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**MANDATORY REVIEW OF THE FUNERAL INDUSTRY
PRACTICES TRADE REGULATION RULE
(16 CFR Part 453)**

STAFF REPORT TO THE FEDERAL TRADE COMMISSION



BUREAU OF CONSUMER PROTECTION

APRIL 1988

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PRACTICES TRADE REGULATION RULE
(16 CFR Part 453)**

Staff Report to the Federal Trade Commission

Bureau of Consumer Protection

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In this report, staff presents the evidence it has gathered to date on the effects of the Funeral Industry Practices Trade Regulation Rule, 16 CFR Part 453, and recommends that the Commission issue a Notice of Proposed Rulemaking to initiate the review proceeding mandated by § 453.10 of the Funeral Rule. Staff recommends that the Notice leave all of the Rule's requirements open to reexamination during the rulemaking amendment proceeding. The Commission has not adopted any of the findings or conclusions presented in this report.

APRIL 1988

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Carol Jennings (Division of Marketing Practices), Tim Daniel (Bureau of Economics) and Tom Maronick (Office of Impact Evaluation) performed with great speed and ability many tasks at our request, including the review and generation of supporting documents and survey data, and answered in simple terms many complex questions about Rule enforcement, economic and statistical topics.

Charles Lane and student law clerk Tom Giblin at our request obtained and analyzed with great diligence current state law regulating funeral industry practice; Mr. Giblin and student clerk John Adair also ably assisted in the analysis of written comments submitted in response to the Advance Notice of Proposed Rulemaking.

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INTRODUCTION AND SUMMARY

This memorandum contains staff's recommendations for initiating the rulemaking amendment proceeding mandated by § 453.10 of the Funeral Rule. The purpose of this unique provision was to determine, through an early review, whether there is a need to continue the Rule after it has had a fair opportunity to correct the industry problems it was adopted to remedy. The Commission in its Statement of Basis and Purpose for the Funeral Rule ("SBP") recognized that the Rule's effects may be evidenced more slowly than in other industries.¹ Nonetheless, the Commission determined that an early review was necessary to consider whether the Rule appears to be working as expected in reducing barriers to price competition and increasing consumer choice, whether some modification is necessary to facilitate those benefits, and whether repeal is warranted as a result of substantially reduced marketplace problems.

The staff in preparing for this amendment proceeding has collected and reviewed evidence from three primary sources: (1) two national mail-panel surveys of funeral purchasers (a 1981 "baseline" study and a 1987 "replication" study); (2) a survey of current state laws regulating the funeral transaction; and (3) public comments submitted in response to the Advance Notice of Proposed Rulemaking ("ANPR") issued by the Commission on December

¹ 47 Fed. Reg. 42260, 42299 (September 24, 1982).

survey and analytical results further suggest that: (1) consumers who receive "compliant" treatment from their funeral provider do not spend less on their funeral arrangements; (2) consumers who receive the Rule-required price lists spend no less on funerals; (3) the proportion of consumers receiving some form of price information early in their meetings with providers has increased, and those consumers spend significantly less on funeral arrangements; and (4) funeral provider misrepresentations have decreased to a small extent and consumer knowledge about funeral requirements and about funeral goods and services has increased to a small extent.

While some of the data summarized above may raise questions about the benefits of the Rule, the available data also suggest that overall compliance with the Rule is mixed at best. Of course, we would not expect 100% compliance under any circumstances. And the survey results may misstate actual compliance due to inaccurate consumer recall. However, as a part of the Commission's assessment of whether the Rule warrants retention or repeal, the Commission will need to examine the degree to which the Rule is sufficiently in place in the market. That is, are enough providers substantially complying with the Rule's requirements to permit accurate judgments about the Rule's effects on consumer and industry behavior in the funeral market? Thus, two important issues for consideration during the rulemaking proceeding will be whether the 1987 consumer survey results accurately reflect the actual level of industry

rulemaking proceeding to help determine whether they need to be modified or warrant retention or repeal.

On the other hand, the currently available survey data and other information could be read to provide some support for retention of the Rule's basic telephone disclosure (requiring providers to answer price inquiries), casket or embalming for cremation, and misrepresentation provisions that prohibit practices identified by the Commission as deceptive or unfair. In addition, our review of the Rule itself and of the ANPR comments indicates that the rulemaking should include consideration of several technical language changes that may be necessary to clarify the Rule's scope and requirements.

We do not at this time propose specific changes or make specific recommendations for retention or repeal in any of these areas. We instead believe that the best and most objective course at this point is to leave all of the current Rule provisions open to debate and inquiry, and, in addition, to focus concern on specific provisions, and on the available evidence relating to those provisions, through questions for comment in the NPRM.

The remainder of this memorandum contains the staff's report on the Funeral Rule Review and recommendations for publishing the NPRM and the consumer survey report. Section I provides a discussion of the Rule, its history, enforcement and presumptive validity, the 1981 baseline study, and changes in the funeral industry. In Section II, staff presents the summary statistics

Essentially, the Funeral Rule requires funeral providers to: (1) disclose prices, available options and other information in person and over the telephone; (2) make truthful representations regarding legal and other requirements; (3) permit consumers to select and purchase only those goods and services they desire; (4) obtain express permission before embalming the deceased for a fee; (5) refrain from misrepresenting the protective and preservative value of funeral goods and services; and (6) disclose whether they charge a fee for arranging cash advance purchases.

A unique feature of the Funeral Rule is its requirement that the Commission initiate a rulemaking amendment proceeding four years after the effective date of the Rule. This provision, set forth in Section 453.10 of the Rule, states:

No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) [of the FTC Act] to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceeding.

2. Objectives

⁴ The Funeral Rule had two effective dates. Those portions of the Funeral Rule that prohibit certain oral or written representations became effective on January 1, 1984. 48 Fed. Reg. 45537 (Oct. 6, 1983). The remainder of the Rule -- the portions that impose affirmative obligations on funeral providers -- became effective April 30, 1984. *Id.*

N.B. The effective date of § 453.3(b)(1)(ii) of the Rule was changed from January 1, 1984, to April 30, 1984. 49 FR 564 (Jan. 5, 1984).

B. History of the Funeral Rule Proceeding

The Bureau of Consumer Protection began an initial investigation of the practices of the funeral industry in December 1972.¹² Following that investigation, the Commission issued an Initial Notice of Proposed Rulemaking in August 1975.¹³ After receipt and analysis of written comments, the Commission issued the Final Notice of Proposed Rulemaking in February 1976. This document identified thirty disputed issues of fact. Hearings were held from April 20, 1976, to August 6, 1976.¹⁴ The Presiding Officer and the staff provided the Commission with written reports on the hearings.

¹² See SBP at 42261.

¹³ The staff proposed that the Commission issue a rule more stringent than the current Funeral Rule. For example, the proposed rule prohibited: (1) embalming without prior permission, unless required by law, (2) unauthorized removal of the deceased remains, (3) refusal to release remains to a family member or other authorized person (whether or not money is owed for services rendered), (4) charging any markup on or profiting from cash advance items, and required funeral providers to: (1) give a brief written statement of legal requirements including health regulations upon request, (2) disclose that caskets are available in colors other than those displayed, (3) display the three least expensive caskets in the same general manner as other caskets are displayed, (4) keep arrangements statements for three years, and (5) disclose on the arrangements statement that the consumer has read and understood the document and has received written information on caskets and other merchandise. The current Rule prohibits embalming for a fee without prior permission, unless the provider has made a diligent effort to obtain permission, requires the holding of statements for only one year and permits providers to profit from arranging cash advance purchases so long as the existence of a markup is disclosed.

¹⁴ The hearings were held in Atlanta, Chicago, Los Angeles, New York, Seattle and Washington, D.C. In all, 52 days were consumed. The hearings generated 14,719 pages of transcript, 4,000 exhibits and involved 315 witnesses.

description of the unfair or deceptive acts or practices that are remedied by the rule. In several provisions of the tentatively adopted rule this had not been done. Accordingly, the Commission directed the staff to conform the tentative rule to the statute.

On December 17, 1980 the Commission met to consider a revised rule and voted to publish it for comment. The Commission subsequently promulgated the present Funeral Rule on September 24, 1982.¹⁶ The Rule became fully effective on April 30, 1984.¹⁷

C. Commission Efforts to Encourage Rule Compliance

Since the Funeral Rule was promulgated in 1982, the staff has been educating the industry and consumers regarding the requirements of the Funeral Rule. These efforts have included: (1) publishing compliance guidelines, model price lists, a consumer guide to the Funeral Rule and an audio-video public service announcement; (2) reviewing hundreds of price lists for individual funeral providers, trade associations, printing companies and other interested parties; (3) drafting hundreds of staff opinion letters on a profusion of compliance issues; (4) participating in compliance seminars, trade conventions, consumer fairs and news programs to explain the Rule.¹⁸

As is customary with new rules, the staff initially concentrated on educational efforts to bring about compliance

¹⁶ Supra note 1.

¹⁷ Supra note 4.

¹⁸ The staff also mailed advisory letters to many funeral providers that were identified as not having forms or having inadequate forms.

On June 23, 1987, the Department of Justice filed a complaint in the United States District Court for the Northern District of Texas, Dallas Division, against a second Dallas funeral provider. The complaint alleged that the funeral home engaged in practices that violated the Funeral Rule.²⁰ In this matter, allegations in the complaint were substantially similar to those in the first Dallas case. One important note is that the funeral transactions that generated the alleged violations of the Rule were mostly pre-need transactions. Thus, when the Commission determined to pursue this case, it unequivocally demonstrated that the Commission will prosecute pre-need as well as at-need transactions that allegedly violate the Funeral Rule.

3. FTC v. Hughes

On June 23, 1987, the Department of Justice filed a complaint in the United States District Court for the Northern District of Texas, Dallas Division, alleging a third Dallas based funeral home engaged in practices that violated the Funeral Rule.²¹ In this matter, the complaint alleged eight types of violations -- four violations concerned the failure to give price information, and four concerned inadequate disclosures on the itemized statement required by the Rule. A substantial portion of the alleged violations also involved pre-need transactions.

D. The Baseline Study

²⁰ Crane-Weiland Funeral Home

²¹ Dudley Hughes Funeral Home.

touched off a debate among Commission staff.²⁵ The principal concern was whether in four specific areas the baseline study results were contrary to evidence in the rulemaking record that staff had relied upon to justify the Funeral Rule, and if so, whether the rulemaking record should be reopened to consider the significance of this additional information.²⁶

The baseline data suggested that in 1981-1982 funeral providers: (1) seldom refused to give price information over the

²⁵ See Memorandum from Funeral Rule Staff to Commission, "Impact Evaluation Survey, Funeral TRR" (July 15, 1982); memorandum from Thomas J. Maronick, Impact Evaluation, to Timothy J. Muris, BCP Director, "Analysis of Funeral Rule Studies" (July 15, 1982); memorandum from Thomas J. Maronick, Impact Evaluation, to Tim Muris, BCP Director, "Comment on Funeral Rule Baseline/Follow-up Study" (July 16, 1982); memorandum from Michael C. McCarey, Associate Director of Service Industry Practices/BCP, to Commission, "Proposed Funeral Rule" (July 16, 1982); memorandum from Timothy J. Muris, BCP Director, to the Commission "Proposed TRR Regarding Funeral Industry Practices" (July 16, 1982); and memorandum from Dennis Murphy, Bureau of Economics, to the Commission, "Funeral Rule Impact Evaluation Studies" (July 16, 1982). (The above memoranda are compiled in the publication: FTC, Funeral Industry Trade Regulation 1982 (FTC Library)). See also Hearings before the Subcommittee on Commerce, Transportation, and Tourism of the Committee on Energy and Commerce, House of Representatives, 98th Congress, 1st Sess. May 4, 1983 (Disapproving the FTC Funeral Rule).

²⁶ The rulemaking record was opened on August 29, 1975 and closed on October 22, 1976 (except for limited reopenings in 1977, 1978 and 1981). See FTC, Funeral Industry Practices, Final Staff Report 20-33 (June 1978) The baseline final report was published in July 1982, six years after the record closed.

(1) and (2) above), they also appeared to contradict much of the evidence presented by funeral industry representatives.³¹

These results indicated that either: (1) practices in the funeral industry had changed since the closing of the rulemaking record in 1976; (2) there were significant inaccuracies in the rulemaking record; or (3) in these four areas the baseline questionnaire was written in such a way as to produce incomplete or ambiguous results.³²

Prior to asking the Commission to reopen the rulemaking record in 1982 to consider the baseline results, the staff contracted with Market Facts, Inc. to conduct a validation

³¹ See Staff Report, *supra* n.24, Part II 187-407. Presiding Officer's Report, 50-52, 91-110. Industry publications placed on the record stated that over half of all funeral homes in the country used package pricing instead of itemized pricing. See V. Pine, A Statistical Abstract of Funeral Services Facts & Figures, 1976, at 64-94. See also SBP at 42267 n.75. Further, many funeral directors, including trade and state board representatives, testified in the Funeral Rule hearings that permission to embalm is never sought. Staff Report at 189. According to the baseline data, 42% of funeral providers sought permission to embalm.

³² *E.g.*, the questions in the baseline questionnaire about the price information consumers received over the telephone did not elicit whether the price information was specific, such as the prices of specific goods and services (as required by the Rule), or general, such as a price range without any other qualifying information.

of the Commission voted against reopening the rulemaking record to consider the baseline results.

During the appeal of the Rule taken to the Fourth Circuit,³⁵ the court examined the question of whether the Commission's decision not to reopen the rulemaking record to include the baseline study was an abuse of discretion.

Harry & Bryant Co. v. FTC, 726 F.2d 993, 998 (4th Cir. 1984).

The court held that "[i]n light of the abundance of information on accessibility of price information already in the record, reopening was clearly not warranted." 726 F.2d at 998.

E. The Applicable Standard for Repeal or Modification

As noted above, Section 453.10 of the Funeral Rule commits the Commission to initiate a rulemaking amendment proceeding pursuant to Section 18(d)(2)(B) of the FTC Act. Section 18(d)(2)(B) states, in part:

A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection.

Thus, the mandatory Funeral Rule review proceeding must be conducted in the same manner prescribed by Section 18(a)(1)(B) of the FTC Act for the promulgation of a trade regulation rule. In the Statement of Basis and Purpose for the Funeral Rule ("SBP"), the Commission states that the early review procedure is designed to determine whether there is a need to continue the Funeral Rule after the Rule has had an opportunity to correct the market

³⁵ See supra n.3.

trade regulation rules.³⁷ Thus, under the APA and Section 18(e)(3)(A) of the FTC Act, the existence of a duly promulgated rule reflects the status quo. Hence, the Commission is required to demonstrate that any changes (revocation or amendment) in the settled course of action (the Funeral Rule) must be based upon substantial evidence in the rulemaking record and must be accompanied by a reasoned explanation.³⁸

To help ensure adherence to the statutory and judicial rulemaking standards discussed above, the Commission has articulated its own rulemaking policy criteria. These criteria are designed to make certain that a rulemaking record contains a

³⁷ The rulemaking requirements of § 18 of the FTC Act complement and, to an extent, modify the requirements of the Administrative Procedure Act, 5 U.S.C. 553, et seq. and 701, et seq. Association of National Advertisers, Inc. v. FTC, 617 F.2d 611, 614-15 (D.C. Cir. 1979). Further, Section 18(b)(1) of the FTC Act states, in part: "When prescribing a rule under (a)(1)(B) of this Section, the Commission shall proceed in accordance with Section 553 of title 5, U.S.C."

For further discussion of the case law concerning the modification or repeal of rules, see State Farm, 463 U.S. 29, 42 (1984); Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-808 (1973) (once an agency has settled on a course of action such as a regulation, the agency must set forth a reasonable basis in the rulemaking record for departing from it); Center for Auto Safety v. Peck, 751 F.2d 1336, 1343 (D.C. Cir. 1985) (the same standard applies whether the agency is enacting a new rule, or revoking or modifying an old one); accord, Consumers Union, Inc. v. FTC, 801 F.2d 417, 421 (D.C. Cir. 1986).

³⁸ The NFDA and NSM in their ANPR comments disagree with this conclusion. These groups state that the burden should be on proponents of the Rule to justify its continuance. C-39 at 5, n.1 (NFDA) and C-275 at 1-5 (NSM).

evidence is rarely sufficient to provide the substantial and reliable evidence necessary to support the promulgation of a rule.⁴¹

F. Trends in the Funeral Industry

The staff has contacted most of the active national industry associations and consulted experts in the funeral industry.⁴² From these contacts, the following trends have emerged.

1. Consolidation

The funeral industry continues to be dominated by small businesses. However, large, diversified multi-establishment funeral providers are emerging in the industry.⁴³ As a result, to remain profitable some small, marginal funeral providers may have to merge or diversify.⁴⁴ In an effort to become more

⁴¹ Id.

⁴² NFDA, the largest association, has 14,000 members. See Consumer Guide to FTC Funeral Rule for more detail on associations.

⁴³ See SBP at 42263-64, "Funeral Service in the Year 2000" (parts 1 & 2), American Funeral Director Magazine (January 1988 and February 1988, respectively); "The Cemetery Industry in the Year 2000" (parts 1 & 2), American Cemetery Magazine (January 1988 and February 1988, respectively). Several multi-state chains have emerged in the funeral industry in recent years. Dr. Joe Adams, director of the National Foundation of Funeral Service, estimates that such chain operations constitute 3% of the market and are growing.

⁴⁴ At the time it issued the Statement of Basis and Purpose for the Funeral Rule, the Commission estimated that in the United States there were at least 22,000 funeral homes, 50,000 licensed funeral directors and embalmers, and over 400 crematories. Staff's initial research appears to indicate that the number of funeral homes may have remained static or even decreased slightly. According to the publishers of the American Funeral Director Magazine, the current number of funeral homes in the United States is 21,830.

("pre-need" funerals).⁴⁸ The experience of SCI, the largest funeral provider, is illustrative. According to the corporation's annual report of fiscal 1987, in the past four years it has arranged pre-need contracts with the following total annual face values (millions of dollars): \$41.9 in 1983, \$72.2 in 1984, \$90.9 in 1985, \$107.5 in 1986, and \$154.8 in 1987.⁴⁹ Hildenbrand Industries, the largest manufacturer of caskets, reportedly estimates that the funeral industry arranged 22,000 pre-need funerals in 1960 and 600,000 in 1985, which equals 30% of the deaths in 1985.⁵⁰ A Hildenbrand official reportedly stated that pre-need is the only means at present for funeral marketers to increase market share.⁵¹ Hildenbrand, the National Selected Morticians, the International Order of the Golden Rule, National Funeral Directors Association and several state associations have recently established pre-need marketing programs. One analyst estimated that with the increase in pre-need selling (approximately 10 new sellers of pre-need contracts in 1987 alone) and indications that venture capitalists are

⁴⁸ See, e.g., Dr. Joe Adams, "Preneed, Megatrend of Funeral Service," American Funeral Director 18 (July 1986) and "Funeral Service in the Year 2000," 30 (February 1988). See also the discussion of Project Understanding, *infra* at p. 24.

⁴⁹ SCI annual report for fiscal 1987 at 10.

⁵⁰ Paul Showalter, "The Business of Death," Venture Magazine 30-36 (January 1987).

⁵¹ Id. at 34.

to be subject to the Funeral Rule.⁵⁵ Currently, whether a seller of pre-need is subject to the Rule depends on several tests. First, the seller must be a funeral provider, as defined by the Rule.⁵⁶ For example, if the seller sells only a funding contract or sells only services, it may not be covered by the Rule. Second, if the pre-need plan is an insurance plan, as insurance is defined in Group Life & Health Insurance Co. v. Royal Drug Co., Inc., 440 U.S. 205, 211 (1979), it is specifically exempt from the Funeral Rule, pursuant to Section 453.8(c) of the Rule.⁵⁷ The issue of continued regulation of the pre-need market under the Rule is discussed in section III.I. of this memorandum.

An additional issue is whether the pre-need market adequately informs consumers that the pre-need plan may not be transferable to a different locale. In its model pre-need laws, AARP advises its members that in some cases they may not be able to transfer the contract to a distant place and may not be entitled to a refund in that situation.

3. Cremation

a. Background

⁵⁵ This issue exists only if the Rule is retained.

⁵⁶ Section 453.1(j) defines a funeral provider as any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

⁵⁷ Section 453.8(c) states that the Rule shall not apply to the business of insurance or the acts in the conduct thereof. See SBP at 42286-87. The Office of the General Counsel has construed this provision to be a codification of the McCarran-Ferguson Act exemption of the business of insurance, as restated in the FTC Improvements Act of 1980.

- (3) misrepresentations regarding the manner of disposition of the cremated remains;
- (4) commingling of the cremated remains from more than one person; and
- (5) alleged use of urns too small to hold all of the cremated remains.

In its ANPR the Commission requested comments on the prevalence of problems in the cremation industry. As indicated later in section III.I. of this memorandum, the comments did not generate much information on the extent to which these alleged abuses are occurring.

b. Project Understanding

Project Understanding was a national mail survey developed and implemented at the Center for Gerontological Education, Research, and Services (GERAS Center) at the University of Notre Dame. Its purpose was to gather data on the motivations and experiences of Americans who select cremation as the method of final disposition for their loved ones. This information would then be available to the funeral industry for a better understanding of these consumers. Project Understanding was funded by a grant from the National Research and Information

arranged burials -- so that the administrators could compare the two groups of respondents.⁶²

This research project provided some data on issues included in the Funeral Rule review. It compared consumers who select burial and those that select cremation. Generally, there were no significant differences. The following reported findings are illustrative:

- (1) respondents were asked about the most influential and most important factors for choosing cremation or burial -- consumers reported that preference of the deceased was both the chief influence and most important reason for the manner of disposition; however, respondents said that the preference of the deceased was more

⁶² The questionnaire packet was mailed to 1,946 available, potential subjects in six metropolitan areas on October 8, 1985. The sponsors claim that the study was national in scope.

A total of 212, or 10.9% of the subject contacts, were determined to be undeliverable or inappropriate. Of the 1,734 remaining contacts, 1,071, or 61.8% of the sample, responded in some form. Individuals who received the questionnaire, but declined to participate, were asked to return the blank questionnaire in the self-addressed, stamped envelope. There were 352 questionnaires, or 20.3% of the total contacts, returned blank.

There were 719 entirely or predominately completed questionnaires that were returned. Of these, 16 were not used in the data analyses: 4 because they were filled out for multiple deaths and could not be scored, 3 because the death occurred years prior to the date requested, 4 because the deceased was younger than 30 years, and 5 because the respondents did not follow instructions and the majority of the questionnaire was unscorable. There were 703 usable questionnaires, 407 from the cremation groups and 233 from the burial group, which constitute 40.5% of the subjects contacted.

- (1) those who chose cremation tended to have a higher level of education;
- (2) the embalming rate for cremation was 14.3% compared to 64.4% in burials;
- (3) visitations with the body present for cremations was 25% compared to 75% for burials.
- (4) those who had cremations were more likely to have lived away from family or spouse at the time of death;

Staff cautions that, although the findings in this study provoke interest, staff cannot without further review, vouch for the methodological soundness. Thus, the data is presented solely for the Commission's information.

II. Evidence on the Funeral Market

A. The Replication Study

The most comprehensive study available on the characteristics of the funeral market under the Funeral Rule is the 1987 consumer survey developed by BCP and BE staff (the "Replication Study" or "RS").⁶⁵ Under contract with the Commission, Market Facts, Inc. conducted a national mail-panel survey of consumers who had or shared primary responsibility for making funeral arrangements between December, 1986 and June,

⁶⁵ "Report on the Survey of Recent Funeral Arrangers," Market Facts, Inc., Report to the Federal Trade Commission, April 1988.

study questionnaires,⁶⁷ while avoiding the problems identified in a few areas of the baseline questionnaire. To address those flaws, the funeral project staff made several significant changes in the questions seeking data on: (1) shopping behavior;⁶⁸ (2) telephone price information;⁶⁹ (3) in-person written price disclosures;⁷⁰ and (4) embalming authorization.⁷¹

⁶⁷ In some situations, comparison to the baseline questionnaire is not useful because: (1) few respondents answered the questions; (2) the baseline question is inaccurate or vague; or (3) the particular question is new. In those situations, comparability with the baseline results was clearly not an important consideration.

⁶⁸ The staff added questions to elicit data on the extent to which consumers contacted more than one funeral home before making arrangements. The original baseline questionnaire had one question on the number of funeral homes contacted. The replication questionnaire has 11 shopping questions.

⁶⁹ The validation study indicated that the baseline questionnaire did not elicit responses on the specific price information that the respondents got over the telephone. For example, question 22 on the baseline questionnaire asked whether any funeral provider refused to give price information over the telephone. The answer to such a question would not reveal whether the price information provided was very general (e.g. "We have funerals from \$500 to \$5,000, come in if you want more specific information.") or specific (e.g. "We have funerals from \$500 to \$5,000, would you like more specific information?"). The replication questionnaire has 5 questions to probe the type of price information the respondent sought and the response the funeral provider gave.

⁷⁰ One of the criticisms of the baseline questionnaire was that it did not help the respondents distinguish between a general price list of the goods and services available and the statement of funeral goods and services selected by the consumer. The wording of the replication questionnaire was modified in an attempt to help respondents distinguish between the two documents.

staff at NFDA's suggestion added a question regarding consumer's overall satisfaction with the goods and services provided by the funeral home (Question 9a).

2. Overall Results

Comparison of the replication and baseline study results⁷⁴ appear to provide no evidence that the Funeral Rule has increased consumer shopping or reduced overall funeral expenditures for consumers who receive the Rule-required disclosures. The results indicate that more consumers select cremations as the final form of disposition.⁷⁵ In addition, the results present evidence that a majority of funeral providers may not be simultaneously complying with the Rule's most important remedial requirements.⁷⁶ The results further suggest that: (1) the proportion of consumers receiving some price information relatively early during their meetings at the funeral home has increased; and (2) funeral home misrepresentations have decreased and consumer

⁷⁴ The BE Staff Report addresses changes that have occurred over time, based on the results of the 1981 baseline and 1987 replication studies.

⁷⁵ It may not be possible at this juncture to determine whether consumers' increased preference for cremation is attributable to the Rule, although one ANPR commenter states that the Rule, in part, is responsible for the change. C-108 at 10 (CANA).

⁷⁶ BE's 1987 regression analysis suggests that consumers who receive compliant treatment do not spend less for their funeral arrangements than others. We expect that these results will be closely scrutinized during the proceeding, and that other evidence on compliance will be presented for evaluation. AARP in its ANPR comment, for example, recommends that the FTC should conduct compliance testing. C-282 at 8.

they shopped (44 of 986).⁷⁹ 36 of these 44 people said they shopped by telephone. By comparison, about 7% of the 1981 respondents said they shopped.⁸⁰ 85% of the RS sample said that they had already decided which funeral home to use before they contacted any to discuss possible funeral arrangements.⁸¹

Similarly, respondents' most important reasons for selecting a funeral home in 1987 were very similar to those in 1981. 32% said that personal experience with the home for other funerals was most important, while 29% mentioned this factor in 1981. Knowing the funeral director or the home's reputation was most important to 30% respondents in 1987 and to 38% in 1981. 19% of the sample in 1987 chose location as the most important factor; 18% in 1981 felt that way. In both studies, 3% of the

⁷⁹ 29 people said that they contacted two homes, eleven contacted three, and four contacted four homes. Almost half of these shoppers, 42.9%, were purchasers of cremation services. The results of Bureau of Economics staff's econometric analysis of the replication study data, discussed in Section III. of this memorandum, could not confidently answer the question whether shoppers paid more or less for their funeral arrangements, in part because the number of shoppers is small.

⁸⁰ The RS and BLS shopping questions differed in that the RS question (Question 19) was asked only of those respondents who had previously said that they had not already decided which funeral home to use before contacting any (Question 18), or who contacted others even though they had already decided. The BLS question, although identical to RS Question 19, included all respondents.

⁸¹ This question was not asked in the baseline study.

reported selecting similar types of caskets in both years, except that consumers last year purchased slightly more sealed metal caskets that are more resistant to the entrance of air and water, and, consequently, generally more expensive, than unsealed metal caskets. Respondents' reported reasons for selecting the casket they actually used were likewise similar in the two years; the most important factors in their selection were family wishes, the deceased's wishes, casket appearance, and cost, in that order. Recommendations made by the funeral director and staff were less important in consumers' selection of a casket than those reasons. Similarly, about the same proportion of respondents in the two studies reported purchasing embalming -- 81% in 1987 and 84% in 1981.

The same proportion of consumers in the two time periods said they purchased these goods and services before the time of need ("pre-need," or "pre-arranged" funerals) -- 23%. BE's multivariate analysis indicates that pre-need services appear to cost the same in 1987 as "at-need" arrangements.⁸⁴ And analysis of the study results indicates that pre-need and at-need purchasers did not differ in their tendency to buy one of the four specific types of funeral arrangements (open-casket burial, closed-casket burial, cremation, and other).

⁸⁴ The RS data may not be indicative of any effect the current pre-need market may be having on the types of funerals that are pre-arranged, because the funerals reflected in the data have already occurred. The effects of the current market on pre-need purchases will not be seen for some time. Industry observers suggest that some 30 percent of current funerals are sold on a pre-need basis.

funerals and of funeral goods themselves has improved slightly since 1981. Consumers' knowledge of embalming requirements and of the ability of sealed caskets to preserve remains, however, still appears to be relatively low.

More people in 1987 seem to know that caskets for cremation are not required by law. When asked whether caskets are required by law when the body is to be cremated, 13% of the 1987 study respondents answered incorrectly that this was definitely or probably true; 19% of the 1981 subjects responded that way. About an equal proportion of the sample in both years thought that the statement was probably or definitely not true, but 9% more in 1987 were unsure (23% versus 12%).

Similarly, a greater proportion of consumers in 1987 appear to know that embalming is not always required by law, but half of the sample still do not know this. 30% of the 1987 study respondents said that embalming is probably or definitely not required, while 22% answered that way in 1981. Half of the RS sample incorrectly said that embalming is so required, compared to 61% in 1981. And a larger proportion of last year's sample were unsure of the answer -- 20% as opposed to 7%.

Consumers in 1987 also responded more accurately to the statement that a sealed casket (and/or grave vault) preserves remains for an indefinite period of time. 60% of respondents incorrectly responded that this statement was definitely or probably true in 1981, whereas 42% in 1987 thought so. And 41% percent of the 1987 respondents reported that statement was

funeral providers' prices at that time.⁸⁹ Still, BE staff reviewed the data on the prices of individual goods and services and concluded that the surveys suggest that real prices for individual goods and services were not significantly different in 1987 than in 1981.

Thus, although BE's analysis indicates that consumers' real funeral expenditures have increased, the analysis cannot discern the extent to which that increase is due to an increase in real prices, an increase in the quantity (or quality) of items purchased, or some combination of those factors.

e. Compliance Issues

The replication study results present evidence that industry compliance with the Funeral Rule is mixed, at best, depending on the Rule provision. Overall, the data present further evidence that a majority of funeral providers may not be simultaneously complying with the Rule's most salient requirements.⁹⁰

i. Overall Compliance

⁸⁹ This BE concern is based on the possibility that, because the Funeral Rule requiring itemization was not in effect in 1981, consumers who in 1981 reported itemized prices may have purchased them from providers who chose to itemize and who also may have charged lower prices. To the extent this occurred, the 1981 itemized price data may be biased downward. According to BE staff, this concern does not extend to figures on total funeral expenditures.

⁹⁰ The replication study provides, in staff's view, the most reliable evidence available on the issue of industry compliance with the Funeral Rule. However, some measure of skepticism may be warranted in relying solely on consumer recall to gauge industry compliance in detail.

Using that "comply" variable⁹², the Bureau of Economics analysis found that 31% of the replication study respondents received "compliance" with the Funeral Rule.⁹³ This finding

⁹² Admittedly, this "comply" variable does not consider all of the Rule's provisions. Still, the three that are included are "core" requirements. In addition, the variable's definition of an "early" GPL contains a charitable interpretation of the Rule's key requirement that the GPL be provided to consumers "upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services;" consumers under the "comply" variable were considered to have received compliance if they got the GPL after discussions had begun but before selection of a casket or other container. The Bureau of Economics staff estimates that the use of this definition of "early" may overstate compliance by as much as 10%. Third, the variable could not take into account whether the GPL and statement of goods and services selected that were received by any of the study respondents were actually in compliance with the Rule's content requirements, other than by virtue of respondents' recalling that the latter statements were sufficiently itemized. However, a "comply" variable that attempted to include all, or even some, of these other compliance factors might have proven less useful as an analytical tool, because the proportion of consumers receiving compliance might have been too low to generate statistically significant results concerning the Rule's overall effects on consumer expenditures. It also could be argued that a funeral provider who complies with the three provisions included in this "comply" definition will have provided the essence of what the Rule requires: itemized, timely price information. Thus, if the Rule is affecting consumer expenditures, this variable should likely capture those effects.

⁹³ 28% of the study subjects also said that they received no price information (oral or written) at the funeral home they used until the funeral arrangements were being finalized, or later.

BE staff devised three additional measures of "compliance" to gauge the relative incidence of rule-required events. The first alternative measure added the requirement that price information was received in writing; the second dropped the misrepresentation requirements; and the third simply included receiving either a general price list sometime during the transaction or an itemized statement of items selected. The results were that consumers respectively received "compliance" 28%, 37% and 80% of the time.

however, about 25%-30% of the callers said that they did not remember whether the director they spoke with made these affirmative disclosures.⁹⁵ Excluding these respondents increases the compliance rate to about 72%.

Nearly all of the consumers in the study said they obtained adequate provider responses to their telephone requests for price information. Although the sample size is very small (16 people), no one who requested such information while shopping for funeral services received a complete refusal.⁹⁶ Of the 52 survey respondents who specifically asked the funeral home used for price information, 10% (five people) were denied.⁹⁷

iii. Price Lists and Statement of Items Selected⁹⁸

The replication study results appear to indicate that about half of funeral industry members are providing timely and

⁹⁵ These data, and, in large part, the information about answering price inquiries stem from responses to Question 23 of the survey instrument, which is not strictly a "shopping" question. That question probed consumers' experiences in telephoning the funeral home(s) actually used, and not those that were shopped.

⁹⁶ 69% of the callers who responded to Question 21a of the survey said that they were given all or most of the requested information. 31% of these shoppers reported that some of the information was provided. None said that no information was received.

⁹⁷ Two people were denied information about the total prices of typical funerals, one did not get requested casket price information, and another two failed to receive prices for various other items such as embalming and viewing of the deceased.

⁹⁸ The Funeral Rule's requirements for the Casket Price List, Outer Burial Container Price List, General Price List, and Statement of Funeral Goods and Services Selected are respectively contained in Sections 453.2(b)(2), (3), (4) and (5).

requirements. 49% of providers may be offering GPLs to consumers "early" in the transaction -- sometime during the arrangements conference and before selection of a casket. In addition, 62% of those consumers who were shown a GPL said that they were offered it to keep; the Rule requires that providers give the GPL to consumers for their retention.

Staff also obtained a non-random sample of 23 actual GPLs received by the replication study subjects. Enforcement staff of the Bureau of Consumer Protection's Division of Marketing Practices reviewed these documents at our request. Based on that review, it appears that about one-third are not in substantial compliance with the Rule's requirements regarding content and disclosures. The review reveals such things as incomplete or inaccurate disclosures and missing or incomplete descriptions of items required to be on the price list.

A related and significant finding of the replication study is that a significantly greater proportion of consumers in 1987 received some form of price information "early" in the funeral transaction, before being shown caskets. When asked when during the arrangements conference they first received written or oral information about prices of various funeral goods and services,

information about outer burial containers before making their selections.

(c) Statement of Items Selected

Approximately 80% of the replication study subjects reported receiving a statement of what the funeral would cost before leaving the arrangements conference, as required by the Rule. When asked to describe the detail with which the prices for goods and services were indicated on that statement, 67% (of the 78% receiving the document) said that the statement contained the total price and the cost of each individual item and service included in the funeral. That level of itemization is required by the Rule. Of the subjects who reported that they purchased funerals on an item-by-item basis, 62% said that they received a properly itemized statement. The results thus appear to show that more than half of the providers in the survey may have complied with the timing and itemization requirements for the statement of funeral goods and services selected.

Staff also obtained a non-random sample of 121 actual itemized statements received by the study respondents and, like the GPLs it received, requested the Funeral Rule enforcement staff to review them. That review indicates that about half of the statements may not fully comply with the Rule's itemization and disclosure requirements. The review pointed out such things as incomplete itemization, missing or incomplete disclosures, and failure to state the reason for embalming where there was a charge for it.

person gave embalming authorization to the funeral home at some point in the funeral transaction.

(e) Misrepresentations

Comparison of the replication and baseline study results provides evidence that provider misrepresentations now prohibited by Section 453.3 of the Rule have decreased somewhat since 1981, but that some misrepresentations may be continuing.

(i) Embalming Requirements

Survey respondents reported that in 1987 12% of funeral providers misrepresented that embalming was always required by law. Another 1% said that the funeral director told them that embalming was required by law to protect the funeral home staff from disease, a representation that is generally untrue. In 1981, a slightly lower number of funeral directors -- 10.4% -- were reported as making one of these misrepresentations.¹⁰²

Two other categories of prohibited misrepresentations concerning embalming requirements were included in the 1987 replication study that had not been probed in 1981: (1) that embalming would preserve the body for a long or indefinite time; and (2) that embalming is required by the funeral home. An additional 6% of the study subjects said funeral directors made

¹⁰² Comparison of the replication and baseline data is difficult because the questions in the two surveys are not entirely comparable on the issue of whether embalming was discussed; the 1987 study asked what the funeral director said about whether embalming "was or was not required," whereas the baseline asked what the director said concerning whether embalming "is or is not required by law in your state."

years, more than a quarter of the respondents did not recall what the provider said about sealed caskets' preservative capabilities. We thus may not be able to reliably gauge compliance levels from these data.

(iii) Protective Abilities of Sealed Caskets/Grave Vaults/Liners

Section 453.3(e)(2) of the Rule complements the previous Rule provision by prohibiting false claims that funeral goods have protective features or will protect the body from gravesite substances. 35% of the replication study subjects reported that funeral directors told them that a sealed casket would keep out air and water; 29% said that directors claimed a grave vault or liner would help keep out dirt and water. Reliable compliance levels also cannot be assessed from these data, however, because 83%-87% percent of the respondents when asked could not recall the time period, if any, mentioned by the director, or said that the director did not say what period of time. Staff makes no comparison of these data to the baseline study because these questions were not asked in 1981.

(iv) Outer Burial Container Requirements

The Rule in Section 453.3(c)(1)(i) proscribes false representations that state or local laws, or particular cemeteries, require outer burial containers. No such public requirements exist in most areas of the country, but many cemeteries ask that a container be used to keep the surface of the grave from sinking. 18% of the 1987 study respondents said that directors claimed an outer burial container was required by

nificantly less on funerals than people who do not receive such information;

(3) Consumers who receive a general price list appear to spend more on their funerals than those who do not receive one, but consumers who receive that list early in their meetings at the funeral home spend no more or less than those who receive neither a general price list nor price information early; consumers say they find price lists helpful in making selections of funeral goods and services and keep them when they are offered;

(4) Misrepresentations regarding casket for cremation requirements that generally result in increased consumer costs have decreased since 1981, and consumer knowledge about funeral requirements and funeral goods has increased to a small extent since that time; and

(5) While a majority of funeral providers are complying with most of the Rule's individual provisions, most are not simultaneously complying with the Rule's most important remedial requirements; consumers who receive compliant treatment spend no less on their funerals.

In staff's view, the replication study results reported by Market Facts deserve substantial additional interpretation and inquiry by interested parties to fully understand their meaning. Staff recommends that the Commission authorize publication of the Market Facts, Inc. report of the study results as soon as

telephone. Thus, AARP concluded that 97.5% of the funeral homes complied with the telephone provisions of the Rule.

However, because of the following problems with data collection and record retention the results may not be very useful for the rulemaking proceedings. First, AARP testers did not use a script or questionnaire to ensure that each of the telephone disclosure requirements in the Rule were triggered.¹⁰⁵ Thus, staff cannot determine whether the tested funeral providers actually were complying with either or both of the Rule's provisions. Second, the funeral homes were not randomly selected for testing. Thus, the results are not necessarily a parallel of the entire industry. Third, AARP has been unable to find any records of the testing.¹⁰⁶ Thus, staff cannot review AARP's test methods or even obtain a copy of the questions posed to the funeral provider. The AARP telephone survey is, nonetheless, of some value because it indicates that the testers who requested

¹⁰⁵ The telephone provisions of the Rule serve two purposes. SBP at 42273. First, if a person calls and asks about the terms, prices or conditions at which funeral goods or services are offered, Section 453.2(b)(1)(i) of the Rule requires the funeral provider to state that price information is available over the telephone. This provision alerts consumers to their right to obtain price information. By simply requesting price information, AARP testers would not have triggered this provision of the Rule. The second purpose, which certainly was triggered by AARP testers, is that funeral providers provide price information, if requested. Because a uniform approach was not used staff cannot determine whether any or all AARP testers triggered both telephone requirements of the Rule.

¹⁰⁶ Staff requested a copy of any test scripts or instructions from AARP and was informed that no copies were available and that, in any event, testers did not use a standard script. The only information they have been able to find on the study is the press release they used to announce its results.

indicated that they had changed their method of quotation.¹⁰⁸ This survey was viewed by NFDA officials as an indication of substantial compliance with the Rule. However, in staff's opinion, the questions asked on the survey about industry compliance with specific provisions of the Funeral Rule were very general.¹⁰⁹ Thus, although the NFDA survey does contain useful information on how the Funeral Rule has affected some consumer behavior and some industry practices, it does not appear to be especially helpful for assessing the degree of industry compliance.

3. Additional Sources of Information

In addition to the studies cited above, there have been a number of localized compliance surveys conducted by newspapers,

¹⁰⁸ The data produced by this survey indicate how funeral directors perceived the Funeral Rule's effect on: prices, consumers selections, goods and services offered by funeral homes, time needed for conferences with customers, telephone inquiries, and consumer reactions to the Rule.

¹⁰⁹ The survey questionnaire does not ask funeral providers whether they are using itemized price lists, providing price information over the telephone, permitting consumers to purchase only what they wish, seeking permission to embalm; refraining from requiring consumers to purchase caskets for cremation, and making only truthful representations regarding legal requirements, cash advances, cemetery and crematory requirements, and the protective and preventative qualities of funeral goods and services.

could not evaluate the accuracy of the conclusions.¹¹¹ Staff will seek to obtain the supporting data for these surveys during the rulemaking in order to evaluate the weight to be given to this additional survey evidence.

C. State Regulation of the Funeral Industry

1. Background

The Statement of Basis and Purpose for the Funeral Rule indicates that the Commission considered relying on action at the state level, rather than to issue a federal rule. This alternative had been suggested repeatedly during the rulemaking proceeding, usually in conjunction with the expression of beliefs that existing state regulation is adequate to correct whatever abuses might exist.¹¹² A proposal to the Commission by several major industry trade associations in 1980 also reflected preference for state level regulation. That proposal consisted of a set of model laws which the proposers suggested be issued by the Commission for voluntary adoption by the states.¹¹³

The Commission recognized that state action to correct existing industry abuses, if such action were taken, could have significant benefits over regulation of the federal level. First, it would allocate all funeral industry regulation to one

¹¹¹ For further discussion of this information see Appendix A to this memorandum, at Section II.I.

¹¹² See, e.g., Summary of Post-Record Comments. XV. at 125-29 (adequacy of existing state regulation).

¹¹³ Proposed "Guides" [model law] and transmittal letter (Oct. 8, 1980), VI-7.

The staff recently conducted a survey of the states' funeral industry statutes, rules and regulations to discern whether state law has significantly changed since 1980.¹¹⁷ The results, as displayed below, indicate a basis for one to conclude that additional states have adopted regulations conceptually similar to the Commission's Funeral Rule. In performing this analysis the staff has not applied the stringent examination required to determine whether state law warrants statewide exemption from the Funeral Rule and does not intend to infer that a particular state has or has not met the criteria for exemption.

The following states have incorporated by reference the Commission's Funeral Rule into their laws:

Oregon, Tennessee, Vermont, Virginia, Wisconsin.

The state of Wyoming has incorporated the Funeral Rule's itemized pricing requirements only.

In addition, the following states have requirements apparently similar to those of the Commission's Rule. The selection is based on the state requiring: (1) itemized price list, (2) anti-tying provision, (3) approval for embalming, (3) availability of price information over the telephone, (4) itemized arrangements statement, (5) prohibition against requiring caskets for cremation, and (6) at least one prohibition

¹¹⁷ Between April and June 1987, the staff contacted each state board or official and requested that they send a copy of the state laws. This review is based on an analysis of these materials.

In the staff's view, the survey of the states' funeral laws, rules and regulations indicates that the states have not incorporated the Rule into state law.

III. Analysis of Current Rule Provisions and Alternatives

A. Introduction

Staff in this section of the memorandum discusses the apparent costs and benefits of the Funeral Rule's provisions in light of the available market evidence, including the Bureau of Economics staff's analysis of the survey data.¹¹⁹ Staff also reviews the major Rule modifications and regulatory alternatives proposed by ANPR commenters or otherwise raised by the evidence, and makes recommendations for Commission treatment of each provision and alternative in the Notice of Proposed Rulemaking (NPRM).

Staff has no recommendations at this time because they would be premature given the unique nature of this review proceeding and the need to further examine the meaning of the consumer survey results. Staff proposes that all of the Rule's

¹¹⁹ The Bureau of Economics staff conducted a multivariate regression analysis of the replication data to help determine the apparent effects of consumers' receipt of price information under the Rule, as reported by the study respondents, on funeral consumers' total expenditures for funeral arrangements (the dependent variable). That analysis does not speak directly to the Rule's effects on prices charged by providers for individual funeral goods and services, because expenditures can vary for several reasons unrelated to price; consumers could simply buy more goods and services at a given price and thus incur increased expenses. Thus, statements in this section of the memorandum discussing consumers' costs refer to their total expenditures, and should not be viewed as results pertaining to the Rule's effects on industry prices.

The National Funeral Directors Association ("NFDA") and most individual funeral directors and firms in their responses to the ANPR support repeal.¹²¹ The NFDA recommends repeal on the basis that the Rule has increased funeral prices, the opposite of its intended effect, by imposing various compliance costs on providers that have been passed on to consumers who continue to base their purchase decisions on social, moral and practical factors other than price. We would expect that the NFDA will argue that its position is supported by the study data described above. In light of those results, the NFDA's arguments would appear to raise the further issue whether the Rule can work to

¹²¹ Comments of the National Funeral Directors Association on Advance Notice of Proposed Rulemaking, February 5, 1988, at 4-8 (hereafter cited as "NFDA Comment", or "C-39", its public record citation). The vast majority of individual comments from funeral providers appear to be identical form letters simply stating that the rule should be repealed because the funeral industry is fully capable of self-regulation.

Two other major industry groups joined the NFDA in recommending repeal in response to the ANPR. See C-269 at 9 (International Order of the Golden Rule) and C-266 (NFDMA). The other major groups were the National Selected Morticians ("NSM"), the Cremation Association of North America ("CANA"), the Pre-Arrangement Association of America ("PAA"), the Casket Manufacturers Association ("CMA") and the American Cemetery Association ("ACA"). The NSM, however, stated in its comment that it would support repeal if facts developed in the proceeding established that consumers and funeral providers may benefit from repeal. C-275 at 36.

Virtually all of the consumer groups and all but one of the individual consumers who commented strongly support retention or expansion of the Funeral Rule. The major consumer group responders were the American Association of Retired Persons ("AARP"), the Continental Association of Funeral and Memorial Societies ("CAFMS"), the Consumer Federation of America ("CFA"), the National Consumers League (NCL) and Consumers Union ("CU").

The available evidence can be argued to support changes to or close scrutiny of several current Rule provisions. First, the available survey evidence that few consumers appear to shop by telephone and that those that do generally seem to receive the requested price information, would, if uncontested, provide a basis for repeal of the affirmative telephone price disclosure requirement.¹²⁴ Second, because the currently available evidence suggests that the receipt of price lists may not reduce consumers' funeral expenses, proposals for changes to the price list provisions of the Rule¹²⁵ will need to be given careful scrutiny. For example, it has been asserted by proponents of the Rule that the general price lists currently provided to consumers may be too lengthy or confusing to permit meaningful price comparisons or consumer choices, or consumers simply may not desire to use them in selecting funeral goods and services. Staff would thus closely evaluate in the rulemaking proposals for a standardized price list format as well as suggestions for reducing or eliminating specific price list itemization requirements. Finally, a review of the Rule provisions by ANPR commenters and staff makes clear that several language changes should be examined to see whether they might reduce unnecessary

¹²⁴ Section 453.2(b)(1)(i) of the Rule. This provision requires that providers tell callers who ask about the prices, terms, or conditions at which funeral goods or services are offered that prices are available over the telephone.

¹²⁵ Sections 453.2(b)(2), (3) and (4).

factor that may need to be considered in the review proceeding. In staff's view, the other three mentioned areas should not be included in the NPRM because they are tangential to the Rule and beyond the scope of this review proceeding. The NPRM seeks information on all other issues just discussed.

Staff in the remainder of this section discusses all of these potential alternatives, and the Rule's current provisions, in light of the available evidence.

B. Price Disclosures

The Commission in promulgating the Funeral Rule determined that it is unfair or deceptive for a funeral provider who sells or offers to sell funeral goods and services to fail to provide itemized price information to persons requesting it. To prevent this practice, the Rule requires providers to supply price information to consumers over the telephone and in person.

1. Telephone Price Disclosures

a. Requirements and Purpose

Section 453.2(b)(1) of the Rule requires funeral providers to give price information to telephone callers in two ways. First, providers must affirmatively tell callers who ask about the "terms, conditions or prices" at which funeral goods or services are offered that price information is available over the telephone. § 453.2(b)(1)(i). Second, providers must, in response to telephone requests about prices or offerings, give consumers any accurate information from the Rule's required price lists and

-- only 3.7% (36 of 986 subjects answering that question).¹²⁹ When asked, 85% of the survey subjects in 1987 said that they had already decided to use a particular funeral home before contacting any to discuss possible funeral arrangements. Of those 93 survey subjects (9.6% of the sample) who called a funeral home in 1987 and asked about funeral prices, terms, or conditions, 46 (49%) reported receiving the required disclosure that prices are available over the phone. Whatever the extent to which consumers receive this disclosure,¹³⁰ it may be inconsequential given the survey results that fewer than 10% of consumers asked about funeral prices, terms, or conditions over the phone and only 5.5% appeared to request any specific price information.

It can be argued that these data raise questions about the consumer benefits that the affirmative telephone price disclosure provision of the Rule (§ 453.2(b)(1)(i)) may provide. The survey data suggest that, four years after the Rule's promulgation, most consumers still do not use the telephone to seek initial information about funeral arrangements or prices, or to comparison shop. As a result, we will need to consider whether it continues to serve any public benefit to require that

¹²⁹ Overall, 44 people in the replication study reported contacting more than one funeral home by some means before making a selection (4.3% of the total number of study participants).

¹³⁰ As reported earlier, the estimated compliance rate increases to about 72% when consumers who said they could not remember whether the provider told them that price information was available over the telephone are excluded from the calculation.

for price information (§ 453.2(b)(1)(ii)) is benefitting consumers. Although the available evidence suggests that the provision may not be used by many individual consumers, it also indicates that its costs may not outweigh its potential benefits; it could be argued that to the extent that competition may develop in the funeral industry, this provision may facilitate it.¹³³

Staff is unaware of any evidence that the Rule's requirement that providers answer consumers' telephone requests for price information (§ 453.2(b)(1)(ii)) impose substantial costs on funeral providers. In its comment, the NFDA reports that funeral directors have incurred little direct cost as a result of the Rule's telephone price disclosure requirements.¹³⁴ This is so, it further states, because providers routinely answered telephone requests for price information before the Rule, and few, if any, additional requests have been generated by the Rule since its promulgation. As a result, providers are spending little additional time providing price information over the telephone that is attributable to the Rule.¹³⁵ The replication study data also suggests that few consumers use the

¹³³ BE staff notes that a firm that wished to establish a presence in a market would be motivated by market incentives to supply price information over the telephone.

¹³⁴ C-39 at 31.

¹³⁵ Id.

requirement may help increase consumer awareness of prices, which may in turn help stimulate competition. Also, 46% of the replication study subjects said that they used the telephone in some way in making actual funeral arrangements. Although apparently only a small number of these customers asked about funeral prices, we do not know whether possible increased awareness of their options would lead a greater proportion of consumers to do so in the future.¹⁴⁰ Of course, it could simply be the case that consumers know they can ask about prices but choose not to.

Finally, the NSM in its comment stated that telephone discussion simply is an "entirely unsuitable" forum for discussing detailed price information.¹⁴¹ The NSM suggests instead that the provision be modified, if it is not repealed, to require that providers answer telephone price requests in a timely manner by any means they choose, including by mail, by in-person conference, or, where feasible to fully respond to the inquiry, by telephone.¹⁴² We would expect that some rulemaking participants, such as the AARP, may argue that these statements and proposals suggest that some members of the funeral industry

¹⁴⁰ Most discussions about the prices, terms or conditions of funeral arrangements actually made occurred at the funeral home. Of those who used the telephone, more than three-quarters reported that they did not ask about or discuss prices, terms, or conditions (93 people did ask or discuss these things, 55 specifically relating to prices).

¹⁴¹ C-275 at 24-25. We need to explore in the rulemaking whether and to what extent NSM's point is valid.

¹⁴² Id.

lists' effective date. The general price list must contain several disclosures¹⁴⁴ concerning consumers' right to select only those items they desire and the retail prices for 17 specified items, if offered for sale, in addition to the list's effective date and information identifying the funeral provider.

The Rule also requires funeral providers to offer these lists at particular points in the funeral transaction. The GPL must be offered "upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services." The CPL must be offered "upon beginning discussion of, but in any event before showing caskets." Similarly, providers must offer the OBC-PL "upon beginning discussion of, but in any event before showing the containers." Finally, the itemized statement of funeral goods and services selected must be given to consumers at the conclusion of the discussion of arrangements. The general price list and itemized statement of funeral goods and services selected must be given to consumers for their retention; consumers have the right to keep those documents if they wish.¹⁴⁵

¹⁴⁴ Staff discusses each of the disclosures required by other Rule provisions to be placed on the GPL in subsequent sections of this analysis.

¹⁴⁵ The Rule permits providers to incorporate the information from the casket and outer burial container price lists in the general price list, thus using one combined list instead of three separate ones. The former two lists (CPL and OBC-PL) may also be presented to consumers in formats other than written lists, such as notebooks, brochures, or charts maintained at the funeral home.

required purchases.¹⁴⁷ The statement also enables consumers to consider whether to add or subtract items based on a review of the total cost of arrangements, by combining in one place the prices of individual items tentatively selected as well as the total price of arrangements. Finally, the statement reminds consumers that they need only pay for items they selected, and that, under certain circumstances, they may not have to pay for embalming.

¹⁴⁷ The statement must include an estimate of cash advance charges that are not ascertainable and a written disclosure of the reasons why particular items were represented as required purchases.

arrangements than those who did not receive one.¹⁵⁰ However, the results suggest that consumers who received a GPL early in the conference spent no more than consumers who said that they received neither a GPL nor other price information early. Similarly, BE staff's analysis indicates that receipt of the CPL (Casket Price List) before seeing the caskets is not associated with lower casket expenditures. And the analysis suggests that consumers who said that they received an OBC-PL (Outer Burial Container Price List) before seeing those items may have spent more on that item than those who did not get the list. Finally, the analysis indicates that consumers who said that they received a properly itemized statement of goods and services selected at the conclusion of the arrangements conference spent the same for arrangements as those who did not get the statement.

BE staff's analysis also presents evidence that consumers who said they received both an "early" GPL (at or near the beginning of the arrangements conference or before the selection of a casket) and a sufficiently-itemized statement of goods and services selected at the end of that conference, and who were told no misrepresentations about casket for cremation and embalming requirements, paid no less for their arrangements than

¹⁵⁰ This result is statistically significant, according to BE Staff's analysis. Unless otherwise noted, statements that consumers paid more, or less, for arrangements than others means that the particular result is statistically significant at least at the 95 percent confidence level. Statements that no cost difference existed could reflect differences in actual expenditures, but the results do not appear to be statistically significant at any conventional level of confidence.

that they want itemized price information. 73% of the 1987 study subjects reported that the lists were important in making selections of funeral goods and services. 34% and 39%, respectively, of consumers who reported that they received the GPL and CPL said, when asked, that those lists were very important in the selection of items and services or caskets and cremation containers. Another 39% and 40% of the respondents respectively felt that those lists were somewhat important in that way.

Consumers' reported feelings that the price lists were wanted can be buttressed by the fact that most of those who were offered the lists took them to keep. 87% of consumers offered the GPL took it. 79% of consumers took the CPL when offered, and 77% kept the OBC-PL.

In addition, the 1987 study data could be read as implying that industry compliance with the Rule's price list provisions may be relatively low.¹⁵³ As we reported in Section II.A. of this memorandum, about half of the surveyed providers were reported as having given timely and otherwise compliant casket and outer burial container price lists and statements of goods and services selected. The data also provide evidence that compliance may be lower for the general price list; consumers reported that less than one-quarter of providers offered that

¹⁵³ This analysis assumes some degree of reliance on consumers' accurate recall of whether and when they received the rule-required documents, and of which particular documents they received.

c. Suggested Modifications to the General Price List Requirements

Several ANPR commenters who support or oppose the Rule's continuance overall made suggestions for changes to the Rule's price list provisions, particularly those concerning the General Price List.¹⁵⁶ Detailed comments regarding the GPL requirements were provided primarily by the AARP, NFDA, and NSM.¹⁵⁷ AARP proposed strengthening those provisions by requiring a standardized format for the General Price List. The two industry groups suggested narrowing or clarifying one or more provisions relating to the GPL's itemization, timing and availability requirements.

i. Standardized Format

The AARP in its comment reports that a confusing array of varying terminology currently used in itemizing goods and services on the GPL makes informed consumer choice "virtually impossible", citing generally the results of various regional reviews of lists used by providers.¹⁵⁸ It thus recommends that

¹⁵⁶ Only one commenter, a funeral director, suggested changes to other price lists that are not in some way covered now under the Rule or staff compliance guidelines. He proposed that the Rule require disclosure of the manufacturer's name and stock number of each casket listed on the casket price list, in place of the description currently required, to help standardize those descriptions for comparative purposes. C-184 at 3. We need to assess whether such a technical description would, by itself, sufficiently differentiate among caskets to allow consumers to make informed casket choices, or whether the proposal may provide benefits as an addition to the description currently required.

¹⁵⁷ C-282, C-39, and C-275, respectively.

¹⁵⁸ C-282 at 10.

unnecessary because: (1) current price lists are already similar; (2) consumers do not comparison shop; and (3) such an obligation would be impossible to meet due to the varying funeral customs and practices conducted throughout the country.¹⁶¹ The NSM adds that standardized lists may be appropriate for the regulation of public utilities, but not for private industries, and may lead to product and price uniformity.¹⁶²

Given these differing views, the Commission may wish to further explore the standard format issue in the rulemaking proceeding. Realizing that any proposed format would need to be developed, tested, and fully debated, staff proposes to initiate discussion on the issue by incorporating into a question for comment in the draft NPRM the staff's model ("Alternative 1") General Price List contained in its 1985 compliance guidelines (50 Fed. Reg. 28078).¹⁶³

ii. Itemization

¹⁶¹ C-39 at 15-16, 48.

¹⁶² C-275 at 26.

¹⁶³ The Commission has required standardized pre-sale disclosure forms in other contexts. For example, the Commission in the Used Car Rule requires that used car sellers use "a standardized form to alleviate confusion and possible deception which might result from inconsistent versions of the Buyers Guide." Statement of Basis and Purpose for the Used Car Rule, 49 Fed. Reg. 45692, 45709. See also 16 CFR Part 305, App. H (energy guide label). Staff notes that the buyers guide and the general price list are not equivalent forms; the buyers guide is a relatively simple warranty disclosure form, whereas the GPL is a more complex form that discloses many funeral prices and explains various consumer rights.

now allows package pricing of direct cremations and immediate burials, in lieu of furnishing any itemized list.¹⁶⁶

The merits of industry's recommendations to amend or repeal the General Price List itemization requirements will need to be assessed in the proceeding, in light of the study evidence on provider compliance with the requirement to give consumers a timely GPL. On the other hand, the NSM suggestion to allow itemization in any manner providers wish would appear to require further evaluation in light of the study evidence that consumers who receive oral or written price information in forms other than those required by the Rule spend less for their arrangements. Overall, as we discussed earlier in this section, all of the price list requirements should remain open to question in the rulemaking proceeding as a result of the study data.

One additional point raised by the NSM comment warrants further brief discussion, namely, the suggestion that the listing requirements may have caused providers to charge all consumers in all cases for certain items, such as acknowledgement cards, that may have been provided free of charge before promulgation of the rule.¹⁶⁷ To the extent that the rule provision thus results in increased consumer costs in cases where it might not otherwise, the Commission may want to consider the relative merits of

¹⁶⁶ C-275 at 28-30.

¹⁶⁷ C-275 at 28.

that providers' interest in keeping professional service fees as low as possible is the reason for proposals for a separate, non-declinable basic facilities fee. Nonetheless, because the Rule currently permits other ways for providers to keep those fees low and to recover fixed costs, staff does not believe that the currently available evidence can be argued to support the change recommended by the NFDA. Staff thus does not highlight this issue in the draft NPRM.

iii. Timing and Availability

The NFDA and NSM suggest that, if the Rule is retained, several changes should be made to the timing and availability requirements for the General Price List in order to correct alleged burdens resulting from those obligations. The primary concern raised in their comments is that the term "funeral arrangements" as used in the Rule to describe when the GPL must be given to consumers -- "upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services" -- is so imprecise as to lead providers to distribute the GPL at inapposite moments.¹⁷¹ For example, these groups posit that, under the Rule, providers are currently placed in the awkward position of giving the list during removal of the body from the place of death,¹⁷² or at the beginning of preliminary discussions of death certificates, veterans'

¹⁷¹ C-39 at 51; C-275 at 30-31.

¹⁷² C-39 at 51.

funeral goods and services. The NFDA in its comment sheds some light on that issue when it tells us that, during the removal of remains, "there often is a very general discussion concerning when to hold the funeral and what type of funeral it will be."¹⁷⁶ A discussion of the type of funeral desired at any time in the funeral transaction triggers the GPL disclosure, because the resulting selection generally commits the consumer to a given level of overall funeral expenditures. One purpose of the GPL -- to inform consumers of the types of funerals available -- would be defeated if consumers had already chosen the type of funeral before seeing the GPL. Ultimately, timing issues such as these may be more appropriately resolved through enforcement guidelines than Rule amendments. Nonetheless, staff believes that industry's proposal to change the timing language of the rule to refer to "prices" rather than "funeral arrangements" warrants further evaluation. The draft NPRM thus seeks information on the issue through questions for comment.

On the other hand, the available data may argue against proposals to change the GPL's "give for retention" requirement to what would essentially be an "upon request" standard, as suggested by the NSM, particularly in light of the survey results on providers' compliance with the existing requirement. In addition, we need to assess whether such a change might lead to further compliance difficulties with the price list requirement, and whether it might tend to frustrate the provision's purpose --

¹⁷⁶ C-39 at 41.

The purpose of these required GPL disclosures was to alert consumers to undisclosed mark-ups of items obtained by providers from third parties when consumers believe that those items are provided at cost.¹⁷⁷ No evidence has yet been received to indicate that this type of disclosure regarding third-party items is less important now than when the Rule was promulgated.¹⁷⁸ However, based on our overall review of the Rule's provisions, the utility of these provisions requiring such disclosure on the GPL may be questioned as unnecessarily contributing to the lengthy and potentially confusing array of information on the GPL. Estimated prices for cash advance items must currently be included on the statement of goods and services selected; it may be sufficient to protect consumers to require that the disclosure that providers mark-up those items be placed on that statement as well.

C. Misrepresentations

1. Purpose and Requirements

The Commission determined that as a result of funeral providers' false claims or failure to disclose accurate information, reasonable consumers erroneously believed that certain services (embalming) or particular goods (caskets for cremation and outer burial containers) were required purchases

¹⁷⁷ SBP at 42278-79.

¹⁷⁸ In fact, staff believes that, if the Rule is retained, its definition of a "cash advance" item may need to be expanded to take account of more current provider practices regarding such items. That discussion is contained in Section III.C. of this memorandum.

or that state or local laws required the use of a casket. The section proscribes representations that a casket, other than an unfinished wood box, is required for cremations by law or otherwise, and requires a written disclosure on the general price list. The disclosure informs consumers that they can buy an unfinished wood box or alternative container for direct cremation, and describes various containers. § 453.3(b) also requires providers who arrange direct cremations to "make available" unfinished wood boxes or alternative containers so that consumers do not have to, de facto, buy a casket.

§ 453.3(c) of the Rule was intended to prevent providers misrepresentations that legal or cemetery requirements oblige consumers to purchase outer burial containers, particularly relatively expensive grave vaults. The provision is designed to correct consumers' resultant lack of awareness that outer burial containers might not be required and that less expensive grave liners would satisfy any such requirement. The section thus prohibits those misrepresentations and requires a written disclosure on the outer burial container price list, or if appropriate, on the general price list. The disclosure tells consumers that, in most areas of the country, there are no laws that require outer burial containers. The statement also informs consumers that cemeteries may require such containers to prevent the grave from sinking, and that either a vault or a grave liner will satisfy that purpose.

may still be a need to prevent misrepresentations and to correct consumer misimpressions about the funeral transaction.

The BLS and RS survey data present data suggesting that misrepresentations prohibited by the Rule harm consumers by causing them to purchase goods and services they otherwise might not buy, and that provider misrepresentations, which do not appear widespread today, have decreased to a small extent and consumers' knowledge about funerals has increased to a small extent since 1981.

Not surprisingly, almost all of the consumers in both the 1981 and 1987 studies who said that they were told that embalming or caskets for cremation were required actually purchased those goods and services; consumers who did not receive those misrepresentations were far less likely to buy those items. And the study subjects reported that provider misrepresentations about casket for cremation requirements decreased 19 percentage points from 1981 to 1987. Providers in 1987 also made truthful statements about embalming in 13% more cases than in 1981. Finally, the data appear to show that consumers' knowledge about casket for cremation and embalming requirements and about the preservative abilities of sealed caskets has increased by 6%, 11% and 18%, respectively since 1981. It can be argued that these data suggest that the Rule's misrepresentation provisions have provided some consumer benefits and that providers are seeking to comply with the Rule's requirements.

embalming is always required by law as a public health measure, 42% still believed that a sealed casket (or grave vault) preserves the body for an indefinite time, and 13% reported incorrectly that caskets are required by law when the body is to be cremated.

Of the ANPR commenters, all non-industry responders who mentioned the misrepresentation provisions support their retention. The NFDA and NSM oppose retention unless substantial evidence of the prevalence of misrepresentations justifies that action.¹⁸³

3. Suggested Modifications

The ANPR comments contain two suggestions for changes to the Rule's misrepresentation provisions. First, the NFDA in its comment said that the embalming disclosure required by § 453.3(a)(2)(ii) of the rule is lengthy, confusing and affirmatively discourages the choice of embalming by interfering with the consumer's right to choose a traditional funeral.¹⁸⁴ However, the NFDA proposed no specific amendment language to that section.

Second, the NSM in its comment reports that the disclosure regarding direct cremations, required by § 453.3(b)(2), is confusing and inapposite where the provider does not stock unfinished wood boxes, but offers other alternative containers as permitted by the Rule. Based on our review of the provision,

¹⁸³ C-39 at 52 (NFDA); C-275 at 2, 32 (NSM).

¹⁸⁴ C-39 at 13.

modification might alleviate a concern that the current disclosure may be potentially misleading and may unnecessarily cause across-the-board mark-ups for cash advances; providers may in fact only mark-up or receive rebates on some, but not necessarily all, of those items.

D. Tying Arrangements

1. Purpose and Requirements

The Commission in promulgating § 453.4 of the Rule determined that it is unfair or deceptive for a funeral provider to condition the furnishing of one good or service upon the purchase of another good or service.¹⁸⁵ This section constitutes the nucleus of the Funeral Rule. It was based on the conclusion that the following point-of-sale industry practices deny consumers' ability to select the goods and services they desire and to decline those they do not want: (1) consumer choice is inherently diminished in the many cases where providers receive the body prior to selection of the form of final disposition -- once a funeral home possesses a body, it is seldom removed to another funeral home; (2) competition in the sale of funeral goods and services does not exist at the point of sale; (3) many providers require the purchase of a casket as a condition of supplying cremation services; and (4) many providers only offer goods and services in predetermined packages, thereby denying consumers any ability to decline unwanted items. To remedy this situation, §453.4 contains two provisions that prohibit tying

¹⁸⁵ SBP at 42279.

any items are required purchases, the reasons will be explained in writing on the statement of goods and services selected. The disclosure further must state that any arrangements selected will include a charge for services if the fee for those services is non-declinable. To complement these provisions, § 453.4(b)(2)(i)(B) requires that a written disclosure be placed on the statement of funeral goods and services selected. That disclosure informs consumers that the prices listed on the statement are only for those items used, and that if any items are required purchases, the reasons are explained on the statement.

The final section of the Rule's tying provisions, § 453.4(b)(2)(ii), permits providers to refuse requests for combinations of goods or services that would be impossible, impractical, or excessively burdensome to provide.

2. Evidence of Effects and Compliance

The BLS and RS consumer survey evidence suggests that the casket for cremation provision may be providing consumer benefits, and the rising rate of cremation indicates that its importance in the funeral market may increase over time. The survey evidence indicates that the proportion of cremation purchasers buying caskets has decreased since 1981. In that year, 39% of cremation buyers (51 of 130) purchased caskets. In 1987, the percentage decreased to 28% (40 of 140). The 1987 study consumers were also more knowledgeable about casket for cremation requirements; 13% in 1987 thought caskets were required

guidance as to which arrangements providers must accept and which they can refuse.¹⁸⁷ The NSM agrees with that view as to the casket for cremation requirements, but supports the principle of the general anti-tying provision.¹⁸⁸ Staff has discussed the repeal issue above, and elsewhere in this section of the memorandum. The guidance issue raised by the NFDA regarding § 453.4(b)(2)(ii) of the Rule (permitting providers to refuse requests that are impossible, impractical or unduly burdensome to provide) may be more appropriately addressed as an enforcement issue than an amendment concern.¹⁸⁹ Staff thus does not highlight the guidance issue in the draft NPRM.

Several ANPR commenters who support retention of the anti-tying provisions, most notably the AARP and PAA,¹⁹⁰ raise their concern that providers are thwarting those provisions by charging excessive handling fees¹⁹¹ for arrangements where consumers supply their own caskets purchased from a third-party casket retailer. These commenters suggest that high casket handling

¹⁸⁷ C-39 at 25, 43, and 54.

¹⁸⁸ C-275 at 33-34.

¹⁸⁹ The PAA in its comment raises its concern that the Rule even permits providers to refuse certain requests for goods and services. C-159 at 59.

¹⁹⁰ C-282 at 12; C-159 at 38.

¹⁹¹ AARP reports fees of up to \$425. C-282 at 11. Another commenter reports that she discovered a casket handling fee of \$400. on her funeral bill after signing the funeral contract, and that she was told by the provider that the fee was necessary to cover the lost profit on the sale of the casket and vault. C-292 at 1 (Kathryn Weihl).

does not allow staff to determine the prevalence of the practice, although the NFDA comment appears to suggest that the practice may occur whenever consumers use third-party merchandise.¹⁹⁶ And the suggestion that a casket handling fee be itemized on the general price list may provide unintended effects if providers as a result charge all consumers who use non-provider goods, regardless of the circumstances. Finally, it is highly unlikely, given the available evidence, that staff would recommend "price regulation" by proposing that the Rule ban certain fees or define what is "punitive." Staff nonetheless seeks further input on the casket handling fee issue in the draft NPRM because of its importance to the Rule's anti-tying provision.

Two technical changes to the anti-tying provisions may need to be explored in the rulemaking based on staff's review and a suggestion of the NSM, if the Rule is retained. The first involves the merits of deleting references to an "unfinished wood box" in § 453.4(a) concerning caskets for cremation. As we discussed earlier, it may not be necessary to distinguish, for purposes of the Rule, between an unfinished wood box and other types of alternative containers that consumers may use in place of a finished casket for cremations; the Rule permits providers to make either type of container available for that purpose. The NSM raised this issue in its comment in connection with providers who do not offer unfinished wood boxes for cremations, but who

¹⁹⁶ One other commenter reports that the practice is normal for several funeral homes in the Chicago area. C-277 at 1-3.

(§§ 453.5(a), (a)(2)).¹⁹⁹ § 453.5(a)(1) excepts providers from this basic requirement if state or local law requires embalming in a particular case, such as where death occurred from certain communicable diseases, or removal of the body involved interstate transportation. § 453.5(a)(3) further excepts providers who exercise due diligence, but who are unable to contact the family or an authorized person before embalming is performed, if the provider has no reason to believe that the family does not want embalming and the provider obtains subsequent approval. That section also requires providers who seek such approval to first disclose that embalming (expressly so described) has been performed, but that no fee will be charged if an arrangement that would not require embalming, such as direct cremation or immediate burial, is selected. The Rule permits providers to infer approval and charge a fee if the family then selects an arrangement requiring embalming.

§ 453.5(b) is designed to help prevent charges for embalming where the Rule prohibits it by requiring providers to place a disclosure on the final bill or agreement. The disclosure informs consumers of their right to decline payment for embalming established by § 453.5(a) of the Rule. The disclosure also must

¹⁹⁹ The Commission recognized that the majority of consumers want embalming because of their intent to have a traditional funeral with viewing and visitation, which arrangements require embalming as a practical necessity. It thus cast the unfair acts or practices in the alternative: embalming for a fee is unfair unless at least one of the three listed conditions are met. SBP at 42284.

benefits that a requirement for subsequent approval would not also provide.²⁰² The NSM in its comment stated that the prior approval provisions are unduly complicated and suggests, if the provisions are retained, that they be modified to read as follows:

(a) Unfair or Deceptive Acts or Practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any funeral provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make, or

(2) Approval for embalming (expressly using the word "embalming") has been obtained from a family member or other authorized person. In seeking approval, the funeral provider must disclose that embalming is among the goods and services for which a charge is made.²⁰³

The NFDA-NSM proposal to eliminate the necessity for prior approval, based on its alleged problems of inconvenience and insensitivity, would create a "negative option" for consumers. On its face, the proposal might not appear to result in economic injury to consumers, who could still avoid payment if they had a right to and chose to do so. However, we need to evaluate whether consumers might be inclined to approve embalming after the fact regardless of their true feelings, and whether the proposal could result in potentially severe emotional injury to

²⁰² Id. at 57.

²⁰³ C-275 at 35.

F. Retention of Documents

The Rule's record-keeping requirements are intended to help insure compliance with the substantive provisions of the Rule. § 453.6 thus requires providers to retain (and make available for inspection by Commission officials upon request) copies of the price lists required by the Rule and copies of each individual statement of services selected by the consumer for each funeral. Providers must keep these documents for one year from the date of their last distribution to consumers (price lists) or the date they were signed (statements).

No ANPR comments suggested changes to the record-keeping provision.

G. Comprehension of Disclosures

§ 453.7 of the Rule requires that funeral providers make all of the Rule's mandated disclosures in a clear and conspicuous manner. The provision's purpose was to help ensure that the information provided under the Rule would be presented in a way readily discernible by consumers; the provision, however, does not define "clear and conspicuous."

As staff discussed in Section III.B.2. of this memorandum, the AARP, PAA and other ANPR commenters recommend that the Rule require a standardized general price list to correct the alleged confusing diversity in terminology and presentation of price information used in current GPLs. The NFDA in its comment stated that it had no objection to making disclosures in a clear and conspicuous manner, to the extent that any affirmative

exemption. The Commission denied Texas' petition²⁰⁷ and granted in part the Arizona petition.²⁰⁸

The ANPR contained questions seeking comment on how the Commission should resolve several difficult legal and policy issues involved in the state exemption process in general. Only one state official or group (of the five states represented in the ANPR responses) attempted to answer these questions.²⁰⁹ And it responded in general terms that, in staff's view, provide little, if any, basis for resolving the issues raised. Staff concludes from this limited response that this individual review proceeding appears to be an inappropriate forum for generating evidence on the Commission's state exemption process in general, which applies to all rulemakings. Staff instead recommends that those issues be addressed by the Commission by some separate means, and thus has not highlighted the state exemption issue in the draft NPRM.

I. Definitions

Staff in this section of the memorandum discusses several substantive and technical modifications to expand the coverage of the Rule or to clarify its requirements. These proposed Rule changes are suggested by ANPR commenters, or appear necessary to

²⁰⁷ 51 Fed. Reg. 43746 (December 4, 1986).

²⁰⁸ The Commission's exemption was effective October 1, 1987.

²⁰⁹ That commenter is the National Conference of Funeral Service Examining Boards. C-281.

answered those questions recommends that the Rule's coverage be expanded in some way.²¹¹ The major commenters on this issue were the AARP, PAA, CANA, NFDA and NSM.²¹²

The AARP in its comment suggests that the definitions be broadened to include all components of the death services industry, particularly cemeteries and crematories that do not sell funeral goods.²¹³ AARP states that three factors argue for coverage of cemeteries: (1) burial service costs have increased to the point where they can equal the cost of some funeral arrangements; (2) cemetery prices exhibit great diversity; and (3) there is some anecdotal evidence that some cemeteries fail to provide consumers with complete written price lists or telephone price information.²¹⁴ Crematories should be covered, according to the AARP, because of the shocking cremation practices exposed

²¹¹ The American Cemetery Association opposes expansion of the Rule's coverage to cemeteries because such expansion was repeatedly considered and rejected by the Commission during the original proceeding and no evidence exists to justify that action. C-245 at 2-5.

²¹² These and all other commenters but one also support the Rule's continued coverage of pre-need funeral sales if the rule is retained. The ANPR asked whether the Rule should continue to cover those transactions. The dissenter, the American Cemetery-Mortuary Council, states that the Rule was not intended to cover pre-need sales and that such expansion would be unnecessary and unjustified. C-244 at 1-4. Staff notes that the NSM, while it stated that no distinction should be made between pre-need and at-need consumers, reserved its position on whether the record authorizes the regulation of pre-need sales. C-275 at 19.

²¹³ C-282 at 4.

²¹⁴ Id. at 7.

disadvantage under the current definition.²¹⁹ However, the PAA does recommend expansion of the Rule to cover (presumably to preempt) the many state laws that it says unnecessarily restrain the development of pre-need funeral sales, including state 100% trusting and other requirements.²²⁰

The CANA in its comment recommends that the Rule be expanded to cover all segments of the cremation industry, and that the Rule further should prescribe minimum standards for the entire cremation process in view of the media expose of certain cremation practices.²²¹

The NFDA suggests that, if the Rule is retained, it should be broadened to include any entity that sells or causes to be sold funeral goods or funeral services, including retail casket sellers, cemeteries, crematories, direct disposition firms, and memorial societies.²²² The NFDA states that such expansion is necessary to eliminate the basic inequity caused by the Rule's failure to cover funeral homes' competitors. Cemeteries, for example, enjoy a competitive advantage over funeral homes according to the NFDA because cemeteries are not burdened by the Rule's costs yet sell caskets, vaults and other funeral items and

²¹⁹ C-159 at 19. The ACA agrees with this conclusion. C-245 at 4.

²²⁰ *Id.* at 66.

²²¹ C-108 at 14-16, 19-39.

²²² C-39 at 3, 8, 34-36.

to limit the coverage of the Rule to providers who sell both funeral goods and funeral services serves as an additional caution in considering any expansion of the Rule's coverage in this way.²²⁷ However, the issue concerning the alleged competitive disadvantage that industry groups say the Rule imposes on them does warrant further evaluation in the rulemaking proceeding. Issues concerning minimum standards for pre-need contracts and cremation practices, and state pre-need regulations, on the other hand, appear to be beyond the scope of this review proceeding.²²⁸ For these reasons, staff is concerned that inclusion of these latter three suggested areas in the rulemaking would unnecessarily encumber the proceeding; staff thus does not include them in the draft NPRM. Staff does highlight in the draft NPRM the remaining issue of expanding the Rule to cover all providers of funeral goods or services.

2. Technical Modifications

Based on our review, several technical changes to certain other of the Rule's definitions may be warranted, if the Rule is retained, to clarify their scope and requirements. First, deletion of the Rule's definition of "accounting year" in

²²⁷ See § 19(c)(1)(A) of the 1980 Federal Trade Commission Improvements Act, 57 U.S.C. 57a.

²²⁸ The Commission staff has filed several advocacy letters with various state officials raising many of the same concerns about restraints on the sale of pre-need funerals pointed out by the PAA, AARP and other ANPR commenters. Staff notes, however, that an evaluation of the effects of state regulations governing pre-need sales would require systematic economic evidence that is currently unavailable and not likely to be generated during this proceeding.

APPENDIX A

SUMMARY AND ANALYSIS OF ANPR COMMENTS

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I. OVERVIEW

In this appendix to the Staff Report, staff analyzes the 349 comments received in response to the Advance Notice of Proposed

associations were split on their recommendations, with many recommending repeal and, in the alternative, major revisions to several of the Rule's requirements.⁶ State officials recommended modifications to the Rule. A significant percentage of the individual funeral director comments appeared to be form letters.⁷

II. ANALYSIS OF COMMENTS ON SPECIFIC ISSUES

Below staff provides a brief digest of the comments that respond to issues presented in the ANPR.⁸ On some issues staff received little or no responses. A few commenters raised new issues not addressed by the questions. Staff refers to specific comments that may be representative of the opinions expressed or particularly noteworthy.

⁵(...continued)

⁵ One hundred sixteen funeral providers and directors recommended repeal, two recommended retention, six recommended modification. Two made no recommendation.

⁶ The National Funeral Directors Association ("NFDA") and the International Order of the Golden Rule ("IOGR") recommended repeal of the Rule as their initial recommendation. NFDA Comment (C-39), at 58. IOGR Comment (C-269), at 9-10. National Funeral Directors and Morticians Association ("NFDMA") made no specific comment other than to concur in the NFDA comment (NFDMA Comment C-266, at 1). National Selected Morticians ("NSM") stated that the question of repeal should be determined by the record developed in the proceeding. NSM Comment (C-275), at 36. The Cremation Association of North America recommended retention and modification of the Rule. CANA Comment (C-108), at 40. The Pre-Arrangement Association of America ("PAA") recommended that the rule be retained and strengthened. PAA Comment (C-159), at 113. Staff received four comments from state trade associations. Associations from New York (Comment C-105, at 1), Illinois (Comment C-104, at 1), and Kansas (Comment C-103 at 1) recommended repeal. A Wisconsin trade association (Comment C-144 at 1-3) recommended that the Rule be expanded.

⁷ Staff received 92 identical letters from funeral providers or directors and several letters from consumers and memorial societies that were very similar.

⁸ The Commission urged that the commenters provide the basis or supporting evidence for comments. The staff notes whether such information was submitted, where appropriate.

helped educate consumers that embalming is not always required.¹⁶ The Continental Association of Funeral and Memorial Societies ("CAFMS") stated the Rule facilitates consumers' ability to obtain price and options information, diminishes misrepresentations and unwanted embalming, and allows consumers to save money by choosing only what they want.¹⁷

Several trade associations stated that the Rule has provided consumers with no net benefit because the Rule has sharply increased prices and has not led to any increase in consumer shopping. The National Funeral Directors Association ("NFDA") stated that its membership surveys indicated that when the Rule went into effect in 1984, prices immediately increased 8% and that in 1985 prices increased another 7%.¹⁸ Similarly, The International Order of the Golden Rule ("IOGR") stated that prices increased between 10 and 11.8% in the year of implementation of Rule.¹⁹ According to IOGR, the price increases resulted from funeral providers' realization that they had been unintentionally underpricing funeral goods and services.²⁰ National Selected Morticians ("NSM") agreed with the other associations and added that itemization raised the price of the least expensive funerals because it hindered "graduated" recovery of expenses. NSM also commented that the Rule has contributed to a substantial increase in time spent by funeral home management personnel and has led to additional legal expenses.²¹ NFDA stated that survey evidence shows the Rule has increased arrangements conference time by 23 minutes per arrangement, which

¹⁶ Id. at 3-4. This comment was shared by most of the memorial societies. The memorial societies came from the following areas: one from Arizona, eight from California, two from the District of Columbia, six from Florida, one from Iowa, two from Kentucky, one from Massachusetts, one from Maryland, two from Michigan, one from Missouri, one from Montana, one from North Carolina, one from New Hampshire, one from New Jersey, three from New York, one from Ohio, five from Pennsylvania, two from Tennessee, one from Texas, three from Virginia and two from Washington.

¹⁷ C-90 at 2.

¹⁸ Comment C-39 at 26-27.

¹⁹ Comment C-269 at 3.

²⁰ Id.

²¹ Comment C-275 at 12-16 (Rule added 20-25 minutes to each conferences, 10 minutes in administrative compliance work, disclosure update, education training).

funeral directors find making the price disclosures required by the Rule embarrassing and cumbersome.³⁰

NSM estimates that 90% of funerals that are arranged have not been preceded by telephone inquiries that asked about price. Thus, NSM commented, this provision is cumbersome, impractical and needlessly intrusive on funeral provider's First Amendment rights. NSM further states the Rule should be changed to allow funeral providers to give information to a caller in a timely and feasible manner whether in writing, by mail, at home, at the funeral home, or by telephone.³¹

D. Embalming Provisions

NFDA commented that in many cases the funeral director knows the family wants embalming; in such circumstances, the requirement to seek prior approval serves no purpose and can be upsetting to the consumer.³² Further, NFDA comments that under the present Rule, the funeral director must seek permission for embalming before the family has come to grips with the tragedy of a death of a family member.³³ If not repealed, the embalming provision should be changed to permit the funeral director to use discretion on when to seek approval.³⁴ Other industry members made similar comments.³⁵

E. Written Price Disclosures

The American Association of Retired Persons and the National Consumers League commented that there is so much diversity in price lists that consumers are confused; thus, the Rule should establish a standard general price list.³⁶ AARP commented that a review of price lists in various regions of the country indicated that because of confusing terminology used by funeral

30 Comment C-269 at 6.

31 Id. at 25.

32 Comment C-39 at 42.

33 Id. at 56.

34 Id. at 57.

35 IOGR C-269 at 9, NSM (C-275) at 35.

36 AARP, C-282 at 10, National Consumers League ("NCL"), C-278 at 5. See also CAFMS, C-90, at 5.

of deceased constitutes a discussion of arrangements.⁴⁵ NSM prepared a revised version of this provision of the Rule to, in its view, clearly state when the lists must be provided.⁴⁶

F. Anti-Tying Provisions

NSM agreed that consumers should not have to purchase what they do not want but that a Rule requirement was not needed because their code of ethics provides sufficient protection.⁴⁷ NFDA recommended that the Commission either repeal the anti-tying provision or allow funeral providers to charge a separate, non-declinable basic facilities fee so that they can recover overhead expenses.⁴⁸

NSM stated that there was no evidence in the original proceeding that funeral providers commonly required caskets for cremation.⁴⁹

One commenter submitted information that in one city some funeral providers charged a handling fee between \$250 and \$700 for caskets provided by consumers; he stated that in some instances the fee was more than the cost of the casket.⁵⁰ NFDA stated that it knows of no evidence of a correlation between handling fees for caskets and a lessening of consumer choice or price competition.⁵¹ Even if a relation exists, the Commission has no authority to regulate the amount of handling fees.⁵² NFDA added that handling fees are no more than a pricing mechanism to recover profits lost from the non-sale of the casket.⁵³ IOGR commented that handling fee charges are rare, the effect is de

45 Comment C-275 at 30-32.

46 Id. at 32.

47 Comment C-275 at 33.

48 Comment C-39 at 55.

49 Comment C-275 at 33.

50 Comment C-277 at 3-4.

51 Comment C-39 at 52.

52 Id. at 53.

53 Id.

and services listed in the Rule.⁵⁹ ACA stated that the feasibility of covering cemeteries within the Rule was repeatedly examined and rejected during the initial rulemaking, and that at that time no evidence was presented that cemeteries were the focus of proceedings.⁶⁰ The Cremation Association of America commented that the Commission should consider expanding the definition of funeral provider and the definition of crematory to cover certain cremation practices.⁶¹ Generally, CANA stated that crematories should comply with any provisions logically related to their practices, such as providing price information, but not be subject to provisions not related to cremation, such as embalming.⁶²

I. Compliance

NFDA stated that in a response to a survey of its members, 92% of funeral directors who answered the survey reported that they are complying with the Rule.⁶³ NFDA added that based on the few complaints received by the FTC, compliance is widespread.⁶⁴ AARP commented that the Commission should conduct compliance testing.⁶⁵ AARP noted that a 1985 survey by researchers at Texas University found 58% of surveyed funeral homes violated state and federal disclosure laws; in 1986, a memorial society survey of 23 funeral homes showed that 26% did not provide price lists; and a Philadelphia study in 1987 found that 75% of funeral homes violated some part of the Rule.⁶⁶ Consumers Union commented that several surveys that have been conducted in Texas since the establishment of the Rule show "a lack of compliance by a majority of funeral homes in Texas."⁶⁷

NFDA stated that embalming authorization, price list and anti-tying requirements are too difficult and too vague to be

⁵⁹ Comment C-245 at 5.

⁶⁰ Id. at 3.

⁶¹ Comment C-108 at 12, 16.

⁶² Id. at 15-17.

⁶³ Comment C-39 at 40.

⁶⁴ Id.

⁶⁵ Comment C-282 at 8.

⁶⁶ Id. at 9.

⁶⁷ Comment C-287 at 2.

survey of its members showed 75% operate only one facility and 16% operate only two.⁷⁴

IOGR commented that retention of the Rule would have no effect on paperwork burden of funeral directors.

L. State Exemption Issues

The Conference of Funeral Service Examining Boards ("CFSEB") stated that in determining whether a state should be exempted from the Funeral Rule, in addition to comparing the state requirements to the Rule, the Commission should examine and consider the state's unique marketplace "checks and balances."⁷⁵ In addition, the Commission should consider that state mortuary boards tend to resolve consumer disputes informally without maintaining records; thus, the state's formal enforcement record may not accurately portray the level of enforcement.⁷⁶ CFSEB also commented that a determination by the Commission that a state requirement is too burdensome or insufficient to justify exemption from the Rule does not constitute preemption of the state law because the Commission lacks authority to preempt state law in this manner.⁷⁷

Consumers Union commented that in reviewing a petition for exemption the Commission should not only review the state law, but also carefully consider the willingness and the ability of the state officials to enforce the state requirements.⁷⁸

M. Effect on Competition

The Office of Attorney General for the State of Colorado commented that, in theory at least, the Rule's disclosure requirements encourage competition between funeral providers by requiring them to disclose information; however, in certain areas of his state the pro-competitive objective of the disclosure provisions is undermined because the market itself is so highly

74 Comment C-39 at 30.

75 Comment C-281 at 3-4.

76 Id. at 5.

77 Id.

78 Comment C-287 at 3-4.

list of materials included in the definition of casket; and (3) unfinished wood boxes should be classified as alternative containers.⁸⁶ CMA also commented that the misrepresentation disclosure provision concerning when a consumer may decline to purchase embalming should be amended to delete the reference to sealed caskets in the absence of refrigeration because sealed caskets do not prevent the release of odors and, thus, do not obviate the need for embalming, refrigeration or some other temporary preservative measure.⁸⁷

The Cremation Association of America ("CANA") commented that the Commission should consider expanding the Funeral Rule to prohibit certain practices engaged in by a few crematories that have been the subject of public concern.⁸⁸ CANA also commented that the Rule's definition of alternative container should be amended to ensure that only rigid, leak-proof and closeable containers be used.⁸⁹ The Pre-Arrangement Association of America ("PAA") commented that the Rule should address "numerous state statutes and regulations which serve no purpose other than to restrict arbitrarily the pre-need market and isolate traditional funeral providers from competition."⁹⁰ The National Concrete Burial Vault Association's executive director commented that some cemeteries are engaging in unfair practices that injure consumers.⁹¹ Generally, he stated that some cemeteries charge prohibitively high installation fees to discourage consumers from purchasing vaults from the cemetery's competitor.⁹²

AARP commented that the Rule should be expanded to cover certain alleged fraudulent practices such as unconscionable fees, unauthorized and undisclosed removal of body parts, undisclosed

⁸⁶ Comment C-304 at 1-2.

⁸⁷ Id. at 2-3.

⁸⁸ These practices include multiple simultaneous cremations of unrelated persons, harvesting body parts without authorization, returning more or less cremated remains than were removed from the cremation chamber, and misrepresenting the identity of the remains. Id. at 20-32.

⁸⁹ Id. at 32-40.

⁹⁰ Comment C-159 at 113.

⁹¹ C-91 at 1.

⁹² Id. at 2.

C-32, Fred Featherstone, Jr of Port Charlotte, FL
C-36, Mary Danos of Arlington, VA
C-40, L. Wade of Lathram of Falls Church, VA
C-41, Lorry Anne Huckins of No. Fort Myers, FL
C-44, Dru Newlon of El Paso, TX
C-46, Hazel Masters of Arcata, CA
C-47, Norma Van Orden of Berkeley, CA
C-49, Henry Farmer, Iii of Newburyport, MA
C-50, Mildred Webster of Orlando, FL
C-54, Morris Huggins of Fresno, CA
C-55, Herbert Bock of North Fort Myers, FL
C-57, Kenneth Kukovich of Arlington, VA
C-58, George Cole of Sarasota, FL
C-60, Millard Parker of Land O'lakes, FL
C-68, Kurk Klossner of Albuquerque, NM
C-76, Armen Tarjan of Gainesville, FL
C-77, Viola Williamson of Albuquerque, NM
C-78, Robbin Ralph of Tampa, FL
C-89, Edward Knapp of Arlington, VA
C-92, Earl Fisher of Cayucos, CA
C-93, Otis Bowman of Tampa, FL
C-95, M. Morby of Arlington, VA
C-96, Frank Maier of Tallahassee, FL
C-99, Gary swope, accounting practicioner, scottsburg, IN
C-100, John Cornish of Bethlehem, PA
C-107, Douglas Frame of Charlottesville, VA

C-218, Gayle Johnson of Tampa, FL
C-219, L. Wiskerchen of Fort Myers, FL
C-221, Harry Weiler of Fort Myers, FL
C-223, Elizabeth Richards of Punta Gorda, FL
C-225, Aili Higbee of Fort Myers, FL
C-226, Eleanor Weiler of Fort Myers, FL
C-233, S. Kerrigan of Port Charlotte, FL
C-234, Anna Languirand of Fort Myers, FL
C-236, Eloise & L. Harmon of Arlington, VA
C-238, Elizabeth Hess of Lehigh Acres, FL
C-239, Genevieve McCain of Naples, FL
C-241, Carol Ann Lipman of Ft Myers, FL
C-243, Mary Coleman of Cape Coral, FL
C-249, William Finlay of Lehigh Acres, FL
C-250, Ralph Mahino of Tampa, FL
C-267, Laverne Finlay of Lehigh Acres, FL
C-270, Lisa Carlson of Hinesburg, VT
C-271, Terrence Hutton of Chicago, IL
C-272, Mary White of Fort Myers, FL
C-283, Harland White of Fort Myers, FL
C-284, Harriette Glasner of West Palm Beach, FL
C-285, Mildred Gregg of Arcata, CA
C-286, Howard Impecoven of Britton, SD
C-289, W. Lear Snyder of Holgate, OH
C-293, Kathryn Weihl of Marietta, OH
C-296, Reginald Haley of Waldorf, MD

- C-339, Eugene of Alhambra, CA
- C-340, Provost Elsa Ramsden, University of Pennsylvania,
Philadelphia, PA
- C-342, Sheldon Appleton of Birmingham, MI
- C-343, John Chapman of Royal Oak, MI
- C-344, Noble Hodge of Tarzana, CA
- C-345, Jerry Coleman of Cape Floral, FL
- C-346, Dennis Groeneboom of Des Moines, IA
- C-347, Walter Heinecke of Uttea, MI
- C-348, Kurt Solmssen of Philadelphia, PA
- C-349, Warren Edward of Scotts Valley, CA

B. CONSUMER GROUPS

- C-3, Southern Tier Memorial Society Inc., Binghamton, NY
- C-8, Bay Area Funeral Society Inc., Berkeley, CA
- C-10, East Tennessee Memorial Society, Pleasant Hill, TN
- C-11, Stanislaus Memorial Society, Modesto, CA
- C-14, California Federation of Memorial And Funeral Societies,
Ventura, CA
- C-17, Mid-Hudson Memorial Society Inc., Poughkeepsie, NY
- C-21, Memorial Society of Cape Cod Inc., Orleans, MA
- C-34, Tampa Memorial Society Inc., Tampa, FL
- C-37, Memorial And Planned Funeral Society, St. Louis, MO
- C-38, Memorial Society of Northern Virginia, Arlington, VA
- C-45, Memorial Society of Greater Philadelphia, Philadelphia, PA
- C-52, Memorial Society of Greater Louisville, Louisville, KY
- C-53, East Tennessee Memorial Society, Fairfield Glade, TN

- C-199, Memorial Society of Northern Virginia, Arlington, VA
- C-202, AARP-NRTA-SDRTA Information & Protective Services Committee
- C-227, Oregon Memorial Society, Vancouver, WA
- C-237, Detroit Memorial Society, Detroit, MI
- C-246, Tucson Memorial Society, Tucson, AZ
- C-261, Memorial Society of Greater Youngstown, Campbell, OH
- C-274, Nat'l Jewish Comm'n on Law & Public Affairs (COLPA), Brooklyn, NY
- C-278, National Consumers League, Washington, DC
- C-282, American Ass'n of Retired Persons, Washington, DC
- C-287, Consumers Union, Austin, TX
- C-298, California Federation of Memorial & Funeral Societies, Sacramento, CA
- C-301, International Consumer Research Institute, Milwaukee, WI
- C-308, San Diego Memorial Society, San Diego, CA
- C-311, Los Angeles Funeral Society,
- C-318, Scotland County Funeral & Memorial Soc'y, Laurinburg, NC
- C-332, Memorial Society of El Paso, TX
- C-341, Foxgill Consultants, West Chester, PA

C. FUNERAL PROVIDERS

- C-12, Joe P. Burns Funeral Home, Perry, FL
- C-18, William L. Jones, Funeral Director of Richmond, VA
- C-31, Fowler-Kennedy Funeral Service Inc., Maynard, MA
- C-33, Devine Colonial Mortuary and Chapel, Marion, IN
- C-35, Soller-baker Funeral Homes Inc., of Lafayette, IN
- C-42, Gale-heer Mortuary, Brush, KS

C-97, Ustick-Donelson Funeral Homes, Rocky Ford, CO
C-101, Burns Funeral Home, Milroy, IN
C-106, Jo Anne Lee, Funeral Director of White Plains, NY
C-112, Feltner Funeral Home, Lyndon, KS
C-113, Quisenberry Funeral Home, Tonganoxie, KS
C-114, Beckwith Funeral Home, Jetmore, KS
C-115, August Hebert & Son Funeral Service, Fall River, MA
C-116, Haucke-Schinderle, Algoma, WI
C-117, Leland-Hays Funeral Home, Inc., Northboro, MA
C-118, Rumsey Funeral Home, Inc., Lawrence, KS
C-120, Ford-Wulf-Bruns Funeral Service, Coffeyville, KS
C-124, Livingston Funeral Home, Kingman, KS
C-125, Parker-Price Mortuary, Topeka, KS
C-127, Rush Smith Funeral Home, Salina, KS
C-129, Bick and Curry Funeral Home, Beverly, MA
C-130, Curran-Jones Funeral Homes, West Springfield, MA
C-132, Ryan Mortuary, Salina, KS
C-133, Mass-Hinitt-Alexander Funeral Home, Junction City, KS
C-134, Armstrong Family Malloy-Mitten, Los Angeles, CA
C-140, Highland Park Funeral Home, Kansas City, KS
C-141, Cantwill - Van Campen, Gaven, KA
C-143, Downing & Lahey Mortuary, Wichita, KA
C-145, Lyons & Hayes Funeral Home Inc., West Newton, MA
C-147, Nolan Funeral Home, Colorado Springs, CO
C-148, Kunkel Funeral Chapel Inc., Moran, KS
C-149, Thompson & Yoder Funeral Home, Nappanee, IN

C-204, Norberg Memorial Home, Princeton, IL
C-205, Kendall Funeral Chapel, Council Grove, KS
C-213, Burris-Carson-Wall Funeral Homes, Parsons, KS
C-220, The Watt Funeral Home, Moline, KS
C-222, Sherrie-bream Funeral Home, Gasport, NY
C-224, The Shrine of Rest, Colorado Springs, CO
C-228, Kenneth H. Sherrie Funeral Home, Newfane, NY
C-229, Kitch Funeral Home, Liberal, KS
C-230, Mckinney Landreth Funeral Home, Cliffside, NC
C-231, Thatcher's Funeral Home Inc., Kansas City, KS
C-235, Olliff-Boeve Memorial, Phillipsburg, KS
C-240, Stirling Gerber Funeral Home Inc., Indianapolis, IN
C-247, Popkess Mortuary Inc., Seneca, KS
C-248, Koster Funeral Home, Oakley, KS
C-251, Cornell Memorial Home, Danbury, CT
C-259, Alden-harrington Funeral Home Inc., Bonner Springs, KS
C-262, Striffler Funeral Homes, Mckeesport, PA
C-263, Andrews Funeral Home, Castle, CO
C-264, Zimmerman Funeral Home, Howard, KS
C-268, Tibbetts Bros. Inc., Belleville, KS
C-279, Long & Son Mortuary Service, Charlotte, NC
C-280, Moore And Kirk Funeral Homes Inc., Indianapolis, IN
C-291, Costin Funeral Chapel, Martinsville, IN
C-292, Big Bear Mortuary, Big Bear, CA
C-294, Carter Fueral Chapels, Chicago, IL
C-295, Shaw Funeral Home, Bicknell, IN

- C-244, American Cemetery-mortuary Council, Falls Church, VA
- C-245, American Cemetery Association, Falls Church, VA
- C-273, Jefferson Memorial Park, Pittsburgh, PA
- C-277, Crescent City Enterprises, Kenner, LA
- C-304, Casket Manufacturers Association of America, Evanston, IL
- C-159, Pre-Arrangement Asssocation of America, Chicago, IL

F. STATE OFFICIALS

- C-67, William C. Klein, Consumer Member, Funeral Directing Advisory Board of New York, Rochester, NY
- C-142, Office of Attorney General of West Virginia, Consumer Protection Division, Charleston, WV
- C-201, Office of the Attorney General of Colorado, Anti-Trust Unit, Denver, CO
- C-281, Conference of Funeral Service Examining Boards, Washington, IN
- C-67, William C. Klein, Consumer Member, Funeral Directing Advisory Board of New York, Rochester, NY

APPENDIX B

PART 453-FUNERAL INDUSTRY PRACTICES

Sec.

- 453.1 Definitions.
- 453.2 Price disclosures.
- 453.3 Misrepresentations.
- 453.4 Required purchase of funeral goods or funeral services.
- 453.5 Services provided without prior approval.
- 453.6 Retention of documents.
- 453.7 Comprehension of disclosures.
- 453.8 Declaration of intent.
- 453.9 State exemptions.
- 453.10 Mandatory review.

Authority: Sec. 6(g) 38 Stat. 721 (15 U.S.C. 46(g); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552).

Source: 47 FR 42299, Sept. 24, 1982, unless otherwise noted.

§453.1 Definitions.

(a) Accounting year. "Accounting year" refers to the particular calendar year or other one year period used by a funeral provider in keeping financial records for tax or accounting purposes.

(b) Alternative container. An "alternative container" is a non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of cardboard, pressed-wood, composition materials (with or without an outside covering) or pouches of canvas or other materials.

(m) Outer burial container. An "outer burial container" is any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

(n) Person. A "person" is any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

(o) Services of funeral director and staff. The "services of funeral director and staff" are the services, not included in prices of other categories in §453.2(b)(4) which may be furnished by a funeral provider in arranging and supervising a funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits and placing obituary notices.

(p) Unfinished wood box. An "unfinished wood box" is an unornamented casket made of wood which does not have a fixed interior lining.

[49 FR 563, Jan. 5, 1984]

§453.2 Price disclosures.

(a) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) Preventive requirements. To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §453.4(b)(1), funeral providers must:

(1) Telephone price disclosures. (i) Tell persons who call the funeral provider's place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services are offered, that price information is available over the telephone.

(4) General price list. (i) Give a printed or typewritten price list for retention to persons who inquire in person about funeral arrangements or the prices of funeral goods or funeral services. When people inquire in person about funeral arrangements or the prices of funeral goods or funeral services, the funeral provider must offer them the list upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services. This list must contain at least the following information:

(A) The name, address, and telephone number of the funeral provider's place of business;

(B) A caption describing the list as a "general price list";

(C) The effective date for the price list; and

(D) In immediate conjunction with the price disclosures required by paragraph (b)(4)(ii) of this section, the statement: "This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services, flowers, and newspaper notices. The prices for those items will be shown on your bill or the statement describing the funeral goods and services you selected."

(ii) Include on the price list, in any order, the retail prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified below for at least each of the following items, if offered for sale:

(A) Forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(B) Receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(C) The price range for the direct cremations offered by the funeral provider, together with: (1) A separate price for a direct cremation where the purchaser provides the container; (2) separate prices for each direct cremation offered including an unfinished wood box or alternative container; and (3) a description of the services and container (where applicable), included in each price;

(C) Either of the following:

(1) The price for the services of funeral director and staff, together with a list of the principal services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)"; or

(2) The following statement: "Please note that a fee for the use of our services is included in the price of our caskets. Our services include (specify)." The statement must be placed on the general price list together with casket price range, required by paragraph (b)(4)(iii)(A)(1) of this section, or together with the prices of individual caskets, required by (b)(4)(iii)(A)(2) of this section.

(5) Statement of funeral goods and services selected.
(i) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(B) Specifically itemized cash advance items. (These prices must be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall be given and a written statement of the actual charges shall be provided before the final bill is paid.); and

(C) The total cost of the goods and services selected.

(ii) The information required by this paragraph (b)(5) of this section may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.

(6) Other pricing methods. Funeral providers may give persons any other price information, in any other format, in addition to that required by paragraphs (b) (2), (3), and (4) of this section so long as the statement required by paragraph (b)(5) of this section is given when required by the rule.

(2) Preventive requirements. To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §453.4(a)(1), funeral providers must place the following disclosure in immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an unfinished wood box or an alternative container. Alternative containers can be made of materials like heavy cardboard or composition materials (with or without an outside covering), or pouches of canvas." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(c) Outer burial container provisions-(1) Deceptive acts or practices. In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that State or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;

(ii) Fail to disclose to persons arranging funerals that State law does not require the purchase of an outer burial container.

(2) Preventive requirement. To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by §453.2(b)(3)(ii), or, if the prices of outer burial containers are listed on the general price list, required by §453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, no State or local law makes you buy a container to surround the casket in the grave. However, many cemeteries ask that you have such a container so that the grave will not sink in. Either a burial vault or a grave liner will satisfy these requirements."

(d) General provisions on legal and cemetery requirements-(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that Federal, State, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

§453.4 Required purchase of funeral goods or funeral services.

(a) Casket for cremation provisions-(1) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket other than an unfinished wood box be purchased for direct cremation.

(2) Preventive requirement. To prevent this unfair or deceptive act or practice, funeral providers must make an unfinished wood box or alternative container available for direct cremations, if they arrange direct cremations.

(b) Other required purchases of funeral goods or funeral services-(1) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part.

(2) Preventive requirements. (i) To prevent this unfair or deceptive act or practice, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by §453.2(b)(4)(ii) and (iii): "The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected."

Provided, however, That if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our services" between the second and third sentences of the statement specified above herein; and

(B) Place the following disclosure on the statement of funeral goods and services selected, required by §453.2(b)(5)(ii): "Charges are only for those items that are used. If we are required by law to use any items, we will explain the reasons in writing below."

§453.6 Retention of documents.

To prevent the unfair or deceptive acts or practices specified in §453.2 and §453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in §453.2(b) (2) through (4), as applicable, for at least one year after the date of their last distribution to customers, and a copy of each statement of funeral goods and services selected, as required by §453.2(b) (5) for at least one year from the date on which the statement was signed.

§453.7 Comprehension of disclosures.

To prevent the unfair or deceptive acts or practices specified in §453.2 through §453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner.

§453.8 Declaration of intent.

(a) Except as otherwise provided in §453.2(a), it is a violation of this rule to engage in any unfair or deceptive acts or practices specified in this rule, or to fail to comply with any of the preventive requirements specified in this rule;

(b) The provisions of this rule are separate and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.

[49 FR 564, Jan. 5, 1984]

§453.9 State exemptions.

If, upon application to the Commission by an appropriate State agency, the Commission determines that:

(a) There is a State requirement in effect which applies to any transaction to which this rule applies; and



BUREAU OF
CONSUMER PROTECTION

APPENDIX C
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 8, 1988

MEMORANDUM

TO: Commission

FROM: William C. MacLeod, Director
Bureau of Consumer Protection

SUBJECT: Recommendation to Initiate Rulemaking Amendment
Proceeding for Funeral Rule, 16 CFR Part 453;
Program Code: J09; Matter No: R011004

NOTE: Commission Action Requested by April 30, 1988

Four years ago, amidst considerable controversy, the Federal Trade Commission promulgated the Funeral Rule. On September 24, 1982 the Commission published in the Federal Register the text of the Funeral Rule, culminating a venture begun in 1972. The Rule became fully effective on April 30, 1984.

The Rule rests on the premise that consumers, in a time of stress, have difficulty making appropriate purchase decisions and that consumers were not provided the requisite information for a fully informed choice about funeral goods and services. To correct this situation the Rule requires funeral providers to:

- 1) disclose price and other information to consumers inquiring in person and over the telephone,
- 2) make truthful representations regarding legal and other requirements,
- 3) permit consumers to select and purchase only those goods and services they desire,
- 4) obtain express permission before embalming the deceased for a fee, and
- 5) refrain from misrepresenting the protective and preservative value of funeral goods and services.

replication, and the analysis of those data by BE, raise serious questions about whether the Rule can achieve its intended goals. For instance, it confirms that consumers rarely comparison shop. In addition, price information requested over the phone is virtually always given. Moreover, those who enjoyed the more extensive information required by the Rule tended to spend more on funerals, not less. These unexpected results resurrect concern that there are facets of this industry that we do not fully understand. It is to fill these gaps with additional evidence and further analysis of existing data that Commission staff and participants in the Rulemaking process will address themselves.

As a consequence of our continued ignorance, and because substantial insight into the costs and benefits of the Rule and certain provisions of the Rule are likely to be proffered during the next stages of this review, I join staff in recommending that the Commission begin this review without proposing to retain, amend or repeal the Funeral Rule. Staff of the Division of Service Industry Practices has prepared a memorandum and a draft Federal Register notice with which I concur. BE also concurs.

Changes in the Funeral Market Since Enactment of the Rule

In the years since the Rule was promulgated, the funeral market has changed in several respects that may affect the provision of service. Since 1982, the marketing of pre-need funeral arrangements has increased substantially. One estimate is that the funeral industry arranged 22,000 pre-need funerals in 1960 and 600,000 in 1985. Future growth in the funeral service industry is likely to in the sale of pre-need funerals.

Second, between 1970 and 1988, the annual cremation rate in the United States grew from 4.58% to 14% of all funeral arrangements. Some analysts predict that the rate will be 20% in the year 2000. According to data in the staff report, cremations tend to be less expensive than more traditional arrangements.

Finally although the funeral industry remains dominated by small firms, typically with 10 employees or less, several analysts detect an increase in vertical and horizontal integration. The most glaring example of this change is the recent and rapid growth experienced by Service Corporation International, with facilities in 32 states. In response to the rise of multi-state chain operations, some small, marginal funeral providers may merge or diversify.

decreased. Second, the replication study data on expenditures indicate the purchasers of funeral goods and services spent more in 1987 than in 1981 (after adjustments for inflation), and that respondents who stated they received a general price list paid on average 7.0% more than those who reported that they did not receive it. Third, except for cremations, consumers' purchasing behavior in selecting particular types of funeral arrangements or particular goods or services has not changed significantly since enactment of the Rule.⁷ In light of these results, the replication study does not demonstrate that the Rule has contributed to more comparison shopping or lower consumer expenditures in the funeral market.

The replication study presents mixed evidence concerning compliance with the Rule. The Bureau of Economics' analysis of the data finds compliance with the itemization requirements can be measured between 25% and 80%, depending on the criteria selected. For example, the results show that more than 80% of respondents report receiving itemized price information at least some time during the transaction. Moreover, apparent misrepresentations regarding the need for embalming or caskets for direct cremation have decreased and are not widespread.

On the other hand, BE's analysis of the 1987 consumer survey data presents evidence that approximately 31% of funeral providers used by the respondents simultaneously comply with all of the Rule's major requirements-- (i) providing a General Price List at the beginning of discussion of funeral arrangements, (ii) giving a sufficiently itemized statement of goods and services selected at the end of the arrangements conference, and (iii) making no misrepresentations about the requirements for embalming and caskets when cremation is selected.⁸

⁷ Both the replication study and the baseline study show that most arrangements involved an open casket (64.72% in 1987 and 66.5% in 1981). The replication data did report an increase in the rate of cremation from 11% in 1981 to 14.1% in 1987. The rise in the cremation rate coincided with a decline in the open and closed casket arrangements. Staff accurately points out that because the rise in the cremation rate began in the early seventies, the trend cannot automatically be attributed to the rule.

⁸ Staff notes that the survey results may understate actual compliance due to inaccurate consumer recall.

Staff's Recommendation

Staff believes it is premature to recommend retention, repeal, or amendment of the Rule. Instead, staff recommends that the Commission identify the significant issues raised by the data in the baseline and replication studies and by commenters regarding the effectiveness of the Rule, and solicit comment on these issues. At the termination of this phase of the proceeding, the record developed will permit the Commission to make a reasoned evaluation of its options.

Staff points out that several provisions appear ripe for reevaluation. For example, the minuscule level of telephone shopping found in both the 1981 and 1987 consumers surveys suggest that the rule's affirmative telephone disclosure provision (which requires providers to tell callers who ask about the terms, conditions or prices of funeral offerings that price information is available over the phone) may not have achieved its intended purpose of inducing consumers to obtain price information before selecting a funeral provider.

The survey evidence also indicates that giving or showing itemized price lists to consumers, as required by the Rule, has not reduced consumers' funeral expenses. Moreover, a significant number of commenters suggested changes to the price list requirements. Some parties, for instance, called for a standard format for price lists to assist comparison shopping. Others merely argued that the provisions explaining when and where the list must be provided to consumers are vague and unworkable.

A few commenters contend that the provision requiring funeral providers to seek express prior approval for embalming is harmful to consumers and places an unnecessary burden on funeral providers who seek to avoid offending persons under stress. These commenters argue that an express request to a loved one immediately after death may cause emotional distress. Moreover, they point out that there may be few countervailing benefits to disclosure when, by custom or prior experience, the funeral provider knows that the family's wishes or the circumstances makes embalming a practical necessity.

Staff also anticipates that participants will seek to expand the Rule to cover all crematories, cemeteries, casket sellers and related merchandisers. Some parties will argue that the failure of the Rule to cover parties who sell funeral goods or services exclusively places funeral providers at a competitive disadvantage. Others will likely argue that because these sellers are unregulated, they are permitted to engage in unfair or deceptive practices proscribed by the Rule, this causes

