral directors from engaging in such practices as adjusting casket prices to take advantage of the consumer's assets, 118/ but, more importantly, it will allow the customer looking around the selection room to know at a glance the price of any particular casket without having to search through the price list. Further, price comparisons between units displayed side-by-side will be made easier.

Paragraph (2) requires that those industry members who sell caskets to customers by means of photographs or in a selection room maintained by a casket manufacturer must also display prices on the photographs or caskets shown. 119/ This provision is necessary to close a loophole for funeral directors who do not have their own selection rooms.

Several states have adopted requirements which are similar to the proposed rule. 120/ Likewise, the National Funeral Directors Association has endorsed a plan which would require displayed prices on any caskets shown to customers at the funeral home, at a manufacturer's display room or through photographs. 121/ Many funeral directors can be expected to admit that casket price cards provide the type of price information to which customers are entitled. 122/

118/ However, the staff has received information about funeral homes which, before the family enters the selection room, switch the cards for families who appear to be more prosperous. The casket price list will make such a practice impossible.

119/ In the D.C. funeral survey, 14 of the 55 funeral homes surveyed lacked a selection room. D.C. FUNERAL SURVEY 17.

120/ E.g., CAL. BUS. & PROF. CODE § 7685.1 (1974); MINN. STAT. § 149.09 (1973).

121/ Letter from Thomas H. Clark, General Counsel, NFDA, supra note 51.

122/ The F.T.C.'s D.C. survey found that 2/3 of the funeral homes with selection rooms had price cards on the caskets. D.C. FUNERAL 17. A Florida state study found that 83.5% of the funeral directors surveyed used some type of casket price card. FLORIDA FUNERAL PRICE SURVEY 5.

(d) Vault Disclosure and Price List

The Practice

Next to the casket, the most important item of merchandise to the funeral director is the burial vault or outer interment receptacle. According to industry figures, 79% of the sales of adult funeral services involve sale of some form of outer interment receptacle. ^{123/} Over a million burial vaults are manufactured annually, ^{124/} and retail sales are in excess of \$300 million. ^{125/}

Most cemeteries require some form of outer interment receptacle ^{126/} to be placed around the casket in the grave to prevent the grave from sinking as the casket and corpse disintegrate. Two basic types of outer interment receptacles are commonly used. The simpler, less expensive grave liner (which typically has no bottom) is usually made of wood or concrete and is sold by some cemeteries and some funeral homes. The more elaborate and more expensive burial vault is typically metal, concrete or asphalt and often lined with fiberglass, asphalt, steel or copper. It is usually sold by funeral directors but may be sold by cemeteries as well. Often it is purported to be airtight and watertight.

^{123/} V. PINE, A STATISTICAL ABSTRACT OF FUNERAL SERVICE FACTS AND FIGURES OF THE UNITED STATES 12 (1974). [hereinafter cited as FACTS AND FIGURES 1974].

^{124/} Cf. AMERICAN BLUE BOOK OF FUNERAL DIRECTORS 1972-73, at 664 (1972).

^{125/} In 1973, vault sales were roughly \$305 million. Funeral Costs: How They All Add Up, MEDIA AND CONSUMER, June, 1974, at 15.

^{126/} A high percentage of private cemeteries now require some form of interment receptacle. A Delaware survey found twelve out of fifteen cemeteries examined had such a requirement. DIVISION OF CONSUMER AFFAIRS, DELAWARE DEP'T OF COMMUNITY AFFAIRS AND ECONOMIC DEVELOPMENT, SURVEY OF THE FUNERAL INDUSTRY IN DELAWARE 4 (1974) [hereinafter cited as DEL. FUNERAL SURVEY]. MEDIA AND CONSUMER reported that 90% of actual private cemeteries require an outer interment receptacle. Note ^{125/}, supra. As we noted in our initial planning memo, there is some doubt as to the necessity for burial vaults, and the claim should not go unchallenged. The staff has not, however, recommended any direct attack on cemeteries requiring vaults because the factual question is a close one and there may be a sufficient basis for the practice, unlike the other practices to which the proposed rule is directed. FTC Funeral Investigation Planning Memo 85-89.

The price differences between liners and vaults can be enormous. Our own price survey in the District of Columbia found in 1973 that the average price of liners was \$85 while the average price of vaults was \$311. 127/ The price of liners in different parts of the country is usually in the range of \$70-\$125. Most vault prices fall in the \$250-\$350 range, with some consumers paying as much as \$700 to \$1500 for stainless steel or copper-lined models. 128/ We know from many sources that the wholesale to retail mark-up for vaults is seldom less than 100% and sometimes is as much as 500% to 600%. 129/ Thus, it is not surprising that the funeral director prefers that the customer buy an interment receptacle from him rather than from a cemetery and that he buy an expensive burial vault rather than a liner.

The goal of selling customers an expensive burial vault can be accomplished in various ways. Sometimes the funeral director will misrepresent the legal necessity for vaults, the attributes of airtightness or watertightness, or the ability of a sealer vault to prevent decomposition of the remains. 130/ These abuses are addressed by other provisions of the proposed rule.

Another sales technique which may be utilized by the funeral director is to misrepresent that cemeteries require that graves be lined while describing the burial vaults he has for sale. Often, he neglects to mention several material pieces of information: the fact that some cemeteries do not require an outer interment receptacle; the fact that, where the requirement exists, it usually can be satisfied by a simple liner as well as by a burial vault; the fact that cemeteries as well as funeral homes sell liners and vaults; and the prices of the different types of interment receptacles which could be used to satisfy the requirements.

The sale of high-priced vaults to bereaved consumers in a situation marked by non-disclosure of such material facts is both deceptive and unfair. It is the proper subject of a required affirmative disclosure.

127/ D.C. FUNERAL SURVEY 26-27.

128/ FLORIDA FUNERAL PRICE SURVEY Appendix 2.

129/ Interview with industry informant, supra note 18. See exhibits submitted to FTC staff by vault manufacturers, Oct. 15, 1974.

130/ See discussion of § 453.3.

The Rule

(d) Vault Disclosure and Price List

(1) to fail to furnish to customers, at the time they are shown or informed as to the availability of outer interment receptacles, before such a customer has made his or her selection, the following printed or typewritten notice:

"Some cemeteries require that an outer enclosure be placed around the casket in the grave, while others do not. Where such a requirement exists, it can usually be satisfied by either a burial vault or a grave liner, which is usually less expensive than a burial vault. Outer interment receptacles are often sold by cemeteries as well as by funeral homes. Before selecting any outer enclosure you may want to determine any applicable cemetery requirements as well as the offerings of your cemetery and funeral home."

(2) to fail to include on the printed statement required by paragraph (d)(1), in clearly legible type, the price for each outer interment receptacle available from the funeral home for purchase by the customer, together with a brief description of each enclosure, and an effective date for the prices specified.

Effect of the Rule

The disclosure specified by the proposed rule will require that every customer who is shown or considers purchasing an outer enclosure receive the necessary information. Customers will be advised that some cemeteries may not require liners; that grave liners are usually simpler and less expensive than burial vaults; and that they may want to check the requirements and offerings of their cemetery. Consumers will be fully apprised of the range of interment receptacles available.

In addition, paragraph (d)(2) requires that the customer be furnished in writing the prices of the enclosures available for purchase at the funeral home. As is true for inexpensive caskets, funeral directors may be reluctant to display the inexpensive burial vaults or liners. The rule provides that the availability and price of any inexpensive vaults or liners stocked must be disclosed. Because of the problem of

burdening customers with too many documents and disclosures, the vault disclosure and price list will be furnished only to those customers who are shown or express an interest in outer enclosures. Some funeral homes do not sell vaults, and some customers are not shown them, for various reasons. Further, the staff believes that to require that such information be provided to every customer would only furnish the undertaker with the entree for another sales pitch for an additional item of merchandise.

(e) Price List and

(f) Memorandum of Funeral Service Selected

The Practice

Paragraphs (e) and (f) are discussed together because they are designed to work in combination to remedy several interrelated pricing abuses affecting the overwhelming majority of consumer funeral purchasers. The basic abuses are: failing to inform consumers of the funeral home's services and merchandise offerings and their respective prices; tying purchase of the casket to other services and forcing upon consumers services they do not need or want; and failing to inform consumers of the availability of price reductions for declined services. These practices deprive consumers of information about prices essential to informed choice, and thus raise the cost of funerals. They also increase costs by forcing on consumers charges for services they do not want.

Funeral prices are quoted to customers in a variety of ways. ^{131/} Funerals and funeral prices involve five basic components: (1) services provided by the funeral director and staff (embalming, transportation of the deceased, obtaining necessary permits, etc.); (2) funeral home facilities provided (chapel, viewing room, family rooms);

^{131/} For a more detailed discussion of funeral pricing methods and related issues, see FTC Funeral Investigation Planning Memo at 124-33; Hearings on H.R. 13492 and H.R. 13969 Before the Subcomm. on Business, Commerce and Taxation of the House Comm. on the District of Columbia, 93rd Cong., 2nd Sess. 27 (1974) (testimony of J. Thomas Rosch, Director, Bureau of Consumer Protection, Federal Trade Comm'n) [hereinafter cited as Rosch Testimony]. In June, 1974, the staff prepared a detailed memo on itemization and the impact which such a requirement would have on prices. The staff's development of the proposed price disclosure and itemization requirements is premised, in large part, on the analysis in that memo. See The Impact of Mandatory Itemization on Funeral Prices: A Theoretical and Empirical Analysis, June, 1974 (FTC staff memo) [hereinafter cited as Itemization Memo].

(3) special equipment used (hearse, casket stand, candelabra, embalming machine); (4) funerary merchandise selected (casket, burial garments, vault); and (5) cash advance items initially paid out by the funeral director and reimbursed by the family. Almost all funeral homes separately list "cash advance" items on their bills to customers. However, there is great variation in the treatment of the items in the first four categories.

Most funeral directors quote a total price, which includes the casket selected and all services, facilities, and equipment. This method is variously termed "unit", "single-unit", or "package" pricing. A smaller number (possibly 30%) of funeral directors quote a price for the casket and a separate price covering all facilities, services, and equipment (called "bi-unit" pricing). Some funeral directors use a tri-unit method--quoting one price for the casket, another for "professional services" and another for "use of facilities".

The breakdown of prices which is referred to as "functional pricing" or "itemizing" can be carried to the point where a few funeral homes list some 50 to 60 separate services (e.g., holding door for pallbearers) with separate prices for each.

While a too detailed itemization can present its own problems, ^{132/} far more prevalent abuses have stemmed from pricing which inadequately itemizes charges for the most important component services. A consumer quoted one price for the complete funeral package often does not know what is and is not included for the quoted price. ^{133/} Moreover, he or she has no way of knowing what proportion of the total charge is for embalming, viewing, use of chapel or other component items. Thus, he or she is prevented from making both cost-value comparisons respecting the various services

^{132/} An overly-detailed price breakdown can be confusing to distraught funeral buyers and can thereby frustrate the objective of communicating useful price information. In addition, there is a real danger that the funeral director will charge several times for the same service in several guises. For example, he may collect several times for his embalming services with charges for "preparation", "use of preparation room", "cosmetology", "washing", and so on. Avoiding this problem is one reason why the staff has specified categories on the memorandum of funeral service selected.

^{133/} Cf. Rosch Testimony, supra note 131, at 4; interview with consumer, supra note 52.

and informed choices as to each item. Consumers do, in fact, feel deprived of such information, which they would like to have. 134/

In addition, there is the fundamental abuse of tying together services and the casket selected. A substantial number of funeral directors take the view that they offer a complete package of services and will charge the customer for them whether or not they are wanted or used. Once a casket is selected, the total price for the funeral is set. In our pilot D.C. funeral price survey, 20% of the respondents admitted that they would not make any adjustments to the funeral price if the consumer wished to decline (as many do) such items as embalming, viewing, use of funeral chapel or use of limousine; 135/ others offered only minimal reductions. 136/ Similar surveys in other jurisdictions, based on the D.C. model, found that 30% of the Arkansas funeral directors 137/ and 40% of the Delaware funeral directors 138/ surveyed refused to give discounts. Moreover,

134/ E.g., File No. 732-3057, complaints #163, 181, 190, 198. It is interesting to note that the recent Casket Manufacturers Association survey, American Attitudes Toward Death and Funerals, indicates that the public has a strong desire for detailed presentation of funeral charges. Over 2/3 of those surveyed expressed a preference for detailed pricing information as compared to a single unit price. R. BLACKWELL & W. TALARZYK, supra note 34, at 34. William L. Bustard, the former Executive Secretary of the National Selected Morticians, has written that funeral pricing "must be responsive to human needs." Bustard, Funeral Service Pricing, in H. RAETHER, supra note 110, at 81.

135/ D.C. FUNERAL SURVEY 11. Based on experience gathered throughout the investigation, the staff believes that a number of other respondents had never even thought about giving discounts until they received the 6(b) reports, and, although they reported a willingness to give discounts, in fact they never had. The percentage of funeral homes which have never made price adjustments for declined services is about 40-50%. This pattern holds true for other price surveys modeled after the pilot D.C. effort.

136/ E.g., \$10 reduction for non-use of viewing facilities, \$35 reduction for non-use of chapel, etc. D.C. FUNERAL SURVEY Table 1.

137/ ARK. FUNERAL SURVEY 4.

138/ DEL. FUNERAL SURVEY 2.

a high percentage of the funeral-homes willing to grant some price reductions would do so on some items but would not give reductions on others. 139/

Even at those funeral homes which claim to grant price reductions, the consumer's right to decline unwanted services is far from assured. In the hundreds of bills examined in the course of the investigation, the staff has never encountered a written notice of the right to decline unwanted items, and we do not believe such disclosures are routinely made orally. Even among trade associations, such as the National Funeral Directors Association, or well-known mortuaries which endorse the idea of reasonable adjustments, there is no commitment to informing customers of the right to decline. 140/

As noted in our planning report, the funeral director's unwillingness to give price reductions for declined services is in the nature of a tie-in sale. The tying product which generates the funeral director's market power over the buyer may be the casket or the other services which the consumer needs or must obtain from a funeral director by law (e.g., state requirements for transporting the body). The tied product can be embalming, viewing, use of chapel or use of limousine. While it may not be economically practical for every single service to be considered a separate item, embalming, viewing, use of chapel and use of limousine are all sufficiently significant and functionally distinguishable (they are sold separately by some funeral homes) so that they should be declinable.

Many funeral directors would argue against a Commission itemization requirement on grounds that there are adequate price disclosure requirements at the state level. This argument is, simply, without merit. At the present time, only six states have any type of required written itemization of charges. 141/ Only one of the six, Minnesota, comes anywhere

139/ See also discussion of discounts for declined services in Rosch Testimony at 7-13.

140/ Transcript of Investigational Hearing 94 (Aug., 1974).

141/ California, Colorado, Florida, Minnesota, New Jersey, and New York.

near having an adequate itemization requirement, 142/ and even it does not require disclosure of the right to decline unwanted services and to receive appropriate price adjustments. Twenty-six states require a written disclosure of the total price, cash advance items and method of payment, but they do not require that component services be separately priced. Nineteen states have no price disclosure requirement.

The Rule

(e) Price List

(1) to fail to furnish to each customer who inquires in person about the arrangement, purchase, and/or prices of funeral goods or services, prior to any agreement on such arrangement or selection by the customer or to any customer who by telephone or letter requests written price information, a printed or typewritten price list, which the customer may retain, containing the prices (either the retail charge or the price per hour, mile or other unit of computation) for at least each of the following items:

142/ The California law is essentially a bi-unit requirement - a separate price for the casket and for "professional services". Items that consumers might wish to decline, such as embalming or viewing, need not be separately priced. CAL. BUS. & PROF. CODE, § 7685.2(a) (1972). The New Jersey law is similar. New Jersey State Bd. of Mortuary Science, Rules and Regulations, Rule 76 (1974). Colorado and Florida require that an itemized statement be given only if the consumer requests one. FLA. STAT. § 470.235 (1974); Colorado State Bd. of Mortuary Science, Rules and Regulations, Rule 18 (1963). Thus, it is not surprising that in the Florida Survey only 48% of the funeral homes reporting indicated that they itemized prices, despite the "requirement" of itemization. FLORIDA FUNERAL PRICE SURVEY 3.

New York specifies the categories of services which must be separately priced, but the law mandates overlaps, such as separate charges for the preparation of the body and for use of the preparation room. N.Y. PUB. HEALTH LAW § 3440(a) (1974); N.Y. Admin. Rules and Regs. § 78.1 (1974). Also, the New York law does not insure that the written itemization statement of prices be given before the consumer has actually decided on a particular funeral.

Minnesota's itemization requirements are specified in MINN. STAT. § 149.09 (1975 Supp.).

- transfer of remains to funeral home.
- embalming.
- use of facilities for viewing.
- use of facilities for funeral service.
- casket (a notation that a separate casket price list will be provided before any sales presentation for caskets is made).
- hearse.
- limousine.
- services of funeral director and staff.
- outer interment receptacle (if outer interment receptacles are sold, a notation that a separate outer interment receptacle price list will be provided before any sales presentation for such items is made).

Provided, however, that the list may include total or package prices for any standard adult funeral service package under \$_____. The items covered by any such single quoted price shall be specified, but need not be separately priced. However, if a customer wishes to decline one or more items, the price shall be reduced by at least the amount of savings accruing to the funeral home from the declination.

(2) to fail to include, on the printed price list specified in paragraph (e)(1), directly above the price listings, in clearly legible type, the following:

(i) the name, address, and telephone number of the funeral home;

(ii) an effective date for the prices listed thereon;

(iii) the statement "You are free to select only those items of service and merchandise you desire. You will be charged for only those items you select. In some instances,

depending on the circumstances of death and/or the type of service you select, some additional services or merchandise may become necessary. If you are required to pay for certain services or merchandise you have not selected, because they are required by other factors, an explanation shall be provided in writing by the funeral director on the memorandum of funeral services selected which you will receive."

(f) Memorandum of Funeral Service Selected

(1) to fail to furnish to each customer making funeral arrangements, on a written memorandum of the funeral service selected, a list, in at least the following categories, of the services and merchandise selected by the customer together with a price for each item:

- embalming.
- other preparation of the body.
- use of facilities for viewing.
- use of facilities for funeral service.
- other services of funeral director and staff.
- casket, as selected.
- other specifically itemized merchandise.
- specifically itemized transportation charges.
- specifically itemized charges for any special services required.
- specifically itemized cash advances or expenditures.

Provided, however, that there may be single prices quoted for each standard adult funeral service package whose total price is below \$ _____, if the services and merchandise included for the

package price are specified, and if the listed price reflects appropriate adjustments for any items declined by the customer, as set forth in paragraph (e)(1).

(2) to fail to include on the written memorandum, required by paragraph (f)(1), in clearly legible boldface type the following:

(i) the name, address, and telephone number of the funeral home;

(ii) the disclosure required by paragraph (e)(2)(iii);

(iii) the statement "no substitutions of agreed-upon merchandise shall be made, unless agreed to in advance, by both parties;"

(iv) the statement "I have read and understood the above statements. I have also received written information regarding the prices of caskets and other merchandise and services;"

(v) immediately below the statements required by paragraphs (f)(2)(iii) and (iv), the signatures of the customer and the funeral service industry member, or an authorized representative, and the date signed.

Effect of the Rule

Paragraphs (e) and (f) are designed to achieve a number of objectives. One objective is to facilitate an informed choice of casket and services by assuring that the consumer knows the prices of the available service and merchandise options before having to make a choice. This objective is achieved by the casket and vault price lists required by paragraphs (b) and (d) and by the basic price list required by paragraph (e). ^{143/} The rule would also enable consumers to obtain written price information by requesting it by telephone or by letter (paragraph (e)(1)).

^{143/} As customer is defined in the rule, the price list required by paragraph (e) would be available not only to customers but also to potential customers, so that it would be practicable for consumers to obtain price information from "competing" establishments before a decision is made.

Another objective is to break up the funeral tie-in sale and prevent the funeral director from making consumers pay for services they do not really want. This objective is accomplished by the requirement that component items be separately priced on the basic price list (paragraph (e)) and on the memorandum detailing what has been selected (paragraph (f)). The consumer is clearly informed of the right to decline unwanted items by the disclosures, which must be on both the basic price list and on the selection memorandum. 144/

It is important that the customer receive the itemization statement and price list prior to any agreement, since such information is a necessary part of the decision-making process. The contrast with present conditions was highlighted during FTC investigational hearings, when it was revealed that the policy at a large D.C. funeral home is to inform customers about applicable discounts after the arrangements are finalized. 145/ While this is preferable to not giving discounts at all, it certainly does not allow the customer to know the price of the funeral with or without certain service options, and to make purchase decisions accordingly.

The right to decline items and to receive the corresponding price reduction is fundamental to the exercise of free choice by the funeral consumer. If the consumer is going to know that funeral charges are to reflect only those items used, it must be so stated in a written disclosure. It is not enough to rely on the undertaker's goodwill. The policy of "reasonable adjustments", which has been endorsed as a policy by various factions within the industry, has not been communicated to consumers and has been all but ignored.

This proposed package of price information, component pricing, and the disclosed right to select the goods and services desired is a significant departure from the

144/ The staff recognized that certain services or merchandise may be necessitated by the circumstances of death (i.e., embalming for death by contagious disease, as required by state law) or the type of service selected (i.e., embalming if the consumer wants a three day period of viewing). The staff included mention of such a possibility so that the customer would not be confused if the funeral director indicated that certain items were required. As a safeguard against falsely stated "requirements" of services or merchandise, the funeral director is required to write on the itemization statement the reason for the necessity of any such items.

145/ Transcript of Investigational Hearing 92-94 (Aug., 1974).

traditional way most funeral directors have conducted their business and dealt with customers. However, it does no more than provide consumers with the basic data on prices and choices which is supposed to be available to all buyers to allow informed marketplace decisions. 146/ The staff has concluded, after almost two years of formal investigation, that unbundling the components is necessary to assure that funeral buyers, who must make hasty purchase decisions with little experience or knowledge to guide them, will have the information necessary to make informed, uncoerced choices and to protect themselves from exploitation.

The staff publicly supported itemization as a remedy to non-disclosure, tie-in sales and other problems, in April, 1974, in testimony of the Bureau Director before the House Committee on the District of Columbia regarding proposed itemization laws for the District. 147/

In the course of the testimony, the staff expressed the view that an itemization law needed to specify the categories of price breakdown and that the categories delineated had to be extensive enough to allow consumers to decline unwanted items. However, the staff suggested that the list should not be so detailed that confusion or double-charging would be encouraged. 148/ In the staff's suggested amendment to the proposed itemization law, the Minnesota itemization law was utilized as the basic model. The itemization categories in the proposed Trade Regulation Rule price list and selection memorandum provisions likewise derive from the Minnesota model.

146/ The Commission can expect strong opposition to the proposed disclosure requirements from large numbers of funeral directors. The industry's largest trade association, the NFDA, has already served notice that their position is that pricing and disclosure decisions must be the prerogative of the individual funeral director.

147/ Rosch Testimony, supra note 131. The bills died in committee because home rule made it inappropriate for Congress to act in this area. The D.C. City Council passed an amendment to the District's funeral regulations six months ago. The measure, which included an itemization requirement, was vetoed by Mayor Washington. Revised recommendations for amendments to the funeral regulations by a mayor-appointed study group are presently before the city council.

148/ Id. at 8.

A few words of explanation need to be said regarding the exception to the required itemized breakdown of prices for packaged funerals priced below a certain level. The basic purpose of the exception to both the price list and selection memorandum itemization requirements is to prevent funeral directors from having to increase the prices of their least expensive funerals due to the itemization of components that would be required. To explain why this is a real practical problem requires preliminary discussion. 149/

Funeral directors who use single or bi-unit pricing methods obtain greater contributions to overhead from their higher-priced funerals than from their lower-priced ones. Since the same services usually are provided by the funeral director regardless of the casket selected, discounting wholesale price differences for the caskets, the price difference between one funeral and the next represents a larger or smaller contribution to overhead (and profit). Concomitantly, the higher or lower charges for the same services when a more expensive or less expensive casket is selected can be viewed as higher charges for the individual component services.

The principle may be better illustrated by a more tangible example. Funeral #1 is a \$1000 package which includes a casket that wholesales for \$220. Funeral #2 is a \$1600 package, offered by the same funeral home with a casket that wholesales for \$320. Customers who buy funeral #2 instead of funeral #1 get the same services and a casket that wholesales for \$100 more, but they pay \$600 more (\$500 over the casket cost difference) for their funeral. They are, in effect, paying more for each of the components of the service package--embalming, viewing, etc.

Itemization requires funeral directors to put price tags on individual components like embalming, and viewing, which, in packaged pricing, are all lumped together. The most logical way for funeral directors to determine the prices of the individual items would be for them to determine the aggregate costs (including some profit) of furnishing embalming, viewing, and so on for all funerals handled and to divide each such cost by the number of funerals expected to be handled. This process of computing the average overhead cost for each item would, of necessity, yield a higher price tag for embalming, viewing, and other services than they would have in the less expensive packaged funerals which, as noted earlier, recoup smaller contributions

149/ See Itemization Memo, supra note 131.

to overall overhead expenses. 150/ The net result would be that the total price of the least expensive funeral (with casket, embalming, viewing, and other services included) would end up being higher than the price of the exact same items offered in a package funeral. Allowing funeral directors to avoid itemizing funeral packages priced below a certain level 151/ will protect against this undesirable result. 152/

The selection memorandum contains several other provisions which are designed to provide protection for the consumer. In addition to the right-to-decline disclosure, the memorandum contains a notice alerting the consumer to the disclosures required by the proposed rule. The memorandum must be signed, and a copy must be given to the consumer. Finally, the rule protects against substitutions of inferior merchandise by notifying the customer that no substitutions may be made without his or her consent.

150/ As we have observed, however, a complete shift to average overhead pricing is not inevitable; funeral directors could, instead, assure themselves of the desired revenue level by increasing the mark-ups applied to caskets. See Itemization Memo, supra note 131 at 38-39, 41-42, 47-49.

151/ Based on the staff's knowledge of overhead costs, pricing methods used, and funeral offerings, the staff believes the exemption cut-off should be about \$700, but public comment should be solicited on this point. The industry claims that the average overhead figure for all funeral homes in 1974 was \$887. FACTS AND FIGURES - 1974, at 23. Yet, most funeral homes offer a number of services below this figure and the extra cost of the casket, and most offer several below \$700. See, e.g., D.C. FUNERAL SURVEY, Table 1; ARK. FUNERAL SURVEY 14-24; DEL. FUNERAL SURVEY, Table of Numerical Results; and FLORIDA FUNERAL PRICE SURVEY, Appendix.

Setting the exemption at a higher level would make the exception to the itemization too broad, while a lower level would not adequately assure coverage of those low-end funerals whose prices we do not want to increase.

152/ Cf. Itemization Memo, supra note 131, at 59-65. The staff believes a specific dollar exception would be preferable to an exception for the two or three least expensive funerals because, in some funeral homes, the two or three cheapest funerals would be priced well above average overhead levels. In that case, it would not be necessary to preserve low-priced offerings to exempt them from the itemization requirement.

Section 453.6 Interference with the market

The Practice

As is obvious from the foregoing discussion, much of the funeral director's power to force the consumer to increase his expenditures arises from the ignorance, confusion and emotional stress of the funeral situation. The problem is exacerbated because no individual consumer deals often enough with a funeral home to become knowledgeably wary.

The advantages of the funeral director could be offset in a number of ways. A potential decedent could make his own arrangements on a pre-need basis by entering into a firm contract arrived at in a less emotional context. While useful, the value of such a technique is limited. Most people do not like to make their own funeral arrangements, since it reminds them of some unpleasant facts. In addition, even if the decedent has entered into a firm agreement, the family is still vulnerable to the pressure of the situation, for arrangements can be revised.

A second useful offset to the funeral director's power would be price advertising, now almost nonexistent. ^{153/} Price advertising would give consumers information about the general standards and prices in the industry.

A third possibility, and possibly the most fruitful, is for consumers to organize. Memorial societies can develop the expertise necessary to bargain with funeral homes and can represent the interests of consumers in a way that funeral directors now profess to do.

^{153/} A 1967 survey found that only 2% of the nation's 22,500 funeral homes engaged in price advertising. Fulton, The Funeral and the Funeral Director: A Contemporary Analysis (1967), in STUDIES OF ATTITUDES TOWARD DEATH, FUNERALS AND FUNERAL DIRECTORS 39. However, there are indications that 2% may be a high estimate. For example, in a study conducted in Philadelphia, only one of the city's 364 funeral homes reported that it had advertised prices in recent years. G. Kissel, An Analysis of the Market Performance of the Funeral Home Industry in Pennsylvania 40, (1970) (unpublished Wharton School of Business M.B.A. thesis) [hereinafter cited as Kissel]. Another industry expert has stated that approximately 3% of funeral industry revenues are devoted to advertising, most of which is institutional rather than price advertising. Interview with Dr. Roger Blackwell, Professor of Marketing, Ohio State University, in Columbus, Ohio, May 12, 1975. What price advertising does exist, is likely to be highly concentrated in a particular region (e.g., Calif.) with most other areas having virtually none.

Two kinds of barriers exist to the use of these devices to reform funeral practices. The first consists of cultural barriers. It is far from clear that consumers are much concerned about the lack of price advertising. The psychological pressure to avoid death-related issues is strong. Additionally, much of the public has been conditioned successfully to eschew price considerations. Similar barriers exist to the use of pre-need contracts and memorial societies. Both require a consumer to advert to the future fact of his own death, an idea which most of us would prefer not to think about.

However, funeral directors prefer not to rely solely on these cultural barriers and have reinforced them with an elaborate web of state and private restrictions. Staff has more information on advertising restrictions than on the others, and the situation with respect to such restrictions is set forth in some detail. Other types of restrictions are then discussed to show the actual and potential existence of the same types of suppression of market forces.

1) The Practice: Price Advertising Restrictions

State restrictions on price advertising vary considerably. In several states, such as Massachusetts and Nebraska, advertising of prices for funeral goods or services is specifically prohibited by statute, while in others, such as Texas, statutes against solicitation of business by funeral directors may be used by state licensing boards to discourage price advertising. Similarly, price advertising is prohibited or severely restricted by regulations of the state licensing board in several states. ^{154/} Frequently, these administrative proscriptions are enacted pursuant to a legislative delegation of rulemaking power to the board, which exercises its authority by defining such statutory terms as "gross misconduct," "unethical behavior," and "false and misleading advertising" to include price advertisements. ^{155/} In other states, the staff believes

^{154/} E.g., Louisiana, Missouri, Oregon, Utah, Virginia, West Virginia, and Wyoming.

^{155/} In Quesenbery v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956), the West Virginia Supreme Court upheld the validity of a board regulation which declared:

All price advertising is here declared to be unethical without exception...

95 S.E.2d at 837. Cf. Boydston v. State, 277 P.2d 138 (Okla. 1954): "Of course general advertising in itself is a character of seeking or soliciting business or patronage." At 142.

that the regulatory boards have a strong prejudice against price advertising. This bias, when coupled with the board's power to revoke or suspend licenses, effectively discourages any price advertising. 156/

Legal restrictions against price advertising are policed by the state morticians' licensing boards, which possess broad powers to revoke or suspend licenses. Composed in most states of funeral directors only, 157/ these boards have been used to protect the interests of industry members at the expense of competition and consumer interests. 158/ Regulations creating barriers to entry and restricting marketing techniques have been used to suppress competition between industry members, and, explicitly or implicitly, price advertising has been opposed. 159/ It is safe to

156/ In response to a staff request for information on state regulations and statutes related to the funeral industry, replies were received from the executives of most state boards. Some of these responses revealed an opposition to price advertising. South Dakota's Board replied that price advertising "is generally not done as it is considered unethical. At best it would be considered misleading." Letter from Donald B. Clements, Secretary-Treasurer, South Dakota State Board of Funeral Service, to Arthur Angel, January 15, 1974. The response from Arkansas stated that the only bar to price advertising there was "good taste, knowing there is no absolute way of price advertising in an ethical manner." Letter from John W. Baker, Secretary, Arkansas State Board of Examiners and Funeral Directors, to Arthur Angel, January 7, 1974.

157/ In all but eighteen states, the state board charged with regulating funeral practices is composed exclusively of funeral directors. Public representatives are included on the boards of six of the eighteen states: Massachusetts, California, Minnesota, Arizona, Delaware, and Michigan. The other twelve have a non-industry representative who usually is a government official such as a public health or vital statistics official.

158/ Kissel, supra note 153, at 73-77; BOWMAN 64-65; Blackwell, Price Levels in the Funeral Industry, 7 Q. REV. ECON. & BUS. 75, 80-84 (1967) [hereinafter cited as Blackwell]; Hearings on S. Res. 262 (Antitrust Aspects of the Funeral Industry) Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 88th Cong., 2nd Sess. passim (1964) [hereinafter cited as 1964 Hearings].

assert that state regulatory boards are antagonistic to advertising as a competitive weapon. 159/

When the price for risking the disapprobation of the board may be loss of one's livelihood, price advertising usually will be eschewed. Some challenges, however, have been mounted against state board regulations that prohibit price advertising. In Quesenbery v. Estep, 160/ a West Virginia statute which prohibited unethical advertising had been defined by a board rule to include a ban on all price advertising. Focusing primarily on the question of the validity of the delegation of the state's police power to the board, the court upheld the delegation of broad, discretionary rulemaking power to the board and held that the challenged rule was a valid exercise of that power.

More recent cases have declined to follow Quesenbery. Grissom v. Van Orsdel 161/ explicitly declined to follow the West Virginia decision in holding that the Florida board's restrictions on advertising exceeded its statutory authority and thereby "represented an unlawful restraint on the use and enjoyment of the defendant's business, in violation of the constitutional guarantees on which defendant relied." 162/ A similar regulation of the Connecticut State Board of Embalmers and Funeral Directors was declared invalid by a Connecticut court on the ground that a statute prohibiting unethical advertising provides no authorization for a regulation against price advertising. 163/ In two other cases, state courts have found statutes restricting price advertising to be constitutionally defective. 164/

159/ Blackwell, supra note 158, at 80-84.

160/ 142 W. Va. 426, 95 S.E.2d 832 (W. Va. 1956).

161/ 137 So.2d 246 (Fla. Dist. Ct. App. 1962).

162/ Id. at 248.

163/ Taylor & Modeen v. O'Connor, Civil No. 130602 (Conn. Super. Ct. 1963), in 1964 Hearings 241.

164/ Osborn Funeral Home v. Louisiana State Bd. of Embalmers, 216 So.2d 145 (La. Ct. App. 1968) (statute which prevented class of funeral directors from advertising credit terms denied class equal protection of laws); Needham v. Proffitt, 220 Ind. 265, 41 N.E.2d 606 (1942) (prohibition on print advertising was unconstitutional discrimination against print media).

Whether or not legal sanctions exist, price advertising is widely viewed by the industry as "unethical":

To speak of price advertising as being unethical or unprofessional may be accepting industry euphemisms for the policy of restricting competition; in any case, price advertising meets with strong disapproval in the industry. 165/

Trade associations have frequently sought to suppress such advertising either by adopting formal codes of ethics which oppose it or by using "moral suasion" to coax members to refrain from price advertising. Numerous instances have been reported whereby trade associations have expelled or otherwise harassed funeral directors who advertise the prices of their goods and services. 166/

These restraints have been legally challenged successfully. In a 1968 consent decree, the National Funeral Directors Association settled an antitrust suit brought by the Justice Department by agreeing not to keep anyone from advertising the prices of funerals. 167/ Prior to the entry of the decree, the NFDA disciplined and expelled price advertisers. The consent agreement required the Association not only to drop this practice but also to exclude any affiliated group which limits or restricts price advertising. The continuing absence of price advertising suggests that compliance with the order may be lacking. 168/

Before the Justice Department decree, a Wisconsin Circuit Court held that the NFDA and its state affiliate, the Wisconsin Funeral Directors Association, had violated

165/ Kissel, supra note 153, at 40. See also Blackwell, supra note 157, at 79; The Oak Ridge-Knoxville Way of Death, supra note 18, at 1.

166/ The Oak Ridge-Knoxville Way of Death, supra note 18 at 1; Sansing, Deathstyles, THE WASHINGTONIAN, Aug., 1973, at 54; J. RICH & L. PLATT, FUNERAL IN THE CITY OF SYRACUSE 62-63 (1973); interview with industry informant, supra note 18; interview with Jessica Mitford, author, in Berkeley, Cal., Jan. 9, 1973; interview with union members, supra note 45; CAL. DEP'T JUSTICE, THE FUNERAL INDUSTRY pt. II, at 12 (1970) (interview with funeral director).

167/ United States v. National Funeral Directors Ass'n, 1968 Trade Cas. Paragraph 72, 529 (D. Wis.).

168/ Kissel, supra note 153, at 29. See also sources cited in note 166 supra.

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These restraints have been legally challenged successfully. In a 1968 consent decree, the National Funeral Directors Association settled an antitrust suit brought by the Justice Department by agreeing not to keep anyone from advertising the prices of funerals. 167/ Prior to the entry of the decree, the NFDA disciplined and expelled price advertisers. The consent agreement required the Association not only to drop this practice but also to exclude any affiliated group which limits or restricts price advertising. The continuing absence of price advertising suggests that compliance with the order may be lacking. 168/

Before the Justice Department decree, a Wisconsin Circuit Court held that the NFDA and its state affiliate, the Wisconsin Funeral Directors Association, had violated

165/ Kissel, supra note 153, at 40. See also Blackwell, supra note 157, at 79; The Oak Ridge-Knoxville Way of Death, supra note 18, at 1.

166/ The Oak Ridge-Knoxville Way of Death, supra note 18 at 1; Sansing, Deathstyles, THE WASHINGTONIAN, Aug., 1973, at 54; J. RICH & L. PLATT, FUNERAL IN THE CITY OF SYRACUSE 62-63 (1973); interview with industry informant, supra note 18; interview with Jessica Mitford, author, in Berkeley, Cal., Jan. 9, 1973; interview with union members, supra note 45; CAL. DEP'T JUSTICE, THE FUNERAL INDUSTRY pt. II, at 12 (1970) (interview with funeral director).

167/ United States v. National Funeral Directors Ass'n, 1968 Trade Cas. Paragraph 72, 529 (D. Wis.).

168/ Kissel, supra note 153, at 29. See also sources cited in note 166 supra.

the state's antitrust law by engaging in a conspiracy to suppress competition among funeral directors in the pricing of services and supplies through a policy of refraining from cost advertising. 169/ Rejecting the defendants' contention that the "professional" nature of a funeral director's services justifies curbs on advertising, the court stated:

After a careful review of the record and analysis of the cases, the court has been constrained to the conclusion that the restraint of the code and by-law do not meet the test of the rule of reason either on the basis of professionalism, uniqueness, the public or quasi-public nature of the vocation or business, or a trade association regulation. 170/

This myriad of advertising restrictions contributes to the lack of price competition in the funeral industry--a condition acknowledged by industry consultants 171/ as well as scholarly observers. 172/ In an industry characterized by inelastic demand, competitive advertising would stimulate a redistribution of business, since new business cannot be generated. Recognizing this harsh fact of competitive life, funeral directors find it mutually advantageous to refrain from advertising prices.

The result of this non-competitive behavior has been considerable excess capacity and an oversupply of small firms. 173/ Since the individual entrepreneur's share of the market is insulated from the outside pressure of competition, inefficiencies lead directly to higher costs. Industry-wide data suggests that the industry is "operating at price levels which are based upon the cost curves of the

169/ Wisconsin v. National Funeral Directors Ass'n, 1967 Trade Cas. Paragraph 72,289 (Wis. Cir. Ct.).

170/ Id. at 84,720.

171/ A. RAPPAPORT, AN ANALYSIS OF FUNERAL SERVICE PRICING AND QUOTATION METHODS 7 (1971).

172/ Kissel, supra note 153; Blackwell, supra note 158.

173/ 1964 Hearings 35, 185; Kissel, supra note 153 at 54; Blackwell, supra note 158, at 76-78; HIGH COST OF DYING 17; AMERICAN WAY OF DEATH 41.

Whether or not legal sanctions exist, price advertising is widely viewed by the industry as "unethical":

To speak of price advertising as being unethical or unprofessional may be accepting industry euphemisms for the policy of restricting competition; in any case, price advertising meets with strong disapproval in the industry. 165/

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many small firms rather than upon the cost curves of large firms which can spread overhead costs over large volume." 174/

Inefficiency is protected, moreover, by the unique nature of the consumer transaction, a purchase in which the decision-making has been left solely to the seller--the funeral director. This phenomenon, which Kissel terms "one of the most significant aspects of market structure," 175/ has contributed to the formation of an industry market structure which Kissel describes as one composed of "atomistic monopolies" and which Blackwell calls "a composite of local markets which possess the characteristics of oligopoly involving a differentiated product." 176/ For the consumer, the effect of these market conditions is an artificially high price structure.

Although most funeral directors claim that funeral purchasers are not interested in price information, this self-serving statement may also be self-fulfilling, for few consumers have ever had an opportunity to obtain such information. Nevertheless, the consumer expenditure involved represents a substantial purchase by millions

174/ Blackwell, supra note 158, at 77. See also, AMERICAN FUNERAL DIRECTOR, 20 (May 1974) (remarks of Walter B. Chasen, an official of the National Funeral Directors Association):

"Why are costs so high for building occupancy? I blame overinvestment--funeral homes are being built that can only be described as monuments to the owners' pride. Structures are being planned without regard to potential income possibilities. In many smaller communities the funeral home is not in conformity with the life style of the area. When you read about these new structures in the journals, they proudly boast of expensive imported furnishings, Taj Mahal landscaping, transmitters that will broadcast funeral services to distant points, sunken gardens, flaming torches, waterfalls, acres of parking. The net result is an investment ranging to four and five thousand dollars of real estate for every adult service conducted. It has been reliably estimated that over fifty percent of all funeral homes are overinvested.

175/ Kissel, supra note 153, at 9.

176/ Id. at 82; Blackwell, supra note 158, at 75.

of buyers every year. 177/ Frequently, funeral arrangements are made under severe time constraints by bereaved persons whose grief and disorientation preclude the exercise of normal care and judgment. Without knowledge of legal requirements or possible alternatives, funeral buyers in these circumstances are at an extreme disadvantage vis-a-vis the mortician.

In this context, price information is essential to enable consumers to make rational purchase decisions. Funeral purchasers need information about the prices, options and policies involved in selecting particular merchandise or services. Armed with such information in advance, the consumer will be in a better position to protect his own interest in negotiating a transaction with a mortician, for most purchasers deal with only one funeral director. 178/ Moreover, increased availability of cost data will enable consumers to shop comparatively if they so desire. The ability to shop comparatively in advance may also stimulate increased advance planning for funeral arrangements and permit greater consideration of purchase decisions before such decisions become imperative.

As indicated in the previous discussion of the anti-competitive effects of price advertising restrictions and the absence of competition in the industry, price advertising should spur competition. In striking down the price advertising restrictions imposed on the Wisconsin funeral industry, the court expressed its rationale:

The basis of the common law and statutory prohibitions against unreasonable restraint of trade is the theory that competition is the life of trade and benefits the public interest...

Advertising is a means or device calculated to stimulate competition in trade and generally benefiting the public. 179/

177/ For 1974, funeral homes' gross receipts were estimated to be \$2.0 billion. U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK--1975, WITH PROJECTIONS TO 1980, at 420 (1975). See also D.C. FUNERAL SURVEY 25-34.

178/ BOWMAN 52; 1964 Hearings 185; Kissel, supra note 153, at 9-12; A. RAPPAPORT, supra note 171; Madden, supra note 91.

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By increasing competition, firms would be able to obtain additional market share through the promotion of better facilities or lower prices. Inefficient firms would be weeded out of the marketplace, and the economies of scale associated with large-scale operations should be realized. 180/ Where competitive rivalry exists, the result should be lower prices for the consumer. 181/

It is recognized, however, that the elimination of price advertising restrictions will not necessarily result in an upsurge of such ads, for price advertising is scant or absent even in localities where such restrictions apparently do not exist. 182/ The reasons for this reluctance to advertise prices have been traced, as mentioned earlier, to the prevailing market conditions in the industry. Consequently, the proposed rule contains a requirement that the availability of price information be advertised. By proposing such a disclosure, the staff believes that the objectives aptly summarized by Blackwell will be promoted:

Because consumers are uninformed, purchase infrequently, and avoid prepurchase planning, regulatory codes should be rewritten to encourage rather than to discourage the type of marketing strategy which stimulates more attention to the funeral purchase decision and which disseminates information about comparative facilities, services, and prices. . . . Competitive rivalry is not restricted to price, of course. Other variables more valued by the consumer than price may be emphasized; but in a competitive market, the consumer should be the final judge as to which marketing mix best satisfies him. 183/

2) The Practice: Other Restraints

Attempts to limit or suppress competitive forces are not confined to price advertising restrictions. The introduction of cost-saving services, such as pre-need contracts and immediate cremations, has been hampered by a number of

180/ Blackwell, supra note 158, at 82-83; Kissel, supra note 153, at 54.

181/ Kissel, supra note 153, at 55, 116-117; Blackwell, supra note 158, at 83.

182/ See note 153, supra, and accompanying text.

183/ Blackwell, supra note 158, at 82-83.

public and private restraints similar to those encountered by potential price advertisers. In some cases, state board sanctions have curtailed the use of these marketing devices; 184/ in others, aggressive competition has been formally opposed by industry-wide associations. 185/ This part of the proposed rule does not purport to override any state laws or regulations in areas other than price advertising; it does, however, prohibit private interference with the offering or promotion of inexpensive alternatives to the traditional funeral.

Pre-need contracts, whereby a person makes funeral arrangements during his or her lifetime, have been hailed as an opportunity for the customer to make sensible purchasing decisions without the pressure imposed by time and bereavement at death. 186/ Since a clear-eyed purchaser may be apt to spend his money more carefully than grieving survivors, the industry has not looked kindly upon these transactions. 187/ Howard Raether, the Executive Secretary of the National Funeral Directors Association, cautioned his colleagues:

Are you ready, willing and able to become part of a program that is going to lower the quality of the average funeral service selected to the point where you will find it difficult, if not impossible, to stay in business rendering the service you now give?

If funeral directors insist on soliciting pre-need funerals, they are in fact prearranging the funeral of their profession. 188/

Because immediate cremation reduces the range of merchandise and services which can be sold, 189/ it presents a cheaper method of disposition than the traditional funeral

184/ E.g., Oklahoma ex rel. State Bd. of Embalmers & Funeral Directors v. Guardian Funeral Home, 429 P.2d 732 (Okla. 1967).

185/ E.g., Utah Funeral Directors & Embalmers Ass'n v. Memorial Gardens of the Valley, Inc., 17 Utah 2d 227, 408 P.2d 190 (Utah 1965); Cedar Memorial Park Cemetery Ass'n v. Personnel Associates, 178 N.W.2d 343 (Iowa 1970).

186/ See generally, Sher, Funeral Pre-arrangement: Mitigating the Undertaker's Bargaining Advantage, 15 STAN. L. REV. 415 (1963).

187/ See cases cited in note 185, supra.

188/ Cited in 1964 Hearings at 106.

189/ But see the discussion of the casket-for-cremation requirement supra, at 28-33.

service. The growth in popularity of cremations 190/ has, therefore, been viewed with apprehension by members of the funeral industry, whose opposition to cremation "clubs" has at times taken more active forms. In California, a low-cost cremation firm was harassed by the industry, which sought to induce crematories to cease dealing with the firm and which instigated an unsuccessful move to place the firm under the jurisdiction of the state funeral directors' board. 191/ Moreover, staff investigations revealed that one of the industry's largest chains established a competing subsidiary and indications that its purpose may have been to drive the independent firm out of business through predatory pricing. Other incidents of harassment by industry-dominated state boards have been reported in Florida and Arizona.

Several examples of industry interference with the operations of memorial societies have been documented. These groups, which contract with cooperating funeral directors to furnish various specified types of funerals to their members at prescribed prices, are sometimes able to secure more favorable rates by virtue of their collective purchasing power. Society leaders are familiar with funeral practices and have acquired expertise in dealing with morticians. These factors, which permit the consumer to make funeral arrangements in a more advantageous bargaining position, have created industry opposition to memorial societies and the funeral directors who cooperate with them.

In Massachusetts, the state board coerced seven cooperating morticians into severing their ties with the nonprofit New England Memorial Society, and the Society claims that no Massachusetts funeral director will enter into a written contract with a memorial society for fear

190/ See, e.g., Roberts, Cremation Gaining Favor in U.S., N.Y. Times, Dec. 6, 1970, at 1; Voelker, The American Style Funeral Fights for Its Life, Pittsburgh Post-Gazette, April 10, 1972, at 1; Bonin, Ashes to Ashes or Dust to Dust?, Miami Herald, April 21, 1974 (Tropic Magazine), at 18.

191/ The firm's president labeled the latter attempt as "having the railroads regulate the airlines". A Move to Embalm Cremation Clubs, BUS. WEEK, Sept. 21, 1974, at 89.

of license revocation. 192/ A Knoxville, Tennessee funeral director was ostracized by other funeral directors in the area for advertising prices and dealing with memorial societies. 193/ The harassment extended to an alleged boycott by local suppliers; one supplier who did deal with the funeral home was reportedly "cut off" by other funeral directors. Moreover, any Tennessee funeral director who contracts with a memorial society is threatened with loss of license by the state board. 194/

A San Francisco funeral director who was expelled from the NFDA alleged that his expulsion was due to his promotion of low-cost funerals, his price advertising, and his cooperation with the Bay Area Funeral and Memorial Society (whose founders included author Jessica Mitford and her husband). 195/ Since the mortician had been advertising prices for some time, there was speculation that his dealings with the memorial society prompted his expulsion. 196/

Such attempts to harass the activities of firms providing more economical funeral services help to continue the industry's insulation from the forces of price competition. Many of these efforts have been organized by industry members, who have sought to protect their status (and preserve their inefficiency) by limiting the choices that would otherwise be available to consumers. By declaring market interference on the part of private parties, whether on an individual or a group basis, to be unfair, the rule seeks to make the option of low-cost funeral services a viable one.

192/ Interview with Cmdr. R. F. Armknecht, Dr. George Richardson and Rev. Frances Caswell, Memorial Society of New England, in Brookline, Mass., Dec. 11, 1972.

193/ The Oak Ridge-Knoxville Way of Death, supra note 18, at 1.

194/ Id. at 3.

195/ See Cathay Mortuary-Wah Sang v. Funeral Directors of San Francisco, Inc., 1965 Tr. Cas. Paragraph 71,505 (N.D. Cal.).

196/ Interview with Jessica Mitford, supra note 166.

3) Discussion of Section 453.6

The Rule

(a) Offering of Inexpensive Funerals

or any other person, partnership or corporation, directly or indirectly, to prohibit, hinder or restrict, or attempt to prohibit, hinder or restrict,

(1) the offering, or advertising of the availability of, low-cost funerals, immediate cremation or other forms of disposition, or arrangements for funeral services in advance of need by any funeral director, memorial society, or other person, partnership or corporation;

(2) contracts or arrangements between memorial societies and any funeral director or other person, partnership or corporation providing services for the disposition of deceased human bodies.

Effect of the Rule

Paragraph (a) of Section 453.6 deals with private attempts to restrict the availability of alternatives to the traditional, costly funeral service. By expanding the application of the rule to cover any other "person, partnership or corporation", this rule provision, by definition, 197/ also applies to trade associations or other industry groups.

As the previous discussion suggests, lack of competition in the funeral industry is reflected by an oversupply of funeral homes. In such a setting, the low number of cases which this market structure allots to each home must yield a profit. To remain in business, therefore, a funeral home will usually have to sell more "Cadillacs" than "Volkswagens", (or charge "Cadillac" prices for Volkswagens) and the nature of the funeral transaction permits this tilt toward high-priced entries. When less expensive methods of human disposition have been introduced, therefore, the reception in the industry has been frequently hostile. Several examples presented to the staff during the course of the investigation reveal that antagonism toward cost-cutters, especially among some trade associations, has at times been transformed into overt interference with the former's methods of operation.

197/ See rule definition (d).

The Rule

(c) Reliance on Price Advertising Restrictions

to change, restrict, make or fail to make any disclosure of accurate price information about any funeral merchandise or service by print media, broadcast media, telephone, leaflets, mailings, or in any other way, because of or in connection with any law, rule, regulation or code of conduct or any non-federal legislative, executive, regulatory or licensing entity or any other entity or person whatsoever, including but not limited to professional associations.

Effect of the Rule

Like paragraph (b) of the rule, this paragraph tracks the requirement imposed by the Prescription Drug Rule 201/ in order to overcome the same obstacles to price advertising: restrictive state laws and state licensing board regulations. In a number of states, the staff's investigation has found that price advertising is forbidden by statute, by licensing board regulations or by the board's interpretation of the statute or regulations. 202/ Similar treatment of these official restraints is accordingly proposed under the rationale espoused in the Prescription Drug Task Force Report. 203/

Under paragraph (c), it is an unfair act or practice for a funeral home to change, restrict, make or refuse to make any disclosure of accurate price information about any funeral product or service because of any law, rule or code of conduct of any non-federal legislative, executive, regulatory or licensing entity or any other entity or person, including trade associations. The purpose of this section is to create a duty on the part of funeral service industry members not to be influenced by or to rely upon such laws, regulations, or codes in making decisions on whether and how to make disclosures of prices of funeral merchandise and services. By forcing a conflict between this federally created duty and inconsistent existing state laws or state board regulations, this provision seeks to preempt repugnant state law. In promulgating the rule, the Commission is declaring federal law under the authority of the Federal Trade Commission Act; pursuant to the supremacy clause of the United States Constitution, this

201/ Id. Rule II(b)(1).

202/ See text at note 154, supra.

203/ FTC Staff Report, Prescription Drugs: Retail Price Disclosure (Jan. 28, 1975).

rule, as an interpretation of the Federal Trade Commission Act, will become the supreme law of the land on the matters it covers and within the confines of the Commission's jurisdiction.

This paragraph requires each funeral industry member to ignore any non-federal regulation relating to the accurate disclosure of funeral prices. At present, a funeral service industry member must weigh and consider the possible repercussions of violating both private and official restrictions if he wishes to disclose prices. Under this provision, a mortician must act as if there were no requirements governing funeral price disclosures other than the rule. His failure to eliminate all consideration of these state or private restraints in order to disclose price information adequately would therefore constitute an unfair act or practice under paragraph (c).

The Rule

(d) Price Availability Notice

to fail to display prominently, in any advertising or promotional materials in print or broadcast media of funeral merchandise or services, the following notice:

Funeral home prices vary substantially.
For information on our prices for
funeral merchandise and services, call:
[Telephone number].

Effect of the Rule

Paragraph (d) requires that a funeral industry member who chooses to advertise or to distribute promotional material in any media must disclose that funeral prices vary and that telephone disclosure of the prices of individual products and services can be obtained by calling the funeral home. While the rule does not go so far as to mandate advertising, it does require that the price availability notice appear in all media promotional materials used by the funeral home.

The use of affirmative disclosures in advertising has been a remedial tool whose implementation is within the discretion of the Commission. In requiring health warnings on cigarettes to correct the effects of deceptive non-disclosure of the dangers inherent in smoking, the Commission stated:

The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic:

Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment? 204/

Although the Funeral Trade Regulation Rule is predicated on Section Five's proscription against unfair acts or practices more than deception, consumer injury likewise results from the widespread failure to advertise prices or the suggestion that price comparisons are inappropriate in purchasing funeral services.

As shown, the noncompetitive structure of the funeral industry market and the peculiarly captive nature of the funeral transaction have led to a unique situation in which there are too many sellers charging too high prices to buyers who have become accustomed to simply paying the final bill. Unlike the prescription drug industry, where large chains have long been clamoring for an opportunity to advertise prices, the funeral industry has maintained a virtually unanimous stance against price advertising. The apparent removal of public and private restrictions to such advertising in some areas has not stimulated promotional efforts in these localities. 205/ In an industry where price considerations have been purposely downplayed, the required message is essential to inform consumers that price information is an appropriate concern and is available. As a corrective measure, 206/ the disclosure requirement is reasonably related to the consumer injury resulting from the previous absence of funeral price information. If effective, the message will encourage price comparisons and price competition.

204/ Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8352 (1964).

205/ Notes 153 and 168 supra.

206/ Moreover, under Sec. 202 of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, P.L. No. 93-637 (Jan. 4, 1975), a Commission rule may include requirements "prescribed for the purpose of preventing such [unfair or deceptive] acts or practices." The disclosure of the availability of price information may be viewed as a means by which the purchaser can minimize the seller's bargaining advantage (and use of unfair tactics) by familiarizing himself with aspects of the transaction.

At this point, the staff does not believe that the additional costs imposed by the requirement will be prohibitive. The rule does not require advertising, but those funeral industry members who choose to advertise must include the few words of the price availability notice. Comment shall, of course, be received on the cost issue during the rulemaking proceeding. Unless the ineffectiveness of the notice can be definitively shown, the staff believes that any additional costs will not be prohibitive in light of the anticipated beneficial effects resulting from the infusion, however limited, of price competition into the funeral marketplace.

Section 453.7 Retention of documents

The Rule

to assure compliance with the provisions of this part and prevent future use of the unfair and deceptive practices it prohibits, all funeral homes subject to the provisions of this part shall be required to retain and to make available for inspection by Federal Trade Commission officials, upon request, true and accurate copies of the written disclosures or price lists required by § 453.3(a)(2) and § 453.5(b)(1), (d)(1), and (e)(1), and all revisions thereof, for at least three years after the date of their last distribution to customers, and a copy of each selection memorandum signed by a customer, as required by § 453.5(f)(1), for at least three years from the date on which the memorandum was signed.

Effect of the Rule

The proposed rule requires a number of written disclosures to dispel misconceptions and misrepresentations regarding embalming, interment receptacles, caskets and public health requirements; provides basic data essential to making informed purchase decisions which heretofore has been denied; and specifies information which must be included on the memorandum memorializing both the customer's selection and the funeral director's willingness to furnish the services and merchandise chosen.

The FTC Improvement Act makes Trade Regulation Rules more enforceable by authorizing immediate institution of a civil penalty action against a rule violator, 207/ instead of requiring that a cease-and-desist order be obtained first and a civil penalty action initiated only for subsequent violations of the order, as was previously the case. As the Bureau Director has observed on a number of occasions, the direct enforcement provided by the Improvement Act makes a Trade Regulation Rule, in effect, an order against an entire industry.

Because of the direct civil penalty action, it is important to include recordkeeping requirements in the rule. Such requirements, which are analogous to the recordkeeping requirements commonly included in Commission Orders, will

207/ P.L. 93-637, Sec. 205(a) (January 4, 1975).

facilitate checks of compliance with the rule. 208/ While earlier procedures required final orders before civil penalties could be obtained, record keeping requirements could be included in the order. Now that the enforcement procedure for a rule violation, under Magnuson-Moss, is a direct civil penalty action, the recordkeeping requirements must be in the rule.

For these reasons, Section 453.7 of the rule has been drafted to require funeral directors to retain, for at least three years, copies of the written disclosures required by Section 453.3(a)(2) and Section 453.5(b)(1), (d)(1), (e)(1), and (f)(1). Since the same Section 453.3(a)(2) and Section 453.5(b)(1), (d)(1), and (e)(1) disclosures would be given to every customer, except when the disclosures would be changed to reflect price or stock changes, it is not necessary that funeral directors retain a copy of each disclosure for every customer; they need only retain one copy of all the versions of each disclosure. The selection memorandum required by Section 453.5(f) does, however, record the selection of each customer, and thus a copy of that statement would have to be retained for the three year period. As we have noted, however, most funeral directors even now use and keep copies of some form of selection memorandum to record what the customer has chosen, the funeral director's agreement to furnish, and the customer's agreement to pay for the selected items.

The staff believes that the recordkeeping requirements imposed by Section 453.7 of the rule will constitute a very minimal burden on funeral directors while making the Commission's job of policing the rule much easier. Promulgating the rule provision for public comment will enable those who will be affected by the recordkeeping requirements to give their reactions. Because the burden imposed is minimal and because retaining copies of the required disclosures would make it easier for funeral directors to demonstrate their compliance, the staff believes that, while there is likely to be strong opposition from many funeral directors to the disclosure requirements themselves (depriving consumers of relevant information has greatly facilitated sales of expensive funerals), there is not likely to be extensive opposition to the record-keeping requirements.

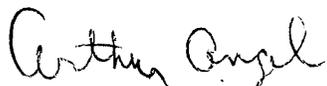
208/ In addition, the availability of retained documents, particularly the written memorandum of services selected, will assist in the settlement of disputes and misunderstandings between funeral directors and their customers.

CONCLUSION

The proposed Trade Regulation Rule we are recommending will effect vital changes in the funeral transaction. Basic information on prices and options previously denied will be made available. Common deceptions and misconceptions will be avoided by proscriptions or affirmative disclosures. Certain egregious abuses will be flatly prohibited. Restrictions on advertising and several other forms of interference with the market will be circumscribed.

Certain consumer problems derive primarily from societal and psychological conditions which are endemic to the bereaved and will change only gradually, along with social mores and societal attitudes. The rule will, however, eliminate serious abuses from the marketplace and arm consumers with information which will help protect them against unfair and deceptive funeral practices in the future.

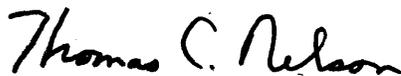
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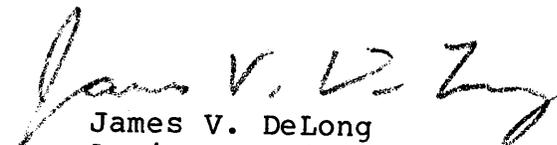


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