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Part II

Federal Trade Commission

16 CFR Part 453
Funeral Industry Practices; Final Amended Trade Regulation Rule

FEDERAL TRADE COMMISSION

16 CFR Part 453

Funeral Industry Practices Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Final amended trade regulation rule.

SUMMARY: The Federal Trade Commission issues final amendments to the Funeral Industry Practices Trade Regulation Rule (hereafter "the Rule" or "the original Rule"), pursuant to the review mandated by § 453.10 of the Rule. That provision required that the Commission initiate a rulemaking amendment proceeding no later than four years after the effective date of the Rule to determine whether the rule should be amended or terminated.

EFFECTIVE DATE: The amended Rule will become effective on July 19, 1994.

ADDRESSES: Requests for copies of the amended Rule and the Statement of Basis and Purpose should be sent to Public Reference Branch, room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Matthew Daynard, Division of Service Industry Practices (202–326–3291), or Carol Jennings (202–326–3010) or Sally Forman Pitofsky (202–326–3318), Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The amended Rule retains the Rule's primary itemization, price and other disclosure requirements, without major, substantive modification; expressly prohibits non-declinable fees (such as so-called "casket handling fees" or "basic facilities fees") charged in addition to the non-declinable fee for basic services of funeral director and staff; deletes the affirmative telephone disclosure requirement, but retains the obligation to give price and other information to consumers who request it over the telephone; and contains a series of changes to the original Rule in the nature of fine-tuning and technical revisions designed to make the Rule more effective and to facilitate compliance.[1]

STATEMENT OF BASIS AND PURPOSE

I. Introduction

A. Overview of the Original Rule

The Commission promulgated the original Rule on September 24, 1982, making it fully effective on April 30, 1984.[2] The Commission's decision to promulgate the Rule was appealed, and was subsequently affirmed in Harry & Bryant Co. v. *FTC*.[3] The Funeral Rule declares it an unfair or deceptive act or practice for funeral providers to: (1) fail to furnish price information to funeral consumers; (2) require consumers to purchase items they do not desire to buy; and (3) embalm deceased human remains for a fee without authorization. The Rule further declares it a deceptive practice for funeral providers to misrepresent: (1) the necessity for embalming, caskets for cremation, and grave vaults or grave liners; (2) legal and cemetery requirements; (3) preservation and protection capabilities of funeral goods and services; and (4) cash advance charges for items arranged for by the funeral provider on the consumer's behalf.

To prevent those practices and to correct consumers' misimpressions, the Rule contains several remedial requirements. The Rule requires that funeral providers: (1) Disclose written price information by means of a General Price List ("GPL"), Casket Price List ("CPL"), and an outer burial container price list ("OBC–PL") to persons who inquire in person about funeral arrangements or the prices of funeral goods and services (§§ 453.2(b)(2)-(4));[4] (2) Give purchasers a written statement, after they have selected funeral goods and services, containing the prices for each of the items selected, the total price for the funeral arrangements selected, price estimates or actual costs, if known, for cash advance items, and any legal, cemetery or crematory requirements that compel the purchase of any items or services for the particular funeral (§ 453.2(b)(5));

(3) Affirmatively disclose to telephone callers who inquire about funeral "terms, prices or conditions" that price information is available over the telephone (§ 453.2(b)(1)(i));

(4) Disclose specific price information over the telephone to persons who call and request it (§ 453.2(b)(1)(ii));

(5) Make truthful representations about legal and other requirements that compel the purchase of particular items or services (§ 453.3));

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[1] In this document, references made to material contained in the rulemaking record, and references to particular, oft-cited documents in the record, are made in the footnotes using the following abbreviations:

Tr.—The transcript of the public hearings (Vol. I–III).

HX—Exhibits presented and accepted into the record at the hearings.

R—Materials submitted by the Commission staff or interested parties, or placed on the record by the Presiding Officer. References to documents in this written ("R") portion of the rulemaking record show the category in which the document was placed, the document number, and the internal page number of the document on which the cited reference appears. The reference number for the rulemaking record itself is 215–66.

R–B–5—The Commission's official publication of the Rule and the SBP, referred to above.

R–N–1—Bureau of Consumer Protection, Federal Trade Commission, Funeral Industry Practices, Mandatory Review (16 CFR Part 453): *Final Staff Report to the Federal Trade Commission With Proposed Amended Trade Regulation Rule*, June 1990 (hereafter cited as the "Staff Report" in text, "SR" in notes).

R–O–1—The Presiding Officer's July 1990 Report ("POR").

R–A–1—The Commission's Notice of Proposed Rulemaking ("NPR") initiating the review proceeding (53 FR 19864, May 31, 1988).

R–B–2—Market Facts, Inc., *Report on the Survey of Recent Funeral Arrangers* (1988) (the FTC-sponsored study of 1,004 consumers who arranged funerals between Dec. 1986 and June 1987, hereafter cited as the "Replication Study" in the text, or "RS" in notes).

R–B–3—Office of Impact Evaluation, Bureau of Consumer Protection, Federal Trade Commission, Market Facts—Washington, and Dr. J. Paul Peter, University of Wisconsin, *Baseline and Follow-up Studies for Evaluating the Effect of the Federal Trade Commission's Funeral Home Industry Trade Regulation Rule: Final Report*, July 1982 (The FTC-sponsored study and follow-up of 1,200 consumers who arranged funerals between Nov. 1980 and May 1981, hereafter cited as the "Baseline Study" in the text, or "BLS" in notes).

HX–122—February 1989, FTC Bureau of Economics staff report analyzing expenditure, selection and compliance data from the 1988 Replication Study (hereafter cited as the "BE Report").

HX–66—1988 study, sponsored by the American Association of Retired Persons and conducted by the Gallup Organization, of 675 consumers who arranged funerals between April 1987 and Oct. 1988 (hereafter cited as the "Gallup Study").

HX–108—Statement of Rebecca Ayers, National Research, Inc., presenting the results of a national study of 500 funeral directors.

R–B–6—1985 FTC Staff publication assisting funeral providers in Rule compliance (hereafter cited as the "Compliance Guidelines").

R–M–9—Proposed Findings of Fact, Conclusions of Law, and Recommended Decision jointly submitted by the National Funeral Directors Association and the National Selected Morticians.

R–M–11—Proposed Findings of Fact, Conclusions of Law, and Recommended Decision submitted by the American Association of Retired Persons.

[2] The Rule had two effective dates. Those portions of the Rule that prohibit certain oral or written representations became effective on January 1, 1984. 48 FR 45537 (Oct. 6, 1983). The remainder of the Rule—the portions imposing affirmative obligations on funeral providers—became effective on April 30, 1984. Id. The effective date of § 453.3(b)(1)(ii) of the Rule was changed from January 1, 1984 to April 30, 1984. 49 FR 564 (Jan. 5, 1984).

[3] 726 F.2d 993 (4th Cir. 1984), cert. denied, 469 U.S. 820 (1984). The Court held that the Funeral Rule did not, as alleged, exceed the Commission's authority under §§ 5 and 18 of the FTC Act and did not violate funeral directors' First Amendment rights of commercial free speech.

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

(6) Allow consumers to select and purchase only those goods and services they desire (rather than offering goods and services only in predetermined packages) (§ 453.4(b));

(7) Seek express approval before embalming the deceased for a fee (§ 453.5));

(8) Make truthful representations about the preservative and protective value of funeral goods and services (§ 453.3(e));

(9) Disclose that they charge a fee for obtaining cash advance items, if that is the case (§ 453.3(f)); and

(10) Make unfinished wood boxes or alternative containers available for direct cremation, if the provider offers direct cremation (§ 453.4(a)(2)).

The Commission in its 1982 Statement of Basis and Purpose stated that the essential purpose of the Rule is to lower barriers to price competition in the funeral market and facilitate informed consumer choice.[5] The Rule thus seeks to ensure that consumers have access to sufficient information to permit informed purchase decisions, that consumers are not required to purchase items they do not want and are not required by law to purchase, and that misrepresentations are not used to influence consumer purchase decisions.[6]

The staff on July 9, 1985 issued Final Compliance Guidelines to assist providers in their efforts to comply with the Rule.[7] Following an initial period where the Commission sought principally through educational efforts to encourage industry compliance, the Commission to date has obtained thirty-six consent orders and one litigated order in thirty-seven completed federal district court actions filed against individual providers regarding various violations of the Rule.[8]

B. The Amended Rule

The Commission, in promulgating the amended Rule, seeks to increase the Rule's potential benefits to consumers by clarifying its requirements and reducing actual or potential compliance burdens on the funeral industry. Such action should increase provider compliance with, and consumer understanding of, the Rule's disclosure and other obligations. Based on the record in this proceeding, the Commission has concluded that the low levels of industry compliance with, and consumer awareness of, the Rule do not permit a full cost-benefit analysis of its impact, because the analysis does not capture the full effects of the Rule had there been greater compliance. Despite this finding, the Commission has determined from the record evidence that the Rule is providing pro-competitive and informational benefits to consumers that outweigh its costs to providers, and that those benefits, but not costs, are likely to increase over time as Rule compliance and consumer awareness of their rights under the Rule increase. The Commission has further concluded that the record in this proceeding does not contain a sufficient basis to overturn the Rule's presumptive validity as a legally promulgated rule.

The Commission has concluded, however, that clarifying amendments to the price disclosure and "unbundling" provisions of the Rule are necessary to clarify that it shall be an unfair or deceptive practice to impose non-declinable fees in addition to the one for "basic services of funeral director and staff," permitted under § 453.2(b)(4)(iii)(C). These amendments effectively eliminate the imposition of so-called "casket handling fees" as separate non-declinable fees charged to consumers who purchase caskets from non-funeral home sources.[9] The Commission has determined that these fees serve to frustrate the Rule's basic "unbundling" requirement by penalizing consumers who decline caskets sold by the funeral home and instead purchase them from third party sellers. The emergence of third-party casket sellers, and consequently, those fees, have developed in the market since the Rule's promulgation.

The Commission further has concluded that repeal of the affirmative telephone disclosure requirement (§ 453.2(b)(1)(i)) is warranted because its costs outweigh its actual and potential benefits. The record evidence indicates that the affirmative telephone disclosure is an inartful and unnecessary signal to consumers about the availability of price information. The Commission has determined that the Rule's other price disclosure provisions are adequate, and that this provision is unlikely to provide substantial additional benefits to consumers. Record evidence indicates that the Rule is contributing now to increased consumer "price-sensitivity" that results in some consumer shopping for lower-cost providers and services. Consumers who call to first arrange a date and time for a funeral service, however, or who request the removal of remains, likely expect an empathetic response, and may be seriously offended by the uninvited offer to discuss prices. Some consumers in that circumstance are likely to interpret the affirmative disclosure as an indication of an unwarranted provider concern with the consumer's ability to afford services. The provision's likely inability to benefit consumers does not justify the imposition of such undue awkwardness and potential offense in what is otherwise an extremely delicate business, social and personal transaction. The Commission has concluded that the integrity of the

[5] 47 FR 42260 (Sept. 24, 1982), R-B-5 (hereafter cited as "SBP").

[6] 47 FR 42260 (Sept. 24, 1982), R-B-5.

[7] R-B-6 (50 FR 28062).

[8] *U.S.* v. *Troy Suggs Funeral Home*, No. CA3-87-1258-G (N.D. Tex., May 20, 1987); *FTC* v. *Crane Rhoton Services Corporation*, No. CA-3-87-1545-T (N.D. Tex., June 13, 1988); *U.S.* v. *Ware Crest, Inc.*, No. CA4-88-437-K (N.D. Tex., July, 11, 1988); *U.S.* v. *Horton Co. Morticians*, No. 88-1828 (D.D.C., July 11, 1988); *U.S.* v. *Simon Funeral Chapel*, No. 88-374PA (D. Or., August 3, 1988); *U.S.* v. *Manning Funeral Chapel, Inc.*, No. 88-4085 (D. Idaho, August 26, 1988); *U.S.* v. *Funeral Corporation Texas*, No. CA4-8929 E (N.D. Tex., January 11, 1989); *FTC* v. *Niday Funeral Home, Inc.*, No. H-88-2308 (S.D. Tex., November 1, 1989); *U.S.* v. *Errington Memorial Chapel*, No. 89-0640M (D.N.M., August 16, 1989); *U.S.* v. *Turner Funeral Home, Inc.*, No. 89-5217 (E.D. Pa., July 21, 1989); *U.S.* v. *Eddy's Funeral Home*, No. 89-593 (D. Nev., September 14, 1989); *FTC* v. *Dudley M. Hughes Funeral Co.*, 710 F. Supp. 1524 (N.D. Tex. 1989), appeal dismissed, 891 F.2d 589 (5th Cir. 1990); *U.S.* v. *Vail-Holt Funeral Homes*, No. NA90-57-C (S.D. Ind., May 11, 1990); *U.S.* v. *J.D. & M. Investment, Inc.*, No. 90-C-476-J (D. Utah, May 30, 1990); *U.S.* v. *Allen Funeral Home, Inc.*, No. IP-90-1430-C (S.D. Ind., June 8, 1990); *U.S.* v. *Fitzhenry's Funeral Home*, No. CV-N-90-282-BRT (D. Nev., June 25, 1990); *U.S.* v. *Striffler Community Funeral Homes*, No. 90-1809 (W.D. Pa., November 5, 1990); *U.S.* v. *Moore Funeral Homes, Inc.*, No. 90-C-965-C (N.D. Okla., November 14, 1990); *U.S.* v. *Wetzel and Son, Inc.*, No. 91-2562 (E.D. Pa., April 24, 1991); *U.S.* v. *Peake Memorial Chapel, Inc.*, No. CV91-637-RE (D. Or., July 5, 1991); *FTC* v. *Perkins Funeral Home, Inc.*, No. 391-CV-00556-JAC (D. Conn., September 25, 1991); *U.S.* v. *McGann & Son Funeral Home*, No. 91-C-6517 (N.D. Ill., October 30, 1991); *U.S.* v. *Goble's Fortuna Mortuary*, No. C-91-3883-SC (N.D. Cal., November 26, 1991); *U.S.* v. *Wilhelm Funeral Home, Inc.*, No. S-91-3152 (D. Md., November 6, 1991); *U.S.* v. *Restland Funeral Home, Inc.*, No. 3-91CV-2576-G (N.D. Tex., filed December 3, 1991) (in litigation); *U.S.* v. *Scala Memorial Home, Inc.*, No. 91-5679 (D.N.J., December 30, 1991); *U.S.* v. *Montrose Valley Funeral Home, Inc.*, No. 92-Z-645 (D. Colo., April 6, 1992); *U.S.* v. *Douglass-Marsh, Inc.*, No. 92-30004-F (D. Mass., January 6, 1992); *U.S.* v. *Higgins Funeral Home, Inc.*, No. 92-10100S (D. Mass., February 19, 1992); *U.S.* v. *Elliston Funeral Home*, No. 92-C-4294 (N.D. Ill., July 6, 1992); *U.S.* v. *J.M. Posey and Sons, Inc.*, No. CA3: 92-2221-17 (D.S.C., August 17, 1992); *U.S.* v. *John Harold Davis*, No. 92-1046-CIV-ORL-22 (M.D. Fla., November 13, 1992); *U.S.* v. *Valley of the Temples Mortuaries, Ltd.*, No. 92-0073 (D. Haw., December 1, 1992); *U.S.* v. *Memorial Guardian Plans, Inc.*, No. 92-2967-MlBro (W.D. Tenn., November 25, 1992); *U.S.* v. *Macias Mortuary Services*, No. C93-0193 (N.D. Cal., January 28, 1993); *U.S.* v. *Meyer Funeral Home, Inc.*, No. 1-93-CV-10010 (S.D. Iowa, March 25, 1993); *U.S.* v. *C.A. Anderson Funeral Parlors, Inc.*, No. C93-1939-EFL (N.D. Cal., June 11, 1993); and *U.S.* v. *Ronald W. Brown d/b/a/ Comisky-Roche Funeral Home*, No. C93-2819-WHO (N.D. Cal., July 29, 1993).

[9] To the extent that these fees include a charge for provider overhead that is not allocated to other items offered for sale, the amended Rule does not prohibit their inclusion in the non-declinable services fee permitted under § 453.2(b)(4)(iii)(C).

Rule's price disclosure requirements will be maintained by retention of the requirement to provide price and other readily-available information over the telephone on request.

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

Finally, the Commission has adopted several technical Rule amendments that are necessary to correct inconsistencies or unnecessary language in certain Rule provisions, or to complement other recommended amendments.[10]

C. Background of this Proceeding

1. The Commission's Findings in 1982

The Commission required this unique review to determine, at an early date: (1) Whether the Rule is operating as expected in reducing barriers to price competition and increasing informed consumer choice, or whether some modification is necessary to facilitate those benefits; and (2) whether there is a need to continue the Rule after it has had an opportunity to work in the marketplace; termination would be considered if increased competition has largely corrected the problems addressed by the Rule.[11]

The Commission determined, however, that the Rule's effects on the funeral market may be evidenced more slowly than in other industries due to factors it found unique to the funeral transaction.[12] One of those factors was that many consumers would not have exposure to the Rule-required price lists and other provisions for many years because purchases of funerals are infrequent. Unlike other situations, consumers also are unusually susceptible to influence from the funeral director's advice because of the unique combination of emotional stress, lack of experience and information, and tight time constraints. The Commission predicted as a result that the initial stimulus for price competition would likely come from existing or new providers that begin to advertise and otherwise compete on the basis of price. The Commission concluded that it could not say how quickly the Rule's competitive impact would begin to be felt in light of traditional industry constraints on price competition and barriers to entry.

The Commission nonetheless predicted that the Rule could provide economic benefits for consumers in various ways.[13] Should greater price competition emerge, for example, the Rule could reduce or hold stable actual prices and overall consumer expenditures for funerals. This would most likely result from increased consumer price-sensitivity, which might lead some consumers to shift from higher to lower-priced providers. Expenditures could also be reduced as consumers decline items previously required in packaged funerals, and as unfair or deceptive acts or practices that induced consumer purchases decline. Finally, the Commission determined that mandatory price itemization was warranted even if some consumers knowingly chose to buy more goods and services than they would have under package-only pricing. The purpose of the Rule is to enhance consumer choice.

The Commission finally determined that, while competition induced by the Rule could reduce price levels, mandatory itemization presented opportunities for providers to voluntarily raise prices.[14] Providers could choose to raise itemized prices or the price for the lowest-priced funeral, for example, in order to increase profits or account for increased consumer declinations of certain items. The Commission reasoned, however, that itemization does not require those results because it does not preclude traditional industry pricing methods, such as package pricing and "graduated recovery" of proportionately more overhead from higher-priced funerals. The Commission further concluded that providers may not be able to raise prices simply to recoup lost revenue or increase profits as price competition increases under the Rule.

2. The Mandatory Review Proceeding

The Commission on December 9, 1987 published an Advance Notice of Proposed Rulemaking (hereafter "ANPR") describing the planned review of the Funeral Rule.[15] The ANPR notified the public that the Commission intended to conduct the rulemaking, and solicited public comments on many of the key Rule-related issues. The ANPR contained 44 questions concerning consumer and funeral provider experiences, the scope of the Rule, compliance, various Rule provisions, regulatory flexibility and the paperwork burden imposed by the Rule. The majority of the commenters[16] recommended retention of the Rule. Funeral director trade groups recommended repeal or, in the alternative, substantial modification and expansion of the Rule to cover other sellers, such as cemeteries.

Following a review and assessment of the comments, the Commission on May 31, 1988 published a Notice of Proposed Rulemaking (hereafter "NPR") initiating this review proceeding.[17] The Commission in the NPR established a schedule for three public hearings to be held in Washington, Chicago, and San Francisco, and requested comment on a number of questions set out in the notice. In all, 189 individuals and groups submitted written comments, including two funeral directors, five cemetery/crematory/third-party casket seller groups or individuals, six funeral director trade associations, 147 consumers, 27 consumer/memorial society groups, one federal official and one state group.

During the public hearings,[18] testimony was received from sixteen

[10] Little, if any, systematic or otherwise reliable evidence in the record documents industry-wide deceptive or unfair practices concerning Rule-related issues by cemeteries, crematories that do not sell funeral goods, or other sellers of funeral goods or funeral services not presently subject to the Rule. Therefore, the Commission has declined to expand the Rule to cover such entities, as recommended by some rulemaking participants. See R-N-1 (SR) at 109–121 for a full discussion of the evidence on this issue.

[11] R-B-5 (Statement of Basis and Purpose) at 42261, 42299.

[12] Id. at 42299.

[13] Id. at 42297.

[14] Id. at 42296–42298.

[15] 52 FR 46706.

[16] Over 350 persons responded to the request for public comment, including 131 consumers, 134 funeral directors, 46 memorial societies, and approximately 20 trade associations and related industries.

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

[18] Based on requests from interested parties who wished to question witnesses at the public hearings, the Presiding Officer designated four groups for that purpose: (1) The Consumer Interest Group, including the American Association of Retired Persons and the Continental Association of Funeral and Memorial Societies; (2) the Funeral Director Group, including the National Funeral Directors Association and the National Selected Morticians (that group also included William Pierson, the owner of the Hursen Funeral Home, the Illinois Funeral Directors Association, and the Conference of Funeral Service Examining Boards; (3) the Crematory and Prearrangement Group, including the Cremation Association of North America and the Pre-Arrangement Association of America; and (4) the Special Cemetery Group, including the American Cemetery Association. The Presiding

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

In April 1989, Rebuttal Submissions were filed by the staff, the Cremation Association of North America ("CANA"), the Monument Builders of North America ("MBNA"), the National Funeral Directors Association ("NFDA") and National Selected Morticians ("NSM") (joint rebuttal), the American Cemetery Association ("ACA"), the American Association of Retired Persons ("AARP") and the Pre-Arrangement Association of America ("PAA"). In response to a request from the Presiding Officer, those groups other than the staff also filed Proposed Findings of Fact, Conclusions of Law and Recommended Decision in May 1989.

In addition to all of the testimonial and written information just described, the record contains three national surveys of actual funeral arrangers, conducted in 1981, 1987 and 1988. The 1981 Baseline Study (or "BLS")[19] was conceived as a benchmark for later comparison with the 1987 Replication Study (or "RS").[20] Conducted for the Commission, these studies examined: (1) Consumer purchasing behavior and expenditures for funerals; (2) consumer knowledge of the funeral market; and (3) industry practices and prices. By comparing the results of the two studies, inferences could be drawn about the Funeral Rule's impact on the funeral market. The Bureau of Economics Report of February 1989[21] contains that comparative analysis. The Gallup Organization conducted the third, and most recent, study of funeral arrangers for the AARP.[22] Viewed together, those three empirical surveys represent the most reliable and comprehensive systematic data available on consumer experiences under the Rule in shopping for and choosing funeral goods and services, and of industry Rule compliance.[23]

In addition to these empirical studies, statistical data and testimony presented by Mr. Wendell Hahn of the Federated Funeral Directors of America (hereafter "FFDA"), an independent firm that provides financial and business consulting services to some 1,500 independent funeral homes in 30 states, representing about 10% of all funerals per year, afforded evidence on changes in funeral home costs of operation and prices under the Rule. A 1988 national survey of 500 funeral directors presented by the AARP provided similar evidence.[24] A 1987 survey of state laws regulating the funeral transaction is also part of the record, as is the 1984 survey of NFDA members regarding changes in provider practices under the Rule. The record further contains two national opinion surveys concerning consumers' views about, and knowledge of, various Rule requirements, and five other surveys of cemeterians, cremationists, monument builders and memorial societies conducted by interested groups on specific, Rule-related issues.

The rulemaking staff and Presiding Officer published their respective Reports in June and July 1990, summarizing the record evidence and recommending, with minor differences, retention of the Rule, repeal of the affirmative telephone disclosure, prohibition of separate non-declinable fees, in addition to the non-declinable fee for basic services of funeral director and staff, such as so-called "casket handling fees," and the adoption of several "fine-tuning" amendments.[25] In response to the Presiding Officer's published invitation,[26] forty-nine groups and individuals submitted comments on those reports by November 1, 1990.[27]

On June 20, 1991, the Bureau of Consumer Protection forwarded its final recommendations to the Commission on this review proceeding. The rulemaking staff continued the major recommendations contained in its 1990 Report, and, together with the Bureau of Economics staff, jointly recommended a separate amendment concerning the disclosures that are necessary whenever the fee for "services of funeral director and staff" is incorporated in the price of caskets offered for sale.[28] The Bureau of Economics concurred with all of the rulemaking staff's recommendations concerning substantive Rule provisions.[29]

On November 21, 1991, representatives of the NFDA, NSM, AARP, CANA, ACA, MBNA and PAA made oral presentations to the Commission concerning this review proceeding. On January 28, 1993, after reviewing the rulemaking record as a whole, the Commission voted unanimously to retain and amend the Rule, incorporating all of the substantive changes recommended by the rulemaking staff and the Bureau of Economics.

II. Basis for the Amended Rule

A. The Legal Standard for Amending the Rule

Section 18(d)(2)(B) of the FTC Act states that "[a] substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection."[30] Thus, the standard of judicial review for amendment to, or repeal of, a section 18 rule is identical to that for any rule

Officer established the last group for the limited purpose of conducting examination on whether the Rule should be expanded to include cemeteries. See R-A-37.

[19] R-B-3, supra n. 1.

[20] R-B-2, supra n. 1.

[21] HX-122.

[22] The Gallup Study, HX-66, supra n. 1.

[23] With respect to the BLS, however, the 1982 rulemaking staff concluded from its review of a telephone validation study that the BLS data were subject to qualification and differing interpretation in four specific areas where the data appeared to conflict with evidence already on the original record—consumers' receipt of telephone price information, written itemized price information and itemized statements, and requests for permission to embalm. See R-B-70 (Memorandum from Funeral Rule Staff to Commission, "Impact Evaluation Survey, Funeral TRR," July 15, 1982). The Commission in its comparative analysis of the Baseline and Replication study data does not rely on the Baseline data in those four areas.

[24] Ayers, HX-108, supra n. 1.

[25] See R-N-1 (SR) and R-O-1 (POR).

[26] 55 FR 30925 (July 30, 1990).

[27] The commenters included 22 consumer organizations (19 local funeral and memorial societies, the CAFMS—two comments, the National Consumers League, and the AARP); three individual consumers; 12 funeral industry trade associations, including five state funeral director associations (California, Illinois, Michigan, North Carolina and South Carolina), the Funeral Director Services Association of Chicago, the ACA, the CANA, the PAA, the MBNA, the Casket Manufacturers Association, and the NFDA and NSM) (joint comment); five individual funeral directors; two casket manufacturers or distributors; one cemetery/third-party casket seller, one economist, and two funeral industry financial consultants, including the FFDA.

[28] BE also recommended a clarifying change to the definition of "services of funeral director and staff," in which the rulemaking staff concurred.

[29] The Office of the Director, Bureau of Consumer Protection, favored a limited review by the Bureau of the amended Rule to measure its impact, in particular the prohibition of "casket handling fees." See Memorandum from Gerald Caplan, Deputy Director, Bureau of Consumer Protection, to the Commission, June 20, 1991 at 5. The Bureau of Economics recommended the inclusion of a future and final mandatory review of the Rule under the rulemaking procedures of section 18 of the FTC Act. See Memorandum from Peter Vander Nat, Bureau of Economics, to the Commission, August 26, 1991 at 3. The Commission has not adopted either recommendation, but has scheduled the Funeral Rule for a mandatory "notice and comment" review in 1999, in accordance with its ten-year review schedule adopted for all Commission rules and guides. See 58 FR 11554 (Feb. 25, 1992).

[30] The Commission's rulemaking standards applicable to promulgation and amendments of a Section 18 rule require a preponderance of reliable evidence. See Statement of Basis and Purpose, Credit Practices TRR, 49 FR 7740 (March 1, 1984).

prescribed pursuant to section 18. Upon judicial review, a section 18 rule may be set aside if it is "arbitrary, capricious" or otherwise not in accordance with law upon any of the grounds set forth in the Administrative Procedure Act (APA) at 5 U.S.C. 706(2)(A)–(D), or if the factual determinations upon which the rule is based are not supported by "substantial evidence" in the rulemaking record as a whole.[31]

In their Proposed Findings, funeral director groups assert that the current rulemaking is subject to the same standards and procedures as a de novo rulemaking. Therefore, they appear to contend that the Commission must support any decision, including the retention of the Funeral Rule, on a new administrative record compiled afresh.[32]

This view is incorrect. A decision to retain any portion of the current Rule may be based upon evidence gathered during the original rulemaking and the Commission's subsequent enforcement experience, as well as evidence adduced during the current rulemaking. Indeed, to the extent that nothing supplements evidence from the initial rulemaking, there is a presumption that the existing rule should be retained.[33]

As discussed elsewhere in this Statement of Basis and Purpose, the Commission has evaluated the relative costs and benefits of the Rule, industry compliance, the Rule's effect on competition and consumer awareness, and a number of other factors, to determine whether to retain, amend, or repeal the Rule. In making that determination, the Commission has taken into account, among other things, the comments received in this rulemaking as well as the record established in the original rulemaking proceeding and the Commission's experience in enforcing the existing Rule. The Commission believes that its decision to retain certain provisions of the Rule while supplementing or amending others, as described in this Statement of Basis and Purpose, comports with the legal standards discussed earlier governing Section 18 rules.

B. Overall Costs and Benefits of the Rule

1. Repeal vs. Retention: Participants' Views.

The vast majority of rulemaking participants supported the Rule's retention, or its expansion to cover other sellers. Of the 189 NPR commenters and 83 public hearing witnesses, only eight unequivocally advocated repeal of the Rule.[34] Two participants suggested repeal as an alternative, if the Commission declined to make various substantive amendments; two advocated repeal because, in their view, existing state laws were deemed adequate to protect consumers.[35]

The NFDA, the largest association of funeral industry firms, was the major proponent of repeal,[36] asserting that repeal is warranted because the Rule has imposed significant costs but failed to provide its promised benefits of increased competition and altered patterns of consumer behavior. According to the NFDA, the evidence shows that consumers in selecting funeral providers and types of funeral service still place a higher importance on social, moral and practical factors (such as provider reputation and quality of service) than they do on price.[37] The NFDA concluded that the evidence logically demonstrates that consumers under the Rule spend no less for funeral arrangements, comparison shop no more, and purchase no fewer items and no different types of service than they did before the Rule. The NFDA asserted that the Rule has imposed various monetary costs on providers that have been passed on to consumers in the form of higher prices, as well as non-monetary costs that interfere with providers' ability to give caring, quality service. The NFDA thus concluded that the Rule should be repealed in its entirety because its costs outweigh its benefits.[38]

In contrast to the NFDA's view, the AARP provided the most vigorous support for retention of the Rule.[39] The AARP advocated that a decision to repeal the Rule must be founded on substantial evidence demonstrating that: (1) The acts and practices addressed by the Rule are no longer prevalent; (2) the harm resulting from those practices has been removed; (3) repeal would not permit the return of that harm; and (4) the benefits of repeal exceed the costs of continuing the Rule. According to the AARP, those questions cannot be answered, and the Rule's full impact cannot be assessed, because the record evidence reveals unacceptably low levels of industry compliance and consumer awareness of the Rule's provisions. Because the Rule's full impact cannot be gauged, the AARP

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[31] 15 U.S.C. 57a(e)(3); *Consumers Union of the United States, Inc. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986).

[32] R–M–9 (NFDA/NSM) at 213–214. The NFDA/NSM further suggest that any change in the Rule's requirements (other than repeal) must be based on new evidence that current practices are unfair or deceptive, in accordance with the Commission's regulatory authority. Id. at 220–221. The amended Rule, however, except as noted, covers no other new acts, practices, or sellers of funeral goods or services. Moreover, the Commission concludes that the NFDA/NSM position is inaccurate. The Commission when it promulgated the Rule determined that the covered practices were unfair or deceptive, as the Rule states. The Rule, however, also contains many "preventive requirements" designed to remedy those practices. Those preventive requirements may be modified without an entirely new record, as discussed in the accompanying text. As the Commission stated in mandating this review, one of its purposes was to determine whether the Rule is operating as expected in reducing barriers to price competition and increasing consumer choice, or whether some modification is necessary to facilitate those benefits. R–B–5 (SBP) at 42299.

[33] See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

[34] Those eight were: The NFDA (R–G–6, R–M–9); the Funeral Directors Service Association of Chicago (R–G–5)(repeal or sunset); Mr. Ninker, funeral director (R–G–1); the Conference of Funeral Service Examining Boards (R–J–1); the National Concrete Burial Vault Association (R–E–2); Mr. Hahn, FFDA, Tr. Vol. II, 674–675, 678 (because he believes the marketplace will not change significantly as a result, even though the Rule has made providers more aware of their cost components and those few consumers who are interested more aware of funeral prices); Mr. Yurs, funeral director, Tr. Vol. II, 554; and the Illinois Funeral Directors Association (R–G–2).

[35] Those four include: The NSM (R–G–3; R–M–9 at 224) (repeal unless major amendments are adopted as proposed and a "sunset" date is mandated); the NYS Funeral Directors Association (R–G–4) (Rule is redundant to New York law); Mr. Hocker, President, NFDA, Tr. Vol. III, 1399, 1400, 1444–1445 (NFDA advocates repeal, but his personal objections are limited to three areas—affirmative telephone disclosure, GPL timing and distribution, and prior permission to embalm; otherwise, the Rule has educated consumers about the funeral process and many providers say they are not overly burdened by the Rule); and Mr. Farrow, Exec. Dir, Texas Funeral Service Commission, Tr. Vol. III, 550–551, 573 (Rule is unnecessary in light of Texas funeral law, which is patterned after the Rule and benefits consumers).

[36] One issue raised during the proceedings was whether individual members of the NFDA or other trade groups agree that the Rule warrants repeal. Several surveys and other evidence introduced into the record indicated that many funeral directors may not wholly agree with the NFDA view. See, e.g., HX–32 (American Funeral Director magazine survey asked its funeral director readers "How would you recommend that the NFDA deal with the Funeral Rule during the forthcoming Review?" 70% responded that the Rule should be accepted as is or partially modified, 12% suggested substantial modification, and 20% repeal; 88% of firms represented by respondent funeral directors were NFDA members); See also, Hocker, President, NFDA, Tr. Vol. III, 1400 (many funeral directors say they are not overly burdened by the Rule); Hunter, President, NSM, Tr. Vol. I, 790–791 (majority of NSM members do not advocate repeal; parts of it have been very helpful); Ayers, HX–108 at 3 (68% of 500 funeral directors surveyed agreed that the Rule's required information was beneficial to consumers).

[37] However, the NFDA suggested that price plays a greater role in consumers' selections of individual items involved in the funeral, such as caskets and outer burial containers. R–M–9 at 20.

[38] See, e.g., R–G–6 (Comment on the NPR) at 5–7, 35, 114–121 and R–M–9 (Proposed Findings) at 216–220, 224.

[39] The other major participants in the rulemaking proceeding and consumer groups that addressed the issue all supported retention as well. These groups included the PAA, CANA, CAFMS, and Consumers Union.

concluded, repeal is unwarranted. The AARP further asserted that the evidence indicates that the Rule has not increased funeral providers' costs, funeral prices, or consumer expenditures, but has begun to provide a variety of consumer benefits. The AARP thus further concluded that, although the Commission need not meet a specific evidentiary burden to retain the Rule, such evidence exists to support the conclusion that the Rule's benefits exceed its costs.[40]

2. Costs and Benefits Compared

The Commission has concluded, based on its review of the rulemaking record viewed as a whole, that the Rule warrants retention because its actual and potential benefits to consumers outweigh its costs to providers, and that those benefits are likely to increase over time as the Rule continues to operate. The Commission finds that, at the time of this review:

(1) The Rule has not been effective in the funeral market for a sufficient period to permit a full assessment of its benefits;

(2) The market is increasingly price-sensitive for the selection of funeral providers, types of service, and individual goods and services, particularly caskets, when price and options information is readily available during the selection process;

(3) Despite a documented, low overall compliance level, pro-competitive and informational benefits attributable in part to the Rule appear to be manifesting in the market and are likely to increase over time;

(4) The Rule overall imposes minimal compliance burdens on providers that do not significantly raise their business costs or prices, or reduce consumers' satisfaction with the funeral services they receive; and

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

a. Levels of compliance/price competition/consumer Awareness. The evidence in the record indicates, at the time of this review, a low level of industry compliance with the Rule. Systematic, empirical data from two independent surveys—the Commission-sponsored, 1987 Replication Study and the 1988 Gallup Study conducted for the AARP—show that 36% of funeral providers simultaneously complied with the Rule's two key requirements to give consumers a general price list ("GPL") and an itemized final statement of goods and services selected.[41] Using the more comprehensive Replication Study results, that overall compliance level dropped to 31% when misrepresentation provisions about the necessity for embalming and caskets for cremation are added to the analysis,[42] and to 9% when the GPL timing requirement is viewed strictly and several other Rule provisions are considered.[43] Most rulemaking participants opined, when asked, that a 30% level of compliance would be insufficient to assess adequately the Rule's benefits.[44]

In addition to the relatively low level of overall industry Rule compliance, the rulemaking record demonstrates that funeral providers have not provided the initial stimulus for "increased competition" on the basis of price considered necessary by the Commission. The few funeral home entrants that aggressively compete on price, documented in the record, appear to be former, more traditional funeral directors who reentered the market as "discount" providers, and who are considered to be "mavericks" by the funeral industry as a whole. More traditional funeral homes, by industry representatives' own admission, generally do not price advertise or otherwise compete on the basis of price.[45] The record further indicates that funeral providers show little support for unfettered competition in the sale of pre-need funeral services,[46] and that many affirmatively attempt to discourage potential price competition from third-party cemeteries and other non-funeral home retailers who sell caskets on a pre-need basis, by imposing so-called "casket handling fees," averaging $300–$500 per funeral on consumers who patronize those sellers.[47]

Finally, the empirical data and record testimony documents that a majority of consumers exhibit low levels of awareness concerning their rights under the Rule[48] and funeral prices and service options,[49] as a result of a general

[40] R–M–6 (Comment) at 10, 12–14 and R–M–11 (Proposed Findings) at 85–95, 144–145.

[41] HX–122 (BE Report) at 25–27; R–M–5 (Staff Rebuttal Statement) at 25, Table 7. Looking at these obligations individually, 23% of RS providers gave consumers the GPL—the key price disclosure document required by the Rule—at the outset of arrangements discussions as required, and 62% gave consumers who purchased a funeral on an item-by-item basis a properly itemized final statement. See HX–122 at Table VIII, p.20 and Table X, p.24.

[42] Id. at 26.

[43] R–M–5 (Staff Rebuttal) at 27, Table 8; R–B–2 (Replication Study/Market Facts Report) data tapes. In the BE analysis (HX–122), RS respondents were considered to have been the beneficiaries of "compliance" with respect to receipt of the GPL if they reported its receipt after discussions had begun but before selection of a casket or other container. BE staff, at the rulemaking staff's request, re-computed the compliance index using the Rule's definition of when a GPL must be given to consumers —"upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services." The result was that compliance with four of the Rule's provisions fell from 31% to 15% (timely receipt of the GPL and a properly-itemized statement, and no misrepresentations about the necessity for embalming and caskets for cremation). Overall, simultaneous compliance continued to drop from a "high" of 29% (using the most stringent BE compliance index, which added receipt of the GPL "in writing" to the four requirements stated above) to a "low" of 9% as other Rule provisions were added to the analysis.

[44] See R–N–1 (SR) at 51–56, notes 200–207.

[45] R–G–6 (NFDA/NSM Comment) at 5, 109–110, 113–114; R–M–9 (NFDA/NSM Proposed Findings) at 8–9, 31, 17–19, 199–200, 202–204; Krause, Tr. Vol. II, 12–13 (majority of Wisconsin providers do not compete); R–M–7 (PAA Rebuttal) at 21 (entry in the funeral market is virtually unheard of without a prior affiliation with a funeral home or cemetery, or the entrant is chain-related).

[46] The testimony of various funeral directors and cemeterians indicates that funeral providers as a group have supported state 100 percent pre-need "trusting" laws. The major impact of a "100 percent" trusting requirement—all moneys received from the consumer for a pre-need purchase must be placed in trust until the time of need—is to leave the pre-need seller without current funds to pay for the expenses associated with pre-need sales, such as an active sales force. See, e.g., Krause, Tr. Vol. II, 8, 13, 31, 34; Starks, Tr. Vol. II, 362–363, 367; Graf, Tr. Vol. II, 593, 649; Nelson, Tr. Vol. II, 180; and Barr, Kansas state representative/cemeterian, Tr. Vol. III, 1513.

[47] Record evidence concerning the widespread existence and effects of so-called "casket handling fees" is fully discussed in Section II.C.3, infra.

[48] Messer, trade embalmer, R–F–60 at 1; Carlson, author/lecturer, HX–22 at 7; Blake, Memorial Society of Door County, Wisconsin, Tr. Vol. II, 1119; Rouillard, Calif. Rural Legal Assistance Foundation ("CRLAF"), Tr. Vol. III, 1343–1344); Rev. Wasielewski, Inter-Faith Funeral Information Committee, Phoenix, Tr. Vol. III, 1619; Klein, consumer member, New York State Funeral Directing Advisory Board ("NYSFDAB"), Tr. Vol. II, 1060 (consumers don't expect a GPL at the beginning of arrangements or know that it's required); Botimer, Phoenix funeral director, Tr. Vol. III, 1283; Barr, Kansas state representative, Tr. Vol. III, 1537; Klugman, President, California Fed'n of Funeral and Memorial Societies, Tr. Vol. III, 924, 931; Rev. Bell, Inter-Faith Ministries of Wichita, Tr. Vol. III, 232, 247–248; Clark, Ark. A.G., Tr. Vol. III, 38; Rev. Dr. Biddle, Tr. Vol. III, 312, 337 (even "informed" consumers are unaware); Elvig, California State Cemetery Board, Tr. Vol. III, 439; Dr. Reveley, former funeral director, Tr. Vol. III, 879; Showalter, Tr. Vol. II, 105; Neel, Pittsburgh funeral director/cemeterian, Tr. Vol. I, 631; and CAFMS, R–H–12 (Comment) at 2.

[49] Hennessy, FDSA, Tr. Vol. II, 994; Showalter, Tr. Vol. II, 105, 107, 126–127 (consumers do not have basic knowledge to discriminate between products and services or know what to ask, or that a funeral is an item that one can price-shop for); SW Florida Funeral and Memorial Society, R–F–64 at 6 (purchase/embalming options and availability of published price data); Neel, funeral director/cemeterian, R–E–1 at 1; Carlson, author, Tr. Vol. I, 516, 524 (consumers are dissatisfied when they learn that they had a choice); Nelson, PAA, Tr. Vol. II, 228, 233 (especially the less expensive options); Prof. Sommer, Center for Consumer Research, Tr. Vol. III, 617, 624, 628–629 (local or national prices because no published price data/prices); Schwarcz,

Continued

lack of "visibility" of the Rule and of readily-available, comparative price information.[50] Other empirical evidence indicates that consumers' "experience" with funerals is low by any measure[51] and that, regardless of their level of experience, consumers are not "familiar" with the funeral transaction.[52] Most rulemaking participants concluded that the documented low levels of overall industry compliance and consumer knowledge, viewed together, indicate that the Rule has not been in place long enough to adequately assess its impact on the funeral market.[53]

b. Market price-sensitivity. Consumers' demand for funerals, of course, is price inelastic. Record evidence indicates, however, that consumers' selections of individual funeral providers, overall types of funeral service, and individual funeral goods and services are price-sensitive.

Consumers value available price information in selecting a funeral home and in making specific funeral arrangements, particularly when they receive the price information early in selecting funeral goods and services. With respect to the selection of a provider, 52% of NSM survey respondents in the years 1983–1988 said that they considered price "very important" in their funeral home selection, although other factors appeared to be more important; only 19% considered price unimportant.[54] Similarly, "low-cost" funeral homes, where they exist, have increased their business substantially in recent years as a direct result of their competitive pricing practices.[55] Regarding the selection of specific goods and services, many consumers are purchasing competitively-priced caskets from third-party sellers when they are available,[56] are increasingly choosing the significantly less-expensive cremation alternative,[57] are purchasing significantly fewer caskets and requesting embalming for cremation less frequently than in 1981,[58] and are declining items that used to be included in funeral "packages."[59] Replication Study consumers who received price information early in the transaction spent $252 less for their specific arrangements than those who did not get that timely information;[60] the earlier consumers received price information, the more likely they were to consider the information important to their choices in making funeral arrangements.[61]

c. Pro-competitive/informational benefits. Despite the 31% overall industry compliance level with four of the Rule's key requirements[62] and the

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focus group, Tr. Vol. III, 460 (embalming option); Blake, memorial society, Tr. Vol. II, 1109, 1119, 1131 (cremation options/declination options); Wertheimer, NAEL, Tr. Vol. III, 964 (consumers blame their inexperience for lack of knowledge); Clark, Ark. A.G., Tr. Vol. III, 38; Buchanan, President, CAFMS, Tr. Vol. III, 1107; Dr. Biddle, Tr. Vol. III, 347; Klein, NYSFDAB, Tr. Vol. II, 1066, 1082 (don't know what to ask over the phone/memorial societies exist to increase consumers' awareness of funeral options); Graf, cemeterian, Tr. Vol. II, 625 (don't know they can move the remains if they wanted to); Snyder, CU, Tr. Vol. III, 1261; Botimer, funeral director, Tr. Vol. III, 1284, 1289, 1311 (price variance); Rev. Wasielewski, Tr. Vol. III, 1620, 1634–1635 (casket prices/price variance); Bejarno, funeral consumer, Tr. Vol. III, 1588, 1597 (price variance); and Dr. Reveley, former funeral director, Tr. Vol. III, 898 (cremation options). But see, Yurs, funeral director (for NFDA), Tr. Vol. II, 559 (consumers with prior experience will have some idea of funeral costs); and Hahn, Federated Funeral Directors of America ("FFDA"), Tr. Vol. II, 709 (consumers are no more aware of prices because they don't price shop).

[50] Although not uncontroverted by the rulemaking staff and funeral industry representatives, the results of two national, consumer opinion surveys indicated that: (1) When asked whether they were "familiar with the FTC's Funeral Rule and what it requires," 90 percent of the 782 respondents aged 45 and above surveyed in the first of these "Excel" surveys said "no" and 10 percent answered "yes;" and (2) when asked whether each of several declarative statements about funeral director obligations and funeral consumer rights was "required by federal law or not," a majority (54 percent-75 percent) of the 916 consumer-respondents aged 21 and over said that, to the best of their knowledge, federal law does not require the rights and obligations actually mandated by the Funeral Rule, or said that they do not know. See McFadden, HX–8 at 3 and Exhibit B, Table 001; Soulas, HX–76 at 3. The "McFadden" survey results also provided evidence that older consumers aged 65 or over are significantly less likely to be aware of the Rule's protections than are younger consumers aged 18–34. HX–8 at Exhibit B, tables 002–004, 006–007.

[51] Thirty-six percent of the RS respondents reported that they had no prior experience arranging funerals; another 30 percent said that they had participated in planning arrangements once before, and the remaining third said they had done so twice before or more. R–B–2 at III–9, Table III–7. Because the RS surveyed recent funeral arrangers, however, and not the general public, the level of respondents' prior experience may not be representative of the population as a whole. The Commission found, for example, that, at the time it promulgated the Rule, about 50 percent of the adult population had never arranged a funeral and another quarter had done so only once. See R–B–5 (SBP) at 42265.

[52] The Bureau of Economics staff performed an analysis of the RS data to determine whether there was any link between respondents' degree of experience in making funeral arrangements (Question 10 of the study) and their level of knowledge about the funeral transaction (Question 55 asked whether embalming is required by law and whether a sealed casket/vault preserves remains indefinitely). BE staff divided respondents into two categories—those with arrangements experience prior to the one surveyed and those without such prior experience. BE staff then performed a statistical test to determine whether there was any relationship between those two categories and their answers to Question 55. BE staff found no relationship between the degree of respondents' reported prior experience and their level of knowledge. See R–N–1 (SR) at n. 124. In addition to BE's statistical test, the RS results show that 50 percent and 42 percent, respectively, of the RS respondents, all of whom had arranged a funeral at least once, reported incorrectly that embalming was always required as a public health measure and that a sealed casket/vault preserves remains for an indefinite time. R–B–2 at Table III–54, p. III–85.

[53] See R–N–1 (SR) at notes 115, 200–207; R–O–1 (POR) at 48–49, 223–224.

[54] The analysis is based on R–J–11, NSM Summary sheets, Question 1.f. See also, R–M–5 at 7–8. The NSM Survey results are remarkably similar to those of the RS concerning the importance of price. That data indicate that 56% of the survey respondents reported that the cost of funeral arrangements was "very" or "somewhat" important in their decision to select the funeral home they used; 15% reported that cost was somewhat or very unimportant. R–B–2 at Table III–28, p. III–39, and data tapes.

[55] Botimer, Tr. Vol. III, 1269, 1325 (based on the surveys his firm conducts, 85% of his clients choose his funeral home because of its low prices); Peebles, Tr. Vol III, 1551–1552 (the majority of his customers come to his funeral home because of its competitive prices); Heffner, HX–33 at 11 and Ex. T (annual funeral calls at the firm he recently purchased have increased 400% as a result of his discount price advertising); and Showalter, Tr. Vol. II, 130 (two discount funeral homes have captured 10% of the market in Phoenix, even though there are some 50 homes in that area, because they offer "traditional" funerals for less than $3,200).

[56] See R–N–1 (SR) at 124–127.

[57] The BE analysis showed that cremation selections increased from 11% in 1981 to 14% in 1987, and that the average cremation cost to 1987 respondents was about one-third of the cost of open-casket funerals ($1,054 vs. $2,818). HX–122 at Table II, p. 6, Table III, p. 7. BE staff noted that the close similarity of the survey results to cremation statistics provided by the CANA suggests that the BLS and RS are representative of the national population. *Id.* at n. 9.

[58] Thirty-four percent of cremation buyers in 1981 also purchased caskets, and 35 percent bought embalming services; those selections dropped in 1987 to 19% (caskets) and 25% (embalming). R–B–3 (BLS) at Table 3, p. 23; R–B–2 (RS) at Table III–44, p. III–71 (caskets) and Table III–42, p. III–67 (embalming). Similarly, CANA member surveys indicate a reduction in the purchase of caskets for cremation from 22% to 17% between 1983 and 1987, a reduction which the CANA attributed to the Rule. See Kelsey, Tr. Vol. II, 310–312; Purdy, Tr. Vol. III, 158.

[59] Hahn, FFDA, Tr. Vol. II, 684–685.

[60] HX–122 (BE Report) at 37 and Table XI, p. 38 (variable noted as "pinferly").

[61] Seventy-six percent of consumers who received price information "at the beginning" of arrangements discussions said that price information was very or somewhat important; 75% said so when they got price information "before casket selection;" 62% who reported that they received such information "when finalizing arrangements" said that it was very or somewhat important at that time; 67% said so when they got the information "after decisions had been made;" and 53% said so when there was "no discussion of price." In the first three periods above, 41%, 31%, and 22% of respondents, respectively, said that price information was "very" important. The analysis is based on consumers' answers to RS questions 27 (when price information was first received) and 35(c)(5) (importance of price information in arranging the funeral). R–B–2 at APPENDIX: Questionnaire, and data tape. See also, R–M–5 (Staff Rebuttal) at 6–7.

[62] Those four requirements are: to give consumers a timely general price list (§ 453.2(b)(4)), and itemized statement of goods and services selected (§ 453.2(b)(5)), and to refrain from misrepresenting the necessity for embalming and caskets for cremation (§ 453.3(a) and 3(b), respectively);

lack of price competition among funeral homes, competitive and informational benefits that are at least partially attributable to the Rule have begun to manifest in the funeral market. Testimonial evidence establishes that the Rule's "unbundling" and price disclosure provisions have encouraged third-party casket sellers and low-cost funeral homes to enter the market and have helped them compete,[63] in part because the GPL and telephone disclosure requirements permit non-industry entities to gather and publish comparative price data.[64] Many consumers have used that data to select those lower-cost funeral providers and purchase caskets from third-party sellers where they exist.

Other testimonial evidence presented by the FFDA, which provides financial and accounting services to 1,500 independent funeral home clients in 30 states, indicates that the Rule—through the availability of the GPL—has raised the industry's "price consciousness," which may be partly responsible for the tempering of price increases in recent years.[65] Mandatory itemization may have helped retard the growth of funeral prices and consumer expenditures, a goal fully intended by the Commission.[66] Statistical data provided by the FFDA and the Replication Study, and analyzed by an economist for the AARP and the BE staff, also establish that, although overall prices and consumer expenditures for funerals increased since 1981 by more than the general price level (the "CPI–U"), which includes all goods and services, the increase was comparable to the increase in service prices (the "CPI–US," which excludes medical services); that is, compared to other service industries,[67] funeral prices and expenditures in the period 1981–1987 did not increase above the rate of inflation.[68] In 1988, expenditures and prices for funeral services increased by even less than the rate of inflation for the general economy (the "CPI–U").[69]

In addition to these benefits, record evidence discussed above suggests that the Rule has helped increase consumers' awareness of prices and service options as factors to consider in making funeral purchase decisions. Many consumers choose low-cost funeral homes and caskets competitively offered by third-party providers, and consumers who chose cremation in 1987 purchased fewer caskets and embalming than in 1981. Finally, that evidence indicated that consumers now decline items once included in packaged funerals, and increasingly choose less-expensive cremation alternatives.[70]

Other empirical evidence indicates that, since 1981, the proportion of consumers who receive price information early in the funeral transaction, and use that information to spend less for their arrangements, has increased by 7%.[71] Consumer purchases of "unneeded" caskets and embalming for cremation have decreased,[72] as have provider misrepresentations about casket requirements,[73] and the accuracy of consumers' knowledge regarding casket for cremation and embalming requirements and the preservative value of sealed caskets has increased slightly.[74] The great majority of rulemaking participants expressed the view that the actual and potential Rule benefits just enumerated will tend to increase over time, as compliance with, and consumer awareness of, the Rule increases.[75]

Although not directly related to pro-competitive and informational benefits, other empirical evidence based on the Replication Study data and BE staff's compliance indices indicates that the proportion of consumers reporting satisfaction with their arrangements steadily increases as simultaneous provider compliance with the Rule's provisions increases.[76] That evidence indicates that compliance with the Rule benefits consumers and funeral

[63] Radovich, PAA, Tr. Vol. III, 1026, 1029 (virtually no third-party casket sellers existed before the Rule; casket retailers owe their existence primarily to the enactment of the Funeral Rule, which effectively allows the consumer to use a casket from an outside source); Drozda, Tr. Vol. II, 894 ("Sale of caskets through cemeteries is a relatively recent innovation. Prior to the enactment of the Funeral Rule in 1984, we were hardly aware of any cemeteries that sold caskets on their own because of the difficulty in obtaining a funeral home which would accept them and provide funeral services").

[64] Memorial society members, journalists and others testified that collecting comparative funeral price data was, at best, a difficult task before the Rule. See, e.g., R–N–1 (SR) at 86–88.

[65] Hahn, FFDA, Tr. Vol. II, 678 (funeral homes refrained from increasing prices for professional services even more than they did because of the GPL).

[66] See R–B–5 (SBP) at 42297.

[67] The funeral home industry is classified by the U.S. Dept. of Commerce in the standard industrial classification scheme (SIC) as a "service" industry, because, like other service industries, it sells services as well as goods.

[68] See R–N–1 (SR) at 78, 79–80. Even if overall industry compliance were higher and consumer expenditures still remained unchanged, the level of expenditures is not the sole test of the Rule's benefits. As the BE staff stated in its report, expenditures may rise as a result of price increases related to funeral homes' fixed costs that are not associated with any costs of Rule compliance. The record evidence indicates, in fact, that Rule compliance has not significantly increased funeral providers' costs or prices, that consumer expenditures and funeral prices, when compared to other service industries, have not increased above inflation, and that an industry "price consciousness" induced by the availability of the GPL may have tempered price increases. If the Rule's only benefit were to increase informed consumer choice (without imposing substantial costs on industry), regardless of whether some chose to spend more for their arrangements than they would have without the Rule, that benefit would likely justify retention of the Rule because other consumers would have the right to choose to spend less. The Commission in its 1982 SBP for the Rule so stated the Rule's purpose. The record evidence in fact indicates that many consumers will purchase fewer funeral items or less-expensive services as a result of informed choice.

[69] See *Funeral Service Insider*, March 20, 1989, at 2.

[70] Although the record evidence supports the conclusion that the Rule facilitates consumers' choice of cremation, the degree to which the Rule has affected the cremation rate is unclear from the record evidence. The NFDA suggested that the Rule has not played an important role in the steadily increasing cremation rate, because the increase began in the early 1970s and is based primarily on changing social and moral values, as well as on the wishes of the deceased, and not on price concerns. The CANA and the AARP, in contrast, asserted that the Funeral Rule proceedings, which also began in the early 1970s, as well as the Rule itself, substantially increased publicity about the cremation alternative, and that many consumers do choose cremation based on price and other considerations. The CANA also provided evidence that the marketing of cremation options has dramatically increased since the Rule's inception. See R–N–1 (SR) at 68–71.

[71] HX–122 (BE Report) at 15 and Table VI, p. 14.

[72] That data show that, in 1981, 18% and 11% of "direct cremation" purchasers, respectively, appear to have bought embalming services and caskets that were unnecessary, because the body is not present during the service (making embalming unnecessary) and is not buried (making a casket unnecessary). In 1987, those figures declined to 9% (unneeded embalming) and 2% (unneeded caskets), respectively. See R–M–5 (Staff Rebuttal) at 9; R–B–2 (RS) and R–B–3 (BLS) data tapes. The decline in unneeded casket purchases is statistically significant.

Record data also indicate that those arguably "unneeded" casket purchases occurred in many cases as a result of funeral director misrepresentations. Those data show that in all but one case, in instances where cremation was selected, consumers purchased a casket when told that one was required—8 of 9 instances in 1981, and 2 of 2 in 1987. Id.

[73] Seven percent of those 1987 RS respondents who purchased cremations said that the providers they used represented that a casket was required, as opposed to 26% of 1981 cremation buyers. See R–B–2 at IV–8; R–N–1 (SR) at 39, n. 149. The 26% figure may be somewhat overstated, however, because, unlike the RS, the 1981 BLS question did not include a response category permitting the compliant statement that an unfinished wood box (an alternative container that is arguably a type of casket) was required. Eleven percent of the 1987 RS respondents answered the question that way.

[74] In 1981, 19% of BLS respondents thought that caskets were required for cremation (vs. 13% in 1987); 61% said that embalming was always required (vs. 50% in 1987); and 80% in 1981 believed that a sealed casket preserved remains for an indefinite time (vs. 42% in 1987). See R–B–3 (BLS Report) at Table 9, p. 32; R–B–2 (RS Report at Table III–54, p. III–65.

[75] See R–N–1 (SR) at notes 116, 200–207.

[76] See HX–125. The analysis demonstrated that, although "satisfaction" is over 80% even when consumers report no compliance with individual measures, the proportion of satisfied consumers increases steadily as compliance with the Rule increases.

providers by increasing consumer satisfaction with funeral service, and that the level of satisfaction might continue to increase if compliance with the Rule were greater.

d. Costs to providers. While the Rule has begun to provide benefits to consumers, empirical evidence demonstrates that its requirements have not been a significant contributing factor to increases in funeral home costs of doing business or funeral home prices, or to any reduction of overall consumer satisfaction with funeral services. Funeral provider groups, however, asserted that the Rule has imposed on providers a variety of increased costs, most notably for personnel as a result of a 23-minute average increase in the duration of the arrangements conference, and for business expenses such as printing, accounting and legal services. These costs, those groups said, have been passed on to consumers in the form of higher prices, particularly for professional services.[77]

Statistical business expense data for the years 1977–1987 presented by the FFDA,[78] and analyzed by an economist for the AARP, indicates that funeral home costs arguably most related to the Rule (such as legal, accounting and consulting costs) have increased at lower rates than other expenses (such as depreciation and casket cost),[79] and that overall cost increases have resulted more from a general increase in all business expenses than from a dramatic increase in any one expense category.[80] Mr. Hahn of the FFDA further testified that the Rule has played a very minor role in business expense and price increases,[81] which he and other witnesses attributed generally to inflation and individual funeral home business decisions.[82]

Further record analysis of the FFDA statistical data by BE staff indicates that funeral homes' personnel expenses appear to have increased very slightly since 1984, but that personnel expense as a proportion of overall business expense has not significantly changed in many years, including the period covered by the Rule. Similar analysis shows that salary expense as a proportion of personnel cost has likewise remained stable.[83] Mr. Hahn of the FFDA testified that significant changes in those areas should have occurred if the Rule were significantly increasing funeral homes' personnel costs.[84]

e. State Regulation of Funeral Providers. The rulemaking record finally documents that most individual states favor the continued existence and strong enforcement of the Funeral Rule to protect funeral consumers, rather than reliance on the states to adopt comprehensive, state-specific legislation. A 1987 staff survey of the states' funeral industry statutes, regulations and rules revealed that ten states have incorporated the Rule by reference into their laws or adopted provisions similar to six of the Rule's most salient requirements; six have enacted at least four of those provisions, and, overall, thirteen to twenty-five states have laws that include one or more provisions similar to the Rule.[85] No party presented evidence during the review that additional states have adopted relevant funeral laws or that existing laws have been significantly strengthened.

Testimonial evidence presented by state legislators and officials further indicates that, although the Rule has helped stimulate the enactment of similar funeral industry laws in several states, such reform is unlikely in their or other states because of industry opposition. Those witnesses expressed their views that the Funeral Rule needs to be retained as a result, and is beneficial to consumers, funeral providers, and state enforcement officials.[86]

C. Section-by-Section Analysis

1. Introduction

The Rule as amended contains two major changes—deletion of the affirmative telephone disclosure requirement and the prohibition of non-declinable fees (such as so-called "casket handling fees" and "basic facilities fees") charged in addition to the non-declinable fee for basic professional services of the funeral director and staff. These primary changes, and a number of "fine-tuning" amendments, are intended to increase the Rule's benefits and reduce its costs by facilitating funeral providers' compliance with, and consumer understanding of, the Rule's requirements, while preserving the integrity of the Rule's "unbundling" and price disclosure requirements. Finally, the Commission has made several technical amendments to the Rule that are necessary to correct inconsistencies or unnecessary language in certain Rule provisions, or to complement other amendments.

2. Affirmative Telephone Disclosure Repeal: Section 453.2(b)(1)(i)

Section 453.2(b)(1)(i) of the original Rule required funeral providers to affirmatively tell persons who call and ask about the "terms, conditions, or prices" at which funeral goods or funeral services are offered that price information is available over the telephone. The Commission has decided that the affirmative telephone disclosure provision should be deleted from the Rule because its costs outweigh its actual and potential benefits to consumers, and because the integrity of the Rule's price disclosure requirements will be maintained by retaining the requirement to provide price information over the telephone on request.

The Commission designed this provision to help consumers in two ways. First, it would alert them to the availability of price information over the telephone, and, second, it might diminish consumers' reluctance to seek such information. The Commission intended that affirmative disclosure

[77] See, e.g., R–M–9 (NFDA/NSM) at 62–76, 89–96 and McChesney, HX–126–A at 52–53, 86–89.

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

[79] Dr. Barnow, speaking on behalf of the AARP, reported that his review of the FFDA data showed that accounting, consultants and legal costs were responsible for 2.6% of the real increase in overall funeral home costs since 1981, whereas depreciation and casket cost respectively accounted for 14.9% and 9.3% of the real increase in costs. See Dr. Barnow, HX–118 at 14 and Exhibit 2, pp.12–13. Dr. Barnow further stated that increased compliance would not substantially increase the Rule's costs, because there are no identifiable, major costs imposed by the Rule now on providers. Tr. Vol. I, 880, 883.

[80] HX–118 at 14. Dr. Berry, an economist and industry observer appearing on his own behalf, agreed that the Rule has not had a significant influence on funeral home costs. Tr. Vol. I, 151.

[81] Tr. Vol. II, 681, 683–85, 689–90.

[82] Id. at 678–80, 683, 688–689, 709; R–C–7 (*American Funeral Director* magazine interview with Mr. Hahn) at 3; Pierson, R–D–1 at 2; Ninker, R–G–1 at 3; Davis, Illinois FDA, R–G–2 at 1; Botimer, Tr. Vol. III, 1292; and FDSA of Chicago, R–G–5 at 25;; Krause, Tr. Vol. II, 24; and Longmire, R–D–2 at 5; see also, R–N–1 (SR) at 83, n. 402 and McChesney, HX–126–A at 53, which contains the following quote from *Business Trends Analysts:*

When first proposed, many believed the Funeral Rule would lower funeral and cremation service prices because lower-priced options would be made known to the consumer. However, when put into effect, the Funeral Rule caused funeral directors to examine their costs. In doing so, many realized that they had been "giving away" some services. In effect, funeral directors became more business-oriented as a result of the FTC rulings, and found that they could actually raise prices.

[83] See HX–50 (BE Personnel Expense Data Analysis).

[84] Tr. Vol. II, 688.

[85] See R–C–12 (staff survey); R–J–1 (Conference of Funeral Service Examining Boards survey) at 4–6.

[86] See the testimony cited in R–N–1 (SR) at 97–100.

provision to facilitate consumers' comparison shopping for a provider.[87]

Empirical evidence presented by the Replication Study, however, indicated that few consumers comparison shop before selecting a provider. The Commission in the NPR thus requested public comment on whether: (1) Consumers are aware of their right to seek price information over the telephone; (2) compliance with this provision is costly; and (3) it should retain the affirmative telephone disclosure provision in view of the study results.[88]

Empirical and testimonial evidence in the record provided insights into the delicate relationship between consumers and funeral providers that appear to affect the degree to which consumers seek price information directly from providers. Results from the Baseline, Replication and Gallup Studies indicated that consumers seldom seek price information or comparison shop by calling providers directly. In 1981, 7.2% of the Baseline Study respondents comparison shopped by contacting more than one funeral home;[89] 4.2% of the 1987 Replication Study respondents did so,[90] and 11% of the 1988 Gallup Study consumers contacted more than one provider.[91] Most 1987 Replication Study respondents knew which funeral provider they intended to use,[92] and those who had not decided on a funeral provider usually contacted only one at the time of need.[93] In the initial telephone contact, RS respondents asked about "prices, terms or conditions" only 9.2% of the time.[94]

Record evidence indicated that both consumers and providers are reluctant to initiate price discussions during funeral arrangements.[95] The evidence indicates that, unlike a visit to the funeral home, where the general price list facilitates the actual review of services and merchandise, the offer to discuss prices over the telephone is helpful only if the consumer is prepared to do so. The weight of the evidence demonstrates that the initial telephone contact is a tentative encounter in which the consumer is relying on the funeral provider to set the tone of the interaction. The funeral provider at that delicate time, however, reasonably wishes to avoid the appearance of insensitivity by raising price issues when the callers' typical concerns are whether and how to arrange the funeral with the particular provider.

Several provider witnesses[96] testified that the affirmative telephone disclosure has offended callers, who interpret the disclosure as an indication of the funeral provider's preoccupation with the consumer's ability to afford services.[97] For example, a state funeral board member observed that, whenever a client calls first to arrange a date and time for a funeral service, expecting an empathic response, the consumer is offended by the funeral director's uninvited statement that price information is available, and the funeral provider resentful about having to make such a statement at this early juncture.[98] Other providers distinguished between the accepted practice of giving price information that is requested, and the difficulty of telling the caller who has not requested it that the funeral provider is prepared to talk about prices.[99] Funeral director representatives concluded that providers' goodwill is harmed as a result of the offense generated by the unsolicited affirmative disclosure, which providers under the Rule must make during the initial telephone contact.[100]

The evidence further shows that providers experience difficulty in understanding their obligation under § 453.2 (b)(1)(i). Under that affirmative disclosure provision, a funeral provider must either tell every caller that price information is available, or determine whether an inquiry concerns a "term," "condition," or "price" of funeral goods or funeral services offered, thus triggering the disclosure. The original staff Compliance Guidelines illustrated that problem; the Guidelines told funeral providers that a call asking whether the provider will perform a funeral for a particular religion does not trigger the disclosure, whereas a call asking whether the provider will remove the deceased from a hospital does.[101] The difficulty of determining whether an inquiry concerns a "term" or "condition" thus places a clear burden on the provider, without a commensurate benefit to the caller.[102]

Other empirical data indicate that the disclosure does not affect consumers' expenditures for funeral arrangements. Economic analysis of the Replication Study data indicated that those consumers who called the provider and received the Rule-required affirmative disclosure spent no less for their arrangements than other respondents.[103]

Consumer group participants, however, suggested that the affirmative disclosure was meant to signal

[87] R–B–5 (SBP) at 42273.

[88] R–A–1 at 19869 (Question 7).

[89] HX–122 (BE Report) at 14, Table VI.

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

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

[91] Colasanto, HX–66 at Ex. B, p. 7 and Tabs, p. 19 (66 of 607).

[92] R–B–2 at Table III–18, p. III–24 (85% had already selected the provider).

[93] Id. at III–25 (95% of the respondents who had not decided on a funeral provider before contacting one still contacted only one).

[94] HX–122 (BE Report) at 16.

[95] See R–N–1 (SR) discussion at 61; Hocker, Tr. Vol. III, 1435; Johnson, Tr. Vol. I, 744; Starks, Tr. Vol. II, 402–403; and Hennessy, Tr. Vol. II, 1024.

[96] None of the systematic, empirical evidence in the record addressed the question whether the unsolicited disclosure during the initial telephone discussion that price information is available was offensive or confusing to consumers. The Gallup results indicated that most arrangers (83%) are not offended "when funeral directors give them information about the cost of funeral services when they first begin making arrangements." See Colasanto, HX–66 at Appendix B, Tabulations, p. 24. That question, however, refers more specifically to consumers' feelings about actual price information offered by providers during the arrangements conference, such as providers' offer of the GPL, and not to consumers' views about the affirmative telephone disclosure that price information is available.

[97] Hocker, Tr. Vol. III, 1400–1401 ("It's very difficult sometimes to tell people price information is available on the telephone when they don't ask for it and when it's the furthest thing from their mind. It creates a real awkwardness for us. There are many times people want to have an idea of when they can have the service, how long they can wait, Joey's in Germany in the service and he has to come back home, and to tell them that price information is available on the telephone is sometimes an intrusion when it's not called for."). See also, Nilsen, Tr. Vol. III, 1482; and Keith, Tr. Vol. III, 1459.

[98] J. Hunter, Tr. Vol. III, 603–604. See also, Nilsen, Tr. Vol. III, 1482 ("It just simply makes it look to callers that instead of caring individuals we're money-hungry professional or business people out there; that's what it does to the consumer at that point in time.").

[99] See Keith, Tr. Vol. II, 1459 ("We're objecting to the disclosure at that moment, that triggering event, not to the disclosure of the prices over the telephone upon request"); and Hocker, Tr. Vol. III, 1464, 1480 ("I would rather not have to make an affirmative statement unless people asked for price information, and then you know that they're interested in it, and so there's no problem.").

[100] See, e.g., Hennessy, HX–81 at 7–8; Farrow, HX–85 at 4; and Johnson, Tr. Vol. I, 748.

[101] R–B–6 at 28062, 28064 (Illustrations #2 and #6).

[102] The Commission, however, has not adopted the AARP-suggested modification that would resolve this compliance problem by requiring funeral providers to inform all callers that price information is available over the telephone. The record contains substantial evidence that some consumers would be offended unnecessarily by such unsolicited remarks, and that substantial harm to funeral providers' reputations could occur, without significant consumer benefit. These possibilities further may increase the likelihood of non-compliance, which the evidence suggests may be no greater than 50% at this time. On balance, ensuring that those callers who seek price information can obtain it would better assist consumers in making informed selections.

[103] HX–122 (BE Report) at 17.

consumers who are reluctant to raise price issues that it is acceptable to do so, and that providers can find ways to make that disclosure without offending consumers.[104] Although the empirical evidence is not conclusive on the issue, the preponderance of the reliable anecdotal evidence provided by many funeral directors who must make the disclosure to consumers supports the conclusion that the requirement's potential to overcome consumers' inhibitions and benefit additional consumers is unlikely, and does not justify the imposition of awkwardness and potential offense in a transaction already fraught with delicate business, social and personal issues.

In summary, the record evidence shows that consumers rarely price shop for a funeral home or seek price information directly from providers because of their reluctance to do so and their general lack of awareness about prices charged by providers, and not because of a conviction that price information cannot be requested over the telephone. The affirmative disclosure that price information is available thus does not appear to give consumers new information that is likely to increase their desire to ask about prices or to encourage price shopping.

The record evidence further indicates, however, that the Rule overall is contributing to increased consumer "price sensitivity" that leads some additional consumers to use the telephone to shop for lower-cost providers, or to seek comparative price information from non-industry sources. Consequently, consumers who want price information will affirmatively use the telephone to seek such information from providers who advertise prices, or to engage in alternative shopping methods, such as calling memorial societies, media price "hotlines," or state agencies that make comparative price information available.[105] The Commission has concluded that consumers will increasingly seek price information as their awareness, and the availability, of comparative price information increases.

The preponderance of the evidence in the rulemaking record indicates that the affirmative telephone disclosure is an inartful and unnecessary signal to consumers about the availability of price information that is unlikely, over time, to provide substantial benefits to consumers not afforded by the Rule's other price disclosure provisions.[106]

In light of this evidence, the Commission has determined to repeal the affirmative telephone disclosure provision because its potential to benefit additional consumers is unlikely, and does not warrant the intrusion of potential offense in what is otherwise an extremely delicate business, social and personal transaction. The Commission further concludes that the integrity of the Rule's price disclosure requirements will be maintained by retention of the general requirement to provide price and other readily-available information over the telephone on request (§ 453.2(B)(1)).

Funeral provider representatives, however, suggested that such action would concede what they consider the Rule's premise that increased comparison shopping was necessary to cure "supracompetitive" prices.[107] That suggestion, however, overstates the importance of the disclosure to achieve the goal of increasing comparison shopping, and fails to acknowledge record evidence indicating that the Rule overall already has contributed to increased price competition.[108]

The Commission in its Statement of Basis and Purpose for the Rule clearly expressed its view that the general telephone requirement to give price information on request, and the requirement to give the GPL to any person seeking in-person information about funeral arrangements, in addition to the affirmative telephone disclosure, would all contribute to increased comparison shopping.[109] Nevertheless, the Commission did not base the Rule's entire success in reducing barriers to price competition on the affirmative telephone disclosure or on comparison shopping, because it fully recognized that such behavior might always be infrequent.[110] As described above, the Rule's provisions already are providing pro-competitive benefits to consumers, including increased price sensitivity, despite the low overall levels of industry compliance, price competition and consumer knowledge demonstrated by the record. Those benefits are likely to increase over time as industry compliance with, and consumer awareness of, the Rule's other provisions increases.

3. "Casket Handling Fees:" Section 453.4(b)(1)(ii).

One benefit the Commission ascribed to the Rule in its 1982 Statement of Basis and Purpose was that "the greater availability of price information may encourage entry into the funeral market of new competitors seeking to attract business by offering lower prices."[111] That prospective benefit was important to the Rule's remedial intent, because the Commission found that the funeral industry had historically opposed price advertising.[112] The Commission concluded that, as a result of that reluctance to make price information readily available, consumers purchased unwanted items and paid higher than competitive prices for items they selected.[113]

The Commission further recognized that easy access to the market and a fair chance to compete were prerequisites to the entry of new retailers into the funeral market.[114] The Rule's general "unbundling" provision, § 453.4(b), afforded that opportunity to new entrants by removing the primary industry restraint on consumer choice—package-only pricing.[115] The Commission found that, by "bundling" all funeral goods and services in a package, funeral providers had effectively forced consumers to buy unwanted items as a condition of providing a necessity that only they can provide: disposition of the remains.[116] Section 453.4(b) of the Rule prohibits funeral providers from conditioning the furnishing of one funeral product or service upon the purchase of another product or service unless required by law, such as embalming for interstate

[104] P–39 (AARP) at 31–39; P–36 (National Consumers League) at 2.

[105] See, e.g., R–N–1 (SR) discussion at 58–59, 66–67.

[106] Nor does the evidence support a conclusion that industry compliance with the affirmative telephone provision is too low to permit a conclusion about its potential benefits. The evidence on compliance with § 453.2(b)(1)(i) is inconclusive. The RS data show that about half of all providers (49%) who were asked about funeral "prices, terms, or conditions" over the telephone made the required disclosure. However, an unusually large proportion of the respondents—29%–31%—could not recall whether they received the disclosure, and the study contractor warned that the results should be viewed with extreme caution because of the small cell size (93 respondents called and asked about "prices, terms, or conditions"). Excluding from the analysis those who could not recall increases the compliance level to about 72%. See R–B–2 (RS) at III–36, Table III–26; HX–122 (BE Report) at 16–17 (compliance results); R–B–2 at III–25, III–31 (Market Facts concern).

[107] P–37 (NFDA/NSM comment) at 23–24.

[108] See the evidence cited at notes 63–65, supra.

[109] R–B–5 at 42272–42273.

[110] Id. at 42273, n. 140.

[111] R–B–5 at 42293.

[112] Id. at 42266.

[113] Id. at 42269.

[114] R–B–5 at 42291.

[115] The Commission's major finding in the original proceeding was that funeral providers had denied consumers the privilege of freely choosing the goods and services they wanted by failing to disclose itemized price information and by "bundling" their funeral offerings together in predetermined packages; consumers' only choice was between packages. R–B–5 at 42260, 42279–42282.

[116] Id. at 42281.

shipping, or as a "practical necessity," such as embalming where the consumer wants a viewing of the remains for several days.

Some ANPR commenters asserted that funeral providers, in response to emerging competition in the sale of caskets from cemeteries and other third-parties, charge high "casket handling fees" for arrangements where consumers supply their own caskets purchased from those third parties.[117] The alleged purpose of these fees was to recoup overhead costs and profits built into casket prices but lost on the third-party casket sales. The Commission in the NPR thus sought comment on the existence and impact of so-called "casket handling fees," and on whether, and how, the Rule should address that practice.[118]

a. Existence and impact. Members of the third-party, casket seller industry[119] provided empirical and other evidence on the purpose, widespread existence and impact of these "casket handling fees." Casket seller representatives asserted that the emergence of third-party casket sellers is directly attributable to the Funeral Rule's "unbundling" provision; those sales were virtually non-existent before the Rule.[120] A PAA official who presented the results of a PAA membership survey (the "PAA Survey") on handling fee issues, Mr. Duke Radovich, estimated that there are between 100 and 200 casket retailers in the country.[121]

The PAA Survey provided empirical evidence on the widespread existence and amount of "casket handling fees," as reported by the respondent retailers. Eighty-six percent of the respondents said that at least 60% of the funeral homes in their market area assess handling fees; about two-thirds said that 80% to 100% charge the fees, and one-quarter reported that all of the homes impose the casket handling fee.[122] Mr. Radovich concluded that a substantial number of providers assess "casket handling fees" wherever third-party sellers exist.[123] Individual casket retailers agreed with that finding,[124] and further testified that funeral providers began imposing handling fees when third-party casket sellers entered the market.[125]

Concerning the amount of "casket handling fees" assessed, 81% of the PAA Survey respondents said that the average handling fee was over $300; 74% reported an average fee between $300 and $500.[126] Sixty-two percent of the PAA Survey respondents further reported that the highest fee charged was over $500; 35% said that the largest fee was over $700.[127] A "handling fee" of $500 was nearly equal to the average wholesale cost of a casket in 1988 ($517) and 60% of the average casket mark-up in that year ($821).[128] Wendell Hahn of the FFDA, which provides financial advising services to 1,500 providers in 30 states, testified that handling fees are assessed because providers, who typically charge professional service fees "hundreds of dollars" below their true operation cost, will try to recoup those costs that are lost by the third-party casket sale. Mr. Hahn concluded that handling fees are thus roughly equal to the amount that providers' non-declinable service fees are underpriced.[129]

Record evidence indicates that "casket handling fees" prevent potential price competition and reduce consumer choice. Ninety-two percent of the casket seller respondents to the PAA Survey reported that their casket sales have declined since the imposition of handling fees; about one-third said that they have reduced or eliminated their casket marketing efforts as a result of those fees.[130] One industry observer testified that "casket handling fees" have caused the exit from the casket market of five small businesses who thought that they could gain market share by offering third-party caskets at lower prices.[131] Several casket retailers and others also asserted that these so-called "handling fees" impede price competition by removing consumers' incentive to price-shop for less costly caskets, and penalize consumers who do shop.[132]

Finally, third-party sellers testified that market forces will not effectively regulate "casket handling fees," and that the elimination of those discriminatory fees would result in increased competition in the sale of caskets and reduced casket prices.[133] Mr. Royal Keith, a funeral provider appearing for the NFDA, when asked on cross-examination about the effect of market forces on handling fees, responded that he was not aware of any cases where market forces have successfully reduced

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[117] See R–A–1 (Notice of Proposed Rulemaking) at 19867.

[118] Id. at 19870 (Question 14).

[119] Third-party casket sellers generally were represented during this review by the PAA.

[120] R–M–12 (PAA) at 18, 82. See also, Radovich, Tr. Vol. III, 1029 (Casket retailers owe their existence primarily to the enactment of the Funeral Rule, which allows the consumer to use a casket from an outside source); and Drozda, Tr. Vol. II, 894 (few casket retailers before the Rule because providers would not accept the outside casket and provide funeral service).

[121] Radovich, Tr. Vol. III, 1057 (31 of the 90 survey respondents were active third-party casket sellers at the time of the survey). He reported that these thirty-one active casket retailers are located in Florida, Illinois, Iowa, Maryland, Michigan, Mississippi, Nebraska, Ohio, Pennsylvania and Wisconsin; 74% of those sellers exist in Pennsylvania, Michigan, and Ohio. Id; HX–101 at Exhibit "A–3."

[122] Radovich, HX–101 at 17 and Ex. B, p. 5.

[123] Id. at 12, 17, 20.

[124] See Neel, HX–25 at 4 and Exhibit 2; Teck, HX–58 at 5–6 and Ex. B; and Heffner, HX–33 at 8 and Ex. J–1.

[125] Graf, Tr. Vol. II, 647; Neel, Tr. Vol. I, 582–584; and Teck, Tr. Vol. II, 861–862. See also, Showalter, Tr. Vol. II, 118. One funeral provider witness who did not charge handling fees stated on the record that, if he got competition from casket retailers, he would begin to assess fees. Hennessy, Tr. Vol. II, 997.

[126] Radovich, HX–101 at 18 and Ex. B, p. 6.

[127] Id.

[128] See Hahn, FFDA, HX–49 at 2. The average mark-up in 1988 was $1,338 (average retail casket price) minus $517 (average wholesale cost), or $821. By definition, a handling fee must be "high" if its purpose is to recoup overhead costs and profit lost on the casket sale.

[129] Tr. Vol. II, 692–693. Mr. Hahn further suggested that by failing to disclose the amount of overhead not included in the non-declinable professional services fee, providers may be engaged in deceptive pricing. Id. at 671.

Several local surveys conducted by individual casket retailers provided further evidence on the range of "casket handling fees" in given market areas. Those surveys found that handling fees ranged from $100 to $700 in Chicago; DeSoto, R–B–42; and Hennessy, HX–61 at 8; from $150 to $1000 in Greater Pittsburgh; Neel, HX–25, Exhibit 2 at 1; and from $100 to $800 in Detroit, Michigan; Teck, HX–58, Exhibit A. Wendell Hahn of the FFDA reported six instances among a sampling of funeral home records he reviewed for the month of August 1988 where handling fees ranging from $75 to $480 were disclosed on providers' GPLs. HX–49 at 5, Tr. Vol. II, 673, 719–720. Other witnesses, including two funeral directors, testified to the existence of handling fees ranging from $425 to $2,500. See Showalter, Tr. Vol. II, 120; HX–36, at 17 (citing an open letter from Steve Shurden, President of the Oklahoma Funeral Directors Association, printed in *The Oklahoma Director*, Vol. XV, No. 9 (Sept. 1985) at 1) ($1,000–$2,500); Starks, Tr. Vol. II, 412 ($700); and Drozda, Tr. Vol. II, 896–897 ($425).

[130] Radovich, HX–101 at 20–22 and Ex. B, pp. 8–9 (sales decreased by 20% for 54% of respondents, by 40% for 29% of sellers, and by 80% for 13% of respondents; although other market factors could have contributed to the decreases, the PAA attributed them to handling fees).

[131] Showalter, Tr. Vol. II, 107–108.

[132] See, e.g., Teck, Tr. Vol. II, 867; Neel, Tr. Vol. I, 568, 572–573, 615; Drozda, Tr. Vol. II, 923, 944; Radovich, Tr. Vol. III, 1063; Showalter, Tr. Vol. II, 109, HX–36 at 16–17; and R–B–27 (CAFMS Comment) at 5.

Casket retailers and others provided evidence that many third-party sellers offer caskets at prices lower than those charged by funeral homes. About half of the seventeen PAA Survey respondents who answered the survey's price question said that their price for the "same or similar" casket was at least $250 less than funeral home prices in their market area. About one-quarter said that their prices were between $100 and $250 less, and another quarter said that their prices were comparable (within $100). See, Radovich, HX–101 at Ex. B, p. 10. One retailer who commented on the ANPR reported that a small casket manufacturer in Chicago was selling 90% of its retail caskets on an at-need basis, charging about half that of Chicago funeral homes—$250 for a cloth-covered casket and $650 for a sealed, metal casket. See, DeSoto, R–B–42.

[133] See, e.g., Teck, Tr. Vol. II, 872–873; Drozda, Tr. Vol. II, 944, 974.

the amount of handling fees charged in a particular area.[134]

b. Providers' basis for imposing "casket handling fees". Proponents of handling fees did not provide evidence to refute that offered by casket retailers and others on the purpose, prevalence and impact of "casket handling fees" on the casket market. Funeral provider representatives, for example, did not dispute that "casket handling fees" are used to recoup profits and overhead costs lost to third-party casket sales, but defended that purpose on several grounds.[135] Providers' responses to third-party casket sales arise, the trade groups asserted, due to the industry's long-standing tradition of recovering much of its overhead costs and profits through the casket mark-up, and not by increasing service fees; lower service fees allow funeral homes to provide full service funerals, including lower-priced caskets, to those who might not otherwise be able to afford them. Although providers in recent years have shifted some of that casket mark-up to service fees, the shift has been very gradual. The industry groups concluded that providers who lose casket sales to third parties must, as a result, still forego the recovery of much of their costs and profits that would have been included in the casket sale.

Those groups asserted that the imposition of "casket handling fees" is an isolated, non-discriminatory practice that fairly allocates providers' overhead costs and profits; the purpose of the fee is to obtain from consumers who buy third-party caskets consumers' proportionate share of providers' costs and profits for rendering the funeral service. Providers' only alternative to handling fees, the industry groups argued, would be to raise service fees charged to all consumers, which, in effect, would require regular clients who purchase providers' caskets to subsidize the funerals of consumers who purchase their caskets elsewhere—by paying the mark-up on the casket as well as the higher service fee that would result from other consumers supplying their own caskets.

Those groups further asserted that handling fees are not assessed for ship-ins, outer burial container sales traditionally lost to competing cemeteries, or for direct cremation/immediate burials where the consumer supplies the alternative container because, unlike the unexpected loss of a casket sale to a third-party seller, providers set prices for those services with the knowledge that they will not make a sale in those cases. Finally, the funeral groups concluded that the amount of "casket handling fees" is sufficiently regulated by the market, because providers that charge unreasonably high fees will offend consumers and lose market share.[136]

c. Commission's conclusion and amendment. The Commission has concluded that substantial "casket handling fees" are imposed on consumers by a significant proportion of providers wherever third-party casket sellers exist, and, as a result, frustrate the Rule's "unbundling" requirements and result in the reduction of potential competition in the sale of caskets fostered by the Funeral Rule.[137] Some providers are forced to impose handling fees because of their competitive reluctance to shift overhead costs and profit from the casket mark-up to professional service fees.[138] Others may use handling fees as a direct response to third-party competition. In either case, the issue to be determined in this proceeding was whether the Rule should allow providers to condition a consumer's right under the Rule to obtain a funeral service with a consumer-supplied casket upon the payment of a non-declinable fee, charged in addition to the basic professional services fee (already permitted under the Rule to be non-declinable), or whether the Rule should require providers to recoup costs and profits lost to third-party casket sales in ways that do not violate the intent of the Rule's "unbundling" provision. For example, providers under the Rule may recoup any unallocated costs or profits lost to third-party casket sales in the non-declinable professional services fee permitted by § 453.2(b)(4)(iii)(C). The Commission has determined that the latter course is warranted to affirm the Rule's intent to increase consumer choice and reduce barriers to price competition.

Section 453.4(b) of the Funeral Rule was intended to address all "bundling" arrangements imposed on consumers by funeral providers. Under that provision, consumers have the right to decline the purchase of any item, including a casket, from a funeral provider, and may elect to supply their own. That right, however, is illusory if funeral providers can condition consumers' choice on the payment of an additional, non-declinable fee. The fee, in any amount, penalizes consumers for exercising their choice afforded by the Rule.[139]

"Casket handling fees" require consumers to pay two substantial mark-ups, one on the casket they purchase from the third-party seller, and another on the casket they did not buy from the funeral provider. The evidence indicates that handling fees average between $300 and $500, and often are higher. That burden, the evidence shows, effectively removes consumers' economic incentive to purchase a casket from anyone but the funeral provider. Casket sales by third parties have declined as a result, and several retailers have curtailed their marketing efforts or withdrawn from the market. Handling fees thus frustrate the purpose of the Funeral Rule—to ensure informed consumer choice and foster a competitive funeral market. The Commission thus concludes that casket handling fees are unfair conditions on a consumer's right to decline unwanted items he or she may wish to purchase elsewhere, in violation of section 5 of the FTC Act, and the spirit of the Rule's "unbundling" provision (§ 453.4(b)).[140]

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[134] Tr. Vol. III, 1422.

[135] Nor did the NFDA and NSM argue that "casket handling fees" are imposed for actual services rendered in "handling" consumer-supplied caskets. Many witnesses, including funeral directors, testified that providers incur no additional labor or insurance costs when third-party sellers provide a casket, and that the actual labor time spent handling any casket is minimal; the cost for that service is normally included in the non-declinable professional services fee. See R-M-9 (NFDA/NSM) at 182; Hahn, FFDA, Tr. Vol. II, 692–693; Bates, NSM Executive Director, Tr. Vol. I, 706–708; Simms, funeral director, R-J-9 (supplementing HX-42); Dr. Nelson, AARP, Tr. Vol. I, 77–78; Showalter, industry analyst, Tr. Vol. II, 116–117, 120–122; Graf, Tr. Vol. II, 652; Hennessy, funeral director, Tr. Vol. II, 1009–1014; Radovich, funeral director/casket retailer, Tr. Vol. III, 1044–1045; Starks, funeral director, HX-41 at 11, Tr. Vol. II, 369; and Drozda, funeral director/casket retailer, Tr. Vol. II, 897.

[136] R-M-9 at 181–189; R-G-6 at 80–83. Individual providers agreed with the NFDA and NSM position. See Hocker, HX-111 at 13; Franzen, Tr. Vol. II, 819–820, Tr. Vol. III, 1408; Hennessy, Tr. Vol. II, 997–998; Keith, Tr. Vol. III, 1419; Yurs, Tr. Vol. II, 530, 563; and Nilsen, Tr. Vol. III, 1414–1415. See also, Hahn, FFDA, Tr. Vol. II, 692–694.

[137] Even if "casket handling fees" were not widespread, their coverage in the Rule would be necessary because they frustrate the original Rule's "unbundling" provision and impose substantial, unavoidable costs on consumers who make purchase decisions based on their rights under that provision.

[138] The Commission disagrees with arguments made by funeral provider groups during the proceeding that regulation of handling fees would amount to "price regulation." The primary issue is the propriety of the handling fee cost and profit adjustment, through the imposition of a separate, non-declinable fee charged in addition to the non-declinable fee for "services of funeral director and staff," and not the amount of the handling fee.

[139] Section 453.4(b)(2)(ii) of the Rule permits providers to refuse a request for goods and services that would be "impossible, impractical, or excessively burdensome" to provide. That provision, however, does not permit a funeral provider to refuse service to a consumer because the consumer supplied the casket. See, e.g., Staff Opinion Letter to George W. Lemka, Executive Director, Casket Manufacturers Association of America (March 18, 1985), FTC File No. 215-46, No. XXVIII-211.

[140] Conditioning the furnishing of any funeral good or service upon the payment of a so-called

Section 453.4(b), however, does not specifically address the practice of conditioning the furnishing of any funeral goods or services on the payment of fees, such as "casket handling" fees, because those fees have developed since the Rule's implementation, and because they are not conditioned charges for "goods" or "services"—the conditioned products referred to in that provision. The Commission thus has concluded that so-called "casket handling" fees, and other non-declinable fees that are more aptly referred to as "recovery of overhead and profit" fees, need to be separately addressed in the Rule.[141]

The Commission recognizes the legitimate desire and expectation of funeral industry members to recover overhead costs and realize a profit. The Rule, however, permits consumers to select and buy only the items wanted unless state or local law require otherwise. The Funeral Rule is designed to permit funeral providers to have one non-declinable fee to recover general overhead costs—the fee for the basic services of funeral director and staff. Permitting funeral providers to have additional surcharges, whether they are called "casket handling fees," or something else, would frustrate the Rule's aim to promote full itemization and informed consumer choice.

To prevent that result and clarify the current requirements of the Rule, the Commission has added paragraph (b)(1)(ii) to § 453.4 of the Rule. That amendment prohibits as an unfair or deceptive act or practice the furnishing of funeral goods or services upon payment of any conditional "fees" not otherwise permitted by the Rule. The amendment, however, permits funeral providers to recover overhead in the two ways permitted by the original Rule—by marking up the items offered for sale to the public, and by having the non-declinable fee for basic services of funeral director and staff, permitted by §§ 453.2(b)(4)(iii)(C) and 453.4(b)(2)(i)(A) of the Rule.

The Commission also has amended § 453.2(b)(4)(iii)(C)(2) of the Rule to require, among other things, disclosure of: (1) The dollar amount charged for any non-declinable basic professional services when that charge is included in the price of the provider's caskets; and (2) the statement "This same fee shall be added to the total cost of your funeral arrangements if you provide the casket." These amendments are intended to have the same effect as the amendment to § 453.4(b) above—they prohibit funeral providers (who choose not to itemize the charge for basic professional services) from charging consumers who purchase caskets from third parties a non-declinable fee for recovery of overhead and profit in addition to the professional services fee charged to all customers.

These two amendments are not intended to impede funeral providers from recovering overhead costs and earning profits from their operations. Efficient providers can structure their prices charged to all consumers to recover the revenue lost to third-party casket (or other merchandise) sales. The evidence indicates that providers for many years have so adjusted their pricing structure to account for consumer-supplied caskets (in ship-in cases), outer burial containers, and alternative containers.[142]

Providers asserted that the impact of a ban on imposing separate, non-declinable casket handling fees, in addition to the non-declinable professional services fee, would be increased professional service fees to all consumers. The funeral provider industry made the same argument in the original proceeding regarding the effect of consumer declinations caused by Rule-required itemization.[143] As the Commission reasoned at that time, providers under the Rule can set or shift prices as they wish; but the long-term competitive impact of the Rule's price availability provisions might not permit providers to recover lost revenue from casket declinations simply by raising professional service fees. In the short-term, some consumers might spend more and some less than they would without the right to decline if providers actually raise service fees in order to recoup revenue lost to third-party casket sales. As discussed earlier, however, the evidence in this proceeding indicates that, although service fees generally are underpriced by roughly the average handling fee amount, providers are reluctant to raise service fees even under current competitive conditions. In any event, the evidence indicates that the impact of a ban on handling fees would more likely be increased competition in the sale of caskets, and, in turn, an overall reduction in casket prices over time.[144]

4. GPL Timing/Distribution Requirements. Section 453.2(b)(4) of the Rule required providers to give for retention a General Price List to persons who inquire in person about funeral arrangements or the prices of funeral goods and services. The GPL must contain, among other things, several disclosures about consumers' right to select only those items they desire and the retail prices for 17 specified items, if offered for sale. Providers under § 453.2(b)(4)(i) of the original Rule were required to offer the GPL "*upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services.*" (Emphasis added.)

Many funeral providers, however, erroneously believe that the GPL must be given immediately upon initiation of preliminary arrangements discussions that do not involve price or specific goods or services. That misinterpretation leads them to offer the GPL at arguably inappropriate times, such as during preliminary discussions of death certificates or veterans benefits, or, in the case of an out-of-town death, the location of the deceased.[145]

To remedy their concerns, provider groups proposed repeal of the GPL timing and distribution requirements, or, in the alternative, amendments that would require providers to:

(1) "Make available" to consumers a GPL;

(2) Offer the GPL to consumers who inquire only about prices;

(3) Offer the GPL to consumers before "specific" funeral goods or funeral services are "selected" or prices discussed; and

(4) Give a GPL for retention only to those consumers who request to keep it.[146]

The Commission has determined, however, that the preponderance of the evidence does not warrant the sweeping amendments to, or repeal of,

"casket handling fee," or any other non-declinable fee not otherwise permitted by the Rule, is an unfair practice for the same reasons articulated by the Commission in declaring "package-only" pricing unfair when it promulgated the Funeral Rule and its general "unbundling" section—453.4(b) (the practice is prevalent and imposes substantial and unavoidable injury on consumers). See R–B–5 (SBP) at 42269–71.

[141] The Commission prohibits fees that are similar in purpose to "casket handling fees" in its Advertising of Ophthalmic Goods and Services Trade Regulation Rule, 16 CFR Part 456. That Rule requires eye doctors to give consumers a copy of their eyeglass prescription, so that consumers can shop for eyeglasses. Section 456.7(c) of that Rule further prohibits eye doctors from charging consumers a fee "as a condition for releasing the prescription," other than the examination fee. The section thus prevents eye doctors from charging a fee for goods and services not provided that, in effect, would penalize consumers who wish to comparison shop for ophthalmic goods. Like the non-declinable "casket handling fee," the conditional fee prohibited by this Ophthalmic Goods and Services Rule frustrates a consumer's right under the Rule to exercise free choice.

[142] See, e.g., the evidence cited at note 136, supra.

[143] See R-B–5 at 42298.

[144] See, e.g., the evidence discussed at notes 135–138, supra.

[145] See R–N–1 (SR) at 151–153.

[146] R–G–3 (NSM) at 43; R–G–6 (NFDA) at 66; R–M–9 (NFDA/NSM) at 277.

§ 453.2(b)(4)(i) as proposed by funeral provider groups. The Commission draws that conclusion particularly in light of the empirical evidence on the level of providers' compliance with the current GPL requirements (23% give the GPL at the outset of arrangements discussions), and the evidence that consumers want price and options information about funeral goods and services and value price information that they receive early in the funeral transaction.

The Commission is persuaded by that compliance evidence, however, that some fine-tuning is necessary to clarify the Rule and promote increased compliance, thereby enhancing the Rule's opportunity to provide benefits to consumers. The amendment discussed below thus is intended to remove any ambiguities and unnecessary rigidity in § 453.2(b)(4)(i) that appear to cause funeral directors to misinterpret their obligations under that provision.

Provider group proposals would have unacceptably narrowed the circumstances in which providers would be required to provide a GPL to consumers. First, the suggestion that providers "make available" a GPL might have been tantamount to effective repeal of the entire GPL requirement if such language means something other than physically giving the GPL to consumers.[147] Consumers might receive no GPL disclosures about funeral service prices or options, or concerning their rights in the funeral transaction under the Rule or other laws, unless they asked to see the GPL and providers voluntarily complied with their request. Such a change is not warranted, given record evidence on relatively low, overall levels of Rule compliance. Other evidence—that consumers are reluctant to raise price issues after the death of a loved one, that consumers, nonetheless, desire price and service options information, and that consumers benefit from price information they receive early in the funeral transaction—also supports this conclusion.

Second, the NFDA suggestion that providers need only give a GPL to persons who inquire in person about the "price" of funeral goods or services would eliminate the obligation to give a GPL to those who ask about prices *or* "funeral arrangements." In light of the evidence just mentioned, this proposed narrowing of the GPL distribution requirement is not supported by the record. Although one of the Rule's goals is to increase price competition, and, in turn, reduce overall consumer expenditures, the Commission also intended the provision of itemized price information to alert consumers to their various options and to permit them to select only those items they desire, whether or not expenses would be reduced as a result.[148] Lacking record evidence to support a change, consumers who inquire about providers' offerings, and not their prices, should thus be entitled to receive a GPL.

Third, the NFDA proposal that providers make the GPL available at the funeral arrangements conference before "specific" funeral goods and services are selected or prices discussed would remove the requirement that providers give the list at the beginning of arrangements discussions, wherever they take place. Record evidence shows that consumers benefit from price and service options information, including the GPL, that they receive early in selecting funeral goods and services, and that at least some funeral arrangements, short of a formal "arrangements conference," often can and do occur away from the funeral home premises.[149] Other evidence discussed earlier demonstrated that consumers' knowledge generally about the funeral transaction, although somewhat improved, is still relatively low. As a result of adopting the NFDA suggestion, consumers' opinions about the overall type of funeral service or individual items could thus be formed, or actual selections made, without the benefit of the GPL disclosures concerning prices, options and consumer rights under the Rule. In that event, the preponderance of the record evidence supports the conclusion that the GPL's purpose to provide ready price and service options information for consultation while consumers are considering what goods to purchase, before they make selections, would be unnecessarily defeated.

Finally, the NFDA-NSM proposal that the GPL's "give for retention" requirement be changed so that only consumers who request to keep the GPL may do so is not supported by the record. The evidence indicates that most consumers value the GPL enough to keep it when it is offered for retention.[150] The Commission might not disagree with the NFDA suggestion if there were evidence that consumers are aware of their right under the Rule to retain the GPL. The record does not contain that evidence, however, and instead shows that consumers generally are unaware of their rights under the Rule.[151] There is no record basis from which to conclude, therefore, that consumers would think to ask to retain the GPL. Consumers, as a result, would be denied the opportunity to use the GPL to comparison shop in at-need or pre-need situations,[152] or to compare authorized selections with final funeral home charges.

The Commission has amended § 453.2(b)(4)(i) to effect two changes to its original, preventive requirements. This amendment remedies providers' stated concerns about the timing of the GPL without limiting consumers' ability to use the information provided by GPL disclosures effectively. First, the amendment clarifies the GPL "timing"

[147] The proponents of this change did not specifically explain or define the term "make available," or how this and other suggested amendments would change the current requirements of § 453.2(b)(4)(i).

[148] R–B–5 at 42297.

Virtually every funeral director who advocated a change in the GPL timing requirements expressed concern about when in the arrangements discussions might be the sensitively correct time to discuss "price" with consumers. None spoke of the correct time to provide or discuss information about funeral service "options" and their relative cost. The record evidence, however, suggested that because price issues may not specifically arise early in the transaction, due to mutual provider and consumer reluctance, consumers may choose particular types of arrangements, or specific items, without the benefit of information about the available alternatives unless they receive a timely GPL.

[149] See, e.g., Hennessy, funeral director, Tr. Vol. II, 1026–1027 (timing of visitation and service often likely to be among first topics of concern to a family during removal); Hunter, Tx. Funeral Service Comm'n, Tr. Vol. III, 602–603 (discussing funeral arrangements away from the funeral home is a very common practice); Johnson, NSM, Tr. Vol. I, 744 (conversations away from the funeral home border on making funeral arrangements); Simms, NFDA, Tr. Vol. II, 452, 470–471, 473 (various arrangements discussions during removal have occurred); Hocker, NFDA, Tr. Vol. III, 1402, 1479 (problem during removal when the family says something like "can we have the funeral on Wednesday" that triggers presentation of the GPL); Dr. Nelson, AARP, Tr. Vol. I, 91 (preliminary arrangements can occur in consumers' homes where their concept of the funeral may be discussed and formed); and Klein, NYSFDAB, Tr. Vol. II, 1067 (not all arrangements are made in the funeral home).

Empirical evidence from the Replication Study on that issue indicated that 14% of consumers said that in-person arrangements discussions took place at a hospital or nursing home, or at the home of the respondent, the deceased, or a relative. See R–B–2 at Table III–24, p. III–33. The extent to which some of those respondents may also have participated in discussions at the funeral home is not clear from the data.

[150] Eighty-seven percent of RS respondents and 82% of Gallup respondents who were offered a GPL to keep said that they took it with them. See R-B–2 at Table III–32, p. III–46, and HX–66, Ex. B, p. 7 and Tabulations, p. 29.

[151] A majority of consumer respondents to the AARP's "Excel" Study were unaware that providers are required to give consumers written price lists when they come in to make arrangements. See Soulas, HX–76 at 3.

[152] Record evidence indicates that consumers may increase their comparison shopping before selecting a funeral provider as the marketing of pre-need funeral services increases, because the time constraints surrounding at-need arrangements are not present to the same degree. See, e.g., Neel, R–E–1 at 3.

requirements by breaking down the triggering term "funeral arrangements" into its component parts, namely, discussions of prices, the overall type of funeral service or disposition, or specific funeral goods or services. This change should eliminate the apparent provider misinterpretation that the GPL must be given immediately upon initiation of preliminary arrangements discussions that do not involve price or specific goods or services. It clarifies, however, that discussions about the overall type of service trigger the GPL requirement, and that providers must give the GPL at the beginning of any discussion involving prices, the overall type of funeral service or disposition, or specific funeral goods or services.[153]

Second, the amendment clarifies the GPL "distribution" requirement contained in an original compliance guidelines interpretation that requires that providers must give consumers the GPL whether discussions occur in the funeral home "or elsewhere." Record evidence shows that arrangements may occur away from the funeral home premises. However, the amendment exempts from the GPL requirement in-person provider requests for prior embalming authorization if the provider makes essentially the same GPL disclosure required by § 453.3(a)(1)(ii) of the Rule concerning the legal necessity for embalming.[154]

Record evidence indicates that providers often may be placed in the uncomfortable position of responding to consumers' requests to discuss selections during removal of remains. If providers are willing to commit consumers to financial obligations at that time by making arrangements, record evidence supports consumers' right to receive a GPL. Record evidence also shows, however, that giving the GPL during removal may be awkward, offensive, and unnecessary if no other arrangements discussions occur at that time. Such evidence further indicates that a provider's request for prior embalming authorization, by itself, may be the most potentially offensive situation for both consumers and funeral directors, because it is a request to perform an intrusive procedure so soon after the survivors' loss.[155]

The original and amended Rule resolve this issue for embalming requests made over the telephone by not requiring any disclosure in that case. But the original Rule required that the GPL must be given if the request is made in person.[156] If no other selections are made when the provider seeks prior permission, arguably the most important information consumers need to make an informed response at that time concerns whether embalming is necessary. The required disclosure that embalming is not required by law except in certain special cases should trigger that discussion if the consumer so desires. The Rule's embalming provisions are predicated on that basis. The amendment simply substitutes the disclosure of that information for the provision of the entire GPL, to reduce the burden on providers and consumers and to promote compliance with the Rule. Under the amendment, providers would be in compliance if they either provided a GPL when seeking prior permission, or made the required embalming disclosure.

5. Fees for Basic (Non-declinable) vs. Other Services

Section 453.4(b) of the Rule imposes the general legal requirement that consumers' selection of funeral goods and services be permitted on an itemized basis. However, § 453.4(b)(2)(i)(A) permits an exception to that general right to select. Under that provision, consumers may not decline the basic services of the funeral provider if the provider so requires. The provision in that event further requires that providers place on the GPL the following statement: "However, any funeral arrangements you select will include a charge for our services." Providers under § 453.2(b)(4)(iii)(C) must also place the following disclosure on the GPL in conjunction with the price for the services of funeral director and staff, if the fee cannot be declined: "This fee for our services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charge for direct cremations, immediate burials, and forwarding or receiving remains.)"

The Commission, in promulgating that exception, reasoned that the process of selection itself involves use of the provider's services, irrespective of the actual goods and services chosen by consumers. The Commission thus permitted providers to make the services of the funeral provider non-declinable.[157]

The Commission also intended that the non-declinable fee for professional services would include only the charge for providers' basic services in arranging and planning the funeral, and not charges for services associated with providing any of the other sixteen items for which itemization is required on the GPL.[158] The Commission, for example, specifically used the term "basic services" in referring to those services that consumers could not decline under § 453.2(b)(4)(iii)(C) (the GPL service fee disclosure requirement).[159] The definition in the original Rule itself stated that 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."[160]

The Commission, however, did not codify in the Rule its intent regarding basic services other than in the definition. No substantive Rule provision thus clarifies that providers in disclosing itemized fees on the GPL must separate "basic," non-declinable services from services associated with providing the other, declinable GPL goods and services, including such items as "use of facilities for viewing," and "use of facilities for funeral ceremony." The original staff compliance guidelines for the Rule, as a result, contained lengthy interpretations of the Rule on that issue, concluding that the non-declinable fee for "services of funeral director and staff" may not include a charge for those services involved in providing any of the other items required to be separately listed on the GPL. Charges for those services, the Guidelines stated, must be included in the price for each of those items. The Guidelines further concluded that the non-declinable fee for services may include the services listed in the Rule's

[153] Record evidence indicates that some providers have construed the term "selection" in the original provision to mean choosing individual items, such as the casket or vault. See, e.g., F. Hunter, Tr. Vol. I, 801 ("as long as before they sign the contract, before they look at the caskets and select the vault and the exact kind of funeral"); J. Hunter, Tr. Vol. III, 604–605 ("after we have discussed some basic funeral plans, when the arranger has determined a feel for the families' wishes and desires, and prior to the selection of any services and/or goods"); Pierson, R-G-1 at 2–3; Starks, Tr. Vol. II, 402; Franzen, Tr. Vol. II, 818). Other providers are reluctant to discuss the GPL until price issues are raised. See, e.g., Hocker, Tr. Vol. III, 1435; Johnson, Tr. Vol. I, 744; Starks, Tr. Vol. II, 402–403; and Hennessy, Tr. Vol. II, 1024.

[154] Any other discussion during that time about price or the selection of funeral goods or services would trigger the requirement that providers give consumers the GPL.

[155] See R-N-1 (SR) at 207–218 for a full discussion of prior embalming approval issues raised during the proceeding.

[156] See R-B-6 at 28078 (Illustration #8).

[157] See R-B-5 at 42282.

[158] Under § 453.2(b)(4)(iii)(C), the non-declinable professional services fee also may include charges for unallocated provider overhead.

[159] Id; see also, R-B-5 at 42285.

[160] Section 453.1(o).

definition of "services of funeral director and staff."[161]

The only fee permitted by the Rule to be non-declinable at the outset of the funeral transaction is the charge for "services of funeral director and staff" and items that are required by law.[162] Several public hearing witnesses expressed their view, however, that the original disclosure requirement for the non-declinable services fee permitted the inclusion of service items that all consumers do not receive with their arrangements, so that consumers may be paying for services not received,[163] or that the services fee should be broken down to separate fees for arranging all funerals and fees for optional services.[164] These and other witnesses further suggested that consumers are unaware of that potential overpayment problem.[165]

Still other witnesses identified another problem with the original services fee disclosure. Those participants testified that, although consumers who "shop" among providers rely on quotes for service fees as a basis for comparison, providers in fact appear to include different items in their service fee charges. Price comparison among funeral homes is difficult as a result.[166] The record contains no evidence or views specifically controverting this.

In addition to these services fee difficulties, funeral provider groups asserted that the exclusion of a separate, non-declinable "basic facilities fee" from the required GPL listing misinforms consumers about the cost of funeral services.[167]

Four witnesses expressed views on the facilities fee issue presented by the NFDA. The then-President of the NSM testified that a non-declinable facilities fee is a legitimate charge to inform consumers that they are purchasing the use of a facility to shelter and care for the remains.[168] Similarly, Wendell Hahn of the FEDA asserted that providers' inclusion of the cost of providing a special-purpose facility in other charges, rather than showing it separately, violates proper accounting practice and may be deceptive pricing. Mr. Hahn concluded that the Rule should permit a separate basic facility charge that is non-declinable.[169] Some funeral providers, in fact, currently include items on their GPLs that could be viewed as non-declinable facility fees, such as fees for "parking lot use."[170]

The Commission agrees that the original requirements for the disclosure of the non-declinable and other service charges likely are causing compliance difficulties for some providers and informational problems for consumers.

The evidence indicates that some providers on their GPLs may not be fully separating non-declinable services from services associated with providing other items on the GPL. To the extent that is occurring, consumers who decline other items may be purchasing more services than they actually receive. Other consumers may be "double charged" for some services if providers, confused about which services are declinable and which are not, include some portion of the services associated with declinable items, such as "use of facilities for viewing," in that charge, as well as the non-declinable services fee. Still other consumers (or groups such as memorial societies that obtain and publish comparative price data) who attempt to comparison shop may not readily be able to do so.

The Commission has concluded that the service disclosure requirements need to be clarified to implement fully the Commission's intent in permitting a non-declinable services fee. Amendment of the Rule, however, to permit a non-declinable "basic facilities fee" charge is not warranted by the evidence or the original Rule requirements. The Rule's core purpose is to permit itemization so that consumers may select only the funeral items they desire, and decline unwanted items. The Rule allows providers to recover overhead for facilities by allocating a portion of those costs to each item offered or by including them in the non-declinable services fee. A second, non-declinable fee would signal a return to package pricing, where all consumers would pay for the use of all facilities (and, presumably, other overhead costs) irrespective of the degree to which consumers choose to use them. Itemization permits consumers to decline the use of various provider facilities. The testimony of at least one funeral director suggested, however, that some providers currently may be imposing in some form a "non-declinable" facilities fee on consumers, in apparent violation of the Rule.

Accordingly, the Commission has adopted the following amendments to clarify the Rule's intent and requirements with respect to service fees and non-declinable charges:

(1) Revision of the "services of funeral director and staff" definition in § 453.1(o) to clarify that these are the basic services that cannot be included in prices of other, declinable GPL categories, and that are furnished by a funeral provider in arranging any funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits, and placing obituary notices;

(2) Addition of the term "basic" before the word "services" where the latter term appears in §§ 453.2(b)(4)(iii)(C) (1) and (2) and 453.4(b)(2)(i)(A), so that all GPL disclosures regarding the non-declinable services fee refer to "basic services" rather than simply "services";

(3) Addition of the phrase "and staff" after the phrase "use of facilities" to §§ 453.2(b)(4) (H) and (I), to clarify that providers are required to disclose the prices for use of facilities and the services of staff associated with viewing and a funeral ceremony;

(4) Replacement of the "other use of facilities" price disclosure requirement, § 453.2(b)(4)(J), with the more specific disclosures "use of facilities and staff for memorial service" and "use of equipment and staff for graveside service";

(5) Addition to § 453.1 of the definitions of a "memorial service" and a "funeral ceremony" to distinguish those services for purposes of listing them separately on the GPL;

(6) Addition of the express requirement to the disclosure requirements of §§ 453.2(b)(4)(iii)(C) (1) and (2) that, if the services fee cannot be declined, it must include all charges for the recovery of unallocated funeral provider overhead, and funeral providers may include in the required

[161] R-B-6 at 28068–28069, 28076, and 28087.

[162] Id. at 28077 (Illus. # 12). Cemetery or crematory requirements, embalming as a "practical necessity," and requests that are "impossible, impractical or excessively burdensome" to provide may result in "non-declinable" charges under certain conditions. Generally, however, those items are not considered "non-declinable" in the sense that consumers, at the outset of planning arrangements, have no choice but to purchase them.

[163] Morrison, Tr. Vol. II, 771, 778; Karklin, consumer, Tr. Vol. I, 553; Carlson, Tr. Vol. I, 501–502; Snyder, Tr. Vol. III, 1252; Ferguson, Tr. Vol. III, 1180; and Showalter, journalist/hospice counselor, Tr. Vol. II, 121, 148.

[164] Klein, New York State Funeral Directing Advisory Board, Tr. Vol. II, 1040, 1062; Morrison, industry observer, Tr. Vol. II, 771, 778; Carlson, author, Tr. Vol. I, 500–502; Snyder, West Coast Director, Consumers Union, Tr. Vol. III, 1252–1253; Ferguson, Seattle memorial society, Tr. Vol. III, 1219; and Blake, Wisconsin memorial society, Tr. Vol. II, 1121.

[165] See, e.g., Bennett, Tr. Vol. I, 355; Carlson, Tr. Vol. I, 500–501; and Snyder, Tr. Vol. III, 1252.

[166] Simms, funeral director, Tr. Vol. II, 495 (consumers rely on professional service price); Johnson, funeral director, Tr. Vol. I, 755–756; Botimer, funeral director, Tr. Vol. III, 1287; Starks, funeral director, Tr. Vol. II, 423–424); and Ferguson, Seattle memorial society, Tr. Vol. III, 1177, 1180, 1219 (1987 Seattle survey for publication showed "services" vaguely and variously described).

[167] R-M-9 (NFDA/NSM) at 128.

[168] R. Johnson, Tr. Vol. I, 745–746, 759.

[169] Tr. Vol. II, 671.

[170] Starks, Tr. Vol. II, 424.

disclosure (and in the GPL disclosure required by 453.4(b)(2)(i)(A)) the phrase "and overhead" after the word "services," so that disclosures regarding non-declinable services fees refer to "basic services," and to "basic services and overhead," if providers wish; and

(7) Addition of paragraph (b)(4)(iv) to § 453.2 to make clear that the Rule permits only one non-declinable fee for services, facilities or unallocated overhead, unless otherwise required by law.

These amendments clarify the Commission's intent and providers' obligations in distinguishing non-declinable service fees from other service charges associated with providing separately listed, declinable goods and services. The changes are designed to promote industry compliance and consumer understanding of the services they must purchase and those they may decline, without substantially altering providers' obligations. The amendment permitting providers to add the phrase "and overhead" to the non-declinable service fee disclosure responds to industry's stated concern that consumers may be deceived by service fee price disclosures that fail to disclose a charge for overhead,[171] and clarifies for providers that the non-declinable fee can include overhead not allocated to other charges.

The Commission further has determined, to reduce stated and potential GPL compliance burdens, to: (1) remove "other automotive equipment" (flower car/family car) [172] and "acknowledgment cards" [173] from the required GPL listing; (2) delete as unnecessary the required GPL disclosure that the GPL does not include cash advance items, § 453.2(b)(4)(i)(D), and move from the GPL to the statement of goods and services selected the cash advance mark-up disclosure required by § 453.3(f)(2); [174] (3) decline to adopt the required use of a "standardized general price list," which the Commission finds is unnecessary in light of the relatively standardized GPL the Rule now requires, and the amendment, discussed below, prohibiting any language in any of the Rule-required price lists that alters or contradicts the information provided therein.[175]

6. Misrepresentation/Disclosure Provisions

Section 453.3 of the Rule currently requires funeral providers to make specific written disclosures on the price lists and the itemized statement of goods and services selected. The Commission in its 1982 Statement of Basis and Purpose determined that, due to funeral providers' false claims or failure to disclose accurate information, many consumers erroneously believed that certain procedures (such as embalming) or particular goods (such as caskets for cremation and outer burial containers) were required purchases not subject to individual choice, and that goods and services had certain protective and preservative qualities when such was not the case.[176]

Section 453.3 thus declares that it is a deceptive act or practice for funeral providers to misrepresent: embalming requirements, casket for cremation requirements,[177] outer burial container requirements, legal and cemetery requirements, preservative and protective value of funeral goods and services, and cash advance charges. The provisions of § 453.3 were designed to prevent those deceptive practices and to correct consumers' misconceptions by requiring written disclosures on both the price lists and the itemized statement.

Funeral provider groups recommended that the twelve affirmative disclosure requirements be deleted, or, in the alternative, that the Rule permit providers to use their own disclosure language.[178] The Commission has determined, however, that the record does not provide a substantial basis to repeal the twelve affirmative disclosures. Although the empirical data indicate that consumers' knowledge has increased somewhat under the Rule, and that some misrepresentations have declined, the data also show that misrepresentations are still occurring, particularly in areas where consumer knowledge is still low, such as embalming. The evidence further demonstrates that consumer knowledge of funeral requirements and products is still at a minimal level. Viewed together, those facts warrant the retention of the disclosure provisions.[179] Nor is there sufficient evidence to warrant an amendment allowing funeral providers to use their own disclosure language. That change would make it more difficult to monitor compliance, whereas the required, standardized language ensures that all consumers are receiving identical information.

The Commission agrees, however, that the language of several of the disclosures has created some potential compliance problems for funeral providers. The Commission therefore has adopted the following changes to the embalming, casket for cremation, outer burial container, and cash advance disclosure provisions in order to clarify the Rule's scope and requirements, and to reduce potential disclosure burdens:

(1) Deletion of the portion of § 453.3(a)(2)(i) that prohibits representations that embalming is required for a funeral using a sealed casket; substantial evidence indicates that, because sealed (i.e., "gasketed") caskets cannot prevent the escape of gases any more than other caskets, embalming may be necessary for a

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[171] Funeral provider groups asserted during the proceeding that consumers should be informed that providers' non-declinable fees include a charge for overhead. Providers may do so under this amendment. See, e.g., P-37 (NFDA/NSM) at 240-242; P-30 (FFDA) at 2.

[172] These items are not as frequently chosen by consumers in today's market as are a hearse or limousine, and providers, of course, may include the flower/family car on the list if they so desire.

[173] To the extent that the Rule's listing provision has caused providers to charge for acknowledgment cards that were previously provided free of charge, as funeral provider groups suggested, the Rule may have had the unintended result of contributing, at least in some small sense, to increased consumer costs. To the extent that the costs are recouped elsewhere, those costs appear to be so incidental as to be tangential to the Rule's primary purpose. In either case, the benefits of requiring acknowledgment cards on the GPL appear to be outweighed by the harm to funeral providers' reputations and consumer satisfaction. The Commission thus has concluded that the better course is to remove the provision from the Rule.

There is no record evidence to support, however, a general right for the provider to list any of the other items now required to be on the GPL as "no charge" items, as industry groups suggested. The Commission is concerned, for example, that if the Rule were to permit the listing of embalming or transportation as "no charge" items, their costs, which can amount to several hundreds of dollars, would be recovered in the prices of other items. As a result, consumers would, in effect, not have the opportunity to decline the costs associated with important items. Such a change could thus result in the diminution of itemization and the return of package-only pricing, which the Rule was primarily designed to prevent. See the discussion at R-N-1 (SR), 172-173.

[174] See R-N-1 (SR) at 201. These amendments appropriately shorten the GPL and give consumers adequate notice of mark-ups.

[175] The AARP and others recommended the adoption of a required format and disclosure language for the GPL more detailed than that required by the original Rule, because of potential provider non-compliance and consumer confusion. See R-N-1 (SR) at 169-172 for a full discussion of the standardized price list issue.

[176] R-B-5 at 42274-42279. Although the record did not contain evidence that certain misrepresentations (such as the protective and preservative claims of goods and the requirement of a casket for cremation) were widespread, the Commission determined that their inclusion in the Rule was necessary because of their pernicious nature, or because of the substantial, potential cost that could be incurred by consumers who make purchase decisions based upon incorrect assumptions of material facts. Id. at 42276-42278.

[177] The companion § 453.4(a)(2) required providers who arrange direct cremations to "make available" unfinished wood boxes or alternative containers so that consumers will not have to buy a casket for that purpose.

[178] R-M-9 (NFDA/NSM) at 225; R-G-6 (NFDA) at 78-79; and R-G-3 (NSM) at 45.

[179] See the discussion and evidence cited at R-N-1 (SR), 180-181.

funeral service using a sealed casket where refrigeration is not available;[180]

(2) Amendment of the deceptive acts or practices definition concerning the necessity for embalming, § 453.3(a)(1)(ii), to include the modifying phrase "if any" after the phrase "except in certain special cases," and amendment of the GPL disclosure required by § 453.3(a)(2)(ii) to permit providers to delete from the disclosure that embalming is not required by law the phrase "except in certain special cases," if state or local law in the areas where the provider does business does not require embalming under any circumstances. These changes are appropriate to reduce compliance burdens and accommodate the situation where state laws do not require embalming under any conditions;[181]

(3) Amendment of the GPL alternative container disclosure required by § 453.3(b)(2) to: (a) Delete the required references to: (i) An "unfinished wood box," in addition to references to an "alternative container," because the former in today's market is considered a type of alternative container, and (ii) "pouches of canvas," which is not a type of container generally available and accepted by crematories; (b) include the phrase "encase the body" after "Alternative containers;" (c) include the statement "The containers we provide are (specify containers)."; and (d) substitute "fiberboard" for "heavy cardboard" to conform to market terminology.

These amendments[182] more accurately describe the purpose of alternative containers and reduce any potential for confusion and misrepresentation concerning the types of containers that are available for use in cremations;[183]

(4) Amendment of the OBC–PL disclosure required by § 453.3(c)(2) to permit providers in disclosing that grave liners or vaults are not required by law to delete the phrase "in most areas of the country," to accommodate situations where state and local laws do not require outer burial containers;[184] and

(5) Amendment of the substance of the cash advance mark-up disclosure, required by § 453.3(f)(2), to require only that providers specify those cash advance items for which the provider charges a mark-up. The Commission has determined that the original disclosure may have caused the misimpression that providers markup all cash advance items, because it broadly referred to all cash advance items, when that is not the case.[185]

7. Other Minor/Technical Amendments

The Commission has made a slight modification to § 453.4(b)(2)(i)(B), a provision designed to enforce the Rule's unbundling provisions. The purpose for this provision was to inform consumers, before they sign the funeral contract, that they may only be charged for those items selected or for items that are required by law. If purchases are required by law or otherwise, this provision further provides consumers with an explanation in writing, together with the reason the requirement applies to their selections. The provision was intended to provide consumers with a final reminder that they need only pay for items that they have selected.[186]

The Commission has amended the required language in order to clarify for consumers the original purpose of the provision. It alerts consumers that they may only be charged for the goods and services that they choose, or that are required by law or by a cemetery or crematory (such as an outer burial container or a certain type of alternative container).[187]

The Commission further adopts a technical change to § 453.6 concerning providers' retention of documents, to clarify its requirements. The original section required the funeral provider to retain a copy of the "signed" statement of goods and services selected. The Rule, however, does not contain any express requirement that the final statement be signed, either by the consumer or the provider. The Commission in its 1982 Statement of Basis and Purpose made no mention of the signature requirement. Earlier drafts of the Rule included a requirement that the funeral provider ask the consumer to sign the itemized statement, but it was not adopted in the final version. The "signed" language of § 453.6 was apparently inserted to complement the earlier draft of the Rule that contained the itemized statement requirement; however, when the signature requirement was deleted, the language of § 453.6 was inadvertently left intact. This language, however, is susceptible to different interpretations, and may lead some funeral providers to believe that they must obtain the signature of the consumer on the statement.

The Commission therefore has amended the language of § 453.6 by deleting the phrase "on which the statement was signed," and substituting the phrase "of the arrangements conference," so that the provision now requires providers to maintain a copy of each statement of funeral goods and services selected "for at least one year from the date of the arrangements conference."[188]

The Commission, in addition, has added clarifying language to the required "clear and conspicuous" disclosure standard contained in § 453.7 of the Rule. That language clarifies that providers may not add statements or information to the Rule-required price lists that alter or contradict the information required to be included in those lists.

This specific prohibition is necessary to prevent violations of the "clear and conspicuous" standard that relate to provider detraction and potential consumer confusion problems demonstrated in the record.[189]

Finally, the Commission has:

(1) Deleted the definition of "Accounting year" (§ 453.1(a)), because that phrase does not appear elsewhere in the Rule;

(2) amended the definition of a "casket" (§ 453.1(d)), to include those constructed of "fiberglass" and "plastic", because those types of caskets represent a significant portion of caskets produced in today's market;[190] and

(3) made a slight grammatical change to the definition of "Funeral services" (§ 453.1(j)), to make it clear that the Rule only covers services that involve both the preparation of remains and the supervision of disposition.

III. Other Matters

A. Final Regulatory and Regulatory Flexibility Analyses

The Commission has determined that these amendments to the Funeral Rule will not have an annual effect on the national economy of $100 million or more, or otherwise have a significant economic impact on a substantial number of small business. The preponderance of the evidence in the

[180] See the discussion and evidence cited at R-O-1 (POR), 204–206.

[181] See R-N-1 (SR) at 187.

[182] These changes require complementary ones to conform related Rule sections—references to an "unfinished wood box" in §§ 453.1(p) (definition), 453.3(b), and 453.4(a) also are deleted; as is the reference to "pouches of canvas" in the definitional section, and "unfinished wood box" is added to the definition of an "alternative container" (§ 453.1(b)).

[183] See R-N-1 (SR) at 188–195 for a full discussion of the evidence on these amendments.

[184] See R-N-1 (SR) at 198.

[185] See R-N-1 (SR) at 200–202.

[186] R-B-5 at 42292 ("Section 453.4(b), the 'optional purchase' provision, ensures that consumers can make use of such price information by making a decision to decline items which they do not wish to purchase.").

[187] See R-N-1 (SR) at 205.

[188] See the discussion at R-N-1 (SR), 218–219.

[189] See R-N-1 (SR) at 219–220 for a full discussion of the evidence, and Commission precedents, relating to consumers' comprehension of Rule-required disclosures.

[190] See R-N-1 (SR) at 223; R-O-1 (POR) at 207.

record indicates that the Rule overall has not significantly increased funeral providers' costs of doing business, and that the amendments will reduce any costs to providers imposed by the Rule's requirements, by making it easier for them to comply. Therefore, pursuant to the exception for Rule amendments contained in section 22(a)(1)(A) of the FTC Act, and the provisions of the Regulatory Flexibility Act; 5 U.S.C. 604, 605, section 22 of the Act requiring that the Commission issue a final regulatory analysis with the promulgation of a final rule does not apply to this amended Rule.

List of Subjects in 16 CFR Part 453

Funeral homes, Price disclosure, Trade practices.

Accordingly, title 16, part 453 of the Code of Federal Regulations is revised to read as follows:

PART 453—FUNERAL INDUSTRY PRACTICES

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

Authority: 15 U.S.C. 57a(a); 15 U.S.C. 46(g); 5 U.S.C. 552.

§ 453.1 Definitions.

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

(b) *Cash advance item.* A "cash advance item" is any item of service or merchandise described to a purchaser as a "cash advance," "accommodation," "cash disbursement," or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may include, but are not limited to: cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.

(c) *Casket.* A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, fiberglass, plastic, or like material, and ornamented and lined with fabric.

(d) *Commission.* "Commission" refers to the Federal Trade Commission.

(e) *Cremation.* "Cremation" is a heating process which incinerates human remains.

(f) *Crematory.* A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.

(g) *Direct cremation.* A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

(h) *Funeral goods.* "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

(i) *Funeral provider.* A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

(j) *Funeral services.* "Funeral services" are any services which may be used to:

(1) Care for and prepare deceased human bodies for burial, cremation or other final disposition; and

(2) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

(k) *Immediate burial.* An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

(l) *Memorial service.* A "memorial service" is a ceremony commemorating the deceased without the body present.

(m) *Funeral ceremony.* A "funeral ceremony" is a service commemorating the deceased with the body present.

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

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

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

§ 453.2 Price Disclosures.

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

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

(1) *Telephone price disclosure.* Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists described in paragraphs (b)(2) through (4) of this section and any other readily available information that reasonably answers the question.

(2) *Casket price list.* (i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the retail prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, that funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information required by this paragraph.

(ii) Place on the list, however produced, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) *Outer burial container price list.* (i) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. Provided, however, that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information required by this paragraph.

(ii) Place on the list, however produced, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) *General price list.* (i)(A) Give a printed or typewritten price list for retention to persons who inquire in person about the funeral goods, funeral services or prices of funeral goods or services offered by the funeral provider. The funeral provider must give the list upon beginning discussion of any of the following:

(1) The prices of funeral goods or funeral services;

(2) The overall type of funeral service or disposition; or

(3) Specific funeral goods or funeral services offered by the funeral provider.

(B) The requirement in paragraph (b)(4)(i)(A) of this section applies whether the discussion takes place in the funeral home or elsewhere. Provided, however, that when the deceased is removed for transportation to the funeral home, an in-person request at that time for authorization to embalm, required by § 453.5(a)(2), does not, by itself, trigger the requirement to offer the general price list if the provider in seeking prior embalming approval discloses that embalming is not required by law except in certain special cases, if any. Any other discussion during that time about prices or the selection of funeral goods or services triggers the requirement under paragraph (b)(4)(i)(A) of this section to give consumers a general price list.

(C) The list required in paragraph (b)(4)(i)(A) of this section must contain at least the following information:

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

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

(3) The effective date for the price list;

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

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

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

(C) The price range for the direct cremations offered by the funeral provider, together with:

(1) A separate price for a direct cremation where the purchaser provides the container;

(2) Separate prices for each direct cremation offered including an alternative container; and

(3) A description of the services and container (where applicable), included in each price;

(D) The price range for the immediate burials offered by the funeral provider, together with:

(1) A separate price for an immediate burial where the purchaser provides the casket;

(2) Separate prices for each immediate burial offered including a casket or alternative container; and

(3) A description of the services and container (where applicable) included in that price;

(E) Transfer of remains to funeral home;

(F) Embalming;

(G) Other preparation of the body;

(H) Use of facilities and staff for viewing;

(I) Use of facilities and staff for funeral ceremony;

(J) Use of facilities and staff for memorial service;

(K) Use of equipment and staff for graveside service;

(L) Hearse; and

(M) Limousine.

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b)(2)(i) of this section; and

(B) Either of the following:

(1) The price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b)(3)(i) of this section; and

(C) Either of the following:

(1) The price for the basic services of funeral director and staff, together with a list of the principal basic services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our basic services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate burials, and forwarding or receiving remains.)". If the charge cannot be declined by the purchaser, the quoted price shall include all charges for the recovery of unallocated funeral provider overhead, and funeral providers may include in the required disclosure the phrase "and overhead" after the word "services"; or

(2) The following statement: "Please note that a fee of (*specify dollar amount*) for the use of our basic services is included in the price of our caskets. This same fee shall be added to the total cost of your funeral arrangements if you provide the casket. Our services include (specify)." The fee shall include all charges for the recovery of unallocated funeral provider overhead, and funeral providers may include in the required disclosure the phrase "and overhead" after the word "services." The statement must be placed on the general price list together with the casket price range, required by paragraph (b)(4)(iii)(A)*(1)* of this section, or together with the prices of individual caskets, required by (b)(4)(iii)(A)*(2)* of this section.

(iv) The services fee permitted by § 453.2(b)(4)(iii)(C)*(1)* or (C)*(2)* is the only funeral provider fee for services, facilities or unallocated overhead permitted by this part to be non-declinable, unless otherwise required by law.

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

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

(B) Specifically itemized cash advance items. (These prices must be given to the extent then known or

reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall be given and a written statement of the actual charges shall be provided before the final bill is paid.]; and

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

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

(6) *Other pricing methods.* Funeral providers may give persons any other price information, in any other format, in addition to that required by § 453.2(b)(2), (3), and (4) so long as the statement required by § 453.2(b)(5) is given when required by the rule.

§ 453.3 Misrepresentations.

(a) *Embalming provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases, if any.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§ 453.4(b)(1) and 453.5(2), funeral providers must:

(i) Not represent that a deceased person is required to be embalmed for:

(A) Direct cremation;

(B) Immediate burial; or

(C) A closed casket funeral without viewing or visitation when refrigeration is available and when state or local law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by § 453.2(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement that does not require you to pay for it, such as direct cremation or immediate burial." The phrase "except in certain special cases" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require embalming under any circumstances.

(b) *Casket for cremation provisions*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires a casket for direct cremations;

(ii) Represent that a casket is required for direct cremations.

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

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

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

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

(2) *Preventive requirement.* To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by § 453.2(b)(3)(i), or, if the prices of outer burial containers are listed on the general price list, required by § 453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, state or local law does not require that you buy a container to surround the casket in the grave. However, many cemeteries require that you have such a container so that the grave will not sink in. Either a grave liner or a burial vault will satisfy these requirements." The phrase "in most areas of the country" need not be included in this disclosure if state or local law in the area(s) where the provider does business does not require a container to surround the casket in the grave.

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

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the deceptive acts or practices identified in §§ 453.3(a)(1), 453.3(b)(1), and 453.3(c)(1), funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by § 453.2(b)(5)) any legal, cemetery, or crematory requirement which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) *Provisions on preservative and protective value claims.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) *Cash advance provisions*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, funeral providers must place the following sentence in the itemized statement of funeral goods and services selected, in immediate conjunction with the list of itemized cash advance items required by § 453.2(b)(5)(i)(B): "We charge you for our services in obtaining: (specify cash advance items)," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item.

§ 453.4 Required purchase of funeral goods or funeral services.

(a) *Casket for cremation provisions*—(1) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral

goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket be purchased for direct cremation.

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

(b) *Other required purchases of funeral goods or funeral services.*—(1) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to:

(i) Condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part;

(ii) Charge any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral, other than the fees for: (1) Services of funeral director and staff, permitted by § 453.2(b)(4)(iii)(C); (2) other funeral services and funeral goods selected by the purchaser; and (3) other funeral goods or services required to be purchased, as explained on the itemized statement in accordance with § 453.3(d)(2).

(2) *Preventive requirements.* (i) To prevent these unfair or deceptive acts or practices, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by § 453.2(b)(4) (ii) and (iii): "The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected." Provided, however, that if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our basic services" between the second and third sentences of the statement specified above herein. The statement may include the phrase "and overhead" after the word "services" if the fee includes a charge for the recovery of unallocated funeral provider overhead;

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

(ii) A funeral provider shall not violate this section by failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

§ 453.5 Services provided without prior approval.

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

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

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(3) The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) *Preventive requirement.* To prevent these unfair or deceptive acts or practices, funeral providers must include on the itemized statement of funeral goods and services selected, required by § 453.2(b)(5), the statement: "If you selected a funeral that may require embalming, such as a funeral with viewing, you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

§ 453.6 Retention of documents.

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

§ 453.7 Comprehension of disclosures.

To prevent the unfair or deceptive acts or practices specified in § 453.2 through § 453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner. Providers shall not include in the casket, outer burial container, and general price lists, required by §§ 453.2(b)(2)–(4), any statement or information that alters or contradicts the information required by this Part to be included in those lists.

§ 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.

By direction of the Commission.

Donald S. Clark,

Secretary.

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