

# **Registered Federal Trade**

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**Friday  
September 24, 1982**

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**Part III**

## **Federal Trade Commission**

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**Funeral Industry Practices; Trade  
Regulation Rule**

**FEDERAL TRADE COMMISSION****16 CFR Part 453****Trade Regulation Rule; Funeral Industry Practices****AGENCY:** Federal Trade Commission.**ACTION:** Final Trade Regulation Rule.

**SUMMARY:** The Federal Trade Commission issues a final Rule, the purpose of which is to provide detailed information about prices and legal requirements to persons arranging funerals. The Rule will require disclosure of itemized price information, both over the telephone and in writing; prohibit misrepresentations about legal, crematory and cemetery requirements pertaining to disposition of human remains and prohibit certain unfair practices, such as embalming for a fee without prior permission or requiring consumers to purchase caskets when they intend to cremate the remains, or conditioning the purchase of any funeral goods and services on the purchase of any other funeral goods and services.

This notice contains the Rule's Statement of Basis and Purpose, the text of the Rule and a Regulatory Analysis relating to the final rule.

**EFFECTIVE DATE:** The Rule will become effective three months after the conclusion of Congressional review. The Commission will publish a further notice of effective date in the *Federal Register*.

**ADDRESS:** Requests for copies of the Rule, the Statement of Basis and Purpose, and the Regulatory Analysis should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW, Washington, D.C. 20580.

**FOR FURTHER INFORMATION CONTACT:** Erica L. Summers, Division of Service Industry Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580 (202) 523-3413.

**SUPPLEMENTARY INFORMATION:** This Rule is being submitted to the Congress for review in accordance with Section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. 57a-1. Under that section, a Rule becomes effective unless both Houses of Congress disapprove the Rule within 90 calendar days of continuous session after the Rule is submitted. The present legislative review provision is scheduled to terminate on September 30, 1982. Assuming that a new legislative review process will be implemented after that date, the Commission has determined that the Rule should become effective three months after the conclusion of

Congressional review. The Commission will publish a further notice of effective date in the *Federal Register* as soon as possible thereafter.

**List of Subjects in 16 CFR Part 453**

Funeral homes, Price disclosure, Trade practices.

By direction of the Commission, Chairman Miller dissenting.

Dated: September 20, 1982.

Carol M. Thomas,  
*Secretary.***Funeral Rule Statement of Basis and Purpose and Regulatory Analysis***I. Introduction*

*A. Need for and Objectives of Rule.* Arranging a funeral plainly involves emotional, religious, and other important social considerations. At the same time, a funeral is more than a social ritual: it is also an expensive consumer purchase. In fact, the purchase of a funeral is the third largest single expenditure many consumers will ever have to make, after a home and a car. Although funeral costs vary substantially among funeral homes and among different kinds of dispositions and ceremonies, price surveys have found that the average funeral, which includes embalming, viewing, a ceremony with the body present and a procession to the cemetery followed by ground burial, costs the consumer between two and three thousand dollars. In recent years there have been approximately 1.9 million deaths annually, bringing the total amount which consumers spend on funeral and burial arrangements to over \$5.2 billion per year.

While the arrangement of a funeral is clearly an important financial transaction for consumers, it is a unique transaction, one whose characteristics reduce the ability of consumers to make careful, informed purchase decisions. Decisions must often be made while under the emotional strain of bereavement. In addition, consumers lack familiarity with the funeral transaction: close to fifty percent of all consumers have never arranged a funeral before, while another twenty-five percent have done so only once. Further, consumers are called upon to make several important and potentially costly decisions under tight time constraints. Within hours of death, consumers must make arrangements to have the body of the deceased removed from the place of death and taken to a funeral home. Within at most 24 to 48 additional hours all additional decisions must be made concerning the form of disposition desired.

Under any circumstances, giving careful consideration to financial matters while arranging a funeral would be difficult. This difficulty is exacerbated, however, by several practices used by funeral providers which limit the consumer's ability to make informed, independent choices. The evidence indicates that a significant number of funeral providers:

(1) Require that consumers purchase "prepackaged" funerals, which may include goods and services which the consumers would not otherwise purchase;

(2) Misrepresent, either directly or by the failure to disclose material information: (a) that the law requires the purchase of embalming, a casket for cremation services, or grave liners and burial vaults; (b) the extent to which funeral goods and services have a preservative and protective value; and (c) that a mark-up is being charged on items such as flowers and obituary notices, commonly termed "cash advance" items;

(3) Require that consumers who wish to arrange direct cremation services purchase a casket for use in those cremations;

(4) Embalm the body of the deceased without first obtaining specific authorization to do so; and

(5) Refuse to discuss or fail to disclose price information over the telephone.

The Commission has concluded that these acts and practices are unfair or deceptive within the meaning of Section 5 of the Federal Trade Commission Act. Section II of this Statement contains a more detailed description of these acts and practices, as well as a discussion of the frequency with which they occur. The rule promulgated by the Commission prohibits these acts and practices and includes requirements designed to prevent their recurrence. The rule's goal is to lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice. The rule will help achieve these goals by ensuring that: (1) Consumers have access to sufficient information to permit them to make informed decisions about which goods and services they wish to purchase; (2) consumers are not required to purchase goods and services which they do not want and are not required by law to purchase; and (3) misrepresentations are not used to influence consumers' decisions on which goods and services to purchase.

Under the provisions of the rule, funeral providers must give consumers a written list, prior to any arrangements discussion, containing the prices of the

funeral goods and services on an itemized basis. At the choice of the funeral provider, separate price lists may also be used to disclose the prices of caskets and outer burial containers. The rule also requires that funeral providers give price information to consumers who call on the telephone and ask about the terms, conditions, or prices at which funeral goods or services are offered by that funeral home. While the rule requires that price information be given to consumers in a relatively standardized, itemized format, it in no way interferes with the ability of funeral directors to offer their goods and services for sale in additional forms (e.g., funeral packages).

To ensure that funeral consumers have the ability to select only the goods and services they want to purchase, the rule generally requires funeral providers to "unbundle" the goods and services they offer for sale and offer them on an itemized basis. Funeral providers may, however, continue to offer "package funerals" for sale as an alternative to itemized purchasing. The rule simply ensures that the consumer has the ability to make an itemized selection.

In addition to the general right to select goods and services on an individual basis, there are two other related provisions that concern items which funeral providers often have required consumers to purchase. First, the rule requires that funeral providers obtain express permission from a family member or representative before embalming is performed, except under special circumstances. This requirement is designed to ensure that consumers do not have to pay for embalming which they neither asked for nor wanted. Second, the rule prohibits funeral providers from requiring that consumers purchase a casket for use in a direct cremation service. The rule requires funeral providers to offer an unfinished wood box or other alternative to a traditional casket for use in this form of direct disposition.

Finally, the rule prohibits several specifically described misrepresentations concerning legal requirements for burial, or cremation, and misrepresentations about the existence of mark-ups on cash advance items. To implement these prohibitions, the rule requires funeral providers to include several short disclosures on the general price list which they provide to consumers. These disclosures simply inform consumers of their legal rights and purchase options.

The rule also contains a provision which requires the Commission to start a rule amendment proceeding to review the effect and operation of the rule no

later than four years after it becomes effective. This mandatory review will enable the Commission to determine whether the rule has worked as expected and will require the Commission to decide whether the rule should be modified or terminated within eighteen months after the proceeding has started. If the rule has been successful in stimulating price competition by that time, the Commission will decide whether the rule is still needed in light of the marketplace changes. This provision ensures that the Commission will decide whether there is a continuing need for regulation of the funeral industry at an early date and in a proceeding open to public participation.

This overview has highlighted the central elements of the rule. Virtually all of its other provisions, including certain definitions, are designed to ensure the integrity of this disclosure scheme and to prohibit misrepresentations of material information. The rule promulgated today is substantially more limited than that which the Commission originally proposed. These modifications are the result of the Commission's careful consideration of the extensive testimony and comments submitted on three different occasions, as well as Congressionally-mandated limitations (discussed below) on the rule's subject matter. The Commission believes that this rule will effectively curb many of the unfair or deceptive practices identified in the rulemaking record with minimal intrusion into the business operations of funeral providers.

**B. History of the Proceeding.** In December of 1972, at the direction of the Commission, the Commission's Bureau of Consumer Protection began an initial investigation of practices in the funeral industry.<sup>1</sup> During the initial investigation, the Commission's staff interviewed consumers, funeral directors, memorial society members, attorneys, state officials and others, and also visited funeral homes. These efforts

<sup>1</sup> The proposal for a limited initial investigation stemmed from an internal staff analysis suggesting a potential for abuse in the funeral transaction, given the unique disadvantages of the funeral purchaser. While few consumer complaints had been received at the time, the potential for consumer injury had been documented by hearings chaired by Senator Phillip Hart in 1964. *Antitrust Aspects of the Funeral Industry: Hearings Pursuant to S.R. 262 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964) (hereinafter cited as *Antitrust and Monopoly Subcomm. Hearings*). This policy planning approach to identifying areas of potential consumer injury was a direct response to criticism made by the American Bar Association in the late 1960s that the Commission relied too heavily on consumer complaints and consequently chose trivial cases for investigation.

led the staff to conclude that a more detailed examination of the industry's practices was warranted. The staff made this recommendation in June, 1973, in a 239 page planning report to the Commission.<sup>2</sup> The Commission subsequently approved a full industry-wide investigation and authorized the use of compulsory process.

An Initial Staff Report by the staff of the Bureau of Consumer Protection based on the industry-wide investigation was published in August, 1975. In that report, the staff recommended that the Commission initiate a rulemaking proceeding pursuant to its authority under Sections 5 and 18 of the Federal Trade Commission Act.<sup>3</sup> The Initial Staff Report described practices relating to the purchase of funeral goods and services which may have violated Section 5 of the Act.

After reviewing the Initial Staff Report, the Commission published an Initial Notice of Proposed Rulemaking ("Initial Notice") on August 29, 1975.<sup>4</sup> It contained the text of a proposed rule, a statement of the Commission's reasons for issuing it, and an invitation to comment on the proposal.

Written comments on the Initial Notice were received through March 6, 1976. More than 9,000 separate documents were received, comprising approximately 20,000 pages. Numerous comments were made by individual funeral industry members, state and national funeral trade associations, individual consumers, consumer groups, state regulatory boards, state and local government officials, representatives of funeral-related industries including florists, cemetery operators, and casket and vault manufacturers, memorial societies, clergymen, academics, and other interested parties.

On February 20, 1976, the Final Notice of Rulemaking ("Final Notice") was published by the Presiding Officer in the funeral proceeding.<sup>5</sup> The Final Notice set out thirty disputed issues of fact to serve as the focus for the public hearings on the proposed rule.<sup>6</sup> Public hearings were

<sup>2</sup> Division of Evaluation, Bureau of Consumer Protection, *Unfair Practices in the Funeral Industry: A Planning Report to the Federal Trade Commission*, June 29, 1973.

<sup>3</sup> 15 U.S.C. 45, 57.

<sup>4</sup> 40 FR 39901 (1975).

<sup>5</sup> 41 FR 7787 (1976).

<sup>6</sup> Prior to the hearings, the National Funeral Directors Association sought to enjoin the hearings in federal court, alleging a number of procedural improprieties and Commission action in excess of its statutory authority. The court denied the injunction. *NFDA v. FTC*, 76-0615 (D.D.C., filed April 14, 1976).

held in six cities from April 20 through August 6, 1976.<sup>7</sup> In all, 52 days of hearings were held during which 315 witnesses presented testimony and exhibits and were subject to cross-examination by the various participating parties. The six hearings produced 14,719 pages of transcript and approximately 4,000 additional pages of exhibits.

At the conclusion of the public hearings, a final opportunity for comment was offered the public to rebut any data or views which had previously been submitted into evidence. Forty-seven separate rebuttal submissions were filed by the Commission staff and various parties to the proceeding.

At the conclusion of the public hearing process, reports to the Commission based on the rulemaking record were prepared by the Presiding Officer,<sup>8</sup> who made findings on the issues which had been designated by the Commission for the public hearings, and by the Commission staff,<sup>9</sup> who analyzed the record evidence and made recommendations to the Commission for final action. The Presiding Officer found that the funeral transaction has several characteristics which place the consumer in a disadvantaged bargaining position relative to the funeral director, leave the consumer vulnerable to unfair and deceptive practices, and cause consumers to have little knowledge of legal requirements, available alternatives respecting disposition of the dead, and funeral homes' offerings and prices. The Presiding Officer also found that some funeral providers fail to disclose relevant purchase information to consumers while some other funeral providers affirmatively misrepresent legal, public health and/or religious requirements to customers. The staff, after reaching similar conclusions,<sup>10</sup>

recommended a revised trade regulation rule which differed from the initial proposed rule in several respects.

Following publication of these reports, the Commission commenced a comment period to permit the public to comment on the reports of the Presiding Officer and the staff.<sup>11</sup> This comment period was originally scheduled to close after 60 days; however, the Commission extended it for 30 days to afford a greater opportunity to comment.<sup>12</sup> Over 1300 separate comments were received during the comment period. To assist the Commission in reviewing them, the Commission's staff prepared a summary, which accompanied the comments to the Commission. This summary<sup>13</sup> essentially indexed the comments filed, identifying each issue of fact, law or policy raised in the comments. The summary was made available to the Commission as well as to outside parties. On February 2, 1979, the Commission's staff forwarded to the Commission their final recommendations.

On February 27 and 28, 1979, the Commission heard oral presentations from selected rulemaking participants who had been invited to present their views directly to the Commission as provided in § 1.13(j) of the Commission's Rules, 16 CFR 1.13(j).<sup>14</sup>

On March 23, 1979, the Commission met in open session, tentatively approved a final funeral rule and directed the staff to prepare the necessary legal memoranda to implement it. The tentative final rule adopted by the Commission was substantially more limited than the one which the Commission had originally proposed. It required that price

evidence on the rulemaking record to make a finding on the prevalence of certain practices, including misrepresentation of cash advance charges and misrepresentation of legal, public health, and/or religious requirements. *Id.* at 68, 73. The staff disagreed with this assessment and reviewed the record evidence in detail in their report, 1978 Staff Report, *supra* note 9, at 251-259, 269-294.

<sup>11</sup> 43 FR 26588 (1978).

<sup>12</sup> 43 FR 34500 (1978).

<sup>13</sup> Summary of Post-Record Comments on the Funeral Industry Practices Rule, January 25, 1979, XIV-1368.

<sup>14</sup> The participants were U.S. Congressman Marty Russo; National Retired Teachers Association and American Association of Retired Persons; National Selected Morticians; International Order of the Golden Rule; U.S. Small Business Association; New York State Consumer Protection Board; Cremation Association of North America; Americans for Democratic Action and National Council of Senior Citizens; National Funeral Directors Association; Continental Association of Funeral and Memorial Societies; National Funeral Directors and Morticians Association; New York State Public Interest Research Group; Pre-Arrangement Interment Association of America; and California Citizens Action Group.

information be made available over the telephone, that funeral goods and services be sold on an individual basis enabling consumers to decline goods and services which they did not want, that prior permission be obtained for embalming, and that consumers not be required to purchase caskets for use in cremation. The rule also included a prohibition on deceptive claims and representations concerning legal and cemetery requirements. However, several other major provisions contained in the proposed rule were dropped.<sup>15</sup>

Prior to promulgation, however, Congress adopted the FTC Improvements Act of 1980.<sup>16</sup> Section 19 of that Act imposed a set of procedural and substantive limitations on the Commission's authority to promulgate a rule regulating practices within the funeral industry.<sup>17</sup> Procedurally, Section 19(c)(2)(A) required the Commission to republish a proposed rule in the *Federal Register* for public comment before the Commission could promulgate a final rule.<sup>18</sup>

During the hiatus in the rulemaking proceeding which attended Congressional consideration and subsequent enactment of the Improvements Act of 1980, a second event occurred which necessitated a revision of the rule. In December of 1979, the United States Court of Appeals for the Second Circuit issued its opinion on the Commission's trade regulation rule concerning practices in the proprietary vocational school industry.<sup>19</sup> In adopting

<sup>15</sup> For example, the Commission eliminated provisions which would have prohibited unauthorized removal of or refusal to release remains, as well as provisions which would have set restrictions on the manner in which funeral providers could display caskets. See Section III(B), *infra*.

<sup>16</sup> Public Law 96-252, 94 Stat. 391.

<sup>17</sup> The substantive limitations imposed by Section 19(c)(1), and the manner in which the rule complies with them, are discussed in Part I(C), *infra*.

<sup>18</sup> The text of Section 19(c)(2)(A), 15 U.S.C. 57a note, states:

"(2)(A) The Commission, before issuing the funeral trade regulation rule in final form—

"(i) shall publish in the *Federal Register* for public comment a revised version of the funeral trade regulation rule which contains the provisions specified in subparagraph (A) and subparagraph (B) of paragraph (1);

"(ii) shall allow interested persons to submit written data, views, and arguments relating to such revised version of the funeral trade regulation rule, and make all such submissions publicly available; and

"(iii) may permit interested persons or as appropriate, a single representative of each group of such persons having the same or similar interests with respect to such revised version of the funeral trade regulation rule, to present their position orally.

<sup>19</sup> Proprietary Vocational and Home Study Schools Trade Regulation Rule, 16 CFR Part 438.

<sup>7</sup> Hearings were held in Atlanta, Chicago, Los Angeles, New York City, Seattle and Washington, D.C.

<sup>8</sup> Report of the Presiding Officer on Proposed Trade Regulation Rule Concerning Funeral Industry Practices (16 CFR Part 453), July 1977 (hereinafter cited as "Report of the Presiding Officer").

<sup>9</sup> Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and proposed Trade Regulation Rule (16 CFR Part 453), June 1978 (hereinafter cited as "1978 Staff Report").

<sup>10</sup> There were several areas of disagreement between the Presiding Officer and the rulemaking staff. For example, the Presiding Officer, in contrast to staff, found insufficient evidence of consumer injury in the rulemaking record to warrant promulgation of a rule provision prohibiting unauthorized removal of remains. See Report of the Presiding Officer, *supra* note 8, at 57. The Presiding Officer also concluded that several practices, such as refusal to release remains or requiring a casket for cremation, were not prevalent, although sufficiently harmful when they occurred to warrant prohibition in the rule. *Id.* at 58, 64. Finally, the Presiding Officer felt that there was insufficient

the rule, the Commission had defined and described the underlying unfair and deceptive acts and practices which were the predicate for the final rule in the Statement of Basis and Purpose which accompanied the rule. Within the text of the rule itself, the Commission included only the remedial requirements designed to prevent the unfair acts and practices from recurring.

In *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658 (2d Cir. 1979) (hereinafter "*Gibbs*") the Second Circuit held that the Magnuson-Moss Act requires the Commission to include in the actual text of a rule a description of the underlying unfair or deceptive acts or practices which serve as its basis.<sup>20</sup> The version of the funeral rule pending before the Commission in 1979 had been drafted in the same manner as the Vocational School Rule, *i.e.*, in several provisions only the remedial language was actually included in the rule.

On December 17, 1980, the Commission met to consider revisions of the proposed funeral rule in light of Section 19 of the FTC Improvements Act of 1980 and the *Gibbs* decision. At this meeting, the Commission voted to publish for public comment a revised version of the funeral rule. The Commission published a notice on January 22, 1981,<sup>21</sup> which contained the text of the revised version of the funeral rule and set forth a sixty-day written comment period. The Commission also provided for a rebuttal period in which parties could respond to comments submitted by other interested parties concerning the revised rule.

On July 7 and 8, 1981, the Commission heard oral presentations from several major participants in the funeral rule proceeding.<sup>22</sup> On July 22, 1981, the Commission met in open session and

approved language of the funeral rule for purposes of submitting the rule's recordkeeping requirement to the Office of Management and Budget (OMB) for review. On June 7, 1982, OMB approved the recordkeeping requirement. After careful consideration and review of the rulemaking record taken as a whole, the Commission has voted to promulgate a trade regulation rule concerning funeral industry practices.

**C. Consistency With Applicable Law.** The funeral rule is being issued under the authority granted the Commission by Section 18 of the FTC Act,<sup>23</sup> as limited by Section 19 of the FTC Improvements Act of 1980.<sup>24</sup> Section 18 of the FTC Act permits the Commission to issue rules defining with specificity acts or practices which are unfair or deceptive under Section 5 of the FTC Act.<sup>25</sup> The Commission further is authorized to include in its rules provisions designed to prevent the defined unfair or deceptive acts or practices. The rule being issued today prohibits and prevents practices which are unfair, deceptive, or both.<sup>26</sup> As such, it is within the Commission's authority under Section 18 of the FTC Act.

The funeral rule, as issued, also complies with the restrictions imposed by Section 19 of the FTC Improvements Act of 1980. Section 19(c)(1) allows the Commission to expend funds to issue and enforce the funeral rule only to the extent that the rule:

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

"(B) prohibits or prevents such persons, partnerships, and corporations from—

"(i) engaging in any misrepresentation; "(ii) engaging in any boycott against, or making any threat against any other person, partnership, or corporation furnishing goods and services relating to funerals;

"(iii) conditioning the furnishing of any such goods or services to a consumer upon the purchase by such consumer of other such

goods or services; or

"(iv) furnishing any such goods or services to a consumer for a fee without obtaining the prior approval of such consumer."<sup>27</sup>

The Commission has revised the rule to ensure that it falls within the substantive limits imposed by Section 19. Thus, § 453.2 of the rule requires price disclosures, as permitted by Section 19(c)(1)(A). Section 453.3 of the rule prohibits misrepresentations, as permitted by Section 19(c)(1)(B)(i). Section 453.4 prohibits funeral providers from requiring a casket for cremation or from conditioning the furnishing of any funeral goods and services upon purchase of any other funeral good or funeral service. These provisions are permitted by Section 19(c)(1)(B)(iii). Finally, § 453.5 of the rule prohibits funeral providers from embalming for a fee without prior approval, as permitted by Section 19(c)(B)(iv).

**D. The Funeral Service Industry.—1. The Funeral Home.** In the United States today there are over 22,000 funeral homes, 50,000 licensed funeral directors and embalmers, and over 400 crematories.<sup>28</sup> In recent years the number of deaths has approached two million per year.<sup>29</sup> The average annual number of deaths per funeral establishment has been about 94.<sup>30</sup> Actual case volume at each funeral establishment varies greatly. Various industry sponsored studies indicate that 50% to over 75% of all funeral homes perform fewer than 100 funerals per year.<sup>31</sup>

The funeral industry is generally composed of small businesses. One report states that 80% of all funeral homes have fewer than seven employees;<sup>32</sup> another report found that 42.9% of the firms in the industry were individual proprietorships<sup>33</sup> and that

<sup>27</sup> 15 U.S.C. 57a note.

<sup>28</sup> 1972-73 American Bluebook of Funeral Directors; 1978 U.S. Industrial Outlook 463; V. Pine, Caretaker of the Dead 21 (1973).

<sup>29</sup> In 1972, the death rate was calculated at approximately 90 per 1,000 or over 1.9 million. Public Health Service, U.S. Dep't. of HEW, 1972 Vital Stat. of the United States: Mortality, Volume II, Part A, at Table 1-1.

<sup>30</sup> *Hearings on Regulations of Various Federal Agencies and Their Effect on Small Business, Before the Subcomm. on the Activities of Regulatory Agencies of the House Small Business Comm. (Part III)*, 94th Cong., 2d Sess. at 65, 75-76 (1975-1976). (Attachment to testimony of H. Raether) (hereinafter cited as "*House Small Business Subcomm. Hearings*").

<sup>31</sup> See, e.g., V. Pine, A Statistical Abstract of Funeral Services Facts and Figures, 1976, D.C. Ex. 4, at 3 (hereinafter cited as "1976 Statistical Abstract").

<sup>32</sup> U.S. Dept. of Commerce, [1973] Country Business Patterns, at 26.

<sup>33</sup> 1972 Census of Selected Service Industries, Volume I, at 7.

<sup>20</sup> 612 F.2d at 662.

<sup>21</sup> 46 FR 6976 (1981). During the written comment period, the National Selected Morticians and the National Funeral Directors and Morticians Association submitted in their comments a modified rule ("NSM/NFDMA proposal") for Commission adoption in lieu of the rule published in the Federal Register. The NSM/NFDMA proposal is discussed in Part III(B)(4), *infra*.

<sup>22</sup> The selected participants, were National Funeral Directors Association; National Retired Teachers Association and American Association of Retired Persons; National Funeral Directors and Morticians Association; National Selected Morticians; Continental Association of Funeral and Memorial Societies; Pre-Arrangement Interment Association of America; Cremation Association of North America; New York Public Interest Research Group; National Council of Senior Citizens and Consumer Affairs Committee of Americans for Democratic Action; Conference of Funeral Service Examining Boards; International Order of the Golden Rule; New York State Funeral Directors Association; Congressman Marty Russo; and Congressman Andy Ireland.

<sup>23</sup> 15 U.S.C. 57.

<sup>24</sup> 15 U.S.C. 57a note.

<sup>25</sup> Section 5(a)(1) of the FTC Act declares unlawful "unfair or deceptive acts or practices in or affecting commerce" through trade regulation rules. The Commission has concluded that it has jurisdiction over funeral providers because their business is "in or affecting commerce." For example, funeral providers sell a variety of merchandise which is shipped in interstate commerce. Many also ship human remains across state lines for funeral purposes. For discussion of these and other bases of the Commission's jurisdiction over funeral providers, see 1978 Staff Report, *supra* note 9, at 468-73.

<sup>26</sup> The Commission's reasons for defining practices as unfair or deceptive are set forth in Part II(A)(1), *infra*.

most of the rest operate as partnerships or private corporations.<sup>34</sup> The industry also is characterized by low rates for entry and exit,<sup>35</sup> with most funeral homes operating in local markets. Recently, however, there has been a slight trend toward the development of funeral home chains.<sup>36</sup> The largest chain is Service Corporation International and the second largest is International Funeral Services. These firms have expanded by purchasing existing funeral homes around the country.<sup>37</sup> Recently these two funeral chains merged.

2. *State Licensure.* The first formal instructional programs for the American funeral industry began with a few trade schools which taught embalming, sanitation, anatomy and other related subjects in a program of short duration.<sup>38</sup> Today there are approximately thirty vocational and college level programs accredited at the state level. The curriculum in these educational programs includes instruction in management principles, merchandising techniques, accounting, public speaking and grief counseling as well as in embalming and restorative arts.<sup>39</sup>

State regulation of the industry began in the latter half of the nineteenth century and arose due both to the public's growing concern over sanitation and the efforts of funeral directors to achieve greater professional stature.<sup>40</sup> Today virtually all states license embalmers and/or funeral directors. Generally, state licensing standards require completion of a nine month to one year vocational training program in mortuary science followed by a period of apprenticeship varying from one to three years in length before qualifying to take the state board examination.<sup>41</sup>

<sup>34</sup> *Id.* See also, Blackwell, "Price Levels in the Funeral Industry," 7 *Q. Rev. of Econ. and Bus.*, VI-A-2, at 75-76 (1976) (hereinafter cited as "Blackwell article").

<sup>35</sup> Blackwell article, *id.* at 77; G. Kissel, An Analysis of the Market Performance of the Funeral Home Industry of Philadelphia (1970) (Wharton School M.B.A. Project), VI-D-23, at 57, 59, 62-65, 70 (hereinafter cited as "Kissel").

<sup>36</sup> Kollat, D.C. Ex. 8, at 13 and Table 8.

<sup>37</sup> 1978 Staff Report, *supra* note 9, at 85, n. 238.

<sup>38</sup> See R. Habenstein and W. Lamers, *The History of American Funeral Directing* 510 (1962) (hereinafter cited as "The History of American Funeral Directing").

<sup>39</sup> *Funeral Service: Meeting Needs* \* \* \* *Serving People*, (NFDA pamphlet), Hausman Ex. 1 (N.Y.), at 5.

<sup>40</sup> *The History of American Funeral Directing*, *supra* note 38, at 450-551.

<sup>41</sup> See, e.g., Tenn. Code Ann. § 82-514(6) (1976); N.M. Stat. Ann. § 67-20-17 (1974 Supp.); Fla. Stat. Ann. § 470.08(1) (1978 Supp.); Va. Code § 54-260.70 (1974). Other states require some college work. See, e.g., Mont. Rev. Code § 66-2708 (1977 Supp.); North Dakota State Board of Embalmers, "Laws, Rules, and Regulations," Rule 43-10-04(3) (1972).

3. *Trade Associations.* The development of the funeral industry as a state-licensed occupation occurred along with the formation of a variety of state and national trade associations. The largest of the national funeral trade associations is the National Funeral Directors Association (NFDA) with 14,000 members who conduct approximately 70% of the nation's funerals.<sup>42</sup> The National Funeral Directors and Morticians Association (NFDMA) is the association of black funeral directors and, with over 4,000 members, is the second largest national trade association.<sup>43</sup> National Selected Morticians (NSM) is a national trade group with slightly over 800 member firms.<sup>44</sup> Unlike NFDA, NSM is an association of funeral home firms and not individual funeral directors.<sup>45</sup> Another national trade group is the Order of the Golden Rule (OGR) with 1400 members.<sup>46</sup> A number of smaller organizations serving limited memberships also exist. Two examples are the Jewish Funeral Directors Association (JFDA) and the Pre-Arrangement Interment Association of America (PIAA). JFDA has approximately 200 members,<sup>47</sup> and PIAA has approximately 700 members dedicated to the promotion and sales of the pre-financed funeral.<sup>48</sup> In addition to these national trade associations, all states except Alaska have funeral trade associations. In all but one of these states, membership in the state association brings concurrent membership in NFDA.

State and national funeral trade associations provide a wide range of services to members—newsletters, journals, national and regional meetings, informational and educational programs, consultants, and the collection of statistical information. A number of trade associations also have enacted codes of ethics which set forth conduct which is considered to be unprofessional.

<sup>42</sup> See *House Small Business Subcomm. Hearings (Part III)*, *supra* note 30, at 64 (testimony of H. Raether). NFDA has apparently doubled its membership since 1938. *The History of American Funeral Directing*, *supra* note 38, at 534.

<sup>43</sup> *House Small Business Subcommittees Hearings (Part IV)*, *supra* note 30, at 24 (testimony of R. Miller, Exec. Dir., NFDMA).

<sup>44</sup> *The American Blue Book of Funeral Directors* 778 (1976-77).

<sup>45</sup> *The History of American Funeral Directing*, *supra* note 38, at 537.

<sup>46</sup> *American Blue Book of Funeral Directors* 785 (1976-79).

<sup>47</sup> *American Blue Book of Funeral Directors* 778 (1976-77).

<sup>48</sup> See PIAA Comment on Revised Rule, XVI-77, at 1.

4. *Pre-need Sales Industry.* This segment of the funeral industry is involved in the promotion and sale of funeral-related goods and services prior to the time of death. In this type of arrangement, payment is made to the funeral seller in advance of death and the particular goods and services selected by the buyer are specified in a pre-need contract.<sup>49</sup> Pre-need plans are marketed by insurance companies, funeral homes, and cemetery operators of cemetery lots, vaults, monuments, and crypts.

5. *Immediate Disposition Companies.* In some areas of the country, immediate disposition companies compete with full service funeral homes. These companies provide a single service—direct disposition of human remains by cremation. They generally do not provide facilities for viewing the body or conducting services, nor do these companies attempt to sell merchandise such as caskets or services such as embalming. Immediate disposition companies offer the service of picking up the body, delivering it to the crematory and returning the ashes. The disposition fee in 1977 was generally less than \$300.<sup>50</sup>

6. *Memorial Societies.* Memorial societies are non-profit consumer cooperatives organized for the purpose of providing information and assistance to their members concerning funeral arrangements. They do not sell funeral goods and services. Some not only provide information on funeral arrangements to their members, but also enter into agreements with cooperating morticians to obtain specified services for their members at prices determined in advance.<sup>51</sup> The major organization representing the 140 member societies and over 500,000 individual members in the United States is the Continental Association of Funeral and Memorial Societies (CAFMS). These societies are staffed primarily by volunteers and pay operating expenses from membership

<sup>49</sup> The seller may be an individual funeral home which makes specific, prepaid arrangements with consumers or a company which specializes in selling prepaid funeral contracts. During the rulemaking proceeding, the sellers of prepaid funeral arrangements have been generally represented by the Pre-Arrangement Interment Association of America (PIAA), which participated as an interested party under Section 1.13(d)(3) of the Rules of Practice. See generally PIAA, *Proposal Identifying Issues of Fact*, II-C-246; *Rebuttal of PIAA, X-6*. The seller of funeral contracts acts as a broker between buyers and cooperating funeral homes. See P. Butler, Exec. Vics Pres., *Funeral Security Plans, Inc.*, D.C. Stmt.

<sup>50</sup> 1978 Staff Report, *supra* note 9, at 82.

<sup>51</sup> See *Handbook for Funeral and Memorial Societies*, D.C. Ex. 39, at II-1 and Appendix; R. Cohen, Exec. Sec., CAFMS, Tx 14.207-10.

fees (usually \$5 to \$15), contributions and bequests, fundraising events and interest on reserve funds.<sup>52</sup>

**E. The Funeral Consumer.** Perhaps the most important element in understanding the nature of the problems which have arisen in the funeral market is a thorough understanding of the funeral consumer—the person called upon to make the arrangements for burial or cremation of a spouse, parent, child, other relative or friend. The arrangement of a funeral is often a very expensive transaction. In 1977, annual payments by consumers to funeral homes and crematories exceeded \$3.4 billion.<sup>53</sup> A variety of related expenditures such as cemetery charges, flowers and obituary notices represented an additional expenditure of approximately \$1.8 billion, bringing the total amount which consumers spent on funeral related expenses to an estimated \$5.2 billion.<sup>54</sup> Reducing these numbers to a more personal basis, the average expenditure for a funeral was approximately \$2360.<sup>55</sup>

Despite the magnitude of the financial commitment consumers are called upon to make in arranging a funeral, several factors limit their ability to make a carefully considered decision. The funeral transaction is one with which most consumers are unfamiliar. Studies show that over 50% of the adult population, although having attended prior funerals, have never been called upon to arrange one. Yet another 25% of the adult population have only arranged one prior funeral.<sup>56</sup> Thus, close to three-

fourths of the population is either wholly inexperienced, or has had only one such experience. Unlike some transactions where consumers will have repeat encounters with sellers in the marketplace, the funeral consumer's purchase decisions are often once-in-a-lifetime decisions, or extremely infrequent ones.

In any transaction where consumers without substantial experience are called upon to make purchase decisions which carry with them substantial price tags, the potential for abuse exists. Other characteristics of the funeral consumer exacerbate this potential for marketplace problems. As discussed below, the two most important of these characteristics are the time-frame in which consumers must act and the psychological state of the persons who must make these important decisions.

While there is no such thing as an "average" or "typical" funeral consumer, some general findings can be made on their mental and emotional state. Often the funeral consumer is grief-stricken, particularly where a close relative or friend is involved; shock and confusion also attend such a death. Research by experts in the field suggests that many consumers feel guilt with respect to the deceased, and view the funeral as the final opportunity to "do right" by the deceased.<sup>57</sup> Others noted the characteristics of dependency and suggestibility following a death.<sup>58</sup> While funeral purchasers are far from helpless, such emotional strains make careful, rational decisions far more difficult than in the typical consumer purchase. In no other situation is a consumer called upon to make decisions about such an

expensive purchase under such difficult emotional circumstances.<sup>59</sup>

The need to make prompt decisions about removing the body of the deceased from the place of death and selecting the form of disposition to be employed also serve to distinguish this transaction from other consumer transactions. Where the arranger selects direct cremation or immediate burial, final disposition typically occurs within 24 hours of death. Even in the more traditional funeral setting, involving viewing and ceremony, the necessary decisions still must be made under tight time strictures, normally 24-48 hours from death.<sup>60</sup> Comparison shopping by consumers is not impossible under these circumstances—indeed, one goal of the rule is to facilitate this type of shopping even at the point of need. But under any objective evaluation, comparison shopping is rendered substantially more difficult.

Perhaps the most critical decision which a bereaved consumer must make, and the decision with the tightest time strictures, is whom to contact to remove the body from the place of death. The evidence shows that once a funeral home has been given possession of the body, rarely, if ever, will a consumer move that body to another funeral home in the same community.<sup>61</sup> Thus, in many situations, a consumer may be called upon to select a funeral home on extremely short notice, wholly unexpectedly. The consumer has no time to plan or to arrange finances, or to put the purchase off until a better time. If the home selected does not offer the particular goods or services desired by

<sup>52</sup> *Id.*

<sup>53</sup> U.S. Dep't. of Commerce, 1977 U.S. Industrial Outlook with Projections to 1985, at 498-99.

<sup>54</sup> See 1978 Staff Report, *supra* note 9, at 153-54, which lists related charges equal to \$968 per funeral, or approximately \$1.8 billion per year.

<sup>55</sup> *Id.*

<sup>56</sup> M. Simmons, A Comparison of Knowledge and Opinions of the Funeral Industry Held by Urban and Rural Consumers in Central New York State 39 (Table 3) (Jan. 1975), VI-D-4. Another survey by Dr. Richard Kalish, commissioned by the FTC staff, found similar results: 48% of the respondents had never before made funeral arrangements; another 29% only once before. D.C. Ex. 24, Table 7 (hereinafter cited as "Kalish Survey"). The evidence further shows that most consumers, even those who have arranged funerals, lack knowledge about prices and legal requirements. For example, in one survey of persons who had arranged funerals, 75% did not know about the legal requirements for embalming. See Maryland Citizens Consumer Counsel, D.C. Ex. 36, at 1-2. Similarly, in a 1965 survey, 78% of the respondents gave no response when asked what the average price of a funeral was in their community. An even higher percentage, 81%, gave no response when asked what the national average price of a funeral was. See R. Fulton, *Attitudes of the American Public Toward Death, in Death and Identity* 95 (1965). Other surveys also support the conclusion that consumers lack knowledge about funeral arrangements. See, e.g., Dr. C. Collette-Pratt, Sea. Ex. 1, Tx 5237-44 (survey of 400 persons shows little knowledge of what

constitutes funeral or what alternatives are); M. Stillwell, Tx 6032-33 (analysis of 139 responses shows general lack of knowledge about funerals by public).

<sup>57</sup> See, e.g., Rabbi E. Grollman, *Industry Consultant*, Tx 840; Sister J. Corcoran, Tx 7208-09; Dr. M. Bluebond-Langner, Ass't Prof. of Anthropology, Rutgers Univ., Tx 2372; J. Hammon, New York minister, Tx 463; P. Leslie, California minister, II-C-1221. See also W. Brown, Ohio Attorney General, II-C-1229; Dr. M. Blum, *The Attitudes and Reactions of a Limited Sample of South Dade County Residents Toward Funeral Arrangements*, D.C. Ex. 11, at 16 (hereinafter cited as "Blum Study"); Pine & Phillips, *The Cost of Dying: A Sociological Analysis of Funeral Expenditures*, 17 *Social Problems* 405, 413 (1970), VI-D-64.

<sup>58</sup> The testimony of experts describes the "hypersuggestibility" of bereaved individuals and their tendency to rely on the funeral director. See, e.g., Dr. N. Humphrey, President of the California Chapter of the National Association of Social Workers, D.C. Ex. 45, at 4; Dr. C. Wahl, psychiatrist psychoanalyst, Southern California Psychoanalytic Institute, Tx 8481; Dr. J. Quint Benoliel, Professor, University of Washington School of Nursing, Tx 5297 (citing I. Glick, R. Weiss, and C. Parkes, *The First Year of Bereavement* 104 (1975)); R. Ebeling, Tx, 6825.

<sup>59</sup> In the majority of cases, a person arranging a funeral is accompanied by another person, most frequently a member of the immediate family. Dr. R. Blackwell, *Funeral Services Attitudinal Survey*, D.C. Ex. 29 (hereinafter cited as "Blackwell Survey") (nearly 95% of the persons making arrangements were accompanied by one or more persons; 90% were members of the immediate family.) While support from the family members may help make arranging a funeral less difficult, other members of the immediate family are likely to be under much of the same emotional stress and other disadvantages as the person with primary responsibility for making the arrangement decisions.

<sup>60</sup> Several of the surveys asked consumers why they did not "shop around" before making a decision. Insufficient time was cited by 36% of the respondents in one (see D.C. Ex. 45, at A-6), 21% in another (Cohen, *Consumer Questionnaire Form A*, D.C. Ex. 39, at A-6 (hereinafter cited as "CAFMS Survey")), and between 15-28% in another (D.C. Ex. 11, at 47).

<sup>61</sup> See, e.g., R. Harmer, Bd. member, CAFMS, Prof., California State Poly. U., D.C. Ex. 7, at 6; D. Cornett, California funeral industry sales representative, X-1-124; L. Bowman, *The American Funeral* 52 (paperback ed. 1964). In addition, a family is likely to be in a very fragile emotional state in the first few hours after death so that any problem in locating or moving the body can cause additional anguish.

the consumer, essentially all options have been foreclosed.

Thus, the funeral transaction possesses some unique characteristics which differentiate it from most, if not all, other consumer transactions. The combination of emotional stress, lack of experience, lack of information and tight time strictures results in the funeral consumer being very susceptible to influence from the funeral director's advice and counsel.<sup>63</sup>

In the sections which follow, the specific unfair and deceptive practices which the Commission has found to occur in this market will be discussed together with an analysis of the Rule provisions adopted by the Commission to address them.

## II. The Rule Provisions

**A. Section 453.2—Price Disclosure.** Section 453.2(a) of the rule defines as an unfair act or practice the failure of a funeral provider to furnish information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies. There is substantial evidence in the rulemaking record that funeral providers have frequently failed to provide consumers with sufficient information about the prices of funeral goods and services. The record shows that funeral providers generally do not advertise prices, usually do not provide price information over the telephone, and usually do not provide consumers with information on the price of specific items of funeral merchandise and services. As we discuss below, this lack of information, particularly with respect to prices, restricts the consumer's ability to make an informed choice and impairs the efficient operation of the funeral market. The rule is designed to address these problems by requiring funeral providers to give consumers the information necessary for them to make an informed purchase decision.

**1. Unfair Acts or Practices.** Section 453.2 is being issued pursuant to the Commission's authority under Sections 5 and 18 of the Federal Trade Commission Act to proscribe unfair acts or practices. Section 18(a)(1) of the FTC Act states:

The Commission may prescribe \* \* \* rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of \* \* \* Section 5(a)(1)).

In December of 1980, the Commission prepared a formal statement analyzing the legal basis for the exercise of its Section 5 consumer unfairness jurisdiction. That document, prepared in

<sup>63</sup> See text and accompanying note 58, *supra*.

response to a request from the Senate Commerce Committee,<sup>63</sup> reviewed the Commission's prior exercise of its unfairness jurisdiction, and clarified the criteria under which this authority will be exercised in the future.<sup>64</sup>

Consumer injury is the focus of the consumer unfairness doctrine. In its recent statement, the Commission observed that:

Unjustified consumer injury is the primary focus of the FTC Act \* \* \*. By itself it can be sufficient to warrant a finding of unfairness.

\* \* \* The independent nature of the consumer injury criterion does not mean that every consumer injury is legally "unfair," however. To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.<sup>65</sup>

Earlier articulations of the consumer unfairness doctrine have also focused on whether "public policy" condemned the practice in question.<sup>66</sup> In its December, 1980 statement, the Commission stated that it relies on public policy to help it assess whether a particular form of conduct does in fact tend to harm consumers.

**2. The Unavailability of Price Information.—a. Price Advertising.** The organized funeral industry has historically opposed price advertising; indeed, the first NFDA code of ethics adopted in 1884 included a provision which prohibited newspaper advertising.<sup>67</sup> Moreover, state

<sup>64</sup> See Letter to the Commission, from the Honorable Wendell H. Ford and the Honorable John C. Danforth, Consumer Subcomm., Senate Comm. on Commerce, Science, and Transportation (June 13, 1980).

<sup>65</sup> See Letter from the Commission, to the Honorable Wendell H. Ford and the Honorable John C. Danforth (Dec. 17, 1980) (hereinafter cited as "Commission Unfairness Statement"). See also *Horizon Corporation*, 97 F.T.C. 464 (1981).

<sup>66</sup> See Commission Unfairness Statement, *id.*  
<sup>67</sup> See generally *FTC v. R. F. Keppel Bros.*, 291 U.S. 304, 313 (1934); Statement of Basis and Purpose, Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 *Fed. Reg.* 8324, 8355 (1964) (hereinafter cited as *Cigarette Rule SBP*); *All State Industries of N.C., Inc.*, 75 *FTC* 465, 491 (1969); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972) (citing *Cigarette Rule SBP*); Statement of Basis and Purpose, Preservation of Consumers' Claims and Defenses, 46 *Fed. Reg.* 53506, 53522 (1978); *Spiegel, Inc.*, 86 *FTC* 425, 443 (1975), *aff'd in part*, 540 F.2d 287 (7th Cir. 1976); Statement of Basis and Purpose, Advertising of Ophthalmic Goods and Services, 43 *Fed. Reg.* 23992, 24000 (1978) (hereinafter cited as "*Eyeglasses I SBP*").

<sup>68</sup> See *The History of American Funeral Directing*, *supra* note 36, at 475-76.

legislatures were encouraged by the industry to enact statutes or regulations prohibiting price advertising.<sup>68</sup> The National Funeral Directors Association (NFDA) and its state affiliates condemned price advertising in their codes of ethics. Two of the reasons cited for the prohibition were explained by NFDA's Executive Director in 1974:

\* \* \* Said funeral director advertising does not create new markets or expand old ones. It does not lower the cost of the "unit" to the public. At best, it shifts the market or helps firms maintain their portion thereof. NFDA has more than one member in most communities. How can it comply with the objectives of its constitution and "safeguard the common interests of its members" by fostering competitive weapons?

Price ads put the emphasis on price, disregarding the most important values and inner meaning of the funeral and the funeral director's role in American Society.<sup>69</sup>

Historically, funeral providers have not engaged in price advertising. This tradition has continued despite the elimination of most formal restraints. In 1968, the NFDA settled an antitrust suit brought by the Department of Justice and agreed to refrain from enforcing provisions against advertising in its own code of ethics and discontinuing its affiliation with state associations that had similar restrictions in their own codes.<sup>70</sup> Most states have eliminated legal prohibitions on price advertising of funerals. Moreover, to the extent that any such laws totally ban truthful advertising they are clearly violative of the first amendment.<sup>71</sup>

Nonetheless, there remains strong sentiment throughout the industry against price advertising. The opposition to price advertising expressed by many industry leaders during the rulemaking hearings suggests that considerable peer pressure exists to discourage price advertising.<sup>72</sup> Even in the absence of

<sup>69</sup> As recently as 1978, two states still had absolute prohibitions on price advertising, and four more had burdensome restrictions on it. See 1978 Staff Report, *supra* note 9, at 429, nn. 88-89.

<sup>70</sup> See *Antitrust and Monopoly Subcomm. Hearings*, *supra* note 1, at 244-46. Such ethical proscriptions of price advertising have been found in other contexts to violate the FTC Act. See, e.g., *Eyeglasses I SBP*, *supra* note 66.

<sup>71</sup> *United States v. National Funeral Directors Ass'n*, 1968 Trade Reg. Rep. (CCH) 72,529 (E.D. Wis. 1968).

<sup>72</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>73</sup> See, e.g., S. Waring, Treasurer, NFDA, Massachusetts funeral director, Tx 671-672; A. Hornberg, President, Funeral Directors Services Ass'n of Greater Chicago, Tx 4827; J. Curran, Pres., New York FDA, Tx 121; N. Greene, member, Virginia Board of Funeral Directors and Embalmers, Tx 14,184; C. Swartz, District Governor of Pennsylvania FDA, Tx 13,964; J. Couch, Illinois State Board of Examiners, Tx 2928; R. Ebeling, former

formal restraints, the rulemaking record indicates only a small amount of price advertising in a few areas of the country.<sup>73</sup>

b. *Failure to Disclose Prices for Individual Items.* Most consumers do not have information on costs when they go to the funeral home to make arrangements.<sup>74</sup> Even at the funeral home, however, many consumers do not receive detailed price information because of the pricing methods which prevail in the industry.

Statistics from funeral trade associations demonstrate that over half of all funeral providers use some form of package or lump-sum pricing.<sup>75</sup> Two variations of packaging are "unit" pricing, in which a consumer is quoted a

managing editor of Mortuary Management, Tx 6860; L. Peake, past Pres., Oregon FDA, Tx 5705; A. Mamary, Pres., Pennsylvania FDA, Tx 12, 883.

<sup>73</sup> See 1978 Staff Report, *supra* note 9, at 98, 412-413.

<sup>74</sup> Due to the absence of price advertising and the lack of previous experience, most consumers do not have prior knowledge about the prices charged either by particular funeral homes or by funeral homes generally. (See discussion in Section I(E), *supra*.) For example, one survey showed that consumers' estimates of the price for a standard adult funeral ranged from \$300 to \$10,000. Maryland Citizens Consumer Council, D.C. Ex. 36, at 3. These findings are confirmed by industry studies. See, e.g., Blackwell & Talarzyk, *American Attitudes Toward Death and Funerals* 34 (1974), VI-D-17 [hereinafter cited as "Blackwell & Talarzyk"].

Further, most consumers do not get specific price information before choosing a funeral home. In some instances, consumers felt that time constraints prevented them from getting comparative price information. See note 60, *supra*. In other instances, consumers attempted to get price information by telephone, but had difficulty in doing so, as discussed in section II(A)(2)(c), *infra*. But in most instances, consumers simply do not try to get price information. Instead, they choose a funeral home on the basis of factors other than price. Some of the more important factors are location and convenience, general reputation, ethnic or religious affiliation, knowing the funeral director personally, and recommendations of friends. Blackwell Survey, *supra* note 59. The same study showed that a majority (55%) of consumers already know which funeral home they would call in the event of a death.

Finally, in other instances, price information is irrelevant in choosing a funeral home, as in the case where there is only one funeral director in the community.

<sup>75</sup> 1976 Statistical Abstract, *supra* note 31, at 64-94 (approximately 65% are priced on a unit or bi-unit basis). See also Statement of R. Cohen, Exec. Secretary, CAFMS, D.C. Ex. 39, at 22 (hereinafter cited as "Cohen Statement") (1968 figures compiled by Batesville Casket Co. indicate that 84% of firms use unit pricing and 9% use bi-unit); R. Bishop, Director, Florida Consumer Services, Atl. Stmt., App. A, at 4 (Florida survey in 1974 found that 52% of funeral directors use unit or bi-unit pricing).

The widespread use of package pricing is partly explained by the industry's belief that it is simpler for consumers to use, that it is easier for funeral directors to use in determining prices, and that it enables funeral directors to make full traditional funerals available at a lower price. These asserted benefits are discussed in detail in the text, *infra*, II(A)(3)(d).

single price for a complete package of goods and services, and "bi-unit" pricing, in which the casket is priced separately from the other goods and services. Under the unit pricing system, the funeral provider quotes a single price for a package of services, merchandise and facilities which he or she has pre-selected for the consumer. Thus, a \$1200 funeral may include transporting the remains, embalming and other preparation, a casket, use of the funeral home facilities for one day of viewing, a ceremony, use of automotive equipment, the services of the funeral director, a guest book and acknowledgment cards. The key feature of the unit pricing scheme is that all of these goods and services are part of a pre-selected package for which there is a fixed price; none of the components is priced separately. The bi-unit method is similar, except that the cost of the casket is separate. Where either method is used, it is usually impossible for consumers to learn the cost of any of the individual components of the funeral package and to select individual items after considering their relative costs.

Under either form of package pricing, a significant number of funeral directors will not reduce the package price if any services or merchandise are unwanted or unused.<sup>76</sup> While some industry members reduce the price if the buyer does not want a part of the package,<sup>77</sup>

<sup>76</sup> See, e.g., California Funeral Director Association, L.A. Ex. 23 (survey of 291 funeral directors revealed that 15 percent do not deduct the embalming charge when the service is declined); A. Nix, Pennsylvania funeral director, Tx 12,922; W. Holman, Oregon funeral director, Tx 12,161; R. Lackey, Pres., Alabama chain of funeral homes, II-A-146, at 4. Surveys confirmed that no credit is given for declined services. L. Speer, Director, CalCAC, Tx 7693; C. Skeels, CAMP Consumer Action Project, Tx 6020 (6 of 10 funeral homes make no price reduction); State of Arkansas Office of the Attorney General, Funeral Survey, VI-D-12, at 4-5 (32 of 104 respondents would not make price reductions for declined services); Delaware Div. of Consumer Affairs, Press Release, VI-D-9 (small deductions are given but do not reflect savings to funeral director). Chosen Statement, *supra* note 75, at 25 (20 out of 101 respondents reported paying for services, merchandise or facilities they didn't want). See also Blackwell Survey, *supra* note 59 (3.7% of the consumers surveyed were required to pay for services which they did not want).

<sup>77</sup> See, e.g., State of Arkansas Office of the Attorney General, Funeral Survey, VI-D-12, at 4-5 (72 out of 104 firms provide discounts for unused items); Delaware Div. of Consumer Affairs, Survey of the Funeral Industry in Delaware, VI-D-9, at 2 (15 out of 25 firms allow price adjustments for declined items); H. Coates, State Bd. of Embalmers and Funeral Directors of Kentucky, Tx 3983-84; N. Heard, Pennsylvania funeral director, Tx 13,181; J. Kerr, Sec'y-Treas., Kentucky FDA, Tx 3024; R. Coats, Pres., Michigan FDA, Tx 3771; F. Walterman, Pres., Indiana FDA, Tx 5006; N. Greene, owner of Virginia funeral home, Tx 14,188; J. Altmeyer, West Virginia funeral director, Tx 11,775; B. Hirsch, Pennsylvania funeral director, Tx 12,538; A. Leak, Illinois funeral director, Tx 3875.

even those funeral directors who do give credits upon request usually do not disclose to consumers, prior to making a purchase decision, their option to decline services for a reduction in price.<sup>78</sup>

In addition, surveys indicate that consumers are often unaware of the range of goods which are theoretically available. For example, a number of surveys on the rulemaking record show that funeral directors do not display their least expensive caskets in the same selection room as their higher priced units.<sup>79</sup> The evidence also shows that when such merchandise is not displayed, consumers usually are unaware that it is available and usually do not ask about it.<sup>80</sup>

Further, while some funeral providers do quote prices on a more detailed basis,<sup>81</sup> many of them supply such information only after the purchasing decisions have been made, in the form of an itemized agreement or bill.<sup>82</sup> In

<sup>78</sup> While NFDA and NSM apparently recognized the right of the consumer to get a credit for an unwanted item, they do not suggest that such credits be disclosed affirmatively and in advance. See T. Clark, General Counsel, NFDA, VI-C-6, at 6; NSM Code of Ethics, D.C. Ex. 20. The proposed Guides submitted to the Commission by the major trade associations in 1980 were similarly vague on the funeral director's obligation to disclose all available credits in advance of any purchase decision.

Several funeral directors testified that they will reduce the price for unwanted items if asked, but that they do not inform consumers of this option. See, e.g., N. Greene, Virginia funeral director, Tx 14,188; E. Fitzgerald, New Mexico funeral director, Tx 6246; R. Ninker, Executive-Director, Illinois FDA, Tx 2687-88; B. Hirsch, Pennsylvania funeral director, Tx 12,533; H. Burton, Pres., consultant in before-need memorial estate planning, Tx 6680; R. Johnson, Indiana funeral director, Tx 12,652.

<sup>79</sup> See, e.g., Comments of Maine PIRG, II-C-1400, at 2 (one-third of 116 funeral homes failed to display least expensive casket); FTC Survey of Funeral Prices in the District of Columbia, VI-D-4, at 16 (14 out of 36 funeral homes did not display least expensive casket).

<sup>80</sup> See New York PIRG, Ex. 1 (N.Y.), at 8 (out of 127 respondents, only 28 realized there might be caskets other than those displayed; only 7 of the 28 asked if anything less expensive was available).

<sup>81</sup> A 1976 study of funeral homes indicates that 26% of 151,943 funerals included in the results involved a multiunit form of pricing and 7% of the funerals were priced on a triunit basis. See 1976 Statistical Abstract, *supra*, note 31, at 64, 74, 84, 94.

<sup>82</sup> The regulations of several states which require itemization specify only that itemized price information be given "at the time of arrangements." These regulations do not specifically direct that consumers be given itemized price information before they decide what to buy. See, e.g., New Jersey State Board of Mortuary Science, Rule 76(a): "Any person engaged in the practice of mortuary science shall, at the time funeral arrangements are made, compile a specific itemization of the charges which will be made for such arrangements." (emphasis added); New York State Department of Health, Rule 78.1(a): "Every person licensed pursuant to article 34 . . . shall furnish at the time funeral arrangements are made for the care and disposition of the body of a deceased person . . .

such cases, the consumer agrees to buy each item, but is still not given the prices associated with each item at the time he or she must decide whether or not to buy it.

(c) *Failure to Disclose Prices Over the Telephone.* The time constraints in arranging a funeral after a death has occurred make it difficult for consumers to get price information before choosing a funeral home. The initial call to a funeral provider to pick up the body of the deceased from the place of death necessarily must occur within several hours of death. Thus, in many instances, at least where death has not been anticipated, all efforts to get price information must occur in an extremely short time span.

Under these circumstances, the gathering of price information by telephone may often constitute the only practical way in which price information can be obtained before a funeral provider is selected.<sup>63</sup> The record reveals, however, that funeral providers often fail to provide price information over the telephone when asked. Individual consumers and consumer groups complained about difficulties they had experienced when they called a funeral home and asked about costs.<sup>64</sup> Consumer groups and state officials in numerous states reported substantial resistance or flat refusals when they

an itemized list of the services and merchandise to be furnished." [emphasis added]; Virginia Board of Funeral Directors and Embalmers, Article XVII, Paragraph 3.A: "Every funeral service licensee . . . shall furnish to the party contracting for such funeral arrangements, at the time such arrangements are made if such party be present . . . a written itemized statement of any and all charges." [emphasis added].

<sup>63</sup> Of course, many consumers do not try to get price information by telephone prior to choosing a funeral home. See discussion at note 74, *supra*. And it is reasonable to believe that funeral directors who refuse to provide price information when asked, as discussed in text and accompanying notes 84-85, are not likely to volunteer this information.

<sup>64</sup> See, e.g., L. Pratt, Washington consumer, II-B-1153; J. Pagdin, Florida consumer, II-B-1534, S. Flanders, Illinois consumer, Tx 4668; E. Sheehan, District of Columbia consumer, Tx 14,666-67; L. MacDonald, NRTA/AARP, Tx 2047. Also, several memorial society representatives cited consumer experiences of unsuccessful attempts to obtain information by the telephone. E. Knapp, Pres., Memorial Society of Metropolitan Washington, II-C-909; L. Tolliver, Pres., Blackhawk Memorial Society, X-1-82.

A number of funeral directors and industry leaders testified that the reason funeral directors could not give information over the telephone was that such information would be confusing, misleading, and deceptive. See, e.g., C. Lightner, former Pres., NFDMA, Tx 10,391; H. Mayes, Oklahoma Funeral Directors Association, Tx 8896; A. Leak, Ill. funeral director. See also NFDA Post-Record Comment, XIV-848, at 9.

attempted to gather price data by telephone for survey purposes.<sup>65</sup>

After the record was closed in this proceeding, data became available which suggested that only a small percentage of funeral directors refuse to answer requests for price information over the telephone.<sup>66</sup> The data seemed to suggest either that the findings of the studies contained in the record were in error, or that funeral directors had substantially changed their practices.<sup>67</sup> After a thorough review of the data, and a presentation of differing staff opinions, the Commission decided not to reopen the record to include the data.<sup>68</sup> The

<sup>65</sup> See, e.g., D. Hoskins, Chairman, Pennsylvania Ass'n of Funeral and Memorial Societies, Tx 13,988; L. Speer, Director, California CAG, Tx 7,717-18; R. Nesoff, Director of Investigation, State Temporary Comm'n on Living Costs and the Economy, Tx 329 (investigator posed as consumer calling for price information but funeral homes refused); M. Edelstein, attorney, New York City Dept of Consumer Affairs, Tx 163 (three of twelve mortuaries called would not provide price information); R. Pooler, Executive Director, New York State Consumer Protection Bd., Tx 38 (found price information is rarely given on the telephone); NYPIRG Ex. 1 (N.Y.), at 2 (testimony of B. Kronman, research associate) (two-thirds of sixty funeral homes called refused or were uncooperative when asked for price information); Indiana PIRG Reports, A Death in the Family, VI-D-8 at 1; Maine PIRG, II-C-1400, at 4; O. Mathews, Maryland Citizens Consumer Council, Tx 14,053; S. Chenoweth, Director, Minnesota Office of Consumer Services, Tx 3123-24; J. Brown, Assoc. Director, Center for Consumer Affairs of the University of Wisconsin Extension, Tx 4306-07.

One possible factor influencing the funeral directors' response is the advice given by NFDA's General Counsel to its state affiliates that funeral directors not cooperate with any price surveys during the pendency of the Commission's rulemaking proceeding. NYPIRG Ex. 3 (N.Y.). While this advice apparently affected returns on written price surveys, see Staff Report, *supra* note 9, at 342-344, its effect on telephone price requests is clear because it would not necessarily be apparent to the funeral director that the questions were part of a price survey.

<sup>66</sup> In 1979, the staff, as part of an on-going program intended to measure the impact of trade regulation rules, began work on an impact evaluation baseline study ("BLS"). The BLS was not intended to be part of the rulemaking record, but was rather intended to gather pre-rule data which could be used as a basis for comparison with a future study to be conducted after the rule had gone into effect. The study was a survey of a national mail panel of consumers, asking for information about funerals that they had arranged in the last year. The data instrument was designed by Market Facts, an independent consultant, along with Commission staff, and information was collected by Market Facts. Due to various delays in the final promulgation, the data from the BLS became available shortly before the Commission's final consideration of the rule. The BLS, and all staff memoranda regarding its findings, were made available to the public but were not made part of the rulemaking record.

<sup>67</sup> The BLS suggested that only 6 percent of the requests for price information over the telephone were rejected.

<sup>68</sup> At its public meeting on July 28, 1982, the Commission heard presentations and considered five memoranda from different staff members, all of which presented different positions. Some staff felt that the record did not need to be reopened because

data were not sufficiently reliable to require the Commission to reopen the record at this stage of the proceeding.<sup>69</sup> Further, the data confirmed that some funeral directors refuse to provide price information over the telephone on request.<sup>70</sup> Perhaps more importantly, the data confirmed the basic finding that the vast majority of consumers do not get price information over the telephone before choosing a funeral home.<sup>71</sup> One of the major purposes of the rule is to signal to those consumers who did not think to ask or were inhibited from asking, that price information is available at this critical moment of decision. That disclosure, and the requirement that price information be given, is part of the remedial scheme which the Commission has chosen to

the data were unreliable and did not contradict the record. Other staff felt that the data were reliable and called into question findings of the rulemaking record. All of these staff memos were made available to the public.

<sup>69</sup> The specific questions in the questionnaire were ambiguous, and it was impossible to determine whether all the respondents understood the questions and responded in the same way. A subsequent validation study, for example, showed significant variations with the results found in the original baseline survey, suggesting confusion on the part of respondents. The Commission agreed with the staff analysis that it was impossible to draw any firm conclusions from the study. Indeed, the very breadth of staff opinion on the reliability of the data strongly suggested that the questions of ambiguity and meaning could not be satisfactorily answered by further public comment.

Generally, the Commission is not required to consider relevant evidence that may be generated after the close of the rulemaking record, for the reason that administrative proceedings would otherwise never end. Vermont Yankee Nuclear Power Corp. v. NRD, 435 U.S. 519, 554-555 (1978) (quoting ICC v. New Jersey, 322 U.S. 503, 514 (1944)). The Commission is required to reopen the record for new evidence only when there has been a change in circumstances that is "not merely 'material' but rises to the level of a change in the 'core' circumstances, the kind of change that goes to the very heart of the case." American Optometric Association v. FTC, 626 F.2d 696, 907 (D.C. Cir. 1980), (quoting Greater Boston Television Corp. v. FCC, 463 F.2d 268, 283 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972)).

The data above, in the Commission's consideration, does not challenge the findings of the record because it lacks the requisite certainty needed to rebut the record. While relevant, the serious questions about its reliability render the data less material than otherwise would be the case.

<sup>70</sup> The BLS suggested that a minimum of 6% of funeral directors refused to answer requests for price information. While that finding was a lower figure than that found in the record, the record also showed that a significant number of funeral directors did provide price information on request. See, e.g., NYPIRG, Ex. 1 (N.Y.) (1% of sixty funeral homes gave price information).

<sup>71</sup> The data indicated that at the very most, some 35% of those telephoning either asked or were offered price information of some sort over the telephone. (Out of 377 persons who telephoned a funeral home, 72 asked for information on arrangements and prices, while 61 had this information offered to them by the funeral director.)

induce greater price competition and consumer choice in this marketplace.

3. *Consumer Injury Due to Inadequate Price Information.* The failure of funeral providers to furnish basic price information results in substantial economic injury to funeral purchasers. This economic injury takes two related forms: consumers purchase items that they may not want or use, and they pay higher than competitive prices for items they purchase.

(a) *Paying for Unwanted Items.*

Package pricing leads consumers to buy items they may not want or use in several ways. As noted above, many funeral directors do not reduce the price of a package even when a consumer asks to have items dropped from the package. By bundling all of the pre-selected goods and services together, the funeral provider is effectively forcing the consumer to buy items as a condition of providing a necessity that only he can provide: disposition. This injury, however, stems less from the lack of price disclosure than from the funeral director's refusal to unbundle the package. Consequently, it is discussed in more detail in Section II(C), *infra*.

Even when funeral directors are willing to unbundle the package upon request, package pricing still causes consumer injury because it denies consumer choice. When a funeral director is willing to give a reduction in price for unwanted goods included in the package, quoting a single price for the full package obscures the fact that the package actually consists of components which may be individually chosen. Further, by the funeral provider's failing to disclose that unwanted components may be declined, consumers are simply likely to assume that the package is not subject to negotiation because all items are necessary or required.<sup>92</sup> Given the funeral purchaser's lack of prior experience and knowledge, and the emotional and time pressures attending the decision, the Commission believes that many funeral purchasers will simply not think to ask whether the

package can be broken into parts or to question aggressively the funeral director's offerings.<sup>93</sup> Consequently, consumers are injured in the absence of a disclosure that parts are declinable because they are likely to assume that there are no choices to be made. As a result, they buy the packages, including items that they would not have bought had they been given information that purchasing the components was optional. In addition, denying consumers information on the prices of the parts further injures consumers because they have no idea how much can be saved by declining the components. Lacking such price information, consumers cannot make an informed purchase decision.

Direct evidence of the extent of this injury, through consumer complaint surveys, is difficult to obtain precisely because consumers are often not aware that they had any choice to make.<sup>94</sup> Further, any systematic observation of consumer behavior related to pre-sale itemized disclosures has not been possible, primarily because so few funeral homes provide such information.<sup>95</sup>

<sup>93</sup> See generally Section I(E), *supra*; Dr. J. Quint Benoliel, Professor, Univ. of Washington School of Nursing, Tx. 5297, citing I. Glick, R. Weiss, & C. Parke, *The First Year of Bereavement* (1975). A study of the funeral industry in Minnesota revealed that only consumers who aggressively questioned funeral directors about the availability of limited services were likely to be informed of all the available options. S. Chenoweth, Director, Minn. Office of Consumer Services, Tx. 3116.

<sup>94</sup> Nevertheless, a number of consumers recite instances in which they were aware that they were being required to pay for goods or services (such as limousines, visitation rooms, and use of the chapel) that were either not wanted or not used. See e.g., Comments in category II-B at 54, 164, 366, 496, 829, 1048, 1108, 1266, 1404, 1486, 1893, 1967, 1984, 2003, 2013, 2034, 2240, 5967, and testimony, S. Ross, Washington consumer, Tx 5274-75.

<sup>95</sup> At the time the hearings were conducted, only four states had enacted laws or regulations requiring mandatory price itemization. See 1978 Staff Report, *supra* note 9, at 357, n. 77. (Three other states required itemization to be given only on request, and one other state required only a limited breakdown on the package price.) But even in those four states, the funeral director was not required to give consumers the price disclosures before the decisions were made, but only a written record of what had been agreed to. As a consequence, no state had a regulatory price disclosure scheme similar to the FTC's proposed rule.

Since that time, a number of states and localities have passed regulations which are more similar to the FTC's proposed rule and which might be suitable for comparative studies. While such studies might be helpful, the Commission believes that the additional time and expense which would be required to conduct such studies and reopen the rulemaking record is not justified and would not add substantially to the record. The Commission is not required to reopen the record to consider relevant evidence which has become available after the record has closed, *ICC v. New Jersey*, 322 U.S. 503, 514, (1944), unless the evidence suggests a "change of circumstances" going "to the very heart of the case." *American Optometric Association v. FTC*, 626 F.2d 896, 907 (D.C. Cir. 1980).

Nevertheless, the record establishes significant consumer injury. Some indication of the extent of the injury can be ascertained from attitudinal studies and other surveys, and comments and testimony from individual consumers, consumer groups and experts indicating that, given price and option information, a significant number of consumers would use such information to make informed choices and would often choose to decline items usually included in the package funeral.<sup>96</sup>

A number of consumer surveys show that consumers find cost to be highly important in making funeral arrangements.<sup>97</sup> It is not surprising, then, that large majorities of consumers want detailed price information about funerals<sup>98</sup> and want funeral prices to be quoted on an itemized basis.<sup>99</sup> Consumers believe that such detailed price information will be useful to them in making funeral arrangements.<sup>100</sup>

Comments submitted by interested parties in 1979 and 1981 offered parties an opportunity to bring to the Commission's attention any such fundamental change since the hearings conducted in 1976. Comments submitted at that time indicated that no significant changes had taken place.

<sup>96</sup> Many consumers, of course, want the package funeral and are not interested in the prices of the parts of the package. Such consumers are not injured by the funeral director's failure to disclose that components of the package are optional and the price of those components, but only because their wants happen to coincide with the funeral director's offering.

<sup>97</sup> See, e.g., Blum Study, *supra* note 57; CAMP Survey, *supra* note 92.

<sup>98</sup> See, e.g., CAFMS Survey which found that a large majority of consumers surveyed supported required price disclosures. CAFMS Survey, *supra* note 60, at A-7 (Form A, Question 22). A survey of over 1000 consumers sponsored by the Casket Manufacturers Ass'n revealed that two-thirds of consumers responding indicated a preference for detailed funeral price quotation. Blackwell and Talarzyk, *supra* note 74, at 34. While these and other surveys on the record have methodological limitations which prevent projection to the national population, these surveys, combined with others and the extensive written comments and oral testimony, show that consumers typically desire more information.

The desire for more detailed price information also was expressed by a great many individual consumers during the rulemaking proceeding. See, e.g., Comments, in category II-B at 97, 240, 305, 529, 541, 597, 706, 726, 736, 780, 796, 916, 1191, 1316, 1562, 1565, 1571, 1589, 1599, 1823, 1834, 1850, 2042 and 2080; and Testimony, see, e.g., W. London, American Legion, Tx 3465.

<sup>99</sup> See, e.g., Blackwell and Talarzyk, *supra* note 74, at 34-35 (CMA survey revealed that two-thirds of respondents preferred pricing quotation that provides some detail on individual components and over one-half of respondents expressed preference for itemization); Blum Study, *supra*, note 57 (survey of South Florida residents indicated that over 90% of respondents favored regulation requiring a funeral director to provide specific information about the price of each item of service and merchandise); Cohen Statement, D.C. Ex. 39, *supra* note 75 (94% of consumers surveyed desired funeral prices to be quoted on an itemized basis).

<sup>100</sup> See Blum Study, *supra* note 57; CAMP Survey, *supra* note 92; Humphreys, D.C. Ex. 45.

<sup>92</sup> J. Todd, Arkansas Funeral Director, Tx 8753; "Why must a package funeral be bought if you only want to be cremated immediately?" E. Given, Michigan consumer, II-B-150. In addition, since many consumers are ignorant of the laws and cemetery requirements applicable to funeral arrangements, they are likely not to question the inclusion of certain items in a package. For example, according to one study, 51% of the consumers surveyed believed embalming was required by law. The Central Area Motivation Program, Consumer Action Project Survey, Sea. Ex. 14 (hereinafter cited as "CAMP Survey"). It can be inferred from this that many of these consumers would, therefore, not think to question the inclusion of embalming in a funeral package.

Evidence shows that, if given the choice, consumers would not buy various parts of the "average" package funeral ranging from rates of 10 percent (for embalming) to 43 percent (for the use of another family car).<sup>101</sup> Many industry leaders expressly opposed itemization at least in part for the fear that consumers, if given the choice, would not buy items usually included in the package.<sup>102</sup>

The aggregate injury caused by consumers purchasing items that they do not want and would not buy if not required to do so, or if they had itemized pre-sale price information, is substantial. Evidence on the record shows that various optional items included in the funeral package are expensive: for example embalming (\$50-\$150),<sup>103</sup> and limousines (\$15-\$75).<sup>104</sup>

(b) *Paying Supracompetitive Prices.* The second source of consumer injury is that the lack of adequate price information may be causing consumers to pay higher than competitive prices for funerals.

Information from a variety of sources has led the Commission to conclude that this economic injury exists. Included in these sources are economic studies of the funeral market, which suggest the existence of consumer injury, because of "a striking absence of price competition in the funeral industry."<sup>105</sup> Industry members have also admitted that funeral directors do not compete on the basis of price at the point of sale.<sup>106</sup> Economic analyses on the record have concluded that price competition in the funeral market is severely inhibited because consumers do not have adequate access to price information.<sup>107</sup> Without the pressure of active price competition, prices for funeral services can be set higher than a competitive equilibrium price.<sup>108</sup>

Information plays an important role in the operation of an efficient market. In particular, the significance of price information to a competitive market is

well-documented in the economic literature.<sup>109</sup> Consumer ignorance about prices will permit sellers to charge higher than competitive prices, even in a market with numerous sellers.<sup>110</sup> The reason for this result is that sellers will gain few customers by lowering prices if consumers have difficulty obtaining price information. Inadequate price information, therefore, serves to give even a large number of small sellers a degree of market power. These theoretical observations have been confirmed by a number of empirical studies in other markets.<sup>111</sup>

Exactly why the market has failed to generate price information is impossible to say with certainty. Evidence in the record suggests that some of the unique structural and demand characteristics of this industry may provide some explanations.

First, there is the tradition of restraints on price advertising noted above.<sup>112</sup> Although formal restrictions against price advertising have generally been eliminated, many industry leaders and members continue to view price advertising as unprofessional. Thus, industry custom and substantial peer pressure serve to inhibit competition by advertising.

The second factor which may operate to distort normal market incentives is the nature of demand in the industry. Total demand for disposition is a function of the death rate. Economists studying the funeral industry point out that total demand for disposition in all forms is extremely inelastic, i.e., the number of funerals is not responsive to changes in price.<sup>113</sup> The demand for the

services of any individual funeral home or for particular forms of disposition, however, may be price-elastic, thereby giving each firm an incentive to lower prices to increase sales. Lower prices and aggressive marketing, however, will not expand the number of consumers in the market; a funeral home can increase the number of funerals it performs only by taking business away from its competitors. Since competing firms are likely to respond with lower prices, the result is that prices are reduced and sales do not increase, thereby reducing total revenues. The funeral home is better off, therefore, avoiding price competition. One economic analysis of the funeral industry concluded that "the funeral director's awareness of the effects of price competition in this demand-inelastic industry" is a major reason for the lack of price advertising.<sup>114</sup> This finding can be contrasted with the experience in professional markets where advertising has flourished after the removal of formal price advertising restraints. For example, studies in the optical market, where perhaps the most professional advertising has occurred, show that demand is price-elastic.<sup>115</sup>

In addition to these two factors which blunt funeral providers' incentives to provide price information, certain aspects of the market make it difficult for new firms to enter and compete. The evidence suggests that a variety of nonprice factors influence a consumer's choice of funeral provider, such as family tradition, religious or ethnic affiliation, and reputation of the firm.<sup>116</sup> These consumer preferences give established firms in the market a distinct advantage over potential entrants. In an industry with a large number of small sellers and significant consumer loyalty, the prospects for attracting a large enough clientele may appear uncertain at best. As a result,

<sup>114</sup> *Id.* at 41. The ability of funeral directors to enforce an informal understanding not to compete on the basis of price is made easier by the fact that most funeral homes have very limited competition. Nearly 70% of all funeral homes have fewer than 4 competitors. V. Pine, Findings of the Professional Census (1971), D.C. Ex. 4.

<sup>115</sup> See *Regulating Through the Professions*, *supra* note 111, at 436-440. See also FTC Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry 31 (1980).

<sup>116</sup> Various consumer surveys on the record examined this issue. See, e.g. N.Y. Ex. 1(I) (N.Y.); Kallish Survey, *supra* note 56, at Table 8; "Funeral Services Attitudinal Survey," D.C. Ex. 29 (Odeasky) at Question 3; G. Reifland Prof. of Sociology, Montana State Univ., D.C. Stmt. at 4. Funeral industry spokesmen also have pointed to the relatively low priority of price as a factor in selecting funeral homes. See e.g., R. Blackwell, Tx 13,707.

<sup>109</sup> See, e.g., Scitovsky, *Ignorance as a Source of Oligopoly Power*, 40 Am. Econ. Rev. 48 (1950); Stigler, *The Economics of Information*, 69 J. of Political Economy 213 (1961); Salop, *Information and Monopolistic Competition*, 66 Amer. Econ. Rev. 240 (1976).

<sup>110</sup> See, e.g., Salop, *Information and Monopolistic Competition*, 66 Am. Econ. Rev. 240 (1976); Grossman and Stiglitz, *Information and Competitive Price Systems*, 66 Am. Econ. Rev. 246 (1976).

<sup>111</sup> See, e.g., J. Begun, "Professionalism and the Public Interest: Price and Quality in Optometry" (Ph. D. dissertation, University of North Carolina, June, 1977); Bureau of Economics, Federal Trade Commission, *Economic Report—Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (Sept. 1980); J. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs*, (American Enterprise Institute for Public Policy Research, Center for Research on Advertising, Domestic Affairs Study 44, 1978); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & Econ. 337 (1972); Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421 (1975) (hereinafter cited as "Regulating Through the Professions").

<sup>112</sup> See Part II(A)(2)(a), *supra*.

<sup>113</sup> See, e.g., Kissel, *supra* note 35, at 23.

<sup>101</sup> Blackwell Survey, *supra* note 59.

<sup>102</sup> See, e.g., H. Coates, member, State Bd. of Embalmers and Funeral Directors of Kentucky, Tx 3981; C. Nichols, Director, Nat'l Foundation of Funeral Service, X-24, at 5-6.

<sup>103</sup> See text and accompanying note 349, *infra*.

<sup>104</sup> See M. Lennon, Tennessee consumer, II-B-3346; FTC Survey of Funeral Prices in the District of Columbia, IV-D-3, at 27 (1973).

<sup>105</sup> Blackwell article, *supra* note 34, at 78.

<sup>106</sup> D. Rollings, Executive Director, OGR, XIX, at 80 (1981 oral arguments).

<sup>107</sup> See, e.g., A. Rappaport, *An Analysis of Funeral Service Pricing and Quotation Methods* (1971), III-1-2, at 4-5 (hereinafter cited as "Rappaport").

<sup>108</sup> Some commentators see evidence of supracompetitive prices in the excess capacity of the industry. See, e.g., Blackwell article, *supra* note 34, at 82; Rappaport, *supra* note 107; Kissel, *supra* note 35.

entry by low-cost providers is discouraged.<sup>117</sup>

(c) *Injury is Unavoidable.* The consumer injury caused by the lack of adequate price information—paying for items which consumers may not want, and paying for funerals at supracompetitive prices—are harms which are not reasonably avoidable. A consumer can only avoid paying for items in a package he does not want if he or she is knowledgeable enough to ask whether they are optional. In the funeral transaction, it is not reasonable to put that burden on the funeral consumer, who typically lacks prior experience and prior knowledge about laws and options, and who must decide under circumstances of limited time and emotional strain.

The only way a consumer could avoid such harm would be to compare prices and offerings before choosing the funeral home. Yet, because of time constraints and other factors, most people do not get such information. Further, the record indicates that even where some consumers have tried to get price information over the telephone, they had difficulty in obtaining it.

Finally, it appears that the market forces are insufficient to generate the needed price information. Due to some unique structural and demand characteristics of this market, there appear to be significant obstacles to price competition. Further, the usual market discipline is lacking. In most cases, consumers who have unnecessarily bought items because they lacked sufficient price information will not be dissatisfied because they will not know that such choices were denied. Given these factors, it is unlikely that the market will correct the failure to provide sufficient price information by itself.

(d) *Countervailing Benefits.* In considering whether a practice is unfair, the Commission must determine that there is net injury, *i.e.*, that the injury caused by the practice is not outweighed by countervailing benefits.<sup>118</sup> Many funeral providers and the major trade associations believe that package pricing has important benefits.<sup>119</sup>

<sup>117</sup> The difficulty of building a clientele has been cited as the primary barrier to entry in the funeral industry. See Kissel, *supra* note 35, at 23. While all states require licensure for morticians, there is no evidence to suggest that the entry barriers posed by those licensure schemes serve to exclude new entrants.

<sup>118</sup> Commission Unfairness Statement, *supra* note 64.

<sup>119</sup> As noted previously, however, most trade associations recognize that consumers are entitled to a "reasonable adjustment" when they decline items; only a few funeral providers defend the required purchase of all parts of the funeral package

One suggested benefit is that package pricing is easier for most consumers to use, since most consumers are interested only in the full traditional funeral and how much the total will cost.<sup>120</sup> Undoubtedly, many consumers will not be interested in declining parts of the traditional funeral package, and those consumers would be interested primarily in the total cost in choosing which funeral package to buy. Itemization, however, does not impose any burdens on such consumers. If consumers are not interested in choosing individual components, they are free simply not to use the price information and to select on the basis of the total cost for all of the components. Further, the rule also allows funeral providers to offer package prices. While itemization thus does not interfere with the ability of those consumers who are interested only in packages to choose the funeral package they want based on the total cost, package pricing, in contrast, precludes consumers who are not interested in the full funeral from making informed choices.

Funeral providers also argue that package pricing, as an accounting method, is an easier method to use than itemization for setting prices. Since itemization is a more complex accounting system, funeral directors may be required to seek accounting assistance and to spend more time in tracking costs and in setting prices.<sup>121</sup> These increased costs, it is suggested, will be passed on in the form of higher prices to consumers. The Commission considers the arguments that the rule will increase costs, and thereby raise consumer prices, in detail in Section IV, *infra*. There, the Commission determines that, while the rule will impose some compliance costs, those costs are modest and are outweighed by the benefits of the rule.

By far the most strongly pressed argument in favor of package pricings, however, is the contention that package pricing enables funeral providers to offer funerals at lower prices than they would be required to charge under itemization.<sup>122</sup> The various arguments

as being beneficial. See, *e.g.*, D. Hanks, Missouri funeral director, II-B 5159; I. Fisher, Mass. funeral director III-H-15, (suggesting that package pricing, as an accounting method, does not permit them to deduct charges for unwanted items).

<sup>120</sup> See, *e.g.*, NFDA Post-Record Comment, XIV-848, at 70, 79, 482; NSM Post-Record Comment, XIV-849, at 93, 96.

<sup>121</sup> See, *e.g.*, NFDA Post-Record Comment, XIV-848, at 488.

<sup>122</sup> See, *e.g.*, NFDA Post-Record Comment, XIV-848, at 483-493; NSM Post-Record Comment, XIV-849, 95-107.

that itemization will lead to higher prices are discussed in detail in Section V(B). As noted there, the Commission finds that, while itemization provides an opportunity for funeral directors to choose to raise their prices, there is no reason why prices would necessarily be lower under package pricing than under itemization.

The Commission finds that the countervailing benefits of package pricing are not significant. While package pricing is probably a less costly accounting method than itemization, the increased costs caused by switching to itemization, as discussed in detail in Section V(B)(2), *infra*, are modest and outweighed by the far greater benefits expected by increased price competition and greater consumer choice.

(e) *Public Policy.* Finally, as discussed in Section II(A)(1), *supra*, the Commission also looks to established public policy for confirmation (or denial) of its finding that a practice is unfair. While the primary focus of the Commission's decision will usually be a direct analysis of the injury caused by a challenged practice, the decisions of other public bodies addressing similar issues will also be taken into account.

In this case, there is clearly no public policy *against* the disclosure of itemized price information.<sup>123</sup> To the extent that there is any clear public policy at all, as evidenced by recent state laws and legislation, it appears to support the Commission's decision.<sup>124</sup> While this might not be sufficient to rest a finding of unfairness on public policy alone, it provides some support for the Commission's own analysis of the consumer injury.

(f) *The Failure to Disclose Itemized Information is an Unfair Practice.* Based on the above evidence, the Commission concludes that the failure of funeral providers to furnish information on the prices of specific funeral goods and services is an unfair practice in violation of Section 5 of the FTC Act. We find that the practice imposes substantial unjustifiable consumer injury.

(g) *Remedial Requirements.* To remedy the unfair and deceptive failure of funeral providers to furnish information on the price of specific funeral goods and services, § 453.2(b) of the rule requires funeral providers to: (1) Provide price information over the

<sup>123</sup> Indeed a policy against disclosure would be hard to reconcile with the general public policy favoring informed consumers and the efficient operation of the free market. See Trade Regulation Rule concerning the Labeling and advertising of Home Insulation, 16 CFR Part 460.

<sup>124</sup> See Fla. Stat. Ann. § 470.035 (West 1979); see also note 82, *supra*.

telephone; (2) furnish consumers with a written price list containing prices of the various individual items and services offered; and (3) give purchasers a written statement identifying the goods and services selected and their individual prices.

The remedies selected by the Commission to cure the lack of price information must bear a "reasonable relationship" to the unfair practice found to exist. In *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946), the Supreme Court set forth the standard for review of remedial provisions of Commission adjudicative orders: "[T]he courts will not interfere except where the remedy selected has no reasonable relationship to the unlawful practices found to exist." Periodically the Supreme Court has reaffirmed the Commission's remedial discretion and the limited role of the reviewing Court. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. National Lead Co.*, 352 U.S. 419, 428-30 (1956); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392-95 (1965).

In exercising this remedial authority, the Commission has not been limited to proscribing only the precise practices found to exist, but rather has been free to "close all roads to the prohibited goal." *Ruberoid*, *supra*, 343 U.S. at 473; *Colgate-Palmolive*, *supra*, 380 U.S. at 395. Cf. *International Salt Co. v. United States*, 332 U.S. 392-400 (1947); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 698 (1978).

The Commission's discretion to formulate an appropriate means of preventing the unfair or deceptive acts or practices found to exist also takes into account the nature of rulemaking, which involves "prediction[s] based upon pure legislative judgment"<sup>125</sup> and "judgmental or predictive"<sup>126</sup> determinations such as those involved in fashioning remedies. In making such determinations, the Commission is "entitled to rely on its judgment, based on experience"<sup>127</sup> as to the appropriate remedy to impose in the rule.

The Commission has designed the remedial requirements in § 453.2(b) to restore consumer choice, enhance the operation of market forces and cure the market failure which has occurred in the funeral industry. In the Commission's judgment, the requirements will achieve this result by giving consumers access to price information at a time and in a form

which will permit them to consider price when making purchase decisions. Increasing the ability of consumers to locate funeral services whose mix of price and quality they prefer and to express those preferences in the market gives sellers an incentive to compete.

The itemized price list addresses the failure of a substantial portion of the industry to provide information on the prices of components of a funeral package. It will enable consumers to weigh the costs and benefits both of the various alternatives to a traditional funeral and of the individual items which they might select for use with a traditional funeral. The itemized list also will provide consumers with relatively standardized price information, while still allowing funeral providers to provide any additional price information they wish to. The second disclosure requirement, the telephone price disclosure requirement, addresses directly the record evidence that funeral directors have failed to respond to telephone inquiries about prices. Consumers will thus have the ability to call several funeral homes and compare their offerings before deciding where to purchase. In this manner search costs can be significantly reduced. In many instances, obtaining price information by telephone represents the only practical opportunity for comparison shopping, since many options are foreclosed once the funeral home is closed. The third disclosure requirement, the itemized statement of services selected, is designed to complement the price list by ensuring that consumers are not charged for items they did not select.

The effectiveness of the rule is clearly dependent on the extent to which consumers actually use the information provided to them. This does not mean, however, that all consumers must comparison shop in order for the market to realize the benefits of price competition. Economic theory indicates that consumers who seek and use price information will benefit uninformed consumers.<sup>128</sup> Thus, as long as some consumers comparison shop, the market should respond. The discussion which follows will describe in more detail how the remedial requirements in the rule will assist consumers during selection of a funeral home and while comparing alternative funeral arrangements in the funeral home.

(1) *Operation of Price Lists.* At the funeral home, consumers will receive one or more price lists. The rule itself identifies three separate lists. One is a "general price list", specified by

§ 453.2(b)(4). The second is a "casket price list", specified by § 453.2(b)(2). The third is an "outer burial container price list," specified by § 453.2(b)(3).

However, the rule also permits funeral providers to merge either or both of the latter two lists with the general price list, if this is more convenient and if the information provided is the same.

In any event, consumers would have to be given the general price list for retention upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services. The list would be present for consultation while the consumers were considering what to purchase. It would show them the prices for 16 basic goods and services which they might wish to use.<sup>129</sup> The general price list would have to be printed or typewritten so that it would be available for retention by consumers.

In addition to the general price list, there would be two other price lists containing information on specific merchandise. The casket price list would show the retail prices of all caskets and alternative containers offered which did not require special ordering. The outer burial container price list would provide similar price information about burial vaults and grave liners. Each of these lists would have to be given to consumers upon beginning discussion of, but in any event before showing the merchandise they list. Unlike the general price list, these lists would not have to be offered to consumers if caskets or outer burial containers happened not to be discussed or shown. Similarly, the lists do not have to be printed or typewritten in a manner which enables them to be given to consumers for retention. Rather, the rule only requires that they be available in the funeral home. Because of this, funeral providers would be free to use alternative formats, such as charts or notebooks.<sup>130</sup>

The principal concern expressed about the operation of these lists was that they would drive up funeral costs because they require funeral directors to itemize prices.<sup>131</sup> For reasons discussed extensively in Part V of this Statement, the Commission has concluded that this would not be the case.

<sup>125</sup> The list might not always be this long. All 16 items have to be listed only if the funeral provider offers them for sale. Moreover, the rule does not prohibit listing other items which the funeral provider might offer for sale in addition to those specified.

<sup>129</sup> If the funeral provider merges these lists with the general price list, the combined list would have to be prepared in a format which consumers could retain.

<sup>131</sup> See discussion in Part V(B), *infra*.

<sup>125</sup> *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1103 (D.C. Cir. 1978) (quoting *Industrial Union Dept. v. Hodson*, 499 F.2d 467, 474 (D.C. Cir. 1974)).

<sup>126</sup> *FCC v. National Citizens Comm. for Broadcasting*, *supra*, 436 U.S. at 813.

<sup>127</sup> *Id.* at 787.

<sup>128</sup> See, e.g., Salop, *Information and Monopolistic Competition*, 66 *Amer. Econ. Rev.* 240 (1976).

Several other concerns were also expressed, however. First, some funeral providers stated that use of an itemized price list would force funeral providers to take more time explaining funeral arrangements and thus substantially lengthen the arrangements conference.<sup>132</sup> Other persons testified, however, that itemized price lists either took no longer to explain or shortened the length of the arrangements conference.<sup>133</sup> To the extent that the time involved in the arrangements conference was lengthened because consumers more carefully review their options and select only those items they desire, such an effect is intended.

A second concern was directed at the casket price list. Some funeral providers suggested that the requirement to have the list reflect all caskets offered would be particularly burdensome in light of the fact that a different casket is sold each time a funeral is arranged.<sup>134</sup> Although the rule does require the casket price list to be kept current, this should not impose a substantial burden. Many funeral providers replace the casket they sell with an identical, comparably priced unit.<sup>135</sup> Whenever this happened, no revision of the casket price list would be necessary. The rule requirement also has been written to minimize the burden which would be imposed on funeral providers when they change their inventory. The casket price list does not have to be prepared as a printed or written list. Instead, it may be displayed in other formats, such as a looseleaf notebook with a page for each casket. If the funeral provider elects to use such a format, revising the list would only require removing one description and replacing it with another. Given this sort of flexibility, the requirement should not be unreasonably burdensome.

A third concern expressed was that the general price lists would be expensive to prepare and duplicate.<sup>136</sup> However, funeral directors who currently provide itemized price information testified that the printed forms do not cost more than a few cents

each to obtain.<sup>137</sup> Neither does the evidence suggest that itemization, as an accounting method, is significantly more complicated or substantially more expensive than the methods currently used by many funeral providers.<sup>138</sup>

(2) *Statement of Goods and Services Selected.* In addition to the price lists, persons making funeral arrangements in the funeral home would receive a "Statement of Funeral Goods and Services Selected." The statement, required by § 453.2(b)(5), would be given to people at the conclusion of the arrangements conference. Its purpose is to combine in one place the prices of the individual items the person is considering for purchase, as well as their total price, so that a final decision on whether to add or subtract particular items can be based on a review of the total cost of the arrangements.

To help ensure that the total cost of the funeral is disclosed on the statement, funeral providers are required to show prices of cash advance items, if known, or to give a good faith estimate of their cost if the actual price is unavailable. To simplify the operation of the rule and avoid unnecessary paperwork, § 453.2(b)(5) permits funeral providers to combine the information required for the "statement" on any contract, statement, or other document which they currently provide at the conclusion of the arrangements conference.<sup>139</sup>

(3) *Telephone Price Disclosure.* The rule provision primarily designed to help consumers obtain price information for use in selecting a funeral home is the provision requiring telephone price disclosures.<sup>140</sup> The section imposes two obligations on funeral providers. First, they must affirmatively inform people who call their place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services

are offered, that price information is available over the telephone. In other words, the provision requires that funeral providers make an oral disclosure letting persons who call know that they can receive price information over the telephone. This provision is intended to inform the large number of consumers who first contact the funeral home by telephone that price information can be obtained before the selection of the funeral home is made. Many consumers who may be interested in price are not presently getting price information because they do not know enough to ask for it, and funeral providers do not volunteer it. Since options may be foreclosed, even under the rule, once a home is selected, this information will help alert consumers to the importance of price at a time when their choices are still open.

If the person calling is not interested in such information, the funeral provider has no further obligations under § 453.2(b)(1). However, if the caller requests price information, the second requirement of the section is triggered. That requirement is to disclose to persons who make telephone inquiries about the funeral provider's offerings or prices any accurate information from the price lists in § 453.2(b)(2) through (4) which reasonably answers the question and any other information which is readily available. The consumer can use this information to compare the prices of different funeral providers in deciding which one to select.

While the Commission believes that the telephone price disclosure provisions will impose a minimal compliance burden on funeral providers, several concerns about the provisions' operation were expressed during the funeral rule proceedings. One was that the provisions would necessitate the hiring of additional personnel to provide the required information.<sup>141</sup> It was argued that many funeral providers currently staff their phones during off-hours with an answering service or with unlicensed employees who lack detailed information about the provider's offerings and prices. Such a concern apparently is based on the view that the rule would require specific price information to be given by the first person answering the phone. However, this view is not the case. To the extent that a funeral home uses a telephone answering service during non-business hours, that service is not subject to the provisions of the rule. While the rule

<sup>137</sup> See, e.g., F. Waltherman, Tx 4985 (after basic charge of \$80, forms can be printed for three cents each); P. Farmer, Tx 2354 (purchases itemization forms for twenty five cents each).

<sup>138</sup> See discussion in Part V(B), *infra*; 1978 Staff Report, *supra* note 9, at 405-06.

<sup>139</sup> The major concerns raised about the statement—the cost of preparing itemized price information—has been discussed above, in conjunction with the description of how Sections 453.2(b) (2) through (4) (price lists) operate.

<sup>140</sup> Theoretically, consumers also would be able to go to different funeral homes and obtain their price lists, then compare these. However, substantial time constraints and emotional barriers to in-person shopping make it unlikely that consumers will avail themselves of this opportunity. While this provision makes it easier for consumers to obtain price information before choosing a funeral home, many consumers may still continue to choose a funeral home without first searching for price information. See discussion of the funeral consumer in Part I(E), *supra*.

<sup>132</sup> See, e.g., A. Anderson, Pres., Utah FDA, Tx 6178. See also R. Thompson, Connecticut Funeral Director, Tx. 2023-24.

<sup>133</sup> See, e.g., S. Hausmann, Exec. Director, New Jersey FDA, Tx 537 (he currently discusses itemization form as an integral part of the arrangements conference); C. Kleiber, researcher, Tx 5745 (student researcher who visited several funeral homes found that the itemized price list actually saved time in explaining of charges).

<sup>134</sup> See, e.g., L. Peak, Pres., Oregon FDA, Seattle Stmt. at 5-7; C. Geer, Ohio funeral director, II-A-479, at 1.

<sup>135</sup> See, e.g., F. Galante, funeral director, Tx 1749.

<sup>136</sup> See, e.g., NFDA Post-Record Comment, XIV-159, at 476.

<sup>141</sup> See, e.g., Dr. V. Pine, NFDA, statistical consultant, Tx 10,827; W. Chasen, Illinois funeral director, II-A-705, at 3.

does cover funeral providers, their employees and agents, the Commission does not construe the rule as reaching entities as far removed as a telephone answering service. Second, to the extent that the concern is that not all employees would possess the substantive knowledge to respond to phone inquiries, the uninformed employees could simply refer calls to someone who was familiar with prices. Moreover, the vast majority of information would be available on the price lists themselves, and thus likely could be given out even by part-time or unknowledgeable employees.

Another concern raised was the possibility that the availability of telephone price information could lead to bait-and-switch practices by funeral providers.<sup>142</sup> Such practices are always a potential problem. However, any funeral providers who gave out false or misleading information over the telephone or engaged in bait-and-switch tactics would be engaged in practices which violate Section 5 of the FTC Act and the laws of virtually every state. Nothing in the rule encourages such deception, nor does the rulemaking record suggest that the practice would be engaged in by the majority of ethical funeral directors.<sup>143</sup>

Third, some funeral providers suggested that the funeral transaction is too complex to explain over the telephone and that telephone price information would tend to confuse consumers.<sup>144</sup> In the Commission's judgment, the informational disclosures which the rule requires can be readily understood and used by the majority of consumers. To the extent that individual consumers find this information too complex, they would always be free, as they now are, to visit the funeral home either to obtain it or any other information which was available. Even if all of the details are not provided over the telephone, general comparisons can be useful.

Fourth and finally, funeral providers suggested that the provision might lead to price fixing because funeral providers would be forced to disclose their prices to competitors. Carried to its logical conclusion, this argument would suggest that price conspiracies are likely in any industry where firms have ready access to competitors' prices. However, access to price information tends to be easiest

in precisely those markets where price competition is most intense. Obvious examples are food retailing and new and used car sales. Thus, the ready availability of price information is by no means a cause or a symptom of cartel behavior.

In the funeral market, moreover, where services currently tend to be sold as a fixed package and where little entry by new providers has occurred, funeral homes may already have acquired a fairly accurate knowledge of their competitors' prices. The problem is that buyers are currently unable to gather comparative price information efficiently and exert the kind of competitive pressure that would discipline the market. Thus, the Commission has concluded that the rule's price disclosure provisions are much more likely to stimulate competition than to serve as an instrument for policing pricing agreements.

**B. Section 453.3—**  
**Misrepresentations.—1. Introduction.** Section 453.3 addresses six types of misrepresentations which have occurred in funeral transactions.<sup>145</sup> These misrepresentations concern: (1) Embalming; (2) caskets for cremation; (3) outer burial containers; (4) other legal and cemetery requirements; (5) preservative and protective value claims; and (6) cash advances. To remedy certain of these misrepresentations the rule requires funeral providers to disclose several items of information on the price list which consumers receive at the beginning of the funeral transaction.

The Commission's authority to prevent consumer deception in the marketplace has been well-established through an extensive body of Commission and court cases. Section 5

<sup>142</sup> As originally proposed, the rule addressed these misrepresentations through a general provision prohibiting misrepresentations of legal, public health, religious and cemetery requirements. See 40 FR 39901, at 39902 (August 29, 1975). The final rule addresses specific misrepresentations (i.e., misrepresentations regarding the legal necessity for embalming, caskets, and outer burial containers) in order to achieve greater specificity in defining the prohibited conduct. This was necessitated by the *Katharine Gibbs* decision. (See Part I (B), *supra*). In addition, the Commission has retained a general prohibition against misrepresentations of legal, cemetery, or crematory requirements to prevent misstatements aside from those specifically defined.

The disclosure requirements associated with the misrepresentation provisions also have been modified in the final rule so as to minimize the paperwork burden on funeral providers. The rule proposed in 1975 mandated more detailed information on the legal requirements concerning disposition of dead bodies and provided that separate documents containing disclosures on legal requirements be given in addition to written price lists.

is violated whenever a seller misrepresents or fails to disclose to a purchaser facts that are material to the consumer's purchasing decision.<sup>146</sup>

A statement is deceptive under Section 5 of the FTC Act if it actually misleads consumers, or has the tendency or capacity to deceive a substantial segment of the purchasing public in some material respect.<sup>147</sup> Thus, Section 5 prohibits not only outright falsities, but also statements which, while literally true, are deceptive in their overall impression.<sup>148</sup> Because deceptive information distorts the marketplace, false or misleading statements are unlawful regardless of whether the seller intends to deceive.<sup>149</sup> In determining whether a claim is deceptive, the seller's claim must be considered in its entirety and evaluated in light of the reasonable expectation or understanding of the expected consumer audience.<sup>150</sup> The deceptive quality of a statement may be shown by evidence of actual deception, or the likelihood of deception can be inferred by the Commission by an examination of the claim itself and on the basis of its accumulated expertise.<sup>151</sup>

Section 5 prohibits not only affirmative misstatements of facts but also the failure to disclose material facts even where the seller has made no representations. In the cases where a failure to disclose material information was found to be deceptive, the Commission has looked to the reasonable assumption which consumers make concerning a product or service based on the product's nature, appearance or intended use.<sup>152</sup> Where

<sup>146</sup> *Firestone Tire and Rubber Co.*, 81 F.T.C. 398 (1972) *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973), *remanded in part*, 492 F.2d 1333 (2d Cir. 1975); *Cigarette Rule SBP*, *supra* note 66, at 8350; *FTC v. Raladam*, 318 U.S. 149 (1942); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 76 (1934); *FTC v. Royal Milling Co.*, 288 U.S. 212, 216-217 (1933).

<sup>147</sup> *FTC v. Colgate Palmolive Co.*, 360 U.S. 374 (1965); *FTC v. Standard Education Society*, 302 U.S. 113 (1937); *J.B. Williams v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967); *Montgomery Ward v. FTC*, 379 F.2d 666, 669 (7th Cir. 1967); *Feil v. FTC*, 285 F.2d 679, 896 (9th Cir. 1960); Materiality is defined as the capacity to affect purchasing decisions. *FTC v. Colgate Palmolive*, *supra*.

<sup>148</sup> *J.B. Williams v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967); *Carter Products Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963).

<sup>149</sup> See *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

<sup>150</sup> *J.B. Williams v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967); *Carter Products Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963); *Peacock Buick, Inc.*, 86 FTC 1532, 1555 (1975). A claim is not deceptive if it is likely to mislead only an insignificant and unrepresentative segment of the class of persons to whom the claim is made. *Universe Co.*, 63 FTC 1282, 1290 (1963).

<sup>151</sup> *FTC v. Colgate Palmolive Co.*, *supra* note 147, at 391-92.

<sup>152</sup> Past Commission cases have held that it is a deceptive act or practice to fail to disclose such

<sup>143</sup> See, e.g., R. Goodwin, Texas funeral director, *Atl. Stmt.* at 7; A. Rayner, Illinois funeral director, *Tx* 4276.

<sup>144</sup> See Report of the Presiding Officer, *supra* note 6, at 95.

<sup>145</sup> See, e.g., R. Grayson, Minnesota FDA, *Tx* 3378; C. Swartz, Pennsylvania funeral director, *Tx* 13,948; Oklahoma FDA, *Tx* 8895.

the effect of nondisclosure is to deceive a substantial segment of the buying public with respect to a material fact by exploiting the reasonable expectations of consumers, the failure to disclose constitutes a violation of Section 5.<sup>153</sup>

Where proof can be shown that a claim is deceptive, no evidence need be shown as a matter of law that consumers were in fact misled by the claim. Rather, the Commission can make a determination based on its experience, as to what the reasonable expectations of consumers were under the circumstances and hold that the failure to disclose the information in question resulted in harm.<sup>154</sup>

The impact of specific failures to disclose are described below. However, it is the Commission's general finding that, in all these specific cases, many consumers have reasonably believed there were legal or cemetery requirements relating to the disposition of remains. Because the consumers were unfamiliar with the precise nature of the requirements, a significant number of consumers made incorrect assumptions about them. Thus, as we discuss below, many consumers reasonably believe that certain procedures (such as embalming) or particular goods (such as caskets or outer burial containers) are required and, therefore, not subject to individual discretion. Resulting purchase decisions are due, at least in part, to incorrect assumptions by consumers about material facts. Funeral providers have failed to disclose correct information about such facts and have, in some cases, made false claims about them.

material facts as: 1) the rayon content in rayon clothing, which is indistinguishable from silk or wool; *Mary Muffet, Inc. v. FTC*, 194 F.2d 504, 505 (2d Cir. 1952); *Seymour Dress & Blouse Co., 49 F.T.C. 1278, 1282 (1953)*; *Academy Knitted Fabrics Corp., 49 F.T.C. 697, 700-01 (1952)*; 2) the true composition of base metal watchcases where the watchcases look like precious metal; *Theodore Kagen Corp. v. FTC*, 283 F.2d 371 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 843; 3) whether a book being sold is an abridged or condensed version; *Bantam Books, Inc. v. FTC*, 275 F.2d 680, 682 (2d Cir 1960); 4) a policy of assigning consumers' notes of indebtedness to third parties against whom the consumer may not be able to raise claims or defenses based on the sales contract; *All-State Industries, Inc. v. FTC*, 75 F.T.C. 465 (1960), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970); 5) that a prescription drug used by a weight loss clinic was not approved by the Food and Drug Administration; and *Simeon Management Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978).

<sup>153</sup> *Cigarette Rule SBP, supra* note 66; *Statement of Basis and Purpose, Trade Regulation Rule, Labeling and Advertising of Home Insulation*, 44 FR 50217, 50223 (1979); *Statement of Basis and Purpose, Trade Regulation Rule: Care Labeling of Textile Wearing Apparel*, 36 FR 119 (1971), 16 CFR Part 423.

<sup>154</sup> See e.g., *All-State Industries, Inc. v. FTC, supra* note 152; *Simeon Management Corp. v. FTC, supra* note 152.

2. *Section 453.3(a)(1)—Embalming.*—  
(a) *Evidence.* Only in exceptional circumstances does state law absolutely require embalming. The two most common occasions are those situations where the body must be transported interstate (where embalming prevents decomposition during transport) and where death has occurred from one of several communicable diseases.<sup>155</sup> Since embalming is not generally required by law, consumers usually have the right to decline to have a body embalmed if they wish. Consumers may wish to decline embalming services because of personal or religious beliefs or in order to avoid the expense of embalming. The record shows, however, that most funeral directors do not disclose that embalming is optional. It is common practice in the industry to embalm without specifically requesting permission.<sup>156</sup> Indeed, industry members stated in comments filed in this proceeding that embalming should be performed unless specifically rejected by the consumer.<sup>157</sup> The

<sup>155</sup> Although there is considerable dispute over the necessity and effectiveness of embalming to prevent the spread of disease, many states require embalming under these circumstances. See, e.g., *Rules and Regulations of the State Board of Embalming of the State of Kansas Relative to Embalming*, Art. III, §§ 63-3-10 to 63-3-16 (1976); *N. H. Rev. Stat. Ann. § 325:40-a (Supp. 1975)*; *Colo. Rev. Stat. § 12-54-112(4) (1973)*. See also CFA, *Analysis of State Statutes, Rules, and Regulations Affecting the Funeral Practices Industry*, Atl. Stmt. at 18-22 (June 22, 1976).

<sup>156</sup> A number of funeral directors testified during the proceedings that they engage in this practice. Several further felt qualified to describe it as a common practice in their community. See, e.g., *W. Rill, Pres., Washington FDA, Tx 5583*; *F. Noland, Pres., Idaho FDA, Tx 5836*; *J. Page, California mortician, Tx 7373*; *L. Ruffner, past Pres., Arizona FDA, Tx 7851*; *N. Heard, Pennsylvania funeral director, Tx 13,150*; *V. Polli, Sec.-Treas., Vermont FDA., Tx 2198*; *R. Murphy, Pres., NSM, Tx 12,598*; *R. Johnson, Indiana funeral director, Tx 12,595*; *J. Kaster, Texas State Representative, Tx 6118*; *S. Waring, Treas., NFDA, Tx 665*; *R. Thompson, member, Conn. State Board of Examiners of Embalmers and Funeral Directors, Tx 2034*. The results of informal surveys of funeral directors also found that a high percentage routinely embalm without seeking permission. See, e.g., *CFDA FTC and You, Questionnaire Results, L.A. Ex. 23 (CFDA survey revealed that half of the funeral directors responding do not obtain permission for embalming)*; *S. Chenoweth, Director, Minnesota Office of Consumer Services, II-C-51, at 5-6*; *H. Sandhu, President, The Memorial Association of Central New Mexico, Inc., II-C-1280*. Similarly, a survey of consumers found that embalming took place in 98% of the cases where the respondents had not requested it. *P. Sperlich, Ph.D., CalCAG, Tx 7410*.

<sup>157</sup> Funeral providers take the position that most consumers expect that funeral directors will immediately embalm the body, and consequently give implied permission to embalm when they authorize the funeral director to pick up the body. They also assert that placing the burden on the consumer to tell the funeral director not to embalm best serves most consumers, because most consumers choose a funeral with viewing, and embalming must be done quickly after a death to

Presiding Officer found that prior express permission for embalming is rarely obtained.<sup>158</sup>

In addition to the widespread failure to disclose that embalming is not required by law, a significant number of funeral providers have affirmatively misrepresented state laws regarding embalming. While such affirmative representations do not appear to be the norm, the record documents numerous instances in which consumers were told that the law required embalming when in fact it did not.<sup>159</sup> In other cases, consumers were led to believe that embalming was a legal requirement by statements that embalming is "required" or "necessary."<sup>160</sup> While embalming is a practical necessity where there is viewing for several days before disposition,<sup>161</sup> references to the "necessity" of embalming may mean that the funeral provider requires embalming in all cases. In any event, such representations have generated substantial confusion among consumers as to what the law requires.

The Commission finds that the failure to disclose to consumers that embalming is usually not required as a matter of law is a deceptive act or practice within

ensure the best cosmetic results. See, e.g., *B. Hotchkiss, California funeral director, Tx 8520-21*; *J. Altmeyer, West Virginia funeral director, Tx 11, 735-36*; *G. Brown, Vermont funeral director, Tx 12,058*; *C. Lightner, past Pres., NFDMA, Tx 10,417*; *J. Wright, Mississippi funeral director, Tx 9466-67*; *H. Ruidl, counsel and Exec. Sec., Wisconsin FDA, Chi. Stmt. at 1-2*; *T. J. Proko, past Pres., Wisconsin FDA, Tx 4186-87*; *J. Curran, Pres. New York FDA, Tx 90*. See also *L. Frederick and C. Stub, The Principles and Practice of Embalming 191 (1967)* (the act of handing over a dead body carries with it an implied permission to embalm).

<sup>158</sup> Report of the Presiding Officer, *supra* note 8, at 54.

<sup>159</sup> *Statement, New York Public Interest Research Group, (NYPIRG), Ex. J at 3* (18% of respondents told that embalming was specifically required by law); *Survey, Funerals in Minnesota: Customer Experiences conducted by Minnesota Office of Consumer Services, XI-592, at 27* (hereinafter cited as "Minnesota Survey") (22% of respondents told that embalming is always required by law); *Survey, Continental Association of Funeral and Memorial Societies, Inc., D.C., August 5, 1978*; (28% of respondents who used embalming told it was required by law). See also the following consumer complaints in Category II-B (4, 379, 417, 893, 1080, 1114, 1258, 1534, 1801, 3495, 3621).

<sup>160</sup> Consumer complaints in Category II-B (432, 453, 375, 740, 1863) and Category X (1-77).

<sup>161</sup> Embalming is the only means by which decomposition can be halted temporarily for viewing for more than a day or so. Refrigeration retards decomposition, but does not provide the cosmetic effects of embalming and is not practical when the body is on view for more than several hours. *L. Frederick & C. Stub, The Principles and Practices of Embalming (1967)*. However, where disposition does not involve viewing (e.g., closed casket, direct disposition), the temporary preservation of the body and the cosmetic effects of embalming are not necessary, although some consumers may still desire them.

the meaning of Section 5 of the FTC Act. The evidence discussed above demonstrates that this practice is widespread in the industry, causing many consumers who in fact believe that embalming is required by law, *i.e.*, that it is not an option, to be misled.<sup>162</sup> In addition, the Commission finds the making of affirmative misstatements about legal requirements for embalming to be a deceptive act or practice in violation of Section 5 of the FTC Act. The evidence further indicates that such misinformation causes some consumers to purchase embalming services in situations where the services might otherwise not be purchased.<sup>163</sup> Since embalming generally costs \$50 to \$150,<sup>164</sup> consumer injury resulting from the misrepresentation is clear.

(b) *Rule Provisions.* Therefore, in § 453.3(a)(1) of the rule, the Commission defines as deceptive: (1) False or misleading statements that state or local law requires that a deceased person be embalmed; and (2) the failure to disclose that embalming is not usually required by law. Section 453.3(a)(2) imposes two remedial requirements on funeral providers. First, it prohibits representations that a body must be embalmed in certain specified situations in which embalming is unnecessary, such as direct cremation or immediate burial. Second, it requires that the general price list mandated by § 453.2(b)(4) contain a disclosure concerning embalming requirements. The disclosure informs consumers that embalming is generally not required by law, but that it is usually necessary for certain funeral arrangements, for example, a funeral with viewing. It also states that consumers can usually select an arrangement which does not require embalming.

These requirements are designed to prevent not only the misrepresentations defined in § 453.3(a)(1), but also the acts defined in § 453.4(b)(1). Under that

<sup>162</sup> One study showed that where consumers arranging funerals were unaware that embalming was not legally required, embalming took place in 88.1% of the cases. On the other hand, where consumers were aware that embalming was not legally required, embalming took place in only 58.5% of the cases. Sperlich, L.A. Ex. 17. See also Minnesota Survey, *supra* note 159, at 27; CAFMS Survey, D.C. Ex. 39; CAMP Survey, *supra* note 92; see also statements of individual consumers, *supra* note 180.

<sup>163</sup> See, e.g., Blackwell Survey, *supra* note 59 (NFDA-sponsored survey of 400 consumers found that only 60% of respondents would definitely choose embalming, 9.5% would not, and 25% were undecided); D. Daley, Seattle funeral director, Tx 5933 (funeral home which presents embalming as true option reports 30% declination rate); CAMP Survey, *supra* note 92 (less than half of those who had purchased embalming expressed a preference for it).

<sup>164</sup> 1978 Staff Report, *supra* note 9, at 196, n. 94.

provision, funeral providers may not require consumers to purchase certain goods or services as a condition to obtaining others. Thus, funeral providers may not condition the availability of their services or offerings on agreement by the consumer to purchase embalming. The general rule, accordingly, is that a funeral provider may not require that consumers purchase embalming services as a matter of funeral home policy. There are two exceptions to this. First, in some cases embalming may be required as a matter of law. Second, for certain types of funeral arrangements embalming is a practical necessity because of the natural decomposition of the body. Funeral directors are not prohibited from requiring embalming in these instances. Accordingly, § 453.3(a)(2)(i) prohibits statements that a body must be embalmed for specified arrangements for which embalming is not a practical necessity, for example, direct cremations. A funeral director may require embalming for arrangements not listed in § 453.3(a)(2)(i), such as a funeral with a viewing.

2. *Section 453.3(b)(1)—Casket for Cremation.*—(a) *Evidence.* A second misrepresentation identified in the rulemaking record concerns representations by funeral providers that state law requires consumers to purchase caskets to have the deceased cremated. Currently, no state has such a requirement.<sup>165</sup> In the absence of any disclosure to the contrary, many consumers believe that there are no alternatives to caskets or that state and local laws require the use of a casket.<sup>166</sup> Yet few funeral directors provide such a disclosure.<sup>167</sup> Moreover, some funeral

<sup>165</sup> See "Funeral Practices, Survey of State Laws and Regulations," CAFMS, XVI-118, Appendix III-C (hereinafter cited as "CAFMS Survey of State Laws and Regulations").

<sup>166</sup> Surveys show consumer misunderstanding of state laws. See, e.g., M. Stillwell, CAMP, Tx 6032 (49% of respondents thought a casket was required or didn't know); Blum Study, *supra* note 57, at Short Form (42% of respondents did not know if casket required for cremation or thought one is); CAFMS Survey, D.C. Ex. 39, at Ex. 2 (40% of respondents believed caskets required by state law). Other evidence indicates that consumers are unaware of alternatives to traditional caskets. See, e.g., M. Fought, Ohio consumer, II-C-58; E. Klein, Vice President, CAFMS, Klein Ex. 1 (NY) at 2-3; K. Marsh, California mortician, Tx 6807; C. Moles, Iowa consumer, II-B-318; N. Kobernuss, Arkansas consumer, II-B-657.

<sup>167</sup> Surveys offer proof that consumers are often unaware that state laws do not require caskets even after they have been involved in a funeral transaction. See, e.g., Blum Study, *supra* note 57. This evidence suggests that funeral providers are not disclosing to consumers that caskets are not necessary. Moreover, a number of consumers complained about having to buy caskets for cremation. See, e.g., consumer complaints in category II-B (16, 18, 24, 439, 1067, 1152, 1464, 2174).

providers affirmatively misrepresent the legal requirements for cremation through claims to consumers that state or local law mandates the purchase of a casket. While the evidence suggests that such affirmative misrepresentations are not typical, the record contains consumer testimony and letters which reveal that a number of funeral providers have falsely informed consumers that state law required a casket for direct cremation services,<sup>168</sup> and consumer group representatives have attested that misrepresentations about a casket for cremation requirements are a significant problem.<sup>169</sup> In addition, some funeral directors misrepresent that crematories require the purchase of a casket when such is not the case.<sup>170</sup> Funeral directors also inform consumers who desire direct cremation that a casket is "required" or "necessary" or what they "have to" purchase a casket.<sup>171</sup> There is some evidence to suggest that consumers often interpret these statements to mean that the law requires purchase of a casket<sup>172</sup> and in any event, it is clear that these consumers were not told that the caskets were not legally required.

The misrepresentations by funeral providers regarding legal requirements for cremations result in consumers purchasing caskets when they do not need to and otherwise might not. There are many different types of alternative containers suitable for holding and transporting remains, and for use in

These complaints indicate that the funeral directors probably did not disclose that state law did not require a casket.

<sup>168</sup> See, e.g., Consumer complaints in Category II-B (271, 346, 417, 458, 602, 719, 1165, 1379, 1444, 1474, 1561, 5753, 6749), Category X-1 (68, 99, 24), written comments and testimony; Comments of NRTA/AARP, II-C-1516, at App. 2 (sample letter 6, #5); J. Berk, Cal. NRTA/AARP, L.A. Ex. 2, at 6-8; W. Bowles, Ark.-consumer, Tx 9257-58; K. Marsh, Cal. funeral director, Tx. 6749; C. Crawford, Tex. consumer, Tx. 6634; Judy, Chicago Statement #51; D. Nugent, Ill. consumer, Chicago Statement #12.

<sup>169</sup> See G. Richardson, Tx 1367 and Richardson, N.Y. Ex. 1 (NY) at 3; S. Cook, Pres., Council Memorial Society, Coinnecticut, Tx 1459; R. Haynes, Pres. Memorial Society of Eastern Oklahoma, II-C-1230; E. Knapp, Federation of Funerals and Memorial Societies of Greater Washington, D.C., D.C. Ex. 14, at 2.

<sup>170</sup> See F. Sweeton, East Tennessee Memorial Society, Tx 9576-77. See also A. Vickery, Conn. consumer, II-C-45.

<sup>171</sup> See, e.g., D. Pritt, Pa. consumer, II-B-4; Oklahoma consumer, VII-8; A. Garries, Wash. consumer, II-B-1030; L. McCoach, Fla. consumer, II-B-982; M. Carpenter, N.Y. consumer, II-B-1863; B. Larratt, Maine consumer, X-1-94; W. Coleman, Ark. consumer, II-B-740; R. McGuire, Tex. consumer, X-1-55; M. Heptonstall, Tex. consumer, II-B-34; W. Pirnack, Tex. consumer, II-B-136; Comments of NRTA/AARP, II-C-1516, at App. 2 (sample letter 1 and 2); F. Fought, Ohio consumer, II-C-58; M. Kent, Michigan consumer, X-1-77.

<sup>172</sup> See L. MacDonald, Illinois, NRTA/AARP, Tx 2640; H. Wienerman, NY NRTA/AARP, Tx 233-34.

cremation. Examples of these containers include unfinished wood boxes and a variety of non-metal receptacles designed for the encasement of human remains, such as containers made of cardboard, pressed-wood or composition materials. In addition, pouches of canvas or other materials (such as polyethylene) can be used for direct cremation. Record evidence suggests that substantial numbers of consumers, possibly as many as 25%, would decline to purchase a casket when presented with an option to do so.<sup>173</sup>

(b) *Rule Provisions.* In response to these problems, § 453.3(b)(1) of the rule defines it as a deceptive act or practice for funeral providers either to represent the law as requiring a casket for cremation or otherwise to represent that a casket (other than an unfinished wood box) is required for cremation. These claims clearly cause harm to the extent that they induce consumers to purchase caskets, where they otherwise would not. Accordingly, in § 453.3(b), the Commission prohibits funeral providers from telling consumers that, by law, a casket must be purchased when the remains are going to be cremated. To prevent this deceptive practice, § 453.3(b)(2) requires that funeral providers who arrange direct cremations place on the general price list an affirmative disclosure concerning casket-for-cremation requirements. This disclosure would inform consumers that they can purchase an unfinished wood box or alternative container for direct cremation. It also describes the construction of various types of alternative containers.

The disclosure requirement is intended to prevent the misrepresentations defined in § 453.3(b)(1) and also the unfair or deceptive acts defined in § 453.4(a)(1). Section 453.4(a)(1) prohibits funeral providers from requiring consumers to purchase a casket, other than an unfinished wood box, for direct cremation. The disclosure required by § 453.3(b)(2) prevents funeral providers from requiring caskets for direct cremation by insuring that consumers are aware of their right to select an alternative.

<sup>173</sup> A funeral home chain which operates 27 funeral homes in Oregon, Washington and Arizona advises its customers that a casket purchase is an option. The chain offers its customers minimal body containers in lieu of a casket, or permits them to select no container whatsoever. The president of the chain testified, in analyzing 1,142 cases, that 73.5% of his clients chose some type of casket, 14.9% chose the body container, and 9.1% rejected any container. See E. Purdy, *See. Ex. 3*, at 20.

**3. Section 453.3(c)—Outer Burial Containers.**—(a) *Evidence.* Outer burial containers, used to prevent collapse of grave space, are not required by state law.<sup>174</sup> Many cemeteries, however, do require some form of outer burial container, but generally this requirement may be satisfied by a simple grave liner rather than a more expensive burial vault.<sup>175</sup> Some funeral directors, however, have told consumers that state law required the purchase of an outer burial container or have misrepresented cemetery requirements regarding burial vaults.<sup>176</sup>

Additionally, survey evidence shows that many consumers believe that a burial vault or some form of outer burial container is required by law.<sup>177</sup> The rulemaking record also reveals that consumers are generally unaware of the existence and availability of grave liners, and that funeral providers have failed to disclose this information. As a result, many consumers may purchase a burial vault in the erroneous belief that there are no alternatives.<sup>178</sup> Because the cost of burial vaults tends to be substantially higher than that of liners,<sup>179</sup> the monetary injury to consumers from unnecessary purchase of these items can be substantial.

(b) *Rule Provisions.* In § 453.3(c) of the rule, the Commission defines as deceptive (1) false or misleading representations that state law or individual cemeteries require the use of

<sup>174</sup> The Commission is aware of only one local jurisdiction in the country which requires use of an outer burial container, and it permits either a grave liner or a burial vault to be used. See 1979 Oral Presentations, XV-1, at 151-52 (Statement of Thomas Clark).

<sup>175</sup> See Memorandum from N. Norvold, Legislative Research Analyst, to B. Morrison, Arizona State Senator, re: Cemeteries that require vaults, L.A. Ex. 16; Wycoff, President, George Washington Memorial Park, Tx 940.

<sup>176</sup> See, e.g., F. Sweeton, President, East Tennessee Memorial Society, Tx 9577; M. Siegel, Illinois consumer, Tx 2957; E. Sheehan, Washington, D.C. consumer, Tx 14,668; E. Sloan, Director, D.C. Office of Consumer Protection, Tx 13,874; R. Mee, casket manufacturer, Ill-F-16; W. Heller, Alabama consumer, X-1-74; B. Reeves, past president of Georgia Cemetery Association, Tx 10,209.

<sup>177</sup> See CAMP Survey, *supra* note 92; CAFMS Survey, D.C. Ex. 39, at Ex. 2.

<sup>178</sup> See, e.g., W. Cushman, Maine consumer, Tx 1360-61; B. Reeves, President, Southeastern Advertising and Sales System, Tx 10,209; W. Heller, Alabama consumer, X-1-74-, at 3,6. The National Concrete Burial Vault Association opposed this provision in part because of the fear that consumers would purchase fewer vaults if they were given the proposed disclosures. Arnold Vice-President, National Concrete Burial Vault Association, Tx 11,538-40.

<sup>179</sup> Testimony show that liners range in price from approximately \$65, (T. Sampson, Tx 970), to \$180, (M. Arnold, Vice-President, National Concrete Burial Vault Ass'n, Tx 11,524), and that vaults range from \$190, (T. Sampson, Tx 970) to \$1500, (Comments of CFA, II-B-1518, at 40).

outer burial containers, and (2) the failure to disclose that state law does not require the purchase of an outer burial container. To prevent these practices, § 453.3(c)(2) requires that a written disclosure appear on the outer burial container price list. The disclosure explains that state law does not require the use of outer burial containers, that outer burial containers are sometimes required by cemeteries to prevent the grave from sinking in and that either a burial vault or grave liner will satisfy this purpose.

**4. Section 453.3(d)—Legal and Cemetery Requirements Generally.**—(a) *Evidence.* As discussed above in connection with § 453.3(a)–(c), the rulemaking record reveals that funeral directors have misrepresented legal, cemetery or crematory requirements regarding the need for embalming, caskets for cremation and outer burial containers. In addition, the record indicates that there are other misrepresentations which have been made to persons purchasing funerals. For example, some funeral providers have told consumers that cremated remains must be buried or that state law required the use of a sealed casket.<sup>180</sup> All of these representations can result in the purchase of unwanted and unnecessary items.

(b) *Rule Provisions.* In § 453.3(d)(1) of the rule, the Commission declares that it is deceptive to misrepresent that federal, state or local laws or particular cemeteries or crematories require the purchase of funeral goods or services. As a remedy, § 453.3(d)(2) provides that a funeral provider who tells a consumer that a legal, cemetery, or crematory requirement mandates the purchase of funeral goods or services must describe that requirement on the statement of funeral goods and services selected, required by § 453.2(b)(5).

The remedial requirement in § 453.3(d)(2) is intended not only to provide consumers with information, but also to aid enforcement of the prohibitions on affirmative misrepresentations. Prohibitions on oral misrepresentations are extremely difficult to police. The requirement of § 453.3(d)(2) serves to document the representation that has been made to the consumer. Since § 453.6 of the rule provides that a copy of the statement of services must be retained for one year, evidence of violations will be preserved.<sup>181</sup> The requirement will

<sup>180</sup> See, e.g., J. Fanagan, CAFMS, Atl. Ex. 9, at 3; M. Kent, Michigan consumer, X-1-77, D. Davis, Mississippi consumer, II-B-417.

<sup>181</sup> A funeral provider intending to make a misrepresentation might well choose not to write it

significantly aid the Commission in detecting and proving violations and creates an additional incentive to comply with the rule. This is particularly important in view of the large number of funeral providers throughout the country.

The Commission has included § 453.3(d) in the final rule to deter future misrepresentations not otherwise specifically proscribed by the rule. The Commission's authority to impose fencing-in requirements in adjudicatory proceedings has been confirmed by the Supreme Court.<sup>182</sup> The rationale for fencing-in is equally applicable to rulemaking proceedings, especially, as here, where the provision imposes a minimal cost burden. The reasonableness of a fencing-in provision is to be judged, therefore, in light of the evidence regarding the similar illegal conduct which forms the basis for the fencing-in provision.

5. *Section 453.3(e)—Preservative and Protective Value Claims.*—(a) *Evidence.* While it is possible briefly to delay decomposition of a deceased body, funeral goods and services such as embalming or sealed caskets do not preserve human remains for long periods of time.<sup>183</sup> However, the record indicates that some funeral providers affirmatively misrepresent the preservative value of embalming<sup>184</sup> and burial vaults.<sup>185</sup> Moreover, both funeral providers and manufacturers often make protective value claims with regard to certain funeral goods, such as caskets and burial vaults,<sup>186</sup> stressing that

down. However, the disclosure form which is given to consumers informs them that if state law requires the purchase of goods or services, a written explanation will be provided. Thus, if an oral representation is made, and no disclosure is made of the requirement, the consumer is at least on notice that something may be wrong.

<sup>182</sup> The Court noted in *FTC v. Ruberoid*, 343 U.S. 470, 473 (1951): Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.

<sup>183</sup> See L. Frederick and C. Strub, *The Principles and Practice of Embalming* 131-32, 238-41 (1967).

<sup>184</sup> Several funeral directors commented that embalming does preserve the body, or that they were taught to say it does. See, e.g., J. Todd, co-owner and manager of an Arkansas funeral home, Tx 8752; Ill. F.D.A. XVI-12, at 2; C. Ronald Savage, Oklahoma funeral director, XVI-162, at 2.

<sup>185</sup> See, e.g., O. Matthews, Maryland Citizens Consumer Council, Tx 14,054 (in surveys of Maryland funeral homes, two funeral directors stated that vaults preserved the body); Rev. D. Haun, Oklahoma clergy, Tx 9935.

<sup>186</sup> See, J. Harris, Utah consumer, Tx 8092; G. Derrick, Illinois consumer, Chl. Stmt. at 2; C. Gladys, Michigan consumer, Tx 3857-58; B. Hughley, District of Columbia consumer, Tx 10,368-69; M. Blackburn, Florida consumer, VII-176; R. Nesoff, former

certain products are airtight, watertight, or offer special protection against the elements. It is impossible to estimate how often such claims are false, because consumers are unable to discover whether protective claims are inflated without exhuming the body. There are, however, reports of instances in which exhumation revealed that the casket had failed to protect the remains, despite claims made by manufacturers.<sup>187</sup>

(b) *Rule Provisions.* While the evidence clearly establishes that false claims of this nature have been made, it does not indicate that these claims are widespread. The Commission has, nonetheless, concluded that a prohibition on such false claims is warranted. Claims concerning the ability of a product to protect the body of a close friend or relative can have a significant capacity to induce the purchase of items which otherwise would not be purchased. Indeed, claims that a product or service will protect the integrity of the body of a deceased person are among the most pernicious made for they directly appeal to the vulnerable emotional state of the consumer. Accordingly, the Commission has chosen to include a provision addressing this practice. Section 453.3(e) prohibits representations that funeral goods or services will delay natural decomposition of the body for an extended period of time. It also prohibits false or misleading claims that caskets, burial vaults or other funeral goods will protect the body from gravesite substances.

6. *Section 453.3(f)—Cash Advances.*—(a) *Evidence.* In a typical funeral transaction, the consumer often pays the funeral provider for so-called "cash advance" items. These items are goods and services which the funeral provider arranges to purchase but which are actually provided by a third party, e.g., flowers, obituary notices, limousine rentals. Many funeral providers charge a markup on these items, or they may simply charge consumers the full price for the cash advance item and receive a

Director of Investigation, New York State Temporary Commission on Living Costs and the Economy, Tx 345; T. Kuhn, *Undertakers Press Customers to Hike Bills, Reporter Finds*, Arizona Republic September 14, 1975, and articles that follow, VI-D-49, at A-20. (Caskets are often represented as airtight and waterproof). Companies refer to their caskets and vaults with names which imply long-term protections or preservatives, e.g., "Invincible" (Boyertown), X-1-93. See also M. Siegel, Illinois consumer, Tx 2957; O. Adams, Michigan consumer, II-B-2119.

<sup>187</sup> New York State Temporary Commission on Living Costs and the Economy, Investigation into the Practices of the Funeral Industry, VI-D-16.

rebate or volume discount from the supplier for the cash advance item.<sup>188</sup>

The Commission does not suggest that it is improper for funeral providers to profit on items obtained from third parties. It is clear that it is wholly proper for providers to do so. Moreover, it is clear that the services or goods being received by consumers, (e.g., flowers, obituary notices etc.) are goods which they do wish to purchase. If, with knowledge that the funeral provider will profit from ordering flowers or arranging obituary notices, a consumer chooses to use the services of a funeral provider, a charge for that service should be anticipated. However, the undisclosed charging of a markup for cash advance items is deceptive because consumers believe that items labeled "cash advances," "accommodation" or "cash disbursement" are being provided at cost. There is an implicit representation that the cash advance transaction involves merely a forwarding of cash by the funeral provider and a subsequent dollar-for-dollar reimbursement by the consumer.<sup>189</sup>

In spite of this, the evidence demonstrates that many individual funeral providers do charge markups for cash advances. In a 1976 survey of California funeral directors, 12% of the 291 respondents admitted charging "in excess of the amount actually advanced for any items of service labeled as 'cash advances' or 'accommodation items.'" <sup>190</sup> NFDA's annual survey of funeral

<sup>188</sup> See, e.g., G. Marshall, Massachusetts, clergy, Tx 1194 (clergy honoraria); S. Fritchman, California clergy, Tx 6515 (clergy honoraria); Dr. J. Marcelli, member, New York Funeral Directing Advisory Board, Tx 579-80 (florist fees and obituary notices). See also J. Todd, Arkansas funeral director, Tx 8754; N. Gregory, former California funeral director, Tx 8645; G. Brown, Vermont funeral director, Tx 12,067; R. Mee, owner of Wisconsin Casket Co., III-F-18; B. Bennett, Florida funeral director, II-A-518; H. Senison, New York funeral director, I-A-145.

<sup>189</sup> Consumer testimony and letters support this conclusion, since a number of consumers complained about having to pay an additional fee for cash advances. See, e.g., L. Shirk, Tex. Consumer, II-B-1210; D. Bailey, Maryland consumer, II-B-353; Maryland consumer, VII-101. Moreover, testimony and statements by industry members support the conclusion that the practice of adding undisclosed markups to cash advance items is deceptive. Two of the major trade associations, NFDA and OGR, agreed that funeral directors should not profit on cash advances. See Comments of NFDA, II-A-659, at 52; Comments of OGR, II-A-666, at 16. Counsel for another trade association, NSM, testified that funeral providers should pass along any rebates they receive on items represented as cash advances. See Statement of D. Murchison, Tx 12,606.

<sup>190</sup> California Funeral Directors Ass'n Questionnaire, "The FTC and You," L.A. Ex. 23. Considering the fact that many leaders of the industry believe that any mark-up on cash advances is deceptive, see note 189, *supra*, the 12% response is probably understated since many respondents would not want to admit using a deceptive practice.

homes, indicates that, on a national level, funeral homes are receiving a 5% mark-up on cash advance items, amounting to \$18,000,000 annually.<sup>191</sup> In addition, there is evidence from industry members,<sup>192</sup> consumers,<sup>193</sup> and businesses which provide cash advance items<sup>194</sup> that funeral directors charge more than they pay for items generally considered to be cash advances.<sup>195</sup>

Similarly, the failure to disclose that a markup will be included on a cash advance item misleads consumers who rely on their reasonable expectations. In ordinary usage, terms such as "cash advance," "accommodation items" or "cash advanced for your convenience" imply that the consumer is being charged only for the actual cash outlay. The use of this term in connection with items such as flowers, obituary notices, etc., which the consumer could easily obtain from a third party, creates the expectation that the amount billed the consumer is the same as the amount paid by the funeral provider.<sup>196</sup> Given this expectation, the failure to disclose the existence of a markup is a deceptive practice.

(b) *Provisions.* Section 453.3(f) defines as deceptive: (1) affirmative misrepresentations that the price charged for a cash advance item is the same as the funeral provider's cost; and (2) the failure to disclose to consumers that a markup is being charged on a cash advance item. In order to prevent these practices, § 453.3(f)(2) requires that funeral providers who charge a markup on cash advances disclose this fact on the general price list. It is

<sup>191</sup> V. Pine, A Statistical Abstract of Funeral Service Facts and Figures 38 (1977) (hereinafter cited as "1977 Statistical Abstract"). The average cash advance charge is \$185; average cost of cash advances is \$175, representing about a 5% mark-up. If multiplied by two million deaths annually, a 5% overcharge would amount to \$18,000,000.

<sup>192</sup> See note 188, *supra*. See also H. Gutterman, Funeral Director, Tx 1876; R. Thompson, Embalmer & Connecticut Funeral Director, Tx 2034; R. Ebeling, Former Managing Editor, Mortuary Management, Tx 6883-84; N. Gregory, former Calif. funeral director, Tx 8645; J. Page, Owner, Mortuary school, Tx 7388.

<sup>193</sup> See, e.g., D. Bailey, Maryland consumer, II-B-358 (25% markup on obituary notice); M. Martin, California consumer, II-B-1695 (overbilled \$62.75 on crematory charge); Cohen Statement, *supra* note 75, at 9 (crematory and newspaper overcharges); *Pittsburg Post-Gazette*, April 10, 1972, at 8, VI-D-36 (death notices); L. Shirk, Texas consumer, II-B-1210 (clergy honoraria).

<sup>194</sup> G. Marshall, Massachusetts clergy, Tx 1194; S. Fritchman, Calif. clergy, Tx 6515; T. Fulton, Wisconsin florist, II-B-234; L. Abbott, New York florist, II-C-82; C. Harness, Indiana hairdresser, X-1-16. See also H. Dailey, Missouri florist, II-B-297; D. Johnson, Oklahoma florist, II-C-15.

<sup>195</sup> In none of these instances is it clear whether the items were specifically labeled cash advances. However, they are of a type that are traditionally considered cash advance items.

<sup>196</sup> See evidence cited in note 188, *supra*.

important to note that this rule provision covers only those situations where the funeral provider makes an affirmative representation that an item is a cash advance, accommodation, cash disbursement item, or any term of similar import. While it may be true that some items are viewed by consumers as inherently "cash advances," the record in this proceeding does not warrant such a finding.

The Commission believes that requiring a disclosure that a markup is being used is a sufficient remedy in light of the evidence discussed below. Prior versions of the rule would have totally prohibited a profit on such items.<sup>197</sup> The Commission has rejected such a remedy because it views the remedy it has selected as being sufficient to correct the identified abuse, while constituting the minimum intrusion into the business practices of the providers.

*C. Section 453.4—Required Purchases of Goods and Services.—1. General Discussion.* When the death of a friend or relative occurs, the persons who will ultimately be charged with arranging the funeral will often not have determined what type of services they wish, nor may they be aware of the deceased's wishes concerning the form of disposition. In other instances death may be anticipated, as in the case of prolonged illness, and the preferred form of disposition selected.

When death is anticipated, market-oriented remedies, such as the provision of information through price lists, can serve to facilitate informed comparison shopping. For example, if consumers knew in advance that they would be called upon to arrange a direct cremation, they could select a provider who offered alternative containers for sale. In this manner, the expense of a casket could be avoided by the consumer, if he or she were so inclined. In many cases, however, the ultimate form of disposition simply has not been selected at the time death occurs. Thus, the person charged with contacting a funeral provider to pick up the body of the deceased may simply be unable to select a funeral provider on the basis of what goods or services they sell, or in what combinations those goods and services are offered for sale.

The fact that the funeral provider may, in many cases, receive the body before the form of final disposition has been selected by the consumer creates a situation with the inherent potential to diminish severely a consumer's ability to select only those goods and services desired. The evidence establishes that

<sup>197</sup> See, e.g., 1978 Staff Report, *supra* note 9, at Appendix B, § 453.2(e).

once a funeral home is in possession of a body, seldom is it removed to another funeral home.<sup>198</sup> As representatives of the funeral industry have acknowledged, competition in the sale of funeral goods and services does not exist at the point of sale.<sup>199</sup> If consumers are to have the ability to select the goods and services they want, and concomitantly to decline those they do not want, some intervention is necessary at the point of sale to eliminate prevailing industry practices which deny that choice.

Accordingly, in § 453.4 of the rule, the Commission prohibits funeral providers from requiring that consumers who are arranging funerals purchase goods or services which they do not want, as a condition of purchasing those which they do want. As discussed above,<sup>200</sup> many funeral industry members have offered their goods and services for sale only in predetermined packages, thereby denying consumers any ability to decline unwanted items. Section 453.4(a) of the rule prohibits funeral providers from requiring that consumers who wish to arrange direct cremations purchase a traditional casket, other than an unfinished wood box, for that cremation. Section 453.4(b) contains the general prohibition on funeral providers conditioning the sale of any goods or services on the required purchase of other goods or services.

*2. Section 453.4(a)—Casket for Cremation.—(a) Evidence.* A direct cremation is one which occurs without any intervening viewing, visitation, or ceremony with the body present.<sup>201</sup> Cremation, as an alternative to traditional burial, is increasing both in terms of the absolute numbers performed, as well as the percentage of all dispositions. Statistics indicate that approximately 3.9% of all dispositions in 1975 were direct dispositions, with the trend toward increasing numbers of such dispositions.<sup>202</sup> The evidence in the

<sup>198</sup> R. Harmer, Bd. member, CAFMS, Prof., California State Poly. U., D.C. Ex. 7, at 6; D. Cornett, California funeral industry sales representative, X-1-124; L. Bowman, *The American Funeral* 52 (paperback ed. 1964). See discussion in Section II(E), *supra*.

<sup>199</sup> D. Rollings, Executive Director, OGR, XIX, at 80 (1961 oral presentations).

<sup>200</sup> See Section II(A)(2)(c), *supra*.

<sup>201</sup> See discussion of the term "direct cremation" in Section II(E)(3), *infra*.

<sup>202</sup> Am. Funeral Director, June 1977, at 53. See also T. Sherrard, General Counsel, Telophase Society, Tx. 7966. Indicative of the increasing trend in direct dispositions is the increase in cremation rates. Cremation amounted to 9.7% of all dispositions in 1980, see *Funeral Service Insider*, Vol. 5, No. 48 (Sept. 14, 1981), up from 6.55% in 1975 (Cremation Association of North America, Post-Record-Comment, XIV-697, at 6 and Exhibit 1). While not all cremations are direct cremations, a substantial percentage are.

record suggests that consumers seek direct cremations for diverse reasons, including simple personal preference and lower cost.<sup>203</sup>

Because cremation reduces a body to ashes, there is no need as there is in ground burial for a permanent container for the body. All that is needed is a container to transport the body to the crematory. If there is to be a viewing before the body is cremated, consumers may prefer to buy a casket to display the body.

The evidence suggests that a significant number of funeral directors require consumers to purchase caskets as a condition of supplying cremation services. Consumer complaints,<sup>204</sup> various surveys,<sup>205</sup> and testimony of funeral directors<sup>206</sup> all suggest that many funeral directors require caskets to be purchased when cremation is desired.

Requiring a consumer to purchase an expensive casket that is unnecessary and unwanted imposes significant consumer injury. While casket prices vary substantially, even the least expensive casket typically carried by a funeral home generally costs substantially more than a non-casket alternative. Although some industry representatives testified that caskets can be purchased by consumers for as

low as \$65,<sup>207</sup> the evidence indicates that the lowest priced caskets generally available to consumers arranging cremations generally fall in the range of \$200 to \$250.<sup>208</sup>

There are, however, containers which cost substantially less than even the least expensive casket. These containers, defined as "alternative containers" in the rule,<sup>209</sup> are generally constructed of cardboard, composition board, or are opaque pouches.<sup>210</sup> The record evidence shows that these products sell at retail for anywhere from \$20 to \$65.<sup>211</sup> Even taking the lowest end of the spectrum of casket prices, a funeral provider imposed requirement that consumers purchase a casket to obtain direct cremation services causes consumers to spend substantial additional money. The extent of this expenditure increases as the minimum price of the caskets offered for sale increases. Thus, a provider-imposed requirement that consumers purchase caskets for any form of disposition imposes a significant cost on those consumers which they might otherwise choose not to assume. As noted in the beginning of this section, this injury is not reasonably avoidable.

In weighing whether a practice is "unfair" under Section 5, the Commission must also consider any

countervailing benefits to determine whether the practice imposed net injury. No testimony or comments provided any evidence of countervailing benefits. Indeed, funeral industry representatives agreed that there was "no justification" for requiring the purchase of a casket for direct cremation.<sup>212</sup>

Finally, in assessing a practice's unfairness, the Commission also looks to public policy as expressed in the decisions of other public bodies. No testimony or comments suggested that there was any public policy favoring the requirement of a casket for direct cremation, and at least nine states have actually prohibited such requirements.<sup>213</sup> Thus, to the extent that there is any public policy at all on this point, it clearly supports the Commission's position.

(b) *Rule Provisions.* Section 453.4(a)(1) defines it as unfair or deceptive for a funeral provider or a crematory to require that a casket other than an unfinished wood box be purchased for direct cremation.<sup>214</sup> The prohibition on requiring the purchase of a casket for a direct cremation extends to all funeral providers who arrange direct

<sup>212</sup> See, e.g., Comments of National Selected Morticians, II-A-661, at 20.

<sup>213</sup> Prohibitions on requiring caskets for cremation are effective in Arizona, California, Colorado, Florida, Maryland, Minnesota, New Mexico, Wisconsin and Wyoming. CAFMS Survey of State Laws and Regulations, *supra* note 165, at Appendix III-C.

<sup>214</sup> The cost of a provider-imposed requirement that a casket be purchased, and the resulting consumer injury, is the same whether the form of disposition chosen is direct cremation, immediate burial, or cremation or burial after a service with the body present. At this time, however, the Commission has required that alternative containers be offered only for direct cremations. The evidence in the rulemaking record supports a finding that consumers have sought the option of employing alternative containers for use in direct cremations. See, e.g., E. Purdy, Oregon funeral director, *Sea. Ex. 3*, at 20. There is little evidence, however, that consumers have sought out these alternatives for other forms of disposition. A distinction can be drawn between traditional burials and cremations on the one hand, and direct cremations on the other. In the former types of disposition, consumers may be able to secure alternative containers from other sources if the funeral provider they have selected does not offer them. Direct cremations, however, have much tighter time strictures, and minimize the ability to secure such a container from a third party. Immediate burials pose much the same, if not identical, problems which attend direct cremations. The record, however, is silent on whether consumers who employ this form of disposition would seek to use alternative containers. Thus, the Commission has declined at this time to extend the protections of this section to immediate burials. The Commission anticipates that where providers arrange direct cremations, and thus note the availability of alternative containers for use in direct cremations on their price lists, those containers will be offered for sale to all consumers, regardless of the type of disposition desired.

<sup>203</sup> Cremation Association of North America, Post-Record Comments, XIV-897, at 6 and Exhibits; 1978 Staff Report, *supra* note 9, at 216-18.

<sup>204</sup> See e.g., over one hundred written consumer complaints in Category IIB (4, 16, 18, 24, 34, 136, 280) and X (34, 46, 55, 61, 64) and individual consumer testimony (C. Crawford, PhD, Tx 6634). In many of the written comments, it is not clear whether the complaints concern cremations other than direct cremations, in which caskets might be desirable for viewing purposes. In any event, it is clear that consumers resent being required to purchase caskets when they do not want to buy them.

<sup>205</sup> G. Richardson, Memorial Society of New England (43 out of 141 members returning replies reported encountering casket for cremation requirements); Rochester Memorial Society, Sampling of Funeral Directors on Use of Simpler Container for Cremation (1975), Klein, Ex. 2(3) (N.Y.) (eight out of fifteen local funeral directors required a casket for cremation); R. Fox, Ass't Attorney General, Vermont, Chi. Statement (survey by Vermont Attorney General's Office showed that over one-half of the state's funeral homes required a casket for cremation).

<sup>206</sup> While no funeral director testified that they personally required consumers to purchase expensive caskets if they wanted cremation, a number of funeral directors indicated that they required consumers to buy the least expensive casket they sold. See, e.g., J. Curran, Pres., New York FDA, Tx 119; V. Polli, Secretary-Treasurer, Vermont FDA, Tx 2186; J. Wright, Mississippi funeral director, Tx 9450. This was confirmed by several other sources. Division of Consumer Affairs, Department of Community in Delaware 5 (1974), VI-D-9. However, in some instances the least expensive casket could be expensive. See notes 207-208, and accompanying text, *infra*.

<sup>207</sup> See, e.g., A. Dunn, Secretary, Okla. FDA, Tx 8924.

<sup>208</sup> See, e.g., D. Boyd, New Hampshire consumer, Tx 1690; R. Coates, Pres., Michigan FDA, Tx 3783; New York consumer complaint, VII-104; B. Kronman, A Death in the Family: A Guide to the Cost of Dying in New York City, Nassau and Suffolk (Sept. 1974). However, in some instances a wider range of prices was available. NYPIRG Ex. 6(C) (N.Y.), at 6 (cost survey reporting that least expensive caskets ranged from \$70 to \$365); Chenoweth, Minnesota Office of Consumer Services, 1972 Funeral Homes Study, Chi. Ex. 43, at 6-7 (Table I reporting that the cost of the least expensive caskets ranged from \$67 to \$220 at funeral homes surveyed).

<sup>209</sup> See discussion in Section II(E)(1), *infra*.

<sup>210</sup> S. Waring Treasurer, NFDA, Massachusetts funeral director, Tx 674 (containers available for \$25-\$35 wholesale charge); T. Sampson, Pres. Massachusetts FDA, Tx 966-67 (unfinished particle board casket offered for \$50-\$75, but most Massachusetts funeral directors don't stock alternative containers); M. Waterson, Minnesota funeral director, Tx 3716 (cremation containers wholesale for less than \$10). See also A. Dunn, Secretary, Oklahoma FDA and past Pres., NFADA, Tx 8924 (pine boxes available for \$65); E. Purdy, *There Must be a Better Way*, Mortuary Management, Oct. 1976, at 34; W. Kinder, President, Minnesota FDA, Tx 3303 (\$50 cardboard box on display); N. Heard, NFDA, Tx 13,154 (cardboard container available for \$50-\$85); E. Wright Pres., South Dakota State Board of Funeral Service, Tx 4704; L. Ruffin, past Pres., Arizona FDA, Tx 7873; C. Denning, Ph.D., Neptune Society, Tx 7762-64; Humphrey Co. Advertisement, X-1-14; Cohen Statement, *supra* note 75, at 7; E. Newcomer, Progressive Mortuary Methods, March, 1976, II-A-860, at 7-8;

<sup>211</sup> See note 210, *id*.

cremations, and to all crematories.<sup>215</sup> Some commentators in this proceeding argued that crematories should be permitted to require the use of caskets for safety-related reasons.<sup>216</sup> It was claimed that rigid containers facilitate the handling of the body. The rule accommodates this concern. Funeral providers and crematories are not prohibited from requiring that an unfinished wood box (which is defined as a "casket") or a rigid "alternative container" (e.g., a heavy cardboard container) be purchased as a condition of arranging a direct cremation.

The requirements of this section work in tandem with the requirements of § 453.3(b) of the rule, which prohibits misrepresentations of legal or crematory requirements for purchasing a casket to obtain direct cremation services. In that section the Commission not only proscribes the making of such misrepresentations, but requires that a simple affirmative disclosure be placed on the price lists given to consumers informing them about the existence of alternatives to caskets for use in direct cremations.

The Commission has determined, however, that it is not sufficient simply to prohibit funeral directors from requiring a casket for cremation and to require a disclosure that alternatives for caskets are available. In addition, remedial steps also must be taken to ensure that, at point of sale, consumers retain the ability to decline the purchase of a casket. As we discussed above, in those situations where consumers have anticipated a death and have selected the form of disposition, pre-need comparison shopping can occur. In those instances, prohibiting funeral providers from requiring the purchase of caskets will enable consumers either to seek out a provider who makes alternative containers available, or to make the necessary arrangements to purchase such a container from a third party for use at a funeral home which does not offer them for sale.

As indicated previously, however, many consumers choose a funeral home without obtaining prior information about prices and offerings, some because they have a limited choice, and others for a variety of reasons previously noted. Given the tight time strictures surrounding a direct cremation and the fact that consumers will not remove the body of a deceased from the provider who first acquires possession, a simple prohibition on required

purchases of caskets and a disclosure of the availability of alternatives may be insufficient to ensure that consumers do not have to, *de facto*, purchase a casket. For example, a funeral provider might not require the consumer to purchase a casket, but if the provider only sells caskets, consumers must either forgo their desire to employ a direct cremation without a casket, or purchase the only available container—a casket.

The Commission therefore finds it necessary to adopt the remedial requirement, found in § 453.4(a)(2), that funeral providers who arrange direct cremations make unfinished wood boxes or alternative containers available for such services. The rule provision adopted by the Commission does not require funeral providers to maintain an inventory of alternative containers. Rather, the rule requires that providers *make* available either a simple wood box, or some form of alternative container. This distinction is an important one, because it significantly reduces any burden which the provision might otherwise impose. Funeral providers need not maintain a current inventory of alternative containers. Rather, they need only be able to secure one such container, on request, and make it available for use in a direct cremation. Moreover, to the extent that some providers might, because of geographic location or other considerations, feel compelled actually to stock an alternative container, the evidence indicates that containers are available which, because of their construction or size, can be easily stored.<sup>217</sup>

It should be stressed that the rule does not require funeral providers to make a range of alternative containers available to consumers. The rule permits the funeral provider to offer any alternative container for sale—wholly within the discretion and business judgment of the provider. Indeed, in lieu of offering an alternative container, a provider can opt to offer only a plain wood box, which is a form of a casket.

**3. Section 453.4(b)—Other Required Purchases.—(a) Evidence.** The record reveals that most funeral providers, in excess of 65%, do not sell their goods and services on an itemized basis.<sup>218</sup> Rather, the industry norm is to offer complete "package funerals" for sale, with all of the items included in the packages having been preselected by the funeral provider.<sup>219</sup> While some

industry members reduce the price if the buyer does not want a part of the package, if asked, many funeral providers do not reduce the price of a package funeral even where a consumer asks to have items dropped from the package.<sup>220</sup> By "bundling" all of the preselected goods and services together, the funeral provider is effectively forcing the consumer to buy items he or she doesn't want as a condition of providing a necessity that only he can provide: Disposition of the body. This injury cannot be reasonably avoided. As previously noted, even if the person arranging the funeral is dissatisfied with the terms of this offer, once the funeral home has taken possession of the body, for all practical purposes the consumer will not go somewhere else.<sup>221</sup> The evidence suggests that a significant number of consumers are required to pay the full package price, and that many are thereby required to pay for items they do not want or use.<sup>222</sup>

In weighing this injury to consumers, the Commission must also consider any countervailing benefits that such packaging might create. The only significant benefit advanced by funeral providers is that packaging permits the funeral director to offer lower prices to consumers. That arrangement is considered in detail in Section V(B)(4), *infra*. There, the Commission finds that, while itemization presents opportunities for funeral directors to raise prices, packaging does not inherently permit lower prices for consumers. Therefore, the Commission finds that the injury to consumers is not offset by any savings made possible by packaging.

The Commission also notes that the major trade associations recognize the basic unfairness in requiring buyers of

<sup>215</sup> See discussion in Section II(A)(2)(b), *supra*, and note 76.

<sup>216</sup> See discussion in Section I(E), *supra*. Further, for those consumers served by only one funeral director, which may be nearly one in four, there is no other place to go. And nearly 70% of all funeral homes have less than 4 competitors, suggesting that the choice may be limited in any event. See note 114, *supra*.

<sup>217</sup> Evidence of consumers being aware that they were required to pay for items they did not want comes from consumers complaints from across the country. (see, e.g., the following complaints in category II-B: 54, 164, 366, 496, 528, 829, 1048, 1108, 1266, 1404, 1466, 1893, 1987, 1984, 2003, 2013, 2034, 2240, 5967), testimony (S. Ross, Tx. 5274-75; Msgr. R. O'Keefe, Arizona St. Bd. of Funeral Directors and Embalmers, Tx. 7064-7065); and surveys (Cohen, D.C. Ex. 39 [20 out of 101 respondents reported paying for services, merchandise, or facilities they didn't want]; Blackwell Survey, *supra* note 59 [3.7% reported paying for services they did not want]). For a number of reasons discussed in the text, *infra*, these results probably underrepresent the number of consumers who bought items that they would not have bought had they been aware of their prices and the fact that they were optional.

<sup>218</sup> See Section III(E)(3) and (4), *infra*.

<sup>219</sup> See B. Bruce, Past Pres., CANA, Tx 10,706-09. CANA crematories require a rigid, opaque, and safely combustible container. *Id.* at Tx 10,686-90.

<sup>217</sup> See 1978 Staff Report, *supra* note 8, at 245.

<sup>218</sup> See Section II(A)(2)(b) at note 75, *supra*.

<sup>219</sup> *Id.*

funerals to purchase items that they do not want. Both associations take the position that consumers are entitled to a "reasonable adjustment" of the package price when the consumer asks if credits are available for unwanted items.<sup>223</sup> While the problems with that industry position have been discussed above,<sup>224</sup> the industries view seems to confirm that refusing to give any discount for unwanted items takes unfair advantage of funeral purchasers.

(b) *Rule Provisions.* Accordingly, in § 453.4(b) of the rule, the Commission finds that it is an unfair act or practice in violation of Section 5 for funeral providers to require that consumers purchase unwanted goods and services, as a condition of obtaining those which they do want. Section 453.4(b)(2), requires funeral providers to place a disclosure on the general price lists which they must deliver to consumers, informing them of their option to make an itemized selection of goods and services with certain exceptions discussed below. The disclosure imposes the legal requirement that selection be permitted on an itemized basis.

After the effective date of the rule, it will be an unfair act or practice for any funeral provider to require consumers to purchase goods or services which they do not wish to purchase. This does not mean, however, that funeral providers will not be prohibited from offering prearranged packages for sale. So long as they comply with the required form of itemized pricing, and permit consumers to select from those itemized lists, providers may, *in addition*, continue to offer packaged funerals for sale. Consumers may continue to select these packages if they desire to do so. The rule simply prohibits the imposition of packages by the provider.

There are several important exceptions to this general right to select requirement. First, consumers may not decline the basic services of the funeral provider.<sup>225</sup> Irrespective of the combination of goods and services which a consumer may choose to select, the very process of selection itself will involve use of the funeral provider's services. Accordingly, the Commission has made the services of the funeral provider non-declinable. This may be done in one of two ways. On the general price list, which informs consumers of their general right to select goods and services on an itemized basis, the funeral provider must disclose either that: (1) The service charge will be

added to the cost of the goods and services;<sup>226</sup> or (2) the service fee has been added to the casket price.<sup>227</sup>

The second major exception to this provision concerns embalming. As we discuss in the next section, the selection of certain forms of disposition, primarily those with a viewing, makes embalming a practical necessity.<sup>228</sup> Thus, funeral providers are permitted to require that embalming be selected by a consumer for all dispositions other than direct cremation and immediate burial.

Third, the Commission also was concerned that § 453.4(b) might be viewed as preventing funeral providers from refusing to deal with consumers who make impractical or idiosyncratic purchase requests.<sup>229</sup> Consequently, the Commission has added a provision in § 453.4(b)(2)(ii) which indicates that the rule does not force funeral providers to comply with a request for a combination of goods which would be impossible, impractical, or excessively burdensome to provide.<sup>230</sup>

It is the Commission's judgment that the remedies it has selected in § 453.4(b) are the least intrusive remedies which will serve to correct the pervasive abuses documented in the record.<sup>231</sup> In the Commission's view, the remedies chosen bear a close relationship to those abuses. Thus, the Commission has not prohibited funeral providers from selling their goods and services in prearranged packages if those sellers view the alternative as desirable in their business judgment. Rather, the rule only prohibits

them from imposing that determination on the consumer, in view of the unique characteristics of the funeral transaction.<sup>232</sup>

*D. Section 453.5—Services Provided Without Prior Approval.—(1) Description of the Evidence.* The record shows that funeral directors customarily embalm a body without obtaining express authorization from the family to do so. Support for this finding comes from testimony of individual funeral directors stating that they do not attempt to obtain authorization from the family prior to embalming.<sup>233</sup> testimony

<sup>223</sup> W. Rill, Pres., Washington FDA, Tx 5563; F. Noland, Pres., Idaho FDA, Tx 5836; J. Page, California mortician, Tx 7373; D. Deaton, Chairman, Alabama Funeral Service Board, Tx 9988; L. Ruffner, past Pres., Arizona FDA, Tx 7851; N. Heard, Pennsylvania funeral director, Tx 13,150; M. Chabot, Minnesota funeral director, II-C-68; R. Mee, former owner of Wisconsin Casket Co., III-F-16; T. Kimche, Oregon funeral director, Tx 5388; R. Myers, Chairman, Utah Funeral Directors and Examining Board, Tx 8294; A. Dunn, Oklahoma funeral director, past Pres. NFDA, Tx 8922-23; C. Austin, Kentucky funeral director, II-A-8; F. Galante, New Jersey funeral director and past Pres., NFDA, Tx 1741; V. Polli, Sec.-Treas., Vermont Funeral Directors and Embalmers Assoc., Tx 2197-98; B. Hirsch, Vice-Chairman, Pennsylvania State Board of Funeral Directors, Tx 12,533; A. Nix, Pennsylvania funeral director, Tx 12,928-27; N. Greene, member, Virginia Board of Funeral Directors and Embalmers, Tx 14,186.

<sup>224</sup> R. Johnson, Indiana funeral director, Tx 12,595; R. Shackelford, Tennessee funeral director, Tx 8987; J. Kaster, Texas State Representative, Tx 8119; N. Gregory, former-California funeral director, Tx 8686; S. Waring, member, Massachusetts FDA, Treas., NFDA, Tx 663; R. Thompson, member, Connecticut State Board of Examiners of Embalmers and Funeral Directors, Tx 2034; Dr. E. Jindrich, Coroner, San Rafael, Calif., L.A. Ex. 28.

<sup>225</sup> CFDA, FTC and You, Questionnaire Results, L.A. Ex. 23 California Funeral Directors Association survey revealed that half of the funeral directors responding do not obtain permission for embalming; S. Chenoweth, Director, Minnesota Office of Consumer Services, II-C-51, at 5-8; H. Sandhu, Pres., The Memorial Association of Central New Mexico, Inc., II-C-1280; F. Schneider, Yale student's survey, Schneider, Ex. 1 (N.Y.), at 3; 1972 Study on Funeral Homes by Minnesota Office of Consumer Affairs, Ch. Ex. 43, at 36 (14 of 33 funeral homes surveyed embalm automatically upon arrival of the body).

<sup>226</sup> See, e.g., consumer complaints in category II-B (423, 536, 1107, 1156, 1206, 1302, 1862, 2038, 5055), in category X-1 (108) and testimony (Tx 1419, 9256).

<sup>227</sup> O. Matthews, Maryland Citizens Consumer Council, Tx 14,054; H. Drinkwater, Education Director, Hanover Consumer Cooperative Society, II-C-668; T. Pearson, Memorial Society of New Hampshire, N.Y. Stmt. at 6.

<sup>228</sup> Fuller, *State Study Assails Some Funeral Home Actions*, Minneapolis Tribune, Jan. 7, 1973, at 1A, attached to VI-D-14; S. Chenoweth, Director, Minnesota Office of Consumer Services, Tx 3121-22; New York Temporary State Commission on Living Costs and the Economy, Hearings, Practices of the Funeral Industry, Oct. 17, 1974, VI-D-1, at 15; Investigation by the New York State Temporary Commission on Living Costs and the Economy into the Practices of the Funeral Industry in the State of New York, VI-D-18, at 16.

<sup>229</sup> N. Dunlop, Memorial Society of Maine, II-B-11; E. Lohof, Memorial Society of Montana, II-C-63; R.

<sup>226</sup> Section 453.2(b)(4)(iii)(C)(aa).

<sup>227</sup> Section 453.2(b)(4)(iii)(C)(bb).

<sup>228</sup> See Section II(D), *infra*.

<sup>229</sup> The Commission therefore specifically asked for comment from interested parties on the question of whether the rule provisions could be reworded to avoid creating technical rule violations in the case of aberrant selections, without vitiating the goals of the rule's itemized selection provisions. See 46 FR 6981 (Jan. 22, 1981) (Question 9). Few comments were received. Of those comments, none provided the Commission with any evidence that such idiosyncratic selection behavior either has occurred in states requiring itemization, or would be likely to occur.

<sup>230</sup> For example, the Commission would not consider it a violation of § 453.4(b) for a funeral provider to refuse doing business with a consumer who said "We have our own casket, transportation, flowers, etc., but wish to use your viewing facilities for two hours next Monday." The Commission wishes to stress, however, that this provision does not give funeral providers the option to reject arrangements which are practical to provide but which do not comport with the provider's judgment of what is appropriate under the circumstances.

<sup>231</sup> See Section II(A)(3)(g), *supra*, for a discussion of the legal standards applicable to remedial requirements in Commission rules.

<sup>232</sup> The rule does not affect, of course, other rights that the funeral director may have under law to refuse to deal with certain consumers or certain requests. Section 453.4(b)(2)(ii) is only intended to clarify the extent of obligation which may be created by the operation of § 453.4(b)(2).

<sup>223</sup> See note 78, *supra*.

<sup>224</sup> See Section II(A)(2)(b), *supra*.

<sup>225</sup> See § 453.2(b)(4)(iii)(C).

of funeral industry trade association representatives and state licensing board representatives,<sup>234</sup> informal surveys of morticians in various parts of the country,<sup>235</sup> individual consumers,<sup>236</sup> consumer group representatives,<sup>237</sup> state agencies,<sup>238</sup> memorial societies,<sup>239</sup> and consumer surveys.<sup>240</sup>

Indeed, while some funeral providers testified to the contrary,<sup>241</sup> the industry acknowledges that express prior permission is not usually sought. Instead, embalming is considered to be a negative option; the consumer must affirmatively state that embalming is not to be done or the process will be automatically performed.<sup>242</sup> The funeral industry contends that funeral directors receive implied permission to embalm from the authorization to pick up the body.<sup>243</sup> Authorization to embalm is also

inferred from circumstances, such as from having handled the funeral of another member of the family in question in which embalming was requested<sup>244</sup> or from general authorization "to take care of the preparation" without any specific mention of the embalming process.<sup>245</sup>

The evidence reveals that, contrary to the funeral industry's assumption, a substantial portion of consumers do not in fact intend to authorize embalming by giving the funeral director limited authority to pick up the body.<sup>246</sup> While a precise estimate is not possible, surveys conducted by both industry and consumer groups suggest that a substantial number of funeral consumers would decline embalming if offered an informed choice.<sup>247</sup> This group would include those who object to embalming on a personal or religious basis, as well as many others who simply desire a less elaborate or less expensive funeral service.

Some caution is warranted in projecting what percentage of consumers would actually decline embalming when making an informed choice. It is possible that some consumers who indicate in the abstract that they would decline embalming might actually purchase such services in order to arrange a funeral with a viewing or visitation. Nonetheless, as the limited purchase data show, a

substantial number of consumers do decline embalming when presented with the option in a real purchase situation.<sup>248</sup>

While some consumers may not be injured if a funeral director embalms without obtaining authorization,<sup>249</sup> many other consumers suffer substantial economic and emotional injury from unauthorized embalming. In terms of the economic injury, there is a charge for embalming, ranging from \$50 to 150,<sup>250</sup> which a consumer interested in a simple, direct or less expensive disposition might not wish to spend. Beyond the actual charge for the service itself, embalming is a necessary predicate to selling techniques which encourage the purchase of higher priced goods and services. Embalming is a practical necessity if there is to be a viewing and an open casket funeral service which normally requires the purchase of a casket, burial clothes, and other services and facilities of the funeral home.<sup>251</sup>

Unauthorized embalming may result in substantial emotional injury to the family of the deceased, as well. For some funeral purchasers, personal convictions may dictate that embalming is not appropriate. For others, embalming may be incompatible with religious beliefs. Orthodox Judaism, for example, forbids embalming as a desecration of the body.<sup>252</sup> A funeral director who has performed embalming without prior approval has inflicted substantial, irremediable emotional injury upon the survivors of the deceased. That the funeral director may voluntarily forego his or her embalming

Haynes, Memorial Society of Eastern Oklahoma, II-C-1230; A. Stensland, Board Member, Minnesota Memorial Society, Chl. Ex. 6, at 2.

<sup>240</sup> P. Sperlich, Ph.D., CalCAG, Tx 7410. The study indicated that "where respondents did not ask for embalming, embalming took place in 98% of the cases . . .". The study also found that 69.6% of 400 respondents said they received embalming but did not ask for it. In the midwest, an informal mail survey conducted by the *Louisville Times* found that the question of embalming was not even raised by funeral directors in approximately two-thirds of the instances. *Cashing in on Grief? Study Reveals Little Exploitation*, *The Louisville Times*, July 19, 1976, at 6, col. 1, D.C. Ex. 34. See also Cohen Statement, *supra* note 75, at 4 (30% of those interviewed said embalming was performed before the funeral director spoke to them about embalming).

<sup>241</sup> Several providers indicated that they did not embalm without permission and expressed doubt about how widespread unauthorized embalming is. G. Primm, New York funeral director and Pres., Empire State FDA, Tx 271; L. Jones, Pres., NFDMA, Tx 9810; A. Juska, Vice-Pres., New Jersey FDA, Tx 2481; R. Miller, Exec. Sec., NFDMA, Tx 3612; M. Waterston, Minnesota funeral director, Tx 3736; H. Coates, member, Kentucky State Board of Embalmers and Funeral Directors, Tx 3965; M. Damiano, past Pres., New Jersey FDA, Tx 1309; P. Farmer, New Jersey funeral director, Tx 2315-18; C. Buell, Oregon funeral director, II-A-765, at 1; M. Russell, Oregon funeral director, II-A-762, G. Heller, Ohio funeral director, II-A-286; S. Fulford, Georgia funeral director, II-C-730. Others felt such a practice would be unfair and even "grossly unethical." J. Broussard, counsel and Pres., Texas FDA Tx 9351; R. Hodge, Sec., New Jersey State Board of Mortuary Science, Tx 2058; M. Damiano, past Pres., New Jersey FDA, Tx 1299; C. Hite, Dean, Simmons School of Mortuary Science, Tx 1523.

<sup>242</sup> According to National Selected Morticians, one of the two major trade associations: Preparation and preservation of a dead human body are standard procedures in funeral service unless there are instructions to the contrary during the initial death call because of religious beliefs or known requests for immediate disposal. Comments of NSM, II-A-661, at 21.

<sup>243</sup> For example, the President of the New York Funeral Directors Association testified that funeral directors often assume the authority to embalm simply because the services of that provider were retained: There has always been an inherent assumption when a funeral director was engaged by a family for one of its members that all necessary

authority flows from that engagement. J. Curran, Pres., New York FDA, Tx 90.

Indeed, basic textbooks used in mortuary school instruct that turning a body over to a funeral home authorizes embalming. L. Frederick and C. Strub, *The Principles and Practice of Embalming* 191 (1967) states: the act of handing over a dead body . . . carries with it an implied permission to embalm that individual.

But see H. Raether and R. Slater, *The Funeral Director and His Role as A Counselor* (1975). In this book by Howard Raether, Executive Director of the National Funeral Directors Association, and Robert Slater, Director of the Department of Mortuary Science, University of Minnesota the authors advise funeral directors to seek explicit permission to embalm.

<sup>244</sup> J. Proko, past Pres., Wisconsin FDA, Tx 4148.

<sup>245</sup> R. Thompson, Sec., Connecticut State Board of Examiners of Embalmers and Funeral Directors, Tx 1982-83; Anderson, Pres., Utah FDA, Tx 6145; B. Hirsch, Vice-Chairman, Pennsylvania State Board of Funeral Directors, Tx 12,533.

<sup>246</sup> In the consumer complaints set out in note 236, *supra*, the consumer typically complained that by the time he or she reached the funeral home, often only shortly after the death, the embalming had already been performed.

<sup>247</sup> See, e.g., Blackwell Survey, *supra* note 59. (NFDA-sponsored survey of 400 consumers found that only 9.5% of respondents would decline embalming in an "average" funeral home, 25% were undecided, and 60% would not decline embalming). In one study, 88.1% of respondents had embalming when they were unaware that embalming was not legally required while only 58.5% of respondents who knew embalming was optional had embalming done. Sperlich, CalCAG, L.A. Ex. 17.

<sup>248</sup> D. Daley, Seattle funeral director, Tx 5933 (funeral home which presents embalming as true option reports 30% declination rate); CAMP Survey, *supra* note 92 (less than half of those who had purchased embalming expressed a preference for it).

<sup>249</sup> E.g., consumers who would have chosen a funeral in which embalming is required as a practical necessity or those who would have been required by law to embalm.

<sup>250</sup> J. Lyon, Washington consumer, II-B-1100; *House Small Business Subcomm.* (Part III), *supra* note 30, at 91, 329; *Funeral Prices, Pricing Policies and Procedures in Florida*, VI-D-6, at Question 13; *Arkansas Attorney General Study*, VI-D-12, at 5; *Delaware Consumer Affairs Survey*, VI-D-9, at 2; R. Mee, former Wisconsin funeral director, III-F-18.

<sup>251</sup> Recent editions of a basic textbook on the subject state that embalming is the "basis for the sale of profitable merchandise." L. Frederick & C. Strub, *The Principles and Practice of Embalming* 2 (1967). Another reference book puts it in the following way: "The foundation of the funeral service profession is embalming and the basis of financial profit is merchandising." E. Martin, *The Psychology of Funeral Service* viii (1970).

<sup>252</sup> See M. Tendler, New York, Rabbi, Tx 855; E. Grollman, Massachusetts Rabbi, Tx 830; A. Schneider, New York Rabbi, Tx 1009; S. Applebaum, New York Rabbi, Tx 1049; Comment of the Washington Board of Rabbis, D.C. Stmt. at 4-5.

fee is likely to be of little or no consolation to the family.

The Commission finds that unauthorized embalming results in substantial consumer injury, both in economic and non-economic terms. The test for unfairness, however, requires that the Commission balance against the harmful effects of conduct, the benefits which may flow from the practice in question. In essence, the unfairness of a practice must be measured by its net effects. Funeral providers have advanced two arguments to support "routine" embalming or embalming predicated on general expression of authority: First, embalming is virtually always desired by funeral consumers; and second, the subject of embalming is repulsive to people and therefore it would be offensive to ask a family about embalming. The record demonstrates, however, that many consumers do not in fact want embalming and would decline it given an option, and that many consumers do not give permission to embalm by authorizing the funeral director to pick up the body.<sup>253</sup> Given consumers' lack of prior experience and knowledge, it is unreasonable to expect that consumers will affirmatively decline embalming in the first telephone contact with the funeral home.

The response to the second argument is twofold. First, evidence suggests that many if not most consumers would not be uncomfortable in giving express permission to embalm. Two surveys of consumer attitudes found that four out of five consumers favor the idea of requiring funeral directors to obtain embalming permission.<sup>254</sup> In addition, the numerous consumer complaints received on the subject of embalming suggest that funeral purchasers are able and willing to address this subject. Furthermore, several funeral director witnesses testified that the subject of embalming did not offend their consumers.<sup>255</sup>

Second, and perhaps more fundamental, the speculative concern of funeral providers that some consumers will be offended by the simple question "May we embalm?" is simply not a justifiable basis for refusing to ask the question at all, thereby imposing the expense of embalming on that segment of the population that would decline if asked.

The Commission finds that consumers cannot readily avoid the harm caused

by this practice, since it often occurs at the point of initial contact with the funeral home. To protect themselves from this harm, consumers would have to know that they must affirmatively instruct the funeral provider not to embalm at the moment the pick-up call is placed, or else embalming will be performed. Such knowledge is highly unlikely, given consumers' lack of prior experience with arranging funerals. Further, as discussed in Section II(B)(2)(a), *supra*, the evidence shows that many consumers believe that embalming is legally required and that they may have no choice.

Charging a buyer for goods or services which the buyer did not agree to buy plainly violates established principles of public policy found in fundamental levels of contract law. The common law insists on mutual consent for there to be a binding contract.<sup>256</sup> While consent may be reasonably implied in some circumstances, courts have also made it clear that acceptance cannot be implied where the offeror knows, or should have known, that the offeree does not understand the terms of the offer. In such cases, clear expressions of acceptance are required.<sup>257</sup> For that reason, the Commission and Congress have, in other contexts, reined in marketing schemes which relied upon unknowing or ambiguous consent on the part of consumers.<sup>258</sup> In addition, seven states have enacted provisions which specifically require funeral directors to receive express permission before embalming,<sup>259</sup> confirming the conclusion that such practices are unjustifiable and injurious.

(2) *Rule Provisions.* Accordingly, § 453.5(a) of the rule defines it as unfair for any funeral provider to embalm a deceased human body for a fee without prior approval from a family member or other authorized person, except in certain unusual circumstances.

In determining which practices to proscribe in the rule, however, the Commission is cognizant of the fact that in virtually all instances where disposition does not occur within a very short time span, (*e.g.*, 24 hours) either embalming must be performed or the body refrigerated to delay decomposition. Concerns were raised in

the rulemaking proceeding that if prior approval for embalming were required, funeral providers would be unable to embalm in those situations where the family or legal representative of the deceased could not be immediately contacted. Unless embalming were performed, it was argued, decomposition would begin thereby precluding the possibility of a traditional funeral.<sup>260</sup>

The Commission recognizes that the majority of consumers arranging funerals, according to all survey evidence, do want embalming because of their intent to have a traditional funeral with viewing and visitation. Thus, the Commission has cast the unfair acts and practices proscribed by § 453.5(a) in the alternative. As noted above, the general rule adopted by the Commission prohibits funeral providers from embalming for a fee<sup>261</sup> without obtaining prior approval from the family or authorized representative of the deceased.<sup>262</sup> Excepted from this general rule are two situations. First, if state or local law require embalming in certain situations, such as where death has occurred from certain communicable diseases or where the body will be transported interstate,<sup>263</sup> the funeral provider must follow the applicable law.

Second, the provision allows for certain exigent circumstances by providing that if the funeral director is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe that the family does not want embalming performed, and obtains subsequent approval from the family, the funeral director may charge for embalming without violating the rule.<sup>264</sup> In seeking subsequent approval, the funeral director must first disclose that embalming has been performed, but that no fee will be charged if the family selects a funeral arrangement which would not require embalming, such as direct cremation or immediate burial. If the family then selects a funeral arrangement which would require embalming, such as a funeral with viewing, visitation, or the body present, subsequent approval may be inferred and a fee charged.

<sup>260</sup> See NFDA Comments on Revised Rule, XVI-112, at 11.

<sup>261</sup> Section 453.5(a)(2).

<sup>262</sup> If the funeral director is unable to locate an appropriate family member, the rule permits the required authorization to come from a local official who has legal authority to make such a decision. This may be, depending on the circumstances and the state law, a coroner, sheriff, public health official, a judge, or one expressly authorized to direct disposition of the dead.

<sup>263</sup> Section 453.5(a)(1).

<sup>264</sup> Section 453.5(a)(3).

<sup>256</sup> See, *e.g.*, Corbin on Contracts § 55 (1963); Restatement (Second) of Contracts § 17 (1979).

<sup>257</sup> See, *e.g.*, Corbin on Contracts § 95, §107 (1963); Restatement (Second) of Contracts § 18 (1979).

<sup>258</sup> See, *e.g.*, Postal Reorganization Act, 39 U.S.C. 3009 (Prohibiting charging consumers for unordered mail merchandise); Trade Regulation Rule on the Use of Negative Option Plans by Sellers in Commerce: 16 CFR § 425 *et seq.* (1975).

<sup>259</sup> CAFMS Survey of State Laws and Regulations, *supra* note 165, at Appendix III-C.

<sup>253</sup> See discussion at note 248, *supra*.

<sup>254</sup> CalCAG Study, *supra* note 247, at 20; CAMP Survey, *supra* note 92, at 5.

<sup>255</sup> D. Deaton, Chairman, Alabama Funeral Service Board, Tx 9997; L. Jones, Pres., NFDMA Tx 9812; C. Brown, Chairman, Vermont Board of Funeral Service, Tx 12,059.

To help prevent a funeral director from charging for embalming in those situations where the rule does prohibit it, § 453.5(b) of the rule requires funeral directors to place a written disclosure on the final bill or agreement given to customers informing them of their right not to pay for embalming performed without prior approval unless they select a type of funeral which would require embalming. Moreover, the disclosure must state that if a fee is charged for embalming, a written explanation will appear on the final bill or agreement given to a customer.

E. *Section 453.1—Definitions.* In § 453.1, the Commission defines several terms of particular importance in the rule. Some of these terms such as "Commission," "cremation" and "person" require no elaboration. Others, which raise significant issues about the scope and coverage of the Commission's rule are discussed below. We have placed this discussion after the discussion of the substantive provisions of the rule to facilitate understanding of the issues they raise.

1. *Section 453.1(a), (c), and (o)—Definitions of "alternative container," "casket," and "unfinished wood box."* The rule defines three categories of receptacles for human remains: Caskets, alternative containers, and unfinished wood boxes. These terms are used in § 453.4(a) which ensures the consumer's right to use an alternative to a traditional casket when choosing a direct cremation. Caskets are defined generally as containers made of wood or metal, ornamented and lined with fabric. An alternative container, on the other hand, is non-metal, without ornamentation or fixed interior lining, and may be made of a variety of materials, such as cardboard, pressed wood or canvas.

The term "unfinished wood box" has been included in the rule because of a concern that what is perhaps the traditional low cost container, *i.e.*, the plain pine box, could fall within either the definition of casket or that of alternative container.<sup>265</sup> The Commission, therefore, has defined an unfinished wood box as a particular type of casket—one which is made of wood and without lining or ornamentation. Under the rule, an unfinished wood box is treated like an alternative container; that is, a funeral provider may satisfy the requirement in § 453.4(a) to offer an alternative to a casket for use in direct cremations by offering an unfinished wood box.

2. *Sections 453.1 (i), (j), and (k)—Definitions of "funeral goods," "funeral provider," and "funeral services."* The definitions of "funeral goods," "funeral provider" and "funeral services" in § 453.1 (i), (j) and (k) are critical because they define the scope of the rule's coverage. Only those persons who fall into the class of "funeral provider" are subject to the rule, and in order to do so a person must sell both "funeral goods" and funeral "services." "Funeral goods," under § 453.1(i), consist of all products sold to the public for use in connection with funeral services. Thus, the definition of "funeral services" is the core on which the definitions of both "funeral provider" and "funeral goods" are based.

Two types of functions come under the definition of "funeral services" in § 453.1(k): (1) Those services used to care and prepare human bodies for burial or other disposition and (2) those services used to arrange, supervise or conduct the funeral or disposition. Both the preparatory and the supervisory types of functions must be performed in order to come within the definition of "funeral services."

A "funeral provider" under § 453.1(j) must sell both "funeral goods" and "funeral services." In order to be classified as a "funeral provider", a person must perform both types of functions listed in § 453.1(k). A cemetery, therefore, would generally not be considered a "funeral provider" under the rule because it only arranges or conducts final dispositions. It does not prepare human remains for burial or other dispositions.<sup>266</sup>

3. *Sections 453.1(g) and (l)—Definitions of "direct cremation" and "immediate burial."* The rule prohibits funeral providers from requiring that consumers choosing direct cremation purchase a casket.<sup>267</sup> In addition, consumers choosing immediate burial or direct cremation may not be required by funeral providers to purchase embalming services.<sup>268</sup> The terms "direct cremation" and "immediate burial" refer to forms of direct disposition of human remains which take place without formal viewing, visitation, or ceremony with the body present.<sup>269</sup> The definitions of these terms do not prescribe a precise time period between death and disposition of the body, but rather refer

<sup>266</sup> Of course, those cemeteries which do prepare human remains for burial would be considered "funeral providers" and therefore covered under the rule.

<sup>267</sup> See Section 453.4(a).

<sup>268</sup> See Sections 453.4(b) and 453.3(a)(2).

<sup>269</sup> Except perhaps for a brief graveside service in the case of immediate burial.

to the lack of ceremony surrounding the cremation or burial.

4. *Section 453.1(g)—Definition of "crematory."* The definition of "crematory" in Section 453.1(g) includes only those persons, partnerships and corporations that both perform cremations and sell funeral goods. The Commission is aware that some crematories do not sell funeral goods and therefore would not fall within this definition. However, the Commission believes that § 453.1(g) is consistent with Section 19 of the 1980 Improvements Act which limits the rule's coverage to persons who sell both funeral goods and funeral services.<sup>270</sup>

5. *Section 453.1(m)—Definition of "outer burial container."* Burial vaults, grave boxes and grave liners are terms commonly used by funeral providers and refer to containers designed for placement in the grave around the casket. The Commission has used the single term "outer burial container" to include the various types of containers which may be used.

6. *Section 453.1(o)—Definition of "services of funeral director and staff."* This term refers to the services which may be furnished by a funeral provider in connection with the arranging of a funeral, including such services as conducting the arrangements conference or planning the funeral services. It does not include services otherwise listed in § 453.2(b)(4), such as embalming, transferring remains to the funeral home, etc.

F. *Section 453.6—Retention of Documents.* Section 453.6 of the rule requires funeral providers to retain a copy of certain documents which must be provided to consumers under the substantive provisions of the rule. Specifically, the retention of documents provision requires funeral directors to retain copies of the price lists required by the rule, and copies of each individual statement of services selected by the consumer for each funeral for a period of one year. Funeral directors would also be required to make these records available to FTC officials upon request for inspection.

The Commission's goal in adopting a recordkeeping requirement is to help ensure compliance with the substantive provisions in the rule. As part of its enforcement program, the Commission will check the records of individual funeral homes to ensure that the price lists and statements required by the rule are complete. Since most of the

<sup>270</sup> See Section 19(c)(1)(A) (the Commission has authority over persons "furnishing goods and services relating to funeral"), 15 U.S.C. 57a note.

information which the rule requires be given to consumers will be contained on the price lists and statement of services selected, availability of those documents for inspection will make it feasible to detect rule violations efficiently and thus to enforce the rule effectively. The recordkeeping provision will thereby deter potential violators and help prevent the unfair and deceptive practices defined by the rule.

During the rulemaking proceeding several concerns were expressed about the operation of this provision. Some of the most frequent were: (1) That the requirement was burdensome because funeral providers would be required to store large numbers of documents in order to comply with the rule;<sup>271</sup> (2) that the time period for retention of records was unreasonably long and should be substantially reduced;<sup>272</sup> and (3) that the requirement would unreasonably invade the privacy of persons arranging funerals.<sup>273</sup> The Commission has considered each of these criticisms and has been as responsive as possible, consistent with the goal of efficient enforcement of the rule.

When compared with the version of the rule first published for public comment in 1975,<sup>274</sup> the version which the Commission has now approved has a recordkeeping requirement which substantially reduces the paperwork storage burden on funeral providers.<sup>275</sup>

<sup>271</sup> See Comments, Other Groups, XIV-867; Individual Funeral Industry Member, XIV-739; State or Local Agency or Official, XIV-678; U.S. Small Business Administration, XIV-819; Individual Funeral Industry Member, XIV-20.

<sup>272</sup> See Post-Record Comments, Other Groups, XIV-967.

<sup>273</sup> See *id.*

<sup>274</sup> See 40 FR 33901 (1975).

<sup>275</sup> The most significant change in this connection is the elimination of the requirement that funeral providers give to each customer (and, therefore, retain a copy) a separate "Statement of Funeral Goods and Services Selected" required by § 453.2(b)(5). The information which formerly would have appeared on the Statement may be incorporated onto the final contract, bill, or other document which the funeral provider already uses to memorialize sales agreements with customers. Since such documents would ordinarily be retained as business records or for tax purposes, the additional burden imposed by the Commission is minimal.

Two other changes in the final rule have significantly reduced the burden imposed by the recordkeeping requirement. First, as published in 1975, the rule required that funeral providers give out a separate sheet describing the legal requirements which a funeral provider claimed required consumers to purchase goods or services. Those disclosures have now been incorporated onto the price lists and statement of services selected, eliminating the need to keep separate records showing compliance with the provision. Second, the rule now permits funeral providers to consolidate certain price information onto one document, *i.e.*, the general price list. Thus, funeral providers may choose to list prices for caskets and outer burial

In response to concerns that the period for record retention was too long, the Commission reduced the period from three years to one year. A one-year record retention period will be less useful than a three-year period in helping identify funeral providers who are engaging in a pattern of rule violations or in identifying all consumers who would be entitled to redress under Section 19 of the FTC Act.<sup>276</sup> The Commission has nonetheless concluded that a one-year record retention period will provide an adequate incentive for funeral providers to comply with the rule's substantive provisions and has, accordingly, revised the rule to reduce the burden on funeral providers.

The recordkeeping requirement has not been revised, however, in response to the concern that it would constitute an unwarranted invasion of the privacy of the persons arranging funerals. The Commission views this concern as unfounded. The rule does not require funeral providers routinely to submit records for examination by Commission officials. To the extent that Commission officials obtain any information from the records of funeral providers as part of an investigation, such information would be subject to the provisions of the Privacy Act<sup>277</sup> and Section 21 of the FTC Act,<sup>278</sup> which provide guarantees against unwarranted disclosure of personal information.

**G. Section 453.7—Comprehension of Disclosures.** The Commission has included a requirement in the rule that the disclosures which funeral providers must provide to consumers must be made in a manner which is clear and conspicuous. The Commission's goal is to ensure that the information provided under the rule will be presented in a manner readily discernible by consumers.

**H. Section 453.8—Declaration of Commission Intent.** In § 453.8 of the rule the Commission clarifies three issues with respect to how it interprets its rule on funeral practices. The Commission has included these statements within the rule itself rather than only in the Statement of Basis and Purpose to assist those persons who are covered by the rule in understanding the scope of the rule and the obligations it imposes.

First, the Commission declares its intent that a violation of either the definitional provisions or the remedial provisions of the rule constitutes a

containers on one list, rather than to prepare three separate documents.

<sup>276</sup> 15 U.S.C. 57b.

<sup>277</sup> 5 U.S.C. 552a, *et seq.*

<sup>278</sup> 15 U.S.C. 57b-2.

violation of the rule, unless otherwise stated. In each provision of the rule, the Commission first describes with particularity the acts or practices which have occurred in the past which the Commission finds to be unfair or deceptive acts or practices. Thereafter, the rule describes what remedial provisions, if any, must be complied with. This format is necessitated by the decision of the Second Circuit in *Katharine Gibbs*.<sup>279</sup>

An example of where a violation of either the definitional or remedial sections would be a violation of the rule is found in § 453.3 concerning misrepresentations. If a funeral provider makes the disclosure required by the rule concerning caskets for cremation (*i.e.*, the remedial provision, § 453.3(b)(2)), but continues to make false claims that the law requires a casket for direct cremation (*i.e.*, the definitional provisions, § 453.3(b)(1)), the funeral provider would be in violation of the definitional section and this would constitute a violation of the rule.

Section 453.2(a) dealing with price disclosure is the one exception to the general standard that a violation of either the definitional or remedial sections constitutes a violation of the rule. In § 453.2(a) the Commission explicitly states that a funeral provider who complies with the remedial requirements concerning price disclosure in § 453.2(b) is not engaged in the unfair or deceptive acts or practices as defined in § 453.2(a).

Second, the Commission states its intent that each of the provisions of the rule are separate and severable from one another. If one or more parts of the rule are found to be invalid by a reviewing court, the Commission intends that the other portions of the rule will continue in effect.

The third issue addressed by this section concerns the effect of the rule on burial insurance and the rule's consistency with the exemptions for the business of insurance embodied in the McCarran-Ferguson Act<sup>280</sup> as restated in Section 5 of the FTC Improvements Act of 1980.<sup>281</sup> This section declares the Commission's intent that the rule be inapplicable to the business of insurance or to acts in the conduct thereof. This explicit declaration was included in the rule in response to several comments questioning the effect of the proposed rule on prearranged funerals governed

<sup>279</sup> See Section I(B), *supra*, at note 18.

<sup>280</sup> 15 U.S.C. 1011, *et seq.* (1976).

<sup>281</sup> Public Law 96-252, 94 Stat. 391.

by burial insurance.<sup>282</sup> The Commission's declaration of intent is included to address these concerns and clarify that the rule does not apply to such arrangements and other areas involving the business of insurance.

**1. Effect of the Rule on State Law—** Section § 453.9. In § 453.9 of the rule, the Commission has specified a process by which the states may obtain exemptions from part of all of the rule's requirements. The purpose of this section is to encourage federal-state cooperation by permitting appropriate state agencies to enforce their own state laws that are equal to or more stringent than the trade regulation rule.<sup>283</sup> To the extent specified by the Commission, the rule will not be in effect in a state obtaining an exemption. Otherwise, any state laws which conflict with this rule after its effective date are preempted to the minimum extent necessary to resolve that conflict.<sup>284</sup> The following discussion first sets out the basis for the Commission's preemptive authority and then describes how that authority affects existing state laws.

**1. Preemptive Authority.** In general, federal authority to preempt or override state law stems from the Supremacy Clause of the United States Constitution.<sup>285</sup> The Supreme Court of the United States has clearly established the principle that "state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."<sup>286</sup> The Court has also made clear that this principle applies to federal agency regulations which have the force and effect of law as well as to acts of Congress.<sup>287</sup>

More specifically, the courts have recognized that federal law may preempt state laws or regulations to the extent that the federal provision requires or authorizes conduct which is inconsistent with state law.<sup>288</sup> This form

of preemption is referred to as "conflict" or "inconsistency" preemption.<sup>289</sup> In *Katharine Gibbs*, the United States Court of Appeals held that Magnuson-Moss trade regulation rules promulgated by the Commission preempt inconsistent state law under traditional notions of "conflict" preemption.<sup>290</sup>

**2. Effect of Rule on State Law.** Every state regulates the licensing of funeral directors and funeral establishments, including such subjects as the educational, apprenticeship and examination requirements for licensees and public health standards for handling human remains. This entire area of state regulation remains intact because it does not conflict with or frustrate the purposes of the rule. The rule also specifically recognizes state regulatory limitations imposed on licensees for public health reasons with respect to embalming.<sup>291</sup>

Some states also have enacted certain protections for funeral consumers which appear similar to those in the rule.<sup>292</sup> State laws exist for example, which prohibit funeral directors from embalming remains without permission (Section 453.5(a)(2))<sup>293</sup> or requiring a casket for cremation (Section 453.4(a)).<sup>294</sup> At least one other state has enacted into law a provision which appears similar to an earlier proposed version of the rule's requirements concerning pre-selection disclosure of itemized prices.<sup>295</sup> Since such provisions do not conflict with the rule, they are not preempted or affected in any way. A violation of such provisions would simply be a violation of both the rule and state law.

Other states have enacted provisions which are directed at the same practices as the rule but appear not to address these problems in a manner similar to the rule. For example, several states require that funeral providers disclose

their prices, but require less disclosure than would occur under the rule's itemization requirement.<sup>296</sup> The rule would not conflict with and preempt such regulations either, because a funeral provider complying with the rule also could comply with the more permissive state law provisions. However, in such cases, funeral directors must also comply with the additional requirements of the rule.

While the Commission is aware of no state laws which are in conflict with the rule, individual states may wish to exercise their right, under § 453.9, to exempt their laws entirely from the rule. Under § 453.9, the rule will not be in effect in a state to the extent specified by the Commission where: (1) Application for an exemption is made by a state; (2) there is a state requirement in effect which applies to any transaction to which the rule applies; and (3) the state requirement provides an overall level of protection which is as great as, or greater than, the protection afforded by the rule. If an exemption is granted, it shall be in effect only for as long as the state administers and enforces effectively the state requirement.

The Commission here offers no opinion as to whether existing state laws or regulations provide a level of protection as great as or greater than that provided by the analogous rule provisions. As set forth in § 453.9, the Commission will instead determine the appropriate relationship between the rule and state law on a case-by-case basis in the context of an exemption proceeding conducted pursuant to § 1.16 of the Commission's Rules of Practice. The Commission will evaluate appropriate petitions for exemption made by state governmental agencies to determine the overall level of protection to consumers and whether the state regulation is administered and enforced effectively. Factors which will be considered by the Commission in determining whether an exemption is warranted include such things as the means available to the state to enforce its provisions, the existence of any private rights of action by an aggrieved consumer, and the scope and format of

<sup>282</sup> Comments on Revised Rule, Academic Group, XVI-171, at 1; Other Groups, XVI-60, at 1.

<sup>283</sup> This provision is in accord with a parallel provision in Section 19(d) of the FTC Improvements Act of 1980. See 15 U.S.C. 57a note.

<sup>284</sup> The Commission is unaware of any state laws which would be preempted by the rule. See discussion in Section II(I)(2), *infra*.

<sup>285</sup> U.S. Constitution, Art. VI, cl. 2 states that: This Constitution and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land . . . anything in the Constitution or laws of any state to the contrary notwithstanding."

<sup>286</sup> *Perez v. Campbell*, 402 U.S. 637, 652 (1971).

<sup>287</sup> See, e.g., *Nash v. Florida Industrial Commission*, 389 U.S. 235, 240 (1967); *Public Utilities Commission v. United States*, 355 U.S. 534, 540-546 (1957). See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 528-533 (1977).

<sup>288</sup> See, e.g., *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

<sup>289</sup> A federal law may also explicitly preempt an entire area covered by state law, in which case the federal statute is viewed as having "occupied the field." See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The funeral rule does not contemplate this type of preemption.

<sup>290</sup> 612 F.2d at 667. At issue in that appeal were provisions of the Commission's Vocational School Trade Regulation Rule (16 C.F.R. Part 439) which imposed obligations on private parties that conflicted with the requirements imposed by the states.

<sup>291</sup> See Sections 453.3(a)(2)(i) and 433.5(a)(1).

<sup>292</sup> See 1978 Staff Report, *supra* note 9, at 123, n. 85 and accompanying text.

<sup>293</sup> See, e.g., Wash. Rev. Code Ann. § 19.39.215 (1982 Supp.); Ind. Code Ann. (Burns 1982) § 25-15-11.1(b)(14); and W. Va. Board of Embalmers and Funeral Directors, Rules 10 (A) and (C).

<sup>294</sup> See, e.g., Md. Ann. Code art. 43, § 387A (Supp. 1981); Minn. Stat. Ann. § 149.09(3) (West Supp. 1978).

<sup>295</sup> Fla. Stat. Ann. § 470.035 (West 1979).

<sup>296</sup> For example, most states only require a written agreement; they do not require price lists. The written agreements usually may be in the form of a single (package) price for all of the funeral homes customary charges, with separate prices only for cash advance items and supplemental items. See "CAFMS Survey of State Laws and Regulations," *supra* note 165, at Appendix III-C. Any funeral provider itemizing to comply with the rule also would provide the disclosure required by these states.

required price disclosures to funeral consumers.

Only state governmental entities may request exemptions from the Commission's rule under § 453.9. Funeral providers may not use this process. The determination to grant an exemption to state law will necessarily place the primary enforcement burden back onto the state to enforce its provision. Such a decision should be made solely by the state entity involved.

### III. Alternatives Considered

During the course of this proceeding the Commission carefully considered several alternatives to the final rule ultimately adopted by the Commission. These options fall into three general categories: (1) Alternatives to the adoption of any rule; (2) specific rule provisions which were ultimately rejected by the Commission in any form; and (3) variations of rule provisions which were included in the final rule. The most significant of those alternatives considered which fall into the third category have been discussed in Part II of this Statement.<sup>297</sup>

The alternatives to the adoption of any final rule which were considered by the Commission include: (1) Taking no action; (2) issuing a nonbinding industry guide; and (3) issuing a model state law for consideration by the states. The alternative requirements which the Commission considered but did not include in the final rule were: (1) Prohibiting funeral providers from removing the remains of a deceased without authorization, or refusing to release the remains of the deceased; (2) prohibiting funeral providers from employing certain techniques and sales practices to steer consumers away from inexpensive funeral merchandise; (3) prohibiting funeral providers from engaging in concerted activity through threats or boycotts aimed at other funeral providers; and (4) permitting funeral providers to use a form of package pricing with declination credits in lieu of itemized pricing. Each of these alternatives will be discussed below.

**A. Alternatives to Any Commission Rule.—1. Take No Action.** Throughout the course of the funeral rule proceeding, one option considered by the Commission was that of taking no action, *i.e.*, terminating the proceeding without issuing a rule or other guidelines. This approach would essentially have maintained the status quo. Thus, the principal benefit of adopting this option is that it would impose no compliance costs on funeral providers, since they could continue

their existing practices without change. In addition, this course would not have required the expenditure of any funds to enforce a rule.

The Commission has concluded, however, that these benefits are substantially outweighed by the costs to consumers arising from the unfair and deceptive practices currently engaged in by funeral industry members, costs which would continue unabated if the status quo were maintained in this market. The practices described in detail in Section II of this Statement cause consumers to pay higher prices for funeral goods and services because funeral providers are insulated from the need to set prices competitively, and cause consumers to purchase and pay for items which funeral providers misrepresent as being required by law or cemetery regulations. These and other practices prohibited by the rule result in substantial injury to consumers, injury which can be eliminated at minimal compliance costs under the provisions of the rule.<sup>298</sup> The Commission has concluded, therefore, that there will be a significantly greater net benefit to society if it issues the rule than if it takes no action.

**2. Rely on Industry Guides.** Under this option, the Commission would issue voluntary trade practice guides instead of a binding rule. This option was first considered by the Commission in 1976, when two industry trade associations petitioned the Commission to convert the rulemaking proceeding into one for the consideration of guides.<sup>299</sup> The Commission rejected this petition, declining to decide what type of action, if any, was warranted until it had an opportunity to review the evidence in the rulemaking proceeding and make findings based on that evidence.<sup>300</sup>

In passing the FTC Improvements Act of 1980, Congress permitted the Commission to issue a funeral rule but specifically encouraged the Commission to consider whether the goals of the rule could be achieved through voluntary guidelines.<sup>301</sup>

<sup>298</sup> The benefits and costs of issuing a rule are described in some detail in Section IV, *infra* (Benefits, and costs, and Other Effects of Rule Provisions). The reasons why existing practices cause consumer injury are described in detail in Section II, *supra*.

<sup>299</sup> Petition of National Selected Morticians, I-A-22. The petition was joined by the National Funeral Directors Association.

<sup>300</sup> Letter from Charles A. Tobin to David D. Murchison, Attorney for National Selected Morticians (April 10, 1976). See Binder 215-46-1-1.

<sup>301</sup> Statement of Congressman Broyhill, 126 Cong. Rec. H3959 (daily ed. May 20, 1980).

After reviewing the rulemaking record, the Commission has concluded that voluntary industry guides are not an appropriate solution to existing problems. If guides containing the rule's substantive provisions were adopted and complied with by the industry, essentially the same compliance costs would be imposed on the industry as would be imposed by the promulgation of a rule. The major "benefit" in such an instance would be the public savings which would accrue from not having to expend resources to enforce a rule.<sup>302</sup> Adoption of this approach, however, would not ensure that funeral providers would comply with the guides, and the benefits to consumers would be reduced by non-compliance. Clearly, if all providers complied with guidelines, consumers would receive the same benefits that the rule will provide. There is no assurance, though that voluntary guides would substantially alter the business practices of this market, since comments by industry members on the rulemaking record clearly show that there is no consensus among funeral providers on the need to revise their current sales techniques.<sup>303</sup> It is the Commission's judgment that voluntary guides, absent such a consensus, would not be complied with by significant numbers of funeral providers.<sup>304</sup> The guides would, therefore, not provide the net benefits to consumers which would be provided by issuance of a rule.

Guides might also offer the benefit of some flexibility, giving opportunities for experimentation with, among other things, different disclosure formats. Given the lack of industry consensus on the basic issue of the fairness of several major industry practices, however, this approach does not seem practical.

**3. Rely on State Action to Correct Abuses.** A third approach to correcting funeral industry abuses would be to await action at the state level, rather than to issue a federal rule. This alternative has been suggested repeatedly during the rulemaking proceeding, usually in conjunction with the expression of beliefs that existing state regulation is adequate to correct

<sup>302</sup> This savings would be offset somewhat, however, by the costs attributable to guideline self-enforcement by industry members. In light of this, the Commission has concluded that there would not be a significant reduction in net enforcement costs to society if the guides are enforced actively.

<sup>303</sup> See, e.g., Summary of Post-Record Comments on Funeral Industry Practices rule, XV, at 160-164 (comments in opposition to mandatory itemization).

<sup>304</sup> The result might be to give an unfair competitive advantage to funeral providers who chose not to comply with the guidelines.

<sup>297</sup> See Section II, *supra*.

whatever abuses might exist.<sup>305</sup> 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.<sup>306</sup>

The Commission recognizes that state action to correct existing industry abuses, if such action were taken, would have significant benefits over regulation at the federal level. First, it would allocate all funeral industry regulation to one level of government (*i.e.*, the state), potentially allowing economies in the cost of enforcing regulations. Second, it would simplify the compliance burden on funeral providers, by giving them a single source of guidance for answers to their questions about their regulatory obligations. Third, state regulators should be able better to keep abreast of non-compliance in local areas than the Commission, and thus should be better able to enforce rule provisions with maximum effectiveness.

The Commission is concerned, however, that state regulation in the past has not addressed the problems which the Commission's rule is designed to correct. A review of state law submitted to the Commission in 1976<sup>307</sup> and another review conducted in 1980<sup>308</sup> indicate, while there has been some improvement at the state level since the proceeding commenced, that most states have not moved to enact requirements comparable to those which the Commission is adopting, particularly in the area of price disclosure.<sup>309</sup> The failure of state funeral licensing boards to enact regulations requiring itemized price disclosure is not surprising, given the fact that most state licensing boards are dominated by funeral directors who are likely to share the traditional view of the major trade associations that package pricing is a perfectly permissible practice.<sup>310</sup> Reliance on

state laws would, therefore, not fully correct the significant problems identified in the record in this proceeding. Nor is there any evidence that states will be likely in the near future to enact such provisions. The Commission thus rejects the notion that promulgation of any rule should be delayed pending action by the states. The effects of current industry practices on funeral consumers are sufficiently serious that action is warranted now.

It should be noted, however, that the rule provisions presently being adopted by the Commission can serve as a model state law. Where states act to pass laws which meet the minimum level of protection for the funeral consumer established by the rule, states may secure exemptions from the operation of the rule. Section 453.9 of the rule establishes criteria which, if met, would enable states to obtain exemptions from the rule.<sup>311</sup> Once the exemption is received, the Commission's rule will not be in effect in that state as long as the criteria continue to be met.

**B. Alternative Rule Provisions.** The version of the funeral rule published in the initial notice of rulemaking contained four sets of provisions which the Commission has considered and decided not to incorporate in the final version of the funeral rule. Those provisions are described here, with an explanation of the Commission's reasons for deciding against their issuance.

directors, Consumer Federation of America, State Statutes, Rules and Regulations Affecting Funeral Practices, Atl. Ex. 7. In the last several years, the Conference of Funeral Service Examining Boards has been encouraging the appointment of "lay" members to funeral boards. As a result, most state licensing boards now have "lay" representatives, although only two states have licensing boards where funeral directors are not the controlling majority. See *Hearings on Funeral Industry*, supra note 308, at 258-260 (testimony of Royal Keith, Past Pres., NFDA).

Members of state licensing boards are, in many instances, chosen because they are respected industry leaders in their communities and states. As a result, they also tend to be active in trade associations: Funeral directors who have served as officers of state and national funeral trade associations have also served as state licensing board members. See 1978 Staff Report, supra note 9, at 132-138. While peer review is not inherently a conflict of interest or necessarily bad policy, it does suggest that the state boards are likely to share many of the basic values and opinions of the industry itself. While state boards are thus likely to be active in enforcing regulations against conduct or practices which the industry also condemns (*e.g.*, refusal to release a body, obtaining possession of body without permission, or misrepresentation), it is unlikely to be active in identifying as consumer problems those practices which the industry as a whole condones.

<sup>311</sup> Section 453.9 and the exemption process it establishes are discussed in more detail in Section II(I)(2), supra.

**1. Unauthorized Removal of Remains and Refusal to Release Remains.** In the rule originally proposed by the Commission, funeral providers would have been prohibited from obtaining custody of deceased human remains without permission from a family member or other legally authorized person. They also would have been required to release remains to a family member or other legally authorized person upon request, whether or not they were owed money for services provided.<sup>312</sup> Both provisions were proposed to address practices which take advantage of consumers' strong reluctance to move a body once it is in a particular funeral home, even if the consumer might prefer to do business with a different funeral provider.<sup>313</sup>

In recommending that the Commission prohibit the unauthorized removal of remains from the place of death, the rulemaking staff cited instances in which funeral providers acquired possession of a body from a hospital or nursing home without permission from the relatives, obtained a body because the provider also served as the coroner, or because a provider misinterpreted a call for information as authorization to pick up the body.<sup>314</sup>

The prohibition on unauthorized removal of remains was intended to ensure that the funeral provider who received the body initially was one who was acceptable to the family or their representative. The prohibition on refusal to release remains was intended to ensure that a funeral director could not prevent dissatisfied customers from moving the body to a competitor, should they so desire.

The Commission has concluded, however, that the practices described above are not widespread and that there are sufficient safeguards in state law to protect consumers for these practices. Unlike other practices addressed by the rule, these practices are widely condemned by the industry and contrary to law in most states.<sup>315</sup> They are the type of conduct which consumers are likely to complain about, and consequently trigger state enforcement action. Barring such practices in the rule would contribute little, if anything, to deterring such conduct. Consequently, in

<sup>312</sup> The provisions are set out at 40 Fed. Reg. 39901 (1975) (Notice of Proposed Rulemaking, Section 453.2(b)) and were supported by the staff, after minor revisions, in the rule version appearing in the 1978 Staff Report, supra note 9, at 178-86 and 208-14.

<sup>313</sup> See discussion in Part II(A), supra.

<sup>314</sup> 1978 Staff Report, supra note 9, at 176-77, 208-09.

<sup>315</sup> See Report of Presiding Officer, supra note 8, at 54-59.

<sup>305</sup> See, e.g., Summary of Post-Record Comments, XV, at 125-29 (adequacy of existing state regulation).

<sup>306</sup> Proposed "Guides" [model law] and transmittal letter (Oct. 8, 1980), VI-7.

<sup>307</sup> See Consumer Federation of America, State Statutes, Rules and Regulations Affecting Funeral Practices, Atl. Ex. 7 (1976).

<sup>308</sup> See, CAFMS Survey of State Laws and Regulations, supra note 165, at Appendix III-C. The CAFMS study is based, in part, on a survey of state laws conducted by the rulemaking staff in 1980 and submitted for the record in *Funeral Industry: FTC Proposed Rulemaking: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 141-144 (1980).

<sup>309</sup> See text and accompanying note 95, supra.

<sup>310</sup> Until recently, virtually all of the state licensing board members were licensed funeral

view of the small number of abuses and the availability of other adequate remedies, including such provisions in the rule is not warranted.

2. *Merchandise and Service Selection Techniques.* The Commission has considered and rejected a number of related recommendations of the rulemaking staff<sup>316</sup> which were intended to reduce funeral industry abuses by regulating the manner in which funeral providers presented caskets, as well as other merchandise and services. These provisions would have required that funeral providers:

(i) Display their three least expensive caskets in the same general manner as their other caskets are displayed;<sup>317</sup>

(ii) Disclose that their three least expensive caskets are available in different colors and arrange to obtain caskets in those colors upon customer request, if the caskets can be obtained within 12 hours;<sup>318</sup>

(iii) Not discourage a customer's selection of less expensive merchandise by disparaging its quality, misrepresenting its availability, offering defective or soiled merchandise for sale, or suggesting that a customer's concern for price reflects lack of respect for the deceased.<sup>319</sup>

<sup>316</sup> The provisions were set out at 40 FR 39902 (1975) (Notice of Proposed Rulemaking, § 453.4), and except for one noted below, were also proposed, with some revisions, in the 1978 Staff Report, *supra* note 9, at 301-339.

<sup>317</sup> The provision was directed at the practice of funeral homes not displaying their least expensive casket(s) in the same selection room as most other caskets to discourage purchase of such merchandise by all but the most persistent consumers. A number of surveys, and other evidence, showed that inexpensive caskets are often not shown in the main selection room. See, e.g., Comments of Maine PIRG, II-C-1400, at 2 (one-third of 118 funeral homes failed to display least expensive casket); FTC Survey of Funeral Prices in the District of Columbia (1974) VI-D-3 (14 out of 36 funeral homes failed to display least expensive casket); H. Buckingham, Maryland consumer, II-B-1159; H. Staples, Florida consumer, II-B-1444. The evidence also indicated that this practice will be successful in preventing most consumers from purchasing the least expensive casket. A NYPIRG survey of 127 consumers found that only 28 realized that there might be caskets available besides those they saw, and only 7 of those respondents asked if anything less expensive was available. NYPIRG Ex. 1 (N.Y.), at 8.

<sup>318</sup> There was some evidence of funeral providers intentionally displaying inexpensive caskets in a damaged condition to discourage their purchase. Instances were cited of inexpensive caskets with nails showing, straw sticking out, and with linings that were worn or ripped. See J. Page, California funeral home employee, Tx 7375-77. See also R. Mee, former Wisconsin casket salesman, III-F-16, at 5. *But see* Rebuttal of NSM, X-8 (Q-R); Rebuttal of NFDA, X-9 (20).

<sup>319</sup> A number of reports on the record indicate that purchase of inexpensive caskets has been discouraged by referring to them as "welfare" caskets, or "pauper's boxes." See, e.g., J. Greyson, Indiana consumer, II-B-1436; W. Troemel, New Jersey consumer, II-B-438; J. Sagan, Massachusetts

(iv) Refrain from using any sales plan or compensation method which discourages salespersons from selling any goods or services which are offered for sale.<sup>320</sup>

The purpose of these provisions was to prohibit sales techniques which attempt to exploit a customer's grief or desire to show affection for the deceased in order to manipulate the customer into the purchase of more expensive merchandise. The Commission has concluded, however, that the provisions would not necessarily provide consumers with significant benefits above and beyond those provided by the information disclosure provisions in the rule. Those provisions require full information about a funeral provider's offerings and prices to be disclosed on a general price list, casket price list, and outer burial container price list. Such disclosures would let consumers know what merchandise and services the funeral providers sell, including the three least expensive caskets. The Commission was concerned that the provisions seeking to regulate oral representations would be difficult to enforce.<sup>321</sup> In addition, the Commission felt that the provisions singling out a funeral provider's three least expensive caskets for special treatment could result in significant compliance costs without ensuring that the goals of the provision were met. In particular, the provisions could have the

consumer, II-B-2239 at 3; C. Moles, Iowa consumer, II-B-318. Similarly, funeral directors appear to have attempted to discourage cremation by referring to that form of disposition as "disposals." See L. Smith, California student, VI-D-54, at 7; E. Morgan, author, Tx 9883. The various ways in which concern for price might be discouraged by funeral providers are described generally in the 1978 Staff Report, *supra* note 9, at 320-25.

<sup>320</sup> The evidence indicated that a few of funeral homes in different parts of the country used compensation systems which linked pay to the size of funeral sales. See J. Page, California funeral home employee, Tx 7346; K. Marsh, California funeral director and attorney, Tx 8757; H. Senison, New York funeral director, II-A-145. However, staff deleted the provision from their 1978 recommended rule based upon their view that the limited incidence of the practice and the lack of evidence that it produced significant consumer injury did not warrant the provision's inclusion in the rule. See 1978 Staff Report, *supra* note 9, at 337. The Commission also finds that the provision is not appropriate for inclusion in the rule.

<sup>321</sup> The provisions banning the disparagement of merchandise or a concern for costs were not based on deception, but unfairness. As a result, it was not possible to prevent the abuse through affirmative disclosures, as was the case with other oral misrepresentations addressed by the rule. See Section II(B), *supra*. Enforcement would have depended solely upon consumer complaints, which would have made enforcement difficult. Further, the scope of the provisions was so vague as to raise serious questions whether funeral providers would have an adequate understanding of the conduct proscribed by the rule.

adverse effect of funeral providers choosing not to sell certain low-price caskets which they currently made available to customers. The Commission has concluded, therefore, that reliance on rule provisions designed to stimulate information disclosure is the most effective way to ensure that consumers have a *bona fide* opportunity to purchase low-cost caskets and other merchandise if they so desire.

3. *Market Restraints.* As originally proposed,<sup>322</sup> the market restraints provision would have made it a rule violation for funeral providers to prohibit, hinder, or restrict other persons from (i) offering inexpensive funerals; (ii) entering into contracts with groups (called "memorial societies") which assist their members in making funeral arrangements; or (iii) price advertising. The provision also would have required funeral providers to place a notice in any advertising or promotional materials advising readers that funeral home prices vary considerably and that price information is available over the phone. The intent of the provision was to eliminate practices designed to stifle vigorous price competition.

The Commission has determined not to include a market restraints provision in the funeral rule. Any such provision would have to fall within the limitations specified by Section 19(c)(1)(B)(ii) of the FTC Improvements Act of 1980.<sup>323</sup> Section 19 permits the Commission only to prohibit or prevent the use of "threats or boycotts" by funeral providers against other funeral providers. In 1981, the Commission published a revised version of the provision which was so limited.<sup>324</sup> To comply with Section 19, the 1981 version of the rule did not contain prohibitions on the use of disparagement or blacklists, or the misuse of state administrative or judicial processes. Moreover, Section 19 limited such a provision to acts and practices directed against funeral providers. The scope of Section 19 did not extend to other persons who could be affected by funeral providers' market restraining practices,<sup>325</sup> such as casket wholesalers or body pick-up services.

After receiving comment on the modified version of the market restraints provision proposed in 1981, the Commission has decided that its inclusion in the rule is not warranted.

<sup>322</sup> See 40 Fed. Reg. 39904 (1975) (Notice of Proposed Rulemaking, Section 453.6).

<sup>323</sup> Public Law 92-252, 97 Stat. 391, 15 U.S.C. 57a note.

<sup>324</sup> See 46 FR. 6979 (1981) (Notice of Publication of Revised Proposed Rule and Notice of Opportunity to Comment, Section 453.4).

<sup>325</sup> See Section 19(c)(1)(B)(ii), 15 U.S.C. 57a note.

One reason is that the conduct proscribed in the provision was, as limited, already against the law. Since the Commission has the authority to bring individual actions against such violations of the antitrust law, adding such provisions to the rule would be superfluous. In addition, much of the evidence to support earlier version related to abuses which could no longer be covered by the rule under Section 19. It related to activities which are not "threats" or "boycotts" or to activities directed against persons or entities other than funeral providers.<sup>326</sup> The Commission finds that the acts and practices described in the record which fall within the limitations of Section 19 do not warrant a rule provision.

While the Commission has chosen not to include a "market restraints" provision in the final rule, it wishes to make clear its resolve to proceed on a case-by-case basis against any such future activities. The record contains allegations that boycotts and other concerted activity may have been directed at entities attempting to enter the funeral market and offer non-traditional services, such as direct disposition.<sup>327</sup> The Commission encourages industry members, consumers, and others to bring such incidents to its attention.

4. *Nonitemized general price list.* In 1981 the Commission received a proposal from two funeral director trade associations for an alternative version of the rule which would be acceptable to their memberships.<sup>328</sup> The proposal was not accepted, however, by NFDA, the largest funeral trade association. The proposal was supported by some of the Commission's staff.<sup>329</sup> A central feature of the proposal was its price disclosure provision, which gave funeral providers the option not to quote separate prices for the individual goods and services they sell.

Under this proposal, funeral providers would have had the option of listing their funeral arrangements by packages, with each package stating a price and including a description of every funeral good or service it contained. Funeral

providers who chose this option also would have had to prepare a credit list, which would have separately identified the funeral goods and services in the packages and would have shown a dollar amount which would be subtracted from the package price if a consumer declined a particular funeral good or funeral service included in that price. This "package with credits list" proposal would have affirmatively informed consumers of their right to decline.

In opposing this alternative disclosure format, many consumers and consumer groups argued that sanctioning package pricing would encourage consumers to continue purchasing packages;<sup>330</sup> indeed, some contended that the alternative would have the effect of establishing the so-called "traditional" funeral as the standard or norm.<sup>331</sup>

After careful consideration, the Commission rejected the proposal and adopted itemization instead. While the Commission is aware that the proposal would have ensured significantly greater opportunity for choice than present industry practices permit, the Commission was concerned that placing the burden on consumers to affirmatively reject goods and services "bundled" by funeral providers was inappropriate given the consumer's unique vulnerability and dependence on the funeral director for guidance. The "package with credits list" format suggests that the consumer who wants less than a full funeral must choose something other than "normal," whereas the itemization format legitimizes the concept that each part of the funeral is something that is affirmatively chosen by a consumer. Further, in view of the traditional reluctance to "bargain" or "negotiate" prices when arranging a funeral, stemming in part from natural reservations about the propriety of price concerns when arranging a funeral for a loved one, putting the consumer in the position of deciding how to *save* money, rather than deciding how to *spend* money, is likely to have very different results. In short, the Commission decided that it was necessary, in light of the consumer's unique position and past industry sales practices, to remove any vestiges of "packaging" which would suggest to consumers what was appropriate.

In addition, allowing alternative formats would inhibit the consumer's ability to compare prices, one of the goals of the rule. Under the itemization proposal adopted by the Commission, every funeral director is required to have a relatively standardized price list, which can be used to give prices over the telephone or which consumers can obtain from different homes.<sup>332</sup> Under the package with declination proposal, some funeral directors would have itemized lists, while others would have package-with-credits lists, making comparison shopping more difficult.

Finally, itemization is more consistent with the trend in state laws and with trends in the industry itself.<sup>333</sup>

The primary benefit of the alternative price list would be a possible reduction in compliance costs to funeral providers. This reduction might be possible because it would take less time for those funeral providers who currently quote package prices to prepare the alternative price list than to prepare a list with separate prices. However, it is the Commission's judgment that the burden of preparing itemized price lists is itself quite low<sup>334</sup> and that the incremental savings in compliance costs from allowing use of an alternative price list would be minimal.<sup>335</sup>

The trade associations supporting the proposal also believed that the "package with credits" proposal would enable funeral providers to continue using a "graduated recovery"<sup>336</sup> approach, thereby avoiding the itemization's alleged effect of raising prices for low-cost package funerals. As discussed in more detail in Section V(B), *infra*, itemization does not preclude "graduated recovery" and it will not necessarily result in higher prices for low-cost package funerals.

<sup>326</sup> Of course, funeral directors may offer packages in addition to itemized price lists, as discussed, *infra*.

<sup>327</sup> Possibly as a result of the increasing number of state and localities who are requiring itemization, see note 95, *supra*, the percentage of funeral directors using itemization has increased over the last fifteen years. For example, in 1971, 74% of funeral directors used unit or bi-unit pricing. See 1971 Professional Census, *supra* note 114. In 1975 the number of funeral directors using unit or bi-unit pricing had dropped to 65%. See 1976 Statistical Abstract, *supra* note 31.

<sup>328</sup> See discussion of costs and benefits for price disclosure provisions of rule in Section IV, *infra*.

<sup>329</sup> The proponents of the alternative price list also suggested that it would benefit consumers through lower costs for funeral arrangements. However, this "benefit" is based upon the view that itemized prices are higher than package prices. The Commission rejects such a view for the reasons stated in Section V, *infra*.

<sup>330</sup> For a more detailed discussion of "graduated recovery" see Section V(B)(6), *infra*.

<sup>326</sup> See 1978 Staff Report, *supra* note 9, at 409-425.

<sup>327</sup> See 1978 Staff Report, *supra* note 9, at 420-28.

<sup>328</sup> Letter and attached Comment, David C. Murchison and Daniel P. Oppenheim, attorneys for National Selected Morticians and Larry C. Williams, Sr., attorney for National Funeral Directors and Morticians Association, XVI-59 (March 23, 1981).

<sup>329</sup> Staff recommendations on the funeral rule, XVIII-1 (June 28, 1981); Letter of Albert H. Kramer, Director, Bureau of Consumer Protection (March 19, 1981), XVI-59, Ex. A. *But see* Memorandum from L. Dorian, Deputy Director, Bureau of Consumer Protection (June 29, 1981), XVIII-2 (recommending that the Commission not adopt the proposal).

<sup>330</sup> See, e.g., Rebuttal Comment of NRTA/AARP, at XVII-23 (May 13, 1981); Rebuttal Comment of NCSC/ADA/CAFMS, XVII-16, at 30, 32 (May 13, 1981).

<sup>331</sup> See, e.g., Rebuttal Comment of NRTA/AARP, *supra* note 330, at 16.

#### IV. Analysis of Projected Benefits, Costs, and Effects of Funeral Rule

This section provides a summary analysis of the costs and benefits of the individual provisions of the funeral rule. Each provision of the rule is designed to address particular abuses reflected in the rulemaking record. As a result, the provisions of the rule are largely segregable from each other for purposes of analyzing its projected benefits, costs, and effects.

The costs and benefits of certain provisions are interrelated, however. The interrelated provisions are:

1. Section 453.2 which requires the disclosure of prices on an itemized basis and § 453.4(b) which ensures that consumers can purchase on an itemized basis;

2. Section 453.3(a) which prohibits misrepresentations concerning when embalming is required and § 453.5 which requires funeral providers to obtain prior approval for embalming;

3. Section 453.3(b) which prohibits misrepresentations concerning the legal requirements for purchasing a casket for cremation and § 453.4(a) which prohibits funeral providers from imposing that requirement themselves;

4. Sections 453.3 (c) through (f) which address other misrepresentations; and

5. Section 453.6 which imposes a recordkeeping requirement.

The costs and benefits of these five groups of provisions will be discussed together.

##### A. Section 453.2 (price disclosures) and § 453.4(b) (optional purchases).

These portions of the rule address funeral industry practices which prevent consumers from selecting a funeral home on the basis of the prices it charges and from selecting different options for funeral arrangements once at the home. Most consumers do not get price information over the telephone, and in some instances, consumers cannot get price information over the telephone even when they ask.<sup>337</sup> Yet choosing a funeral home is a serious financial decision; since consumers will not change funeral homes once the funeral director has taken possession of the body. If price information is to be obtained prior to selecting a home, it must be obtained quickly since the body must be moved soon after death.

The record also indicates that after consumers have chosen a particular funeral provider, the practice of "package pricing" makes it difficult or impossible for consumers to select the type of funeral option which most suits their needs. The package price does not

disclose the individual prices of the arrangement's components, or even that the arrangement consists of discrete components.<sup>338</sup> Many funeral providers refuse to sell other than a complete funeral package and refuse to give consumers a discount even if the consumer desires not to purchase all items in the package.<sup>339</sup>

The fact that consumers fail to obtain detailed price information before selecting a funeral provider and often cannot get such information even at the funeral home tends to insulate individual funeral providers from price competition. The lack of competition suggests that the overall level of prices in the funeral industry are higher than they otherwise would be in a properly functioning competitive market.

Moreover, the refusal to sell on an item-by-item basis in the funeral home limits consumers' options and forces them to pay for items which they might refuse to purchase if given the opportunity to do so.<sup>340</sup>

1. *Benefits.* The rule benefits consumers by reducing the economic injury resulting from the aforementioned practices. It does so through a twofold approach. First, it alerts consumers that price information is relevant and available at the critical moment of choosing a funeral provider, and ensures that consumers can obtain sufficient price information to comparison shop among different funeral providers. The telephone price disclosure provision (Section 453.2(b)(1)) requires that funeral providers make price information available over the telephone. The provisions requiring itemized information on a general price list (Section 453.2(b)(2)), casket price list (Section 453.2(b)(2)), and outer burial container price list (Section 453.2(b)(3)), provide a relatively uniform format for the information which will be given to consumers over the telephone, further facilitating comparison shopping. Comparison shopping will help stimulate price competition among funeral providers, thereby better enabling consumers to get the maximum benefit for their money.

Second, the rule gives consumers in the funeral home an opportunity to consider various options and purchase only those items they desire. The itemized price lists disclose the costs of different goods and services, making such comparisons possible. Itemized information also would be made available on the itemized statement required by § 453.2(b)(5). This

information would allow consumers to see the total cost of the items they tentatively have decided to purchase for a given funeral and to evaluate them in conjunction with each other. Section 453.4(b), the "optional purchase" provision, ensures that consumers can make use of such price information by making a decision to decline items which they do not wish to purchase.

The Commission anticipates that these provisions will reduce economic injury through both a short term and a long term effect. In the short term, the greater ease with which consumers will be able to obtain price information for purposes of comparison shopping should substantially increase the number of consumers who do so.<sup>341</sup> This in turn, will create a pressure on funeral providers to price their products at competitive levels in order to continue receiving business from consumers who comparison shop. Even consumers who do not comparison shop will benefit from this overall tendency toward lower prices. In addition, all consumers will have the opportunity in the funeral home to purchase only the items they want and to pay accordingly. This will provide them with another opportunity to exercise their choice and save money.<sup>342</sup> Such an opportunity will be the only one directly available to consumers who are unable to comparison shop among funeral homes.

In the long term, increased competition may further benefit consumers by changing the structure of the funeral industry. As prices decrease, the principal way by which existing funeral providers will be able to keep up their profit margins will be by lowering their cost per funeral. This should give at least some firms an incentive in the long term to become more efficient, possibly by adapting their physical plant and marketing strategies or providing more specialized services at greater volume.

<sup>341</sup> Surveys of consumer attitudes and other evidence on the rulemaking record suggest that a substantial number of consumers would use such information. See 1978 Staff Report, *supra* note 8, at 510-11. For example, a 1974 survey sponsored by The Casket Manufacturers Association reported that 95% of the respondents felt that such information was "somewhat" or "very helpful."

<sup>342</sup> A trade association survey revealed that from 10% to 40% of consumers responding would not use such services as embalming (9.5%), other care of the body (9.7%), visiting hours (20.9%), funeral services in the funeral home (11.4%), family car (29.1%), and other automobiles (40.6%). Moreover, in every one of these categories, another one-quarter to one-third of the respondents were undecided. The survey received these responses based on questions which quoted specific dollar amounts for the services in question. Blackwell Survey, *supra* note 59, at Question 8.

<sup>338</sup> *Id.* at note 75 and accompanying text.

<sup>339</sup> *Id.* at note 76 and accompanying text.

<sup>340</sup> *Id.* at notes 92-102 and accompanying text.

<sup>337</sup> See discussion in Part II(A), *supra*.

In addition, greater availability of price information may encourage entry into the funeral market of new competitors seeking to attract business by offering lower prices. Such potential competitors appear to be inhibited from entry into the market in most areas of the country by existing practices which make price comparisons difficult and which, thereby, decrease the likelihood that consumers will comparison shop.<sup>343</sup> This decreases the pool of potential customers for any new venture and increases the likelihood that the venture will fail.

2. *Costs.* The Commission believes that the price disclosure provisions will result in two types of compliance costs to funeral providers. First, most funeral providers will be faced with the initial cost of revising their method of quoting prices so as to come into compliance with the rule. Second, they will incur some ongoing costs as they remain in compliance with the rule.

The most substantial initial compliance cost which faces funeral providers will be that falling on those funeral providers who do not currently quote their prices in an itemized manner, approximately 65%.<sup>344</sup> These individuals will be required to produce price information in a format different from that which they currently use.

The Commission estimates that the compliance costs for these funeral providers to revise their pricing formats will be relatively low. One reason is that the preparation of itemized price information will not require that most funeral providers search out new cost data. Rather, the basic data which they will need to use is already available to them and, in fact, is currently used by them, albeit in a different format. Most funeral directors who presently use package pricing also offer credits for unwanted items, and such credits can be a basis for the itemized prices. For others, a number of business texts provide basic "do it yourself" methods for determining prices under an itemization system.<sup>345</sup> It can also be expected that state and national associations will assist in giving advice, and that the experience of funeral providers who have been required to switch to itemization under state law will be useful.

In addition to this cost, which only some funeral providers will incur, all providers will be required to prepare the

printed papers, notebooks, charts, or other forms which are the tangible medium on which price lists and statements will be shown to consumers. The time involved in designing the lists also will be minimized, however, through availability from the Commission and other sources of model forms.<sup>346</sup> Funeral providers will be able to convert the model forms into actual price lists and statements simply by inserting in appropriate places the necessary information (such as name, address, and prices) for their particular business.

Besides these initial costs, there will be three relatively minor ongoing costs of complying with the price disclosure provisions. One will be the increased time spent explaining prices over the telephone as more consumers use the telephone to comparison shop. The absolute amount of additional time spent answering price questions over the phone would be minimal, however, given that the prices which are listed on the general price list are basic and relatively few in number and given that, for the most part, the funeral provider need only read these few prices (or a subset of them, if only that is requested) over the phone.

The second ongoing cost would be the cost of reproducing the price lists and statements so that copies of the forms could be made available to consumers. This cost would be nominal for the casket and outer burial container price lists, which do not have to be given to consumers for retention. It also would be negligible for the statement, since it can be merged with forms which funeral providers already use. The marginal cost therefore would be small. The only potentially significant cost would be that of reproducing the general price list, which must be provided to consumers for retention. Given that the average funeral provider conducts 94 funerals a year, however,<sup>347</sup> even in this case the actual number of forms given out would be small and the cost of complying with the provision would be only a few dollars a year.<sup>348</sup>

<sup>343</sup>In addition, the model price lists and statement which the Commission is publishing simultaneously with the rule provide simple, basic guidance on the type of prices which funeral providers must use.

Shortly after the funeral rule was proposed, the National Funeral Directors Association distributed model price disclosure forms. Similarly, state trade associations have helped their members by providing sample forms in states which have enacted itemization requirements. See 1978 Staff Report, *supra* note 9, at 488, n. 40. The Commission anticipates similar trade association activities in helping funeral providers comply with the rule.

<sup>347</sup>See 1978 Staff Report, *supra* note 9, at 85.

<sup>348</sup>The rulemaking record indicates, of course, that one effect of the rule will be to encourage

The third ongoing compliance cost would be the time involved in updating the price lists as the funeral provider's prices or offerings change. However, the incremental burden imposed by the rule in this connection would be small, since funeral providers are already obliged to recalculate their prices whenever their costs or offerings change, irrespective of the pricing method they currently use. If any additional effort were imposed by the rule, it would be time involved in transposing these prices to the price lists required by the rule.

B. *Section 453.3(a) (embalming misrepresentations) and Section 453.5 (prior permission for embalming).* Section 453.3(a) prohibits funeral providers from representing that embalming is required by law when it is not or failing to disclose to consumers that embalming is not required by law except in certain special cases. To prevent such practices, the provision requires that consumers be given a written disclosure advising them of their right, except in special cases, to select arrangements which do not require embalming. The purpose of § 453.3(a) is in short, to ensure that consumers know that embalming is an option.

Section 453.5 works together with § 453.3 by requiring funeral providers in most instances to obtain permission before embalming. Section 453.5 also requires that funeral providers give consumers a disclosure advising them that they have the right not to pay for embalming performed without their prior permission if they select arrangements which do not require embalming. Thus, § 453.5 ensures that most consumers will have the opportunity to exercise a choice in deciding whether or not embalming should be performed.

1. *Benefits.* A significant benefit of these provisions will be to end practices which deceive consumers into purchasing embalming through misrepresentations of those instances where providers embalm without permission. Where embalming would be prevented through the operation of the rule, a savings of the cost of embalming, which amounts to between \$50 and \$150 per arrangement, will result.<sup>349</sup> The rulemaking record suggests that a substantial percentage of consumers would decline embalming if offered a true choice, possibly as many as thirty percent.<sup>350</sup> While it is impossible to

consumers to contact two or more funeral providers before deciding with whom to make arrangements. Most such contacts will be by phone, however, and would not involve handing out price lists.

<sup>349</sup>See discussion in Part II(D), *supra*, at note 249.  
<sup>350</sup>*Id.* at notes 247-248.

<sup>343</sup>See discussion in Part II(A), *supra*, at notes 98-103.

<sup>344</sup>*Id.* at note 83.

<sup>345</sup>See, e.g., Blackwell, Talamyk and Deever, *A Manual for the Return-on-Investment Approach to Professional Funeral Pricing* (1976); Pine and Pine, *Adaptive Funeral Pricing and Quotation* (1975).

predict with certainty the number of consumers who will decline embalming given a choice, even a relatively small percentage of declination can amount to large savings. The total benefit to consumers from these provisions alone, therefore, could be expected to equal millions of dollars a year in savings.<sup>351</sup>

2. *Costs.* The provisions will result in minimal initial and ongoing compliance costs for funeral providers. The only initial costs will be those involved in preparing the disclosures required by §§ 453.3(a) and 453.5. These disclosures can be copied verbatim from the model general price list and model statement of funeral goods and services selected which the Commission is publishing along with the rule.

In addition to these initial costs there will be minimal ongoing compliance costs. The only such costs of significance are attributable to § 453.5, and are the costs of the time involved in obtaining prior permission for embalming. These costs should be negligible, however, since approval may be obtained either orally or in writing, and in whatever manner is most expeditious under the circumstances. Typically, permission could be requested of the family during the "first call", when the funeral provider is asked to pick up the body, or during the funeral arrangements conference if that conference is held within a few hours of death. Moreover, § 453.5 has a built-in limitation to ensure that costs of seeking prior permission do not become excessive in extraordinary cases. The Section specifically permits embalming without prior permission if the funeral provider is unable to contact a family member or other authorized person after exercising due diligence (and has no reason to think that the family does not want embalming performed). Thus, the cumulative burden of obtaining prior permission for embalming should be minimal.

C. *Section 453.3(b) (casket for cremation misrepresentations) and § 453.4(a) (alternative container requirements).* The rulemaking record indicates that consumers seeking to arrange direct cremations want to buy inexpensive cremation containers in lieu of an ornamented, and correspondingly more expensive, casket.<sup>352</sup> Sections

453.3(b) and 453.4(a) of the rule are intended to eliminate two related practices. Section 453.3(b) prohibits funeral providers from representing that the law requires a casket for cremation. Section 453.4(a) correspondingly prohibits funeral providers from imposing that requirement themselves. The provision further requires that funeral providers who arrange direct cremations make simply constructed body receptacles (unfinished wood boxes and alternative containers) available to consumers desiring to use such items for direct cremations. Finally, § 453.3(b) requires that funeral providers give consumers a written disclosure to inform them of their right to purchase merchandise other than ornamented caskets for direct cremations.

1. *Benefits.* These provisions will enable persons desiring low-cost, simple dispositions to obtain unfinished wood boxes or alternative containers. The benefit to consumers will be a savings in their total funeral costs. As is the case with embalming, discussed above, these economic savings can be substantial. For example, cardboard, composition, and wooden alternative containers typically cost no more than \$20 to \$65 at retail, while ornamented metal or solid wood caskets sell for at least \$150 to \$250.<sup>353</sup> The total savings, of course, would depend on the rate at which consumers will choose to buy such containers in lieu of caskets. While a precise prediction of the rate is impossible, even a modest rate could result in significant aggregate savings.<sup>354</sup>

2. *Costs.* The only potentially significant compliance costs imposed by either § 453.3(b) or § 453.4(a) will be imposed by § 453.4(a). Section 453.3(b) will result in some very minor initial compliance costs, because it requires funeral providers to place a written

disclosure on the general price list. However, this can be done quickly and simply by copying the disclosure appearing on the model general price list which accompanies the rule.

On the other hand, the requirement in § 453.4(a) that unfinished wood boxes or alternative containers be "made available" to customers arranging direct cremations could impose somewhat more significant costs on some funeral providers. Even so, these would be negligible for the great majority of funeral providers because the Commission deliberately has drafted § 453.4(a) only to require that unfinished wood boxes or alternative containers be "made available" to customers. Most funeral providers, therefore, would not have to stock such items, since the items could be made available to customers from the stock of the casket wholesaler with whom the funeral provider normally does business. Consequently, most funeral providers would not have inventory or storage costs; the item would be bought only after being ordered by a consumer. The Commission thus anticipates that most funeral providers will be able to comply with § 453.4(a) without any special expenditure of time or money.

A relatively small number of funeral providers, such as those in isolated rural areas, would have to stock unfinished wood boxes or alternative containers so that they would be available to customers arranging direct cremations. For such funeral providers, the compliance burden would be inventory and storage costs. None of these costs should be substantial, however. Funeral providers would only be required to stock a sufficient number of containers to meet expected demand. An average funeral home might arrange 3 or 4 direct dispositions per year.<sup>355</sup> Of course, funeral directors can rely on their experience in predicting the demand for such items in their own community. Inventory costs, then, will be low: for most homes having to stock them, having one or two such unfinished wood boxes or alternative containers would be sufficient. The record shows that such containers have a wholesale cost of as little as \$5.<sup>356</sup> Storage costs are also minimal, since many types are collapsible, thereby minimizing storage problems.<sup>357</sup> It is the Commission's

<sup>353</sup> 1978 Staff Report, *supra* note 9, at 239, nn. 110, 112. The rule does not, of course, require that funeral providers charge \$20-\$65, or any other prices for unfinished wood boxes or alternative containers. However, the rule does require that the items be constructed of a limited range of typically inexpensive materials. This will make it difficult for funeral providers to sell such merchandise at an abnormal mark-up.

<sup>354</sup> In 1977, the direct disposition rate was approximately 4.5%. Where cremation is the form of direct disposition, caskets would be unnecessary and consumer could save from \$70 to \$200 (the difference between the price of alternative containers and the least expensive casket.) If 70% of direct dispositions are cremations, and if only 10% of those consumers choose to save the minimum amount (\$70), total aggregate savings would be \$418,950. On a high range, if 90% of the consumers buying direct cremation save the maximum amount (\$200), total consumer savings would be \$10,733,000. In one chain of funeral homes which disclosed that caskets are optional, nearly 15% of the total dispositions (including burials and full funerals) involved the purchase of a minimal container. Purdy, Oregon funeral director, *Sea. Ex. 3.*

<sup>351</sup> Approximately 1.9 million funerals are arranged per year. An NFDA-sponsored survey indicated that 9.5% of consumers would decline embalming in an "average" funeral home, while 24.7% more were undecided. Taking a hypothetical declination rate of 10% and an embalming cost of \$75, the total savings to them would be over \$14 million. Blackwell Survey, *supra* note 59, at Question 6.

<sup>352</sup> See Section II(B)(2)(a), *supra*.

<sup>355</sup> Based on an average 94 funerals per year and a 4.5% direct disposition rate. *House Small Business Comm. Hearings, supra* note 30.

<sup>356</sup> *Progressive Mortuary Methods*, 1976, II-A-860, at 8.

<sup>357</sup> See Staff Report, *supra* note 9, at 245.

conclusion that the direct compliance costs will be relatively minor.

One indirect effect of this Section of the rule may also impose costs on consumers. Some funeral directors may find it more profitable to stop offering cremation altogether, rather than offer cremation with alternative containers. While this possibility exists, the Commission believes that several factors make such an outcome unlikely. A funeral director who does not offer cremation at all is likely to lose some customers to other funeral homes who do offer it or, in some areas of the country, to immediate disposition firms. While a direct cremation may not be as profitable as a full funeral, it is more profitable than losing a customer altogether. Since many funeral homes operate barely over break-even points,<sup>358</sup> many funeral directors may be reluctant to take the risk of losing even several customers who will make at least some contribution to fixed costs while paying variable costs.<sup>359</sup> Finally, the price lists required by the rule and the telephone price information requirement will make it easy for consumers to determine whether a funeral home offers cremation. To the extent the rule encourages such shopping, it is unlikely that the overall availability of cremation will decline even if individual firms decide to stop offering it.

**D. Sections 453.3(c)-(f)**  
(misrepresentations other than embalming or casket for cremation). These provisions address a variety of factual misrepresentations and failures to disclose material information. Specifically:

(i) Section 453.3(c) prohibits funeral providers from claiming that laws or cemetery regulations require the purchase of outer burial containers if they do not. The section also requires that funeral providers disclose this information to consumers by means of a statement on the outer burial container price list.

(ii) Section 453.3(d) is a general prohibition against misrepresentations of requirements imposed by federal, state, or local laws or by cemetery or crematory regulations. To decrease the frequency of such misrepresentations, the provision requires that funeral providers briefly describe in writing any requirements orally represented to a customer.<sup>360</sup>

<sup>358</sup> Blackwell, Appendix B of prepared stmt, D.C. Ex. 29.

<sup>359</sup> Cf. S. Shavell, Pro. Economics, Tx 11, 909, 11, 924.

<sup>360</sup> Of course, funeral providers desiring to make misrepresentations without detection might consider simply not writing such misrepresentations

(iii) Section 453.3(e) prohibits two types of false claims about product characteristics. First, it prohibits funeral providers from claiming that funeral goods or services can delay decomposition for a long-term or indefinite time. Second, it prohibits claims that funeral goods (primarily caskets and outer burial containers) will protect the body from gravesite substances (such as water) if they cannot.

(iv) Finally, § 453.3(f) prohibits funeral providers from claiming that they are billing their customers at cost for items purchased for the customer from other persons ("cash advance items"), e.g., flowers or obituary notices, if this is not the case. Correspondingly, the Section requires that funeral providers disclose in writing that they charge for their services in obtaining cash advance items if they do.

Unlike the three sets of provisions described in the immediately preceding sections, these provisions do not address interrelated problems. However, these provisions operate in similar ways to address their discrete problems. For this reason, their benefits and costs can be described together.

1. *Benefits.* With the partial exception of the provision on cash advance items, all of the misrepresentation provisions produce benefits in identical ways: They reduce the economic injury which consumers suffer when misrepresentations or failures to disclose material information induce consumers to purchase unnecessary products. Such losses can be substantial. For example, burial vaults range in price from \$190 to \$1,500.<sup>361</sup> If a consumer is told falsely that such items are required by law or cemetery regulations, the economic injury can thus be considerable. Even if the cemetery does, in fact, require use of some sort of outer burial container, misrepresentations about such requirements can still cause substantial economic losses to consumers. Cemeteries do not require use of burial vaults *per se*. They permit, alternatively, the use of grave liners, which range in price from \$55 to \$180. See Part II(B)(3)(a), *supra*, at note 175. The difference between this price and the price of a burial vault represents economic injury to a consumer who would have purchased a grave liner if told of the option to do so. Similarly, a

down. However, the rule requires a preprinted disclosure on the statement of goods and services selected informing consumers that oral claims about legal or cemetery requirements also will be noted in writing. If this does not occur, that fact alone would serve to alert consumers that something was amiss.

<sup>361</sup> See Part II(B), *supra*, at note 179.

consumer who purchases a "sealer" casket (one which keeps out water and other gravesite substances) in the mistaken belief that such a casket will preserve the body may pay \$300 to \$500 above the price for comparable caskets which are not sealers.<sup>362</sup> However, the merchandise will not perform the function for which a premium price was paid. By preventing misrepresentations and providing accurate information to consumers through disclosures, § 453.3(c)-(e) help ensure that consumers only pay for items which are truly necessary or desired by the consumer for the arrangements selected or which have a genuine ability to perform in the manner described.

The provision on cash advance items also can save consumers money, although in a slightly different manner. Section 453.3(f) helps ensure that consumers are told if they are being charged an amount above and beyond the funeral provider's stated fee for professional services to obtain cash advance items. The consumers then may elect to obtain the items directly and save on the service fee. While these savings would vary depending on the amount of the funeral provider's surcharge, they could be substantial.<sup>363</sup>

2. *Costs.* With the exception of § 453.3(d) the costs of these provisions are virtually nonexistent. They impose only two types of obligations on funeral providers: First, most provisions require that funeral providers prepare standard preprinted (or written) disclosures for inclusion on one of the price lists or the statement which the rule requires. However, these disclosures simply can be copied from the Commission's model forms. Second, the provisions require that funeral providers cease to make certain misrepresentations. This does not require funeral providers to take any affirmative steps or to incur corresponding compliance costs.

Section 453.3(d) is somewhat different from the rest of the provisions because it also requires that funeral providers briefly describe in writing any legal or cemetery requirements which they represent orally to a customer. The amount of time to do so can be expected to vary from one arrangement to another. However, it will be largely

<sup>362</sup> See 1978 Staff Report, *supra* note 9, at 292.

<sup>363</sup> The National Funeral Directors Association's 1977 annual survey of funeral home economic data revealed a 5% difference between the reported income attributable to cash advance items and the corresponding expense figure. This statistic suggests an average national service charge equal to 5% of the cost of cash advance items. The total mark-up amounts to nearly \$18,000,000. 1977 Statistical Abstract, *supra* note 191.

within the funeral provider's own control, since statements need not be described in writing unless the funeral provider elects to make them orally in the first place. At most, it might involve a brief description of an embalming regulation and a cemetery requirement. In many situations it would not even be necessary to describe the cemetery requirement, if the customer expressed a desire to purchase an outer burial container for other reasons. Thus, the overall time necessary to comply with § 453.3(d) should be small.

**E. Section 453.6 (recordkeeping requirement).** Section 453.6 of the rule requires that funeral providers keep a copy of each nonidentical casket price list, outer burial container price list, and general price list disseminated to customers as well as a copy of each statement disseminated to customers. The provision does not directly remedy specific abuses. Rather, it is a remedial requirement which will help end the unfair and deceptive practices identified in § 453.2 and § 453.3 of the rule. It will simplify rule enforcement by enabling Commission staff to examine written records rather than having to conduct more time-consuming oral interviews to detect rule violations.

**1. Benefits.** As noted above, the recordkeeping provision will benefit consumers by helping to ensure compliance with the substantive provisions of the rule. As part of its enforcement program, the Commission will check the records of individual funeral homes to ensure that the price lists and statements required by the rule are complete. Since most of the information which the rule requires be given to consumers will be contained on the price lists and statement of services selected, availability of those documents for inspection will make it possible to detect rule violations efficiently and thus to enforce the rule effectively. The recordkeeping provision will thereby have substantial deterrent value.

The principal alternative to a recordkeeping provision would be to use consumer complaints to detect rule violations. However, evidence on the rulemaking record shows that the frequency with which consumers complain about problems in this area does not approach the frequency with which they occur.<sup>364</sup> In part, this absence of complaints is attributable to the fact that the experience of making funeral arrangements is unpleasant, so that consumers are anxious to put the experience behind them rather than to relieve it by registering a complaint. In

part, the lack of complaints also is attributable to the fact that consumers are not sufficiently informed to be aware that any improper practices have occurred.

To a considerable extent, therefore, the Commission will need to rely on its own resources to monitor compliance with the rule. The recordkeeping requirement significantly increases the effectiveness of such monitoring by requiring that a substantial majority of the information which the rule requires to be disclosed is readily available for examination by Commission officials.

**2. Costs.** The compliance burdens attributable to Section 453.6 are the tasks of: (1) Storing forms; and (2) removing forms from storage. The amount of time which would be required to perform these functions would depend on the number of funerals arranged yearly by a funeral provider. However, the Commission estimates that the amount of time required to comply with the provision will average under one hour per year for individual funeral providers.<sup>365</sup>

#### V. Other Economic Issues Raised in the Proceeding

In this section of the regulatory analysis, the Commission discusses two economic issues not specifically addressed in the analysis of the costs and benefits for particular rule provisions. One issue is the general effect of the rule on consumers and small businesses. The other issue is whether or not itemization will cause funeral prices to rise.

**A. Effects of the rule on small businesses and consumers.** There are approximately 22,000 funeral providers in the United States.<sup>366</sup> A 1973 report by the U.S. Department of Commerce indicates that most have a small payroll, with 80% employing seven or fewer persons.<sup>367</sup> Trade association statistics show that in 1972, the average number of deaths per funeral establishment was ninety-four,<sup>368</sup> or fewer than two a week, although actual case volume varies greatly.<sup>369</sup> These statistics and others

<sup>364</sup> The calculations which resulted in this figure are described in a "Supporting Statement" which the Commission submitted to the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980. See Letter from the Commission, to the Honorable David A. Stockman, (March 8, 1982).

<sup>365</sup> 1978 U.S. Industrial Outlook 463.

<sup>366</sup> U.S. Department of Commerce, [1973] Country Business Patterns, VI-A-45, at 28.

<sup>367</sup> See *House Small Business Subcomm. Hearings*, supra note 30, at 65, 75-76 (testimony of H. Raether).

<sup>368</sup> See, e.g., Kissel, supra note 35, at 47-49 (25-500 funerals per year); and F. Bates, National Selected Morticians, Tx 12,580 (75-5,000 funerals per year).

are consistent with a conclusion that funeral establishments are primarily small businesses.

Thus, it is evident that the primary impact of the rule will be on small businesses. The Commission anticipates that the impact of the rule will be primarily manifest in three areas. First, compliance costs will slightly increase funeral providers' business expenses. The review of the rule's costs and benefits in Part IV indicates, however, that compliance costs will not be significant. Most would be one-time costs attributable to initial preparation of the price lists and "statements of funeral goods and services selected" required by the rule. The only potentially ongoing compliance costs would be those involved in updating the price lists, providing the general price list for retention to customers, and retaining records for a period of one year. There is no reason, however, to believe that these costs would be anything more than minor.

Indeed, evidence on the rulemaking record confirms the fact that compliance costs would be negligible.<sup>370</sup> For example, a survey on the subject of compliance costs,<sup>371</sup> authorized by the Commission, concluded that the cost of complying with the rule would not be significant. These results derived from direct queries to funeral providers about the difficulty they would have had complying with the 1975 version of the funeral rule. In-depth interviews were conducted at a variety of different funeral homes in the Atlanta area, including urban and rural, large and small firms. Compliance costs for the 1975 rule version, according to the survey, were not significant for the industry members surveyed. Even so, the Commission has subsequently revised the rule to further reduce compliance costs.

Additional evidence that the rule would not be burdensome comes from the expressed views of two of the major funeral trade associations. These associations proposed an alternative rule virtually identical to the final rule promulgated by the Commission with

<sup>370</sup> In reaching this conclusion, the Commission is mindful that some participants felt compliance costs would be significant. Thus, trade associations and individual funeral providers typically expressed concern about compliance costs. See, e.g., National Funeral Directors Association, Post-Record Comment, XIV-348, at 609. On the other hand, consumer groups and individual consumers expressed views that compliance costs would not be substantial. See, e.g., Post-Record Comment, Consumer Federation of America, XIV-889, at 3. The Commission has considered all such views in reaching its own determination.

<sup>371</sup> R. Perry, MacFarlane & Co., Tx 9,148.

<sup>364</sup> See, e.g., 1978 Staff Report, supra note 9, at 452-60.

the exception of a provision for use of an alternative price disclosure system.<sup>373</sup> In submitting their proposal, the trade associations noted that such a rule would not be unduly burdensome to funeral providers.<sup>373</sup>

The second effect of the rule upon small businesses will be increased price competition, which could have a positive impact on prices in several ways. First, competition induced by greater price information could serve actually to reduce prices as price sensitivity by funeral consumers is increased—or, at least, competitive pressures could place a downward pressure on future price increases. Second, greater price information may serve to shift some consumers away from higher priced sellers to lower priced providers, thereby reducing overall consumer expenditures (and consequently the mean price). Both of these predicted results have in fact occurred in other markets where the Commission has acted to infuse greater price information.<sup>374</sup> Given the relatively fixed demand for funeral services, increased competition will likely lead to an actual reduction in total funeral expenditures, or at least a substantial reduction in the rate of growth. Third, several individual rule provisions will eliminate practices which induce consumers to purchase certain goods and services through misrepresentations or failures to disclose material facts. All of this will mean a loss of revenues to funeral providers. Such revenues are, however, attributable to deceptive practices or to practices which foster noncompetitive market conditions. The

<sup>373</sup> This alternative is discussed in Part III(B)(4), *supra*.

<sup>373</sup> Letter of D. Murchison to A. Kramer, XVI-159, at 60. The principal difference between the rule and the proposal of the trade associations is that their proposal permitted a package price with disclosed discounts for parts of the package not selected.

<sup>374</sup> Following promulgation of the Commission's trade regulation rule on the Advertising of Ophthalmic Goods and Services, 18 CFR Part 456, (permitting price advertising) available evidence indicates that the rate of inflation for eyeglasses and eye examinations has been substantially lower than other medical care services and other consumer goods and services, and in some categories, such as soft contact lenses, average prices have actually declined.

For example, in the year following promulgation of the Eyeglasses rule, prices for soft contact lenses actually decreased from a 1978 average of \$256 to a 1981 average of \$204. (Includes full package price for eye exam, lenses, fitting, care kit and follow-up care. Source: Health Products Research, Inc., Morristown, N.J.; Prices are those collected in an annual consumer survey.) From October, 1978 to October, 1979, the unadjusted percentage price increase for eyeglasses (6.5), was less than for all consumer goods (12.2), durable goods (9.6), or medical care (9.4). [U.S. Department of Labor, Bureau of Labor Statistics, CPI Detailed Report (Oct. 1979)].

loss of such revenues to funeral providers will enable the economy to allocate them to more productive users.

Indeed, these lost industry revenues represent the principal benefit which the rule will provide to consumers. As the discussion in Part IV indicates, the total revenues generated by unfair and deceptive industry practices are substantial. Thus, the Commission anticipates that the rule will produce significant benefits to consumers by allowing them to save on expenses. These savings will much more than offset any price increase which might be attributable to the costs of complying with the rule.

In the Commission's view, these are the only principal effects which the rule will produce for consumers and funeral providers. In concluding this, the Commission rejects the view expressed during the rulemaking proceeding that the rule will cause the funeral industry to become dominated by large firms or chains.<sup>375</sup> Those firms which meet a specific demand—such as serving a small community or a particular racial, ethnic, or religious group—are unlikely to lose business because of generally increased competition.<sup>376</sup> The Commission does recognize, however, that there may be some increase in concentration within the industry resulting from the increased competition. The evidence suggests that there is substantial unused capacity in the funeral market. Notwithstanding this excess capacity and low utilization rates, the absence of competition has permitted inefficient sellers to remain in the market. To the extent that the rule achieves its intended effect, inefficient providers will have to change their operations to become more efficient or risk going out of business. It would be expected, therefore, that some inefficient businesses, including inefficient small businesses, will suffer an adverse competitive impact.

**B. The Effects of "Itemization" Upon Funeral Prices.** One of the designated issues discussed during the rulemaking proceeding was whether mandatory itemization forces up prices.<sup>377</sup> After reviewing the evidence, the Commission concludes that mandatory itemization presents opportunities for raising prices but that it does not, by itself, require funeral directors to raise prices.

<sup>375</sup> See, e.g., R. Sargent, New Hampshire funeral director, II-A-437; J. Couch, Illinois funeral director, Tx 2,931-32; J. Kerr, Jr., Sec'y-Treas., Kentucky FDA, Tx 3,038; R. Coats, Pres., Michigan FDA, Tx 3,755.

<sup>376</sup> See, e.g., S. Shavell, Prof. Economics, Tx 11,882-83.

<sup>377</sup> 41 FR 7789 (1976) (Final Notice of Rulemaking, Designated Issue 28).

The Commission has discerned six different arguments presented in support of the view that itemization would raise prices. Each is discussed below.

1. *Consumers will choose more.* Some funeral providers and others commented or testified that itemization will raise prices because consumers will buy more. It was suggested that when consumers see items broken out on a list, they find the prices so reasonable that they end up choosing more than they would if the items had been packaged.<sup>378</sup>

The record contains no empirical evidence supporting or refuting this claim. However, even if itemization had the effect of allowing consumers to choose more than they would have under itemization, that result would not be a reason not to require itemization. It is evident that such a result would be the operation of consumer choice, not any result of increased costs or marketplace distortions introduced by the rule. The purpose of the rule is to enhance consumer choice. If some consumers choose to buy more, with a clear understanding of the price associated with that choice, that is not a concern to the Commission. Other consumers will have the right to choose less.

2. *Prices will be changed.* Other funeral directors testified that if they were required to examine their pricing structure as a result of having to compile a new price list, many would decide that the prices that they had been charging in the past were too low and that the prices ought to be raised.<sup>379</sup>

Again, such an argument is not of concern to the Commission. The argument is not that the rule will impose costs which must be passed on to consumers in the form of higher prices, but simply that funeral directors have decided to increase profits by raising prices. Funeral directors are, of course, perfectly free to do that at any time. The rule has nothing to do with such a decision other than the fact that it requires funeral directors to think about prices in compiling a new price list. While funeral directors may choose to raise their prices in order to increase their profits, it is certainly not a necessary result of the rule.

<sup>378</sup> See, e.g., NSM, "Progressive Mortuary Methods," D.C. Ex. 20; NSM, "Itemization May Increase Your Total Profit Margin," D.C. Ex. 20.

<sup>379</sup> See, e.g., Anderson, Pres., Utah FDA, Tx 6148; "The Folly of Itemization," *Mortuary Management*, Jan. 1976, at 8, III-1-113; Oral Presentation of Tom Clark, general counsel of NFDA, Feb. 28, 1979 (154; 158-159); NFDA Post-Record Comments, XIV-848, at 480; Report of the Presiding Officer, *supra* note 8, at 101.

3. *Compliance Costs.* Some funeral providers<sup>320</sup> commented that the direct compliance costs imposed by the rule will be passed on in the form of higher prices to the consumer.

For the reasons discussed above, the Commission believes that the direct compliance costs will be minimal. While such costs will undoubtedly be passed on to consumers, rather than absorbed by funeral homes,<sup>321</sup> such increases should be as modest as the compliance costs themselves.

4. *The "economies of packaging argument".* Other funeral providers appear to argue that an identical set of goods and services will inherently cost more on an itemized basis than on a packaged basis and that the higher cost will be passed on in the form of higher prices to consumers. In other words, the argument is that there are "economies of packaging" which result in a lower cost for packaged services and merchandise. The analogy is often made to the "blue plate special" versus the "a la carte" menu.<sup>322</sup>

There are economies of packaging for many goods and services in our economy. Some products can be offered more cheaply to consumers by being packaged because it costs less to produce them in a packaged form than in an unpackaged form.<sup>323</sup>

There is no evidence to suggest, however, that there are any significant economies of packaging in funerals. The cost to the funeral director of offering a set of goods and services is much the same whether the parts are offered separately or together. The only potential savings in packaging is the savings in time that it may take to discuss individual requests under itemization.<sup>324</sup>

<sup>320</sup> See, e.g., R. Dyer, New York Funeral Director, Tx 1570-71; J. Caran, Pres., New York FDA, Tx 132.

<sup>321</sup> Profit margins in the funeral industry are general small and demand is not sensitive to price. Blackwell, Comprehensive Outline, D.C. Ex. 29, at 14, 20. As a result, any increases in costs will undoubtedly be fully passed on to consumers.

<sup>322</sup> In fact, the "economies of packaging" argument is never made explicitly, but only by analogy to situations in which such economies exist, e.g., the blue plate special. See, e.g., House Small Business Subcomm. Hearings, supra note 30, at 71 (testimony of H. Raether, Exec. Dir. NFDA).

<sup>323</sup> To take an obvious example, it is often cheaper to buy a radio on a car when it comes as standard equipment than to order it separately, since the manufacturer can cut costs by simply including a radio in every car. The manufacturer can buy the radios at a lower price because it is buying them in greater volume and can cut labor costs by installing radios on all cars rather than on some cars but not on others.

<sup>324</sup> The record shows that the great majority of the costs of funeral homes are fixed costs for overhead which will not vary whether funerals are offered on a package basis or an itemized basis. See, e.g., Blackwell, D.C. Ex. 29, Appendix B, Exhibits 5-7.

Even if there were modest cost differences, however, the rule expressly permits funeral directors to offer packages as long as they also offer goods and services on an itemized basis. Therefore, if there are any savings in packages, they can be passed on to those consumers who are interested in package prices. Consumers who are not interested in packages may have to pay somewhat more in order to buy on an itemized basis, but that is their choice. Further, any increase in price for the total package may be more than offset by the consumer's ability to decline unwanted items.

5. *The effect of decline.* The remaining arguments do not claim that itemization will affect the funeral director's cost, but instead recognize that itemization may result in a shift of prices presently charged. The arguments assume that overall revenues and overall profits will remain unchanged.<sup>325</sup>

Some funeral providers and others argued that if a substantial number of consumers decline items that would ordinarily be included in the package, in order to retain the same revenue and profit level, other prices would have to be increased to make up for the lost revenue.<sup>326</sup>

The rule does not regulate how funeral directors determine prices. Consequently, funeral directors may shift prices and set prices for parts of the funeral which they believe are appropriate. Some funeral directors may well choose to charge more for items which consumers are less likely to decline in order to make up for revenue lost on items consumers are more likely to decline. Other pricing strategies are also possible. As a result, in the short term, there is the possibility that some consumers will be paying more, while others are paying less, than they would under a package pricing scheme.

The argument that some prices will go up depends, however, on the assumption that funeral directors will simply be able to recover any lost revenue simply by raising prices. As price competition increases, such a strategy may not be possible. Instead competition will generate pressure on funeral directors to become more efficient and to cut costs as the primary means of retaining profitable levels, rather than by raising prices. Further, to the extent that itemization allows consumers to choose less than traditional funerals, the increased demand for less than full funerals may stimulate innovative new services and allow the market to

<sup>325</sup> Blackwell, D.C. Ex. 29, Comprehensive Outline, Exhibits 6-8.

<sup>326</sup> NFDA Post-Record Comment, XIV-848; *id.*

respond. As a result, the long run effect of itemization is expected to drive all prices down to the competitive level.

6. *The effect of itemization on the lowest-priced package funeral.* The major argument advanced by funeral providers and trade associations, however, is that itemization will necessarily cause the price of the lowest-priced package funerals to increase. Again, the argument assumes that revenue and profitability will remain the same; therefore, the argument also assumes that the price of the average package funeral will stay the same, while the price of the highest-priced package funeral will actually decrease.<sup>327</sup>

Under the present system of package pricing, many funeral directors apparently determine prices using a "graduated recovery" approach.<sup>328</sup> Basically, this method means that packages are priced so that buyers of higher-priced funerals are contributing proportionately more to overhead and fixed costs than are buyers of lower-priced package funerals. Since the only variable between a higher-priced funeral and a lower-priced funeral is the casket selected,<sup>329</sup> another way of explaining this method is that buyers of the low-priced funerals are paying more than the buyer of the low-priced funeral for the identical services. "Graduated recovery" therefore allows the funeral provider to lower the price of the package funeral on the low-price end since any loss is made up by raising prices on the high-priced end.<sup>330</sup> In essence, buyers of higher-priced package funerals are subsidizing buyers of lower-priced package funerals.<sup>331</sup>

<sup>327</sup> Dr. Alfred Rappaport "The Expected Impact of Fragmented Quotation on Funeral Service Prices" III-1-3; NSM Post-Record Comment, XIV-848, at 22 107.

<sup>328</sup> *Id.*

<sup>329</sup> 1978 Staff Report, supra note 9, at 389.

<sup>330</sup> Some funeral providers indicated that the desire to create subsidized low-priced funerals stemmed from the funeral director's belief that a full package funeral should be affordable even in the low income range, so that everyone can afford a full, dignified funeral. See, e.g., NFDA Post-Record Comment, XIV-848. Other commentators note however, that such a pricing strategy could increase profits. See, e.g., Dr. Michael Lawson, D.C. Ex. 22, at 14; Shavell, D.C. Ex. 13, at 16.

<sup>331</sup> Some have suggested that this undisclosed subsidy is improper in that buyers are not paying the "true cost" for the items bought. Others have suggested that it is not the funeral director's role to re-allocate income by subsidizing the funerals of lower-income consumers with the funerals of high-income consumers. And others have commented that even if such a goal is appropriate, there is no guarantee that graduated recovery achieves that result. Poorer consumers may often be the consumers who buy the more expensive funeral. (Evidence in the record supports the claim, for example, that blacks buy more expensive funerals.)

The rule requires the prices of each part of the package to be disclosed separately. Funeral providers argue that this means that they will be required to charge all buyers the same price for the same services.<sup>393</sup> Since this would prevent funeral directors from charging buyers of higher-priced package funerals more than buyers of the lower-priced funeral for the same item, it would end the present subsidy of the buyers of the lower-priced funeral. As a consequence, it is argued that the prices of the lowest-priced funerals would have to increase.

The Commission recognizes that funeral directors may choose to respond to the rule by raising the prices of the lowest-priced funeral. The Commission does not believe, however, that this result is required by the rule. The rule does not preclude the use of "graduated recovery." Under one alternative format, for example, funeral directors may quote a single price for professional services and caskets. That price can be structured to achieve a graduated recovery effect. Even under the alternative list, funeral directors can price caskets to achieve the same result.

Nevertheless, some funeral directors may choose to raise the prices of the lowest-priced package funeral. The impact of this change, however, may not be great for two reasons. First, such increases may be offset by savings which consumers can achieve by declining unwanted items. Second increased price competition will generate pressure to keep prices down. Finally, nothing in the rule will prevent funeral directors from meeting any perceived social responsibility to make services available at nominal charges for welfare cases or from charging special lower prices for infant deaths or other special cases.

The evidence submitted during the rulemaking proceeding is consistent with the Commission's finding that while itemization presents opportunities for funeral providers to raise prices, which some funeral directors have in fact done, it is not necessarily required by the rule itself. Many funeral directors testified that prices increased after

than educated white consumers, see CalCAG Study, *supra* not 247, at 30-31).

The Commission does not suggest that such subsidization is improper, nor does it believe that it is the Commission's function to judge the social value of such a pricing scheme. The Commission recognizes that many items in our economy have a pricing structure in which some items contribute proportionately more to profit than to other items.

<sup>393</sup> This result does not follow directly from the rule, but from the funeral director's reluctance to disclose different prices to different people for the same items. A Rappaport, III-1-111, at 10-11; Oral Presentation of Tom Clark, GC, NFDA, at 154.

itemization,<sup>393</sup> while others testified that their prices did not increase.<sup>394</sup>

#### VI. Other Matters

**A. Effective Dates.** Because of the legislative review provisions set forth in Section 21 of the FTC Improvements Act of 1980, the effective date of this rule is most appropriately tied to the conclusion of the legislative veto period.<sup>395</sup> Under the terms of the statute, that period runs for ninety calendar days of continuous legislative session.

Industry members have been on notice since July, 1981, of the terms of the rule. In addition, the rule and this statement will be available during the legislative review process, which is likely to take at least four months. We have determined that the rule should become effective three months after conclusion of Congressional review. We believe that three months is a sufficient amount of time both the industry and consumers to become familiar with the requirements of the rule given the opportunity to become familiar with the rule during the legislative review. The Commission will accept petitions for exemption, pursuant to § 453.9 of the rule, during this period.

**B. Mandatory Review.** Section 432.10 requires the Commission to initiate a rulemaking amendment proceeding, pursuant to Section 18(d)(2)(B) of the Federal Trade Commission Act, within four years after the effective date of this rule, to determine whether the rule should be amended or terminated. Under the terms of Section 18(d)(2)(B) and the Commission's rules of practice, an amendment proceeding will provide full opportunity for all interested parties to provide data and views on the question of whether the rules should be modified or terminated, and will include the rights available under a Magnuson-

<sup>393</sup> See, e.g., F. Galante, New Jersey funeral director, Tx 1734-35; T. Sheehan, Pres., New Jersey FDA, Tx 458-57; R. Johnson, Indiana funeral director, Tx 12,464-66; J. Wylie, Exec. Director, Florida FDA, Tx 8714-17; H. Coates, member, State Bd. of Embalmers and Funeral Directors of Kentucky, Tx 3978-79; M. Heitner, Minnesota funeral director, Tx 3340-41. See also, NSM comment on Revised Rule, XVI-159, at Appendix B.

<sup>394</sup> See, e.g., G. Primm, Pres., Empire State FDA (NY), Tx 264; N. Panepinto, Director, New York Bureau of Funeral Directing, Tx 300; S. Hausmann, Exec. Director, New Jersey FDA, Tx 533; M. Damiano, New Jersey funeral director, Tx 1311; C. Whigham, New Jersey funeral director, Tx 768; M. Waterston, Minnesota funeral director, Tx 3745-46; W. Kinder, Pres., Minnesota FDA, Tx 3282; P. Hultquist, California FDA, Tx 7602. Cf. J. Wylie, Exec. Director, Florida FDA, Tx 9723-24.

<sup>395</sup> The present legislative review provision is scheduled to terminate on September 30, 1982. If no other legislative review process applies after that date, the legislative review process will be considered concluded for the purposes of determining the effective date of the rule.

Moss proceeding to limited cross-examination.

In addition, the Commission is required to decide, within eighteen months after the rulemaking amendment proceeding has been initiated, whether the rule should be modified or terminated.

The Commission has established this early review procedure to ensure that there is a need to continue the rule after it has had an opportunity to work in the marketplace. If the rule operates as expected, there should be increased competition in the market which may obviate the need for continued federal intervention. Requiring an early amendment proceeding commits the Commission to conducting a public proceeding, open to full participation, to review the operation of the rule and its effect. At this time, the Commission expects to have data from its own internal impact evaluation to aid in the consideration of these issues. The Commission will consider whether the rule should be modified or terminated at that time.

While the rule is expected to increase price competition, the Commission cannot say on the basis of the present record when the rule's impact will begin to be felt. For a number of reasons, the effect of the rule may take longer than in other industries.<sup>396</sup> Nevertheless, the Commission is committed to reviewing, at an early date, whether the rule appears to be operating as expected or whether some modification is required. If the marketplace problems addressed by the rule appear to be largely solved by increased competition, the Commission will consider terminating the rule at that time.

Accordingly, Title 16 of the Code of Federal Regulations is amended by the addition of new Part 453.

### PART 453—FUNERAL INDUSTRY PRACTICES

#### Sec.

- 453.1 Definitions.
- 453.2 Price disclosures.
- 453.3 Misrepresentations.

<sup>396</sup> As discussed previously, the purchase of a funeral is infrequent. Consequently, many consumers will not have exposure to price data or other provisions of the rule for many years. Thus, the stimulus for price competition, at least initially, is likely to come from sellers rather than buyers. The extent to which new entrants begin to compete on the basis of price, or which existing sellers begin to compete or advertise prices, is likely to determine how quickly competition begins to effect the marketplace. Considering the industry's tradition of opposition to price advertising, and other constraints on price competition and barriers to entry, it is difficult to predict how quickly such competition will emerge.

## Sec.

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)); 60 Stat. 383, as amended, 61 Stat. 54 (5 U.S.C. 562).

**§ 453.1 Definitions.**

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

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

(c) *Cash advance item.* A "cash advance item" is any item of service or merchandise described to a purchaser as a "cash advance," "accommodation," "cash disbursement," or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may include, but are not limited to, the following items: Cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.

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

(e) *Commission.* "Commission" refers to the Federal Trade Commission.

(f) *Cremation.* "Cremation" is a heating process which incinerates human remains.

(g) *Crematory.* A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.

(h) *Direct cremation.* A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

(i) *Funeral goods.* "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

(j) *Funeral provider.* A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

(k) *Funeral services.* "Funeral services" are any services which may be used to care for and prepare deceased human bodies for burial, cremation or other final disposition; and arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

(l) *Immediate burial.* An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

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

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

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

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

**§ 453.2 Price disclosures.**

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

unfair or deceptive acts or practices defined here.

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

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

(ii) Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists in paragraph (b)(2) through (4) of this section which reasonably answers the question and any other information which reasonably answers the question and which is readily available.

(2) *Casket price list.* (i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the retail prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. *Provided however,* that funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is required by this paragraph (b)(2)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) *Outer burial container price list.* (i) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In

lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner.

Provided however, that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is required by this paragraph (b)(3)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

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

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

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

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

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

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

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

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

(C) The price range for the direct cremations offered by the funeral provider, together with: (1) A separate price for a direct cremation where the

purchaser provides the container; (2) separate prices for each direct cremation offered including an unfinished wood box or alternative container; and (3) a description of the services and container (where applicable), included in each price;

(D) The price range for the immediate burials offered by the funeral provider, together with: (1) A separate price for an immediate burial where the purchaser provides the casket; (2) separate prices for each immediate burial offered including a casket or alternative container; and (3) a description of the services and container (where applicable) included in that price;

(E) Transfer of remains to funeral home;

(F) Embalming;

(G) Other preparation of the body;

(H) Use of facilities for viewing;

(I) Use of facilities for funeral ceremony;

(J) Other use of facilities, together with a list of facilities provided for any quoted price;

(K) Hearse;

(L) Limousine;

(M) Other automotive equipment, together with a description of the automotive equipment provided for any quoted price; and

(N) Acknowledgment cards.

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b)(2)(i) of this section; and

(B) Either of the following:

(1) The price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b)(3)(i) of this section; and

(C) Either of the following:

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

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

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

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

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

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

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

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

#### § 453.3 Misrepresentations.

(a) *Embalming Provisions.—*(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§ 453.4(b)(1) and 453.5(2), funeral providers must:

(i) Not represent that a deceased person is required to be embalmed for

direct cremation, immediate burial, a funeral using a sealed casket, or if refrigeration is available and the funeral is without viewing or visitation and with a closed casket when state or local law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by § 453.2(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement which does not require you to pay for it, such as direct cremation or immediate burial."

(b) *Casket for cremation provisions.*

(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires a casket for direct cremations;

(ii) Represent that a casket (other than an unfinished wood box) is required for direct cremations.

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

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

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

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

(2) *Preventive requirement.* To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by § 453.2(b)(3)(ii), or, if the prices of outer

burial containers are listed on the general price list, required by § 453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, no state or local law makes you buy a container to surround the casket in the grave. However, many cemeteries ask that you have such a container so that the grave will not sink in. Either a burial vault or a grave liner will satisfy these requirements."

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

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the deceptive acts or practices identified in § 453.3(a)(1), § 453.3(b)(1), and § 453.3(c)(1), funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by § 453.2(b)(5)) any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) *Provisions on preservative and protective value claims.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) *Cash advance provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, funeral providers must place the following sentence in the general price list, at the end of the cash

advances disclosure, required by § 453.2(b)(4)(ii)(C): "We charge you for our services in buying these items," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item.

§ 453.4 Required purchase of funeral goods or funeral services.

(a) *Casket for cremation provisions.*—

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

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

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

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

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

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

(B) Place the following disclosure on the statement of funeral goods and services selected, required by § 453.2(b)(5)(ii): "Charges are only for

those items that are used. If we are required by law to use any items, we will explain the reasons in writing below."

(ii) A funeral provider shall not violate this section by failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

#### § 453.5 Services provided without prior approval.

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

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

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(3) The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) *Preventive requirement.* To prevent these unfair or deceptive acts or practices, funeral providers must include on the contract, final bill, or other written evidence of the agreement or obligation given to the customer, the statement: "If you selected a funeral which requires embalming, such as a funeral with viewing you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

#### § 453.6 Retention of documents.

To prevent the unfair or deceptive acts or practices specified in § 453.2 and § 453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in § 453.2(b) (2) through (4), as applicable, for at least one year after the date of their last distribution to

customers, and a copy of each statement of funeral goods and services selected, as required by § 453.2(b) (5) for at least one year from the date on which the statement was signed.

#### § 453.7 Comprehension of disclosures.

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

#### § 453.8 Declaration of intent.

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

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

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

#### § 453.9 State exemptions.

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

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

(b) That state requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule; then the commission's rule will not be in effect in that state to the extent specified by the Commission in its determination, for as long as the State administers and enforces effectively the state requirement.

#### § 453.10 Mandatory review.

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

*Dissenting Statement of James C. Miller III, Chairman, Federal Trade Commission on Funeral Rule*

I cannot in good conscience go along with a final rule affecting the funeral industry at this time. I do not oppose a rule in principle. Indeed, I've always said that this is an area worthy of Commission investigation. But for

the reasons set forth below, I believe that action at this time is ill-advised.

Furthermore, I want to make it clear that I respect the views held by my colleagues on the Commission. This is neither a Republican nor a Democratic issue. It is neither conservative nor liberal. The question is whether the action taken today can be defended. I believe it cannot.

The basic reason for my opposition to today's action is the lack of evidence in the record. That record is woefully inadequate for a proceeding that has lasted 10 years. In my view, the Commission does not have a reliable description of the industry, much less a working knowledge of how it operates. The facts presented are often contradictory, are heavily anecdotal, and may not be representative of industry practices. From what description can be gleaned from the record, two theories seem to fit equally well: (a) That the industry is operating quite effectively; and (b) that the industry is vitiated with market imperfections crying out for governmental intervention.<sup>1</sup>

Nor do we have any basis in the record to conclude that the rule approved today will adequately deal with alleged market imperfections, assuming they exist. For example, the requirement that services be "unbundled" can easily be circumvented by funeral directors' simply charging higher prices for services a la carte. (The point about the price of a new automobile's being far less than the summed prices of all new parts is particularly relevant here.)

Moreover, certain provisions may actually harm consumers. For example, the only empirical evidence we have of the effects of forced unbundling (in Minnesota) suggests increased costs to consumers. Also, the requirement of prior authorization before embalming may well raise costs to consumers, diminish their satisfaction with the overall service, or have both effects.

Because of the paucity of evidence in the record, I believe it is likely the courts would sustain a legal challenge to the rule. This risk could have been mitigated if the Commission had taken my recommendation and had reopened the rulemaking record for the submission of additional evidence. The Commission's own "baseline" study, in particular, should have been entered into the record, even if this would have meant a few months delay while the Commission accepted public comment on it.

Portions of the baseline study seriously challenge the theory of market imperfections that is implicit in the Commission's action. For those who think the baseline study actually supports the Commission's rule, it is ironic that by refusing to admit it into evidence the Commission forgoes the opportunity to use the study's results to support the rule, but enable anyone to use it in challenging the Commission's action.

Beyond the integrity and sufficiency of the formal record—on which of course the Commission's decision must be based—there is one other matter I wish to touch upon

<sup>1</sup> The memoranda of Timothy J. Muris, Director of the Bureau of Consumer Protection, and Robert D. Toulson, Director of the Bureau of Economics, disclose in detail these deficiencies in the record.

briefly. I believe that the Commission's action today will make it considerably more difficult to resist efforts by the "learned professions" to obtain exemption from FTC laws concerning unfairness and deception, and from FTC enforcement of the antitrust laws. Indeed, there is a plausible argument that the objects of the Commission's action—funeral directors—would be exempt under the language already adopted by the Senate Commerce Committee ("Federal Trade Commission Amendments Act of 1982").

In conclusion, I fear that the Commission has deceived a very vulnerable segment of American consumers. The Commission's action is deceptive because it raises expectations of lower prices for funerals and better service, when in fact we have little evidence to believe the rule would have these effects. It is also deceptive because the rule may well be reversed in the courts. As if this were not enough, the Commission's action places in further jeopardy a much more important matter—the Commission's efforts

to police anticompetitive, unfair, and deceptive practices in the professions.

In view of the inadequacy of the record, I respectfully dissent from the Commission's action. In the larger view of all that is at stake, I fear that in this case the Commission is showing signs of returning to its errant past of regulating first and asking the right questions later.

[FR Doc. 82-26351 Filed 9-23-82; 8:45 am]  
BILLING CODE 6750-01-M